

2000

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### Recommended Citation

Darlene Wong, *A More Efficient Alternative to Fines in Deterring Corporate Misconduct*, 3 CAL. CRIM. L. REV. 3 (2000).  
Available at: <http://scholarship.law.berkeley.edu/bjcl/vol3/iss1/3>

### Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z380K8S>

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## STIGMA: A MORE EFFICIENT ALTERNATIVE TO FINES IN DETERRING CORPORATE MISCONDUCT

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[cite as "3 Cal. Crim. L. Rev. 3 (Oct. 2000) available at <http://www.boalt.org/CCLR/v3/v3wongnf.htm>";  
pincite using paragraph numbers]

### I. Introduction

¶1 Sanctions that focus on fines or imprisonment as efficient deterrence measures for corporate misconduct generally neglect the more efficient policy of sanctioning through stigma. Unlike sanctions that fine or imprison corporate offenders, a policy that formally imposes stigma upon corporate processes and products adequately accounts for the true social costs<sup>1</sup> of inefficiency that result when a pricing system of fines accommodates corporate "pay to pollute" behavior. "Pay to pollute" describes a corporate response to fines and damage awards that treats them as predictable business expenses that can be weighed against the cost of changing a product or process to make it safer.<sup>2</sup> Recent proposals to revise the Sentencing Reform Act,<sup>3</sup> scholarship by

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\* Thanks to James Mink, James Oleson, Professor Charles Weisselberg and the California Criminal Law Review, Professor George Shepherd, and my colleagues in the Law and Economics Fall 1999 Seminar at Emory University School of Law. Grateful appreciation also to the following: Bradley Elbein for valuable advice and encouragement; Marc Biondi for emissions trading research leads; Professor Seth Roberts, Brian Prendergast, Harold Kirtz, Andrea Foster, Emory Public Interest Committee, and the faculty and administration of Emory University School of Law for the opportunity to further develop my interests and ideas; Professor Ann Fagan Ginger, Miranda Brown, Aaron Goldzimer, Amanda Gaide, and Paul Lin for friendship and inspiration; all my friends and family members; Regina Wong; Sze Sze Samuels; and especially my father, Stanley Wong, and my grandfather, Don Hang Wong, for advice and wisdom, steadfast love and support.

<sup>1</sup> Guido Calabresi puts forth the idea that the best market results when prices accurately reflect "true costs" to society. As an example of true costs as an ethical and economical concept, Calabresi shows that accident costs of producing a social product should factor into the overall equation of product costs. In Calabresi's system, an economic analysis that accounts for true costs will consider the following factors: the costs of the activity, and whether the activity will be allowed if economic and non-economic costs are met, or if the benefits of the activity outweigh its undesirability so that the benefits induce risk-taking. See Guido Calabresi, *The Decision For Accidents: an Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 722-23 (1965). Calabresi describes a "social cost accounting" system, that in the interests of "sounder resource allocation," forces activities to bear the costs they create. *Id.* at 725.

<sup>2</sup> See David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not be a Crowd When Enforcement is Authority is Shared by the United States, the States, and Their Citizens?* 54 MD. L. REV. 1552, 1607 ("Small fines and lengthy time limits to achieve compliance promote a pay to pollute mentality.") (citing *Water Pollution Prevention and Control Act of 1991: Hearing on S. 1081 Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 102d Cong., 1st Sess. 688 (1991) (statement of John Martin, Inspector General, Environmental Protection Agency (EPA), at 687); Alissa J. Stern, *A Proposal to Improve Corporate Compliance with RCRA*, 22 ENVTL. L. 539, 568 (1992).

<sup>3</sup> Dan M. Kahan, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 385 (1999) (suggesting a hybrid sentence of a fixed shaming component and a variable fining component). It has been proposed that optimal sanctions for corporate criminality should focus upon non-monetary, non-prison measures of deterrence that impact corporate reputation and are capable of addressing corporate-induced social costs. See Harvey M. Silets and Susan W. Brenner, *The Demise of Rehabilitation: Sentencing Reform and the Sanctioning of Organizational Criminality*, 13 AM. J. CRIM. L. 329, 359, 362, 367-68, 371, 374-75

norms theorists such as Dan Kahan,<sup>4</sup> Lawrence Lessig,<sup>5</sup> and Richard McAdams,<sup>6</sup> and courts that increasingly impose creative criminal sanctions that invoke public condemnation<sup>7</sup> suggest that to widely implement a formal policy of stigma in cases of intolerable corporate misconduct is timely and appropriate.

¶2 Law and economics theorists have established that fines are optimal criminal sanctions for those who can afford them, in comparison to imprisonment, which does not create revenue for society.<sup>8</sup> Yet further quantitative research shows that liability reforms that enlarge monetary judgments slow productivity growth and restrict employment while reforms that decrease fines encourage employment and worker output.<sup>9</sup> This point of view suggests support for a policy that places caps on the amount of damages and criminal fines that may be recovered in cases of corporate misconduct.<sup>10</sup> Public advocacy groups, on the other hand, argue that a policy that limits punitive damage awards discriminates against lower-income people.<sup>11</sup> The combination of these findings indicates that fines are limited in their applicability as an economically fair and efficient deterrence measure. Additionally, there are some types of undesirable social conduct that remain undeterred under a system that depends upon fines to penalize corporate misconduct.<sup>12</sup> “Pay to pollute” dynamics result when predictable fines allow corporations to consider even punitive damages as fixed costs, thereby rendering the fining system ineffective.<sup>13</sup>

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(1986)(discussing special conditions of probation and publicity sanctions). Sentencing reforms allow publicity sanctions that serve as the notice requirement to victims. *See id.* at 375 (citing 18 U.S.C. § 3555 (Supp. II 1984)(effective Nov. 1, 1986)). Section 3555 allows a court to require defendants convicted of fraud or deceptive practices, at their own cost, to give notice to their victims “by advertising in designated areas or through designated media.” *See* 18 U.S.C. § 3555.

<sup>4</sup> *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?* 63 U. CHI. L. REV. 591 (1996); Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & Econ. 365 (1999); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997).

<sup>5</sup> *See* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

<sup>6</sup> *See* Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995).

<sup>7</sup> *See* Joseph R. Tybor, *Unusually Creative Judges Now Believe Some Punishments Can Fit the Times*, CHI. TRIB. 1, Jul. 3, 1988 (courts have ordered a slumlord to live, monitored, in his building and a drunk driver to undertake the written process of earning Boy Scout merit badges for traffic safety, law and citizenship); *see also* Suzanne Steel, *Man Sentenced in Steer Scandal*, COLUMBUS DISPATCH (Ohio) 01c, Feb. 16, 1995 (judge ordered defendant to perform community service and advertise his conviction in a national livestock publication).

<sup>8</sup> *See e.g.* Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980). Posner argues that fines are preferable as an economically efficient deterrence measure for white-collar criminals because not only are fines effective deterrents but they are also cheaper to administer than a policy of imprisonment. *See id.* at 410

<sup>9</sup> *See* Thomas J. Campbell et al., *Liability Reforms and Economic Performance*, in THE MOSAIC OF ECONOMIC GROWTH 276-77 (Ralph Landau et al., eds. 1996).

<sup>10</sup> *See id.* at 268-69.

<sup>11</sup> *See* Letter from Public Citizen’s Congress Watch, *Limiting Punitive Damages: What Will Deter Bad Corporate Conduct Now?* (Oct. 29, 1999). Public advocates claim that placing limits on liability discriminates against lower income people when (1) the damages formula includes a multiplier of loss wages and (2) lower-income people who can only afford to pay attorneys on a contingency-fee basis rather than an hourly-fee are subject to attorney’s natural inclination to avoid taking their case because it is not profitable enough, therefore limiting low-income peoples’ ability to be fairly and adequately compensated. *See id.*

<sup>12</sup> The world’s second largest passenger cruise line was undeterred from dumping oily waste into the Atlantic Ocean a second time, a few weeks after Miami’s U.S. District Court Judge Donald Middlebrooks first imposed a \$9 million fine on Royal Caribbean. Royal Caribbean in the first case pled guilty for oil dumping in the Atlantic which left a

¶3 This paper attempts to reconcile the concern for an economically efficient penal system as demonstrated by proponents of a fine-implementing system, with the concern for a broader definition of social well-being as demonstrated by public advocates. Here, social well-being is a goal that includes factors of economic analysis not traditionally included in equations of efficiency, yet which do not exclude the possibility of economic efficiency. This paper proposes a model policy of uniform product labeling that deliberately imposes stigma as an alternative sanction in cases of corporate misconduct. Product labels that stigmatize provide a consumer-oriented, information-rich vehicle that enables consumers to accurately assess product price, including social cost. Product warning labels are an effective stigma sanction that is economically preferable to fines, especially where both fines and imprisonment decrease society's productivity so that the economic advantages of fines over imprisonment no longer exist.

¶4 Currently, the Clinton administration has proposed legislation that would reaffirm, in more precise terms, the federal government's duty to decline to contract with businesses that repeatedly or seriously transgress worker rights, health, safety, environmental, tax, or anti-trust laws.<sup>14</sup> The proposed legislation that opponents call "blacklisting legislation" is evidence that there currently exists an opinion at the federal level that some costs of corporate misconduct are intolerable and therefore society would benefit by a policy of deterring corporate misconduct through market exclusion that has effects similar to stigma, as the legislation's "blacklisting" label suggests.

¶5 The apparently non-violent and less harmful misconduct of a white-collar criminal can on surface actually appear to support society's shared goal of economic productivity. However, there remains a sense of unfairness underlying the belief that white collar criminals can easily afford to "pay off" their debt to society through money rather than imprisonment. This sense of unfairness stems from contexts in which courts subscribing to the theory of economic productivity use fines,<sup>15</sup> and in the process communicate greater leniency in contrast to imprisonment.<sup>16</sup> This discomfort stems from the dissonance that results when a fining (i.e. "pricing") system accommodates corporations' undesirable social behavior by expressing a

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seven-mile oil slick, and then lying to the U.S. Coast Guard about it. See Russell Mokhiber, *Corporate Bullies: The 10 Worst Corporations of 1998*, MULTINATIONAL MONITOR, Dec. 1, 1998, at 15.

<sup>13</sup> Liability caps allow companies to continue socially prohibitive behavior by treating transgressions of the law as a fixed cost of doing business. For example, capping punitive damages at fixed limits in effect makes punitive damages into fines that are predictable. See Letter from Public Citizen's Congress Watch, *Profits Over Lives: Long-Hidden Documents Reveal GM Cost-Benefit Analyses Led to Severe Burn Injuries; Disregard for Safety Spurred Large Verdict*, (Oct. 29, 1999). This results in the ability of wrongdoers to budget around deterrence measures. See *id.* Therefore, treating punitive damages as fixed costs tends to circumvent the underlying rationale for such sanctions -- deterring lawlessness. See *id.*

<sup>14</sup> See Steven Greenhouse, *U.S. Issuing New Rules to Gain Contracts*, N.Y. TIMES, Jul. 9, 1999, at A12; see also Molly Ivins, *The Rich Keep Getting Rich, as the Chamber Smirks*, SEATTLE TIMES, Jul. 26, 1999, at B5; Terry Deeny, *Viewpoint: Federal Procurement -- Blacklisting Regs Threaten Us*, ENG'G NEWS-REC. Nov. 1, 1999, at 115 (criticizing Federal Acquisition Regulation amendments that President Clinton proposed in July 1999).

<sup>15</sup> See Posner, *supra* note 8 and accompanying text.

<sup>16</sup> See generally Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996). Kahan states that alternative sanctions are politically unacceptable because of their inadequacy along the expressive dimension of punishment. Kahan notes that the public rejects alternative sanctions because alternative sanctions fail to express condemnation as imprisonment does. Kahan explicitly contrasts this reason for the public's rejecting alternative sanctions with rejection that stems from their lack of severity or practicality. See *id.* at 592.

message of permissiveness that conflicts with the message of disapproval that society instead desires to express and that imprisonment more accurately represents.<sup>17</sup>

¶6 When courts use fines in lieu of imprisonment in cases of corporate misconduct, those courts invoke inaccurate representations that fail to express society's condemnation of an intolerable corporate behavior, instead cloaking the corporate misdeed in a socially accommodating pricing system. By proposing a model of labeling to implement a policy of stigma as a deterrence measure, this paper attempts to resolve the tension that results when courts' imposition of fines on corporate criminals in "pay to pollute" contexts inappropriately conveys messages of public accommodation of corporations' intolerable social conduct when instead communicating public intolerance is more accurate, effective, and efficient a deterrent. The proposed model that labels intolerable corporate behavior with stigma addresses social costs that are otherwise unaccounted for in a fine-implementing system. Labeling intolerable corporate behavior with stigma also substitutes as an effective sanction when imprisonment is not an economically feasible punishment.

## II. Literature Review

### A. *Posner on Optimal Sentencing for Corporate Crime*

¶7 Richard Posner's view on deterring corporate crime can be summed in his statement, "For every prison sentence there is some fine equivalent; if the fine is so large that it cannot be collected, then the offender should be imprisoned."<sup>18</sup> Posner finds that when there are equatable deterrence effects, the disutility of imprisoning a corporate offender is equivalent to the disutility of fines.<sup>19</sup> He further finds that the disutility of fines can be equivalent to the disutility of alternative sanctions, offering as an example a SEC violator whose punishment is his being permanently barred from practice. According to Posner, in this example, the amount of the "fine" equals the difference between the SEC violator's income in his best substitute occupation and the violator's expected future income were he allowed to continue his practice.<sup>20</sup> Therefore, though Posner advocates a fines-implementing system of penalties, he acknowledges the possibility of efficient alternative sanctions.

¶8 Regarding the alternative sanction of stigma as a deterrent measure, however, Posner is skeptical, stating:

"The economic objection to relying on stigma for deterrence is that, like imprisonment, it is more costly to society than the pure fine (or civil penalty) because it does not yield any revenue. (Stigma, unlike a fine, imposes costs on the criminal with no corresponding gain to society.) Hence, it would seem more efficient to drop the criminal label, and any stigma attached to it, and offset any loss in disutility to the criminal by increasing the size of the civil penalty. In that way, the social revenue can be increased with no loss of deterrence."<sup>21</sup>

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<sup>17</sup> *See id.* at 592-93.

<sup>18</sup> Posner, *supra* note 8, at 415.

<sup>19</sup> *See id.* 413. ("[B]y comparing the incidence of the offenses across districts, we should be able to infer the rate of exchange at which days in jail translate into dollars of fine with no loss of deterrence.").

<sup>20</sup> *Id.* at 412.

<sup>21</sup> *Id.* at 417.

*B. Campbell, Kessler, and Shepherd Find that Fines Restrict a State's Overall Productivity*

¶9 Researchers conducting an empirical study of the general economic influence of liability reforms<sup>22</sup> across 50 states over 21 years found that states adopting additional “decrease reforms”<sup>23</sup> experienced increased productivity in terms of worker output and employment, and states adopting additional “increase reforms”<sup>24</sup> experienced less productivity and reduced employment.<sup>25</sup> Therefore a relatively inexpensive policy of stigma seems preferable to fines when increased massive fines restrict states’ economic growth.

*C. Dan Kahan and Social Meaning of Penalties: A Stigmatizing System Adequately Expresses Condemnation Where a Fining System Fails*

¶10 Non-monetary sanctions are significantly distinct from fines in that they express prohibition while a pricing system of fines expresses permission.<sup>26</sup> Kahan explains this dynamic, stating:

Fines condemn much more ambivalently. When combined with a term of imprisonment, no one doubts that fines convey moral disapproval. But when fines are used as a substitute for imprisonment, the message is likely to be that the offenders’ conduct is being priced rather than sanctioned. And while we might believe that charging a high price for a good makes the purchaser suffer, we do not condemn someone for buying what we are willing to sell.<sup>27</sup>

The result is that fines are inherently inadequate as social penalties where society would rather express condemnation.

¶11 In light of Kahan’s idea that prison expresses stigma through condemnation and fines express permissiveness, I define the problem with a fining system in a public interest capacity as the following: in the specific context of corporations that inefficiently externalize the true cost of a corporate process or product upon unknowing consumers, a social policy that imposes fines as penalties upon corporate offenders in effect accepts inefficient corporate behavior at an underestimated price. Such inaccurate pricing fails to communicate the true cost of the corporate product or process, undermining the free market principle of voluntary transactions that accurate information would otherwise enable. A pricing system of fines inappropriately expresses social accommodation by hiding non-monetary costs. The non-monetary costs to society can be so high that interests of achieving efficiency demand a policy that accurately communicates<sup>28</sup> to involved parties the socially prohibitive nature of the corporate behavior.

<sup>22</sup>Liability reforms have included: (1) placing caps on contingency attorney fees (2) reducing damage awards by reforming the Collateral Source Rule (3) capping damages (4) paying future damages periodically rather than in one lump sum (5) eliminating joint and several liability (6) limiting or eliminating punitive damages (7) adopting “pure” or “modified” comparative negligence (8) allowing plaintiffs to collect pre-judgment interest. *See* Campbell et al., *supra* note 9, at 268-71.

<sup>23</sup>Decrease reforms are tort reforms that are likely to decrease judgment amounts. *See id.*

<sup>24</sup>Increase reforms are tort reforms that are likely to increase trial judgments and settlement amounts. *See id.* at 271.

<sup>25</sup>*See id.* at 277-79.

<sup>26</sup>*See* Kahan, *supra* note 16, at 621 (citing Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523-25 (1984)). Sanctions express “a detriment imposed for doing what is forbidden” while price expresses a detriment that must be incurred “in order to do what is permitted.” *Id.*

<sup>27</sup>Kahan, *supra* note 16, at 620.

<sup>28</sup>Contrasted to “expressing,” the term that Kahan prefers to use in relevant writings. *See generally* Kahan, *supra* note 16.

¶12 In other words, because social costs in a fining system are inaccurately priced, hidden, and high, a more emphatic communication between parties that establishes a message of intolerance and subsequent remedy is necessary and preferable. In a fining system, a socially undesirable behavior loses the sense of social stigma that prison is capable of imparting, because fines express a willingness to accommodate that behavior. Condemnation may inappropriately express accommodation where society's objective is to communicate intolerance as a means to stimulate social change.<sup>29</sup> A deterrence system capable of communicating intolerance is what is necessary.

*D. McAdams on Status and Esteem as Non-Material Individual Incentives to Cooperate for Group Welfare*

¶13 Richard McAdams suggests that individuals' pursuit of social status is the reason "excess cooperation" exists despite the cost to the individuals' solitary self-interest.<sup>30</sup> Therefore, because individuals seek non-monetary rewards of esteem, esteem can function as a currency and leverage that induces individuals to take action that contributes to group welfare.<sup>31</sup>

¶14 McAdams builds upon Robert Ellickson's idea of third-party enforcers<sup>32</sup> by providing the necessary context of individual desire for esteem<sup>33</sup> in which Ellickson's theory must operate. Socially connected groups provide individuals with the sought-for esteem.<sup>34</sup> McAdams finds support for this in experimental data<sup>35</sup> that shows individuals will act on the incentive for esteem by incurring personal costs in order to gain intra-group status.<sup>36</sup> In addition, the group itself, motivated by similar incentives,<sup>37</sup> will likewise seek status within its larger community. The group will utilize "status payments" to group members to create additional incentives for individuals to contribute to achieving intra-group status.<sup>38</sup>

¶15 Extending McAdams' dynamic of individual and group esteem-seeking to corporate behavior, I apply the notion that corporations seek esteem through good reputation. Good reputation can be considered a value that has utility to a corporation that can be compromised by the threat of stigma.<sup>39</sup> Corporate reactions in the world demonstrate that stigma is an effective measure of deterrence when it threatens a corporation's reputation.<sup>40</sup>

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<sup>29</sup> Expression is achieved first as a solitary act while communication implies active participation on the part of both communicator and receiver. Communication requires two parties, a communicator and a receptive audience, as successful communication requires that a clear message is both sent and received. Therefore, communication rather than expression is the term that accurately describes the vehicle that carries a message of stigma.

<sup>30</sup> See McAdams, *supra* note 6, at 1019.

<sup>31</sup> See *id.*

<sup>32</sup> Third party enforcers include nonhierarchical social associates who sanction through methods that ostracize, such as through gossip, when violations of social norms occur. *Id.* at 1027 (citing ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 131 n.21, (1991)).

<sup>33</sup> See McAdams, *supra* note 6, at 1027.

<sup>34</sup> See *id.* at 1019.

<sup>35</sup> Individuals were less likely to free-ride in commons-depletion scenarios when they knew they would be evaluated as a group rather than according to competing subgroups. See *id.* at 1032.

<sup>36</sup> See *id.* at 1031.

<sup>37</sup> See *id.* at 1018, n.54 (citing DENNIS CHONG, COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT 34-35 (1991) (In the context of the civil rights desegregation movement, the social goals of friendship, maintaining one's esteem among one's peers, and avoiding alienation are what spur individuals to take collective action.))

<sup>38</sup> *Id.* at 1031.

<sup>39</sup> See *id.* at 1057 Also, corporations recognize reputation is important to preserve in order to avoid markets' punishing effect. Jathon Sapsford, *Japan's Bailout Package Raises New Questions*, WALL ST. J., Oct. 15, 1998, at

*E. Lawrence Lessig: Tools for Regulating Social Meaning*

¶16 In offering an approach to regulate social meaning, Lessig divides normative judgement into two categories: efficiency norms and distributional norms.<sup>41</sup> Efficiency norms approach policy decisions where changing the social meaning has a goal of increasing total wealth.<sup>42</sup> A distributional norms approach to decision-making centers around concern over who is benefited and who is burdened.<sup>43</sup>

¶17 Illustrating concepts within the context of an anti-smoking norm example, Lessig offers four methods to reconstruct, change, or maintain social meaning by changing their “meaning costs:”<sup>44</sup> tying,<sup>45</sup> ambiguation,<sup>46</sup> inhibition,<sup>47</sup> and ritual.<sup>48</sup> Tying and ambiguation are semiotic techniques.<sup>49</sup> Inhibition and ritual are behavioral techniques.<sup>50</sup>

¶18 Tying is essentially creating an associated meaning that connects an idea to both a behavior and the costs of that behavior. For example, Lessig offers the example of warning labels on cigarettes. Labels on cigarettes serve to tie or associate negative health effects with the behavior of smoking.<sup>51</sup>

¶19 Ambiguation is a technique to reduce the clear meaning of an act or expression in order to manipulate the social costs of manifesting that behavior or expression.<sup>52</sup> For example, a cigarette label normally warns smokers of the detriment to their personal health, but when in addition the label indicates that the personal choice to smoke can cause detrimental health effects to other persons in the environment, the cost of smoking has increased a private decision to a wider social sphere that extends costs beyond personal harm to wider social effects.<sup>53</sup> A person asking another to put out a cigarette could justify the request as a benefit to everyone in the vicinity, rather than merely a personal preference for a smoke-free environment.

¶20 Inhibition is a technique that weakens support for a behavior by reducing its incidence.<sup>54</sup> The result is that inhibition increases the costs of performing that behavior. For example, countries that prohibit youth from smoking in essence attempt to weaken social support for smoking by instilling a social message that smoking among the young is intolerable.<sup>55</sup>

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A19 (Japanese banks reluctant to accept government bail-out because of stigma attached to the bailout that expresses economic frailty).

<sup>40</sup> See, e.g., *infra* note 78 and accompanying text.

<sup>41</sup> See Lessig, *supra* note 5, at 1002.

<sup>42</sup> See *id.* at 1003.

<sup>43</sup> See *id.* at 1004.

<sup>44</sup> See *id.* at 1034.

<sup>45</sup> See *id.* at 1031.

<sup>46</sup> See *id.* at 1031-32.

<sup>47</sup> See *id.* at 1032.

<sup>48</sup> See *id.* at 1032-33.

<sup>49</sup> See *id.* at 1009.

<sup>50</sup> See *id.* at 1012.

<sup>51</sup> See *id.* at 1031.

<sup>52</sup> Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2187 (1996).

<sup>53</sup> See Lessig, *supra* note 5, at 1031-32.

<sup>54</sup> See *id.* at 1032.

<sup>55</sup> See *id.*

¶21 Lessig describes ritual as “extremely rare, existing only when there is a long-standing tradition that supports the ritualistic practice.”<sup>56</sup> The example of ritual that Lessig offers is the historical ban on smoking in the first minutes of airplane flights during the years spanning 1979 to 1987. The significance of this prohibition, when couched in a litany of other safety instructions such as how to find life-jackets, was that the individual’s responsibility to refrain from smoking became larger and more significant in the context of the entire group’s interest of general air safety.<sup>57</sup> Therefore, through ritual, the costs and benefits that the individual smoker associated with his or her own health and well-being had to be adjusted in light of group safety concerns. The concerns of the group outweighed and illuminated the individual’s behavior as being too great a risk for the individual, as a member of the group, to bear.

¶22 In effect, Lessig provides “techniques for changing context that might change the cost of behaviors, within that context.”<sup>58</sup> In this paper, I will use Lessig’s tools of manipulating meaning costs of sanctions within an efficiency or distributional framework of normative judgement to examine the economic and social efficiencies of the proposed labeling model of stigma.

¶23 In short, building upon the literature, in this paper I propose in “pay to pollute” contexts where true social cost is hidden, effective sanctions must contain truthful information that reveals the injury, thus creating a new public context for future action and present reparation.<sup>59</sup> More specifically, I apply a labeling model of stigma to accomplish these ends.

¶24 In light of Kahan’s notion that effective penalties are those which accurately express societal condemnation rather than permissiveness;<sup>60</sup> the notion that esteem that has value and utility to individuals and groups that therefore implies a corporate incentive to protect corporate reputation within the market community;<sup>61</sup> and also the notion that effective judgment must be an act of the community that establishes a new public context for future actions,<sup>62</sup> I will use Lessig’s tools to attempt to demonstrate that a policy of stigmatizing though labeling can accurately communicate a communal judgement of intolerance that establishes a new public context and therefore effectively deters corporate misconduct by threatening corporate reputation. I propose that in sanctioning socially inefficient corporate practices where “pay to pollute dynamics” exist, a policy that communicates intolerance is preferable over a policy that expresses accommodation.

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<sup>56</sup> *Id.*

<sup>57</sup> *See id.*

<sup>58</sup> Lessig, *supra* note 52, at 2188.

<sup>59</sup> *See* Oliver O’Donovan, Regius Professor of Moral Theology at Christ Church, Oxford, United Kingdom, *Lecture for History of Church and State: Justice and Judgement*, at Emory University School of Law (Nov 18, 1999).

O’Donovan’s theory of justice implies just punishment necessarily refers to and adheres to community standards. “Justice is a right, a virtue, and a judgment,” says O’Donovan. *Id.* O’Donovan then defines the third element of justice, judgment, as “an act of justice based upon a preceding state of affairs, implemented by and for the whole community.” *Id.* Judgment therefore establishes a new and shared public context for future actions that avoids scattering opinion and disintegrating into “shards of mutual miscomprehension and frustration.” *Id.* Further, judgment must contain: (1) a true pronouncement (2) creative foundation and (3) public element. *Id.* To be effective, judgment must bring a private injury into the public space for reparation. *Id.* In that O’Donovan’s approach to justice and judgment appears to depend upon shared community understandings that complement and support principles that underlie Lessig’s and Kahan’s norms formulations, I apply O’Donovan’s definition of justice and judgment to create a warning label model of stigma that effectively sanctions corporate misconduct by accurately conveying community norms in harmony with a sanction that communicates a true pronouncement, creative foundation, and public element.

<sup>60</sup> *See generally* Kahan, *supra* note 16.

<sup>61</sup> *See generally* McAdams, *supra* note 6.

<sup>62</sup> O’Donovan, *supra* note 59.

Additionally, in the specific context where “pay to pollute” behavior exists, yet where Posner finds that a sanction of imprisonment is costly to society<sup>63</sup> and Campbell, et al. find that massive fines as deterrence measures may be similarly costly,<sup>64</sup> I will try to show that a model of stigmatizing labels provides an economically efficient sanction preferable to both fines or imprisonment that can also adequately deter socially intolerable corporate behavior.

*F. What constitutes stigma?*

¶25 Stigma, as referred to in this paper, draws upon its definitions in economic, social, and legal contexts. In economics, stigma is the decreased earning potential for someone with a criminal record because the employer is less willing to pay as much as previously.<sup>65</sup> In a social context, stigma means reduced influence among family and friends.<sup>66</sup> In a legal context, stigma includes reluctance to interact with someone with a criminal record.<sup>67</sup> In addition, stigma in this paper will refer to a vehicle for a legally imposed campaign of public information. The legal vehicle of a stigma sanction has an inherent ability to communicate a true, accurate, and effective message to the marketplace that establishes a “new public context for future actions.”<sup>68</sup> I define “proportionality” of a stigma sanction as a measurement defined and also effectuated by community norms and standards. Proportionality results when there is a truly accurate and informed market response to stigma and where stigma is achieved by referring to accurately communicated social norms.

*G. What constitutes intolerable corporate behavior?*

¶26 I characterize “intolerable” corporate behavior as economically inefficient behavior, defined by its inability to internalize costs to society in the process of creating irreparable, ongoing social harm. Further, intolerable conduct includes corporate behavior that social policy or law prohibits but which offenders may routinely violate because a current pricing system of fining misconduct inadequately deters when fines express social accommodation for the prohibited behavior instead of communicating intolerance that stimulates behavioral change.

¶27 “Pay to pollute” behavior in emissions trading<sup>69</sup> is an example of socially intolerable behavior. In light of public health, safety, and environmental concerns, governments have prohibited corporations from emitting more than a given level of pollution.<sup>70</sup> Even though emissions trading policies may induce a corporation to reduce its own pollution levels by creating a financial incentive, because emissions trading is based upon a pricing system, it communicates a message that society will accommodate the social cost of environmental degradation. The company that redistributes its pollution quota to another party may profit by selling the remaining allotment, but the social cost of pollution, no matter that it comes from

<sup>63</sup> See Posner, *supra* note 8.

<sup>64</sup> See Campbell, et al., *supra* note 9.

<sup>65</sup> See Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 540 (1996).

<sup>66</sup> See *id.*

<sup>67</sup> See *id.* at 520.

<sup>68</sup> O’Donovan, *supra* note 59.

<sup>69</sup> Cass Sunstein describes emissions trading as economically efficient, but neglects to address the fact that the real cost bearer is society which does not receive reimbursement. See Cass R. Sunstein, *Administrative Substance*, 1991 DUKE L.J. 607, 634 (1991).

<sup>70</sup> To address global warming, Norway, Sweden, Denmark, Iceland, and Finland recently agreed to create an emissions trading system that would allow them to buy and sell emissions quotas of greenhouse gases. *Nordic Countries Test Emissions Trading*, CHEM. WEEK ASSOCIATES, Sept. 8, 1999, at 8.

company A or company B, will always be borne by society. Governments' pricing policies that allow corporations to sell the common, public good of a clean environment might be viewed as something akin to a taking, without the justification of public interest to support it. In effect, emissions trading is an example of "pay to pollute" behavior that although legal, as a social policy is intolerable because it allows corporations to continue socially inefficient behavior by profiting through imposing social costs that the corporation is not obligated to repay.<sup>71</sup>

### III. Models of stigma

¶28 A basic model of an economically efficient stigma sanction that also effectively deters corporate misconduct is one in which courts purposefully, rather than unintentionally or fortuitously, produce stigma. In light of corporations' concern over preserving their good reputations, court-ordered measures would create economic incentives for corporate defendants to change their irresponsible behavior. More specifically, courts can create stigma by leveraging corporations' concern with retaining a marketable brand and reputation.<sup>72</sup> Models of stigma sanctions<sup>73</sup> could include advertising and adverse publicity,<sup>74</sup> community service,<sup>75</sup> self-debasement or public apology,<sup>76</sup> a label that invokes a symbolic scarlet letter,<sup>77</sup> or a warning label. In each of these models, creating stigma would be the goal, rather than a mere by-product of the court-ordered sanction.

#### A. Advertising and adverse publicity

¶29 In stating that advertising and negative publicity are more effective deterrents than money, Executive Director of the U.S. Consumer Product Safety Commission (CPSC) Pamela Gilbert points to CPSC's administrative complaint against Black & Decker Corporation as an example. CPSC's complaint alleged that Black & Decker's unilateral recall announcement of October 27, 1997, did not adequately notify the public of either the recall or the fire danger associated with Black & Decker's Spacemaker Optima Model T1000 Type 1 Horizontal Toasters.<sup>78</sup> Of 234,000

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<sup>71</sup> This example is given to illustrate a strict definition of what constitutes intolerable behavior. On the other hand, if upon deliberation in a public context, a decision is made that the inefficiencies are to be tolerated, society has freely chosen a policy of accommodation, rather than intolerance. Whether such a policy should continue therefore depends upon whether society, which bears the cost of pollution, makes an informed decision to accommodate some pollution in a fining system, or creates a new policy that prohibits imposition of the social cost of pollution altogether in a stigmatizing system of intolerance.

<sup>72</sup> See Sapsford, *supra* note 39, at 1057.

<sup>73</sup> See generally, Kahan, *supra* note 16.

<sup>74</sup> See Rasmusen, *supra* note 65, at 538 (publicizing government records in sex offender cases).

<sup>75</sup> See e.g., *United States v. Danilow Pastry Co.*, 563 F.Supp. 1159 (1983).

<sup>76</sup> See Kahan, *supra* note 16, at 631-34.

<sup>77</sup> See Joseph R. Tybor, *Unusually Creative Judges Now Believe Some Punishments Can Fit the Times*, CHI. TRIB., Jul. 3, 1988, at 1 (drunk drivers required to attach a "scarlet letter" bumper sticker on their cars); See generally Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1 (1991)(discussing informational sanctions and their constitutional impacts).

<sup>78</sup> The Spacemaker Optima Model T100 Type 1 Horizontal Toaster was recalled because the model allowed food to catch fire, and when the toaster door automatically opened with the food rack extending beyond the door, flames from the food sometimes would escape the unit and expose kitchen cabinets and their contents to the fire. See Press Release, U.S. Consumer Product Safety Commission, *CPSC, Black & Decker Settle Toaster Lawsuit; Improve Recall Remedy*, available at <http://www.cpsc.gov/cpscpub/prerel/prhtml98/98097.html> (Apr. 23, 1998). At the time of the recall, Black & Decker reported 242 such events. By April 23, 1998, Black and Decker received 1,066 food

units sold, only 19,000 or approximately eight percent of consumers responded to the recall in the six months that followed the announcement. CPSC's complaint also alleged that Black & Decker's offering discount coupons for future Black & Decker purchases as a remedy was not adequate. In its answer, Black & Decker denied the allegations, but after both complaint and answer were filed, Black & Decker began to cooperate with CPSC by offering a free replacement product instead of a coupon. Gilbert believes that Black & Decker's initial resistance, followed by eventual compliance, was a reaction to the threat of litigation with CPSC that would result in adverse publicity, something corporations typically seek to avoid.

¶30 For a sanction of stigma that includes adverse publicity to be effective, it would need to be capable of notifying the perhaps widespread, far-flung public, and also it would need to motivate people to act accordingly.<sup>79</sup> Adverse publicity could be effectively carried out by consumer advocates already involved in the case and it could be government funded. Adverse publicity could also indirectly be funded by the corporate offender itself, as happened in the case of states suing the tobacco industry.<sup>80</sup>

¶31 A problem with the adverse publicity model, when used as a sanction rather than a threat to induce settlement before litigation, is that widespread advertising and discussion may actually increase social acceptance of the normally undesirable social behavior.<sup>81</sup>

### B. Community Service

¶32 In *United States v. Danilow Pastry Co.*,<sup>82</sup> six bakeries pleaded nolo contendere to a charge that they had violated the Sherman Act, and the District Court ordered the bakeries to provide community services by donating baked goods to the needy.<sup>83</sup> The purpose of the sanction was to call the wrongdoings of the defendants to public attention so that the public would be aware of both the "symbolic restitution"<sup>84</sup> the court was imposing on the defendants, as well as the benefits of the service that served the needs of the community. The court in *Danilow* noted that there was evidence from criminologist literature that "symbolic restitution that reaffirms the community standards is an important element of general criminal deterrence."<sup>85</sup>

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fire complaints, 656 of which caused property damage such as damage to the kitchen cabinet and one kitchen fire. There were also eight burn injuries that were reported. *See id.*

<sup>79</sup> For recalls to be successful, people must know about the recall and also be motivated to act upon it. *See id.*

<sup>80</sup> According to CPSC Director Gilbert, tobacco company defendants indirectly paid for states' advertisements against the tobacco industry when money awarded to states such as Florida was allocated to fund a counter-advertising campaign, aimed at decreasing tobacco companies' consumer base. *See id.*

<sup>81</sup> *See* Michelle J. White, *Why don't more households file for bankruptcy?* 14 J.L. ECON. & ORG. 205, 211 (1998) (debtors' discussing bankruptcy reduces stigma; advertisements of bankruptcy lawyers increase bankruptcy's acceptability). The example of bankruptcy is offered to illustrate that where stigma that merely functions as adverse publicity it may be ineffective or have the reverse effect of what one might expect. Other models of stigma such as labels that function as information carriers, however, are not necessarily intended to be loaded with the same bias as a message carried by an adverse publicity model. Rather, the product labeling model of stigma, like a price tag, would create an effect at the point of purchase, based upon true and accurate information that might otherwise would be hidden, as when a gag rule is imposed upon prevailing plaintiffs. Therefore, in stigmatizing models other than the adverse publicity model, comprehensive information, rather than the spectacle of publicizing the harm, is the counter-intuitive focus. Punishment is less important than the goal of deterring socially intolerable, inefficient behavior.

<sup>82</sup> 563 F. Supp. 1159 (1983).

<sup>83</sup> *See id.* at 1167.

<sup>84</sup> *See id.*

<sup>85</sup> *Id.*

¶33 The *Danilow* court chose alternative sanctions in light of the economic consideration that fines large enough to deter would bankrupt the defendants.<sup>86</sup> Similarly, given a case where optimal fines are unaffordable for the defendant and the defendant's offense violates community standards, the courts' imposition of stigma through community service is preferable, as the sanction serves to inform the public through a mechanism similar to adverse publicity.<sup>87</sup>

¶34 A problem with the community service model is that this sanction may result in the reverse of the intent of stigma where the defendant receives admiration rather than shame.<sup>88</sup> For example, it could be unclear that the defendants in *Danilow* are distributing bread to the needy as a sort of penance for a wrong. Instead, a misinformed community could view the bakery's action as evidence of altruistic virtue and so the deterrent effect of the stigma is lost. A sanction of stigma successfully implemented necessarily affects reputation negatively. If a sanction instead increases the good reputation of the corporate defendant, it is unsuccessfully implemented.

### C. Self-abasement/public apology

¶35 Applying stigma through self-abasement involves public disgrace through rituals analogous to the public spectacle of the stocks.<sup>89</sup> A more recent example of this vehicle for stigma is seen in an Arkansas municipality that requires parents to be put on public display if they have curfew-violating children.<sup>90</sup> The public apology is also a ritual of public humiliation as in Maryland where juvenile offenders are only released after apologizing to their victims, sincerely and with hands and knees on the ground.<sup>91</sup>

¶36 Because stigmas of self-abasement and public apology seem to be based upon a desire to create an emotional remorse or humiliation, they would be difficult to apply to a corporate, non-person entity. If the sanction contemplated targeting organizations' individual leaders, however, such a sanction might be possible. Deterrence and punishment would be served through evoking those undesirable emotional states, but there could be constitutional issues raised by the targeted individuals.<sup>92</sup>

### D. Warning Labels and Symbolic Scarlet Letters

¶37 Not only is direct labeling an information carrier to society, but it can be another form of adverse publicity. CPSC Executive Director Gilbert states that there is a direct and proven correlation between the government's counter-advertising and consumer behavior in declining to smoke. The government's anti-smoking ads of the 1960s and 1970s successfully reduced the number of smokers, saving costs to society in terms of health care, even while tobacco companies continued their own positive advertising of cigarettes.

¶38 Direct labeling that effectively communicates a social harm may be the best vehicle for implementing stigma as a sanction, considering the effectiveness of cigarette warnings that

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<sup>86</sup> See *id.* at 1166.

<sup>87</sup> See *id.* at 1167. Publicity of community service fosters deterrence.

<sup>88</sup> See Kahan, *supra* note 16, at 626.

<sup>89</sup> See Kahan, *supra* note 16, at 653 n.165

<sup>90</sup> See *id.*

<sup>91</sup> See *id.* at 634.

<sup>92</sup> See *id.* at 643-44.

emphasized the societal harm of second hand smoke.<sup>93</sup> Direct labeling may serve both capacities of a warning label and a symbolic scarlet letter simultaneously. One example of the interaction of the scarlet letter and warning label model are instances in which courts order drunk drivers to adhere labels to their cars that communicate their conviction.

¶39 One problem with a labeling model may be that space to communicate the social harm is limited. A second problem may be that labels or symbolic scarlet letters may not be effective where the communication is unclear so that the consumer is not empowered to make an informed decision.

#### IV. Approach and Predicted Effects of Warning Labels for “Pay to Pollute” Behavior

¶40 The proposed model to label inefficient or intolerable corporate conduct has a basic goal of more accurately communicating hidden social cost to the consumer. It must therefore identify (1) the basic nature of the social harm and (2) the serious social cost that accompanies the harm.<sup>94</sup> In light of the idea that it is social and group esteem that motivates individuals to incur personal costs to achieve societal status, a label that identifies cost and harm that a product’s production imposes upon the wider society will influence consumer choice.

¶41 Because consumers may find it difficult to absorb the level of detailed information that can be essential to communicating complex calculations of social harm and social cost, a warning label could contain a symbolic scarlet letter. In addition, incorporating a symbolic message into the label may be necessary because a product may offer limited surface to attach a verbose label to. The scarlet letter might include a uniform sign, analogous to a stamp of disapproval, which quickly conveys to the consumer a general societal disposition or government policy and attitude toward a corporation and its services, products, or processes. The stamps may contain quick, visual cues of distinction to convey different information in the least costly manner in terms of transaction costs of gathering product information and time costs to the consumer. For example, a square symbol may quickly convey Violation A, while a round symbol conveys Violation B. The color red conveys a high level of misconduct, and the color yellow conveys a lower level of misconduct. Therefore a red square label placed on a product quickly conveys that Violation A occurred and the level of misconduct was high. A yellow square conveys Violation A occurred at a lower level of misconduct.

¶42 Beyond the basic goal of the direct labeling model is the goal of creating a new public context that creates opportunity for social choice and possible change as necessary.<sup>95</sup> Therefore, the context of the labeling should be one in which warning labels are likely to reduce the extent,

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<sup>93</sup> The Surgeon General’s publicizing the risk of second hand smoking radically changed the social acceptability of smoking whereas such change did not occur with the 1960’s implementation of warning labels. See Lessig, *supra* note 5, at 1028-29. However, the greater effectiveness of publicizing second hand smoke dangers over product label warnings seems to turn upon the substantive message of social harm (contrasted to individual harm), rather than the vehicle that delivers the message. Therefore, a warning label that carries a substantive message conveying social harm, rather than individual costs, could be effective. See Monica Langley, *Lagging Lobby: The Tobacco Institute Loses Political Power As Attitudes Change*, WALL ST. J., Fri. Nov. 14, 1986.

<sup>94</sup> See Frederick H. Degnan, *The Food Label and the Right to Know*, 52 FOOD & DRUG L.J. 49, 53-54 (1997)(goal of food labeling is to communicate essential information so that consumers can make better choices). I am basing a labeling model for “pay to pollute” behavior upon models of food warning labels, because food labels function to carry out similar purposes to a stigma label. Food labels satisfy a consumer right to know. They illuminate the health costs that the health-conscious consumer may incur by purchasing and ingesting food, and through information they provide a new context for future consumer behavior.

<sup>95</sup> See O’Donovan, *supra* note 59.

frequency, or severity of social harm and social costs.<sup>96</sup> The degree that the model can achieve these goals indicates the model's level effectiveness.<sup>97</sup>

¶43 To achieve the goals of communicating the social harm and social costs along with creating a new public context for adjusting socially intolerable and inefficient behavior, an effective model of warning labels must influence the consumer's behavior at the point of purchase.<sup>98</sup> To influence the consumer's behavior at the point of purchase, the warning label must clearly communicate a social message that changes the cost of the normal behavior. Applying Lessig's tools of regulating social meaning could achieve this end. Assuming that the consumer is motivated to act under economic reasoning that takes into account cost-benefit outcomes of the consumer's behavior, the consumer will make both purchasing and other behavioral adjustments. Socially pervasive behavioral changes will therefore create a new meaning context for individuals, who will then interact with corporate products and processes based upon the new norm and cost-benefit context that the stigma label will suggest.

¶44 For example, in *John Doe v. Unocal*,<sup>99</sup> a landmark suit of alleged corporate misconduct that constituted intolerable social behavior,<sup>100</sup> Burmese plaintiffs sued California-based Unocal, in a United States federal court. The plaintiffs, represented by the Centre for Constitutional Rights and Earthrights International, alleged that Unocal acted through the Burmese army to physically force local Burmese to aid the company, with little or no pay, to construct the Yadana natural gas pipeline.<sup>101</sup> Although the court acknowledged that violence perpetrated against the plaintiffs was well documented and that Unocal most likely knew that its project was benefiting from forced labor,<sup>102</sup> the court held that under the Alien Tort Claims Act, such knowledge does not meet the standard for liability of participation or cooperation in forced labor practices.<sup>103</sup> The court also held that the alleged "preparatory activities"<sup>104</sup> that Unocal undertook was conduct that was too

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<sup>96</sup> See Mark R. Lehto and James M. Miller, *The Effectiveness of Warning Labels*, 379 PRACTISING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 167, 169 (1989).

<sup>97</sup> See *id.*

<sup>98</sup> See *id.* at 204. Other steps for effective warning that Lehto and Miller refer to are (1) public exposure (2) attention gaining (3) comprehension (4) retrievable in memory (5) trigger an idea of a preferred behavior (6) trigger the preferred action (7) stimulate a person who is capable of performing the preferred behavior (8) suggest a response that adequately addresses the initial problem. *Id.*

<sup>99</sup> 963 F. Supp. 880 (1997) (holding that Burmese citizens stated a claim against Unocal through plaintiffs' allegations that the Burmese army tortured and enslaved plaintiffs in connection with Unocal's project of constructing a natural gas pipeline).

<sup>100</sup> A Fortune 500 company, Unocal can be said to have economically benefited Burma by investing over \$2 million in the region. See Los Angeles and Rangoon Agencies, *Oil firms sued for alleged abuses*, S. CHINA MORNING POST Oct. 5, 1996, at 13. See also THE PLANET, *Environmental Wrongs, Human Rights*, (Dec. 1999), at 5. On the other hand, if the evidence is interpreted such that in the course of doing business, Unocal imposes social costs upon the Burmese in the form of civil rights abuses, then Unocal's producing social benefits of (1) gas and (2) investments in Burma's community must be balanced against true costs that are intolerable in their ultimate inefficiency. Civil rights abuses, if established, are physical and psychological costs to the victim which Unocal cannot internalize. In addition, inefficient externalities of the alleged corporate policy of abuse can mean public costs in plaintiffs and Unocal utilizing public resources in the federal courts.

<sup>101</sup> Los Angeles and Rangoon Agencies, *supra* note 100. See also THE PLANET, *supra* note 100.

<sup>102</sup> In 1995, a consultant to Unocal wrote, regarding the forced relocation of workers near the Unocal pipeline route, "Unocal, by seeing to have accepted [the Burmese government's] version of events [calling forced labor service in lieu of paying taxes], appears at best naïve and at worst a willing partner in the situation." *Doe v. Unocal Corp.*, 2000 WL 1239935, \*5 (C.D.Cal.).

<sup>103</sup> See *id.* at \*16-17.

<sup>104</sup> The preparatory activities included communicating about Unocal's participation in the pipeline project, Unocal's holding finance meetings, and Unocal's transferring money to fund the pipeline project in Burma. See *id.*

remote or indirect to the abuses in Burma, for subject matter jurisdiction under RICO to attach.<sup>105</sup> Although had plaintiffs successfully demonstrated that a credible threat of human rights violations to their persons existed in furtherance of the Unocal pipeline project, the court denied the plaintiffs standing for purposes of a class action suit. The court believed enjoining Unocal from paying the Burmese government involved in the pipeline project would not achieve redress for plaintiffs' injuries where the actions of independent third parties involved in the pipeline project were unpredictable.<sup>106</sup> In other words, the court recognized that an injunction issued in the context of a pricing system would fail to deter third parties.

¶45 It may be that lawyers for the plaintiffs would have been more successful had they framed their argument in terms of restitution, where a claim could be asserted that Unocal was unjustly enriched at the plaintiffs' expense, even absent a tort.<sup>107</sup> What could have happened in this case, if the federal court had found Unocal guilty? The court, acting under a labeling model of stigma, could have employed techniques of tying, ambiguation, inhibition or ritual as a sanction to deter further such misconduct.

¶46 If the court had found Unocal guilty, a court operating under a labeling model of stigma could order the company to advertise its conviction on fliers that it must post on its property in public view in order to tie Unocal's name to the alleged intolerable behavior. The negative association would deter managers of other companies from endorsing similar corporate policies, and also deter the guilty corporation from repeating any such crime. Tying would therefore deter the misconduct and inefficient behavior through individual and group esteem-seeking dynamics where publicity that reveals a corporation's civil rights abuses increases the costs to corporate reputation.<sup>108</sup>

¶47 A court order implementing a stigmatizing warning label could also introduce ambiguation into the meaning of consumer choice to affect the cost-benefit incentives of the decision-making process. After being exposed to the social harm and social costs of the corporate policy indicated by informative labels adhered to corporate advertisements, the public could perceive that the true cost of blindly selecting a gas provider has increased from a personal choice to a wider social sphere. When a court sends an information-rich message through the vehicle of stigmatizing warning labels attached to public relations literature, the result is a more balanced corporate image. A court-imposed warning label gives rise to a more accurate accounting of true costs when the information that appears alongside a corporate logo illuminates the social costs. The overall message serves to act as an information vehicle to the consumer regarding the company's corporate policy. Because individuals are more likely to be motivated to act in the interests of a group to which they perceive themselves as belonging,<sup>109</sup> ambiguation would effectively influence consumer behavior. The result would be that consumers might select a natural gas provider which they do not perceive to exact as high a true cost as Unocal might impose. When consumer market choice changes, by the law of supply and demand, the defendant corporation will change its costly behavior to less costly behavior that can reclaim

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<sup>105</sup> *See id.*

<sup>106</sup> *Doe v. Unocal Corp.*, 67 F.Supp.2d 1140, 1143 (C.D. Cal. 1999).

<sup>107</sup> *See generally* Andrew Kull, *Rationalizing Restitution*, 83 CALIF. L. REV. 1191 (1995); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277 (1989).

<sup>108</sup> *See supra* note 51 and accompanying text; *see also* notes 30-39 and accompanying text.

<sup>109</sup> *See supra* notes 32-36 and accompanying text.

market share.<sup>110</sup> Therefore, a stigmatizing warning label will achieve deterrence of the misconduct at issue.

¶48 The same court order could also encourage inhibition of intolerable corporate policy. The type of corporate misconduct that Unocal was accused of would eventually cease to manifest when the increased costs to corporate esteem cause the behavior to decrease in pervasiveness and ultimately cease. Increased social condemnation would increase the esteem costs of Unocal's alleged behavior so that it would no longer be affordable to engage in even preparatory conduct to finance a project that the company strongly suspected would thereby be accompanied by the Burmese military's imposition of forced labor.<sup>111</sup> The communication of social intolerance would prevent a guilty company from continuing to adhere to a "pay to pollute" mentality.

¶49 Also, over time, a ritual might develop when the ceremony of a court applying the labeling model of sanctions to a guilty corporation attains an almost ceremonial meaning of social condemnation. Over time, the tools of tying, ambiguation, and inhibition will change the meaning costs of a court conviction for behavior such as that alleged in the Unocal case. As in the inhibition example, the result will be that such corporate misconduct will become rare when social costs to corporate esteem are too high. Therefore, when a conviction actually takes place, it assumes the meaning of a condemnation ritual, consisting of court proceedings followed by the ceremonial, uniform posting of information in public view and subsequent public reaction. The posting itself, in order to communicate the social harm and costs more effectively than words, may become something of a symbolic scarlet letter. The posted literature in public view might always be on red paper, and it might always be of a certain weight and shape, so that words may not even be needed or become supplementary to the message of the posted symbol itself.

¶50 One question that arises is who determines what the stigma should be and who should administer it? It has been proposed that stigma should be privately imposed so that it does not cost the government, which also will not then be predisposed to implement sanctions based upon financial factors.<sup>112</sup> This model uses courts as an example of possible administrators of the stigmatizing warning label sanction. However, this model does not exclude the possibility that society and private entities might effectively implement a stigma sanction.

¶51 The problem with societal, un-institutionalized enforcement may be lack of uniform application. A policy of stigma labeling that allows random, un-institutionalized implementation of stigma sanctions may open the door to segments of society practicing forms of outright discrimination. On the other hand, even though courts that purposefully implement stigma sanctions on a case-by-case basis may be vulnerable to accusations of unfairness, judges are bound to precedent. Courts' legal obligation to follow precedent may help address the uniformity of application and fairness issues. Private institutions that enforce stigma may likewise offer a greater possibility of uniform application of penalties, but similarly to the problems of un-institutionalized enforcement, private entities may also be less likely to implement a stigma sanction that reflects society-wide norms. The decisions and actions of a private entity may be less accountable to social interests and more committed to the pricing system that has been shown to inaccurately assess social costs. It may be that courts can find

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<sup>110</sup> When stigma labeling affects consumer choice, it may represent an application of the hybrid model of stigma that Kahan has recently described. *See* Kahan, *supra* note 3, at 385.

<sup>111</sup> *See* *Doe v. Unocal Corp.*, 2000 WL 1239935, \*14 (C.D.Cal.)

<sup>112</sup> *See* Rasmusen, *supra* note 65, at 536.

principles of social norms more easily, being bound to both law that is developed by precedent and the society that courts serve.

## V. Results and Analysis

### A. Traditional Economics Theory Supports Stigma as Preferable to Fines

¶52 Posner's theory that stigma imposes costs on the criminal with no corresponding gain to society is inapplicable to most real world situations if social "gain" goes beyond monetary definitions and includes the utility that is gained by creating a culture that encourages a preferred social behavior.<sup>113</sup> For example, deterrence of homicide is an example of a social gain that appears to be created at least in part by a policy of capital punishment.<sup>114</sup> Some studies indicate that capital punishment creates a culture that encourages social behavior where would-be murderers refrain from killing.<sup>115</sup>

¶53 These findings illustrate the fact that policies can shape a culture by keeping criminal action from taking place. Therefore, by extension, because culture is malleable, it is possible to use a policy of stigma warning labels to create a culture that encourages behavior supporting social well-being, where the "gain" is non-monetary behavioral change and where would-be corporate offenders refrain from the "pay to pollute" conduct that is a problem in a fining system.

¶54 Posner's economic view also neglects to take note of the inherent inadequacy of necessarily quantifiable fines. Because some costs to society are permanent with the result that succeeding generations suffer the harm in perpetuity, finite monetary fines are inadequate restitution. For example, some environmental costs that corporations create are impossible to internalize. They are irreparable costs that society must pay inevitably as well as indefinitely. Fines that encourage "pay to pollute" policies contribute to growing social costs of depleted ozone and increased smog that industry creates. All of society must shoulder the cost when monetary fines do not adequately address corporate-induced costs to quality of life: loss of health, air quality, toxic water, and degradation of an aesthetic experience in a clean environment. In addition, unrestrained and unsustainable logging activities that destroy the possibility of preserving a diversity of species<sup>116</sup> cost the public in that such activity inhibits medical advancements<sup>117</sup> and

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<sup>113</sup> Robert Ellickson has this to say about Posner: "Although Ronald Coase, Guido Calabresi, Richard Posner and the other founders of classical law and economics accomplished much, they exaggerated the role of the law in the overall system of social control and, conversely, underestimated the importance of socialization and the informal enforcement of social norms. They also implicitly placed too much stress on individuals' hunger for material, as opposed to status, rewards." Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998).

<sup>114</sup> See Paul Rubin, et al., *Capital Punishment and Deterrence: County Level Estimates Using Recent Execution Data*, at 7, 13-14 (1999) (on file at Emory University School of Law, Atlanta Georgia). But see Raymond Bonner & Ford Fessenden, *Absence of Executions: A special report; States With No Death Penalty Share Lower Homicide Rate*, N.Y. TIMES, Sep. 22, 2000, at A1.

<sup>115</sup> See *id.*

<sup>116</sup> Greenpeace reports that in the U.S., which is the leading consumer of the world's ancient forest wood products, 95 percent of original native forests have been destroyed. See *Letter regarding Ancient Forests Campaign*, Greenpeace, (Oct./Nov. 1999). Also, 80 percent of the world's ancient forests, which include 500 year old trees and rare and threatened wildlife, have been lost. *Id.* Ancient forests continue to disappear at the rate of an acre per second, threatening global biodiversity. See *id.*

<sup>117</sup> Loss of biodiversity presents a problem that could negatively impact society's ability to develop medicines for various ailments, present and future. See J. Wallace, *Rainforest Rx*, SIERRA, Jul.-Aug. 1991, at 36, 41. The survival

creates future health costs. Not only does industry-induced environmental degradation diminish natural resources' psychic utility in terms of providing people with pleasure, but "pay-to-pollute" dynamics also compromise the ability of future generations to utilize those natural resources for society's material well-being when fines fail to deter resource depletion and degradation.

Therefore, short-term monetary compensation may sometimes come at the cost of long-term social well-being.

¶55 Also, because some costs to society are externalities that aren't readily discernable, it may be impractical to attach a price as Posner would suggest. When a worker is seriously injured on the job due to corporate misconduct,<sup>118</sup> there are ripple effects to the injured worker's family. It may be that both the worker's family and community will bear not only the monetary costs of medical care, but the emotional and opportunity costs of the injured worker, as well as the cost of the labor the worker would have performed. These ripple effects that travel from the injured worker to surrounding people, are externalities that are not compensated because emotional and opportunity costs are hard to put a finger on, may be hard to litigate, and may be unfairly priced for both the plaintiff and defendant. Effects are wide spread, and though causal, may be indirect. Further, disease or health problems due to health and safety violations might only manifest after the applicable statute of limitations has run, preventing victims of corporate misconduct from receiving compensation.

¶56 Moreover, the cautions that Campbell, Kessler, and Shepherd raise in interpreting their tort reform data point to implementing a policy of stigma over fines. First, in addition to the conclusion that large fines restrict productivity growth, the authors caution that the effects of liability reform within states may be due to a reallocation of costs among the industries or states studied, signifying that national productivity may not necessarily show the same effects as those in the states studied.<sup>119</sup> Further, decrease liability reforms that reallocate costs between industries within a state may actually lead to greater overall costs to social well-being<sup>120</sup> where costs are externalized when the reforms compromise product quality and leave consumer injuries

rate *quadrupled* for children with leukemia due to the alkaloid vincristine found in the rosy periwinkle of Madagascar. *See id.* Vincristine sells at \$100 million annually, an economic incentive for further rainforest research. *See id.* THE ECONOMIST dismisses rainforests as a medicinal source, but acknowledges that three existing anti-cancer drugs, Taxol, Camptothecin, and homoharringtonine are rainforest discoveries. *See Shaman Loses Its Magic*, THE ECONOMIST, Feb. 20, 1999, at 77. Further, the National Cancer Institute predicts that it will need to screen an average of 50,000 plants in order to find one cancer or AIDS effective compound, and 10,000 plants to find additional disease-fighting compounds. *See Nira Worcman, Prospecting for Drugs; Incentives for Countries Preserving a Diversity of Plant Species*, TECHNOLOGY REVIEW, Oct. 1992, at 16. The NCI has contracted research institutions to the tune of \$6.4 million to collect rainforest plants, and planned to invest approximately \$7.5 to award grants as incentives for furthering such research. *See id.*; *see also* James Drozdowski, *Saving an Endangered Act: the Case for a Biodiversity Approach to ESA*, 45 CASE. W. RES. L. REV. 553, 601-02 (1995). Aggressive funding in the face of such numbers evidences that preserving rainforests to research their medicinal properties has great expected value, contrary to THE ECONOMIST's view.

<sup>118</sup> Romic Environmental Technologies in Palo Alto, California, has repeatedly committed worker health and safety violations. The EPA discovered Romic violated over 37 such regulations and lied in the presence of federal authorities. Until at least 1998, the state of California continued to allow Romic to operate under permit despite Romic's questionable employment policy. Romic fired one worker who refused to use defective air supply protective gear. A second worker who agreed to use the defective protective gear received brain injury due to suffocation. *See* Meiklejohn Civil Liberties Institute, *Issue Sheets: Facts and Questions for the First United States Report Under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1999), at 42 (on file at Meiklejohn Civil Liberties Institute, Berkeley, CA).

<sup>119</sup> *See* Campbell, et al., *supra* note 9, at 279-80.

<sup>120</sup> The authors use the term, "welfare." *See id.* at 280.

uncompensated.<sup>121</sup> If true, these possibilities also point to a situation in which states should apply a labeling model of stigma sanctions rather than a pricing system of fines. Where decrease reforms that reduce fines allow defective, harmful corporate practices and products to continue, a policy that imposes a label of stigma upon defective processes or products will be more likely to motivate corporations to internalize costs.

¶57 The significance of a stigmatizing label is that the label identifies the social harm and holds the offending corporation accountable through its concerns for maintaining reputation and through information that is readily available to the consumer, independent of the corporation's location.<sup>122</sup> Therefore, one strength of a stigmatizing label is its ability to decrease the value of the offending corporation's brand and reputation. The other element that makes a stigmatizing label effective is its information carrying capacity. Consumers who have access to the information that a product carries on its attached stigma label can hold the offending corporation accountable for irresponsible behavior, regardless of whether the corporation has relocated. Because a stigmatizing label's impact on corporate reputation is therefore likely to have widespread effects,<sup>123</sup> corporations will be deterred from conduct that would warrant society's application a stigmatizing label. A policy that creates the threat of a court-imposed stigma label can therefore decrease harm to consumers and the market.

### 1. Deterrence through a stigma label is more efficient than imprisonment

¶58 Imprisoning corporate offenders can be socially costly where imprisonment of a productive employee hinders a company's ability to contribute to society. Courts' current resort to imprisonment as a sanction for corporate offenders may be due to an acknowledgment of the normative theory of punishment that expresses social condemnation. However, a stigmatizing model of product labeling could also express condemnation without the resulting loss in efficiency. Therefore, it may be more appropriate to operate under a model of sanctioning that labels intolerable corporate products and processes with stigma rather than imprisoning the offender.

### 2. A stigmatizing label is still effective absent deep pockets

¶59 A policy of implementing stigma warning labels avoids the problem of a defendant who can't afford to pay. A defendant with no assets in a fining system will never be sued and so will continue socially undesirable behavior. However, in a stigmatizing system, a defendant corporation with few assets will still be motivated to adjust its actions in order to protect its reputation.<sup>124</sup>

### 3. Stigma avoids the problems of both predictability and unpredictability of fines

¶60 In a stigmatizing penal system, a corporate offender will be unable to view the punishment as a fixed cost of doing business around which it can plan a budget. It also may be more fair to

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<sup>121</sup> See *id.*

<sup>122</sup> That a stigma label's effect on corporate reputation is independent of the corporate location addresses the issue that liability reforms may induce corporations to relocate to states with friendlier policies under the "Delaware effect." See *id.*

<sup>123</sup> Because the stigmatizing label always accompanies the product when sold, the effect of stigma may be a widespread as the product's range of distribution.

<sup>124</sup> See Rasmusen, *supra* note 65, at 536.

defendants in that a policy of imposing stigma additionally avoids the unpredictability of uncapped, large jury awards or fines that may threaten a corporate offender with financial ruin. It may be that the corporation, though guilty, nonetheless provides society with a good that is worthwhile to continue producing.

4. Stigma labels as a sanction for intolerable corporate behavior supports a free market.

¶61 Stigma sanctions are somewhere between fines and imprisonment where the consumer is concerned<sup>125</sup> and although the corporation might not be literally prohibited from continuing to produce products, it will be discouraged from engaging in practices that a disapproving market will not support.

¶62 Further, a stigmatizing system of warning labels supports what Green Party presidential candidate and consumer advocate Ralph Nader calls the “first principle of consumer protection,” which is “shopping around.”<sup>126</sup> Where stigmatizing warning labels act as information carriers, consumers can make informed choices to support the production of the best and most efficient processes, products, and services on the market.<sup>127</sup> Where there is no stigma label, the consumer loses information and power to make a choice to encourage socially desirable behavior and discourage socially undesirable behavior. An uninformed consumer may then continue to support a defective process, product or service, creating inefficiencies where more information would result in more efficient choice.

¶63 For example, products produced by child labor and underpaid workers continue to be provided in the market in part because consumers are unaware of the socially undesirable conditions they are supporting.<sup>128</sup> Informing consumers of this cause and effect through adverse publicity could discourage consumers from purchasing from those companies, and encourage companies to create minimum wage jobs, thereby reducing the number of workers who depend upon publicly funded food stamps.<sup>129</sup> Stigma attaches to both buyer and producer, enforcing the preferred societal behavior of both.

5. A labeling model of stigma is capable of achieving marginal deterrence

¶64 Optimal levels of deterrence can be achieved in that stigma in its many articulations is an inherently rich carrier of consumer information. As such, marginal deterrence is achieved when the information communicated accurately reflects the type and degree of injury that has occurred. An adverse publicity campaign in the media using stigmatizing labels, for example, could differentiate between different degrees of injury, and the effect upon the corporation would in theory be proportionate to its crime, as measured by the recipient community’s social norms and standards. Likewise, the accurate and specific information that a stigmatizing warning label carries could effectuate proportionality in deterrence when the severity of the sanction is

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<sup>125</sup> Thanks to Professor George Shepherd for this insight.

<sup>126</sup> Ralph Nader, Speech, *NAPIL 1999 Public Interest Law Conference*, Consumer Rights Panel, Washington, D.C. (Oct. 31, 1999).

<sup>127</sup> See Richard T. Miller, *Stock Exchange Inquiry: Problems with Disclosure of Preliminary Merger or Acquisitions Negotiations*, 11 J. CORP. L. 715, 720 (1986) (public disclosure in stock exchange is efficient because the investor can make an informed choice); see also Rasmusen, *supra* note 65, at 536 (noting that stigma acts to increase efficiency because the greater information available leads to greater allocative efficiency).

<sup>128</sup> See Mokhiber, *supra* note 12, at 16-17. Sam Walton, the owner of Wal-Mart, built his empire “on the backs of child laborers and an “underpaid, unorganized workforce, a large percentage of whom qualify for [publicly funded] food stamps.” *Id.* at 17 (citing BOB ORTEGA, IN SAM WE TRUST: THE UNTOLD STORY OF SAM WALTON AND HOW WAL-MART IS DEVOURING AMERICA).

<sup>129</sup> See *supra* notes 32-38 and accompanying text.

measured against the very same community standards that determine what conduct constitutes a crime.

¶65 A policy of stigmatizing warning labels also lowers information costs when adverse publicity and information contained within the stigma label easily carries information to the consumer in a free market. Transaction costs may be lower for the consumer who has product information more readily at his or her disposal. The costs that are reduced may be both the monetary costs usually incurred in collecting product information, and costs of time.

### *B. Norms Theory Supports A Labeling Model of Stigma Over Fines*

¶66 Based upon Kahan's emphasis on the importance of sanctions that accurately express societal norms, a stigmatizing system of warning labels that invokes community norms to affect corporate reputation succeeds in deterring corporate misconduct where a fining system incapable of communicating social norms fails. If the corporation can afford the price of the fine and it is advantageous to continue the illegal practice, the corporation will continue the harmful behavior. The corporation will treat the fine as a predictable fixed cost where society, uninformed as to true costs, accommodates corporate behavior that pursues company profit by imposing its costs on society. Corporate policy in a fining system may injure consumers by relying solely upon cost-benefit analysis in strict, traditional economic terms that do not account for the benefits of a broader definition of social well-being. A system implementing stigma labels could support such well-being through public education.

¶67 For example, the second biggest selling corporation in the world,<sup>130</sup> General Motors (GM), is a corporation that has exhibited what can be considered intolerable corporate misconduct by taking advantage of the social accommodation inherent in a fining system that allows a corporate offender to budget around social prohibitions. GM deliberately implemented policies that violated consumer health and safety due to a cost-benefit analysis that "trumped safety concerns."<sup>131</sup> For over a decade, GM knew that the design and placement of gas tanks in its cars caused an increased risk of gas tank explosions that safer, available alternatives could avoid. However, GM refused to spend \$8.59 per car in design changes that would reduce the risk of gas tank explosions. GM's reasoning was based upon a memo<sup>132</sup> that determined that at a rate of 500 "burned deaths" due to fuel-fed fires from GM cars, "burned deaths" would cost GM \$2.40 per vehicle, but it would not be efficient for GM to pay more than \$2.20 per car for each "burned death."<sup>133</sup> Public Citizen reports that even though "GM had the technology to make its cars safer by moving the fuel tank...[GM]...failed to implement safety changes because of cost and other factors...GM decided it was cheaper to pay the lawsuit damages than to fix the gas tank defect."<sup>134</sup> GM had the tools to save human life, but it made a deliberate decision to take

<sup>130</sup> GM reportedly has sales of \$173.22 billion, second in the world only to Exxon Mobil. Morgan Stanley Capital International, Inc., *How the Giants Stack Up*, BUS. WK., July 10, 2000 at 109. The year previous, GM's average yearly sales reportedly were \$162 billion, or \$442 million daily. Letter from Public Citizen's Congress Watch, *supra* note 13.

<sup>131</sup> Public Citizen's Congress Watch, *supra* note 13.

<sup>132</sup> The title of the memo: "Value Analysis of Auto Fuel Fed Fire Related Fatalities." *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> In the July 1999 case of *Anderson v. General Motors* where six motorists in 1993 were severely burned because their 1979 Chevrolet Malibu exploded upon impact with a drunk driver, a Los Angeles jury awarded a record \$4.9 billion in its verdict against GM: \$107 million in compensatory damages and \$4.8 billion in punitive damages. *Id.* The jury determined that GM was 95 percent responsible. In August 1999, the Superior Court reduced the punitive

advantage of social accommodation in a fining system to continue a practice of endangering the lives of people traveling on the roads in or around GM cars. The threat of intolerance in a stigmatizing warning label system, through the possibility of non-monetary yet costly reputation expenses, might have deterred GM from externalizing corporate costs onto society through human lives lost and injured.

¶68 The plaintiffs in the GM case recovered a large damage award, most likely on the theory that the monetary award must be enough to punish and to deter.<sup>135</sup> While the monetary award may have been large enough to send a stigmatizing message that effectively accomplished those ends, the fines may have done so at a cost of sacrificing economic efficiency to society. It has been found that liability reforms that enlarge large damage awards to punish and deter corporate misconduct may cost the community by restricting employment and productivity.<sup>136</sup> In subsequent cases of intolerable corporate misconduct then, instead of massive fines, an alternative sanction of stigmatizing warning labels that both communicates social intolerance and also deters would be more appropriate. Further support for implementing a policy of stigma over massive fines comes from the CPSC. CPSC Executive Director Gilbert states, “Advertising and negative publicity is a much stronger deterrent [to corporate misconduct] than money.”<sup>137</sup>

1. Undesirable behavior remains undeterred in a pricing system that cannot enforce desired norms

¶69 Recently, Bridgestone/Firestone’s Japanese parent, Bridgestone Corporation, planned to reserve funds of \$350 million to cover the costs of recalling tires.<sup>138</sup> In a corporate nightmare witnessed by a worldwide audience, the U.S. Congress is conducting investigations into the link between faulty Firestone tires and numerous fatal road accidents involving cars, such as the Ford Explorer, which used those tires.<sup>139</sup> Both Ford and Firestone have faced lawsuits involving tire problems in the past.<sup>140</sup> However, Ford and Firestone imposed a gag rule upon plaintiffs who wished to settle in those previous cases.<sup>141</sup> Because the gag rule was a condition of settlement, federal safety officials and the public were not alerted to those previous complaints of tire problems.<sup>142</sup>

¶70 In other words, the gag rule, that Ford and Firestone imposed, likely functioned with an effect of insulating Ford and Firestone from just this type of federal government scrutiny, public

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damages award to \$1.09 billion but emphasized that GM deserved punishment for designing a fuel tank “in order to maximize profits, to the disregard of public safety.” *Id.*

<sup>135</sup> Punitive damages serve to punish abhorrent, social deviancy and to deter both the defendant and others from such future conduct. *See id.*

<sup>136</sup> *See* Campbell, et al., *supra* note 9, at 277.

<sup>137</sup> Despite the lack of empirical testing, it is possible to see, based on existing knowledge of deterrence, that stigma, as an effective behavioral sanction in a psychological dimension, creates more deterrence to lawlessness than does imprisonment or other sanctions. *See* Kahan, *supra* note 16, at 638–40.

<sup>138</sup> *See* Barnaby J. Feder, *Unusual Line of Business for Lawyers*, N.Y. TIMES Aug. 16, 2000 at (C)(1). In an ad placed by Ford, the tires affected in the recall are all Firestone ATX, ATX II’s of P235/75R15 size and P235/75R15 Firestone Wilderness AT tires produced in Firestone’s Decatur, Illinois plant. Advertisement, N.Y. TIMES, Sept. 24, 2000 at A47.

<sup>139</sup> *See* Keith Bradsher, *Tire Deaths are Linked to Rollovers*, N.Y. TIMES, Aug. 16, 2000, at C1. Ford was the car manufacturer that installed most of Firestone’s faulty tires. *See id.*

<sup>140</sup> *See* Editorial, *When Tires Start Blowing Apart*, N.Y. TIMES Aug. 11, 2000 at A18.

<sup>141</sup> *See id.*

<sup>142</sup> *See id.*

outcry, and media pressure for more information that could increase the risk of liability for those companies, and which the companies now face. As early as 1997, Firestone had received claims regarding failure of its tires, but Firestone did not recall its tires until three years after the company was aware that such complaints existed.<sup>143</sup> What could be the reasoning underlying this apparent lag in corporate responsiveness to consumer health and safety issues?

¶71 Presumably, a company operating solely under traditional monetary cost-benefit reasoning, decides against making changes in product design or manufacturing behavior - even if such changes would prevent the recurrence of complaints of property damages, personal injuries, and deaths - if that company views the monetary expense of making such changes prohibitive. Rather than face public outcry or admit its product design failings, a company might decide to impose a gag rule in its settlements with an agreement by the corporation to be fined by the plaintiffs, in exchange for the plaintiffs' promise not to malign the corporate reputation with disclosure.

¶72 However, a company operating under such reasoning errs by making a decision under what is ultimately an inaccurate framework for accurate cost assessment. More specifically, a gag rule that stifles information and communication, by hiding true costs, also fails to create the context necessary for communicating what is needed to create true efficiency. For example, human lives lost and injured are social costs that must be considered in an accurate and efficient accounting that reflects not only values that are monetary, but values that are social norms. By cloaking relevant costs in a gag order and a settlement that results in a mere fine, true costs that otherwise would be illuminated by public reaction to the information that a label of stigma imparts, are also obscured. This permits injury to continue, without society's communication of social intolerance that would force an end to inefficient social expenditures of human life. A system that heightens public awareness through stigma, if implemented, would illuminate that choosing to compromise safety in a balancing act with any other consideration, in this context, is too costly to be permissible, and is costly to the degree of being intolerable.<sup>144</sup> When a stigma label illuminates true cost, further harm to consumers would be prevented when those consumers exercise a choice to protect themselves against a known, compared to unknown, risk. Further, under an efficient labeling model of stigma, consumers are also free to assume the risk and support a faulty behavior or product that a corporation is free to continue to produce.<sup>145</sup> The important factor is that assuming the risk is made from an informed decision.

¶73 As applied in the instances of those past complaints that Ford and Firestone faced, stigma, rather than the gag rule that was ultimately imposed, might have saved Ford and Firestone from

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<sup>143</sup> See Keith Bradsher, *Ford Says Firestone Was Aware of Flaw in Its Tires by 1997*, N.Y. TIMES, Aug. 14, 2000, at A1.

<sup>144</sup> See *id.* (stating that automakers involved in the Firestone tire recall said they "set an appropriate balance between customer satisfaction and safety."). The use of the term, "balancing act" here implies that a compromise was made to safety and communicates the idea that lowering safety thresholds was considered permissible, rather than intolerable.

<sup>145</sup> In class action suits against tobacco companies, the tobacco companies argued that smokers assumed the risk of smoking, yet tobacco companies were unsuccessful in using that defense where a Florida jury awarded plaintiffs punitive damages of \$145 billion. See Laura Parker & Deborah Sharp, *Sentiment on Tobacco Shifts; Jurors in Fla. Smokers' Case Show Disdain for the Industry*, USA TODAY, Jul. 17, 2000 at 3A. At least one juror was swayed by the fact that tobacco companies *concealed* the risks that they claimed plaintiffs had willingly assumed. See *id.* (juror implying the verdict would have been different if tobacco companies "gave people the facts.") In contrast, a policy of stigma would truthfully reveal the risks while allowing consumers to knowledgeably assume those revealed risks, if they so choose.

the prospect of many lawsuits that they presently face.<sup>146</sup> Stigma, as an information carrier, could have alerted the public and federal safety officials, and pressured Ford and Firestone into behavior resulting in a more efficient social outcome than what they likely face now.

¶74 The principle that a pricing system expresses permissiveness and fails to communicate intolerable conduct, is further illustrated in a political context by Johnny Chung in his testimony before Congress for improper contributions to the Democratic Party. Chung unaffectedly stated that from observing American politics, he understood “the American Way” to mean that paying gives an individual access to the President and political power.<sup>147</sup> Chung’s perception of the democratic process is an example of how the pricing system of trading money for influence in politics creates a culture that Chung perceived to express accommodation for his questionable behavior. Currently, bi-partisan attempts for campaign finance reform demonstrate that the public recognizes the need for a policy with the ability to communicate intolerance of “soft money”<sup>148</sup> contributions. It appears that the legislation is motivated by the public’s need to express not mere condemnation but intolerance that will remedy politicians’ current practice of politicians operating within a pricing system of accommodating select business interests in exchange for business’ contributions of large amounts of soft money to politicians’ campaigns. This example, as in previous examples, shows that stigma in a labeling model is both a socially preferable penalty and a more effective means to deter undesirable corporate behavior, compared to accommodation in a pricing system.

## 2. A permissive pricing system of fines lowers social standards

¶75 Widespread accommodation and acceptance of corporations’ lack of social accountability, as expressed by a permissive pricing system of fines, lowers the social standards, customs, and norms of respect for peoples’ lives, dignity, health, and the environment. These four factors are compromised in the long run because the subsequent policies that result from a compromised social standard will reflect a lower standard of care, spiraling downwards.<sup>149</sup>

## 3. A stigma label ties social costs to reputation costs, encouraging corporate accountability

¶76 A labeling system of stigma deters intolerable corporate behavior when it affects corporate reputation. This is true because the information that a stigmatizing warning label carries to the consumer in a free market enables consumer choice that can eliminate from the market products of unacceptable quality along with processes that create products in socially undesirable ways. For example, Home Depot promised to stop selling wood products from endangered areas of ancient forests after efforts by the Sierra Club and other environmental advocates created a threat of stigma in the market. The social advocates implemented a campaign of public information

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<sup>146</sup> Plaintiffs will not necessarily lose individual compensation awards with the imposition of stigma upon criminal corporations. This is because stigma labels function to communicate true cost, including social cost. See Calabresi, *supra* note 1, at 722-23.

<sup>147</sup> See Alan C. Miller & William C. Rempel, *Former Democratic Donor Defends His Contributions, Politics: Speaking before House panel, Chung calls efforts to parlay political access 'the American way,'* L.A. TIMES, May 12, 1999, at A1.

<sup>148</sup> “Soft money” is money unregulated by federal campaign law that is given for the purpose of building up the political party. See Samuel M. Walker, *Note: Campaign Finance Reform in the 105<sup>th</sup> Congress: the Failure to Address Self-Financed Candidates*, 27 HOFSTRA L. REV. 181, 184 n.16 (1998) (citing Center for Responsive Politics, *Coming to Terms: A Money-in-Politics Glossary* 23, 26 (1995), at 14). For instance, soft money can finance political parties’ bumper stickers and voting drives. See *id.* However, soft money can also benefit specific candidates as a result and effect of those party-building activities. See *id.*

<sup>149</sup> See Peter H. Huang & Ho-Mou Wu, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J.L. ECON. & ORG. 390, 391 (1994)(notes that social norms rather than explicit laws sometimes control behavior).

that resulted in 20,000 postcards requesting that Home Depot end its practice of buying wood from loggers of old-growth forests.<sup>150</sup> Further demonstrating the value of reputation, Home Depot also planned to advertise its good works.<sup>151</sup>

¶77 A second example that shows reputation is valuable to a corporation is the Feminist Majority's effectively influencing Unocal so that the oil corporation took action to address accusations that it was violating the rights of Afghani women.<sup>152</sup> As shown in these examples, true and accurate information, such as that which a stigma label can convey, by communicating intolerance can successfully impact corporate reputation and deter socially intolerable behavior. 4. Labeling as a stigmatizing function has been successfully used as a deterrence measure that expresses condemnation

¶78 Internet auctions such as Ebay, Yahoo, and Amazon.com effectively stigmatize when buyers' condemnation means others will forgo buying. In other words, a stigmatizing system that labels products and sellers with information akin to a warning label naturally has arisen in a new medium for voluntary transactions where there is a need to express condemnation or communicate intolerance for irresponsible merchant behavior.<sup>153</sup>

## VI. Caveats and Conclusions

¶79 First, it could be argued that it is unfair to the corporate defendant when stigma affects future productivity. In other words, a stigmatizing warning label operates as a fine against the market value of a corporation's reputation, and the label's effect further acts as an effective economic deterrent to corporate misconduct in the indefinite future.<sup>154</sup> However, deduction from future productivity is appropriate in cases where the stigma label addresses an intolerable behavior, and when the purpose of applying the stigmatizing warning label is to ensure to the greatest extent that the intolerable behavior will not continue.<sup>155</sup>

¶80 In fact, there are some undesirable behaviors which are not always undesirable and become socially acceptable or beneficial at some point, so that condemnation via stigma can properly give way to a pricing mechanism. For example, a corporation may unintentionally destroy a consumer's property due to a faulty product or process. However, when that corporation alerts consumers to product defect in the interests of consumer health and safety, the corporation demonstrates no malicious intent or fraud. It also demonstrates desire and willingness to reimburse. Therefore a fine is appropriate, because even though it is socially undesirable to hurt another person, it is socially desirable to reinforce a voluntary "coming clean" rather than penalize the corporation through public condemnation.

<sup>150</sup> See The Planet, *Updates*, (Oct. 1999), at 7.

<sup>151</sup> Home Depot volunteers built a playground in Los Angeles and a house for Habitat for Humanity. See Patti Bond, *Good Deeds on Display: Home Depot, like many companies, is highlighting its community work in ads*, ATL. J. CONST., Oct. 24, 1999, at H1.

<sup>152</sup> See Meiklejohn Civil Liberties Institute, *supra* note 118, at 42.

<sup>153</sup> However, there could also be somewhat disreputable sellers and flawed products that buyers are nevertheless willing to accommodate. Here, a pricing system arises that lowers the purchase price where the market is willing to accommodate the flaws.

<sup>154</sup> The publicity sanction of 18 U.S.C. § 3555 limits to \$20,000 court-imposition of defendants' cost in giving notice. See *supra*, note 3. However, by definition, one could interpret court-imposed procedural costs of defendants' giving notice as independent and distinct from market-imposed costs to corporate reputation.

<sup>155</sup> See Kahan, *supra* note 3, at 385.

¶81 If the corporations in question behaved with integrity, their release of information could protect society by lowering the costs that would otherwise be imposed upon an uninformed society: bodily injury, property damage, and investigation of concealed corporate misconduct. In addition, the corporation's voluntary "coming clean" coincides with the socially desirable behavior of one taking responsibility for one's actions, therefore internalizing costs in an economically efficient manner. Moreover, stigmatizing a corporation for voluntarily coming clean would discourage this preferable and efficient behavior, driving up investigative costs and enabling the social harm to continue.

¶82 Alternatively, society could utilize positive reinforcement that operates with the mechanisms of a positive stigma, opposite in effect to negative stigma, and publicize the efficient and socially desirable behavior of a corporation. Implementing a model of stigmatizing warning labels that allows for messages of positive stigma would help create a culture where other companies in similar situations are encouraged to behave in a similarly socially desirable way.

¶83 Second, there may be constitutional concerns. For example, does reputation imply a liberty or property interest that the due process clause protects? However, the Supreme Court determined that reputation alone does not invoke due process.<sup>156</sup>

¶84 Third, implementation of a stigmatizing system should take care to apply pressure to a defendant together with an expectation that defendant's behavior will improve. This precaution avoids a reaction from the defendant corporation in which it is unmotivated to stop the behavior because there is nothing to lose by continuing the behavior, and nothing to gain by stopping the it. For example, it should be a social goal that a policy of attaching stigma will have a goal of spurring behavioral improvement. Such was the case in property values that rebounded after stigma attached to a toxic area of land.<sup>157</sup> The information a stigmatizing label carried enabled a decision to clean-up the area, and as a result, the area became viable for either commercial or residential use once more, and property values increased.

¶85 Fourth, the effectiveness of a stigmatizing system depends upon defendants' capacity to respond to stigma. If a defendant corporation doesn't respond to a stigmatizing sanction because the corporation doesn't care what society thinks, the behavior isn't deterred. It has been said that stigma is effective only for "someone with a reputation to lose."<sup>158</sup> However, even in the case of an uncaring defendant, the market will operate to exclude the defendant's participation by making the defendant enterprise unprofitable and unsustainable.

¶86 Fifth, the effectiveness of a stigmatizing warning label may depend upon the label's ability to communicate sometimes abstract market dynamics to the average consumer, which may be an unrealistic expectation. However, a stigmatizing warning label that utilizes easily identifiable symbols rather than words may address this problem.

¶87 Finally, even if stigma as a vehicle for public information is accessible, such a system could place too great a demand upon consumers, requiring consumers to remember, learn, and synthesize a great deal of information that they may have no intention of retaining.<sup>159</sup> On the

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<sup>156</sup> See *Paul v. Davis*, 424 U.S. 693, 711-12 (1976); See also Roger Pearson, *BCCI Ruling Sets Back Stigma Claims*, THE LAWYER, Aug. 2, 1999. *But cf.* Stephen Saltburg, *Burdens of Persuasion in Criminal Cases: Harmonizing the Views of the Justices*, 20 AM. CRIM. L. REV. 393, 405 (1983). *But cf.* *Codd v. Vegler*, 429 U.S. 624 (1977)(employer may be required to clear false and defamatory impression of a terminated employee where impression disseminated by employer).

<sup>157</sup> See Larry Dale, et al., *Do Property Values Rebound From Environmental Stigmas? Evidence From Dallas*, 75 LAND ECON 311 (1999).

<sup>158</sup> Rasmusen, *supra* note 65, at 536.

<sup>159</sup> See Lehto and Miller, *supra* note 96, at 189-192.

other hand, regardless of whether a consumer is caring or uncaring about the significance of a stigmatizing warning label, or whether the consumer remembers details, labels that are directly affixed or adhered onto the offending corporation's product can remedy that concern by demanding consumers' attention at the critical point of purchase.<sup>160</sup>

¶88 The changes in meaning costs that a labeling model of stigma achieves, in contrast to a pricing system of fines, would change the accounting of the true cost of intolerable corporate behavior to a more accurate estimation. Behavioral change could result in a new context of cost benefit analysis that would try to adjust for the new cost values as seen from the point of view of both corporate offender and consumer. The result would be an increased efficiency where information through stigma labels will enable consumers and corporations to recognize the true costs of their consuming and producing behaviors. True costs will be recognized because the information a stigma label provides brings to light previously unarticulated, unaccounted for social harms. Once true costs are accurately communicated to the community, the community will be empowered to make a more accurate determination of appropriate sanctioning that both upholds and creates less tension in relation to community norms and standards – whether it be accommodation or intolerance that most accurately describes a state of social efficiency.

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<sup>160</sup> See *id.*, *supra* notes 95-97 and accompanying text.