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THE LEGAL CHARACTER OF PRIVATE CODES OF CONDUCT: MORE THAN JUST A PSEUDO-FORMAL GLOSS ON CORPORATE SOCIAL RESPONSIBILITY

Veronica Besmer*

I. INTRODUCTION

Perhaps no other event has shaken the business environments of the industrialized economies more than the recent corporate governance scandals. Shortly after the record-breaking bankruptcies of Enron and WorldCom in the U.S., the infamous tidal wave swept the Old Continent. In 2003, the Italian food giant Parmalat became “Europe’s Enron” with an accounting and securities fraud that the Securities and Exchange Commission (“SEC”) called “one of the largest and most brazen corporate financial frauds in history.”¹ Neither shaky corporate governance nor bankruptcies are novel. What makes the recent round of scandals mind-boggling is their magnitude: the combined market capitalizations of Enron and WorldCom that were wiped out exceeded the individual gross domestic

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products ("GDP") of such countries as the Czech Republic, Venezuela, the Philippines, and Pakistan.²

In response, legislators in many countries have rushed to enact more meaningful "good corporate governance"³ laws to protect households and investors within their jurisdictions. On the voluntary level, Corporate Social Responsibility ("CSR") has been touted as the politically correct and most effective answer by both "Corporate America" and nongovernmental organizations ("NGOs"). The former senses another clever marketing opportunity, while the latter applauds self-restriction as an efficient and, if done earnestly, effective solution. Although CSR means different things to different people, the concept suggests that a corporation recognizes its duty to address some of the social and environmental problems that afflict humankind.⁴ A private code of conduct enhances such a CSR commitment by adding an air of formality. It articulates the standards by which a corporation professes to be bound. Even Jack Welch, former General Electric CEO and one of the greatest "captains of industry" of the 20th century, has gone on record as saying that he believes the time has passed when making a profit and paying taxes were all that a company had to worry about.⁵ Indeed, CSR has caught on in business circles as the latest form of altruism, and has become the new pet project of many managers and directors. The Economist, a U.K.-based magazine, dedicated its first February 2005 issue to this topic.⁶ Gone are the days of public, top-down regulation; the trend shifts toward industry-wide private codes or company-internal self-regulation.⁷ But do private codes guard against excess

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² The World Bank Group, World Development Indicators Database, World Bank (Sept. 2004), available at http://www.worldbank.org/data/wdi2005/wditext/Section1.htm (last visited Oct. 10, 2005) (this paper juxtaposes the market capitalization and GDP purely to illustrate the scale of the bankruptcies, not to suggest a similarity between these two metrics).

³ This note uses the terms "corporate governance," "corporate social responsibility" and "corporate sustainability" interchangeably, as the nuances are a matter of subjective preference and do not impact the essence of this note.


malfeasance of big multinationals, especially when the vulnerable human and ecological environments are located abroad?

The U.S. Supreme Court granted certiorari to a case involving the validity of voluntary corporate codes for the first time in 2003.8 In 1998, Marc Kasky, a private consumer, confronted Nike Inc. with the glaring discrepancies between the company’s misleading statements about labor conditions in its offshore factories and the reality of ongoing human rights violations at those locations. Kasky claimed the company violated its own policies, California’s consumer protection laws, and the Federal Trade Commission Act.9 The shoe giant settled before the Supreme Court reached a decision on whether Nike fell under the constitutional “free speech” protection, a presumed defense to most private code challenges.10 But the California Supreme Court’s ruling in the case remains good law: factual statements about corporate operations—the type of information often found in private codes—are commercial speech and as such may be regulated to prevent consumer deception.11

Following the Nike case, public debate about the scope and possible revision of company liability swelled and consumers, investors, politicians12 and judges collectively have indicated a heightened awareness for good corporate governance. This note analyzes the extent of a company’s liability under its own code of conduct; not for its products or design defects, but for its behavior as a global corporate citizen.

Part II will survey the current forms of regulations of transnational enterprises, breaking them down into public codes and voluntary CSR measures. It will show that existing formal laws are ill-suited to enforce private codes of conduct because legislators do not have jurisdictional and subject matter authority over multinational enterprises ("MNEs"), and because the idea of “transjudicialism,”13 which could indeed one day help

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9. Id. at 656.
13. Transjudicialism connotes the idea of judicial globalism: the cross-jurisdictional cooperation between courts, the development of supranational tribunals, and the
to control the "the tentacles of Corporate America as they twist around the globe," is still utopian. Part III analyzes three creative litigation strategies to possibly enforce private codes under current U.S. law. It will also delineate the First Amendment defense often raised against challenges of voluntary corporate codes. The paper discusses the proposition in Part IV that quasi-formal enforcement mechanisms such as stakeholder pressure and self-regulation work best in this new environment of heightened awareness for good corporate governance to effect compliance with self-imposed CSR codes.

II. CURRENT REGULATIONS OF MNEs

To date, globalization has worked well for multinational enterprises ("MNEs"): the emergence of more free trade zones with fewer tariff barriers, an increasingly internationally trained and multilingual work force, and cheaper transportation costs have enabled many manufacturers and service providers to exploit the differences in production and labor costs and cash in on huge profits without the burden of complying with inhibiting regulations. But lower consumer prices, one of the most welcome benefits of globalization, are not free. Some of the shrewder MNEs have milked the liberalization of national markets like a cash cow, accelerating the proverbial race to the bottom. If one accepts the notion of interconnectedness as true, as an increasing number of commentators profess to do, then the continued exploitation of lesser developed countries ("LDCs") could come back to haunt private or institutional citizens in the West. And indeed, it arguably already has. Since 2000, Unocal grappled rearticulation of the notion of judicial comity in litigation involving private parties create a cosmopolitan, egalitarian system of international law. See Symposium, Globalization, Courts, and Judicial Power: From Empire to Globalization . . . and Back? A Post-Colonial View of Transjudicialism, 11 IND. J. GLOBAL LEG. STUD. 183, 184 (2004).


15. "Stakeholders" refers to all parties that are indirectly affected by a business transaction, such as customers, employees, local communities, shareholders, governments, environmental NGOs or even opinion formers.

with the risks that materialized from doing business in a totalitarian country when it was accused of slave labor use in Burma. During litigation, the U.S. oil company conceded that some workers had been tortured and abused when they were forced by the military to clear jungle for the construction of a $1.2 billion natural gas pipeline. As the first in a series of U.S. MNEs to face allegations that they acquiesced in or benefited from human rights violations, it fought the suit until December 2004, when it agreed to settle for $30 million.

Fifty years ago, the concept of sustainable development, the doctrinal sister of CSR, was not on anyone’s radar screen. Today, the phrase is fashionably used by corporations, studied by academics and propagated by legislators. Sustainability connotes development that “meets the needs of the present without compromising the ability of future generations to meet their own needs.” The private sector has enthusiastically incorporated the concept of sustainability by proclaiming various CSR programs including the imposition of a private code of conduct. Coca Cola, for example, provides six different reports of its “Code of Business Conduct,” and has translated it into six languages. Johnson & Johnson, the $30 billion pharmaceutical giant, has ten social responsibility web spaces devoted to topics that range from diversity to environment and HIV/AIDS, and has devoted a substantial part of its website to the discussion of its “credo.” International treaties do not lag behind. NAFTA, which is by investment volume the largest free trade agreement that the U.S. has ever entered into,

17. See Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), reh’g granted en banc, 395 F.3d 978 (9th Cir. 2003), dismissed by parties’ stipulation, 403 F.3d 708 (9th Cir. 2005).
18. Id. at 942.
19. Birchall, supra note 12 (other defendants include ExxonMobil, Coca-Cola, Drummond, Occidental Petroleum, and Del Monte Foods; cases against ChevronTexaco and Shell have already survived motions to dismiss).
20. This most frequently used definition was put forth by the World Commission on Environment and Development in their report entitled Our Common Future, also known as the Brundtland Report. See High, supra note 14, at 137.
22. Although chiefly a conceptual underpinning of those free trade agreements, these sustainability policies are legally significant either as the interpretive context or as the enforceable “spirit” of otherwise non-enforceable rights. See, e.g., Doe v. Bolton, 410 U.S. 113, 209 (1973) (Douglas, J., concurring) (implying that rights, otherwise not federally enforceable, may be enforceable when they come within the sweep of the Preamble to the U.S. Constitution).
refers to sustainable development in its preamble, main text and side agreement. Likewise, the General Agreement on Tariffs and Trade ("GATT"), generally viewed as a strictly trade oriented multilateral agreement between its 148 Contracting Parties, also agreed to take into account sustainable development principles, and established a Committee on Trade and the Environment to enforce them.

In order to discuss the complex controversy over the extent of corporate autonomy under public and private codes, it is useful to first analyze the current scope of the public codes. These government-initiated guidelines have the same overarching goal of the corporate codes—the protection of the natural and human ecosystem—but started earlier than the private codes.

A. PUBLIC CODES OF CONDUCT DO NOT SUFFICIENTLY REGULATE MNES

Currently, no set of international law governs the behavior of MNEs, nor do the United Nations, the World Bank, IMF, or any other large development institution have the mandate to regulate transnational corporations. This does not mean that no one has tried to formulate a voluntary, universal code of conduct. In the 1980s, members of the United Nations drafted several versions of a non-binding code of conduct for MNEs, which they termed the "United Nations Code of Conduct for Transnational Corporations." The last version, in 1990, would have obligated transnational corporations to "respect the social and cultural objectives, values and traditions of the countries in which they operate," to

“take steps to protect the environment and where damaged to rehabilitate it,” and to “respect human rights and fundamental freedoms in the countries in which they operate.” This proposed law was abandoned after MNEs and Western governments fought it persistently for over three years. Nevertheless, the volume and significance of soft law has increased markedly in recent years, not least as a response to the dramatic surge of multilateral treaties and Foreign Direct Investment (“FDI”), or private investment capital, into emerging markets. Soft law is text that uses recommendatory language and consists of nonbinding or incompletely binding legal norms. Unlike the unilateral private codes, these types of codes are the product of cross-sectional negotiations with input from a range of interest groups. The operative word for these attempts to foster responsible practices among MNEs through private codes is “fragmentation.”

The quintessential voluntary public code is probably the 1976 “Declaration on International Investment and Multinational Enterprises” (“Declaration”), to which all thirty OECD member countries and eight non-member countries have subscribed. It contains non-binding principles and standards addressed to both governments and companies. Where the Declaration deviates from its principal purpose of promoting international investment, it discusses only environmental protection as opposed to labor issues or corporate governance, which is typical of many of the early codes. Agenda 21 of the “Rio Declaration on Environment and Development” is another large-scale public project that attempted to codify social responsibility. More than 178 governments adopted it at the first

29. Id. at 166-67.
30. Duruigbo, supra note 27, at 139.
31. Sungjoon Cho, The WTO’s Gemeinschaft, 56 ALA. L. REV. 483, 536-537 (2004) (noting that this soft law, the collective term for “guidelines” or “recommendations,” often “provides a constructive solution to potential disputes involving developed and developing countries.”).
32. Hepple, supra note 7, at 352.
34. Id.
35. High, supra note 14, at 153.
Earth Summit in Brazil in 1992, the event that arguably gave birth to the concept of sustainable development.

Some consider the Charter promulgated by the International Chamber of Commerce ("ICC") as the best known of the generic codes of environmental conduct. Because it is backed by the Business Charter for Sustainable Development, the self-proclaimed "voice of world business," more than 2,300 global companies have endorsed the Charter. The World Business Council for Sustainable Development is another prominent private CSR network. Its 170 corporate members coalesce their competitiveness into a shared commitment to "sustainable development, ... eco-efficiency, innovation, and corporate social responsibility."

Though praiseworthy, the effectiveness of these public "codifications" is often questionable. Overall, these instruments have not succeeded in substantially reducing instances of environmental degradation or labor abuse. Three reasons explain this failure. First, these agreements are spineless without the force of international customary law or ratification under domestic law. Supranational bodies lack the political will and national legislators lack the authority to formulate a binding legal standard for these voluntary initiatives; yet implementation is impossible without an enforcement mechanism. Any attempt to regulate cross-border practices runs into the problem that the home and host jurisdictions will compete for regulatory and enforcement power. Many infant CSR laws have succumbed to the intricacies of cross-jurisdictional lawmaking. The U.S. exemplifies these political and legal difficulties. To date, Congress has not reached a consensus among the fifty, geopolitically divergent states to enact binding legislation to mandate some form of sustainable

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39. Id.
41. Westfield, supra note 4, at 1084-85.
development,\textsuperscript{43} despite the fact that many of the more than 35,000 multinationally operating corporations\textsuperscript{44} are domiciled in the U.S.

Second, these non-binding supranational codes are ineffectual for the simple reason that the financial reward a company stands to gain from exploiting lax regulations in LDCs will often overshadow the lesson that the popularity of CSR taught: namely, that benign self-restraint bears multiple benefits as well. This behavior contributes to what is known as “the race to the bottom.” The theory is rooted in the belief that “industry will flock to places where the least restrictions are imposed on them, while countries with rigorous environmental, [health, or safety] standards will be drawn into lowering those standards in order to compete.”\textsuperscript{45} In other words, the gap between developed, developing, and transitioning countries creates the natural risk for exploitation. Studies have found that there are some companies, particularly in pollution-intensive industries, that remain attracted to poorer countries as their principal place of production.\textsuperscript{46} As long as the differences in regulations, tariffs, quotas and other forms of market distortion remain stark, smaller firms who lack the foresight or war chest for implementing CSR programs will remain inclined to pursue the old-fashioned and proven strategy of adjusting manufacturing to minimize production cost.

Third, public codes of conduct are largely inadequate because they cannot compel accountability. MNEs’ inherently stratified operations dilute the vindicability of self-reports, which is unfortunate because these reports are often the first information source for monitoring corporate behavior. Furthermore, the prime institutional objective of both privately held and publicly traded corporations is to serve their owners. Complying with soft law on sustainable development, environment protection or fair labor practices seems inherently at odds with reaping the profits of investment growth, which after all is the only metric that corporations are obliged to account for vis-à-vis their shareholders. Lastly, MNEs are unaccountable for social behavior because behavior cannot be uniformly

\begin{thebibliography}{10}
\bibitem{High注释} High, \textit{supra} note 14, at 163.
\bibitem{McRae} Donald McRae, \textit{Trade and Environment: Competition, Cooperation or Confusion?}, \textit{Alberta L. Rev.} 745, 750 (2003).
\bibitem{Hsia注释} Hsia, \textit{supra} note 37, at 680-81.
\end{thebibliography}
measured. While NGOs and international development agencies now compete to establish a “gold standard” against which to measure corporate social and environmental impact, standardizing social justice is next to impossible, especially on an international scale.

Overall, public codes succeeded in raising expectations of a new corporate culture, sparking a dialogue between the public sector, private industry, and stakeholders, and designing codes that might one day become the basis for getting all participants to play by the same rules. As of now, however, public codes remain too aspirational in nature to have the power to influence corporate behavior indefinitely.

B. PRIVATE CODES OF CONDUCT ARE ALIVE, BUT ARE THEY KICKING?

Since public codes are insufficient to control international corporate behavior, we should welcome the current surge of companies turning to CSR programs and private codes of conduct. Case closed, right?

It is true that private corporations in the U.S. and other developed countries increasingly recognize that they may have responsibilities beyond maximization of shareholder value. Dr. Peter Drucker, known as one the most enduring management thinkers of our time, advocated the idea that the power of a corporation “over workers and consumers...[gives] it a social and political, as well as an economic, dimension and it should be run for the benefit of its shareholders, workers, and the wider community.”

At the 1999 World Economic Forum in Davos, Switzerland, UN Secretary General Kofi Annan called on world business leaders to “embrace and enact” a set of nine principles in their individual corporate practices by supporting complementary public policy initiatives. Initially, the U.S. industry strongly resisted this idea of its own involvement in the movement towards sustainability, but the formulation of good corporate governance programs has now gained acceptance. MNEs like the idea of self-regulation, partly because of the ease of administration, non-intrusiveness, and its flexibility. The movement began on an industry-wide level, well intending the effect of binding one’s “peers” to the same


48. Mr. Annan thereby launched the “United Nations Global Compact,” which is a standard that includes specific practices that endorsing companies would enact. The Global Compact carries no sanctions to enforce its rules. See Hsia, supra note 37, at 681.

49. High, supra note 14, at 152-53.
restrictions to avoid negative comparative advantages. Today, practically every Fortune 500 company has participated in this process, and businesses are turning "socially responsible" at an exponential rate.

1. Various forms of CSR programs

To date, no generally accepted definition exists of what behavior falls under the rubric of Corporate Social Responsibility. Broadly, CSR entails the notion of approaching a company's "decisions, actions, and operations" in a holistic mindset. Some reduce it to the obligation to comply with various "international standards of human rights and basic labor standards." Others draw the circle larger by defining CSR as managing the demands and expectations of various constituents. The lack of a single CSR standard gives any interpretation an ephemeral quality. Ultimately, the sincerity and usefulness of a CSR measure is in the eye of the beholder.

The "first generation" CSR measures required companies only to provide greater social disclosure. The businesses promulgated broad social values in a CSR report, mission statement, or environmental and social impact assessment. The notion of transparency in the corporate context is not a new idea. In fact, the SEC demands regular disclosure of financial information of the 14,000 publicly listed U.S. companies. However, companies are free to issue almost any proposition as to non-financial data. Sometimes they impress the public with their actual or

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54. Cynthia A. Williams, The Securities and Exchange Commission and Corporate Social Transparency, 112 HARV. L. REV. 1197, 1199 (1999) (defining "social disclosure" as the reporting of information about a company's products, the countries in which a company does business, and the labor and environmental effects of a company's operations).

projected social behavior, and even the business investment community has been known to reward CSR program launches with increases in stock price.

In a peculiar competition to defy the accusation that corporate responsibility statements are often nothing more than lip service at best and post facto damage control at worst, progressive companies have stepped up their CSR efforts. Some have created a CSR ombudsman, implemented environmental management systems, added staff participation in pro bono projects or implemented "social auditing schemes."56 Others seek to distinguish themselves by actually reversing their impact on the community and the environment.57 Such companies spend considerable amounts of dollars to reduce their institutional greenhouse gas emissions, for example by experimenting with CO₂ emissions trading.58 One case in point is British Petroleum, whose ambitious climate change agenda is notable less for its originality than for the fact that the company operates in a highly carbon-intensive industry,59 which makes such an exposure more vulnerable to external criticism.

A voluntary code of conduct is another form of CSR.60 The normative content of a corporate code can vary, although it often assumes the form of a contract.61 It is nothing more than a system of policies, addressed to an internal or external audience.62 Of course, the typical code of conduct is publicly available; after all, no homus economicus would incur the pain of self-restriction without the gain of credit from the public. Self-imposed codes long have had a place in international politics. For example, the European Union ("EU") has agreed to put a toughened "code of conduct" in place in order to soothe American concerns over Europe's impending arms embargo lift for China.63 On the judicial side, codes of ethics have

58. Id. at 213 (mentioning DuPont as one of the first to enter CO₂ emissions trading markets).
59. Tony Blair (by invitation), A Year of Huge Challenges, ECONOMIST, Jan. 1, 2005, at 49 (BP has spent $20 million on its emissions trading program, the heart of its commitment to reduce the company's greenhouse gas emissions by ten percent over the next three years).
60. Sutton, supra note 52, at 1162 (noting that adopting voluntary codes of conduct drives most CSR activity).
61. Id.
62. Frey, supra note 28, at 159.
63. The European Union's Courtship of China - And its Implications for America, ECONOMIST, Jan. 15, 2005, at 50 (suggesting that the code would presumably stop a European company from selling weapons to China).
likewise been offered to facilitate the enforcement of international arbitration awards. Only recently have codes entered the domain of private business.

2. Benefits of CSR

The expenses associated with developing, promulgating and monitoring the objectives expressed in a CSR statement are considerable. Given this cost and the potential for self-induced embarrassment, the nascent voluntary self-regulation seems counter-intuitive. What do companies stand to gain from “social” behavior? The goal is insipidly old-fashioned: Companies hope to enhance profitability.

A growing number of companies recognize a business case in CSR. The reasons for the phenomenon of profitable sustainability are two-fold. First, CSR initiatives often yield tangible savings in operating expenses and overhead. Implementation of a CSR program requires an unprecedented examination of processes in the procurement, distribution and waste disposal. The result of such crosssectional gathering, analyzing, processing and reporting of data usually results in the elimination of duplications and optimization of existing resources. Many studies also confirm the economic case for “greening” the buildings. A minimal upfront investment of approximately two percent of construction costs will typically yield life cycle savings of over ten times the initial investment in the form of energy use savings, water conservation, waste reduction, and improvement of productivity and health. Each of these resource-saving initiatives has a direct positive impact on corporate bottomline.

Second, CSR makes for good marketing. As the national economy becomes increasingly service-oriented, more companies find that their

64. Rogers, supra note 42, at 357-58.
66. Id.
fixed assets constitute only a small portion of their total value.\textsuperscript{68} For example, ninety-six percent of Coca-Cola Company's value consists of "intangibles," mostly in form of company reputation.\textsuperscript{69} Maintaining that brand name is vital, and surviving any storms in the corporate seascape may be a little easier with a sound CSR formulation. Furthermore, CSR helps improve public relations because it allows companies to respond to unforeseen mishaps more authentically. For example, Ford Motor Company attributed its non-defensive reaction to Congressional hearings about the Ford Voyager incident to the fact that it is part of the Global Reporting Initiative.\textsuperscript{70} Similarly, Nike said that the recent Kasky litigation prompted the company to launch "new tools for dialogue with our stakeholders," and to release an online newsletter.\textsuperscript{71} In short, CSR makes business sense because it creates tangible savings as well as a cushion of goodwill upon which the firm can fall back on when times are rockier.

3. Criticism of CSR

Some observers dismiss the new CSR measures as mere public relations gimmicks meant to polish the beaten corporate image.\textsuperscript{72} Professor Joel Bakan described CSR in his recent book as an oxymoron and outright fraud.\textsuperscript{73} Others have attacked the CSR development on laissez-faire grounds. Instead of placing misguided reliance on CSR, the argument goes, we should rely on Adam Smith's invisible hand to redistribute wealth as a more efficient way to maximize social and economic welfare. CSR, the argument goes, is philanthropy on another person's dime:

Businesses are owned by their shareholders -- any money they spend on so-called social responsibility is effectively theft from those shareholders who can, after all, decide for themselves if they want to give to charity.\textsuperscript{74}

\textsuperscript{68} Baker, \textit{supra} note 5.
\textsuperscript{69} Id.
\textsuperscript{70} The GRI is an independent imitative that binds member companies to disclose specified social and environmental information. \textit{See} Williams, \textit{supra} note 54, at 421; \textit{see also} Global Reporting Initiative, \textit{GRI At a Glance}, at http://www.globalreporting.org/about/brief.asp (last visited Nov. 1, 2005).
\textsuperscript{71} Kinley & Tadaki, \textit{supra} note 10, at 957 n.109.
\textsuperscript{73}JOEL BAKAN, \textit{THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER} 109 (Free Press 2004).
\textsuperscript{74} Baker, \textit{supra} note 5.
Robin Hood was still a bandit when he stole from the rich to give to the poor, no matter how noble his cause might have been. Managers who indulge their charitable instincts at the expense of the firm's owners in effect swindle people who have placed them in a position of trust to safeguard their property.

Another line of criticism laments an already incipient feeling of "code fatigue." This point deserves consideration. Companies affix the CSR label on a bewildering number of initiatives, many of which are nothing more than what once was considered ordinary, common sense decency. At the same time direct charitable donations fell, the number of companies with CSR programs rose dramatically. Not all initiatives have a net social benefit, which supports the claim that CSR is nothing but window-dressing and a gloss on capitalism.

Unfortunately, the rise of CSR to its lofty status stands in no direct relationship to a demonstrated stricter construction of the corporate conscientiousness, especially on an international scale. One particularly sad example of exploitation occurring under the auspices of Western companies and misuse of CSR rhetoric is the tragedy in Juárez, Mexico, a large industrial town near the Texan-Mexican border. Since 1993, over 300 young women have been kidnapped, raped, and murdered. Investigators suspect drug and prostitution cartels, as well as a corrupt government are responsible for the crimes. On a deeper level, the tragedy is but a gross manifestation of the upward struggles of a poor country.

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76. Id.
77. Kinley & Tadaki, supra note 10, at 955.
78. The Union of Concerned Executives, supra note 75.
79. The Good Company, supra note 6, at 4 (according to the Guardian 2004 Giving List, a British newspaper, charitable contributions of the 100 companies listed on the FTSE averaged just 0.97% of pre-tax profits).
81. SEÑORITA EXTRAVIADA (Xochitl Films 2001) (Academy Award-nominated filmmaker Lourdes Portillo provides an in-depth portrait of the problem in this documentary shot between 1999 and 2000).
Many victims had one thing in common: they worked in the foreign-owned assembly plants called "maquiladoras," which hundreds of foreign-owned companies such as Philips, Axxion, or Levi & Strauss Company operate. The MNEs have not been sued so far, which reflects the perceived or real limited legal causality between corporate action (or lack thereof) and legal liability. But the companies' exploitation of cheap labor and "loud" silence about this tragedy flies grotesquely in the face of the CSR statements on their websites.

III. ENFORCEMENT OF MNE REGULATION

Codes, whether self-imposed or not, are only as meaningful as their enforceability. Positive laws dealing with Corporate Social Responsibility, were they to exist, would be the most direct enforcement mechanism. But the status of non-legislative codes is murkier. In the recent past, plaintiffs have nevertheless found creative causes of action to compel adherence to private codes of conduct and to obtain relief for CSR violations.

A. ENFORCEMENT UNDER INTERNATIONAL LAW IS IMPOSSIBLE

To state it upfront: MNE's cannot be held liable under international law for violating a self-imposed limitation. Civil litigants can resolve a private suit either by following the relevant choice of law provisions, which forces them into a domestic court, or through international arbitration.


84. Alice Weldon & Suzannah Hernandez, Americans Should Help Stop Tortures and Murders of Young Women in Mexico, ASHEVILLE CITIZEN-TIMES, Oct. 9, 2004, at 7A (about one-half of the victims were in some way affiliated with one of these companies).


86. Duruigbo, supra note 27, at 138.

The latter method is questionable because difficulty in enforcing arbitral awards is common, as is the reluctance of plaintiffs, often idealism-driven NGOs, to allow an MNE to "negotiate away" or pay off some of its social responsibility.

B. ENFORCEMENT UNDER DOMESTIC LAW IS DIFFICULT, BUT DOABLE

The impossibility of international prosecution does not hamper plaintiffs' enthusiasm to sue MNEs in U.S. domestic courts for unruly out-of-jurisdiction conduct, in violation of their own codes. They typically pursue one of three main litigation strategies.

1. Prescriptive jurisdiction

First, the doctrine of prescriptive jurisdiction allows the limited application of U.S. law for certain corporate activities that occur abroad. Although the U.S. has a strong presumption against such extraterritorial regulation out of respect for other sovereignties, the Supreme Court has indicated that it would uphold limited jurisdiction under an act of Congress to enforce international-law-based norms. Still, the prescriptive jurisdiction doctrine is useful only procedurally: akin to a long-arm statute, the principle merely allows plaintiffs to bring the corporate defendant into a courtroom. The doctrine does not itself legitimize the claim of a private code violation; the plaintiff must still proceed with a conventional cause of action under domestic law, such as human rights abuse. This reliance on domestic laws to hold corporations to social principles is a double-edged sword. On the one hand, U.S. law would govern a large number of MNEs because most are headquartered in the states. This makes the proposal to

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90. Westfield, supra note 4, at 1087.
91. Sosa v. Alvarez-Machain, 542 U.S. 692, 763-64 (2004) (Scalia, J., concurring) (principally upholding the prescriptive doctrine of the Alien Tort Claims Act for "specific, universal, and obligatory" crimes—generally murder, torture, kidnapping, and slavery—against "the law of nations" regardless of where they happened, but disallowing the Mexican plaintiff to seek damages in U.S. courts in this case because of an exception barring claims where the injury was suffered in a foreign country). Still, a successful litigation under the Alien Tort Statute seemed credible enough for Unocal to announce in December 2004 its decision in principle to settle. See Birchall, supra note 12.
92. Westfield, supra note 4, at 1079.
use domestic law appealing because, comparatively, U.S. law tends to be
tough on corporations. At the same time, claims may be tried in foreign
jurisdictions as well. Because Third World countries often compete
fiercely over valuable FDI, they may be reluctant to impose stringent labor
standards on foreign investors. Even presuming that these states do agree
with the philosophy that they do have a responsibility to regulate corporate
action, a somewhat contradictory proposition given that the West also
loudly calls for deregulation of hitherto national economies, many of these
countries are a long way from being politically and administratively able to
impose a "socially responsible" layer on their laws. Therefore, the utility
of the prescriptive jurisdiction doctrine to enforce private codes is reduced
to a function as a procedural enabler rather than a source of substantive
law.

2. Consumer protection law and the constitutional "free speech" defense

Second, private codes of conduct could be enforceable under state laws
that bar misinformation or fraud. In fact, the plaintiffs in Nike proceeded
under California’s unfair competition law when they alleged that Nike
committed negligent or intentional misrepresentation, unlawful business
practices and false advertising. Because codes of conduct often assume
the form and language of a contract, they are arguably even more
intentional and misleading to the average consumer than were Nike’s
statements in its press releases about the labor exploitation allegations.
Businesses inevitably respond with a "free speech" defense, and the
litigation quickly boils down to a dispute over whether to classify CSR as
non-commercial speech or the lesser-protected commercial speech. The
Nike case provides instructive insight.

Under a 1993 memorandum of understanding with its subcontractors,
Nike committed itself to ensuring that its subcontractors comply with local
laws and regulations. Thereafter, reports uncovered that Nike products
were made by workers paid less than the applicable local minimum wage
and encouraged to work more overtime hours than applicable local law
allowed. The workers were also subjected to physical, verbal and sexual
abuse, and unduly exposed to toxins, noise, heat and dust, both violations

93. Id. at 1085-86.
96. Id.
of local occupational health and safety regulations. In a public relations campaign, Nike denied the charges with concrete numbers and examples that were proven wrong or misleading at trial. Still, both lower courts perceived the messages as a mere "public dialogue on a matter of public concern" and hence constitutionally protected noncommercial speech. But the California Supreme Court overturned the narrow interpretation of the commercial speech doctrine when it held that the statements did constitute commercial speech and therefore were subject to state laws that bar false and misleading commercial messages. It reasoned that the messages were directed by a commercial speaker to a commercial audience, and that they made representations of fact about the corporation's own business operations for the purpose of promoting sales. Moreover, "product references," one of three factors guiding a commercial speech analysis, includes information about the manner in which the products are manufactured, not just price and availability. Predictably, businesses are fighting this broad interpretation.

The categorization melee about whether CSR constitutes non-regulated public relations or regulated product advertisement exemplifies the limitation of using state law to enforce private codes. Besides resulting in non-uniform enforcement of CSR across jurisdictions, neither framework analyzes the actual deviation from the code. To remove the discussion from the underlying wrongdoing to a constitutional analysis is a legal abstraction that may seem ill-guided to many stakeholders. Still, it is a viable strategy to enforce a private code under positive law.

97. Id.
98. Id. (Nike said that workers were protected from abuse, were paid in accordance with applicable local laws, were paid on average double the applicable local minimum wage, received a "living wage," received free meals and health care, and that their working conditions were in compliance with local laws).
100. Kasky, 27 Cal. 4th 939 at 970.
101. Id. at 964 (emphasis added).
102. Id. at 961.
103. See, e.g., SEC v. Siebel Sys. Inc., No. 04 Civ. 5130 (S.D.N.Y.). See also Marcia Coyle, Siebel Challenges SEC Rule, THE RECORDER, Feb. 28, 2005, at 1 (discussing how Siebel raises a rare First Amendment challenge to an SEC disclosure regulation and asserting that not "anything motivated by commercial efforts or emanating from the corporate mouth" is commercial speech because the U.S. Supreme Court has defined commercial speech very narrowly).
3. Stricter legislative and judicial construction of “good corporate governance” law

Third, plaintiffs can ride on the current “good corporate governance” wave to draw favorable judicial attention to private code deviation under new securities law. Stricter scrutiny of corporate practices makes this strategy now possible. Corporate governance has witnessed great upheaval, discussion, and legislation. The string of corporate scandals in the first years of the 21st century has motivated many judges to apply a higher standard to assess a corporation’s culpability. On the legislative side, Congress reacted to the business collapses by enacting the Sarbanes-Oxley Act in 2002, the most extensive revision of securities law in sixty years. It contains provision § 406, auspiciously titled “code of ethics.” This section mandates that companies provide greater transparency and self-impose a limited private code. Alas, the title promises more than the content delivers. The requirement applies only to financial officers, leaving many top-level executives with bottom-line responsibility unregulated. Moreover, the code provision is confined to demanding disclosure; Congress has delegated the responsibility to formulate enforceable good corporate governance regulation to the SEC, a rather business-friendly entity. That agency exercised its power to issue implementing rules, but the practical effect three years later is negligible. Thus, this peculiar setup has reduced § 406 of the Sarbanes-Oxley Act to a

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form of self-regulation that "seeks to inspire good corporate behavior rather than impose it."\textsuperscript{112}

The judiciary has likewise responded to the corporate failures, albeit much more cautiously. The courts in Delaware, the state of incorporation for most of the country's largest corporations,\textsuperscript{113} have traditionally upheld the "business judgment rule"\textsuperscript{114} that protects managers' decisions from judicial second guesses absent fraud, waste or illegality.\textsuperscript{115} Now, judges are willing to review board decisions and corporate governance more closely.\textsuperscript{116} Professor Charles Elson for example, who heads the Corporate Governance Center at the University of Delaware, confirms that there is "a paradigm shift . . . from allowing independence to enforcing oversight."\textsuperscript{117}

This trend creates considerable consternation among business leaders, for whom the \textit{Martha Stewart} decision\textsuperscript{118} was but the latest warning sign about the palpable risks of personal damages liability. Insiders warn that if Delaware's courts do not strike the right balance between the interests of federal lawmakers and corporate America, corporations will be less inclined to incorporate in that state.\textsuperscript{119} Corporate flight away from Delaware is unlikely, however, given that this jurisdiction still has the most favorable commercial laws and the most experienced corporate judges.\textsuperscript{120} Thus, businesses find themselves losing cases under a more exacting review of their policies and governance decisions. Recent examples are

\begin{thebibliography}{99}
\bibitem{Hem} Hern, \textit{supra} note 106, at 228 (approximately 400,000 corporations and more than half of the Fortune 500 firms are incorporated in Delaware).
\bibitem{Aronson} See, e.g., Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("It is a presumption that in making a business decision the directors . . . acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.").
\bibitem{Veasey} E. Norman Veasey, \textit{Counseling Directors in the New Corporate Culture}, 59 BUS. LAW. 1447, 1454 (2004). The author is a retired Chief Justice of Delaware and Senior Partner at Weil, Gotschal & Manges LLP.
\bibitem{Id} Id. at 1449.
\bibitem{Hern} Hern, \textit{supra} note 106, at 216.
\bibitem{Hern2} Hern, \textit{supra} note 106, at 210.
\bibitem{Beck} Susan Beck, \textit{Boards Find Tougher Terrain in Delaware; Series of Decisions Shows State’s Courts are Paying Closer Attention to Actions of Corporate Managers and Directors}, \textit{LEGAL TIMES}, Apr. 12, 2004, at 14.
\end{thebibliography}
plenty: eBay, Inc., the Walt Disney Co., the Oracle Corp., and Abbott Laboratories. So far, the courts in these three cases have merely denied defendants' motions to dismiss, but experts already speak of a groundbreaking trend towards a stricter construction of permissible corporate action. This development sounds promising in the ears of many citizen groups, but judicial activism bears its own set of problems: the judiciary is not well equipped to second guess corporate judgment, plus judicial oversight will inevitably produce inconsistencies across jurisdictions.

In sum, U.S. or foreign law does theoretically have some power to press MNEs to take their own codes seriously, but the limits are manifold. CSR law varies widely among industrialized countries, and LDCs often lack the will or power to carry out a socially stringent form of corporate law. In the U.S., the legal debate over the proper classification of CSR for purposes of "free speech" claims or determining the appropriate level of judicial scrutiny has only begun. This combination leaves gaps big enough for companies to avoid judicial review when they clothe their pursuit of greater profits in pseudo-legality in order to appease stakeholders and pull in additional sales in a consumer market increasingly mindful of social and environmental concerns.

IV. TWO ALTERNATIVES THAT CAN SHARPPEN THE BITE OF PRIVATE CODES

The market meltdown that began in 2001 and lasted well into 2005 demonstrated that domestic disclosure regulation failed, as did the attempt to turn accountants into policemen. Formal enforcement, while "no doubt a sufficient condition for the achievement of compliance in many situations," is not necessarily the only form of attaining compliance.

121. In re Walt Disney Co. Derivative Litig., 825 A.2d 275 (Del. Ch. 2003) (the court found for shareholders, who sued management for breach of fiduciary duty when the CEO paid $140m compensation to a former director).
123. In re Abbott Labs. Derivative S'holders Litig., 325 F.3d 795 (7th Cir. 2003) (refusing to defer to the business judgment of directors in a duty to supervise case).
124. Beck, supra note 120.
126. Duruigbo, supra note 27, at 104.
Codes of conduct can be a very effective quasi-formal enforcement, either in form of self-regulation or stakeholder pressure.

A. NO SELF-REGULATION WITHOUT OBJECTIVE VERIFICATION

The development towards greater "codified" self-restriction is commendable because it signals a willingness on the part of private industry to do something about a recognized problem. Self-regulation must make sense on some level, or else attorneys would not have their Model Rules of Professional Conduct nor doctors the Hippocratic Oath. But without objective standards, self-regulation constitutes but a variant of the well-known "fox guards the henhouse" problem and is bound to fail. This section examines why.

The savings and loans crisis in the 1980s, a sequence of bankruptcies that ruined many businesses and caused a multiyear economic depression, is an example of self-regulation gone awry. The first attempt to save the national economy from downfall came from the Federal Home Loan Bank Board, a self-regulating body, which designed its own set of accounting principles to determine compliance with regulations. The Board's principles significantly deviated from time-honored generally accepted accounting principles. Alas, the financial troubles persisted, not least because of the ineffectiveness of the private rules, which Congress later characterized as "accounting gimmicks." Only subsequent federal legislation was able to prevent further disaster. Today, many business leaders are again drawn to the promises of self-regulation. The former SEC Chairman, William H. Donaldson, advocated self-control when he stated that "we can write all the laws we want, but in the final analysis it's going to be the human characteristic that helps set the tone for the markets."

However, both Enron and WorldCom featured CSR language on their websites at the same time that they were cooking their accounting books,

127. Livingston & Braunschweig, supra note 112.
129. Id. at 369-70.
powerfully demonstrating what happens when officers’ moral inclinations to adhere to a voluntary code of conduct are less than exemplary.\footnote{132}{The Good, the Bad, and Their Corporate Codes of Ethics, supra note 111, at 2129 (quoting Enron's code that prohibited any full-time officer or employee from “own[ing] an interest in or participating . . . in the profits of any other entity which does business with . . . [Enron], unless such ownership or participation . . . does not adversely affect the best interests of the Company.” Enron’s officers used exactly such “other entities” to construct an accounting scheme that ultimately brought down this multibillion dollar company).}

The S&L crisis notwithstanding, self-regulation can work well if implemented properly. This requires two factors: a justiceable standard and sanctions for non-adherence.\footnote{133}{The SEC, for example, avows that its enforcement authority is “crucial” to its effectiveness, and highlights that it brings between 400-500 civil enforcement actions against individuals and companies that break the securities laws. See Securities and Exchange Commission, The Investor’s Advocate, available at http://sec.gov/about/whatwedo.shtml (last modified Jan. 12, 2005).} Technically, CSR self-regulation fails because of the first prong. In the U.S., the SEC regulates and enforces disclosure requirements of companies. While it has an impressive array of sanctions at hand, the agency has not yet issued any standard for corporate responsibility. Nor has any other governmental branch or private firm stepped up to the plate. This includes Société Générale de Surveillance (“SGS”), the world’s leading inspection, verification, testing and certification company.\footnote{134}{SGS offers CSR courses that teach “the principles and practices of the CSR debate,” but it has not developed and certified its own CSR standards. The “SGS Climate Change Programme” comes closest, but it reduces itself to verifying and validating greenhouse gas emissions, which is ultimately a numerical undertaking and in methodology but a variant of financial accounting. See at www.sgs.com (last visited Oct. 10, 2005).} The reasons are obvious: the feat of standardizing good corporate governance is next to impossible considering the high fragmentation of CSR measures. The variety of reasons for which corporations become “responsible” compounds the difficulty, especially if MNEs’ motivations for appointing their CSR committees are insincere. The problem is a catch-22: It is impossible to assess the intent of an economic actor (acting individually or in association with a self-regulating body) absent an objective standard, yet a practicable CSR standard logically must be some sort of aggregation of private practices. But this lowest common denominator may be too low to increase the quality of corporate governance. The solution here would be the top-down imposition of an independent standard by a disinterested third party, backed by the ability to impose stiff sanctions. Unlike attorneys or doctors who face personal expulsion from professional associations when they do not
live up to professional standards,\textsuperscript{135} public disgrace hardly deters MNEs from an occasional over-step when profits are on the line. It is evident, therefore, that self-regulation can be a good enforcement mechanism of private codes of conduct when an authoritative entity like the SEC or a private certifier like KPMG or PriceWaterhouseCooper would issue a standard and ideally also have sanctioning power for noncompliance.

B. \textsc{Stakeholder Enforcement Is Most Feasible to Compel Compliance Because Where There Is Demand, Supply Will Follow}

NGOs press CSR measures onto companies as a way to control much-feared corporate manipulation or exploitation. What do these civil society advocates fear? For one, it is sheer size. Statistics show that any of the world’s ten largest corporations has greater annual revenues than the national GDP of any one of 135 countries.\textsuperscript{136} They exert tremendous power over the daily lives of most of the world's citizens.\textsuperscript{137} Some have opined that corporations now govern society, perhaps more than governments themselves do.\textsuperscript{138} These MNEs may have too much power to maintain integrity, either because of government capture or simply because domestic legislators cannot match the MNEs’ geographical reach. Consequently, the disappearing national boundaries leave greater operational freedom to corporations.\textsuperscript{139} Relying on informal, regional market-based means of control seems more in line with the dynamics of today’s society. Consumers can and should substitute as the new de facto enforcer of private codes of conduct, simply because they have the power to do so.

If you want to change governments, you have to aim at changing corporations, and if you want to change corporations, you first have to change consumers.\textsuperscript{140}

\textsuperscript{135} Livingston & Braunschweig, supra note 112.
\textsuperscript{136} Quigley, supra note 47, at 109.
\textsuperscript{137} Id. at 110.
\textsuperscript{138} Bakan, supra note 73, at 106.
It is a truism that consumers have considerable power over a corporation’s behavior. Consumers collectively vote with their wallets and corporations are eager to avoid their wrath. Bank HSBC drove this point home during the recent outbreak of corporate charity in connection with the Tsunami disaster in 2004. It described its $2 million donation not as an act of philanthropy, but as a way to avoid the price one pays “if you’re perceived [in the community] to have behaved badly.”

Absent top-down regulation, the effectiveness of private codes is premised on the assumption that corporations should adopt a more progressive view of corporate accountability. But it is a fallacy to believe that the public outcry over the economic and human consequences of corporate scandals is itself sufficient to cause corporations to change their for-profit nature and adopt more binding social and environmental responsibilities unilaterally. Oft-quoted Nobel prize winner Milton Friedman, a founder of the libertarian Chicago School, succinctly summarized the thinking of many business leaders when he said that “the social responsibility of business is to increase profits.” Products or business models may change over time, but a corporation’s DNA is still singularly focused on the ever-continuing quest to expand market share. It is important to remember that the agent of change is the marketplace. Companies will supply whatever the consumer and investor demand dictate, as this is arguably the principal reason for their existence. Thus, consumer leverage may compel corporations into complying with their legal or moral obligations as long as demand for responsible corporate behavior is sufficiently high for companies to answer this market demand profitably.

Change may be on the horizon, Consumer awareness has undeniably shifted in recent years. Studies show that about twenty-five percent of the U.S. adult population is beginning to make value-based choices in different product categories. Fueled in part by the generally affluent and socially conscious baby boomers, consumers increasingly demand, and are willing to pay, a premium for socially and environmentally friendly goods and

141. Tsunami Relief: Companies Chip in, ECONOMIST, Jan., 15, 2005, at 60 (quoting the bank’s Asian spokesman). Note that HSBC has sizeable operations in Sri Lanka.
142. Duruigbo, supra note 27, at 136.
143. Id. at 136 (quoting a New York Times Magazine article of Sept. 13, 1970).
services. All else held equal, 76% of consumers would switch brands or retailers if a company is associated with a good cause; 84% would pay more for sweatshop-free and child labor-free clothing; and 59% would like to change their investments to support environmental concerns. These statistics indicate a rapidly growing "conscientious consumer" segment.

On the investor side, a growing number of shareholders care about the social practices of the businesses they invest in, earning them the nickname "Socially Responsible Investors" or SRIs for short. Even institutional investors track metrics above and beyond the traditional risk and return projections. In fact, experts estimate that about fifteen percent of money under professional management is being invested with some sort of social screen, making this one the fastest growing financial subsectors. The heightened sense of awareness has spilled over into the area of corporate malpractice as well. In three polls taken by Business Week between 1996 and 2000, 95% of the people agreed with the statement that "U.S. corporations should have more than one purpose and that they should sometimes sacrifice some profit for the sake of making things better for their workers and communities." Institutional investors likewise demand sound social reporting, as they make high-stakes investment decisions and will not easily forgive a company's intentionally inaccurate disclosure.

Of course, market participants do not have perfect information to assess the legitimacy of the CSR statements. But, neither do financial analysts with respect to fiscal data. Most large-scale deception will surface eventually, not least because of the favorable treatment of whistle blowers since Time Magazine crowned three officers who revealed dishonest

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147. Id.; see also Douglas A. Kysar, Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice, 118 HARV. L. REV. 525, 615 (commenting on the growing numbers of consumers who pay attention to the manufacturing processes and avoid buying, for example, "conflict diamonds" or "slavery chocolate," i.e. chocolate derived from cocoa beans harvested by enslaved children in West Africa).
149. Anavo Group, supra note 144.
practices of their employers as Persons of the Year 2002. Overall, stakeholder enforcement by means of consumer pressure is the quickest, cheapest, and least adversarial enforcement mechanism for private codes of conduct, which an objectively verifiable standard could only enhance further.

V. CONCLUSION

Private codes of conduct are the latest fashion on the Corporate Social Responsibility catwalk. They allow a multinational corporation to lock in the multiple financial and nontangible benefits that arise from participating in this wildly growing movement. Although they are today’s best practices in industry, private codes may not be as far ahead of positive law or government regulation as business leaders would like us to believe. But because a healthy degree of self-initiative and an ostensibly sincere recognition of a corporate citizen’s greater responsibilities underlies them, CSR programs and their voluntary “codifications” may be the next best foot forward in preventing future major corporate failures.

However, the codes’ enforceability is erratic at best. No pertinent international law provision exists, and domestic statutes require a plaintiff to come up with a creative cause of action as well as a solid response to a First Amendment defense a la Nike. Further, self-regulation is very malleable because of a lack of an independently verifiable oversight, assuming that an inherent conflict of social and economic interest prevents for-profit corporations from becoming the “stewards of public interests” in the first place. In an incongruous twist, consumers became the “white knights” for MNEs because their increasing preference for environmentally and socially sound products allows corporations to tout the CSR horn while increasing their bottomline in this high-premium market segment at the same time. But it is also true that the recent scandals lowered the tolerance of stakeholders for unscrupulous corporate behavior. Thus, the current peculiarly sensitive environment for good corporate governance makes stakeholder enforcement of private codes of conduct the best choice because stakeholders exert leverage over what continues to concern MNEs the most—competition in the global consumer and financial markets.

151. The honor was bestowed upon Ms. Cynthia Cooper at WorldCom, Ms. Sherron Watkins at Enron, and Ms. Coleen Rowley at the FBI. See James Kelly, The Year of the Whistleblowers, TIME, Dec. 30, 2002, at 8.