

# BLACKLISTING OR BANNING TECHNOLOGIES THAT SCARE US: AI, CRYPTOCURRENCIES, AND MORE

NIZAN GESLEVICH PACKIN\* & HADAR YOANA JABOTINSKY\*\*

*Policymakers often play a critical role in regulating the use and advancement of technology. Their decisions can have significant positive impacts on the development, adoption, and use of various technologies, but also negative ones if they decide to limit or even block a certain technology. Italy's temporary banning of the Generative Artificial Intelligence (GenAI) platform ChatGPT, much like New York City's Department of Education, demonstrates administrations' and policymakers' reliance on blacklisting and banning.*

*Blacklisting and banning are often used interchangeably. Nevertheless, in the context of regulation, the terms are different and used for different purposes, and it is key to understand why, how, and what consequences are associated with each term, particularly when used in connection with innovative and disruptive technologies, such as GenAI.*

---

\* Professor of Law, Baruch College, City University of New York. Senior Lecturer, Haifa University Faculty of Law. Affiliated Faculty, Indiana University Bloomington's Program on Governance of the Internet & Cybersecurity.

\*\* Founder and Senior Research Fellow, Hadar Jabotinsky Center for Interdisciplinary Research of Financial Markets, Crises and Technology. Research Fellow, Zefat Academic College School of Law. We thank the participants at the LawFin Research Seminar at Goethe University for their feedback, and Roe Sarel for helpful comments. Special thanks are due to the editorial team of the *American University Law Review*: Cameron Azimi, Manuel Alcantar-Robles, Krista Zamurs, Elizabeth Clinch, Adam Markhoff, Will Rogers, Krista Trefren, and Shaina Varghese for great dedication, remarkable feedback, comments, suggestions, and outstanding editorial work that profoundly improved the quality of this Article. The Authors used ChatGPT, OpenAI's large-scale language-generation model, to assist in checking the spelling and grammar of parts of this text. Upon generating draft language, the Authors reviewed, edited, and revised the language to their liking and take ultimate responsibility for the content of this publication.

*This Article explores the use of blacklisting as a regulatory tool while differentiating it from the practice of banning. In doing so, this Article examines the impact of any related explicit and implicit sanctions, especially as such sanctions include reputational damage, increased hardship in getting credit, and the potential costs of “doing business.” Additionally, the Article makes the important distinction between two rationales for blacklisting: (1) Blacklisting for participating in or advancing an illegal activity or failing to comply with binding legal requirements; and (2) blacklisting for moral or ethical reasons. It also describes why sanctions do not always work. Finally, this Article makes policy recommendations that would help increase the effectiveness of blacklisting as a regulatory tool, while acknowledging the problematic nature of regulation by enforcement.*

#### TABLE OF CONTENTS

Introduction .....	1469
I. Regulatory Measures.....	1479
A. Carrots and Sticks .....	1479
B. Why Do Regulators Use Sticks? The Economic Analysis of Crime .....	1484
C. Public Criticism Approach .....	1489
II. Blacklisting and Banning .....	1494
A. Distinguishing Between Blacklisting and Banning	1495
B. Examples of Banning .....	1497
C. Blacklisting.....	1498
1. Mechanics of blacklisting.....	1499
a. Targeting entities and individuals .....	1506
b. Targeting jurisdictions .....	1508
2. The network effects of blacklists .....	1511
3. Implicit sanctions .....	1513
III. Challenges of the Practice of Blacklisting and Banning and Policy Recommendations .....	1517
A. Challenges.....	1518
1. Cost of doing business?.....	1518
2. Chilling effect.....	1524
3. Lack of industry involvement .....	1525
B. Policy Recommendations.....	1525
Conclusion.....	1532

## INTRODUCTION

The rapid advancement of artificial intelligence (AI) is profoundly impacting all aspects of life. From autonomous weapons to financial robo-advisors to algorithms used in court, AI is increasingly integrated into decision-making processes, presenting both new opportunities and risks to society.<sup>1</sup> As a result, new questions and legal challenges are emerging that require the attention of lawmakers.<sup>2</sup> Among the various forms of AI, large language models (LLMs), like Open AI's ChatGPT,

---

1. See, e.g., Rebecca Crootof, Margot E. Kaminski & W. Nicholson Price II, *Humans in the Loop*, 76 VAND. L. REV. 429, 429 (2023) (discussing the role of AI in making decisions that “affect human lives”); Mariano-Florentino Cuéllar, *A Common Law for the Age of Artificial Intelligence: Incremental Adjudication, Institutions, and Relational Non-Arbitrariness*, 119 COLUM. L. REV. 1773, 1773–74 (2019) (illustrating how AI is used in assisted driving); Damon Ferrara, *Self-Driving Cars: Whose Fault Is It?* 1 GEO. L. TECH. REV. 182, 182–83 (2016) (exploring liability issues related to self-driving cars); Hadar Y. Jabotinsky & Michal Lavi, *Can ChatGPT and the like Be Your Co-Authors?*, 42 CARDOZO ARTS & ENT. L.J. (forthcoming 2024) (manuscript at 1) (on file at <https://ssrn.com/abstract=4528953>) (discussing the role of generative AI in academic writing); Hadar Y. Jabotinsky & Michal Lavi, *The Eye in the Sky Delivers (and Influences) What You Buy*, 24 U. PA. J. CONST. L. 1329, 1344 (2022) (focusing on the role of AI in operating delivery drones); Hadar Y. Jabotinsky & Roe Sarel, *Co-Authoring with an AI? Ethical Dilemmas and Artificial Intelligence*, ARIZ. ST. L.J. (forthcoming) (manuscript at 1) (on file at <https://ssrn.com/abstract=4303959>) (discussing the use of AI in legal writing and academia); Weston Kowert, Note, *The Foreseeability of Human - Artificial Intelligence Interactions*, 96 TEX. L. REV. 181, 184–85 (2017) (discussing impact of AI on tort law); Nizan Geslevich Packin, *Consumer Finance and AI: The Death of Second Opinions?*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 319, 319 (2020) (describing how it is hard for people to resist the persuasiveness of AI); Alexander I. Platt, *Beyond “Market Transparency”: Investor Disclosure and Corporate Governance*, 74 STAN. L. REV. 1393, 1398 (2022) (referring to the use of AI in trade and stock investment); Tim Wu, *Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social-Ordering Systems*, 119 COLUM. L. REV. 2001, 2002 (2019) (claiming that with regards to the utilization of AI in legal proceedings, there is a growing anticipation that human-machine hybrids will eventually supplant legal systems that solely rely on human involvement); Scomit Yanisky Ravid, *Generating Rembrandt: Artificial Intelligence, Copyright, and Accountability in the 3A Era<sup>3/4</sup> the Human-like Authors are Already Here- a New Model*, 2017 MICH. ST. L. REV. 659, 668 (2017) (discussing AI algorithms as creators).

2. See Margot E. Kaminski, *Regulating the Risks of AI*, 103 B.U. L. REV. 1347, 1347 (2023) (discussing the use of risk regulation in AI governance); Margot E. Kaminski & Jennifer M. Urban, *The Right to Consent AI*, 121 COLUM. L. REV. 1957, 1957, 1961 (2021) (arguing for a new form of due process fit for the digital age, in light of the rise of AI); Roe Sarel, *Restraining ChatGPT*, 75 HASTINGS L.J. 115, 115 (2023) (discussing regulation of generative AI systems like ChatGPT).

are particularly noteworthy.<sup>3</sup> These innovative but disruptive tools have the potential to revolutionize most industries by generating content autonomously or collaborating with humans as co-creators.<sup>4</sup> These abilities not only give rise to new forms of creative expressions, but also open the door to numerous challenges for modern society, such as deep fakes<sup>5</sup> and the dissemination of false information.<sup>6</sup> In fact, in a recent warning, industry leaders have said that AI tools might threaten the existence of the human race.<sup>7</sup> Thus, it is not surprising that governments are trying to control AI's advancement and use.<sup>8</sup> One such notable attempt was made by the Italian government, which tried to ban ChatGPT altogether.<sup>9</sup> This ban was then lifted a few weeks

---

3. Jabotinsky & Lavi, *Can ChatGPT and the like be Your Co-Authors?*, *supra* note 1, at 3; Jabotinsky & Sarel, *supra* note 1, at 3.

4. *OpenAI's ChatGPT Will 'See, Hear and Speak' in Major Update*, REUTERS (Sept. 25, 2023, 10:57 AM EDT), <https://www.reuters.com/technology/openai-chatgpt-will-see-hear-speak-major-update-2023-09-25> [<https://perma.cc/4BXQ-ADBA>]. OpenAI's ChatGPT got a major update in September 2023 with extremely user-friendly "see, hear and speak" abilities that would "enable the viral chatbot to have voice conversations with users and interact using images, moving it closer to popular artificial intelligence (AI) assistants like Apple's Siri . . . . The voice feature 'opens doors to many creative and accessibility-focused applications.'" *Id.*

5. See Leon Yehuda Anidjar, Nizan Geslevich Packin & Argyri Panezi, *The Matrix of Privacy: Data Infrastructure in the AI-Powered Metaverse*, HARV. L. & POL. REV. (forthcoming) (manuscript at 3, 7) (on file at <https://ssrn.com/abstract=4363208>) (discussing data as infrastructure and the ease of creating deep fakes using AI in Web 3.0).

6. Bibhu Dash & Pawankumar Sharma, *Are ChatGPT and Deepfake Algorithms Endangering the Cybersecurity Industry? A Review*, 10 INT'L J. ENG'G & APPLIED SCI. 1, 1 (2023).

7. Kevin Roose, *A.I. Poses 'Risk of Extinction,' Industry Leaders Warn*, N.Y. TIMES (May 30, 2023), <https://www.nytimes.com/2023/05/30/technology/ai-threat-warning.html> [<https://perma.cc/N73Z-ZZ3R>].

8. See Morgan Meaker, *The EU Just Passed Sweeping New Rules to Regulate AI*, WIRED (Dec. 8, 2023, 6:20 PM), <https://www.wired.com/story/eu-ai-act> [<https://perma.cc/TKM8-9AX6>] (acknowledging the passage of the EU's Artificial Intelligence Act, which provides a framework for the development and regulation of AI).

9. Shiona McCallum, *ChatGPT Banned in Italy over Privacy Concerns*, BBC (Apr. 1, 2023), <https://www.bbc.com/news/technology-65139406> [<https://perma.cc/G9S4-Z662>].

later.<sup>10</sup> Likewise, in China, the government issued regulations banning GenAI-powered content that is not clearly labeled as such.<sup>11</sup>

Banning, however, is not the only tool used to control new and disruptive technologies that raise concerns related to security,<sup>12</sup> privacy,<sup>13</sup> economics,<sup>14</sup> ethical and social considerations,<sup>15</sup> legal and regulatory compliance failure,<sup>16</sup> and protectionism.<sup>17</sup> One other such

---

10. Shiona McCallum, *ChatGPT Accessible Again in Italy*, BBC (Apr. 28, 2023), <https://www.bbc.com/news/technology-65431914> [<https://perma.cc/RSA4-ZK7J>].

11. Victor Tangermann, *China Just Outlawed AI-Generated Media that Isn't Clearly Labeled*, THE BYTE (Dec. 14, 2022, 3:56 PM EST), <https://futurism.com/the-byte/china-ai-generated-media-labeled> [<https://perma.cc/97RK-98N7>].

12. Diane Bartz & Alexandra Alper, *U.S. Bans New Huawei, ZTE Equipment Sales, Citing National Security Risk*, REUTERS (Nov. 30, 2022, 11:13 PM EST), <https://www.reuters.com/business/media-telecom/us-fcc-bans-equipment-sales-imports-zte-huawei-over-national-security-risk-2022-11-25> [<https://perma.cc/5NHV-Z72A>] (discussing the U.S. ban on “telecommunications equipment” from Huawei for national security reasons).

13. See, e.g., Jabotinsky & Lavi, *The Eye in the Sky*, *supra* note 1, at 1330 (discussing privacy concerns relating to the operation of delivery drones); Hadar Y. Jabotinsky & Michal Lavi, *NFT for Eternity*, 56 MICH. J. L. REFORM 827, 891 (2023) (discussing privacy concerns with regards to NFTs, which are uploaded directly on the blockchain).

14. See, e.g., Rebecca Elaine Elliott, Note, *Sharing App or Regulation Hack(ney)?: Defining Uber Technologies, Inc.*, 41 J. CORP. L. 727, 729 (2016) (explaining the significance of “the impact of the Sharing Economy model on the business and regulatory environment [and how] . . . Uber is illustrative because . . . [f]or example, Germany, Spain, Italy, and France either have or have nearly banned Uber nationwide.”).

15. See, e.g., Sarah Karlin, *Gene Editing: The Next Frontier in America's Abortion Wars*, POLITICO (Feb. 16, 2016, 5:21 AM EST), <https://www.politico.com/story/2016/02/gene-editing-abortion-wars-219230> [<https://perma.cc/4FS3-2RVK>] (discussing the debate over banning gene editing technologies); Rachel Rose Ostrander, *Commodification of the Female Egg: Stem Cell Technology and the Future*, 7 N.C. CENT. U. BIOTECHNOLOGY & PHARM. L. REV. 69, 83 (2014) (“The United States government has taken the banning approach with regards to funding stem cell research. Under the Bush Administration, all future embryonic stem cell research was banned.”); John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J. L. & MED. 439, 483 (2003) (stating that the Congressional ban on funding for embryo research left “the matter in the hands of the private sector”).

16. Franck Kuwonu, *Protectionist Ban on Imported Used Clothing*, AFR. RENEWAL (Dec. 2017–Mar. 2018), <https://www.un.org/africarenewal/magazine/december-2017-march-2018/protectionist-ban-imported-used-clothing> [<https://perma.cc/5YJF-KYXU>] (discussing a protectionist ban on imported clothing for the benefit of local industry in East Africa).

17. Countries might block foreign technology companies to protect or promote their domestic industries. This is often seen in trade wars, where technology is a key

tool is regulatory blacklisting. Both banning and blacklisting can be used by policy makers to navigate the behavior of entities, individuals or even other jurisdictions.

In recent years, regulators have used blacklisting as a key enforcement tool. Firms have been blacklisted for selling spyware to foreign governments,<sup>18</sup> being Russian,<sup>19</sup> supporting the modernization of China's army,<sup>20</sup> money laundering<sup>21</sup> and more. The blacklisting of

---

battlefield. For example, China has long maintained a Great Firewall, a set of regulations and technologies designed to regulate the internet domestically. This has effectively blocked major foreign tech firms like Google, Facebook, and Twitter, allowing home-grown companies like Baidu, WeChat, and Sina Weibo to dominate the Chinese market. *See, e.g.,* Lindsay Willson, Comment, *TikTok v. Trump: The "Renegade" of Digital Fair Trade*, 24 OR. REV. INT'L L. 263, 268–69 (2023) ("In China, digital protectionism takes the form of 'web censorship . . . forced technology transfer[s] . . . and onerous requirements on nearly every foreign company' working within China. This is especially salient considering China's 'Great Firewall,' which limits China's internet reciprocity with other nations.").

18. Off. of Pub. Affs., *Commerce Adds NSO Group and Other Foreign Companies to Entity List for Malicious Cyber Activities*, U.S. DEP'T COM. (Nov. 3, 2021), <https://www.commerce.gov/news/press-releases/2021/11/commerce-adds-nso-group-and-other-foreign-companies-entity-list> [<https://perma.cc/3UYW-PBJ3>] (discussing the U.S. government's blacklisting of NSO Group and Candiru for "develop[ing] and suppl[y]ing spyware to foreign governments that used these tools to maliciously target government officials, journalists, businesspeople, activists, academics, and embassy workers").

19. Elena Chachko & J. Benton Heath, *A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield*, 116 AM. J. INT'L L. UNBOUND 135, 135–37 (2022) (noting the various sanctions, blacklistings, and other actions taken against Russians by the international community in the wake of the Russian invasion of Ukraine).

20. Jill Disis & Kylie Atwood, *US Adds a Dozen Chinese Companies to Its Trade Blacklist*, CNN BUS. (Nov. 25, 2021, 5:54 AM EST), <https://edition.cnn.com/2021/11/25/tech/us-chinese-companies-trade-blacklist-intl-hnk/index.html> [<https://perma.cc/X6VZ-LHV9>] (discussing U.S. blacklisting of Chinese firms, preventing them from gaining access to U.S. companies and technologies).

21. David Yaffe-Bellany, *Treasury Dep't Blacklists Crypto Platform Used in Money Laundering*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/2022/08/08/technology/treasury-blacklist-crypto-tornado-cash-laundering.html> [<https://perma.cc/H6N8-WL9K>] (discussing the U.S. Treasury Department's August 2022 blacklisting of Tornado Cash for aiding criminals in laundering money, which effectively banned Americans from using the service); TheNewsCrypto, *Tornado Cash Yet Again Sanctioned by U.S Treasury*, BINANCE SQUARE (Nov. 9, 2022, 3:10 PM) <https://www.binance.com/en/feed/post/50041> [<https://perma.cc/ED4L-46G3>] (informing on the Treasury Department's update of the blacklisting of Tornado Cash after the Treasury Department discovered that Tornado Cash had been used to send resources to North Korea); MacKenzie Sigalos & Ryan Browne, *Crypto Mixing Service Tornado Cash Blacklisted by Treasury Department for Alleged Use in Laundering*, CNBC (Aug 8, 2022, 2:47

Tornado Cash, an entity that works to conceal the identity of those trading cryptocurrencies by obscuring the trail of funds, is perhaps one of the most surprising examples of this trend.<sup>22</sup> U.S. Treasury's Office of Foreign Assets Control (OFAC) blacklisted Tornado Cash for allegedly helping launder over \$7 billion in cryptocurrencies.<sup>23</sup> When Tornado Cash was blacklisted, Americans were no longer legally permitted to use the services.<sup>24</sup> Shortly after its blacklisting, a group of cryptocurrency investors, funded by the cryptocurrency exchange Coinbase, filed a still-ongoing lawsuit against the Treasury Department in the Western District of Texas, claiming that it lacks the authority to blacklist Tornado Cash.<sup>25</sup> This raises legal questions regarding

---

PM EDT), <https://www.cnn.com/2022/08/08/crypto-mixing-service-tornado-cash-blacklisted-by-treasury-department.html> [<https://perma.cc/BP63-CJPC>] (“The U.S. Department of Treasury . . . sanctioned the popular cryptocurrency mixer Tornado Cash, banning Americans from using a service that the government said, ‘launders the proceeds of cybercrimes.’ ‘Despite public assurances otherwise, Tornado Cash has repeatedly failed to impose effective controls designed to stop it from laundering funds for malicious cyber actors on a regular basis and without basic measures to address its risks,’ Under Secretary of the Treasury for Terrorism and Financial Intelligence Brian Nelson said in a statement.”).

22. See Sigalos & Browne, *supra* note 21 (describing what a crypto mixing entity does).

23. *Id.*

24. In reality, however, this sanction might not prove to be very effective, as Tornado Cash is a smart contract mixer, and essentially a code, so, in theory, it can run in perpetuity. Lisa Forte, *OFAC Sanctions Tornado Cash: What This Means for Ransomware Payments*, REDGOAT, <https://red-goat.com/ofac-sanctions-tornado-cash-what-this-means-for-ransomware-payments> [<https://perma.cc/ZLB8-YBFL>] (“It isn’t a centralised service that you can just shut down. It isn’t a ‘person’ you can sanction easily. In fact, according to Coin Desk Tornado Cash was still processing transactions the day after the sanctions ‘it processed over \$2 million worth of cryptocurrency transactions. The code itself cannot be stopped.’ Many crypto reporters and industry notables comment on how the Tornado Cash code is ‘unstoppable.’ Without an ability to update the code that is correct. However, and perhaps making the situation even harder for OFAC is the fact that it is accessible by anyone with an Ethereum address. This makes it permissionless and means it can’t be censored. So yes, you can sanction it, ban it, whatever you want but how do you actually enforce that to any meaningful level? Anyone can send funds from Tornado Cash to anyone else with an Ethereum account thus enlisting them in potential criminal activity.”).

25. Complaint, *Van Loon v. Dep’t of Treas.*, No. 22-cv-920, 2023 WL 2576436 (W.D. Tex. Feb. 16, 2023); see Aislinn Keely, *Crypto White Collar Cases to Watch in 2024*, LAW360 (Jan. 1, 2024, 8:02 AM EST), <https://www.law360.com/articles/1775336/crypto-white-collar-cases-to-watch-in-2024> [<https://perma.cc/HU3N-EUWL>] (discussing how the Fifth Circuit Court of Appeals will rule on the case in 2024).

blacklisting as a regulatory tool, mainly when and how should it be used, as well as who has the authority to exercise it.

The United States is not the only jurisdiction that uses blacklisting as a regulatory and enforcement tool.<sup>26</sup> Moreover, blacklisting also plays a key role in international relations, as the entire world witnessed in early 2022 when President Biden decided to blacklist Russian banks and other corporations<sup>27</sup> as part of the administration's sanctions on Russia.<sup>28</sup> Then, in August 2022, China demonstrated the utility of blacklisting to officials again, when its foreign ministry decided to impose sanctions on U.S. House Speaker Nancy Pelosi and her immediate family, after she visited Taiwan despite China's firm opposition.<sup>29</sup>

---

26. John O'Donnell, *Exclusive: Austria Blocks Russian Sanctions over Raiffeisen Blacklisting – Sources*, REUTERS (Dec. 14, 2023, 12:55 PM EST), <https://www.reuters.com/markets/europe/austria-stalls-russian-sanctions-over-raiffeisen-blacklisting-sources-2023-12-14> [<https://perma.cc/25W9-ZPCA>] (discussing Ukraine's blacklisting of Raiffeisen Bank International for doing business in Russia).

27. Demetri Sevastopulo, *US Blacklists Chinese Companies for Allegedly Supporting Russian Military*, FIN. TIMES (June 29, 2022), <https://www.ft.com/content/a866bf53-ed1a-4329-aa01-2d7c1fcf305d> [<https://perma.cc/X66T-Z3UA>] (discussing the five Chinese companies placed on an export blacklist for violating sanctions aimed at Russia). For a detailed review of the sanctions imposed on Russia, see Chachko & Heath, *supra* note 19, at 135–37, detailing the types of sanctions by the United States on Russia in response to the war in Ukraine, and Ana Swanson, *US Announces Sweeping Restrictions on Technological Exports to Russia*, N.Y. TIMES (Feb. 24, 2022), <https://www.nytimes.com/2022/02/24/business/us-announces-sweeping-restrictions-on-technological-exports-to-russia.html> [<https://perma.cc/7DZW-E7A2>], reporting that the Biden Administration blacklisted Russia after its invasion of Ukraine with the effect of preventing Russia from receiving certain “high-tech good that are made in foreign countries using American machinery, software or blueprints.”

28. Victor Reklaitis, *Biden's New Sanctions Against Russia: Blocking More Banks and Cutting off Tech Imports, But No SWIFT Move*, MARKETWATCH (Feb. 24, 2022, 2:18 PM ET), <https://www.marketwatch.com/story/bidens-new-sanctions-against-russia-blocking-more-banks-and-cutting-off-tech-imports-but-no-swift-move-11645730297> [<https://perma.cc/3QJ7-UK7V>]. Sometimes, private entities also practice blacklisting, the legality of which varies according to the context and the jurisdiction. *See, e.g.*, Employment Relations Act 1999 (Blacklists) Regulations 2010, SI 2010/493 (UK) (outlawing the compiling and use of trade union blacklists in the UK). *But see Creating a Blacklist*, NETH. ENTER. AGENCY, <https://business.gov.nl/regulation/creating-blacklist> [<https://perma.cc/6Z7G-N99M>] (providing instructions to Dutch businesses on how to create their own blacklists in accordance with the EU's General Data Protection Regulation).

29. Jessie Yeung, *China Suspends Cooperation with US on Range of Issues, Sanctions Pelosi over Taiwan Trip*, CNN (Aug. 5, 2022, 9:55 AM EDT), <https://edition.cnn.com/>

However, there are also possible implicit sanctions associated with being blacklisted, which typically involve some reputational effects.<sup>30</sup> Indeed, the fact that business entities, organizations, persons, and even countries actively take steps to avoid being blacklisted illustrates their concern about their reputations.<sup>31</sup> First, getting blacklisted signals a negative reputation, which discourages interaction with those on the blacklist.<sup>32</sup> Second, being blacklisted can result in the cost of errors, such as chilling interaction with those on the blacklist due to uncertainty surrounding the restrictions to which they are subject.<sup>33</sup>

---

2022/08/05/asia/nancy-pelosi-taiwan-china-tokyo-intl-hnk/index.html [https://perma.cc/8C3V-NRM5].

30. See, e.g., Susan C. Morse, *Tax Compliance and Norm Formation Under High-Penalty Regimes*, 44 CONN. L. REV. 675, 706 (2012) (discussing the reputation signaling associated with the Organization for Economic Cooperation and Development's blacklist).

31. See ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 105 (1984) (noting that “[u]nder conditions of uncertainty and decentralization . . . [a] good reputation makes it easier for a government to enter into advantageous international agreements”); Morse, *supra* note 30, at 706, 722–24 (discussing tax compliance, the Foreign Account Tax Compliance Act (FATCA), and its international impact, arguing that “[r]eputation signaling explains why low-tax countries took pains to avoid the OECD blacklist”).

32. In the case of blacklisting, this effect is not all bad. Note that if the market does consider blacklists as providing relevant information, having blacklists may mean that investors will be more willing to invest in the market. See Morse, *supra* note 30, at 706 (noting that the OECD's blacklist has created a “good banks don't lie” norm). This is the same effect when regulators utilize “naming and shaming.” See, e.g., Kristine Gallardo, Note, *Taming the internet Pitchfork Mob: Online Public Shaming, the Viral Media Age, and the Communications Decency Act*, 19 VAND. J. ENT. & TECH. L. 721, 727 (2017) (explaining online norm enforcement); Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an internet Age*, 75 MD. L. REV. 1029, 1034 (2016) (describing shaming on the internet).

33. See, e.g., Constantine Lizas & Ross Hofherr, *FinCEN Alerts On Sanctions Evasion Signal Shifting Approach*, LAW360 (Mar. 22, 2022, 5:45 PM EDT), <https://www.law360.com/articles/1476099/fincen-alerts-on-sanctions-evasion-signal-shifting-approach> [https://perma.cc/KXN6-5SU7] (stating that in early 2022, the Financial Crimes Enforcement Network (FinCEN) issued alerts about efforts to evade the sanctions on Russia and Belarus following the invasion of Ukraine; these alerts put financial institutions on notice that FinCEN will expect a higher level of vigilance from them, despite confusing and ever-changing sanctions and regulations); see also Bryce Baschuk & Brendan Murray, *How Blacklisting Companies Became Trade War Weapon*, WASH. POST (Sept. 21, 2020, 11:37 AM EDT), [https://www.washingtonpost.com/business/how-blacklisting-companies-became-a-trade-war-weapon/2020/09/21/323ef43c-fc1b-11ea-b0e4-350e4e60cc91\\_story.html?](https://www.washingtonpost.com/business/how-blacklisting-companies-became-a-trade-war-weapon/2020/09/21/323ef43c-fc1b-11ea-b0e4-350e4e60cc91_story.html?) [https://perma.cc/APF5-RADU] (discussing how U.S. blacklisting of Chinese technology companies prevents them from purchasing U.S. software and components in the future).

Lastly, being blacklisted can result in financial losses due to the negative impact on blacklisted entities' credit scores.<sup>34</sup>

By analyzing various regulatory measures that employ both incentives (“carrots”) and penalties (“sticks”), distinguishing between blacklisting and banning, and examining the overt and subtle repercussions of being blacklisted, this Article demonstrates how blacklisting allows lawmakers and officials to impose regulatory standards on businesses and jurisdictions. For better or worse, this approach has been a valuable tool for regulators, especially when confronting new, disruptive technologies that they are unsure how to regulate, such as GenAI. By examining different sanctions and how using them leverages doctrines such as the signalling economy, this Article argues that regulatory blacklisting is similar to regulation by enforcement—a widely criticized practice.<sup>35</sup> It further suggests that by making sure that the factors that drive law enforcement are clear, transparent, and challengeable *ex ante*, regulators and administrations could more effectively deter entities from engaging in undesired behaviors.<sup>36</sup> Additionally, because rational business entities could

---

34. See, e.g., *Israeli Spyware Firm NSO ‘At Risk of Defaulting’ After U.S. Blacklisting*, HAARETZ (Nov. 23, 2021) [hereinafter: *NSO “At Risk of Defaulting”*], <https://www.haaretz.com/israel-news/tech-news/israeli-spyware-firm-nso-at-risk-of-defaulting-after-u-s-blacklisting-1.10408897> [<https://perma.cc/SPX6-EUEZ>] (“Moody’s said in June that it downgraded the company’s rating from B2 to B3, adding that its outlook remains negative . . . . Following the U.S. Commerce Department announcement [,] . . . NSO’s senior management has lobbied . . . to pressure the U.S. government to lift sanctions imposed against the company.”); see also James J. Park, *Bondholders and Securities Class Actions*, 99 MINN. L. REV. 585, 612 (2014) (discussing how credit ratings operate).

35. Chris Brummer, Yesha Yadav & David T. Zaring, *Regulation by Enforcement*, S. CAL. L. REV. (forthcoming) (manuscript at 2) (on file at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4405036](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4405036) [<https://perma.cc/CW6V-4LZV>]) (stating that “[t]his approach, popularly termed ‘regulation by enforcement,’ prompted fierce critiques from commentators and the marketplace, often from the standpoint of fairness—and based on an implicit assumption that such regulatory conduct might be illegal, or at the very least, politically motivated”).

36. Understanding that regulation by enforcement is problematic, in the last few years, regulators and government agencies have tried to better provide transparency and clarity of compliance expectations. For example, “[OFAC] has overhauled its enforcement program to provide more information, including case summaries . . . .” Mengqi Sun, *U.S. Sanctions Compliance Fines Hit Decade High*, WALL ST. J. (July 25, 2019, 8:32 AM EST) <https://www.wsj.com/articles/u-s-sanctions-compliance-fines-hit-decade-high-11564057920> [<https://perma.cc/P34R-JHGE>]. This effort is part of the Treasury’s focus on “outlining the hallmarks of an effective sanctions compliance program,” which included issuing in 2019 an official “guidance on what it expects from corporate sanctions compliance programs.” *Id.*

consider regulatory sanctions, including fines or other business and financial limitations and prohibitions, as a cost of doing business,<sup>37</sup> getting blacklisted might not always prove as impactful as one would think.

Finally, this Article argues that when considering blacklisting as a potential regulatory “stick,” regulators would be wise to distinguish between two types of situations, namely: (1) cases relating to criminal activities such as money laundering, terror-related activities, fraud, corruption, or violations of human rights, whereby blacklisting noncompliant business entities and jurisdictions might be desirable, but insufficient;<sup>38</sup> and (2) cases whereby entities are presumably behaving in an unethical or economically undesired way in the eyes of regulators and officials, as President Donald Trump’s administration perceived the case with TikTok—the Chinese social platform—to be.<sup>39</sup>

---

37. See, e.g., David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CAL. L. REV. 917, 922 (2001) (explaining that if entities are rational, the possibility of criminal penalties is crucial to deterrence, as the economic benefit of noncompliance can and often does exceed paying fines or the economic cost of sanctions). Similarly, in the context of GenAI, one could argue that for tech companies to train their AI models on web-scraped images, infringing on artists’ rights arguably makes financial sense, given the potential benefits. *Id.* For more on this topic, see Kyle Wiggers, *The Current Legal Cases Against Generative AI Are Just the Beginning: AI that Can Generate Art, Text and More Is in for a Reckoning*, TECHCRUNCH (Jan. 27, 2023, 11:30 AM EST), <https://techcrunch.com/2023/01/27/the-current-legal-cases-against-generative-ai-are-just-the-beginning> [<https://perma.cc/CD55-E32S>] (describing the growing number of investments in generative AI start-ups despite the mounting legal questions surrounding test data intellectual property).

38. Blacklisting might be desirable but insufficient, especially as studies show that in the years following the 2008 financial crisis, the U.S. Department of Justice has relaxed policies aimed at holding individuals liable and lowered the size of penalties and fines imposed on business entities. See generally Dorothy S. Lund & Natasha Sarin, *Corporate Crime and Punishment: An Empirical Study*, 100 TEX. L. REV. 285, 341 (2021) (discussing the ineffectiveness of fines on large businesses since they the fines as a “cost of doing business” rather than a penalty requiring change).

39. The Trump Administration sought to add TikTok to the same banned “Entity List” as Huawei and considered declaring a “national emergency” that would give the administration’s officials “broad authority” over foreign business transactions. See, e.g., Daniel Van Boom, *Trump’s TikTok ban Isn’t Actually About TikTok*, CNET, (Aug. 7, 2020 6:10 PM EST), <https://www.cnet.com/news/trumps-tiktok-ban-isnt-actually-about-tiktok> [<https://perma.cc/SW8K-YH62>] (explaining the administration’s reasoning behind banning TikTok similar to the ban placed on Huawei); Kim Lyons, *Judge Halts Trump Administration Ban on TikTok Downloads*, VERGE, (Sep. 27, 2020, 8:24 PM EST)

In the first instance, sanctions beyond those traditionally associated with blacklisting should be utilized to make “breaking the law” not economically worthwhile. Additional sanctions include policing and addressing the noncompliance directly with the individuals responsible for initiating or directing the legal violations.<sup>40</sup> In the second instance, regulators need to focus on providing transparency and clarity of compliance expectations. For example, the ethical aspect of AI’s role in media remains a point of contention.<sup>41</sup> Should media outlets detail their AI tool usage like *The Houston Times* does, or use AI to generate most of their stories without clear attribution, and still be considered in compliance?<sup>42</sup>

Discussing these issues, the Article is structured as follows: Part I examines the different types of regulatory measures available when policing the behavior and activities of business entities, individuals, and even jurisdictions. It analyzes the notions of reward and punishment in regulation (i.e., the carrots and sticks approach), describes the motivation for using sticks through the economic analysis of crime, and explains how public criticism can also be an effective regulatory tool. Part II explores the concepts of blacklisting and banning in-depth. It provides different examples of the use of bans,

---

<https://www.theverge.com/2020/9/27/21458375/tiktok-judge-trump-china-ban-app-bytedance> [<https://perma.cc/T9RJ-FAEQ>] (describing the series of executive orders leading up to the attempted ban on new TikTok downloads).

40. This type of sanction is based on basic behavioral economics, which attempts to find effective ways to incentivize and make people “avoid temptation, exert more self-control, and ultimately reach their long-term goals.” DAN ARIELY, *THE UPSIDE OF IRRATIONALITY: THE UNEXPECTED BENEFITS OF DEFYING LOGIC AT WORK AND AT HOME* 9 (2010). Increasing personal accountability is also likely to improve performance. See *infra* Part VI.

41. See Charlotte Trobitt, *The Ethics of Using Generative AI to Create Journalism: What We Know so Far*, *PRESS GAZETTE* (Apr. 17, 2023) <https://pressgazette.co.uk/publishers/digital-journalism/ai-news-journalism-ethics> [[HTTPS://PERMA.CC/4AMX-9ZCQ](https://perma.cc/4AMX-9ZCQ)] (highlighting ethical issues and varied responses from news organizations).

42. See generally, Jabotinsky & Sarel, *supra* note 1 (discussing disclosure obligations with regards to the use of AI); Jabotinsky & Lavi, *supra* note 1 (claiming that the use of AI should be disclosed); Oliver Darcy, *Disney, The New York Times and CNN Are Among a Dozen Major Media Companies Blocking Access to ChatGPT as They Wage a Cold War on A.I.*, *CNN* (Aug. 28, 2023, 10:17 PM EDT), <https://www.cnn.com/2023/08/28/media/media-companies-blocking-chatgpt-reliable-sources/index.html> [<https://perma.cc/9SLH-F8XB>] (describing the way multiple news outlets have decided to block access to GenAI to avoid ethical issues). Using AI to generate stories without attribution can lead to misinformation and hard-to-trace content. See *id.* (noting the informational problems that could arise if chatbots fully replace traditional news sources).

highlights the differences between the concepts of banning and blacklisting, and explores the origins and common usages of blacklists in the global economic market and financial regulation. This Part also delves into the mechanics of blacklisting, discusses the network effects of blacklists, and introduces the notion of implicit sanctions, such as reputation signaling-based harms, credit issues, customer loss, and other risks. Part III discusses the problems with blacklisting and banning. It sheds light on how entities see the punishment for noncompliance as a cost of doing business, how blacklists can have an unintended chilling effect, and how regulation often does not allow for regulatory solution to sprout out from the regulated industry.<sup>43</sup> Finally, this Part also offers policy recommendations to address these problems. The Article concludes by advocating for a different policy response for those engaging in unethical behavior versus those engaging in illegal activities, calling for more transparency and clarity of compliance expectations.

## I. REGULATORY MEASURES

A regulator's job is to identify market failures and repair them.<sup>44</sup> Regulators do that by using different regulatory measures. First, this Part discusses how regulators influence behavior by utilizing "carrots" and "sticks." Second, this Part applies the economic analysis of crime to blacklisting. Finally, this Part explains the role of public criticism in regulating entities.

### A. *Carrots and Sticks*

Regulators use "carrots" and "sticks" to nudge entities and persons to advance socially desirable goals.<sup>45</sup> Consequently, highly compliant

---

43. This is what Open AI and other platforms have arguably done, especially in connection with training on copyrighted content. For a discussion of the issue of copyrights in products of generative AI, see generally Jabotinsky & Lavi, *supra* note 1.

44. See, e.g., Hadar Y. Jabotinsky, *The Network Effects of International Crypto and DLT Regulation*, VANDERBILT J. TRANS. L. (forthcoming 2025) (manuscript at 14–29) (on file with authors) (arguing the need for regulating crypto and DLT).

45. See Brian Galle, *The Tragedy of the Carrots: Economics and Politics in the Choice of Price Instruments*, 64 STAN. L. REV. 797, 808 (2012) ("Society can use either carrots or sticks interchangeably to get externality producers to 'internalize' the marginal effects of their decisions on others."). The use of carrots has also been discussed in the theoretical economics of crime literature as a possible substitute for some of the sticks approach, namely punishing criminals by fines or incarceration. See Murat C. Mungan, *Rewards Versus Imprisonment*, 23 AM. L. ECON. REV. 432, 473 (2021).

entities and persons are encouraged to continue acting this way by being offered various advantages (carrots). These rewards come in different forms,<sup>46</sup> such as greater access to administration-operated or subsidized projects;<sup>47</sup> credit to top executives for their and their entities' performance;<sup>48</sup> and reputation signaling that publicly showcases such persons' and entities' high level of compliance.<sup>49</sup> Conversely, non-compliant entities and persons are discouraged from continuing their undesired behavior by being subject to certain penalties (sticks). These sticks can include blacklisting and banning.<sup>50</sup>

There are two main situations in which regulators and governments use sticks. The first is when they serve an educational purpose that attempts to instill in the wrongdoer a sense of accountability for their actions.<sup>51</sup> The second is when they seek to police and punish illegal, immoral, or unethical behavior and noncompliant conduct.

When attempting to educate persons—be it individuals or entities—using carrots can include developing a uniform sanction for each potential violation or misbehavior.<sup>52</sup> Indeed, an educational sanction mainly needs to identify conduct as wrongful and make the person responsible for such conduct immediately understand that they have

---

46. Rewards are also an important tool in the international arena, which lacks a centralized enforcement system. Rewards “are improvements in a target’s value position relative to a baseline of expectations. Rewards are transfers of positively valued material or immaterial goods, such as opportunities for and benefits of cooperation, money, technology, or social approval/good reputation. Penalties are deprivations relative to the same baseline.” Anne van Aaken & Betül Simsek, *Rewarding in International Law*, 115 AM. J. INT’L L. 195, 196 (2021).

47. See Omri Ben-Shahar & Anu Bradford, *Reversible Rewards*, 15 AM. L. & ECON. REV. 156, 180 (2013) (arguing for subsidies for industries that compete against noncompliant actors).

48. For example, The Basel Accords III have a mechanism ensuring that if the capital conservation buffer falls below 2.5%, then discretionary bonus payments will automatically halt so that the buffer can replenish. Thus, this mechanism rewards executives who maintain the buffer above 2.5% by allowing them to receive the bonus. See Bank for Int’l Settlements, *The Capital Buffers in Basel III – Executive Summary*, FSI CONNECT, [https://www.bis.org/fsi/fsisummaries/b3\\_capital.pdf](https://www.bis.org/fsi/fsisummaries/b3_capital.pdf) [https://perma.cc/4938-ZW7H].

49. See van Aaken & Betül Simsek, *supra* note 46, at 211 (describing efforts by the International Committee of the Red Cross to publicly praise good actors).

50. See Galle, *supra* note 45, at 805 (describing the opposite yet interchangeable goals of punishment and reward).

51. Kathleen K. Bach, Note, *The Exclusionary Rule in the Public School Administrative Disciplinary Proceeding: Answering the Question After New Jersey v. T.L.O.*, 37 HASTINGS L.J. 1133, 1159–60 (1986) (discussing sanctions in the context of education).

52. *Id.*

harmed others' interests. Punishments, on the other hand, are used to penalize wrongful parties for their misbehavior, rather than to teach right and wrong.<sup>53</sup>

Differentiating between the two regulatory goals of education and punishment is fairly straightforward, but also important.<sup>54</sup> The Supreme Court in *Kennedy v. Mendoza-Martinez* offered a seven-factor test that classifies a regulatory response as punitive if: (1) it constitutes an affirmative restraint;<sup>55</sup> (2) it historically has been viewed as, or considered a punishment;<sup>56</sup> (3) it is imposed for an offense that requires knowledge of the wrongful consequences of one's conduct;<sup>57</sup> (4) it advances deterrence;<sup>58</sup> (5) it applies to behavior that is already chargeable as a crime;<sup>59</sup> (6) it could rationally be attributed an alternative, non-punitive purpose, while still being punitive in effect;<sup>60</sup> and (7) it seems excessive when considered in connection with the alternative purpose attributed to it.<sup>61</sup>

Based on *Kennedy*, blacklisting is clearly of a punitive nature. It typically includes some type of affirmative restraint;<sup>62</sup> it historically has

---

53. *Id.*

54. Regulatory measures of a penal nature should be supported by a due process of law and safeguards as required by the Fifth and Six Amendments of the constitution. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 184 (1963).

55. *Id.* at 168.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 168–69.

61. *Id.* at 169.

62. For examples of common law treatment of blacklisting as restraints of trade, see, e.g., *Mineral Water Bottle Exch. v. Booth & Co.*, 57 LT 573 (1887) (Ch. Div.); *Huston v. Rentlinger*, 15 S.W. 867 (1891); *Mattison v. Lake Shore & M. S. Ry. Co.*, 3 Ohio Dec. 526 (C.P. 1895); *Blumenthal v. Shaw*, 77 F. 954 (3rd Cir. 1897); see also RESTATEMENT (FIRST) OF CONTRACTS § 515 cmt. c, illus. 20–22 (AM. L. INST. 1932). For a discussion of the practical case of Chinese drone-making company DJI being restricted by being placed on several U.S. blacklists, see Demetri Sevastopulo, *Chinese Drone Maker Lobbies to Defeat US National Security Ban*, FIN. TIMES (July 14, 2022) <https://www.ft.com/content/8636c764-40ea-4544-8b1f-0b2f1bb417a8?list=intlhomepage> [<https://perma.cc/EJ5X-8BX8>] (“DJI is one of many Chinese technology companies that have fallen into Washington’s crosshairs over security concerns. Donald Trump’s administration in 2018 placed the group on the ‘entity list’, a blacklist that effectively prevents it from buying US technology. President Joe Biden last year added DJI to the ‘Chinese military-industrial complex companies’ list, a group of entities in which Americans are prohibited from investing.”). For the treatment of

been viewed as a punishment in various contexts;<sup>63</sup> it could be imposed for an offense that requires knowledge of the wrongful consequences of one's conduct, as is the case when corporate entities violate human rights law,<sup>64</sup> and it is fair to say that it is often used as a deterrent.<sup>65</sup>

---

blacklisting as restraints in general, see Mariana C. Minaya, *Volver a "Bracero"? Lessons from Spain on Migrant Worker Recruitment*, 19 HARV. LATINO L. REV. 89, 108 (2016) discussing different types of hurtful retaliation, the author lists "intimidation, threats, restraints, coercion, blacklisting or discharge . . ." and Jason A. Cade, "Water Is Life!" (*and Speech!*): *Death, Dissent, and Democracy in the Borderlands*, 96 IND. L.J. 261, 300 n.233 (2020) analyzing, in the context of immigration, how "blacklists operate as a prior restraint that suppresses a range of activities . . ."

63. See, e.g., Daniel C.K. Chow, *How China Uses International Trade to Promote Its View of Human Rights*, 45 GEO. WASH. INT'L L. REV. 681, 703 (2013) (detailing how the United States "has an extensive set of laws and policies that regulate external U.S. trade throughout the world . . . [which furthers [U.S. national security and global peace and security] by publicly rewarding states with strong human rights records with trading opportunities, while punishing or 'blacklisting' states with poor human rights records by denying such opportunities."); Richard R. Carlson, *Citizen Employees*, 70 LA. L. REV. 237, 263–64 (2009) (discussing how employers could use blacklists to punish employees for various reasons); Gary Williams, *Can Government Limit Tenant Blacklisting?*, 24 SW. U. L. REV. 1077, 1081 (1995) (addressing "the possibility that courts may treat tenant blacklisting as 'core' or political speech but contend[ing] that tenant blacklisting" is a punishment that is contrary to public policy); Michael D. Cicchini, *Law Review Publishing: Thoughts on Mass Submissions, Expedited Review, and Potential Reform*, 16 U.N.H. L. REV. 147, 158 (2017) (discussing blacklisting as a punishment in the context of legal literature submissions to law journals).

64. See, e.g., Joel Slawotsky, *US Financial Hegemony: The Digital Yuan and Risks of Dollar De-Weaponization*, 44 FORDHAM INT'L L.J. 39, 46 (2020) (quoting Andrew Rennemo, *With China Sanctions, America Pushes the Limits of Its Financial Power*, DIPLOMAT (June 19, 2020), <https://thediplomat.com/2020/06/with-china-sanctions-america-pushes-the-limits-of-its-financial-power> [<https://perma.cc/M4TH-NSNT>]) ("Washington added a further 33 Chinese entities to an export control blacklist for alleged complicity in human rights violations . . .").

65. See, e.g., Maritza I. Reyes, *Professional Women Silenced by Men-Made Norms*, 47 AKRON L. REV. 897, 970 (2015) (discussing how women continue to be discriminated against and harassed and remain silent about it "because retaliation, such as being 'blacklisted' . . . is a deterrence . . ."). Similarly, for an argument that tax shelter deterrence policy could largely be achieved through the use of blacklists, see Mark P. Gergen, *The Logic of Deterrence: Corporate Tax Shelters*, 55 TAX L. REV. 255, 255 (2002), arguing for a combination of blacklisting newly identified tax shelters and punishing those who use or promote them, and Kyle D. Logue, *Legal Transitions, Rational Expectations, and Legal Progress*, 13 J. CONTEMP. LEGAL ISSUES 211, 233–34 (2003) suggesting that blacklists in tax shelter deterrence could be effective because sophisticated taxpayers would know the consequences of using an illegal tax shelter and strive to avoid blacklists.

Coming back to the regulatory use of carrots or sticks, in recent decades, for the most part, regulators have demonstrated a preference for using carrots, rather than sticks, when attempting to achieve policy goals.<sup>66</sup> They have found carrots to be more effective in preventing undesired activities.<sup>67</sup> This is particularly true in financial regulation, as regulators and scholars seem to believe that “[i]ncentives, when properly calibrated and designed, can be incredibly powerful regulatory tools for governing individuals and institutions in the face of complexity.”<sup>68</sup> Another potential reason for this carrot preference could be the signaling theory of nonmonetary sanctions, which has developed in recent decades in both law and economics,<sup>69</sup> incorporating educational and informative concerns and issues into the standard theory of deterrence,<sup>70</sup> and discussing situations in which

---

66. Shi-Ling Hsu, *The Rise and Rise of the One Percent: Considering Legal Causes of Wealth Inequality*, 64 EMORY L.J. ONLINE 2043, 2065–66 (2015) (explaining that “the carrots” in the regulation of industries that are important to economic development “frequently take the form of some capital promotion or protection”).

67. Gerrit De Geest & Giuseppe Dari-Mattiacci, *The Rise of Carrots and the Decline of Sticks*, 80 U. CHI. L. REV. 341, 345 (2013) (focusing on how “carrots” have become more widely used in recent decades in our society and arguing that “carrots” are superior to “sticks” in the face of complexity, including, particularly in connection with disclosure requirements and financial regulation).

68. Tom C.W. Lin, *The New Financial Industry*, 65 ALA. L. REV. 567, 614–15 (2014) (explaining that although “penalties and punishments may be psychologically, politically, and administratively more satisfying following financial misbehavior, incentives may be more effective” in more complex situations).

69. See, e.g., Massimo D’Antoni & Roberto Galbiati, *A Signaling Theory of Nonmonetary Sanctions*, 27 INT’L REV. L. & ECON. 204, 213–14 (2007) (“[N]onmonetary sanctions may be more credible in transmitting information about the harmfulness of actions.”).

70. See, e.g., Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1045–52 (2010) (discussing this idea in the context of police departments and lawsuits); Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 596–600 (2000) (arguing that the costs of settlements and judgments should be allocated between police departments and officers); Aaron Marr Page, *Just Compensation? Whether “Business & Human Rights” Compensation Awards Should Embrace Deterrence Considerations*, 50 N.Y.U. J. INT’L L. & POL. 353, 445–46 (2018) (finding that damages should be seen as a deterrence practice and not simply used for compensation purposes).

the public enforcer is more informed than the potential wrongdoer about the possible negative consequences of conduct or behavior.<sup>71</sup>

*B. Why Do Regulators Use Sticks? The Economic Analysis of Crime*

To understand why regulators use sticks, some interesting insights may be taken from the economic analysis of crime. The law and economics<sup>72</sup> theory of crime<sup>73</sup> assumes that criminals are rational players.<sup>74</sup> Rational criminals who are given their choice set of whether to commit a crime will choose whichever best maximizes their utility<sup>75</sup>

---

71. See, e.g., Massimo D'Antoni & Roberto Galbiati, *A Signaling Theory of Nonmonetary Sanctions*, 27 INT'L REV. L. & ECON. 204, 205 (2007) (asserting that governments can affect individuals' perceptions of likely consequences because they are in a position to better know the risks and harms of criminal actions).

72. For a discussion of the law and economics theory, see generally Gary Minda, *The Jurisprudential Movements of the 1980's*, 50 OHIO ST. L.J. 599, 604–14 (1989) (describing the law and economics theory as analyzing and reforming common law adjudication through the application of a few fundamental economic concepts).

73. Darren Bush, *Law and Economics of Restorative Justice: Why Restorative Justice Cannot and Should Not Be Solely About Restoration*, UTAH L. REV. 439, 442 (2003) (discussing the “Law and Economics Theory of Crime” where economists must begin with “a discussion of rationality” as with all human activity).

74. “Economics assumes rationality as a first principle that is typically unquestioned. Where humans are not rational, they are not competent, according to the theory. For law and economics followers, there is no way to prove that humans are consistently rational in market transactions, except to assert it by definition.” *Id.* at 442 n.17; see also Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 456–59 (1974) (arguing that “people are rationally self-interested” and are willing to pay for what they find valuable); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1553 (1998) (analyzing whether making the consequences of criminal actions more visible to the public would effectively deter criminal behavior if people could see the low probability of consequences for their actions).

75. Perfect information is not a required assumption when applying the rationality concept of the law and economics theory on criminal law and persons' choice to commit crimes. See, e.g., ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 437–39 (3d ed. 2000). However, behavioral economics argues that individuals do not necessarily conduct themselves as the rational risk-averse utility-maximizer predicted by conventional neoclassical economics, or according to the traditional law and economics doctrine. Nizan Geslevich Packin, *It's (Not) All About the Money: Using Behavioral Economics to Improve Regulation of Risk Management in Financial Institutions*, 15 U. PA. J. BUS. L. 419, 450 (2013). Behavioral economics “developed as a result of a great deal of experimental research done in behavioral psychology that focused on how individuals actually behave . . . [and suggests that] some deviations from the rational utility-maximizer model are predictable, and not just a random error, but the result of systematic biases.” *Id.*

through a cost-benefit analysis.<sup>76</sup> The rationality assumption is important both to understand why individuals and corporations may choose to violate the law, and to effectively design disincentives for those behaviors.<sup>77</sup> According to the seminal work of Becker,<sup>78</sup> criminals often weigh the benefit (b) of their crime against the probability (p) and form (f) of punishment of being caught;<sup>79</sup> they will usually only commit crimes where the benefit outweighs the other two (where  $b > p * c$ ).<sup>80</sup> With time, this general framework has developed to include additional choices. Specifically, scholars have noted that the choices the individuals are faced with (to commit the crime or not) can also entail benefits and not just costs.<sup>81</sup> These benefits and costs may include monetary elements, like the value of the stolen goods or a fine, or non-monetary elements, such as the pleasure criminals may derive from hurting others or the loss of utility due to their imprisonment.<sup>82</sup> As more theoretical scholarship on crime deterrence has continued to develop,<sup>83</sup> a vast area of empirical literature on punitive damages has

---

76. Roe Sarel, *Crime and Punishment in Times of Pandemics*, 54 EUR. J.L. & ECON. 155, 156 (2022) (arguing that individuals may commit crimes where they determine that the benefits are greater than the consequences).

77. See, e.g., Israel Klein, *Contemptuous Tax Reporting*, 2019 WIS. L. REV. 1161, 1201–07 (2019) (minimizing contemptuous tax reporting of corporations by enhanced scrutiny of non-IRS parties).

78. See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECONOMY 169 (1968) (explaining that “obedience to law is not taken for granted, and public and private resources are generally spent in order both to prevent offenses and to apprehend offenders”).

79. *Id.* at 207–09 (describing the calculation in terms of cost to society).

80. *Id.*

81. Sarel, *supra* note 76, at 156. See generally A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45 (2000) (detailing the various methods public enforcement of the law can employ when deterring criminals who commit crimes after evaluating that the benefits outweigh the losses). See, e.g., A. MITCHELL POLINSKY & STEVEN SHAVELL, *The Theory of Public Enforcement of Law*, in 1 HANDBOOK OF LAW AND ECONOMICS 403, 405, 407 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (acknowledging that when deciding how to impose monetary sanctions, one must evaluate the gains that the criminals expect from committing the crime); Matteo Rizzolli & Luca Stanca, *Judicial Errors and Crime Deterrence: Theory and Experimental Evidence*, 55 J. L. ECON 311, 312–15 (2012) (finding that criminals evaluate expected payoffs of crimes even when balancing the risk of judicial error in their cost-benefit analysis).

82. Sarel, *supra* note 76, at 156.

83. See generally, CASS R. SUNSTEIN, REID HASTIE, JOHN W. PAYNE, DAVID A. SCHKADE & W. KIP VISCUSI, *PUNITIVE DAMAGES: HOW JURIES DECIDE* 62–63, 70 (2002) (finding that

emerged. This area is divided into two camps, one arguing that punitive damages have become too widely used and are not ideal deterrents,<sup>84</sup> and one that has argued that punitive damages are

---

juries award punitive damages as a punishment more often than as a deterrent consideration); Steve P. Calandrillo, *Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics*, 78 GEO. WASH. L. REV. 774 (2010) (arguing that punitive damages should be imposed without considering whether a party acted immorally, but as a deterrent when that party has escaped liability before); Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383, 1386, 1391–92, 1396–98 (2009) (arguing that the system of applying punitive damages needs to be reconstructed to ensure more certainty); Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 319–20 (2009) (asserting that retributive damages could provide a more proportional response to sanction activity lying between civil and criminal fines); Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 395 (2008) (arguing that modern punitive damages are unconstitutional because they punish more than just private wrongs to individuals); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 962 (2007) (arguing that punitive damages in tort law should act as private retribution and not as general deterrence); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 107 (2005) (finding that the “plaintiff’s right to be punitive” provides a stronger foundation for punitive damages than does a punishment theory); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 352 (2003) (asserting that civil damages should be reconstructed to include a new category called compensatory societal damages); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 870 (1998) (arguing that punitive damages should only be awarded if the culpable party might escape liability, and only then for the deterrent effect it provides); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1394–96 (1993) (suggesting that punitive damages are fundamental in civil cases and are necessary to punish wrongdoers).

84. See, e.g., Victor E. Schwartz & Christopher E. Appel, *Exporting United States Tort Law: The Importance of Authenticity, Necessity, and Learning from Our Mistakes*, 38 PEPP. L. REV. 551, 558 (2011) (finding that the United States allows for punitive damage awards at a much higher amount and frequency than other nations); Alison F. Del Rossi & W. Kip Viscusi, *The Changing Landscape of Blockbuster Punitive Damages Awards*, 12 AM. L. & ECON. REV. 116, 154–55 (2010) (analyzing the effect a 1:1 ratio of compensatory to punitive damages would have on the effect of ‘blockbuster’ awards); Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, 9 (2004) (finding that juries are responsible for awarding a disproportionate amount of punitive damages compared to non-jury trials); Victor E. Schwartz, Mark A. Behrens & Joseph P. Mastro Simone, *Reining in Punitive Damages “Run Wild”: Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1008–10 (1999) (finding the amount and frequency of punitive damage awards has significantly increased in the modern era).

reasonable and predictable.<sup>85</sup> The empirical literature has proven parts of the Becker model to be accurate in real-life settings.<sup>86</sup> For instance, the empirical and experimental literature has revealed that a tradeoff exists between the probability of being caught (p) and the form of punishment if caught (f).<sup>87</sup> Furthermore, this literature highlights the relevance of other variables such as risk, time preferences, uncertainty, behavioral biases, judicial errors, long-term effects and more.<sup>88</sup>

---

85. See, e.g., Theodore Eisenberg, Michael Heise, Martin T. Wells, *Variability in Punitive Damages: Empirically Assessing Exxon Shipping Co. v. Baker*, 166 J. INSTITUTIONAL & THEORETICAL ECON. 5, 20 (2010) (finding that high award cases do not have disproportionate ratios between the punitive and compensatory damages, so the system, as it stands, is constitutional); Theodore Eisenberg, Paula L. Hannaford-Agor, Michael Heise, Neil LaFountain, G. Thomas Munsterman, Brian Ostrom et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996 and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263, 270 (2006) (arguing that the reason that juries award a significant portion of punitive damages compared to non-jury trials is because they see more torts cases involving corporations and hospitals); Theodore Eisenberg & Martin T. Wells, *The Significant Association Between Punitive and Compensatory Damages in Blockbuster Cases: A Methodological Primer*, 3 J. EMPIRICAL LEGAL STUD. 175, 194 (2006) (finding that blockbuster awards have a strong correlation with their linked compensatory value, and are similar in that ratio to smaller punitive awards); Theodore Eisenberg, Neil LaFountain, Brian Ostrom, David Rottman & Martin T. Wells, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 745 (2002) (arguing that when juries do award punitive damages, it is often in an amount similar to the compensatory award); Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida: In Terrorem and in Reality*, 38 HARV. J. LEGIS. 487, 487–89 (2001) (finding that juries in Florida rarely award punitive damages, and when they do, there is no evidence they do so arbitrarily); Theodore Eisenberg, John Goerd, Brian Ostrom, David Rottman & Martin T. Wells, *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 624–25 (1997) (asserting that punitive damage awards are one of the more easily explicable facets of the legal system because of their close correlation with compensatory damages).

86. Justin T. Pickett, J.C. Barnes, Theodore Wilson & Sean Patrick Roche, *Prospect Theory and Criminal Choice: Experiments Testing Framing, Reference Dependence, and Decision Weights*, 37 JUSTICE Q. 1140, 1142 (2020) (outlining an expected utility model of criminal choice).

87. *Id.* at 1142.

88. Sarel, *supra* note 76, at 156 (analyzing the effect of risk and other variables); see also Berno Buechel, Eberhard Feess & Gerd Muehlheusser, *Optimal Law Enforcement with Sophisticated and Naïve Offenders*, 177 J. ECON. BEHAVIOR & ORG. 836, 837 (2020) (comparing the risk perceptions of sophisticated and naïve offenders); Justin T. Pickett, J.C. Barnes, Theodore Wilson & Sean Patrick Roche, *Prospect Theory and Criminal Choice: Experiments Testing Framing, Reference Dependence, and Decision Weights*, 37 JUSTICE Q. 1140, 1144 (2020) (finding that several variations affect the decision-making process of an individual engaging in criminal activity, including their initial

When discussing the tools in the regulatory arsenal, sticks tend to have the same effect on the players as criminal sanctions do on criminals. When discussing blacklisted entities, the regulated industry is typically composed of corporate business entities, which are considered rational players.<sup>89</sup> Therefore, the regulated business entities will perform the abovementioned cost-benefit analysis, and if they expect their gains to be greater than the cost of the sanction multiplied by the probability of being sanctioned, then the business entities will likely move forward with the undesirable activity.<sup>90</sup> When discussing business entities, an additional notable factor is added to the decision-making process. As Paternoster and Simpson rightly point out, it is individuals inside the corporations who decide whether to commit crimes or make morally problematic, questionable decisions.<sup>91</sup> These individuals are, however, affected by their corporate environment and thus take a few factors into account: “(1) the risks and benefits they perceive for themselves, (2) the risks and benefits they perceive for their firm or company, and (3) the presence or absence of offending inducements or restrictions within the specific context of the organization.”<sup>92</sup> Additionally, the Paternoster & Simpson study also found that regulatory sanctions directed at business entities also help reduce unwanted behavior and deter those acting on behalf of the business entities.<sup>93</sup> These types of instances of corporate wrongdoing and management decision-making have been broadly covered in the academic literature discussing agency costs.<sup>94</sup> On a side

---

wealth); Matteo Rizzolli & Luca Stanca, *Judicial Errors and Crime Deterrence: Theory and Experimental Evidence*, 55 J. L. ECON. 311, 312 (2012) (discussing the theory of deterrence under multiple types of judicial errors); Charles R. Tittle & Ekaterina V. Botchkovar, *Self-Control, Criminal Motivation and Deterrence: An Investigation Using Russian Respondents*, 43 CRIMINOLOGY 307, 309 (2005) (arguing that self-control is a significant variable in criminal decisions).

89. See Alan E. Singer, *Strategy as Moral Philosophy*, 15 STRATEGIC MGM'T J. 191, 192 (1994) (linking strategy and rationality in the corporate context).

90. Raymond Paternoster & Sally Simpson, *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime*, 30 L. & SOC'Y REV. 549, 550–51 (1996).

91. *Id.* at 553.

92. *Id.*

93. *Id.* at 579.

94. The extensive literature on agency costs generally suggests that whenever one person engages another to perform services on their behalf, the parties will incur some “positive monitoring and bonding costs (nonpecuniary as well as pecuniary), and in addition there will be some divergence between the agent’s decisions and those

note, it is worth mentioning that it is not always the case that such instances of corporate wrongdoing are well-calculated and reflect the most effective choice of action. Indeed, decision-making under uncertainty has also been explored in game theory literature, administrative law, and behavioral economics.<sup>95</sup> Decision-making under “uncertainty” includes situations where decision-makers are not able to quantify the likelihood of different outcomes.<sup>96</sup> This happens not because the decision-makers are clueless about the possibility that certain potential outcomes will materialize, but because they do not know how likely it is that any of these possibilities will happen.<sup>97</sup>

### C. Public Criticism Approach

Regulation is not the only activity that can help police business entities’ illegal, immoral, or unethical behavior. Indeed, consumers,

---

decisions which would maximize the welfare of the principal.” Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976); see also Louis Putterman, *Ownership and the Nature of the Firm*, 17 J. COMP. ECON. 243, 244 (1993) (“The . . . separation of ownership and work is the basic cause of the familiar agency problem between employer and employee.”); Robert H. Sitkoff, *An Agency Cost Theory of Trust Law*, 89 CORNELL L. REV. 621, 635 (2004) (“The agency cost theories of the firm focus on the problems of shirking and monitoring that stem from information asymmetries within the organization’s component relationships.”). Since it has become popular, many scholars have used the agency cost literature in different contexts. See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 377 (2000) (utilizing agency cost literature to examine class action); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 12 (1991) (“The lawyer’s role as agent of the client can be analyzed from an economic perspective with modern tools of agency cost theory.”).

95. For more on decision-making under uncertainty, see Barbara H. Fried, *Ex Ante/Ex Post*, 13 J. CONTEMP. LEGAL ISSUES 123, 126 (2003), focusing on the shift “from viewing the ex post costs (benefits) of legal transitions as an unanticipated windfall, to viewing them as the payoff of an ex ante rational bet, [and how it] has had enormous implications for what law and economics scholars take to be the appropriate policy response.” See also Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 513–14 (1986) (examining the close relationship between government policy and market uncertainty); DANIEL N SHAVIRO, *WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY* 26 (2000) (finding that uncertainty often may inform or influence behavior).

96. FRANK H. KNIGHT, *RISK, UNCERTAINTY AND PROFIT* 19–20 (Houghton Mifflin Co., The Riverside Press Cambridge, 1921).

97. See, e.g., José Luis Bermúdez & Michael S. Pardo, *Risk, Uncertainty, and “Super-Risk”*, 29 NOTRE DAME J.L. ETHICS & PUB. POL’Y 471, 475 (2015) (asserting that a person evaluating too many unknowable variables leads to unpredictable decision-making).

employees, and various stakeholders can all play a role in influencing parties' behavior.<sup>98</sup> Effective public criticism, which includes shaming in media outlets, different social circles, and social networks can prove useful in pressuring individuals and entities to act ethically.<sup>99</sup> Public criticism has already proved effective with GenAI platforms such as ChatGPT.<sup>100</sup> Indeed, shaming is a promising enforcement tool, which can greatly assist in promoting corporate social responsibility norms; environmental, social and governance (ESG) goals;<sup>101</sup> and civic

---

98. Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. REG. 499, 513 (2020) (asserting that from consumers to employees, individuals play a role in policing unethical behaviors).

99. See, e.g., Klonick, *supra* note 32, at 1034 (finding that social shaming relies on pressuring others to conform to societal norms); Kristine Gallardo, *Taming the Internet Pitchfork Mob: Online Public Shaming, the Viral Media Age, and the Communications Decency Act*, 19 VAND. J. ENT. & TECH. L. 721, 727 (2017) (asserting that internet platforms have given individuals the opportunity to assert their values and beliefs, including condemnation of behavior that does not meet social norms); Nizan Geslevich Packin, *In Too-Big-to-Fail We Trust: Ethics and Banking in the Era of Covid-19*, WIS. L. REV. 101, 112–14 (2020) [hereinafter Packin, *In Too-Big-to-Fail We Trust*] (finding the U.S. financial market is led by a market-based regulatory approach); Klein, *supra* note 77, at 1178, 1180 (finding that self-reporting personal taxes is a preferred method when taxpayers play by the rules).

100. For instance, OpenAI has disabled ChatGPT's Browse with Bing feature after receiving much criticism about the platform being used to bypass paywalls, which are typically used by news outlets to encourage readers to sign up for a paid subscription. Brian Quarmby, *OpenAI Pauses ChatGPT's Bing Feature, as Users Were Jumping Paywalls*, COINTELEGRAPH (July 5, 2023), <https://cointelegraph.com/news/chatgpt-bing-integration-paused-for-helping-bypass-paywalls> [<https://perma.cc/BUM7-NQJ7>].

101. See Thomas Lee Hazen, *Corporate and Securities Law Impact on Social Responsibility and Corporate Purpose*, 62 B.C. L. REV. 851, 853–54 (2021) (stating that “[t]he corporate social responsibility (CSR) movement wants companies to consider the societal impact of their operations”); see also Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1249–50 (2020) (focusing on an overlooked dimension of the ESG-based competition among major institutions—the effort to attract Millennial assets—given research indicating that Millennial investors are more likely to invest based on ESG considerations than are investors of other ages); Lipton, *supra* note 98, at 527 (describing how some commentators believe that when it comes to the social impact of corporate activity, the informational needs of investors and the public are not that different). “Sustainability metrics . . . are material to investors’ evaluation of long-term financial performance . . . [as such] practices ultimately contribute to . . . corporate health,” and help generate goodwill, which translates into better sales, hiring, economic signaling and compliance operations. *Id.*

accountability.<sup>102</sup> Consumers can also influence corporate behavior through customer boycotts, massive loss of customers, and other types of customer dissatisfaction.<sup>103</sup> This is especially true given the strong evidence that businesses are concerned about their reputation and will modify their business practices to avoid any bad press,<sup>104</sup> which they

---

102. See generally Sharon Yadin, *Regulatory Shaming*, 49 LEWIS & CLARK L. SCH. ENV'T. L. 407, 407 (2019) (finding that shaming is a legitimate approach and is used by many agencies through press releases and social media to enhance civic accountability).

103. See, e.g., Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1123 (2007) (explaining that some securities laws propose disclosure to activist groups because their involvement is crucial to spur collective action); Douglas A. Kysar, *Preferences for Process: the Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 584–87 (2004) (detailing the growth of consumer activism as a movement in the United States which historically reformed market practices through substantial boycotts).

104. See, e.g., David Dayen, *USAA Grabs Coronavirus Checks from Military Families*, AM. PROSPECT (Apr. 16, 2020), <https://prospect.org/coronavirus/usaa-bank-grabs-stimulus-checks-from-military-families> [<https://perma.cc/6YWU-UKM5>] (highlighting that several members of Congress publicly shamed USAA for its conduct in taking stimulus checks from military families in debt, causing other banks to return any funds they had seized); Lisette Voytko, *Shake Shack Returns \$10 Million PPP Loan amid Criticism of Restaurant Chains Receiving Stimulus Funds*, FORBES (Apr. 20, 2020, 8:54 AM), <https://www.forbes.com/sites/lisettevoytko/2020/04/20/shake-shack-returns-10-million-ppp-loan-amid-criticism-of-restaurant-chains-receiving-stimulus-funds> [<https://perma.cc/G63H-Z24V>] (noting that Shake Shack returned a \$10 million small business loan to the government after facing public criticism that large restaurant chains had depleted the loan program); Oliver Darcy, *Tucker Carlson's Show Has Been Hit by an Advertiser Boycott, and It's Having a Visible Effect*, CNN (Dec. 20, 2018), <https://www.cnn.com/2018/12/20/media/tucker-carlson-fox-news-ad-boycott/index.html> [<https://perma.cc/W6ME-PYDB>] (reporting that liberal organizations successfully spearheaded an advertiser boycott of “Tucker Carlson Tonight” after his commentary on mass immigration); Jason Schwartz, *Big Advertisers Still Shunning Ingraham's Fox News Show Months After Boycotts*, POLITICO (Oct. 16, 2018, 5:04 AM), <https://www.politico.com/story/2018/10/16/ingraham-fox-news-advertising-902466> [<https://perma.cc/7ZVP-Z7TP>] (reporting that nationally recognized brands similarly conducted an advertiser boycott of “The Ingraham Angle” after her comments angered gun-control activists). Financial institutions have also stopped granting loans and offering credit to controversial industries—such as anti-abortion institutions, gun manufacturers, and the private prison industry—in response to significant public pushback. See, e.g., Laura J. Keller & Polly Mosendz, *BofA Will Stop Lending to Makers of Assault-Style Guns*, BLOOMBERG (Apr. 10, 2018, 4:54 PM), <https://www.bloomberg.com/news/articles/2018-04-10/bofa-will-no-longer-lend-to-some-gunmakers-vice-chairman-says> [<https://perma.cc/7XXY-5ABR>] (noting that multiple large national banks have decided to not finance gun manufacturers and retail chains that do not promote gun safety); Taylor Telford & Renae Merle, *Bank of America Cuts Business Ties with Detention Centers, Private*

fear will negatively affect their profits and operations.<sup>105</sup> Similarly, employees in recent years have made their voices heard. Powerful tech companies and other large corporate entities have experienced their share of employee revolts against ventures associated with abuse of human rights, or even consumer privacy-related concerns, demonstrating to big corporate entities the power of employees to alter business practices and norms.<sup>106</sup>

But shaming is not just a tool that stakeholders use. Indeed, regulators and lawmakers have started to increasingly engage in public shaming to nudge entities toward advancing desired policy goals—a phenomenon that is also referred to as the ‘name and shame’ approach.<sup>107</sup> While it is true that the most obvious way for regulators to

---

*Prisons*, WASH. POST (June 27, 2019, 1:42 PM), <https://www.washingtonpost.com/business/2019/06/27/bank-america-cuts-business-ties-with-detention-centers-private-prisons/> [<https://perma.cc/GV7Y-8ZJG>] (reporting that several large national banks are cutting ties with private prisons and detention centers as they attempt to distance themselves from the legal crossfire).

105. See Claire A. Hill, *Marshalling Reputation to Minimize Problematic Business Conduct*, 99 B.U. L. REV. 1193, 1208 (2019) (arguing that businesses with better reputations may be able to charge premiums on their products and have higher price-earnings multiples).

106. See, e.g., Kate Conger & Cade Metz, *Tech Workers Now Want to Know: What Are We Building This for?*, N.Y. TIMES (Oct. 7, 2018), <https://www.nytimes.com/2018/10/07/technology/tech-workersask-censorship-surveillance.html> [<https://perma.cc/6W2K-UVFL>] (finding that especially in technology companies, employees are beginning to demand more transparency in the projects they contribute to and refusing to provide their skills on projects that they consider unethical); Kelsey Gee, *The New Labor Movement: Pushing Employers to Be Socially Active*, WALL ST. J. (June 25, 2019), <https://www.wsj.com/articles/the-new-labor-movement-pushing-employers-to-be-socially-active-11561476199> (finding that nearly 50% of millennial employees have spoken to their employers about a controversial topic to change the company policies or decisions); Billy Nauman, Patrick Temple-West & Andrew Edgecliffe-Johnson, *BlackRock Under Fire, (Dual) Class War, PAC Attack*, FIN. TIMES (Aug. 7, 2019), <https://www.ft.com/content/4ad02fa4-b895-11e9-8a88-aa6628ac896c> (reporting that employees demanding greater transparency made Microsoft suspend and revisit its political donation program); Michael Forsythe & Walt Bogdanich, *McKinsey Ends Work with ICE amid Furor over Immigration Policy*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/business/mckinsey-ends-ice-contract.html> [<https://perma.cc/42SD-J6FD>] (writing that McKinsey & Company issued a statement to increase transparency with employees after it was disclosed that the company had done over \$200 million in consulting work for Immigration and Customs Enforcement).

107. See Olga Balakina, Angelo D’Andrea & Donato Masciandaro, *Bank Secrecy in Offshore Centres and Capital Flows: Does Blacklisting Matter?*, 32 REV. FIN. ECON. 30, 31 (2017) (asserting that blacklisted countries are put under international pressure using

police behavior is, naturally, via regulation,<sup>108</sup> regulatory shaming can also be effective. Paralleling the discussion regarding carrots and sticks, regulators have a broad spectrum of measures ranging from criminal punishments to regulatory shaming at their disposal; the latter does not seem significant but has a substantive impact on businesses.<sup>109</sup> Regulators using naming and shaming publish negative, government-provided information concerning private entities, mainly business organizations, to promote public-interest goals.<sup>110</sup> Therefore,

---

the ‘name and shame’ approach); CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY* 152–58 (2012) (examining the various methods by which international actors place pressure on each other, including the name and shame approach); Juliette J.W. Pfaeltzer, *Naming and Shaming in Financial Market Regulations: A Violation of the Presumption of Innocence?*, 10 *UTRECHT L. REV.* 134, 134–35 (2014) (arguing that while naming and shaming has become a popular regulatory tool, implications of the presumption of innocence are at issue with this method); Judith van Erp, *Naming Without Shaming: The Publication of Sanctions in the Dutch Financial Market*, 5 *REG. & GOVERNANCE* 287, 290 (2011) (opining that publishing sanctions can provide guidance regarding appropriate behavior).

108. An example of policing via regulation was when the Office of the Comptroller of the Currency (OCC) tried to promulgate regulations to block recently-adopted liberal banking practices from becoming business norms during the Trump Administration, only for the Biden Administration to end this attempt several months later. See Chris Arnold, *Trump Regulator’s Rule Would Force Banks to Lend to Gun-Makers and Oil Drillers*, *NAT’L PUB. RADIO* (Jan. 11, 2021, 5:07 AM) <https://www.npr.org/2021/01/11/954945486/trump-regulators-rule-would-force-banks-to-lend-to-gun-makers-and-oil-drillers> [<https://perma.cc/S8L5-7RD9>] (announcing a ban on banks that deny services to entire sectors); Eric Rosenbaum, *Banking Regulator Pauses Rule that Enraged Wall Street and Climate Investors*, *CNBC* (Jan. 28, 2021), <https://www.cnbc.com/2021/01/28/occ-pauses-bank-rule-that-enraged-wall-street-climate-investors.html> [<https://perma.cc/42JG-EHVY>] (describing how the OCC paused the rule that would have otherwise required banks to explain any decisions to not lend to the oil, gas, and firearms industries); see also Nizan Geslevich Packin & Srinivas Nippani, *Ranking Season: Combating Commercial Banks’ Systematic Discrimination of Consumers*, 59 *AM. BUS. L.J.* 1, 5–6 (2022) (arguing that banks need to be held to clear standards through laws and regulations to advance ESG goals); Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 *U. COLO. L. REV.* 731, 734 (2019) (finding that the amount a business participates in ESG considerations reflects financial factors, its reputation, and the well-being of employees).

109. See Klonick, *supra* note 32, at 1034 (asserting that from regulatory to social shaming, regulators have mighty tools at their disposal to shape behaviors).

110. See, e.g., Packin, *In Too-Big-to-Fail We Trust*, *supra* note 99, at 112–14 (some businesses get ahead of name and shame by using market-led initiatives); Balakina et al., *supra* note 107, at 30 (describing international blacklisting and the international use of naming and shaming); Brummer, *supra* note 107, at 152 (discussing the application of sanctions to, as well as blacklisting of, non-conforming countries);

while not the same as blacklisting, regulators do cause a similar signaling effect associated with reputational harms to the entities that they shame.<sup>111</sup>

Commentators have argued that shaming is an appropriate, useful, and democratic regulatory tool.<sup>112</sup> Regulatory shaming is intended to “communicate an external moral judgment about corporate activities rather than causing internal feelings of shame. Similarly to other types of regulation, regulatory shaming is aimed at correcting market failures . . . as well as advancing desired social goals.”<sup>113</sup>

## II. BLACKLISTING AND BANNING

Banning and blacklisting are two similar terms that are often used interchangeably.<sup>114</sup> This confusion between the terms mainly happens because typically, when persons or entities are blacklisted, they are banned from using, benefiting, or profiting from something.<sup>115</sup> Nevertheless, the terms are different, and it is key to understand why,

---

Pfaeltzer, *supra* note 107, at 134–35 (asserting that a wide publication of sanctions further punishes wrongdoers by minimizing the amount of consumers who use their services); van Erp, *supra* note 107, at 290 (finding that by publishing sanctions, regulators also have an opportunity to clarify guidelines to encourage more businesses to comply); Sharon Yadin, *Shaming Big Pharma*, 36 YALE J. REG. BULL. 131, 131–33 (2019) (stating that “[n]aming and shaming’ tactics have been used by the FDA with regards to the pharma industry in recent years, mainly through online publication of noncompliance and warning letters,” an example of which is the agency’s online blacklist of “dozens of branded drug companies that are supposedly using unlawful or unethical means to attempt to impede competition from generic drug companies”).

111. Yadin, *supra* note 110, at 134.

112. *Id.* at 136.

113. Yadin, *supra* note 102, at 420.

114. Dave Zirin, *Andrew Cuomo Would Have Blacklisted Muhammad Ali*, NATION (June 8, 2016), <https://www.thenation.com/article/archive/andrew-cuomo-would-have-blacklisted-muhammad-ali> [<https://perma.cc/XT37-7UMR>] (noting that “[d]espite the fact that [Muhammad] Ali had already felt the sting of a blacklist, banned by boxing from 1967–70, he did not stop speaking out upon his return to ring”).

115. For instance, “[o]ne of the easiest and most cost-effective ways to punish and deter wrongdoers is to name and shame individuals and organizations that are banned from partaking in a particular activity.” Benjamin R. Davis, *Ending the Cyber Jihad: Combating Terrorist Exploitation of the internet with the Rule of Law and Improved Tools for Cyber Governance*, 15 COMMLAW CONSPICUOUS: J. COMM’NS L. & TECH. POL’Y 119, 181 (2006) (describing the intersection of blacklisting and banning in the context of ICANN, which can “implement this strategy by creating a consolidated blacklist of individuals and entities banned from using, benefiting, or profiting from the internet”).

how, and what consequences are associated with each term, because it has proven difficult to define what constitutes a ban.<sup>116</sup>

*A. Distinguishing Between Blacklisting and Banning*

Generally, banning entails the prohibition of something, such as a specific location, product, or activity, from certain individuals.<sup>117</sup> Some commentators argue that laws can be characterized as either bans or as unintentional burdens.<sup>118</sup> However, case law has made it clear that it is reductive to label a law as a ban merely because it prohibits something.<sup>119</sup>

Examples of bans include orders forbidding travel to and from certain destinations,<sup>120</sup> legislation or directives prohibiting economically beneficial use of a certain type of property,<sup>121</sup> laws restricting a sub-section of a class of ‘arms,’<sup>122</sup> state and local regulation

---

116. Joseph Blocher, *Bans*, 129 YALE L.J. 308, 331 (2019) (describing several doctrinal challenges that make this identification process complex and explaining that “[t]o characterize a law as a ban, after all, usually means concluding that it fully deprives someone of some component of a constitutional entitlement”); *see, e.g.*, Joshua R. Hendrickson & William J. Luther, *Banning Bitcoin*, 141 J. ECON. BEHAV. & ORG. 188, 188 (2017) (“We define a ban as a policy whereby government agents refuse to accept an alternative currency and mete out punishments to private agents caught using it.”).

117. *Ban*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/ban> [<https://perma.cc/R5HM-HJR3>].

118. *Id.* at 315.

119. *See Blocher, supra* note 116, at 340 (stating that caselaw makes it “clear that it is too simplistic to label a law a ban, in a constitutionally consequential sense, based solely on the fact that it prohibits a particular thing”).

120. Former President Donald Trump’s executive order limiting entry from certain Muslim-majority countries—commonly known as the “travel ban”—is a good illustration. *See id.* at 2403–06 (summarizing the most notable provisions of President Trump’s travel ban).

121. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1006–07 (1992) (ruling on the validity of a state law that effectively prevented an individual from building any habitable structure on their beachfront property).

122. According to Justice Scalia’s majority opinion, a law that prohibited “an entire class of ‘arms’ that is overwhelmingly chosen by American society for [a] lawful purpose” was partly unconstitutional. *District of Columbia v. Heller*, 554 U.S. 570, 628–30 (2008) (“Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning [handguns] from the home . . . would fail constitutional muster.”).

that bans public smoking,<sup>123</sup> or even municipalities' laws prohibiting panhandling.<sup>124</sup>

Separate from bans, the term blacklisting means "a list of persons who are disapproved of or are to be punished or boycotted."<sup>125</sup> Somewhat similarly, the Court of Federal Claims defined a blacklist as follows: "[a] list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate . . . ."<sup>126</sup> Therefore, blacklisting refers to the act of identifying and listing of individuals, entities, or organizations that are considered undesirable, untrustworthy, or sanctionable.<sup>127</sup>

In general, banning refers to a legal prohibition that is imposed by a governmental authority or administration, while blacklisting is typically a non-legal action taken by regulatory bodies or private organizations to identify, list, and possibly sanction or limit exposure to or interaction with undesirable entities.<sup>128</sup> When it comes to government or administration decisions, a ban is usually imposed through legislation or executive orders.<sup>129</sup> It is often a response to a specific situation, such as a health crisis or national security

---

123. Nowadays, dozens of states and thousands of municipalities have laws restricting where smoking is allowed. See Daniel F. Hardin, *Blowing Electronic Smoke: Electronic Cigarettes, Regulation, and Protecting the Public Health*, U. ILL. J.L. TECH. & POL'Y, Fall 2011, at 433, 450 (noting that as of publication in 2011, 39 states and over three thousand municipalities limited public smoking).

124. See Katie Pilgram Neidig, *The Demise of Anti-Panhandling Laws in America*, 48 ST. MARY'S L.J. 543, 544 (2017) (describing the trend in the 1980s for local governments to deter panhandlers in downtown areas).

125. *Blacklist*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/blacklist> (last updated Mar. 14, 2024).

126. Scott J. Kaplan, *Trustworthiness in Public Contracting: Back to Boss Tweed?* CF&I Steel v. Bay Area Rapid Transit District, 31 PUB. CONT. L.J. 237, 240–41 (2002) (citing Estate of Braude v. United States, 35 Fed. Cl. 99, 105 n.8 (1996)).

127. Katharine A. Van Tassel, *Blacklisted: The Constitutionality of the Federal System for Publishing Reports of "Bad" Doctors in the National Practitioner Data Bank*, 33 CARDOZO L. REV. 2031, 2039 (2012) ("What should stand out in this very general overview of the history of blacklisting in the United States is that most blacklisting efforts are focused on individuals who are targeted because of some characteristic that makes them much more likely to engage in very dangerous criminal activity that carries with it a serious risk of physical harm.").

128. *Id.* at 2038–39.

129. Peter J. Benson, Valerie C. Brannon, Joanna R. Lampe, Chris D. Linebaugh & Stephen P. Mulligan, CONG. RES. SERV., LSB10942, RESTRICTING TIKTOK (PART II): LEGISLATIVE PROPOSALS AND CONSIDERATIONS FOR CONGRESS 2 (2023).

concerns.<sup>130</sup> A regulator's decision to blacklist a certain entity, on the other hand, is usually based on a violation of regulations or industry standards.<sup>131</sup> Both methods, however, fall under the use of sticks to police behavior.

### *B. Examples of Banning*

Banning attempts that specifically targeted GenAI started in 2023. In March 2023, Italy's data privacy authority, Garante per la Protezione dei Dati Personali (GPDP), banned the use of ChatGPT due to non-compliance with several principles of the General Data Protection Regulation (GDPR).<sup>132</sup> When the prohibition came into effect, Italy joined the list of jurisdictions that were officially concerned about the controversial chatbot.<sup>133</sup> Similarly, a couple of months after ChatGPT's launch, in January 2023, the New York City's Education Department (NYC DOE) banned the use of the chatbot on its schools' devices and networks.<sup>134</sup> This ban was initially put in place due to concerns raised by many individuals who believed that the chatbot had the potential to encourage cheating and plagiarism by students.<sup>135</sup> In May 2023, however, NYC DOE announced that it would rescind its ban on the wildly popular chatbot.<sup>136</sup> David Banks, the chancellor of New York City Public Schools, stated that "the knee-jerk fear and risk overlooked the potential of generative AI to support students and teachers, as well as the reality that our students are participating in and will work in a world where understanding generative AI is crucial."<sup>137</sup>

---

130. *See id.*

131. *See* Van Tassel, *supra* note 127, at 2037, 2042.

132. Ryan Browne, *Italy Became the First Western Country to Ban ChatGPT. Here's What Other Countries Are Doing*, CNBC (Apr. 4, 2023), <https://www.cnbc.com/2023/04/04/italy-has-banned-chatgpt-heres-what-other-countries-are-doing.html> [<https://perma.cc/K264-SD27>].

133. *Id.* (listing the United Kingdom, the European Union, the United States, and China, as well as citing concerns about safety, data privacy, job security, and misinformation).

134. Maya Yang, *New York City Schools Ban AI Chatbot that Writes Essays and Answers Prompts*, GUARDIAN (Jan. 6, 2023), <https://www.theguardian.com/us-news/2023/jan/06/new-york-city-schools-ban-ai-chatbot-chatgpt> [<https://perma.cc/JQ23-HAUS>].

135. *Id.*

136. Kalhan Rosenblatt, *New York City Public Schools Remove ChatGPT Ban*, NBC NEWS (May 18, 2023), <https://www.nbcnews.com/tech/chatgpt-ban-dropped-new-york-city-public-schools-rcna85089> [<https://perma.cc/LT2W-BGT8>].

137. *Id.*

However, banning is not restricted to AI. Widely covered by mainstream media, bans such as the Trump Administration's planned prohibition on using the social media app TikTok in 2020 reflect attempts to address legal challenges and concerns associated with new technologies.<sup>138</sup> The Trump Administration cited national security concerns and alleged that the app was collecting data on American users that could be shared with the Chinese government.<sup>139</sup> The ban was ultimately not implemented, as courts intervened and stopped this initiative.<sup>140</sup> However, in May 2023, Montana took the most drastic measure by any state against TikTok when its governor signed a bill that prevents mobile app stores from providing the popular social media platform to users.<sup>141</sup>

### C. Blacklisting

As mentioned before, blacklisting is a practice often used by regulators as one of the tools in their regulatory arsenal. An example of one way in which regulators shame entities and persons and inform the public of their wrongdoings is by using blacklists. Blacklists have

---

138. Eric Cortellessa, *Why Trump Flipped on a Tik Tok Ban*, TIME (Mar. 12, 2024), <https://time.com/6900348/tiktok-ban-donald-trump-congress> [https://perma.cc/4Z9M-J4E6] (explaining former President Trump's initial efforts to ban Tik Tok during his presidency, and how he has since reversed his position); Sapna Maheshwari & Amanda Holpuch, *Why Countries Are Trying to Ban Tik Tok*, N.Y. TIMES (Dec. 12, 2023), <https://www.nytimes.com/article/tiktok-ban.html> [https://perma.cc/G32D-39CX].

139. A TIK-TOK-ING TIMEBOMB: HOW TIKTOK'S GLOBAL PLATFORM ANOMALIES ALIGN WITH THE CHINESE COMMUNIST PARTY'S GEOSTRATEGIC OBJECTIVES (2023), [https://networkcontagion.us/wp-content/uploads/A-Tik-Tok-ing-Timebomb\\_12.21.23.pdf](https://networkcontagion.us/wp-content/uploads/A-Tik-Tok-ing-Timebomb_12.21.23.pdf) [https://perma.cc/AJW7-SGFD]; Mike Gallagher, *Why Do Young Americans Support Hamas? Look at Tik Tok*, FREE PRESS (Nov. 01, 2023), <https://www.thefp.com/p/tik-tok-young-americans-hamas-mike-gallag> [https://perma.cc/73G9-J57U] (recognizing that TikTok, which is "controlled by America's foremost adversary," the Chinese Communist Party, is more than "an app [that] teenagers use to make viral dance videos"; it is an increasingly popular news source, is "the top search engine for more than half of Gen Z," and is regularly used by "about six in ten Americans . . . before their seventeenth birthday"); Caroline Anders, *Young People Support Gazans. Critics Blame Tik Tok*, WASH. POST (Nov. 29, 2023), <https://www.washingtonpost.com/politics/2023/11/29/young-people-support-palestine-critics-blame-tiktok> [https://perma.cc/49QL-HZAY].

140. Maheshwari & Holpuch, *supra* note 138 (reporting that after the Governor of Montana signed a bill to ban TikTok throughout the entire state, a federal judge granted a preliminary injunction on the grounds that the ban would likely violate the First Amendment).

141. David Shepardson, *Montana Governor Signs Bill Banning Tik Tok in State*, REUTERS (May 17, 2023), <https://www.reuters.com/world/us/montana-governor-signs-bill-banning-tiktok-state-2023-05-17> [https://perma.cc/AZ3J-NSAV].

had an especially useful immediate effect in cases where there is information asymmetry, also known as market failure.<sup>142</sup> In situations in which the public has no way of knowing about business entities' and individuals' wrongdoing, regulators can fix that market failure<sup>143</sup> by making relevant information about blacklisted entities or individuals and their conduct accessible.<sup>144</sup> Blacklists are an important regulatory tool. As mentioned before, some blacklists target business entities, while others target individuals or jurisdictions.<sup>145</sup> The following Sections will discuss the mechanics of blacklisting while also providing details on some of the most prominent regulatory blacklists worldwide.

### 1. *Mechanics of blacklisting*

Before fully understanding the role of blacklisting, one must examine how and why it is used. Historically, regulators and officials have used blacklists to influence the activities, motives, behaviors, and operations of various business entities, individuals, organizations, and even other jurisdictions.<sup>146</sup> Being a regulatory tool of a punitive nature, blacklisting is no different than other sticks,<sup>147</sup> which typically come in the form of disincentives. That can include assigning personal

---

142. Steven L. Schwarcz, *Systematic Regulation of Systemic Risk*, 2019 WIS. L. REV. 1, 25 n.146 (2019) (defining market failure as “a ‘situation’ in which there is an economic inefficiency”).

143. *Id.* at 25 n.145; PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 38 (19th ed. 1995) (stating that the main goal of financial regulation needs to be to correct market failures); DAVID GOWLAND, *THE REGULATION OF FINANCIAL MARKETS IN THE 1990S* 21 (1990) (defining the “public interest theory” as regulating markets to correct market failure).

144. See ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE, *UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE* 18–19 (2d ed. 2012) (identifying that regulations in general can facilitate consumer access to information).

145. Jason C. Sharman, *The Bark is the Bite: International Organizations and Blacklisting*, 16 REV. INT’L POL. ECO. 573, 574 (2009).

146. Chachko & Heath, *supra* note 19, at 137 (recognizing “the central role of sanctions as a tool of the post-1945 legal order” and that “[t]oday, sanctions are a widely recognized pressure valve in international relations” that can “influence state and increasingly individual behavior and punish violations of the law”).

147. See, e.g., Alex Leary & Ian Talley, *U.S. Blacklists Dozens of Chinese Entities over Surveillance, Military Work*, WALL ST. J. (Dec. 16, 2021, 8:19PM EST), <https://www.wsj.com/articles/u-s-to-blacklist-more-chinese-tech-companies-over-surveillance-11639663210> (describing the blacklisting of Chinese entities as punishment for their engagement in surveillance which subverted U.S. interests).

liability<sup>148</sup> or negative points to those that do not comply with standards and laws, or whose actions conflict with regulators' agendas. It can also include limiting or reducing access to government funds and government-sponsored projects, fines for compliance failures, and other penalties such as public shaming,<sup>149</sup> which can signal the entire world to minimize or eliminate any interaction with them in accordance with their blacklisted status.<sup>150</sup> The use of economic sanctions as a tool of war gained popularity during World War I.<sup>151</sup> The Allies and Associated Powers, led by Britain and France, launched an unprecedented economic war against Germany, and blacklisting was a key tool in that economic warfare.<sup>152</sup> However, blacklisting has become a somewhat more common regulatory tool, which is backed-up by local

---

148. See, e.g., Mark A. Cody & Mark G. Douglas, *A Look at 3 Bankruptcy Remedies Lenders Commonly Use*, LAW360 (Sept. 2, 2016, 12:20 PM EDT), <https://www.law360.com/articles/835929/a-look-at-3-bankruptcy-remedies-lenders-commonly-use> [<https://perma.cc/P8Q8-L39N>] (discussing how non-recourse creditors have been utilizing special 'bad boy' guarantees to "impose personal liability on any person controlling the borrower upon the occurrence of events that were not traditionally deemed 'bad acts,' such as a bankruptcy filing by (or against) the borrower, the borrower's opposition to foreclosure, or the borrower's failure to maintain its status as an SPE"); Cloe Pippin, Recent Development, *Bankruptcy Control Tools: Good News for Creditors*, 38 REV. BANKING & FIN. L. 88, 90–91 (2018) (describing "bad boy" provisions as one of various means creditors use to achieve greater control over a borrower's ability to file for bankruptcy).

149. See, e.g., Packin, *In Too-Big-to-Fail We Trust*, *supra* note 99, at 116 (recounting that after "Treasury Secretary Steven Mnuchin condemned the NBA's Los Angeles Lakers in April 2020 for taking \$4.6 million from the PPP meant to enable small businesses to pay employees during the COVID-19 pandemic, the team returned the funds," and that similarly, Harvard University rejected PPP funds after former President Trump claimed that it was receiving PPP money).

150. See Nicholas Mulder, *THE ECONOMIC WEAPON: THE RISE OF SANCTIONS AS A TOOL OF MODERN WAR* 294 (2022) (discussing the consequences of sanctions on a country).

151. See *id.* at 291.

152. See, e.g., *id.* at 260–61 (explaining that nowadays, economic sanctions are viewed as an alternative to war, but that for the majority of people in the interwar period, the economic weapon was actually the very essence of total war; the basic intention behind creating the economic weapon was not to use it, and economic sanctions such as blacklisting were meant to be a form of deterrence); Fitzgerald, *supra* note 154, at 10–11 ("The concept of using a SDN-like blacklist to cut off indirect dealings with the target destination is a direct outgrowth of U.S. efforts to address 'corporate cloaks' and 'fronts' operating for the Axis powers in World War Two, with what was then called the Proclaimed List of Certain Blocked Nationals." The list was designed "so that anyone entangled in the web of Nazi influence could be subjected to the control." Thus, these Treasury Department blacklists, from their onset, were tools for economic warfare.").

laws, regulations, and executive orders that enable regulators to employ it.<sup>153</sup>

By blacklisting individuals or entities, states are de facto trying to influence the behavior of those who are beyond their territorial reach.<sup>154</sup> They do so by influencing and restricting the behavior of those who are within their reach so that they do not interact with the blacklisted entity or individual, which incentivizes the blacklisted entity or individual to change its behavior.<sup>155</sup> In this way, blacklisting can advance regulators' goals without having to use material sanctions or threats.<sup>156</sup> Blacklisting advances regulators' goals through two mechanisms: ex ante deterrence and ex post punishment.<sup>157</sup> Ex ante deterrence works by causing entities and/or governments to avoid being blacklisted due to the anticipated economic losses.<sup>158</sup> Ex post punishment works by causing blacklisted entities to comply with rules to remedy the material and reputational damage resulting from

---

153. The use of regulatory blacklisting is supported by laws that provide regulators with the possibility to create and maintain the blacklist. For example, in the United States, the Terrorism Sanctions Regulations allowed regulators to create a blacklist for Specially Designated Terrorists. 31 C.F.R. § 595.101–595.901 (1997). However, some experts question the source of authority of this practice when it comes to international law. See Patrick C.R. Terry, *Enforcing U.S. Foreign Policy by Imposing Unilateral Secondary Sanctions: Is Might Right in Public International Law?*, 30 WASH. INT'L L.J. 1, 26 (2020) (arguing that United States' use of sanctions to promote its domestic goals is contrary to public international law).

154. Peter L. Fitzgerald, *Pierre Goes Online: Blacklisting and Secondary Boycotts in US Trade Policy*, 31 VAND. J. TRANSNAT'L L. 1, 8–9 (1998).

155. Fitzgerald, *supra* note 154, at 9.

156. *But see* Sharman, *supra* note 145, at 574 (arguing that blacklisting is “an effective stick” to “threaten and beat” entities into compliance).

157. James Sharman refers to ex ante deterrence as “pre-emptive compliance” and to ex post punishment as “reactive compliance.” *See id.*, at 574 (defining pre-emptive compliance as when entities “anticipate material economic losses from being blacklisted and thus comply to pre-empt this damage,” and defining reactive compliance as when entities “observe and then react to material economic losses resulting from the reputational damage caused by blacklisting”).

158. *See id.* (discussing pre-emptive compliance). It should be noted that there might be a tradeoff between ex ante and ex post considerations. If a blacklisted entity anticipates it will be easy to get off a blacklist, it reduces the chilling ex ante effect that the blacklist has on entities. On the other hand, if entities can relatively easily get off blacklists, then it might incentivize them more to ex post correct their mistakes. On the tradeoff between ex ante and ex post considerations, see generally Benito Arruñada & Carlos A. Manzanares, *The Trade-off Between Ex Ante and Ex Post Transaction Costs: Evidence from Legal Opinions*, 13 BERKELEY BUS. L.J. 217, 228 (2016).

blacklisting.<sup>159</sup> While avoiding getting blacklisted altogether *ex ante* is the less costly route, successfully doing so is not always possible.<sup>160</sup>

Blacklists result in serious, explicit sanctions.<sup>161</sup> For example, getting blacklisted by the World Bank for being a corrupt and fraudulent entity bars the blacklisted entity from participating in World Bank-funded contracts for a certain period.<sup>162</sup> Similarly, becoming blacklisted by the U.S. Commerce Department's Bureau of Industry and Security (BIS) usually means being subject to certain restrictions on exports or transfer of goods to and from the blacklisted entity.<sup>163</sup>

In the United States, various laws empower regulators to blacklist individuals and entities. These laws pertain to financial,

---

159. See Sharman, *supra* note 145, at 574 (discussing reactive compliance).

160. For example, in "big data blacklisting," which occurs when personal data are used to create risk profiles that "justify" exclusive, intrusive, or even discriminatory treatment of persons, individuals get categorized as administratively "guilty until proven innocent" by virtue of suspicious digital data and database screening results. Then, their risk profiles are shared with government agencies, affecting their opportunities, ranging from government employment to immigration. Yet, unlike in other situations in which persons could act in a certain way to avoid being blacklisted, in big data blacklisting, the ability to do so is virtually nonexistent. See Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735, 1735 (2016) (explaining the process of big data blacklisting); Danielle Keats Citron & Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 HASTINGS L.J. 1441, 1443 (2011) (providing background history on surveillance and data sharing in the U.S. government); David Gray & Danielle Keats Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 81 (2013) ("Governmental data-mining systems have flagged innocent individuals as persons of interest, leading to their erroneous classifications as terrorists or security threats, intense scrutiny at airports, denial of travel, false arrest, and loss of public benefits.").

161. See generally Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063 (2020) (discussing national security apparatus' capacity to sanction individuals); J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020 (2020) (describing reforms that reintegrate the economic order with the national security state); Elena Chachko, *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, 44 YALE J. INT'L. L. 1 (2019) (discussing blacklisting in the international regime and claiming that the growing use of economic sanctions against jurisdictions is pressuring courts and tribunals to scrutinize sanctions more closely).

162. PROCUREMENT – WORLD BANK LISTING OF INELIGIBLE FIRMS AND INDIVIDUALS, WORLD BANK, <https://www.worldbank.org/en/projects-operations/procurement/debarred-firms> [<https://perma.cc/6M5Z-TC4U>].

163. See, e.g., *US Blacklist 6 Chinese Entities over Balloon Program*, ASSOCIATED PRESS (Feb. 11, 2023, 10:52 AM EST), <https://apnews.com/article/politics-united-states-government-china-beijing-business-cdf319c71f097f7f8ef176b6d7b9526c> [<https://perma.cc/7TBZ-FTBU>] (discussing the BIS backlisting of Chinese companies and their subsequent restrictions on access to U.S. technology exports).

environmental, health and safety, consumer protection, terrorist watchlist, and homeland security regulations. First, financial regulators, such as the Office of Foreign Assets Control (OFAC), Securities and Exchange Commission (SEC), and Commodity Futures Trading Commission (CFTC) have the authority to blacklist individuals or companies that violate securities or commodities laws.<sup>164</sup> They can also impose fines, penalties, and other sanctions.<sup>165</sup> Regulators often use their authorities to blacklist entities or individuals, but it is worth noting that they do not always actually use the term “blacklisting,” even though that is effectively what they are doing.<sup>166</sup>

---

164. See, e.g., Nikhilesh De, *Crypto-Mixing Service Tornado Cash Blacklisted by US Treasury*, COINDESK (Aug. 8, 2022), <https://www.coindesk.com/policy/2022/08/08/crypto-mixing-service-tornado-cash-blacklisted-by-us-treasury> [https://perma.cc/E6A7-3VGX] (describing how OFAC recently blacklisted Tornado Cash because a North Korean hacking group allegedly used it to launder stolen funds); Taofik Salako, *SEC Blacklists Six Online Trading Platforms*, NATION (May 1, 2023), <https://thenationonline.ng.net/sec-blacklists-six-online-trading-platforms> (reporting that the SEC blacklisted six online trading companies for not being registered with the proper authorities and having unauthorized financial services); Arnab Shome, *CFTC Adds 34 Illegal FX and Binary Options Platforms to the Red List*, FIN. MAGNATES (July 15, 2022), <https://www.financemagnates.com/forex/regulation/cftc-adds-34-illegal-fx-and-binary-options-platforms-to-its-red-list> [https://perma.cc/N4S4-PYD2] (describing similar instances of the CFTC blacklisting companies for offering financial services without proper registration).

165. See Securities Exchange Act of 1934, 15 U.S.C. § 780(b)(4) (providing that the SEC “shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker. . . .”); § 15(b)(6) (allowing the SEC to discipline a person associated with a broker or dealer); § 21C (allowing the SEC to issue cease-and-desist orders); see also Commodity Exchange Act § 6(c)-(d), 7 U.S.C. § 6(c)-(d) (providing the CFTC with the authority to conduct investigations, issue cease and desist orders, and impose civil penalties for violations); § 9(a) (making it a felony to manipulate commodity prices and providing for imprisonment and substantial criminal fines for violations).

166. For instance, the authors of a recent empirical research study examining compliance and sanctions against crypto entities “used the blacklisted and/or warned firms and individuals as the unit of analysis,” explaining that the term “[b]lacklist” is not defined by the regulators, and, therefore, we are unable to clarify the regulators’ intentions in labeling such action as a blacklist.” Douglas S. Eakeley, Yuliya Guseva, Leo Choi & Katarina Gonzalez, *Crypto-Enforcement Around the World*, 94 S. CAL. L. REV. POSTSCRIPT 99, 104, 108 (2021). This indirect blacklisting or blacklisting without calling it as such is not uncommon or limited to the financial industry. For example, “[a] country can indirectly blacklist by mandating that ISPs not allow users to access Internet sites containing undesirable content.” Ari Staiman, Note, *Shielding Internet*

Second, the Environmental Protection Agency (EPA) has the authority to semi-blacklist companies that violate environmental regulations, such as pollution control laws.<sup>167</sup> It also uses other regulatory tools; for instance, under the Toxic Substances Control Act<sup>168</sup> (TSCA), the EPA can prohibit companies from “manufacturing, processing, or importing” certain products, and under different laws, they can also levy fines and penalties for non-compliance.<sup>169</sup>

Third, the Occupational Safety and Health Administration (OSHA) has authority to enforce safety regulations from the Occupational Safety and Health Act of 1970.<sup>170</sup> While the term “blacklisting” is not used in the context of OSHA’s activities besides the agency’s power to issue fines, require remediation, and in extreme cases, refer matters for criminal prosecution, they also name and shame corporations for not complying with the regulation, which could eventually create a sort of “blacklist.”<sup>171</sup> OSHA also provides databases and other resources on its website that disclose company workplace safety records, regulatory

---

*Users from Undesirable Content: The Advantages of A Pics Based Rating System*, 20 FORDHAM INT’L L.J. 866, 886 (1997).

167. See, e.g., Margot Hornblower, *New Weapon to Force Compliance*, WASH. POST (Feb. 5, 1977, 7:00 PM) <https://www.washingtonpost.com/archive/politics/1977/02/05/new-weapon-to-force-compliance/34549987-1943-47ad-882c-dcde9c553fae> [<https://perma.cc/GYP2-FCG3>] (describing the EPA’s first use of their blacklisting powers on a coke plant for their excessive air pollution).

168. 15 U.S.C. §§ 2601–29.

169. See, e.g., EPA Press Office, *EPA Takes Action to Stop Use of Certain PFAS Products and Protect American Consumers*, ENV’T PROT. AGENCY (June 22, 2020), <https://www.epa.gov/newsreleases/epa-takes-action-stop-use-certain-pfas-products-and-protect-american-consumers> [<https://perma.cc/3MYJ-VBVR>] (outlining the EPA’s prohibition of the certain long-chain PFAS).

170. Occupational Safety and Health Act of 1970 § 5, 29 U.S.C. 654. Various provisions of the Act provide OSHA with enforcement authority. See *id.* (establishing that employers owe a general duty to keep their workplaces free of known dangers); § 8(a)(1)–(2) (allowing OSHA to conduct inspections and investigations); § 9(a) (enabling OSHA to issue citations for violations, propose penalties, and require abatement of the hazardous condition); § 10(a) (outlining the procedures for enforcement of orders and penalties).

171. See Michael T. Cimino, Note, *Criminal Prosecution of Workplace Safety Violations*, 94 W. VA. L. REV. 1007, 1008 (1992) (discussing OSHA’s ineffectiveness in deterring workplace safety violations). In addition, OSHA officials can also order work to stop if they find a severe risk on-site, and OSHA routinely uses shaming and public exposure strategies to promote adherence to worker-safety regulations. Sharon Yadin, *Saving Lives Through Shaming*, HARV. BUS. L. REV. 1, 2 (2018). OSHA often communicates through social media platforms like Twitter, openly mentioning companies that have breached occupational safety rules and criticizing their actions. *Id.*

violations, and their voluntary endeavors towards exceeding compliance safety objectives through the agency's cooperative programs.<sup>172</sup>

Fourth, the main consumer protection regulator, the Federal Trade Commission (FTC), does not technically “blacklist” companies, but it can and does take enforcement actions against companies that violate these and other rules.<sup>173</sup> These enforcement actions can include cease and desist orders, fines, and in some cases, actions to recover damages for consumers.<sup>174</sup> The FTC also maintains a publicly accessible database of enforcement actions, and businesses that are subject to these actions could be considered “blacklisted” in a sense, and it can also impose fines and penalties and require companies to take corrective actions.<sup>175</sup> Additionally, it manages the National Do Not Call Registry, which “includes information on Do Not Call and robocall complaints reported to the Federal Trade Commission.”<sup>176</sup>

Fifth, the U.S. federal government has a consolidated Terrorist Screening Database (TSDB) that is “often referred to as the ‘Terrorist Watchlist,’ and serves as a bridge between law enforcement, Homeland Security, the Intelligence Community, and international partners.”<sup>177</sup> This database is managed by the Terrorist Screening Center, Federal Bureau of Investigation, U.S. Department of Justice (DOJ),<sup>178</sup> and “consists of the names of individuals whom airlines serving or flying within the United States may not transport.”<sup>179</sup>

---

172. See *Occupational Safety & Health Administration Cooperative Programs*, OSHA, <https://www.osha.gov/cooperativeprograms> [<https://perma.cc/33YL-SVPK>].

173. See Hayden Field, *FTC Launches AI Inquiry into Amazon, Alphabet, Microsoft, Looking at Investments and Partnerships*, CNBC (Jan. 25, 2024, 6:48 PM EST) <https://www.cnbc.com/2024/01/25/ftc-looking-into-ai-deals-at-amazon-alphabet-microsoft-openai.html> [<https://perma.cc/F5AL-HU5E>] (describing investigations into prominent tech companies' AI investments).

174. 15 U.S.C. § 45.

175. See *Legal Library: Cases and Proceedings*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/cases-proceedings> [<https://perma.cc/AV52-U3XB>]; Federal Trade Commission, *Consumer Sentinel Network Data Book 2020* (Feb. 2021), <https://www.ftc.gov/reports/consumer-sentinel-network-data-book-2020> [<https://perma.cc/UV3L-YUHA>].

176. *Do Not Call Data (DNC)*, FED. TRADE COMM., <https://www.ftc.gov/policy-notices/open-government/data-sets/do-not-call-data> [<https://perma.cc/QYL5-B3DT>] (last updated Apr. 12, 2024).

177. Hu, *supra* note 160, at 1787–88.

178. *Terrorist Screening Center*, FED. BUREAU OF INVEST., <https://www.fbi.gov/investigate/terrorism/tsc> [<https://perma.cc/U2LE-N7J3>].

179. *Tarhuni v. Holder*, 8 F. Supp. 3d 1253, 1262 (D. Or. 2014).

Lastly, the Commerce Department's Bureau of Industry and Security (BIS) manages a list of "names of certain foreign persons – including businesses, research institutions, government and private organizations, individuals, and other types of legal persons – that are subject to specific license requirements for the export, re-export and/or transfer (in-country) of specified items."<sup>180</sup> Grounds for inclusion on this list include "activities sanctioned by the State Department and activities contrary to U.S. national security and/or foreign policy interests."<sup>181</sup>

*a. Targeting entities and individuals*

As apparent from the above mentioned blacklists, the tactic of blacklisting did not remain at the public international law level. In recent years, several major regulatory institutions and leading global actors began adopting this procedure to punish or shame entities or persons and to achieve other social goals such as alerting the general public to bad behavior or instances of fraud.<sup>182</sup> For example, inclusion on the World Bank's blacklist for corrupt and fraudulent entities disqualifies these entities from World Bank contracts for a set period.<sup>183</sup> The World Bank also reserves the right to condition collaboration on companies adopting compliance and monitoring regimes.<sup>184</sup>

Another example is the investor alerts and bulletin used by the Securities and Exchange Commission (SEC).<sup>185</sup> The SEC's Office of Investor Education and Advocacy publishes lists on commission actions and topical issues to prevent investors from becoming involved in fraudulent schemes.<sup>186</sup> In most cases, these alerts are general, but

---

180. *Entity List*, BUREAU OF INDUS. & SEC. U.S. DEP'T. OF COM., <https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list> [https://perma.cc/KHC3-5585].

181. *Id.*

182. Sharman, *supra* note 145, at 577.

183. *Procurement World Bank Listing of Ineligible Firms and Individuals*, WORLD BANK, <https://www.worldbank.org/en/projects-operations/procurement/debarred-firms> [https://perma.cc/JRF4-TFZS].

184. Caroline Binham, *World Bank Sanctions at Seven-Year High*, FIN. TIMES (Sept. 15, 2013), <https://www.ft.com/content/7b08e5a2-1c9d-11e3-8894-00144feab7de> [https://perma.cc/FNR2-RCJR].

185. *Investor Alerts and Bulletins*, U.S. SEC. & EXCH. COMM'N., <https://www.sec.gov/investor/alerts/enforcement> [https://perma.cc/WNS6-CTSX].

186. *Id.*; see also Israel Klein, *Voting on Reporting*, 48 J. CORP. L. 15–17 (forthcoming 2022) (describing the effect of a publicly disclosed SEC comment letter) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4078226](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4078226) [https://perma.cc/9MEF-MFP8].

sometimes they are more specific.<sup>187</sup> The Indian market regulator, the Securities and Exchange Board (SEBI), also has the power to blacklist firms and prevent them from operating in India.<sup>188</sup> One such example is the ban of PricewaterhouseCoopers (PwC), a global accountancy firm, from auditing firms in India for two years.<sup>189</sup> The ban was initiated following its auditing of Satyam computers, whose owner admitted to inflating earnings.<sup>190</sup>

Finally, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) also uses the power of blacklisting to deter or reprimand firms.<sup>191</sup> One example is the blacklisting of two Israeli companies, NSO Group and Candiru, for providing spyware to foreign governments.<sup>192</sup> BIS stated that this spyware was used by governments to "maliciously target government officials, journalists, businesspeople, activists, academics, and embassy workers."<sup>193</sup> The BIS blacklist is a tool that helps

[R]estrict the export, reexport, and in-country transfer of items subject to the [Export Administration Regulations] to persons (individuals, organizations, companies) reasonably believed to be involved, have been involved, or pose a significant risk of being or

---

187. *Compare Investor Alerts and Bulletins: Natural Disasters and Investment Scams—Investor Alert*, U.S. SEC. & EXCH. COMM'N. (Aug. 16, 2023), <https://www.sec.gov/oiea/investor-alerts-and-bulletins/natural-disasters-and-investment-scams-investor-alert> [<https://perma.cc/HB59-PAKV>] (giving bulleted advice for avoiding scams related to investments in natural disaster recovery), *with Investor Alerts and Bulletins: Brokered CDs: Investor Bulletin*, U.S. SEC. & EXCH. COMM'N. (Nov. 30, 2023), <https://www.sec.gov/oiea/investor-alerts-and-bulletins/investor-bulletin-brokered-cds> [<https://perma.cc/J3YT-A2W8>] (detailing features, which make complex certificates of deposit (CDs) riskier than garden variety CDs).

188. *See Powers and Functions of the Board*, SEC. & EXCH. BD. INDIA, <https://www.sebi.gov.in/powers-and-functions.html> [<https://perma.cc/T3VA-VV84>] (showing that section 11A of the Securities and Exchange Board of India Act empowers the Securities and Exchange Board of India to prohibit companies from soliciting money for the issuance of securities).

189. *Accountancy Firm Price Waterhouse Banned from India*, BBC (Jan. 12, 2018), <https://www.bbc.com/news/world-asia-india-42662259> [<https://perma.cc/U2SR-X3DV>].

190. *Id.*

191. *Lists of Parties of Concern*, U.S. DEP'T. OF COM. BUREAU OF INDUS. & SEC., <https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern> [<https://perma.cc/7RUQ-RMA7>].

192. Off. of Pub. Affs., *supra* note 18.

193. *Id.*

becoming involved, in activities contrary to the national security or foreign policy interests of the United States.<sup>194</sup>

*b. Targeting jurisdictions*

On the international level, blacklists are used to motivate other states to comply with international standards or rules without having to use material sanctions or threats.<sup>195</sup> Blacklisting has indeed proven to be an effective tool in generating compliance by using one of two mechanisms. First, as blacklists cause reputational damage, decision-makers in blacklisted jurisdictions respond to the material damage caused by their nation state being blacklisted and strive to comply with global standards to exit the blacklist.<sup>196</sup> In other situations, decision-makers anticipate the economic losses that might occur if their jurisdiction is blacklisted and try to avoid them *ex ante*.<sup>197</sup> In this way, blacklists are considered a form of “speech acts,” or cases in which by saying something, the speaker is also doing something.<sup>198</sup> In the words of Sharman: “[R]ather than the declaration being a description, or a signal for an action that will change some part of the world, it *is* an action that changes some part of the world.”<sup>199</sup>

One example of a blacklist which is used to motivate other countries to comply with international standards is the “Non-Cooperative Countries and Territories” blacklist issued by the Financial Action Task Force (FATF) in 2000.<sup>200</sup> The list flags states that do not comply with FATF’s anti-money laundering recommendations.<sup>201</sup> The FATF was established in 1989 by a group of seven developed countries (the G-7)

---

194. *Id.*

195. Paternoster & Simpson, *supra* note 90, at 551 (arguing that the reputational harm from committing corporate crimes, even when not backed by the threat of sanctions, is sufficient to motivate compliance).

196. *See id.* at 555–56 (reporting that decisionmakers are dissuaded from continuing any further corporate crimes if it may harm their competitiveness).

197. Sharman, *supra* note 145, at 574.

198. *Id.* at 579.

199. *Id.*

200. *See About the Non-Cooperative Countries and Territories NCCT Initiative*, FATF, <https://www.fatf-gafi.org/en/publications/Fatfgeneral/Aboutthenon-cooperativecountriesandterritoriesncctinitiative.html> [<https://perma.cc/T8MM-8MDA>] (identifying the criteria for selecting Non-Cooperative Countries or Territories for money laundering prevention measures).

201. *Id.*

to combat money laundering and terror financing.<sup>202</sup> The FATF issued recommendations that jurisdictions are supposed to adopt through internal legislation.<sup>203</sup> These recommendations set an international standard aimed at eradicating the flow of funds to terror organizations and combating money laundering, with FATF blacklisting states for noncompliance.<sup>204</sup> The result of being listed on the FATF's blacklist is that financial institutions in compliant states are likely to refrain from interacting with financial institutions or individuals from noncompliant states.<sup>205</sup> For instance, the FATF instructs in section 51 of its February 2000 Report on Non-Cooperative Countries and Territories that

In order to make it difficult for individuals and legal entities established or registered in non-cooperative jurisdictions to enter into the financial systems of FATF members, the latter should make sure that financial institutions within their jurisdiction fully satisfy the obligation to identify their clients before starting business relations. It should be forbidden to open an account if the applicant fails to supply really valid documentation enabling the financial institution to know without ambiguity the true identity of the owner/beneficial owner of such an account.

(ii) *Specific requirements for financial institutions in FATF members to pay special attention to or to report financial transactions conducted with*

---

202. *History of the FATF*, FATF, <https://www.fatf-gafi.org/en/the-fatf/history-of-the-fatf.html>; see also James T. Gathii, *The Financial Action Task Force and Global Administrative Law*, J. PROF. LAW. 197, 197 (2010) (arguing that the FATF's power under the G20 framework circumvents that of governments and professional societies).

203. *The FATF*, FATF, <https://www.fatf-gafi.org/en/the-fatf.html> [<https://perma.cc/R384-TYRJ>].

204. Hadar Y. Jabotinsky & Michal Lavi, *Speak Out: Verifying and Unmasking Cryptocurrency User Identity*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 518, 538 (forthcoming).

205. See Caitlin Maslen, *U4 Helpdesk Answer: The Impact of Grey Listing by the Financial Action Task Force (FATF)*, CMI U4 ANTI-CORRUPTION RES. CTR. & TRANSPARENCY INT'L 12 (Oct. 25, 2023), <https://www.u4.no/publications/the-impact-of-grey-listing-by-the-financial-action-task-force-fatf.pdf> [<https://perma.cc/XY8Q-MPB6>] (identifying that FATF recommendations for financial institutions include "limiting business relationships or financial transactions with the identified country or persons in that country"). For current FATF recommendations, see *The FATF Recommendations*, FATF (2023), <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fat-recommendations.html> [<https://perma.cc/72C3-KQC8>].

*individuals or legal entities having their account at a financial institution established in a “non-cooperative jurisdiction.”*<sup>206</sup>

This is an extremely effective sanction, as it is difficult to conduct business if banks around the world refuse to assist your financial transactions.<sup>207</sup>

The FATF is not the only global institution that uses blacklisting as a tool to induce compliance. The Organization for Economic Cooperation and Development (OECD) also uses blacklists to tackle harmful tax competition.<sup>208</sup> In a report issued in 2000, the OECD identified a few countries as being nontransparent “tax havens.”<sup>209</sup> Between 2000 and 2002, following the OECD’s report, thirty-one states committed to being more transparent, whereas seven jurisdictions refused to make such commitments and were classified by the OECD as un-cooperative states.<sup>210</sup> In the following years, all the remaining jurisdictions committed to the OECD’s principles and were therefore removed from its blacklist.<sup>211</sup> Beyond declaration power, adding states to the blacklist also demonstrates classification power.<sup>212</sup> By classifying states as nontransparent, the OECD shapes reality—other states now perceive the noncompliant state differently and change their engagement with it accordingly.<sup>213</sup>

---

206. FIN. ACTION TASK FORCE ON MONEY LAUNDERING, REPORT ON NON-COOPERATIVE COUNTRIES AND TERRITORIES 8 (Feb. 14, 2000).

207. See Maslen, *supra* note 205, at 12 (identifying FATF’s recommendation to limit interactions with institutions in listed countries).

208. *The OECD Issues the List of Unco-operative Tax Havens*, OECD (Apr. 18, 2002), <https://www.oecd.org/daf/anti-bribery/theoecdissuesthelistofunco-operativetaxhavens.htm> [<https://perma.cc/5ATZ-6GHW>].

209. *List of Unco-Operative Tax Havens*, OECD WEB ARCHIVE, <https://web-archiv.eocd.org/2018-06-05/79420-list-of-unco-operative-tax-havens.htm> [<https://perma.cc/7E DX-YP2B>] (last published June 4, 2018).

210. *Id.* (listing Andorra, The Principality of Liechtenstein, Liberia, The Principality of Monaco, The Republic of the Marshall Islands, The Republic of Nauru, and The Republic of Vanuatu as tax havens).

211. *Id.*

212. Sharman, *supra* note 145, at 580 (explaining how classification can be a “matter of life and death” because although a blacklisting declaration ostensibly causes only a change in status, it also generates real social and economic consequences).

213. *Id.*

## 2. *The network effects of blacklists*

There are several reasons as to why blacklists can be an effective tool,<sup>214</sup> and one of the key reasons is the network effect. Network effects, also known as network externalities, are the economic effects created when one person or entity uses a product or service and by so doing influences the value of that product or service to others.<sup>215</sup> In describing network effects, Professors Michael Katz and Carl Shapiro write that “[t]here are many products for which the utility that a user derives from consumption of the good increases with the number of other agents consuming the good.”<sup>216</sup> Examples of this are telephones and fax machines, since the more persons and entities adopt these

---

214. Some scholars have argued that the success of blacklists depends on three main attributes: “the stigma attached to the act that led to the blacklisting, the nature of any sanctions that it imposes and the blacklist’s legitimacy.” See Katrin Eggenberger, *When Is Blacklisting Effective? Stigma, Sanctions and Legitimacy: The Reputational and Financial Costs of Being Blacklisted*, 25 REV. INT’L POL. ECON. 483, 483 (2018). This claim is also somewhat supported by empirical data. See, e.g., Van Erp, *supra* note 107, at 287 (explaining that “[t]he case study suggests . . . that the publication of sanctions may provide an opportunity for guidance, provided they contain a moral message, rather than technical instruction”).

215. Despite its unsettled definition, many believe that the true impact of this effect is when an entity’s value to a customer on one side of the market increases as more customers on the other side join or participate. See generally Jabotinsky, *supra* note 44 (manuscript at 9) (arguing that in the context of crypto and DLT regulation, the influences of network effects spread through regulated markets, regulated firms and regulators themselves). Network effects can also be described as a phenomenon where the profits of a firm selling the product are influenced by the number of people or firms using the service or product. Oz Shy, *A Short Survey of Network Economics*, 38 REV. INDUS. ORG. 119, 119–20 (2011); see also Benjamin E. Hermalin & Michael L. Katz, *What’s so Special About Two-Sided Markets?*, in TOWARD A JUST SOCIETY: JOSEPH STIGLITZ AND 21st CENTURY ECONOMICS 113 (Martin Guzman ed., 2018) (explaining how network effects can be both direct and indirect); Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645, 645–46 n.1 (2006) (defining the “two-sided market as one in which the volume of transactions between end-users depends on the structure and not only on the overall level of the fees charged by the platform”); David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 325, 328, 332 (2003) (“Platform businesses compete in ‘multi-sided markets.’ For example, video game console companies such as Sony, Nintendo, and Microsoft compete for game developers and users, while payment card companies such as American Express, MasterCard, and Visa compete for merchants and cardholders.”).

216. Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985).

products, the benefits to all users of the “network” increases.<sup>217</sup> This is also true for service providers, such as business owners who “do not want to invest in [new] technology and contracts for credit cards that customers do not use, while cardholders do not want credit cards that stores will refuse to accept.”<sup>218</sup> Regulation too can create network effects.<sup>219</sup>

Network effects in regulated markets arise when a market’s decision to join a regulatory network adds or reduces value for all other markets in the network.<sup>220</sup> For example, standardizing financial regulation through rules such as Basel 2, 3, and 4, which highlight major supervisory issues concerning the global community and improve banking supervisory standards worldwide, pushes states to harmonize their regulations.<sup>221</sup> Such harmonization creates positive network effects such as “drafting efficiency”<sup>222</sup> and “learning benefits,”<sup>223</sup> which are derived from using standardized terms.<sup>224</sup>

In a similar way, blacklists may contribute to network externalities, as they are a way to induce jurisdictions, entities, or individuals to join and comply with a common standard. The more jurisdictions that embrace the common blacklist, the more they can add information to and adjust it. Besides pushing these actors into cooperation, a blacklist

---

217. *See id.* (explaining that the utility that a telephone customer derives from the telephone is dependent on if others have also purchased a telephone); *see also* John M. Yun, *Does Antitrust Have Digital Blind Spots?*, 72 S.C. L. REV. 305, 313 (2020) (citing cellphones and fax machines as often-used examples of the network effect, as their utility depends on others having and using cellphones and fax machines).

218. Ben Bloodstein, *Amazon and Platform Antitrust*, 88 FORDHAM L. REV. 187, 194 (2019); Patrick R. Ward, Comment, *Testing for Multisided Platform Effects in Antitrust Market Definition*, 84 U. CHI. L. REV. 2059, 2075 (2017).

219. Jabotinsky, *supra* note 44 (manuscript at 1).

220. *Id.*; *see also* Roe Sarel, Hadar Y. Jabotinsky & Israel Klein, *Globalize Me: Regulating Distributed Ledger Technology*, 56 VANDERBILT J. TRANSNAT’L L. 435, 467 (advocating for global regulation of blockchain technology to account for the network effects in the use and mining of bitcoin and to account for the risk that bad actors may just move to an unregulated market).

221. Jabotinsky, *supra* note 44 (manuscript at 36–37).

222. *See* Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or “The Economics of Boilerplate”)*, 83 VA. L. REV. 713, 720 (1997) (defining “drafting efficiency” as the cost reduction through efficient contract formulation and fewer errors resulting from standardized terms).

223. *See id.* at 719 (outlining the learning benefits associated with standard terms including drafting efficiency and decreased uncertainty).

224. Israel Klein, *The Gap in the Perception of the GAAP*, 54 AM. BUS. L.J. 581, 587–88 (2017) (discussing the benefits of standardized financial information).

also enables others to discover hidden and problematic information about them.<sup>225</sup>

In addition, blacklists may be a way to prevent forum shopping by noncompliant entities, or individuals. In an international market, and in the absence of a common blacklist, entities or persons can cross borders and locate themselves in alternative jurisdictions.<sup>226</sup> Where they do so to avoid strict regulation, the phenomenon is known as “forum shopping.”<sup>227</sup> Whenever entities or persons can forum shop for more favorable regulation, a risk arises that regulators will participate in a harmful regulatory competition, as each regulator might lower its regulatory standards to attract players to its jurisdiction.<sup>228</sup> However, if standards are harmonized across jurisdictions, then business entities and persons could not ‘shop’ for the least regulated one. Regulators would be able set high regulatory standards and strictly monitor the markets.<sup>229</sup> Each additional jurisdiction that joins the network and embraces the common blacklist reduces the potential for forum shopping and thus strengthens the power of the regulators in the network and enables regulators to work more effectively. In this way, regulators can employ more vigilant regulation against noncompliant states, entities, or persons.<sup>230</sup>

### 3. *Implicit sanctions*

Blacklists result in immediate, explicit sanctions.<sup>231</sup> For example, the ban imposed by SEBI on PwC, previously discussed, restricts the accounting firm’s ability to provide services to firms active in India for

---

225. Eggenberger, *supra* note 214, at 486.

226. See Sarel et al., *supra* note 220, at 467 (explaining that unregulated markets such as “Blockchain Havens” attract firms that are seeking to avoid regulation, which creates a forum shopping problem and, if not addressed, a “regulatory race to the bottom”).

227. See Hannah Murphy & Aynsley Kellow, *Forum Shopping in Global Governance: Understanding States, Business and NGOs in Multiple Arenas*, 4 GLOB. POL’Y 139, 139–40 (2013) (defining forum shopping as when actors seek to realize their objectives by seeking specific policy arenas with particular governing characteristics).

228. See David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT’L L. 683, 689 (2012) (discussing the race to the top or bottom).

229. Jabotinsky, *supra* note 44 (manuscript at 40).

230. *Id.*

231. *E.g.*, *Accountancy Firm Price Waterhouse Banned*, *supra* note 189 (providing example of PwC’s ban in India); Off. of Pub. Affs., *supra* note 18 (providing examples of the restrictions set against foreign companies added to Entity List).

two years.<sup>232</sup> The blacklisting of NSO group and Candiru by BIS directly interferes with their ability to purchase United States-made materials or parts they may require to produce their product.<sup>233</sup> However, blacklists also result in additional implicit sanctions that make them even more effective.<sup>234</sup>

The first type of implicit sanctions relates to reputation signaling.<sup>235</sup> Reputation plays a central role in complying with international standards.<sup>236</sup> Although placement on the FATF's or OECD's blacklists does not obligate states to follow suit, many states still quickly replicate the same blacklists domestically.<sup>237</sup> For example, the U.S. Financial Crimes Enforcement Network (FinCEN) issued advisories against St. Kitts and Nevis, the Cayman Islands, the Cook Islands, and Liechtenstein one month after they had been blacklisted by the FATF in June 2000.<sup>238</sup> These advisories were only withdrawn after the jurisdictions began to comply with the FATF's recommendations and were removed from its blacklist.<sup>239</sup> Furthermore, being blacklisted also has an effect on services one can receive from financial intermediaries, such as banks, investment firms, insurance companies, and advisers (such as legal and accounting firms).<sup>240</sup> These entities often fear for their own reputations and thus perform a thorough due diligence process on their clients.<sup>241</sup> If during the due diligence undertaking the prospective client comes up as blacklisted, it may very well be denied service.<sup>242</sup> If a jurisdiction is blacklisted by the FATF, it may be placed as a key-term on privately developed software meant to detect and alert companies to money laundering activities.<sup>243</sup> Thus, any jurisdiction the FATF or the OECD blacklists will find itself experiencing declining

---

232. *Accountancy Firm Price Waterhouse Banned*, *supra* note 189.

233. Off. of Pub. Affs., *supra* note 18.

234. KEOHANE, *supra* note 31, at 103–06.

235. *Id.* at 105.

236. *Id.*

237. Sharman, *supra* note 145, at 581.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 581–82.

242. *Id.*

243. *Id.* at 581. One such example is World Check—a program designed for Know Your Customer screening and due diligence. *LSEG World-Check*, LSEF RISK INTELLIGENCE, <https://www.refinitiv.com/en/products/world-check-kyc-screening> [https://perma.cc/JP3Y-F4CG].

government revenues and overall financial activity.<sup>244</sup> Here, the blacklist serves as an information tool that conveys negative information about whatever and whoever is listed on it and thus discourages others from doing business with them.<sup>245</sup>

A second type of implicit sanction relates to the price of making mistakes. Once an entity has been added to a blacklist, confusion concerning what type of blacklist this entity is on can arise.<sup>246</sup> Indeed, it is not unlikely that when future investors consider whether to invest in the blacklisted NSO Group, they will confuse the blacklist of BIS for that of the FATF and refrain from investing in the firm due to a misperception that it is connected to money laundering, even though the group was blacklisted for selling spyware.<sup>247</sup> Such confusion can cause real financial damage.<sup>248</sup> Moreover, once an entity has been blacklisted, a general chilling effect ensues and can take on a life of its own, which can even affect other entities and persons who share some connections or similarities with the blacklisted entity.<sup>249</sup> In the case of NSO Group, after the BIS blacklisting occurred, a snowball effect

---

244. Sharman, *supra* note 145, at 581. Getting blacklisted creates a signaling problem for entities, persons, and jurisdictions. See Julia C. Morse, *Blacklists, Market Enforcement, and the Global Regime to Combat Terrorist Financing*, 71 INT'L ORG. 511, 511–13 (2019). The concept of market signaling entails that, in some markets, sellers convey information to buyers by transmitting signals. Michael Spence, *Signaling in Retrospect and the Informational Structure of Markets*, 92 AM. ECON. REV. 434, 434 (2002). In the case of blacklists, such information relates to the low or reduced quality of the product, which thus requires sellers to set a lower price for it. *Id.*

245. See Sharman, *supra* note 145, at 581 (explaining that it is not uncommon for some “foreign financial service firms [to withdraw] from particular blacklisted jurisdictions rather than be tainted by association and suffer a decline in share prices”).

246. See, e.g., David Scigliuzzo, *Blacklisted Pegasus Spyware Firm Shunned by Wall Street, Too*, BLOOMBERG (Nov. 12, 2023), <https://www.bloomberg.com/news/articles/2021-11-12/spyware-firm-nso-group-drops-deeper-into-distress-after-ceo-exit>.

247. *Id.*; see *supra* text accompanying notes 192–94 (summarizing the BIS blacklisting of NSO).

248. David Scigliuzzo, *Israeli Spyware Firm NSO Seen at Risk of Default as Sales Drop*, BLOOMBERG (Nov. 22, 2021), <https://www.bloomberg.com/news/articles/2021-11-22/israeli-spyware-firm-nso-seen-at-risk-of-default-as-sales-drop>.

249. See Morse, *supra* note 244, at 521 (explaining that “[t]he FATF list damages a country’s international reputation not just through a “peer effect” but through something like a “lowest-common-denominator effect,” where countries are judged by the worst of the group”).

started, raising concerns among Israeli officials that the U.S. administration would target all Israeli offensive cyber firms next.<sup>250</sup>

A third type of implicit sanction associated with the blacklist is the negative impact on a firm's credit rating and the resulting difficulties in raising credit. Credit rating agencies play a crucial role in the U.S. capital markets, as they are a primary way of supplying information to potential investors in regard to securities and bonds.<sup>251</sup> Accordingly, they are supposed to estimate the likelihood that the debt issuer will fail to make timely payments on the debt and inform investors by lowering or raising the debt issuers' credit score.<sup>252</sup> Credit rating agencies measure the riskiness of the debt issuers through solicited

---

250. See Amos Harel & Chaim Levinson, *After NSO Blacklisting, Israel Fears U.S. Targeting All Israeli Offensive Cyber Firms*, HAARETZ (Dec. 14, 2021), <https://www.haaretz.com/israel-news/not-just-nso-israel-fears-u-s-targeting-all-israeli-offensive-cyber-firms-1.10463087> [<https://perma.cc/X4UX-L7XV>] (reporting on the uncertainty around whether the United States planned to blacklist all nineteen Israeli offensive cyber technology companies, or whether it would stop with the blacklisting of NSO and Candiru). In a similar vein, as mentioned above, during the McCarthy period, private parties blacklisted individuals for fear of their own reputational damage brought about by being perceived as communist sympathizers. Jack M. Balkin, *The First Amendment Is an Information Policy*, 41 HOFSTRA L. REV. 1, 27–28 (2012).

251. The three big credit rating agencies that rate securities are Standard & Poor's Ratings Services, Moody's Investors Service, and Fitch Ratings. "When engaged by the issuer to do so, [credit rating agencies] give a grade to the securities or class/tranche of securities, which in turn guides the investment decisions of buyers." Christopher K. Odinet, *Securitizing Digital Debts*, 52 ARIZ. ST. L.J. 477, 502 (2020). For a more detailed discussion of rating agencies, see Don Mayer, Anita Cava & Catharyn Baird, *Crime and Punishment (or the Lack Thereof) for Financial Fraud in the Subprime Mortgage Meltdown: Reasons and Remedies for Legal and Ethical Lapses*, 51 AM. BUS. L.J. 515, 555 (2014) discussing role of credit agencies in 2008–09 economic crisis. See also Asaf Eckstein, *Skin in the Game of Credit Rating Agencies and Proxy Advisors: Reality Meets Theory*, 7 HARV. BUS. L. REV. 221, 222–23 (2017) (discussing role of credit agencies as an answer to the "moral hazard" created by agency theory); Frank Partnoy, *Historical Perspectives on the Financial Crisis: Ivar Kreuger, the Credit-Rating Agencies, and Two Theories About the Function, and Dysfunction, of Markets*, 26 YALE J. ON REG. 431, 431–33 (2009) (highlighting the flaw in the overreliance on credit ratings, which was born out of 1930s regulations and was shown to be the case in the 2008–09 financial crisis). See generally HERWIG M. LANGOHR & PATRICIA T. LANGOHR, *THE RATING AGENCIES AND THEIR CREDIT RATINGS: WHAT THEY ARE, HOW THEY WORK AND WHY THEY ARE RELEVANT?* (2009) (describing the credit ratings industry and the critical roles these agencies play).

252. *Id.*; see also *Credit Rating Agencies and Nationally Recognized Statistical Rating Organizations (NRSROs)*, U.S. SEC. & EXCH. COMM'N (May 31, 2013), <http://www.sec.gov/answers/nrsro.htm> [<https://perma.cc/SCU6-TP8J>] (explaining that credit agencies assess an obligor's creditworthiness).

ratings, requested and paid for by the issuer, but these agencies at times publish unsolicited ratings as well, and those are not paid for by anyone.<sup>253</sup> Three major firms currently dominate the credit rating market in the United States with a market share of around ninety-five percent, namely, Moody's, Standard & Poor's, and Fitch.<sup>254</sup> These firms are intermediaries of information and are supposed to act in investors' favor.<sup>255</sup> Their output contributes to the trustworthiness of information so that investors can make informed decisions.<sup>256</sup> However, their output also influences the debt issuer's ability to raise additional capital.<sup>257</sup> The higher the credit score of the debt issuer, the lower the interest rate it will have to pay the investors buying its bonds.<sup>258</sup> It is for that reason that "firms whose securities are rated prefer favorable ratings [,] as it directly lowers their cost of capital . . ." <sup>259</sup> Here is where another implicit sanction of being added to a blacklist lies—once added to a blacklist, it is extremely likely that the credit rating agencies are going to lower the credit score of the entity on the list.<sup>260</sup> One such example is the degrading of the NSO Group, whose credit grade fell by two notches amidst the company's growing risk of breaching the terms of its debt agreements after it was blacklisted by the U.S. Department of Commerce.<sup>261</sup> This means that the firm, already in financial distress due to its limited ability of transacting and reputational damage, has spiraled down even further due to the lowering of its credit rating.<sup>262</sup>

### III. CHALLENGES OF THE PRACTICE OF BLACKLISTING AND BANNING

---

253. Claire A. Hill, *Regulating the Rating Agencies*, 82 WASH. U. L.Q. 43, 51 (2004).

254. Eckstein, *supra* note 251, at 228.

255. *Id.*; see also Claire A. Hill, *Rating Agencies Behaving Badly: The Case of Enron*, 36 CONN. L. REV. 1145, 1146–47 (2003) (explaining a credit rating's impact on investors' investment calculus).

256. Eckstein, *supra* note 251, at 228.

257. See Hill, *supra* note 255, at 1146 (explaining that rating agencies are "critically important players in the capital markets" as the rating they provide affects a company's ability to borrow additional funds).

258. See Hill, *supra* note 253, at 48, 53 (dictating that investment grade debt (debt above a BBB- rating) has more "marketability, liquidity, and a lower interest rate" than otherwise indistinguishable unrated or lower rated debt).

259. Bo Becker & Todd Milbourn, *How Did Increased Competition Affect Credit Ratings?*, 101 J. FIN. ECON. 493, 494 (2011).

260. *Cf.* Scigliuzzo, *supra* note 248 (explaining the impact of being blacklisted on an Israeli spyware firm's credit rating and their bleak future financial outlook).

261. *Id.*

262. *Id.*

## AND POLICY RECOMMENDATIONS

So far, we have discussed the practice of using blacklists and bans to regulate unwanted behavior. However, using these practices does not always result in the behavior that the regulators or governments aspire to achieve. In the following pages we will zoom in on some of these challenges and offer policy recommendations.

*A. Challenges*

Given that blacklists and bans are frequently used as tools to police behavior, or at least to nudge it in the direction preferred by regulators or the state, the question then arises: are there any challenges associated with these practices?

*1. Cost of doing business?*

Despite motivational incentives and regulatory attempts to discourage unwanted, noncompliant, and even illegal behavior, some entities and individuals, including platforms such as ChatGPT, nevertheless choose to bend the rules; they view this questionable business conduct as economically efficient for two principal reasons.<sup>263</sup> The first reason is regulators' limited resources and capabilities. It has been argued that insufficient personnel have been devoted to

---

263. This calculation also holds true for organizations with legitimate business operations, not only those that fall under the U.S. SENTENCING GUIDELINES MANUAL § 8C1.1 (U.S. Sent'g Comm'n 2008). These rules require courts to impose funds which are big enough to strip the corporation of its assets. For more on this, see Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 275–77 (2008) providing an overview of the perverse incentives in the current corporate liability structure that cause entities to forego compliance with regulations. It should also be noted that noncompliance is not always intentional. In recent decades, Congress has increased the complexity of the regulatory regime, especially in the corporate arena, making it harder for entities and persons to understand how they are supposed to conduct themselves in tricky real-world situations. Nizan Geslevich Packin, *RegTech, Compliance and Technology Judgement Rule*, 93 CHI. KENT L. REV. 193, 206 (2018) (explaining how businesses have “faced large amounts of new regulation since the 2008 banking crisis,” and discussing the difficulties and rising costs associated with the new compliance and regulatory expectations). Given the lack of clarity and increasing complexity, such entities and persons might opt to rely on technology to comply with the law or simply take business risks. Cf. Kristin Smith, *Regulatory Clarity Will Ensure American Crypto Leadership*, MORNING CONSULT (Sep. 15, 2021, 5:00 AM ET), <https://morningconsult.com/opinions/regulatory-clarity-will-ensure-american-crypto-leadership> [<https://perma.cc/45CM-YYBK>] (giving context to the discussion around the crypto industry, which many believe is not regulated, but which others are convinced is sufficiently regulated and certain).

combating financial fraud and compliance violations in recent decades,<sup>264</sup> that law enforcement has focused on fighting terrorism rather than white collar crime,<sup>265</sup> and that some agencies and task forces are simply slow and operationally incapable.<sup>266</sup> Second, and a more important reason, is that businesses have been proven to view sanctions and fines as a cost-of-doing-business.<sup>267</sup>

Specifically, in the years since the 2008 financial crisis, scholars and the media have paid close attention to a unique phenomenon, according to which business entities that behave immorally, unethically, and even illegally have been able to avoid potential prosecution by settling out of court, or paying fines,<sup>268</sup> at times

---

264. See William K. Black, *The Department of Justice “Chases Mice While Lions Roam the Campsite”: Why the Department Has Failed to Prosecute the Elite Frauds that Drove the Financial Crisis*, 80 UMKC L. REV. 987, 998 (2012) (describing how even though the FBI warned about an epidemic of financial fraud in the early 2000s, the FBI leadership at the time said it did not have resources to address it); Matthew A. Edwards, *The Concept and Federal Crime of Mortgage Fraud*, 57 AM. CRIM. L. REV. 57, 79 (2020) (explaining that mortgage fraud went unprosecuted in the early 2000s because law enforcement resources were reallocated to combat terrorism rather than financial crime, leading to only 120 FBI agents reviewing more 50,000 reports of mortgage fraud by 2007).

265. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions> [<https://perma.cc/X4H6-HWN2>] (explaining that many of the over one thousand FBI agents assigned to investigating financial fraud were reassigned to antiterrorism work after the September 11<sup>th</sup> terrorist attacks, leading to only 120 agents being tasked with reviewing the many reports of mortgage fraud in 2007).

266. Jesse Eisinger, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* 175–76 (2017) (“The task force had no operational powers to bring cases. The Justice Department struggled to staff it. It was just a coordinating committee to check in with offices around the country on their progress, with representatives from at least twenty-six federal agencies and departments . . . as well as state attorneys general, district attorneys and ‘other state, local, tribal and territorial representatives.’ It would meet once a month, often with staffers calling into conference calls in their principals’ steads . . . Because of the failure, no one at Justice oversaw the entirety of the investigative effort. No one person was responsible. Every case was discrete. Any national push to combat the financial crisis died.”).

267. This is especially in cases where the stigma of being on the blacklist is not very strong. See Balakina et al., *supra* note 107, at 31 (explaining the stigma of being placed on a blacklist as well as the resultant monetary costs that can arise due to being blacklisted).

268. See, e.g., Lund & Sarin, *supra* note 38, at 295–96 (claiming that corporate prosecutions have steadily declined and reached a record lowest number in 2018 due to increasingly frequent settlements); Court E. Golumbic & Albert D. Lichy, *The “Too*

receiving deferred or non-prosecution agreements and eventually avoiding indictment or convictions altogether.<sup>269</sup> In the financial industry, the government's inconsistent or lax disciplinary approach toward important financial institutions that fail to comply with the law was nicknamed "too-big-to-jail,"<sup>270</sup> after the then-Attorney General Eric Holder explained that the DOJ had trouble indicting systemic institutions out of fear of economic harm.<sup>271</sup> Instead, the DOJ preferred to settle with, or subject such entities to nominal sanctions, as was demonstrated in JPMorgan's settlement in 2013 with the

---

*Big to Jail? Effect and the Impact on the Justice Department's Corporate Charging Policy*, 65 HASTINGS L.J. 1293, 1321–23 (2014) (providing an overview of a senator's outrage at the disparate treatment that prosecutors afford corporate criminals (e.g., through lenient settlements) and criminals perpetrating other crimes such as drug offenses (which result in jail time)); Letter from Jeffrey A. Merkley, U.S. Senator, to Eric Holder, Att'y Gen., DEP'T OF JUST. (Dec. 13, 2012), <https://www.merkley.senate.gov/news/press-releases/merkley-blasts-too-big-to-jail-policy-for-lawbreaking-banks> [<https://perma.cc/HK7P-C3LT>] ("This 'too big to jail' approach to law enforcement, which deeply offends the public's sense of justice, effectively vitiates the law as written by Congress."); see also Hyeran Jo, Brian J. Phillips & Joshua Alley, *Can Blacklisting Reduce Terrorist Attacks?: The Case of the US Foreign Terrorist Organization (FTO) List*, in THE POWER OF GLOBAL PERFORMANCE INDICATORS 271, 276 (Judith G. Kelley & Beth A. Simmons eds. 2020) (mentioning that blacklisting can also trigger a negative response from the target and create more unwanted behavior).

269. Nizan Geslevich Packin, *Too-Big-to-Fail 2.0? Digital Service Providers as Cyber-Social Systems*, 93 IND. L.J. 1222, 1223–25 (2018) (explaining the use of deferred prosecution agreements and the "too-big-to-jail" policy of avoiding prosecution of large systemic institutions to avoid negative economic consequences).

270. Nizan Geslevich Packin, *Breaking Bad? Too-Big-to-Fail Banks Not Guilty as Not Charged*, 91 WASH. U. L. REV. 1089, 1095 (2014). For a discussion regarding the lack of successful criminal prosecutions against major financial players arising out of the financial crisis, see Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2023–27 (2014), discussing JEFF CONNAUGHTON, *THE PAYOFF: WHY WALL STREET ALWAYS WINS* (Prospect Press, 2012), the lack of fraud prosecutions during the 2008 financial crisis, and the lack of regulatory reform to confront the 2008 crisis "too-big-to-jail" mindset.

271. *Oversight of the US Dep't of Just.: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 15 (2013) (statement of Eric. H. Holder, Jr., Att'y Gen. of the United States); *Who Is Too Big to Fail: Are Large Financial Institutions Immune from Federal Prosecution?* Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs., 113th Cong. 5–6 (2013) (statement of Mythili Raman, Acting Assistant Att'y Gen., Criminal Division, Department of Justice).

government for the bank's culpability in helping foster the 2008 crisis.<sup>272</sup>

Similarly, in July 2016, it was revealed that the UK's former financial watchdog, the Financial Services Authority, obstructed the 2012 United States' investigation into HSBC's money laundering by helping water down the bank's sanctions.<sup>273</sup> As part of what has been described as yet another type of a "cosmetic" prosecution agreement, reflecting a reduced punishment and deterrence of corporate crime,<sup>274</sup> in December 2021, JPMorgan accepted a \$200 million fine for allowing its employees to use messaging apps to communicate with customers and conduct the bank's business activities, while admitting its failure to comply with the law.<sup>275</sup>

This phenomenon is not unique to the financial sector.<sup>276</sup> For example, in the 2010s and 2020s, reports of potential immoral, unethical, and even illegal behavior in connection with technology companies, including the Federal Trade Commission's (FTC) probe of Google's business conduct, caught the public's attention, after which FTC leaders enabled Google to make voluntary changes to its business practices rather than continuing with legal proceedings.<sup>277</sup>

---

272. See, e.g., Golumbic & Lichy, *supra* note 268, at 1331–32, 1336 n.282 (outlining the settlement process and the \$1.7 billion in penalties JP Morgan agreed to pay to avoid prosecution).

273. Rupert Neate, *HSBC Escaped US Money-Laundering Charges After Osborne's Intervention*, *GUARDIAN* (July 11, 2016, 3:36 PM), <https://www.theguardian.com/business/2016/jul/11/hsbc-us-money-laundering-george-osborne-report> [<https://perma.cc/AV5A-GXX6>].

274. See Jed S. Rakoff, *Justice Deferred Is Justice Denied*, *N.Y. REV. BOOKS*, Feb. 19, 2015, at 8, 10 <https://www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied> [<https://perma.cc/8MKR-MEH2>] ("But the broader point . . . is that for the past decade or more, as a result of the shift from prosecuting high-level individuals to entering into 'cosmetic' prosecution agreements with their companies, the punishment and deterrence of corporate crime has, for all the government's rhetoric, effectively been reduced.").

275. Dave Michaels, *JPMorgan Fined \$200 Million over Employees' Use of WhatsApp and Other Messaging Apps*, *WALL ST. J.* (Dec. 17, 2021, 9:31 AM), <https://www.wsj.com/articles/jpmorgan-admits-widespread-record-keeping-breakdown-in-sec-settlement-11639747801> [<https://perma.cc/W78A-YTR9>].

276. See, e.g., BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 8 (2014) (arguing that the too-big-to-fail phenomenon has involved many different types of large public corporations, including Google).

277. See, e.g., Benjamin Edelman, *Does Google Leverage Market Power Through Tying and Bundling?*, 11 *J. COMPETITION L. & ECON.* 365, 370–71, 375–77 (2015) (examining

Similarly, Facebook's (now Meta) \$5 billion settlement with the FTC in 2020 over data-sharing practices ended allegations that Facebook had violated consumer protection laws.<sup>278</sup>

Finally, in the GenAI context, several tech giants have been facing legal challenges concerning their use of copyrighted material.<sup>279</sup> Among those are Microsoft, GitHub, and OpenAI that have been embroiled in lawsuits alleging that their code-generating AI system, reproduce licensed code and content without credit.<sup>280</sup> Similarly, AI art tool companies Midjourney and Stability AI have been accused of training their AI on web-scraped images, infringing on artists' rights.<sup>281</sup> Furthermore, Getty Images has sued Stability AI for using numerous images without permission, the core issue lies in generative AI's ability to replicate copyrighted content from its training data.<sup>282</sup> For instance, an AI tool used by CNET plagiarized human-written articles, while another study revealed image-generating AI models could reproduce elements from their training images.<sup>283</sup>

However, thus far, the entities operating these GenAI platforms have arguably made a financially sound bet. Despite legal challenges and

---

Google's repeated practice of leveraging and exploiting its market dominance); Rick Rule, *FTC's Pass on Google Opens the Door for the Justice Department*, U.S. NEWS (Jan. 9, 2013, 9:00 AM), <http://www.usnews.com/opinion/articles/2013/01/09/ftcs-pass-on-google-opens-the-door-for-the-justice-department> [<https://perma.cc/C4E7-6DCR>] (criticizing the FTC's decision to close its investigation into Google and underscoring that Google's customer base extends beyond the web user base identified by the FTC to include advertisers who have been legitimately harmed). The FTC also chose to not act in its response to Google Street View, even though many state attorneys general and international regulators targeted the same Google business practices. See *Investigation of Google Street View*, ELECTRONIC PRIV. INFO. CTR., <https://epic.org/privacy/streetview> [<https://perma.cc/8RUW-CDSZ>] (providing an overview of the illegal practices, including interrupting Wi-Fi transmissions, that Google engaged in during the development of its street view product, all of which Google chose to voluntarily correct before charges were filed).

278. See, e.g., Daniel R. Stoller, *Facebook's Record \$5B FTC Settlement Wins Court Approval*, BLOOMBERG (Apr. 24, 2020, 1:07 PM), <https://news.bloomberglaw.com/privacy-and-data-security/facebooks-record-5b-ftc-settlement-wins-court-approval> [<https://perma.cc/K678-DTVZ>].

279. See Jabotinsky & Lavi, *Can ChatGPT and the like Be Your Co-Authors?*, *supra* note 1, at 37–38 (explaining that the use of copyrighted material as a source for generative AI may not be sufficiently transformative to survive a legal challenge).

280. Wiggers, *supra* note 37.

281. *Id.*

282. *Id.*

283. *Id.*

content bans by some platforms, the GenAI industry has seen increased funding and interest.<sup>284</sup>

Using a “mild” carrot, and enabling persons, organizations, and business entities that behave immorally, unethically, and even illegally to avoid potential legal liability, or even prosecution, by letting them pay a certain fee has created a significant problem—public perception has formed that coughing up money for questionable, immoral, or even illegal behavior and conduct is simply part of doing business and merely another expense to be factored into the equation.<sup>285</sup> Moreover, viewing sanctions such as fines as another business cost also encourages more immoral, unethical, and even illegal behavior. A basic cost-benefit analysis demonstrates that as long as profits from such behavior are earned that can cover the cost of fines or could be gained by continuing that same unethical behavior, it remains economically advantageous to keep up such behavior.<sup>286</sup> Additionally, it creates a distortion—a bias in the legal system—as it de facto results in a favorable treatment of large and public entities with many shareholders or great economic influence.<sup>287</sup>

---

284. *See id.* (claiming that the AI industry was able to raise \$1.3 billion in venture funding in 2022).

285. *See* Packin, *supra* note 270, at 1095–96 (explaining that banks considered too-big-to-fail face a set of perverse incentives that promote criminality by (1) receiving a “carrot” in the form of the proceeds of that criminality, and (2) avoiding a “stick,” as these crimes are not prosecuted and the financial losses can be offset with the proceeds of future crimes); *see also, e.g.*, Israel Klein, *The Corporate Tax Paradox*, 42 VA. TAX. REV. 153, 155, 171–72 (concluding in a study that large companies are not deterred by the IRS’s increased reporting requirements, as they increasingly file tax returns that do not conform with the tax code and would not survive an audit as an illegal method of tax deferment).

286. Klein, *supra* note 285, at 176 (“On the one hand, the information about unsustainable positions is disclosed and reported to the IRS, while on the other, companies continue to report such unsustainable positions whose overall value continues to increase from year to year.”); *see* Packin, *supra* note 270, at 1095–96 (explaining that only imposing financial consequences for criminal acts creates a profit motive for banks that are considered too-big-to-fail to engage in criminal behavior, as the consequences of such acts can be offset with the proceeds of future criminal acts).

287. Sharon E. Foster, *Too Big to Prosecute: Collateral Consequences, Systematic Institutions and the Rule of Law*, 34 REV. BANKING & FIN. L. 655, 658 (2015).

## 2. *Chilling effect*

Innovative technologies enhance access to information, which enrich social life, the marketplace of ideas, and democratic culture.<sup>288</sup> However, regulatory regimes can impede innovation,<sup>289</sup> affecting its trajectory and influencing investments in specific technologies and the adoption of business models.<sup>290</sup> Therefore, regulating innovative technologies should be done carefully and special attention should be given to unwanted chilling effects which might stifle innovation altogether.<sup>291</sup>

As most of the technologies that scare us are also innovative technologies, and as regulators have a true sense of urgency with regards to the need for regulating these technologies, they might sometimes overuse regulatory measures, including bans and blacklists, in these contexts and cause an unwanted chilling effect.

---

288. Nissim Cohen & Hadar Y. Jabotinsky, *Nudges and Sludges: Regulating Innovation* 14 (working paper, 2024) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3523910](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3523910) [<https://perma.cc/U77N-K9K5>]; see LEE RAINIE & BARRY WELLMAN, NETWORKED: THE NEW SOCIAL OPERATING SYSTEM 256–63 (2012); Michal Lavi, *Evil Nudges*, 21 VAND. J. TECH. & ENT. L. 1, 11 (2018) (“The advent of the internet, mobile phones, and online social networks . . . affords new opportunities to create social ties, share ideas, form communities, and engage in diverse social dynamics anywhere and at any time.”).

289. Gideon Parchomovsky & Alex Stein, *Torts and Innovation*, 107 MICH. L. REV. 285, 314 (2008). Evidence suggests that innovation thrives under liberal liability regimes. See Kyle Graham, *Of Frightened Horses and Autonomous Vehicles: Tort Law and Its Assimilation of Innovation*, 52 SANTA CLARA L. REV. 1241, 1270 (2012) (noting how “basic ground rules regarding the use of autonomous vehicles emerge, so too will new causes of action”); Guy Pessach, *Deconstructing Disintermediation: A Skeptical Copyright Perspective*, 31 CARDOZO ARTS & ENT. L.J. 833, 864 (2013) (discussing regulatory regimes in the context of YouTube and the safe harbor regime of 17 U.S.C. § 612(c)); Tal Zarsky, *The Privacy - Innovation Conundrum*, 19 LEWIS & CLARK L. REV. 115, 125–26 (2015) (“Therefore, privacy norms will most likely be enacted into law using broad language and general concepts. These will allow industry, courts, and regulators to adapt after the fact to the changing environment. Yet such broad and abstract regulation generates concerns as to its impact on innovation . . .”).

290. Cohen & Jabotinsky, *supra* note 288, at 14; see Dotan Oliar, *The Copyright - Innovation Tradeoff: Property Rules, Liability Rules, and Intentional Infliction of Harm*, 64 STAN. L. REV. 951, 1001 (2012) (describing how “[m]uch of the distortion in ex ante investments stems from the behavior of inefficient parties” who are protected by entitlements).

291. See Cohen & Jabotinsky, *supra* note 288, at 14–24 (identifying various challenges to regulating new technologies, which can result in a chilling effect on innovation).

### 3. *Lack of industry involvement*

In a manner related to the previous subsection, due to the sense of urgency in regulating new technologies, regulators do not always afford business entities or individuals the time to develop market-based regulatory solutions for the market failures caused by these new technologies.<sup>292</sup> This may prove counterproductive, as the industry often understands the technology better than the regulators and thus are better prepared to find preferable regulatory solutions.<sup>293</sup> Additionally, in some cases, banning or blacklisting technologies that scare us might, in fact, achieve the opposite of the regulator's intention, as it might go against social norms in the industry. Emerging technologies poised for widespread use can shape the formation of social norms regarding their usage and development.<sup>294</sup> Research on social norms suggests that when there is a disconnect between social norms and legal norms, crafting effective regulatory measures becomes more challenging.<sup>295</sup> Enforcement of legal norms becomes problematic when there is no social disapproval, ostracism, or guilt associated with non-compliance with legal standards. In some cases, social disapproval, guilt, and ostracism may act as effective deterrents even in the absence of legal repercussions. Conversely, certain technologies may reinforce behaviors aligned with social norms despite regulatory constraints.<sup>296</sup> In such cases, it is preferable to have the industry involved in suggesting the regulation, rather than trying to ban or blacklist it.

### *B. Policy Recommendations*

Considering blacklisting's explicit and implicit sanctions on jurisdictions, entities and individuals, the true challenge for regulators

---

292. *See id.* at 17–18 (describing how regulators often impose regulations when faced with uncertainty around new technologies).

293. *See id.* at 18–19 (discussing the effects of an industry having more knowledge than the regulators); Daniel Gervais, *The Regulation of Inchoate Technologies*, 47 HOUS. L. REV. 665, 668 (2010) (“I argue that regulating inchoate technologies will have unintended consequences that may defeat the intervention. In particular, it may interrupt or divert potential chains of events that might have yielded substantial benefits . . .”).

294. Gervais, *supra* note 293, at 668; Jonathan M. Barnett, *Property as Process: How Innovation Markets Select Innovation Regimes*, 119 YALE L.J. 384, 402 (2009).

295. Gervais, *supra* note 293, at 668; Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996).

296. An example of this phenomenon occurs with regulating cryptocurrencies.

is how to encourage compliance with the law and ethical standards without causing too much of a chilling effect. In addressing this point, it is helpful to distinguish between blacklisting in response to illegal activities that amounts to a punitive or quasi-criminal chosen “stick” under *Kennedy*, and blacklisting in an attempt to discourage unethical or undesired conduct, as may be perceived by specific regulators or government agencies.<sup>297</sup> A classic example of the latter is the Trump Administration’s attempts to ban the popular social network TikTok, citing national security concerns and connections with the Communist Party.<sup>298</sup> This ban could have resulted in blacklisting if the administration had been allowed to continue.<sup>299</sup> But U.S. courts viewed TikTok’s conduct as legitimate, determining that the Trump Administration’s attempted ban was “arbitrary and capricious”<sup>300</sup> rather than a response to illegal conduct or behavior that puts U.S. national security at risk.<sup>301</sup> Further supporting that view, in 2021, the DOJ signalled in a court filing that the Biden Administration did not share the Trump Administration’s subjective view of the Chinese-owned video-sharing app,<sup>302</sup> as an entity that is “reasonably believed to be involved, have been involved, or pose a significant risk of being or becoming involved, in activities contrary to the national security or

---

297. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (outlining the seven-factor test for determining when regulatory measures are punitive); see also *supra* note 62 (elaborating on common law treatment of blacklisting).

298. Keith Bradsher & Raymond Zhong, *After Trump’s TikTok Ban, China Readies Blacklist of Foreign Companies*, N.Y. TIMES (Sept. 19, 2020), <https://www.nytimes.com/2020/09/19/technology/china-tiktok-wechat-blacklist.html> [<https://perma.cc/FQ7N-2BX4>].

299. *Id.* (focusing on Beijing’s plan for retaliation for the Trump Administration’s decision to ban the Chinese-owned apps TikTok and WeChat).

300. *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 112 (D.D.C. 2020).

301. See, e.g., Bobby Allyn, *U.S. Judge Halts Trump’s TikTok Ban, The 2nd Court to Fully Block the Action*, NAT’L PUB. RADIO (Dec. 7, 2020, 8:36 PM) [hereinafter Allyn, *Judge Halts Trump’s TikTok Ban*], <https://www.npr.org/2020/12/07/944039053/u-s-judge-halts-trumps-tiktok-ban-the-2nd-court-to-fully-block-the-action> [<https://perma.cc/5UPP-9GT6>].

302. See, e.g., Bobby Allyn, *Biden Administration Pauses Trump’s TikTok Ban, Backs off Pressure to Sell App*, NPR (Feb. 10, 2021, 8:21 PM) [hereinafter Allyn, *Biden Administration Pauses Trump’s TikTok Ban*], <https://www.npr.org/2021/02/10/966584204/biden-administration-pauses-trumps-tiktok-ban-backs-off-pressure-for-tiktok-to-s> [<https://perma.cc/JL5A-PJEK>] (“Citing national security concerns, Trump had attempted to force the sale of TikTok, which is owned by Beijing-based ByteDance, to an American company. If no deal was reached, Trump said TikTok would be effectively blacklisted in the U.S.”).

foreign policy interests of the United States.”<sup>303</sup> Moreover, specifically addressing the business entity’s activities, President “Biden has said that he has some concerns with TikTok, and the administration is scrutinizing other Chinese tech companies and trade practices, but taking action on a sole app like TikTok is not expected to be the focus.”<sup>304</sup> This view has recently changed with President Biden’s declaration that he will sign a bill banning TikTok,<sup>305</sup> proving the point that ethical conduct is context dependent.

In regard to criminal activities and illegal conduct, studies focusing on corporate crime have found that along with sanctioning the corporations themselves, regulators should also apply sanctions to the individuals operating inside the business entities and make the decisions on behalf of the business entities.<sup>306</sup> Furthermore, research shows that a moral appeal is an incredibly strong tool in corporate social control<sup>307</sup> and that a sense of accountability contributes to better

---

303. This is the standard for getting blacklisted by BIS, which composes a blacklisted entity list for such “persons (individuals, organizations, companies).” Off. of Pub. Affs., *supra* note 18; *see also* Allyn, *Biden Administration Pauses Trump’s TikTok Ban*, *supra* note 302 (noting that the Biden Administration may drop the case against TikTok entirely).

304. Allyn, *Biden Administration Pauses Trump’s TikTok Ban*, *supra* note 302. For more on the active role of the Chinese government in the capital markets and how it has become a cause for growing concern for policymakers worldwide, contributing to the escalation in the of United States-China relations, and resulting in calls for an economic de-coupling of the United States from China, *see* Tamar Groswald Ozery, *The Politicization of Corporate Governance—a Viable Alternative?*, 70 AM. J. COMP. LAW 43, 47, 79 (2021) discussing the “politicization of corporate governance” in Chinese firms and the concerns that it presents when compared with the Anglo-American system. For a discussion on the problems related to TikTok, *see* A TIK-TOK-ING TIMEBOMB, *supra* note 139, at 2–3 discussing the political manipulation of which Tik Tok has been accused, Gallagher, *supra* note 139 contextualizing the pervasive use of TikTok by Americans and the influence that the app has over American’s foreign policy and political beliefs, and Anders, *supra* note 139 summarizing political backlash to TikTok and its influence over Americans with polarizing and oversimplified videos.

305. *Joe Biden Says He Would Sign Bill Banning TikTok*, SKY NEWS (Mar. 9, 2024, 12:44 PM), <https://news.sky.com/story/joe-biden-says-he-would-sign-bill-banning-tiktok-13090624> [<https://perma.cc/5FFY-NGSC>].

306. Samuel W. Buell, *The Responsibility Gap in Corporate Crime*, 12 CRIM. L. & PHIL. 471, 475, 488–89 (2018) (suggesting that using settlements to deter corporate wrongdoing compromises the principles of wrongdoing); Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 133, 144 (2020) (“If we still have not learned the lessons of the last financial crisis, the next one cannot be far ahead.”); Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1790–91, 1796 (2015) (“[F]ar too many corporate cases lack individual prosecutions.”).

307. *See* Paternoster & Simpson, *supra* note 90, at 579–80.

decision-making,<sup>308</sup> which is why the SEC also explored such individual responsibility-based rules.<sup>309</sup> Therefore, regulators should dedicate efforts to incentivizing corporate entities' leadership to conduct itself more ethically, as regulatory actions toward shaming not only business entities for immoral behavior, but also their executives and management, would prove effective in deterring business entities from engaging in unwanted behavior.<sup>310</sup>

---

308. See, e.g., Philip E. Tetlock, Richard Boettger & Linda Skitka, *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. PERSONALITY & SOC. PSYCH. 632, 633 (1989) (showing that people unconstrained by prior commitments will be incentivized and inclined to do more complex, self-critical thinking when made accountable for the decisions they make); Philip E. Tetlock & Jae Il Kim, *Accountability and Judgment Processes in a Personality Prediction Task*, 52 J. PERSONALITY & SOC. PSYCH. 700, 707 (1987) (explaining how research results reveal that accountability caused subjects to digest and process data in more meaningful and complex ways).

309. Examining this several years ago, the SEC has suggested rules mandating that corporations disclose more information on their board leadership structure, including information on whether the corporation has a lead director, and if so, what their role is in guiding it. Press Release, SEC. & EXCH. COMM'N, SEC PROPOSES MEASURES TO IMPROVE CORPORATE GOVERNANCE AND ENHANCE INVESTOR CONFIDENCE (July 1, 2009), <http://www.sec.gov/news/press/2009/2009-147.htm> [<https://perma.cc/8UMK-7Q85>] (outlining proposed disclosure requirements to provide public company shareholders with more insight into compensation and corporate governance decisions, including information about conflicts of interest of compensation consultants, qualifications of executive leadership, and leadership structure). The SEC also recommended including information on the qualifications of board members, any potential conflicts of interest that might impact compensation consultants, and how the relevant corporation's compensation guidelines are aligned with risk-taking. Press Release, SEC. & EXC. COMM'N, SEC APPROVES ENHANCED DISCLOSURE ABOUT RISK, COMPENSATION AND CORPORATE GOVERNANCE (Dec. 16, 2009), <http://www.sec.gov/news/press/2009/2009-268.htm> [<https://perma.cc/Y55V-WS28>] (quoting SEC Chairman Mary L. Schapiro "[g]ood corporate governance is a system in which those who manage a company . . . are effectively held accountable for their decisions and performance. But accountability is impossible without transparency' . . . '[b]y adopting these rules, we will improve the disclosure around risk, compensation, and corporate governance, thereby increasing accountability and directly benefitting investors." (internal quotations omitted)).

310. Cf. Mark De Rond & Raymond Alain Thietart, *Choice, Chance, and Inevitability in Strategy*, 28 STRATEGIC MGMT. J. 535, 535, 544 (2007) (advocating for individual responsibility and accountability as an essential element in strategic management); see also Singer, *supra* note 89, at 194, 196 (explaining that, if the proper incentive structures are in place, integrating self-interest into corporate management systems will result in value-creation for firms by aligning the individual's and firm's interests); Christopher J. Robertson & William F. Crittenden, *Mapping Moral Philosophies: Strategic*

Finally, because in creating law, “notice-and-comment” rulemaking is the most common way for regulators and agencies to establish rules,<sup>311</sup> regulators and government agencies should always try to give business entities and persons an opportunity to modify and alter behavior and business operations before enforcing unclear standards.<sup>312</sup> This is especially important as the explicit and implicit sanctions discussed in this Article can cause economic and reputational losses not only to blacklisted entities, but also to other industry players and more or less related stakeholders.<sup>313</sup>

Therefore, it is advisable that regulators instruct entities and persons, prior to publicly announcing blacklisting decisions, as to how

---

*Implications for Multinational Firms*, 24 STRATEGIC MGMT. J. 385, 385 (2003) (discussing the trend in the business ethics community of integrating moral philosophy into the strategic management framework); Dan M. Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996) (explaining that punishment is a social convention that signifies moral condemnation and why society has traditionally found alternative sanctions, such as fines, politically unacceptable); Lauren M. Goldman, *Trending Now: The Use of Social Media Websites in Public Shaming Punishments*, 52 AM. CRIM. L. REV. 415, 418–19 (2015) (providing a history of public shaming in colonial America and explaining that public shaming was effective deterrent because of the fear of being shamed in front of a community of peers); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1912–15 (1991) (elaborating on the history of public shaming in white colonial America and contextualizing the practice’s effectiveness as part of a close-knit culture).

311. See Jeffrey S. Lubbers, A GUIDE TO FEDERAL AGENCY RULEMAKING 5 (5th ed. 2012) (providing an overview of 15 U.S.C. § 553, the Administrative Procedure Act’s general rulemaking statute, which is governed by “notice-and-comment” rulemaking requiring notice of upcoming rules, an opportunity for public comment regarding those rules, and a publication of the final rule).

312. Brummer et al., *supra* note 35, at 38 (“By pursuing an enforcement action as a first means of creating new law, policymakers raise the risk of doing so in a way that, justified or not, could appear to give those affected scant prior notice of illegality or expected punishment.”).

313. Tornado Cash’s blacklisting impacted various celebrities and other individuals who had been non-consensually sent small amounts of Tornado-cash affiliated funds. Initially these people faced the risk of criminal prosecution. Sander Lutz, *Treasury Won’t Punish Dusted Celebs, Will Allow Users to Recover Funds from Tornado Cash*, DECRYPT (Sept. 13, 2022), <https://decrypt.co/109635/treasury-wont-punish-dusted-celebs-will-allow-users-to-recover-funds-from-tornado-cash> [https://perma.cc/8423-4KVF] (explaining how days after sanctions were imposed on Tornado Cash, a user of the platform “trolled a number of celebrities, including Jimmy Fallon and Logan Paul, by ‘dusting’ them—sending them small amounts of funds and therefore potentially exposing them to criminal liability,” but that the government declined to prosecute these celebrities, leaving the question of how the Treasury would distinguish between solicited and unsolicited Tornado Cash transactions unclear).

they can avoid such classification and related sanctions.<sup>314</sup> Guidance could include the recommendation to eliminate a specific type of business transaction or lines of operations, the need to appoint a compliance officer at the management level,<sup>315</sup> or create inside policies and procedures,<sup>316</sup> to better evaluate the risk<sup>317</sup> of being blacklisted as part of a periodic risk survey. Either way, regulators looking to make certain business norms or operations become socially—not to mention legally—prohibited must first attempt to create clear rules and standards. Indeed, failing to do so is why commentators have long criticized regulation by enforcement.<sup>318</sup> And although historically this

---

314. Brummer et al., *supra* note 35, at 40 (“Enforcement by regulation should thus be undertaken with a clear understanding by regulators as to its risks and exercised in ways that optimize the long term interests of agencies, their stakeholders, and regulated entities.”).

315. Financial Action Task Force (FATF), INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION 87 (updated Nov. 2023), <https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf> [https://perma.cc/TN9T-GR6T] (requiring a compliance officer at the management level to ensure compliance with anti-money laundering provisions).

316. *Id.* at 18.

317. *Id.* at 14–15.

318. Regulation by enforcement, a historically widely-criticized practice, occurs when a regulator or government agency creates a piecemeal rule via enforcement actions or interpretive letters, therefore bypassing the traditional process of regulation creating. *See, e.g.*, Brummer et al., *supra* note 35, at 21–23 (contextualizing the incentives for agencies to pursue regulation by enforcement as well as the criticism of regulation by enforcement); Roberta S. Karmel, REGULATION BY PROSECUTION: THE SECURITIES AND EXCHANGE COMMISSION VS. CORPORATE AMERICA 95 (1982) (“The evils of combining prosecutorial and adjudicative functions have been exacerbated by the predilection for formulating regulatory policy through the prosecution of enforcement cases.”); James J. Park, *The Competing Paradigms of Securities Regulation*, 57 DUKE L.J. 625, 635–37 (2007) (describing how regulation by enforcement happens when agencies or regulators use interpretive letters to create a rule that otherwise does not clearly exist); Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 937 (1998) (explaining interpretive letters as letters that agencies send in response to a request for guidance on the applicability of a particular regulation); Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149, 155–56 (1990) (describing that many agencies have not maintained a “vigorous, highly-visible, and largely successful enforcement profile”); COMM. ON CAP. MKTS. REGUL., INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 66 (2006), (“[B]ank regulators, concentrating on the ‘safety and soundness’ of the financial system, take a prudential approach to supervision and

criticism was largely relevant in connection with the SEC, other regulators should also not rely on such rulemaking, even if, as former Secretary of the Treasury Timothy Geithner stated, “it is imperative [in some situations to] . . . be able to adapt quickly to innovation and to changes.”<sup>319</sup>

Hence, articulating the factors that could result in decisions to blacklist entities and persons in a public, clear, transparent, and challengeable way, *ex ante*, is important and would help those that want to comply with the law steer themselves out of trouble. This is especially the case when regulators target activities and conduct that are not illegal—whether by nature, or because they are associated with new and cutting-edge technologies—but are undesirable according to certain administrations’ views. Moreover, clear and transparent rules make it easier for business entities and persons to understand the regulatory environment in which they operate, increase compliance, and conduct themselves in a more ethical manner.<sup>320</sup> Indeed, businesses’ strategy “is predicated on causation, on the belief that events have causes as well as consequences. Managers make choices precisely because they believe these to contribute substantially to the performance and survival of their organizations.”<sup>321</sup>

---

generally do not broadly publicize their enforcement actions.”); Douglas C. Dreier, Note, *The Lending-Limit Combination Rules: Regulation by Enforcement at the OCC*, 62 DUKE L.J. 1747, 1752–53 (2013) (explaining how regulation by enforcement is relevant to other government agencies beyond the SEC, including other banking regulators).

319. Dreier, *supra* note 318, at 1752–53 (arguing that the alternative could “produce an ossified safety and soundness framework that is unable to evolve to keep pace with change and to prevent regulatory arbitrage” (quoting Letter from Timothy F. Geithner, U.S. Sec’y of the Treasury, to Rep. Keith Ellison (Jan. 11, 2010), available at [http://ellison.house.gov/images/stories/Documents/2010/01-11-10\\_Treasury\\_Letter.pdf](http://ellison.house.gov/images/stories/Documents/2010/01-11-10_Treasury_Letter.pdf))).

320. If it is not clear what can be done differently, it is hard to behave differently in future scenarios, comply with the law, or even behave more ethically. In TikTok’s case, reports have found that “[t]he amount of data TikTok mines from its mobile phone users is on par with what other apps collect, including ones owned by Facebook and Google.” Allyn, *Biden Administration Pauses Trump’s TikTok Ban*, *supra* note 302. Additionally, “TikTok has maintained that there is a firewall between the app and its corporate owner in China. TikTok officials have said that none of the data on U.S. users is stored on Chinese servers and that the data can only be accessed with the permission of American-based security officials.” *Id.*

321. De Rond & Thietart, *supra* note 310, at 535; *see also* Singer, *supra* note 89, at 207 (advocating for a strategic management framework that integrates moral philosophy and character); Robertson & Crittenden, *supra* note 310, at 391 (discussing

## CONCLUSION

To sum up, this Article has delved into two specific regulatory and statutory tools: banning and blacklisting, which have recently gained momentum and public attention due to their application to new technologies like GenAI and cryptocurrencies. President Biden's sanctions on Russian corporations serve as another notable example of their usage. However, it is essential to differentiate between these tools, as they carry distinct implications.

Banning, typically carried out by administrations, seeks to completely prevent and prohibit all activities associated with the banned entity or technology. On the other hand, blacklisting involves immediate and public sanctions issued by regulators and government agencies, along with implicit sanctions that incentivize compliance with regulations.

This Article underscores the need to differentiate between the use of blacklists as tools to deter and prevent illegal activities, such as money laundering, bribery, and terrorism, and their use to halt activities deemed ethically questionable by regulators. To bolster the efficacy of blacklisting in either context, this Article offers policy recommendations. While blacklists can be a powerful deterrent, they should not be the sole strategy. Enforcement agencies should also contemplate sanctioning individuals and senior executives who enable illicit conduct within their organizations. However, regulators must exercise prudence when contemplating blacklisting, especially when the underlying cause is ethically or morally questionable but not explicitly illegal. Given the potential for significant economic and reputational fallout, alternative strategies to deter undesirable entities and persons should be evaluated, particularly when dealing with innovative and disruptive technologies, such as GenAI. Policymakers grapple with balancing societal protection via regulation and fostering technological progress. Achieving this equilibrium demands a comprehensive assessment of risks and benefits.

In conclusion, a well-informed and thoughtful approach to using banning and blacklisting as regulatory tools is imperative to foster innovation, economic progress, and societal well-being while effectively deterring illegal and harmful activities. As technological advancements continue to shape our world, maintaining this

---

integrating individual moral values into corporate structures and implementing training programs to ensure that managers are able to operate across cultures and legitimize their decisions).

equilibrium remains a complex but crucial responsibility for policymakers and regulatory bodies.