REGULATORY SHAMING

BY

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Should the government engage in public shaming? This Article is the first to define and explore an intriguing practice—"regulatory shaming." Regulatory shaming refers to the publication of negative information by administrative agencies concerning private regulated bodies, mostly corporations, in order to further public-interest goals. For instance, regulatory agencies such as the Occupational Safety and Health Administration send out condemning press releases and use social media to publish workplace safety violations with the names of responsible companies, while the United States Securities and Exchange Commission and the Food and Drug Administration shame companies for high internal pay gaps and for blocking competition in the pharmaceutical industry. The United States Department of Health and Human Services rates nursing homes on a one to five star scale, and the United States Environmental Protection Agency assigns color ratings to factories according to level of compliance with environmental regulation.

The practice of regulatory shaming is at a crossroads. While some agencies are adopting shaming strategies, others do not; some are even rolling them back. In light of these contradictory trends, it is time to seriously explore shaming by administrative agencies from a normative perspective. The Article argues that shaming can be a legitimate, efficient, and democratic regulatory approach, and it suggests general considerations for utilizing shaming tactics.

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I. INTRODUCTION

Should the government engage in public shaming? This Article aims to evaluate administrative agencies' practice of shaming corporations into good behavior. Regulatory shaming is now at a crossroads. While some agencies are currently adopting new shaming strategies, others are rolling back such practices. For instance, an Occupational Safety and Health Administration (OSHA) rule introduced in 2016, which promoted workplace safety by naming and shaming companies responsible for safety violations that resulted in injuries, illness, or fatality,[1] is currently in the process of being

[1] *See* Sharon Yadin, *Saving Lives Through Shaming*, HARV. BUS. L. REV. ONLINE (forthcoming 2019). The rule, effective as of 2017, requires employers in certain industries to submit injury and illness data to OSHA electronically. The frequency and content of these establishment-specific submissions is dependent on the size and industry of the employer. OSHA intended to post the data from these submissions online. *See* 29 C.F.R §§ 1902, 1904 (2016). *See also* Press Release, U.S. Dep't of Labor, OSHA's Final Rule to "Nudge" Employers to Prevent Workplace Injuries, Illnesses (May 11, 2016), https://perma.cc/V7AX-NW2J [hereinafter OSHA's Final Rule to "Nudge" Employers]. The database from a previous initiative is available on OSHA's website. *See Establishment Specific Injury & Illness Data (OSHA Data Initiative)*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://perma.cc/3S64-8RLH (last visited Apr. 13, 2019).

repealed.[2] However, the United States Food and Drug Administration (FDA) is taking a different tack, as it recently published a list exposing pharmaceutical companies that are acting to prevent the entry of generic drugs to the market in order to protect their own branded versions.[3] The United States Securities and Exchange Commission (SEC) has adopted a new shaming strategy as well, introducing a regulation that requires companies to disclose the compensation ratio between their median employee (by salary) and their CEO.[4] In light of these contradicting approaches, now is the time to seriously explore regulatory shaming from a normative perspective. In this Article, I assert that shaming is a legitimate and efficient regulatory tactic, and examine its many advantages as well as some possible pitfalls.

The word "shaming" is often used in the context of social media, or other types of media, to refer to cases where a person is exposed and condoned by others for an inappropriate or unseemly behavior or characteristic.[5] These practices may include, for example, shaming sex offenders for their crimes,[6] shaming parents who irresponsibly subject their children to danger,[7] and shaming college professors for being "difficult."[8] Regulatory shaming is different from these civilian shamings. It refers to situations in which shaming is undertaken as a governmental regulatory strategy by administrative agencies and not by a private person. Though other branches of government are not the focus of this Article, judges and legislators can also engage in regulatory shaming.[9]

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2 *See* Tressi L. Cordaro, *OSHA's Revised "Improve Tracking of Workplace Injuries and Illnesses Regulation" at OMB for Review*, OSHA L. BLOG (May 29, 2018) https://perma.cc/A3W9-2MM7; Melissa A. Bailey & Aaron M. Wilensky, *OSHA Anticipates More Changes to the Electronic Recordkeeping Rule: What Does it Mean for Employers?*, OGLETREE DEAKINS (Jan. 8, 2018), https://perma.cc/59ST-HHZB.

3 Such companies may create obstacles making it difficult for generic drugs developers to purchase samples of their brand drugs, to purposely cause delays in bringing affordable generic alternatives to patients. *See* Press Release, U.S. Food & Drug Admin., Statement from FDA Commissioner Scott Gottlieb, M.D., on New Agency Efforts to Shine Light on Situations Where Drug Makers May be Pursuing Gaming Tactics to Delay Generic Competition, (May 17, 2018), https://perma.cc/6XP4-BYCZ [hereinafter Statement from FDA Commissioner Scott Gottlieb]. The list of companies is published on the FDA's website. *See Reference Listed Drug (RLD) Access Inquiries*, U.S. FOOD & DRUG ADMIN., https://perma.cc/7XHY-NQDT (last visited Apr. 13, 2019).

4 *See* 15 U.S.C. § 78i note (2012); 17 C.F.R §§ 229, 240, 249 (2015). This reform is also highly controversial. *See* Celia R. Taylor, *The Dodd-Frank Death Knell*, 49 LOY. U. CHI. L.J. 655, 660–62 (2018); *Securities Regulation—Dodd-Frank Wall Street Reform and Consumer Protection Act*, 129 HARV. L. REV. 1144, 1145 (2016).

5 *See, e.g.*, Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, 75 MD. L. REV. 1029, 1034 (2016); Kristine Gallardo, *Taming the Internet Pitchfork Mob: Online Public Shaming, the Viral Media Age, and the Communications Decency Act*, 19 VAND. J. ENT. & TECH. L. 721, 727 (2017).

6 *See, e.g.*, DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 80, 92 (2007).

7 *See* Gallardo, *supra* note 5, at 727.

8 *Id.* at 726.

9 It is widely common to identify regulators with the executive branch. However, both courts and legislators also often participate in the regulatory process. *See* Christel Koop &

While there is no definitive definition of general shaming, this Article is based on the relatively broad meaning that was formulated by the well-known criminologist, John Braithwaite, of expressing disapproval with the intent of invoking condemnation by others.[10] My definition of the specific term "regulatory shaming" will be discussed in detail below,[11] but in a nutshell, regulatory shaming refers to any intentional publication, by regulatory agencies in the executive branch, of information regarding companies' misbehavior that is designed to convey a normatively negative message to the public, for a regulatory purpose.[12] The main question the Article will discuss is whether the modern administrative state should "shame" companies as part of its regulatory functions. It will examine whether such an act is efficient and legitimate, and if so, under what circumstances.

I use the term "regulation" to refer to governmental activities intended to steer the markets through the institution and enforcement of laws, rules, and regulations aimed at private entities.[13] It relates to the function of authorized bodies that have legal powers to set standards, monitor compliance, and enforce laws and regulations with regard to private bodies.[14] The regulatees include, *inter alia*, corporations, businesses, industry sectors, and non-profit organizations. This type of regulation is usually aimed at the business and social activities of private markets, in which goods and services that are supplied to the public—such as health, education, communications, retail, food, and electricity—need to be adjusted and directed by some form of government intervention.[15]

This Article aims to fill a void in both shaming literature and regulation literature, which so far have neglected to address regulation by shaming. Until now, shaming was mainly discussed in the context of private citizens, in which individuals shame other individuals, and in criminal contexts, in which the government, mostly through the judiciary, shames offenders by publishing information about crimes and criminals after crimes are committed.[16] Where shaming of corporations has been discussed in the

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Martin Lodge, *What is Regulation? An Interdisciplinary Concept Analysis*, 11 REG. & GOVERNANCE 95, 104–05 (2017).

10 *See* JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION 100 (1989) ("Shaming means all social processes of expressing disapproval which have the intention or effect of invoking remorse in the person being shamed and/or *condemnation by others who become aware of the shaming*." (emphasis added)).

11 *See* discussion *infra* Part II.B.

12 *Id.*

13 For different meanings of the term "regulation," see Koop & Lodge, *supra* note 9, at 95–96; *see also* David Levi-Faur, *Regulation and Regulatory Governance*, *in* HANDBOOK ON THE POLITICS OF REGULATION 3, 3–5 (David Levi-Faur ed., 2011).

14 This meaning of regulation is very common in legal scholarship. *See, e.g.*, Robert Baldwin et al., *Introduction*, *in* A READER ON REGULATION 1, 3–4 (Robert Baldwin et al. eds., 1998); Koop & Lodge, *supra* note 9, at 103–04.

15 *See, e.g.*, ANTHONY I. OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 1–3 (2004).

16 *See* discussion *infra* Part II.B. Shaming is also common in the international arena as a tool directed towards states that infringe on human rights. *See, e.g.*, Sandeep Gopalan & Roslyn Fuller, *Enforcing International Law: States, IOs, and Courts as Shaming Reference Groups*, 39

literature, it was mainly in the context of shaming by the media and by civil society organizations.[17] Meanwhile, shaming of corporations by the government was discussed mainly in the context of criminal proceedings in courts, usually toward corporate officers.[18] Previous works on adverse publications by administrative agencies regarding corporations have focused on actions taken for informative and warning purposes, in the context of disclosure and transparency.[19]

Unlike those previous works, this Article deals with shaming in the context of administrative regulation, introducing the concept of "regulatory shaming" for the first time. It combines shaming scholarship and regulation scholarship in order to examine shaming from a unique regulatory perspective. Regulation by shaming can be utilized by an administrative agency to help enforce administrative or civil norms, and not only to punish and deter criminal behavior. Regulatory shaming can even be used in connection with corporate moral and social responsibilities, in situations in which no legal norm has been breached.

The Article's main argument is that shaming is a desired regulatory strategy from both normative and practical perspectives. First, regulatory shaming is inherently efficient. It can achieve regulatory goals in a quicker, simpler, and less expensive fashion than other enforcement tools. Second, it encourages citizens to play an active role in regulatory processes, advancing cooperation, democratic values, and trust between the government and its citizens. This advantage is especially important in an era in which citizens' trust in the government, its bureaucratic and regulatory systems, and the corporations themselves, is diminishing. Third, regulatory shaming does not affect regulated corporations in the same manner that shaming affects individuals psychologically and emotionally. Thus, it can be considered a soft and proportional tool in comparison with other enforcement strategies, such as criminal or administrative proceedings.

The Article is organized as follows: Part II distinguishes between two types of shaming— shaming by civilians and shaming by the government. It discusses the main characteristics of these two categories, explores their chief justifications, and reviews key arguments against them. This Part concludes with a discussion of the moral and psychological aspects of shaming. Part III introduces the concept of regulatory shaming and outlines its features, key actors, goals, methods, and procedures. It then differentiates between shaming regulation and mandatory disclosure rules, which regulators sometimes use in order to share relevant information with consumers regarding a commodity or a service provided by private

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BROOK. J. INT'L L. 73, 74–75, 74 n.6 (2014). Shaming in the international arena is also manifested in the attempt of the Organization for Economic Co-operation and Development (OECD) to fight harmful tax practices by "naming and shaming" tax havens as renegade states in an international tax regime. *See* Lorraine Eden & Robert T. Kudrle, *Tax Havens: Renegade States in the International Tax Regime*, 27 L. & POL'Y 100, 124 (2005).

17 *See* discussion *infra* Part III.A; discussion *infra* notes 102–103 and accompanying text.

18 *See* discussion *infra* Part II.B.

19 *See* discussion *infra* Part III.C.

corporations. Part IV proposes three main justifications for regulatory shaming—economic, democratic, and liberal—and addresses the possible pitfalls of regulatory shaming. Finally, the Conclusion summarizes the Article and its arguments and offers some brief practical guidelines to regulatory bodies.

II. CIVILIAN SHAMING AND GOVERNMENTAL SHAMING

A. Shaming by Civilians

Shaming of civilians by other civilians has metamorphosed in the internet age.[20] In the past, civilian shaming mainly took the form of "a false and derogatory statement" regarding a person or a corporation, made in a physical public space where other people could hear or read it.[21] Such derogatory statements were communicated to third parties via, for example, conversations, letters, and telegrams.[22] However, this type of shaming, which is regulated mostly under defamation laws,[23] is no longer the main arena of shaming practices.[24] The spread of social media networks, as well as other online platforms, has resulted in a substantial increase in the possible damage that public statements can inflict, as the ability to reach an extremely wide audience in a matter of seconds via online platforms has immensely intensified the adverse effects of shaming.[25] The greatly increased exposure means that online and mass-media shaming today may inflict grave harm on the person being shamed, as well as on others in their circle, and in extreme cases can even lead to loss of life.[26] Such shaming has been described in the literature as the current technological form of stoning, facilitating "lynch-mob justice."[27] According to this approach, private shaming—that is, shaming by individuals—is considered immoral, undemocratic, and disproportionate.[28]

Private shaming usually does not relate to formal legal proceedings.[29] Rather, it is used as a kind of "social justice" tool, to punish a person considered to have acted illegally or immorally, at least in the eyes of the

20 *See generally* JON RONSON, SO YOU'VE BEEN PUBLICLY SHAMED (2015). *See also* SOLOVE, *supra* note 6, at 78.

21 *See, e.g.*, Note, *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 930–31 (1956); RESTATEMENT (SECOND) OF TORTS §§ 558–59 (AM. LAW INST. 1977).

22 *See Developments in the Law—Defamation*, *supra* note 21, at 932.

23 *See generally* RESTATEMENT (SECOND) OF TORTS §§ 558–59 (AM. LAW INST. 1977).

24 *See supra* note 20 and accompanying text.

25 *See, e.g.*, SOLOVE, *supra* note 6, at 78; Ronen Perry & Tal Z. Zarsky, *Liability for Online Anonymous Speech: Comparative and Economic Analyses*, 5 J. EUR. TORT L. 205, 206 (2014); Gallardo, *supra* note 5, at 729.

26 *See, e.g.*, BRAITHWAITE, *supra* note 10, at 68; DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 11 (2014).

27 *See* Emily Chiang, *Institutional Reform Shaming*, 120 PENN ST. L. REV. 53, 84 (2015).

28 *See id.* at 84; SOLOVE, *supra* note 6, at 95–96.

29 *See, e.g.*, Gallardo, *supra* note 5, at 725.

"shamer."[30] Though many view shaming as a harmful social practice that should be eradicated,[31] others believe that it can serve as an effective civilian "punishment" that can achieve worthy outcomes and maintain civil order.[32] Under this approach, shaming is generally considered a democratic practice that is protected under freedom of speech and can effectively bypass governmental bureaucracy, in which the wheels of justice tend to turn slowly.[33]

B. Shaming by the Government

Shaming performed by governmental bodies is very different from the civilian form of shaming discussed above.[34] Until now, governmental shaming was mostly discussed as part of the government's punishment doctrine, in which shaming is directed toward individuals or companies charged under criminal law, as an alternative to traditional sanctioning by the courts, such as incarceration, penalties, or license revocation.[35]

Shaming as a criminal sanction is nothing new. In fact, the history of legal shaming is rooted in punishments—such as public whipping—that included a component of public moral denunciation,[36] and that were characterized by a purposeful direction of attention toward the criminal's act.[37] The goal of these punishments was to reinforce pervading social norms and a law-obeying culture by denouncing the non-conforming behavior of the shamed individual.[38]

While in the past, criminal shaming was executed by simple technical means, such as searing the mark of Cain on the forehead of the lawbreaker or using pillories,[39] today these punishments have been replaced by other, less extreme measures. Modern shaming in criminal proceedings is often mandated by courts as part of plea bargaining, in which the defendant may

30 *See* SOLOVE, *supra* note 6, at 96 (explaining that private shaming is outside of the realm of the legal system and offering an example of a university using shaming as a tool to punish those they believed to be guilty).

31 *See, e.g.*, MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 321 (2004) (asserting that shame and disgust are feelings that should play a minimalistic role in law).

32 *See, e.g.*, AMITAI ETZIONI, THE MONOCHROME SOCIETY 42 (2003).

33 *See id.*

34 *See supra* Part II.A.

35 *See* Dan M. Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 591–93 (1996).

36 *See, e.g.*, Lauren M. Goldman, *Trending Now: The Use of Social Media Websites in Public Shaming Punishments*, 52 AM. CRIM. L. REV. 415, 418–19 (2015); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1912–15 (1991). In the United States and in Europe, the shift from shaming sanctions to incarceration took place during the nineteenth century. *See id.* at 1929.

37 See Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 368 (1999).

38 *See* Kahan, *supra* note 35, at 597–98.

39 *See* Goldman, *supra* note 36, at 418–19 (offering examples of past forms of public shaming such as using pillories); Gallardo, *supra* note 5, at 725 (providing examples of popular forms of public shaming in the past).

be required, for example, to publish an apology in the newspaper regarding the unlawful act, to wear a T-shirt with a statement announcing the illegal act or the sentence, to publicize previous drunk driving offences on their license plates, to put up a sign announcing their unlawful actions on the door of their house, or even to carry a street sign detailing their wrongdoings.[40] For example, a Pennsylvanian court ordered that a woman convicted of stealing would not be incarcerated, but instead would wear a sign visible to bystanders, across from the courthouse, which stated "I stole from a nine-year-old on her birthday! Don't steal or this could happen to you!"[41] In another example, a federal judge in San Francisco ordered a gas company to broadcast a televised campaign announcing to the public that it was found guilty of violation of safety standards after a natural gas pipeline exploded, resulting in the deaths of eight people.[42]

Another company was required to publish a full-page advertisement in leading national newspapers with the following text: "Warning: The illegal disposal of toxic wastes will result in jail. We should know. We got caught!"[43] In another case, a company that polluted the waters in the area of its operation was sanctioned with a fine as part of a plea bargain, in which it was also required to publish the following newspaper advertisement: "We . . . sincerely apologize for contaminating the coastal waterways of Massachusetts. . . . Our company has discharged human waste directly into coastal Massachusetts waters. For these actions, we have paid a steep fine and have pleaded guilty to criminal charges. We are sorry."[44] However, despite this apparent trend in criminal judicial sanctioning, some emphasize that these cases are mostly lower-court initiatives of a small number of creative judges and do not represent any important development in court jurisdiction.[45]

The literature discussing these types of governmental shaming is split between those who support shaming as a sanctioning tool and those who call for its abolishment. Sometimes, the two opposite positions can be attributed to the same researcher's body of work. In 1996, Dan Kahan

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40 *See, e.g.*, NUSSBAUM, *supra* note 31, at 1; Goldman, *supra* note 36, at 415–46; Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 734–37, 743 (1998); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1823 (2001) (all discussing examples of shaming tactics in the criminal context).

41 *See Public Shaming Instead of Incarceration in Pennsylvania Theft Case*, SENT'G L. & POL'Y (Nov. 4, 2009), https://perma.cc/46L2-Q9X7.

42 In 2010, a natural gas pipeline ruptured beneath a residential neighborhood, causing an explosion that also injured dozens and completely burned down thirty-eight homes. *See* William Pentland, *PG&E Sentenced to Public Shaming, Community Service for San Bruno Explosion*, FORBES (Jan. 26, 2017), https://perma.cc/7KYR-4N8V. The company was sentenced to a fine of $3 million and 10,000 hours of community service. *Id.* It was also handed a $1.6 billion fine by state regulators and paid more than $550 million to settle civil claims. *Id.*

43 *See* JAMES GOBERT & MAURICE PUNCH, RETHINKING CORPORATE CRIME 237 (2003); s*ee also* Kahan & Posner, *supra* note 37, at 385 (discussing a similar example).

44 Plea Agreement, United States v. Rockmore Co., Inc., No. 1:10-cr-10003-JLT (D. Mass. Jan. 7, 2010); Robin Kaminski, *Marblehead's Rockmore Reaches Agreement over Illegal Raw Sewage Dumping*, ITEMLIVE (Feb. 9, 2010), https://perma.cc/CJZ5-5WVN.

45 *See, e.g.*, Garvey, *supra* note 40, at 739.

published a prominent article in which he argued that shaming is a normatively desired criminal sanction.[46] He contended that shaming is an appropriate, inexpensive alternative to classic punishments in criminal procedure, since it encompasses essential dimensions of denunciation and condemnation, which are lacking in many criminal sanctions, such as fines or community service.[47] However, approximately a decade later, Kahan changed his position and argued that shaming cannot enjoy the same political legitimacy as other punishments because it is not accepted by communities that value individualism and equality, as opposed to communities that are hierarchical and communitarian, and therefore concluded that shaming sanctions are inefficient.[48]

Martha Nussbaum and Tony Massaro have also asserted that shaming should not be used as a legal punishment, but unlike Kahan, they focused on liberal arguments, and pointed to grave injuries that shaming may cause to human dignity.[49] A different view was adopted by scholars such as Amitai Etzioni, Eric Posner, John Braithwaite, and James Whitman, who emphasized the advantages of shaming as a democratic, efficient criminal sanction, which reinforces governing societal norms.[50]

Generally, two types of governmental shaming can be identified: direct and indirect.[51] The former is based on imposing direct sanctions, such as public announcements of law infringements and the names of wrongdoers.[52] In China, for instance, the government attempts to fight jaywalking by applying facial recognition technology and displaying jaywalkers' faces and names on huge LED displays on the streets.[53] This is an example of direct governmental shaming. Another example comes from the United Kingdom, where Parliament recently enacted legislation that mandates the disclosure of ownership of companies based in British Overseas Territories, which function as tax havens.[54]

Indirect shaming, meanwhile, relates to a general social norm of which any violation will not only be considered illegal but will also shame the

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46 *See* Kahan, *supra* note 35, at 594.

47 *See id.* at 652–53.

48 *See* Dan M. Kahan, *What's* Really *Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2089–90 (2006). Theories of punishment suggest that sanctions have to be accepted by a community in order to be effective. *See id.* at 2086–87. A different stance in regard to shaming sanctions is assumed by Braithwaite, who advocated communitarianism rather than individualism. *See* BRAITHWAITE, *supra* note 10, at 168–74.

49 *See* NUSSBAUM, *supra* note 31, at 231, 321; Massaro, *supra* note 36, at 1942–43.

50 *See* ETZIONI, *supra* note 32, at 42; Kahan & Posner, *supra* note 37, at 365–66; BRAITHWAITE, *supra* note 10, at 100; James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1058 (1998).

51 As this Article will show, regulatory shaming deals mostly with direct governmental shaming. *See* discussion *infra* Part III.

52 *See Public Shaming Instead of Incarceration in Pennsylvania Theft Case*, *supra* note 41.

53 *See, e.g.*, Liza Lin, *China is Using Facial Recognition to Nab Jaywalkers; Investors Get Interested*, WALL STREET J., https://perma.cc/WC3U-YSEK (last updated July 11, 2017).

54 *See* Sanctions and Anti-Money Laundering Act 2018, ch. 13, § 50 (U.K.).

transgressor, regardless of any active shaming performed by the state.[55] Robert Ellickson defines a norm as a rule that is supported by informal sanctions.[56] These informal sanctions may take the form of social denunciation, such as shaming.[57] Thus, for example, a law that prohibits jokes of a sexual nature in the workplace can be enforced not only by formal criminal mechanisms, but also by social condemnation of the employers and the employees who engage in such activity.[58] In addition to the direct legal sanctions it provides, the law also confers greater legitimacy on the company and its employees to activate sanctions of shaming toward any persons who violate the norm.[59] Thus, indirect shaming may aid in internalizing the norm and influencing a change in behavior.[60]

From different perspectives, governmental shaming can be viewed as either harsher or softer than private shaming. For instance, private shaming may be based on either false or truthful statements; the question of the statement's veracity does not play a significant role in the success of the shaming.[61] Governmental shaming is different in that regard, in that it is usually perceived by its audience as more truthful because it originates in an authoritative body of the government (though generally, independent regulatory agencies and judges of higher courts tend to be perceived as more truthful in their statements than politicians).[62] As a result, a governmental publication of a legal infringement is generally considered truthful and therefore has a greater shaming effect than civil shaming,[63] which people tend to trust less.[64]

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55 *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 132 (1991) (explaining how internalized social norms may create shame).

56 *See id.* at 126.

57 Alex Geisinger, *Reconceiving the Internal and Social Enforcement Effects of Expressive Regulation*, 58 WM. & MARY L. REV. ONLINE 1, 9–10 (2016); *see* Brian Galle, *Tax, Command . . . or Nudge?: Evaluating the New Regulation*, 92 TEX. L. REV. 837, 856 (2014) (providing an example of social denunciation).

58 *See* Geisinger, *supra* note 57, at 10 (contemplating the social effects of violating laws).

59 *Id.* at 10 (discussing this effect both generally and in the context of laws that prohibit smoking in public places).

60 *See id.*; Kenworthey Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 241, 250–51 (Eyal Zamir & Doron Teichman eds., 2014); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 949–62 (1995) (explaining that social meanings may be constructed).

61 *See, e.g.*, SOLOVE, *supra* note 6, at 77–78. Although, true statements are more protected under defamation laws than false statements. *See* RESTATEMENT (SECOND) OF TORTS § 581A (AM. LAW INST. 1977).

62 *See, e.g.*, Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633, 637 (2018) (arguing that the public distrusts elected representatives but trusts regulatory administrative agencies due to the credible rationality and transparency afforded by administrative procedures). *See generally* Rebecca M. Bratspies, *Regulatory Trust*, 51 ARIZ. L. REV. 575, 578–627 (2009) (discussing the importance of public trust in regulators, which is dependent on three main factors: expertise, stewardship, and transparency).

63 Effective shaming depends on the credibility of the shaming entity and the reliability of the shaming information, which are high when it comes to governmental agencies. *See* Nathan Cortez, *Regulation by Database*, 89 U. COLO. L. REV. 1, 71 (2018).

64 Notably, however, some people tend to believe information that is widely circulated through the Internet, especially if they encounter the same piece of information online on

Another aspect of the discussion of the severity of civil shaming versus governmental shaming involves the identity of the shaming entity. Ostensibly, governmental shaming would seem to be a more serious act against the shamed entity than civil shaming, since governmental shaming is performed by formal law enforcement institutions. However, criminology literature suggests that sanctions that are imposed by family members or friends, within the private shaming framework, carry greater impact on criminal behavior than sanctions imposed by a distant law enforcement figure.[65]

Supervision of shaming entities is another point for discussion in the comparison between civil and governmental shaming. While governmental shaming is subject to certain legal norms, citizens are generally not bound by such restrictions. Regulatory agencies are subject to constitutional review of their actions,[66] as well as to judicial examination of the legality of these actions based on administrative law, in terms of procedure and rationality.[67] Of course, citizens are also subject to various legal norms when engaging in shaming, such as defamation, privacy, harassment, and copyright laws.[68] However, civil shaming is often performed anonymously, due to narrow technological and legal constraints.[69] As a result, it is difficult to control the scope of injury caused by private shaming.[70] By contrast, governmental shaming is formally identified with the authoritative bodies of the government and agencies are not permitted to "hide" behind an online alias.[71] As a result, governmental shaming is generally more transparent than civil

several occasions. *See* Gordon Pennycook et al., *Prior Exposure Increases Perceived Accuracy of Fake News*, 147 J. EXPERIMENTAL PSYCHOL. 1865, 1868 (2018) (discussing the trust effect in "fake news"—entirely fabricated and often partisan content that is presented as factual). *See also* Gallardo, *supra* note 5, at 729–30 (discussing the lack of fact-establishing safeguards associated with shaming).

65 *See* BRAITHWAITE, *supra* note 10, at 69.

66 *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(B) (2012) ("The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (B) contrary to constitutional right, power, privilege, or immunity.").

67 *See, e.g.*, Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 815 n.4 (2000). Under the Administrative Procedure Act (APA), a rule can be challenged in court on the basis that it is arbitrary, capricious, or an abuse of discretion; contrary to a statute; or the agency failed to follow required legal procedures. *See* 5 U.S.C. §§ 706(2)(A), (C)–(F) (2012).

68 *See, e.g.*, Klonick, *supra* note 5, at 1059–62 (discussing defamation suits, tort claims for intentional or reckless infliction of emotional distress, and privacy claims); CITRON, *supra* note 26, at 121–23 (discussing harassment, copyright claims in the context of online posting of personal photographs or other material, emotional distress claims, humiliation and reputational claims, libel claims, and invasion of privacy claims.); Gallardo, *supra* note 5, at 730–31 (analyzing defamation and emotional distress claims in the context of online shaming).

69 *See* Perry & Zarsky, *supra* note 25, at 206, 214; Gallardo, *supra* note 5, at 728–29.

70 *See* Perry & Zarsky, *supra* note 25, at 206.

71 *See id.*; *supra* notes 66–67 and accompanying text. Although, generally, reputational injury by government agencies' adverse publications is not actionable under the Federal Tort Claims Act (FTCA). *See* Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 BYU L. REV. 1371, 1448 (2011).

shaming, and therefore subject to more extensive criticism and self-restraint.[72]

C. Psychological and Moral Aspects of Shaming

As discussed in the introduction above, shaming can be defined in different ways. While some scholars stress the act of shaming and the ways in which it is perceived by third parties, others point to the person who is being shamed and the inner processes that take place within that person's mind.[73] According to the internal approach, shaming is dependent on inner feelings of shame, rather than on the acts or feelings of others towards the shamed person.[74] The internal approach describes shaming as an act that aims to humiliate a person and injure that person's basic humanity and dignity.[75] The literature on the inner feelings of shame describes an emotional harm so great that it may never heal.[76] Shaming has also been described as causing the shamed individual the equivalent of physical pain.[77]

A different approach to shaming emphasizes its external moral dimension. This approach focuses on the importance to the shaming process of "private enforcement" by citizens.[78] In this view, shaming can only work when shameful behavior is countered with a morally negative response, which can take the form of, for example, boycott, denunciation, ostracism, disapproval, disrespect, or condemnation.[79] Some scholars describe a person who becomes a target of shaming sanctions as being perceived by the shaming community as morally inferior; a person who, due to inappropriate behavior, has become unworthy to continue to be part of the community as an equal among equals.[80]

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72 However, regulatory shaming is not merely an example of government transparency. *See* discussion *infra* Parts III.C., IV.B.

73 *See, e.g.*, Massaro, *supra* note 36, at 1902 n.100 (emphasizing the shamed person's inner processes); *see also* BRAITHWAITE, *supra* note 10, at 69 (Braithwaite's definition of shaming, which utilizes both external and internal meanings of shaming). Some scholars define the feeling of shame as a negative self-valuation of the shamed person, accompanied by awareness of the ways in which their faulty personality may be reflected to others. *See* June Price Tangney et al., *Shame-Proneness, Guilt-Proneness, and Psychological Symptoms*, *in* SELF-CONSCIOUS EMOTIONS: THE PSYCHOLOGY OF SHAME, GUILT, EMBARRASSMENT, AND PRIDE 343, 344 (June P. Tangney & Kurt W. Fischer eds., 1995).

74 *See, e.g.*, EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION 333 (Christine Parker & Vibeke Lehmann Nielsen eds., 2011).

75 *See* Massaro, *supra* note 36, at 1903, 1942–43 (questioning whether the assault on human dignity is always proportional punishment); NUSSBAUM, *supra* note 31, at 321 n.91 & n.96 (describing natural reactions to shame).

76 *See, e.g.*, Kahan & Posner, *supra* note 37, at 370 ("Shaming destroys one's reputation.").

77 *See* Kipling D. Williams, *Ostracism: The Kiss of Social Death*, 1 SOC. & PERSONALITY PSYCHOL. COMPASS 236, 236–37 (2007).

78 *See* ERIC A. POSNER, LAW AND SOCIAL NORMS 94 (2000).

79 *See, e.g.*, Massaro, *supra* note 36, at 1903.

80 *Id.* at 1901–02; Kahan, *supra* note 35, at 636–37; *see also* BRAITHWAITE, *supra* note 10, at 102 (linking shaming effectiveness and communitarianism).

Within the external approach, some describe shaming as tainting a person's personality, based on that person's actions.[81] Such shaming portrays that person as essentially bad, rendering highly unlikely the possibility of a shamed person ever erasing their moral stain.[82] In this line of research, shaming is also regarded as an "expressive imprisonment," which imprisons the shamed person in the eyes of the shaming community and allows no escape.[83]

A different strand in this literature perceives shaming as an act that condemns only the offending party's behavior and not their personality.[84] Thus, the person who is being shamed remains, under this approach, essentially good, despite their bad behavior.[85] This approach emphasizes the importance of forgiveness, rehabilitation, and reintegration of the shamed person into the community.[86] This perspective focuses on the expressive and educational dimensions of shaming, which aim at conveying the moral message[87] that wrongdoing cannot be corrected via monetary reparations alone.[88]

Despite these different distinctions of shaming in its external moral sense, this type of shaming generally refers to communicating a message to a public, which may be very broad or more targeted,[89] as a moral sanction. Under this concept, shaming cannot be performed privately or in secret, or it will have no effect.[90]

III. REGULATORY SHAMING

A. What is "Regulatory Shaming"?

In this Article, I use the term "regulatory shaming" to mean publication of information that is negative in nature,[91] executed or ordered by an administrative agency, relating to a private entity that provides services or commodities to the public. The information made public may be detailed or

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81 *See, e.g.*, Rebecca A. Neville, *Mandatory Shaming Statutes and Sensationalized Shaming of Sex Buyers*, 8 J.L. & SOC. DEVIANCE 1, 19 (2014).

82 *See, e.g.*, Massaro, *supra* note 36, at 1937–38 (describing the massive damage that shaming can cause to a person); s*ee also supra* notes 25–26 and accompanying text.

83 *See, e.g.*, Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186, 2194 (2003) ("What is not transient . . . is the stigma that accompanies shaming.").

84 *See, e.g.*, BRAITHWAITE, *supra* note 10, at 101.

85 *Id.*

86 *Id.* at 100–01 .

87 *See* Garvey, *supra* note 40, at 762, 765 (explaining that the educating model "conceives of punishment as a way to teach the offender how and why his offense was wrong").

88 *See, e.g.*, Kahan, *supra* note 35, at 593.

89 *See supra* notes 51–61 and accompanying text.

90 *See, e.g.*, Kahan & Posner, *supra* note 37, at 369; Massaro, *supra* note 36, at 1901–02. *But see* Garvey, *supra* note 40, at 738–39 (describing "private" shaming).

91 Although most regulatory shaming utilizes adverse publications, publication of positive information regarding other firms may also shame. *See* discussion *infra* notes 159–160 and accompanying text.

summarized, basic or processed, technical or substantive.[92] It may address administrative or criminal regulatory infringements or it may relate to voluntary norms of corporate social responsibility.[93] Regulatory shaming aims to communicate an external moral judgment about corporate activities, rather than causing internal feelings of shame.[94] Similarly to other types of regulation,[95] regulatory shaming is aimed at correcting market failures, such as monopolies,[96] informational asymmetries,[97] and negative externalities,[98] as well as advancing desired social goals.[99] It is a form of direct governmental shaming[100] that is designed to serve a public-interest goal, such as securing the rights and interests of workers, people with disabilities, women, the elderly, or children; protecting consumers' and citizens' health and safety; protecting the environment; or securing financial stability, competition, and fair trade.[101]

While shaming of corporations may be undertaken by "civilian regulators," such as non-profit and for-profit organizations,[102] or the media,[103] this Article focuses on direct shaming by governmental bodies[104]—specifically, by administrative agencies in the executive branch that engage in regulation. These include both executive agencies, which are part of government departments, and independent agencies, which are situated outside the federal executive departments.[105]

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92 *See* discussion *infra* Part III.B.

93 *See id.*

94 These distinctions of external versus internal modes of shaming were discussed *supra* notes 73–80 and accompanying text. Regulatory shaming is also defined in the Introduction section of this article, based on Braithwaite's broad definition of shaming. *See* BRAITHWAITE, *supra* note 10, at 100; *see also* discussion *infra* Part IV.C..

95 The term "regulation" is defined in the text accompanying *supra* notes 13–15.

96 *See, e.g.*, STEPHEN BREYER, REGULATION AND ITS REFORM 15–16 (1982).

97 It is a common perception that competitive markets can only function properly if consumers are sufficiently well informed to evaluate competing products. Regulation can make information more accessible, accurate, and affordable to consumers. *See* ROBERT BALDWIN ET AL., UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 18–19 (2d ed. 2012).

98 Negative externalities are "social costs which are not reflected in the price of the product or services." *See* OGUS, *supra* note 15, at 268.

99 *See, e.g.*, BALDWIN ET AL., *supra* note 97, at 15–23 (listing various market failures that justify government intervention in the markets).

100 *See supra* notes 51–61 and accompanying text (differentiating between direct and indirect governmental shaming).

101 *See generally* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 24–26 (1990).

102 *See, e.g.*, Skeel, *supra* note 40, at 1824–25, 1844–45. See also the Fly Quiet and Clean League Table produced by Heathrow Airport, which rates air flight companies by their level of air and noise pollution. *See Fly Quiet and Clean League Table*, HEATHROW (Sep. 27, 2017), https://perma.cc/S45H-RD2X. "Regulation" may be understood as private or public, though this article deals with public regulation. *See supra* notes 13–14 and accompanying text.

103 *See, e.g.*, Skeel, *supra* note 40, at 1843.

104 *See* discussion *supra* Part II.B.

105 The distinction between executive and independent agencies is based on the agency's location in the administrative scheme and on its institutional design, especially its leadership. While executive agencies are cabinet agencies located in one department in the executive branch and led by a single administrator, independent agencies are situated outside the political

Evidence of "regulation by shaming" can be found in various agency actions and initiatives.[106] Some agency shaming activities have only very recently begun to emerge, while others are more established. However, these regulatory shamings are becoming a trend in agency regulation practices. Agencies engaging in corporate shaming include, *inter alia*, OSHA, the FDA, and the SEC.[107]

OSHA is a regulatory agency located within the Department of Labor,[108] responsible for safe and healthy working conditions for employees.[109] It has been OSHA's policy for the past few years to issue press releases about corporations that violate worker safety regulations.[110] These are also published by the agency on its website[111] and on social media platforms, such as Twitter.[112] Press releases may include statements regarding issued citations, as well as settlement agreements,[113] and these statements may include identification of a specific company, a detailed description of its worker safety violations, the implications for employees' health, and a moral judgment of the company's behavior issued by the regulator.[114] The moral aspects of these regulatory statements can be found in such examples as "[t]his employer is risking the safety of workers by failing to comply with fall protection requirements"[115] and "[t]his employer's failure to protect employees resulted in a tragedy that could have been prevented if training was provided and machinery was appropriately guarded."[116] Another OSHA publication stated that the "company's history of safety violations continues, putting employees . . . at risk of serious injuries . . . . [The company's] 10th inspection since 2011 yields $1.9M in penalties. . . . [The company's] extensive list of violations reflects a workplace that does not prioritize

arena, led by a college of commissioners, and its members cannot be removed by the President except for cause. *See, e.g.*, Dominique Custos, *The Rulemaking Power of Independent Regulatory Agencies*, 54 AM. J. COMP. L. 615, 615–17 (2006); Alan B. Morrison, *How Independent Are Independent Regulatory Agencies*, 1988 DUKE L.J. 252, 252 (1988).

106 *See* discussion *infra* notes 107–116 and accompanying text.

107 These examples are discussed briefly in the Introduction. *See supra* notes 1–4 and accompanying text.

108 *See About OSHA*, U.S. DEP'T LAB., https://perma.cc/NQ56-2834 (last visited Apr. 13, 2019).

109 *Id.*

110 *See OSHA News Releases — Enforcement*, U.S. DEP'T LAB., https://perma.cc/TUP8-WGJ5 (last visited Apr. 13, 2019).

111 *Id.*

112 *See* OSHA (@OSHA_DOL), TWITTER, https://perma.cc/5CA4-H7TK (last visited Apr. 13, 2019).

113 *See OSHA News Releases — Enforcement*, *supra* note 110.

114 *See id.* (describing the types of companies and violations they committed).

115 *See* Press Release, U.S. Dep't of Labor, Roofing Company Faces Penalties After Exposing Employees to Numerous Fall and Other Safety Hazards, (June 25, 2018), https://perma.cc/4VLU-XTSJ.

116 *See* Press Release, U.S. Dep't of Labor, U.S. Department of Labor Cites New Jersey Renewable Energy Company Following Fatality at New Hampshire Power Plant, (June 1, 2018), https://perma.cc/Z2FE-J85R.

worker safety and health."[117] OSHA also operates a public database of records of its enforcement inspections, searchable by the name of the establishment.[118] The practice was termed by former OSHA Administrator, David Michaels, who originally promoted it, "regulation by shaming."[119]

OSHA's shaming practices proliferated, following the introduction of a new OSHA rule in 2016 that required employers of 250 or more employees (or twenty or more employees in industries that OSHA has deemed hazardous) to submit data on work-related injury and illness to the agency electronically.[120] This data was intended to be made publicly available by OSHA via a searchable online database on its website.[121] This initiative was formulated so that it will be easy for members of the public to find a specific corporation's "incident rate"[122]—a measure created to indicate the ratio of cases of injury and illness relative to the number of employee working hours.[123] The electronic submissions rule also aimed to give plaintiffs' attorneys and union organizers access to this data.[124] Furthermore, the rule aimed to give OSHA itself a clear view of overall injury and illness rates, because to this day the data is mostly recorded on paper and poorly indexed.[125]

Shaming tactics have recently been adopted by the FDA as well.[126] The responsibilities of this agency, which is located within the Department of Health and Human Services, include regulating drugs for safety and effectiveness.[127] Two major types of drugs can be identified: "branded" and "generic." Generic drugs are the unbranded versions that appear after the branded drugs have lost patent and regulatory protection, such as Omeprazole and Loratadine.[128] Generics contain the same active ingredients,

117 *See* Press Release, U.S. Dep't of Labor, Aluminum Manufacturing Company's History of Safety Violations Continues, Putting Employees at Camden County Facility at Risk of Serious Injuries, (July 21, 2017), https://perma.cc/UBF5-3D3Q.

118 *See Establishment Search*, U.S. DEP'T LAB., https://perma.cc/KM4K-RGGU (last visited Apr. 13, 2019).

119 "In some cases, 'regulation by shaming' may be the most effective means for OSHA to encourage elimination of life-threatening hazards and we will not hesitate to publicize the names of violators, especially when their actions place the safety and health of workers in danger." *See* Letter from David Michaels, Assistant Sec'y, Occupational Safety & Health Admin., U.S. Dep't of Labor, to Colleagues (July 19, 2010), https://perma.cc/T7J2-TAVN.

120 *See supra* note 1 and accompanying text.

121 *See id.*

122 *See Establishment Specific Injury & Illness Data (OSHA Data Initiative)*, *supra* note 1.

123 *See id.*

124 *See* Bailey & Wilensky, *supra* note 2.

125 *See id.*

126 *See* Sharon Yadin, *Shaming Big Pharma*, 36 YALE J. REG. BULL. 131 (2019), https://perma.cc/E7PM-6UJC; Maggie Fox, *FDA Publishes Shame List of Firms Fighting Generic Competitors*, NBC NEWS (May 17, 2018), https://perma.cc/V5TR-5K6P.

127 *See About the FDA: FDA Organization Charts*, U.S. FOOD & DRUG ADMIN., https://perma.cc/49KH-SBVM (last visited Apr. 13, 2019).

128 *See* Kathleen Craddock, *Improving Generic Drug Approval at the FDA*, 7 MICH. J. ENVTL. & ADMIN. L. 421, 423 (2018).

but not necessarily the same inactive ingredients, as branded drugs,[129] and "they cost eight to eighty-five percent less than the brand name equivalent."[130] Generics thus provide an affordable alternative for patients in need.[131]

The FDA has recently reported on its website that certain branded drugs companies are using inappropriate means to attempt to impede competition from generic drug companies.[132] For instance, potential applicants for generic drug approval are prevented from obtaining samples of certain branded products, which are necessary in order to support FDA approval of generic drugs.[133] In response, the FDA has published an online list that details all relevant regulatory approvals, applications, and correspondence regarding the availability of branded drug samples for generic companies.[134] In the list, the FDA names branded drug companies that have not made the necessary samples available despite requests from prospective generic applicants, and despite the fact that no regulatory restrictions with regard to the samples' safety and distribution were imposed.[135] For example, according to the FDA's "shame list," one branded drug company that received letters from the agency permitting it to distribute samples to generic companies was nevertheless the subject of thirteen inquiries received by the FDA from generic companies who were unable to receive such samples.[136]

Regulatory shaming can also be found in a recent SEC regulation. The SEC, an independent regulatory agency, aims "to protect investors; maintain fair, orderly and efficient markets; and facilitate capital formation."[137] The Dodd-Frank Wall Street Reform and Consumer Protection Act[138] and the subsequent SEC regulations require public companies, as of 2018, to disclose the salary ratios of their employees and company executives in regulatory

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129 *See* Cheryl Spector, *Generic Copies: Are They "New Drugs?"*, 3 CARDOZO L. REV. 131, 131 & n.3 (1981).

130 *See* Shyam Goswami, *Windfall Profits and Failed Goals of the Bayh-Dole Act*, 19 J. GENDER RACE & JUST. 375, 382 (2016).

131 *See Reference Listed Drug (RLD) Access Inquiries*, *supra* note 3.

132 *See id.*; Statement from FDA Commissioner Scott Gottlieb, *supra* note 3.

133 *See Reference Listed Drug (RLD) Access Inquiries*, *supra* note 3. Samples of the brand drug are important to generic applicants because the generic drug company needs to show the FDA that its version of the product is bioequivalent to the brand drug. *See id.* A generic drug developer generally needs 1,500 to 5,000 units of the brand drug to perform studies for FDA approval. *Id.* Branded drug companies have also placed restrictions in their commercial contracts or agreements with prescription drug distributors, wholesalers or specialty pharmacies that limit the ability of these intermediaries in the drug supply chain to sell samples to generic drug developers for testing. *See* Statement from FDA Commissioner Scott Gottlieb, *supra* note 3.

134 *See Reference Listed Drug (RLD) Access Inquiries*, *supra* note 3.

135 *See id. See also supra* note 3 and accompanying text.

136 *See Reference Listed Drug (RLD) Access Inquiries*, *supra* note 3.

137 *See About the SEC*, U.S. SEC. & EXCHANGE COMMISSION, https://perma.cc/BBR3-8DXJ (last visited Apr. 13, 2019).

138 Pub. L. No. 111-203, 124 Stat. 1376 (2010).

filings.[139] These companies are required to disclose a) "the median of the annual total compensation of all employees" of the company, except the chief executive officer; b) the annual total compensation of the chief executive officer of the company; and c) the ratio of these two amounts.[140] According to the first filings made to the SEC, CEO-to-median-employee pay ratios are the highest in the financial sector (429:1), in industrial companies (428:1), and in health care (388:1).[141]

While maintaining a low wage ratio is not a formal legal norm, by publishing these figures the SEC seeks to give shareholders a tool for influencing the board of directors to design compensation policies that are more socially responsible.[142] Publicizing high wage gaps can also draw the attention of activist investors and other stakeholders, resulting in embarrassment to the company and its shareholders.[143] These requirements were included in the Dodd-Frank Act as a response to inappropriate compensation packages at financial services firms, such as Bear Stearns and Lehman Brothers, which were identified as contributors to the financial crisis of 2008.[144]

As these examples illustrate, the information provided by regulatory shaming aims to communicate a negative view of the shamed entity or its activity. It invites relevant communities to apply pressure, to change the discourse, to alter behavioral patterns or ways of thinking about the shamed entity, and in appropriate circumstances to denounce, condemn, or boycott it. For example, employees of a shamed company may quit; shareholders may sell their holdings; competing companies may embargo it from professional associations, joint ventures, or conferences. Other businesses may avoid entering into contracts or dealing with a shamed company. Politicians may refuse its endorsement and contributions and avoid aiding its cause or furthering its interests. Consumers may boycott its products or file a class action suit against it. The media may be hostile to a shamed company in its coverage of its activities in general and refuse to advertise it. The residents of the area in which the company is located may demonstrate against it and disrupt its activities. Non-profit organizations may file suits against the company, and governmental regulators may pay special attention to its activities and concentrate enforcement resources on it.[145]

One possible outcome of regulatory shaming relates to the corporation's decreased ability to act as an esteemed member of a

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139 *See Securities Regulation—Dodd-Frank Wall Street Reform and Consumer Protection Act*, *supra* note 4, at 1144.

140 *See* 17 C.F.R § 229.402(u) (2017).

141 *See* Kyoko Takahashi Lin et al., *The First Wave of Pay Ratio Disclosures*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (Mar. 27, 2018), https://perma.cc/MLR6-M22S.

142 OBM Team, *Tackling the CEO-Worker Pay Gap*, OR. BUS. (Dec. 11, 2014), https://perma.cc/P4CG-EGSK.

143 *See id.*; *see also* Sandeep Gopalan, *Shame Sanctions and Excessive CEO Pay*, 32 DEL. J. CORP. L. 757, 758–61 (2007).

144 *See* Richard Trumka, *Time for Transparency Over CEO Pay*, CNN, https://perma.cc/AZR4-AKBN (last updated Aug. 4, 2015).

145 *See* discussion *infra* Part III.D.

community. To demonstrate this, let us consider three hypothetical examples: a) a construction company that advertises that all of its buildings are environmentally friendly; b) an international technology company that wishes to be perceived as helping to advance humanity through the devices it develops and markets; c) a sportswear company that advertises its efforts to help advance women in sports by financially supporting them with scholarships. All three are examples of the type of reputational efforts made by companies today in order to establish their standing in the community and display their social responsibility.

But what happens when such companies are publicly shamed (by regulators, the media, or civilians) with information that calls into question their public image as socially responsible companies? For instance, it may emerge that the construction company is rated last in a regulatory worker-safety league table,[146] or that the innovative technology company has a high suicide rate of workers due to unreasonable working conditions,[147] or that the sportswear company employs child workers in third-world countries illegally.[148] In such cases, the companies lose their social standing, as the shaming prevents them from presenting themselves as adding social value to the community.

B. Types of Regulatory Shaming

Regulatory shaming can take many forms. A typology of shaming by regulation can be based, *inter alia*, on its level of formality, its timing, and its form. For instance, some regulatory shaming is authorized by statutory provisions, while others lack such an authoritative basis.[149] Some publications are made after a regulatory infringement is discovered,[150] while others are made regardless of any regulatory infringement.[151] Acts of

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146 *See generally* Cortez, *supra* note 63 (discussing government databases, including ratings and tables, with adverse information regarding companies, which are published online for disclosure purposes).

147 A well-known example is the case of Apple and its manufacturing in China. *See* Larry Catá Backer, *Transnational Corporations' Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc.*, 20 IND. J. GLOBAL LEGAL STUD. 805, 841–43 (2013).

148 This resembles the case of Nike, which was shamed by human-rights activists regarding child workers in Southeast Asia. *See* Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625, 665–66 (2011); Ryan P. Toftoy, *Now Playing: Corporate Codes of Conduct in the Global Theater. Is Nike Just Doing It?*, 15 ARIZ. J. INT'L & COMP. L. 905, 908, 923 (1998).

149 For example, the SEC's policy requiring disclosure of public companies' pay ratios of CEOs to median employees is based on the Dodd-Frank Act and on an SEC rule. *See* 17 C.F.R § 229.402(u) (2017). However, the FDA and OSHA do not enjoy such clear statutory powers to publicly "shame" regulated entities with online publications and news releases. These shaming examples are discussed *supra* Part III.A.

150 *See, e.g.*, Note, *Disparaging Publicity by Federal Agencies*, 67 COLUM. L. REV. 1512, 1512 (1967).

151 The SEC's pay ratio disclosure rule, presented in this article as a type of "regulatory shaming," is not dependent on any regulatory violation regarding pay gaps (there is no such regulation). *See* discussion *supra* Part III.A. However, OSHA's publications are made after regulatory violations regarding workplace safety are discovered. *See OSHA News Releases — Enforcement*, *supra* note 110; *see also* Yadin, *supra* note 1.

shaming performed by regulatory agencies also differ in terms of the mode of publication, as they can take the form of newspaper advertisements; media campaigns (online, televised, or other); online publications, including in social media; news conferences; and news releases.

Regulatory shaming can be based on information provided by regulatees themselves (such as in the case of reporting work injuries[152]), gathered independently by regulatory agencies (for example, data regarding enforcement activities[153]), or a combination of both. Furthermore, the shaming information can be in the form of raw data, such as work-related fatalities,[154] or it can comprise new information based on regulatory compilation and analysis of raw data.[155] For example, the Department of Health and Human Services rates nursing homes based on a five-star scale.[156] Each rated facility is assigned a star rating based on its weighted score from recent health inspections, its staff-resident ratio, and clinical data.[157] Another example is the United States Environmental Protection Agency's Toxic Release Inventory (TRI) program, in which the agency publishes facility-based information regarding air, water, and land pollution, as well as compliance status (significantly non-compliant facilities are marked red; compliant facilities are marked blue).[158]

Regulatory shaming can also be based on negative information or positive information regarding other companies in a form of "soft shaming." Soft shaming may occur when regulators award some companies with labels[159] and decorations,[160] while others remain "unlabeled" and "undecorated." The level of shaming incorporated in regulatory messages

152 *See supra* notes 120–123 and accompanying text.

153 *See, e.g.*, *Establishment Search*, *supra* note 118 (allowing for searches of logged OSHA enforcement inspections).

154 *See Fatality Inspection Data: Work-Related Fatalities for Cases Inspected by Federal or State OSHA*, U.S. DEP'T LAB., https://perma.cc/ZX4P-ZB3C (last visited Apr. 13, 2019).

155 The governmental "coloring" of raw information regarding regulatory violations may be regarded a harsher sanction than raw-facts-based governmental shaming because it tends to entail a greater dimension of condemnation. On the other hand, one could argue that soft, processed information published by the authorities inflicts less harm on the entity that is being shamed than "hard" information.

156 *See, e.g.*, *About Nursing Home Compare Data*, MEDICARE, https://perma.cc/F9J5-7ZCY?type=image (last visited Apr. 13, 2019).

157 *See id.*

158 *See Toxics Release Inventory (TRI) Program*, U.S. ENVTL. PROTECTION AGENCY, https://perma.cc/L8D7-NWK7 (last visited Apr. 13, 2019); *see also* DAVID MICHAELS, DOUBT IS THEIR PRODUCT: HOW INDUSTRY'S ASSAULT ON SCIENCE THREATENS YOUR HEALTH 257–58 (2008); OSHA's "incident rate," *supra* note 122 and accompanying text.

159 *See, e.g.*, EPA's "Energy Star," which offers special product labels to manufacturers of consumer products that meet voluntary energy efficiency standards. *Energy Star*, U.S. DEP'T ENERGY, https://perma.cc/PV7R-RWAB (last visited Apr. 13, 2019); s*ee also* Cary Coglianese & Jennifer Nash, *Performance Track's Postmortem: Lessons From the Rise and Fall of EPA's "Flagship" Voluntary Program*, 38 HARV. ENVTL. L. REV. 1, 3–4 (2014).

160 *See, e.g.*, Sidney A. Shapiro & Randy Rabinowitz, *Voluntary Regulatory Compliance in Theory and Practice: The Case of OSHA*, 52 ADMIN. L. REV. 97, 144–45 (2000).

may also differ. As will be discussed in the next Subpart,[161] sometimes shaming is central to the regulatory act, while in other cases, shaming is merely a byproduct of the regulatory action, which focuses on informing, educating, warning, or facilitating transparency. The institutional characteristics of the shaming community,[162] the governmental body engaging in shaming,[163] and the shamed entity[164] also vary. The ways in which regulatory shaming is constructed may play a significant role in its legitimacy and efficiency.[165]

C. Shaming Regulation Versus Disclosure Regulation

Regulatory shaming should be differentiated from other types of expressive regulatory actions, in which information is conveyed to the public by administrative agencies. This is especially important because regulatory shaming is often presented or regarded as mere disclosure or transparency activity.[166] For example, the SEC pay ratio regulation discussed above was described by the agency as a rule that "helps inform shareholders when voting on 'say on pay.'"[167] Similarly, in regard to the FDA initiative to post a list of brand drug companies who purposely impede generic drug competition, the FDA Commissioner stated "[w]e hope that this increased transparency will help reduce unnecessary hurdles to generic drug development and approval."[168]

This confusion is not surprising, because regulatory shaming is closely related to such regulatory actions as warning, informing, disclosing, or facilitating transparency, in that these are all forms of "expressive regulation." Expressive regulation "changes community norms, or informs the community of existing norms, and capitalizes on social or internal enforcement of the norm as the means for changing behavior."[169] Thus, all forms of expressive regulation involve aspects of communicating messages to the public. Due to the common features of these forms, no single expressive regulatory act can be considered to consist exclusively of shaming or promoting transparency. Rather, some forms of expressive

161 *See* discussion *infra* Part III.C.

162 *See* discussion *infra* Part III.D.

163 *See supra* notes 102–105 and accompanying text.

164 *See* discussion *supra* note 15 and accompanying text. Generally, regulatory shaming is aimed at businesses, corporations, and industry sectors that are currently regulated by the government or may be regulated by the government in the future. *See* discussion *infra* notes 268–271 and accompanying text.

165 *See* discussion *infra* Parts III, V.

166 *See, e.g.*, Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380, 1399, 1402, 1404 (1973); Cortez, *supra* note 71, at 1373.

167 *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Rule for Pay Ratio Disclosure (Aug. 5, 2015), https://perma.cc/9JN6-C9BD.

168 *See* Statement from FDA Commissioner Scott Gottlieb, *supra* note 3.

169 *See* Geisinger, *supra* note 57, at 5.

regulation have a greater element of shaming than others or are more informative in nature (or meant to warn consumers).[170]

Shaming regulation is often confused with, and most related to, disclosure regulation. Generally, modern regulation utilizes a wide variety of tools, including command and control (criminal or administrative sanctioning),[171] self-regulation (such as industry codes of conduct),[172] economic incentives (such as taxes or subsidies),[173] voluntary regulation (companies join programs in which they commit to perform "above and beyond" the law),[174] and contractual regulation (agreements made between regulators and regulatees regarding compliance, enforcement, supervision, or rulemaking).[175] Disclosure regulation is another of these regulatory tools.[176]

Disclosure regulation focuses on requiring manufacturers and service providers to actively reveal information about their products—either directly to the public, or indirectly, by means of reports made to the regulatory agency which the agency then publishes.[177] Disclosure regulation applies, for example, to public companies on the stock exchange, which are obligated to divulge to the public information that may be significant to investors.[178] It is also used to require manufacturers in food and drug industries to provide certain information on their packaging.[179] The objective of disclosure regulation is to provide consumers with the information necessary to make an informed decision about purchasing a particular product or service.[180] This approach is based on the idea of advancing individuals' personal autonomy and reducing the paternalism that is inherent

170 *See id.* at 9–12.

171 *See, e.g.*, KEITH HAWKINS, LAW AS LAST RESORT: PROSECUTION DECISION-MAKING IN A REGULATORY AGENCY 13–14 (2002).

172 *See generally* CHRISTINE PARKER, THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY (2002).

173 *See, e.g.*, OGUS, *supra* note 15, at 246–49.

174 *See, e.g.*, Coglianese & Nash, *supra* note 159, at 4–5.

175 *See* Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 191–94 (2000) (describing regulatory negotiation as a contract-like instrument used to develop and implement regulations); David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 475 (1999) (explaining regulation-for-performance contracts); ANDREW P. MORRISS ET AL., REGULATION BY LITIGATION 43–47 (2009) (discussing the public and agency perspectives of regulations-by-negotiations); Cristie L. Ford, *Toward a New Model for Securities Law Enforcement*, 57 ADMIN. L. REV. 757, 759 (2005) (describing the problems with the SEC's settlement protocol).

176 *See generally* Cortez, *supra* note 71 (discussing the American history of disclosure regulation and its current state in the Internet age).

177 *See* BALDWIN ET AL., *supra* note 97, at 119.

178 *See generally The Laws That Govern the Securities Industry*, U.S. SEC. & EXCHANGE COMMISSION, https://perma.cc/9QGE-5C25 (last visited Apr. 13, 2019) (indicating laws relating to public company disclosure obligations).

179 *See* BALDWIN ET AL., *supra* note 97, at 119; Jack Gainey, *An Examination of Trans Fat Labeling: Splitting the Third & Ninth Circuit*, 23 WASH. & LEE J. C.R. & SOC. JUST. 461, 470 (2017).

180 *See* BALDWIN ET AL., *supra* note 97, at 119; OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 3 (2014).

to traditional command and control regulation.[181] In this way, price controls and other restrictions imposed on business activities are replaced or supplemented with mandatory disclosure.[182] Disclosure rules allow the regulated entity to operate relatively free from regulation in a specific area, as long as relevant information is provided to the public.[183] Usually, regulatory agencies set rules of disclosure, which detail the ways and forms in which the information is to be disclosed.[184] Disclosure is also subject to regulatory supervision and enforcement.[185]

Disclosure regulation comprises two main components: making information accessible; and supporting decision making.[186] That is, information is made available in order to provide a solid factual basis for informed decision making. Properly informed, consumers can decide whether, how, when, where, and how much to use a product or a service. However, regulatory shaming works in a different way. Though, like disclosure regulation, regulatory shaming is based primarily on information, and both styles of regulation are expressive in nature, shaming involves a negative judgment and the expression of normative disapproval by the regulatory agency. For instance, while FDA regulations provide that the presence of trans fats in foodstuff should generally be disclosed in the nutrition label in the form of grams per serving,[187] this information in itself does not carry a message of negative judgement by the agency. This disclosure regulation merely aims to inform consumers so that they can make a conscious, facts-based choice, and to prevent deceit and information asymmetry between manufacturers and consumers. By contrast, regulatory ranking of food manufacturers by the FDA according to trans fat levels, in which manufacturers that avoid trans fats will be regarded as "good" while others will be regarded as "bad" or unhealthy, accompanied with a condemning regulatory statement, can be considered "shaming."

Regulation by shaming and regulation by disclosure also differ in their regulatory goals. Though both strategies aim to softly influence consumers' (or other addressees') choices as an alternative to the paternalism of command and control, disclosure regulation leaves the decision making entirely to the consumer, and the regulator takes a fairly passive normative stance regarding the company, product, or service. Its emphasis is on providing the public with detailed information to support an informed decision. However, regulatory shaming aims to convey a message that carries not only factual information, but also a negative judgment. The message may express dissatisfaction, scolding, or condemnation, and it will highlight the shamed entity's unacceptable behavior, character, set of values,

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181 *See* BEN-SHAHAR & SCHNEIDER, *supra* note 180, at 146–47.
182 *See* BALDWIN ET AL., *supra* note 97, at 119.
183 *See* BEN-SHAHAR & SCHNEIDER, *supra* note 180, at 5.
184 *See* BRONWEN MORGAN & KAREN YEUNG, AN INTRODUCTION TO LAW AND REGULATION 96 (2007).
185 *See e.g.*, *id.* at 577–96 (discussing supervision and enforcement imposed by financial regulators).
186 *See* BEN-SHAHAR & SCHNEIDER, *supra* note 180, at 3.
187 *See* 21 C.F.R. § 101.9(c)(2) (2018).

and/or beliefs. For example, regulatory shaming might take the form of a statement, "This company regularly adds trans fats to its products. It operates with little regard for its customers' health and wellbeing."

Regulatory shaming does not seek to contribute to the informational basis on which citizens make decisions (such as selecting a healthier snack or a drug that will not make them drowsy), but rather to create a morally negative message about a specific entity and convey that message to relevant audiences. After receiving the shaming message, consumers may feel negatively toward the company that sells high trans-fat foods and may even boycott it. By contrast, the informational messages conveyed by disclosure regulation are non-judgmental in nature; thus, while consumers may decide not to buy a specific product based on information that was mandatorily disclosed, they do not necessarily feel negatively towards the manufacturer.[188]

The key question in differentiating between disclosure and shaming regulation is the level of condemnation inherent in the regulatory act. For example, are star ratings for hospitals designed mainly to help people choose a hospital when they need to undergo a procedure, or to condemn specific hospitals that have a high infection rate?[189] It is clear that regulators often use their expressive activity to achieve multiple goals, which may include a mix of shaming and disclosure. Differentiating between such goals is not always easy or conclusive. However, identifying the extent of condemnation inherent in the regulatory message is important for regulatory policy formulation.

Furthermore, sometimes regulators relay messages to the public that aim mainly to warn rather than to shame (with shaming only a secondary goal).[190] For instance, FDA regulations require that graphic images, including of bodies ravaged by disease, appear on every cigarette pack, alongside a textual warning.[191] In this case, and in other such cases in which manufacturers are required to warn consumers about possible damage and adverse consequences that may arise from use of their product or service, the central goal is not to condemn manufacturers but to warn consumers.[192] However, when OSHA (for example) publishes the names of facilities that severely violate safety regulations,[193] it is not primarily seeking to warn current or potential employees. Rather, it targets a completely different audience, such as investors, donors, and customers, aiming to shame more than warn.

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188 Consumers may even feel the opposite, due to the company's fair disclosure practices (even when such disclosure is mandatory).

189 *See Hospital Compare Overall Hospital Rating*, MEDICARE, https://perma.cc/JUS4-K3CJ?type=image (last visited Apr. 13, 2019) (explaining Medicare's hospital comparison rating system).

190 *See* Gellhorn, *supra* note 166, at 1382–83; Cortez, *supra* note 71, at 1378–79.

191 *See Labeling and Warning Statements for Tobacco Products*, U.S. FOOD & DRUG ADMIN., https://perma.cc/2KJG-4HRM (last visited Apr. 13, 2019); *See also* Nathan Cortez, *Do Graphic Tobacco Warnings Violate the First Amendment*, 64 HASTINGS L.J. 1467, 1468, 1469 fig.1 (2013).

192 *See* Gellhorn, *supra* note 166, at 1383.

193 *See supra* notes 120–122 and accompanying text.

Thus, the identity of the "shaming communities" can help differentiate shaming regulation from disclosure regulation and from warnings. I use the term "shaming communities" to mean audiences that the regulatory agency deems relevant for inflicting reputational damage or applying pressure to amend corporate behavior. While warnings and disclosure of information target mostly consumers, regulatory shaming addresses much wider audiences.[194]

Another type of expressive regulation takes the form of corporate apologies, in which companies are required to ask for forgiveness from the public, in accordance with regulatory instructions.[195] This is also a form of regulatory shaming, as its main purpose is to attach a negative label to the corporation—for example, as having little regard for its employees' safety, and being unwilling to invest funds in order to prevent bodily harm to its workers. Regulatory sanctioning in the form of corporate apology advertisements aims to deliver the following message: This employer does not abide by the values and norms that you and I believe in and live by. This is not moral. Let us apply pressure to change this employer's behavior.[196]

D. The Mechanism of Regulatory Shaming

Shaming by regulation is a process that should include the following steps in order to succeed: first, the regulatory agency conveys negative information to relevant communities regarding a specific regulatee. Subsequently, the members of the community receive the message, agree with its content, and take steps to sanction the regulatee. The first step involves identifying and reaching relevant communities. Regulatory shaming can fail at this stage if the regulator does not succeed in conveying the shaming message to relevant communities due to technical errors pertaining to the medium (such as choosing the wrong media for the communication), or due to wrongly identifying the relevant communities (for example, targeting the facility's employees instead of environmental interest groups).[197] Next, the shaming community needs to agree with the regulator's normative view of the situation and its negative message. For instance, if the facility's employees believe that there is nothing wrong with their employer's actions they will not complete the shaming process and it will fail. Finally, if the community agrees with the shaming message and is willing to act on it, it needs to take measures that actively show that the message is received, such

194 These are discussed *infra* Part III.D.

195 *See, e.g.*, *supra* notes 42–44 and accompanying text.

196 Public apologies may be especially useful in cases where regulators believe in reintegration following regulatory shaming. Reintegration is an approach discussed in criminology literature that deals with the ways in which the shamed person or entity can return to the community as equal among equals after mending their ways. *See* BRAITHWAITE, *supra* note 10, at 101.

197 For example, OSHA's Assistant Secretary, Dr. David Michaels, stated that the "reporting requirements will 'nudge' employers to prevent worker injuries and illnesses to demonstrate to investors, job seekers, customers and the public that they operate safe and well-managed facilities." *See* OSHA's Final Rule to "Nudge" Employers, *supra* note 1.

as boycott, condemnation, denunciation, excommunication, disapproval, criticism, or showing disrespect towards the shamed entity. The community's actions can be considered effective and successful when they cause reputational damage[198] to the entity and motivate it to change its behavior.

Professional communities, for example, may condemn an organization in several ways. They may excommunicate it from important conferences and business ventures, or they may outright reject business offers from the shamed corporation, including both commercial collaborations and larger transactions, such as mergers and acquisitions. Some firms may even invest great efforts in differentiating themselves from the shamed entity. For example, they might launch media campaigns that emphasize their social responsibility in comparison to the socially irresponsible entity whose reputation was damaged. In that sense, the initial regulatory shaming sanction is replicated into further shaming acts, such as by relevant industry actors. Other companies may also invest efforts in demonstrating to the regulatory agency that they are not connected in any way to the shamed entity, in order to avoid excess scrutiny.

Employees, especially organized workers, are also capable of shaming employers. They can pressure their employer to change its ways, by reducing pollution, increasing workplace safety, or ceasing animal experiments, and can employ various means to do so, including demonstrations and strikes. Thus, employees can multiply the damage from shaming and reach larger communities, such as residents throughout the city, the state, or the entire country, or even international customers and suppliers. When these audiences learn that the company's own employees have taken a moral stance against the company's actions, this can result in significant corporate reputational damage.

Investors may also play a role in the regulatory shaming process. Many investors are unwilling to invest in companies with whose values, actions, and goals they cannot identify.[199] This is a common phenomenon with tobacco, alcohol, and arms companies.[200] Sometimes, such investors are driven by fear that investing in such companies may cause them to be personally shamed by others who consider such investments immoral.[201] These issues are central to an approach known as "corporate social responsibility" (CSR), which now plays a prominent role in investors' considerations.[202] Under the terms of CSR, the corporate entity is understood through a communitarian prism, which focuses on social and moral aspects

198 *See* Roy Shapira, *A Reputational Theory of Corporate Law*, 26 STAN. L. & POL'Y REV. 1, 7 (2015) ("A company's reputation can be defined as the set of beliefs that stakeholders hold regarding the company's quality. . . . A reputational sanction thus is simply the process of updating beliefs and lowering expectations.").

199 *See, e.g.*, Douglas M. Branson, *Corporate Social Responsibility Redux*, 76 TUL. L. REV. 1207, 1219 (2002).

200 *See id.*

201 *See id.*

202 *See id.* ("In selecting, and then in monitoring, their investments, large activist institutional investors have placed corporate social responsibility on their agendas.").

of the corporation's community activities, rather than its own individualistic interests.[203] This approach has given rise to the "stakeholders model," in which shareholders are considered only one of the interest groups to which the corporation is beholden.[204] Other stakeholders may include employees, consumers, and local communities.[205]

IV. JUSTIFICATIONS FOR REGULATORY SHAMING

While regulatory shaming is now gaining momentum—as several agencies, including the FDA, the SEC, and OSHA, engage in "naming and shaming" practices—not everyone supports this regulatory strategy. For instance, a report by the United States Treasury Department recommends a repeal of the SEC's regulation on pay ratio disclosure.[206] OSHA's rule that requires facilities to electronically report workers' injuries and illnesses is currently under a repeal process,[207] and in anticipation of the new rule, new reports cannot be submitted online.[208]

Though simultaneously both highly controversial and alluring, regulatory shaming has yet to be normatively evaluated in legal scholarship. This Part of the Article aims to answer a key question for regulatory shaming: whether regulatory shaming is a moral and legitimate governmental regulatory tool. In general, the term "shaming" is often perceived negatively, causing shaming to be regarded as illegitimate.[209] It has also been argued that some shaming practices are illegal.[210] However, this Part will show that shaming can be a legitimate regulatory apparatus, using

203 *See id.* at 1217; *see also* Oren Perez et al., *Governance Through Global Networks and Corporate Signaling*, REG. & GOVERNANCE (forthcoming 2019), https://perma.cc/PE4E-T8U2 (discussing the reasons why companies adopt CSR schemes).

204 *See* Branson, *supra* note 199, at 1217.

205 *Id.*; Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 722–25 (2004).

206 *See* U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: CAPITAL MARKETS 29 (2017), https://perma.cc/G4N7-QL5R.

207 *See supra* note 2 and accompanying text.

208 *See* Bailey & Wilensky, *supra* note 2.

209 *See, e.g.*, Whitman, *supra* note 50, at 1055–59; Beth Mole, *FDA Has Named Names of Pharma Companies Blocking Cheaper Generics*, ARSTECHNICA (May 17, 2018), https://perma.cc/T8KQ-M346 (pointing out the FDA commissioner's conflicting terminology with regard to "shaming" tactics).

210 Shaming practices vary from one agency to another, and even within the same agency. Each has a different legal basis and therefore they cannot all be legally analyzed in a single generalized discussion. *See supra* note 149 and accompanying text. Examples of possible illegality of regulatory shaming include harsh reputational damage; publication of citations prior to final orders, which entails due process implications; and lack of statutory authority to sanction by public shaming (all were argued in regard to OSHA's adverse press releases). *See* Eric J. Conn & Casey M. Cosentino, *Hot Off the Press: Two Attorneys Argue That OSHA's Enforcement Press Releases Violate the Federal Administrative Procedure Act*, EHS TODAY (Sept. 1, 2011), https://perma.cc/S36V-ELPP; *see also* Cortez, *supra* note 63, at 63 (discussing litigation pertaining to nursing home's rating by the Department of Health and Human Services); Cortez, *supra* note 71, at 1374 (stating that most agencies lack agency authority to issue adverse publicity).

three main justifications, based on the idea that regulatory enforcement must be 1) efficient, 2) democratic, and 3) liberal in order to gain legitimacy. The practical conclusion will be that governmental authorities—legislators, regulatory agencies, and judges—all need to legally recognize regulatory shaming.

A. The Economic Justification: Shaming as an Efficient Means of Enforcement

It is commonly held that regulation is intended to correct market failures or to achieve social goals.[211] Therefore, some scholars distinguish economic from social regulation.[212] The common foundation of all regulatory goals is to safeguard the public interest, such as protecting the environment or investors in the markets.[213] Generally, the regulatory process entails three basic stages, which are often intertwined: legislation, inspection, and enforcement.[214] Regulatory legislation refers not only to congressional and state legislation, but also to rulemaking by administrative agencies, in which binding norms are set for various industries through statutes, rules, and regulations. Regulatory norms are monitored for compliance by administrative agencies, using such tools as inspections, industry self-reporting, surveys, consumer complaints, reviews, and examinations.[215] Breaches detected during the inspection stage are typically dealt with by enforcement measures, which may include license revocation, fines, penalties, orders, and regulatory agreements.[216] Shaming is most closely suited to the enforcement stage of regulation.[217]

Below I discuss regulatory shaming from the point of view of regulatory enforcement scholarship. My main argument will be that regulatory shaming is an efficient tool that should be taken seriously when devising regulatory regimes. Regulatory shaming is cheap, enriches regulatory enforcement pyramids,[218] enhances compliance, and creates both specific and general deterrence. I do not aim to offer an exhaustive economic discussion of regulatory shaming, but rather to suggest preliminary points of discussion, especially regarding regulatory enforcement theory.

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211 *See supra* notes 95–99 and accompanying text (explaining the general goals and purposes of regulation).

212 *See, e.g.*, BRONWEN MORGAN & KAREN YEUNG, AN INTRODUCTION TO LAW AND REGULATION 26–36 (2007).

213 *See, e.g.*, BALDWIN ET AL., *supra* note 97, at 40–41.

214 *See* MORGAN & YEUNG, *supra* note 212, at 3.

215 *See, e.g.*, BALDWIN ET AL., *supra* note 97, at 228. *See generally* Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369 (2019) (highlighting the prominent role in the modern administrative state played by the monitoring authority of regulatory agencies as wielded by examiners and inspectors).

216 *See* BALDWIN ET AL., *supra* note 97, at 229 & n.3, 275.

217 The idea of shaming as a sanction is also discussed *supra* notes 56–59 and accompanying text; *see also* Cortez, *supra* note 71, at 1442 (noting that agencies' adverse publicity is a sanction).

218 *See* discussion *infra* Part IV.A.2.

1. Enforcement Costs

Modern regulation is greatly lacking in efficient enforcement tools.[219] The main avenues of enforcement available to regulators today are either criminal or administrative.[220] Administrative enforcement tools are considered the "new generation" of regulatory enforcement, resulting from a certain disillusionment with criminal enforcement in the regulatory context.[221] Criminal law, it emerged, is harsh, expensive, and inefficient, and is therefore not suitable for all types of regulatory infringements.[222] Consequently, softer, lighter new tools were developed that do not require proof of criminal intent and do not involve a lengthy court process seeking conviction.[223] Civil monetary penalties, for example, are now one of the most popular administrative enforcement tools.[224]

However, both criminal and administrative sanctioning require great regulatory resources.[225] They depend on establishing an extensive factual basis for sanctioning through rigorous regulatory investigations, hearings, and judicial procedures.[226] Moreover, these intensive efforts may still result in exoneration or the revocation of sanctions, after lengthy hearings in courts and other judicial tribunals.[227] Even when corporations are sanctioned monetarily, the sums imposed are often low and do not necessarily justify the regulatory enforcement effort invested.[228] Furthermore, it has been

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219 *See* NEIL GUNNINGHAM & PETER GRABOSKY, SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY 7–10, 376, (1998); Geisinger, *supra* note 57, at 3–4.

220 *See, e.g.*, BALDWIN ET AL., *supra* note 97, at 249–50 (discussing administrative and criminal sanctions to control corporate compliance).

221 *See, e.g.*, Keith Hawkins, *Law as Last Resort*, *in* A READER ON REGULATION 288, 288, 294 (Robert Baldwin et al. eds., 1998) (discussing regulatory enforcement as a means to secure change rather than to punish, as is the case in general criminal enforcement); Eithan Y. Kidron, *Systemic Forum Selection Ambiguity in Financial Regulation Enforcement*, 53 AM. CRIM. L. REV. 693, 693–94 (2016).

222 *See* GUNNINGHAM & GRABOSKY, *supra* note 219, at 7.

223 *See* Anthony Ogus, *Better Regulation—Better Enforcement*, *in* BETTER REGULATION 107, 113 (Stephen Weatherill ed., 2007). Corporate criminal prosecution adversities are also discussed *infra* Part IV.C.; BALDWIN ET AL., *supra* note 97, at 251–54.

224 *See, e.g.*, OGUS, *supra* note 15, at 113–14, 116–17. Other administrative enforcement tools include cease and desist orders; suspension or revocation of license; censures and bars from association with the industry. BALDWIN ET AL., *supra* note 97, at 260 fig.12.1.

225 *See* BALDWIN ET AL., *supra* note 97, at 110; GUNNINGHAM & GRABOSKY, *supra* note 219, at 46.

226 *See, e.g.*, Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. MICH. J.L. REFORM 103, 139 (describing how agency heads investigate, charge and adjudicate in a manner that challenges separation of powers).

227 *See generally* Michael Asimow, *The Administrative Judiciary: ALJ's in Historical Perspective*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 157 (2000) (surveying the evolution of the institution of the administrative law judge in the United States).

228 *See* Kahan, *supra* note 35, at 622–23. *But see* Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 278 (2008) (discussing the Federal Organizational Sentencing Guidelines, which "require courts to impose a fine that would be sufficiently large to divest a corporation of all of its assets if the court determines that the organization operated primarily for a criminal purpose or primarily by criminal means." (internal quotation marks omitted)).

argued that direct monetary sanctions imposed on corporations lack a condemning effect or stigma, allowing corporations to simply pay a "price tag" for regulatory violations.[229] Despite this critique, the fact that corporations cannot be incarcerated means that monetary sanctions remain the most commonly used corporate enforcement tool.[230] Consequently, the regulatory enforcement world is very much engaged in a search for new, more efficient, and more effective methods of increasing corporate compliance.

In this search, efficacy is key. Regulation is now very commonly assessed using the Regulatory Impact Assessment (RIA) tool,[231] which involves detailed analysis of relevant information in choosing and shaping new regulatory norms and tools.[232] These should appropriately match the identified goals of the regulation in question.[233] The RIA process is thus designed to help regulatory agencies establish whether regulation is necessary and justified for achieving a regulatory objective, such as correcting a market failure.[234] After identifying a set of potential regulatory approaches, agencies conduct a cost-benefit analysis for each approach,[235] and also apply cost-benefit analysis to choosing regulatory enforcement tools.[236] As a general rule, the public benefits of the regulation should outweigh its costs.[237] Similarly, regulatory enforcement tools whose costs are greater than the benefit to the public interest are generally considered inefficient and will not meet RIA standards.[238]

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229 *See, e.g.*, Kahan, *supra* note 35, at 621.

230 *See* Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 112–14 (2006).

231 *See generally* CASS R. SUNSTEIN, THE COST–BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION 110–11 (2002) (asserting that the RIA is the most informative document in assessing regulation because it provides "actual numbers on the benefit (including nonmonetized and monetized quantities) and cost sides"); Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 45–46 (2011) (citing ROBERT C. ANDERSON & PAUL KOBRIN, NAT'L CTR. FOR ENVTL. ECON., U.S. ENVTL. PROT. AGENCY, *Regulatory Economic Analysis at the EPA* § 7 (June 2000)); Cass R. Sunstein, *Don't Change U.S. Rules Without Weighing Impact*, BLOOMBERG VIEW (Feb. 6, 2018), https://perma.cc/4ZXZ-K5KV; Jonathan B. Wiener & Alberto Alemanno, *Comparing Regulatory Oversight Bodies Across the Atlantic: The Office of Information and Regulatory Affairs in the US and the Impact Assessment Board in the EU*, *in* COMPARATIVE ADMINISTRATIVE LAW 309, 313–14 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010) (discussing the origin of RIA use by the United States federal government); Colin Kirkpatrick & David Parker, *Regulatory Impact Assessment: An Overview*, *in* REGULATORY IMPACT ASSESSMENT: TOWARDS BETTER REGULATION? 1, 1 (Colin Kirkpatrick & David Parker eds., 2007).

232 *See* Kirkpatrick & Parker, *supra* note 231, at 1, 3.

233 *See id.* at 3.

234 *See* U.S. OFFICE OF INFO. & REGULATORY AFFAIRS, REGULATORY IMPACT ANALYSIS: A PRIMER 2 (2011), https://perma.cc/W4FU-UZCK.

235 *See id.* at 3.

236 *See* Kirkpatrick & Parker, *supra* note 231, at 230; Ogus, *supra* note 223, at 109. *See generally* ORG. FOR ECON. CO-OPERATION & DEV., INTRODUCTORY HANDBOOK FOR UNDERTAKING REGULATORY IMPACT ANALYSIS (RIA) (2008), https://perma.cc/3CZK-ZJ63 (describing the reasons and process for conducting impact analysis).

237 ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 236, at 5.

238 *Id.* at 4.

Against this backdrop, it is surprising that shaming has not been previously discussed in regulatory enforcement scholarship, except in criminal contexts.[239] Shaming is cheap. It involves communication—conveying information, beliefs, and ideas. Press releases and online publication, such as on regulatory agencies' websites or social media, are virtually costless. In some cases, it is the corporations themselves that finance the costs of such communications.[240] Though the compilation and analysis of the relevant data by the regulator—such as creating rankings, league tables, and searchable databases—may entail some expenses, these are relatively low. As for liability, while regulatory shaming may impose costs on the government if it becomes the subject of litigation, in this respect, regulation by shaming is no different from any other regulatory enforcement tool that may be subject to judicial review. Similarly, critiques regarding the indirect costs of shaming—such as price increases, employee dismissals, and reduced quality of products—are also not unique to shaming and apply to various regulatory enforcement tools.

2. Enforcement Pyramid

The advantages of regulatory shaming are also apparent in the enforcement pyramid model. This model is founded on "responsive regulation" scholarship, a central approach in regulatory enforcement literature.[241] Ayres and Braithwaite suggested that each regulator must have an "enforcement pyramid" that will both deter regulatees and induce compliance and cooperation.[242] The pyramid should include varied sanctions, organized according to their degree of severity.[243] Regulators should use the lightest sanctions as often as possible and the most severe sanctions as infrequently as possible.[244] According to the enforcement pyramid model, regulatory regimes that lack diversity in sanctions encourage violations because regulatees understand that regulators without access to mid-level

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239 *But see* Ogus, *supra* note 223, at 117 (a brief discussion in which the author asserts that reputational sanctions, such as "naming and shaming," may be more efficient than civil monetary penalties, which are hard to collect and may impede the regulatee's financial stability); *see also* Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws* (Working Paper, 2018), https://perma.cc/FHM5-4SMC (an economic analysis of OSHA's adverse press releases showing they reduce workplace injuries at other work places).

240 This is the case with the SEC's rule on pay ratio disclosures, for example. *See supra* notes 4, 137–144, and accompanying text; *see also supra* notes 40–42 and accompanying text (discussing judicial orders that require companies to finance their own media shaming campaigns).

241 *See generally* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992).

242 *See id.* at 35–40. The enforcement pyramid was first presented in JOHN BRAITHWAITE, TO PUNISH OR PERSUADE: ENFORCEMENT OF COAL MINE SAFETY (1985) [hereinafter BRAITHWAITE, TO PUNISH OR PERSUADE]. This influential work was the basis for many subsequent works. *See, e.g.*, Robert Baldwin & Julia Black, *Really Responsive Regulation*, 71 MOD. L. REV. 59 (2008); GUNNINGHAM & GRABOSKY, *supra* note 219, at 138.

243 *See* AYRES & BRAITHWAITE, *supra* note 241, at 35–40.

244 *See id.* at 39.

sanctions will prefer soft sanctioning or no sanctioning to extreme sanctioning.[245] Consequently, a well-constructed enforcement pyramid should include a mix of soft and hard sanctions, as well as a variety of soft sanctions.[246] The more diversified the sanctions, the greater the expected compliance.[247]

Responsive regulation further suggests that regulatory tools must be chosen in response to the regulatee's behavior and compliance level over time ("tit-for-tat"), rather than just according to the severity of a particular infringement.[248] When non-compliance persists, regulators must move up the pyramid onto harder sanctioning and vice versa.[249] When compliance approves over time, regulators should move back down to softer tools of enforcement.[250] Responsive regulation is especially suitable to situations in which the regulator and the regulated entity interact frequently,[251] and is not suited for cases of possible catastrophic dangers to public interest.[252] The model aims to answer the classic regulatory question: To punish or persuade? i.e., how should regulators choose the appropriate tool of enforcement? When is it right to punish and when to persuade them to comply using non-punitive methods?[253]

Ayres and Braithwaite's twenty-five-year-old enforcement pyramid originally included such sanctions as license revocation and suspension, criminal penalties, civil penalties, warning letters, and persuasion (in that order, from top to bottom).[254] Today, new enforcement tools can be added to the pyramid, such as regulatory contracts[255] and regulatory shaming. Regulation by shaming could function as an additional sanction in regulatory enforcement pyramids, diversifying sanctioning tools and thus increasing enforcement efficacy.

An important question in the discussion of shaming and its significance in the enforcement pyramid relates to its location in the pyramid. Ayres and Braithwaite asserted that soft tools should be used as the first line of defense in regulatory enforcement and as often as possible, while other tools, such as license revocation, should never be administered, if at all possible.[256] But should regulatory shaming be considered a soft enforcement

245 *See id.* at 36. Because extreme sanctions might result in corporate financial instability, which may lead to market failures.

246 *See id.* at 6.

247 *See id.*

248 *See id.* at 19–35.

249 *See id.*

250 *See* JOHN BRAITHWAITE, REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER 87–94 (2008).

251 *See* John Braithwaite & Seung-Hun Hong, *The Iteration Deficit in Responsive Regulation: Are Regulatory Ambassadors an Answer?*, 9 REG. & GOVERNANCE 16, 23, 25 (2015).

252 *See* Neil Gunningham, *Enforcement and Compliance Strategies*, *in* THE OXFORD HANDBOOK OF REGULATION 120 (Robert Baldwin et al. eds., 2010).

253 *See* BRAITHWAITE, TO PUNISH OR PERSUADE, *supra* note 242, at 187.

254 *See* AYRES & BRAITHWAITE, *supra* note 241, at 35–36.

255 *See supra* note 175 and accompanying text.

256 *See* AYRES & BRAITHWAITE, *supra* note 241, at 35–40.

tool, to be placed at the bottom of the pyramid, or a hard enforcement tool, at its top?

This is not an easy question to answer. Some will argue that shaming is harsher than imprisonment,[257] while others will view shaming as de-facto non-sanctioning or corporate evasion of regulatory enforcement that may stem from regulatory incompetence or "regulatory capture."[258] I believe, as will be further explained below,[259] that shaming should be perceived as a soft rather than hard sanction, relative to other common regulatory enforcement tools, and designed and deployed accordingly.[260]

Regardless of whether regulatory shaming is considered a soft or a hard sanction, and placed at the base or the top of the pyramid, the point remains that it is an enforcement tool that can enrich regulatory enforcement pyramids. Adding shaming to the mix of regulatory sanctions (whether intended for frequent use or not) can in itself make enforcement regimes much more efficient, according to enforcement theories.[261]

Furthermore, shaming can be coupled with other sanctions, administrative or criminal, and used to mitigate their severity.[262] For example, naming and shaming the corporations with the most severe violations of SEC regulations and ranking them publicly could allow for a reduction in the severity of the primary sanction that is imposed on such companies, such as civil penalties.[263] In this way, regulatory shaming could enable reduced civil or criminal penalties or reduced inspections (thus reducing enforcement probability and enforcement costs[264]), while maintaining the desired level of deterrence.[265]

Adding shaming to the regulatory arsenal is important for another reason. Often, regulators are not authorized to use hard enforcement measures, such as criminal or administrative sanctions, for various reasons.[266] This happens, for example, when the regulator is unable to harness congressional support for granting it administrative sanctioning powers; or when there is lack of public or political consensus regarding such

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257 *See* discussion *supra* Part II.C.

258 Regulatory capture refers to situations in which regulators serve the industry's private interests and not the public interest. *See, e.g.*, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE IN REGULATION AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2014).

259 *See* discussion *infra* Part IV.C

260 *See id.*

261 *See supra* notes 245–247 and accompanying text.

262 *See, e.g.*, Skeel, *supra* note 40, at 1817.

263 Other enforcement sanctions are discussed *supra* note 216 and accompanying text.

264 Enforcement costs include the costs of agency monitoring; the costs of processing and prosecuting cases; defense costs; and the costs of misapplications of law, including convicting the innocent and deterring undesirable behavior. *See* BALDWIN ET AL., *supra* note 97, at 247.

265 *See id.* at 247–48 ("For each potential offender deterrence flows from the expected punishment, which is the probability of punishment times the magnitude of the punishment."); A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LIT. 45, 65–66, 72 (2000).

266 *See* Gellhorn, *supra* note 166, at 1398–99.

legislation; or due to historical, practical, or cultural reasons.[267] This may also happen in cases in which the regulator lacks the formal authority to force an organization to follow certain norms, since these have not yet been enshrined in legislation.[268] Such situations are common with regard to technological, economic, or social innovations, such as crowdfunding,[269] virtual economy (e.g., Bitcoin),[270] or sharing economy.[271] In other cases, the regulator may have the statutory power to apply criminal or administrative sanctions, but may lack the political or public legitimacy necessary to wield it.[272] In all these cases, shaming may be a useful enforcement solution.[273]

Furthermore, regulatory shaming is well suited to situations in which the regulator is contemplating regulating a certain market or activity using command and control.[274] Shaming can be deployed as a soft enforcement tool to test the industry's reaction to regulation, without having to legislate extreme enforcement powers or engage in extensive litigation of regulatory violations from the get-go.[275] Regulatory shaming allows the regulator to communicate to the market its expectations in terms of acceptable behavior.[276] If the industry fails to comply, the regulator will have to consider harsher sanctions, which would now be much easier politically after the industry has shown itself to be unresponsive to soft sanctioning; but if it does fall into line, then legislation of command and control powers may be redundant.[277]

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267 *See* Robert A. Kagan, *Editor's Introduction: Understanding Regulatory Enforcement*, 11 L. & POL'Y 89, 105–06 (1989); Gellhorn, *supra* note 166, at 1398–99.

268 *See* Cortez, *supra* note 71, at 1374.

269 Crowdfunding refers to utilization of the Internet to raise capital from a large number of individuals in support of a specific idea or venture. *See* Michael R. Meadows, *The Evolution of Crowdfunding: Reconciling Regulation Crowdfunding with Initial Coin Offerings*, 30 LOY. CONSUMER L. REV. 272, 272 (2018).

270 *See* Jerry Brito et al., *Bitcoin Financial Regulation: Securities, Derivatives, Prediction Markets, and Gambling*, 16 COLUM. SCI. & TECH. L. REV. 144, 147 (2014) ("Bitcoin is an Internet protocol, a peer-to-peer network, software client, and a digital currency unit.").

271 *See* Alexander B. Traum, *Sharing Risk in the Sharing Economy: Insurance Regulation in the Age of Uber*, 14 CARDOZO PUB. L. POL'Y & ETHICS J. 511, 512 (2016) (Sharing economy refers to new technologies that "enable users to access and share goods and services with one another through digital platforms").

272 *See* AYRES & BRAITHWAITE, *supra* note 241, at 36.

273 Whether it is legislated or not. Regulatory agencies differ in their statutory authorities in regard to shaming. *See supra* note 210.

274 *See supra* note 171 and accompanying text; s*ee also supra* notes 269–271 and accompanying text.

275 The disadvantages of criminal and administrative sanction are described above. *See supra* Part IV.A.1.

276 The idea of "expressive regulation" is discussed *supra* notes 169–170 and accompanying text.

277 This type of responsive regulation is discussed *supra* notes 248–249 and accompanying text.

3. Deterrence

One of the most common critiques of regulatory enforcement refers to either over-deterrence or under-deterrence,[278] which affect the ability of regulators to properly fulfill their regulatory goals.[279] For example, civil penalties are often mismatched to the financial abilities of the corporation being penalized, making violations an economically efficient option for firms.[280] Under these circumstances, it is not surprising that modern regulators' attempts to regulate the activities of corporations, especially large, wealthy companies, often fail.[281] In these types of situations, shaming may serve as an efficient enforcement tool[282] that costs the regulator very little[283] but can cost the regulatees enough to serve as an efficient deterrent and ensure that regulatory goals are satisfied.[284]

Research shows that corporations are threatened and motivated not only by the risk of classic legal penalties but also by informal social and economic sanctions, stemming from negative publicity.[285] Adverse publicity has both a general and a specific deterrent effect on firms.[286] Many firms comply with legally binding regulations because they fear the negative publicity that can flow from serious violations.[287] Studies show that initial press reports of allegations or investigations of corporate criminal activity, such as fraud, induce an average drop of up to 5% in the values of the

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278 *See, e.g.*, Manuel A. Utset, *Corporate Actors, Corporate Crimes and Time-Inconsistent Prefaces*, 1 VA. J. CRIM. L. 265, 305 (2013); Amanda M. Rose, *Fraud on the Market: An Action Without a Cause*, 160 U. PA. L. REV. 87, 95 (2011). There is perfect deterrence if the expected sanction equals social harm, under-deterrence if the expected sanction is below social harm, and over-deterrence if the expected sanction is above social harm. Efficient deterrence means that the expected sanction maximizes social welfare. *See generally* Polinsky & Shavell, *supra* note 265.

279 *See, e.g.*, Keith Hawkins, *Bargain and Bluff: Compliance Strategy and Deterrence in the Enforcement of Regulation*, 5 L. & POL'Y Q. 35, 48 (1983).

280 *See, e.g.*, Ford, *supra* note 175; Dorothy Thornton et al., *General Deterrence and Corporate Environmental Behavior*, 27 LAW & POL'Y 262, 262 (2005); Gellhorn, *supra* note 166, at 1398.

281 *See* Geisinger, *supra* note 57, at 3–4.

282 *See* Johnson, *supra* note 239, at 31–33.

283 *See supra* Part IV.A.1.

284 *See* Thornton et al., *supra* note 280, at 263 (explaining the basic theory of general deterrence, according to which regulated entities are profit-driven "amoral calculators"); Ogus, *supra* note 223, at 109 (explaining how economic analysis of regulatory enforcement through harming corporate reputation works). *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (one of the most influential works in criminal law and economics).

285 *See* Thornton et al., *supra* note 280, at 263–64; NEIL GUNNINGHAM ET AL., SHADES OF GREEN: BUSINESS, REGULATION, AND ENVIRONMENT 52 (2003); Gellhorn, *supra* note 166, at 1398.

286 *See* Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 372–76 (1996). General deterrence refers to a firm hearing about legal sanctions against others and trying to avoid similar fate, while specific deterrence happens when a firm receives a punishment severe enough so that it tries to avoid incurring the same punishment again. *See id.* at 346 n.27; Thornton et al., *supra* note 280, at 263.

287 *See* Thornton et al., *supra* note 280, at 264.

common stock of affected companies.[288] Publicly traded corporations that are named as targets of regulatory investigations also sustain substantial losses in goodwill.[289]

However, while deterrence is important in the realm of regulatory enforcement,[290] over-deterrence[291] is a real concern with regulatory shaming. Shaming may cause firms to become bankrupt or financially unstable.[292] This is a particular worry because regulatory shaming may spin out of control, especially in the internet era, in terms of scope and magnitude.[293] The regulator has only a limited ability to control the extent of reputational injuries, because once the information is made public these will be largely determined by the various shaming audiences.[294]

This issue must be given due consideration by policy makers when devising shaming policies in the regulatory context. To create optimal deterrence, attention must be paid to the regulatory shaming characteristics that were discussed previously, such as the form of shaming,[295] its timing,[296] and the shaming communities.[297] Another factor to consider is the size of the targeted companies. Differentiating between small and large firms is common practice in the context of regulatory enforcement,[298] and is highly relevant here as well.[299] Shaming large, and especially international, firms may attract considerable attention because the story can be of interest to larger and wider communities. This, in turn, can lead not only to general deterrence of many other firms operating in the same industry, which take their cue from such mega-firms and follow their operations closely, but can also increase the reputational costs to the firm, because big firms generally have higher reputational damage potential (they can lose more money).

On the other hand, a big firm may be able to financially "absorb" reputational harm, even if it is very great, in a manner that is not possible for smaller firms. Big firms can also contain reputational damage by investing considerable resources in legal and media advisors. Corporate lobbyists can help manage the reputational crisis successfully, possibly through negotiations and regulatory agreements.[300] By contrast, even moderate reputational harm may be fatal for small businesses, and therefore

288 *See* Jonathan M. Karpoff & John R. Jr. Lott, *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757, 759 (1993).

289 *See* Sam Peltzman, *The Effects of FTC Advertising Regulation*, 24 J.L. & ECON. 403, 437 (1981).

290 *See generally* Polinsky & Shavell, *supra* note 265.

291 *See supra* note 278 and accompanying text.

292 *See supra* notes 290–291 and accompanying text.

293 *See* Cortez, *supra* note 71, at 1374, 1398.

294 *See generally* Kahan & Posner, *supra* note 37, at 384–85; POSNER, *supra* note 78, at 95.

295 *See supra* Part III.B.

296 *See id.*

297 *See supra* Part III.D; *see also* discussion *infra* Part V.

298 *See* FIONA HAINES, CORPORATE REGULATION: BEYOND 'PUNISH OR PERSUADE' ch. 7 (1997).

299 *See, e.g.*, Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & ECON. 489, 504, 520 (1999) (discussing unique findings regarding reputational damages of small firms).

300 *See,* e.g., Shapiro & Rabinowitz, *supra* note 160, at 146.

disproportionate to the regulatory violation.[301] In this view, small firms, who are part of small local communities, can be viewed as not less but more sensitive to reputational damage than large firms.[302] This factor can be beneficial to regulators, if used properly, given that small employers represent most of the cases of severe workplace safety violations, for example, "with about 75% of offending companies having 100 or fewer employees and roughly 55% having 25 or fewer employees."[303]

This issue warrants empirical research to assess whether alternative enforcement measures are more suitable to small companies that are unable to pay direct monetary penalties.[304] Such research should further evaluate the efficacy of shaming medium-sized firms, which may be the least sensitive to this sanction. This is because small firms and mega-firms are possibly more identified with their officers or their prominent shareholders than mid-sized firms.[305] If this is true, then regulatory shaming of medium-sized firms could prove less effective (but more proportionate) than shaming of very large or very small firms.

B. The Democratic Justification: Shaming as a Tool for Enhancing Public Participation

Citizens all over the world are experiencing a decline in satisfaction and trust with regard to their governments, bureaucracy, public officials, and politicians.[306] The background to this decline includes, among other things, behaviors stemming from "regulatory capture,"[307] "revolving doors,"[308] and corruption among top public officials.[309] Revelations of ties between the

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301 *See* Cortez, *supra* note 71, at 1380–82; Gellhorn, *supra* note 166, at 1381.

302 Though the required size of the community that can effectively shame is controversial. *See, e.g.*, Massaro, *supra* note 36, at 1883–84; Geisinger, *supra* note 57, at 17–19, 22, 25.

303 *See* Gloria Gonzalez, *Employers Wary of OSHA's Public Shaming Tactics for Severe Violators*, BUS. INS. (Mar. 24, 2016), https://perma.cc/K3LV-3GD6.

304 *See generally* Nathan Wilda, *David Pays for Goliath's Mistakes: The Costly Effect Sarbanes-Oxley has on Small Companies*, 38 J. MARSHALL L. REV. 671, 691 (2004).

305 *See* Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 966–67 (1999) (describing top corporate executives in America as especially sensitive to shaming sanctions). For example, consider Facebook and its chairman and chief executive officer, Mark Zuckerberg.

306 *See, e.g.*, Organization for Economic Co-operation and Development: Public Management Committee, *Synthesis of Reform Experiences in Nine OECD Countries: Government Roles and Functions, and Public Management*, OECD PUMA/SGF(99)1, at 5 (Aug. 16, 1999); Lewis A. Grossman, Essay, *FDA and the Rise of the Empowered Consumer*, 66 ADMIN. L. REV. 627, 633–34 (2014). Though generally in decline, public trust in various governmental entities may differ, as administrative agencies, for example, may receive more public trust than politicians.

307 *See supra* note 258 and accompanying text.

308 "Revolving doors" refers to regulators who are offered lucrative occupational opportunities in the regulated private sector toward the end of their tenure, causing them to become extra lenient toward regulated firms during their public terms. *See, e.g.*, Toni Makkai & John Braithwaite, *In and Out of the Revolving Door: Making Sense of Regulatory Capture*, 12 J. PUB. POL'Y 61, 62 (1992).

309 *See, e.g.*, *Corruption Perceptions Index 2016*, TRANSPARENCY INT'L (Jan. 25, 2017), https://perma.cc/3N79-F33L.

government and wealthy individuals and private organizations lead to public distrust of regulatory intentions and actions,[310] resulting in significant damage to public trust in the mechanisms of democracy and in the rule of law.[311]

Citizens' trust in corporations has also drastically decreased.[312] Some corporations, such as Google and Apple, have become so large that their annual revenues exceed those of many governments worldwide,[313] while the ability of formal legal mechanisms to control their activities is limited.[314] It is against this background that corporations tend to take advantage of their monopolistic powers and of consumer information gaps to profit unfairly.[315]

These processes are at the heart of the shift from the "positive state" model, in which the government supplies citizens with services and products directly,[316] to the "regulatory state" model, in which the government regulates corporations and other private entities that supply goods and services to citizens.[317] This expansion of the corporate sector also instigated a move toward "smart regulation"[318] and "governance regulation,"[319] which emphasize the role of private actors in the regulation of markets. Under this framework, non-governmental organizations, such as interest groups, non-profit organizations, business unions, self-regulatory bodies, and even civilians and communities, have a prominent role to play in the regulatory effort, while

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310 *See, e.g.*, SUSAN ROSE-ACKERMAN & BONNIE J. PALIFKA, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 119, 195, 527 (2nd ed. 2016).

311 *See Corruption Perceptions Index 2016*, *supra* note 309.

312 *See* 2018 EDELMAN TRUST BAROMETER: GLOBAL REPORT 5–6 (2018), https://perma.cc/742T-38RG; Richard Edelman, *Beyond the Grand Illusion*, EDELMAN (Jan. 18, 2016), https://perma.cc/29BH-Q3VW; Matthew Harrington, *Survey: People's Trust Has Declined in Business, Media, Government, and NGOs*, HARV. BUS. REV. (Jan. 16, 2017), https://perma.cc/RUL6-YR8U.

313 *See* John Cavanagh & Sarah Anderson, *Top 200: The Rise of Corporate Global Power*, INST. POL'Y STUD. (Dec. 4, 2000), https://perma.cc/QC4A-B3PL; D. Steven White, *The Top 175 Global Economic Entities, 2011*, DSTEVENWHITE.COM (Aug. 11, 2012), https://perma.cc/PS3G-5V7K.

314 *See generally* BENJAMIN R. BARBER, JIHAD VS. MCWORLD: HOW GLOBALISM AND TRIBALISM ARE RESHAPING THE WORLD (1995).

315 *See* Ariel Ezrachi & David Gilo, *Are Excessive Prices Really Self-Correcting?*, 5 J. COMPETITION L. & ECON. 249, 249–50 (2009).

316 *See* Giadomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17 J. PUB. POL'Y 139, 141–42 (1997).

317 *See id.* at 146.

318 *See* GUNNINGHAM & GRABOSKY, *supra* note 219, at 10.

319 *See, e.g.*, Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 345 (2004); Robert F. Weber, *New Governance, Financial Regulation, and Challenges to Legitimacy: The Example of the Internal Models Approach to Capital Adequacy Regulation*, 62 ADMIN. L. REV. 783, 785 (2010) ("The central tenet of new governance literature posits that traditional command-and-control, top-down regulation has been supplanted, to varying degrees, by new forms of collaborative and polycentric governance, often involving dynamic cooperation between the public sector (formerly the 'governors') and the private sector (formerly the 'governed'), and often characterized by an increased participation in governance by third-party nonstate actors.").

governmental regulators "steer but [do] not row the boat."[320] Smart regulation and governance regulation can thus create savings in government expenses and increase the government's legitimacy.[321] Regulation by non-governmental bodies may also be viewed as more democratic than governmental regulation because it does not involve the government flexing its enforcement muscles.[322] In a similar vein, regulatory shaming can enjoy legitimacy because it is based on (civilian) shaming communities rather than on coercive governmental powers.[323] Though the regulatory agency creates the conditions for shaming and initiates the shaming process, it does so with a "light touch" rather than being involved in the markets directly.

As this Article has shown,[324] regulatory shaming incorporates elements of public participation, regulatory governance, and smart regulation.[325] It can also address the current crisis in trust between citizens and their governments, as well as between consumers and corporations.[326] Regulatory shaming leaves the decision as to whether a corporation's actions are moral and socially responsible in the hands of communities, such as workers at a particular facility or department store consumers. These communities are also the ones to decide whether to take action and if so, what kind.[327] The function of the regulatory agency in this regard is largely to create the background conditions for the main regulatory arena, which is private in nature.

Despite the apparent difficulties inherent in giving too much power to civilians, who are not subject to public law and are not properly restrained,[328] this view of regulatory shaming as a private, democratic, participatory tool strengthens the idea of shaming as a soft enforcement mechanism. This concept of regulatory shaming as an alternative to hard enforcement tools also goes hand in hand with the global wave of de-regulation and removal of regulatory burdens.[329] The Subpart below will discuss another soft

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320 *See* DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 25 (1993). This approach was also called "governing at a distance." *See* GUNNINGHAM & GRABOSKY, *supra* note 219, at 10.

321 Although some assert that regulatory legitimacy decreases when it is based on non-governmental actors. *See, e.g.*, Weber, *supra* note 319, at 787 (noting that challenges to democratic legitimacy are normal when involvement of nonstate actors in the regulatory process increases).

322 *See* Lobel, *supra* note 319, at 466–67 (explaining that private sector involvement in regulation can restore legitimacy in the democratic process).

323 The mechanism of shaming communities is discussed *supra* Part III.D.

324 *See* discussion *supra* Part III (describing shaming by civilians and the government, as well as the different definitions of shaming).

325 *See supra* notes 318–319 and accompanying text.

326 *See supra* notes 306–315 and accompanying text.

327 Possible actions of shaming communities are discussed *supra* Part III.D.

328 *See* POSNER, *supra* note 78, at 95 (explaining that the government is unable to control the level of ostracism towards targets of shaming).

329 *See, e.g.*, Exec. Order No. 13,771, 82 Fed. Reg. 9,339, 9,339 (Jan. 30, 2017) ("[F]or every one new regulation issued, at least two prior regulations be identified for elimination. . . ."); COMPTROLLER & AUDITOR GEN., NAT'L AUDIT OFFICE, THE BUSINESS IMPACT TARGET: CUTTING THE COST OF REGULATION 14 (2016), https://perma.cc/S4SJ-B8ZZ ("[D]epartments must introduce £3

characteristic of regulatory shaming, pertaining to the objects of shaming—artificial legal entities that are incapable of any feeling.

C. The Liberal Justification: Corporations Cannot Feel Shame

As previously discussed, many critics of shaming assert that it is inhumane, cruel, and immoral, as it injures a person's dignity and personality.[330] However, unlike shaming that targets individuals, regulatory shaming targets mostly corporations.[331] Corporations can have both legal rights and liabilities through their legal personality, which is separate from their shareholders.[332] Corporate personhood allows corporations, *inter alia*, to enter into contracts, own property, and sue and be sued.[333] However, corporations' artificial legal personalities differ from human beings, who have natural legal personalities.[334] Corporations do not have an independent thinking center that allows the formation of intentions, such as criminal intent or negligence, nor the physical abilities to perform actions that generate legal responsibilities, such as killing people or evading taxes.[335] That is, corporations lack the psychological and physiological attributes of humans.

Despite these limitations, corporate law supports the attribution of acts, thoughts, and intentions to the corporation.[336] It permits the transference of the thoughts and actions of company officers, such as the CEO and the company's directors, to the company itself, in order to impose on it civil and criminal liability.[337] Some scholars even view the corporation as a real entity, greater than the sum of its parts, with separate existence from its shareholders and even from the state.[338] However, when it comes to feelings of shame, it is very hard to speak of corporate shame in similar terms to the personal shame experienced by individuals. As previously mentioned,[339] shaming in the context of individuals relates to causing them emotional

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of savings to business for every £1 of cost introduced by new legislation under the 'one-in, three-out' rule. The government sees regulation as a last resort. . . .").

330 *See supra* Part II.C (describing the psychological effects of shaming); *see also* Massaro, *supra* note 36, at 1936–43 (evaluating the humaneness of shaming as a sanction); *supra* note 49 and accompanying text (noting that shaming is cruel alternative to other punishments).

331 *See supra* Part III.A.

332 *See* Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1639 (2011).

333 *See id.* at 1638.

334 *See, e.g.*, *id.* at 1636–38 (examining the Supreme Court's treatment of corporate personhood); Bryant Smith, *Legal Personality*, 37 YALE L.J. 283, 293 (1928) (noting that the legal personality of a corporation is an abstraction); Sanford A. Schane, *Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 565 (1986) (explaining that associations have no natural rights, unlike individuals).

335 *See* Pollman, *supra* note 332, at 1648–49 (surveying the development of corporate criminal liability).

336 *See id.*

337 *See id.*

338 *See id.* at 1641–42 (describing "real entity" theory).

339 *See supra* Part II.C.

discomfort, embarrassment, and a desire for the ground to swallow them whole.[340] Such descriptions are not consistent with the ways in which we usually perceive corporate personhood.

Thus, shaming of corporations does not involve hurting their feelings but rather influencing their reputation and prestige. Regulatory shaming aims to encourage corporations to act (or to desist from an action) by creating business conditions that make this worthwhile, rather than seeking to cause feelings of embarrassment or shame as a form of punishment.[341] It follows that critiques of shaming that emphasize the harm inflicted to personal dignity are not as applicable to corporate regulation as they are to private contexts.[342]

While the stigmatization that follows a criminal procedure entails financial implications for the individual (such as loss of business opportunities) as well as social implications (such as the ability to adopt or to marry), regulatory sanctioning imposes mainly financial harm on corporations. Most social implications of corporate shaming can eventually be quantified in terms of profit and loss. Can regulatory shaming be justified on the basis that it does not cause companies real shame but rather only inflicts monetary damage (though courts may be reluctant to grant compensation in such cases)?[343] On the other hand, one could argue that the very act of shaming in turn shames the government and its agencies, because it is not behavior worthy of a sovereign[344]—regulatory shaming involves damaging a business's social standing and causing it loss of face.[345] Also, it can be argued that even if shame cannot be truly inflicted upon artificial legal entities, such as corporations, regulatory shaming may adversely affect company officers and shareholders, employees, and other stakeholders, on a personal level.[346]

In response to these critiques, it should be noted that regulatory shaming aims to fulfil a public-interest goal,[347] and thus it may be justified even at a certain cost to corporate reputations. Indeed, the purpose of regulatory shaming is to enforce regulatory norms (whether formal or informal).[348] For this reason, it is important that agencies, when considering the use of shaming, are able to point to a well-defined regulatory goal that

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340 *See* Tangney et al., *supra* note 73, at 344 (discussing feelings of worthlessness and powerlessness associated with shame).

341 Regulatory shaming was defined in this article as relating to external moral aspects of the activity and condemnation rather than to internal feelings of shame. *See supra* Parts I, II.C.

342 Differences of civil and governmental shaming are discussed *supra* Parts II.A., II.B. *But see* Konstantin Tretyakov, *Corporate Identity and Group Dignity*, 8 WASH. U. JURIS. REV. 171, 205 (2016) (discussing an approach that applies concepts of dignity to entities such as corporations). Other approaches deny the application of the concept of dignity to groups (rather than individuals). *See id.* at 213.

343 *See* Cortez, *supra* note 71, at 1452 (referring to agencies' adverse publicity, mostly in the context of consumer warnings and notifications and disclosure schemes).

344 *See supra* notes 209–210 and accompanying text.

345 *See* discussion *supra* Part III.A.

346 *See* Barnard, *supra* note 305, at 967.

347 *See supra* Part III.A.

348 *See supra* notes 215–217 and accompanying text.

they wish to achieve[349] and ensure that shaming is the right tool for the task.[350]

Furthermore, individuals who wish to operate through corporations and provide commodities or services to citizens take into account the costs of governmental regulation. They must expect a certain "cost of doing business." Some of those costs are related to reputational injuries not only of the corporation, but also of prominent shareholders and company officers. This being the case, there would seem to be no special reason to protect the corporation from governmental shaming if it acts against the public interest.

Regarding the assertion that corporate shaming may harm individual stakeholders and inflict emotional as well as financial damage, this claim has some merit. Corporations are viewed by some as an aggregation of individuals.[351] Companies that are closely identified with their shareholders or CEOs[352] are most sensitive to such reputational damage "spillover," though stakeholders in other companies may also suffer in this respect, including company officers and employees. This is an important point for policy makers to consider when designing regulatory enforcement schemes, as regulators should always strive to apply the least injurious tool that can effectively achieve the regulatory goal.[353]

I do not believe that shaming in itself is inappropriate for use by the government or its regulatory agencies. As long as it is executed systematically, respectfully, and legally[354] then it has no internal moral flaw. Shaming must never be used as a tool for retaliation,[355] or in any other manner that is otherwise an abuse of administrative discretion. Such actions by administrative agencies are generally considered unlawful, and are subject to judicial review.[356]

V. CONCLUSION

Governments all over the world are beginning to deploy shaming, not only in criminal contexts but also in wider regulatory settings, including in relation to administrative regulation and voluntary norms of corporate social responsibility.[357] Though at first glance, shaming may appear to be an

349 Regulatory goals are discussed *supra* Part III.A.

350 The process of regulatory impact assessment is discussed *supra* Part IV.A.1.

351 *See* Pollman, *supra* note 332, at 1641.

352 *See supra* note 305 and accompanying text.

353 *See supra* notes 235–237 and accompanying text.

354 *See supra* notes 210, 349–350, and accompanying text.

355 *See generally* Cortez, *supra* note 71, at 1450 (claims that adverse agency publications that were meant to inform or warn the public are used as a retaliation tactic are without merit).

356 Under the APA, agency action can be challenged in court, *inter alia*, on the basis that it is arbitrary, capricious, or an abuse of discretion. *See* 5 U.S.C. § 706(2)(A) (2012).

357 *See, e.g.*, Franz Wohlgezogen & Melissa A. Wheeler, *Naming and Shaming Bankers May Be Satisfying, But Could Backfire*, CONVERSATION (Mar. 15, 2017), https://perma.cc/WU3Y-8ZC3 (a proposed Australian regulation would require banks to disclose to the public information regarding violations of banking regulations within five days of the violation); Tom Hunt & Rachel Thomas, *Law Society Warns it can Name and Shame Bad Lawyers*, DOMINION POST (Mar. 28, 2018), https://perma.cc/C39D-SZ85 (New Zealand's lawyers' association is considering

inappropriate activity, especially when performed by government, regulation by shaming has unique characteristics that make it attractive and desirable for regulatory agencies. The main argument in this Article was that the shaming of corporations by administrative agencies can be justified from economic, democratic, and liberal perspectives and should therefore be considered by regulators in varied types of regulatory settings.

However, the Article should not be read as extending sweeping and unreserved support for regulatory shaming. Regulatory agencies must impose the sanction of shaming reasonably and proportionately. They must evaluate whether this tool can achieve their regulatory objectives, and must weigh it against other enforcement strategies.[358] Regulators also need to ensure that shaming information is presented fairly and accurately and must avoid any appearance of abuse of discretion.[359]

The following is a list of key questions designed to guide regulators in choosing, designing, and implementing shaming tactics. The list is based on various points that were discussed in the article.

- What is the desired regulatory outcome of shaming, and are there alternative enforcement tools that can better achieve this goal?[360]
- Is shaming expected to increase or decrease the public's trust in the shamed entity?[361] In the shaming regulator?[362]
- Is shaming expected to create specific/general deterrence in the regulated market?[363]
- Does the regulatory publication include a moral denunciation, which is closer to shaming, or does it aim mostly to educate, inform, or warn consumers as part of the agency's disclosure mechanisms?[364]

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publishing the names of lawyers who are the subject of sexual harassment in the workplace complaints); *Food Crisis, Fraud in the Food Chain and the Control Thereof*, 2016/C 482/04 (Jan. 14, 2014), https://perma.cc/BA9U-QGG6 (a proposal to form a public registry of food industry businesses that were convicted of felonies); Harpreet Bajwa, *Chandigarh Diary: Rose Festival, Naming and Shaming Power Defaulters, Online System for RLA*, NEW INDIAN EXPRESS (Feb. 7, 2018), https://perma.cc/6R4P-N8VA (in India, the electricity department publishes the names of companies that have unpaid debts); Errol Oh, *The Name-and-Shame Game*, STAR (July 29, 2017), https://perma.cc/Z9C9-WXQP (the Malaysian prime minister announces the intention to shame companies with all-male boards of directors).

358 *See generally* Barak Orbach, *What is Government Failure*, YALE J. REG. ONLINE 2012, at 44 (discussing the concept of "regulatory failure").

359 A report by the Administrative Conference of the United States (ACUS) suggested that "[a]ll adverse agency publicity should be factual in content and accurate in description." *See* 38 Fed. Reg. 16,839, 16,839 (June 27, 1973); *see also* NATHAN CORTEZ, AGENCY PUBLICITY IN THE INTERNET ERA 9–12 (2015), https://perma.cc/BNM9-CTWH; Adoption of Recommendations, 81 Fed. Reg. 40,259, 40,259 (June 21, 2016).

360 *See supra* Part IV.A.1.

361 *See supra* Part IV.B.

362 *See supra* Part IV.C.

363 *See supra* Part IV.A.3.

364 *See supra* Part III.C.

- Which type of regulatory shaming can best achieve the regulatory goal?[365]
- How does shaming fit into the agency's enforcement pyramid?[366]
- What is the nature of the adverse activity that is the subject of shaming—criminal, administrative, or moral?[367]
- Which type of media would be most suitable for this kind of publication (and why)?[368]
- What are the direct costs of shaming (e.g., relating to creating indexes, developing online databases, compiling and analyzing data, advertising in newspapers, launching media campaigns)?[369]
- What is the size of the relevant corporation and what is its reputation sensitivity level?[370]
- How should the shaming information be constructed (e.g., shaming lists, league tables, ratings, announcements, databases)?[371]
- What is the legal basis of the specific regulatory shaming that is being considered?[372]
- What is the possible damage that shaming may cause and to whom?[373]
- What is the likelihood that the shamed entity will litigate, lobby, or respond via the media?[374]
- Which shaming communities are the most suitable targets for shaming information?[375]
- Was shaming previously administered as an enforcement tool in this industry? If so, did it achieve its desired goal?[376]

Regulators are advised to consider these main points as a basis for developing shaming policies in the future. As regulated industries differ greatly from one another, different types of enforcement strategies may apply. However, in the face of a general lack of efficient enforcement tools available to regulators of corporate activities today, shaming may become the next generation of regulatory enforcement tools.

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365 Types of regulatory shaming are discussed *supra* Part III.B.
366 *See supra* Part IV.A.2.
367 *See supra* Parts II.A, II.B, III.A..
368 Types of media are discussed *supra* Parts II.B., III.B; *see also* Yadin, *supra note* 126.
369 *See supra* Part IV.A.1.
370 *See supra* Part IV.A.3.
371 Types of regulatory shaming are discussed *supra* Part III.B.
372 *See supra* note 210.
373 *See supra* Parts III.D., IV.A.3, IV.C.
374 *See supra* Part IV.A.3.
375 *See supra* Part III.D.
376 *See supra* Part IV.A.2.

This Article is the first to explore "regulatory shaming" and normatively evaluate it. It draws on varied literature, including criminology, regulation, corporate law, administrative law, and law and economics, reflecting the complexities that shaming entails for regulatory arenas. The introduction to this Article posed two main questions: Can shaming be a good thing? And should government agencies engage in shaming? I believe the answer to both is yes. When properly understood and administered, shaming can be efficient in achieving regulatory goals and can inspire trust between public regulators and private communities, and it is not inherently morally flawed. While shaming is mostly identified with private activities—in which individuals shame others, mainly through social media and often baselessly and anonymously—shaming in the public arena of regulation by administrative agencies is something completely different. Regulatory shaming is a promising enforcement tool, with the potential to be an essential addition to the modern administrative state.