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Repugnant Business Models: Preliminary Thoughts on a Research and Policy Agenda

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Repugnant Business Models: Preliminary Thoughts on a Research and Policy Agenda

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I. Introduction

Specialists in infectious disease are protesting a gigantic overnight increase in the price of a 62-year-old drug that is the

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> standard of care for treating a life-threatening parasitic infection.
>
> The drug, called Daraprim, was acquired in August 2015 by Turing Pharmaceuticals, a start-up run by a former hedge fund manager [named Martin Shkreli]. Turing immediately raised the price to $750 a tablet from $13.50, bringing the annual cost of treatment for some patients to hundreds of thousands of dollars.[1]

The public was outraged.[2] Congressional hearings were held.[3] Shkreli was arrested for fraud in an unrelated matter, and he was forced to resign from Turing.[4] He promised to lower the price of Daraprim, a promise that he largely did not keep.[5] More

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1. Andrew Pollack, *Drug Goes From $13.50 a Tablet to $750, Overnight*, N.Y. TIMES (Sept. 20, 2015), http://www.nytimes.com/2015/09/21/business/a-huge-overnight-increase-in-a-drugs-price-raises-protests.html (last visited Mar. 30, 2017) (on file with the Washington and Lee Law Review); *see also* Emma Court, *Here's Why Daraprim Still Costs $750 a Pill*, MARKETWATCH (Feb. 4, 2016), http://www.marketwatch.com/story/heres-why-daraprim-still-costs-750-a-pill-2016-02-03 (last visited Mar. 30, 2017) (discussing the Daraprim price increase) (on file with the Washington and Lee Law Review); Heather Long, *Here's What Happened to AIDS Drug That Spiked 5,000%*, CNN MONEY (Aug. 25, 2016, 12:10 PM), http://money.cnn.com/2016/08/25/news/economy/daraprim-aids-drug-high-price/ (last visited Mar. 30, 2017) (same) (on file with the Washington and Lee Law Review); Victor Luckerson, *Everything to Know About the Arrested Drug Price-Hiking CEO*, TIME (Dec. 17, 2015), http://time.com/4153512/martin-shkreli-pharmaceuticals-arrested-turing-daraprim/ (last updated Dec. 18, 2015, 12:48 PM) (last visited Mar. 30, 2017) (same) (on file with the Washington and Lee Law Review); Lydia Ramsey, *There's Now A $1-A-Pill Competitor To Pharma CEO Martin Shkreli's $750-A-Pill Drug*, BUSINESS INSIDER (Oct. 22, 2015, 4:27 PM), http://www.businessinsider.com/a-compound-pharma-company-is-making-a-daraprim-killer-2015-10 (last visited Mar. 30, 2017) (same) (on file with the Washington and Lee Law Review).

2. *See* Long, *supra* note 1 (discussing public response to the Daraprim price increase).

3. *See* Court, *supra* note 1 (noting hearings held before the House Committee on Oversight and Government Reform).

4. *See* Luckerson, *supra* note 1 ("[T]he 32-year-old entrepreneur [Shkreli] has been arrested for securities fraud in a case tied to a separate pharma company that he used to run . . . . Shkreli has resigned as CEO of Turing Pharmaceuticals.").

5. *See* Court, *supra* note 1 (discussing Turing's promise to lower Daraprim's price).

recently, while there has been some decline, at last report Daraprim apparently still costs significantly more than it did before the initial price increase.[6] Meanwhile, other companies have promised to bring the drug to market far more cheaply.[7]

Wells Fargo has also recently elicited significant outrage.[8] Bank employees were caught having opened millions of "ghost" bank and credit card accounts for existing customers, responding to pressure to sell each customer or household eight banking

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6. *See* Long, *supra* note 1 (noting that (as of the date of the article) Daraprim's price was still approximately $375 per pill).

7. *See* Ramsey, *supra* note 1 (discussing compounding pharmacies that are offering dramatically cheaper alternatives).

8. *See* Geoff Colvin, *Wells Fargo CEO John Stumpf's $41 Million 'Clawback' Isn't What It Appears*, FORTUNE (Oct. 3, 2016), http://fortune.com/2016/10/03/john-stumpf-wells-fargo-clawback/ (last updated Oct. 3, 2016, 4:30 PM) (last visited Mar. 30, 2017) ("Wells Fargo and CEO John Stumpf are getting beaten up like no other bank or CEO since the financial crisis.") (on file with the Washington and Lee Law Review); Stacy Cowley, '*Lions Hunting Zebras': Ex-Wells Fargo Bankers Describe Abuses*, N.Y. TIMES (Oct. 20, 2016), http://www.nytimes.com/2016/10/21/business/dealbook/lions-hunting-zebras-ex-wells-fargo-bankers-describe-abuses.html (last visited Mar. 30, 2017) [hereinafter Cowley, *Lions Hunting Zebras*] ("Wells Fargo would like to close the chapter on the sham account scandal, saying it has changed its policies, replaced its chief executive and refunded $2.6 million to customers. But lawmakers and regulators say they will not let it go that quickly.") (on file with the Washington and Lee Law Review); Stacy Cowley, *Wells Fargo to Claw Back $41 Million of Chief's Pay Over Scandal*, N.Y. TIMES (Sept. 27, 2016), http://www.nytimes.com/2016/09/28/business/dealbook/wells-fargo-john-stumpf-compensation.html (last visited Mar. 30, 2017) ("As more details emerge of how toxic Wells Fargo's sales culture could be—and of how many workers were fired or punished for their attempts to draw attention to the problems they saw at their branches—the scandal has intensified.") (on file with the Washington and Lee Law Review); Matt Egan, *I Called the Wells Fargo Ethics Line and Was Fired*, CNN MONEY (Sept. 21, 2016, 1:26 PM), http://money.cnn.com/2016/09/21/investing/wells-fargo-fired-workers-retaliation-fake-accounts/ (last visited Mar. 30, 2017) (describing claims that Wells Fargo made a practice of firing employees who reported ethical violations) (on file with the Washington and Lee Law Review); Matt Levine*, Wells Fargo Opened a Couple Million Fake Accounts*, BLOOMBERG VIEW (Sept. 9, 2016, 6:30 AM), https://www.bloomberg.com/view/articles/2016-09-09/wells-fargo-opened-a-couple-million-fake-accounts (last visited Mar. 30, 2017) (describing problematic practices supposedly used by Wells Fargo to generate new accounts from existing customers) (on file with the Washington and Lee Law Review).

products; the mantra was "Eight is Great."[9] Employees say that they feared for their jobs if they did not sell the required number of accounts, so, with their supervisors' acquiescence, they created accounts without the customers' consent.[10] There are allegations that college students, Native Americans depositing their portion of casino earnings distributed to tribe members, Mexicans without social security numbers, and the elderly were particularly targeted for the unauthorized accounts, presumably on grounds that they were less likely to ask questions.[11] There are also allegations that individuals anonymously reporting the accounts on the ethics hotline were tracked down and fired.[12] The bank was fined $185 million, 5,300 employees were fired, the CEO resigned, and he and another top executive responsible for the business unit involved, who had recently retired, returned millions of dollars of compensation (although the high amounts reported in the media may be overstated).[13]

What Turing did was not illegal.[14] What Wells Fargo did was illegal, but the behavior nevertheless persisted for quite a long time, perhaps close to ten years, or even longer.[15]

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9. *See* Levine, *supra* note 8 (describing Wells Fargo practices encouraging the opening of unauthorized accounts); Doreen McCallister, *Wells Fargo CEO Discusses Secret-Accounts Scandal in Senate Hearing*, NPR (Sep. 20, 2016, 5:26 AM), http://www.npr.org/sections/thetwo-way/2016/09/20/494680201/wells-fargo-ceo-to-address-accounts-scandal-before-senate-panel (last visited Mar. 30, 2017) ("When it comes to cross-selling, Wells Fargo used the slogan 'Eight is Great.'") (on file with the Washington and Lee Law Review).

10. *See* McCallister, *supra* note 9 ("Managers often tell employees to do whatever it takes to reach their quotas. Employees who do not reach their quotas are often required to work hours beyond their typical work schedule without being compensated for that extra work time, and/or are threatened with termination.").

11. *See* Cowley, *Lions Hunting Zebras*, *supra* note 8 ("They would look for the weakest, the ones that would put up the least resistance.").

12. *See* Egan, *supra* note 8 (discussing claims of retaliation against whistleblowers).

13. *See id.* (discussing the fallout of the Wells Fargo scandal).

14. *See* Long, *supra* note 1 ("It's not illegal what they've done [at Turing], but it's unethical and immoral." (quoting Dr. Judith Aberg)).

15. *See* Egan, *supra* note 8 (discussing claims that the practice of opening unauthorized accounts was of long standing).

Four more examples help set the stage. One is casinos' attempts to entice people the casinos know or should suspect have gambling problems to visit their casinos. In the extreme, a casino might even target people who had previously gone bankrupt because of their gambling debts who then obtained money by inheritance or otherwise, sending such people vouchers or other enticements to visit the casino.[16] A second is one company's business model of buying structured settlements—amounts payable over a period of time, typically several years—for lead paint exposures from people who had gotten such settlements in exchange for a too-small immediate lump sum payment,[17] conduct for which the Consumer Financial Protection Bureau has sued the company.[18] A third is the practice by some plaintiffs' law firms to identify companies that are about to merge, advertise for plaintiffs (shareholders of the company) who they can represent to make (arguably, quite specious) arguments that the merger disclosure was inaccurate, and then push for and accept a settlement in which the company adds some small disclosures, the officers and directors of the company get an expansive release, and the lawyers get a significant payoff for their trouble.[19] A final example is some medical providers' (eye doctors and dentists, mostly) practice of visiting nursing homes

16. *See* John Rosengren, *How Casinos Enable Gambling Addicts*, ATLANTIC (Dec. 2016), http://www.theatlantic.com/magazine/archive/2016/12/losing-it-all/505814/ (last visited Mar. 30, 2017) (describing strategies used by casinos to encourage gambling) (on file with the Washington and Lee Law Review).

17. *See* Terrence McCoy, *How Companies Make Millions Off Lead-Poisoned, Poor Blacks*, WASH. POST, (Aug. 25, 2015), (last visited Mar. 30, 2017) https://www.washingtonpost.com/local/social-issues/how-companies-make-millions-off-lead-poisoned-poor-blacks/2015/08/25/7460c1de-0d8c-11e5-9726-49d6fa26a8c6_story.html?utm_term=.95ebba6c9f87 (last visited May 2, 2017) (on file with the Washington and Lee Law Review).

18. *CFPB Sues Access Funding for Scamming Lead-Paint Poisoning Victims Out of Settlement Money*, CONSUMER FIN. PROTECTION BUREAU (Nov. 21, 2016), [hereinafter *CFPB Sues Access Funding*] https://www.consumerfinance.gov/ about-us/newsroom/cfpb-sues-access-funding-scamming-lead-paint-poisoning-victims-out-settlement-money/ (last visited May 2, 2017) (on file with the Washington and Lee Law Review).

19. *See generally* Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557 (2015); Sean J. Griffith, *Correcting Corporate Benefit*, 56 B.C. L. REV. 1 (2015).

and getting incompetent patients' relatives to approve ambitious treatment plans for unnecessary medical care that would be largely or exclusively paid for with government funds.[20]

All these examples are of business practices that, it seems fair to say, elicit strong negative reactions. In some cases, the practices are illegal but in many cases, they are in a grey area, or are even legal—albeit quite undesirable from a societal perspective. I wondered whether additional forces could be marshaled against these types of practices, preferably before they were able to cause much harm. This Essay provides my starting suggestion as to how to proceed; I will develop the ideas in detail in a longer piece. The hope is to develop and define a concept—"Repugnant Business Models"—and try to make it salient, such that it could be used to pressure companies to represent that they were not using such models (or were using their best efforts not to use such models), and to explain the steps they were taking to assure that result. Critically, the pressure would not be to a binary end, just as Repugnant Business Models is not a binary concept. Turing's price increase might make a lesser, but still high, price increase less outrage-inducing.[21] Companies should be pressured to examine whether they are using a business model or engaging in practices intended to "take advantage" (of patients needing life-saving drugs, of gambling addicts, of doctor-venerating relatives of incompetent patients, etc.).

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20. *See* Peter Eisler & Barbara Hansen, *Doctors Perform Thousands of Unnecessary Surgeries*, USA TODAY (June 19, 2013), http://www.usatoday.com/story/news/nation/2013/06/18/unnecessary-surgery-usa-today-investigation/2435009/ (last visited Mar. 30, 2017) (describing unnecessary surgeries performed by doctors) (on file with the Washington and Lee Law Review); Katie Lobosco, *Doctors and Nurses Busted for $712 Million Medicare Fraud*, CNN MONEY (Jun. 21, 2015, 2:50 PM), http://money.cnn.com/2015/06/19/pf/medicare-fraud-doctors/ (last visited Mar. 30, 2017) (discussing fraudulent practices targeting vulnerable populations) (on file with the Washington and Lee Law Review). Note that much of what is written is about practices that are illegal but enforcement is difficult. The practice described in the text—which I personally encountered—certainly violates the spirit of the law, but does not violate the letter of the law.

21. I thank Peter Krause for pointing out that a visceral example of repugnance might inspire other companies to take advantage of the high bar thus set to seem less repugnant by comparison.

The pressure might, for public companies, take the form of shareholder proposals or SEC disclosure requirements. Perhaps shareholders or state attorneys general could be allowed to bring lawsuits against companies for employing Repugnant Business Models? Lawmakers and policymakers might also feel pressured to act—to close loopholes (which is arguably what was at issue with Daraprim), counter influential interest groups (at issue in other repugnant pharmaceutical industry practices), or beef up enforcement (which could have uncovered the Wells Fargo situation sooner, perhaps by looking expressly for too-aggressive and unrealistic sales targets), for instance. In appropriate cases, judges could, in dicta, encourage (or regulators, in deferred prosecution agreements or nonprosecution agreements, could require) companies to take steps to ensure they were not using Repugnant Business Models. Courts or lawmakers might broaden the doctrine of piercing the corporate veil to allow recourse to shareholders' personal assets where their corporation's business model effectively took advantage of the corporate form, using the corporation to externalize harms from Repugnant Business Models and "organized [and maintained] with capital insufficient to meet liabilities which are certain to arise in the ordinary course of the corporation's business."[22]

The Repugnant Business Model concept is intended to have both reputational and legal force. Most companies care about their reputations, and shaming might cause them to examine their practices. Those that do not, such as companies whose entire business model is premised on such models, would presumably care about potentially increased costs and sanctions from lawmakers and courts.

This Essay and the broader project have another and perhaps seemingly contradictory aim: to suggest that outrage against some other business models is in fact misplaced. I will argue, for instance, that Uber's surge pricing during popular times unwarrantedly elicits outrage. This outrage led to legal restrictions in some jurisdictions.[23]

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22. Walkovszky v. Carlton, 18 N.Y.2d 414, 427 (N.Y. 1966). I thank Randall Thomas for this suggestion.

23. *See* Danielle Muoio, *Uber's Surge Pricing Was Just Banned in the World's Second-Largest City*, BUSINESS INSIDER (Apr. 21, 2016, 11:57 AM), http://www.businessinsider.com/uber-can-no-longer-offer-surge-pricing-in-delhi-

This aim is, though, less contradictory than it might appear. If everything induces outrage, outrage loses its force. I argue here that there can be a principled articulation of the conditions under which outrage is, and is not, warranted. Such an articulation should make outrage a more effective force for advancing society's interests.

In all, I will distinguish between three types of business models: Repugnant Business Models generally elicit, and warrant, pure outrage. Another category involves models which elicit some outrage, but the outrage reflects a societal clash in values. One common clash is between paternalism and autonomy. Another involves the extent to which disadvantaged people should be able to get health care, housing, food, or other "necessities" at societal expense, and more generally, what disparities in access to "necessities" is appropriate and what the "haves" owe to the greater society.

To illustrate the paternalism vs. autonomy clash, consider potentially differing reactions to the physical features of many casinos. The casinos seek to disorient patrons by having no windows, carpets with elaborate patterns, and very few clocks. People are, one could say, being tricked into spending more time in casinos and presumably, gambling more. But aren't people responsible for resisting such lures? Clashes implicating differing views about the consequences of inequality and the responsibilities of good citizens are so obvious and frequent as to scarcely need illustrations, but one interesting example warrants mention: outrage over surge pricing for transportation when the increased demand causing the surge relates to a natural disaster (or an "unnatural" disaster such as terrorism). Should Uber, as a

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2016-4 (last visited Mar. 30, 2017) (noting New Delhi banned Uber's surge pricing) (on file with the Washington and Lee Law Review); *see also* Will Brunelle & Dana Rubinstein, *Bill Would Ban 'Surge Pricing' by Uber*, *Rideshare Services*, POLITICO (Feb. 13, 2015, 5:34 AM), http://www.politico.com/states/new-york/albany/story/2015/02/bill-would-ban-surge-pricing-by-uber-rideshare-services-086949 (last visited Mar. 30, 2017) (discussing efforts to ban surge pricing in New York) (on file with the Washington and Lee Law Review); Liam Dillon, *California Bill Seeking to Limit Surge Pricing by Uber and Lyft Dies*, L.A. TIMES (Apr. 29, 2016, 7:12 PM), http://www.latimes.com/politics/la-pol-sac-essential-poli-uber-and-lyft-surge-pricing-bill-dies-1461112198-htmlstory.html (last visited Mar. 30, 2017) (detailing failed efforts to ban surge pricing in California) (on file with the Washington and Lee Law Review).

matter of good civic citizenship, pay drivers a premium that is not passed along to passengers if those passengers are fleeing a hurricane?

My third category is models that, in my view, elicit unwarranted outrage, such as surge pricing during popular times. There is much more to be said about these examples and categories, of course. In this Essay, I can only sketch out some of the principal delineations and arguments.

Ultimately, what motivates this Essay (and the larger project that will further develop the ideas) is my view that attempts to influence corporate behavior, including those made by lawmakers, but to a greater extent through extra-legal means, are too often based on fads and people's "agendas," rather than from a principled consideration of what corporations should and should not be doing. Better-focused pressure can and should be brought to bear on corporate actors as well as government actors. In many cases, I would argue for more pressure. In other cases, I would argue for less. And in some cases, where the issues may be intractable, the society would benefit from a reasoned discussion that acknowledges differences in first principles leading to resolutions that many find outrageous, but that are quite acceptable to others.

II. Defining Repugnant Business Models

Consider a "perfect" transaction, one involving a willing, informed buyer with full capacity to contract. Even better, the seller would be a repeat player or otherwise have a considerable reputational stake in the transaction. Many transactions do not meet that ideal, but some are, of course, far further from it than others. Repugnant Business Models are those that are designed to take advantage—either of people under duress, people who are particularly vulnerable (and to which the society may be solicitous), third parties, or some combination thereof, or of a legal privilege, for a reason that violates the spirit of the law. The word "designed" in this formulation means that the advantage-taking is intended.[24] A model for this purpose can be a

24. I owe this observation to Francis Shen.

company's principal business—its 'raison d'être'—or it can simply be one business or practice of many.

The determination is also not binary. There are degrees of taking advantage, and there are degrees of intention. A person who needs a lifesaving drug urgently when no alternatives exist is arguably more amenable to being taken advantage of than a person who became bankrupt because of gambling losses and now is being tempted with free gambling chips to visit a casino. (Or, perhaps, the two are equally amenable to being taken advantage of, but society should be more solicitous of the person needing the drug?) A CEO who knows perfectly well that her "lifesaving" drug is worthless has more of an intention to take advantage than one who simply has anecdotal evidence that the drug might work, but has not had testing done that might support, or disprove, the drug's efficacy. Taken to its extreme, the application of this concept could be truly ludicrous, extending to practices that, in my view, absolutely should not be considered repugnant: a company spends a lot of money making a wonderful product, the (high) price of which reflects its development costs, and it becomes a "must have" product for everyone, including people who then "have" to "sacrifice" necessities to obtain it. The iPhone may be an example. I discuss later in this Essay how to characterize outrage in this context: as reflecting a clash in values among people in the society as to what a baseline standard of living should consist of, and how much higher a standard of living money should be able to buy.

My project requires very difficult, and contestable, distinctions. It is important (albeit quite difficult) to distinguish between raising the price of a lifesaving generic drug one has acquired the rights to sell, and recouping the price of a lifesaving drug one has recently and at great expense developed. In the first case, the model in this formulation consists of the acquisition of the generic drug with the intent of significantly raising its price; in the second case, the model is both the development and sale of the drug. The consumers in both cases are just as desperate (and hence "under duress"). But many would agree with the characterization that the former is an abuse of the law, while the latter is the law's intended and desired goal. The latter is not "taking advantage" while the former arguably is.

The Repugnant Business Model concept will require a systematic definition. Among the likely sources are contract law and other forms of consumer protection law. In both types of law, contracts can in some circumstances be found unenforceable. Contract law, for instance, provides that contracts entered into or modified under duress, contracts made with parties who are incompetent, contracts that are unconscionable (meaning, generally, that the terms are extremely unfavorable to one party, typically a type of party to which the law is solicitous), contracts where a party is exerting undue influence or attempting to impose an "unfair" term on the other party, may be unenforceable.[25] Most of the examples in this Essay involve something in the general family of duress, incompetence, or undue influence, but there are examples tracking these other doctrines as well.

That being said, the concept of Repugnant Business Models needs to also encompass certain third party harms, such as the government paying for unnecessary health care. Law does not have an express category or particular label for third party harms, but such harms are a familiar focus of law. Tax is a particularly frequent context: the obvious third party is the government, which is losing out on revenue to which it is arguably entitled, due to actions by a person and her tax adviser. When the government allocates money to pay for health care for senior citizens, the money is supposed to go towards improving the life of such citizens, not lining the pockets of providers who have finagled their way into providing unnecessary services. When the law contemplates a settlement between lawyers purportedly representing the two sides in a dispute, neither side is supposed to be in a position to advance its own interests while harming the interests of its supposed client.

Let us apply this rough definition of intentionally taking advantage to the examples above. The first example involved

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25. *See, e.g.*, CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW 533–667 (7th ed., 2012) (discussing principles in contract law under which enforcement of a contract can be denied, such as incapacity, bargaining misconduct, unconscionability, and public policy). There is also precedent, such as "anti-abuse" rules and regulations in various contexts, for the form of a transaction not to be respected, a subject that will be more fully developed in the detailed exposition of these ideas.

Daraprim. The problem is not just the high price—after all, as noted above, a critical point of the patent system is to motivate innovation by allowing the innovator to be handsomely rewarded.[26] Many new drugs cost a great deal, which may be controversial when the price is particularly high, but, at least until recently, often has not been.[27] The problem is that the innovation at issue in the Daraprim case was in the distant past, Daraprim was no longer under patent, and Turing was exploiting a regulatory "glitch"—even generic drugs require a form of FDA approval, which Daraprim already had, but other potential manufacturers did not.[28] Because the approval is time consuming, at the lower price, other manufacturers had not found the approval worthwhile to obtain.[29] The other companies now promising to bring the drug to market more cheaply were "compounding" pharmacies, which are allowed to make drugs using pre-approved compounds, for specialized uses.[30]

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26. *See* Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1580 (2003) ("There is virtually unanimous agreement that the purpose of the patent system is to promote innovation by granting exclusive rights to encourage invention.").

27. *See, e.g.*, Carolyn Y. Johnson, *$300,000 a year? Doctors Question High Drug Prices for Rare Diseases*, BOSTON GLOBE MEDIA PARTNERS (Oct. 1, 2013, 6:03 PM), http://archive.boston.com/news/science/blogs/science-in-mind/2013/10/01/year-doctors-question-high-drug-prices-for-rare-diseases/rJwjMUXTyTFWkkDt lj5dxJ/blog.html (last visited Mar. 30, 2017) (noting the high cost of many new drugs) (on file with the Washington and Lee Law Review).

28. *See* John Graham, *Martin Shkreli a Creature of FDA Regulation, Not Pharma Industry's Greed*, FORBES (Sep. 28, 2015, 5:17 PM), http://www.forbes.com/sites/theapothecary/2015/09/28/martin-shkreli-is-a-creature-of-fda-regulation-not-pharma-industrys-greed (last visited Mar. 30, 2017) (discussing the price impact of the FDA approval process for generic drugs) (on file with the Washington and Lee Law Review).

29. *See id.* (noting the lack of other generic alternatives).

30. *See* Ramsey, *supra* note 1 (discussing the use of compounding pharmacies). Another very similar example involves the EpiPen, a device for delivering epinephrine to someone in the throes of an allergic attack. *See generally* Gretchen Morgenson, *EpiPen Price Rises Could Mean More Riches for Mylan Executives*, N.Y. TIMES (Sept. 1, 2016), http://www.nytimes.com/2016/09/04/business/at-mylan-lets-pretend-is-more-than-a-game.html (last visited Mar. 30, 2017) (describing price increase of EpiPen) (on file with the Washington and Lee Law Review).

The pharmaceutical industry offers many other examples. A notorious practice in the industry involves a product about to lose patent protection that is slightly tweaked so that it can be re-patented and gain exclusivity for several more years.[31] Yet another practice, now illegal, is for a patent holder of an expiring patent to pay a potential generic manufacturer to delay producing the product so that the patent holder can retain exclusivity beyond the patent period.[32] These examples are also of "taking advantage," here of a system intended to motivate innovation, but instead being used to get higher prices. And we can consider who is being taken advantage of in such cases—the consumer, the government, the private insurer, etc. The unnecessary health care example takes advantage of a third party—the government—which is paying for the health care in question. I would argue that it takes advantage of the patients as well, especially insofar as the health care may be painful and even dangerous. A safeguard against the provision of the unnecessary care exists under law: approval must be obtained from "competent" individuals authorized to consent on behalf of the party lacking capacity. But, in my view, the safeguard does not suffice. The individuals will not infrequently be cowed by medical personnel, agreeing to what has been "recommended." I would wager a considerable amount that the dentists proposing extensive painful dental work for patients who are not in pain and who are in the last years of their lives would not recommend such work for their own close relatives. Intuition strongly argues that the model is a paradigmatic example of the category: a business model that is designed to take advantage, and that would not make sense but for taking advantage.

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31. *See* TOM COTTER, PATENT WARS: HOW PATENT DISPUTES IMPACT OUR DAILY LIVES (forthcoming 2017) (discussing patenting minor improvements on drugs to extend patent protection).

32. *See* Marc-André Gagnon, *Corruption of Pharmaceutical Markets: Addressing the Misalignment of Financial Incentives and Public Health*, 41 J.L. MED. & ETHICS 571 (2013) (discussing problems posed by combining profit driven private industry and public health needs); Aaron S. Kesselheim, Michelle M. Mello & David M. Studdert, *Strategies and Practices in Off-Label Marketing of Pharmaceuticals: A Retrospective Analysis of Whistleblower Complaints*, 8 PLOS MED. e1000431 (2011) (discussing off-label marketing of pharmaceuticals); *see also generally* TOM COTTER, *supra* note 31 (providing background about tactics used to delay ANDA applications and antitrust implications).

The structured settlement purchases involve a very similar mechanism. They must by law be approved by someone "independent," but the law has not proven effective in ensuring that nominal independence is true independence. The Consumer Financial Protection Bureau has charged that "Access Funding [a company in the business of buying these settlements] steered victims to receive 'independent advice' from a sham advisor, an attorney who was actually paid directly by the company and indicated to consumers that the transactions required little scrutiny."[33]

The casino example is similar in important respects. Yes, the person receiving inducements to gamble has not been declared incompetent, but the person is known to be someone with a gambling addiction and who has lost considerable amounts of money that he almost certainly could not afford to lose. Sending a letter with free gambling chips and other inducements to gamble to someone who went bankrupt on account of gambling debts is surely an attempt to take advantage of a well-known vulnerability. As I discuss below, trying to make such conduct illegal risks overreaching and encountering vehement objections on grounds of paternalism—which is precisely why an approach based on extra-legal pressure might be indicated.

Let us consider two other examples involving what Richard Painter and I have called financial maneuvering, which is an attempt to do an end-run around financial regulations or covenants.[34] One is Enron's attempt, using various investment-bank crafted techniques, to vastly understate the amount of debt it had.[35] The other is Goldman Sachs' creation of a cross-currency swap that enabled Greece to understate its debt so as to meet the requirements to adopt the Euro.[36] The parties that

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33. *CFPB Sues Access Funding*, *supra* note 18.

34. *See* CLAIRE A. HILL & RICHARD W. PAINTER, BETTER BANKERS, BETTER BANKS 66 (2015) (identifying financial maneuvering as a form of financial engineering "intended to deceive or subvert a regulatory scheme or contractual obligation").

35. *See id.* at 66 ("Enron used many bank-crafted techniques to create a wholly false financial appearance, intending to deceive the market into thinking it was far healthier than it was.").

36. *See id.* ("In Goldman's cross-currency swap with Greece, there was an EU regulation intended to limit Greece's debt level, which Goldman apparently

were hurt in these cases were third parties—indeed, in both cases, the two parties to the transaction were getting precisely what they bargained for.[37] And the legality of what was contracted for is complicated—unlike in the case with Wells Fargo, where the conduct was clearly illegal but apparently not stopped for a long time, this conduct is close to the line for many reasons, including, in the case of the Greek cross-currency swap, jurisdictional reasons.[38]

Where is law in all this? Where should law be in all this? These are very difficult and weighty questions that warrant further exposition. For present purposes, I make two points. First, the conduct at issue in Repugnant Business Models would, by most metrics, seem "as bad" as conduct that is illegal, and many of the rationales for making conduct illegal would apply to Repugnant Business Models. In some cases, what is at issue are negative externalities, a well-recognized and accepted reason for law. In others, it is some combination of paternalism and externalities—the bankrupt gambler and his family now have to rely on public assistance. In some cases, it may be a case of fixing a problem that law itself created—a loophole, for instance—that allows patent protection for far longer than was intended or is needed. The law—granting patent protection—intended to interfere with markets for a good reason, but it was used to allow interference even absent that reason. More broadly, improving the workings of markets is seen as a plausible rationale for law, and many Repugnant Business Models interfere with markets.

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helped Greece to effectively subvert.").

37. *See id.* at 66–68 (identifying third parties as the primary group harmed).

38. Yet another example is private prisons. Governments want to save money by privatizing prisons. They would like to assure quality, but doing so is quite difficult, especially where the companies' incentives are deeply perverse: they want more prisoners serving longer sentences and want to spend the smallest amount of money possible on them. Governments are hard pressed to monitor to overcome these incentives. This problem has been recognized for quite a long time. *See generally* Oliver Hart, Andrei Shleifer, Robert W. Vishny, *The Proper Scope of Government: Theory and an Application to Prisons*, 112 Q.J. ECON. 1127 (1997) (discussing reasons why certain services should be provided by governments, and certain other public services can be contracted out to third party providers). Note that it is the prisoners as well as the broader society on whom the costs are being foisted. *Id.*

The examples are those we have seen before: transactions involving fraud or duress or undue influence or taking advantage of diminished capacity.

Second, in some cases, it is plausible to say that the conduct would be effectively addressed by law but for certain obstacles, such as difficulties in specification, difficulties in enforcement, and failures of political will. Specification is always a challenge. Attempts at greater precision, in the form of rules, provide road maps for evasion. But the standard alternative to rules, standards, are also problematic, allowing too-expansive use of law, and corroding law's legitimacy. Consider trying to specify what sorts of medical care could be recommended for people near the end of life. Process-based solutions may be employed, but they are amenable to the same problems as are rules: the cowed relative approving the unnecessary health care, and the "independent" person approving the fairness of the structured settlement purchase.

Enforcement is also difficult, with nimbler and better resourced-businesses prevailing over (less nimble and under-resourced) regulators (often, in the notorious "whack a mole"). Problems of political will arise when it's clear that the status quo does some harm and could be improved upon, but powerful interests benefit from the status quo and block any changes. The problem of new patents granted on slightly tweaked versions of old drugs losing patent protection could easily be remedied by a requirement that the new drug do something useful that the previous drug did not.[39] Among the hoped-for strengths of the approach I suggest here is an increase in pressure that could counter a lack of political will, and, more broadly, pressure that could make the search for loopholes as a business model more reputationally costly. One recent salutary development, involving a legal solution to the problems posed by a particular Repugnant Business Model, is the new judicial hostility in Delaware to disclosure-only settlements granting defendants, corporate officers and directors, broad releases from liability in exchange for some trivial increased disclosure and a

39. I owe this example to Lisa Larrimore Ouellette.

big check to plaintiffs' lawyers.[40] After hearing convincing demonstrations that these settlements were pernicious, the courts became far less apt to approve them.[41] Of course, the result might be that, at least in the short term, the litigation somehow manages to move to other jurisdictions. Hopefully, the concept of Repugnant Business Models can complement those courts' consideration of the issues when they arise.

III. Other Types of Business Models

Models that do not fit into my Repugnant Business Models category also sometimes elicit outrage. I consider two such models. I make no claim to being comprehensive, but I believe these models go a significant way to covering the relevant terrain.

The first model elicits outrage because of an underlying conflict in values. The conflict that can be articulated most straightforwardly is between paternalism and autonomy. How much should the society protect people from themselves, and how much are people chargeable with protecting themselves? What happens when protecting some people increases costs for those not in need of protection? Recall the perfect transaction with which the Repugnant Business Models were contrasted—the well-informed, fully competent buyer, and perhaps, a seller with a significant reputational stake. Many of the transactions in the Repugnant category had buyers who were under duress or particularly vulnerable.[42] In these conflict of values models, the buyers' foibles are far less extreme—the buyers may, for instance, be "too easily" tempted. The gambling addict is of course a hard

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40. *See generally* Matt Chiappardi, *Meet the Man Changing Deal Litigation As We Know It*, LAW360 (Apr. 19, 2016) https://www.law360.com/articles/785037/meet-the-man-changing-deal-litigation-as-we-know-it (last visited May 1, 2017) (on file with the Washington and Lee Law Review); Edward B. Micheletti, Jeness E. Parker & Bonnie W. David, *Forward Momentum: Trulia Continues to Impact Resolution of Deal Litigation in Delaware and Beyond*, SKADDEN (Nov. 17, 2017), https://www.skadden.com/insights/forward-momentum-trulia-continues-impact-resolution-deal-litigation-delaware-and-beyond (last visited May 1, 2017) (on file with the Washington and Lee Law Review)

41. *Id.*

42. *Infra* Part II.

case—my fuzzy attempt at demarcation characterizes a direct lure to identified addicts being repugnant, while a softer lure that is made more broadly is characterized as being in the conflict category. Any principled attempt the society made to be more solicitous to people on grounds of how tempted they can be (allow themselves to be?) would quickly lead to objections of excessive paternalism. Many people might want our society to be more paternalistic, but many people very much do not.

One example in this category is the production, sale, and marketing of hyper-palatable foods, now that the foods are known to mute natural signals of satiation and otherwise contribute to significant overeating and unhealthy diets.[43] Another is marketing expensive "status" sneakers, especially to populations without much disposable income.[44] Many other examples can be given, such as payday loans and other very expensive ways for people without much money to acquire money quickly.[45] Yet other examples include supersizing options for fast food meals, or, as discussed earlier, casinos' use of disorienting carpets to get would-be gamblers to lose track of time and place.[46] (What about the carpet manufacturer making the carpets expressly for casinos and knowing their purpose? Their model would probably fit into this category as well.)

One term that covers some of the examples in the paternalism versus autonomy category is "bad nudges." The

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43. *See generally* MICHAEL MOSS, SALT SUGAR FAT: HOW THE FOOD GIANTS HOOKED US (paperback ed. 2014) (discussing techniques used by food manufacturers to make food more addictive).

44. *See* Emily Chertoff, *The Racial Divide on . . . Sneakers*, ATLANTIC (Aug. 20, 2012), http://www.theatlantic.com/national/archive/2012/08/the-racial-divide-on-sneakers/261256/ (last visited May 1, 2017) (describing the prominence of status sneakers in low-income African American communities) (on file with the Washington and Lee Law Review).

45. *See* Megan McArdle, *On Poverty, Interest Rates, and Payday Loans*, ATLANTIC (Nov. 18, 2009), http://www.theatlantic.com/business/archive/2009/11/on-poverty-interest-rates-and-payday-loans/30431/ (last visited May, 2017) (discussing high interest and fee financing options targeted toward low-income communities) (on file with the Washington and Lee Law Review).

46. *See generally* NATASHA DOW SCHULL, ADDICTION BY DESIGN (2013) (describing techniques used by casinos to get people to gamble more money and for longer periods of time).

concept of "nudges" was originated by Richard Thaler and Cass Sunstein in their seminal 2008 book *Nudge: Improving Decisions About Health, Wealth, and Happiness*.[47] As the title suggests, the book focuses on "good nudges"—nudges that encourage behavior that society desires and, they argue, individuals "really" desire too, such as make healthier food choices.[48] For example, fruit, rather than candy, might be placed near cash registers at supermarkets, encouraging impulse purchases of fruit and discouraging impulse purchases of candy. Bad nudges, by contrast, are manipulations of buyers by self-interested sellers.[49] An example is a "free" one month trial magazine subscription that includes an automatic renewal at the regular price, where the procedures to cancel the subscription are buried in fine print.[50]

Words used to describe the models at issue sometimes are quite charged—"exploitation," for instance—and there is an interesting linguistic ambiguity in the word that is not accidental. Is a business practice of having casino employees looking for gamblers seated at a slot machine who are showing

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47. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008). Thaler and Sunstein advocate good nudges, "non-coercive" ways of getting people to make better decisions. *Id.* But they have noted that there are bad nudges as well. *Id.* A paradigmatically bad nudge would attempt to covertly manipulate a buyer, for the benefit of the seller, giving the buyer little ability to opt out. *Id.* Admittedly, the word "manipulation" is charged, and quite difficult to define rigorously and other than conclusorily. But the concept may nevertheless have sufficient traction.

48. *Id.*

49. *Id.*

50. Sunstein and Thaler argued that "nudges" achieved aims that might be considered paternalistic while not being paternalistic. Indeed, the concept was originally called "libertarian paternalism," which the authors characterized as "anti-anti paternalism." *See generally* Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 175 (2003). Some have argued that nudges (good or bad) actually can or do undermine autonomy. *See, e.g.*, Christopher McCrudden & Jeff King, *The Dark Side of Nudging: The Ethics, Political Economy, and Law of Libertarian Paternalism*, QUEEN'S U. (2015) http://pure.qub.ac.uk/ portal/en/publications/the-dark-side-of-nudging(062809e1-27c2-4ce5-b742-bbc0a 517fb32)/export.html (last visited May 1, 2017) (on file with the Washington and Lee Law Review). This is not the place to air the debate fully, but for present purposes, suffice it to say stark oppositions between paternalism and autonomy in principle and in practice may be difficult to articulate fully satisfactorily, which has added to the muddle of this category.

signs of hunger and bringing the people meals so they will not stop gambling exploitative? (And if so, what follows?) How about using a technique to determine a person's preferred resistance from the gambling lever, and automatically setting the device to that resistance? (Both practices are described in the book *Addiction by Design*,[51] as are the disorienting carpets mentioned above, lack of windows, and lack of clocks, all to discourage easy exit from the casino.) What about the Heart Attack Grill, a restaurant in Las Vegas that has "courted controversy by serving high-calorie menu items with deliberately provocative names coupled with waitresses in sexually provocative clothing?"[52]

Complicating matters, people not protected from themselves may inflict costs on third parties—people who spend all their money gambling may leave their households impoverished, and people who eat too much unhealthy food may have higher health costs borne by others. To what extent business models which allow for or encourage these behaviors should be discouraged, and by what means, are important questions—what is critical for my purposes is to distinguish the models at issue from repugnant business models. One very difficult-to-classify example is the attempts by investment banks just before the financial crisis to unload their toxic securities onto "sophisticated" money managers who had sympathetic beneficiaries, sometimes the proverbial widows and orphans—or at least pension recipients—who, admittedly, had entrusted their funds to the wrong people. Should societal solicitousness extend that far? Perhaps the answer is yes given the extent to which the greater society suffered harms. Perhaps what tips this into Repugnant territory

51. SCHULL, *supra* note 46.

52. *Heart Attack Grill*, WIKIPEDIA, https://en.wikipedia.org/wiki/Heart_Attack_Grill (last visited May 1, 2017) (on file with the Washington and Lee Law Review); *see also We'll Make Reporting Easy for You . . .* , HEART ATTACK GRILL, http://www.heartattackgrill.com/press.html (last visited Mar. 30, 2017) (on file with the Washington and Lee Law Review). Speaking of sexually provocative clothing, where in my categorization does Hooters belong? I would say that paternalism is not what is at issue (although many people with different world views would disagree, saying that people "should" be saved from pornography). There is an argument that it causes negative externalities insofar as the society, and especially many women, may suffer from the results of the message Hooters conveys. But of course all this turns on highly contested priors as to all these matters, something I readily acknowledge.

is the deliberate strategy to sell to investors who could be duped, even though the investors' nominal sophistication meant that the law did not give them the protections they would have been accorded had they not qualified as sophisticated.[53]

Other conflicts relate to disparities between people, mostly those involving income and wealth. What is the baseline standard of living to which all citizens are entitled? Should a lifesaving innovation only be available to the very wealthy? These conflicts reflect disagreements on first principles and on related empirical matters. The point warrants, and in the longer exposition of the argument will get, far more exposition, but for present purposes, consider different views as to why poor people are poor. If somebody thinks that a person is poor because of indolence, they are far less likely to think the person should be supplied with food, housing, and health care at government expense than someone who thinks people who are poor are unlucky or discriminated against and not responsible for their financial difficulties. (People's prior beliefs as to whether government is good at addressing problems are also at issue—some people think government works far better than others do.) A final related clash of values concerns the responsibilities of citizenship. If there is a natural disaster or terrorist attack from which citizens need to escape, do private transportation companies and their employees have an obligation not to benefit from the increased demand for their services?

The final category elicits what in my view is unwarranted outrage. My paradigmatic example is surge pricing, such as Uber's surge pricing for cars on popular evenings.

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> In a December 28[, 2006] email discussing a list of customers to target for the year, Goldman's Fabrice Tourre, then a vice president on the structured product correlation trading desk [who is now best known for his role in the Abacus transaction], said to 'focus efforts' on 'buy and hold rating-based buyers' rather than 'sophisticated hedge funds' that 'will be on the same side of the trade as we will.' The 'same side of the trade' as Goldman was the selling or shorting side—those who expected the mortgage market to continue to decline.

FINANCIAL CRISIS INQUIRY COMMISSION, FINANCIAL CRISIS INQUIRY REPORT 235–36 (2011).

The business models and practices in this category are, in my view, unobjectionable. But they elicit outrage for what I will characterize as self-serving reasons, often "shooting the messenger." Somebody wants to go out on an evening on which there will be high demand for Uber cars, but low supply. Uber's business model includes getting more drivers on the road by offering the drivers more money. People somehow feel an entitlement to the same price at all times (even though I expect they would be fine with a discounted price under certain circumstances—to take people to religious services, hospitals, or funerals?). Thus, the ride costing more at peak times is objectionable, and the messenger, the company that sets the higher price, is behaving outrageously. Status quo bias is a factor here, as it is with business models in this category more generally: the outrage arises when there is a change in what people had come to feel entitled to.

A related example is when a company unbundles services that had previously been bundled. Someone used to getting a free meal on the plane, or checking luggage for free, now has to pay.[54] If asked why people who do not want the meal should have to pay for people who do, a person might respond, "This is just the airline's way of raising prices." In particular cases, it could be true (and might especially be believed by someone who thinks of business as trying to gouge its customers and generally take advantage whenever it can) but unbundling as a principle seems hard to argue with.

Another example concerns outsourcing to countries with cheaper labor.[55] A person who thinks the practice is odious is free

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54. *See* Christopher Elliott, *By Unbundling, Airlines Make a Bundle*, WASH. POST (Apr. 4, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/04/01/AR2010040103315.html (last visited May 1, 2017) (discussing unbundling of services in the airline industry) (on file with the Washington and Lee Law Review).

55. *See, e.g.*, Barbara Brotman, *Chicago Activist Begins Oreo Boycott to Protest Mondelez Layoff Plans*, CHI. TRIBUNE (Aug. 9, 2015), http://www.chicagotribune.com/lifestyles/columnists/ct-oreos-brotman-talk-0810-20150806-column.html (last visited May 1, 2017) (describing one woman's mission to boycott Mondelez, the company who manufactures Oreo, for moving jobs to Mexico) (on file with the Washington and Lee Law Review); *see also* Daniel Roberts, *Here's Why Donald Trump is Giving Up Oreo Cookies*, FORTUNE (Aug. 26, 2015, 6:37 PM), http://fortune.com/2015/08/26/donald-trump-oreos/

to only purchase products made with higher-priced labor. A person who continues to purchase the cheap-labor products notwithstanding her objection to the practice has available a variety of narratives. Some seem to me principled—they "can't afford" the higher prices, for example. But what of people who argue against the practice but continue to buy the products, arguing that companies should simply have lower profit margins or the executives should be paid less? I am not arguing that the present profit margins or executive compensation levels are somehow inviolate (although I suspect that even much lower executive compensation would not yield the cost savings at issue). The point, instead, is that the outrage reflects a fact about the world (and perhaps themselves) that is uncomfortable, and the outrage, I think, reflects an attempt to resolve the discomfort in a manner that may complicate the operation of markets.

Another type of example can be introduced by describing a famous Kurt Vonnegut story published in 1961, *Harrison Bergeron*.[56] The story begins: "The year was 2081, and everybody was finally equal. They weren't only equal before God and the law. They were equal every which way. Nobody was smarter than anybody else. Nobody was better looking than anybody else. Nobody was stronger or quicker than anybody else."[57] A dance performance in this society is described as follows: "They weren't really very good—no better than anybody else would have been, anyway. They were burdened with sashweights and bags of birdshot, and their faces were masked, so that no one, seeing a free and graceful gesture or a pretty face, would feel like something the cat drug in."[58]

The story conjures up a society in which equalization of talents, looks, and material resources was attempted on a grand scale.[59] The subject is quite an uncomfortable one, and, in our

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(last visited May 1, 2017) (discussing Donald Trump's boycott of Oreo cookies because manufacturer Mondelez was moving Chicago plant jobs to Mexico) (on file with the Washington and Lee Law Review).

56. Kurt Vonnegut, Jr., *Harrison Bergeron*, *in* WELCOME TO THE MONKEY HOUSE 7 (1968).

57. *Id.* at 7.

58. *Id.* at 8.

59. *See id.* at 7–13 (depicting a world in which people's superior attributes are equalized through handicaps).

world, the discomfort manifests itself in various contexts. For instance, a woman with various canonically desirable attributes (appearance, youth, intelligence) could sell her eggs for more than a woman with fewer of those attributes.[60] (Getting into "hot nightspots" is also easier for people who are more attractive). One hears objections—that such people "should not" get these advantages over others. The same is true as to other desirable attributes that are, as all such attributes are, unevenly distributed. But people are often not consistent on this front. Nobody begrudges a beautiful movie star having many choices among highly desirable suitors. Society tolerates many inequalities, and—to get very provocative—some people who object to others' advantages may feel quite entitled to their own.[61] Note that this category overlaps with the clash of values category insofar as it relates to advantages accruing to unevenly possessed attributes, and clearly, there is no bright line separating the two.

I know people who very much disagree with many of the examples I will give. For instance, if a seller (say, Amazon) knows so much about you that they know precisely how much you are willing to pay for some good or service, is it problematic if they use that knowledge to get you to pay a bit more than the price they might charge someone else? Or is the relationship a game in which they have too many advantages, so that you should be able to frustrate their attempts to figure out your preferences enough to "exploit" you? And does it make a difference if there are mechanisms by which you can "conceal" your past purchases, and thus information about yourself, but do not do so? But, putting

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60. *See* Jacoba Urist, *How Much Should a Women be Paid for Her Eggs?*, ATLANTIC (Nov. 4, 2015), https://www.theatlantic.com/health/archive/2015/11/how-much-should-a-woman-be-paid-for-her-eggs/414142/ (last visited May 1, 2017) (noting higher prices paid for eggs from women with "desirable" traits) (on file with the Washington and Lee Law Review).

61. The concept of moral dumbfounding may be relevant here, at least by analogy. *See generally* JONATHAN HAIDT, THE RIGHTEOUS MIND (2012) (providing background on moral dumbfounding). Moral dumbfounding is what happens when a person has a moral position that some behavior is wrong for a particular reason, but, when shown that the reason she gave is inapplicable, she still sticks to the position. *Id.* I suspect that a comparable phenomenon would occur if people were asked to give principled moral reasons in the contexts I describe here.

aside the specifics, the general category is one I hope will resonate.

IV. How (and Why) Would the Mechanism(s) for Repugnant Business Models Work?

In a sense, the concept of Repugnant Business Models is the easiest of the three. A search for "most hated man on Earth" would, for quite a few months, have yielded many hits for "Martin Shkreli." But, even assuming, heroically, that I succeeded in establishing the concept of Repugnant Business Models and making it salient, how could doing so serve to reduce such models?

The mechanisms I have described are mostly extra-legal, or involve the law in an attenuated or indirect way. One possibility I have mentioned for public companies is shareholder proposals to ask boards to consider putting in place steps to assure that their companies are not using Repugnant Business Models, and identifying what those steps are.[62] Another is a disclosure requirement to the same end in public filings.[63] Objections are easy to anticipate: more expense for companies but no substantive result, except perhaps in the case of disclosure requirements, a bad one, enriching plaintiffs' lawyers who would find some supposed defect in the disclosure. The objection that a disclosure requirement would "inspire" costly opportunistic litigation by plaintiffs' lawyers is one I take very seriously. The lawsuits brought by plaintiffs after corporations were required to make disclosures on pay in connection with the newly required say-on-pay vote were in my view opportunistic and of no benefit to companies or their shareholders.[64] Either of two solutions are possible and should solve the problem: either companies would

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62. *Supra* Part 0.

63. *Supra* Part 0.

64. *See generally* Kevin LaCroix, *Enough Said Yet?: Say on Pay Litigation May Have Had Its Day*, D&O DIARY (Sept. 26, 2013), http://www.dandodiary.com/2013/09/articles/executive-compensation/enough-said-yet-say-on-pay-litigation-may-have-had-its-day/ (last visited May 1, 2017) (providing background on say on pay litigation) (on file with the Washington and Lee Law Review).

have a "good faith" defense against private suits, such that if they could show that their disclosure was made in good faith after due inquiry, a suit would be dismissed, or, there would be no private cause of action.

My main response, though, to the broader objection that my solution has no teeth is the following. Outrage-inducing scandals occur with some regularity. This by itself is leading to more calls for action. At the same time, companies' concerns for their reputations are leading them to compete in the spheres of sustainability and corporate social responsibility.[65] Compliance initiatives are increasingly focused not just on compliance with law but also with firms' codes of ethics and conduct (which of course also reflect the firms' reputational concerns). Moreover, regulators who have supervisory and monitoring responsibilities are well-positioned to make inquiries as to what steps are being taken to avoid and uncover Repugnant Business Models.

In sum, given the outrage certain business models elicit, and the extent to which an appreciable amount of the outrage mirrors general concerns of law, the concept of Repugnant Business Models would seem well-situated to command attention in this general sphere. And not just perfunctory check-the-box attention. The inquiry will by its nature be nuanced, given that the category does not have necessary and sufficient conditions.

V. Conclusion

In their pursuit of profit, what should corporations refrain from doing? There are legal prohibitions, of course, but there are other pressures as well, including in the form of outrage. Some such pressures lead to the desired changes, and some do not, but even when they do not, they may very well influence what

65. *See, e.g.*, DELOITTE, 2014 GLOBAL SURVEY ON REPUTATIONAL RISK: REPUTATION@RISK 17 (2014), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Governance-Risk-Compliance/gx_grc_Reputation@Risk%20survey%20report_FINAL.pdf (discussing steps to be taken by companies to protect their reputations); *Sustainability Reporting*, AT&T, http://about.att.com/content/csr/home/sustainability-reporting.html (last visited May 1, 2017) (outlining sustainability goals taken by AT&T) (on file with the Washington and Lee Law Review).

corporations do and do not do, and how they present themselves. Indeed, survey evidence suggests that corporations view reputational risk as one of the most significant risks they face.[66] While reputational risk may arise from bad outcomes of business models and conduct that would generally be considered non-objectionable, it can also arise from reactions to business models themselves. The use of child labor provides a ready example.

To make my argument, I distinguish between three categories of business models: a) those that are repugnant and warrant pure outrage; b) those that cause complex, somewhat negative, reactions—conflicted outrage—for reasons relating to societal value conflicts on various subjects, including paternalism versus autonomy or the respective rights and obligations of people with greater, and fewer, resources; and c) finally, those that in my view elicit unwarranted outrage, where the outrage is often a case of "shooting the messenger," trying to will away an inconvenient fact about the world.

These three categories do not, of course, capture the universe of business models. Initially, I started by trying to define and make salient the concept of repugnant business models, and flesh out a definition that could be a basis for action, perhaps in the form of shareholder proposals requesting corporate boards to take steps to discourage such models, or disclosure requirements under which companies would describe the steps they are taking to avoid using such models. So far, so ambitious, but perhaps tractable, at least as a starting point. Consider in this regard the enormous negative reaction to the dramatic price rises in Daraprim and EpiPen, both of which are life-saving. The price rises were legal under present law, but were so unpopular that the companies to some extent retrenched, or competitors emerged. But the fix was not immediate: some damage was done. And what of behavior that is less extreme and hence less well publicized?

Having considered "pure" outrage, I began thinking about outrage that seemed to me less pure—where what was at issue was controversial, and sometimes defended, even vigorously so.

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66. *See id.* at 4 (presenting survey evidence of corporations' concern for reputational risk).

Without, again, attempting to capture the universe of business models, I delineated two other categories, one of which involved activities and values about which people have principled but differing views, and the other of which involved clashes, but, dare I say it, less principled ones. Clearly, this judgment is extremely contestable, as are, more broadly, my three categories, and the criteria for inclusion therein. Indeed, some of what I am arguing for rests first on principles people have that they will not readily abandon (and this is not to say that they should.).

This project seeks to persuade readers of three things. First, that developing a principled basis for characterizing what constitutes bad corporate behavior is a good idea. Second, that considering and debating the assumptions that would support or argue against my categories or criteria, or both, is also a good idea. Most importantly, I hope that this approach, and these categories, can be used to influence corporate behavior. If I succeed in making Repugnant Business Models salient, I can envision, among other sources of pressure and influence, shareholder proposals that ask companies to consider what they are doing to ensure that they do not have such models, or judges or regulators taking the characterization and the laxity of a company's efforts in preventing such models into account in determining how they treat the company. Lawmakers, too, might be prodded to act. On the flip side, perhaps companies with business models that do not warrant outrage can put up a better defense when the models are attacked. I think a much better job can be done articulating a principled rationale for when outrage at corporate behavior is, and is not, warranted, saving outrage's force for when it is most appropriate. I hope that I have made some contribution to the effort.