American University Business Law Review

Volume 13 | Issue 2 Article 1

2024

Accidental Corporate Social Norms

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ACCIDENTAL CORPORATE SOCIAL NORMS

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Corporations deliberately attempt to shape social norms through advertising, publicity, and political contributions. This paper considers the threat of corporations' accidental influence on social norms and expectations. When corporations have accidents, we frequently focus on direct harms: an oil platform may catch fire and explode, leading to environmental and human losses. These accidents may also impact social norms, though. If users stay with a dominant social networking firm despite repeated data privacy breaches, for example, people might come to accept a lack of data privacy. Dominant firms may inadvertently facilitate rapid reshaping of societal expectations. Judicial recognition of this threat can pave the way for more stable law that provides opportunity for more organic societal development.

* Associate Professor of Law, University of Houston Law Center. The author wishes to thank Will Thomas, Jessica Bregant, Roy Shapira, Mihailis Diamantis, Dave Fagundes, Daniel Morales, the participants of the 2022 National Business Law Scholars Conference, and the editors at the American University Business Law Review. Thank you to Megan Kibler for her excellent work in research assistance.

I. INTRODUCTION

Corporations have accidents, and large corporate accidents may cause disproportionate harm to victims. A petroleum company's loss of an oil drilling platform in the ocean can result in immediate, dramatic loss of life and environmental damage.

For large corporations, these accidents may also have an overlooked impact on social norms and expectations. Consider Facebook's power in social media. In 2015, media reports revealed that Cambridge Analytica had obtained Facebook (now Meta) data in support of Ted Cruz's presidential campaign.[1] Such data usage was in violation of Facebook's policies, and Facebook attempted to restrict such misuse. By 2018, new reporting uncovered further Facebook involvement and continued usage of data in supporting now-former-President Donald Trump's campaign.[2] While the discovery raised alarms among users, less clear was whether such alarm would actually convert to less user interaction with Facebook.[3] Facebook's dominant social networking position likely led to users' continued usage of the company's products. Four years later, Facebook would settle a privacy-based class action concerning improper consent and notice about facial recognition technology.[4]

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1. *See* Harry Davies, *Ted Cruz Using Firm That Harvested Data on Millions of Unwitting Facebook Users*, GUARDIAN (Dec. 11, 2015, 5:22 PM), https://www.theguardian.com/us-news/2015/dec/11/senator-ted-cruz-president-campaign-facebook-user-data.

2. *See* Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach*, GUARDIAN (Mar. 17, 2018, 6:03 PM), https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election; Matthew Rosenberg et al., *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. TIMES (Mar. 17, 2018), https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html.

3. *See* Jessica Guynn, *Delete Facebook? It's a Lot More Complicated Than That*, USA TODAY (Apr. 26, 2018, 3:36 PM), https://www.usatoday.com/story/tech/2018/04/25/delete-facebook-nope-facebook-growing/551535002/ .

4. *See In re* Facebook Biometric Info. Priv. Litig., 522 F. Supp. 3d 617, 620 (N.D. Cal. 2020); FACEBOOK BIOMETRIC INFORMATION PRIVACY LITIGATION, https://www.facebookbipaclassaction.com/ (last visited Mar. 9, 2023).

Facebook's continued privacy issues could have a variety of impacts on the marketplace. Facebook users may grow accustomed to privacy breaches, leading to a lack of privacy expectations. Although they might have started with greater personal interests in privacy, repeated exposure to such violations may change their personal preferences. Facebook users' expectations might also have changed in the marketplace regarding software and services more broadly. Given the inability of a dominant firm such as Facebook to protect their privacy, users might come to have reduced expectations regarding other firms as well. Facebook users, and even potential Facebook users, might also interpret others' continued participation with Facebook as expressive: that most users do not care about privacy, since they continue to use Facebook. If other users do not care about privacy, perhaps the questioning user should similarly disregard her previously stronger privacy interests.

Similarly, this change in expectations could affect potential competitors. Companies that wished to differentiate themselves by emphasizing user privacy might find their claims incredible and ineffective. They might be convinced that potential users do not really care about privacy, given their ongoing Facebook usage — even if, in reality, potential users did care about privacy. If potential users' preferences did change, then a potential competitor's decision to disregard user privacy might be correct in the sense that it would be unprofitable for the firm to focus on privacy.

Even if potential users cared about privacy, they also might not trust smaller companies: if the dominant firm is unable to limit privacy breaches, how could users expect smaller companies to do so? Facebook's repeated privacy issues may result in changes in how society understands communication. What should people make of Facebook's repeated claims that it respects and protects user privacy in light of the repeated privacy breaches? An optimistic approach is that people would be suspicious of only Facebook's claims. A more cynical opinion would be that society grows to distrust anyone's claims regarding user privacy, rendering trust and contracts more difficult at large.

Psychologists studying these phenomena under the umbrella of attribution theory typically attempt to isolate how third parties view the allocation of responsibility for the accident.[5] If a person suffers severe burns after spilling a cup of fast food coffee, are observers likely to blame the fast food restaurant or the consumer?[6] For both reputational and civil

5. *See* Whitney Ginder et al., *Effects of Internal–External Congruence-Based CSR Positioning: An Attribution Theory Approach,* 169 J. BUS. ETHICS 335, 366 (2021) (analyzing the factors that contribute to consumer attributions and behavioral reactions to a corporation's perceived intrinsic and extrinsic motivations as an actor).

6. *See* Caroline Forell, *McTorts: The Social and Legal Impact of McDonald's Role in Tort Suits*, 24 LOY. CONSUMER L. REV. 105, 112–13 (2011) (discussing how

liability reasons, corporations are likely to take actions that reduce accident attribution to the corporation.[7] The potential perverse impact is that such efforts by the corporation to protect itself and shift accident attribution away from itself may lead to greater shifts in social norms. This shift in the Facebook example might occur by society attributing data breaches to the customer rather than Facebook. If responsibility for the breaches lies with the customers, people may generally come to believe that no one really cares about personal data privacy.

Dominant firm accidents, and the subsequent responses, present a potential detrimental harm to social norms. There are no easy answers, however, when addressing this potential detrimental social norm harm. The evolution of social norms and expectations can be difficult to control. One ideal solution would be to stop the accidental conduct itself, but as repeated corporate scandals suggest, doing so is not a trivial matter. As I discuss in Part IV, courts can at least play a modest role in recognizing this potential social norm harm in evaluating the reasonability of participants' beliefs and actions: people involved with dominant firms may face limited choices, and courts should be leery of furthering the impact of such firms' power.

II. THE POWER OF DOMINANT FIRMS

Large firms present a variety of challenges.[8] The most common discussion of some of these challenges comes from antitrust. A traditional antitrust concern is the large firms' use of market power to charge uncompetitively high prices and restrict outputs to the detriment of consumers.[9] The broader threats of large firms in big-tech include concerns about democracy and society itself.[10] Due to their size, large firms can

McDonald's uses media and marketing to attribute consumer behavior to an internal decision-making process unaffected by external factors).

7. *See id.* at 110 (highlighting that corporate entities attempt to limit liability in personal injury tort cases by framing such issues as involving individual freedom and personal responsibility).

8. *See, e.g.*, Michael B. Landau, *The Astounding Growth of "Big Tech" and the Lack of Enforcement of the Intellectual Property, Antitrust, and Contract Laws*, 30 ALB. L.J. SCI. & TECH. 1, 60 (2020) (concluding that the practices and market dominance of large tech firms have contributed to numerous issues regarding privacy, antitrust, and copyright violations); Roy Shapira, *The Challenge of Holding Big Business Accountable*, 44 CARDOZO L. REV. 203, 206 (2022).

9. *See, e.g.*, Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993) (noting "antitrust laws' traditional concern for consumer welfare and price competition"); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 107 (1984) (stating that "Congress designed the Sherman Act as a 'consumer welfare prescription" (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)).

10. *See, e.g.*, FRANKLIN FOER, WORLD WITHOUT MIND: THE EXISTENTIAL THREAT

cause greater harms that would be mild in comparison if committed by smaller entities.[11]

Another arm of concern regarding large firms is the difficulty in their governance.[12] Large firms may be relatively resistant to consumer pressures.[13] Prosecutors may also be hesitant to take aggressive action against firms that are "too big to fail" in the post-Enron era because they are concerned about the collateral damage to employees and associated entities that were not culpable for wrongdoing.[14] Prosecutors' failure to address corporate wrongdoing may engender disrespect and disregard for the law.[15]

This paper addresses the intersection of two areas of concern related to large firms: accidents and influence on social norms.

A. Accidents and Corporate Reputation

Setting aside deliberate corporate malfeasance, a major challenge for large firms is the potential for accidents.[16] I utilize the term accidents to

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OF BIG TECH (Penguin Books 2017) (discussing the impact the algorithms have on democracy); *Why Google Poses a Threat to Democracy and How to End That Threat: Before the Subcomm. On Const.* (statement of Robert Epstein, Senior Research Psychologist, American Institute for Behavioral Research and Technology) https://www.judiciary.senate.gov/imo/media/doc/Epstein%20Testimony.pdf.

11. *See* W. Robert Thomas, *The Conventional Problem with Corporate Sentencing (and One Unconventional Solution)*, 24 NEW CRIM. L. REV. 397, 411 (2021) (discussing Deepwater Horizon oil spill, PG&E's role in California wildfires, and Wells Fargo consumer account fraud).

12. *See, e.g.*, AM. ECON. LIBERTIES PROJECT, CONFRONTING AMERICA'S CONCENTRATION CRISIS: A LEDGER OF HARMS AND FRAMEWORK FOR ADVANCING ECONOMIC LIBERTY FOR ALL (2020), https://www.economicliberties.us/wp-content/uploads/2020/08/Ledger-of-Harms-R41.pdf.

13. *See* Wallace N. Davidson III et al., *Influencing Managers to Change Unpopular Corporate Behavior through Boycotts and Divestitures: A Stock Market Test,* 34 BUS. & SOC'Y 171, 181 (1995) (suggesting boycott announcements may be more effective than stock divestitures); Paul Sergius Koku et al., *The Financial Impact of Boycotts and Threats of Boycott*, 40 J. BUS. RSCH. 15, 16 (1997) (finding that boycotts increase value of target firms); Stephen W. Pruitt & Monroe Friedman, *Determining the Effectiveness of Consumer Boycotts: A Stock Price Analysis of Their Impact on Corporate Targets*, J. CONSUMER POL'Y 375, 382 (1986) (finding that boycotts decrease value of target firms).

14. *See, e.g.*, BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 1 (Harvard Univ. Press, Belknap Press 2014).

15. *See, e.g.*, Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191, 1210–12 (2015).

16. *See, e.g.,* Jane F. Barrett, *When Business Conduct Turns Violent: Bringing BP, Massey, and Other Scofflaws to Justice*, 48 AM. CRIM. L. REV. 287, 321–30 (2011) (discussing BP Deepwater Horizon oil spill and Massey Energy Company mine accident); McKay Smith & Garrett Mulrain, *Equi-Failure: The National Security Implications of the Equifax Hack and A Critical Proposal for Reform*, 9 J. NAT'L SEC.

describe results from corporate activity that no one within the corporation desires. Accidents are unintentional: people within in the corporate entity generally do not intend nor desire the specific accident, whether it is a corporate truck involved in a vehicular collision or a fire that breaks out on an oil platform. Because of their large scale of business, corporations may know, even with certainty, that accidents will occur with some frequency. A corporation that has 200,000 delivery drivers on the road knows that at least one will have a vehicular accident this year, even if it does not know which of its drivers will be involved. Nonetheless, those accidents are not desired.[17] There may be disagreement within the corporation as to the appropriate approach to reduce the risk of such accidents, but this is still distinct from individuals desiring the actual occurrence of an accident.[18] My central point of emphasis here is that my analysis is not on purposeful wrongdoing by a corporate entity, such as a firm whose core business is a Ponzi scheme. This analysis is on unintentional, undesirable wrongdoing.

The severity of the accident can vary. On one end is a mild accident, such as an employee suffering a paper cut. For this article's purposes, accidents must be sufficiently significant to draw public attention. For most entities, a single employee suffering a paper cut likely does not constitute an accident drawing such significance, as that harm is likely to

L. & POL'Y 549, 551 (2018) (responding to the Equifax data breach); Nilufer Oral, *PSSA for the Black Sea*, 35 U. HAW. L. REV. 787, 795, 801–03 (2013) (arguing for protecting of the Black Sea due to impacts from shipping accidents); Abigail E. André, *A Canary in A Coal Mine: What We Haven't Learned from Deepwater Horizon and How Courts Can Help*, 33 GEO. ENV'T. L. REV. 1, 32–33 (2020) (advocating for broader application by courts of Section 311 of the Clean Water Act in response to deep water drilling accidents to fully maximize the Act's deterrent and punitive effect); Robert L. Rabin, *Corporate Responsibility in Mass Disaster Cases*, 72 DEPAUL L. REV. 495, 507 (2023) (discussing tort law's effectiveness and shortcomings in deterring mass disasters, like oil rig explosions, and its ability to secure restorative compensation); Thomas H. Koenig & Michael L. Rustad, *Reconceptualizing the BP Oil Spill As Parens Patriae Products Liability*, 49 HOUS. L. REV. 291, 346–49, 391–92 (2012) (proposing that products liability, rather than nuisance, would enable maximum recovery for states and increased deterrence impact on oil industry defendants who "abdicate their duty to states"); Rory Van Loo, *The Revival of Respondeat Superior and Evolution of Gatekeeper Liability*, 109 GEO. L.J. 141, 150 (2020) (commenting on potential expansion of third party liability through respondeat superior or nondelegable duties to hold corporations liable for accidents like oil spills or trucking accidents).

17. It is possible that there may be malevolent individuals within an organization who desire such bad outcomes; such malice would justify individual criminal sanctions, and potentially corporate criminal sanctions.

18. *See, e.g.*, Mark Gold et al., *Stemming the Tide of Plastic Marine Litter: A Global Action Agenda*, 27 TUL. ENV'T L.J. 165, 202–03 (2014) (discussing ten proposed regulatory, governance, and corporate changes to reduce the amount of plastic marine litter, particularly, creating enforceable marine litter standards to effectively deter corporate violations of treaties).

go unnoticed by anyone besides the person suffering the cut. For a larger firm, if there is a mass outbreak of paper cuts, it is possible that those paper cuts would constitute an accident, as media might latch onto a story about such an outbreak. Severe accidents, such as the death of a customer or employee, would nearly always constitute an accident for purposes of public attention.

Strong causation and responsibility are not necessary here, simply association. For example, a corporate truck might be involved in a vehicular accident on a public highway in which a reckless drunk driver crashes into the truck. As a formal matter, the corporate truck is a but-for cause of the accident; if it had not been in that location at that particular time, it would not have been involved in the vehicular accident. Nonetheless, even if the corporate truck driver was complying with all rules and regulations and was not negligent, this unfortunate crash would still constitute an accident: the corporate entity would be associated with the bad outcome. Similarly, if a third party commits a random murder and dumps the victim's body onto a corporation's land, this could still constitute an accident to the extent that media and the populace focus on the tenuous connection to the corporation.

Although we may not think of litter or pollution as accidental, improper refuse disposal may fit into this accident rubric.[19] Some consumer goods companies have expressed concern about their labeled empty product containers being publicized on beaches or other public areas.[20] These corporations do not intend for their product packaging to be associated with improper waste disposal, even if they recognize the probabilities that consumers may not exercise responsibility after purchasing those products. The irresponsibility of consumers, or perhaps downstream waste management, is the most proximate cause in the chain leading refuse to become litter. Nonetheless, the corporation's identity may become linked to such irresponsibility.[21]

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19. *See id*.

20. *See, e.g.*, Josie Clarke, *Coca-Cola, PepsiCo and Heineken Products Make Up 23% of Branded Litter in UK*, INDEPENDENT, (May 6, 2022, 12:01 AM), https://www.independent.co.uk/climate-change/news/litter-pepsi-heineken-coke-uk-b2072713.html; BREAK FREE FROM PLASTIC, BRAND AUDIT REPORT 2018–2022: BRANDED– FIVE YEARS OF HOLDING CORPORATE PLASTIC POLLUTERS ACCOUNTABLE (2022) (naming the Coca-Cola Company the worst plastic polluter five years in a row).

21. *See, e.g.*, Maysoon Khan, *New York Sues PepsiCo in Effort to Hold It Responsible for Litter That Winds Up in Rivers*, ASSOCIATED PRESS (Nov. 15, 2023, 6:13 PM), https://apnews.com/article/pepsico-buffalo-river-drinking-water-new-york-59bcaa6bd324bab5c4c683fea2801db0.

I also emphasize that for this article's purposes, corporate accidents are detrimental, unlike, for example, the accidental discovery of penicillin.[22] Thus, the corporate response to accidents will be mitigation at some level. There are direct harms to victims, such as physical injuries to individuals in a motor vehicle accident and financial losses incurred in compensation, as well as diagnosis, prevention, and monitoring efforts. There is also the reputational loss for the corporation: corporations do not want to be associated with harm. Reputational losses may be associated with long term financial losses in the form of reduced interest from customers, partners, and capital markets.[23]

These losses may or may not involve litigation. Litigation may reveal information about comparative negligence in the accident, but the parties' choices in litigation may also impact reputation in a fashion distinct from the accident itself. In the McDonald's hot coffee scenario, the plaintiff's decision to litigate might engender greater societal sympathy for the corporation if some people already have cynical views that attorneys pursue nuisance settlements.[24] Conversely, others may be dismayed at what they feel is McDonald's unwillingness to settle on reasonable terms.[25]

Setting aside the broad question of whether litigation practices properly reflect societal interests, the general goal of the corporation will be to minimize its financial and reputational losses. Of particular interest is work by psychologists in attribution theory and situational crisis communication theory ("SCCT").[26] The study of SCCT, as the name suggests, aids corporations in understanding communication strategies after the occurrence of a crisis. SCCT uses attribution theory to understand how people attribute responsibility for a crisis.[27] When something goes wrong,

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22. *Compare* Simon Constable, *How the Enron Scandal Changed American Business Forever*, TIME (Dec. 2, 2021, 1:06 PM), https://time.com/6125253/enron-scandal-changed-american-business-forever/ (describing how the fall of Enron had detrimental impacts on the company and on the market), *with* Lexi Krock, *Accidental Discoveries*, PBS (Feb. 27, 2001), https://www.pbs.org/wgbh/nova/article/accidental-discoveries/ (describing groundbreaking discoveries that came from accidents).

23. *See* JASON PERRY & PATRICK DE FONTNOUVELLE, MEASURING REPUTATIONAL RISK: THE MARKET REACTION TO OPERATIONAL LOSS ANNOUNCEMENTS 1 (2005) (noting that a survey found that reputational risk is the "greatest potential threat" to market value and that reputation damage can "driv[e] away customers, shareholders, and counterparties").

24. *See, e.g.*, Andrea Gerlin, *A Matter of Degree: How a Jury Decided that a Coffee Spill Is Worth $2.9 Million*, WALL ST. J., Sep. 1, 1994, at A1.

25. *See McDonald's Settles Lawsuit of Woman Burned by Coffee*, LIAB. WK., Dec. 5, 1994.

26. *See generally* W. Timothy Coombs, *Attribution Theory as a Guide for Post-Crisis Communication Research*, 33 PUB. RELS. REV. 135, 135–139 (2007).

27. *See* Jack Carson, *External Relational Attributions: Attributing Cause to Others' Relationships*, 40 J. ORG. BEHAV. 541, 548 (2019).

do people blame the corporation for the crisis? Not surprisingly, a prior history of crises is detrimental: society is likely to blame a corporation for a current crisis when it has a history of similar crises.[28] Research in SCCT also finds that a corporation's prior reputation, separate from this question of prior crisis history, is also relevant to the attribution of blame.[29] Society is less likely to blame a corporation for a current crisis if the corporation has a good prior reputation.[30] Thus, a corporation seeking to protect its reputation regarding crises has two viable strategies: reduce the incidence of similar crises and/or treat others well in other contexts to develop a good reputation.

B. Influence on Social Norms

Beyond seeking a positive reputation, corporations have substantial interests in shaping social norms and expectations.[31] Social norms and expectations are constraints on human conduct that are distinct from legal requirements.[32] Social norms and legal requirements may overlap in certain areas such as morality: there are both social norms and laws against physically attacking a stranger. Social norms, though, are often more encompassing. There are various social norms that would not be enforced by law, such as friendliness or politeness when engaging with a stranger. Corporations can play a pivotal role in developing and facilitating norms, as some have sufficient power and scope to do so.[33]

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28. *See* W. Timothy Coombs, *Impact of Past Crises on Current Crisis Communications: Insights From Situational Crisis Communication Theory*, 41 J. BUS. COMMC'NS 265, 268 (2004); Se-Hoon Jeong, *Public's Responses to an Oil Spill Accident: A Test of the Attribution Theory and Situational Crisis Communication Theory*, 35 PUB. RELS. REV. 307, 308–09 (2009); Timothy P. Munyon et al., *Consequential Cognition: Exploring How Attribution Theory Sheds New Light on The Firm-Level Consequences of Product Recalls*, 40 J. ORG. BEHAV. 587, 590 (2019) (discussing relevance of corporation's prior knowledge of defects).

29. *See* W. Timothy Coombs & Sherry J. Holladay, *An Extended Examination of the Crisis Situation: A Fusion of the Relational Management and Symbolic Approaches*, 13 J. PUB. RELS. RSCH. 321, 331 (2001); W. Timothy Coombs, & Sherry J. Holladay, *Reasoned Action in Crisis Communication: An Attribution Theory-based Approach to Crisis Management*, *in* RESPONDING TO CRISIS: A RHETORICAL APPROACH TO CRISIS COMMUNICATION 95, 111 (Robert Lawrence Heath & Dan Pyle Millar eds., 2003).

30. *See* Daniel Laufer & W. Timothy Coombs, *How Should a Company Respond to a Product Harm Crisis? The Role of Corporate Reputation and Consumer-Based Cues*, 49 BUS. HORIZONS 379, 384 (2006).

31. *See* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996).

32. *See* Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1255–56 (1999).

33. *See* Regina Robson, *A New Look at Benefit Corporations: Game Theory and Game Changer*, 52 AM. BUS. L.J. 501, 502 (2015); Joseph P. Fishman, *Copyright*

Perhaps in theory, corporations as profit-seeking entities would want a social norm of consumption of its products and services. As a practical matter, though, many companies expressly eschew certain market areas. For example, luxury-good retailers exercise caution in discounting and making low-end sales as a business strategy.[34]

A corporation's most direct social norm of importance is the appropriateness of their products and services. Manufacturers of tobacco products rely upon the social acceptance of consuming their products. Similarly, corporations put effort into making alternatives less socially acceptable — for decades media and software companies have been attempting to discourage unlicensed sharing and usage of their copyrighted materials.[35] Corporations have pursued a wide variety of strategies to push their desired norms.[36] Legislation, advertising, sponsorships, and litigation have had varying levels of success in pursuit of the social norms directly tied to their business. Nonetheless, the public can feel relative confidence that encouraging certain social norms is part of a deliberate and purposeful strategy by corporations.

Less clear is how corporations support social norms other than those tied directly to their businesses. The growth and debates surrounding environmental, social, and governance ("ESG") or corporate social responsibility ("CSR") tacitly acknowledge that there are other social values and pursuits that are less directly tied to the corporate profit motive.[37] Do corporations sincerely pursue such other interests? Should they? Or do they discuss ESG in an effort to enhance reputation with low regard for actual social change? Such suspicion over corporate efforts to address areas such as employee safety, workplace harassment, and ethical business practices continues.[38]

Infringement and the Separated Powers of Moral Entrepreneurship, 51 AM. CRIM. L. REV. 359, 359 (2014) (comparing corporate power with public enforcement in shaping moral norms in copyright).

34. *See generally* Kevin Lane Keller, *Managing the Growth Tradeoff: Challenges and Opportunities in Luxury Branding*, 16 J. BRAND MGMT. 290, 293 (2009) (explaining growth strategies for luxury brands).

35. *See* STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 24–25 (Oxford Univ. Press 2006); Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws,* 54 AM. U. L. REV. 783, 792 (2005).

36. *See* Venkatesh Shankar, *How Jeff Bezos and Amazon Changed the World*, THE CONVERSATION (Feb. 2, 2021, 10:41 PM), https://theconversation.com/how-bezos-and-amazon-changed-the-world-154546 (describing how Amazon's practices redefined the retail experience).

37. *See* Catherine Janssen et al., *Corporate Crises in the Age of Corporate Social Responsibility*, 58 BUS. HORIZONS 183, 183 (2015).

38. *See, e.g.*, Lauren B. Edelman & Jessica Cabrera, *Sex-Based Harassment and*

Public support for certain social values can create significant challenges for corporations.[39] Corporate power may be channeled through political lobbying coupled with monetary support for particular candidates and causes. The power to influence legislation in this manner has raised concerns about governmental capture.[40] Conversely, corporations have also received pushback from politicians for their expressions. For example, the governor of Florida and the Walt Disney Corporation have been ensnared in political and legal turmoil after Disney publicly criticized Florida legislation concerning sexual orientation and gender identity in elementary schools.[41] Even ostensible attempts to sell product may be ensnared into conflicts about social norms, as Budweiser learned in marketing its products.[42]

It can be difficult for employees, partners, and outside parties to determine whether the corporation is simply concerned about reputation or truly interested in encouraging certain social norms. One question may be the level of power exercised by corporate insiders in such pursuits. Corporations are, of course, artificial entities and not monolithic. When a corporation "pursues" ethical marketing practices, the reality is that individual people are responsible for the pursuit. The fact that the shareholders of a corporation have religious pursuits does not necessarily mean that every employee subscribes to those beliefs. Bringing an entire corporation's ambit toward a central pursuit is no small task. My aim here is to emphasize that there is a spectrum of social norms that corporations pursue with varying levels of effort and cohesion.

Finally, I note that at times outside parties may attempt to adopt corporations in the pursuit of certain social causes.[43] Corporations can thus

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Symbolic Compliance, 16 ANN. REV. OF L. & SOC. SCI. 361, 361 (2020) (finding that "symbolic policies . . . do little to protect employees from harassment").

39. *See* Michael E. Porter, The Changing Role of Business in Society, (July 19, 2021) (unpublished manuscript) (on file at Harvard Business School), https://www.hbs.edu/ris/Publication%20Files/20210716%20Business%20in%20Society%20Paper%20For%20Website_84139c25-9147-4137-9ae9-28e27e1710a1.pdf.

40. *See, e.g.*, Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 229 (2012); Jonathan C. Zellner, Note, *Artificial Grassroots Advocacy and the Constitutionality of Legislative Identification and Control Measures*, 43 CONN. L. REV. 357, 357 (2010).

41. *See* Walt Disney Parks & Resorts U.S., Inc. v. DeSantis, No. 4:23-cv-163-AW-MJF, 2024 WL 442546, at *1 (N.D. Fla. Jan. 31, 2024).

42. Amanda Holpuch, *Behind the Backlash Against Bud Light*, N.Y. TIMES (Nov. 21, 2023), https://www.nytimes.com/article/bud-light-boycott.html.

43. *See, e.g.*, Zach Schonbrun, *Tarnished by Charlottesville, Tiki Torch Company Tries to Move On*, N.Y. TIMES (Aug. 20, 2017), https://www.nytimes.com/2017/08/20/business/media/charlottesville-tiki-torch-company.html.

find themselves scrambling to disavow such causes and subsequently supporting a competing social norm.[44]

C. Dominant Firms

Because of the concern with social norms, this paper focuses on more than just large corporations with market power. Instead, this article addresses the impact of dominant firms, which I define as firms that have enough power to shape market expectations. This would typically include firms that have traditional market power as discussed in antitrust. In its monopolistic heyday, the actions of AT&T (then the Bell Telephone Company) would have had an impact on market expectations regarding telephone services.[45]

Dominant firms, however, are not limited to firms exercising market power.[46] Discussions regarding market power frequently address the question of the relevant markets, and such analysis is not essential to the potential for firms to shape market expectations. Consider Tesla, a firm that produces, among other things, electric vehicles. Tesla's market share for all automobiles in the United States may be very low, but it commands a much greater share of the U.S. market limited to electric, highway-capable four-wheeled vehicles.[47] Regardless of the relevant market, Tesla's market actions have had significant impact.[48] The firm's behavior attracts such widespread attention that it considers traditional advertising and marketing efforts unnecessary. Tesla's marketing of "Full Self

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44. *See* Steve Annear, *New Balance Decries Bigotry After Endorsement From Neo-Nazi Site*, BOS. GLOBE (Nov. 14, 2016), https://www.bostonglobe.com/metro/2016/11/14/neo-nazi-site-calls-new-balance-official-shoe-white-people/xpn45MaKAPrE65w93RehHO/story.html.

45. *See* Dan Schiller, *Like Facebook, AT&T Once Dominated Communications. The Difference? It was Regulated.*, WASH. POST (Oct. 6, 2021, 8:56 AM) https://www.washingtonpost.com/outlook/2021/10/06/like-facebook-att-once-dominated-communications-difference-it-was-regulated/ (discussing AT&T's market dominance during the height of its monopoly power).

46. *See* Robert B. Ahdieh, *Imperfect Alternatives: Networks, Salience, and Institutional Design in Financial Crises*, 79 U. CIN. L. REV. 527, 539–41 (2011) (discussing factors that might lead to market salience).

47. *See* Zaheer Kachwala, *US Electric-Vehicle Hit Record High, Tesla Loses Market Share, Report Says*, REUTERS (Oct. 12, 2023, 5:52 PM), https://www.reuters.com/business/autos-transportation/us-electric-vehicle-sales-hit-record-high-tesla-loses-market-share-report-2023-10-12/ (stating that Tesla demands about half of the electric vehicle market).

48. *See* Nathan Furr & Jeff Dyer, *Lessons from Tesla's Approach to Innovation*, HARV. BUS. REV. (Feb. 12, 2020), https://hbr.org/2020/02/lessons-from-teslas-approach-to-innovation (asserting that Tesla's marketing strategies have attracted more attention than most companies are able to garner).

Driving" and "Autopilot" have triggered significant changes in consumer expectations regarding their vehicles.[49]

Similarly, many of the concerns regarding large information technology firms are precisely about consumer information and expectations.[50] Companies such as Meta/Facebook have a direct influence on consumer beliefs. Other technology firms operate as online platforms, such as ridesharing and delivery service firms. To the extent that these firms are ostensibly providing logistics and coordination among millions of independent drivers, these platforms expressly standardize consumer expectations and pricing across the marketplace.

III. DOMINANT FIRMS' ACCIDENTAL IMPACT ON SOCIAL NORMS

Beyond the direct physical impacts of corporate accidents, dominant firms' accidents may have a disproportionate impact on social norms and expectations for a number of reasons. First, society will simply be more aware of dominant firms' accidents.[51] This may be driven by actual prevalence: large firms have more and repeated contacts with society, and thus a company with many trucks on public highways will, on average, have more accidents than a company operating fewer trucks. Awareness may also be due to disproportionate media focus on dominant firms: critics have asked whether Tesla vehicles are more dangerous than other car manufacturers, or if media outlets are simply more likely to highlight accidents involving Tesla vehicles. Second, dominant firms provide a locus for perception of repeated accidents: a smaller firm may only be involved in a single accident, making it more difficult to focus upon the firm's response, while repeated accidents for a particular dominant firm will raise questions and interest in its responses.[52] Third, the dominant

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49. *See* Stephen S. Wu, *Unfair and Deceptive Trade Practice Claims Against Manufacturers of Automated Vehicles*, ABA SCITECH L., Summer 2018, at 4, 5–6 (2018).

50. *See* Katherina Haan, *Over 75% of Consumers Are Concerned About Misinformation From Artificial Intelligence*, FORBES: ADVISOR https://www.forbes.com/advisor/business/artificial-intelligence-consumer-sentiment/ (July 20, 2023, 8:00 AM) (listing concerns of job loss, misinformation, privacy, and lowered quality of services related to use of artificial intelligence).

51. *See* Will Hall-Smith, *Top 10 Biggest Corporate Scandals And How They Affected Share Prices*, IG.COM (Nov. 1, 2018, 7:12 AM), https://www.ig.com/uk/news-and-trade-ideas/top-10-biggest-corporate-scandals-and-how-they-affected-share-pr-181101 (documenting several large corporation accidents that affected the companies' share prices).

52. *See* Peter Valdes-Dapena, *Teslas Crash More Than Gas-Powered Cars. Here's Why*, CNN (Jan. 18, 2024, 2:42 PM), https://www.cnn.com/2024/01/18/business/why-dopeoplekeepcrashingteslas/index.html#:~:text=The%20Highway%20Loss%20Data%20Institute,though%2C%20according%20to%20the%20HLDI (explaining that even

firm's position in the market may give consumers little options: if competitive options are very limited, the lack of market reaction may be difficult to interpret.[53]

For smaller entities, the indirect harm of accidents is typically limited to the firm itself; the firm might gain a reputation for carelessness, and customers might choose to work with competitors instead. The stakes are higher for a dominant firm, despite its influence in the marketplace. These harms are driven by three major characteristics of the dominant firm: the size/scope, the practical difficulties for participants to exit, and the disproportionate market attention. The power of these dominant firm traits can lead to a shift in norms in the marketplace.[54] Establishing new norms is typically a difficult exercise in collective action, but the centralized power of dominant firms may overcome these collective action problems.[55]

These distinctions for the dominant firm leave the tendencies for a firm's response unclear. Is a dominant firm more likely to take preventative actions because of its high-profile position? Or might it be less likely to take corrective action because it feels confident in its market position?

A dominant firm that cares little about its reputation and only its legal liabilities might pursue a disclosure strategy: disclosing the risks of accidents to associated entities, such as customers, and shifting the burden of those risks to the respective entities.[56] In contrast, a dominant firm that does care about its reputation will likely pursue a public relations campaign informed by the aforementioned SCCT. It may work to reduce the probability of such accidents and publicize its methods for doing so. The firm may also invest in other areas to improve the customer and partner experience, thus enhancing its reputation.

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though Tesla's make up the majority of the all new EV's sold in the US, the Highway Loss Data Institute "has not found higher crash rates for Tesla vehicles or other EVs more broadly based on overall insurance claims" but tend to have higher claim costs).

53. *See* Daniel Leussink, *Toyota Remains World's Top-Selling Automaker; Chairman Apologises Over Scandals*, REUTERS (Jan. 30, 2024, 5:35 AM), https://www.reuters.com/business/autos-transportation/toyota-keeps-crown-worlds-top-selling-automaker-2023-2024-01-30/ (explaining that despite Toyota's chairman coming forward to apologize for recent affiliate scandals, Toyota was the top-selling automaker for 2023).

54. *See generally* Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1 (2001) (describing norm cascades initiated by "exogenous change" as well as distinctions between "informational cascades" and "reputational cascades").

55. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 177–78 (1991).

56. *See, e.g.*, *Product Recalls: Anticpating the Product Liaility Lawsuits*, JONESDAY (Feb. 2012), https://www.jonesday.com/en/insights/2012/02/product-recalls-anticipating-the-product-liability-lawsuits (discussing the *Aqua Dots* case where the company issued a recall on the product, shifting the liability to consumers).

The common threat to social norms, regardless of the corporate strategy, is that many people will associate and be associated with dominant firms. Does a person who eats at Chick-fil-A intentionally support the Truitt family's religious beliefs?[57] Or is the religious messaging ancillary to the customer's primary interest in a chicken sandwich? How do third parties view people who carry a Chick-fil-A branded cup? Do they see someone who is simply thirsty and happened to be near a Chick-fil-A facility, or do they see someone endorsing particular political or religious sentiment?

Because of their scale, dominant firms present a challenge with repeated accidents and responses. Some firms will be successful in addressing the crisis, such as Johnson & Johnson's tamper-related Tylenol drug deaths in the 1980s.[58] Johnson & Johnson rapidly escalated a product recall in response to a growing number of Tylenol-related deaths, culminating in a nationwide recall and significant changes in packaging and pharmaceutical delivery.[59] Today there is little consumer hesitation about consuming Tylenol or other related pharmaceutical products; Johnson & Johnson's remedial actions have been successful both from a prevention perspective — reducing tampering in its products — and an expressive perspective — convincing the marketplace that it is concerned about product safety.

If firms are unsuccessful in redressing accidents, however, these expressive harms may cause shifts in norms and beliefs. This is not a claim that the corporation is purposefully acting as a norm entrepreneur or with the goal of reshaping community norms, although this expressive harm problem does become more serious if individual corporate employees do have such a purpose.[60]

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57. *See* Rick Warren, Opinion, *Chick-fil-A Founder Truett Cathy Truly Lived His Faith*, TIME (Sept. 9, 2014, 4:21 PM), https://time.com/3310038/rick-warren-chick-fil-a-founder-truett-cathy-truly-lived-his-faith/ ("[F]ew got to see the Cathy family up close, and marvel at this family dynasty of Christian faith.").

58. *See* Bolanle A. Olaniran et al., *Johnson and Johnson Phantom Recall: A Fall From Grace or a Re-Visit of The Ghost of the Past*, 38 PUB. RELS. REV. 153, 153–55 (2012).

59. *See Tylenol and the Legacy of J&J's James Burke*, KNOWLEDGE AT WHARTON (Oct. 2, 2012), https://knowledge.wharton.upenn.edu/article/tylenol-and-the-legacy-of-jjs-james-burke/ (explaining that Tylenol recalled 31 million packages of Tylenol in two months); Howard Markel, *How the Tylenol Murders of 1982 Changed the Way We Consume Medication*, PBS (Sept. 29, 2014, 11:39 AM), https://www.pbs.org/newshour/health/tylenol-murders-1982 (describing post-tragedy reforms in the industry, including foil-sealed bottles and tamper-resistant caplets).

60. *Cf.* Sunstein, *supra* note 31, at 968.

A. Involvement Rationalization

One possibility is that people involved with the dominant firm rationalize the dominant firm's accidents: because of their association with the firm, they deem the accident acceptable, even if they would not have deemed it acceptable had another company had a similar accident.[61] This could happen to the dominant firm's users, employees, or partners. If people evidence a tendency to retroactively support their decision to be involved with the firm, these individuals may steadily reshape their own preferences.[62] Employees who previously valuated data privacy might steadily reduce their personal interests in data privacy as they work for a firm that has repeated user privacy breaches.[63] While involvement rationalization would be a risk at any firm, the scale of dominant firms magnifies this risk for the marketplace. The sheer volume of employees, users, and partners of a dominant firm creates the possibility that a large proportion of society may reshape their beliefs about the importance of data privacy.[64]

B. Perceived Indifference

A related possibility is that people, regardless of whether they are involved with the dominant firm, see the continued loyalty of customers, employees, and partners of the firm and come to believe that the accidents are socially acceptable. Because of its dominance, existing customers and employees are unlikely to suddenly leave or abandon the firm.[65] People observing this behavior may conclude that most of those existing customers and employees are indifferent to the accident. This perception may lead

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61. *See generally* C.B. Bhattacharya & Sankar Sen, *Consumer-Company Identification: A Framework for Understanding Consumers' Relationships with Companies*, J. MKTG., Apr. 2003, at 76, 84 (2003); Jane E. Dutton et al., *Organizational Images and Member Identification*, 39 ADMIN. SCI. Q. 239, 243 (1994); Donald Lange & Nathan T. Washburn, *Understanding Attributions of Corporate Social Irresponsibility*, 37 ACAD. MGMT. REV. 300, 300 (2012).

62. *See* Bhattacharya & Sen, *supra* note 61, at 78, 80 (noting that "a company can exert greater control over the identity communicated by . . . employees . . . than by . . . shareholders [or] customers" and that employees, generally, strongly trust their employers' identities).

63. *See* John Zorabedian, *Data Breach Fatigue Makes Every Day Feel Like Groundhog Day*, SEC. INTEL. (Feb. 1, 2019), https://securityintelligence.com/data-breach-fatigue-makes-every-day-feel-like-groundhog-day/ (noting that, in recent times, the public has become desensitized to frequent data breaches; significant percentages of breach victims barely react to protect compromised data).

64. *See* Lange & Washburn, *supra* note 61, at 306 (detailing that a large firm will experience larger effects than a small firm with less employees).

65. *See generally* James Fanto, *Whistleblowing and the Public Director: Countering Corporate Inner Circles*, 83 OR. L. REV. 435, 464–69 (2004).

others to similarly believe that they should be indifferent to the accident; their prior elevated concerns about data privacy were misguided, as most people are not so concerned about privacy breaches. Here, again, the sheer volume of people involved with the dominant firm creates this risk.

Moreover, note that this perceived indifference may be worse in the case of a firm that otherwise has a good reputation.[66] Under SCCT, observers may be reluctant to place blame for the accident upon a firm with high reputational strength; this reluctance is desirable for firms from a public relations perspective.[67] If so, blame will likely be allocated elsewhere. For some forms of accidents, society may be willing to not allocate any blame: perhaps no one is to blame for an unforeseeable natural disaster.[68] For other accidents, though, observers might blame the victims if they feel the firm is not at fault: perhaps social media users are to blame for exposing their personal information on the internet.[69]

C. Desensitization Due to Repeated Incidents

Repeated accidents by a dominant firm may shape people's industry expectations.[70] It is possible that only the firm itself gains a reputation for accidents. Nonetheless, if the dominant firm repeatedly has data privacy-related issues, and the dominant firm is consistently in the news, people may become inured to such occurrences. Privacy breaches may simply be a non-issue from a newsworthiness perspective.[71] Generalization of the

66. *See* Margaret Rysnar & Karen E. Woody, *A Framework on Mandating Verus Incentivizing Corporate Social Responsibility*, 98 MARQ. L. REV. 1667, 1682 (2015) (detailing that corporate rankings have shortcomings since companies may misrepresent the extent of their social contributions).

67. *Id.* at 1679 (explaining that potential impact on corporate social responsibility turns on the public consciousness); Laufer & Coombs, *supra* note 30, at 384.

68. *See generally* Kristian Cedervall Lauta, *Disasters and Responsibility. Normative Issues for Law Following Disasters*, *in* DISASTERS: CORE CONCEPTS AND ETHICAL THEORIES, 43–53 (Dónal P. O'Mathúna, Vilius Dranseika, & Bert Gordijn eds., 2018) (exploring the effect of natural disasters on the political, moral, and cultural spheres).

69. *See* Clay Calvert, *Playing the Social Media Blame Game: Lawsuits and Legislation Everywhere,* AM. ENTER. INST. (Nov. 2, 2023), https://www.aei.org/technology-and-innovation/playing-the-social-media-blame-game-lawsuits-and-legislation-everywhere/ (turning the blame on users of social media, instead of social media companies for issues that arise on platforms).

70. *See generally* ORG. FOR ECON. COOP. & DEV., REMEDIES AND SANCTIONS IN ABUSE OF DOMINANCE CASES (2007), https://www.oecd.org/daf/competition/38623413.pdf (identifying cases of abuse of dominance cases and weighing appropriate and effective remedies and sanctions).

71. *See generally* LILLIAN ABLON, ET AL., CONSUMER ATTITUDES TOWARD DATA BREACH NOTIFICATIONS AND LOSS OF PERSONAL INFORMATION (2016), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1100/RR1187/RAND_RR1187.pdf (studying consumer attitudes toward data breaches).

lowered import of privacy breaches may extend beyond the dominant firm. People may come to expect that every social networking firm will similarly have data privacy issues. This desensitization risk is driven by both the scale and market visibility of the dominant firm.

D. Normalization of Mitigation

Repeated accidents by a dominant firm pose another risk beyond desensitization to the accidents itself. The response from both the firm and outside parties to the repeated accidents may become normalized. The dominant firm will likely have some investments in preventing the accidents, and it may even highlight those investments and improvements in the course of repeated accidents. The public salience of the dominant firm's messaging, combined with the aforementioned desensitization and rationalization, may lead people to believe that the firm is doing the best that it can, and thus no additional action needs to be taken. This belief could take a number of forms. One form of belief is that no further action would be successful: accidents are inevitable, and the dominant firm has done all it can do to minimize that risk.[72] Another related belief is that the cost-benefit analysis leading to the existing accident-prevention infrastructure is correct: the dominant firm has invested at the proper level for minimizing accidents.[73] While further investment might decrease the rate of accidents, the cost of doing so is not justifiable.

E. Desensitization to Communications

Beyond the dominant firm's actions in attempting to mitigate the risk of accidents, its communications may also come to impact societal expectations of communication. If the dominant firm claims to protect user data privacy but repeatedly fails to do so, users may come to disregard such claims.[74] The concern, however, is that users may come to disregard such

72. *See* Lange & Washburn, *supra* note 61, at 303 (describing how an observer's attention and interpretation of a firm's behavior may be influenced by preconceived conceptions that the firm is irresponsible). For a summary of sociological theories addressing the development and understanding of corporate compliance regimes, see Lauren Edelman & Shauhin Talesh, *To Comply or Not to Comply – That Isn't the Question: How Organizations Construct the Meaning of Compliance*, *in* EXPLAINING COMPLIANCE 104–05 (Christine Parker & Vibeke Nielsen eds., 2012).

73. *See* ORG. FOR ECON. COOP. & DEV. *Consumer Data Rights and Competition – Background Note*, at 24 (2020), https://one.oecd.org/document/DAF/COMP(2020)1/en/pdf ("If the negative externalities associated with data collection and use outweigh the positive externalities, there will be a tendency towards data collection above the socially optimal level, even if consumers are fully informed and consumer consent is required.").

74. *See* Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1004–05 (2019) (outlining that despite previous statements it was not

claims from market participants at large and not just from the dominant firm. This degradation in communication creates uncertainty and raises the costs of communication: for a competitor interested in distinguishing itself by reducing its rate of accidents, it will be more challenging to credibly claim improvements. This degradation may be due to market skepticism of the claims at large due to the dominant firm's claims, but it may also result from market skepticism about the feasibility of the claim: if a dominant firm with all of its resources is unable to effectively protect user privacy, can any upstart competitor realistically do better?

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The threat from dominant firms' accidents lies around the core of inertia: it takes significant effort to exercise voice and to signal dissatisfaction when dealing with a dominant firm.[75] The default action for many is to continue silently with the status quo after an accident that is insufficiently serious. Unfortunately, there is great potential that social norms and expectations may shift under such repeated accidents and continued inertia. These changes in social norms may even counter corporate goals: a social networking company's business model may rely upon users trusting it with personal information, and a world in which users systematically distrust social networking companies may be less profitable.

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tracking users' data, Facebook continued to, and later announced, that it tracked and captured users' data across third-party platforms and "use[d this] surveillance data to boost Facebook's advertising business"); *see also* Cameron F. Kerry, *Why Protecting Privacy is a Losing Game Today—and How to Change the Game*, BROOKINGS INST. (July 12, 2018), https://www.brookings.edu/articles/why-protecting-privacy-is-a-losing-game-today-and-how-to-change-the-game/ ("Trust needs a stronger foundation that provides people with consistent assurance that data about them will be handled fairly and consistently with their interests. Baseline principles would provide a guide to all businesses and guard against overreach, outliers, and outlaws. They would also tell the world that American companies are bound by a widely accepted set of privacy principles and build a foundation for privacy and security practices that evolve with technology. Resigned but discontented consumers are saying to each other, 'I think we're playing a losing game.' If the rules don't change, they may quit playing.").

75. *See* John L. Campbell, *Why Would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility*, 32 ACAD. MGMT. REV. 946, 953 ("Proposition 2: Corporations will be less likely to act in socially responsible ways if there is either too much or too little competition. That is, the relationship between competition and socially responsible corporate behavior will be curvilinear.").

IV. OFFSETTING THE SOCIAL NORM POWER OF CORPORATE ACCIDENTS

The need for collective action in addressing potential changes in social norms suggests the importance of a government response.[76] Such a response might include educational efforts and media campaigns; a full consideration of tools to shape norms and beliefs is beyond the scope of this piece. For this article's purposes, let us consider legal responses. Broadly speaking, the interplay between law and norms is contentious. Some suggest that laws are most effective when they correspond with existing norms.[77] Whether the passage and enforcement of laws can reshape norms is less clear.[78] It may be important for Congress and other legislatures to pass laws to offset the power of dominant firms.

One legal strategy would be to encourage better actions by dominant firms. The additional threat to social norms due to corporate accidents suggests that there may be under-investment by dominant firms in accident prevention and mitigation.[79] In particular, we might reconsider the gap between legal liability and the results of attribution theory: what are the rationales for the distinctions between general social attribution of fault and legal attribution of fault? I do not claim to conduct a thorough analysis of these distinctions here, but rather to consider potential approaches towards increasing the incentives for firms to reduce the incidence of accidents and to mitigate the resultant harms.

A. Legal Liability

Corporations are a common target for civil liability regarding accidents. They have the deep pockets to make financial sanctions viable for private plaintiffs, in contrast to the pursuit of individual liability.[80] Regulatory

76. *See* Ellickson, *supra* note 54, at 41 (explaining that a government offers tools to influence social norms by increasing the payoffs for private agents who share common goals, improving upon the speed in which norms shift, and offering grants to organizations that project favorable norm-making activities).

77. *See* Matthew Jackson & Daron Acemoglu, *Social Norms and the Enforcement of Laws*, VOXEU (Sept. 19, 2014), https://cepr.org/voxeu/columns/social-norms-and-enforcement-laws (noting a law is ineffective when contrary to existing social norms).

78. *See* Eisenberg, *supra* note 32, at 1270 (discussing that legal rules may be effective in clarifying an existing social norm).

79. *See id*. at 1291 (noting that, recently, social norms have diminished efficiency in corporate settings, specifically in the roles of institutional investors and corporate directors).

80. Richard Wickliffe, *Overcoming the Challenge of Deep Pocket Bias*, PROPERTYCASUALTY360 (July 1, 2015), https://www.propertycasualty360.com/2015/07/01/overcoming-the-challenge-of-deep-pocket-bias/?slreturn=20240301151302 (finding that juries treat corporations less favorably due to deep-pockets bias, and plaintiffs are more likely to recover greater amounts unless defense lawyers humanize the defendant).

agencies could similarly pursue civil or administrative actions against large corporations.[81] Criminal sanctions are possible, too, particularly if serious wrongdoing can be clearly linked to specific employees. Although the practical effects of a criminal conviction, as opposed to public civil or regulatory sanctions, upon a corporate defendant are unclear, given that a corporate conviction does not result in any person losing their physical liberty to prison.

1. Liability for the direct harm of the accident

Regardless of whether liability is criminal or civil, though, corporate legal liability for accidents tends to focus upon ex ante risk analysis.[82] Not all accidents generate corporate liability. There is some level of risk that would be sufficient to establish legal liability, whether through civil negligence or criminal recklessness. What did the corporation know before the accident occurred, and what did the corporation do leading up to the accident occurring? On the informational side, we would ask whether the corporation was on notice about the potential risks of the accident. Had similar accidents occurred previously within the industry? What was the magnitude, frequency, and severity of those risks? Were partners, customers, and employees on notice of those risks? On the action side, was the corporation in compliance with the relevant laws and regulations? What did the corporation do to measure and mitigate those risks?

This ex ante risk analysis is most evident in tort liability for negligence. If a victim has been harmed by the accident, recovery in tort requires demonstrating some ex ante failure by the corporation regarding the accident.[83] Only in rare cases does strict liability apply, and even strict products liability still requires the finding of some ex ante "defect" in the product.[84]

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81. *See generally* Blair Levin & Larry Downes, *Microsoft, Google, and a New Era of Antitrust*, HARV. BUS. REV. (Feb. 17, 2023), https://hbr.org/2023/02/microsoft-google-and-a-new-era-of-antitrust (explaining that by filing "big cases against big companies, [the government] is send[ing] a message designed to discourage future dealmaking").

82. *See* Charles D. Kolstad et al., *Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements?*, 80 AM. ECON. REV. 888, 888–89 (1990) (providing data that shows that *ex ante* risk analysis is the preferred risk mitigation method as planning ahead will help to defeat potential negligence claims).

83. *Id.* at 897–98 (providing modeling that shows the introduction of ex ante safety precautions increases the defendant's likelihood of success in a lawsuit because it reduces the likelihood of a finding of negligence).

84. *See Understanding the Interplay Between Strict Liability and Product Liability*, LEXIS: LEGAL INSIGHTS (Jan. 6, 2021), https://www.lexisnexis.com/community/insights/legal/b/thoughtleadership/posts/understanding-the-interplay-between-strict-liability-and-products-liability ("To prevail in a

Similarly, criminal liability for accidents may accrue in serious cases, and that liability will typically focus upon some statutory failure tied to the accident. It is possible, of course, that the occurrence of the accident itself will lead to increased regulatory oversight, and such oversight may lead to the discovery of criminal or civil statutory violations. Those violations may or may not be causally tied to the accident, but the government might use those discovered violations as the basis for punishment.

An expansive approach towards increasing liability would be to consider shifts in the standards for negligence and recklessness: what are the reasonable standards that we should expect from corporations in addressing the risk of accidents? The strongest response would be to incorporate strict liability.[85]

2. Liability for communication surrounding the accident

Distinct from liability for the accidents themselves is liability for communications surrounding the accidents.[86] Deceptive communication from corporations could be the basis of both criminal and civil fraud liability. Consumer victims of an accident might claim fraud against the corporation: the corporation induced customer participation, either affirmatively by stating that its product was safe to use, or via omission by failing to warn the customer of a material risk. A theory of fraud would focus upon what risks were known at the time of the contract, rather than at the time of the accident.[87] In contrast, a corporation's statements

strict liability products liability case, a plaintiff must show by the preponderance of the evidence that: . . . . The product was defective when sold by the defendant.").

85. *See* Abigail E. André, *A Canary in A Coal Mine: What We Haven't Learned from Deepwater Horizon and How Courts Can Help*, 33 GEO. ENV'T. L. REV. 1, 23, 32, 50 (2020) (advocating for both Section 311 of the Clean Water Act's strict liability fault standard and its negligence-based penalty scheme to be broadly applied by courts to "fully maximize the Act's deterrent and punitive effect"); *see also* Alicia Solow-Niederman, *Beyond the Privacy Torts: Reinvigorating A Common Law Approach for Data Breaches*, 127 YALE L.J. FORUM 614, 629–33 (2018) (advocating for strict liability breach of confidence tort in response to data breaches like those at Equifax and Yahoo!); Rory Van Loo, *The Revival of Respondeat Superior and Evolution of Gatekeeper Liability*, 109 GEO. L.J. 141, 17172 (2020) (commenting on the potential expansion of third-party liability through respondeat superior or nondelegable duties to hold corporations liable for accidents like oil spills or trucking accidents).

86. *See* Kenneth Ross, *Product Liability Marketing Defects*, INCOMPLIANCE (Nov. 30, 2020), https://incompliancemag.com/product-liability-marketing-defects/ ("Manufacturers of products and providers of services can be held liable for injury, damage or economic loss suffered by a customer or a third party based on all aspects of its products and services. This includes the product or service itself, all written materials that accompany the product including warnings and instructions, and all oral and written statements made before and after sale.").

87. *See* Mark D. Oshinskie, *Tanks for Nothing: Oil Company Liability for Discharges of Gasoline from Underground Storage Tanks Divested to Station Owners*,

disclaiming liability for the accident after the occurrence would be seen as legal argumentation rather than a basis for fraud.[88]

This is not to say that the corporation's communications and actions after the accident are irrelevant. For repeated accidents, those communications and actions will be relevant in legal proceedings regarding future accidents. Affirmative remediation by the corporations could mitigate the risk of prosecutors and regulators taking aggressive future action.

A related option for liability is based on the corporation's communications. The strongest form of liability would sound in fraud: did the corporation know about the risk of the accident and intentionally mislead others about such risks? A standard defense for the corporate defendant would be disclosure of risk at the time of contract. Relatedly, fraud might be found in a corporation's claims to address such risk but then failing to do so.[89]

Even if the high level of mens rea required for fraud cannot be proven, failure to address such risks might be found in a contractual breach.[90] Such a failure might be material in a party's decision to participate in a contract. For example, if a social media firm has suffered a privacy breach in the past and assures future users that it has taken corrective action, its failure to take the corrective action may constitute a material breach in the contract, even if fraud cannot be proven.

B. Reducing the Vulnerability of Legal Doctrines

One modest solution to the existing legal liability structure is for courts to recognize the distortive power of dominant firms' accidents in doctrines

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18 VA. ENV'T L.J. 1, 33 (1999) ("In both negligence and strict liability actions, the failure to adequately warn of the dangers of using a product is itself a defect that gives rise to liability.").

88. *See* Eugene H. Sage, Comment, *Avoidance of Disclaimer by Action for Fraudulent Misrepresentation*, 30 WASH. L. REV. 54, 55–56 (1955) (discussing the tension between overcoming the burden to show intent for fraudulent misrepresentations and disclaimer clauses serving as the basis for a contract).

89. *See* 18 U.S.C. § 1341 (stating that obtaining money by means of "false or fraudulent pretenses, representations, or promises" may be considered fraud).

90. *See* Frank J. Cavico, *Fraudulent, Negligent, and Innocent Misrepresentation in the Employment Context: The Deceitful, Careless, and Thoughtless Employer*, 20 CAMPBELL L. REV. 1, 2–3 (1997) (explaining that companies can claim misrepresentation as a basis "to rescind a contract or as an affirmative defense to a lawsuit for breach of contract"); Sandra Chutorian, *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm*, 86 COLUM. L. REV. 377, 381 (1986) ("Courts have insisted that the duties implied by the covenant of good faith and fair dealing are derived from the specific rights and obligations created by the particular contract before the court.").

such as materiality.[91] The Supreme Court has suggested that if a victim of alleged fraud fails to take corrective action upon learning the truth of the matter, this could be "strong evidence" that the fraud is immaterial and not actionable.[92] Nonetheless, there are numerous reasons why a customer might continue to do business with a firm that lies. Rather than adopting a naïve empirical approach that only perceives consumer "loyalty" to a dominant firm, courts should consider the potential impact of their decisions upon markets that have the potential for improvements. Embracing a more sensitive materiality test may provide consumers some power against dominant firms that fail to live up to their promises.

An example of such a sophisticated analysis is the D.C. Circuit's approach in *United States v. Philip Morris USA, Inc.*[93] The court recognized that materiality was an element of mail and wire fraud, defining materiality as a matter "of importance to a reasonable person in making a decision about a particular matter or transaction."[94] Contrast this definition of materiality with the common *Kungys* formulation, "ha[ving] a natural tendency to influence, or [being] capable of influencing, the decision of the decision-making body to which it was addressed."[95] In *Phillip Morris*, Prosecutors argued that the defendants' statements denying any link between smoking and cancer were material statements; the defendants suggested that any such health statements on their part were not material because there was already independent scientific consensus that smoking had severe health consequences.[96] The court held that whether a reasonable person would have believed the defendants' false statements was

91. *See* Neil W. Averitt & Robert H. Lande, *"Using the Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 176 (2007) (explaining how concentrated markets can affect the ability or desire for consumers to look for alternatives); *see also* Michael A. Carrier & Rebecca Tushnet, *An Antitrust Framework for False Advertising,* 106 IOWA L. REV. 1841, 1859 (2018) ("Materiality focuses on whether a claim is likely to influence a reasonable consumer's decision, not whether every consumer's behavior is changed as a result . . . it's easy to imagine scenarios in which competition could be suppressed particularly effectively by targeting specific subgroups, such as price-sensitive consumers (as AT&T did with its false claims), early adopters, or risk-averse consumers.") (explaining how monopolistic or dominant firms can manipulate the market to suppress competition and capture consumers in discussing materiality in the false advertising context).

92. *See* Universal Health Servs., Inc. v. United States, 579 U.S. 176, 195 (2016).

93. 566 F.3d 1095 (D.C. Cir. 2009).

94. *Id.* at 1122.

95. United States v. Wells, 519 U.S. 482, 483 (1997) (citing Kungys v. United States, 485 U.S. 759, 770 (1988)).

96. *Philip Morris*, 566 F.3d at 1123.

unimportant and affirmed that the deception was material because reasonable people would have considered the matter "of importance."[97]

The D.C. Circuit's handling of the materiality element is sensitive to some key facts. First, smoking is addictive, and the individuals who persisted in using those products likely did so for a variety of reasons. Their failure to discontinue usage when they knew that the product was unhealthy should not render health claims "immaterial" for purposes of criminal fraud. In the same way, consumers may continue to engage with dominant firms despite learning of various deceptive practices; courts should hesitate before deeming such deception immaterial.[98]

Second, the court's analysis sidesteps the question of the reasonable person's belief of the defendants' health claims. For deontological reasons, this step affirms the importance of truthfulness in commercial activity. This decision implicitly recognizes that some people prefer to do business with honest parties. Unfortunately, nicotine addicts may have had limited choices regarding their cigarette suppliers. Similarly, even if dominant firms are unable to steer clear of wrongdoing, courts should hold open the possibility that better firms may emerge and not remove the possibility of fraud as a remedy.[99]

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97. *Id.*

98. *Id.* ("The question, however, is not whether a reasonable person would have believed Defendants' false statements, but only whether a reasonable person would have considered the issue 'of importance'") (parsing that the question of materiality turns on the importance of the defendant's statements to the consumer, not a showing of specific evidence that the consumer exclusively relied on the statements or should have known better); *see also id.* at 1122 ("Materiality does not require proof that any specific person (or number of people) purchased cigarettes as a result of the false statements. Nor does it require Defendants' false statements to be the cause, reason, or sufficient condition of any person's decision to purchase cigarettes. Moreover, no subjective evidence regarding any particular person is required; the test is only whether a reasonable person would consider the matter to be of importance regarding the transaction.") (explaining that the materiality analysis does not require evidence of an individual's actions but whether a reasonable consumer would consider the defendant's statements important when considering their options).

99. *See* Micah L. Berman, *Smoking Out the Impact of Tobacco-Related Decisions on Public Health Law*, 75 BROOK. L. REV. 1, 31 (2009) ("In addition to prompting changes in product design and serving the traditional tort litigation goal of compensating injured victims, others have argued that public health litigation can also (a) increase costs for dangerous products (thereby decreasing demand and/or forcing the industry to internalize costs imposed on others), (b) bring health risks to the attention of regulators and legislators, (c) heighten public awareness of public health risks (potentially leading to social change), (d) uncover industry misconduct, and (e) deter future misconduct. They point to a list of public health improvements credited to personal injury and products liability litigation: cars with airbags and shoulder restraints, the removal of dangerous products (such as asbestos and the Dalkon Shield intrauterine device) from the marketplace, and the clean-up of environmental toxins.") (explaining how litigation such as suits brought against the tobacco industry can result

C. Imputing the Relevance of Corporate Size

In *United States v. Weimert*,[100] the Seventh Circuit held that a bank employee's deception in negotiating his compensation package did not constitute criminal bank fraud.[101] The decision, as a policy matter, seems practical. Assuming that the employee's deception was undesirable and unfair, his compensation gains could be recouped by the bank through civil litigation. Such a civil action could generate reasonable deterrence of other potential employees considering deception in negotiating pay. The stronger condemnation of criminalization does not appear critical here.

Consider a contrasting hypothetical *Weimert* scenario: what if the deception in compensation stemmed from a dominant banking chain? This banking chain's deception might have a much greater impact in the marketplace. Potential employees, learning of the deception, may be reluctant to trust any bank's compensation claims, believing that banks generally lie about compensation. Employees, while disgruntled at the dominant banking chain's deceptive practices, might remain with the chain, believing that other banks would not treat them any better, or because other benefits drive them to stay.

A naïve court might interpret these facts to suggest that bank compensation deception is not material for purposes of fraud, but a superior approach would be to recognize the distortions that the dominant banking chain has caused through its deceptive practices.

This hypothetical *Weimert* scenario raises a broader proposal: perhaps the original *Weimert* case was wrongly decided, because criminal sanctions

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in net-positives for consumers and society); *see also* Sara D. Guardino & Richard A. Daynard, *Punishing Tobacco Industry Misconduct: The Case for Exceeding a Single Digit Ratio*, 67 U. PITT. L. REV. 1, 37–38 (2007) ("This "secondary reprehensibility" has allowed the tobacco industry to largely avoid liability. As a result, although the tobacco industry has had a number of adverse judgments against it, it has made payments to only four plaintiffs in the history of smoking and health litigation (as of this paper's writing). Under these circumstances, the tobacco companies have had no economic incentive to take proper safety precautions, and their prices have not reflected the actual cost of using their products. The result has been "too little care and . . . excessive output"-i.e., the continued sale of billions of packages of a lethal product with revenues in the billions of dollars-coupled with consumers who have no recourse for the resultant harm. Punishing the industry's secondary reprehensibility through large punitive damage awards, therefore, would help to rectify this unfairness and would put smoking and health litigation back in line with the standard law and economics welfare-maximizing model.") (explaining that the failure to exact higher penalties against the tobacco industry has stopped needed reforms or competition that would resolve the fraud or deficiencies that adversely affect consumers and how increased penalties through litigation could bring about this needed change).

100. 819 F.3d 351 (7th Cir. 2016).

101. *See id.* at 353.

should remain available due to the threat of dominant firms.[102] Courts frequently endorse an implicit hierarchy of sanctions. Criminal law is for the most severe wrongdoing, while civil law can address a broader range of wrongdoing. A judicial strategy that focuses on conduct, rather than the potential harms, may be a myopic approach towards proportionality and stability.

In other words, the Seventh Circuit in *Weimert* focused on the conduct of deception in the context of compensation negotiation; it held this conduct was not criminal bank fraud.[103] Following this article's recommendations, the *Weimert* holding should be constrained to the facts of its distinctive defendant: a singular bank employee. In contrast, criminal sanctions may be an important tool in addressing compensation fraud by a dominant bank as opposed to a singular bank employee.

When it comes to prohibited conduct, courts should distinguish by entity dominance. We see this approach expressly embraced by Congress, most prominently in antitrust,[104] but also in reducing regulatory burdens by firm size.[105] Here, I suggest that even if Congress or state legislatures have not expressly addressed defendant firm size, courts should factor these defendant characteristics into determinations of liability as opposed to leaving such factors to, for example, the calculation of penalties.[106]

We can see this approach in the Supreme Court's *Groff v. DeJoy*[107] decision regarding Title VII of the Civil Rights Act of 1964.[108] Title VII

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102. *See generally id.* (illustrating the potential for abuse of market power through deceptive practices).

103. *See id.* at 370 (Flaum, J., dissenting) (highlighting the dissent's view that Weimert's actions were not legitimate employment negotiation but rather simultaneous representation and deception for personal gain).

104. *See, e.g.,* Mark Glick et. al., *Big Tech's Buying Spree and the Failed Ideology of Competition Law*, 72 HASTINGS L.J. 465, 467 (2021).

105. *See, e.g.*, 12 C.F.R. pt. 30, App. A (Interagency Guidelines Establishing Standards For Safety And Soundness) ("In institution should have internal controls and information systems that are appropriate to the size of the institution and the nature, scope and risk of its activities . . ."); *In re* First Nat'l Bank and Tr. Co. of Vinita Vinita, No. 2020-038, 2020 WL 8186468, at *1 (O.C.C. July 16, 2020) ("The Comptroller finds, and the Bank neither admits nor denies [that] [t]he Bank's strategic and capital planning, capital ratios, liquidity risk management, problem loan processes, ALLL methodology, credit risk management, concentration risk management, and audit are deficient given the Bank's size, complexity, and risk profile.").

106. *See, e.g.*, Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377, 1384 (5th Cir. 1991) ("While the Due Process Clause requires that punitive damages not be grossly excessive, it does not require that punitive damages be ineffectual and impotent. The corporate size of Reserve Life is another factor that supports the award of punitive damages against it.").

107. 600 U.S. 447 (2023).

108. *See id.* at 470–71.

requires employers to accommodate the religious practices of their employees unless doing so would impose an "undue hardship on the conduct of the employer's business," but it does not expressly discuss employer size.[109] The Court describes the relevant factors for determining undue hardship to include "the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer."[110] This frank acknowledgement by the Court suggests that there are burdens that can be placed upon large employers that would be unacceptable for smaller employers.

There are already judicial doctrines that disfavor large firms. Respondeat superior, for example, as a rule for corporate liability generally increases potential large firm liability.[111] Firms with more employees cumulatively have a greater risk of offending if the risk of each employee committing an offense is independent. Similarly, doctrines like collective knowledge make it easier to impute mens rea to a larger firm.[112]

Nonetheless, I recognize that varying criminal liability based upon the status of the defendant as a dominant firm may be troubling. Following this article's proposals, as a practical matter, conduct will not be uniformly criminalized. Small firms may commit offenses that are not subject to criminal penalties, even though large firms would suffer criminal sanctions for the same conduct. While such statutory approaches are common, such specificity may raise concerns under the principle of generality.[113]

V. CONCLUSION

Dominant firms can accomplish great things, but they also pose a distinct threat to society. Problematic actions undertaken by small firms may be relatively straightforward to resolve, as market forces and civil liability may be sufficient to restrain such actions. Those same problematic actions by a dominant firm, however, may cause significant harm, and those actions may distort market expectations. Repeated consumer privacy breaches by a small firm may steer consumers to alternatives, but a

109. *See* Pub. L. No. 88-352, 78 Stat. 253 (1964), *amended by* 42 U.S.C. § 2000e(j) (1971).

110. *Groff*, 600 U.S. at 470–71 (internal quotations omitted) (stating that the Brief for the United States suggested the consideration of the size and operating cost of an employer).

111. *See* United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 971 (D.C. Cir. 1998), *aff'd,* 526 U.S. 398 (1999) (stating that respondeat superior "increase[s] incentives for corporations to monitor and prevent illegal employee conduct").

112. *See* United States v. Bank of New Eng., N.A., 821 F.2d 844, 856 (1st Cir. 1987).

113. *See generally* Paul Gowder, *The Rule of Law and Equality*, 32 L. & PHIL. 565, 603–04 (2013).

dominant firm's repeated breaches may lead to large disclosures of information and even degraded consumer expectations of firm behavior. Dominant firms may underinvest in preventing and mitigating the harms of accidents, because those accidents may inadvertently reshape societal norms and expectations about appropriate behavior.

Not all changes in social norms may be bad; perhaps it is better that we have become more trusting of allowing strangers to drive us in their own private vehicles as a result of firms such as Uber and Lyft. Courts should nonetheless remain wary of the impact of dominant firms' accidents, as a variety of legal doctrines rely upon general impressions of reasonableness and fairness that may be unduly shaped by corporate accidents. The market strength of dominant firms frequently suggests that market forces may be insufficient to reshape corporate behavior, and courts can play a critical role in both bringing light to the impact of such accidents and in giving room for social norms to develop outside of the potential corporate distortions.