2011

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Recommended Citation

Faith Stevelman, Global Finance, Multinationals and Human Rights: With Commentary on Backer's Critique of the 2008 Report by John Ruggie, 9 *SANTA CLARA J. INT'L L.* 101 (2011).
https://digitalcommons.law.seattleu.edu/faculty/267

Global Finance, Multinationals and Human Rights:

With Commentary on Backer's Critique of the 2008 Report by John Ruggie

Faith Stevelman*

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* Professor of Law, New York Law School; Director, Center on Business Law & Policy. This article is dedicated to my mother Barbara Reider Stevelman, who even in her seventies is the most intellectually curious person I know, and to my father, who in his forty-five years as a physician cared for every patient with equal dignity. Enthusiastic "thank you's" are owed to Dana Brodsy and Nicholas Turner, New York Law School, Class of 2012, for their superb editing; and to Law Professors Peter Rosenblum and Sheldon Leader, for their pathbreaking work in this emerging field.

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I. Introduction

I comment on the project of promoting heightened corporate attentiveness to human rights compliance as an expert in corporate and securities law and novice in the field of international human rights law.[1] The disparity sheds light on the difficulty of the project embraced in the United Nations Human Rights Council's reports on business and human rights.[2] To succeed, it must unite professionals from many different fields, including business leaders, heads of nongovernmental organizations, politicians, human rights activists, lawyers and academics. This multiplicity is reflected even within the academic community itself, where the work of scholars of international law, human rights law, labor law, environmental law, immigration law and corporate and securities law is all relevant. These professional "factions" come to the enterprise with remarkably different priorities, methodologies and ways of viewing the world.

Harvard Professor John Ruggie, as the U.N. Special Representative to the Secretary-General ("SRSG") on Business and Human Rights—reporting to the Human Rights Council—would have had a daunting task before him were it only to achieve consensus on businesses' responsibility to eschew human rights abuses. That his project has gone further—has endeavored to create and operationalize a basic framework for *promoting* businesses' attentiveness to human rights compliance and remediation—illuminates the project's daring. Were the real-world stakes not so high, Ruggie's and the Human Rights Council's efforts would seem foolhardy.

I cannot speak of the schism that exists between senior business leaders and human rights activists first hand.[3] But it is easy to imagine the flash points in such conversations. The SRSG consultation I attended in the fall of 2008 gave me a feeling for some of the varied viewpoints and actors who have contributed to the annual reports beginning in 2005.[4] But my own professional space is the academy. And within the academy, business law and human rights scholars rarely cross paths.[5] These are distinct scholarly communities sepa-

1. For my previous writing in the field, see Faith Stevelman, *Globalization and Corporate Social Responsibility*, 53 N.Y.L. SCH. L. REV. 817 (2009).
2. For citations to any of the "famous" projects/working papers in the area, see Larry Catá Backer, *On the Evolutions of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context*, 9 SANTA CLARA J. INT'L L. 37 (2010).
3. Remarkably, the Ruggie information-gathering process has revealed widespread concern for human rights compliance among business leaders. For data and citations, see U.N. Special Representative of the Secretary-General, *Protect, Respect and Remedy: A Framework for Business and Human Rights: Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, delivered to the Human Rights Council*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter *SRSG 2008 Report*].
4. I attended the consultation in Boston in fall 2008 (sponsored by the Kennedy School of Government and Oxfam) that addressed remedies and their appropriate fora. *See* Caroline Rees, SRSG Consultation at Kennedy School of Government, Access to Remedies for Corporate Human Rights Impacts: Improving Non-Judicial Mechanisms (Nov. 2008), *available at* http://www.hks/harvard.edu/m-rcbg/CSRI/publications/report_32_consultation_report_november_08.pdf [hereinafter SRSG Consultation].
5. Scholars in international and human rights law have moved into the economic realm; business law scholars have been slower to move in the other direction. For an example of the former, see, e.g., Robert Howse & Ruti Teitel, *Beyond the Divide: The Covenant on Economic, Society and Cultural Rights and the World Trade Organization*, 30 OCCASIONAL PAPER (FES GENEVA) 1 (Apr. 2007).

rated, with rare exception, by considerable mistrust and intellectual schisms.

In these past three decades, human rights internationalists have been deeply invested in creating a viable legal tissue of global ordering, especially to reduce states' infliction of harm. For human rights scholars, the opposite of law isn't "efficiency." It is discord, opportunism and force. As we know, Hobbes' "nasty, brutish and short" is a reality immediately around the corner in many, many parts of the world, and corporations have not consistently been attentive to human rights and law-abidingness.[6] The incentives for corporate opportunism have been great; the sanctions—as applicable to global multinationals—less impressive.

For corporate and securities law scholars, the counter-factual of law has been "efficiency"—even "liberty"—from a neo-liberal vantage point.[7] Put most simply, for the past three decades, business law scholars have been preoccupied with streamlining law to reduce the net costs they've imputed to it—costs they portray as friction on market transacting.[8] Their professional lives have been defined by the luxury, or fallacy, of taking basic law and order for granted.[9] For example, though remarkable, it appears to be true that Alan Greenspan

6. For an academic treatment of how the project of market development may often, unwittingly, spark greater ethnic or national division, see AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY (2003); and, for a more journalistic account, see NAOMI KLEIN, THE SCHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM (2007).

7. Neo-liberalism is a controversial and loaded term but most simply it implies a reduction in state control to free up (even) market actors to seek their own individual good, in economic terms, as a form of freedom. For a critical reading of the neo-liberal tradition and a contemplation of its plausible impact on the global financial crisis, see, e.g., José Gabriel Palma, *The Revenge of the Market on the Rentiers: Why Neo-Liberal Reports of the End of History Turned Out to Be Premature*, 33 CAMBRIDGE J. ECON. 4, 829-69 (July 2009), *available at* http://ssrn.com/abstract=1433955 or doi:10.1093/cje/bep037.

8. For an account of the deregulation of the financial services sector in this period, see SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN (2010). For one of the seminal treatments of law and economics thinking in the corporate law area, see FRANK EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991).

9. It is not a simple matter to ascertain the extent of the law abidingness or persistent law breaking by major corporations and financial firms. Rigorous statistical studies have been hampered by inadequate data. Nevertheless, the combination of the accounting scandals that began the decade, the mortgage lending fiascos and financial firms' seeming reckless disregard for common sense after they accomplished massive deregulation present a discouraging picture. And more bad news appears on the horizon in this sector. *See e.g.*, Jean Eaglesham, *US Sets 50 Bank Probes*, WALL STREET JOURNAL, Nov. 17, 2010, at A1 ("The Federal Deposit Insurance Corp. is conducting about 50 criminal investigations of former executives, directors and employees of U.S. banks that have failed since the start of the financial crisis."). Furthermore, on Friday evening, November 19, the Wall Street Journal's website revealed, for the first time, the existence of a massive insider trading case amassed by the government.

> Federal authorities, capping a three-year investigation, are preparing insider-trading charges that could ensnare consultants, investment bankers, hedge-fund and mutual-fund traders, and analysts across the nation, according to people familiar with the matter.
>
> The criminal and civil probes, which authorities say could eclipse the impact on the financial industry of any previous such investigation, are examining whether multiple insider-trading rings reaped illegal profits totaling tens of millions of dollars, the people say.

Susan Pulliam, Michael Rothfeld, Jenny Strasburg & Gregory Zuckerman, *U.S. in Vast Insider Trading Probe*, WALL STREET JOURNAL, Nov. 20, 2010, http://online.wsj.com/article/SB10001424052748704170404575624831742191288.html. All of this raises the question of whether massive financial frauds constitute any form of "human rights abuse." On the view that human beings have a right to live in a community wherein the rich (firms and individuals) are constrained from preying on the rest, at least this author would answer the ques-

questioned aloud the need for legal prohibitions on fraud.[10]

Hence principles-based and methodological silos have delimited the professional discourses of business versus human rights law, keeping them distinct from each other and more immune to critique. Consequently, the view one takes of Professor Ruggie's "Protect, Respect, Remedy" (PRR) framework, as detailed in the 2008 Report to the Human Rights Council is likely to be contingent on one's starting point—the profits-markets-efficiency camp or the rights-governance-vulnerability one.

The basic working premise outlined in the 2008 Report is simple, at least on its face. States have a duty to protect their citizens from human rights abuses. Businesses have a duty to respect human rights. Both governments and corporations have duties to work in tandem to establish or strengthen and expand remedial frameworks for hearing human rights grievances against corporations. The PRR framework is innovative and ambitious. Only if we naïvely imagined a politically stable, culturally simpatico "flat-world" of market transacting might we dismiss the brave beliefs inherent in what Ruggie and his cohort have produced. Although impossible to predict the scope of their practical success, the PRR framework is undoubtedly clear, savvy and thoughtful—indeed more thoughtful than its simple surface suggests (as explained below).

When it comes to the outcome of human rights efforts, of course, little can be predicted. Nothing within punditry or scholarship enables us to predict the evanescent windows of opportunity for social and legal change. And yet we know that progressive social and legal change does occur. For example, it is easy to forget that the word "genocide" was coined only in 1943 by Raphael Lemkin, a Polish lawyer and linguist of Jewish descent. (Lemkin himself narrowly escaped the Holocaust in Europe and lost forty-nine relatives therein—his own life illuminates the contingency of social and legal change.)[11] Just such bold advance of principles and practices (and ultimately laws) is precisely what the PRR framework contemplates for the business and human rights area. And the timing of the Ruggie reports, as they span both the heyday and disasters of twenty-first century market neoliberalism, is tantalizing.

For a dozen years after the fall of the Berlin Wall, in what was described as a one "superpower," "end of history" world, such a self-sustaining, globally prosperous market was imagined.[12] But twenty years later, amidst the harshest global economic downturn since the

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tion in the affirmative.

10. In a fascinating story first printed in Stanford Magazine, former head of the Commodity Futures Trading Commission Brooksley E. Born recounts her 1996 lunch with Alan Greenspan during which he told her, " 'Well, you probably will always believe there should be laws against fraud, and I don't think there is any need for a law against fraud,' she recalls. Greenspan, Born says, believed the market would take care of itself." *See* Rick Schmitt, *Prophet and Loss*, STANFORD MAG., 2009, http://www.stanfordalumni.org/news/magazine/2009/marapr/features/born.html.
11. For discussion of Lemkin's work and his legacy in the development of international laws against atrocities, see, e.g., David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85 (2004).
12. Henry Hansmann & Reinier H. Kraakman, *The End of History for Corporate Law* (Yale Law Sch., Working Paper No. 235; New York Univ., Working Paper No. 013; Harvard Law Sch., Discussion Paper No. 280; Yale Sch. of Mgmt., Working Paper No. ICF - 00-09), *available at* SSRN: http://ssrn.com/abstract=204528; *see also* LEA BRILMAYER, AMERICAN HEGEMONY: POLITICAL MORALITY IN A ONE SUPERPOWER WORLD (1996).

Great Depression, it no longer can be.[13] Russia's slide into plutocracy provides one cautionary tale of what goes wrong with too little law and justice.[14] The festering problems catalyzed by the Washington consensus, as they have played out in the southern cone of Latin America for example, provide another.[15] China presents a unique conundrum in its admixture of law, authoritarianism and capitalism. And the rise of radical Islam—with its antagonism towards liberal, democratic, capitalist practices—has altered the legal and geopolitical landscape in almost every respect.[16] Here in the United States, Americans are profoundly disappointed by corporate capitalism and by the government; neither seems to have fulfilled its promises. As these examples and the writings of Robert Gilpin illuminate, the understanding of global economic phenomena cannot be divorced from the study of international politics, including the results of regional and religious conflicts and human rights claims.[17] In just this far-sighted vein, both the PRR framework and Backer's critique situate firms and markets in broader geo-political structures: legal and political, as well as moral and cultural. Neither firms nor markets can flourish apart from them. (This is what makes China's experiment in authoritarian capitalism so fascinating to watch, of course.)

Nevertheless, the accelerated pace of international trade and financial deal-making, as the Ruggie reports affirm, has created gaps in governance that demand new approaches and responses. In the short term, corporations will be able to paper over conflicts and disconnects between their profit-maximizing objectives and human rights tenets. But the enormity of the looming problems and challenges (the exigencies of looming climate change, global pandemics, threats of terrorism, as well as widely vocalized, surprisingly commonly held aspirations for justice) suggests that a global public is organizing to demand something better than a superficial, short term fix when it comes to business and human rights. Corporations that ignore this demand are likely to be threatened at the bottom line. And most likely sooner rather than later.[18] The failed states and failed markets enumerated above are exemplars of this truth: At least over a reasonable time horizon, law—including human rights law—is a natural complement to the market and not its enemy.

As the 2008 Report states, corporations will not thrive, over the longer term, where governments ignore or facilitate legal vacuums. Without reasonable regulations and credible legal enforcement (through the private or public sector), businesses have little opportunity to avoid the "race to the bottom." They have no room to pursue *both* profit and "add-

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13. For the argument that the current mess is appropriately denominated a depression rather than a recession, see RICHARD A. POSNER, THE CRISIS OF CAPITALIST DEMOCRACY 210-45 (2010).
14. For a superb treatment of the reasons (securities) law matters and how, see Robert B. Ahdieh, *Making Markets: Network Effects & the Role of Law in the Creation of Strong Securities Markets*, 76 S. CAL. L. REV. 277 (2003).
15. There is a vast literature on the shortfalls of globalization. *See, e.g.*, JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002); *see also* SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS (1998).
16. For a treatment of this issue, see Faith Stevelman Kahn, *Bombing Markets, Subverting the Rule of Law: Enron Financial Fraud and September 11, 2001*, 76 TUL. L. REV. 1579 (2002).
17. ROBERT GILPIN, GLOBAL POLITICAL ECONOMY (2001)
18. MAX WEBER ET AL., ECONOMY AND SOCIETY (Geunther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1900) (presenting the finest treatment of the place of market (economic) institutions within the broader scheme of social institutions).

ed capacity," such as safety in the workplace and honest consumer and investor relations. In the absence of greater human rights coherence and global governance, international trade and finance are expanding, but the emerging picture isn't as attractive as the World Bank, World Trade Organization (WTO) and the academic vanguard of laissez faire had proposed. Instead we observe a rough and tumble of realpolitik, national and regional exigency, high stakes-high risk, and highly opaque financial transacting—all transpiring against a backdrop of increasingly complex and uncertain macroeconomic and geopolitical effects.[19] If the global economic crisis illustrates anything, it's that the project of constructing international superstructures of governance—governance spanning the realms of politics and economics/finance—cannot be delayed without inflicting incalculable social welfare loss across the planet. The global economic crisis has written a new chapter in the tale of globalization.

Indeed, there is consensus that the contemporary dynamics of globalization are unique—qualitatively different than earlier ones.[20] Humans have been "globalizers" since before they were "human." To be sure; recent studies in paleo-anthropology suggest that *Homo Erectus* meandered out of Africa behind the animals who foraged the grasses, advancing through Asia and Europe. The Chinese, of course, were fantastic early traders, as their thousands of years of cultural achievements display. And in the early modern West, that is European Renaissance, progress in the sciences, arts, law and letters was spurred by advances in banking, finance and trade (over land and sea).[21]

Of course, it's modern technology that has occasioned the seismic effects of the current wave of globalization. With global satellites, personal computing and inexpensive, nearly universal cell phone access, information and communications technology has revolutionized how business is conducted, enabling nearly instantaneous gathering, synthesis and responses to operations and financial data—across the entire Earth's geography and time zones.[22] While cheap air travel has facilitated the ability of multinationals to move people and cargo across the world, gaps in governance have allowed them to accomplish this without internalizing the full environmental cost of their conduct.

A further crucial piece of this technological revolution is commonly overlooked: The invention of the global corporation itself. The highly leveraged, widely (and largely anonymously) owned, professionally managed, structurally byzantine, limited liability corporation is the result of ongoing twentieth century legal transformation. And its "invention" is more historically contingent than we commonly acknowledge. The invention of this kind of corporation is a story of legal invention (affirmative rule-making) and legal destruction (i.e., systematic deregulation). Legal invention is recognizable, for example, in the global recognition of the corporation as a robustly capable, distinct legal person, an individual

19. For example, we see increasingly dramatic signs of climate change across the globe, as exemplified by a rise in large-scale natural disasters and widespread fatalities; and yet we are at a moment of hope in relation to Palistinian-Israeli peace talks.
20. ROBERT GILPIN, THE CHALLENGE OF GLOBAL CAPITALISM: THE WORLD ECONOMY IN THE 21ST CENTURY (2000).
21. RICHARD A. GOLDTHWAITE, BANKS, PALACES & ENTREPRENEURS IN RENAISSANCE FLORENCE (1995).
22. For discussion see, e.g., *id.*; see also Eric E. Schmidt, *Truth or Consequences*, FORBES MAG. (Aug. 12, 2010), http://www.forbes.com/forbes/2010/0830/opinions-technology-eric-schmidt-google-on-my-mind.html.

possessing distinct rights, if lesser duties. The legal "person" is recognized as possessing immortality in time and unbounded power in the geographic scope of its operations *as a result of accepted law*. And its rights under the United States constitution are expanding.[23]

An early example of deregulation is the elimination of the many stakeholder-regarding proscriptions which inhered in the early twentieth century incorporation codes. Such deregulation of corporate power encouraged corporate capital investment, hence industrialization, and then the transition to an awesomely complex post-industrial, service economy.[24] The surface simplicity of corporate law (especially the codes, which govern the process of creating a corporation), in conjunction with the durability of the corporate form, encouraged the establishment of corporations, ones "preloaded" with all powers requisite to conducting any lawful business. Indeed, it's easy to miss that most financial institutions (including almost all the "shadow banking industry") and many previously "governmental functions" (including the operation of war-related services, for example) have migrated to the corporate form on account of the durability, anonymity and global capital-raising advantages it confers. If one contrasts the easy formation, surface simplicity and muscularity of the corporate form with, for example, the fragility of wills and trusts, the indeterminacy (legally speaking) of "the family," and the cumbersome caveats attendant to the conveyance of real property, the success of the modern "corporate legal technology" comes into view.

My task is to comment on the excellent article of Larry Catá Backer, as it provides an analysis of the 2008 Report's "Protect, Respect, Remedy" (PRR) framework.[25] Ruggie's most recent efforts, reflected in the 2010 Report, are directed at operationalizing the PRR framework set forth in the 2008 Report. Both these reports have been vetted internationally amongst governments, lawyers, academics and human rights advocates.[26] How will governments, corporations, trade associations and rights advocates conceptualize and construct the fora and modes of recourse available to persons aggrieving human rights abuses?[27] That question is the central focus of the 2010 Report and, as such, lies beyond

23. Citizens United v. FEC, --- U.S. ---, 130 S. Ct. 876 (2010).
24. For discussion of the transition from the pattern of legislative chartering and proscriptive regulation of the corporate form to the far more "deregulatory" pattern of incorporating via simple filings under statutes which freely grant corporate powers and impose very few restrictions, see Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 66–74 (2009) (discussing Delaware's interest in holding onto the firms chartered there). *See also* Frederick Tung, *Before Competition: Choice of Forum and Delaware's Stake in Corporate Law*, 32 J. CORP. L. 33 (2006) (discussing the internal affairs doctrine, its origins and its effect upon state competition for incorporation).
25. Backer, *supra* note 2.
26. Ruggie so describes the vetting of the *SRSG 2008 Report*, *supra* note 3, therein; Fried Frank L.L.P. has produced a memo/survey that describes further vetting. Memorandum from Fried, Frank, Harris, Shriver & Jacobson L.L.P., to the UN Special Representative on Business and Human Rights (Dec. 2007), http://www.business-humanrights.org/Documents/Fried-Frank-Memo-Dec-2007.pdf. For the most recent report by SRSG John Ruggie, see *Business and Human Rights: Further Steps toward the Operationalization of the "Protect, Respect, Remedy" Framework* (Apr. 9, 2010), http:/198.170.85.29/Ruggie-report-2010.pdf.
27. This was the precise subject of the fall 2008 consultation with the SRSG which I attended, as sponsored by the Kennedy School of Government in conjunction with Oxfam American at the Boston offices of Foley & Hoag, L.L.P. *See* SRSG Consultation, *supra* note 4.

my current charge here.

My comments are not intended to be comprehensive. I first provide a brief restatement of the 2008 Report, and then in Part III comment upon Backer's discussion and analysis of it. In Part IV I engage some additional questions and themes presented by the 2008 PRR framework. In Part V, I turn overtly to describing and analyzing the relationship between business and human rights questions and recent developments in American corporate law. Part VI addresses how the agenda of business and human rights relates to certain recent developments in federal securities law. In the conclusion I contemplate the curious relationship between legal change and social change. Professor Backer is certainly correct that the PRR framework will be influential in the evolving relationship of business and human rights. The rest remains to be resolved through a complicated conversation, between business leaders, human rights advocates and lawyers and politicians, for years to come.

II. Overview: The PRR Framework of the 2008 Report

There were reports prior to 2008,[28] and there have been ones since, so why do commentators focus on Ruggie's 2008 Report? The answer is that the 2008 Report lays out the core principles of the Human Rights Council's initiative in promoting adherence to human rights by international businesses. The 2008 Report refers to itself as a "conceptual and policy" framework for business and human rights, and its central message is captured in the phrase: "Protect, Respect, Remedy." States must "protect" against human rights abuses. Corporations must respect human rights in all their operations, those of their affiliates and suppliers. Both must work towards remediation, and compensation, where appropriate.

The Ruggie reports follow the spectacular descent into oblivion of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ("Norms").[29] The Norms were released in 2003—and by 2004 they had been roundly rejected by international commentators. Professor Ruggie, a highly accomplished political scientist, was himself one of the most outspoken detractors from the Norms.[30] The Norms' failed approach was to enunciate a core set of international human rights standards that businesses would be immediately responsible for protecting. For the Norms' critics, these rights were catastrophically under-inclusive. Moreover, they contended, the allocation of primary and secondary responsibility for human rights compliance, as between states and businesses in various contexts, was incoherent and would

28. *See Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises Reports*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/SRSGTransCorpIndex.aspx (last visited June 15, 2011).

29 U.N. Econ. & Soc. Council [ECOSOC], Subcomm'n on the Promotion and Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (August 26, 2003).

30. For a listing of John Ruggie's credentials, scholarship and professional accomplishments, see *John Ruggie—Biography*, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, http://www.hks.harvard.edu/m-rcbg/johnruggie/bio.html.

produce unproductive, harmful confusion and dissension. Following the Norms' failure to garner adherents, in 2005 Professor Ruggie was appointed the "Special Representative on business and human rights," reporting to the Secretary-General and the Council. His five-year term was extended for an additional five years in 2010.[31]

The 2008 Report begins with an extensive discussion of *states'* duty to protect citizens from human rights violations, whether committed by individuals or corporations. Most germanely, the Report describes states' responsibility for using law to promote human rights respecting corporate cultures. The Report notes states' shortfalls in "vertical coherence"—that governments have paid lip service to corporations' human rights obligations while failing to establish effective mechanisms for the redress of human rights grievances against corporations. The Report also notes shortfalls in the "horizontal coherence" of states' policies towards business and human rights; that is, that states have ignored or facilitated gaps between governmental bodies tasked with human rights responsibilities and others empowered to advance commercial and investment goals.

Another highly important discussion encompassed within the 2008 Report relates to business investment treaties (BITs). Too often, host states have been so needful of financing and assistance in project development that they have agreed to halt social welfare regulation during the pendency of such a project of financing (or to pay damages if they do enact such regulations). These BITs have thus too often stymied host governments from enacting new regulations essential to social welfare. Indeed, in a given country, such a privately enforced "hiatus" in social welfare regulation may persist for decades. As a field of study and policy inquiry, BITs and their net effects on host country citizens' social welfare has largely fallen into the chasm of the business and human rights divide described above. Nor are BITs, even, a central focus of the Ruggie reports. As is true of the 2008 Report, these are largely aimed at multinational operating companies and the human rights externalities which foreseeably arise from their conduct in conditions of weak rule of law.[32]

The central, organizing question of the 2008 Report is: "How to improve human rights compliance by individual businesses?" According to the 2008 Report, the first crucial missing factor is the absence of a coherent "conceptual and policy" framework. This is where the PRR framework is aimed—at filling just this void. As resolved therein, corporations have a duty to *respect* human rights—in essence, a duty to "do no harm" to citizens' human rights. At face value, the duty is a passive one, but this is misleading. To accomplish this negative injunction, definitive, affirmative actions by corporate executives (and their lawyers) are required.

Just so, the 2008 Report describes myriad intra-corporate initiatives that will contribute to corporations' avoiding complicity in human rights abuses. For example, it uses the notion of "corporate culture" to invoke corporate executives' responsibilities to inspire the

31. For a superb overview of the United Nations Human Rights treaties dating back decades and leading up to the Ruggie reports, see *Global Efforts to Hold Corporations Accountable: Past Efforts and Current Initiatives*, 12 INT'L REV. NEWSL. 16 (Ctr. for Int'l L. at N.Y.L. Sch., New York, N.Y.), Fall 2009.

32. For a sober (i.e., relatively nonpartisan) account of the investment treaty process and structure, see Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179 (2010).

observance of human rights. As stated therein, senior corporate executives should be vigilant in overseeing the establishment of systematic compliance codes, the dissemination of such codes, other corporate education protocols, internal reporting systems attuned to human rights compliance, and the creation of effective, accessible modes of processing rights complaints. As another example of this proactive approach, the 2008 Report advises that corporations should undertake human rights impact studies *before* they formalize investment contracts and commence development projects. The 2008 Report also encompasses an expanded discussion of human rights "due diligence" and its role in avoiding corporations' complicity with abuses. The 2008 Report suggests that by taking such steps, executives can enable their corporations to "respect" human rights and reduce their firms' chances of being complicit in human rights abuses.

Another achievement of the 2008 Report is its cataloguing of earlier and ongoing business and human rights studies, guidelines, codes and other initiatives. As becomes evident from the 2008 Report, the United Nations' effort in generating these reports, and its commitment to the business and human rights agenda, is larger than the sum of any individual report. As described therein, the 2008 Report is the culmination of fourteen multi-stakeholder consultations on five continents; the undertaking of more than two dozen research projects assisted by global law firms and other legal experts; the amassing of 1000 pages of documents and twenty "submissions," including previous reports both to the Commission on Human Rights and the Human Rights Council.[33]

The astounding accumulation of studies, initiatives, guides to best practice and business and human rights compliance codes bubbling up from the international business and activist communities is a revelation. These include the Equator Principles,[34] the Paris Principles,[35] a multitude of multi-stakeholder initiatives such as the Kimberly Process,[36] the OECD Guidelines for Multinational Enterprises,[37] the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,[38] the Global Compact,[39] and the ongoing efforts of the International Labor Organization.[40] Situating the 2008 Report in this context, it's plain that there is a mounting crescendo of demand and desire to avoid human rights abuses by corporations.

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33. "All documentation produced by and for the mandate is posted on the Business and Human Rights Resource Centre's website." *SRSG 2008 Report, supra* note 3, ¶ 3 n.1; *UN Special Representative on Business & Human Rights*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTER, http://www.business-humanrights.org/Home (last visited Feb. 8, 2011).
34. THE EQUATOR PRINCIPLES, http://www.equator-principles.com (last visited Feb. 4, 2011).
35. *The Paris Principles*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www2.ohchr.org/english/law/parisprinciples.htm (last visited Feb. 4, 2011).
36. THE KIMBERLEY PROCESS, http://www.kimberleyprocess.com/home/index_en.html (last visited Feb. 4, 2011)
37. The Organization for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises* (2008), http://www.oecd.org/dataoecd/56/36/1922428.pdf.
38. International Labor Office, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (Third Edition)* (2001), http://www.ilo.int/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf.
39. UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/ (last visited Feb. 4, 2011).
40. *Programmes and Projects*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/global/programmes-and-projects/lang--en/index.htm (last visited Feb 4, 2011).

On the issue of remedies, the 2008 Report surveys the strengths and weaknesses of the spectrum of fora and approaches to remediation. These include governmental (state) tribunals, international tribunals, and nonstate/arbitration councils established by consortia of businesses (organized variously by region and industry). The Report's critique of the limits of redress for corporations' *host*-state human rights violations, as available in *home* state courts, is powerful. Travel and litigation costs, jurisdictional and other procedural hurdles, evidentiary problems, and even defenses based on "state interests" (for example, as employed in the recent "state secrets" defense used to the advantage of a Boeing subsidiary in federal court)[41] will commonly mean that host states' citizens will not be able to achieve redress in home states' courts. Too often, according to the 2008 Report, multinationals garner an advantage from ignoring human rights issues in host states that lack the legal capacity to provide meaningful redress for human rights abuses.

On the subject of remediation, an exciting proposal put forth in the Report is the establishment of an international "ombudsman"—an office or agency that would advise aggrieved persons about the most accessible, practicable and otherwise appropriate modes for pursuing their allegations of human rights abuse against multinational corporations.

Although it surely represents a conceptual and policy innovation, the 2008 Report presents itself, appropriately, as only one critical step in what will undoubtedly be an ongoing project of improving corporations' human rights compliance. And the 2008 Report, as the result of earlier reports in 2006 and 2007,[42] presents evidence of progress that would not "have been conceivable a decade ago," as expressly stated therein.[43] And yet such progress is not tightly linked to formal, legal change, and hence may be fragile. The progress defined in the 2008 Report, and the guidelines, plans and codes enumerated therein, are still informal, inchoate, contingent responses to serious international shortfalls in human rights compliance. State sponsored violence, civil rights abuses, government corruption triggering famines, worsened public health emergencies and illiteracy; multinationals operating in states where such problems are rife are constantly poised on the cusp of complicity in human rights abuses. And so long as human rights oversight is informal, they will have relatively less incentive to stay on the right side of that line.

The most palpable hope is that energy, creativity and purposefulness inherent in the 2008 Report, and the other initiatives it catalogues, will alter social expectations fundamentally. To be sure, altered social expectations can lead to formal legal change and greater private sector (voluntary) adherence to human rights observance. There's nothing to

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41. See Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943 (9th Cir. 2010).
42. U.N. Special Representative of the Secretary-General, *Interim Rep. of the Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶¶ 14–16, *delivered to the Economic and Social Council*, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006), *available at* http://www1.umn.edu/humanrts/business/RuggieReport2006.html; U.N. Special Representative of the Secretary-General, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Act: Rep. of the Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 1, *delivered to the Human Rights Council*, U.N. Doc. A/HRC/4/35 (Feb. 9, 2007), *available at* http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf.
43. *SRSG 2008 Report*, *supra* note 3, ¶ 105.

say that we are not approaching a tipping point in this respect.

III. Comments on Backer's Critique of the 2008 Ruggie Report

A. The Importance of History

The Introduction and first substantive section of Backer's article provide an intellectual and practical history to the 2008 Report.[44] We get an account of the many private sector, voluntary business initiatives aimed at fostering human rights compliance, including global reporting initiatives and the Guidelines for Multinational Corporations promulgated by the Organization for Economic Co-operation and Development (OECD).[45] We also learn about the prior efforts by UN agencies, including the UN Global Compact and the abandoned UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (again, the "Norms").[46] Finally, Backer offers a description of the conceptual and policy evolution of Ruggie's annual reports beginning in 2006.[47]

Why so much history? Perhaps to human rights scholars the answer is obvious. But, notably, it would not be to corporate law scholars. In the tradition of law and economics, corporate law teaching and scholarship has eschewed historical inquiry.[48] Instead, attention has been devoted to more contemporary and quantitative analysis. For example, corporate legal scholars have developed a passion for event studies seeking to correlate stock price movements with governance changes at the level of individual firms. A similarly quantitative, ahistorical approach has been directed at studying the financial results of hedge funds and private equity funds, and their governance. And at the theoretic level, for example, game theory has been employed to study whether any corporate laws should be mandatory. Even securities regulation has been analyzed, in most recent scholarship, in terms which are largely quantitative, theoretical and ahistorical.[49]

Human rights law appears different in this regard. Perhaps this is because its history is so recent. Also significant to the inclusion of history, I suspect, is the field's contingency, its overtly constructed, optative nature. Human rights law is an ongoing, deliberative, interpretive project; as such, its core tenets are intelligible only when viewed in institutional

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44. *See* Backer, *supra* note 2.
45. *Id.* at 41-50.
46. *Id.* at 45-50.
47. *Id.* at 50-68.
48. Under the auspices of the newly formed Adolphe A. Berle Jr. Center on Corporate Governance, its founder, Professor O'Kelley, is providing a greater scholarly platform for historical inquiry in the area of corporate law history and twentieth century corporate political economy. *See, e.g.*, Charles O'Kelley, *Berle and the Entrepreneur*, 33 SEATTLE U. L. REV. 1141 (2010). For other notable exceptions, see, for example, LAWRENCE MITCHELL, THE SPECULATION ECONOMY: HOW FINANCE TRIUMPHED OVER INDUSTRY (2001), and MARK ROE, STRONG MANAGERS, WEAK OWNERS (1996).
49. A wonderful deviation from this ahistorical focus, which helps to make sense of the broader arc of the securities laws, is contained in the library and archives of the SEC Historical Society. SEC HISTORICAL SOCIETY, http://www.sechistorical.org/ (last visited Oct. 25, 2010); *see also* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE (Northeastern Univ. Press 1995) (1982).

and historical context.[50] Backer's article accomplishes this feat of historical survey and contextualization clearly and succinctly, which is a great service to the Report and its readers.

B. The New Governance: Hard and Soft Law

At the most superficial level people consider "law" to be the rules that cannot be disregarded without risk of civil or criminal sanction. Nevertheless, as a concept, "law" is patently broader, more amalgamated and elusive than any such "risk of sanction" approach captures. This appears to be especially true of human rights law. As Tom Tyler's writing illuminates, the term "law" vests widely shared concepts and standards with added social authority, that is, legitimacy. Laws are most commonly adhered to when they are internalized as legitimate—principled, rational and coherent.[51] Rather than the mathematics of risk of detection multiplied by sanctions, adherence to law is most commonly inspired by law's instantiation of widely shared values.[52]

Seen from this perspective, human rights law is handicapped at two levels: the practical and the conceptual. The limits of sovereignty pose a functional, practical problem for human rights law in terms of enforcement and sanction.[53] And value pluralism and cultural difference pose challenges to the commonality of understandings necessary for internalization and voluntary adherence. Furthermore, most germanely for this analysis, the discourse of "business and human rights" is especially thorny because it is aimed (especially) at large, faceless bureaucracies. From the perspective of human rights theory and injunctions, we may be dealing with an anonymous corporate shell, which is inherently problematic, of course; or we may be seeking to identify the real, human corporate executives. If the latter, we are attempting to promulgate standards to address persons of many different tongues, cultures, ethnicities and disparate professional/occupational statures.

These practical and conceptual challenges, in part, explain why the 2008 Report, in attempting to make progress in the business and human rights area, took the "duty to respect" as its organizing principle for businesses. That duty, at least superficially, seems conceptually simpler, less alarming, and more practicable. The principle, indeed, appears almost self-evident; of course corporations would have a duty to "do no harm." Again, the duty to respect framework presents itself as more appealing for being (seemingly) more simple, practicable and thus rewarding for corporations to espouse. As Ruggie and Backer emphasize, the substantive duties implied in "respecting" human rights can evolve gradually, and through both formal law-making and informal "soft law" practices and guidelines. The duty to respect is, quite obviously, a derivative duty; a duty contemplating that another body has assumed responsibility for defining human rights and outlawing their abuse.

50. *See* RUTI TEITEL, HUMANITY'S LAW (2011).
51. *See* TOM TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT 77 (2000).
52. For a fascinating analysis of the theoretical bases for recognition of private law beyond sovereign borders, see Florian Rödl, *Private Law Beyond the Democratic Order? On the Legitimatory Problem of Private Law "Beyond the State,"* 56 AM. J. COMP. L. 743 (2008).
53. The problem is illustrated, for example, by the controversy surrounding the legitimacy and authority surrounding the International Criminal Court—which still lacks the full support of the United States and many other countries.

States' duties to protect their citizens against human rights abuses need a more absolute, harder, legal edge than does a "duty to respect."[54]

In this respect, the Ruggie reports mandate that corporations "respect" human rights is a product and reflection the new governance movement.[55] And Professor Backer's analysis of the Report's synthesis of "harder" human rights laws and principles with "softer" guidelines and norms is illuminating. As Backer recognizes, the "hard plus soft" synthesis encompassed in the PRR framework is intellectually exciting; it is also potentially confounding—confusing especially because the new governance movement is itself a moving target. "New governance"—the admixture of hard law and softer rules and norms to achieve policy objectives—means different things to different professional and academic communities. Industry, government, nonprofit, legal and academic communities (and subgroups); each is likely to have different perspectives on the benefits and drawbacks of soft versus hard law, "self-regulation" versus regulation by government.

At least prior to the financial crisis, corporate and securities law scholars, as well as policy makers, overwhelmingly embraced the tenets of the new governance and the virtues of private (soft) "self-regulation." In these fields, of course, the preference for self-regulation has not been driven by value pluralism, but by faith in the enhanced efficiency (overall cost reduction) associated with private bodies' looser and more local standards setting.[56] Some examples may be illuminating. In corporate and securities law, scholars and policy makers have favored "default" or "optional" rules, especially ones arising from the stock exchanges or other private sector bodies. For example (again, prior to Dodd-Frank), responsibility for market regulation had come to rest mostly within the Financial Industry Regulatory Agency (FINRA).[57] FINRA, a stand-alone, private regulatory body, was formed by the combining the rule-making functions of both the New York Stock Exchange and the National Association of Securities Dealers. The same impulse supported the promulgation of accounting rules by the (private) "Financial Accounting Standards Board," and auditing oversight by the (private) Public Company Accounting Oversight Board.[58] Even Delaware's courts of equity—the most nationally influential courts in corporate law—have favored "intra-corporate solutions" such as ratification by subcommittees of "independent" directors or

54. For Ruggie's own discussion of the challenge, see John Gerard Ruggie, *Business & Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819 (2007).

55. *See* Orly Lobel, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498 (2004); *see also* Michael Wilkinson, *Three Conceptions of Law: Towards a Jurisprudence of Democratic Experimentalism*, 2010 WIS. L. REV. 673 (2010).

56. *See, e.g.*, Saule Omarova, *Rethinking the Future of Self-Regulation in the Financial Industry*, BROOK. J. INT'L L. (forthcoming) (explaining that the project of rethinking self-regulation in the financial industry has, of course, more than begun); Chris Brummer, *How International Financial Law Works (And How It Doesn't)*, Columbia Law School, Law and Economics Workshop (Sept. 20, 2010); *Gillian Hadfield—Curriculum Vitae*, UNIVERSITY OF SOUTHERN CALIFORNIA SCHOOL OF LAW, http://lawweb.usc.edu/contact/contactInfo.cfm?detailID=220 (last visited Nov. 14, 2010).

57. For the argument that the internationalization of capital has effectuated a system of enhanced exchange-based financial regulation and regulatory competition, see Chris Brummer, *Stock Exchanges and the New Market for Securities Laws*, 75 U. CHI. L. REV. 1435 (2008).

58. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 701 (D.C. Cir. 2008). For discussion, see Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975 (2005).

votes of a majority of (disinterested) shareholders as modes of dispute resolution implicitly superior to judicial oversight.[59] These are only a few of the myriad corporate and securities oversight and regulatory functions assigned to "self-regulatory," private bodies.

The guiding motive behind these modes of self-regulation is the belief that soft law/self regulation is less costly, more flexible and thus conducive to maximizing private actors' wealth—again, "efficiency." And there's no doubt that laws promulgated by legislatures (state or federal) or even specialized administrative agencies (as they're encumbered by due process requirements, including notice and comment) are less easily modified and slower to evolve. But commercial self-regulation is most legitimate in situations where there is little danger of persistent inequalities of bargaining power and equal access to information. Where these conditions do not pertain, self-regulation is too likely to operate as a variation on regulatory capture. Privatizing regulation does nothing to limit pervasive conflicts of interest, for example. And without doubt the economic debacle which began in 2007 is forcing the financial services industry and most governments, citizens and even lawyers to rethink the excesses of "soft law"/self-regulation.[60]

The financial and corporate experiment with "soft law" and new governance has been sufficiently problematic as to invite sharp skepticism. But perhaps in the human rights area, the appropriate question may be "compared to what?" Ruggie and Backer, at least, appear relatively sanguine about what "soft law" can add to the mix in the business and human rights area. Each portrays soft law human rights programs aimed at elevating corporations' adherence to human rights as being complementary to states' hard law duties in the area. Of course, neither Ruggie's nor Backer's enthusiasm for soft law solutions is based on the same notion of enhanced efficiency or profit-making described above. The keystone would seem to be, rather, complementarity; in this vision, the soft law mandates pick up on the space left by voids in hard law, and support and amplify the tents of hard law where they do overlap. Backer's terminology for this synthesis of hard and soft law into a web of interconnected, overlapping mandates is "polycentricity," a term which, in his usage, is saturated with heightened promise. States' hard law duty to protect citizens against human rights abuses (including abuses by corporations) are strengthened, supported, amplified by corporations' soft law duty to respect human rights. As for remedies, moreover, in this area there is a marriage, a resolution of this dualism, as envisioned in the PRR framework.

What to make of this enthusiasm, this acceptance of the potentially soft, shifting ground

59. The most aggressive of such proposals involves eliminating judicial review of controlling shareholders' freezeout transactions where there's been majority of the minority shareholder consent and special committee consent. *See, e.g., In re* Cox Communs., Inc. S'holders Litig., 879 A.2d 604, 605 (Del. Ch. 2005). For commentary, see Kenneth B. Davis, Jr., *Structural Bias, Special Litigation Committees, and the Vagaries of Director Independence*, 90 IOWA L. REV. 1305 (2005).

60. The ranks of the working-age poor climbed to the highest level since the 1960's as the recession threw millions of people out of work last year, leaving one in seven Americans in poverty. Erik Eckholm, *Recession Raises Poverty to a 15-Year High*, N.Y. TIMES, Sep. 17, 2010, at A1, *available at* http://www.nytimes.com/2010/09/17/us/17poverty.html?_r=1. The overall poverty rate climbed to 14.3 percent, 43.6 million people, the Census Bureau said Thursday in its annual report on the economic well being of U.S. households. *See* U.S. CENSUS BUREAU, P60-238, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009, *available at* http://www.census.gov/prod/2010pubs/p60-238.pdf.

of soft law—the potential faddishness of "new governance?" The UN Norms on Business and Human Rights might have obtained relatively greater, mandatory force by leveraging treaties into a "nexus of contracts" promoting business and human rights compliance. So, was the abandonment of the Norms' approach in favor of Ruggie's a positive move? I believe it was, but not for the reasons elucidated by Ruggie and Backer. The 2008 Report states that the Norms' assignment of principal and secondary responsibilities among the state and corporations, and the delimiting of human rights responsibilities between them, presented irresolvable ambiguities. Backer's enthusiasm for what he describes as "polycentricity" is less obvious, but seems to rest on the conviction that combining some "hard" human rights law with a lot of soft law guidelines addressed to multinationals will up the ante of compliance and the cost of noncompliance.

I believe that the approach endorsed in 2008 Report is superior to that in the Norms, but for subtle and tactical reasons, rather than explicit or conceptual ones. Put simply, the PRR framework is likely to be more effective because it sounds easier and more "doable" for companies. It will produce less alarm, and hence less resistance. The 2008 Report's genius is leveraging standard, existing business (and business law) concepts to promote multinationals' human rights compliance—concepts like "due diligence" and internal controls. The more palatable, softer law mandate to "respect" human rights, in contrast to a duty on the part of companies to "protect" human rights, is simply more likely to garner adherents. This is because corporate executives on the ground are forced to make choices *in conditions of scarcity and uncertainty*. The "duty to protect" sounds too absolute, too speciously clear for executives to adopt it as a rule of decision in real conditions, including time and financial constraints. The seemingly easier, seemingly more flexible and forgiving "duty to respect" would appear more worthwhile to attempt. Setting achievable goals for corporations—selling the program to corporate actors as one that is both achievable and potentially "profitable" (a fortiori not excessively costly or troublesome to implement)—is surely part of the battle.

As an example of this "under-sell, over-deliver," the 2008 Report gives real content to the duty to respect in its description of corporate human rights due diligence. It captures how fact-specific and contextually precise it must be; thus the fact that it is not susceptible to programmatic compliance.[61] As the 2008 Report states, businesses' appropriate attentiveness to avoiding human rights abuses will require an appraisal of country/regional factors, firm-specific practices and the company's network of supplier and customer operations.[62] In such a dynamic environment, hands-on executives—sometimes on their own, and often in conjunction with their lawyers and boards' committees—will be required to make situationally specific judgment calls in interpreting the mandates of "do no harm." Clearly, this is not the kind of duty that lends itself to hard specification ex ante. As the 2008 Report implicitly suggests, the key is to encourage and incentivize business leaders to account for the downside of corporate human rights abuses *as part of their business judgment*—the totality of their acts and decisions in overseeing corporate affairs—rather than

61 *SRSG 2008 Report, supra* note 3, ¶¶ 73-81.
62. *Id.* ¶¶ 56-64.

as an afterthought. In sum, the soft law "duty to respect" framework is likely to be more palatable for corporate leaders and their advisers than would the timber of a hard law "duty to protect." The former better comports with corporate managers' business judgment than would more intrusive human rights law-making.[63]

Thus I think that Backer slightly misses the mark in his somewhat overzealous embrace of "polycentricity," and the "more is more" perspective of public law new governance. It's not accidental that the 2008 Report itself never mentions anything remotely like the "new governance movement." Indeed there is virtually no discussion of the difference between "hard" and "soft law." Nor is there even a subtle flavoring of the academic, theoretic lexicon of international law (including terms like "polycentricity"). This is because the 2008 Report is aimed at skeptics and practioners: business executives, politicians, "hard-knuckled" corporate lawyers. It asks only that executives take account of human rights compliance as part of their existing internal controls and risk management functions.[64] Again, the undersell, over-deliver: Now what could be problematic about that?

C. Due Diligence and the Problem of Complicity

As mentioned above, in elaborating the content of the duty to respect, the 2008 Report invokes the concept of corporate "due diligence."[65] As described therein, corporate human rights due diligence should encompass the gathering of information about rights-based "risks," creating statements of goals and standards, and integrating them throughout the different levels of the corporate organization.[66] In addition, it would be essential for companies to measure and systematically revisit compliance goals. As part of their existing internal controls programs, corporations do this kind of assessment in many areas, of course. The communications and technology revolutions described earlier have radically improved corporations' ease in conducting just these kinds of fact intensive assessments, the dissemination of codes and guidelines, and the monitoring of compliance throughout the enterprise.[67] One would think that the challenge of remaining efficient, which is to say profitable, would demand a nearly constant refinement of the corporation's data and information ga-

63. There's little doubt that American corporate law affords corporate directors substantial leeway to avoid the public and corporate harms arising from human rights abuses. This discretionary space exists within the construct of "the business judgment rule." For a recent review of the grounds of board primacy (from the perspective of efficiency or civil society theory), see Grant Hayden & Matthew T. Bodie, *Shareholder Democracy and the Curious Turn Toward Board Primacy*, 51 WM. & MARY L. REV. 2071 (2010).
64. For the argument that accurate and comprehensive internal reporting, up to the offices of senior management, the board and shareholders, as required, is the most vital component of corporate fiduciary duty, see Faith Stevelman Kahn, *Transparency and Accountability: Rethinking the Relationship of Corporate Fiduciary Duty and Corporate Disclosure*, 34 GA. L. REV. 505 (1999-2000).
65. For a famous account of corporate due diligence in relation to corporate securities offering materials, see Escott v. BarChris Constr. Corp., 283 F. Supp. 643 (S.D.N.Y. 1968).
66. For an early statement of the comprehensive importance of internal corporate information gathering and reporting systems, see NATIONAL COMMISSION ON FRAUDULENT FINANCIAL REPORTING, REPORT OF THE NATIONAL COMMISSION ON FRAUDULENT FINANCIAL REPORTING (1987); for commentary on its gradual acceptance into the corporate governance framework, see Melvin A. Eisenberg, *The Board of Directors and Internal Controls*, 19 CARDOZO L. REV. 237 (1997-1998).
67. For the landmark instance, see Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

thering and reporting systems. Although they will not spit out solutions, these systems should readily be adaptable to encompassing the reporting of facts and risk factors associated with human rights abuses.[68]

Some further discussion of the concept of corporate due diligence is appropriate, in order to understand how it is employed by the 2008 Report, and corporate lawyers and executives. Corporate lawyers do "due diligence" for their business clients prior to a variety of transactions and events. Due diligence is practiced prior to offerings of securities and the preparation of Securities and Exchange Commission (SEC) filings, so that the statements made therein correspond to the true condition of the business.[69] Due diligence is also required prior to mergers and other sale-of-business transactions, for valuation and risk assessment purposes, and so that the representations in the contracts will match the condition of the business, consistent with the parties' agreement. The firm's lawyers work hand in hand with corporate senior executives to achieve these reporting and contractual objectives.

The understanding of due diligence that the 2008 Report employs is not less transactionally specific. Rather it's a more recent one arising from the literature on internal controls, as well as practical improvements in information management and internal controls systems. This emphasis on internal control systems is pervasive in the Sarbanes-Oxley Act, although it relates principally to financial reporting therein. As relates to improved financial transparency and the avoidance of illegality, ongoing due diligence exists as a "monitoring obligation" of the board of directors. It reflects a mandate arising first within the auditing literature, and later within the securities literature and finally within the equitable jurisprudence of corporate fiduciary law. This trend in favor of enhanced internal and external corporate transparency reflects decades of evolution, harkening back to the original Treadway Report of 1987,[70] and even earlier to the books and records provisions of the Foreign Corrupt Practices Act (which Congress included in the securities laws a decade earlier).[71] Within the scholarly discourse of international law, transparency and the accountability it makes possible have always been a 'first principle' of good governance.

The challenge presented by the 2008 Report's human rights due diligence construct is not its novelty, or even its feasibility. Nor is the monitoring cost, as such, a critical factor. In cases where there would be a substantial risk of corporate complicity in human rights abuse firms will have powerful incentives, direct financial ones as well as reputational ones, to invest resources in avoiding them. (This assumes, of course, that the corporation is

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68. Many corporate commentators have suggested that we are on the verge of moving to a system of real time corporate disclosure, instead of the system of periodic reporting with updating on Form 8-K or as necessary to obviate selective disclosure (as required by Regulation Fair Disclosure). But the law has not moved that far yet.
69. *Escott*, 283 F. Supp. at 696. Note, too, that due diligence is becoming more complicated and less effective in a "shelf offering" world. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (establishing new disclosure requirements for securitizations as shelf offerings); WorldCom, Inc. Secs. Litig., 346 F. Supp. 2d 628 (S.D.N.Y. 2004).
70. *See* NATIONAL COMMISSION ON FRAUDULENT FINANCIAL REPORTING, *supra* note 66.
71. Securities Exchange Act of 1934, 15 U.S.C. § 78 (2006); Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 (2006).

well run and its managers/agents are acting in good faith.) The problem with the due diligence concept endorsed in the 2008 Report is the danger for the firm of having an operating but seriously flawed system; or otherwise a good system but a manager with seriously flawed judgment. If a corporation has a smart, reasonably well constructed system of due diligence and human rights risk assessment, as well as reasonably well informed and well advised leaders, then its internal controls systems, as part of ongoing due diligence, should help the company avoid serious or ongoing abuses of human rights. And even if abuses do occur, well advised firms with rigorous human rights compliance and oversight systems should, at least, avoid legal liability and harsher public opprobrium.

The danger arises in cases where the due diligence and compliance programs are poorly designed or recklessly or infrequently monitored. Paltry due diligence efforts or poorly run compliance programs may be worse than none if trouble ensues. This is because they may suggest knowledge of wrongdoing and indifference. Poor monitoring or compliance may present themselves as corporate smugness, if not "green-washing." The 2008 Report is, naturally, silent about this unintended consequence of poor corporate due diligence in the human rights area. Professor Backer, however, astutely notes the risk.[72] And it is a significant challenge for firms contemplating establishing human rights compliance and due diligence programs. Colloquially speaking, they may be damned if they don't, but damaged if their execution is decidedly poor.

Furthermore, as a separate matter (as both Ruggie and Backer acknowledge), corporate "complicity" is a thick, elusive concept.[73] It has both a strict legal definition, and an extra-legal, lay meaning which is at once far broader and more elusive. The scope of *legal* complicity in human rights abuses would track, most probably, the scienter and causality concepts operative in corporate criminal law (and, with slight variation, in securities law fraud cases). Given this high bar, proving corporate complicity in cases of alleged human rights abuses in a court of law would ordinarily be difficult in all but the most egregious cases. The twenty-six years that plaintiffs spent pursuing a remedy against Union Carbide on account of the tragedy in Bhopal, and the limited success of the result, stand as illustration.[74] The same is true of the criminal trial against W.R. Grace employees for poisoning the population of Libby, Montana through toxic asbestos exposure (the technical nature of the charge was "knowing endangerment"). Despite a hard-driving federal prosecution team that pressed forward for close to a decade, not one of the executives who had been in charge of decades of egregious asbestos leaks from a local refinery in Libby (that was owned and operated by W.R. Grace) was held "complicit" in the population's poisoning.[75]

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72 Backer, *supra* note 2 at 77–78.

73 *Id.*; *SRSG 2008 Report*, *supra* note 3, ¶¶ 73–81.

74. In June 2010, seven ex-employees, including the former Union Carbide chairman, were convicted in Bhopal of causing death by negligence and sentenced to two years imprisonment and a fine of about $2000 each, the maximum punishment allowed by law. Lydia Polygreen & Hari Kumar, *8 Former Executives Guilty in '84 Bhopal Chemical Leak*, N.Y. TIMES, June 7, 2010, at A8. An eighth former employee was also convicted but died before judgment was passed. *Id.*

75. For reference to an extensive archive of trial related materials and commentary see *W.R. Grace, Executives, Acquitted in W.R. Grace Criminal Trial*, ASBESTOS NETWORK, http://www.asbestosnetwork.com/news/nw_060209_wr_grace.htm (last visited Oct. 25, 2010).

But *legal* complicity is not all that's at stake, of course, even just in terms of money. Where there are persistent claims of serious human rights abuses, social opprobrium may trigger costly consumer, investor and even employee backlash. Such backlash is not constrained by the structures of civil procedure and law. In a world where there is growing popular concern about human rights compliance, as well as growing technological capacity to post any form of "smoking gun" evidence to the web, the prospect of more aggressive human rights due diligence will be a two-edged sword for companies and executives. Consumers, employees, investors and governments will each expect if not demand it. Corporations will become more accustomed to these expectations, and to their commitments, if not their duties, to live up to them.

D. A "Conceptual Framework" Light on Theory

The 2008 Report acknowledges the very different structure and incentives that operate in business corporations, in contrast to states. As stated therein: "[C]orporations are . . . economic organs, not democratic public interest institutions. As such, their responsibilities cannot and should not mirror the duties of States."[76] Furthermore, the PRR framework is definitive in attributing to states, and only states, the responsibility for *protecting* citizens against human rights abuses, whether by individuals, corporate enterprises or other institutions. It is remarkable that, while the 2008 Report describes itself as a "conceptual and policy framework,"[77] it scrupulously avoids grand pronouncements about the place of multinational corporations (or any corporations) in the social structure.

To elaborate, there are no references to civil society theory. There are no references to social contract theory. There are no references to democratic theory. Nor, even, is there mention of corporate "legal personhood." Nevertheless, in reading the Report, we don't initially notice these omissions. Indeed, my view is that the Report gains greater force and coherence by eschewing theory. Rather, it presents a meaningfully practical account of how corporate culture may be shaped, by states and by corporations themselves, to actualize greater respect for human rights by employees, managers and agents. According to the Report, it is the phenomenon of globalization—the enhanced scope and scale of corporate operations in conjunction with limits on legal compliance arising from law's historic "stickiness" to national boundaries—that is the "causal" agent behind the 2008 Report's mandate to promote corporate compliance with human rights. The unifying idea, the point of departure, is reducing anarchy and suffering, and apportioning responsibility in a way that is realistic and practicable, as well as intelligible and coherent. As stated previously, although advertised as a "conceptual and policy framework" it is not theory which drives the mandate, but rather the darkness of the realities on the ground and the raised expectations of the public.

And yet Backer accepts the notion that the Report supplies a "conceptual framework." According to him, that conceptual framework synthesizes legal obligations and social

76. *SRSG 2008 Report, supra* note 3, ¶ 53.
77. *Id.* ¶ 1.

norms into a "multi-level system of polycentric governance."[78] As Backer describes it, the "Three-Pillar framework acknowledges the reality of non-state governance systems centered on the regulatory community of economic actors."[79] Elsewhere Backer states that the report "builds a system [of corporate commitments] that is not tied to the state ... but rather grounded in social legitimacy and what might be understood as disciplinary and culturally embedded techniques."[80] In this, perhaps Professor Backer is rereading the 2008 Report in light of Professor Ruggie's earlier political science writing on "embedded liberalism."[81] An accomplished political scientist, there is no doubt that Ruggie could have waxed theoretical in establishing a conceptual framework for his Report if he so chose. Presumably he eschewed such theorizing in the interest of avoiding controversy and promoting the adoption of the PRR framework.

As an academic, in contrast to an activist, I can dilate a bit longer on the issue of theory, however. Leaving aside embedded liberalism, the most obvious theoretic "peg" would have been corporate personalty. Corporate personalty has recently been revived as a theory for mandating or proscribing conduct by the United States Supreme Court, and corporate personalty is very much part of the present policy debate. According to the Court, the Constitution sufficiently recognizes the corporation-as-person concept so that "the corporation's" participation in politics, even its funding campaign advertising, cannot be proscribed without running afoul of the First Amendment. That is the import of the recent, highly controversial decision in *Citizens United v. FEC* decision, which has substantially "freed up" corporate election spending.[82]

So why would Ruggie assiduously avoid delving into the corporate personalty construct as a vehicle for the "duty to respect"? After all, since it is accepted international law that all persons have a duty to respect human rights, the conceit would seem useful; yet Ruggie avoided it. What about the concept of the legal personalty of the corporation was found insufficient or unhelpful? Here is one illuminating possibility: All human persons exist in a place and have a certain, specified citizenship. Real persons do not escape the bounds of sovereignty, except in extraordinary cases (for example, in the absence of treaties on extradition). And very, very few human persons have the scope of influence that multinational corporations do. But corporations, though we speak of them as "persons," are entirely different from natural persons in this respect. Certainly, in their multinational incarnation, on account of their intangible nature, they transcend geographic and political boundaries. They exist and do not exist in multiple places simultaneously; indeed they may operate in some places where, for some legal purposes, they don't "exist" at all. As the 2008 Report signals in its introduction, the globalization problem is catalyzed by the limits of state sovereignty and the contingent nature of international law, especially in relation to

78. Backer, *supra* note 2, at 80.
79. *Id.* at 68.
80. *Id.* at 68–69.
81. John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order,* 36 INT'L ORG. 379 (1982).
82. Citizens United v. FEC, --- U.S. ---, 130 S. Ct. 876 (2010). For a landmark case establishing the "separate" legal personhood of a corporation, see Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

intangible entities like corporations. This is what forces the business and human rights issue to the fore. And because of the "slipperiness" of the corporate person, the "corporate personalty" theory does nothing to help resolve the legal and enforcement problems posed by multinational business enterprises in the human rights area. As such, the corporate personalty concept is not a useful vehicle for advancing the goals of the 2008 Report. Thus Ruggie astutely avoids it, consciously or not, as a pointless distraction.

For corporate legal scholars interested in business and human rights, however, the corporate personalty issue is interesting and even relevant. This is because the robustness of the corporate person was not always universally accepted among the states, even in early twentieth century American jurisprudence. As Professor Tung and other scholars (including myself) have noted, a feature of the "corporations as creatures of state law" notion encompassed a risk that states other than the chartering state would not fully recognize a corporation's full set of legal powers (i.e., those established by the chartering state).[83] Nor was this a matter of a foreign states trampling on established law. It simply had not been self-evident that all corporate powers "travelled." In essence, the concept of corporate personalty—the inviolability of *corporate* rights to property, powers to sue and limited liability of its shareholders—is a legal tautology. That a corporation's rights "belong" to it, irrespective of where it operates, is true simply because the principle has been accepted by states and governments as being true. Such corporate powers, it would appear, have been accepted as existing and travelling with the corporation wherever it operates not because of logical or principled reasons, but because the recognition of these rights is seen as encouraging capital formation and economic development. The rationale is instrumental rather than formal. In sum, it's not apparent that there is any political, social or legal "theory" that has evolved to keep pace with the legal, conceptual and technological development of the modern corporation as an engine of economic development.

Backer fills the theoretic void in the 2008 Report by pointing to what he sees as an internationally meaningful framework of social legitimacy, and the limits, he asserts, such consensus implies on legitimate corporate action.[84] I'm not sure I'm convinced that such a consensus exists. Even on the matter of torture, the issue of defining absolute human rights is growing ever more thorny. And so is the issue of corporations' complicity, for example, in the setting of aid to extraordinary rendition (as illustrated by the *Mohamed v. Jeppesen* case). As they fall outside of the Freedom of Information Act, and given the hurdles and bars to corporate criminal prosecution, corporations may be situated as ideal conduits for unsavory state actions that could not be accomplished directly. This makes the analysis of corporate responsibilities and corporate complicity in human rights even more compelling and timely.

83. *See* Tung, *supra* note 24, at 35–47; *see also* Stevelman, *supra* note 24, at 75–78.
84. Backer, *supra* note 2, at 67.

IV. Further Thoughts on "Protect, Respect, Remedy"

A. What is International Human Rights "Law?"

These comments are, in part, an extension of the issues raised in the discussion of new governance, above. But here I raise the more basic question of how rules worthy of being construed as "law" are constituted in international law, especially in the pluralistic area of human rights. The problem here is not merely to reconcile "hard" and "soft" law into something persuasively coherent that can be respected as law. Instead, the issue is how international law becomes "law," in the absence of a global sovereign, for example. One approach, of course, is to look to the areas where there is consent (e.g., on the basis of binding treaties or even "customary international law"). Another approach would be to look to the United Nations, although even the Security Council does not operate authoritatively in the mode of a sovereign over nations. (The United Nations is said to have "no will" apart from those of its members.) Leaving aside the metaphysics, how are human rights standards upheld as "law" when there are deep conflicts or misunderstandings and allegations of unconscionable abuse? How are human rights standards "made" effective?

Further insight may come from reference to the Law and Society movement, which draws upon insights from the social sciences in answering questions like these. For Law and Society scholars (such as my colleague, Frank Munger) the question provokes deeper scrutiny of socio-legal institutions, the patterns and processes by which they are staffed and operated, and the assumptions, customs and belief systems that support them.[85] More prosaically, for any of us who have dealt with or been immediately affected by even local courts or legislative bodies (by adulthood this is probably most of us), the question of who gets to make an authoritative law and apply it to our lives takes on new force. The creation of law is a fascinating and mysterious mode of cultural production. This is, I adventure, one reason why legal academics mostly remain enthralled by their field even after years of study.

I have no magic answer to the "what is international law?" question. Some say the question is fundamentally misleading and must be replaced by: "What can international law effectively do to solve problems?" Here is what I can add, by reference to my field. International law scholars wrestle with these most basic questions, and yet they almost all make a leap of faith. They accept the possibility of international "law" making, and go from there.

For corporate and securities law scholars, the "mystery" of international law may produce a deeper skepticism. Corporate and securities lawyers are trained to find a way to accomplish the goals of their clients. This will frequently involve developing an understanding of where there are vacuums in the law, at least vacuums in their enforceability. For corporate and securities lawyers, the key is the "negative space"; the opposite may be true for internationalists. They are motivated to see the larger patterns arising in interna-

85. *See, e.g.*, Frank Munger, *Globalization, Investing in Law, and the Careers of Lawyers for Social Causes: Taking on Rights in Thailand*, 53 N.Y.L. SCH. L. REV. 745 (2009); *see also* DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES (2003) (analyzing beliefs about what the law is and how those beliefs influence everyday action).

tional laws, despite the gaps and shortfalls. For human rights scholars and activists, it's important to begin with an awareness of this likely deep skepticism about international law on the part of corporate and financial lawyers. And from this perspective the absence of theory and deeper legal principle in the 2008 Report may indeed be a problematic shortfall.

On the other hand, there are reasons for corporate counselors to be preoccupied with their clients' human rights compliance irrespective of whether it's legally mandated. That is, the court of public opinion has entirely different rules than do civil or criminal courts. Corporate senior executives, boards and their firms stand to be vilified, boycotted and otherwise financially harmed by the exposure and wide publication of damaging facts, irrespective of whether they would constitute a definitive human rights abuse actionable in any court of law. Here, the facts and the ground and the court of public opinion may get ahead of the law. Executives, boards and firms will care equally as much about being harmed by egregious *allegations* of human rights abuses, especially where the allegations are backed up by snapshots, or videos or snippets of recorded conversations that can be posted to the Web. So companies and their managers have this motive to take international human rights issue seriously, and increasingly they do. This reality, and the costs it threatens to impose on companies, will make counseling corporate executives and boards on international human rights compliance an interesting and challenging area of practice.

B. The State's Role in Shaping Corporate Culture

The 2008 Report states, "Governments are uniquely placed to foster corporate cultures in which respecting rights is an integral part of doing business."[86] To a corporate law scholar the statement is arresting. It is obvious that governments can and do encourage and discourage various forms of corporate conduct. They use the tax laws and administrative regulations, and even criminal law as necessary, to influence corporate conduct. But for corporate law scholars, this would not amount to government "shaping corporate culture." At least, we are not in the habit of thinking about government deliberately shaping corporate culture, or even what "corporate culture" means and how it can be manipulated by the state. In eighteen years of reading corporate legal scholarship, for example, I've never read anything that explicitly endorses the view that government should mold corporate cultures. This most likely reflects the silent power of the neo-liberal ideal. Policy makers and most academics have accepted that corporations, as much as possible, should be free to follow their own profit-maximizing ends, as they adapt (presumably) to changing conditions in competitive markets. If we believe in robustly competitive markets, corporate culture would be an extension or reflection of the market—there's little room for governmental shaping. And from the perspective of contemporary legal theory, the "nexus of contracts" view has eradicated the internal space of "corporate culture" that would be susceptible to being molded.

Yet despite the paucity of discussion of law's role in shaping corporate culture, it is ap-

86. *SRSG 2008 Report*, *supra* note 3, ¶ 29.

parent that Congress has indeed taken a more active role in going in just this direction. In enacting the Sarbanes-Oxley Act of 2002, for example, Congress sought to raise the baseline level of corporate transparency and legal accountability for fraud.[87] It enacted various legal improvements in internal controls and auditing requirements, heightened executive/managerial accountability for achieving corporate transparency, general counsel responsibility for alerting the senior-most officers to evidence of unlawful corporate conduct, heightened protections for whistleblowers and other measures designed to promote corporate cultures more in keeping with the rule of law. Indeed, this is precisely why the Act proved so controversial: It was not aimed at maximizing short term profits. Indeed, compliance would increase costs in the short term, even if it would increase confidence in investing in U.S. firms over the longer term. Many legal commentators argued that the Act's costs would discourage listing in the United States.[88] To the contrary, a few legal scholars realized that the scope and magnitude of the accounting scandals signaled there was a wide-ranging problem in the corporate culture, even at seemingly "blue chip" American firms. These "contrarian" scholars defended Sarbanes-Oxley as a well-intentioned legal program to move corporate culture in the direction of transparency and accountability[89]—even as they recognized the contingent and incomplete nature of the Act.

Another explanation for the paucity of discussion of corporate culture by corporate legal scholars lies in the focus of our interdisciplinary work. Although corporate law scholars have mined the literature and wisdom of neo-classical micro-economic analysis, we have been rather less attuned to the findings from studies of group and organizational psychology—lessons which would help us better understand corporate culture, and the forces and institutions which shape it.[90] Ruggie's notion of corporate culture should be further studied by corporate legal scholars concerned with making a contribution to elevating corporate conscientiousness about human rights. [91]

In fact, although we don't directly discuss the issue, I'm sure that all corporate law scholars have a view of law's role in shaping the conduct and incentives of executives and cor-

87. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 203, § 10A, 116 Stat. 745, 773 (2002) (codified as amended at 15 U.S.C. §§ 78j–78l (2002)) (audit partner rotation); *Id.* § 304, 116 Stat. at 778 (codified as amended at 15 U.S.C. § 7243 (2002)) (forfeiture of certain bonuses and profits); *Id.* § 401, 116 Stat. at 785 (codified as amended at 15 U.S.C. § 7261 (2002)) (disclosures in periodic reports); *Id.* § 404, 116 Stat. at 789 (codified as amended at 15 U.S.C. § 7262 (2002)) (management assessment of internal controls).

88. *See* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005).

89. *See, e.g.*, John C. Coates, IV, *The Goals and Promise of the Sarbanes-Oxley Act*, 21 J. ECON. PERSP. 91 (2007); James Fanto, *A Social Defense of Sarbanes-Oxley*, 52 N.Y.L. SCH. L. REV. 517 (2007–2008).

90. *See* Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797 (2001).

91. Following the spate of high level accounting fraud scandals which broke after 2001, certain "progressive" corporate legal scholars turned their attention to this issue of corporate culture. For example, corporate legal scholars Marlene O'Connor and Lynne Dallas wrote about law, group psychology and corporate groups (especially as related to the problem of "group think" and executives' seemingly irrational assessment of risk). *See* Lynne L. Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron's Demise*, 35 RUTGERS L.J. 1 (2003); Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233 (2003).

porations, i.e., "corporate culture." It's just that we don't generally acknowledge the issue/phenomenon in such terms. Indeed, reference to corporate culture in recent years would have seemed out of place, naïve, suggestive (potentially) of ignorance about microeconomics and the influence of markets on firms. And for a corporate legal scholar nothing could make a worse impression amongst one's peers. Sarbanes-Oxley intended just such an alteration of corporate culture; and yet the Act did not nearly go far enough.[92]

Accordingly, eight years later, in the Dodd-Frank legislation,[93] Congress was compelled to embrace a far more wide-ranging agenda, and to rework the governance of the financial services sector to promote fair dealings, transparency and more rational limits on risk-taking. Could Congress have left financial services firms to pick up the pieces and redefine, for themselves, the contours of their new approach—their new "culture"—of lesser leverage, more reasonable risk-taking, more straightforward dealings with consumers and greater recognition of responsibility to the international financial infrastructure? Could firms have made these "cultural" shifts on their own? The answer is probably not. The extant evidence suggests that the profit incentives of high-risk trading and high leverage are simply too powerful. Government intervention was required to alter this facet of the culture and conduct of these firms. And such intervention was accepted as legitimate, given the massive financial bailouts, with taxpayer funds, that their near failure necessitated. Congressional intervention to mold a new financial services culture was required not merely to save the firms themselves, but to preserve the existing financial system—and the American culture which presumes it. In the United States we have just lived through a transformational moment in the evolution of finance, law-making and corporate culture. For the millions of Americans who have been left jobless, families without health insurance, without a home of their own and with inadequate food, the connection between finance, corporations and basic human rights is far less abstract than it had been.

V. Corporate Law: The "Who" and "Why" of Human Rights Compliance

A. Who? Of Boards, Committees, Officers and Shareholders

1. Boards and Committees

Perhaps for constitutional law scholars or social theorists, the failure to discuss political or social theory—theories bearing on corporations' obligations in relation to human rights—is the most notable omission in the Report. For human rights scholars, perhaps, the failure to endorse precise human rights priorities for corporations is the Report's most salient omission.

But for corporate governance scholars, the Report's most notable omission is its failure to discuss *where* the "respecting human rights function" should reside within the corpora-

92. Faith Stevelman, *Forward: Corporate Governance Five Years After Sarbanes-Oxley: Is There Real Change?*, 52 N.Y.L.S. L. REV. 475 (2008).
93. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

tion. The question is crucial to the efficacy of the result. And there are many possible options: the board or a board subcommittee (like the risk management committee), senior executive officers or even the legal or compliance department.

First, it should be noted that, from the perspective of corporate law, it's axiomatic that boards have plenary oversight and decision-making responsibility. This responsibility encompasses all matters beyond the ordinary scope of business, at least as conceived of in the formal legal model. The board's responsibility also encompasses the establishment of an efficacious institutional architecture for the corporation, including the selection and appointment of the most appropriate, effective senior-level officers for the firm.[94] This principle of primary and plenary authority in the corporate board is reflected in the states' corporation codes, as well as the corporate case law. As for the latter, the "business judgment rule" restricts shareholders, stakeholders and courts from second-guessing board decisions (absent evidence of conflicts of interest or gross dereliction of duty).[95] Nevertheless, when this touchstone concept of board oversight and authority is applied to the business and human rights context, difficult issues surface immediately.

The first problem is a supremely practical. Although boards have plenary legal authority in corporate affairs, for the majority (of public companies') board members, their service is very part time. Their primary professional obligations are elsewhere. This is a fundamental contradiction in American corporate governance that scholars and other commentators have never resolved. Given the number and complexity of corporate tasks and responsibilities assigned to boards within the American system of governance, the formal model is contradictory and dysfunctional.

Furthermore, the problem of "over-tasked" corporate boards is growing more critical. The list of matters the board as "ultimate corporate decision-maker" must oversee or (at least) ratify upon reasonable information is expanding exponentially in scope and complexity. This is a function of new technology, generally heightened expectations about governance and the byproducts of global operations.

The stop-gap, technical solution to the problem of "too many responsibilities, too little time" has been to divide the board's functional responsibilities and assign them to specialized board subcommittees. This is licensed by the state statutes, the case law and "best practices" literature. Committees of outside, independent directors are commonly consti-

94. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141 (West 2010) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . . ."); N.Y. BUS. CORP. LAW § 701 (2010) (requiring that the business of a corporation shall be managed under the direction of its board of directors).

95. *See, e.g.*, Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. Ct. 1968) (holding that the company was not required to alter its policy against night baseball games, despite the revenue which the games would quite patently produce); Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) (refusing to interfere with the Ford board of directors' business expansion plans even when they garnered shareholder protest); Kamin v. Am. Express Co., 383 N.Y.S.2d 807 (N.Y. Sup. Ct. 1976) (refusing to agree with shareholders' position that a sale of stock owned by the company would be more advantageous than distributing it as a dividend, when the board of directors had decided otherwise). For a recent case, see Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106 (Del. Ch. 2009) (holding that the board of directors' decisions regarding business risks in the subprime lending market were not considered a breach of its fiduciary duty to shareholders).

tuted in the areas of executive compensation, board nominations, audit and financial reporting oversight, shareholder litigation, takeover response, and other matters where conflicts of interest present themselves. Increasingly, also, there are "risk management committees," which quite forseeably could accommodate "human rights risk management." At least in the abstract, as a matter of formal "fit," such a risk management board committee looks like the best solution as to where to lodge the human rights compliance function.

And yet the solution is more problematic than it first appears because a human rights risk management committee—presumably a committee at the parent company level—is likely to be isolated both geographically and informationally from the immediate area where rights conflicts will present themselves. Perhaps to avoid just this kind of "bureaucratic stacking" and escape from accountability, early codes of incorporation disallowed companies from owning stock in other companies. The hydra-like structure of holding companies owning subsidiaries, and subsidiaries of subsidiaries—creating compounding layers of bureaucracy and plausible deniability—was an organizational impossibility in the first few decades of the twentieth century.

In an earlier, Jeffersonian tradition, governments were simply loath to allow their commercial "creatures" to grow so powerful, agile and faceless as to pose a threat to state sovereignty. Early in the twentieth century, however, the states let go of this "populist" fear of lack of corporate accountability. That sort of fear (which is distinct from the "fear" of size which influences antitrust policy) has not informed policy making since the 1930's.[96] Only with the ascent of the Obama administration have we seen genuinely extensive federal re-regulation in the corporate and financial services sector, in the name of heightened corporate accountability and reduced reckless risk-taking (with other peoples' money). The Republican "deregulation" revolution launched by Ronald Reagan endured for three decades.

As a matter of state corporate law fiduciary duties, furthermore (as discussed further below), the fiduciary duty of good faith—which would encompass boards' oversight duties vis-à-vis human rights—is profoundly indeterminate.[97] It's indisputable that the most vital force influencing boards' and committees' conduct and perspective on human rights law is not the "letter of the law" or even threat of liability, in most instances. Rather, "the law" operates as part of the rhetorical, persuasive force by which multinational law firms advise their corporate clients about staying out of legal trouble and the eye of public storms. Such international law firms, along with the constant threat of unwanted media attention and public outrage, are the real forces which will drive compliance. In this vein, smart boards and committees will keep their corporate counselors close at hand and well informed. In sum, it will be global law firms, rather than the force of law in the abstract, which will drive corporations' "acclimation" to the greater demands being imposed upon them in the area of human rights. Anticipating this, global corporate law firms and their cadre of enterpris-

96. For a discussion of changes in attitudes toward the corporate form in the early and mid-twentieth century, see Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law* (New York University Center for Law and Business Working Paper No. CLB-99-013, Jan. 2000), *available at* http://ssrn.com/abstract=204528.

97. William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, U. ILL. L. REV. 1 (2009).

ing, seasoned corporate lawyers have already adopted the "business and human rights" agenda as part of advising boards, committees and officers on risk management. These forward-thinking firms have devised institutional programs, compliance plans and codes of conduct to speak to these emerging issues.[98] In this tradition, lawyers like Martin Lipton (at Wachtell)[99] and Ira Millstein (at Weill Gotshall),[100] and law firms like Fried Frank, Epstein Becker, and Foaley Hoag, as well as the American Bar Association (under the aegis of the Corporate Social Responsibility Committee of the Section on International Law) are disseminating the message to their partners and clients that human rights compliance is at the forefront of issues that will be in the spotlight.

This more proactive posture towards corporate human rights compliance is unquestionably promising, in respect to greater attentiveness by business compliance lawyers. And yet there's room for concern as well. This cadre of powerful, elite advocates will reconstitute themselves as corporate defense counsel, virtually instantaneously, if there are real concerns about either litigation or substantial negative media exposure.

2. Officers: Chief Compliance Officer, Chief Operating Officer, General Counsel

Another sensible institutional "platform" for a human rights compliance program is the office of the Chief Compliance Officer. Over the past decade the legal compliance function has grown exponentially, as a corporate institution distinct from the corporate law department. The standard ingredients of compliance include endorsing and enunciating a set of standards, disseminating the agenda throughout the organization, reinforcing the message through a variety of channels of reporting and demonstrating leadership from the top of the organization. These functions are readily translatable to the area of human rights compliance.[101] This augurs for locating human rights oversight within the compliance de-

98. The 2009 Report refers to plans for a forthcoming survey of lawyers and law firms and their approaches to business and human rights counseling. *See* U.N. Special Representative of the Secretary-General, *Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework: Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,* ¶ *4, delivered to the Human Rights Council,* U.N. Doc. A/HRC/11/13 (April 22, 2009), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf. *See also* Press Release, United Nations, Leading corporate law firms advise UN Special Representative on business and human rights (Mar. 23, 2009), *available at* http://www.reports-and-materials.org/Corporate-law-firms-advise-Ruggie-23-Mar-2009.pdf. Rising interest is also reflected by the recent creation of the Corporate Social Responsibility Committee within the International Law Section of the American Bar Association.

99. Wachtell Lipton put out a memo on the *SRSG 2008 Report, supra* note 3, which was cautionary, if not critical, of the increasing pressure being brought to bear on boards and firms in general. *See* Wachtell, Lipton, Rosen & Katz, *A United Nations Proposal Defining Corporate Social Responsibility for Human Rights* (May 1, 2008), *available at* http://amlawdaily.typepad.com/amlawdaily/files/wachtell_lipton_memo_on_global_business_human_rights.pdf.

100. Ira Millstein, of Weill, Gotshall & Manges, also put out a client memorandum. He was less critical of the PRR framework and its import for corporate governance.

101. This corporate function gained increased salience as a result of the federal sentencing guidelines pertaining to corporations. The guidelines expressly endorsed a more "forgiving" approach where corporations had adopted reasonable compliance programs and endeavored in good faith to implement

partment, and allocating leadership responsibility to the Chief Compliance Officer. But the problem with this approach is that it may have the unintended effect of marginalizing the importance of respect for human rights, on account of the phenomenon of institutional segregation or ghettoization. To recall, in discussing shortfalls in *states'* human rights records, Ruggie described this phenomenon as one of "horizontal incoherence": Where the human rights "function" is cabined at the margins of what are perceived to be more pressing concerns. A "check-the-box" approach to human rights compliance will only work when the situation on the ground is stable and the likelihood of abuses are low. That is, this approach is prone to be useless when it matters most. The burgeoning literature on corporate compliance suggests that achieving genuine respect for corporate goals and policies (as well as respect for law) is far more complicated, especially in far flung parts of an enterprise, than it may initially appear.[102]

What about allocating responsibility for respecting human rights to the office of the Chief Operating Officer (COO)—even to COOs at subsidiaries in host countries? High functioning COOs will possess the requisite information to anticipate where rights issues are likely to arise. And if these COOs are in the host country, they are likely to be close enough to the problem to respond rapidly either ex ante—to prevent serious abuses, or ex post—to limit the damage and/or provide some form of remediation. This would be especially valuable for COOs at foreign subsidiaries in regions where there is weak rule of law and high risk of conflict.

But once again, there are problems with this approach as well. First, the duties of COOs are traditionally quite broad, adding a human rights function to the total mix is not likely to produce effective monitoring and compliance. Second, the COO's attention is trained, traditionally, on keeping the operation "on the rails"—that is, driving revenues. The costs of inadequate respect for human rights may not be immediately salient to COOs since they're concerned with the basic fundamentals of keeping the enterprise running and in the black. Part of globalization is the presence, usually, of enhanced competition of many kinds. Such enhanced competitive pressures may, in the short term, obscure the importance of raising the baseline on human rights compliance, especially for COOs. Where competition and political or social disorder are high, these forces stand to drain away the organizational resources that might otherwise be directed to elevating the business' human rights record.

That leaves the general counsel, the company's senior-most inside lawyer. What is the role of the general counsel in achieving better human rights compliance by the corporation? Interestingly, the Sarbanes-Oxley Act of 2002 becomes relevant to the general counsel's role in human rights in two ways—the first has to do with internal controls. First, the Act puts a premium on the construction of robust and comprehensive corporate internal

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them on a firm-wide level. *See, e.g.*, Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697 (2002) (discussing the positive effects of the corporate compliance programs induced by the Federal Sentencing Guidelines).

102. *See, e.g.*, Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949 (2009); *see also* Pamela H. Bucy, *Corporate Criminal Liability: When Does it Make Sense?*, 46 AM. CRIM. L. REV. 1437 (2009); James A. Fanto, *Recognizing the "Bad Barrel" in Public Business Firms: Social and Organizational Factors in Misconduct by Senior Decision-Makers*, 57 BUFF. L. REV. 1 (2009); Joan T. A. Gabel et al., *Letter vs. Spirit: The Evolution of Compliance into Ethics*, 46 AM. BUS. L.J. 453 (2009).

controls systems. These internal controls should yield superior data and reports for the senior officers, boards and general counsel to review. As part of the objective of achieving greater corporate legal accountability, the Sarbanes Oxley Act requires chief executive officers to certify the integrity—the reasonable sophistication and efficacy—of the corporation's internal controls systems.[103] This is a legal expression of the advances in communications and information technology described above. As firms have become more technologically capable of tracking their performance, they have gradually been held to a higher standard of governing their conduct.

Most germane to this immediate discussion, Sarbanes-Oxley connects the information gathering and reporting (internal controls) function to the "reporting up" responsibilities of the General Counsel. That is, Section 307 of the Sarbanes Oxley Act provides that where the general counsel becomes aware of "evidence of unlawful conduct," he or she must report such information "up the ladder"—even to the board of directors if necessary to obtain an adequate, remedial response.[104] So if the internal controls system yields information about human rights problems, whether at the parent or subsidiary, it's arguable that the general counsel must drive the evidence to the upper echelon of the corporation, and must keep on doing so until he or she is satisfied that there will be an appropriate response.[105]

This objective, federal legal reporting duty assigned to general counsel is an enormously promising development for advancing corporate compliance with human rights. Although there is controversy over the standard of "evidence of unlawful conduct," there's no doubt that a wise general counsel would not volunteer to be the firm's scapegoat by "sitting on" plausibly unlawful conduct, including human rights abuses by employees or officers of the firm.

Furthermore, and of crucial importance, once the general counsel has elevated the information about a potential rights problem to the senior-most corporate officers and/or directors, the scope of their "plausible deniability" is radically curtailed. This means, as described below, that a space opens to hold these officers and directors liable for deliberately ignoring their duty to curtail illegality by the firm. Within the language of corporate fiduciary duty, this is known as a "breach of good faith."

B. Directors' and Officers' Duty of Oversight and Corporate Accountability for Human Rights

As discussed earlier, the 2008 Report barely addresses the conceptual underpinnings of corporations' duty to respect human rights. Corporate fiduciary law, in tandem with expanding SEC disclosure and internal controls requirements, may hold some promise in

103. Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7262 (2002). *See also* Houman B. Shadab, *Innovation and Corporate Governance: The Impact of Sarbanes-Oxley*, 10 U. PA. J. BUS. & EMP. L. 955 (2008).
104. *See* Sarbanes-Oxley Act § 307, 116 Stat. at 784.
105. I say it's arguable because the statute speaks of evidence of illegal conduct, which raises the question of whether the apparent human rights problems would fit into the category of illegality. Certainly, a wise general counsel would not volunteer to "sit on" that kind of potentially career-breaking technical ambiguity.

strengthening corporations' duty to respect human rights. The basic notion is captured in the adage "with power comes responsibility." That is, corporate directors and officers increasingly have the technological power to know far more about what is going on in their company, even globally. Hence, corporate fiduciary law is expanding their duty to know, under the duty of care and the duty of oversight. As this is happening, a byproduct is greater accountability on the part of the directors and officers (and general counsel) for knowing about and attending to elevating their corporations' human rights' records. This latter duty, which is usually identified under the rubric of "duty of good faith," is akin to a duty to supervise against and respond effectively to instances of illegality.

Under the duty of good faith, boards and officers have a duty to establish internal systems of information gathering and reporting, to oversee their reasonable efficacy and to employ the information they've acquired to promote the company's legal compliance. This obligation is referred to under a number of rubrics: again, the duty of oversight, duty of care and a duty of good faith.[106] But under each of these terminologies, a firm's directors and officers would have an obligation to be observant about corporate human rights risks, as part of their duty to be informed about the firm's conduct and legal compliance. It's indisputable that they'd have an obligation to take decisive action if they'd become cognizant of corporate complicity in human rights violations. To have such information, and fail to act to limit the unlawful conduct would violate their duty of good faith.

Again, the heart of the PRR framework is for companies (their officers, boards and lawyers) to become more aware of the danger of corporate complicity in human rights abuses, and more vigilant about avoiding them. As for fiduciary law, in the aftermath of the landmark 1996 decision of the Delaware Court of Chancery, *In re Caremark*[107]—as affirmed by the Delaware Supreme Court in *Stone v. Ritter*[108]—it is accepted that boards have a duty to implement and oversee efficacious systems of information gathering and reporting. This monitoring duty relates not only to the production of *financial* information, but the gathering and synthesis of all information relevant to promoting the corporation's compliance with the law.[109] (In *Caremark* itself the unlawful conduct was not financial fraud but whether the board could be held liable for failure to supervise where substantial fines and penalties resulted from violations of health care laws and regulations.) This explicit, board-level duty of oversight, and duty to promote legal compliance, arose belatedly in corporate law—after the internal controls and monitoring framework had already been well established in auditing and securities regulations.[110] And though there is some ambiguity about the scope of liability for "monitoring failures," as breaches of loyalty and good faith,[111] there is no disputing that a conscious failure to act (or reckless indifference to action) in

106. For a thorough and thoughtful survey of the field and the contemporary case law, see Eric J. Pan, *A Board's Duty to Monitor*, 54 N.Y.L. SCH. L. REV. 717 (2009-2010).
107. Caremark Int'l, Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).
108. *See* Stone *ex rel.* Amsouth Bancorporation v. Ritter, 911 A.2d 362 (Del. 2006).
109. *See id.*
110. For an excellent account of the history of the internal controls notion, prior to its acceptance into the corporate fiduciary canon, see Melvin A. Eisenberg, *The Board of Directors and Internal Control*, 19 CARDOZO L. REV. 237, 244-50 (1997).
111. *See Ritter*, 911 A.2d at 362.

the face of corporate illegal conduct constitutes a breach of the fiduciary duty of loyalty. Again, the landmark fiduciary law case establishing this monitoring and "legal compliance duty" was written only in 1996 by Chancellor Allen. Furthermore, the decision issued in the procedurally awkward setting of an approval of a settlement of a derivative suit. In *Caremark*, Allen provided a new reading of the "duty of care" (elsewhere therein described as a "duty of good faith") that encompassed an ongoing duty to establish and monitor the efficacy of the corporation's internal controls systems. Of course, such systems are essential to gather, synthesize and report vital information up the ladder. Such information, the opinion notes, is presumably requisite to the board's, and other senior decision makers', ability to execute their statutory duties.[112] The *Caremark* opinion is unflinching in endorsing this facet of institutional design and assigning it, as a new fiduciary responsibility, to the board and senior-most officers.

Yet, as stated above, it was only in 2006, in *Stone v. Ritter*, that the Delaware Supreme Court affirmed this "Caremark 'monitoring' duty" and clarified that consistent with this monitoring duty, directors or officers consciously possessing information about unlawful corporate conduct, who failed to act to arrest or redress the conduct, would be culpable of breach of loyalty (also known as breach of good faith).[113] Notably, in the 2008 Report, there are clear echoes of Chancellor Allen's language in *Caremark*. Allen's admonishments ring through in the Report's emphasis on the importance of ensuring widespread distribution of compliance programs in the firm, so as to reduce potential corporate criminal liability.[114]

For ten years, between 1996 and 2006, the "Caremark oversight and compliance" duty remained controversial; but after *Stone v. Ritter*, there is no question that boards and senior officers will be responsible for acting upon information about corporate illegality that comes into their possession either from the General Counsel's office, or as a product of the firm's internal reporting systems.[115] This augurs for improved corporate response to evidence of potential unlawful violations of human rights.

But *Stone v. Ritter* also clarified that there are important caveats to this expanded duty of loyalty/good faith. The most germane is that the corporate conduct must be unlawful, and not merely a reflection of poor business judgment, in order to be actionable as a breach of the duty of good faith/loyalty. Second, for directors or officers to be legally culpable, they must knowingly fail to respond, or at least be recklessly indifferent in responding to, illegality which they knew about or should reasonably have known about. Just these issues have recently been tested in litigation in the Court of Chancery. In shareholder derivative litigation against the board of Citibank, the court held that there could be no liability under the duty of good faith because the corporation's investment choices, though faulty, were not in any way unlawful.[116] Because the shareholders could not demonstrate any

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112. In *Caremark* this appears in the discussion of boards' duties to adopt compliance programs, consistent with reducing the foreseeable scope of corporate criminal liability, consistent with the federal sentencing guidelines. *Caremark*, 698 A.2d at 969.
113. *Ritter*, 911 A.2d at 362.
114. *SRSG 2008 Report, supra* note 3, ¶ 31.
115. *Ritter*, 911 A.2d at 362.
116 Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106 (Del. Ch. 2009).

illegality in the corporation's failed investment policies and practices, their claims were dismissed.[117] This raises the question of whether boards, even boards aware of ongoing failures in human rights compliance, could escape liability by arguing that though serious, the abuses did not rise to the level of being unlawful, at least as far as the corporation's involvement is concerned. Proving corporate complicity in unlawful violations of human rights is, of course, no simple matter. Hence, this is one "rabbit hole" available for boards threatened with liability under *Stone*'s duty of good faith. One can only hope that the legal counsel for directors in multinationals at risk of complicity in human rights violations will not advise their clients about the least they can do and still skirt liability. After all, the court of public opinion is extraordinarily powerful, especially for corporations that deal with consumers and those whose investor population includes public pension funds and socially conscious mutual funds. Directorial personal liability for breach of loyalty/good faith would be the ultimate form of accountability under the law, but it is not the only form of accountability and liability imposed on firms that are regarded as negligent in respecting human rights.

The issue of directorial knowledge of unlawful conduct, as a prerequisite to a finding of breach of good faith, has also recently been tested in a case of relevance to business and human rights. In particular, the Delaware Court of Chancery recently dismissed a "breach of good faith/breach of monitoring" derivative suit against the board of Dow Chemical.[118] The plaintiffs alleged oversight/supervision failures in regard to bribes paid by Dow officers in conjunction with business dealings in a joint venture in Kuwait. For purposes of evaluating the motion, the court accepted that the bribery had occurred. However, it held that there was insufficient evidence that directors were aware of the officers' participation in the bribery, thus they could not be held liable for failure of supervision constituting a breach of good faith. The *Dow* decision illuminates the Delaware courts' extreme reluctance to hold directors personally liable for breach of fiduciary duty—that is, for any kinds of breaches of fiduciary duty which would give rise to personal liability.

In sum, the fiduciary duty of oversight and the duty of good faith are useful as "standards of conduct." Careful outside counsel and general counsel will be motivated to encourage boards and officers to raise the level of corporate respect for human rights accordingly. But these duties, the duty of oversight and good faith, are not overwhelmingly likely to result in concrete sanctions against directors and officers, even if human rights violations do occur, consistent with the caveats and limitations described above.

117. *Id.*

118. *In re* Dow Chem. Co. Derivative Litig., No. 4349-CC, 2010 WL 66769 (Del. Ch. Jan. 11, 2010). The ruling from Delaware Chancellor William B. Chandler III dismissed each claim, stating the plaintiffs did not provide enough evidence to support their claims. *Id.* at *15. The lawsuit, filed by shareholders of The Dow Chemical Co., alleged that board members breached their duties during the company's purchase of Rohm and Haas Co. *Id.* at *1. In the lawsuit, plaintiffs Michael D. Blum and Norman R. Meier claimed Dow's board breached its financial duties by approving the deal, misrepresented how a failed joint venture in Kuwait would affect the purchase of Rohm and Haas and failed to prevent alleged bribery, misrepresentation, insider trading and wasteful compensation. *Id.* Chandler found that the "plaintiffs have failed to plead particularized facts sufficient to establish a substantial likelihood of liability for any Dow director, let alone a majority of the board, on the grounds of bribery, misrepresentations, insider trading, excessive or wasteful compensation or any other ground." *Id.* at *10.

VI. U.S. Securities Law and Human Rights Concerns

Securities law has a fundamentally different focus from corporate law, of course, and may be ahead of corporate law in promoting corporate conscientiousness towards human rights. Federal securities law works principally through the mechanism of mandatory disclosure by public corporations, which has in recent years increasingly encompassed matters of social concern, as well as obvious "bottom line" matters. The securities laws' anti-fraud provisions threaten sanctions on firms and their agents for material misrepresentations relevant to the firm's financial condition and performance. However, with respect to the expanding areas of "socially relevant" disclosure, liability is not a substantial concern. Instead, the force of disclosure is felt in the market, and particularly the market of public opinion.

The guiding principle in securities law disclosure has always been: "What information is important to reasonable investors?" This classic definition, validated by the Supreme Court in the landmark case of *TSC Industries v. Northway*, is operative throughout the securities laws.[119] Rather than the *test* for materiality, its application to the scope of required disclosure has remained controversial. There simply is no objective cut off or definition for what matters reasonable investors are or should be concerned about. For many years the Securities and Exchange Commission resisted inclusion of information which departed from concerns directly relevant to immediate profit and loss. In recent years, however, the scope of mandatory reporting has expanded to include a variety of subject areas relevant to the corporation's treatment of stakeholders, as well as its handling of negative externalities, as further elaborated below.

Furthermore, it was in no way inevitable that mandatory disclosure would hew so narrowly to matters germane to short term revenues and expenses. For example, both Louis Brandeis and Adolfe A. Berle, Jr. were concerned with the enactment of corporate and securities laws that would serve the broader public interest and democratic values, as well as the needs of investors.[120] Though Berle's landmark *The Modern Corporation and Private Property* is read most commonly by academicians as a treatise on corporate agency costs, the volume's themes are in actuality much broader.[121] Indeed, Berle expresses concern about the growing political and social influence of the increasing population of immensely wealthy, bureaucratic, public corporations—entities, he feared, that were accountable to no one.[122] Berle enunciated his anxiety that these national and international corporations

119. TSC Industries Inc. v. Northway, Inc., 426 U.S. 438 (1976).
120. LOUIS DEMBITZ BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 19 (Kelly, 1986) (1914) ("Publicity is justly commended as a remedy for social and industrial diseases."); ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (Transaction Publishers 1991) (1933).
121 For recent commentary on the landmark volume, see *In Berle's Footsteps*, SEATTLE UNIV. SCHOOL OF LAW, http://www.law.seattleu.edu/Centers_and_Institutes/Berle_Center/Symposium/2009.xml (last visited June 11, 2011).
122. BERLE & MEANS, *supra* note 120, at vii–viii.

> [A] society in which production is governed by blind economic forces is being replaced by one in which production is carried on under the ultimate control of a handful of individuals. The economic power in the hands of the few persons who control a giant corporation is a tremendous force which

would wield their immense organizational and financial resources selfishly, and in time, would accrue power equivalent or superior to states.[123] What Berle foresaw, then, was the essential challenge posed by multinational corporations in a globalized marketplace—that such businesses would become so wealthy and powerful that they would escape (if not form to their selfish advantage) the bounds of law and regulation.

As described above, corporate law has not attended to this concern, and the SEC has formerly attempted to marginalize it within the framework of mandatory disclosure and intra-shareholder communications, at least until the mid-1970's. Since that time, albeit very gradually, the old view of the "rational" investor as someone caring exclusively about immediate profit and loss—and caring little or nothing about how their invested capital affected employees, local communities, the environment or civil or human rights—has gradually been disintegrating. As it has done so, the reporting and shareholder proposal systems operating in public corporations (including American subsidiaries of foreign corporations) has grown to encompass information relevant to whether the corporations are "good citizens"—including information relevant to firms' human rights records.

A. Social Disclosure and the New Dodd-Frank Provisions

Over the last fifteen or so years, especially as a result of sustained and mounting pressure by socially conscientious mutual funds and public pension funds, an altered dynamic is emerging in the development of mandatory reporting for public companies under the SEC's oversight. As a result of various commissioned studies, the scope of the subjects that Congress and the SEC now assume falls within the interest of reasonable investors has broadened considerably.[124] The strictures of the mandatory reporting system are being enlarged to require additional reporting of corporations' environmental compliance, labor standards, executive compensation rates and policies, anti-corruption efforts and anti-discrimination policies. Shareholders have become more attuned to the fact that substantial white-collar criminal penalties attach to malfeasance in many of these areas, as well as civil fines, embarrassing enforcement actions and negative publicity campaigns. Moreover, as large institutional investors, and especially public pension funds, play an increasingly salient role in the securities markets, the investing public's concerns increasingly mirror those of the broader citizenry. The costs of social and environmental degradation are costs investors suffer as citizens.

> can harm or benefit a multitude of individuals, affect whole districts, shift the currents of trade, bring ruin to one community and prosperity to another. The organizations which they control have passed far beyond the realm of private enterprises—they have become more nearly social institutions.

Id. at 46.

123. *Id.*

124. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2006) (calling for disclosure of gap between senior-most executive compensation pay and the average worker's pay); *see also* Amendments to Rules on Shareholder Proposals, 17 C.F.R. § 240 (2006), *available at* http://www.sec.gov/rules/final/34-40018.htm ("We have gained a better understanding of the depth of interest among shareholders in having an opportunity to express their views to company management on employment-related proposals that raise sufficiently significant policy issues.").

The recent Dodd-Frank Legislation includes three new socially significant disclosure mandates.[125] The first, in section 1504, requires U.S. listed, internationally active extractive enterprises to disclose payments to foreign governments for resource rights, including the extraction of oil, natural gas and other mineral rights.[126] The new law gives the SEC roughly nine months to promulgate final regulations to require such resource extraction issuers (and/or their subsidiaries or controlling companies) to make disclosure in their annual reports of payments made to foreign governments (or to the federal government) for commercial development of oil, natural gas or minerals.[127] In formulating the precise features of this disclosure mandate, the SEC has been directed to take account of the guidelines, scope and limits in the well-established, international— but merely voluntary—Extractive Industries Transparency Initiative.[128]

The operative notion is that the disclosure will benefit investors by protecting their companies from false publicity asserting below-market, "collusive" contracts and improper dealings with corrupt governments. Averting the costs of such false negative publicity and reducing the danger of asset seizures upon the occurrence of regime changes is obviously in the best interests of investors. Furthermore, the disclosures may simultaneously benefit indigenous populations by facilitating efforts to ascertain whether corporate payments for resources are flowing back into the seller-countries (to fund infrastructure and other civic, capacity building projects) or are being appropriated by powerful, corrupt individuals.

In a similar vein, section 1502 of Dodd-Frank mandates SEC rulemaking to require disclosure by public companies (or subsidiaries or controlling entities of such companies) whose products use "conflict" minerals originating in the Democratic Republic of the Congo (or adjoining countries also subject to ongoing, violent unrest).[129] The impetus for the SEC's rulemaking in this area is its conviction that companies whose products (or manufacturing methods) employ such minerals must exercise and display evidence of their heightened due diligence on the "source and chain of custody of such minerals."[130] Congress has specifically mandated that the report provide evidence of an independent private sector audit demonstrating the company's efforts to ensure that the minerals were obtained absent corporate complicity in indigenous conflicts and violence. Under the Act, the SEC is directed to promulgate rules requiring annual reports to the SEC by such firms, as well as public reporting on the corporations' websites.[131] This provision, quite patently, represents an effort by Congress to promote corporate human rights observance by worldwide affiliates of U.S. listed companies.

Finally, after several high profile (national and international) coal mining disasters in 2010, Congress has endorsed, in section 1503 of the Act, greater disclosure of mining com-

125. 124 Stat. 1376.

126. In the interests of full disclosure, I testified before the House Financial Services Committee in favor of passage of the bill. For this testimony, see Stevelman, *supra* note 1, at 853-58.

127. 124 Stat. at 2220-21.

128. *See Disclosure*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, http://eiti.org/eiti/implementation/disclosure (last visited June 16, 2011).

129. 124 Stat. at 2213-18.

130 *Id.*

131 *See id.*

panies' and their subsidiaries' health and safety records. Such data on safety is to be disclosed in each periodic report filed with the SEC. Congress has asked corporations to report the total number of any mining-related fatalities at the enterprise, as well as more general indicia of the company's safety record.[132]

These new disclosure requirements, which went into effect on August 20, 2010, should also vastly increase the leverage of the Mine Safety and Health Administration (MSHA). They require comprehensive disclosure of MSHA's issuance of notices of violations of health and safety standards, imminent danger orders and the total value of financial fines ("assessments") MSHA has levied for violations. Congress made the section self-effectuating—i.e., it does not depend on subsequent SEC rulemaking in order to become effective.[133] In this article I take a positive view of these disclosure developments. I have long believed that the SEC had been too heavy-handed in mandating, implicitly, that it was "unreasonable" for investors to be concerned about the broader implications of the use of their investment capital by corporations. Nevertheless, opposition to this view is more than trifling. Evidencing alarm at the SEC's deviation from the older, narrow definition of investors' "reasonable" interests, one elite corporate law firm noted in a client advisory that the new mining disclosures are "unbounded by traditional concepts of materiality."[134] Another law firm went so far as to describe the Dodd-Frank Act's new disclosure mandates as "an unfortunate use of the federal securities laws for purposes unrelated to securities transactions and disclosures."[135]

Many corporate law firms may be sounding the alarm to their traditional clients, which is probably astute, tactically, as a manner of garnering business. Yet it's nevertheless true that many companies are increasingly perceiving that employee, customer and investor morale may improve with greater corporate attentiveness to social responsibility, including expanded transparency in this area. Consistent with this objective, the International Standards Organization (ISO) is working to promulgate a more consistent and rigorous body of standards which will foster improved quantification of companies' performance in the social responsibility and human rights areas.

In sum, it's a transitional moment in the development of investors' and citizens' expectations of corporate citizenship, including human rights compliance. Transitional, to be sure—but the trend is solidly in the direction of greater social and hence corporate attentiveness.

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132. *Id.* at 2218–20.
133. *See* 5 U.S.C. § 553(b) (1966).
134. *See Advisory/Dodd-Frank Act: New Disclosure Rules Relating to Extractive Industries*, COVINGTON & BURLEY, L.L.P., (July 22, 2010), http://www.cov.com/ (follow "Financial Regulatory Reform" hyperlink under "Hot Topics"; then search "Advisory/Dodd-Frank Act: New Disclosure Rules Relating to Extractive Industries").
135. *Id.* at 4.

B. Social Action Shareholder Proposals in the Company Proxy

In the United States, shareholder proposals to be included in the corporate proxy statement are the most established, consistent channel for shareholder social activism.[136] This reflects and is consistent with Congress' mandate to the SEC under section 14(a) of the Securities Exchange Act. Under that provision Congress empowered the Commission to consider "the public interest," as well as the protection of investors in promulgating proxy rules.[137] In its earliest incarnation, the SEC's shareholder proposal rule reflected the goal of rendering the corporate proxy statement materially complete. If the company did not include the shareholders' proposals in its proxy statement—at least those proposals it knew would be presented at the live, annual meeting—the rest of the shareholders would not be informed about them (since, for most, attending the live meeting would be prohibitively costly).[138] This was especially pressing because the system contemplated that the proxies (which functionally, though not legally speaking, constituted the votes) were cast prior to the live gathering. Accordingly, originally, the sole reason for exclusion was if the proposal did not constitute "a proper subject for action by shareholders."[139] Of course, circulation of an independent proxy statement by the shareholder-proponent was prohibitively costly in cases where control was not being sought.

Nevertheless, it was not truly until the 1970's that social action shareholder proposals really took off. Indeed, after a famous ruling by the D.C. District Court in *Medical Committee for Human Rights v. SEC*,[140] in 1976, the SEC altered the shareholder proposal rule to provide, expressly, that matters which raised substantial social policy issues could not be excluded from the corporate proxy, even if they touched on some facet of "ordinary" corporate operations traditionally within the sole purview of the board.[141] In these years, Reverend Leon Sullivan used the publicity arising from his submission of shareholder proposals to General Motors to persuade the company to accelerate its progress towards racial and gender diversity in its management ranks.[142] Dr. Sullivan went on, through further proxy activism, to spur the campaign for divestment from apartheid-era South Africa.[143]

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136. For a brief account of the legal history of corporate social responsibility within the American system of corporate governance, see Stevelman, *supra* note 1, at 823–27.
137. Securities Exchange Act of 1934, 15 U.S.C. § 78n (2006).
138. For discussion, see Securities and Exchange Commission v. Transamerica Corp., 67 F.Supp. 326 (D.C.Del. 1946).
139. Securities Exchange Act of 1934, Exchange Act Release No. 3638, Investment Company Act Release No. 735, 1945 WL 27415 (Jan. 3, 1945).
140. Med. Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972). For commentary on the development of shareholder proxy activism through this twenty-year period, see Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879 (1993).
141. Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12999, 1976 WL 160347 (Nov. 22, 1976).
142. For commentary, see Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419 (1971).
143. The connection between Dr. Sullivan's obtaining a presence on GM's board and the genesis of the "Sullivan Proposals" is described in a recent letter to the SEC from the Interfaith Center on Corporate Responsibility [ICCR], which has been perhaps the most active proponent of shareholder social activism through the proxy. *See* Letter from Paul M. Neuhauser, Board of Directors, ICCR, to the SEC (Aug. 17, 2009) (on file with author) (favoring the adoption of amendments to the SEC's rules to facilitate

And social action shareholder proposals of many varieties have flourished ever since. A quick search of the SEC's records (or the LEXIS database) reveals shareholders' proposals dealing with firms' environmental record, safety records pertaining to workers, labor practices, political activities, charitable contributions, executive compensation policies and approach to equality and anti-discrimination efforts. Even where they have not garnered a majority of shareholder votes, so as to become binding, these proposals have often proven "successful" in raising awareness, publicity and thus leverage to catalyze change at large corporations. Many times, the proponents are able, even, to drop their campaign to have the proposal included, because the companies, proactively, voluntarily conform their conduct to the stated objective in the shareholder proposal. In 2006, for example, roughly one-third of the social action proposals submitted were voluntarily withdrawn prior to the circulation of the proxy statement because the shareholder advocates had reached a voluntary resolution of their concerns in consultation with the company's management.[144]

There are an increasing number of shareholder proposals that expressly raise the issue of business and human rights, or raise issues that are encompassed as part of the business and human rights agenda. For example, a group called "Investors Against Genocide" has employed the shareholder proposal process to persuade TIAA-CREF and American Funds to commit to avoiding investment in firms that are implicated in the genocide in Darfur.[145] Investors Against Genocide is presently campaigning to expand this "disinvestment" campaign to virtually all of the major American mutual fund companies and major financial institutions. In this same vein, Fidelity was informed by the SEC that it could not omit a shareholder proposal proposing a ban on investment in corporations doing business in Sudan.[146] Indeed, in this same vein, in 2008, several ethically motivated investor groups agreed to drop their formal proxy proposals when Canadian mining firm Goldcorp, Inc. agreed to conduct a study of its human rights record in Guatemala.[147]

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shareholder director nominations).

> In 1971 the Episcopal Church introduced a shareholder proposal at General Motors requesting that registrant to cease operations in South Africa, a nation then enforcing a very strict apartheid, including total separation by race in the workplace (jobs, pay, drinking fountains etc). The registrant's proxy statement revealed that one of GM's directors, the Rev. Leon Sullivan, had voted against the Board's decision to oppose the shareholder proposal. At the annual meeting Rev. Sullivan came down from the dais and spoke in favor of the shareholder proposal. The upshot of the 'conflict' on GM's Board was the creation, by a coalition led by General Motors but consisting of almost all of the major US corporations operating in South Africa, of the 'Sullivan Principles,' a code of conduct to abolish apartheid in their South African workplaces. Thus, the need for GM's Board to adopt a *modus vivendi* between the conflicting views on the Board brought real progress not only at GM, but at virtually all American companies operating in South Africa.

Id. For further commentary on the shareholder proposal system as a vehicle for enhanced social transparency and social accountability on behalf of public companies, see Cynthia A. Williams, *The Securities Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999).

144. CAROLYN MATHIASEN & HEIDI WELSH, SOCIAL POLICY SHAREHOLDER RESOLUTIONS IN 2006: ISSUES, VOTES AND VIEWS OF INSTITUTIONAL INVESTORS (2007).
145. *See About Us*, INVESTORS AGAINST GENOCIDE, http://investorsagainstgenocide.net/aboutus (last visited Oct. 26, 2010).
146. Fidelity Aberdeen Street Trust, SEC No-Action Letter, 2008 WL 223122 (Jan. 22, 2008).
147. *See* HRIA—GUATEMALA, http://hria-guatemala.com (last visited Oct. 26, 2010) (describing the study completed by Goldcorp). For a brief summary of Ethical Fund's accord with Goldcorp which led to the study, see Press Release, Ethical Funds, Ethical Funds announces support for human rights assess-

Shareholder proposals seeking to raise corporate awareness of labor abuses occurring along the company's supply chain have been presented to corporations including Gap, Mattel, Sears, Walt Disney, McDonald's and Costco.[148] These shareholder proposals have encouraged companies to adopt the core conventions of the International Labor Organization to ensure against forced labor and child labor. In addition, through the use of shareholder proposals, companies in the mining sector have been made to feel increased pressure to raise their standards of safety and environmental compliance, which complements the new Dodd-Frank disclosure standards described above.

Finally, shareholder proposals have been used to demand greater transparency and accountability about corporations' political (and purportedly philanthropic) activities—including politically motivated donations to think tanks and foundations associated with politicians.[149] Disclosure arising from traditional campaign finance and lobbying laws is deficient in providing an adequately clear and comprehensive account of such corporate activities. For this reason, activist shareholders have resorted to asking companies directly to account for their political donations and "charitable" gifts.[150] Shareholder proposals requiring disclosure of corporate political activity will be particularly important in the wake of the Supreme Court's *Citizens United* decision, which expanded corporations' power to expend funds in a variety of political venues.[151] The push for greater transparency in regard to businesses' lobbying and campaign finance expenditures is part of the broader concern for advancing the rule of law and democratic values—both being essential facets of the human rights agenda.

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ment of Goldcorp's Marlin Mine (May 17, 2010), https://www.ethicalfunds.com/en/Investor/OurStory/InTheNews/EthicalFundsintheNews/Pages/17052010e.aspx.

148. *See, e.g.*, Costco Wholesale Corp., SEC No-Action Letter, 2004 WL 2587881 (Oct. 26, 2004); The Gap Inc., SEC No-Action Letter, 2002 WL 562183 (Mar. 13, 2002). For citation and discussion, see Adam Kanzer, *The Use of Shareholder Proposals to Address Corporate Human Rights Performance*, *in* FINANCE FOR A BETTER WORLD 71 (Henri-Claude de Bettignies & François Lépineux eds., 2009).

149. Such shareholder proposals can be excluded from the corporate proxy for a variety or reasons, including, *inter alia*: (i) where they are deemed not to be a subject for shareholder but rather for board decision-making; (ii) where they are vague; and (iii) where they reflect a "personal grievance" on the part of the proponent. Shareholder Proposals, 17 C.F.R. § 240.14a-8 (2010). *See also* Pacific Gas & Electric Corp., SEC No-Action Letter, 2010 WL 128062 (Mar. 10, 2010) (allowing company to exclude proposal requesting semi-annual report of company's charitable contributions and policies governing them on basis that request was "substantially implemented" by the company); Halliburton Co., SEC No-Action Letter, 2010 WL 5149217 (Jan. 21, 2010) (concluding that company had no proper basis to exclude request for disclosure of company's political contributions); Caremark Rx, Inc., SEC No-Action Letter, 2005 WL 562506 (refusing to concur with the corporations reasons for excluding request for report on company's charitable contributions).

150. For a discussion of the disclosure void relevant to politically motivated corporate "philanthropic" donations to politically active foundations, think tanks and litigation boutiques, see Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579 (1997); Nancy Knauer, *Reinventing Government: The Promise of Institutional Choice and Government Created Charitable Organizations*, 41 N.Y.L. SCH. L. REV. 945, 983 (1997). On the use of seemingly philanthropic "conduits" to mask corporate political activities, see *id.*

151. Citizens United v. FEC, --- U.S. ---, 130 S. Ct. 876 (2010).

C. The Anti-Bribery Provisions of the Securities Exchange Act

Bribery and other forms of corruption involving corporations and foreign governments are obviously subversive of human rights. Consistent with this concern, the United Kingdom recently enacted the toughest modern anti-corporate bribery laws extant[152]—laws that are far more stringent than the Foreign Corrupt Practices Act.[153]

The Foreign Corrupt Practices Act (FCPA) was enacted in 1977 after a series of scandals uncovered that American companies had been paying bribes to foreign governments to win contracts.[154] The FCPA was enacted as part of the Securities Act of 1934, along with more stringent books and record-keeping provisions for public companies.[155] The nexus was that companies making bribes and other unlawful payments were also creating slush funds and other false records, inconsistent with the securities laws' disclosure requirements. This is an early example of how disclosure requirements of significance to investors were also intended expressly to influence substantive corporate conduct in the direction of greater honesty and integrity.

Over the past five years, there has also been an intensification in the number and seriousness of FCPA enforcement actions brought by the SEC in civil cases, and by the Department of Justice for alleged criminal violations. Indeed, FCPA enforcement in the past five years has set several new records.[156] For example, in April 2010, the DOJ announced that the German automobile manufacturer Daimler, A.G. agreed to pay $185 million in criminal and civil penalties in settlement of FCPA charges.[157] Also in April 2010, a Virginia federal court meted out a seven year jail sentence to an American, acting on behalf of a consulting company, who paid bribes to the Panamanian government for purposes of obtaining a twenty-year no-bid contract.[158] This enhanced scrutiny and enforcement is moti-

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152. On April 8, 2010, the U.K. Parliament passed significant and long-pending legislation reforming Britain's laws on criminalizing corrupt payments to government officials. Initially expected to come into full force April 2010, but delayed until July 2011,, the Bribery Act of 2010 replaces fragmented and difficult-to-prosecute, common law bribery offenses and statutory offenses that date back to the early 1900's. The reform coincides with significantly increased enforcement efforts by the U.K. Serious Fraud Office and responds to international criticisms that U.K. legislation lagged behind OECD Anti-Bribery Convention implementation legislation and the U.S. Foreign Corrupt Practices Act. For an overview of the new U.K. law, see Gary DiBianco & Penny Madden, *U.K. Parliament Enacts Landmark Anti-Bribery Law*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, L.L.P. & ASSOCIATES (Apr. 15, 2010), http://www.skadden.com/Index.cfm?contentID=51&itemID=2045.
153. Prohibited Foreign Trade Practices by Issuers, 15 U.S.C. § 78dd-1 (1998).
154. For a landmark case (decided after the enactment of the FCPA) which allowed a special litigation committee to quash a shareholder derivative suit against a board of directors and senior officers where the company had engaged in pattern of making unlawful payments to foreign governments, prior to the enactment of the FCPA, see Auerbach v. Bennett, 393 N.E.2d 994 (N.Y. 1979).
155. 15 U.S.C. § 78m(a) (2002) (prior to 2010 amendment).
156. *See* Lanny A. Breuer, Assistant Attorney Gen., U.S. Dep't of Justice, Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act, in Wash. D.C. (Nov. 17, 2009), http://www.justice.gov./criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf.
157. As part of the settlement, former FBI Director Louis Freeh will serve as the company's independent compliance monitor for three years. Richard L. Cassin, *Freeh Named Daimler Monitor*, FCPA BLOG (Mar. 25, 2010, 11:48 AM), http://www.fcpablog.com/blog/2010/3/25/freeh-named-daimler-monitor.html.
158. The official announcement of the verdict and findings is presented by the DOJ. Press Release, Dep't of

vated by anti-corruption and anti-money laundering objectives, and also by provisions of the USA PATRIOT Act, which targets eradicating the flow of funds to governments possibly supporting terrorist organizations.[159] The stepped-up anti-bribery legislation enacted by the United Kingdom was mentioned above, but this renewed commitment to expanding anti-corruption laws and enforcement efforts is evidenced in many acts of the European Union, United Nations and international treaties as well.[160] Here in the United States, too, there are ongoing initiatives dedicated to raising the level of corporate compliance with the FCPA. In sum, there is a broad and deep consensus that a strong stance against business corruption is essential to building a law-abiding, human rights-respecting global order.

VII. Conclusion

There are powerful reasons to be skeptical, if not cynical, about efforts to raise the level of business compliance with human rights—that is, efforts to use law, policy and public pressure to transform corporate cultures to rights-respecting ones, rather than rights-exploiting ones. There is no embarrassment in expecting the worst and being proven correct, or being passive in the face of complex problems. Business' efforts to promote respect for human rights may be lambasted as public relations, or as ineffectual, or "inefficient." Governments' efforts may be criticized on the same basis. However, when pressure mounts to hold businesses that profit from global operations to account for their treatment of vulnerable populations and scarce natural resources mounts at several fronts—simultaneously and with increasing force—from governments and business leaders themselves, from groups representing employees and investors, concerned citizens and students—attention must be paid.

Change happens—momentous, transformational, unlikely socio-legal change. Examples include the end of segregation in the United States, the advance of women's rights, the end of Apartheid in South Africa, and the fall of the Berlin Wall. None of these changes seemed

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Justice, Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials (Apr. 19, 2010), http://www.justice.gov/opa/pr/2010/April/10-crm-442.html.

159. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

160. *See, e.g.*, United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XVIII-14&chapter=18&lang=en.; European Union Convention on the Protection of European Communities' Financial Interests, 1995 O.J. (C 316) 49, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41995A1127(03):EN:HTML; Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 (1996); Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (1998), *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf; African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5 (2004). Policies instituted by the World Bank and the IMF allow for the investigation of corruption committed by companies and governments. *See, e.g.*, *WBI Governance & Anti-Corruption*, THE WORLD BANK, www.worldbank.org/wbi/governance (last visited Feb. 2011); *FactSheet: The IMF and Good Governance*, INTERNATIONAL MONETARY FUND, http://www.imf.org/external/np/exr/facts/gov.htm (last visited Feb. 2011). For commentary and statistics, see *Recent Trends and Patterns of FCPA Enforcement*, SHEARMAN & STERLING, L.L.P. (Feb. 13, 2008), http://www.shearman.com/files/upload/LT-021308-Recent-Trends-and-Patterns-in-FCPA-Enforcement-February-2008.pdf.

inevitable. Nor were their causes singular. On account of the technological innovations that have enabled information gathering and real time reporting on the Web, human rights harms by businesses will not remain invisible. And in a condition of visibility, the voices calling for greater respect on the part of business for human rights will be many.

The Human Rights Council has done well in authorizing John Ruggie to sponsor several years of international consultations with leaders in government, business and the human rights community. If they follow the "Protect, Respect, Remedy" framework with seriousness of purpose, businesses may be able to get out in front of the tumultuous change their human rights abuses and disregard for "externalities" might otherwise spur. Then, instead of violent confrontations and anti-business regulation, we might see gradual, international progress towards a more humane and also more prosperous world where business and human rights concerns were not always viewed as being at odds.

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