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SOFT LAW, HARD MARKETS: COMPETITIVE SELF-INTEREST AND THE EMERGENCE OF HUMAN RIGHTS RESPONSIBILITIES FOR MULTINATIONAL CORPORATIONS

Ralph G. Steinhardt*

INTRODUCTION

Do multinational corporations have enforceable obligations to protect international human rights? If they do, two principles lying at the foundations of two traditionally separate bodies of law—corporate law and international human rights law—must be reconceived and reconciled. In corporate law, the bedrock principle of shareholder primacy requires a corporation’s directors and officers to maximize the return on their shareholders’ investment.¹ One dominant critique of the corporate responsibility initiative suggests that it subverts shareholder primacy by requiring management to develop an expertise in human rights law and exercise *de facto* control over abuses generally committed by governments, raising costs without raising revenues.² In international human rights law, the bedrock principle of state responsibility traditionally places a comprehensive obligation on governments to protect human rights and either imposes no obligations on non-state actors like corporations or imposes obligations only in extraordinary circumstances defined by international agreement. From that perspective, the corporate human

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1. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.”). See also PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 rep. note 1 (Am. Law Inst. 1994) (“Some cases, mostly arising before the turn of the century, applied the concept reflected in *Dodge v. Ford*, a strict notion of *ultra vires*, or both, to strictly preclude the utilization of corporate resources, either by way of donation or otherwise, for humanitarian, educational, philanthropic, or public welfare activities.”).

2. See, e.g., Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (Univ. of Chi. Press 1982) (1962) (“Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible. This is a fundamentally subversive doctrine.”).

rights initiative dilutes the “state primacy” principle and poses a controversial distraction from the already daunting task of getting government actors to take human rights law seriously.

In contemporary corporate and international law, the doctrines of shareholder supremacy³ and state responsibility⁴ have lost their simple rigidity, but a puzzle persists: in what circumstances—if any—may civil or criminal liability be imposed on a company for violating human rights standards, and how—if at all—will those obligations be enforced?

I have previously argued that the emerging standards of corporate responsibility rest on four separate but compatible regimes of doctrine and practice, each with its own characteristic modes of enforcement:⁵ (i) *a market-based regime*,⁶ or “human rights entrepreneurialism,” under which corporations compete for consumers and investors by conforming to international human rights standards; (ii) *a regime of domestic regulation*,⁷ exemplified by sanctions or boycott legislation, which channels

3. The shareholder primacy principle, insofar as it reflected an assumption that corporate altruism is inherently unprofitable, has been qualified considerably:

(a) . . . a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.

(b) Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business: (1) is obliged, to the same extent as a natural person, to act within the boundaries set by law; (2) may take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business, and (3) may devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.

PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, *supra* note 1, at 55. A contemporary, progressive stream of corporate law scholarship rests on the “concern about the harm to nonshareholders that can occur as a result of managerial adherence to the shareholder primacy principle. Efforts to maximize shareholder wealth are often costly to nonshareholders and often come at the expense of particular nonshareholder constituent groups.” David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, in *PROGRESSIVE CORPORATE LAW* 1, 1 (Lawrence Mitchell ed., Westview Press 1995).

4. For at least twenty years, governments have had the obligation, especially under the regional human rights systems, to protect against human rights abuses by non-state actors. See generally ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 347–436 (Oxford Univ. Press 2006).

5. Ralph G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria*, in *NON-STATE ACTORS AND HUMAN RIGHTS* 177–226 (Philip Alston ed., Oxford Univ. Press 2005). Part III of this Article replicates this prior work.

6. *Id.* at 180.

7. *Id.* at 187.

corporate behavior to advance a rights-based foreign policy; (iii) *a regime of civil liability*,⁸ enforced through private lawsuits in domestic courts and exemplified in the United States by actions under the Alien Tort Statute (“ATS”),⁹ such as the Holocaust litigation¹⁰ and the *Unocal* case;¹¹ and (iv) *a regime of international regulation and quasi-regulation*¹² by both intergovernmental organizations and non-governmental organizations, based on a variety of international instruments of varying formality and legal status, in order to minimize the role that multinational corporations play in the violation of human rights.

These four regimes do not preclude the evolution of other approaches to corporate responsibility,¹³ nor do they operate independently of one another: developments in one regime have direct effects in another. Nor is there any argument that the law of corporate human rights responsibility is fully formed and operable in any of these four areas. But the coherence of these developments with one another suggests that contemporary analysts—whether corporate counsel or human rights advocates, not to

8. *Id.* at 194.

9. Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

10. *See, e.g.*, *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) (descendants of Jewish customers of French financial institutions sued for damages, alleging conspiracy to expropriate assets and failure to disgorge these assets to their rightful owners post-Holocaust); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999) (class action brought against German corporations, seeking damages for enforced labor during the Holocaust and for oppressive living and working conditions).

11. *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003).

12. Steinhardt, *supra* note 5, at 202.

13. It is conceivable for example that a regime of corporate *criminal* responsibility is in prospect, as several papers in this Symposium suggest. Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT'L L. 955 (2008); Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 BROOK. J. INT'L L. 899 (2008). *See also* Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 22, *delivered to the General Assembly*, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007). In particular, the Special Representative noted the following:

[C]orporate responsibility is being shaped through the interplay of two developments: one is the expansion and refinement of individual responsibility by the international *ad hoc* criminal tribunals and the . . . Statute [of the International Criminal Court]; the other is the extension of responsibility for international crimes to corporations under domestic law. The complex interaction between the two is creating an expanding web of potential corporate liability for international crimes, imposed through national courts.

Id.

mention scholars of international law and corporate law—should not ignore or minimize this recent history.

Other participants in this Symposium have focused on the power and the limits of the three regimes that are in principle the most coercive: domestic regulation, civil liability, and international regulation.¹⁴ In this Article, I argue that the *least* coercive regime—the free and competitive marketplace—also serves as a means of enforcing the emerging standards of corporate responsibility, although my conception of enforcement may initially appeal more to devotees of Adam Smith than to lawyers.¹⁵ The argument is that the law protecting the freedom of competition allows companies to compete with one another by implementing human rights policies and by adopting industry-wide statements of best human rights practices. History suggests that these best practices, beginning perhaps as voluntary or aspirational guidelines, can assume a more authoritative cast over time and become the best available measure of a company's due diligence and fair dealing.¹⁶ The evolution may be gradual and atomistic (e.g., through individual civil claims against non-complying companies for unfair business practices or false advertising), or it may be coordinated through legislation with general application (e.g., through “comply or explain” directives designed to increase market transparency by maximizing information to consumers, investors, and other businesses).¹⁷

The modes by which law emerges from the conduct of corporations in the marketplace may vary, the timing may not be linear or uniform, and progress—however defined—may not always be discernible. However, history offers a tolerable parallel in the medieval and renaissance *lex mercatoria*, the law merchant, which originated in the long-term, mutual, and sophisticated self-interest of the entrepreneurial class and which gradually became codified in the commercial law of states, ultimately emerging as a form of contemporary transnational law. As this Article

14. Nicola M.C.P. Jägers & Marie-José van der Heijden, *Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands*, 33 BROOK. J. INT'L L. 833 (2008); Anthony J. Sebok, *Taking Tort Law Seriously in the Alien Tort Statute*, 33 BROOK. J. INT'L L. 871 (2008).

15. See *infra* note 61.

16. See *infra* Part III.

17. The “comply or explain” principle has become a feature of Europe's approach to corporate governance. The governance codes in the various member states articulate norms or recommendations that may not be mandatory, but companies must either comply with these norms or explain publicly why they are not complying with them. See Statement of the European Corporate Governance Forum on the Comply-or-Explain Principle (Feb. 22, 2006), available at http://ec.europa.eu/internal_market/company/docs/ecgforum/ecgf-comply-explain_en.pdf (last visited May 31, 2008).

will illustrate, commercial law has characteristically developed from the bottom up, following a distinctive normative trajectory, evolving from competitive practices into commercial customs and expectations, then transforming into the soft law netherworld of principles or model contracts, and finally taking shape as law. In short, norms that corporations themselves consider to be in their competitive self-interest may ratchet towards normativity and become more recognizably law-like.

The emerging norms of corporate responsibility in matters of human rights can and should be understood in light of this ancient dynamic: substantively and chronologically, the law merchant followed mercantile custom rather than creating, defining, coercing, displacing, or preempting it. From this perspective, the voluntary or aspirational undertakings of entrepreneurs are not only consistent with the emergence of legal obligations; they propel and refine them. In addition, appreciating this historical trajectory has certain practical consequences for the contemporary practice of law. Quite apart from understanding how legal obligations evolve from business cultures, the *lex mercatoria* paradigm of corporate human rights responsibility suggests that the distinctions that structure the current debate—between, for example, voluntary aspirations and mandatory obligations, between state and non-state actors, or between public international law and private international law—radically oversimplify the issues.

The argument proceeds in three stages. Part I advances a modest empirical claim that multinational corporations have increasingly declared their commitment to human rights standards (or some substantial subset of them) and that they increasingly compete for customers and investors in this mode. Part II makes a normative claim that the justifications for this “human rights entrepreneurialism” are multiple and mutually reinforcing. Part III advances the analytical claim that links the emerging rules of a corporation’s best human rights practice to the ancient *lex mercatoria*.

I. THE EMPIRICAL CLAIM: HUMAN RIGHTS ENTREPRENEURIALISM

Many multinational corporations now voluntarily proclaim some commitment to human rights, even if the record of their compliance is mixed. These unilateral and voluntary commitments take various forms, including corporate codes of conduct, which articulate and standardize the company’s business practices. The codification initiative began in the anti-*apartheid*¹⁸ and pro-environment¹⁹ movements, but has grown to

18. The Sullivan Principles, first articulated in 1977 and ultimately incorporated by President Reagan into Executive Order No. 12,532, 50 Fed. Reg. 36861 (Sept. 9, 1985),

address a variety of human rights concerns, like security operations, corruption, freedom of association, discrimination, child labor, and forced labor of any sort. A handful of firms—especially petroleum companies, the largest corporations in the world—have even pegged corporate policy to the Universal Declaration of Human Rights,²⁰ suggesting that the companies were aligning themselves with traditionally governmental obligations that go well beyond the rights of workers.²¹

amounted to a voluntary code of conduct for companies doing business in South Africa during the *apartheid* regime. The principles required certain human rights practices, like integrated workplaces, fair employment, and affirmative action. They also gave companies an objective, common, and auditable standard under which their presence in South Africa might be defended in the competition for a good corporate image. In 1984, with some 125 signatories, the principles were expanded to require companies to take more aggressive action against *apartheid*, tantamount to corporate civil disobedience. The principles also provided a benchmark for the managers of municipal pension funds and university endowments, and served as the model for the MacBride Principles for companies doing business in Northern Ireland. By 1987, with only glacial change in South Africa, even the drafters of the Sullivan Principles considered them a failure and urged corporations to withdraw from South Africa altogether.

19. In 1989, the Coalition for Environmentally Responsible Economies (“CERES”) adopted the Valdez Principles, which required signatory companies to adopt a variety of green practices to protect the biosphere by using renewable resources, disposing of wastes properly, disclosing environmental risks, and submitting to an annual environmental audit. Coalition for Environmentally Responsible Economies [C.E.R.E.S.] Principles, <http://www.ceres.org/NETCOMMUNITY/Page.aspx?pid=416&srcid=811> (last visited May 18, 2008).

20. The Universal Declaration of Human Rights is an authoritative articulation of governments’ human rights responsibilities under the United Nations Charter. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. Doc A/810 (Dec. 10, 1948). See also INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 143–64 (Richard Lillich et al. eds., Aspen Publishers 2006).

21. See, e.g., Amerada Hess Corporation, Corporate Responsibility Policy (2002), <http://www.hess.com/downloads/documents/pdf/csrpolicy.pdf>; Chevron Corporation, Human Rights Statement (2006), <http://www.chevron.com/documents/pdf/chevronhumanrightsstatement.pdf>. See also The Body Shop, Human Rights Principles (2006), <http://www.thebodyshopinternational.com/NR/rdonlyres/023A7009-1E1A-4305-9BA9-F1845F1EA038/0/Humanrightsprinciples.pdf>. This instrument states:

As a global business, we respect local, cultural and political differences, but will always insist that our business activities adhere to basic human rights, as enshrined in the Universal Declaration for Human Rights. We will assess all our business activities to determine where we have direct or indirect impacts, ensure compliance with human rights legislation and strive to have a positive impact on our stakeholders and on society at large. We will use objectively measurable standards that reflect internationally recognised human rights standards and conventions.

Id. at 1.

These voluntary, unilateral codes of conduct characteristically address the business-to-business relationships of a company with its suppliers and vendors. For example, Levis Strauss & Co. (“LS & Co.”), in its Global Sourcing and Operating Guidelines, declared that it “favor[s] business partners who share our commitment to contribute to improving community conditions” and it “require[s] that [contractors] implement a corrective action plan within a specified time period” if “a contractor is not complying with [LS & Co.’s Business Partner Terms of Engagement].”²² Moreover, in its Country Assessment Guidelines, LS & Co. articulated the criteria it would apply to determine whether doing business in a particular country was harming its competitiveness and profitability, including whether the human rights environment would prevent the company from “conduct[ing] business activities in a manner that is consistent with [LS & Co.’s] Global Sourcing Guidelines and other company policies.”²³

Equally prominent are rights-sensitive certification and branding initiatives in a variety of industries that purport to offer consumers some assurance that the products they buy were not produced in ways that violate the rights of workers or broader communities. When, for example, the World Diamond Council realized that the world market for diamonds was undermined by consumer fears of conflict diamonds, it developed the Kimberley Process Certification Scheme (“Kimberley Process”), a public-private partnership for developing an auditable certification protocol to assure buyers that profits from the sale of gems would not support governments or paramilitary groups that violate the human rights of civilians in conflict zones.²⁴ By design, the Kimberley Process served the specific commercial goal of “protect[ing] the legitimate diamond indus-

22. Levi Strauss & Co., Global Sourcing and Operating Guidelines, <http://www.levistrauss.com/Downloads/GSOG.pdf> (last visited May 18, 2008).

23. *Id.*

24. World Diamond Council, Kimberley Process Certification Scheme, <http://www.worlddiamondcouncil.com> (follow “Resolutions” hyperlink; then follow “Kimberley Process Certification Scheme” hyperlink) (last visited May 18, 2008). The Kimberley Process Certification Scheme has been specifically approved by the United Nations in recognition that it:

[C]an help to ensure the effective implementation of relevant resolutions of the Security Council containing sanctions on the trade in conflict diamonds and act as a mechanism for the prevention of future conflicts, and calls for the full implementation of existing Council measures targeting the illicit trade in rough diamonds, particularly conflict diamonds which play a role in fuelling conflict.

G.A. Res. 62/11, ¶ 2, U.N. Doc. A/62/L.16 (Nov. 21, 2007).

try,”²⁵ and now covers the overwhelming bulk of the world’s trade in diamonds.²⁶ Similarly, coffee retailers, like Starbucks, routinely offer “fair trade” coffees through the Coffee and Farmer Equity Practices (“C.A.F.E.”) program, guaranteeing on every cup that the production and marketing of its products did not harm workers or the environment.²⁷ Like the Kimberley Process, the C.A.F.E program may target the retail consumer, but it also regulates business-to-business relationships in the supply chain. The apparel industry has also adopted various workplace codes of conduct and monitoring protocols to structure a business relationship in order to assure customers that sweatshop practices are reduced or stopped altogether.²⁸ Chiquita Brands International sought to market an “Ethical Banana” by adopting an auditable social and environmental standard for its farms in Latin America, under the Better Banana Project (“BBP”) of the Rainforest Alliance.²⁹ Similarly, in the extractive industry, where private security operations have frequently led to human rights violations, a unique partnership of government representatives, corporate officers, and human rights activists has developed a voluntary system to minimize the risk of violations.³⁰

There have also been efforts to define a common measure of corporate compliance, to standardize the unilateral codes of conduct, and to offer the consumer a readily identifiable mark at the point of purchase. The

25. *International Trade: Significant Challenges Remain in Deterring Trade in Conflict Diamonds, Testimony Before the Subcommittee on Oversight of Government Management, Restructuring and the District of Columbia, Committee on Governmental Affairs, U.S. Senate*, GAO-02-425T, at 6 (2002) (statement of Loren Yager, Director, International Affairs and Trade), available at <http://hsgac.senate.gov/021302yager.pdf>.

26. For more information on the ongoing successes of the Kimberley Process, see <http://www.kimberleyprocess.com> (last visited Apr. 16, 2008).

27. For more information about the C.A.F.E. practices, see SCS Collaboration with Starbucks Coffee to Create the C.A.F.E. Practices Program, <http://www.scs-certified.com/csrpurchasing/starbucks.html> (last visited May 18, 2008).

28. See, e.g., The Fair Labor Ass’n, Workplace Code of Conduct, <http://www.fairlabor.org/var/uploads/File/The%20Fair%20Labor%20Association%20Workplace%20Code%20of%20Conduct.pdf> (last visited May 18, 2008); The Fair Labor Association, Principles of Monitoring, http://www.fairlabor.org/docs/FLA_PRINCIPLES_OF_MONITORING.pdf (last visited May 18, 2008); The Clean Clothes Campaign, Code of Labour Practices for the Apparel Industry Including Sportswear, <http://www.cleanclothes.org/codes/index.htm> (last visited May 18, 2008).

29. Rainforest Alliance, *Profiles in Sustainable Agriculture: Chiquita Reaps a Better Banana* (2005), http://www.rainforest-alliance.org/programs/profiles/documents/chiquita_profile.pdf; Chiquita Banana, *Better Banana Project: Working for the Environment* (2007), <http://www.chiquita.com/discover/owbetter.asp>.

30. See Bennett Freeman, Maria B. Pica & Christopher N. Camponovo, *A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 HASTINGS INT’L & COMP. L. REV. 423 (2001).

most developed of these efforts is Social Accountability (“SA”) 8000 (“SA 8000”), a voluntary protocol under which independent auditors certify that a company complies with human rights standards derived from, *inter alia*, International Labour Organisation conventions, the Universal Declaration on Human Rights, and the U.N. Convention on the Rights of the Child.³¹ Nine specific areas are identified in the SA 8000 standard: child labor, forced labor, health and safety, freedom of association, freedom from discrimination, disciplinary practices, work hours, compensation, and management systems to assure compliance.³² Like other auditable standards, including ISO 9000 on quality control and ISO 14001 on environmental management, SA 8000 and its cognates³³ allow certified companies to differentiate themselves from their uncertified competitors.³⁴ Since its introduction, SA 8000 has come to cover hundreds of thousands of workers and thousands of factories in scores of countries, altering the essential commercial relationship between a company and its suppliers.

Human rights concerns are also present in the investment market: over the last decade, individual and institutional investors have adopted social or ethical criteria to screen their initial investments and to guide their votes as stockholders once the investment is made. The typical target of shareholder activism has been sustainable business,³⁵ of which human rights responsibility is one component. The dominant investment houses have also marketed ethical-investment mutual funds, and the major stock markets have developed social indices to guide investors with human

31. Social Accountability International, Overview of SA 8000, <http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageID=473> (last visited June 1, 2008).

32. *Id.*

33. *See, e.g.*, European Union [E.U.] Eco-Label Scheme, http://ec.europa.eu/environment/ecolabel/whats_eco/ov_concept_en.htm (last visited May 18, 2008); Fairtrade Foundation, http://www.fairtrade.org.uk/what_is_fairtrade/fairtrade_foundation.aspx (last visited May 18, 2008); G3 Sustainability Reporting Guidelines, http://www.globalreporting.org/NR/rdonlyres/ED9E9B36-AB54-4DE1-BFF25F735235CA44/0/G3_GuidelinesENU.pdf (last visited May 18, 2008).

34. Problems with implementing the SA 8000 persist, and the system may rest on the fiction of quantifying the unquantifiable (and auditing it) or finding a consumer with perfect information who is not driven exclusively by considerations of price. *See generally* Li-Wen Lin, *Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China*, 15 CARDOZO J. INT’L & COMP. L. 321 (2007).

35. Tim Dickson, *The Financial Case for Behaving Responsibly*, FIN. TIMES, Aug. 19, 2002, at 5 (defining sustainable business as behavior “that enhances long-term shareholder value by addressing the needs of all relevant stakeholders and adding economic, environmental, and social value through its core business functions”). *See also* Louisa Wah, *Treading the Sacred Ground*, 87 MGMT. REV. 18–22 (1998).

rights concerns.³⁶ An entire ethical consulting industry has also arisen in order to assist companies manage risk by adhering to the norms of corporate citizenship.

These examples could be multiplied, but even this overview suggests that companies routinely perceive a competitive advantage in offering rights-sensitive product lines and branding, even if limits on the effectiveness of these initiatives remain clear.³⁷ Indeed, the proliferation of these commitments can be traced to the competitive demands placed on a corporation, including the need to attract consumers and investors. However, it also rests on the company's need to develop sustainable business relationships in the marketplace. Business groups, like the Chamber of Commerce and the Business Leaders Initiative on Human Rights, regularly report on the best practices of their members across industrial sectors, in dozens of countries, implicating a broad range of human rights concerns.³⁸ The commercial advantages of human rights entrepreneurialism are clearly not lost on successful competitors.

II. THE NORMATIVE CLAIM: TOWARDS A UNIFIED PRINCIPLE OF JUSTIFICATION

It is one thing to observe that multinational corporations have increasingly taken on some public commitment to the protection of human rights. It is quite another to argue that corporations *should* take these commitments on, especially when governments continue to bear primary responsibility at law for the protection of individuals' human rights. After all, the multinational corporation may be better conceived as a bearer of rights than as a bearer of obligations in this arena. In this Part, after identifying the three principal categories of justifications—consequentialist, deontological, and positivist—I argue that the theoretic-

36. See, e.g., Dow Jones STOXX Sustainability Index, <http://www.sustainability-indexes.com> (last visited May 18, 2008); FTSE4Good Index, <http://www.ftse4good.com> (last visited May 18, 2008). These indices are only partial indicators of human rights practices because they include only particular areas of corporate responsibility, some of which have little to do with human rights.

37. See generally Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Standards Through Private Initiatives*, 30 LAW & POL'Y INT'L BUS. 111 (1998).

38. Examples of such reports produced by the U.S. Chamber of Commerce and the Business Leaders Initiative on Human Rights can be found on their respective Web sites. U.S. Chamber of Commerce: Reports and Studies, <http://www.uschamber.com/publications/reports/default> (last visited May 18, 2008); Business Leaders Initiative on Human Rights, Reports and Tools, <http://www.blihr.org/> (follow "Reports & Tools" hyperlink) (last visited May 18, 2008).

cal rationales for accepting these obligations (or having them imposed) are multiple and reinforcing.

Consequentialism. A purely consequentialist justification suggests that it is in the long-term self-interest of the corporation to bring its practices into conformity with at least some subset of human rights standards. The orthodox rationale for consequentialism is that a company suffers in capital markets if its shares lose value in an increasingly socially-conscious investment environment, and it suffers in the retail market via consumer choices at the point of purchase (including boycotts). With the rise of ATS litigation against corporate defendants, it may increasingly suffer in a courtroom. The dominant rationale offered by corporations that have voluntarily adopted human rights policies is the market reliability rationale: to the extent that respect for human rights correlates with a commitment to the rule of law, the corporation should choose the more ordered, and therefore more profitable, environment. The commercial case for corporate human rights responsibility compliance has been articulated by the U.N. High Commissioner for Human Rights:

- (1) [Ensuring] Compliance with both Local and International Laws
- (2) Satisfying Consumer Concerns
- (3) Promoting the Rule of Law
- (4) Building Community Goodwill
- (5) [Improving] Supply Chain Management
- (6) Enhancing Risk Management
- (7) Keeping Markets Open
- (8) Increasing Worker Productivity and Retention
- (9) Applying Corporate Values[] . . . in ways that [maintain] the faith of employees and external stakeholders in company integrity.³⁹

Market players confirm this dynamic. For example, the former President of the American Chamber of Commerce in Hong Kong observed:

[W]hile it might not always be the case that trade and business are good for human rights, it most certainly is the case that a good human rights environment is always good for business. Businesses are acting in their

39. U.N. High Commission for Human Rights' Presentation for the Annual Meeting of the World Economic Forum, Davos, Switz., Jan. 2000, *Business and Human Rights: A Progress Report*, Part I, available at <http://www.unhchr.ch/business.htm#11>.

own self-interest when they actively promote respect for human rights in countries where they operate.⁴⁰

Deontological approaches. A second principle of justification is classically deontological and grounded in the natural law conception of rights.⁴¹ In this view, human beings have rights simply by virtue of being human, regardless of whether these rights have been articulated in positive law or not, and no one (natural or juridical) is immune from the obligation to respect and protect those rights. From that perspective, the burden of persuasion rests on those who would exclude corporations from the human rights initiative, rather than on those who would include them. The carve-out from human rights obligations for corporations becomes especially problematic as more government operations—like security, the conduct of armed conflict, and the running of prisons—are privatized. Governments cannot privatize their way out of international legal obligations to protect human rights. The delegation of public authority to a nominally private actor cannot relieve the government of its international legal obligations. Entities, both public and private, should be held accountable if human rights are abused in the exercise of government functions, regardless of who—or what—is performing them.

Positivism. A third rationale is essentially positivistic, as that term of art is understood in international law (referring to the practice of states, including the adoption of treaties).⁴² International law has recognized

40. John Kamm, *The Role of Businesses in Promoting Respect for Human Rights in China*, INT'L BUS. ETHICS REV., Nov. 1, 1997, available at <http://www.business-ethics.org/newsdetail.asp?newsid=30>. Experience over the past decade confirms that the market reliability rationale (and similarly consequentialist arguments) continues to be a dominant public justification for bringing human rights concerns into the corporate decision-making process. E.g., *Beyond the "Genocide Olympics"*, THE ECONOMIST, Apr. 24, 2008, available at http://www.economist.com/business/PrinterFriendly.cfm?story_id=11090045 (last visited May 30, 2008) ("What is striking today is how often activists, big firms and governments are now in agreement about the importance of human rights, and are working together to advance them."). See generally DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* (Brookings Institution Press 2005).

41. See generally PATRICK HAYDEN, *THE PHILOSOPHY OF HUMAN RIGHTS* 3–10 (Paragon House 2001).

42. Since the time of Grotius, the traditional basis for international legal obligations has been the consent of states, expressed through treaties and custom. "Positivism" at international law refers to the process by which states generate international law in these forms, generally out of a sense of their national interest. FERNANDO R. TESON, *A PHILOSOPHY OF INTERNATIONAL LAW* 73 (Westview Press 1998) ("[P]ositivism rests on two pillars: national interest and state consent."). For a general overview of traditional ethical approaches to decision-making by multinational corporations, see THOMAS DONALDSON, *THE ETHICS OF INTERNATIONAL BUSINESS* (Oxford Univ. Press 1989).

two separate circumstances under which a nominally private actor might nonetheless bear international responsibility: first, a narrow class of *per se* wrongs identified by treaty and custom that are unlawful even in the absence of state action, and second, a broader class of offensive conduct that is sufficiently infused with state action to engage international standards.

The wrongs in the first category are identified in treaty regimes that prohibit certain human rights violations and explicitly override the state action requirement. For example, the Genocide Convention requires that persons committing genocide be punished, “whether they are constitutionally responsible rulers, public officials or private individuals.”⁴³ Certain aspects of the war crimes regime of the Geneva Convention, especially common article 3, similarly bind non-state actors when they are parties to an international armed conflict.⁴⁴ The prohibition on slavery is quintessentially aimed at acts by individuals in a market setting and is unlawful whether there is state action or not.⁴⁵ The International Law Commission (“ILC”), which was directed by the United Nations General Assembly to codify the Nuremberg principles, has never required state action for wrongs in this category. Indeed, in 1985, the ILC rejected a draft that would have limited liability to “State authorities” in favor of a draft making all individuals who commit an “offence against the peace and security of mankind” liable.⁴⁶ Routine commercial activity by multinational corporations does not typically fall into this class, of course, but there is no prophylactic rule that corporations are in principle immune from liability for acts that do come within these treaty regimes.

It is equally clear that multinational corporations cannot be immune from human rights obligations for their state-like or state-related activities. In other words, there may be corporate conduct that falls into the second category of non-state liability, namely conduct that becomes internationally wrongful by virtue of the actor’s relationship with a state. In this theory, a mere contractual relationship with a government that com-

43. Convention on the Prevention and Punishment of the Crime of Genocide art. 4, Dec. 9, 1948, 78 U.N.T.S. 1021.

44. Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135.

45. See Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L.J. 1, 31–2 (2004) (discussing the *Unocal* case and how “the law of nations attributes individual liability [for engaging in forced labor, the ‘modern variant of slavery’] such that state action is not required”).

46. *Draft Code of Offences Against the Peace and Security of Mankind*, [1985] 2 Y.B. Int’l L. Comm’n 7, A/CN.4/SER.A/1985/Add.1 (Part 2), at 14, available at [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1985_v2_p2_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1985_v2_p2_e.pdf).

mits human rights violations should be insufficient to trigger liability—moral agency theory does not revoke the law of proximate cause. However, a private actor that fulfills a government function or is in a business relationship with a government that requires human rights violations for profit should satisfy the standard. And both international and domestic law articulate aiding-and-abetting standards that cover both juristic and natural individuals.⁴⁷

Positivism, like the deontological approach, shifts the burden of proof: because the law treats both human beings and corporations as individuals, the burden of justification falls to those who carve out an exception for companies. A related positivist rationale would not consider the practice of states internationally but rather the standard company law of most municipal legal systems, which provides a crucial *quid pro quo*: companies receive from the state the benefit of incorporation, meaning the right to exist and to limit the liability of stockholders to the extent of their investment, and, in exchange for that considerable and profitable right, they can be expected to serve the public interest and not abuse their privileges.⁴⁸

The common principle in these positivist approaches is the understanding that international law is not different *in kind* from other sources of obligation for the modern corporation. It is well-established that a corporation might be liable in tort for damages caused by the negligence or intentional acts of its employees,⁴⁹ that a corporation can violate the property rights of others and be required to pay damages or to obey an injunction, and that a corporation can be guilty of criminal offenses including conspiracy and aiding and abetting.⁵⁰ The human rights norms

47. The predictable variation at the margins of the international aiding-and-abetting standard—whether within international institutions or among the municipal legal systems around the world—does not undermine its core denotation. In *United States v. Smith*, 18 U.S. 153 (1820), the Supreme Court had to determine the international definition of piracy, and the Court discerned a lowest common denominator among the practice of states and the scholarly consensus. Specifically, the Court acknowledged controversy in some particulars but concluded that “*whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery or forcible depredations upon the sea, animo furandi* [i.e., with the intention to steal] is piracy.” *Id.* at 161 (emphasis added).

48. See DAVID SCIULLI, *CORPORATE POWER IN CIVIL SOCIETY* 27–28 (N.Y.U. Press 2001) (arguing that U.S. state legislatures historically imputed a duty upon corporations to serve the public interest in every undertaking and in no way viewed them as merely vehicles of profit).

49. See FRANCIS M. BURDICK, *THE LAW OF TORTS: A CONCISE TREATISE* 145–47 (Charles K. Burdick ed., Banks & Co. 4th ed. 1926). See also RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006).

50. See AMERICAN BAR ASS’N, *THE CORPORATE LITIGATOR* 643 (Francis J. Burke, Jr. & Michael Goldblatt eds., 1989).

imposed on, or undertaken by, the corporation are similarly compatible with their juristic status.

III. THE ANALYTICAL CLAIM: THROUGH THE LENS OF *LEX MERCATORIA*

The history of the law merchant is that best commercial practices started as a form of spontaneous or voluntary order and, if they survived, gradually became codified in the commercial law of states,⁵¹ evolving ultimately into international trade law and the U.N. Convention on Contracts for the International Sale of Goods.⁵² Contemporary scholars have prolonged a hundred years war over whether the *lex mercatoria* existed independently of municipal law and what its substantive norms—if any—were.⁵³ There is, however, a wide consensus that the law in its positivist forms eventually replicated certain customary practices at the heart of an effective and ethical transnational business order.

In the sources and content of norms governing corporate responsibility, it is possible to see the emergence of a new *lex mercatoria*—a contemporary variant of the medieval and renaissance law merchant. The *lex mercatoria* was developed and enforced as a tool to promote better business practices through offers of security to consumers and other merchants. The *lex mercatoria* also served an interstitial role, filling the gaps of each jurisdiction's commercial law and harmonizing disparate approaches in

51. Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions* (Lex Mercatoria), 19 HARV. INT'L L.J. 221 (1978) (noting that certain widespread similarities in legal doctrines governing the allocation of risk of loss or damage to goods, standard clauses in bills of lading or letters of credit, and arbitration clauses are "due in part to common commercial needs shared by all who participate in international trade transactions"). See also WYNDHAM A. BEWES, *THE ROMANCE OF THE LAW MERCHANT* 28–62 (1923) (demonstrating that certain doctrines of contemporary commercial law can be traced through the law merchant and ultimately to medieval business customs, including the enforceability of informal agreements, the rights of a possessor of a bearer bill of exchange, the protection of the good faith purchaser of stolen goods even against the original owner when the goods were bought in the "open market," the right of a seller to stop the transit of goods if the buyer defaults after shipment, and the right of partners to an accounting). Accord LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 25–26, 33 (1983) (describing similarities between the ancient *lex mercatoria* and the modern Uniform Commercial Code in the United States).

52. Cf. John Honnold, *The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law*, in *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* 70, 76 (Clive M. Schmitthoff ed., 1964).

53. See, e.g., Richard A. Epstein, *The Empirical and Theoretical Underpinnings of the Law Merchant: Reflections on the Historical Origins and Economic Structure of the Law Merchant*, 5 CHI. J. INT'L L. 1 (2004); Charles Donahue, Jr., *Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica*, 5 CHI. J. INT'L L. 21 (2004).

different markets and nations. The law's genesis in the customs of the marketplace

was by far the most decisive factor in its development: it made the law eminently a practical law adapted to the requirements of commerce; and as trade expanded and new forms of commercial activity arose—negotiable paper, insurance, etc.—custom everywhere fashioned and framed the broad general principles of the new law. Custom is alike the ruling principle and the originating force of the Law Merchant.⁵⁴

In this way, the *lex mercatoria* became one model for innovation in the introduction of new legal principles and doctrines, originating and evolving from the initiative of merchants who were motivated by a long-term, sophisticated, and mutual self-interest. As a result, key entrepreneurial concepts and practices found their way into the commercial law of states—and ultimately into contemporary international trade law and the U.N. Convention on Contracts for the International Sale of Goods. The international legal order thereby replicated and formalized the ethical business order, rather than displacing, coercing, or pre-empting it.⁵⁵

But there were more than merely utilitarian reasons for the emergence and the stability of *lex mercatoria*: the influence of canon law tended to inject transnational standards of good faith and equity into commercial dealings as well:

Canon law, the body of universal law and procedure developed by the [Roman Catholic] Church for its own governance *and to regulate the rights and obligations of its communicants*, had from the beginning its own sphere of application and separate courts. . . . [But] there was a tendency towards overlapping jurisdiction, and before the Reformation it was common to find ecclesiastical courts exercising civil jurisdiction.⁵⁶

54. WILLIAM MITCHELL, AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT 12 (1904).

55. See, e.g., INTERNATIONAL CHAMBER OF COMMERCE, INCOTERMS (2000). *Incoterms* is a source of international uniform definitions for commercial delivery terms, which defines the obligations of sellers and buyers regarding shipment and receipt of goods. Because its publisher, the International Chamber of Commerce, is a non-governmental entity, *Incoterms* does not have the legally binding effect of an international treaty. But it does provide a written expression of custom and usage—or best practice—in the industry. Parties to international transactions often expressly incorporate *Incoterms* into their contracts, and even when they do not, courts will occasionally incorporate them. RALPH FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS 72 (West 2d ed. 2001).

56. J.F. O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW 25–26 (1991) (emphasis added).

For that reason, it was perhaps inevitable that jurisprudence of the Church would converge with (and to some extent displace) the Roman civil law:⁵⁷ the pragmatic need for cooperation, combined with the “spiritual jurisprudence” then ascendant, assured that merchants would act with some sense of mutual restraint in their dealings with one another.⁵⁸ As a result, the merchant had to rely on standards of fairness, which changed in accordance with commercial practice. The influence of canon law is illustrated by the fact that by the sixteenth century, virtually every commercial nation in Europe had altered prior doctrine and, in response to the usages of the merchant class, recognized the enforceability of a *bona fide* purchaser’s rights, the validity of sales confirmed by the payment of earnest money, the validity and enforceability of formless contracts, the negotiability of bills of exchange, the obligations of partners and agents, and the necessity of swift justice *ex aequo et bono*.⁵⁹ In each of these respects, commercial habits and practices were transformed into legal institutions, doctrines, and codes, with the result that the law was increasingly uniform—even as it became increasingly cosmopolitan and equitable.

The *lex mercatoria* was also distinguished by the ways that its norms were enforced and commercial disputes were resolved. The dominant mode of enforcement was the internalization of norms by entrepreneurs themselves.⁶⁰ One determinant of a merchant’s sustained prosperity was his ability to conform to the expectations of the market, which were formalized only over time into law; there were concrete commercial consequences for any merchant insufficiently committed to the abstract standards of good faith that underlay the pragmatic doctrines in the law merchant. When internalization failed and disputes did arise, they were typically resolved by the merchants themselves through mercantile councils and guilds or through informal, expeditious forms of mediation and arbitration—not by professional judges in the formal setting of a courtroom. When a dispute became sufficiently serious or prolonged that the local courts became involved, the law that governed was—directly or indi-

57. *Id.* at 26. See also 1 FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 190 (1970) (demonstrating that, in the early medieval period, a “new and Christian tinge” came to color contractual obligations and commercial law generally).

58. TRAKMAN, *supra* note 50, at 7.

59. MITCHELL, *supra* note 53, at 157–58.

60. Cf. Harold H. Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 203–06 (1996).

rectly—what the merchants had themselves adopted to facilitate ethical and uniform trade practices.⁶¹

It will be noted that the *lex mercatoria*, in its original form, effectively blurred the received distinction between self-interest and altruism. Adam Smith fully understood the reinforcing dynamic between these two forces; Smith is commonly invoked by advocates of laissez-faire capitalism who stress those passages in the *Wealth of Nations* that find the “invisible hand” in rational economic actors pursuing their self-interest.⁶² That emphasis however ignores the balance at work in Smith’s philosophy, especially in *The Theory of the Moral Sentiments*, which focuses on the innate sense of empathy with which human beings regulate their instinct for acquisitive self-interest.⁶³ It radically oversimplifies Smith’s theory of capitalism to suggest that individuals in natural or juristic form are exempt from the dictates of conscience or equity; indeed (and perhaps counter-intuitively), the distinction between altruism and self-interest cannot adequately account for the variance in commercial decision-making by individuals, by firms, and by nations. If it did, the ra-

61. MITCHELL, *supra* note 53, at 156; BERMAN & KAUFMAN, *supra* note 50, at 226–27. For example:

Through the decisions of Lord Mansfield and his successors, there was created a body of judicially declared English commercial law which incorporated and refined rules developed in earlier times throughout Europe. The incorporation of the law merchant added a cosmopolitan dimension to the English common law, without which the common law courts could hardly have served the needs of British commerce.

Id. at 226–27.

62. 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 477 (Edwin Cannan ed., Univ. of Chicago Press 1976).

[The individual] generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. . . . [He] intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.

Id. See also Alan B. Krueger, *Economic Scene; The Many Faces of Adam Smith: Rediscovering ‘The Wealth of Nations’*, N.Y. TIMES, Aug. 16, 2001, at C2 (discussing Emma Rothschild’s view that “Smith has been reinvented as a narrow, unyielding defender of unfettered free enterprise”).

63. ADAM SMITH, THE THEORY OF THE MORAL SENTIMENTS 11 (1759) (“How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.”).

tional breach of contracts would be nearly universal, and *pacta sunt servanda* would become the relic of a naïve age.

In sum, *lex mercatoria* comprised a body of authority that was (and remains to this day) transnational in scope, grounded in good faith, reflective of market practices, and codified in the commercial law of the various nations and in international law. Because these features reappear in some emerging forms of commercial law in the twentieth and twenty-first centuries, these new pockets of law have been described as “a” or “the” new *lex mercatoria*.⁶⁴ But with consequences not yet fully appreciated by either the corporate community or the human rights community—let alone the academic community—the corporate human rights standards described above offer fertile ground for the emergence of a similarly stable and significant body of commercial standards.

It is clear at the threshold that the market-based initiatives described in Part I reflect the apparent competitive advantages of establishing and projecting a reputation for equitable conduct and a measure of transparency in corporate decision-making. The Kimberley Plan governing the sale of conflict diamonds, the evolution of SA 8000, and the sale of rights-sensitive product lines, *inter alia*, suggest that the market ultimately gives new relevance to international human rights standards in the global economy. It would be neither unprecedented nor illegitimate if what began as the articulation and internalization of best business practices became enforceable legal standards over time, either through domestic regulation, international standard-setting, or, in extraordinary circumstances, the prospect of civil liability. There is, in short, a critical historical connection between best practices in the market and the rules of law: “In all great matters relating to commerce, the legislators have copied, not dictated.”⁶⁵

CONCLUSION

One critique of this analysis rests on the truth that human rights standards are not yet common business conventions, let alone universal norms. Nor are they conspicuously successful. Nor do they cement the

64. Examples include, among others, the law of cyberspace. See, e.g., Aron Mefford, Note, *Lex Informatica: Foundations of Law on the Internet*, 5 *IND. J. GLOBAL LEGAL STUD.* 211 (1997); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 *STAN. L. REV.* 1367 (1996). Examples also include the norms adopted in transnational arbitration panels. Harold J. Berman & Felix J. Dasser, *The “New” Law Merchant and the “Old”*: Sources, Content, and Legitimacy, in *LEX MERCATORIA AND ARBITRATION* 21 (Thomas E. Carbonneau ed., 1990).

65. GOLDSCHMIDT, *HANDBUCH DES HANDELSRECHTS* 378–79 (1891), quoted in Trakman, *supra* note 50, at 10.

relationship among merchants through reciprocal assurances of commercial good faith. To the contrary, the principal beneficiary of these standards (and the “altruism” behind them) is not the mercantile community itself; it is a labor force, a society, or even an idea. But the genetic marker of the *lex mercatoria* was that seemingly soft notions like good faith evolved into widely accepted standards—standards that became some of the hardest commercial law there is and originated in the notion that a merchant’s self-interest depended on his or her respect for the interests of others. In other words, at the substantive core of this supposedly private law were public values, and at the procedural core of what became commercial law were voluntary undertakings of the merchant class.⁶⁶

It is in addition ahistorical to require that so new a development be wholly formed before it can be taken seriously. In the synergistic dynamic that was the *lex mercatoria*, practices affected rules, which affected practices, which refined rules, and so on over the centuries. This dynamic allowed a communal sense of fairness or equity to emerge and get transformed into doctrinal form. That dynamic is again on display as the business and legal culture changes in response to the four regimes of principle and practice described above. It also suggests that the business community and the human rights community might assist one another in the articulation of a common sense of justice and the development of legal standards to maximize the benefits of compliance at decreasing marginal cost.

In short, human rights entrepreneurialism, the codes of conduct, the ATS litigation in *Unocal* and its progeny, the work of groups like the RiskMetrics Group,⁶⁷ and the adoption of domestic and international legal norms reflect a partial, but very real, development at the intersection of the law and the marketplace. Indeed, the corporate human rights initiative mirrors the two dominant faces of globalization: the expansion of international trade and commerce without regard to boundaries and the

66. See *Bank of Conway v. Stary*, 200 N.W. 505, 508 (N.D. 1924). As stated by the court:

The law merchant is a system of law that [did] not rest exclusively on the institutions and local customs of any particular country, but consists of certain principles of equity and usages of trade which general convenience and a common sense of justice have established to regulate the dealings of merchants . . . in all the commercial countries of the civilized world.

Id. at 508.

67. The RiskMetrics Group is a signatory to the United Nations’ Principles for Responsible Investment (“UNPRI”). Principles for Responsible Investment, <http://www.unpri.org/principles/> (last visited June 1, 2008).

universalizing effects of the human rights movement—the only global ideology to survive the twentieth century. Without suggesting that the corporate culture is about to enter some millennial Age of Aquarius, we will see the continued development of broad-based organizations specifically devoted to bringing human rights issues into the corporate boardroom, the modest growth of a consumer- and investor-driven market dynamic that embraces human rights concerns, the imposition of civil and criminal liability in appropriate circumstances, and a continuing transformation in the work of human rights advocates, all of which reinforces the insight that we must not think too simply about corporate decision-making, about human rights law, or about the received distinction between so-called public and so-called private law.