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"Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law"

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Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law

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Enlightened shareholder value (ESV) is the idea that corporations should pursue shareholder wealth with a long-run orientation that seeks sustainable growth and profits based on responsible attention to the full range of relevant stakeholder interests. This approach to management contrasts with a short-term focus on current share price even when that objective entails immediate or longer-term negative effects on nonshareholders. ESV still recognizes the priority of shareholder interests and therefore differs from a pluralist management model based on balancing of all stakeholder interests. Nevertheless, because ESV recognizes that long-term business success depends on regard for the interests of all who contribute to and are affected by corporate activity, it represents an alternative to a narrow conception of shareholder primacy. The combination of a long-range, sustainable conception of value coupled with acknowledgement of the importance of stakeholder considerations for achievement of that goal thus resonates with notions of corporate social responsibility (CSR).

This paper considers the prospects for acceptance of an ESV approach to management by US transnational corporations. It begins by explaining management practice, looking first for legal determinants and then at the non-legal causes that actually shape current behavior. US corporate law provides ample space for express recognition of nonshareholder interests and a long-run approach to management. The law does not mandate shareholder primacy. Neither, however, does it require commitment to social responsibility. US law, in other words, is surprisingly agnostic on the important question of management's primary duty. And, by disclaiming a clear definition of the constituencies that management is supposed to serve, the law also declines to address the question of corporate purpose. Despite the emergence in recent years of "soft law" norms that encourage responsibility for human rights and environmental values, international law also does not provide a basis for holding transnational corporations accountable to nonshareholders except in the most egregious cases. Within this legal vacuum, the current practice in the US – shaped by extra-legal factors such as shareholder expectations and management compensation – is to prioritize short-term, quarter-to-quarter share price. Stakeholder or sustainability considerations typically are ignored unless they bear on that objective.

The ESV approach to management responsibility and corporate purpose was endorsed in the UK Companies Act 2006. Under that statute, management's ultimate responsibility is to the shareholders, but it is required to pursue that objective with regard to long-term consequences, employee interests, relations with suppliers, customers, and others, impact on the community and environment, and the company's ethical reputation. This is, in other words, an explicit repudiation of an exclusive focus on shareholder wealth defined in terms of short-term share price. It is not, however, a requirement that management balance the interests of all the corporation's stakeholders, nonshareholders as well as shareholders. Thus, ESV has been seen as a possible "third way," an alternative to strict shareholder primacy, on the one hand, and also, on the other, to a pluralist vision of CSR that elevates nonshareholders to the same plane as shareholders.

Beyond the specific mandate of sec. 172, ESV can be seen as a general approach to management that differs from current US business practice. There are two dimensions to this difference. A "longitudinal" – or temporal – dimension refers to the appropriate time frame for achievement of corporate goals. Under ESV, a long-run horizon replaces short-termism. There is also a "latitudinal" dimension that defines the breadth of management's perspective. ESV rejects a sole focus on shareholder interests and instead embraces a broader approach that includes the corporation's other stakeholders as well.

My aim in this paper is to consider whether market pressures might generate a version of ESV that could have the effect of shifting US transnational corporations away from narrowly focused shareholder primacy. The model I explore here is based on corporate risk management practices. Activities – such as labor and environmental policies – that reduce operating expenses in the short-term may present litigation and reputational risks because of the threat of public exposure, especially by non-governmental organizations (NGOs) and the media. The result may be significant litigation and settlements costs, as well as negative reputational effects in product, labor, and capital markets. Consumers may stop buying, employee morale may suffer and recruitment may become more difficult, and investors may move their money to companies that are more attentive to the potential costs of human rights and environmental violations. In these various ways, members of the public acting as critics and responding to corporate misbehavior can exert pressure on corporations to behave in more socially responsible ways. Conceived of in terms of risk management, attention to stakeholder interests under pressure from public scrutiny may result in better outcomes for affected constituencies.

The market-driven version of ESV discussed here may have limited effects in the longitudinal or temporal dimension. A shift to a long-run approach requires more than just avoidance of human rights or environmental wrongdoing. US corporations also need to discard their preoccupation with short-term, quarter-to-quarter financial results in favor of long-term, sustainable growth and profits. Avoiding litigation or reputational costs does not necessarily imply a reorientation of focus toward the long-run. That is likely to require investments – for example, in improved working conditions or environmental facilities – that are costly in the near term and offer only long-run payoffs. Shareholder pressures for short-term results and compensation packages that reward management for delivering them will presumably continue to encourage a myopic outlook. Competition in product markets – especially from firms that already enjoy cost advantages – may also cause reluctance. In short, even if market-based considerations based on risk management can expand management's outlook latitudinally, it is hard to see how they might have that effect in the longitudinal dimension. Law might be necessary to bring about a longitudinal reorientation.[1]

Although the market-driven model of ESV may not be sufficient to lengthen management's time horizon, there is reason to expect that it could have beneficial

[1] See, for example, the reforms proposed in The Aspen Institute, Business & Society Program, Overcoming Short-termism: A Call for a More Responsible Approach to Investment and Business Management (Sept. 9, 2009). The proposals would address both managerial and shareholder incentives.

latitudinal effects. Risk management concerns driven by externally generated transparency and accountability pressures are leading transnational corporations to pay closer attention to potential human rights and environmental problems. By broadening the range of interests attended to by management to include important stakeholder considerations, ESV therefore does have the potential to produce CSR benefits. This is the sense in which ESV might realistically be characterized as a third way, an alternative to short-term shareholder primacy as well as to an approach to management based on stakeholder balancing. Accordingly, this paper focuses on that aspect of ESV.

This approach to change appears to hold significant promise. Rather than relying on new legal mandates to redefine management responsibility and corporate purpose, extra-legal pressures can have that effect instead. And, because concerned private actors apply the pressure, public opinion about socially acceptable behavior drives management's rethinking of its role. The result may be a richer, more socially-oriented notion of the corporate objective, shaped by public opinion, and this would occur without public intervention through law.

Despite the promise of a public redefinition of corporate purpose without law, some caveats are in order. As mentioned above, it seems unlikely that market-driven ESV will itself be sufficient to produce a commitment to long-run sustainability. There are also some serious questions as to ESV's capacity to broaden management's focus to include important nonshareholder considerations even in the short term. For public pressure to be effective, transparency is necessary so that corporate activity can be subjected to scrutiny. As explained below, there is no reason to think that private actors alone can generate the amount of information needed to hold transnational corporations fully accountable for their behavior. And, even when misdeeds are exposed and pressure brought to bear, it is not clear that corporations necessarily deal fully with the problems they have created. Public relations and reputational recovery may be the real objective. Finally, and most importantly, this approach to CSR is driven by bottom-line considerations. ESV is still about shareholder value after all, and this objective imposes a limit on how far corporations are likely to be willing to go. Certainly this approach to management will not necessarily result in corporations "doing the right thing" where that would be costly to shareholders. To the extent this is true, critics of transnational corporations should not expect that a commitment to shareholder value – even if enlightened – will necessarily generate the measure of socially responsible behavior that they believe to be appropriate. There may still be a role for law.

I. Corporate Purpose in the US: Law and Practice

A. Delaware

Under the US federal system, most business corporations are formed pursuant to a state's corporation statute. Because a business need not be headquartered or even do business in the state in which it is incorporated, corporations are free to choose the legal regime that their managers prefer. For most of the largest corporations, the jurisdiction of choice is Delaware. This state's corporation statute and common law therefore govern questions of internal affairs – including the structures and procedures of governance authority – and corporate purpose. US securities law, though complex and intricate, is primarily concerned with disclosure requirements and other mechanisms designed to facilitate shareholders' exercise of substantive rights – such as voting and trading rights –

defined by state law regimes. Federal law does not play an important role in the definition of corporate purpose.

It is often assumed that Delaware corporate law mandates a shareholder primacy conception of management's responsibility.[2] This means that the company is supposed to be managed with the financial interests of shareholders primarily in mind. The shareholders' assumed interest in wealth maximization is not to be sacrificed for nonshareholder considerations, such as human rights or environmental concerns. This notion of management's duty in turn implies a particular conception of corporate purpose, which is to generate profits for shareholders.[3]

The assumption that Delaware law requires shareholder primacy is wrong. It has long been clear that management owes its fiduciary duties of care and loyalty not simply to the shareholders but to the corporation as well.[4] This formulation recognizes the shareholders' special status as residual claimants – they are traditionally referred to as the firm's owners – but at the same time also emphasizes that management is not simply the agent of the shareholders charged with maximizing their wealth. Instead, management is also responsible for the well-being of the corporation as an entity. As such, management must attend to the full range of considerations that determine its well-being. So, for example, in responding to the threat of a hostile takeover, management is supposed to evaluate "its effect on the corporate enterprise."[5] In addition to possible harms to

[2] I use the term "management" to refer to the corporation's board of directors and senior officers.
[3] Notice that shareholder primacy here refers to the relative weight to be accorded to shareholder versus nonshareholder interests but does not imply primacy as to governance authority. As between managers, shareholders, or other corporate constituencies, management has responsibility for governance, with shareholders exercising only very limited powers of control. The recent "shareholder empowerment" movement in the US aims to redress that balance.
[4] See, e.g., Loft, Inc. v. Guth, 2 A.2d 225, 238 (Del. Ch. 1938), aff'd sub nom. Guth v. Loft, Inc., 5 A. 2d 503 (Del. 1939).
[5] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).

shareholders, relevant considerations may include "the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally) . . . ."[6] Only in special cases – when management has chosen to cede its managerial discretion to chart the corporation's future by agreeing to a transfer of control or to the corporation's break-up and dissolution – does its duty change from a responsibility for the well-being of the entity as whole, to one of obtaining the best deal possible for the shareholders alone.[7]

Shareholders lack the ability to mount legal challenges to management's exercise of its authority. Under the well-known "business judgment rule," the judiciary will not second-guess strategic and operational decisions as long as they are based on sufficient information, not subject to conflict of interest, and made in good faith. Of special importance is the courts' willingness to defer to managerial judgment about the corporation's long-run best interests. A broad range of decisions that seemingly sacrifice short-term shareholder profits for the sake of nonshareholder considerations can be justified by reference to the corporation's long-run well-being. So, for example, employment policies that seem costly in the short term can be said to improve worker morale and productivity over a longer time horizon. Charitable expenditures or decisions to forego profitable but unsavory business opportunities may enhance the corporation's "good will" among consumers despite immediate impact on profits. When management

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[6] Id.

[7] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985); Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994).

appeals to long-run corporate benefit, courts do not require a demonstration of actual gains.[8]

The *Dodge v. Ford* case, decided by the Michigan Supreme Court case in 1919, is often cited for the proposition that corporate management may not subordinate shareholder financial interests to nonshareholder considerations.[9] In that case, Henry Ford refused to cause the corporation to declare a special dividend despite a huge holding of cash and a massive accounting surplus because he preferred to pursue policies designed to benefit employees and consumers. In an oft-quoted passage, the court declared that, "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. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend . . . to other purposes."[10] Despite its strong language, the opinion has had little influence on US corporate law. As Professor Stout notes, Delaware courts have cited the decision only once in the last 30 years, and for an altogether different proposition (concerning oppression of minority shareholders by a controlling shareholder).[11]

More significant is the adoption by 41 states of so-called constituency or stakeholder statutes.[12] These statutes expressly authorize the board of directors to consider nonshareholder interests, which are typically expressed in terms of a list including employees, customers, suppliers, creditors, and local communities. They also typically

[8] See, e.g., Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. Ct. 1968) (upholding directors' refusal to play nighttime baseball games because of concerns about community well-being).
[9] Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).
[10] Id. at 664.
[11] Lynn Stout, Why We Should Stop Teaching *Dodge v. Ford*, in The Iconic Cases of Corporate Law 1, 4 (Jonathan R. Macey ed., 2008).
[12] See David Millon, Redefining Corporate Law, 24 Ind. L. Rev. 223 (1991); Lawrence E. Mitchell, A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes, 70 Tex. L. Rev. 579 (1992).

include a provision allowing the board to prioritize the shareholders' long-term financial interests over enhancement of share price in the short-term. While some statutes are limited to the hostile takeover context, most are not. These statutes are important because they represent deliberate rejection of the shareholder primacy conception of corporate purpose and managerial responsibility. Delaware has not enacted one of these statutes, but as we have seen Delaware's common law of fiduciary duty embraces an essentially similar approach, at least outside of the narrow case of management decisions to enter into change of control or entity break-up transactions.

Other legal mechanisms are no more effective than fiduciary duty law at rendering management directly accountable to shareholders. It is highly unusual for shareholders to replace an incumbent board of directors via the annual election. Even with ownership of shares of the largest companies increasingly concentrated in the hands of large institutional investors, collective action costs remain extremely high and the presumption in favor of the status quo remains extremely difficult to overcome. The threat of a hostile takeover via tender offer is also of limited effect because the Delaware courts have allowed target company managers generous leeway in deploying effective defensive measures. The important *Time/Warner* decision in particular endorses management's authority to determine the corporation's future where its existing business strategy would not accommodate an unwelcome change of control.[13]

Under US corporate law, transnational companies have broad freedom to pursue policies that temper the quest for profits with other considerations, such as human rights or

[13] Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989). In this case, the Delaware Supreme Court stated, "The fiduciary duty to manage a corporate enterprise includes the selection of a time frame for achievement of corporate goals. That duty may not be delegated to the stockholders. . . . Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy." Id. at 1155 (citations omitted).

environmental concerns. Nothing in current law *mandates* such behavior, but management's authority to cultivate the corporation's long-range well-being provides ample space for more than mere profit maximization. Shareholders who might object face formidable doctrinal and practical obstacles.

B. International Law, "Hard" and "Soft"

Traditionally, the focus of international human rights law has been on state actors as the most likely source of abuse. Non-state actors generally have not been subject to its requirements, except in extreme cases of egregious conduct. No multilateral human rights treaties exist that require states to police the activities of corporations within their borders or to regulate their own corporations extraterritorially. The International Covenant on Civil and Political Rights (ICCPR) specifies a number of "negative" rights of individuals against the state.[14] States that are parties to the ICCPR are obligated to ensure that their citizens enjoy its guarantees and the preamble affirms that individuals too are subject to the treaty's prohibitions. However, because the treaty's focus is on civil and political rights, it does not deal with corporate responsibility for a broad range of human rights and environmental issues.

In contrast, the International Covenant on Economic, Social and Cultural Rights (ICESCR) does contain a range of substantive pronouncements on "positive" entitlements to basic human needs, including provisions dealing with labor, health, food, housing, and education.[15] These quality of life issues are fundamentally important adjuncts to the civil and political rights specified in the ICCPR and, because of frequent lack of host state

[14] See http://www2.ohchr.org/english/law/ccpr.htm
[15] See http://www2.ohchr.org/english/law/cescr.htm

regulation, are subject to serious infringements by transnational corporations.[16] However, the ICESCR itself does not impose substantive obligations on state governments as the ICCPR does; instead, the parties undertake to operationalize the benefits of the ICESCR's provisions over time, by enacting legislation or otherwise. This is necessarily a gradual, state-by-state process and progress so far has been sporadic even among the parties to the treaty. Meanwhile, the US has signed but has yet to ratify the ICESCR.

Customary international norms are limited in scope as to economic, social, and cultural human rights. The relatively narrow ambit of customary international law governing human rights has had the effect of restricting significantly the scope of one potentially important remedy for abusive conduct. The US Alien Tort Claims Act provides a cause of action for aliens seeking to bring tort claims based on a "violation of the law of nations or a treaty of the United States."[17] This statute could provide a basis for claims against US transnational corporations that commit human rights violations abroad, but the US Supreme Court has held that the norm on which the plaintiff relies must be a clearly established principle of customary international law.[18] Customary law is an evolving corpus but at the moment proscribes only the most heinous forms of human rights violation, such as genocide, slavery, or war crimes.[19]

While currently neither treaty nor customary law specifies corporations' human rights and environmental obligations or the responsibility of states to protect citizens against violations committed by transnational corporations, "soft law" developments

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[16] Justine Nolan & Luke Taylor, Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?, J. Bus. Ethics (Dec. 29, 2009).
[17] 28 USC. (2009), originally part of the Federal Judiciary Act of 1789.
[18] Sosa v. Alvarez-Machain, 542 US 692 (2004). See also Flores v. So. Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362 (E.D. La. 1997).
[19] See Cynthia A. Williams, Corporate Social Responsibility in an Era of Economic Globalization, 35 U.C. Davis L. Rev. 705, 764-66 (2002).

indicate movement in the direction of a set of substantive standards governing the activities of transnational companies. The UN Universal Declaration of Human Rights specifies a number of basic human rights, including rights to equal protection of the law, freedom of expression, personal security, food and housing, work, an adequate standard of living, education, and cultural opportunities.[20] The Declaration states expressly that no "State, group or person" may violate any of the rights contained in it and thus is potentially applicable to corporations and other private actors.[21] However, the Declaration is simply a declaration, and as such is hortatory and aspirational rather than legally binding.

Other "soft law" initiatives are similarly noteworthy. Perhaps best known is the UN Global Compact. Launched in 2000, the compact is a set of 10 principles defining "corporate citizenship in the world economy" in the areas of human rights, labor, the environment, and anti-corruption.[22] Although participation is voluntary, this project currently includes over 5200 businesses in 130 countries. Annual reporting is required, with reports being publicly available, and companies are "de-listed" for failure to comply.

Other statements of voluntary standards of good conduct include the International Labour Organization's Declaration on Fundamental Principles and Rights at Work[23] and the Rio Declaration on Environment and Development.[24] In a similar vein, the World Economic Forum, a non-profit Swiss foundation, is working with business leaders, government representatives, civil society organizations, and other to develop the concept of "corporate global citizenship."[25]

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[20] www.un.org/en/documents/udhr/
[21] Art. 30.
[22] United Nations Global Compact, http://www.unglobalcompact.org/
[23] See http://www.ilo.org/declaration/lang--en/index.htm
[24] See http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm
[25] See www.weforum.org

Especially important for transnational corporations is the UN's project on Business and Human Rights. Pursuant to an appointment by the UN Human Rights Commission, Dr. John Ruggie has served as Special Representative to the Secretary-General (SRSG) since 2005, charged with clarifying the role and responsibilities of business with respect to human rights. Following extensive consultations with government officials, business people, and representatives of the NGO community, the SRSG in 2008 issued a report proposing a policy framework consisting of three elements: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and greater access to remedy, judicial and non-judicial, for victims.[26] This document endorses corporate responsibility to avoid infringement of human rights and recommends due diligence systems aimed at clarifying human rights responsibilities and monitoring business activities for potential violations.[27]

The Organisation for Economic Co-operation and Development , currently including 30 member countries (including the US), has published "Guidelines for Multinational Enterprises."[28] These amount to a code of conduct covering a wide range of topics, including human rights, the environment, labor relations, consumer interests, and corruption. They are not binding on corporations but OECD countries have agreed to

[26] "Protect, Respect and Remedy: A Framework for Business and Human Rights," Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (April 2008).

[27] In 2003, the UN Sub-Commission on the Protection and Promotion of Human Rights produced a draft document called "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights." This document was based on the inadequacy of a purely state-centric approach to the problem of human rights. The Human Rights Commission, in 2004, chose to do nothing further with it, however, and instead appointed Dr. Ruggie to conduct further investigation of the problem. The Norms are thus considered to be "defunct." Justine Nolan & Luke Taylor, Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?, J. Bus. Ethics (Dec. 29, 2009).

[28] http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/25782F1E15806ADAC125729D005CD3A3?OpenDocument

promote their implementation. As such, the Guidelines are an important instance of governmental endorsement of important human rights principles.

These "soft law" developments do not as yet provide a legal means for holding transnational corporations accountable for human rights or environmental violations. Nevertheless, they do constitute an emerging body of substantive norms specifying standards for appropriate corporate behavior. They therefore have the potential to shape corporate management's own sense of responsibility. For example, some of these norms may be incorporated in companies' voluntarily adopted codes of conduct. These norms also provide criteria against which corporate activities can be assessed and evaluated by external critics. As yet, however, as explained below, US corporations tend to define their purpose in terms of shareholder wealth maximization. As a result, it seems clear that emerging "soft law" norms have so far had limited impact.

C. Corporate Purpose in the US Today

While observers of worldwide business practice conclude that CSR is now "mainstream,"[29] managers of US corporations tend to conceive of their duties in terms of shareholder primacy. Institutional shareholders share this view. As a matter of practice, this approach to management means attention to short -term, quarter-to-quarter share price maximization at the expense of longer-term considerations. A group of concerned business leaders, investment professionals, and academics states, "in recent years, boards, managers, shareholders with varying agendas, and regulators, all, to one degree or another,

[29] Special Report on Corporate Social Responsibility, The Economist, Jan. 19, 2008, p. 3.

have allowed short-term considerations to overwhelm the desirable long-term growth and sustainable profit objectives of the corporation."[30]

The general acceptance of the view that short-term share price maximization is the appropriate objective for managers and shareholders is reflected in current law reform initiatives in the US that would strengthen shareholders' ability to hold management responsible for inadequate financial performance. These initiatives take for granted that accountability to shareholders is the primary objective of corporate law. Strangely, some reformers claim that the excessive risk-taking and abuse of leverage that were major causes of the current financial crisis were due at least in part to insufficient managerial accountability to shareholders. In fact, however, this reckless behavior was a response to investor demands for immediate profits and high stock prices.[31] In this respect, much of the irresponsible activity that led to the financial crisis reflected dominant views about the legitimacy of a short-term focus on shareholder value.

As discussed above, this shareholder primacy approach to corporate purpose and management responsibility is not the result of legal requirements. Instead, several non-legal factors seem to be at work. Equity-based executive compensation arrangements align management's financial incentives with those of shareholders.[32] To the extent they reward short-term results rather than longer-term performance, these practices encourage management to disregard considerations – including stakeholder considerations – that would benefit the corporation only over the long haul.

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[30] The Aspen Institute, Business & Society Program, Overcoming Short-termism: A Call for a More Responsible Approach to Investment and Business Management p. 2 (Sept. 9, 2009).
[31] See Leo E. Strine, Jr., Why Excessive Risk-Taking is not Unexpected, N.Y. Times, Oct. 5, 2009.
[32] See David Walker, Evolving Executive Equity Compensation and the Limits of Optimal Contracting (Nov. 9, 2009).

Management seems to be increasingly wary of institutional shareholder activism. Many of these investors – particularly public pension funds – are under extreme pressure to generate high returns on a regular basis.[33] From their point of view, management therefore needs constantly to focus on enhancement of share prices. Even though voting majorities continue to be very hard to assemble, major institutional investors are succeeding in making their presence felt. Proxy advisory firms – Institutional Shareholder Services is especially influential – have been effective in mitigating collection action problems. These firms evaluate companies according to shareholder accountability criteria and advise large institutional investors about how to vote their shares. Recommendations to vote contrary to management can result in large negative blocks.[34] In recent years, a number of US corporations have dismantled poison pills and eliminated staggered boards of directors in response to shareholder objections. Some have also voluntarily adopted shareholder access to management's proxy solicitation materials and non-binding "say on pay" shareholder referenda, initiatives currently under consideration by Congress and the SEC. These developments reflect a climate in which corporate managers seem increasingly attentive to the preferences of institutional shareholders.

Cultural factors also appear to be at work. It seems to be widely assumed in US business circles that management's primary loyalty should be to shareholders. Business schools encourage this outlook, generally taking for granted that this is the relevant benchmark.[35] The business press and law reformers likewise speak of shareholder value as

[33] Mary Williams Walsh, Public Pension Funds are Adding Risk to Raise Returns, N. Y. Times, March 8, 2010.

[34] See Tamara Belinfanti, The Proxy Advisory & Corporate Governance Industry: The Case for Increased Oversight and Control, 14 Stan. J. Law, Bus. & Fin. 384 (2009).

[35] See Rakesh Khurana, From Higher Aims to Hired Hands: The Social Transformation of American Business Schools and the Unfulfilled Promise of Management as a Profession (2007).

the appropriate goal for corporate management. Calls for a reorientation toward the long-term have gained urgency in the wake of the financial crisis, but still seem to run counter to dominant views. US norms and practices emphasizing short-term shareholder value are thus out of sync with notions of CSR widely accepted elsewhere in the world.

II. Enlightened Shareholder Value and Corporate Social Responsibility

As we have seen, US law is flexible enough to accommodate corporate policies that reject short-term shareholder wealth maximization in favor of an approach that takes a fuller range of stakeholder values and long-term sustainability into account. It does not mandate that approach, but neither does it mandate shareholder primacy. US law, in other words, is agnostic on the question of corporate purpose. While soft law developments and different social and political value systems around the world seem to be pushing companies in the direction of heightened regard for human rights and other nonshareholder values, US business practice currently is to focus on short-term share prices without express regard to social responsibility or sustainability concerns. I now turn to the question of whether we can expect US transnational corporations to reorient their approach to management and their conception of corporate purpose. In particular, I explore the possibility of reorientation without legal intervention.

A. Enlightened Shareholder Value

Scholars have suggested that there may be an emerging "third way" between US shareholder primacy and the CSR approach to management – emphasizing stakeholder balancing – that is increasingly influential in much of the rest of the world.[36] The "ESV" model was developed in the UK and is expressed in sec. 172 of the Companies Act 2006. That provision provides that directors are supposed to promote the interests of the corporation for the benefit of the shareholders but then goes on also to require regard for long-term consequences, employee interests, relations with suppliers, customers, and others, impact on the community and environment, and the company's reputation for "high standards of business conduct."[37] Rather than embracing stakeholderism over shareholder primacy, the approach taken by sec. 172 rejects an emphasis on short-term share price in favor of an approach to management that seeks to promote the long-term sustainability of the firm. A long-term perspective requires attention to the full range of stakeholder concerns that have the capacity to affect the corporation's business success. Sustainability values are thus seen to rest on recognition of the legitimacy of nonshareholder as well as shareholder interests. In this respect, a long-term orientation depends on recognition of the corporation's responsibility to its various internal and external constituencies.

ESV's more expansive time frame and richer sense of the factors that contribute to a business' long-run success resonate with elements of existing US law, particularly the nonshareholder constituency statutes discussed above. As noted, these statutes authorize management to take an enlightened approach to shareholder value that is based on the long-run well-being of the corporation as a whole. The business judgment rule shields

[36] See Cynthia A. Williams & John M. Conley, An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct, 38 Cornell Int'l L. J. 493 (2005); Virginia Harper Ho, 'Enlightened Shareholder Value': Corporate Governance Beyond the Shareholder-Stakeholder Divide (Oct. 2009).

[37] The statute also requires, in section 417, disclosure regarding environmental, employee, social, and community issues to the extent "necessary for an understanding of . . . the company's business." As one commentator notes, this is "a much watered-down version of the mandatory social reporting requirements that were initially introduced . . . in 2005" but later abandoned. Virginia Harper Ho, 'Enlightened Shareholder Value': Corporate Governance Beyond the Shareholder-Stakeholder Divide, p. 18 n. 81 (Oct. 2009).

from shareholder challenge and judicial review management's discretion to approach its responsibilities in this way if it so chooses. The Delaware Supreme Court has been clear in its endorsement of management's authority to chart the future of the "corporate enterprise" without interference from shareholders' preferences for immediate returns. Nevertheless, however, current US law differs from the UK's recently enacted sec. 172 in an important respect. While UK law appears to mandate an ESV philosophy, US law merely allows management to exercise its authority in that way if it chooses to do so.

The question, then, is whether in the absence of legal mandate US corporations might be persuaded to reorient their priorities. Internal pressures – compensation practices, social norms, and pressure from institutional shareholders – currently drive the shareholder primacy focus, which is understood to require an obsession with short-term share value. Countervailing external pressures therefore appear to be needed. In the discussion that follows, I explore one possible source of such pressures, management concerns about risk. Corporations are increasingly augmenting existing approaches to risk monitoring and loss prevention with more sophisticated strategies that recognize the potential costs to the corporation of activities that cause human rights abuses or environmental damage. Such costs can take the form of litigation risk and also the risk of harm to a corporation's reputation. Management has a natural incentive to minimize these risks because they can result in significant expense. Economic self-interest therefore seems to have the potential to generate heightened attention to human rights and environmental considerations.

The dynamic that might produce such outcomes is fairly straightforward. Exposure of human rights or environmental wrongdoing can lead to losses in the form of litigation and settlement costs and also of harm to the corporation's reputation, which in concrete terms can mean lost sales, disinvestment by shareholders, and employee morale problems. Accordingly, prudential considerations – independent of any moral ones – should lead transnational corporations to pay more attention to the human rights and environmental impacts of their activities. While this model seems simple enough and good outcomes seem plausibly predictable, each element deserves close scrutiny. The analysis that follows below attempts to do this, focusing in turn on the built-in limits of risk management – a cost-benefit exercise – as a device for discouraging bad behavior; on the limited ability of consumers and shareholders to bring pressure to bear on corporate management; and on the limited abilities of private parties such as NGOs or the media to expose corporate misbehavior to public scrutiny. Finally, and perhaps most important, it should be kept in mind that even if the dynamic sketched here leads corporations to avoid some human rights or environmental abuses, that does not necessarily translate into a shift in management outlook from a reactive strategy that aims to prevent losses to a proactive one that seeks long-run sustainability by cultivating productive relations with all of the corporation's stakeholders. This seems to be the vision behind sec. 172's concept of ESV. Even though US corporations approaching human rights and environmental issues from a risk management perspective may improve their behavior in important ways, that would not necessarily indicate embrace of ESV in sec. 172's more robust sense.

B. Risk Management

1. Liability Risk

Risk management is part of any responsible corporate management's efforts to meet its financial targets. Management must typically attend to a range of standard financial risks. These include liquidity and cash flow considerations, credit risks involving customer or other counterparty obligations, the reliability of supply chains, possible changes in consumer demand, pressure from competitors, workforce disruptions, and market risks relating to the value of a company's financial assets. Management must also be aware of governmental and regulatory risks posed by the prospect of new laws or regulations and to the possibility of political instability and natural disasters.

Litigation risk is part of this mix. US companies operating abroad increasingly must be wary of civil or criminal prosecutions based on activities that have negative human rights or environmental effects. Local law of host states may in many situations have little to say about such matters, and, even if it does, governments may be reluctant to confront businesses whose presence is thought to be valuable for a number of reasons. Nevertheless, there are numerous instances of high-profile judicial proceedings that have resulted in costly judgments or settlements.

The Bhopal disaster may be the best known example. In 1984, a toxic gas leak at a Union Carbide facility in India resulted in over 20,000 deaths and an additional 100,000 people suffering various adverse health effects. A settlement was reached in 1989 committing the corporation to pay $470 million for the benefit of the victims. Criminal prosecutions brought in India against the corporation and its senior officers are on-going.

In 2005, Unocal Corporation agreed to settle several lawsuits filed in California arising out of its complicity with the Burmese government in forced labor, rape, torture, and murder of villagers in connection with a natural gas pipeline project.[38] The amount of the cash settlement was confidential but compensation for the victims is said to be

[38] Daphne Eviatar, A Big Win for Human Rights: Unocal's Settlement with Burmese Villagers May Spur Better Corporate Conduct, The Nation, May 9, 2005.

significant. In addition, Unocal also undertook to provide funds to improve living conditions, health care, and education for residents of the pipeline region.

Another notable example is the settlement in 2009 of charges brought against Royal Dutch Shell plc and its Nigerian subsidiary for its involvement in the torture and execution by the military government of non-violent Nigerian activists protesting Shell's destruction of local communities and the environment. The $15.5 million settlement represents compensation for the victims and also provides for a range of social programs for the people of the affected region. Meanwhile, US federal court cases are underway against Chevron for human rights abuses in Nigeria and against Occidental Petroleum for environmental and public health violations in the Amazon region.[39]

High-profile cases like these cannot be ignored by corporate management. Aside from the costs of bad publicity, they are expensive to defend and to settle. Because it is clearly in their self-interest to limit litigation exposure, transnational corporations are increasingly including human rights and environmental impact in their routine risk management protocols. This requires clear statements of company policy – often in the form of codes of conduct – and careful monitoring of the activities of a company's various subsidiaries.

It should be noted, however, that there is a limit to the extent to which concerns about litigation can affect corporate behavior. Lawsuits like the ones referred to here are likely to occur only as a result of especially egregious human rights or environmental abuses that are serious enough to draw the attention of NGOs and other activists. As noted above, because the statute has been interpreted as proscribing only behavior that amounts

[39] For discussion of recent litigation in a number of countries, see Sarah A. Altschuller & Amy Lehr, Corporate Social Responsibility, 43 Int'l Law. 577, 580-87 (2009).

to clear violation of customary international law, the Alien Tort Claims Act gives US courts jurisdiction only over especially serious wrongs like genocide, slavery, or war crimes. Prosecution by home state authorities for less grievous offenses is still possible, but local governments are sometimes themselves implicated in corporate wrongdoing – as in the Unocal/Burma case, for example – and even if they are not may be reluctant to bring cases against companies whose presence provides economic benefits. Developing countries compete for foreign investment capital as a way to promote economic growth and prosperity. They therefore have an incentive to provide hospitable legal environments for transnational corporations doing business within their borders.[40] Litigation risk thus may not deter behavior that does not rise to the level of a serious human rights or environmental violation. Further, litigation risk does not appear to be a lever for encouraging corporations to reorient their direction from short-term share price maximization to a longer-term approach based on sustainability principles. This requires affirmative initiatives – such as improved working conditions and attention to environmental impacts – as well as avoidance of policies that inflict serious harms. Failure to move forward proactively typically is not by itself a basis for litigation.

2. Reputational Risk

The costs of major human rights or environmental litigation are greater than just the massive expenditures required for defense and resolution. They also present major public relations challenges. This is evident in the fact that settlements often involve more than just payment of compensation to the victims of the wrongs at issue. Corporations also

[40] Rachel J. Anderson, Toward Global Corporate Citizenship: Reframing Foreign Direct Investment, 18 Mich. St. U. J. Int'l L. 1, 11-12 (2009).

typically undertake to assume additional obligations that have nothing directly to do with compensation. These can include contributions designed to improve the quality of life for local residents. Companies will also, if they haven't already, adopt new codes of conduct designed to prevent recurrence of the kind of activities at issue. Nike, discussed below, is an example of this phenomenon. The point is that these initiatives amount to recognition that corporations that have been implicated in these kinds of wrongdoing must take affirmative steps to demonstrate that they disapprove of such conduct and will not engage in it in the future. The motivation is to remove the reputational stain that high-profile litigation leaves on the company's reputation.

Transnational corporations also face reputational risk even where conduct does not generate litigation. If a corporation is shown to be engaged in human rights or environmental abuses, the harm to its reputation can cost it money. Sales may suffer if consumers are sufficiently concerned. Further, the cost of capital could increase if investors perceive the possibility of future legal difficulties or simply object to the conduct in question. Avoidance of these kinds of reputational costs is simply the flip side of affirmative efforts to burnish the company's public image by expensive advertising of its activities as a "good citizen." Thus, risk management extends beyond avoidance of litigation to the broader challenge of avoiding behavior that is likely to be condemned in the court of public opinion.

Transnational corporations increasingly are attempting to formalize attention to these kinds of issues. General Motors Corporation, for example, has not one but two high-level committees charged with monitoring of reputational considerations.[41] Many of the

[41] Cynthia A. Williams & John M. Conley, Corporate Social Responsibility in the International Context: Is There an Emerging Fiduciary Duty to Consider Human Rights?, 74 U. Cin. L. Rev. 75, 94 n. 93 (2005).

largest corporations now have board of directors committees dedicated to social responsibility.[42]

While avoidance of reputational costs can certainly create incentives to avoid bad behavior, here as with litigation risk it should be kept in mind that this dynamic is subject to built-in limitations. Relatively minor activities are unlikely to trigger significant reputational backlash because they may not receive significant public attention. Further, the desire to avoid bad publicity would not necessarily lead corporations to adopt affirmative measures necessary to shift from a short-term, share price focus to a longer-term, sustainability management philosophy.

C. Accountability

1. Shareholders

Litigation and reputational risk are matters of financial concern to corporate management because increasingly shareholders are factoring these costs into their decisions about whether to invest in particular companies. This is true not just of "socially responsible" investment funds, for which human rights and environmental issues have always been highly relevant. Mainstream institutional shareholders, concerned primarily about investment return, are also taking an increasingly broad view of risk and are now routinely including so-called "environmental, social, and governance" (ESG) metrics into their investment decisions.

Most notable in this regard is the UN Principles for Responsible Investment (PRI).[43] In 2005, at the invitation of the UN Secretary-General, 20 institutional investors

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[42] Lisa M. Fairfax, The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms, 31 Iowa J. Corp. L. 675, 713-15 (2006).

from 12 countries consulted with 70 representatives of the investment industry, government, civil society, and academia. Under the coordination of the UN Global Compact and the UN Environmental Programme Finance Initiative, this process resulted in a set of six core principles. Most importantly, signatories commit to "incorporate ESG issues into investment analysis and decision-making processes, . . .be active owners and incorporate ESG issues into our ownership policies and practices, . . . [and] seek appropriate disclosure on ESG issues by the entities in which we invest." They also agree to promote the acceptance of the principles, to work together to implement them, and to report on progress. By agreeing to these principles, large institutional shareholders and other investors undertake to evaluate their investment decisions according to long-term criteria that expressly recognize the relevance of a range of stakeholder concerns for the financial success of their portfolio companies. In other words, they purport to eschew an approach to investment management that focuses primarily on short-term share prices rather than sustainability over time. To date 201 asset owners, 375 investment managers, and 137 professional service providers have signed on. US institutions include the AFL-CIO, CalPERS, CalSTRS, the Connecticut, Illinois, Los Angeles County, Maryland, New York State and City pension funds, and TIAA-CREF.

It remains to be seen how far this development will spread. Mutual funds are notably absent from the current list, but Vanguard recently decided to include portfolio company human rights practices in its investment decisions.[44] It is also unclear how rigorously these investors will evaluate ESG criteria or how much weight they will accord to them. As discussed below, disclosure on such issues is often superficial or even lacking

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[43] www.unpri.org

[44] Virginia Harper Ho, 'Enlightened Shareholder Value': Corporate Governance Beyond the Shareholder-Stakeholder Divide, p. 27 (Oct. 2009).

altogether. Nevertheless, wealthy, activist institutions like CalPERS certainly have the clout to influence the corporations in which they invest. Their endorsement of the financial relevance of ESG criteria cannot easily be dismissed, as one might disregard a proponent of CSR whose shareholding is small and who is more concerned with human rights or environmental issues than with investment return.

2. Public Opinion

So far, at least, institutional investors are not the primary constituencies pressuring corporate management to pay more attention to possible costs of human rights and environmental misbehavior. Consumers too can put effective pressure on companies to behave in a socially responsible manner. For example, when it came to light in the early 1990s that Nike relied on child labor to manufacture many of its products, NGO- and student-organized boycotts and demonstrations targeted its retail outlets. As a result of this major public relations disaster, in 1992 Nike adopted a code of conduct for its suppliers that mandates observance of basic labor, health, and safety standards. Although monitoring of compliance has proved to be difficult, it is clear that Nike is very concerned about its public image and devotes substantial resources to its enhancement.

Other examples of transnational corporations responding to public pressure are abundant. Starbucks' introduction of Fair Trade coffee in 2000 was a response to public criticism of its global expansion strategy. Major drug companies, initially unwilling to reduce prices of anti-HIV/AIDS drugs sold in South Africa, eventually backed down in the face of widespread pressure from consumer groups and others.[45] It is also common for

[45] See Claire Moore Dickerson, Human Rights: The Emerging Norm of Corporate Social Responsibility, 76 Tul. L. Rev. 1431, 1439-40 (2002).

corporations to adopt socially responsible policies because of employee recruitment and retention concerns. For example, a Goldman Sachs executive says, "people want to be part of a company that stands for something."[46]

It is a fair question whether highly publicized corporate responses to criticism from consumers, activists, and employees are driven primarily by genuine motivation to solve problems or are instead aimed mostly at improvement of the company's public image. For example, critics of Nike point out that wages at its contract factories remain very low even as it tries to eliminate child labor. And Fair Trade represents only a small fraction of Starbucks' coffee sales. Goldman Sachs' announcement in 2009 of a plan to distribute capital to small businesses was seen by some as a scheme to deflect public outrage over its historic profits facilitated in part by the largesse of the US government. The very existence of emerging CSR standards may ironically make it easier for corporations to create the appearance of responsible behavior by endorsing CSR precepts and adopting CSR rhetoric but without necessarily making significant changes to their business policies.[47] For example, a high-profile initiative designed to confer laudable benefits on a local population may actually involve only a small part of a transnational corporation's global activities.

There is no doubt that public relations considerations are a major element of many CSR initiatives. Nevertheless, in at least some cases there is a sincere effort to respond in a meaningful way to legitimate public criticism of corporate behavior. One study of 14 pulp and paper manufacturing mills located in Australia, Canada, New Zealand, and the United States found significant improvements in the reduction of environmentally harmful

[46] Lisa M. Fairfax, The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms, 31 Iowa J. Corp. L. 675, 708 (2006).
[47] See Cynthia A. Williams & John M. Conley, Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement, 31 Iowa J. Corp. L. 1, 14-16 (2005).

emissions.[48] Some had done better than others, but differences in legal regulation did not explain these discrepancies. Instead, "social pressures" – such as local communities, activists, NGOs, and the media – seem to have been a key variable, along with differences in attitude among corporate managers, in determining the extent to which companies exceeded legally mandated minimum standards. A highly visible, worldwide campaign by Greenpeace targeting use of chlorine as a bleaching agent was apparently especially influential. In some cases, consumer demands also played an important role. This study demonstrates that corporations pay attention not only to legal mandates – the "regulatory license" to operate – but also to extra-legal public pressure, the "social license." In this way, public values can shape corporate behavior independently of law and regulation.

D. Transparency

In order for external pressure to be effective in compelling corporate management to take into account the potential costs of human rights or environmental abuses, mechanisms must first exist that are capable of bringing such behavior to light. Mandatory and voluntary disclosure can play a role here, but even more important are the concerted efforts of NGOs like Amnesty International, EarthRights International, Human Rights Watch, Greenpeace, World Wildlife Federation, and many others.

1. Disclosure

US law does not specifically mandate social or environmental reporting beyond required disclosure of the costs of compliance with new environmental regulations or

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[48] Robert A. Kagan, Neil Gunningham & Dorothy Thornton, Explaining Corporate Environmental Performance: How Does Regulation Matter?, 37 L. & Soc'y Rev. 51 (2003).

information about pending environmental litigation.[49] In this respect, the US differs from a number of European countries. Several require broader environmental disclosure and France goes further and requires companies whose shares are traded on the Bourse "to provide extremely detailed environmental, labor, community involvement, health, and safety information in its annual reports to shareholders."[50] The EU now requires reporting on social and environmental as well as financial matters.[51]

Even so, US securities laws do require disclosure of "material" information, including "any known trends or uncertainties" that the reporting corporation expects will have an unfavorable impact on financial performance.[52] This provision is general enough to impose a duty to disclose information about any social or environmental risk that has potentially significant financial implications. As yet the SEC has not interpreted the materiality requirement in terms of a general obligation to report on sustainability or social responsibility issues. However, because the operative criterion is whether a reasonable shareholder would consider the information in question to be important, evolving expectations within the investment community about the relevance of social and environment risk factors are likely to result in more expansive disclosure requirements.

By relying on a general "materiality" requirement defined in terms of investor expectations, US law essentially adopts a market-driven approach to disclosure. This is in contrast to a command-driven approach that would be based on governmental mandate of specific ESG disclosures. It also contrasts with an ethics-based approach that would rely simply on the good will of the corporations themselves, on their desire "to do the right

[49] Regulation S-K, Items 101(c)(xii) & 103, 17 C.F.R. §§ 229.101 & 229.103 (2010).
[50] Cynthia A. Williams & John M. Conley, An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct, 38 Cornell Int'l L. J. 493, 504-505 (2005).
[51] Id. at 509.
[52] Regulation S-K, Item 303(a)(3)(ii), 17 C.F.R. §§ 229.303 (2010).

thing."[53] Assigning responsibility to the investment community to shape corporate disclosure according to its own needs has the advantage of placing power in the hands of actors to whom corporations must pay attention. Perhaps this is preferable to government mandates, which generate concerns in the business community about over-regulation and would not necessarily respond accurately to investor needs. Nevertheless, this approach has built-in limits because it is driven solely by investors' concerns about the need for information relevant to pricing decisions. Disclosure that might have other social value but that cannot be linked to investment return therefore is not likely to emerge from this process.

In the US, the SEC defines its mission solely in terms of investor interests. It has not attempted to mandate ESG disclosure but, speaking on behalf of shareholders, it nevertheless is able to influence disclosure practices. An important recent development in this regard is a SEC interpretive release on climate change disclosure.[54] The release offers guidance with reference to four potential issues that could trigger reporting obligations, including the potential impact of pending US legislative and regulatory initiatives and international treaties and accords and also indirect risks such as decreased demand for existing products that produce greenhouse gas emissions. The release also refers expressly to reputational considerations: "Depending on the nature of a [reporting company's] business and its sensitivity to public opinion, [it] may have to consider whether the public's perception of any publicly available data relating to its greenhouse gas emissions could

[53] I draw the distinction among market-, command-, and ethics-based disclosure regimes from Gordon L. Clark & Eric R. Knight, Institutional Investors, the Political Economy of Corporate Disclosure, and the Market for Corporate and Environmental and Social Responsibility: Implications from the UK Companies Act (2006) (Alfred P. Sloan Foundation Studies, 2008).

[54] Commission Guidance Regarding Disclosure Related to Climate Change, Releases Nos. 33-9106, 34-61469, FR-82 (Feb. 2, 2010).

expose it to potential adverse consequences to its business operations or financial condition resulting from reputational damage."[55] Although the SEC disclaims any intention to impose any new disclosure obligations, it is nevertheless likely that corporations for whom these issues are potentially relevant will focus more closely on these issues than they have in the past. This will be a significant improvement over recent practice, which according to a one report has produced very little disclosure of climate risk, even in sectors for which carbon reduction is likely to be quite costly.[56]

In a related development, the SEC late last year reversed a Bush administration policy that had allowed corporations to refuse to include shareholder proposals in their proxy solicitation materials where the proposals were requests for information regarding financial risks associated with environmental, human rights, and other social issues.[57] Now, where the underlying subject matter of the proposal raises a "significant policy issue," shareholders will be able to submit their proposed requests for information to a shareholder vote. Here too the SEC appears to be sympathetic to shareholders' interest in obtaining disclosure of risk information that goes beyond traditional financial metrics.

Although as yet mandated disclosure of human rights and environmental matters is still limited, a number of US companies voluntarily exceed the minimum requirements. As of 2002, 36 percent of the largest US corporations published social reports,[58] a number that is very likely higher today. Among major companies issuing sustainability reports today are Anheuser-Busch, AT&T, General Motors, Intel, Johnson & Johnson, McDonald's,

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[55] Id. at 26.
[56] The Corporate Library, Climate Risk Disclosure in SEC Filings: An Analysis of 10-K Reporting by Oil and Gas, Insurance, Coal, Transportation and Electric Power Companies (June 2009).
[57] SEC, Div. of Corp. Fin., Staff Legal Bulletin No. 14E (CF) (Oct. 27, 2009).
[58] Cynthia A. Williams & John M. Conley, An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct, 38 Cornell Int'l L. J. 493, 497 (2005).

Nike, and PepsiCo.[59] Companies that publish separate documents often refer to them as "corporate citizenship" or "corporate responsibility" reports.[60] These focus on the company's good relations with customers, employees, and the broader community. Even if they do not produce a separate document, most Fortune 500 companies now include discussion of stakeholder issues in their annual reports, often quite prominently.

It is important to distinguish between disclosure that candidly and thoughtfully explains potential human rights or environmental problems that might arise out of the company's operations, on the one hand, and less concrete pronouncements about the company's asserted commitment to social and environmental values. The latter is more likely to reflect public relations considerations than it is rigorous self-examination. Nevertheless, all of this voluntary disclosure does indicate increasing acknowledgement by corporate management that more is expected of business activity than simply the enhancement of share prices.

US developments in the area of voluntary reporting are part of a larger worldwide movement in the direction of expanded corporate disclosure. The Global Reporting Initiative has developed the GRI Sustainability Reporting Framework.[61] The purpose is to provide a standardized template for economic, environmental, and social disclosure, facilitating thorough treatment of the full range of stakeholder interests and allowing comparisons among companies. Over 1000 organizations are now using GRI guidelines for their social reporting, including 13 percent of the S&P 500 in the US.[62]

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[59] SEC Investor Advisory Committee Briefing Paper No.1, "Possible Refinements to the Disclosure Regime," p. 7 (July 27, 2009).
[60] Lisa M. Fairfax, The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms, 31 Iowa J. Corp. L. 675, 691-93 (2006).
[61] See www.globalreporting.org
[62] GRI Press Release (July 15, 2009).

2. External Scrutiny

These developments are important and indicate movement in the direction of routine inclusion of social and environmental considerations in corporate reporting. Nevertheless, most US transnational companies do not do this or do so only incompletely. And in many cases disclosure seems to be motivated as much by public relations considerations as it is by genuine desire to present a full picture of the human rights or environmental challenges confronting a particular business. For example, one study concludes that, even among companies that chose to publish sustainability reports in 2009, human rights reporting "still falls far short when measured in relation to certain key principles and elements of good human rights reporting."[63] In particular, reporting companies tended to emphasize implementation of policies and positive impacts while underplaying potential negative human rights effects arising from their operations.

For the moment, at least, a more promising source of transparency is the work of NGOs and other activists who are committed to the investigation and exposure of human rights and environmental problems. NGOs like Amnesty International, EarthRights International, Human Rights Watch, Greenpeace, World Wildlife Federation, and others have played important roles in uncovering and publicizing activities that otherwise might not receive the notice of anyone other than the people immediately affected. The mainstream media can also play a role by publicizing the results of NGO investigations.

[63] Corporate Human Rights Reporting: An Analysis of Current Trends (Nov. 2009) (report commissioned by the UN Global Compact, Global Reporting Initiative, and Realizing Rights: The Ethical Globalization Initiative).

For example, the New York Times reported prominently on a small Indian NGO's discovery of pesticide in Coca-Cola and Pepsi soft drinks.[64]

Amnesty International, for example, states that "Our mission is to conduct research and generate action to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated. Our members and supporters exert influence on governments, political bodies, companies and intergovernmental groups. Activists take up human rights issues by mobilizing public pressure through mass demonstrations, vigils and direct lobbying as well as online and offline campaigning."[65] Despite its historic focus on state-sponsored human rights violations, Amnesty International recognizes that transnational corporations can also be responsible for abuses, especially where local governments fail to protect their citizens, and is publicizing corporate human rights violations and campaigning for global standards on business and human rights.

EarthRights International documents and publicizes human rights and environmental abuses, with a particular focus on the activities of transnational corporations.[66] For example, a series of reports exposes the complicity of Chevron and the French oil company Total in murder, forced labor, and high-level government corruption in connection with the construction of a natural gas pipeline in Burma. EarthRights International also supports litigation in US courts, including the Doe v. Unocal case on behalf of Burmese villagers.

Greenpeace continues its non-violent confrontations with businesses and other actors who engage in environmental destruction.[67] The aim is to shed light on such

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[64] Amelia Gentleman, For 2 Giants of Soft Drinks, a Crisis in a Crucial Market, N.Y. Times, Aug. 23, 2006.
[65] See www.amnesty.org.
[66] See www.earthrights.org.
[67] See www.greenpeace.org/usa.

activities "in order to raise the level and quality of public debate." It also tries to influence corporate behavior in other ways. Currently underway is a campaign to persuade major information technology firms to take leadership roles in developing technological solutions to climate change problems and in advocating for energy use regulations. Greenpeace seeks to apply the pressures of public opinion by grading CEOs of leading companies according to a set of criteria and publishing the results. Google, Microsoft, and IBM are criticized for failing to stand up against the US Chamber of Commerce's opposition to climate change legislation, while Apple is praised for its high-profile decision to withdraw its membership.

Through investigation and publicity, NGOs have the potential to expose corporate behavior and policies to a much broader audience than might otherwise learn of them. Certainly for egregious human rights or environmental abuses, this is likely to provide far greater transparency than would reliance on voluntary disclosure alone. Publicity can also be effective for less dramatic but no less important activities like greenhouse gas emissions that companies also would not necessarily disclose voluntarily.

Greater transparency resulting from NGO activity facilitates public scrutiny and pressure. NGOs are mission-driven, but because they must rely so heavily on private donations, they must necessarily pursue agendas that resonate with public opinion and values. In this way, they act as conduits for the views of a larger public constituency. Likewise, once the light of publicity has been directed at particular behavior, those members of the public who care can use their resources to bring pressure to bear. As we have seen, this pressure can come from consumers or investors. It may result in litigation but it need not in order to be effective. Ultimately publicity can also result in governmental action, as occurred in India when several states enacted partial bans on sales of Coca-Cola products in the wake of the pesticide controversy mentioned above.

Technology may also make it possible for activists with very limited resources to make a difference. The example of a Californian named Amit Srivastava is instructive.[68] Working alone, he has created a website for collection of information about Coca-Cola's public health and environmental offenses in India and serves a resources for activists around the world. His site also provides a coordination point for otherwise dispersed and disconnected local protesters in India. His speeches to college students in the US and Europe have resulted in a number of colleges banning Coke products. He has organized a "fax action" campaign that resulted in over 9,000 faxes being sent to Coca-Cola headquarters. Even a determined individual apparently can have an impact on public opinion.

Powerful as this process of transparency and pressure can be, it should still be recalled that NGOs and individual activists inevitably have limited resources and areas of interest. There is no reason to think that all of the kinds of problematic corporate behavior that society might legitimately be worried about will be brought to light in this way. Technology allows anyone with a camera phone and a computer link to YouTube to expose bad behavior, and there is evidently a sympathetic audience for these messages consisting of numerous concerned people around the world who are deeply skeptical about the good will of transnational corporations. Even so, it would be a mistake to conclude that the threat of exposure by private actors can be sufficient to deter the full range of human rights and environmental abuses that businesses are likely to cause. Moreover, to

[68] Steve Stecklow, How a Global Web of Activists Gives Coke Problems in India, Wall St. J., June 7, 2005, p. A1.

the extent that corporations are concerned solely with "damage control," there is no reason to assume that risk management policies themselves can be powerful enough to produce a shift from short-term shareholder wealth concerns to longer-term sustainability values.

III. Corporate Social Responsibility Without Law?

Because it is market-driven rather than legislatively or judicially mandated, the version of ESV presented in this paper relies on management's evaluation of the corporation's self-interest as the driving force behind expanded attention to human rights, environmental, and other CSR values. As explained above, US law does not require the emphasis on short-term share price that currently preoccupies corporate management; various extra-legal factors account for that. The question therefore is whether – or rather to what extent – financial considerations might spur management to embrace a broader conception of its responsibilities. The prospect of reform without legal intervention is surely intriguing. Even so, there is reason to think this process may disappointment the ambitions of CSR advocates.

According to the model presented above, ESV would emerge naturally from business practice. Transnational corporations that have committed serious human rights or environmental violations have been subjected to lawsuits in the US and elsewhere resulting in substantial litigation and settlement costs. In addition to paying compensation, corporations have also agreed to significant changes in their behavior, including efforts to prevent future violations and also measures to improve living conditions for affected populations. Companies have also sustained significant reputational costs, measured most concretely in lost sales but probably also including less quantifiable but still substantial damage to corporate "brands." They have therefore found themselves compelled to adopt well-publicized policies designed to improve their public image as "good corporate citizens." Ex ante, anticipating and avoiding material litigation and reputational costs is now an accepted part of risk management. Companies thus acknowledge an incentive to take proactive steps to avoid activities that could expose them to lawsuits or negative publicity. Attention to human rights and environmental considerations, motivated by financial self-interest, thus can lead corporations to behave in ways that are in many ways consistent with the objectives of CSR advocates.

Importantly, under this model progress can be achieved without resort to legal mandates that redefine management's responsibility and corporate purpose in terms of CSR. Although the legal regimes of some western European states include elements that reflect appreciation of stakeholder and sustainability values, for the most part states around the world have been very reluctant to enact legislation mandating CSR for corporations organized under their laws or operating within their borders. Certainly there has been no significant movement in that direction in the US. Typically such legislation is viewed as a trade-off between the interests of investors and nonshareholder stakeholders. Developed countries fear loss of investment and higher costs disadvantaging firms in product markets. Developing countries, often competing with each other for foreign investment, are concerned about regulations that might deter entry. Multilateral initiatives, if widely adopted, could address concerns about jurisdictional competition by leveling the playing field but as yet consensus on such matters has proved to be exceedingly difficult to realize. The dynamic sketched here, in contrast, presents the prospect of progress without law, by relying on the financial self-interest of transnational corporations.

Instead of legal mandate, extra-legal pressures reshape management attitudes and behavior. Importantly, these pressures come from private actors, whose influence over corporate behavior causes it to change, in the process in effect redefining corporate purpose. NGOs, community activists, and the media in particular devote substantial resources to the investigation and public exposure of human rights and environmental problems. Consumers can punish companies whose activities they disapprove of by refusing to buy and discouraging others from doing so. Employees' morale may depend in part on a sense that the companies they work for behave in acceptable ways, and this may also be a factor in employee recruitment as well. Institutional shareholders, motivated by concerns about investment return rather than CSR as such, nevertheless must evaluate risk, and pension funds in particular need also to worry about the long-term performance of their portfolios. Corporations seeking investors therefore must increasingly acknowledge that their human rights and environmental policies are relevant to valuation metrics. As part of this process, evolving understandings of materiality in turn encourage disclosure of social and environmental information. In all these ways, segments of the public impose their own notions of appropriate corporate behavior on management. The public rather than the law thus has the potential to redefine corporate purpose.

To be sure, law is not entirely irrelevant to this story. NGOs, activists, consumers, and the media often express their critique of corporate behavior with explicit or implicit reference to western legal rules and principles. Tort law, environmental regulations, or international human rights norms can result in lawsuits. Investors concerned about litigation and reputational risk likewise evaluate corporate policies against a backdrop of law that can result in expensive litigation or provide the basis for negative publicity.

Nevertheless, the point is that pressure to change corporate behavior under the model discussed here comes from a range of private, non-state actors rather than from government acting under color of law and according to a redefined concept of management responsibility and corporate purpose. Sometimes there is an actual or implied threat of resort to legal process but not necessarily. Sometimes the threatened harm may simply be lost business.

Promising as it might be, the process described here, by which the public influences and reshapes corporate purpose, still raises some important questions. First, the process of change based on external pressure depends on exposure of problematic behavior by private actors. Unless human rights or environmental violations are revealed somehow, public opinion cannot bring its power to bear. NGOs, other activists, and the media have limited resources. These actors also have a built-in interest in investigating and documenting especially egregious violations. These are the kinds of wrongdoing that will draw the most attention to the crusaders who expose them; favorable, high profile publicity will garner donations or sell copy. This means that less newsworthy kinds of wrongdoing are less likely to attract attention. Some – perhaps a great deal – of problematic corporate activity inevitably will escape discovery.

Increased corporate disclosure in response to pressure from institutional shareholders likewise is an incomplete source of information on potentially important human rights and environmental matters. Because their concern is investment return, shareholders are typically only interested in such matters to the extent it might affect the corporation's financial performance. Information that is not material in that sense is irrelevant and need not be disclosed, even though it might be important for other, nonfinancial reasons. Moreover, a commitment to sustainability may express itself in many small, seemingly routine policies and decisions. Failures to take adopt measures are likely not material in themselves, even though together they might signal lack of commitment to sustainability values. Again, this class of private actors may lack the incentives to cause corporations to disclose the full range of information that might be of interest to CSR advocates.

If the first set of concerns centers on whether the optimal amount of information will come to light, a second set considers the efficacy of public pressure when information actually is made available. In the most grave cases of abuse, those most likely to be exposed and arouse public outrage, corporations are likely to respond appropriately, by paying compensation, attempting to fix the problem, and, often, investing in improvements for the affected community. They may also embrace general policies that go beyond the particular incident in question and seek to prevent recurrences in other places. In some cases, however, responses may be more symbolic than genuinely transformative. A corporation might announce a high-profile initiative that sounds promising but in fact has a limited impact on the firm's business. This is to be expected. If public opinion is the source of external pressure for change, a response designed to placate the public and deal effectively with the company's reputational concerns may be all that's forthcoming. NGOs or activists may try to expose this fact, but even despite widespread misgivings about corporate good will, a wealthy corporation with a well respected brand may have an advantage in the public relations contest.

A third caveat is particularly important. At the end of the day, even if there is sufficient transparency and public pressure generates genuine accountability, it must be kept in mind that any social benefits depend ultimately and entirely on the corporation's own voluntary choices. The bottom line in most cases will be the bottom line – namely, the impact of the available alternatives on the corporation's finances. All businesses must earn profits in order to survive and prosper. This is just as true for corporations that pay attention to nonshareholder interests as it is for those that pursue short-term shareholder primacy. Confronted with human rights or environmental problems, corporations must engage in cost-benefit analysis just as they do with other business decisions. This perspective imposes a limit to how far a company will be willing to go. Even if its perspective is broader than short-term shareholder value alone, there will be cases where management will not go as far as a robust conception of social responsibility might seem to demand.

This is the key difference between social responsibility mandated by law and socially responsible behavior that is the voluntary response to external pressures based on financial considerations. Even if "enlightened" by a broader sense of corporate purpose, voluntary corporate behavior may not attain the breadth of social responsibility that legal mandate could achieve. This is because law has the power to demand behavior based on a range of criteria. Corporate financial considerations may be one but so too might be human rights or environmental values that are deemed to be right even if they are not profitable. The law thus has the ability to require behavior that would not otherwise be chosen willingly. Those who are committed to human rights and environmental values that cannot be justified in cost-benefit terms may therefore find themselves disappointed by an approach to CSR that is based on shareholder value, however enlightened it might be by the pressures of public opinion.

Conclusion

The promise of the model of ESV analyzed in this paper is the possibility of social responsibility embraced voluntarily by US transnational corporations. This would make up for the absence of legal mandate in this area. Instead, corporations concerned about litigation and reputational risk find it to be in their self-interest to pay attention to human rights and environmental norms of good behavior. Corporate purpose, currently thought of in the US in terms of short-term shareholder value, can be thus be redefined more broadly to encompass nonshareholder interests as well – and the engines of change can be NGOs, community activists, consumers, the media, and even investors, rather than government regulators. We should hesitate, though, before concluding that all is well or soon will be. For one thing, there is little reason to think that market-based pressures will cause corporate management to discard short-termism in favor of a long-run perspective. There are also reasons to doubt the efficacy of this process as a vehicle for expanding the breadth of management's perspective. Before the public can bring pressure to bear on corporate management, it must have information about what corporations are doing. NGOs, other activists, and the media have had some notable successes exposing cases of egregious corporate behavior, and institutional shareholders are encouraging corporations to expand disclosure beyond traditional financial metrics. Still, though, it would be a mistake to think that these processes will be sufficient to expose the full range of activities that can have negative human rights or environmental impacts. Absent such information accountability necessarily will be limited. Even where the public is made aware of corporate misdeeds and brings pressure to bear, there is reason to doubt that corporate responses are fully attentive to the affected stakeholder interests. Because management is concerned about reputational costs, it may be motivated by public relations considerations as much as by genuine desire to fix problems and prevent their recurrence. Ultimately, corporate management is and will continue to be driven by cost-benefit concerns, which means that certain problems will not be addressed or prevented if it is not cost-effective to do so. There is, in other words, no reason to think that corporations will voluntarily go as CSR advocates might think they should. From this point of view, then, there is a responsibility gap – a disjunction between actual and ideal behavior – that seems inevitable. How large that gap is and will continue to be is an open question. So too is the question whether we should tolerate it.