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Corporate Social Responsibility and the New Governance: In Search of Epstein's Good Company in the Employment Context

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CORPORATE SOCIAL RESPONSIBILITY AND THE NEW GOVERNANCE: IN SEARCH OF EPSTEIN’S GOOD COMPANY IN THE EMPLOYMENT CONTEXT

Michael B. Runnels^{*}, Elizabeth J. Kennedy^{**},
and Rev. Timothy B. Brown, S.J.^{***}

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“Corporations are not responsible for all the world’s problems, nor do they have the resources to solve them all . . . [but], a well run business . . . can have a greater impact on the social good than any other institution or philanthropic organization.”¹

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1. Porter, M.E., Kramer, M.R., *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, 84 HARV. BUS. REV. 78, 92 (2006). Porter and Kramer presented an updated contextualization of Friedman argument that “there is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.” Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Magazine), Sept. 13, 1970, at 124, *reprinted in* BUSINESS ETHICS 17 (Tamara L. Roleff ed., 1996).

Business leaders,² policy makers,³ key stakeholders,⁴ and scholars⁵ have long recognized that the corporation, the most powerful global institution, can and should be more attuned to human needs.⁶ Now, as the world experiences the first financial crisis of the twenty-first century,⁷ many individuals and groups recognize the need for a refined balance among government, the economy, and civil society.⁸ As the current financial crisis originated with American transnational

2. *A Stitch in Time*, ECONOMIST, Jan. 19, 2008, at 12, 13 fig.5 (responding to the query: “[w]hat are the main business benefits to your organisation of having a defined corporate-responsibility policy?”). Business leaders provided a range of responses, such as “[h]aving a better brand reputation,” “[m]aking decisions that are better for our business in the long term,” “[b]eing more attractive to potential and existing employees,” “[m]eeting ethical standards required by customers,” and “[h]aving better relations with regulators and lawmakers.” *Id.*

3. Stefano Zamagni, *Religious Values and Corporate Decision Making: An Economist’s Perspective*, 11 FORDHAM J. CORP. & FIN. L. 573, 581 (arguing that consumers who use their purchasing power to express moral sentiments motivate policy-makers to seek corporations that are more socially responsible).

4. The key stakeholders we refer to include unions. See Marleen A. O’Connor, *Organized Labor as Shareholder Activist: Building Coalitions to Promote Worker Capitalism*, 31 U. RICH. L. REV. 1345, 1346 (discussing the alliance of unions with those seeking to promote a greater sense of corporate social responsibility).

5. See, e.g., Don Mayer, *Corporate Citizenship and Trustworthy Capitalism: Cocreating a More Peaceful Planet*, 44 AM. BUS. L.J. 237 (2007) (considering links between corporate behavior and peaceful, sustainable societies); Timothy L. Fort, *The Times and Seasons of Corporate Responsibility*, 44 AM. BUS. L.J. 287 (2007) (suggesting that corporate focus on profitability puts people, businesses, and the free market at risk); Thomas W. Dunfee & Timothy L. Fort, *Corporate Hypergoals, Sustainable Peace, and the Adapted Firm*, 36 VAND. J. TRANSNAT’L L. 563 (2003) (using the language of “hypergoals” to highlight universal principles that govern a wide range of organizations). Dunfee and Fort’s work considers how corporations can achieve sustainable peace. *Id.* Thomas W. Dunfee & David Hess, *Getting From Salbu to the “Tipping Point”: The Role of Corporate Action Within a Portfolio of Anti-Corruption Strategies*, 21 NW. J. INT’L L. & BUS. 471 (2001) (considering improved corporate behavior in the context of corruption in international business); Don Mayer, *Community, Business Ethics, and Global Capitalism*, 38 AM. BUS. L.J. 215 (2001) (contributing to dialogues about community, corporate ethics, and the generation of potent moral norms); Daniel T. Ostas, *Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory*, 38 AM. BUS. L.J. 261 (2001) (making the concept of CSR useful by drawing insights from legal and economic theory).

6. George Cheney, Juliet Roper & Steve May, *Overview*, in THE DEBATE OVER CORPORATE SOCIAL RESPONSIBILITY 3 (Steve May, George Cheney & Juliet Roper eds., 2007).

7. See Saule T. Omarova, *The New Crisis for the New Century: Some Observations on the “Big-Picture” Lessons of the Global Financial Crisis of 2008*, 13 N.C. BANKING INST. 157, 158 (2009) (contextualizing the scope of the financial crisis). Omarova explains its focal point as the inherent tension “between the increasingly globalized and interconnected nature of today’s financial markets, on the one hand, and an inherently fragmented nationally-based approach to financial sector regulation and supervision and regulation, on the other.” *Id.* He further argues that prior financial crises were either generally confined to emerging markets or to certain developed countries, with only minimal collateral effect. *Id.* In the current crisis, however, every economy, irrespective of its geographical location, size, or developmental status, has been affected. *Id.*

8. Cheney, Roper & May, *supra* note 6, at 4.

corporations (TNCs),⁹ calls for reform have highlighted the political clout of TNCs,¹⁰ especially in reference to their singular ability to affect global economic activity¹¹ and human rights.¹² Traditional approaches¹³ to reform highlight legislative action, while contemporary approaches¹⁴ draw from a wide range of action, including voluntary action, that

9. Omarova, *supra* note 7, at 161. Lehman Brothers and American International Group (AIG) are two examples.

10. See David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 933 (2004).

11. Joe W. (Chip) Pitts, III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J.L. & POL'Y 334, 380 (2009) (arguing that TNCs occupy a unique role in their ability to affect significant social change). Pitts explains that since "a relatively small number of TNCs represents a large proportion of global economic activity," successful efforts to prevail upon corporate behavior can result in a significant social impact. *Id.*

12. Kinley & Tadaki, *supra* note 10, at 933 (arguing that the economic and political muscle of TNCs uniquely position them to significantly impact the enjoyment of human rights). Kinley and Tadaki explain that the concerted efforts of myriad entities—from workers, states, and NGOs to the TNCs themselves—are needed to highlight the behavior of TNCs and to hold them accountable for such behavior under international human rights law. *Id.* The authors further argue that since TNCs habitually compartmentalize their economic interests and concern for human rights as distinct and unrelated aspects of their interest, TNCs habitually treat concern for human rights as a peripheral matter. *Id.* As such, the authors call on "every individual and every organ of society" to defend the value of human dignity by prevailing upon TNCs to conceptualize their economic bottom line and basic human dignity as fundamentally inseparable. *Id.* at 1022.

13. Although all authors listed in this footnote use the terms "hard" (e.g., laws) and "soft" (e.g., corporate codes) to describe various modes of social control, this article reframes "soft" approaches as contemporary and "hard" approaches as traditional. This re-framing reflects our appreciation for *New Governance*, especially its less adversarial, more collaborative approach. See Cristie L. Ford, *New Governance, Compliance, and Principles-based Securities Regulation*, 45 AM. BUS. L.J. 1, 28 (2008) (conceptualizing a *New Governance* framework for securities regulation). Ford explains that it would entail a regulatory structure that "spans the so-called public/private divide, pulls industry experience into regulatory decision making, and establishes robust ongoing communication mechanisms [rather than an information-hoarding, adversarial relationship between industry and regulator]." *Id.* For articles utilizing the "hard" and "soft" terminology, see Pitts, *supra* note 11; John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1 (2005); Amiram Gill, *Corporate Governance as Social Responsibility: A Research Agenda*, 26 BERKELEY J. INT'L L. 452 (2008); Peer Zumbansen, *The Parallel Worlds of Corporate Governance and Labor Law*, 13 IND. J. GLOBAL LEGAL STUD. 261 (2006).

14. See generally Pitts, *supra* note 11, at 337-42, 373-82 (describing antiquated approaches to CSR and pointing to more contemporary approaches). Pitts explains that corporations engaging in apparent "voluntary" good governance initiatives should be viewed as engaging not in voluntary behavior, but in more "legal" substantive and sanctionable behavior than many commentators realize. *Id.* He goes on to describe such voluntary initiatives as ahead of the regulatory curve by being more responsive to market forces than the legislative process. *Id.* at 415. He argues that enlightened companies increasingly understand that reasonable regulation, which need not be top-down and legally mandated, can be of the "more nuanced varieties of information regulation and meta-regulation/enforced self-regulation [that] is indispensable to effectively functioning, sustainable markets." *Id.* Such behavior, Pitts argues, is a contemporary approach to corporate reform. *Id.*

incentivize corporations to be more responsive to societal needs.¹⁵ Most importantly, contemporary approaches to reform explore intersections between corporate social responsibility (CSR)¹⁶ and new approaches to corporate governance, or the “New Governance.”¹⁷

CSR seeks improved behavior from corporations. It asks corporations to broaden relationships with multiple stakeholders,¹⁸ engage in meaningful and sustained efforts to improve communities,¹⁹ and/or to conform to society’s rules—those embodied in both law and ethical custom.²⁰ In recent years, CSR has focused on corporate governance as a means through which its maxims may be incorporated into the business decisionmaking processes.²¹ *New Governance* is a phraseology that refers to a fresh approach to reform that encourages dialogue about regulatory principles from the perspectives of industry, regulators, CSR advocates, and shareholders.²² Indeed, dialogues about

15. Gill, *supra* note 13, at 452-55 (arguing that corporate governance is adjusting from its traditional focus on agency conflicts to a focus on the contemporary issues of transparency, accountability, and ethics). Gill explains that the corporate social responsibility movement is increasingly focusing on corporate governance as a means by which corporations can be incentivized to be more attuned to societal needs. *Id.*

16. Conley & Williams, *supra* note 13.

17. While *New Governance* theory is complex and its terminology and taxonomies are often contested, a core element in virtually all formulations, however, is the idea of the “postregulatory state.” The essence of this idea is that regulatory power is diffused progressively among networks of state and nonstate actors that transcend national boundaries. See generally Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State*, in THE POLITICS OF REGULATION 145 (Jacint Jordana & David Levi-Faur eds., 2004) (exploring theoretical approaches to regulation and providing a foundation for *New Governance* scholarship).

18. Cheney, Roper & May, *supra* note 6, at 3.

19. *Id.*

20. Friedman, *supra* note 1, at 33 (describing the responsibility of the corporate executive). Friedman argues that this responsibility “is to conduct business in accordance with [the shareholder’s] desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.” *Id.* While Friedman articulates this point as a response to the CSR movement, he fails to consider how ethical custom and the law interact. Indeed, he fails to consider that ethical custom and the law are, in fact, interdependent. See Cyrus Mehri, Andrea Giampetro-Meyer & Michael B. Runnels, *One Nation, Indivisible: The Use of Diversity Report Cards to Promote Transparency, Accountability and Workplace Fairness*, 9 FORDHAM J. CORP. & FIN. L. 395, 407 (2004).

21. Gill, *supra* note 13, at 463-66; see also Cheney, Roper & May, *supra* note 6, at 4 (explaining that conversations about unchecked corporate power are central to conversations about how to “probe in an informed and systematic way the potentials for positive social change in, through, and around the modern corporation”); Conley & Williams, *supra* note 13, at 37-38 (describing CSR as “a complex communication network among public and private actors,” which, “[a]t its best, promises a corporate decisionmaking process in which managers think and talk openly about social and environmental issues and then tell the world what they did and why”).

22. Ford, *supra* note 13, at 5.

New Governance include CSR principles and more. *New Governance* promotes systems that “use[] innovative, pragmatic, information-based, iterative, and dialogic mechanisms to gather, distill, and leverage industry learning in the service of a still-robust but better designed, that is, more effective and less burdensome, public regulatory mandate.”²³ *New Governance* envisions decision making as a collaborative, rather than an adversarial process.²⁴

In *The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux*,²⁵ Professor Edward M. Epstein, a chief architect of what we now call the field of CSR, engages with *New Governance* scholarship.²⁶ Epstein acknowledges the power of TNCs to actualize the goals of CSR and considers what factors may incentivize TNCs to become “Good Companies,” ideal companies²⁷ that undertake behavior that maximizes benefits for society.²⁸ In particular, he describes six factors—law, affinity group regulation, self-regulation, ethical precepts, the media, and an engaged civil society—as “modes of social control”²⁹ that encourage TNCs to engage in socially beneficial behavior.³⁰ Epstein’s work provides a practical framework that allows

23. *Id.* at 5 (describing the British Columbian (Canada) model as an example of the *New Governance*). Ford defines the linchpin of this model as a substantially altered relationship between regulators and industry—a relationship not defined by inflexible regulators mandating rules that are often incompatible with fast-paced business environments, but a relationship defined by a shared responsibility and a pragmatic responsiveness to “complex real-life social systems.” *Id.* at 27-28. Ford goes on to describe this *New Governance* as providing a rational, systemic alternative to draconian rule-making and their often adverse effects of business—and as the “most effective mechanism for making decisions in complex organizational structures.” *Id.* This, Ford argues, is an opportunity for “dialogic and transparent securities regulation,” viewed from the perspective of industry, regulators, shareholders, stakeholders, and CSR advocates. *Id.* at 60.

24. *See supra* note 13.

25. Edwin M. Epstein, *The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux*, 44 AM. BUS. L.J. 27 (2007).

26. Professor Emeritus, Haas School of Business, University of California Berkeley. He does not actually use the phrase “*New Governance*.” Professor Epstein has written about the conceptual foundations of business in society for over thirty years. *See, e.g.*, EDWIN M. EPSTEIN, CORPORATIONS, CONTRIBUTIONS, AND POLITICAL CAMPAIGNS: FEDERAL REGULATION IN PERSPECTIVE (1968).

27. Epstein, *supra* note 25, at 212-13.

28. *Id.* (arguing that CSR is inherently insufficient in achieving the *Good Company*). Epstein provides his own framework and describes TNCs, by virtue of their economic and political power, as the most efficient proxies through which his framework can encourage the actualization of the *Good Company*. *Id.*

29. *Id.* at 210-12.

30. *Id.* at 220 (discussing the desire for more socially responsible corporations). Epstein writes that he envisions “better companies, organizations that continuously seek to perform the economic functions for which society relies upon them in a manner that optimizes the firm’s utility

scholars to engage in a systematic review of ways to harness the best corporate behavior.

The purpose of this Article is to apply Epstein's *Good Company* framework to corporate behavior that falls under three distinct employment law issues³¹ that continually challenge TNCs as they conduct business.³² Part I summarizes Epstein's *Good Company* framework and his insights about the *Good Company*.³³ Part II integrates Epstein's *Good Company* framework with TNCs' ability to curb the use of abusive forms of child labor (enact responsible child labor policies), foster open, democratic, and collaborative workplaces (improved employer-employee bargaining), and to create an ethic of care for employees (ethic of care).³⁴ Part III briefly analyzes our findings, suggests modifications to Epstein's *Good Company* framework, and positions the modifications in the context of *New Governance* scholarship.³⁵ The article concludes by affirming Epstein's approach to the *Good Company* and offers final reflections about fostering *Good Companies* in the employment context.

I. THE RHETORIC AND REALITY OF GOOD COMPANIES

A. Epstein's Description of the Contemporary Setting

In *The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux*,³⁶ Epstein succinctly details

to the diverse stakeholders affected by their actions and minimizes the deleterious effects . . . of their operations." *Id.*

31. These three issues, child labor, employee-employer bargaining, and the cultivation of an ethic of care for employees, involve basic human rights and are issues that TNCs, more than most nation states, have the power to affect. See Douglas M. Branson, *The Very Uncertain Prospect of "Global" Convergence in Corporate Governance*, 34 CORNELL INT'L L.J. 321, 326 (2001) (arguing that issues such as "worker exploitation" and "economic imperialism" emanate from TNCs, "whose power exceeds that of most nation states"); see also *supra* note 12 and accompanying text.

32. The Article engages in a metaphorical search for Epstein's *Good Company*, a company that illustrates the ideal in terms of respect for both financially sound business decisionmaking and human rights.

33. See *infra* notes 35-89 and accompanying text. The *Good Company* is shaped, and/or held accountable by modes of social control, such that these TNCs are powerful corporate engines that work for "socially efficacious purposes."

34. See *infra* notes 90-213 and accompanying text. For each issue (ethic of care, improved bargaining, and responsible child labor policies), Part II asks which modes of social control are most likely to incentivize TNCs to engage in socially efficacious behavior.

35. See *infra* notes 214-40 and accompanying text.

36. Epstein, *supra* note 25.

the externalities³⁷ linked with the operation of TNCs.³⁸ Noting the evolution of the corporate form from organizations designed to benefit the public good³⁹ to the modern TNC, Epstein considers questions regarding CSR to be the natural outgrowth of this evolution.⁴⁰ Epstein frames the significance of these questions by defining the contemporary setting of TNCs.⁴¹

There are four phenomena that define this contemporary setting: globalization, the energy crisis, technological revolutions, and social transformations.⁴² Each phenomenon will be described in turn. Transnational business activity is creating a globalized economy in which modern communications and transportation technologies are rendering geographical barriers non-existent.⁴³ TNCs, Epstein argues, originated and will continue to serve as the prime instrumentalities of this process.⁴⁴ As to the energy crisis, Epstein argues that industrialized countries' dependence on fossil fuels is affecting the geopolitical balance of power in ways that empower corrupt petroleum-exporting countries that have poor track records in human rights.⁴⁵ The increasingly complex relationship between TNCs dealing in petroleum and the regimes controlling these resources raises questions about whose

37. CSR is often viewed by scholars as a means to reduce negative corporate externalities. Geoffrey Heal, a Columbia Business School professor, also takes this view, defining CSR as "a program of actions taken to reduce externalized costs or to avoid distributional conflicts." Geoffrey Heal, *Corporate Social Responsibility – An Economic and Financial Framework* 1 (Dec. 2004), <http://ssrn.com/abstract=642762> (unpublished).

38. Epstein, *supra* note 25, at 207-08 (discussing the nature of TNCs).

Early on, it became apparent that these companies, trusts, and enterprises, in addition to being highly effective structures for developing complex industrial economies, were very significant social, political, and cultural institutions-- individually and collectively, possessing considerable power and profoundly affecting all aspects of society from the local to the global.

Id.

39. *Id.* at 216 (arguing that the notion of TNCs having a responsibility to serve the public interest is rooted in the fact that the earliest corporations were designed to meet certain public service objectives, such as building "turnpikes, railroads, and canals . . . and [stimulating] the growth of essential industries"). Epstein further argues that "it is ironic that modern society is only now returning to recognition of these societal objectives of corporate enterprise." *Id.*

40. *Id.* at 207 ("[I]t is the emergence of large scale business organizations in the last third of the nineteenth century within Europe and the United States that gave rise to concerns about corporate social responsibility . . .").

41. *Id.* at 208.

42. *Id.* at 208-10.

43. *Id.* at 208-09.

44. *Id.* at 209.

45. *Id.*

interests the TNCs are truly serving.⁴⁶ Indeed, as the energy crisis continues to develop, inevitable questions of conflicts of interest arise.⁴⁷

The third phenomenon Epstein uses to define the contemporary setting is the advent of myriad technological revolutions.⁴⁸ From high-tech and biotech to technological developments in traditional economic sectors,⁴⁹ these revolutions are so ingrained in the stream of commerce that virtually every human being is affected—for good and for ill.⁵⁰ TNCs, frequently in relationships with government entities,⁵¹ often originate and spur these revolutions—revolutions that dramatically improve the quality of life for some, while diminishing the quality of life for other global citizens.⁵² Finally, the three aforementioned phenomena galvanize the social transformations that accompany the rise of TNCs.⁵³ The rise of corrupt regimes awash in petrodollars and the role technology plays in raising global awareness of the deprivations and entitlements resulting from growing corporate power, Epstein argues, frames the reality that TNCs inhabit.⁵⁴ As the maldistribution of the benefits of a global economy inflames local and international politics,⁵⁵ the social influence of TNCs becomes apparent. Indeed, Epstein argues that when TNCs invest in host regions, respect human rights, employ best practices, contribute to the development of an educated workforce, protect the health of their workers, and are not in league with corrupt regimes, they are forces for good in these areas.⁵⁶ However, when TNCs

46. *Id.* at 221 (highlighting the behavior of the United Fruit Company in various parts of Latin America in addition to energy companies in the Middle East and Africa). Epstein reasons that “[a]t times, transnational corporations have even acted as de facto governments in countries with weak political institutions.” *Id.*

47. *Id.*

48. *Id.* at 209.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* (discussing such phenomena). “The shedding of colonial domination, the creation of the United Nations as a forum for less developed countries to influence international developments and consciousness, and the impact of communications technologies . . . have contributed to an awareness of deprivations and entitlements on the part of persons throughout the world.” *Id.*

54. *Id.*

55. *Id.* at 209-10 (discussing the influence of TNCs in these disparities). Epstein argues that TNCs “play an important role in facilitating global peace or exacerbating global conflict” that result from this maldistribution. *Id.*

56. *Id.* at 214.

sustain policies that are exploitative of less developed nations, their behavior has ruinous effects on regional and global peace.⁵⁷

B. Epstein's Description of Modes of Social Control

Within this contemporary setting, Epstein considers what factors, or *modes of social control*, are central to the actualization of the *Good Company*.⁵⁸ Epstein defines six *modes of social control* in descending order of importance—law, affinity group regulation, self-regulation, ethical precepts, the media, and an engaged civil society—that, individually and in combination, are paramount in achieving the *Good Company*.⁵⁹ Each mode will be described, in turn, below.

Epstein places law first in terms of its importance, but also postulates that law, the articulation of public policy enforced by government, is an inherently impractical *mode of social control* in achieving the *Good Company* in the fast-paced business environment.⁶⁰ As the creation of law is a customarily extended process,⁶¹ laws created for TNCs operating in fast-paced business environments often constitute dated answers to yesterday's problems.⁶² Epstein defines "affinity group regulation" as standards of behavior established by members of a particular profession, such as law or medicine.⁶³ Those TNCs operating under seriously administered affinity regulations can be encouraged to have positive impacts on the social good.⁶⁴ Self-regulation, on the other hand, pertains to voluntary adherence to standards set by nongovernmental entities [NGOs] concerned with specific issues,⁶⁵ such as child labor and third-world apparel manufacturing.⁶⁶ These standards often establish baselines that allow TNCs to act in the public good

57. *Id.* (noting the supposed benefits of free trade). Epstein maintains that the benefits have, in fact, "been asymmetrical, benefiting wealthier nations and contributing to interstate and intrastate conflicts." *Id.*

58. *Id.* at 210.

59. *Id.* at 212.

60. *Id.* at 210 (considering the impractical nature of law as a mode of social control for corporations in the modern economy). Epstein reasons that the impracticality is rooted in the law's inability to "anticipate the virtuously limitless array of issues and concerns occasioned by corporate actions." *Id.*

61. *Id.* (arguing that this extended process is a product of asymmetrical balances of power and centrality of arriving at compromise).

62. *Id.*

63. *Id.* at 211.

64. *Id.*

65. *Id.*

66. *Id.*

without competitive disadvantage.⁶⁷ However, engagement in socially efficacious practices occurs only to the degree to which TNCs observe these standards in good faith,⁶⁸ a concern highlighted by the lack of any enforcement mechanisms.⁶⁹

Epstein characterizes ethical precepts as beliefs derived from religion, humanistic philosophy, social customs, mores, and traditions.⁷⁰ If one considers law as the lowest common denominator of the social contract,⁷¹ ethics operate above this common denominator and often inform the creation of the law. However, those *modes of social control* derived from social custom, mores, and tradition can result in manifestly unethical behaviors such as “honor killings” of women who are deemed to have violated social norms.⁷² Since it is often the first source of information about corporate malfeasance, a vigilant and responsible media, Epstein argues, is central to promoting *Good Companies*.⁷³ In this way, TNCs can be held increasingly accountable for illegal and/or unethical behavior.⁷⁴ Alternatively, favorable media coverage can result in increased business activity and serve as a catalyst for the actualization of *Good Companies*.⁷⁵ Finally, Epstein argues that an engaged civil society is a *mode of social control* that can encourage socially efficacious behavior from TNCs.⁷⁶ Direct citizens’ action through the leveling of pressure on government officials, for example, thwarted Wal-Mart’s efforts to move into several San Francisco Bay Area communities.⁷⁷ While other successful examples abound,⁷⁸ direct citizen action is not always effective in fostering the *Good Company*.⁷⁹

67. *Id.*

68. *Id.*; see also SIMON COUNSELL & KIM TERJE LORAAS, THE RAINFOREST FOUND., TRADING IN CREDIBILITY: THE MYTH AND REALITY OF THE FOREST STEWARDSHIP COUNCIL 30-34, http://www.wrm.org.uy/actors/FSC/Trading_Credibility.pdf (noting the concerns raised in response to the occasional deceptiveness and hypocrisy of CSR commitments formally made, though not honored). The authors further argue that these voluntary efforts must be seriously reformed to enhance actual accountability. *Id.*

69. Epstein, *supra* note 25, at 211.

70. *Id.*

71. *Id.* at 211-12.

72. *Id.* at 212.

73. *Id.*

74. *Id.* (noting the role of the media in exposing corporate malfeasance). Epstein highlights the disclosures relating to the Enron scandal and suspect marketing strategies relating to major pharmaceutical companies. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. See generally María Elena Durazo, *Making Movement: Communities of Color and New Models of Organizing Labor*, 27 BERKELEY J. EMP. & LAB. L. 235 (2006).

79. Epstein, *supra* note 25, at 212.

C. *Epstein's Insights*

As noted earlier,⁸⁰ Epstein considers the CSR movement alone, as fundamentally incapable of achieving the *Good Company*. This view is not based on any belief in the inherent malevolence of the human condition, but rather, Epstein explains, on a recognition of the structures that comprise the contemporary business environment—structures that TNCs and their corporate managers must abide by.⁸¹ An increasingly competitive globalized economy, driven by the Anglo-American modus operandi of short-term profit maximization,⁸² structures environments where TNCs are incentivized to cut corners with regards to employees, communities, developing nations,⁸³ and myriad stakeholders burdened by corporate behavior.⁸⁴ Moreover, Epstein argues, conflicting cultural norms as to what constitutes ethical behavior⁸⁵ further restrains the actualization of the *Good Company*.⁸⁶ In this context, TNCs are neither inherently good nor bad, but hold the manifest ability to amplify either on a global scale.⁸⁷ Accordingly, given the origin of the corporation⁸⁸ and its singular ability to impact the public good,⁸⁹ Epstein offers his *modes of social control* as the metrics by which the *Good Company* can be achieved.⁹⁰

II. MODES OF SOCIAL CONTROL IN THE EMPLOYMENT CONTEXT

A. *Responsible Child Labor Policies*

In today's globalized economy, one out of every seven children⁹¹ works⁹² in a range of "economic activities."⁹³ Many view child labor,

80. See *supra* note 28 and accompanying text.

81. Epstein, *supra* note 25, at 212-13.

82. See Claire Moore Dickerson, *Culture and Trans-Border Effects: Northern Individualism Meets Third-Generation Human Rights*, 54 RUTGERS L. REV. 865, 878 (2002) (considering the adverse effect of TNCs singular focus on short-term profit maximization on human rights).

83. See *supra* note 45 and accompanying text.

84. See *supra* note 28 and accompanying text.

85. See *supra* note 71 and accompanying text.

86. Epstein, *supra* note 25, at 213.

87. *Id.* at 213-14; see also *supra* note 37 and accompanying text; *infra* Part I-A (discussing the corporate capacity to amplify a range of ethical and unethical behavior).

88. See *supra* note 38 and accompanying text.

89. See *supra* note 11 and accompanying text; see also *supra* note 12 and accompanying text.

90. See *supra* note 30 and accompanying text.

91. Those persons under the age of 18 are understood to be "children." INT'L LABOUR ORG. [ILO], *Worst Forms of Child Labour Convention*, at art. 2, ILO Treaty Doc. No. 106-5, 2133 U.N.T.S. 161 (June 17, 1999) [hereinafter *Worst Forms of Child Labor Convention*]; see also INT'L

per se, as morally repugnant,⁹⁴ a view fueled by the increasing globalization of trade and, correspondingly, the growing influence of TNCs.⁹⁵ While there are a number of domestic laws,⁹⁶ international treaties, and conventions⁹⁷ designed to curb TNCs' abusive use of child labor, such use remains prevalent.⁹⁸ Given the seeming intractability of the child labor problem, adopting Epstein's *modes of social control* framework, as a means by which to discern viable disincentives for

LABOUR ORG. [ILO], *Convention on the Rights of the Child*, at art. 1, 1577 U.N.T.S. 3 (Nov. 20, 1989) (providing that "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier") [hereinafter *Convention on the Rights of a Child*].

92. See *Child Domestic: The World's Invisible Workers*, HUMAN RIGHTS WATCH, June 10, 2004, <http://hrw.org/english/docs/2004/06/10/africa8789.htm>; Int'l Labour Org., Facts on Child Labour 2006 (2006), <http://www.ilo.org/ipecinfo/product/viewProduct.do?productId=2899>; Press Release, Int'l Labour Org., World Day Against Child Labour 2007 (June 12, 2007), available at <http://www.ilo.org/ipecinfo/product/viewProduct.do?productId=4048>.

93. The term "economic activity" is defined as encompassing the "most productive activities undertaken by children, whether for the market or not, paid or unpaid, for a few hours or full time, on a causal or regular basis, legal or illegal; it excludes chores undertaken in the child's own household or schooling." INT'L LABOUR ORG., THE END OF CHILD LABOUR: WITHIN REACH 6 (2006), <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-i-b.pdf>; see also LAKSHMIDHAR MISHRA, CHILD LABOUR IN INDIA 46-47 (2000) (contextualizing the demands of child laborers). Mishra describes the transportation of children in Sivakasi, Tamilnadu, in India, to a workshop specializing in the production of matches and notes that:

The factory bus leaves the factory premises around 6 p.m. It drops the children on the way, while the nearest village is 1 km from the factory, the farthest one is about 20 km. The bus . . . reaches the last village by 8 to 9 p.m. The bus starts from that village between 3 to 4 a.m. with the last child and proceeds towards the factory. It reaches the factory premise around 6 a.m. The sleeping children are thereafter dumped into a hall to sleep up to 7 a.m. After that . . . they have their breakfast and start work.

Id.

94. See M. Neil Browne, Alex Frondorf, Ronda Harrison-Spoer & Sumangali Krishnan, *Universal Moral Principles and the Law: The Failure of One-Size-Fits-All Child Labor*, 27 Hous. J. INT'L L. 1 (2004) (detailing the views, mostly held by Westerners, of child labor and discussing the counter-productiveness of considering the occurrence of child labor as inherently amoral).

95. *Id.* at 15.

96. We refer here to the domestic laws in the host countries of TNCs.

97. See David L. Parker, *Child Labor: The Impact of Economic Exploitation on the Health and Welfare of Children*, 21 WHITTIER L. REV. 177, 180-81 (1999). Parker discusses the regulatory structure adopted by the International Labor Organization (ILO) and the United Nations Convention on the Rights of the Child as examples of international agreements that call on signatories to work for a future in which the rights of children are respected. See *Convention on the Rights of a Child*, *supra* note 90; see also Susan O'Rourke Von Streunsee, *Violence, Exploitation and Children: Highlights of the U.N. Children's Convention and International Response to Children's Human Rights*, 18 SUFFOLK TRANSNAT'L L. REV. 589, 594-627 (1995) (describing the rights attributed to children as agreed to by those nations who ratified the Convention on the Rights of the Child).

98. See BUREAU OF INTERNATIONAL LABOR AFFAIRS, U.S. DEP'T OF LABOR, [CHILD LABOR REPORT] CHAPTER I: INTRODUCTION, available at <http://www.dol.gov/ILAB/media/reports/iclp/sweat5/chap1.htm>.

TNCs' use of child labor, provides a contemporary analysis. To this effect, the utility of each mode will be discussed, in turn, below.

Epstein lists his *modes of social control* in descending order of importance:⁹⁹ law, affinity group regulation, self-regulation, ethical precepts, the media, and an engaged civil society. However, due to the distinctive nature of the child labor problem, this Article alters the modes' order of importance, as prescribed by Epstein, to an order more specifically tailored to the challenges posed by TNCs' use of child labor. Given that critiques of child labor often stem exclusively from core ethical beliefs,¹⁰⁰ and given the interdependence of law and ethics,¹⁰¹ the ethics mode will be discussed first, followed by a discussion of law. A discussion of the other *modes of social control* in a reconfigured order of importance, concluding with affinity group regulation, will then follow.

In an increasingly globalized world, concepts such as justice, fairness, and ethics are often rendered nebulous. Indeed, the use of child labor is not necessarily seen as unethical in developing countries.¹⁰² While child labor might be considered morally abhorrent in the West, children in developing countries often need to work in order to sustain the health and welfare of their families.¹⁰³ From a historical perspective, however, the primary factor explaining the prevalence of child labor is poverty,¹⁰⁴ both in the East and West.¹⁰⁵ In developing countries, childhood is often seen as a period for acquiring employable skills so that children may earn better pay when they become older.¹⁰⁶ Moreover,

99. Epstein, *supra* note 25, at 213.

100. *See generally supra* note 93.

101. *See supra* note 20 and accompanying text.

102. *See supra* note 93 and accompanying text.

103. *See* Kinley & Tadaki, *supra* note 10, at 982.

104. *See generally supra* note 93; Anna A. Kornikova, *International Child Labor Regulation 101: What Corporations Need to Know About Treaties Pertaining to Working Youth*, 34 BROOK. J. INT'L L. 207, 213 (2008).

105. *See* Browne et al., *supra* note 93, at 7 (noting the use of child labor on colonial America as a necessary cost of doing business). Browne et al. explain that:

In North American colonies, children were an asset—free labor to their families and their new farms. Child labor was seen as a tool to keep children from idleness, as well as a necessity for starting a successful colony and farm. However, as part of the changes necessitated by the American colonists' desire to be independent from England, Americans needed to start producing their own goods, such as clothing. To facilitate this manufacture, the first children began working in American textile and clothing shops. Children were ideal for working in these factories because they worked for a fraction of the cost of comparable adult workers. They also were quick to learn, and their small hands could create the intricate details in the fabrics.

Id.

106. *See* Shahidul Alam, *The Use of Child Labor Does Not Always Violate Human Rights*, in HUMAN RIGHTS: OPPOSING VIEWPOINTS 81, 86 (Mary E. Williams ed., 1998); *see also* Kinley &

when parents' income is insufficient to feed, clothe, and shelter the family, there are rarely any clear alternatives to child labor.¹⁰⁷ Accordingly, when developed countries, or an engaged citizenry within them, overzealously advocate the complete abolition of child labor from their particular ethical perspective, they can be seen as both hypocritical¹⁰⁸ and culturally imperialistic¹⁰⁹ by not taking into consideration the economic and social realities of developing countries.¹¹⁰

While most developing countries agree that the worst forms of child labor should be prohibited,¹¹¹ it is unwise to seek international legal regimes that mandate universal adherence to child labor standards

Tadaki, *supra* note 10, at 981-82; *supra* note 93 and accompanying text; Kornikova, *supra* note 103, at 213 (describing the responsibilities of children in the developing countries of Africa). Kornikova explains that, "through their productive activities, children integrate into the community, as in Africa, where children as young as ten years old begin imitating their family members in the household and farm tasks, and then move to other tasks, including serving the elders in their community." *Id.*

107. See Browne et al., *supra* note 93, at 13 (discussing the correlation between economic development and the ethics of child labor—and the salience of this correlation among different cultures).

108. See *supra* note 104 and accompanying text.

109. See generally *supra* note 93.

110. See Browne et al., *supra* note 93, at 3-4 (noting the dangers of applying moral absolutes to the child labor issue). Browne et al. note that:

Such international declarations of universal rights are highly attractive in that they appeal to our sense of humanity; indeed, there are very powerful arguments suggesting that certain normative states ought to exist among humans regardless of differences in culture, religion, worldview, geographic location, or economic disposition. However, scholars and policymakers alike must recognize the inherent danger in wholeheartedly embracing and imposing a universal moral vision upon other groups in situations as emotionally, economically, culturally, and developmentally complex as that of child labor, particularly where power disparity exists.

Id.

Id. See Kinley & Tadaki, *supra* note 10, at 982.

111. See *Worst Forms of Child Labor Convention*, *infra* note 147; see also Kornikova, *supra* note 105, at 221 (detailing the treaty obligations). Kornikova writes that:

The Convention applies to all persons under eighteen years of age and focuses on the abolition of two categories of child labor: the "unconditional worst forms of child labor" and "hazardous work." The unconditional worst forms of child labor include "all forms of slavery or practices similar to slavery," debt bondage, and the use of children in various illicit activities. These forms of labor are prohibited unconditionally because improving their conditions would not justify such practices. . . . [H]azardous work encompasses "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children." The [Convention] refers to a list of considerations for identifying "hazardous work" as set forth in ILO Recommendation No. 190. These considerations include, without limitation, exposure to dangerous machinery and substances damaging to health.

Id. (citations omitted).

equivalent to those of developed countries. In cases where attempts have been made, resistance often originates not with TNCs, but from the workers these laws are intended to protect.¹¹² In addition, resistance to these laws frequently come from the governments of developing countries who not only fear losing the competitive advantage derived from cheap labor, but suspect that the imposition of such laws masks a trade protectionism agenda that advantages developed countries.¹¹³ Moreover, the adoption of laws stemming from such moral absolutism can often be counterproductive. During the debate surrounding the 1992 Child Labor Deterrence Act,¹¹⁴ which sought the imposition of sanctions on those products made with child labor, Bangladeshi activists cautioned that the dismissal of children from the workplace would effectively funnel them into more hazardous professions.¹¹⁵ As a result of this focus on the alleged immorality of child labor, Bangladeshi manufacturers, between 1992 and 1995, dismissed tens of thousands of children who ultimately found employment in the rickshaw pulling, brick carrying, rag-picking, and prostitution professions.¹¹⁶ Consequently, while there might be universal agreement on the amorality of child labor, it is quixotic to approach the issue utilizing overarching laws or trade restrictions seeking an outright ban. Rather, a more comprehensive

112. See Kinley & Tadaki, *supra* note 10, at 973.

113. *Id.*; see Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61, 65 (2001); see also Pradeep S. Mehta & Sandeep Singh, *Current Issues in Human Rights, Development and International Trade in the WTO*, 13 INTERRIGHTS BULL. 143-45 (2001). At the WTO ministerial conference in Doha, the proposal to link trade and core labor standards gained virtually no support from developing countries in Asia and was fiercely opposed by India, Pakistan, and Malaysia. See Internat'l Confed. of Free Trade Unions, *The Doha Declaration: A Trade Union Analysis*, <http://www.icftu.org/displaydocument.asp?Index=991214586&Language=EN> (last visited Sept. 13, 2009).

114. Child Labor Deterrence Act of 1992, S. 3133, 102d Cong. (1992).

115. See Shareen Hertel, *New Moves in Transnational Advocacy: Getting Labor and Economic Rights on the Agenda in Unexpected Ways*, 12 GLOBAL GOVERNANCE 263, 267-68 (2006).

116. See JEREMY SEABROOK, CHILDREN OF OTHER WORLDS: EXPLOITATION IN THE GLOBAL MARKET 23, 64-65 (2001); WORLD VISION UK, OFFERING HOPE, NOT DESPAIR: ERADICATING CHILD LABOR WITHOUT PUTTING CHILD WORKERS ON THE STREETS 7 (1997); see also Kornikova, *supra* note 105, at 223-24 (contextualizing the debates regarding the 1992 Child Labor Deterrence Act); Kinley & Tadaki, *supra* note 10, at 974-75 (arguing that a premature ban on child labor, for example, can have "devastating consequences on workers because it may result in immediate termination of their employment, leaving them without any alternative means of earning an income").

approach, which identifies and addresses the causes and contexts within which child labor flourishes, is obligatory.¹¹⁷

Under these circumstances, a vigilant and responsible media, bolstered by an engaged civil society within the TNC's host country, best effectuates such an approach. The power of the media to be a catalyst for change in TNCs' child labor policies is irrefutable.¹¹⁸ However, many of these changes frequently result in the adoption of highly publicized corporate codes of conduct, which some TNCs then display, with little good faith adhering to,¹¹⁹ or a reactionary dismissal of the children, which consequently filters them into more dangerous lines of work.¹²⁰ As the child labor problem is rooted in the unique socioeconomic conditions of the TNC's host country,¹²¹ the solutions ought to be specifically tailored to that country. As such, the media not only must be vigilant in exposing abuses, but must also be responsible by making it evident that each country faces distinct challenges and that the typical reactionary corporate response will not do. In order for the media to effectively shoulder the burden of its responsibilities in this regard, an engaged civil society within the TNC's host country, in

117. See *supra* note 93, at 6 (discussing the need for more nuance in the child labor debate—a debate often rooted in arguments claiming moral absolutism). Critiquing the view of the child labor debate through a morally purist lens, Browne argues:

Declarations of human rights are often a powerful stimulus in focusing attention on severe human problems. But, such declarations' attempts to impose a strict, one-size-fits-all moral regulatory structure, absent an analysis of the underlying national, economic, cultural, and historical factors that might affect the efficacy of such a structure, constitutes an abdication of responsible policy-making.

Id.

118. See generally Lance Compa, *Corporate Social Responsibility and Workers' Rights*, 30 COMP. LAB. L. & POL'Y. J. 1 (2008) (detailing a list of corporate responses to media exposure of their child labor practices).

119. See BUREAU OF INTERNATIONAL LABOR AFFAIRS, U.S. DEP'T OF LABOR, *THE APPAREL INDUSTRY AND CODES OF CONDUCT: A SOLUTION TO THE INTERNATIONAL CHILD LABOR PROBLEM?* § 3-4 (1996), <http://www.dol.gov/ILAB/media/reports/iclp/apparel/apparel.pdf> (revealing that "some companies, particularly retailers, may have general language in their purchase order or vendor contracts requiring vendors to comply with applicable laws but have no mechanisms for monitoring compliance"); see also *id.* at 48 (discussing how TNCs monitor their facilities for compliance with their corporate codes). The study notes that "[m]onitoring is usually part of a larger process that includes issues such as quality control and delivery coordination. For this reason, it is not always clear to what extent site visits focus on the code implementation." *Id.*

While monitoring for product quality, and even for health and safety conditions, is customary in the garment industry, . . . monitoring for compliance with provisions of the codes of conduct of U.S. garment importers dealing with other labor standards. . . and child labor in particular . . . is not.

Id. at 101.

120. See *supra* note 115 and accompanying text.

121. See generally *supra* note 93.

addition to other international sources privy to information in the host country, is essential in providing the media with accurate information.

Unlike what is called for in Epstein's self-regulation mode of social control, which involves the voluntary adoption of standards established by NGOs concerned with child labor, these NGOs should not seek the TNC's adoption of universal child labor standards, which is often counterproductive.¹²² The NGOs should collaborate with an engaged civil society within the TNC's host country in providing the media with accurate information, so that the public—and the corporate boardroom—can be responsibly informed of the complexity of domestic child labor abuses and of the ways that a socially responsible TNC can respond.¹²³ Such a collaborative approach is emblematic of *New Governance*—a systemic process that uses “innovative, pragmatic, information-based, iterative, and dialogic mechanisms to gather, distill, and leverage industry learning”¹²⁴ for the purpose of addressing complex business challenges. For those TNCs that undertake socially responsible practices, favorable media coverage can be politically useful and enhance business activity through the cultivation of corporate goodwill.¹²⁵

122. See *supra* note 115 and accompanying text; see also *supra* note 116 and accompanying text.

123. See H&M, Supply Chain Monitoring: What Do We Do If We Find Child Labor Being Used?, http://www.hm.com/us/corporateresponsibility/supplychainworkingconditions/supplychainmonitoring/whatwedoifwediscoverchildlabour_monotoringarticle4.nhtml (last visited Sept. 16 2009) (describing how the apparel and accessories retailer H&M Hennes & Mauritz AB (H&M) responds when it discovers “underage workers” at its supplier’s site). The site notes that H&M, in cooperation with the supplier, contacts the family of the affected child and seeks a solution in the child’s best interests. *Id.* One such solution is to allow the child to continue education and paying wages to the child’s family during the child’s stay in school until the child reaches the appropriate age. *Id.* See also Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT’L L. 663, 674-85 (1995) (describing how Levi Strauss & Co., a multinational apparel company, makes decisions to pay for the children’s education and school supplies until they reach a minimum age when they would be offered a job at the plant); STARBUCKS CORPORATION, BEYOND THE CUP: CORPORATE SOCIAL RESPONSIBILITY FISCAL 2005 ANNUAL REPORT 40 (2005) (describing how Starbucks Corporation, an international coffee retailer and coffee-house chain, partnered with Save the Children USA, an international relief and development organization, in bringing bilingual education to Mayan communities in Guatemala, which will expand the employment prospects for children in these communities). These socially responsible activities, providing resources and creating opportunities for the implementation of child labor standards in the local communities, serve the goals of addressing the child labor problem more effectively than the often counterproductive dismissal of the child laborers from work. See note 115 and accompanying text.

124. See *supra* note 23 and accompanying text.

125. Epstein, *supra* note 25, at 212.

For the same reasons that the law, ethics, and self-regulation *modes of social control* fail to be effective tools in addressing the complexity of the child labor problem—that is, they all seek overarching solutions to a problem that defies one-size-fits-all solutions—affinity group regulation will be similarly ineffective.¹²⁶ Indeed, such morally absolutist approaches by governments, NGOs, and individuals “constitute[] an abdication of responsible policy-making,”¹²⁷ which can have devastating effects for the intended recipients of their well wishes.¹²⁸ The nuance typifying the child labor problem demands the sensitivity that a *New Governance* approach provides.

B. Workplace Democracy

The commitment of a TNC to engage in socially responsible corporate behavior faces one of its greatest challenges when employees signal a desire to form a labor union. *Good Companies*, which endeavor to foster open, democratic, and collaborative workplaces, recognize that such environments require an unfettered freedom of association¹²⁹ and opportunities for employees to bargain collectively over working conditions.¹³⁰ TNCs that respond with interference, intimidation, or coercion,¹³¹ in order to undermine their employees’ right to form a

126. See Browne, et al., *supra* note 93, at 6 (“[A]ttempts to impose a strict, one-size-fits-all moral regulatory structure, absent an analysis of the underlying national, economic, cultural, and historical factors that might affect the efficacy of such a structure, constitutes an abdication of responsible policy-making”).

127. *Id.*

128. See *supra* note 115 and accompanying text.

129. The right to freedom of association is widely recognized in international instruments, including the UDHR, ICCPR, ICESCR, and the ILO Convention No. 87. Kinley & Tadaki, *supra* note 10, at 976.

130. As United Electrical Worker organizers Leah Fried and Mark Meinster explain:

NLRB elections are not democratic. Imagine if you were voting in a municipal election and you [were] supporting the opposition. Imagine that for eight hours every day, for three to four months straight, you are being harassed. You have no right to free speech and you are constantly being threatened. Imagine that if you publicly say you are voting for the opposition, you lose your job. How can you vote freely in that situation?

NIK THEODORE AND CHIRAG MEHTA, UNDERMINING THE RIGHT TO ORGANIZE: EMPLOYER BEHAVIOR DURING UNION REPRESENTATION CAMPAIGNS 8 (2005), <http://www.americanrightsatwork.org/dmdocuments/ARAWReports/UROCUEDcompressedfullreport.pdf>.

131. According to a recent study by the Economic Policy Institute regarding employer tactics in union representation elections, employers threatened to close the workplace in 57 percent of elections, discharged workers in 34 percent, and threatened to cut wages and benefits in 47 percent of elections. Employees were forced to attend anti-union one-on-one meetings with a supervisor—at least weekly—in two-thirds of union elections. KATE BRONFENBRENNER, NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 1-2 (2009),

union, violate fundamental principles of CSR¹³² and *New Governance*,¹³³ and yet face few, if any, sanctions for such behavior.¹³⁴ Although a majority of workers report that they would choose to belong to a union if they could make that choice freely, unions represent a shrinking number of workers in the United States.¹³⁵ The effect of hostile employer anti-union tactics on union organizing campaigns is both pervasive¹³⁶ and effective.¹³⁷ Three *modes of social control* in descending order of importance—*law*, *self-regulation*, and a *vigilant and responsible media*—can help to reinforce, reproduce, and hold accountable “Better Companies” that promote workplace democracy while retaining market competitiveness.

http://www.aflcio.org/joinaunion/voiceatwork/efca/upload/No_Holds_Barred.pdf. These tactics represent an increased intensity in the use of coercive and retaliatory actions by employers in order to undercut majority support for a union.

132. See Pitts, *supra* note 11, at 341 (describing some of the basic principles of CSR). Pitts offers seven such principles: “(i) integrated decision-making (to incorporate environmental and social as well as economic factors), (ii) stakeholder engagement, (iii) transparency and triple-bottom-line reporting, (iv) respect for and consistent implementation of the highest global environmental and social norms and best practices, (v) the precautionary principle, (vi) accountability, and (vii) community investment.” *Id.*

133. See Kinley & Tadaki, *supra* note 10, at 973.

134. As Prof. Epstein observes, “Firms may be exemplary in their environmental practices and abominable in their employee policies.” Epstein, *supra* note 25, at 213.

135. See Richard B. Freeman, *Do Workers Still Want Unions? More Than Ever*, ECONOMIC POLICY INSTITUTE, Issue Brief #182 2 (2007), available at <http://www.sharedprosperity.org/bp182/bp182.pdf> (reporting survey findings that the proportion of workers who want unions has risen substantially since 1995 and that a majority of nonunion workers in 2005 would vote for union representation if they could). See also BRONFENBRENNER, *supra* note 131 at 4. According to the U.S. Department of Labor, in 2009, the national union membership rate—the percentage of wage and salary workers who are members of a union—was 12.3 percent. During the prior one-year period, the number of wage and salary workers belonging to unions declined by 771,000 to 15.3 million. See Press Release, Bureau of Labor Statistics, U.S. Department of Labor (Jan. 22, 2010), available at <http://www.bls.gov/news.release/pdf/union2.pdf>. “In 1983, the first year for which comparable union data are available, the union membership rate was 20.1 percent, and there were 17.7 million union workers.” *Id.*

136. A 2002 study examining labor union petitions filed with the NLRB in Chicago found that while a majority of workers supported unionization when the petition was first filed with the NLRB, unions were ultimately victorious in only 31 percent of the elections. Theodore & Mehta, *supra* note 129, at 8-12. At some point after workers petitioned for union representation, pro-union workers lost their majority status. *Id.*

137. Losing an NLRB union recognition is not the only way that employees’ efforts to form a union are thwarted. A recent study found that 62 percent of new unions are unable to successfully negotiate a first contract within one year of winning an NLRB election. John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives*, 62 INDUS. & LAB. REL. REV., 6 (2008). Under NLRB regulations, if one year has passed with no negotiated union contract, employees may hold another election to decertify the union. As Harley Shaiken has observed, “Organizing delayed can be organizing denied.” HARLEY SHAIKEN, UNIONS, THE ECONOMY, AND EMPLOYEE FREE CHOICE 8 (2007), <http://www.sharedprosperity.org/bp181/bp181.pdf>.

The ability of the legal system to promote democracy and improve working conditions is hampered by the asymmetric balance of power between employers and employees.¹³⁸ Labor and employment laws, in many cases, merely establish the “lowest common denominator of socially acceptable behavior,” and go no further.¹³⁹ In order to pressure their employees to drop their support for a union in their workplace, TNC managers are free, under federal labor law, to engage in “captive audience meetings,” enlist supervisors in aggressive one-on-one meetings with workers about the union campaign,¹⁴⁰ and otherwise communicate alleged dire consequences of unionization to their employees.¹⁴¹ Current labor law lacks sufficient incentives for TNCs to refrain from using coercive tactics during a union organizing campaign.¹⁴² Law is not a static *mode of social control*. Just as a new legal framework for labor-management relations was created out of the distress, dislocation, and turmoil of the Great Depression, changes to the National Labor Relations Act (NLRA) proposed today may similarly change the game rules for several stakeholders, including workers, TNCs, and labor unions.¹⁴³ Congress has proposed changes to the NLRA which, if signed into law, would diminish the opportunities for TNC managers to use tactics of delay, interference, or coercion during

138. Epstein, *supra* note 25, at 210.

139. *Id.*

140. Bronfenbrenner, *supra* note 130, at 9.

141. There do exist, however, some protections for employees, including limitations on management’s ability to fire or otherwise discriminate against workers for supporting the union; to threaten the closing of the workplace directly as a result of unionization; to engage in coercive surveillance of workers; and to unilaterally grant or promise benefits to the work force if they reject the union. The central instrument in U.S. law for protecting workers’ rights to organize, to bargain collectively, and to strike is Section 8(a) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (2006). Section 8(a)(1) of the NLRA makes it an unfair labor practice to “interfere with or coerce” employees engaged in concerted activity. Section 8(a)(3) protects the right to organize by defining an unfair labor practice of discrimination against workers for protected concerted activities, including union activity. Section 8(a)(4) makes it unlawful to retaliate against a worker for filing unfair labor practice charges or giving testimony in NLRB proceedings. Open, direct threats to close a plant in retaliation for workers’ choosing union representation are considered a violation of Section 8(a)(1) of the NLRA, which says, “It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” However, Section 8(c), the employer free speech clause adopted as part of the Taft-Hartley Act of 1947, has been interpreted by the courts to allow a “prediction” of plant closing if it is “carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control.” See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

142. Theodore and Mehta, *supra* note 129, at 5.

143. William B. Gould, IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. REV. 291, 292 (2008).

union organizing campaigns.¹⁴⁴ The current draft of the Employee Free Choice Act (EFCA) would allow the National Labor Relations Board to certify a union when a majority of employees in that workplace have signed authorization cards in support of unionization.¹⁴⁵ This process, also called “card check,” would bypass the often lengthy NLRB election process during which employers routinely pressure employees to abandon their support of a union. Some industrial relations scholars have taken a *New Governance* approach to framing this issue, and argue that card-check reduces conflict¹⁴⁶ and leads to more positive labor relations.¹⁴⁷

Mandating the protection and promotion of workplace democracy by passing legislation like the Employee Free Choice Act is one way civil society can encourage corporate behavior that is beneficial, rather than harmful. A second, complementary, means of promoting such behavior is created when corporations themselves establish voluntary, industry-wide workplace standards.¹⁴⁸ TNCs can voluntarily adopt

144. *Id.*

145. Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009). The Employee Free Choice Act would amend Section 9(c) of the NLRA, allowing the National Labor Relations Board to certify a bargaining representative after a majority of employees in the unit file a petition with the National Labor Relations Board.

Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).

Id.

146. Adrienne E. Eaton and Jill Kriesky, *NLRB Elections Versus Card Check Campaigns: Results of a Worker Survey*, 62 *INDUS. & LAB. REL. REV.* 157, 158-59 (2009). This argument underpins many of the statutory requirements of card check and neutrality at the state and municipal levels. A 1998 San Francisco ordinance, for example, which required hotels and restaurants in which the city has a proprietary interest to use card check as a method to recognize unions, relied on this argument. *Id.* at 159.

147. *Id.* at 158. Most recently, and after an extensive period of consideration, the NLRB issued its decision in the *Dana* and *Metaldyne* cases. The NLRB decided to treat recognitions reached through voluntary means (like card checks) differently from those reached through an election, by lifting the “election bar” (a bar on a new representation election pending negotiation of a collective bargaining agreement) for forty-five days following the voluntary recognition. These decisions are widely regarded to have dealt a critical blow to the right of workers to form a union by voluntary card check agreement with their employer. *Dana Corp.*, 351 N.L.R.B. 434 (2007).

148. Epstein, *supra* note 25, at 210-11.

internationally recognized standards for workplace standards that help establish open, democratic, and fair workplaces. Freedom of association and the right to organize and bargain collectively are two of the core labor rights articulated by the International Labour Organization's (ILO) Declaration on Fundamental Principles and Rights at Work.¹⁴⁹ When voluntarily adopted by a critical number of firms within a particular industry, these baseline standards can enable TNCs to respect the rights of their employees without experiencing competitive disadvantage.¹⁵⁰ Such advantages of voluntarily standards are limited, however, by the lack of any enforcement mechanisms.¹⁵¹

Given the lack of established mechanisms for enforcement,¹⁵² the more compelling reason for TNCs to voluntarily adopt the ILO standards may be found in the economics literature and case studies that correlate unionization and high productivity.¹⁵³ Innovative *Good Companies* that establish open, democratic workplaces, pay workers wages that reflect market success, and respect the rights of their employees to join a union and bargain collectively, are more likely to develop motivated, productive employees.¹⁵⁴ Consider the examples of Costco and Cingular. Despite the fact that Costco spends 40 percent more on labor costs than its competitor Sam's Club (a Wal-Mart affiliate), Costco's

149. INT'L LABOUR ORG. [ILO], Declaration on Fundamental Principles and Rights at Work, art. 2 (June 17, 1948). These core labor rights were expanded on by the eight fundamental ILO Conventions. INT'L LABOUR ORG. [ILO], Forced Labour Convention, 39 U.N.T.S. 55 (June 28, 1930); INT'L LABOUR ORG. [ILO], Abolition of Forced Labour Convention, 320 U.N.T.S. 291 (June 25, 1957); INT'L LABOUR ORG. [ILO], Freedom of Association and Protection of the Right to Organize Convention, 68 U.N.T.S. 17 (July 9, 1948); INT'L LABOUR ORG. [ILO], Right to Organize and Collective Bargaining Convention, 96 U.N.T.S. 257 (July 1, 1949); INT'L LABOUR ORG. [ILO], Equal Remuneration Convention, 165 U.N.T.S. 303 (June 29, 1951); INT'L LABOUR ORG. [ILO], Discrimination (Employment and Occupation) Convention, 362 U.N.T.S. 31 (June 25, 1958); INT'L LABOUR ORG. [ILO], Minimum Age Convention, 1015 U.N.T.S. 297 (June 26, 1973); INT'L LABOUR ORG. [ILO], Worst Forms of Child Labour Convention, 38 I.L.M. 1207 (June 17, 1999).

150. Epstein, *supra* note 25, at 211.

151. This lack of enforcement is not universal. In Brazil, for example, captive audience speeches would not be permitted under Brazilian labor law because they represent a major breach of workers' fundamental rights. Roberto Fragale Filho & Ronaldo Lobão, *Captive Audience Speech in the Brazilian Labor Law*, 29 COMP. LAB. L. & POL'Y J. 341, 345 (2008). That they are a clear breach of freedom of association rights recognized by the ILO Conventions No. 87 (1948) and No. 98 (1949) would render them impermissible in Brazil. *Id.* They would also violate Article 8 from the Brazilian Federal Constitution, which grants professional or union-like freedom of association. *Id.*

152. Kenneth Abbott & Duncan Snidel, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 535 (2009).

153. Shaiken, *supra* note 135, at 5.

154. *Id.*

profits are nearly double those of Sam's Club, a difference attributed to the significantly lower turnover rates at the partially-unionized Costco.¹⁵⁵ Costco CEO James Sinegal explains, "Most people agree that we're the lowest-cost provider. Yet we pay the highest wages. So it must mean we get better productivity. . . . [T]hat's not just altruism, it's good business."¹⁵⁶ Cingular, the largest wireless carrier in the United States, accepted a "neutrality agreement" with the Communications Workers of America (CWA), in which the TNC and the union agreed not to use hostile or aggressive tactics during the organizing campaign, and the TNC agreed to card-check rather than the lengthy NLRB process (a preview of how EFCA might work in practice). After over 85 percent of Cingular employees joined the union, the company reported that the union has provided a competitive advantage for the company because while conflict and disagreement still occur, the union provides a mechanism with which to work out those issues cooperatively.¹⁵⁷ Thus, by respecting the free association rights of their employees, TNCs benefit from (a) diminished workplace discord, (b) collaboration among management and employees in resolving workplace issues, and (c) a competitive advantage through reduced turnover and other barriers to a productive workforce. While appealing to a TNC's quest for competitive advantage is not outside the scope of CSR, *New Governance* emphasizes the need for such economic efficiency arguments to be linked with the relevant social ramifications.¹⁵⁸ In other words, to be *Good Companies*, TNCs should harness the behavior of firms like Costco and Cingular not only because it is the profitable thing to do, but also because it is the socially responsible thing to do.

In "ferreting out illegal or unethical corporate behaviors,"¹⁵⁹ the media play a valuable role in educating the public about, and holding accountable, employer-led opposition and coercion during union organizing campaigns. Unfortunately, the ability of the news media to help stimulate socially responsible business behavior is threatened by the

155. Costco produced \$21,805 in operating profit per hourly employee in the United States in 2005, almost double the \$11,615 generated at Sam's Club. SHAIKEN, *supra* note 126, at 5, (citing Wayne Cascio, *Decency Means More than "Always Low Prices": A Comparison of Costco to Wal-Mart's Sam's Club*, ACAD. MGMT. PERSP., Aug. 2006, at 28, 35). Costco's turnover rate is 6 percent annually compared to 21 percent for Sam's Club. SHAIKEN, *supra* note 135, at 6 (citing Holmes, Stanley, & Wendy Zellner, *The Costco Way; Higher Wages Mean Higher Profits. But Try Telling Wall Street*. BUS. WK., April 12, 2004, at 76).

156. SHAIKEN, *supra* note 135, at 5-6.

157. *Id.* (citing Marc Gunther, *Cingular Bucks Anti-Union Trend*, FORTUNE, June 7, 2006).

158. Kinley & Tadaki, *supra* note 10, at 974.

159. Epstein, *supra* note 25, at 212.

current climate of newspaper consolidation, downsizing, and dissolution.¹⁶⁰ Newspapers that formerly had a critical mass of labor writers on staff in the 1940s, 1950s, and 1960s, have dropped the labor beat entirely.¹⁶¹ Today, only four of the top twenty-five newspapers in circulation in the United States have full-time labor/workplace reporters: the *New York Times*, *Wall Street Journal*, *Chicago Tribune*, and *Boston Globe*.¹⁶² Where traditional labor reporting has diminished, however, opportunities for developing new forms of media coverage have arisen,¹⁶³ underscoring the enduring need for vigilant and responsible media in an open, democratic society.

C. *Ethic of Care*

A *Good Company* engages in behavior that maximizes benefits for society. This ideal company *treats* its employees, customers, and members of local communities fairly.¹⁶⁴ It gives stakeholders¹⁶⁵ their due.¹⁶⁶ An ethic of care¹⁶⁷ inspires those who embrace stakeholder

160. Television and radio broadcast news-reporting on labor issues is almost nonexistent, aside from a workplace correspondent employed by National Public Radio. Christopher R. Martin, *Writing Off Workers: The Decline of the U.S. and Canadian Labor Beats*, in KNOWLEDGE WORKERS IN THE INFORMATION SOCIETY 22 (Catherine McKercher & Vincent Mosco eds., 2008).

161. *Id.* at 23. The *New York Times*, which had a staff of four labor reporters in the 1960s, currently has only one such reporter on staff. *Id.* at 22-23.

162. *Id.* at 25. This does not include reporting on ancillary or cultural workplace issues, such as workplace etiquette, fashion, or benefits, which while arguably pertinent, largely exclude labor issues related to organizing, collective bargaining, and the power dynamics inherent in labor-management relations.

163. See, e.g., AFL-CIO Now News Blog, <http://blog.aflcio.org>; Change to Win Connect Blog, <http://www.changetowin.org/connect/>.

164. See Epstein, *supra* note 25, at 214.

165. Stakeholders include owners, management, the local community, customers, employers, and suppliers. A stakeholder approach to corporate social responsibility asks managers to “balance the multiple claims of conflicting stakeholders.” See R. Edward Freeman, *Stakeholder Theory of the Modern Corporation*, in ETHICAL CHALLENGES TO BUSINESS AS USUAL 258, 263 (Shari Collins-Chobanian ed., 2004).

166. Robert G. Kennedy, *Virtue and Corporate Culture: The Ethical Formation of Baby Wolverines*, 17 REV. BUS. 10, 14 (1995-1996) (“Fairness may be thought of as the habit of giving to others what they are due This virtue comes into play in many ways, not the least of which concerns attending to the rights and interests of the stakeholders of a firm.”). Epstein provides clear support for the stakeholder theory of management. He writes, “Maybe our goal should be Better Companies, or organizations that continuously seek to perform the economic functions for which society relies upon them in a manner that optimizes the firm’s utility to the diverse stakeholders affected by their actions and minimizes the deleterious effects...of their operations.” Epstein, *supra* note 25, at 220.

167. Conversations about an “ethic of care” are more likely in the health care industry than others industries. See, e.g., Mark A. Hall, *A Corporate Ethic of “Care” in Health Care*, 3 SEATTLE J. FOR SOC. JUST. 417 (2004). Hall explains that “care” means “a feeling or attitude rather than an

perspectives to hope for more than an absence of abuse.¹⁶⁸ It re-imagines TNCs as companies ready and willing to protect the dignity¹⁶⁹ of employees, to engage in deep reflection about right relationships with stakeholders, and to act with an awareness of which actions promote well-being.¹⁷⁰ An ethic of care acknowledges the significance of human work.¹⁷¹ It asks employers to appreciate the interconnectedness inherent

action.” An ethic of care calls for “genuine concern for the well-being of . . . customers and communities.” *Id.* Hall explains that the health care industry has been at the forefront of conversations about an ethic of care because “the vulnerability of patients and the suffering caused by illness create moral conditions that compel an ethic of compassion.” *Id.* Hall highlights an ethic of care in health care corporations as a response to social norms. *Id.* He believes that “[a] culture of caring about the set of goals and outcomes can be a more powerful and systematic influence on corporate behavior and attitudes than any overtly regulatory regime.” *Id.*

168. See Ford, *supra* note 13, at 41. For a review of abuse in the context of TNCs, see Kinley & Tadaki, *supra* note 10, at 933-44. Kinley and Tadaki are aware of the positive impact of TNCs’ foreign direct investment. *Id.* at 933. They also outline human rights abuses by TNCs, giving as examples both Nike and The Gap, companies that have been accused of violating workers’ rights. *Id.* at 933-34. They also highlight alleged abuses by both Coca-Cola in Columbia and Phillips-Van Heusen in Guatemala. *Id.* at 934.

169. Scholars who study the link between Catholic social thought and legal change highlight the concept of dignity. See, e.g., Adam K. Butman, *Bridging the Gap: A Catholic Perspective on Global Trade as a Tool of Development*, 21 NOTRE DAME J.L. ETHICS & PUB. POL’Y 263 (2007). Butman states that “[t]he transcendent dignity of the person provides the basis for a Catholic understanding of the moral dimensions of economic life.” See also Ken Matheny, *Catholic Social Teaching on Labor and Capital: Some Implications for Labor Law*, 24 ST. JOHN’S J. LEGAL COMMENT. 1, 13 (2009). Matheny writes that “[e]very economic decision and institution must be judged in light of whether it protects or undermines the dignity of the human person.” *Id.* For a similar statement that is not based upon religious doctrine, see David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523, 524 (2009). Yamada states that “we need to reframe the intellectual and rhetorical debate over employment law and policy to focus on the dignity and well-being of workers.” *Id.* at 524.

170. For an example of an organization in the United States that encourages companies to care, see The Center for Companies That Care, <http://www.companies-that-care.org/> (last visited Feb. 14, 2010). This organization lists criteria for companies that want to be listed as Companies that Care. *Id.* The ten characteristics that define a company as caring and responsible are that the organization: (1) sustains a work environment founded on dignity and respect for all employees; (2) makes employees feel their jobs are important; (3) cultivates the full potential of all employees; (4) encourage individual pursuit of work/life balance; (5) enables the well-being of individuals and their families through compensation, benefits, policies and practices; (6) develops great leaders, at all levels, who excel at managing people as well as results; (7) appreciate and recognize the contributions of people who work there; (8) establishes and communicates standards for ethical behavior and integrity; (9) gets involved in community endeavors and/or public policy; and (10) considers the human toll when making business decisions. *Id.*

171. See Matheny, *supra* note 167, at 10-11. Matheny explains that work is important for a number of reasons, including that work “is an appropriate way for [a person] to give expression to and enhance . . . human dignity.” *Id.* Work is also important because it is necessary to maintain a family. More fundamentally, “[h]uman work proceeds directly from persons created in the image of God. . . . Work honors the Creator’s gifts and talents received from him.” *Id.*

in company relationships with stakeholders,¹⁷² see stakeholders as on par with themselves,¹⁷³ accept responsibility for all,¹⁷⁴ and respect freedom and culture.

Globalization,¹⁷⁵ technological revolution,¹⁷⁶ and social transformations¹⁷⁷ shape a contemporary setting that makes an ethic of care necessary and possible. In a borderless, transparent world, we know which companies treat workers, customers, and local communities well. Two *modes of social control*, working together, create incentives for firms aspiring to become *Good Companies* to model an ethic of care, ethical precepts, and affinity group regulation. When employed in mutually reinforcing, or intertwined ways, these two *modes of social control* offer powerful tools to harness the best in companies.

Ethical precepts, religious doctrines and principles, humanistic philosophy, feminist thought,¹⁷⁸ social customs, mores, and traditions, yield both formal and informal approaches to inspiring an ethic of care. High-level religious leaders offer guidelines in formal documents,¹⁷⁹ guidelines that encourage and actions that affirm an ethic of care. Clerics from a range of religious traditions, scholars, and ordinary citizens¹⁸⁰ acting upon religious instruction, theories, and/or customs, offer a wide range of informal ideas and actions to promote an ethic of

172. This interconnectedness is fundamental to the concept of solidarity. See Butman, *supra* note 167, at 275 (“Solidarity centers on the interconnectedness of humanity.”).

173. See *id.* at 266.

174. See Lois Shepherd, *Assuming Responsibility*, 41 WAKE FOREST L. REV. 445, 461 (2006). Shepherd urges the reader to “do something”; she writes that if “we really do wish to prevent and alleviate suffering caused by disease, disability, and pain, then we need to begin talking about responsibility—accepting our own and requiring others to accept theirs.” *Id.*

175. Epstein, *supra* note 25, at 208.

176. *Id.* at 209.

177. *Id.* at 209-10.

178. Epstein does not mention that ethical precepts can come from feminist thought. For an article explaining an ethic of care from a feminist perspective, see Francis Carleton & Jennifer Nutt Carleton, *An Ethic of Care and the Hazardous Workplace*, 10 WIS. WOMEN’S L.J. 283, 284-89 (1995). Carleton & Carleton write that:

An ethic of care refers to the practice of extending care and compassion to vulnerable individuals and groups who have been harmed or are in harm’s way. The ethic of care is characterized by “cooperation, relationship, and interdependent nurturance,” and emphasizes the deep obligation that we owe to one another to protect vulnerable individuals and groups from harm.

Id.

179. See, e.g., Pontifical Council for Justice and Peace, http://www.vatican.va/roman_curia/pontifical_councils/justpeace/index.htm (last visited Feb. 14, 2010), noted in Matheny, *supra* note 6, at 10.

180. See, e.g., Rebecca Leung, *The Mensch of Maiden Mills*, CBS NEWS, July 6, 2003, <http://www.cbsnews.com/stories/2003/07/03/60minutes/main561656.shtml>.

care from the ideas about how to develop emotional wisdom¹⁸¹ and master the art of dialogue,¹⁸² to conversations about the virtues of promoting just relationships,¹⁸³ empowering others,¹⁸⁴ listening,¹⁸⁵ and paying attention.¹⁸⁶

When communities of faith and/or social justice evaluate systems, institutions, and organizations on how well they promote basic human rights and moral values, they consider local culture and social context.¹⁸⁷ For example, although both Starbucks Coffee Company (Starbucks) and Levi Strauss & Co. (Levi Strauss) have established solid reputations for

181. A leader's emotional wisdom is derived from the disposition he/she brings to the organization. STEPHAN STRASSER, *PHENOMENOLOGY OF FEELING: AN ESSAY ON THE PHENOMENA OF THE HEART* 185 (1997). Strasser writes about the "stirrings, shaming, exalting events, successes, and defeat, [which] all have their dispositional reverberations." *Id.*

Here are five skills that leaders with emotional wisdom demonstrate. They: (1) accept people as they are; (2) accept relations and problems in terms of the present rather than of the past; (3) treat those close to them with the same courteous attention that is extended to strangers and acquaintances; (4) trust others, even if the risk seems great; (5) do not seek constant approval and recognition from others. See TIMOTHY BROWN & PATRICIA SULLIVAN, *SETTING HEARTS ON FIRE: A SPIRITUALITY FOR LEADERS* 51 (1997).

182. Martin Buber, a Jewish philosopher, explains that genuine dialogue means not only thinking, talking and reasoning together, but also an all-out effort to establish mutual respect and understanding. He suggests that dialogue is the very essence of communication between the leader and followers and is inseparable from an effective ethic of care in leadership. BROWN & SULLIVAN, *supra* note 179 at 35.

183. One definition of social justice is fidelity to the demands of a relationship. John R. Donahue, *Biblical Perspective on Justice*, in *THE FAITH THAT DOES JUSTICE* 68, 69 (John C. Haughey ed., 1977).

184. Empowerment is a humanistic exercise of power that frees people from problems of dominance or oppression.

185. The Woodstock Theological Center has developed a set of questions that help organizations listen to the aspirations of an organization. WOODSTOCK THEOLOGICAL CENTER, *CREATING AND MAINTAINING AN ETHICAL CORPORATE CLIENT* (1990), <http://woodstock.georgetown.edu/resources/books/Creating-an-Ethical-Corporate-Climate.html>.

The Center suggests these questions: (1) Does top management have a common understanding of and strong commitment to ethical values?; (2) Do management's actions and values reflect the organization's values?; (3) Do employees throughout the firm share management's ethical values and commitment?; (4) Do managers at all levels work to build shared ethical values?; (5) Does management provide employees with ethical guidance, when needed?; (6) Are ethical considerations included in personnel decisions?; (7) Does the firm's system of rewards include ethical accountability?; (8) Does the organization have a procedure for identifying and dealing with ethical violations?; (9) Does the organization have designated personnel whose job it is to monitor and promote and ethical climate?; (10) As a result of all of the above, does every employee consider ethical conduct, supervision, and guidance a part of the job? *Id.*

186. See generally Timothy Brown, *Paying Attention*, in *GREAT IDEAS, GENTLE AS DOVES: REFLECTIONS ON CATHOLIC SOCIAL TEACHINGS* 8 (2003). Here is an ethic of care examen, created by Fr. Brown for readers of this article: (1) look for a focus on paying attention to the dynamics in the organization, (2) examine how relationships are going, (3) look for ways to reconcile differences, (4) choose a new route to recovering right relationships.

187. See Yamada, *supra* note 167, at 554.

acting upon an ethic of care, they do so in different ways. Starbucks is known for treating its employees like partners.¹⁸⁸ Levi Strauss is known for its Worldwide Code of Business Conduct,¹⁸⁹ and its more general policies and practices, which recognize the competitive advantage workers in developing countries rely on with regard to labor policies. In this context, the company acts upon the assumption that, “in the long run, educated and healthy workers are vital for economic development.”¹⁹⁰

It is important to note that ethical precepts in the context of TNCs are not silver bullets. Some writers suggest that ethical precepts are soft and ineffective.¹⁹¹ Jillian J. McMillan takes a stronger approach.¹⁹² She writes, convincingly, that is unlikely that the modern corporation can engage in social responsibility in a way that reflects true care for fellow human beings.¹⁹³ In essence, she writes that the modern corporation is incapable of taking society’s interests into account because its collective and “serious institutionwide breakdown of character and ethics . . . struck a devastating blow to [its] credibility.”¹⁹⁴ She doubts whether a discourse of “connection, reciprocity, and trust”¹⁹⁵ can replace a discourse that highlights “instrumentality, exclusivity, attribution, monologue, and narcissism.”¹⁹⁶ McMillan’s comments suggest that

188. See Press Release, Starbucks, Starbucks Demonstrates Unprecedented Level of Commitment to Partner (Employee) Coffee Education and Training (Feb. 11, 2008), http://news.starbucks.com/article_display.cfm?article_id=69.

189. See LEVI STRAUSS & CO., WORLDWIDE CODE OF BUSINESS CONDUCT (2006), <http://www.levistrauss.com/Downloads/WWCOC/WWCOC-English.pdf>.

190. Kinley & Tadaki, *supra* note 10, at 974.

191. See *supra* note 13.

192. Jillian J. McMillan, *Why Corporate Social Responsibility? Why Now? How?*, in THE DEBATE OVER CORPORATE SOCIAL RESPONSIBILITY 3 (Steve May, George Cheney & Juliet Roper eds., 2007).

193. *Id.* at 15. McMillan argues that:

(1) that the modern corporation has accepted a role of social responsibility that it is ill-suited to enact, (2) that the shared traits of corporate discourse are inappropriate to promote CSR, and (3) that a reconsideration of *ethos* as *participation* and *place* offers a more appropriate frame for corporate credibility and voice.

Id. McMillan bases her arguments on Aristotelian philosophy. She stresses the need for a “mutual dwelling place,” which

stands to transform both corporate worlds and actions by: (1) replacing corporate monologue with dialogue...; (2) replacing exclusivity with corporate profit/loss accounting that assesses *all* stakeholders...; (3) replacing solitary measures of instrumentality with measures of success in terms of human and social capital...; (4) replacing external attribution with corporate accountability and disclosure

Id. at 25 (numbers added).

194. *Id.* at 16.

195. *Id.* at 22.

196. *Id.*

ethical precepts may need reinforcement. They need to draw strength from another *mode of social control*. The most likely mode of control to offer meaningful reinforcement in the context of an ethic of care is affinity group regulation.¹⁹⁷

Epstein points out that global codes are general and lack enforcement mechanisms. He writes that “[t]hey are aspirational precepts rather than operational standards.”¹⁹⁸ Presumably, Epstein sees other aspirational precepts, including ethical precepts, as guides that are difficult to translate into operational standards. Aspirational precepts can, however, serve as the basis for operational standards. Managers embrace operational standards, especially standards with outcomes that can be measured, e.g., “what’s measured gets done.”¹⁹⁹ When organizations, measure, they report. Reporting yields increased accountability and transparency.

Associations, from professional bodies (e.g., the American Bar Association),²⁰⁰ to religious authorities (e.g., the General Congregation of the Society of Jesus),²⁰¹ to social organizations, (e.g., the Girl Scouts of America)²⁰² establish standards of behavior for their members. They impose standards on their own group, and they do so voluntarily, for the good of their association and the constituents they serve. These standards put ethical precepts into action, action that can be measured.

One industry that puts an ethic of care into measurable action is the health care industry. According to Mark Hall, a health care law and policy scholar, it is a natural for those who work in the health care industry to deliver on an ethic of care to customers and communities²⁰³ because “[t]he vulnerability of patients and the suffering caused by

197. For an argument that law is a superior mode of social control, see Larry Catá Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*, 39 GEO. J. INT’L L. 591 (2008) (“Hard international law can serve as a vehicle for the enhancement of a market environment in which corporate stakeholders, and principally consumers and investors, might incorporate information about corporate ‘social’ behavior in their consumption and investment decisions.”).

198. Epstein, *supra* note 25, at 215.

199. The idea that “what’s measured gets done” is a basic quality management principle.

200. See MODEL RULES OF PROF’L CONDUCT, available at http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

201. See Jesuit.org, General Congregation 35, <http://www.jesuit.org/index.php/main/about-us/jesuit-conference/35th-general-congregation/> (last visited Feb. 14, 2009).

202. See GIRL SCOUTS OF AMERICA, CAMP CODE OF CONDUCT, available at http://www.campwest.org/handouts/vaughn_conduct%20code%20stats.pdf.

203. Hall, *supra* note 165, at 417.

illness create moral conditions that compel and ethic of compassion.”²⁰⁴ He urges objective measures and reporting mechanisms that measure a culture of care,²⁰⁵ urges us to compare health care providers in terms of an ethic of care, and notes that “caring” is already measured in the health care setting. For example, accreditation standards and patient satisfaction surveys consider an ethic.²⁰⁶ One highly regarded health care consulting company, Press Ganey,²⁰⁷ writes,

Health care is a unique industry in which success is not measured simply by financial returns. The most successful health care organizations act upon the needs of all customers to improve the delivery of care and achieve organizational results. It is our mission, philosophy, work ethic, and dedication to hiring only the best that allows us to help our clients succeed.²⁰⁸

The existence and success of organizations such as Press Ganey show that, in the health care industry, firms not only invest in an ethic of care, but they measure it, and value the rewards that come from doing well, especially awards that recognize excellence in quality management.²⁰⁹ The health care industry shows the potential for benchmarking, considering the best practices of the highest-performing companies in an industry.²¹⁰

Epstein makes it clear that six *modes of social control*, “individually, and in combination, are critical to achieving socially responsible corporate behavior.”²¹¹ However, in some contexts, such as the ethic of care context, law, self regulation, a vigilant and responsible media, and civil society, provide few additional incentives for companies to become *Good Companies*. Scholars disagree about the extent to which rules of law can make companies care.²¹² Even if rules of law can promote an ethic of care, it is not clear we need laws in

204. *Id.* at 418; see also Lois Shepherd, *supra* note 172, at 456-59 (urging conversations about responsibility in the health care setting, e.g., that health law attorneys look to what their clients need, rather than asserting their clients’ rights).

205. Hall, *supra* note 165, at 421.

206. *Id.* at 423. For information about Press Ganey, see Press Ganey, <http://www.pressganey.com> (last visited Feb. 14, 2010).

207. Press Ganey partners with over 10,000 health care organizations. Press Ganey, Pressroom, <http://www.pressganey.com/cs/pressroom> (last visited Feb. 14, 2010).

208. Press Ganey About Press Ganey, http://www.pressganey.com/cs/about_press_ganey (last visited Feb. 14, 2010).

209. See, e.g., Baldrige National Quality Program, <http://www.baldrige.nist.gov/>.

210. Ford, *supra* note 13, at 41.

211. Epstein, *supra* note 25, at 212.

212. See *supra* note 34. But see Yamada, *supra* note 167, at 554 (“The law cannot force organizations to care about the health and well-being of their employees.”).

certain industries; some industries gather information, engage in monitoring, and disclose results voluntarily. Self-regulation means voluntary acceptance of standards, which Epstein indicates are inspired by NGOs.²¹³ Affinity group regulation and self-regulation in the context of an ethic of care are complementary in some industries, such as health care. For example, Johnson & Johnson engages in self-regulation by adhering to a credo that ranks people higher than profits.²¹⁴ The company acts based upon its credo, presumably as an act of self-regulation. In doing so, the organization acts in accordance with expectations from others in the health care field. The remaining *modes of social control*, vigilant and responsible media and engaged civil society, hold promise in promoting an ethic of care.²¹⁵ However, actors in the media and concerned citizens are more likely to, and should, use their energy to combat the antithesis of an ethic of care, that is, outright exploitation and abuse.

III. REVISITING EPSTEIN'S "GOOD COMPANY" FRAMEWORK

Epstein accurately considers the CSR movement as fundamentally incapable of achieving the *Good Company*.²¹⁶ Part of this incapability stems from the traditional debate between those arguing that TNCs should engage in CSR because they ought to do good for goodness sake²¹⁷ and those viewing such arguments, by their own nature, as being inherently lost in translation if not linked with the corporate bottom line.²¹⁸ Irrespective of the normative values underpinning the CSR

213. Epstein, *supra* note 25, at 211.

214. Johnson & Johnson, Our Credo Values, <http://www.jnj.com/connect/about-jnj/jnj-credo/?flash=true> (last visited Feb. 14, 2010).

215. Epstein, *supra* note 25, at 212.

216. See *supra* note 28 and accompanying text.

217. See, e.g., M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571 (2009) (characterizing the philosophical underpinnings of the CSR movement as based on the view that corporations have a moral duty to do good for others, even at the expense of the bottom line); see also David P. Baron, *The Positive Theory of Moral Management, Social Pressure, and Corporate Social Performance* 5 (June 2006), available at <http://ssrn.com/abstract=913808> (arguing that one of the principles underlying the CSR movement is that corporations have an abstract "moral duty" to do good).

218. See Elizabeth F. Brown, *No Good Deed Goes Unpunished: Is There a Need for a Safe Harbor for Aspirational Corporate Codes of Conduct?*, 26 YALE L. & POL'Y REV. 367, 399 (2008) (explaining the reason why certain corporations do not engage in CSR). Brown argues it is partly due to the fact that following CSR principles is more expensive than not and these added costs cannot always be passed along to the consumer. *Id.* Moreover, Brown argues that "[p]art of those added costs are the costs associated with increased risk of litigation that corporations adopting codes that embody CSR principles face." *Id.* See also Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831, 839

movement, many critics argue that it is now effectively co-opted by corporate marketing strategies.²¹⁹ Indeed, some argue that the modern CSR movement is little more than an elaborate public relations charade whereby TNCs perform certain prescribed rituals while continuing to conduct business as usual.²²⁰ Epstein's framework recasts the conception of the socially responsible corporation not as an organization responsive to an often inchoate CSR movement, but an organization operating at the nexus of certain metrics, or *modes of social control*.

As noted earlier, Epstein lists his *modes of social control* in descending order of importance: law, affinity group regulation, self-regulation, ethical precepts, the media, and an engaged civil society.²²¹ While Epstein effectively describes the modes that contextualize the challenges in attaining the *Good Company*, his prescribed order of importance unnecessarily constrains the modes' ability to perform their function. For example, as evidenced by the application of Epstein's framework to the child labor²²² and ethic of care²²³ matters, law can, in fact, be the least important mode through which to attain the *Good Company*. Indeed, reliance on an overarching legal framework in order to end child labor can be counterproductive by exacerbating the very problems such legal regimes are meant to resolve.²²⁴ As such, Epstein's

(2008) (characterizing CSR as profit-centric). Kerr explains that since the effects of CSR on the bottom line have become quantifiable, the law supports, if not requires, TNC managers to investigate and consider whether CSR can impact the bottom line. *Id.* Kerr further argues that a TNC manager who does not consider such linkages could be considered derelict in her duty. *Id.*

219. See, e.g., S. PRAKASH SETHI, SETTING GLOBAL STANDARDS: GUIDELINES FOR CREATING CODES OF CONDUCT IN MULTINATIONAL CORPORATIONS (2003) (regarding the marketing benefits from CSR and the widespread practice of insufficient or inconsistent implementation); see Pitts, *supra* note 11, at § III (finding credible the critiques that consider "CSR as, at best, toothless and marketing-oriented, and at worst a malevolent strategy to co-opt or render powerless the critical forces hoping to tame corporations with the more meaningful constraints of law"); Ruth V. Aguilera et al., *Putting the S Back in Corporate Social Responsibility: A Multilevel Theory of Social Change in Organizations*, 32 ACAD. MGMT. REV. 836, 838 (2007) (arguing that "some companies introduce CSR practices at a superficial level for window-dressing purposes"); Betsy Atkins, *Is Corporate Social Responsibility Responsible?*, FORBES.COM, Nov. 28, 2006, http://www.forbes.com/corporatecitizenship/2006/11/16/leadership-philanthropy-charity-lead-citizen-cx_ba_1128directorship.html (detailing the disingenuousness of TNC CSR campaigns). Atkins writes that "[i]here are practical reasons why corporations should cloak themselves in the politically correct rhetoric of social responsibility . . . [b]ut marketing should not be confused with significant deployments of corporate assets." *Id.* See also Gill, *supra* note 13, at 462 (arguing that CSR "has become a business-sensitive, if not business-driven practice"). Gill notes that many critics consider the original social change motives of CSR to have been effectively subordinated to TNC marketing strategies. *Id.*

220. See *supra* note 216.

221. See Epstein, *supra* note 25, at 213.

222. See discussion *infra* Part II-A.

223. See discussion *infra* Part II-C.

224. See *supra* note 115 and accompanying text.

prescribed order of importance—or any order of importance—lacks the flexibility to effectively scrutinize certain problems that continually challenge TNCs as they conduct business.

Epstein's argument that each mode, individually and in combination, must be used in order to achieve the *Good Company* similarly runs afoul of the flexibility needed to approach complex business issues. As seen with the treatment of the child labor,²²⁵ improved employer-employee bargaining,²²⁶ and ethic of care matters,²²⁷ some modes may be essential while others may be either irrelevant²²⁸ or detrimental²²⁹ in encouraging the *Good Company*. While Epstein's proposition that the *modes of social control* must be both considered in a precise order and in concert, they may be asymmetric to challenges faced by TNCs as they conduct business. The modes do, however, provide a sufficient foundation for how these challenges can be faced with a *New Governance* approach.

A *New Governance* approach would emphasize the importance of matching the appropriate *mode of social control* with the specific challenges facing TNCs.²³⁰ Instead of focusing on overarching legal prohibitions and adversarial enforcement,²³¹ *New Governance* approaches consider ongoing deliberation between TNCs and a broad range of stakeholder groups, which have access to local information and context-specific understanding of business problems, as the most effective mechanism for making decisions in complex fast-paced business environments.²³² Such an industry and situation-specific use of

225. See discussion *infra* Part II-A.

226. See discussion *infra* Part II-B.

227. See discussion *infra* Part II-C.

228. See discussion *infra* Part II-C (noting the irrelevance of the “self regulation,” “vigilant and responsible media,” and the “engaged civil society” *modes of social control*).

229. See discussion *infra* Part II-A (noting the counterproductive nature of the “law” *mode of social control*).

230. See Ian Ayres & John Braithwaite, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 39 (1992) (arguing that the adoption of a strategy that allows the changing of regulatory instruments in light of circumstances may be the most effective approach at influencing the behavior of TNCs).

231. See Orly Lobel, *Citizenship, Organizational Citizenship, and the Law of Overlapping Obligations*, 97 CAL. L. REV. 433, 471 (2009) (arguing against the effectiveness of legal prohibitions and adversarial enforcement in affecting corporate behavior). Lobel writes:

Over the past five decades, top-down rules and adversarial enforcement—the hallmark of command-and-control—have often failed to achieve their intended goals of increasing compliance and, at times, have been counter-productive in regulating private industry. In particular, as technology and production methods change rapidly, it is virtually impossible to address all the risks of production and work through universal standards.

Id.

232. Ford, *supra* note 13, at 27-28 (explaining the dynamics of *New Governance* approaches).

Epstein's *modes of social control* will have three favorable results in achieving the *Good Company*. Namely, such an approach: (1) creates a larger pool of context-specific information;²³³ (2) ensures the representation of a broad range of stakeholder views;²³⁴ and (3) holds TNC managers accountable to the public.²³⁵ In this way, adapting Epstein's *modes of social control* to a *New Governance* approach provides a rational, systemic alternative to draconian rule-making and their often adverse effects of business.²³⁶

IV. CONCLUSION

Epstein writes that:

Harnessing the energies ... of powerful corporate engines for socially efficacious purposes yet rendering them accountable for their deleterious impacts on other sectors of society and assuring them they would be good companies has been the objective of public policy and an enduring private concern on the part of intellectuals, religious authorities and ordinary citizens since the emergence of the megacorporation of the nineteenth century.²³⁷

In the context of increasing global concerns about the misbehavior of TNCs, Epstein's *modes of social control*, combined with his vision for these modes, work together to incentivize companies and serve as a starting point for robust conversations about how to promote improved corporate cultures—especially those cultures that can impact human rights and social change in positive ways.

We have considered three distinct employment law issues: (1) curbing the use of child labor;²³⁸ (2) improving employer-employee bargaining;²³⁹ and (3) providing an ethic of care for employees.²⁴⁰ In applying Epstein's vision of how *modes of social control* incentivize companies in the employment context, we have observed that his prescribed use of the modes unnecessarily constrains the ability of the

233. Primarily through collaboration with NGO's and an engaged civil society (an adaptation of the "self regulation" and "engaged civil society" *modes of social control*). See Epstein, *supra* note 25, at 211-12.

234. *Id.*

235. Primarily through the "vigilant and responsible media" and "engaged civil society" *modes of social control*. See Epstein, *supra* note 25, at 212.

236. See *supra* note 23 and accompanying text.

237. See Epstein, *supra* note 25, at 208.

238. See discussion *supra* Part II-A.

239. See discussion *supra* Part II-B.

240. See discussion *supra* Part II-C.

modes to actualize *Good Companies*.²⁴¹ We argue that *New Governance* language lends flexibility to Epstein's framework.²⁴² In essence, when Epstein's framework intersects with *New Governance* priorities—especially collaboration, dialogue, innovation, and pragmatic learning—the consequence is a more flexible role for the *modes of social control*, a role that promises corporate cultures that are mindful, conscious, and self-scrutinizing in terms of the social consequences of their business practices. Indeed, such an approach aspires to realize Epstein's *Good Company*.

241. *See supra* Part III.

242. *See supra* Part III.

