Ozymandias As Community Project: Managerial/Corporate Social Responsibility and the Failure of Transparency

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I. INTRODUCTION

Transparency is not a panacea. The media in the developed world have devoted reams and gigabytes to the Enron management's pursuit of asset-lite virtual reality and to the endless stream of accounting violations. That managers of Enron and of other multinationals acted arrogantly is now no surprise. What may be shocking, however, is the realization that information concerning these managers' shenanigans was publicly available, but no one cared until it was too late.

If transparency proved ineffective protection in the financial arena, it was at least as useless with respect to the Enron management's exercise of raw power in India—an exercise that included very concrete, physical human-rights abuses in the context of a classic, asset-heavy infrastructure project in India. Available evidence suggests that Enron managers hired local police to beat environmental-rights activists who protested against the construction of India's largest utility. There also are allegations, that the media similarly have ignored, of Enron-approved bribes paid to government officials in India. Although this information, too, had been publicly available for years, the Western media and public apparently did not care. To the contrary, despite information about both financial and human-rights abuses, the public and the media placed senior managers of major Western multinationals in a special pantheon: these people could do no wrong. Whether because of the personality traits that successful managers generally possess, or because of the public adulation, or both, managers, too, *1036 seemed unconcerned about their own behavior. Either they believed that they were truly above mere mortals and their petty morality, or they believed that they were in fact working toward a greater good. I think that it is fair to say that all of us who participated in the bubble, however passively, contributed to that reality.

We are now in a period of transition. National governments, no longer relying purely on transparency, are tightening regulations in the financial/accounting arenas. This moment of disequilibrium and self-doubt is a particularly rich opportunity to extend the regulatory effort to at least some non-financial areas. These are areas wherein multinationals' managers can and do have an impact. Specifically included in this broader realm are human rights.

The effort at extension into non-financial areas will be far more difficult than merely imposing financial regulation on managers. Who will identify the norms? Who will enforce them? In the context of financial controls, the answers are relatively straightforward. As we will see, any nation with a developed securities market will have a similar perspective: transparency is healthy for markets, and healthy markets are good for the national economy. In fact, however, transparency is not enough. We had disclosure before, and it neither prevented managers from financial excess nor caused the media and the public to cry foul. The managers were not worried; the media and the public were too thoroughly swept up in the bubble. Governments that wish to reduce managerial excess in order to protect their financial markets, for example, will have to change...
not only the norms of the senior managers, but also those of the public at large. When a national
government, seeking to curry favor with a chastened investing public, imposes regulation also
supported by the media, transparency can begin to constrain and shape managerial behavior.
Managers can perceive a likelihood that they will be caught and punished.
Extending these concepts to the human rights arena is more complicated. We will see that Enron
managers and representatives of the U.S. government pursued an investment in India despite
evidence of human-rights abuse, and that the Western media and public paid scant attention to
publicly available information concerning these excesses. Again, transparency did not constrain
either Enron managers or individual U.S. officials; these groups have not internalized anti-abuse
norms. Before these persons can be forced to internalize anti-abuse norms, the norms have to
pervade the managers' community. And how will that happen? With respect to multinationals,
especially outside the strictly financial arena, evidence confirms that we cannot rely on national
governments to support the internalizing of human-rights norms. At best, we can look to national
governments to enforce the norms, but the international community must establish them.
When discussing the inadequacy of transparency and the unreliability of national governments as
constraints on multinationals, one more point deserves emphasis. The discussion of
constraints on behavior becomes simpler and clearer if the multinationals are not
anthropomorphized. Multinationals are not truly the actors to be constrained--their managers are.

II. SETTING THE STAGE
A discussion needs material. I will first briefly describe the types of financial excesses perpetrated
by managers of multinationals based in established, Western democracies, two in Anglo-Saxon
jurisdictions and one in a Continental jurisdiction. To round out the illustrations, I offer a
description of abuses, which I will later confirm to be human-rights violations, that the managers
of a U.S.-based multinational condoned, and perhaps engineered.
Whether endowed with an Anglo-Saxon heritage or a Continental heritage, the governments of
major Western economies have focused on financial wrongs alone.

A. Financial Wrongs

1. Anglo-Saxon Financial Excesses

a. United States (Enron)
The most venerable of the recent, spectacular melt-downs, the Enron debacle illustrates
managerial failure in the financial realm.
Based principally on sources publicly available long before Enron's implosion, the media later
highlighted Enron management's extraordinary efforts to create paper profits. Using that
information, the media concentrated on financial issues. They focused on the arrogance of
Enron's senior managers: the aggressive use of special purpose entities ("SPEs") to hide losses;
[FN1] the Potemkin trading floor to hide a lack of operations; [FN2] and the rank- and-yank
human resources policy to create a pantheon of non-accountable uber-managers. [FN3] The
media also revealed that the Enron managers are only the first among many. We have seen a
remarkable succession of senior managers hauled before Congressional committees, fired for
*1038 various flavors of overreaching, and even carted off to court in handcuffs. [FN4] The
senior managers of multinationals based in other Western democracies have been similarly
humiliated for financial or managerial irregularities. [FN5]
Former Enron CEO Jeffrey Skilling's fake trading floor is high farce, but as we now know, it is
consistent with other operations generated and approved by Enron's senior management. [FN6]
Two categories of questionable dealings should suffice for our discussion: management's use of
SPEs, together with the conflicts of interest involved, and on a much larger stage, the efforts of
Enron's managers to corner the California market for energy.
By using so-called "qualified SPEs," the Enron managers sought to generate profits by causing
Enron to make sales to entities majority-owned by third parties. In order to allow Enron to book
the revenues from those sales, one requirement is that an unrelated third party contribute at
least three percent of the SPE's capital, provided that the third party has control over the
disposition of the SPE's asset. Further, the third-party investor must truly be at risk: the
transferor to the SPE (Enron, in this case) must not guarantee the investor's return. As Professor William Bratton notes, there is nothing illegal about the SPEs: they are used all the time. [FN7] What made the SPEs affiliated with Enron different, however, is that managers did not pass through all the requisite hoops. With respect to at least some of the SPEs, Andrew Fastow, then the chief financial officer of Enron, was in control of the equity investor. [FN8] Besides the fact that Fastow led Enron into a violation of accounting and Securities and Exchange Commission ("SEC") rules, [FN9] what does Enron's convoluted structuring reveal? Managers who hold stock options have a very clear conflict of interest. Securities analysts anticipate specific earnings per share; failure to meet that expectation will cause the stock price to tumble. [FN10] If the stock price falls, the value of managers' stock options is adversely affected; managers have a powerful incentive to use any method, including manipulation of bogus SPE's, to keep pushing up Enron's share price. But if conflict of interest is the problem, Fastow generated a more unambiguous one through his control of the equity investors. Fastow received $30 million for his service as manager of the equity investors; the public was incensed, and he was fired two days after the SEC initiated an investigation. [FN11]

Was this conflict of interest evidence of the Enron management's concerted efforts to avoid transparency? Not necessarily. Fastow's direct conflict of interest was disclosed in the Enron public documents, although not highlighted. [FN12] In the meantime, the Enron board of directors confirmed publicly that it had reviewed and approved Fastow's participation in the equity transactions. [FN13]

Thus, the Enron transactions reveal at least two kinds of self-interested transactions by managers: either they were pumping up the share price, which would benefit anyone with executive (or other) stock options, or they were dipping directly in the till. In our examples, the existence of both types of conflict was publicly disclosed, and the board also expressly acknowledged its approval of the second. Obviously, transparency did not prevent these financial wrongs. At Enron, moreover, managerial malfeasance reached beyond taking from shareholders and bilking potential investors. Enron managers sought other ways to increase profits and, thus, benefit managers. The allegation is that, as California politicians have long maintained, Enron managers sought to manipulate the partially deregulated California energy market by various tactics, including moving energy in and out of California to avoid price controls. [FN14] Such an effort to manipulate prices would affect not only energy users, but also the taxpayers of California who ultimately would have to pay the price of long-term energy contracts purchased by the state in an effort to stabilize prices. [FN15] The press at that time focused on the falling supply and increasing prices, and accused the politicians of having rushed to deregulation. [FN16] Although there was talk about possible manipulation, [FN17] the consumer-taxpayers in California did not organize any boycotts, although many did follow the governor's call for conservation. [FN18]

We already know that Fastow, the CFO, was forced to resign. In August of 2001, shortly before the Enron's financial melt-down, Skilling resigned as chief executive officer after only six months on the job. He claimed that his resignation was for "personal reasons." [FN19] In the year following Enron's filing in bankruptcy, [FN20] only four Enron officials have been criminally charged--Fastow himself, two associates of Fastow, and the erstwhile head of Enron's energy trading in California. [FN21] There is no public outcry for more blood, although prosecutors are doubtless trying to work up the chain of command at least as far as Skilling. In the United States, then, the accessibility of information about the accounting and other financial excesses created transparency. Until Enron's implosion, however, the available information exerted no discernable constraint on management.

b. United Kingdom (Marconi)

The Marconi plc debacle of 2001 is a recent example of corporate-governance failures in another Anglo-Saxon jurisdiction, the United Kingdom. Again, the media have focused on financial excesses. Marconi, through its wholly owned subsidiary formerly named the General Electric Company, [FN22] had developed into a multi-billion pound-sterling company by the late 1990s. Its prior chief executive had been frugal with company funds, but his successors, Lord George Simpson as
senior executive officer, and Sir Roger Hurn as the non-executive Chairman of the board of directors, led the company to the largest write-down of assets ever experienced by a British company. [FN23] The underlying cause for a sixty *1042 percent drop in share price in a single week was, arguably, exactly the type of business decision that would be protected by the business judgment rule in the United States. While that rule has no direct analogue in the United Kingdom, the results of patterns of enforcement are similar. [FN24] Simpson, whose previous experience had not included the telecommunications industry, at first decided to sell the company's telecommunications business. When he failed to do so, he became determined to build it up instead—and then the communications industry collapsed spectacularly. [FN25] The vocabulary used by the executives reflects the same swagger and optimism as that of Enron's management: Marconi was to succeed because of the Marconi culture, the so-called Marconi Way, characterized by "velocity," "radical thinking," "passion and pride." [FN26] Over-optimistic management estimated unrealistically high sales and failed to pay attention to its customers and market position. In all of these activities, the non-executive Chairman of the Board, intended to be the independent check on policy, was Hurn.

If the firings of three-eighths of an 8,000-person work-force in Britain [FN27] and the destruction of ninety percent of the share value were not enough to generate outrage, [FN28] two other factors directly related to Simpson and Hurn fueled the stockholders' ire. First, Simpson's golden parachute amounted to £1 million, and Hurn's to £300,000. [FN29] Second, as the company's *1043 stock price sank, Marconi management had tried to rebase the stock options that Marconi had previously issued to its executives. [FN30] Nevertheless, the money that the managers took out of the company as it slid to oblivion was nowhere near the amounts grabbed by the Enron management during that company's gloaming, in part because the Marconi managers were not quietly selling shares and talking up the stock simultaneously. [FN31] Interestingly, while Simpson as chief executive received most of the excoriation in the press, Hurn, the non-executive Chairman, was challenged on his combination of supervisory passivity and apparent willingness to receive substantial remuneration. Although he had not engaged in fraud, and although he could not be accused of failing to ferret out massive malfeasance (there apparently was none to find), Hurn had not lived up to what the public expected of a putative independent director. [FN32] Three issues, thus, are emphasized by the Marconi melt-down. First, and perhaps most importantly, the role of non-executive directors is in question. The second issue is the computation of termination compensation. The final issue is executive stock options. Certainly, the dramatic implosion of Marconi shocked the larger financial community. Hurn, for example, was forced to resign from his non-executive Chairmanship of Prudential plc because of a perception that he had exercised poor judgment at Marconi. [FN33] For the United Kingdom, Marconi represents only a recent example of managerial excess. Since the beginning of the 1990s, there have been a series of scandals, each triggering a new government-sponsored study on corporate governance. As we will see, these careful, detailed analyses addressed whatever form the most recent scandal had taken, and—although their recommendations were largely adopted by self-regulating or governmental organizations—they did not prevent the next excess.

Further, it was hardly a state secret that non-executive directors have not been particularly independent. Traditionally, that post was awarded to former industry captains as they entered their twilight years. The posts were highly remunerated and, typically, not taxing. Certainly, superannuated managers gave no evidence of embarrassment when they accepted the title of non-executive director, even though everyone seemed to expect them to receive high wages for little effort. What Hurn failed to do, however, was to ride herd on the business decisions, including those relating to the acquisition strategy and the unwholesome stock options. *1044 This failure, however, was not due to a lack of transparency. The fact that Marconi was very actively engaged in a strategy of acquiring telecommunications businesses after an unsuccessful attempt to sell its own foothold in that industry was publicly available information. It was only when, in mid-2001, Marconi stopped the trading in its shares and announced massive layoffs that the public responded and the stock price plummeted. Hurn's and Simpson's activities were publicly known far earlier; neither the investors nor the government reacted until the financial consequences were irreversible.
2. Continental (French) Financial Excesses

Vivendi Universal ("VU") offers a particularly interesting example of managerial excess in France, because the company's bicultural existence highlights differences between the French and Anglo-Saxon perspectives and experiences. Some of the criticism leveled against the VU managers are totally foreign to the two Anglo-Saxon examples. Some of the activities giving rise to the criticism, however, are thoroughly familiar to U.S. and U.K. observers.

When Jean-Marie Messier became chief executive officer (Président-Directeur Général, or "PDG"), his company was a water-and-sewage utility. At his last shareholders' meeting for VU, held in the post-Enron spring of 2002, the comments hurled at him included "liar" and "resign." [FN34] In between those two poles, VU's share price lost two-thirds of its value, [FN35] only to fall by over half again three months later. [FN36] In the meantime, VU management had the effrontery to request new stock options for senior executives. [FN37]

We are all familiar with the argument that stock options align management interests with those of the shareholders, [FN38] and VU management asserted that the stock options were necessary to attract top talent to its top ranks. [FN39] As an expression of their displeasure, the shareholders not only balked at the request for new stock options, but they also refused to approve a repeal of the preemptive rights. This preemption provision is far more common among French companies than among U.S. companies. The rejection of its repeal nevertheless underscored the shareholders' dismissal of management's recommendations, especially since management had claimed that the repeal was essential to VU's ability to raise capital. [FN40]

There are other ways in which Messier's conduct tracked the arrogant and self-serving behavior of Enron's U.S. executives. In 2001, VU purchased a $17.5 million apartment in New York City for Messier's use--a four-and-one-half bathroom, penthouse duplex on Park Avenue. [FN41] Messier's contract with VU included another import from the United States: the golden parachute. He claimed a $20 million payout, and was accused of having borrowed an additional $25 million for the purchase of shares.

A private French organization in support of minority shareholders of public companies was incensed [FN42] and sought court review. In particular, it accused the managers of breaching their fiduciary duties by failing to provide the Board with sufficient information. [FN43] The court ultimately dismissed the suit, but those French minority shareholders had shown themselves to be unusually aggressive. [FN44]

American shareholders not involved in management brought a class action, asserting not only that VU's public documents were misleading, but also that Messier had systematically sought to hide the company's liquidity problems. [FN45] Other North American shareholders, too, expressed their displeasure: because of VU's acquisition of Seagram Co., the Bronfman family were the largest single shareholder. [FN46] As VU's crisis deepened during the spring of 2001, the Board named Edgar Bronfman, Jr., the non-executive Vice Chairman of the Board, as co-chair of a new Governance Committee of the Board. The other co-chair was Marc Viénot, the former head of Société Générale, and, as we will shortly learn, the principal author of two recent reports on corporate governance in France. [FN47]

In the eyes of the French public, whether or not this includes shareholders in VU, Messier's sin was in part his extraordinary arrogance. A satirical comedy had dubbed him J6M, meaning Jean-Marie Messier, Myself, Master of the World; Messier had gleefully adopted the title. [FN48] The French public also condemned Messier for systematically "Americanizing" both his French company and, in the process, his role as CEO. [FN49] It is ironic that Messier's disastrous shareholders' meeting of 2002 occurred as VU, for the first time, published its quarter results under the United States' Generally Accepted Accounting Principles ("GAAP"). [FN50]

Additional disclosure requirements would not necessarily have protected the investing public. Messier's aggressive, voracious acquisition program led to the collapse of VU's empire, and the public were long aware of Messier's imperialist aims. [FN51] There is one accounting scandal, however, that should have come to light sooner. Messier's American—or Anglo-Saxon—tendencies revealed themselves in his approach to financial disclosure as well. The European Union's antitrust authorities had demanded that VU divest itself of the U.K. firm, British Sky Broadcasting ("BSkyB"), before acquiring Seagram. [FN52] After searching diligently but unsuccessfully for a buyer, in late 2001, VU resorted to using the BSkyB shares as collateral for a
loan, which apparently satisfied the European regulators. [FN53] That problem resolved, Messier and his team turned their attention to the accounting consequences of this BSkyB transaction. If they were permitted to treat the transaction as a sale for accounting purposes, VU would generate a gain of approximately $1.4 billion, even before *1047 the shares were actually sold. [FN54] If, on the other hand, they had to account for the transaction as a borrowing, VU's financial picture turned to red, presumably with a predictable, and for the managers unattractive, effect on VU's stock price. [FN55]

Arthur Andersen, VU's U.S. auditors, supported Messier's view that the transaction should be booked as a sale for accounting purposes. [FN56] In the US auditors' defense, the SEC had approved the treatment advocated by Messier. VU's French auditors, Salustro-Reydel ("Salustro"), disagreed with their U.S. counterparts. Salustro's in-house compliance specialist maintained that French accounting norms are more rigorous and require that the BSkyB transaction be reflected as a borrowing. That compliance specialist, supported by the Salustro accountant in charge of the VU account, reported his conclusion to the French equivalent of the SEC, the Commission des Opérations de Bourse ("COB"). [FN57] The regulators sided with the specialist. [FN58]

VU's management viewed the Salustro compliance specialist's actions as a betrayal. [FN59] VU's senior financial officers were particularly displeased that Salustro not only failed to support the VU analysis, but expressed doubts to the COB. [FN60] Messier himself challenged Salustro's ethics. [FN61] Salustro responded by firing its compliance specialist, and dutifully reporting that action to Messier and VU's chief financial officer. [FN62] Four days later the COB threatened Salustro with penalties if it failed to rehire the compliance specialist. [FN63] Once more, Salustro conceded, and rehired the specialist. [FN64]

There is, nevertheless, a fundamental difference between the Enron and *1048 VU accounting stories. In both cases, the auditors' feckless behavior, and the intense pressure that the client's management brought to bear, should have been made public, or at least have been communicated early to the regulatory agency. The SEC did not learn of the pressure Enron's managers placed on Arthur Andersen until it was too late. The delay allowed the Enron managers to engage in shenanigans hidden in plain sight, including the miracles with SPEs, and thus to deceive the public. In contrast, although VU's auditors, Andersen and Salustro, institutionally caved to VU pressure, Salustro's compliance officer notified the COB. Unlike Enron's SPEs, the BSkyB transaction ultimately did not inflate VU's income. Even if transparency alone proved insufficient to protect the public from a reality it chose to ignore, the regulators intervened in the nick of time.

### B. Violation of Human Rights (Enron in India)

To justify the financial excesses, the physical beatings of protestors, the bribery, and the environmental degradation, Enron's managers may have calculated that the gains outweighed the losses. First, they might not get caught, and even if they were, the social atmosphere did not seem to condemn their actions. On the other hand, the managers may simply not have viewed their behavior as wrong, because it facilitated a greater good--one that they were entitled to define and implement. Enron's managers did more than bilk the company's investors for their own gain. There is significant evidence that they also either actively participated in human rights violations overseas, or at minimum, allowed these violations to occur. For purposes of analysis, Enron's incursion in India is a rich example of managerial insouciance about which there was a great deal of publicly available information. [FN65]

As early as 1999, Human Rights Watch ("HRW") published an extensive report that described in detail how Enron's management obtained a contract to build in India. [FN66] The transaction is interesting, in part because it sought to construct the world's largest electricity-generating plant, and represented the largest foreign direct investment ever made in India. Enron, then one of the largest energy companies in the world, was the "overseer" *1049 and fifty-percent shareholder in Dabhol Power Corporation ("DPC"), the subsidiary that was to make the investment. [FN67] The sheer heft of the transaction is important because it suggests that irregularities would be unsubtle, which was, indeed, the case. These irregularities came in three principal flavors: political corruption, environmental degradation, and physical violence against persons. Accusations that Enron took part in these irregularities if true, suggest a very public display of
remarkable arrogance on the part of Enron's managers. First, consider the evidence of political corruption perpetrated by Enron management. After the original, non-binding memorandum of understanding had been signed with Enron, Maharashtra, the Indian state where the plant was to be built, asked the World Bank to evaluate the transaction. [FN68] The World Bank concluded that the agreement was hugely biased in favor of DPC-Enron, and far exceeded Maharashtra's energy needs. [FN69] That the project was too big is relevant because the amounts to be paid by the government to DPC depended, in part, on DPC's construction costs. It was not only the World Bank that cast a jaundiced eye on the DPC-Enron project: the Central Electricity Authority ("CEA"), the Indian government's own agency responsible for regulating the generation of electricity in India, determined that the price Enron would be allowed to charge was twice a normal, competitive price. [FN70] Nevertheless, the deal was consummated. Rebecca Mark, then-CEO of Enron's international-investments subsidiary, had asked the central government to pressure the CEA. [FN71] That agency ultimately capitulated and Maharashtra signed the final agreement with DPC a week later. [FN72] How could this have happened? According to a committee ("Munde Committee") appointed by the Maharashtra government, after a shift in political power, the answer is political corruption. [FN73] Managers of Enron-DPC, according to available evidence, had led their company into a world of bribe-payments. [FN74] The Munde Committee recommended that the contract with DPC be cancelled as contrary to public policy, and the state's lawyers, pleading in support of cancellation, alleged the payment of bribes. [FN75] Later, *1050 a panel of the Bombay High Court, while failing to rule on separately brought corruption charges, noted that the "message of corruption, bribery and fraud is eloquent" in the Munde Committee's report. [FN76] As to the charges of environmental degradation, so much fresh water was diverted for the DPC-Enron project, even long before the plant went into operation, that DPC managers finally agreed to bring water in by tankers to supply local villagers. As the water levels changed, well-water not only dwindled, but also suffered sewage-contamination. [FN77] In addition, the plant's cooling system depended on discharge of superheated sea water back into local waters, threatening neighboring fishing areas. [FN78] As the Munde Committee mildly put it, the location of such a huge plant in a relatively unpolluted location, where fish and plants were at risk, should legitimately be questioned. [FN79] The perpetrators were not merely faceless corporations. Managers, as the agents of the corporations, are their human manifestations. These managers make the decisions and take the actions. Indian law required DPC, as it prepared to take water and land, to publish notice of its intent and to take note of objections received. [FN80] The DPC managers officially reported to the CEA that they had received no objections, although the company had actually received thirty-four. [FN81] Further, DPC managers responded to other complainants by form letter stating that the project would have no negative effects. [FN82] The managers' behavior reflects now-familiar arrogance.

Enron-DPC management authorized a third major irregularity (to use an understated word): physical violence against the local population. When protesters marched against the DPC project, the police used lathis [FN83] and tear gas against them. There are other indications, too, of the close connection between DPC/Enron and the police. The police held within DPC's compound the protestors taken into custody. [FN84] After the police beat a protest leader severely, they took him to the DPC infirmary where he was treated by a DPC doctor. [FN85] The top law-enforcement officer of the district *1051 promulgated an order specifically directed against the leaders of the anti-Enron protest, [FN86] and police were ferried about in an Enron helicopter. [FN87] The protesters certainly believed that the police served Enron, and not the state. [FN88] To underscore the extent of the Enron-DPC managers' dealings with the local community, consider that at the time of the protests Rebecca Mark confirmed Enron's offers to hire persons who objected to the project. She noted that "[t]here are always ways to include people, to make them productive when they could be counterproductive." [FN89] DPC's Vice President for Community Relations offered jobs to the principal objectors. [FN90] Senior management was unsubtly involved throughout. [FN91] In the United States, Enron's home government was similarly involved. Far from reining in a multinational based on its territory, U.S. Energy and State Department officials, including the Secretary of Energy and the U.S. ambassador to India, and even the Export-Import Bank, all
applied extraordinary pressure on the Indian government to approve the transaction, or at least facilitated application of pressure. [FN92] The U.S. government, to all appearances, did not perceive that protecting the rights of the vulnerable in India was of greater national interest than the commercial success of one of the largest U.S.-based multinationals. [FN93] Just as public knowledge of Enron's excesses had not reined in the Enron managers, it did not constrain the behavior of the U.S. government's representatives either.

III. THE NORMS OF FAIR PLAY AND OF TRANSPARENCY: MANAGERS AND THE LARGER COMMUNITY

After the scandals erupted, the national governments have seized on these examples of financial excess as an attack on the markets in general, *1052 and on the securities markets in particular. The focus has been both on designing accounting systems to force effective disclosure, and on obtaining effective supervision of and from managers. [FN94] These efforts are driven by local perspectives of national self-interest, and they are salutary as far as they go. However, their focus is far too narrow: they neither require effective transparency nor encourage effective condemnation of non-financial abuses. In fact, they do not even bother trying to define what the abuses are.

A. Systemic Responses from National Governments: Against Financial Wrongs

Both "Anglo-Saxon" jurisdictions such as the United States and the United Kingdom, and Continental jurisdictions such as France, have studied corporate governance and have sought to rectify the perceived problems.

1. Three Western Jurisdictions Address Governance Concerning Financial Issues

Governments regulate their securities markets because transparency breeds investor confidence, which is positively correlated with strong capital markets; in their turn, these are positively correlated with economic growth. [FN95] The reforms tend to target the particular wrong that has most recently destabilized that nation's securities markets, and they are very specifically focused on the financial wrongs.

a. Anglo-Saxon (United States) Reforms

The examples from the past century are straightforward. In the decade leading up to the Crash of 1929, there was significant evidence of insider trading and flat-out securities manipulation. President Roosevelt and others responded by a call for disclosure, in part codified by the Securities Act of 1933. Three decades later, when a pattern of fraud by smaller corporations came to light, the SEC mounted a campaign to extend the reporting obligations of the Securities Exchange Act of 1934 to medium-size companies *1053 traded in the over-the-counter market. [FN96] These changes, however, did not prevent either the insider trading of the 1980s, or the accounting/disclosure failures of the past few years.

To be fair, a general loosening of market-regulation occurred in the last third of the twentieth century. Thus, the failure of the prior regulatory efforts to prevent the more recent financial wrongs cannot be attributed wholly to the earlier reformers' failure of imagination. For example, since the mid-1970s, the U.S. Supreme Court has retreated from its support of private causes of action, thereby diminishing the probability that a manager's violation of the securities laws will be identified and challenged. [FN97] Congress, too, has manifested antipathy for private causes of action and has worked to limit their incidence. [FN98] To the extent that the government has successfully impeded those suits, it has reduced the individual manager's cost of trading on material, non-public information, and of otherwise obscuring the market's transparency. Whether or not these intervening, deregulatory years drove the recent scandals, the fact remains that Depression-era reforms have not protected U.S. shareholders from the managers of Enron or of other Enron-era corporations. [FN99] As described above, the Enron managers ignored accounting rules and conflicts of interest limitations. Perhaps the most recent governmental reform impulses, triggered by managerial excesses at Enron and its ilk, will have broader application and thus broader implications for the future?

*1054 A review of the more frequently touted aspects of the new Sarbanes- Oxley Act of 2002 disabuses us of this optimistic hope. [FN100] The statute requires senior management to certify
the accuracy of company filings, including the financial statements. [FN101] In addition, the SEC is instructed to promulgate regulations concerning disclosure of off-balance-sheet transactions, such as the SPE-deals set up by Enron's managers. [FN102] The SEC is to work with the national securities exchanges to impose listing standards concerning the composition and responsibility of the board of directors' audit committee. For example, the committee of a public company must be made up of independent directors only, and the committee will have a responsibility not only to review the auditors' work, but also the company's internal controls. [FN103] More generally, the SEC must promulgate rules to encourage public companies to adopt a code of ethics, but only for their senior financial management. [FN104]

Some of these new requirements are closely focused on the excesses of Enron's management. The new disclosure requirements for off-balance-sheet transactions, for example, are directly attributable to the Enron managers' use of SPEs. Perhaps this type of provision will merely whet creativity, as future managers seek to avoid its application. The other provisions are far more general. What will be their impact? One interesting suggestion from the practicing bar is that companies with best practices already have an audit committee made up of independent directors, and that the audit committee already reviews internal controls. [FN105] As to the certifications, a cynical observer notes that the concept of delegation--a CEO virtue--is incompatible with a CEO who reviews each scrap of paper. [FN106]

Even assuming that well-run companies already conform to the Sarbanes-Oxley Act and related governmental regulations, all of these requirements, including that of establishing a code of ethics for senior managers, will encourage smaller companies to establish their first compliance programs, and the more established firms to review their existing programs with care. The norms are yet to be worked out: a Fortune 500 utility opted *1055 for a thorough review, culminating in a report carefully read by the CEO; another large company has established a chain of certifications, where each person certifies based on the report of subordinates. [FN107]

Two questions arise. First, what will all of this effort have accomplished? The answer may be that these efforts will increase the cost of replicating the specific managerial excesses of the Enron Era, and create a concomitant, renewed appreciation for, and a shift of expectation toward, best practices. On the other hand, the more cynical view is that, as a practical matter, Sarbanes-Oxley will measurably increase neither transparency nor the public's interest in whatever information is disseminated. Second, will even the maximum range of this effort's impact reach beyond the financial realm? For now, all we can know is that these provisions are focused on rectifying purely financial wrongs, and that their practical impact will depend very directly on the norms of the larger community.

b. Anglo-Saxon (United Kingdom) Reforms

Since the early 1990s, both the business groups and the government have studied corporate governance. This effort was triggered by a series of corporate scandals and business failures, perhaps the most notable being the collapse of Robert Maxwell's media empire. [FN108] The first response, the Cadbury Report, appeared in 1992. The principal focus was the role of the board of directors, although it also reviewed the auditors' role. The Cadbury Report's conclusion was that board accountability is the prerequisite to proper corporate governance. [FN109] One of the directors' responsibilities is to provide shareholders with relevant information. [FN110] The Cadbury Report also called for the separation of the roles of Chairman of the board from that of chief executive officer. [FN111] However, the Cadbury Report's drafters did not espouse legislative reform. The closest they came was to recommend that London's Stock Exchange include in its Listing Rules the *1056 Cadbury Report's conclusions, memorialized in a Code of Best Practice. [FN112]

Three years later, an organization representing business interests commissioned the Greenbury Report. This report also generated a Code of Best Practice which the London Stock Exchange again substantially incorporated into its Listing Rules. [FN113] The cynical interpretation is that the business community was again motivated, as it had been before, to preempt possible legislation, [FN114] but the new report's thrust was slightly different from that of the earlier one. The Greenbury Report focused on compensation, and strenuously encouraged the formation of a remuneration committee of the board made up of non-executive directors ("NEDs"); these directors are not insiders, but neither are they necessarily truly independent. [FN115] In addition,
this Report recommended facilitating shareholder participation in the compensation decision, and consequently emphasized the board’s obligation to provide relevant information to shareholders. [FN116]

The third major report was drafted by the Hampel Committee in 1998. It reviewed prior reports and analyzed the sufficiency of corporate governance generally. [FN117] The Hampel Report approved the recommendations of its predecessors and, for example, emphasized both the responsibility of the board (including its obligation to provide information to its shareholders), and the critical need for NEDs. It also called for separation of the roles of chairman and CEO. [FN118] The London Stock Exchange took the recommendations of this report, too, and included the “Combined Code” in its Listing Rules. [FN119] *1057 In referring to board and management responsibilities, an overarching theme is disclosure and, more generally, transparency. This was a major focus of the next major report, completed in 2001, and charmingly entitled Modern Company Law for a Competitive Economy. This report departs from the track followed by the prior studies in an important way: it calls for statutory redress, in particular with respect to directors’ fiduciary duties. [FN120] The success of these reforms is debatable. A number of the pre-Cadbury scandals occurred despite the ostensible involvement of NEDs. [FN121] On the other hand, the Codes of Best Practice recommend the use of NEDs, [FN122] although research suggests that the percentage of NEDs is virtually the same for successful and unsuccessful companies. [FN123] Indeed, it appears that contrary to the experience in the United States, the only effective discipline in the United Kingdom is by equity. That is, shareholders of U.K. public corporations exercise discipline only when the corporation needs capital. [FN124]

This conclusion is amply demonstrated by the events leading to the Marconi meltdown. [FN125] Marconi had already carefully separated the roles between Hurn as Chairman and Simpson as CEO. Transparency nevertheless was not effective: everyone knew that NEDs did not really ride herd but were instead captured by those very fees that had been blessed by prior reports. The shareholders finally disciplined Simpson and Hurn only after the company was in desperate financial straits. Despite untold hours of study and analysis by prominent business figures and scholars, and despite the resultant rules and exhortations, the practical outcome in the United Kingdom was in many ways similar to what the United States experienced up to the collapse of Enron. Senior management and directors were arrogant *1058 and grasping, and the public turned a blind eye to evidence of mismanagement and even malfeasance until it was too late. The principal difference is that the most recent spate of excesses in the United Kingdom do not appear to have included the same level of fraud as had occurred there in the late 1980s and early 1990s, and in the United States toward the end of the recent bubble. [FN126]

c. Continental (French) Reforms

In 1995, Marc Viénot, PDG of Société Générale, prepared the first Viénot Report ("Viénot 1995"). [FN127] As we have come to expect based on the U.K. experience, this report encourages the election of non-insiders to the board (here, truly independent directors) and the use of special audit, compensation, and nomination committees of the board. [FN128] Also consistent with the U.K. perspective, the report merely provides guidance; it does not advocate statutory mandates. [FN129] This is not surprising since it was commissioned by a business organization of company executives. [FN130]

Viénot 1995 did not protect the public from scandals that erupted in 1996. [FN131] In response, the French government commissioned the Marini Report which, in contrast, did make legislative recommendations. [FN132] In its turn, it was followed in 1999 by a second Viénot report ("Viénot 1999"), and finally, by legislation. [FN133] These reports provide a valuable vignette of what are perceived in France to be the points of governance weakness. Thus, it is interesting that *1059 Viénot 1995 calls for at least two independent directors and, as is the case in the United Kingdom, a director is independent only if not tied to the company. [FN134] Viénot 1999 picks up the refrain. In addition, this report emphasizes the importance of providing the board with the information it needs to function properly and specifies that the chief executive officer is responsible for assuring that the other board members have access to all the facts they need. [FN135] Far more informative, however, is the time and energy spent on deciding whether and, if
relevant, how to separate the role of the chairman of the board (président) from that of the chief executive officer (directeur général). The discussion is complicated by the existence of an option to create a two-tier board. [FN136] That is, there can be a supervisory board which the chairman would chair, and a directoire or functioning board, at which the chief executive officer would preside. The supervisory board sets policy which the functioning board then implements. [FN137]

In 1999, only two to three percent of corporations had adopted the two-tier structure, although twenty percent of the largest forty French companies had done so. For the vast majority of companies that have a unitary board, the senior officer is the Président-Directeur Général ("PDG"), who thus has both supervisory and executive authority. [FN138] In this connection, Viénot 1999 recommends that the unitary board articulate, for internal purposes, the extent of the responsibilities delegated to the PDG. [FN139]

Viénot 1999 is also fierce in its desire to preserve the independence of the outside auditors. It specifically recommends that the client not enter into relationships with affiliates of its auditors in order to avoid compromising the auditors' ability to walk away from fees. [FN140] On the other hand, with the exception of this concern for the accuracy of financial statements and related communications, neither Viénot report focuses on the obligation of management to provide shareholders with information. This lapse may result from the very different role of management vis-à-vis shareholders in the French as opposed to Ango-Saxon jurisdictions.

When discussing the mission of the board, Viénot 1995 emphasizes that the board's role is to focus on the general corporate interest (intérêt social). [FN141] The report expressly contrasts this concept with the Anglo-Saxons' focus on shareholder wealth maximization. The general corporate interest means that management must respect the corporation's own interest, as distinct from that of all the usual stakeholders (shareholders, employees, creditors, suppliers, and customers). The assumption is that management's focus on the corporation's interest inevitably serves these stakeholders' common interest. [FN142] Shareholders have not traditionally been the primary concern of French management. [FN143]

Certainly, VU's shareholders would agree. But then again, the shareholders had possession of all relevant information and did not stave off VU's collapse. [FN144] Minority shareholders with small holdings may not have a significant say. [FN145] VU had large shareholders; however, they had contracted away their right to ride herd on management. [FN146] While this system did prevent the kind of billion-dollar accounting fraud with which we in the United States have become familiar, it did not protect VU's stakeholders from very significant losses. [FN147]

2. The Efforts by Each Jurisdiction concerning the Financial Arena Are Similar, and Similarly Limited

The governments focused on commercial norms in connection with managerial behavior regarding financial matters. The specific concern was the protection of the securities markets. The government-ordered and government-supported studies directed that managers provide transparency to the level required to encourage investment. Such transparency would, it was hoped, prevent self-dealing by insiders, at least to the extent necessary to calm investors' fears. Thus, the principle underlying transparency is a form of fair play defined by function, and it is applied in all three Western jurisdictions under study.

The idea that governments want to protect markets, and that the means will be similar around the world is easy to grasp because, wherever located, a market that facilitates capital formation is one in which investors will wish to place their capital. [FN148] However, it is not clear that, even with respect to the financial abuses, these governmental efforts will successfully rein in corporate managers.

The managers involved in the excesses, whether through commission as in our United States example, or by omission as is more generally the case in the United Kingdom and French illustrations, had not internalized the fair-play norm or, at least to initial appearances, the transparency norm. [FN149] However, the managers had in fact complied with disclosure requirements more than is generally acknowledged: Marconi's and VU's aggressive acquisition strategies were well known, and information about much of Enron's accounting abuses has long been publicly available--hidden in plain sight. Thus, transparency alone has not been sufficient to constrain the managers' behavior. In Enron's case, investors even ignored the financial references to transactions that ultimately brought down the firm. [FN150] The point, of course, is
that transparency creates constraints only when the larger community is prepared to take action based on a revelation. In these examples, fairly significant transparency proved insufficient to serve as an external constraint, even though the investing public, and the governments seeking to bolster their national economy, have a continuing incentive to support easy and cheap access to capital. [FN151] Thus, even where there exists an identifiable and widely held interest in full transparency, meaningful disclosure will not occur, unless, at minimum: (1) those in a position to disclose have internalized the transparency norm; and (2) those outside the community (a) have internalized a norm against a wrong revealed by transparency, and (b) then act on that revelation.

Here, national governments can, and do, play a role: They increase penalties in order to change managers' cost-benefit calculation and influence public perceptions. Raising the managers' cost of hiding information and lying may encourage managers to internalize fair play and transparency norms, or at least to comply with them. [FN152] Further, the governments can alert the investing public to particular risks. Again, the fair play and transparency norms' universality across national boundaries is likely: wherever markets are reasonably developed, the commercial and political communities will support fair play and transparency because of their functionality, except when the commercial and larger communities are swept away in a bubble. Thus, individual national governments do pass pro-investor laws, promulgate supporting regulations, and encourage industry self-policing. [FN153] But what is, in fact, the effect of these efforts? The three Western governments under scrutiny have indeed reacted to past financial irregularities. These actions cannot prevent the next flavor of irregularity unless both the managers and the public internalize the broader, overarching norm. The managers must do so because it is they who control the method and scope of the information that the company discloses: if they do not adopt the norm, they will try to evade the rule. [FN154] The public must internalize the norm because no amount of disclosure will have any impact unless the public is ready to impose consequences, whether directly by effects on the market, or indirectly by calling politicians and investigatory bodies to account. Thus, finely focused rules aimed at a specific topic tend to promote neither general transparency nor a new, public condemnation of behavior previously tolerated.

B. Inadequacies of National Governments' Systematic Responses to Human-Rights Abuses

All interested governments desire to bolster their own securities markets, and they share that goal with the bulk of their citizens. Nevertheless, they still do not--cannot--impose effectively either their norm of transparency or the underlying norm of fair play. It is yet more difficult to identify and implement a goal that even the national governments do not, in practice, share. Such is the dilemma when faced with the non-financial abuses of Enron and its ilk.

1. The Activities of Enron in India Are Human-Rights Abuses

I have described above the allegations that Enron's managers involved the company in political corruption, environmental degradation and, through the intermediation of the local police, physical violence in India. Each of these activities is a violation of human rights. Political corruption is inconsistent with civil and political rights. These rights are confirmed by the International Convention on Civil and Political Rights ("ICCPR"), [FN155] which the United States ratified in 1992. [FN156] The ICCPR provides for, among other rights, the right to vote. [FN157] Political corruption effectively disenfranchises voters because suborning governmental officials establishes a conduit of persuasion parallel to that of the voters. [FN158] In addition, to the extent that political corruption impedes economic progress, it also violates the emerging right to development. [FN159]

For its part, environmental degradation that endangers life or health, or that eliminates a livelihood, is inconsistent with economic, social and cultural rights. [FN160] As we have seen, that is precisely what Enron's managers are accused of having accomplished: the villagers around the Enron plant in India no longer had potable water and the locality's fishing industry was fast disappearing.

Less subtle is direct physical violence. The violence against the protestors is a violation of the right to bodily integrity and, ultimately, to life. As such, it is a violation of civil and political rights under the ICCPR. [FN161]
2. The National Governments' Efforts Are Inadequate to Reach Human- Rights Abuses

In what way, then, are the governmental efforts to promote transparency in accounting too narrow, even assuming that transparency were an effective constraint on managerial behavior in the financial realm? Consider a non-financial category of violation by Enron: the human-rights abuses in India. Those abuses, just like the accounting and structural irregularities, were publicly known. [FN162] Neither the Western media, nor the investors in Enron, gave any sign of picking up on the topic. [FN163]

There are two principal reasons for this lack of interest. First, the managers allowed the wrong to occur because, just as was the case for the accounting irregularities, they had not internalized the contrary norm—in this case, a norm of avoiding human-rights violations overseas. The description of Enron's pursuit of the contract to construct India's largest utility includes examples of extraordinary arrogance and highhandedness by senior Enron executives. Second, while extralegal constraints finally punished companies engaged in accounting irregularities, the securities markets, to all appearances, were uninterested in human rights abuses. [FN164]

Further, Enron and its managers were not otherwise susceptible to effective, external constraints from the larger community. Just as this larger community neither complained of Enron's accounting practices nor rose up against the energy-manipulation in California until long after Enron's meltdown, it failed to act against the human rights abuses in India. [FN165]

There is a reason for Enron's immunity from community influence. Consider the difference between Enron and companies that do submit to external, extralegal pressures, such as consumer boycotts. Unlike companies that sell trademarked products directly to consumers at retail, Enron was not subject to the risk that its ultimate customers would organize a boycott against Enron products. The influence of consumers on Nike or Wal-Mart and their managers simply is different. If non-securities, developed country markets are involved—for example, a retail market for consumer-goods—the consumers can be mobilized to have significant impact. Consumers in developed countries have helped shape management's conduct at Nike, Wal-Mart and other sellers of consumer goods. In substantial part because of consumer-imposed constraints, Nike management and the collective management of the entire apparel industry have adopted codes of conduct that conform to sophisticated human-rights principles. [FN166] Even managers in the multinational pharmaceutical industry have succumbed to consumer pressure. [FN167] Enron had a significant retail operation as well, [FN168] but before its spectacular implosion, Enron's presence was not likely to raise customer hackles: Enron's prices were lower than those of other energy-providers. [FN169]

In addition, a customer unhappy with Enron management's manipulation of the market, or its abuse of human rights, would be ill-advised to rely on shame to influence Enron toward more professional conduct. Enron's management might be swayed by massive consumer outrage, but such a movement is unlikely to evolve because consumers' dealings with questionable energy-suppliers are not readily visible. This is clearly different from Nike, for example, since everyone will immediately know whether the garment I am wearing bears the "swoosh." It is even different from Reverend Sullivan's attempts to thwart South Africa's apartheid regime by pressuring United States entities to divest their holdings of companies that had invested in South Africa, especially if these had not adhered to anti-apartheid employment practices. [FN170] When shares of a public company are held in street name, it can be difficult to find out who the ultimate owner is. However, Reverend Sullivan selected major holders of securities and asked them to divest whatever holdings they had in corporations that did not conform to the anti-apartheid principles. Universities and other institutional investors agreed to divest, as did municipal pension funds. [FN171] Thus, the targets were a limited number of investors that could influence companies doing business in South Africa, as opposed to a large number of retail consumers of energy, none of whom, individually, would have any clout at all. For both these reasons, Enron's consumers were self-interestedly content with pricing, and could not easily be shamed into a boycott. Thus, there [FN168] was no identifiable, informal group likely to pressure Enron's management to cease manipulating the energy market, let alone to stop committing human-rights abuses abroad. There was no such group, and if there had been one, it was unlikely that it would have had significant influence.

Perhaps nations can step into the breach? Perhaps they can and will demand compliance with
human rights norms? This, too, is unlikely. As we have seen, nations were slow to respond even to governance abuses of a financial nature, that is, even when their national self-interest was immediately consistent with a demand for best practices. Second, outside the financial arena, national leaders seem unable to articulate national self-interest clearly. Certainly, with respect to Enron in India, neither the United States nor the Indian governments acted to prevent human rights abuses. Despite seemingly unambiguous language in its own regulations, the U.S. government actively supported the efforts of Enron's management. [FN172] The Indian government was either powerless to thwart the United States, or was actively complicit in permitting the human rights abuses to occur. [FN173] Given these grim realities, what mechanisms support the imposition, on a multinational's managers, of human rights' broader conceptions of the fair-play and transparency norms?

IV. SOLUTIONS REQUIRE WORLD-WIDE NORMS AND LOCAL REINFORCEMENT

For the larger community to succeed in correcting the recent excesses, it will have to achieve two goals simultaneously: (1) articulate clear goals applicable across boundaries; and (2) communicate to managers that they are part of, rather than above, the larger community. A key impediment to articulation of these goals is that human rights norms are still evolving and thus are not fully internalized by the world community. This is a direct contrast to the fair-play and transparency norms to which the developed commercial communities return when they have strayed during periods of "irrational exuberance." In the commercial arena, as noted above, Western governments have consistently emphasized fair play and transparency. The legitimacy of economic, social and cultural human rights, however, is somewhat in question because of the U.S. government's continuing refusal to ratify the relevant International Covenant. Despite the United States' refusal to ratify, the rights do benefit from a generally accepted view that they have passed into international customary law. [FN174] The universality of rights to development is yet more debatable. The conduct of Enron's management in India, however, implicates civil and political human rights. According to reports, Enron management was directly responsible for political corruption, and for beatings that, without due process, the local constabulary administered to local activists. This behavior by West-based managers is particularly shocking because it violates the category of human rights--civil and political rights--that has been an integral part of Western politics since the eighteenth century. [FN175] Certainly, Western governments have not consistently been up to the task of articulating broad goals for their multinationals. Even when these governments engage in human-rights talk, it is limited in scope and purpose. The U.S. government has, for example, worked hard to push through the OECD Anti-Bribery Convention, arguably protecting civil and political, as well as development rights. [FN176] The South African government has fought the pharmaceutical manufacturers based in developed countries, in effect supporting its citizens' rights to bodily integrity (a civil and political right) and healthcare (an economic and social right), through the use of the language of the WTO's TRIPS Agreement. [FN177] In both these cases, however, the national governments acted from the same narrow self-interest that triggers their call for fair play and transparency in their securities markets. The United States wished to level the playing field for its multinationals who were struggling under the constraints of the Foreign Corrupt Practices Act ("FCPA"), [FN178] and the South African government was responding to its population's need for anti-AIDS/HIV drugs. [FN179] When responses are so fact-dependent, other nations in different circumstances may not actively support the same principles. That, in turn, weakens the clarity of the norm. The U.S. Department of State, for example, supported the efforts of Enron's management to invest in India. The State Department's decision was not consistent with civil and political human rights. Because motives are so complicated, nations' enhancements of, and even conformity to human rights remain highly unpredictable.

On the other hand, once a national government has adopted a norm, whether it be fair play and transparency in the securities markets, or a stance against political corruption, the criminal sanctions that a national government imposes will reinforce the norm. The South African government's self-help with regard to anti-AIDS/HIV drugs was successful for more complex reasons. Not only was that government clear in expressing its needs, but it was willing to do so under the protection of the WTO and the TRIPS Agreement and, importantly, it had been able to rouse the ire of the pharmaceutical companies' customers in the developed world. [FN180] South
Africa was able to place the pharmaceutical companies' managers in the same quandary as that faced by the management of Nike or Wal-Mart. South Africa was thus able (and willing) to force those managers to act in a manner consistent with human-rights norms.

National governments can be effective enforcers, but enforcement depends on highly particularized realities. That is why norms applicable to globalized multinationals must be articulated by the larger, international community, and only then enforced by national governments. In effect, that is the model for securities-law violations: the same norms have emerged in the international community of mature securities markets, and national governments then enforce those norms. In the context of the Enron managers' escapades in India, international players should publicize the managers' role and the U.S. State Department's complicity. In that way, the international community reinforces the international norm. Perhaps the U.S. government could be shamed into extending its investigation of Enron's management beyond payments in violation of the FCPA and the OECD Anti-Bribery Convention. The inquiry should include an analysis of any activity enforceable against private parties in U.S. courts, such as claims of torture. [FN181]

*1071 Essentially, the international community re-educates the national governments; they in turn re-educate the multinationals' managers. The international community defines the norms of fair play and transparency on the global scale, and then supports the national governments' implementation of these norms. This is analogous to the role played by the national governments' self-interest in the context of financial norms. It is the interest in encouraging healthy national securities markets that causes these governments to make at least desultory gestures toward reinforcing the transparency and fair play norms locally, with respect to their own securities markets. As we have seen, even the national governments could benefit from external prodding toward a more standards-based, as opposed to the more narrow rule-based, approach to the regulation of corporate governance. The broader standards approach, grounded in a revised norm would be less susceptible to technical evasion than is a rule. Thus, a standard is more likely than a rule to prevent subsequent managerial behavior harmful to the national securities markets. The situation is even more dire outside the financial arena: while each nation has an interest in shaping its own securities market toward disclosure and fair play, each individual country's self-interest is to cheat on human rights and breach those norms. As is the case with any cartel, individual nations have the incentive to look away as their own nationals continue to violate human-rights norms, especially when these violations are overseas, for obvious reasons of externalities. [FN182]

Individual nations cannot be trusted to develop and implement human-rights norms: this change inevitably must occur on the supranational level. A classic example is bribery. No developed nation had any interest in reducing the supply of bribes unless all similarly situated nations did the same. The United States started the process by triggering the OECD's convention-process; however, the United States pulled the trigger for its own internal reasons—a serendipitous event. To be sure, a similar confluence of events may replicate itself in the context of human rights more generally. Any individual nation or group of nations could start generating a supranational description of how to implement a human-rights norm. [FN183] The individual nations would then be expected to enforce the norm, as the *1072 OECD Anti-Bribery Convention expressly contemplates. South Africa exemplified this paradigm when it defied the multinational pharmaceutical companies: the WTO's TRIPS Agreement provided norms consistent with international human rights, and South Africa's domestic law supplied the enforcement muscle. [FN184]

V. CONCLUSION

Transparency has not adequately protected investors. Managers have not internalized the obligation to communicate all relevant information in a clear way. Even when managers have made information available, the public does not necessarily care. This grim reality applies even when national governments have the incentive to support the internalizing of a cooperative, fair-play norm of behavior, as is the case with respect to the securities markets. It applies with yet more force when national governments can benefit by turning a blind eye to lax, or even illegal, managerial behavior. National governments have tolerated, if not encouraged managerial cheating in the context of international commercial transactions, such as Enron's investment in...
India. Thus, even if national governments could be a source of norms for domestic securities markets, they have proved that they cannot be trusted to generate fair-play norms in the international arena.

A source for such norms exists in international public law's human rights regime. The international community, in consultation with myriad local communities, can identify and articulate the norms for the international commercial arena. [FN185] Supranational organizations thus promulgate these standards which, once established, national governments can then enforce. Only at this point will the norms be internalized both by managers and by the public. Only at this point can transparency have a significant and positive impact.

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[FN2]. See Jason Leopold, Questioning the Books: Enron Executives Helped to Create Fake Trading Room, WALL ST. J., Feb. 20, 2002, ("Former Enron Corp. Chief Executive Ken Lay and former President Jeff Skilling were personally involved in stage-managing a fake trading room to impress analysts.").


[FN4]. See Tom Detzel, Skilling Takes on Doubtful Senators, PORTLAND OREGONIAN, Feb. 27, 2002, at A1, 2002 WL 3948557 (describing Jeffrey Skilling's proclamation to a Senate committee that he has "nothing to hide"); Marilyn Geewax, Who Knew at Enron? Stories Don't Match, ATLANTA J. & CONST., Feb. 8, 2002, at 1A, LEXIS, News Library, AtlJnl File (describing the often conflicting testimony before Congress of former Enron President and Chief Executive Jeffrey Skilling, then-current President and Chief Operating Officer Jeffrey McMahon, and then-current Vice President and General Counsel Jordan Mintz); see also Mark Maremont & Laurie P. Cohen, Executive Privilege: How Tyco's CEO Enriched Himself, WALL ST. J., Aug. 7, 2002, at A1 (describing the resignation of L. Dennis Kozlowski, former Chief Executive of Tyco International, Ltd., the day before his indictment for sales tax evasion); Alexei Barrionuevo et al., Enron's Fastow Charged With Fraud, WALL ST. J., Oct. 3, 2002, at A3 (describing how Andrew Fastow, former Enron Chief Financial Officer, was arrested and led into the courthouse in handcuffs early on October 2, 2002). Other companies' executives, such as Adelphi Communication's founder John Rigas, as well as two of his sons, and former World Com Chief Financial Officers Scott Sullivan and David Myers, were arrested as well. Daniel Eisenberg, Jail to the Chiefs? The White-Collar Crackdown Brings a Parade of Suits in Cuffs, but can Prosecutors Make the Charges Stick?, TIME, Aug. 12, 2002, at 24.

[FN5]. Steve Hare, finance director for insolvent British telecoms equipment maker Marconi, could be the fifth senior director to lose his job and pay the price for the company's £2.6 billion debt. Ben Hunt & Juliana Ratner, Marconi's Finance Chief Could Lose Job, FIN. TIMES, Aug. 20, 2002, § 1, at 17, LEXIS, News Library, FinTme File; see also Mark Johnson, Non-Executives: No Longer Non-Combatants, GLOBAL FIN., June 1, 2002, at 24. Prudential's chairman, Robert Hurn, was "forced to resign" as a result of his earlier failures at Marconi. Id. Vivendi Universal's CEO, Jean-Marie Messier, after facing the empire's record loss, had to resign under the pressure from board members and investors. Richard Verrier & Anita M. Busch, Under Intense Pressure, Vivendi's Messier is Forced Out as Chairman, L.A. TIMES, July 2, 2002, at A1, LEXIS, News
There is evidence that Jeffrey Skilling will be harder to indict than Andrew Fastow. See Jonathan Weil & Alexei Barrionuevo, Justice Department Finds Building Criminal Case Against Lay Tough, WALL ST. J., Aug. 26, 2002, at A3; Barrionuevo et al., supra note 4. Enron's two former chief executive officers, Jeffrey Skilling and Kenneth Lay, remain under U.S. Justice Department investigation.

Bratton, supra note 1, at 1307 (describing that SPEs are respectable).

Id. at 1308; see also John R. Emshwiller, Enron May Have Started Earlier on its Off-Balance Sheet Deals, WALL ST. J., Sept. 30, 2002, at A3 (discussing Enron's violation of the three percent minimum-equity rule).

Bratton, supra note 1, at 1306-07 n. 118.

See, e.g., David Barboza, Ex-Executives Say Sham Deal Helped Enron, N.Y. TIMES, Aug. 8, 2002, at A1 (discussing Enron's use of sh am deals to meet year-end profit targets).

See Bratton, supra note 1, at 1310; see also Weil & Barrionuevo, supra note 6 (noting that Fastow was fired after his $30 million side payment was widely publicized).

Bratton, supra note 1, at 1310. Footnote 16 to the financials did not, for example, disclose Fastow's name, but it did disclose the size of the transactions, and the proxy statement specified that Fastow would receive compensation measured as a percentage of profits. Id.

Id. at 1311.


See Long-Term Contracts Said by California Officials to Be Key to Stable Future, ELECTRIC UTIL. WK., June 25, 2001, at 1, LEXIS, News Library, EIUtil File. The State of California signed 38 long-term electricity contracts with 18 power suppliers over the next 10 years with a combined value of over $40 billion. Id.

See, e.g., Judy Waggoner, More Power from Less Power Use, MARKETPLACE MAG., May 22, 2001, at 34, 2001 WL 11436951 (discussing how poorly planned deregulation, a widening gap between supply and demand, and high energy prices set by independent energy producers contributed to the California energy crisis).

See Enron Beats Analysts' Expectations, AP ONLINE, July 12, 2001, 2001 WL 24711427 (discussing how the California State Senate issued subpoenas to Enron in connection with an investigation of possible price manipulation in energy markets).

See Short Seller Saw Danger Signals at Enron a Full Year Before It Collapsed, PETROLEUM FIN. WK., Feb. 18, 2002, 2002 WL 8121917 (discussing how Jeffrey Skilling resigned abruptly for personal reasons); see also David Barboza, Enron's Many Strands: The Former Chief: Friends Say Ex-Chief Despairs, Seeking Someone to Believe Him, N.Y. TIMES, Aug. 23, 2002, at C1 (discussing Jeffrey Skilling's despair over Enron's collapse and his close friends' descriptions of his behavior); Louise Daly, Andersen Staffers Discussed Enron "Smoking Gun" in August 2001, AGENCIE-FRANCE PRESSE, May 9, 2002, 2002 WL 240311 (reporting that Jeffrey Skilling resigned as Enron's Chief Executive after a six-month tenure). Skilling's close associates report that he maintains that he really did not know of the SPE excesses, and really did resign for personal reasons.


See Barrionuevo et al., supra note 4 (reporting that Andrew Fastow was arrested and led into court on October 2, 2002); Kurt Eichenwald, Ex-Enron Official Admits Payments to Finance Chief, N.Y. TIMES, Aug. 22, 2002, at A1 (reporting the guilty plea of Michael Kopper, a former Enron finance executive and close associate of Andrew Fastow's, to charges of conspiracy to commit wire fraud and money laundering); Kurt Eichenwald, Former Enron Executive Pleads Guilty to Tax Violations, N.Y. TIMES, Nov. 27, 2002, at C5 (reporting the guilty plea of Lawrence M. Lawyer, a former Enron executive, to charges of filing false tax returns in connection with off-the-books partnerships); Rebecca Smith & John R. Wilke, Top Trader for Enron Admits to Fraud in California Crisis, WALL ST. J., Oct. 18, 2002, at A1 (reporting the guilty plea of Timothy Belden, the former head of Enron's Western energy-trading desk, to a single count of wire fraud for conspiring to manipulate California's electricity market).

The company is unrelated to the U.S. company, General Electric Corp. ("General Electric"). Suzanne Kapner, Creditors to Control Marconi Under Accord to Forgive Debt, N.Y. TIMES, Aug. 29, 2002, at W1.

Alex Brummer, This Man's 1 Million Payoff for Running a Company Which Lost 4 Billion This Year Is an Insult to Every Decent, Hardworking Briton, DAILY MAIL, Sept. 6, 2001, at 12, 2001 WL 26071644 [hereinafter Brummer, Hardworking Briton]. Lord Weinstock, Lord Simpson's predecessor as CEO was described by the U.S. GE's Jack Welch as "tightfisted" with the company's money; in contrast, under Lord Simpson's leadership, Marconi spent lavishly for offices and airplanes, and ultimately took the "biggest write-off of assets in the history of British finance." Id.

See, e.g., Lawrence A. Cunningham, Commonalities and Prescriptions in the Vertical Dimension of Global Corporate Governance, 84 CORNELL L. REV. 1133, 1183 (1999) (noting that, in practice, the standard of care for directors in the United Kingdom, for example, is substantially similar to the standard applicable to directors in the United States); see also Vassil Breskovski, Directors' Duty of Care in Eastern Europe, 29 INT'L LAW. 77, 80- 81 (1995) (observing that the standard of care applicable to directors of U.K. corporations is hard to compare to that of directors of U.S. corporations, with liability requiring at least gross negligence or fraud; perhaps the standard applicable to U.S. directors is slightly higher). But see JULIAN FRANKS ET AL., WHO DISCIPLINES MANAGEMENT IN POORLY PERFORMING COMPANIES? (Centre for Econ. Pol'y Research Discussion Paper No. 2949, 2001) (finding "more minority investor protection in the UK than in the US [and] less fiduciary obligations on directors in the UK"), available at

[FN25]. Alex Brummer, Weinstock Legacy Betrayed, DAILY MAIL, July 10, 2001, at 65 [hereinafter Brummer, Weinstock Legacy] (reporting Simpson's attempt to sell the telecommunications business), 2001 WL 23581105; Jane Fuller, Marconi-Judging This Very British Failure: Collapse Avoids U.S.-Style Scandal, FIN. TIMES, Aug. 27, 2002, at 20 (reporting that members of Marconi's top management "were wading into areas [such as telecommunications] they did not fully understand"), 2002 WL 26140605.

[FN26]. Fuller, supra note 25.


[FN28]. See, e.g., Brummer, Hardworking Briton, supra note 23 (calling huge payments to departing Marconi executives "an affront to human decency"); Andreas Whittam Smith, It Will Take More Than Legislation to Rein in Executive Pay, INDEP. (London), Oct. 22, 2001, at 5, 2001 WL 27716948 (reporting that Marconi's stock price dropped from £12 per share to 13p under Simpson's "stewardship"); Wilson, supra note 27 (reporting that Weinstock is "furious" after the value of his interest was cut by ninety percent in one year); sources cited supra note 23.

[FN29]. Brummer, Hardworking Briton, supra note 23.


[FN31]. Fuller, supra note 25. Marconi thus avoided a U.S.-style scandal. Id.

[FN32]. See, e.g., Brummer, Weinstock Legacy, supra note 25, at 65.

[FN33]. Andreas Whittam Smith, A Quiet Revolution Has Started in Our Boardrooms, INDEP. (London), May 13, 2002, at 13 (reporting that Prudential chairman (Hurn) left because of his conduct at Marconi), 2002 WL 20195830.


[FN35]. Sophie Barker, Messier Puts Money Where His Mouth Is, DAILY TELEGRAPH, Apr. 25, 2002, at 31 (reporting that in the prior two years, the stock price had fallen from <<currency>>120 to <<currency>>39), 2002 WL 18132433.


[FN39]. Carreyou, supra note 37.

[FN40]. Verrier et al., supra note 34.
Motoko Rich & Sheila Muto, From Park Avenue to Paris, It Is Often a Perk of Office, But Is There a Duty for Companies to Disclose?, WALL ST. J. EUR., June 17, 2002, at A11, 2002 WL-WSJE 22215444. Messier's apartment cost $500,000 less than the more famous New York lodgings of Tyco International Ltd.'s former CEO, Kozlowski. Id.

Martine Orange, Le "Golden Parachute" Controversé de Jean-Marie Messier, LE MONDE (France), July 4, 2002, at 18. As we will see below, a loan from the company to Messier is strictly prohibited under French law. Id.


World Business Briefing Europe: France: Vivendi Suit Dismissed, N.Y. TIMES, June 28, 2002, at W1, 2002 WL 23416313. As we will see, management has the affirmative obligation to provide the Board with information. See infra Part III.


Martin Peers & John Carreyou, Bronfmans Weigh Next Move, GLOBE & MAIL (Toronto), July 1, 2002, at B5 [hereinafter Peers & Carreyrou, Weigh Next Move]. The Bronfmans own over five percent of VU, but are hamstrung by a standstill agreement signed at the time of the merger and cannot make a proposal directly to the shareholders. Id.; see also Georg Szalai, VU Tightening Purse Strings: Bronfman Co-Chairs Oversight Committee; Messier Stays, HOLLYWOOD REP., May 30, 2002, at 1 (reporting that Bronfman, as the largest stockholder, has "a lot at stake"), 2002 WL 19114707.


In French, the pseudo-title does work out to J6M: "Jean-Marie Messier, Moi-Même, Maître du Monde." Maître Dethroned: Jean-Marie Messier's Resignation May Not Be the End of the Media Group's Troubles, ECONOMIST, July 6, 2002, at 58 [hereinafter Maître Dethroned].

Verrier et al., supra note 34. It may well be that the French public saw this alleged Americanizing as merely another manipulation of Messier's perceived arrogance.

Carreyrou, supra note 37, at B11.

See, e.g., Maître Dethroned, supra note 48, at 58 (mentioning that acquisitions were in many industries, including "telecoms, utilities and ... pay-television operation"). Additionally, the targets included prominent names, including Universal Studios and Universal Music, the Bronfman's Seagram, Barry Diller's USA Networks, and French giants such as Cegetel (telecommunications), increasing the public nature of the transactions. Id. at 58-59.


Tagliabue, supra note 53.

See generally id.

Id.
[FN57]. Id.

[FN58]. See Follorou, supra note 52; Tagliabue, supra note 53.

[FN59]. See Follorou, supra note 52.

[FN60]. Id.; see also Tagliabue, supra note 53.

[FN61]. Follorou, supra note 52; see also Tagliabue, supra note 53.

[FN62]. Follorou, supra note 52.

[FN63]. Id.

[FN64]. Id. Incredibly, Salustro's chief executive officer claimed that the firm's compliance specialist had been relieved of his duties only temporarily, and for reasons unrelated to the VU affair. Id. Much of this information might not have come to light if the newspaper Le Monde had not found out about the attempted firing of the compliance specialist, and if Salustro had not fired the accountant who worked directly on the VU account (ostensibly for insubordination). After Salustro fired her, the accountant sued. She also responded by letter, detailing the auditing firm's lapses, including the intense pressure Salustro, applied to convince her to report certain transactions as the client directed. Jacques Follorou, Licenciée, une Auditrice de Salustro-Reydel Met en Cause les Pratiques du Cabinet, LE MONDE (France), Sept. 11, 2002, LEXIS, News Library, Monde File; see also Un Mode de Management Surprenant, LE MONDE (France), Sept. 10, 2002, LEXIS, News Library, Monde File (containing excerpts from the fired accountant's letter).

[FN65]. Human rights violations in India are not, however, the only example of human rights violations condoned by Enron management. Political corruption is arguably a violation of human rights. See infra text accompanying note 158. The U.S. Justice Department is investigating Enron's activities, and the World Bank expressed concern about the company's activities in Ghana, Nigeria, and Mozambique, in addition to India. John R. Wilke, Enron Criminal Probe Focuses on Alleged Corruption Abroad, WALL ST. J., Aug. 5, 2002, at A1.


[FN67]. Id. at pt. I (Summary and Recommendations). The other shareholders were General Electric Corporation and Bechtel Corporation (ten percent each), and the Maharashtra (state) government's Maharashtra State Electricity Board (thirty percent by late 1998). Id.

[FN68]. Id. at pt. II.

[FN69]. Id.

[FN70]. Id. (discussing World Bank and expert-agency resistance to the transaction).

[FN71]. Id.

[FN72]. Id. (discussing agency capitulation).

[FN73]. Id. at pt. II (the Munde Committee Report).

[FN74]. Id.
[FN75]. Id. A subcommittee of the Maharashtra Cabinet noted dryly that the remarks of a VP, Global Finance of Enron Development Corporation to the effect that the company had spent $20 million on "education and project development alone, not including any project cost" deserved "further clarification." Id. at app. B, § 3.3.

[FN76]. HUMAN RIGHTS WATCH, supra note 66, at pt. II.

[FN77]. Id. at pt. III.

[FN78]. Id.

[FN79]. See id. at pt. II.

[FN80]. Id.

[FN81]. Id. at pt. III.

[FN82]. Id. at pt. III.


[FN84]. HUMAN RIGHTS WATCH, supra note 66, at pt. V.

[FN85]. Id.

[FN86]. Id.

[FN87]. Id. at pt. VII.

[FN88]. Id.

[FN89]. Id. at pt V.

[FN90]. Id.

[FN91]. They even discussed with state officials the measures the state would take against protestors. See id. at pt. VII.

[FN92]. See id. at pt. II (discussing the involvement of then Secretary of Energy, Hazel O'Leary); id. at pt. VIII (discussing the involvement of the Departments of Energy and State, and of then-U.S. Ambassador Frank Wisner and the apparent refusal of the Export-Import Bank, and in that connection of the Department of State, to complete the effective determination of the funded transaction's human-rights impact, mandated by the Bank's own policy manual).


[FN94]. See, e.g., Brian R. Cheffins, Current Trends in Corporate Governance: Going from London


[FN96]. See Seligman supra note 95, at 12-13, 18-19 & 52-53 (discussing pre-1933 and 1933-1964 statutory reforms).

[FN97]. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (holding there is no private cause of action under Rule 10b-5 for investors who have not sold or purchased stock). See generally Lawrence E. Mitchell, No Business Like No Business, in THE REHNQUIST COURT (Herman Schwartz ed., 2002) (discussing the line of cases started by Blue Chip).


[FN99]. Interestingly, under Enron's managers' guidance, "Enron was issuing its own common stock to itself to cover its own income statement loss, thereby increasing its own net earnings." Bratton, supra note 1, at 1317. This represents a highly irregular process since earnings are supposed to be generated by selling inventory or services, not by issuing stock. Id. In 1932 and 1933, the Chase National Bank inflated its income by transfers from its capital and capital surplus accounts. Seligman, supra note 95, at 29.


[FN103]. Id. § 301 (amending 15 U.S.C. § 78j-1 (2000)).


[FN106]. Id. (noting comments of Martin Weinstein, head of Foley & Larder's corporate
compliance department).

[FN107]. Id.

[FN108]. Bank of Commerce & Credit International was also a trigger. PREFACE, REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE (Dec. 1992) [hereinafter CADBURY REPORT], available at http://www.worldbank.org/html/fpd/privatesectrcg/docs/Cadbury.pdf (last visited Feb. 6, 2003) (on file with the Connecticut Law Review); see also Cheffins, supra note 94 (finding that Maxwell's debacle was the trigger). Robert Maxwell is perhaps best known to U.S. corporate governance audiences because of Mills Acquisition Co. v. Macmillan, 559 A.2d 1261 (Del. 1989) (discussing Maxwell's successful challenge to Macmillan, Inc.'s preference for a white knight and Macmillan's use of an asset lockup option as part of a merger agreement, which the court held was invalid).


[FN110]. CADBURY REPORT, supra note 108, § 4.1 (finding in the Code of Best Practice that, "[i]t is the board's duty to present a balanced and understandable assessment of the company's position"). That sounds like a call for transparency.

[FN111]. Id. § 4.9 (stating the need for separation between the Chairman and the CEO).


[FN113]. Id. at 20-21 (discussing the Greenbury Report).


[FN115]. NEDs are directors who are not executives; however, they are not necessarily "independent." See, e.g., CADBURY REPORT, supra note 108, § 4.12. An independent director receives nothing but director's fees and shareholdings, and has no business relationships with the company that would reduce the director's independence. Id. On its face, no executive director could be "independent."


[FN118]. See, e.g., HAMPEL REPORT, PRINCIPLES OF CORPORATE GOVERNANCE, § 2.A.III (board to balance NEDs with executive directors); see also id. § 2.5 (separate chairman from CEO); id. § 2.A.IV (board to supply information).


[FN121]. See Colin Boyd, Ethics and Corporate Governance: The Issues Raised by the Cadbury Report in the United Kingdom, 15 J. BUS. ETHICS 167 (1996) (reviewing the published reactions to the Cadbury Report and concluding that the compliance with the report’s call for outside directors is unlikely to stop the incidence of business scandals in the United Kingdom, especially given that companies involved in several of the largest pre-Cadbury scandals were not protected by their outside directors).

[FN122]. See, e.g., CADBURY REPORT, supra note 108, § 4.41 (recommending that service contracts for directors not exceed three years).


[FN124]. Id. § 5.2 (finding that shareholders of U.K. companies act only when company is raising equity).

[FN125]. See generally supra Part II.A.1(b).


[FN130]. See id. at 25.

[FN131]. See id. at 15 (Marseille soccer club's Tapie & Alcatel Alsthom's Suard).

[FN132]. Id. at 29-30 (discussing corporate scandals involving proposed legislative reforms). These reforms, however, were broad in nature. See James A. Fanto, The Role of Corporate Law in the Adaptation of French Enterprises, 1998 COLUM. BUS. L. REV. 97, 113-18 (1998) (arguing that corporate law has been, and will continue to be, important in the adaptation of French enterprises).


[FN135]. VIENOT 1999, Third Part, II.

[FN136]. See, e.g., Fanto, supra note 132, at 116.

[FN137]. Benjamin Mojuyé, French Corporate Governance in the New Millennium[sic]: Who Watches the Board in Corporate France?, 6 COLUM. J. EUR. L. 73, 91-94 (2000); Aste, supra note 128, at 21.


[FN140]. Id. Third Part, III.

[FN141]. VIENOT 1995, Part I, § 1; see also Aste, supra note 128, at 26-27.


[FN143]. The existence of this concept of general corporate interest is surely one reason. Another is that, historically, the state has been an extremely influential holder of French corporations' shares. Mojuyé, supra note 137, at 74-77. Since the French constitution requires the state to favor the national community over private property, and since citizens are the state, at least with respect to French shareholders and when the managers also are French, there is no separation of ownership from control. See id. at 77-78. A French corporation, under this analysis, is pre-Berle & Means. See id. at 110-11. On an abstract level that analysis makes sense. On a practical level, however, even French managers, as individuals, give rise to the usual agency costs, because they will have the usual incentives to shirk or otherwise steal. And just as surely, managers will pay attention to their shareholders, including the state, to the extent necessary to stay in office. If managers perceive the media to be a greater threat to their autonomy than are the shareholders, that may reflect no more than a collective action problem, even given France's relatively concentrated capital structure. Id. at 110.

[FN144]. The detail may have been less available to the public. It certainly is true that the general information about Messier's voracious pursuit of acquisitions was in the public domain. See John Carreyrou & Martin Peers, How Messier Kept Cash Crisis at Vivendi Hidden for Months, WALL ST. J., Oct. 31, 2002, at A1. There is evidence suggesting that Messier's acquisition program was even more aggressive than previously thought, and that, without informing either the board or his chief financial officer, he may have caused VU to buy back its own stock in order to stabilize the price. See id. These accusations could lead to more charges against, and more serious liability for, Messier.

[FN145]. The smaller shareholders are trying to have their say now. See Jacques Follorou, La Justice Enquête sur les Comptes de Vivendi, LE MONDE (France), Oct. 30, 2002, at 12. An association of shareholders with small positions has filed a complaint, based on which a criminal investigation has been opened, alleging that VU under Messier had misrepresented the financial condition of the company. Id.


See Michael Dwyer, Step Back for China Stocks, AUSTL. FIN. REV., June 20, 2001, 2001 WL 21619256 (stating that Chinese stock markets typically lack transparency, and as a result, investors lack "confidence and trust" in the markets). Despite "rock-bottom interest rates," the typical Chinese investor only about 12% of their savings in the stock market, and only 1,200 companies (mostly substantially government-owned) are traded. See Jocelyn Ford, Investing in the Chinese Stock Market, MARKETPLACE, Aug. 6, 2002, LEXIS, Lexis News Library, News Group File. Andy Rothman, China analyst for CLSA Emerging Markets, reports that investors in the Chinese securities markets either engage in extraordinary due diligence or believe that they have inside information. Id. Two senior citizens assert that investing in securities is "gambling ... like walking through a field of landmines," and that the process of investing is a form of entertainment. Id. However, stock market regulators are realizing that the economy needs a good capital market, and are beginning not only to delist money-losing companies, but also to pursue aggressively fraudulent companies. Id.

See JOHN C. TURNER, SOCIAL INFLUENCE 40-42, 144 (1991) (discussing internalized norms and interdependency in group cohesiveness); Richard B. Stewart, A New Generation of Environmental Regulation?, 29 CAP. U. L. REV. 21, 127 (2001) (discussing internalization and "the role of law in aligning organizational behavior with social needs and values").

Bratton, supra note 1, 1307, 1309 (stating that information was publicly available about the SPEs' inappropriate ownership and about Fastow's conflict of interest). In the summer of 2000, Fortune Magazine described Enron as possibly continuing with a 25% per year increase in earnings, in part because of broadband. David Rynbecki, 10 Stocks to Last the Decade, FORTUNE, Aug. 14, 2000, at 118. However, by the early spring of 2001, Fortune had already begun to change its tune. See, e.g., Bethany McLean, Is Enron Overpriced?, FORTUNE, March 5, 2001, at 123-24 (calling very particular attention to the obfuscating complexity of the company's financials--this is perhaps the first article in the major business press to challenge the then-conventional wisdom about Enron).

Mathew Ingram, Financial Disclosure Is Good--But It Doesn't Always Help, GLOBE & MAIL, Feb. 5, 2002, at B16 (stating that most people missed the red flag raised in Enron's financial disclosure reports and prospectuses).

Julie Kosterlitz, To the Rescue?, 34 NAT'L. J. 2148 (2002) (discussing the Sarbanes-Oxley Act, that developed out of the Sarbanes Bill, which contains more severe criminal penalties for corporate fraud).


See Sohn, supra note 155, at 24 (discussing rights included in the ICCPR).

Because the ICCPR is not self-executing in the United States, there is significant authority that the right to vote, found in ICCPR Art. 25, does not bind the United States. ICCPR, supra note 155, at 179; see, e.g., Igartua De La Rosa v. United States, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (stating that right to vote is not protected by the ICCPR because the convention is not self-executing); Christian A. Levesque, Comment: The International Covenant on Civil and Political Rights: A Primer Raising a Defense Against the Juvenile Death Penalty in Federal Courts, 50 AM. U. L. REV. 755, 778 n.137 (2001) (noting that in the Igartua case the Supreme Court declared the ICCPR not self-executing). However, there also is authority for the proposition that the rights set out in the ICCPR passed into customary law, and the United States Supreme Court has noted that customary international law is federal law. See The Paquete Habana, 175 U.S. 677, 700 (1900); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815). As of 1997, 140 states ratified the ICESCR, forty of which ratified the treaty with qualifications. See Sharon K. Hom & Eric K. Yamamoto, Collective Memory, History, and Social Justice, 47 U.C.L.A. L. REV. 1747, 1789 n.194 (2000).

In some cases, corruption may give rise to an "efficient" result. See, e.g., Susan Rose-Ackerman, Reducing Bribery in the Public Sector, in Corruption & Democracy: Political Institutions, Processes and Corruption in Transition States, in EAST-CENTRAL EUROPE AND IN THE FORMER SOVIET UNION 21, 24-25 (Duc V. Trang ed., 1994) (asserting that corruption may be efficient, depending on the circumstances). It is nevertheless only a second-best solution; Susan Rose-Ackerman, Corruption and Democracy, 90 AM. SOC'Y INT'L L. PROC. 83, 84 (1996); Karel Vasak, Pour une Troisième Génération des Droits de l'Homme, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES 840 (Christophe Swinarski ed., 1984) (discussing the right to development in the context of respect for basic human rights and the preservation of peace); Sohn, supra note 155, at 48 (discussing the right to self-determination).

This is so, although not all environmental degradation necessarily involves a violation of human rights. See, e.g., Dinah Shelton, Human Rights, Environmental Rights, and the Right to Environment, 28 STAN. J. INT'L L. 103, 105 (1991); see also Martin Wagner, The International Legal Rights of Indigenous Peoples Affected by Natural Resource Exploitation: A Brief Case Study, 24 HASTINGS INT'L & COMP. L. REV. 491, 494 (2001) (discussing the U.N. Special Rapporteur's 1994 report on Human Rights and the Environment). The right to life is a civil and political right described in the ICCPR, and the rights to health and property are found, inter alia, in the International Covenant on Economic, Social and Cultural Rights [hereinafter ICESCR]. See ICESCR, Dec. 16, 1966, 93 U.N.T.S. 3, reprinted in 6 I.L.M. 360 (entered into force Jan. 3, 1976); id. art. 12, at 8 (covering the right to health). The United States still has not ratified this treaty, although the Senate has had it to consider since 1978. See, e.g., John C. Yoo, Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements, 99 MICH. L. REV. 757, 808 n.196 (2001) (discussing the submission of the ICESCR to the United States Senate). By the end of the twentieth century, three quarters of all nations had ratified the ICESCR. See Hom & Yamamoto, supra note 158, at 1789 n.194.
[FN161]. ICCPR, supra note 155, arts. 6(1), 6(7), at 174-75 (declaring the rights to life and bodily integrity, respectively).


[FN163]. Maria Recio & Jennifer Autrey, Enron's Huge India Project was in Constant Political Turmoil, FT. WORTH STAR-TELEGRAM, Mar. 24, 2002 ("Despite critical reports by Amnesty International and Human Rights Watch, Enron's activities in India have only recently received U.S. attention."), LEXIS, News Library, Major Newspapers File. Even in early August 2002, the United States media referred only to Enron's corruption abroad, not to its hiring thugs in India. Wilke, supra note 65.

[FN164]. The well-respected, semi-strong version of the efficient capital markets hypothesis claims that available information, including that relating to the accounting violations and human rights abuses, would have been impounded in Enron's stock price. Clearly, that was not true with respect to the accounting irregularities: the information had been substantially available to the public, but the price plunged when the media concentrated on the abuses. See Accounting Firm Fires Lead Enron Auditor; Arthur Andersen Says Partner Ordered Rushed Disposal' of Documents, SEATTLE POST-INTELLIGENCER, Jan. 16, 2002, 2002 WL 5926453; see also supra note 64 and accompanying text. After the media began the discussion of Sherron Watkins' letter, Enron's stock was delisted by the New York Stock Exchange. Its stock started to trade in the over-the-counter market, and the price plunged from $90 in August 2000 to around 60 cents in January 2002. Id. Enron's stock price was inflated because, inter alia, Enron had used sales of its own stock as a source of revenues, which is completely unacceptable under GAAP. See, e.g., Bratton, supra note 1, at 1317.

[FN165]. See supra Part II.A.1.a (discussing that California consumers did not rise up before the meltdown, even though there was talk of manipulation). Despite the HUMAN RIGHTS WATCH REPORT, and a book available in the United States written by an activist in India, the American press has been largely silent on these abuses. See HUMAN RIGHTS WATCH, supra note 66; ABHAY MEHTA, POWER PLAY: A STUDY OF THE ENRON PROJECT 193-96 (1999).

[FN166]. Claire Moore Dickerson, Transnational Codes of Conduct Through Dialogue; Leveling the Playing Field for Developing Country Workers, 53 FLA. L. REV. 611, 613 (2001) [hereinafter Dickerson, Transnational Codes]. This does not mean that investors are unable to apply constraints. The Sullivan Principles were based on the assumption that the Rev. Leon Sullivan would be able to convince investors to shun corporations that did not comply with the principles. Sullivan ultimately gave up on the premise. In any event, his effort was more similar to the pressure exerted by consumers against Nike or Wal-Mart, than to the classic securities market: the latter are expected to be self-executing, while the Nike, Wal-Mart, and Sullivan enterprises were triggered, or at least sustained, by norm entrepreneurs. See id. at 650, 652-53 (noting that the Apparel Industry Partnership promulgated its code voluntarily, but only after considerable "jaw-boning" by then-President Clinton); see also Susan Schereik, A Conscience Doesn't Have to Make You Poor, BUS. WEEK, May 1, 2000, at 208 (interviewing Amy Domini, who stated that the boycotts of Nike occurred as a result of investors' concern for sweatshops); Manufacturing: Clinton Endorses Plan to Curb Sweatshops Through Using Code of Conduct, Monitoring, 72 DLR AA-1 (April 15, 1997) (noting that significant members of the apparel industry formed the Apparel Industry Partnership in 1996). Of course, adoption of the codes does not necessarily mean enthusiastic implementation.


[FN168]. While Enron did have a significant, negative impact on consumers in the United States,
the electricity that Enron traded away from Californian markets, for example, was not easily associated with the Enron trademark in the understanding of consumers. Thus, consumers were highly unlikely to mount the kind of boycott of which Nike has been a regular target. See Royalty-In-Kind Federal Oil and Gas Production: Hearing Before the Subcomm. on Energy and Natural Resources of the House Comm. on Resources, 105th Cong. (1997) (statement of Edward P. Segner III, Executive Vice President & Chief of Staff, Enron Corp., that a commodity such as gas has become fungible product), 1997 WL 11235478; David L. Huard, Impact of the Enron Bankruptcy on Governmental Entities in California and Considerations for the Future, 18 ANDREWS CORP. OFF. & DIRECTORS LIAB. LITIG. REP. 35 (2002) (stating that Enron "had 58,000 residential customers, 14,000 small-business owners, and 9,500 large commercial and industrial customers in California, ... controlled significant amounts of natural gas and electric commodities for sale in the state, ... [and] controlled the major trading platform on which such commodities were bought and sold wholesale."); Christopher Reed, Nike Chief Run to Ground, THE AGE, Apr. 21, 1997 (noting that in 1992, an American consumer group first boycotted Nike), 1997 WL 20930553.

[FN169] Howard Fine, Enron Customers Fear Return to High Energy Bills, L.A. BUS. J., Jan. 21, 2002 at 5, 2002 WL 11231685 (reporting that in the months leading up to Enron's bankruptcy, the Enron retail customers' rates were stable, while those of other utilities had doubled). Contrast the experience of Nike or Wal-Mart, or of the major distributors of pharmaceutical products. For instance, this may be an example of pharmaceutical companies being hoist by their own petard as a result of spending vast amounts of money on advertisement. See Medication Nation, ST. LOUIS POST-DISPATCH, July 23, 2001, at C18 (reporting that "a recent survey ... found large pharmaceutical companies spend substantially more on advertising ... than they do on research and development."). 2001 WL 4473346. As a result of spending so much capital on advertisement, these companies have raised the consumers' awareness of their products. By increasing their salience, they have increased the likelihood that consumers will raise issues concerning their business practices. Claire Moore Dickerson, From Behind the Looking Glass: Good Faith, Fiduciary Duty & Permitted Harm, 22 FLA. ST. U. L. REV. 955, 1019-20 (1995) (arguing that consumers are the last participants in ensuring corporate responsibility).


[FN172] See HUMAN RIGHTS WATCH, supra note 66, at part VIII (highlighting the apparent refusal of Ex-Im Bank and the State Department to effectively complete their determination of the human rights impact that Enron's transactions had on the Indian people, in violation of the Bank's own policy manual). To fully appreciate the US government's dubious position concerning Enron's project in India, it is important to note that one of the allegations against Enron's management is that it conducted bribery of Indian officials. This would be a violation of FCPA (a U.S. statute) and the OECD Anti-Bribery Convention (ratified and implemented by the U.S.).

[FN173] See id. at part II.B (citing U.S. and Indian governmental involvement and acquiescence in Enron's activities).


[FN176]. See OECD, Anti-Bribery Convention, supra note 156 (illustrating the U.S. government and OECD's concern over international corruption's cost to legitimate business enterprises).


[FN178]. Dickerson, Transnational Codes, supra note 166, at 653-55 (OECD Anti-Bribery Convention is the U.S.'s narrowly self-interested response to the FCPA).

[FN179]. See generally Dickerson, Emerging Norm, supra note 167, at 1439-41 (arguing that corporations are developing a greater sensibility towards having responsibility to its shareholders and greater awareness of a collectivized respect for human rights as indicated by the pharmaceutical companies selling HIV/AIDS treatment drugs at reduced prices to South Africa).

[FN180]. See, e.g., Rachel L. Swarns, Fight Ends in S. Africa Over Cheaper AIDS Drugs, SAN DIEGO UNION-TRIBUNE, Apr. 20, 2001 at A1 (reporting that the pharmaceutical corporations capitulated to their domestic and international pressure forcing them to sell their HIV/AIDS treatment to South Africa at reduced prices and allowing generic drugs to compete as well), 2001 WL 6455238.

[FN181]. See Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (holding that deliberate torture perpetrated under color of official authority violates universally accepted norms of international law).

[FN182]. See, e.g, PHILLIP E. AREEDA ET AL., 2 ANTITRUST LAW, AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 405(b), at 27 (1995) (explaining that cartels are unstable because the members' incentive to cheat is inherent in the structure); see also Eleanor M. Fox, The End of Antitrust Isolationism: The Vision of One World, 1992 U. CHI. LEGAL F. 221, 235 (calling for national governments to enforce their anti-cartel rules in order to avoid increasing a cartel's externalities).

[FN183]. If this occurs at all, it is more likely that the European Union rather than the United States will pull the trigger to enforce human rights, because the former has the more stringent human rights regime. See, e.g., Pall A Davidsson, Note, Legal Enforcement of Corporate Social Responsibility within the E.U., 8 COLUM. J. EUR. L. 529, 530 (2002) (asserting that the E.U. considers that economic efficiency and human rights are necessary to each other).

[FN184]. The South African law purported to authorize domestic manufacture of generics, in direct competition with the multinationals' products. See Swarns, supra note 180.

[FN185]. See Dickerson, Transnational Codes, supra note 166 (arguing for the recognition and enforcement of international human and labor rights under a supranational organization).