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The New Social Contracts in International Supply Chains

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THE NEW SOCIAL CONTRACTS IN INTERNATIONAL SUPPLY CHAINS

DAVID V. SNYDER*

This Article considers, from legal, practical, moral, and policy perspectives, Model Contract Clauses (MCCs) to protect the human rights of workers in international supply chains. The product of the ABA Business Law Section Working Group to Draft Human Rights Protections in International Supply Contracts, the MCCs are an effort to provide companies with carefully researched and well-drafted clauses to incorporate human rights policies into supply contracts (purchase orders, master vendor agreements, and the like). The Article discusses the impetus, goals, and strategies of the MCCs and explains the paradigm of the corporate, operational, and political landscape for which they are designed, including the seeming lack of emphasis on worker health and safety. An overview of some of the doctrinal issues and solutions is provided, emphasizing the objective

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of the MCCs to be legally effective and operationally likely. On a more theoretical note, it is argued that international supply chain contracts that attend to moral issues like the human rights, health, and safety of workers are a new kind of social contract, supplementing but not supplanting more classical notions of the social contract, with which they share some characteristics. In particular, the moral nature of these supply chain agreements is likened to the normative goals of the social contract, but these new social contracts necessarily move in more contemporary directions because they are typically constituted by multinational enterprises—corporations quite different from the individuals and states conceived by the classical theorists. In addition, supply contracts, and the supply chains that they constitute, cross state lines and geographic boundaries, reaching past the nation-state. After arguing that companies have a moral duty to the workers in their supply chains, the Article suggests that companies should protect them through voluntary contractual undertakings such as those in the MCCs. The place of public regulation is considered as well, including the possibility of Good Samaritan-style protection for companies that take ameliorative steps. Finally, the role of experimentalist governance in a possible new version of the MCCs is considered briefly.

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The common law has traditionally eschewed theory and the statement of broad principle, but this does not mean that its instinct for the possible and the practical cannot be justified in terms of principle.¹

—Alexander McCall Smith

INTRODUCTION

This contribution offers an academic consideration of the Model Contract Clauses (MCCs) published by the ABA Business Law Section Working Group to Draft Human Rights Protections in International Supply Contracts (the “Working Group”).² The Article takes on several different tasks. It explains the impetus, goals, and strategies behind the MCCs and the basic paradigm for which they were designed. It also suggests that international supply chain contracts that attend to the human rights, health, and safety of workers are a new kind of social contract. On a related note, the Article argues that companies bear a moral responsibility to the workers in their supply chains, and that the companies can fulfill that responsibility, in part, through appropriate supply contracts. In short, supply contracts that transform moral duties into legal ones in a globalized, extraterritorial economic world

1. Alexander McCall Smith, *The Duty to Rescue and the Common Law*, in *THE DUTY TO RESCUE: THE JURISPRUDENCE OF AID* 55, 56 (Michael A. Menlow & Alexander McCall Smith eds., 1993). Professor McCall Smith is nowadays famous as a novelist, but for many years he was a distinguished law professor.

2. David V. Snyder & Susan A. Maslow, *Human Rights Protections in International Supply Chains—Protecting Workers and Managing Company Risk: 2018 Report and Model Contract Clauses from the Working Group to Draft Human Rights Protections in International Supply Contracts*, 73 *BUS. LAW.* 1093 (2018) [hereinafter *Model Contract Clauses*].

are a new kind of social contract. The legal and policy implications of these arguments are also considered.

This newer social contract provides a necessary supplement to the social contract conceived by the Enlightenment thinkers and their classical predecessors.³ Through the lens of social contract theory, we can see how the privately ordered, contractual structure of a large, complex, and far-reaching supply chain, often involving thousands of people directly or indirectly, takes on the kind of organizational functions of a social contract in order to achieve mutually beneficial cooperative relationships. At the same time, this lens brings into focus some of the moral aspects of contracting, illuminating central and ancient ideas about law and its functions and goals, obligations with their implications and imperfections, and lawyers with their multiple duties and hopes.

Frequently this lawyerly work is technical and obscure, but sometimes, tragically, it blares from the front page. At least since the sweatshop scandals of the 1990s, the problem has flared into Western consciousness every few years, sometimes because of human trafficking, modern slavery, or child labor, and more recently because of catastrophic factory fires and building collapses. Many recall when Tazreen Fashions, a garment factory in Dhaka, Bangladesh, caught fire and killed 112 people, with many more seriously injured. The factory had employed about 1500 workers and produced clothes for retailers such as Walmart and Sears. The building had been found in violation of safety standards, including fire exits.⁴ A few months later, another

3. It is also a different kind of “new social contract” than that expounded by Ian Macneil in his relational theory of contract, see *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACT RELATIONS* xii (1980), and certainly not the same as the “National Bargain” of Robert Reich, see *THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM*, ch. 5 (1991), or Jill Esbenshade’s “social contract” whereby “working-class brothers and sisters” commit “to contain their struggle” while employers “commit[] to share their rising profits” and the government “commit[s] to regulate and mediate the relationship and to provide a crucial safety net,” see *MONITORING SWEATSHOPS: WORKERS, CONSUMERS, AND THE GLOBAL APPAREL INDUSTRY* 13 (2004) (citing REICH).

4. See, e.g., Steve Henn, *Factory Audits and Safety Don’t Always Go Hand in Hand*, NPR (May 1, 2013, 10:26 AM), <http://www.npr.org/2013/05/01/180103898/foreign-factory-audits-profitable-but-flawed-business>; Matt Stiles, *Documents: Wal-Mart Auditors Inspect Bangladesh Factory, Find Safety Flaws*, NPR (Apr. 30, 2013, 6:48 PM), <http://www.npr.org/2013/04/30/180123158/documents-wal-mart-auditors-inspect-bangladeshi-factory-find-safety-flaws>. The effectiveness of monitoring and audit schemes is beyond the scope of this Article, but those issues are certainly relevant. For a perspective on the issue, consider ESBENSHADE, *supra* note 3, including the literature review in chapter 6. For another, more recent, perspective, see RICHARD M. LOCKE,

Dhaka factory collapsed, resulting in the deaths of 1129 people. The collapse occurred just one day after inspection teams had discovered structural flaws in the building. Some businesses in the building had closed because of the unsafe conditions, but others ordered their employees to work, where they were crushed to death.⁵ There have been many other disasters, not only in Bangladesh, killing and maiming workers.⁶ There will be more.

This project is motivated by two crucial ideas: horrifying things happen in international supply chains too often, and lawyers want—and are able—to help. Business lawyers, because they are close to the companies and contracts that animate the supply chain, are uniquely positioned to achieve progress.⁷ The MCCs are designed to help lawyers in this work—the technical aspects of which are unusually difficult—and to provide a clear value proposition to companies to persuade them to adopt ameliorative policies. The goal is to implement policies that are legally effective and operationally likely to protect the human rights of workers.

The MCCs are simultaneously ambitious and modest. Their ambition is to have a real effect for real people. The basis for this hope is the ability of contracts to allow planning, promising, verification, and remediation. The customary place of contracts in the legal and business worlds grounds this hope: contracts are taken seriously; they are used in management, operations, and manufacturing as well as in the legal world; and their function and efficacy in the legal world gives them more force elsewhere.

At the same time, the MCCs are purely legal: they are legalese. Most importantly, they do not take on the substantive obligations that are of the most interest. For example, they do not say how old workers need to be (at what age is child labor objectionable?), how many fire exits are required, or from where materials must be sourced. This minimalist strategy is purposeful though controversial. Primarily, it is practical. Standards will necessarily vary by industry. Apparel manufacturers will care about cotton sourcing, while electronics companies will have no interest in cotton. Just as importantly, wide consensus has so far proved

THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY 35–39 (2013).

5. Julfikar Ali Manik & Jim Yardley, *Building Collapse in Bangladesh Leaves Scores Dead*, N.Y. TIMES (Apr. 24, 2013), <http://www.nytimes.com/2013/04/25/world/asia/bangladesh-building-collapse.html>.

6. See *infra* note 36 and accompanying text.

7. See generally E. Christopher Johnson, Jr., *Business Lawyers Are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor*, 70 BUS. LAW. 1083 (2015) (noting that business lawyers can help their clients identify supply chain risks).

impossible.⁸ But particular parties, or even industries, can reach some agreement. These clauses increase the probability that such an agreement will be legally binding and operationally likely. That is the primary goal.

Much work has been done already, and it has been crucial, groundbreaking work. The UN Guiding Principles are perhaps best known,⁹ and they have shown a way forward. There are many other efforts, including other principles and policies¹⁰ as well as legislative and regulatory attempts primarily aimed at human trafficking and conflict minerals.¹¹ These efforts involve not only countless trade-offs, but

8. Child labor is illustrative. At what age is labor objectionable? Many children work; many parents and societies view this work as important to the moral and social formation of children. Work by very young children who should be in school may be highly objectionable; a seventeen-year-old child who works on the family farm during the summer when school is not in session may not be objectionable. Where lines are to be drawn, and who should draw them, is the subject of considerable debate, even within the United States. See, e.g., Andrew Van Dam, *452 Children Died on the Job in the U.S. Between 2003 and 2016*, WASH. POST (Dec. 20, 2018), <https://www.washingtonpost.com/business/2018/12/20/child-labor-deaths-us-twenty-first-century/> (“Child labor exists in the United States in the 21st century. It’s legal and widespread . . .”). The variation is likely much wider internationally.

9. U.N. Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. HR/PUB/11/04 (Mar. 21, 2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. For recent guidance on how companies can use them, with particular emphasis on the guidance documents from the International Bar Association, see John F. Sherman, III, *Wise Counselling on Global Supply Chains: The IBA Practical Guide on Business and Human Rights for Business Lawyers*, BUS. & HUM. RTS. REV. 22 (2017). Business and human rights is an entire field of study, and no effort is made here to review or cite even the leading literature in the field. These notes simply highlight some of the key contributions, like the U.N. Guiding Principles, and a few articles discussing them. The cited sources should help lead interested readers into the vastness of the literature.

10. See, e.g., *ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor*, ABA (Jan. 9, 2019), http://www.americanbar.org/groups/business_law/initiatives_awards/child_labor. See generally Johnson, *supra* note 7.

11. Consider, for example, Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), Pub. L. No. 114-125, 130 Stat. 122 (2016); Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101–7112 (2012); see also 18 U.S.C. §§ 1589–1591 (2012); Trafficking Victims Protection Reauthorization Act of 2013 (TVPPRA) (Title XII of the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013)); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), § 1502 (conflict minerals); California’s Transparency in Supply Chain Act of 2012 (TSCA), CAL. CIV. CODE § 1714.43 (2012); FAR §§ 52.222-50–59 (2017); Modern Slavery Act 2015, c. 30 (UK); the French Corporate Duty of Vigilance Law, Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre [Law 2017-399 of March 27, 2017

they are riven by a complex of geopolitical and economic interests that can hamper their effectiveness. For these reasons, many of the legislative solutions are narrowly limited, and the NGO and soft law projects that publish principles for companies to follow not only face similar pressures to compromise but are often hortatory, aspirational, or vague. Between the work of the United Nations (UN), quangos, nongovernmental organizations (NGOs), legislatures, and regulators, the rules and tools can seem bewildering, if not overwhelming, at least to an outsider.¹²

Some of the most direct and effective intervention can come from companies themselves, particularly the Western buyers at the top of the supply chain. They see this, and their energies have been extensive and generally fall into one or more of three categories. Most prominent has been the adoption of policies, perhaps based on the UN Guiding Principles or one of the other projects, that the company posts on its website. These policies are sometimes aspirational and sometimes reflect a corporate commitment; the distinction, of course, can be legally decisive.¹³ Sometimes the commitment extends to requiring suppliers and others in the supply chain to agree to adhere to the corporate “code of conduct” or “ethical business practices.”¹⁴ Often such agreements may be legally required, as when the buyer is

on the duty of vigilance of parent companies and contractors], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], Mar. 28, 2017; Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 1. For more on European and Australian efforts, see generally Davide Casale, *Joint Responsibility of Enterprises for the Health and Safety of Their Contractors' Workers: Recent Trends in Italian Law*, 36 COMP. LAB. L. & POL'Y J. 131 (2014); Paul Harpur & Philip James, *The Shift in Regulatory Focus from Employment to Work Relationships: Critiquing Reforms to Australian and U.K. Occupational Safety and Health Laws*, 36 COMP. LAB. L. & POL'Y J. 111 (2014); Claudia Schubert, *The Case of AFOA v. Port of Seattle: A German Point of View*, 36 COMP. LAB. L. & POL'Y J. 149 (2014); Louise Vytopil, *Contractual Control and Labour-Related CSR Norms in the Supply Chain: Dutch Best Practices*, 8 UTRECHT L. REV. 155 (2012).

12. For a collection, see Radu Mares, *The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments*, 79 NORDIC J. INT'L L. 193 (2010), but the list is not complete. One additional entry, for example, from Amnesty International, is the *Human Rights Principles for Companies*, ACT 70/01/98 (1998), <https://www.amnesty.org/download/Documents/148000/act700011998en.pdf>.

13. Order Denying Defendant's Motion to Dismiss, Nat'l Consumers League v. Wal-Mart Stores, Inc., No. 2015 CA 007731 B, 2016 WL 4080541, at 11 (D.C. Super. Ct. July 22, 2016) (qualifying language such as “expect,” “goal,” and “ask” shows an aspiration rather than a promise or commitment).

14. See *id.* at 2–4, 11; see also *Vendor Code of Conduct*, ABERCROMBIE & FITCH, <http://corporate.abercrombie.com/af-cares/sustainability/social/vendor-code-of-conduct>.

subject to the Federal Acquisition Regulation.¹⁵ And sometimes the commitment involves a complex of other parties, as where a Western buyer joins a standard-setting organization (like the Fair Labor Association or the Worker Rights Consortium) and requires its suppliers (so-called “first tier suppliers” or colloquially “first-tiers”) and their suppliers and subcontractors to join the same organization. Membership in the organization entails a commitment to abide by the organization’s principles (e.g., to protect worker health and safety and to guard against forced labor) and an agreement to be audited by that organization or its agents.¹⁶ But these details can await further development below.

The point for now is more basic. Behind the MCCs are two stories, a seemingly straightforward effort and a wishfully simple hope. One story is notorious: the tragically repeated human catastrophes that haunt international supply chains. The other story is technocratic, revolving around bar association activities and corporate organization. The MCCs that resulted from all of this are an effort to prevent more human loss, to exercise corporate power in a morally conscious way, and to be as hardheaded and as practical as any good business lawyer.

A critical part of practicality is an eye to what it takes to get a deal closed. Sometimes closing a deal means skipping the hard part. Such a move is risky, but neither businesses nor business lawyers can live in a world without risk. A term sheet for a business deal will leave much for later development and negotiation; the same is true for letters of intent and the like. Complex business arrangements cannot close every hole or forecast every possibility. All contracts are necessarily incomplete.¹⁷ Closing a deal will sometimes mean leaving more holes, or larger ones, than either party desires. But agreement beforehand may be too difficult, too costly, or even impossible, and sometimes parties prefer to leave the hole and close the deal.

15. FAR §§ 52.222-50–59. See generally Lyndsey Conrad et al., *Mandated Corporate Responsibility for Human Trafficking: New Federal Acquisition Regulation Steps up Supply Chain Accountability*, 60 ST. LOUIS U. L.J. 73, 73–74, 87 (2015). According to some assessments, the codes of conduct are ineffective, or at least insufficiently effective, rendering the companies that adopt them out of compliance with public law mandates. See Debra Cohen Maryanov, Comment, *Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain*, 14 LEWIS & CLARK L. REV. 397 (2010).

16. See generally MARTIN DAVIES & DAVID V. SNYDER, INTERNATIONAL TRANSACTIONS IN GOODS: GLOBAL SALES IN COMPARATIVE CONTEXT 236–43 (2014).

17. E.g., Richard R.W. Brooks, *The Efficient Performance Hypothesis*, 116 YALE L.J. 568, 587 n.43 (2006) (“[C]ontracts are necessarily incomplete, even when written by sophisticated parties.”).

That has been part of the strategy of the MCCs, and there are two obvious roads that have not (yet) been taken. Most obviously, as mentioned earlier, the MCCs do not set the human rights standards that will apply to suppliers. Similarly, they do not set standards for buyers (even though many would argue that buyers' demands for low cost and quick production are a significant cause of the problems). The reasons have been sketched already and will receive fuller attention below. In short, the MCCs do not attempt to solve all of the problems in supply chains; their aim is simply to be part of a necessarily multifaceted solution.

Less obviously and perhaps more interestingly, the MCCs do not seek to set up an elaborate structure of governance for the supply chain relationship. Such structures have generated serious interest from political scientists and political theorists, and practically speaking, they may be the most promising road to greater success in making improvements on the ground. Such efforts are much more ambitious than the current version of the MCCs, but if there were to be an effort for Model Contract Clauses 2.0, this road deserves further exploration. These issues receive more attention below.¹⁸

I. THE PROBLEMS TO BE ADDRESSED BY THE MODEL CONTRACT CLAUSES

Identifying the problems to be addressed is often a productive starting point. There are several, and they will be described shortly. Since the MCCs were drafted with a lawyerly, problem-solving, fact-based attitude, sketching a paradigmatic supply chain setup will be a useful first step. Then the problems can be more easily identified, separated, and understood.

A. *A Supply Chain Paradigm for Human Rights Protections*

This paradigm is simplified and stylized, as paradigms necessarily are. It is based on some research¹⁹ and some experience, but I cannot

18. See *infra* Section III.B.

19. Perhaps the leading study on protecting workers in international supply chains is by LOCKE, *supra* note 4. Numerous other works are cited elsewhere in this Article. Information can also be gathered from case studies such as Christopher A. Bartlett et al., *IKEA's Global Sourcing Challenge: Indian Rugs and Child Labor (B)*, HARV. BUS. SCH., No. 9-906-415 (rev. Nov. 14, 2006); Dana Brown & Jette Steen Knudsen, *Trip Trap: Managing Certification in the Global Supply Chain*, RICHARD IVEY SCH. OF BUS. FOUND., No. W14528 (Oct. 24, 2014); Monali Malvankar, *Nokia India: Battery Recall Logistics*, RICHARD IVEY SCH. OF BUS. FOUND., No. W11082 (May 4, 2011). But these are only tastes: the management and study of supply chains is its own discipline—universities offer degrees in the subject—and this Article cannot attempt a canvas of the literature.

claim that it is an empirically based model, which would have to be the subject of a different paper. If empirical investigation reveals significantly different paradigms, then some of the thinking may need to be revisited. In essence, the purpose of this section is to explain the assumptions so that as assumptions are questioned, relaxed or expanded, the strategies and arguments can be refined or revised.

Here, then, is the paradigm. Western Company²⁰ sells goods in consumer markets in the developed world, primarily in the United States but also in Europe and elsewhere. Western Company is large and well known, and its brand is valuable. Western Company is organized so that it has a purchasing department, an operations department, a product development department, and a marketing department. These are the business departments. It also has a general counsel's office; an office devoted to social responsibility (CSR office),²¹ which may have titles and responsibilities related to environmental sustainability, diversity, ethics, and the like; as well as other departments. Contracts, compliance, and legal policies are the province of the general counsel's office. The contracts are drafted and reviewed by the general counsel's office. The business departments develop products, decide production and marketing timeframes, acceptable costs of production and sales, and they consider who can make the products. Much of the contract negotiation is done by the business departments, often without much involvement from the general counsel's office, which will only be involved in large negotiations and which will briefly review the resulting contract for compliance with the law and company policies. Those policies may be

Aside from the many works of Locke, interested readers will find that Dara O'Rourke and Abraham Ringer, *infra* note 26, as well as GARY GEREFFI (most recently his GLOBAL VALUE CHAINS AND DEVELOPMENT: REDEFINING THE CONTOURS OF 21ST CENTURY CAPITALISM (2018)) offer entry into the literature. Readers interested in more theoretical considerations might start with IGLP Law & Global Production Working Group, *The Role of Law in Global Value Chains: A Research Manifesto*, 4 LONDON REV. INT'L L. 57 (2016) [hereinafter *Manifesto*]; Klaas Hendrik Eller, *Private Governance of Global Value Chains from Within: Lessons from and for Transnational Law*, 8 TRANSNAT'L LEGAL THEORY 296 (2017), <http://dx.doi.org/10.1080/20414005.2017.1307310>. Both offer citations to recent literature and the former also surveys current research projects.

20. This name is chosen because it is descriptive. The hypothetical company in the paradigm has no relation to The Western Company, a western-wear retailer in Denver, or to any other real company. Some literature might prefer to call it the Northern Company (as opposed to the workers in the Global South—not to be confused with the southern United States).

21. I will call it the CSR office, although that is an unlikely name for it.

related to labor practices, anticorruption, transparency, quality control, product reliability, and the like. The CSR office may be involved in assuring that the chosen contracting counterparty will comply with, and does not raise any red flags with respect to, Western Company's policies on responsible business practices.

The counterparty in the contract that Western Company signs is First Tier Supplier (FTS). FTS may make some components of Western Company products itself, but subcontractors of FTS will perform much if not all of the manufacturing. At a minimum, then, the supply chain will consist of Western Company at the top, FTS in the middle, and subcontractors at the bottom. Quite possibly there will be more layers, but this description will suffice for the paradigm. To engage FTS, Western Company will sometimes use an agent or broker.²² Sometimes, though, an FTS will itself function like an agent or broker. In these situations the primary job for FTS is to find others to do the work. FTS in such cases, in purely economic terms, may simply take a cut, i.e., a percentage of the sales, although the formal legal and accounting arrangements may call for a sale from subcontractors to FTS and a further sale by FTS to Western Company. Much if not all of the manufacturing will take place in developing countries distantly removed from the principal place of business and primary markets of Western Company.

Once the contract is signed, there are two salient pressures for the purposes of this Article: keeping costs low and production fast. The consumer market moves quickly, not only in the most obvious industries like fashion, which is characterized by its constantly changing styles, but in other industries like sporting goods and electronics. Partly these pressures are tied to fashions (even outside the fashion industry) and changing consumer tastes and demands, but much of it is purposeful revenue generation: increasing revenue requires increasing sales, and increasing sales is aided by introducing new products to sell. Put simply, a smartphone company is anxious for everyone to want a new model as soon as possible, even if the smartphone everyone has works perfectly well. And most obviously, lowering costs of production increases profits, and lowering labor costs is a key component of this strategy. The pressure on the supply chain that comes from cost control is obvious. What may be less apparent, but also important, are the problems that come from time pressure. Bringing new products to

22. See, e.g., *Filanto S.p.A. v. Chlewich Int'l Corp.*, 789 F. Supp. 1229, 1230 (S.D.N.Y. 1992) (involving a contract between a New York firm and an Italian manufacturer secured through the firm's foreign agent in the United Kingdom).

market quickly can easily lead to excessive work hours, exploitation of transient workers, or cheating on supply chain commitments.²³

Operational aspects of the paradigm are also relevant. There are workers on the factory floor. They will receive instructions either orally or in writing from a supervisor. They need to be told, in other words, what to do: what to sew and how many; how many containers to fill and of what sizes; in short, how to fulfill the contract for the production of goods. The supervisors will receive this information in writing (electronically or perhaps on paper) to pass along to the workers. The supervisors will also need this information to manage scheduling, production timing, quality control, and countless other manufacturing tasks. In the paradigm, much of this information appears not in the main body of the contract—the legalese—but in a schedule attached to a contract, or a purchase order issued under a master agreement—for example, a master vendor agreement—or the like. Operations personnel will not be looking at representations, warranties, and merger clauses; they will be looking at a schedule or appendix that is only referred to in the legalese. Other operationally important matters are also stated elsewhere, like the steps that Western Company expects FTS and subcontractors to take to protect Western Company's intellectual property. These schedules or appendixes or purchase orders, in short, tell the production staff at FTS or its subcontractors what to do, perhaps how to do it, and also what will be checked or monitored or audited (e.g., the production run will be monitored for quantity and quality; IP safeguards may be checked or audited; and so on).

Moving away from operations and back to corporate headquarters, the paradigm includes the realities of corporate politics. For the most part, the company is managed from the C Suite, senior or executive vice presidents for operations, for marketing, and so on, and is run by the people who report directly to the people in the C Suite offices. The general counsel sits in the C Suite but does not have quite as much to do with the core business of the company—developing products, producing them, selling them. Nevertheless, the general counsel and the CEO sit on the board of directors or are at least present at the board meetings.

The chief officer in charge of CSR, like the general counsel, may have a hand in various operational aspects of the company, particularly relating to labor, due diligence, reporting, and marketing. Like the general counsel, the CSR chief is a bit of an afterthought for the business people—not in the literal sense of being sought out afterwards,

23. See LOCKE, *supra* note 4, ch. 6.

although that is often true with respect to the general counsel—but is viewed as an extra step in the process. CSR is a supernumerary department or an extra person who must be permitted on the team.

The overall performance of the company and the executive officers are overseen by the board, and large matters of policy are the province of the board. The board does little or nothing that is not at the behest of the CEO, however. The board may adopt a policy, for instance, but it may or may not be put into everyday practice. What happens in the operations of the company is up to management, not the board.

In this paradigm there is another set of players: NGOs who will mount an outcry and advocate for negative consequences for Western Company if it misbehaves. The NGOs will do a bit of monitoring and will “name and shame” companies for misbehavior; they may also try to help companies build new capabilities for protecting workers. The NGO outcry will be at its most strident not when monitoring reveals lapses but when something terrible happens. The NGOs will also launch lawsuits against offending companies²⁴ and will seek negative publicity against them. The NGOs will also advocate for Western Company to adopt different practices and will issue reports on which companies follow preferred policies, which do not, and which companies are the best and worst.²⁵ The preferred policies will vary depending on the NGO.

The paradigm just described underlies the thinking in this Article, but there are variations. In some, the link to the consumer market may be weak, invisible, or nonexistent. This will have several implications. First, there is not likely to be nearly the same level of consumer consternation and market effect if there turn out to be problems with, say, the steel production for oceangoing cargo vessels, or the manufacturing of rail presses used by heavy-truck manufacturers, and so on. Similarly, the NGOs may have trouble gaining as much traction in their efforts, and either for that reason or others may have less interest in devoting energy and money into monitoring, reporting, and

24. *E.g.*, Order Denying Defendant’s Motion to Dismiss, Nat’l Consumers League v. Wal-Mart Stores, Inc., No. 2015 CA 007731 B, 2016 WL 4080541 (D.C. Super. Ct. July 22, 2016).

25. For further information on the empirical and theoretical bases for the part of the paradigm described in this paragraph, see generally THE POLITICS OF LEVERAGE IN INTERNATIONAL RELATIONS: NAME, SHAME, AND SANCTION 32-102 (H. Richard Friman ed., 2015), particularly the chapters on *Revisiting Human Rights Naming and Shaming*. See *e.g.*, ESBENSHADE, *supra* note 3, at 10–12, 52–58 (on the role of civil society and NGOs in monitoring sweatshops and exerting pressure); LOCKE, *supra* note 4, ch. 4; Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT’L ORG. 689 (2008).

the like. Also, whatever effect consumer demand has on the production of untainted goods may play differently in the market for rail presses than in the market for chocolate.²⁶

Regardless of the variation in the paradigm—whether it involves a consumer market or not—one assumption made here is that the leadership of Western Company wants to “do the right thing.” Operating in the real world as it does, Western Company faces constraints on achieving the ideal. The executives know that they will not reach the ideal and that their version of the “right thing” might differ from the NGOs’. But they would like to do their best, and they are willing to incur costs to do so, with the understanding that their best also includes considering the financial health of the company, which means taking into account revenues and time-to-market measures, costs, profits, shareholders, domestic employees, and others. It also means taking into account the reputation of the company, which—particularly in the consumer-market version of the paradigm—aligns with their desire to do the right thing.

This alignment is not perfect: protecting the reputation of the company, keeping it compliant with a variety of laws and regulations that apply differently and variously around Western’s global operations, and doing the right thing will induce a number of the decisionmakers to assign these tasks to particular departments, the key one of which is the CSR department, and another one of which is the general counsel’s office. This division of labor allows some executives

26. The wording here is deliberate. There is some indication that consumer demand for untainted goods will help clean up supply chains. See, e.g., Laura Enax et al., *Effects of Social Sustainability Signaling on Neural Valuation Signals and Taste-Experience of Food Products*, 9 FRONTIERS IN BEHAV. NEUROSCIENCE 1 (2015), <https://www.frontiersin.org/articles/10.3389/fnbeh.2015.00247/full> (chocolate experiment); Jens Hainmueller et al., *Consumer Demand for Fair Trade: Evidence from a Multistore Field Experiment*, 97 REV. ECON. & STAT. 242 (2015) (coffee experiment); Howard Kimeldorf et al., *Consumers with a Conscience: Will They Pay More?*, 5 CONTEXTS 24 (2006) (sock study). Even these cautiously optimistic studies, however, report results that must be qualified by limits on how much more consumers are willing to spend and particularly by consumers’ limited capacity to take in information, as was made clear by the sock study. See Kimeldorf et al., *supra*, at 26–28. Other studies are even less optimistic. Adam S. Chilton & Galit A. Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 STAN. J. INT’L L. 1 (2017). For an assessment on the environmental side, see Dara O’Rourke & Abraham Ringer, *The Impact of Sustainability Information on Consumer Decision Making*, 20 J. INDUS. ECOLOGY 882 (2015) (arguing that “providing more or better information on sustainability issues will likely have limited impact on changing mainstream consumer behavior unless it is designed to connect into existing decision-making processes”), and more generally, DARA O’ROURKE, *SHOPPING FOR GOOD* (2012).

and departments to leave human rights concerns to others. Moreover, reputation can be protected through marketing efforts in addition to and to some degree instead of substantive remediation. The NGOs and some consumers are often quite worried about this “whitewashing” phenomenon.²⁷ They will be worried that the attractive, glossy efforts of the marketing department will sufficiently obscure supply chain problems so that Western Company will ignore the issue.²⁸ The company, in short, may enjoy something close to the magical invisibility that enables the company to do wrong with impunity.²⁹

Finally, and crucially, the paradigm assumes that regulation is increasing, but that it remains primarily if not exclusively limited to regimes of disclosure, due diligence, or both. Widespread international imposition of liability for injuries in the supply chain—whether such a regime is desirable or not—is presumed to be highly unlikely in the foreseeable future.³⁰

27. Medea Benjamin, *Foreword* to ARCHON FUNG ET AL., CAN WE PUT AN END TO SWEATSHOPS? ix (2001) (“[T]he real battle was over how to ensure that the company’s code was not just a lofty document on a piece of paper but something that had meaning on the ground.”). Salminen argues that even enforceable contractual liability against Western buyers allows “whitewashing.” Jaakko Salminen, *The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers’ Liability in Global Supply Chains?*, 66 AM. J. COMP. L. 411, 412 (2018). I am keenly aware that similar arguments may be leveled against the MCCs. See Sarah Dadush, *Contracting for Human Rights: Looking to Version 2.0 of the ABA Model Contract Clauses*, 68 AM. U. L. REV. 1519, 1534–45 (2019).

28. Concerns are not limited to marketing. ESBENSHADE, *supra* note 3, at 11, argues that even monitoring production and auditing supply chains are methods used by companies “primarily to avoid bad publicity and to address consumer concerns.”

29. This problem is one impetus for the social contract: Plato suggests the idea (in Glaucon’s argument) that a person will prefer to do injustice as long as he will not be punished, as would be the case if he had a magical ring that could make him invisible while engaging in wrongdoing. In this sense, the fear is that marketing and public relations give Western Company something like this magical ring. In short, PR is the corporate ring of Gyges. See PLATO, THE REPUBLIC bk. II, 359a–360d, in THE REPUBLIC OF PLATO 37–38 (Allan Bloom trans., 2d ed. 1968). (Current readers can conceive of the ring of Gyges as being much the same as Harry Potter’s cloak of invisibility). The conventional agreement to law and contracts to achieve justice is a compromise to avoid the undesirable results of accommodating everyone’s presumed desire to do as much injustice as possible. These matters are taken up *infra* in Section II.A.

30. Imposition of supply chain liability remains quite limited. The law in France, see *supra* note 11, is perhaps the most prominent, although perhaps not the most ambitious. Consider the project of Bair, Jackson & Rogers mentioned in *Manifesto*, *supra* note 19, at 76.

*B. Making Human Rights Protections Legally Effective
and Operationally Likely*

With the paradigms in mind, the problems emerge. There are several. First and most important, workers are suffering and sometimes dying as they work to produce the goods so enjoyed and so expected by the prosperous. On this there is general agreement, but the agreement ends when the conversation becomes more specific, and this is the second problem: consensus on meaningful standards is difficult or impossible to achieve. One of the chief problems for lawyers to solve is this lack of consensus; the law is no stranger to moving forward despite a lack of complete agreement.³¹ Another problem may be a lack of consensus within a particular corporate context, but the issue may be more a matter of organization and emphasis than any active disagreement. Still, the corporate politics may need some careful navigation—hence the attention to management organization in the paradigm. That work will include an eye to operations so that corporate policies are not merely nice window dressing on the corporate website but have some chance at being put into practice (“operationalized,” in the parlance).

Additionally, and not least, the clauses necessary to make the protections legally effective are extremely difficult to draft from a doctrinal standpoint. This difficulty results mainly from the focus of commercial law on the goods to be produced rather than the conditions of production.³² That focus, in turn, leads to difficulty with respect to remedies³³ that are geared to workers’ human rights, health, and safety rather than monetary compensation for defective goods.

31. “[C]ontracts are necessarily incomplete.” Brooks, *supra* note 17, at 587 n.43. Even during the most formalistic period, although it required agreement on the same thing (*consensus ad idem*), e.g., *Raffles v. Wichelhaus* (1864), 159 Eng. Rep. 375, 375–76 (Peerless Case), the common law did not insist on agreement on every possible detail, which would have been impossible in any case. Further, what agreement there is may be worthwhile even though it is incompletely theorized and even though the parties’ reasons may in fact diverge. See generally Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1737–38 (1995).

32. This issue explains the extensive attention to representations and warranties and their relation to the goods themselves in the *Model Contract Clauses*, *supra* note 2, ¶¶ 1–2. Most importantly, breach of the obligations with respect to workers makes the goods themselves nonconforming under the MCCs. See *id.* ¶¶ 2.2 (rejection of goods), 3.1 (buyer’s revocation of acceptance) & 1099 n.29 (defining nonconforming goods).

33. See Jennifer S. Martin’s contribution to this symposium, *Private Law Remedies, Human Rights, and Supply Contracts*, 68 AM. U. L. REV. 1781 (2019).

In sum, there are multiple problems to be solved: (1) improving the conditions for workers; (2) crafting agreements in the absence of consensus; (3) drafting contractual language despite doctrinal gaps created by a mismatch in focus; (4) finding productive paths through the corporate political landscape; and (5) making corporate policies operational instead of aspirational, and certainly not mere window dressing. Each of these problems is addressed below.

1. Protecting the human rights, health, and safety of workers, and the problem of moral luck

At first it may seem that not much argument would be necessary on this score, but three points are worth making. The first is easiest because it is obvious—too often supply chains are plagued by forced labor, child labor, or unsafe working conditions. Sometimes the situation reaches sufficiently horrific levels to draw headlines in Western media. The second point is that current efforts are insufficiently effective. The problem is partly due to measures being ignored too often, either because some companies do not have them or because other companies have them but do too little to make them effective. And interestingly, but perhaps controversially, there is an argument (advanced most forcefully by Provost Richard Locke) that the kind of measures represented by the MCCs are doomed to tragic insufficiency because private efforts cannot achieve the goal without public legal reinforcement.³⁴

First, the worst (but easiest) part: this Article began with the factory fire that killed over 100 and the building collapse that killed over 1000, just a few years ago and within easy memory.³⁵ A sizeable literature documents and considers abuses and tragedies in domestic and international supply chains.³⁶ The good news on the bad news is that

34. LOCKE, *supra* note 4, at 17 (authoritative rulemaking, as from a state, required to solve collective action problems), 18 (“[E]nabling rights’ . . . can be brought to life” only by law), *passim*.

35. See *supra* notes 4–5 and accompanying text.

36. See, e.g., GLOBALIZATION FROM BELOW: THE WORLD’S OTHER ECONOMY (Gordon Mathews et al. eds., 2012); LAURA HAPKE, SWEATSHOP: THE HISTORY OF AN AMERICAN IDEA (2004); ROBERT J.S. ROSS, SLAVES TO FASHION: POVERTY AND ABUSE IN THE NEW SWEATSHOPS (2004); FUNG ET AL., *supra* note 27. Additional examples of recent allegations include Annie Kelly, *Nestlé Admits Slavery in Thailand While Fighting Child Labour Lawsuit in Ivory Coast*, GUARDIAN (Feb. 1, 2016), <https://www.theguardian.com/sustainable-business/2016/feb/01/nestle-slavery-thailand-fighting-child-labour-lawsuit-ivory-coast> (presenting Nestlé’s instances of forced labor within its supply chains); Daniela Penha, *Slave Labor Found at Starbucks-Certified Brazil Coffee Plantation*, MONGABAY

it makes the news, and thus makes the importance of the issue clear. In the terms of cognitive biases and behavioral economics, the information becomes more “available.”³⁷ In this sense it is too bad that problems do not make the front page more often (although of course no one wishes for any more tragedies).

Steps taken so far, then, are inadequate. The problem does not arise for absence of effort; perhaps there is not enough effort, or perhaps the efforts are insufficiently effective. One of the most salient points of the factory fire and building collapse was that the particular issues in the buildings were not unknown. Nor was the knowledge merely general, along the lines of, “Oh, yes, there are always issues in those places.” Recent inspections had discovered the problems in the particular places where the deaths occurred, and the inspections had found the specific problems—a lack of fire exits in the case of the factory fire and structural flaws in the case of the building collapse.³⁸ Again, this seems like good news and bad news: the problem of knowledge has been solved, at least in these cases. The problem of remediation, however, has not.

Provost Locke’s work argues that a complementary public-private structure will in any case be necessary to achieve optimal labor protections.³⁹ The point is intuitive: if public and private players work in complementary ways on the same problem, presumably the solving power is at its greatest.⁴⁰ Some scenarios might be imagined where the public and

(Sept. 18, 2018), <https://news.mongabay.com/2018/09/slave-labor-found-at-starbucks-certified-brazil-coffee-plantation> (finding slave labor in a Starbucks coffee bean supplier); Michael Sainato, *Accidents at Amazon: Workers Left to Suffer After Warehouse Injuries*, *GUARDIAN* (July 18, 2018, 6:00 AM), <https://www.theguardian.com/technology/2018/jul/30/accidents-at-amazon-workers-left-to-suffer-after-warehouse-injuries> (revealing numerous instances of workplace injuries in Amazon’s factories); Martje Theuvs & Pauline Overeem, *Flawed Fabrics: The Abuse of Girls and Women Workers in the South Indian Textile Industry*, *SOMO CTR. RES. MULTINATIONAL CORPS.* 17–30 (2014), <http://www.indianet.nl/pdf/FlawedFabrics.pdf> (reporting on women’s labor conditions in five spinning mills: Best Cotton Mills, Jeyavishnu Spintex, Premier Mills, Sulochana Cotton Spinning Mills, and Super Spinning Mills).

37. E.g., DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 129–30 (2011).

38. See *supra* notes 4–5 and accompanying text.

39. LOCKE, *supra* note 4, at 12–22 & ch. 7; see also Thomas A. Hemphill & George O. White III, *The World Economic Forum and Nike: Emerging ‘Shared Responsibility’ and Institutional Control Models for Achieving a Socially Responsible Global Supply Chain?*, 1 *BUS. & HUM. RTS. J.* 307, 308 (2016).

40. This seems to be much the same point as Justice Jackson’s famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J.,

private actors work counterproductively, but this seems unlikely, and Provost Locke's research suggests that the intuition is borne out empirically. In the electronics industry, where private efforts are combined with public ones, the results are better.⁴¹ Further, this may not be simply a matter of better results stemming from more and varied institutional players working in the same direction. Crucial to understanding Provost Locke's argument is the idea that only an authoritative rulemaker can resolve collective action problems and conflicts of interest.⁴²

This conclusion seems well worth noticing even if at first there is little that the business lawyer or the supply contract can do about it. Although a private effort alone is disparaged as second best,⁴³ the claim does not seem to be that private efforts should not be made. The argument made by Provost Locke, many NGOs, and labor advocates is simply that public efforts are also necessary and should not be discouraged. Indeed, many NGOs have devoted themselves to advocating for private supply chain management to promote labor rights, human rights, and the like, both in the traditional manner contemplated by the MCCs and in newer, "capability building" initiatives.⁴⁴ Assuming this argument is correct—that private efforts alone will achieve less human rights protections than combined private and public ones—then only so much can be hoped for. Still, second best is better than nothing, and may be quite a lot better than nothing, particularly once the goals are considered clearly.

Moreover, remember that Provost Locke, other labor-oriented scholars, the International Labour Organisation, and many NGOs share goals (like unionization) that companies like Western Company may not fully support.⁴⁵ Further, Western Company has a number of other goals

concurring) (federal power is at its greatest when the President and Congress act in concert, and less when they do not, particularly when they act in opposition).

41. LOCKE, *supra* note 4, ch. 7.

42. *E.g., id.* at 12, 17.

43. *Id.* at 9.

44. See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); GAY W. SEIDMAN, *BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS, AND TRANSNATIONAL ACTIVISM* (2007); LOCKE, *supra* note 4, at 11, ch. 4.

45. ESBENSHADE, *supra* note 3, at 12 ("[P]romote workers' organizing . . ."); LOCKE, *supra* note 4, at 18, 21; ROSS, *supra* note 36, ch. 9. This Article does not mean to argue against unionization, but it does recognize the issue as contested in an international context. For instance, unionization rights and collective bargaining are recognized and protected by the National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169. *Id.* at 78. Internationally, the situation is less clear. Unionization is

that must be met. So two observations are necessary. First, strategies like those in the MCCs can only achieve so much, but they still seem worth pursuing. Second, these criticisms point to next steps that may be more productive. They may lead, in other words, to Model Contract Clauses 2.0.

There is a different problem with respect to worker health and safety. Leaving aside the more controversial issues (meaning that consensus will be difficult or impossible to achieve) like unionization, the issue of worker health and safety often seems to get less attention—especially compared to forced labor—despite its obvious importance. The evil of forced labor should not be minimized, but surely it is at least as bad for workers to be crushed to death in a building collapse or to be immolated in a factory fire. Aside from that horrific point, certainly it does not escape notice that when such events occur, they make front page news and lead to the outcries and boycotts that could (in theory) decimate Western Company's bottom line. So why is it that worker health and safety seem to get slighted in comparison to forced labor policies?

At first this (apparent) phenomenon is puzzling, and observers of Western Company's supply chain management practices may question whether the observation is correct. But there are reasons. First, in terms of the legal and compliance practice within Western Company, forced labor, human trafficking, and child labor are the subject of numerous laws and regulations that bind Western Company directly.⁴⁶ Violations could lead to civil⁴⁷ and potentially criminal liability for Western Company, depending on various detailed facts of what happened and how, as well as the seizure of its products by federal agents.⁴⁸ Even under laws that require disclosure of supply chain practices rather than prohibiting certain practices,⁴⁹ child labor,

protected by article 23 of the Universal Declaration of Human Rights, but that is a nonbinding instrument. And while the right is also protected by article 8 of the International Covenant on Economic, Social and Cultural Rights, the United States has not ratified that instrument.

46. *See, e.g.*, Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101–7112 (2012); *see also* 18 U.S.C. §§ 1589–1592 (2012) (criminal sanctions for forced labor, trafficking, and peonage); Trafficking Victims Protection Reauthorization Act of 2013 (TVPRA) (Title XII of the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013)).

47. The first private cause of action under the TVPRA was settled recently. *See* Stipulation of Dismissal, *Sorihin v. Nguyen*, No. 16-5422 (N.D. Cal. Jan. 3, 2018).

48. Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), Pub. L. No. 114-125, 130 Stat. 122 (2016).

49. *E.g.*, California Transparency in Supply Chains Act of 2010 (TSCA), CAL. CIV. CODE § 1714.43 (West 2010) (effective Jan. 1, 2012).

forced labor, or trafficking could easily result in liability for Western Company itself as it is unlikely to have made any required disclosures about such practices in its supply chain.⁵⁰ Since Western Company is large and has global reach, the laws under which it will find itself in deep trouble are nearly innumerable.⁵¹ Small wonder that Western Company pays close attention to these matters. Western Company also pays close attention to conflict minerals because of the U.S. Securities and Exchange Commission rule on such matters.⁵² Energy is also focused on what the law of the European Union requires with respect to conflict minerals.⁵³ In other words, and entirely predictably, the attention of Western Company is focused on legal compliance requirements that apply directly to it.

While this explains why the general counsel of Western Company is concerned with forced labor, child labor, human trafficking, and to a degree, conflict minerals, the question remains as to why worker health and safety seem to receive less concentrated attention. Perhaps the answer has two parts. First, Western Company is not itself bound by

50. See, e.g., *id.* (outlining retailers' duty to disclose efforts to eradicate slavery and human trafficking from direct supply chain for tangible goods).

51. See, e.g., Modern Slavery Act 2015, c. 30 (UK); French Corporate Duty of Vigilance Law, Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 on the duty of vigilance of parent companies and contractors], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], Mar. 28, 2017; Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 1.

52. See 17 C.F.R. § 240.13p-1 (2018). Part of the rule was held unconstitutional. See Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015) (invalidating the rule on the grounds that it violated the First Amendment to the extent it required entities to report to the Commission and to state on their websites that any of their products have "not been found to be 'DRC conflict free'"). Other parts remain in force in at least some sense, Keith F. Higgins, *Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule*, SEC (Apr. 29, 2014), <https://www.sec.gov/news/public-statement/2014-spch042914kfh>, although the public statement of Acting Chairman Michael S. Piowar says that "it is difficult to conceive of a circumstance that would counsel in favor of [the SEC] enforcing" the U.S. conflict minerals rules. Michael S. Piowar, *Statement of Acting Chairman Piowar on the Court of Appeals Decision on the Conflict Minerals Rule*, SEC (Apr. 7, 2017), <https://www.sec.gov/news/public-statement/piowar-statement-court-decision-conflict-minerals-rule>.

53. See generally Enrico Partiti & Steffan Van der Velde, *Curbing Supply-Chain Human Rights Violations Through Trade and Due Diligence. Possible WTO Concerns Raised by the EU Conflict Minerals Regulation*, 51 J. WORLD TRADE 1043 (2017) (assessing the EU regulatory strategy for supply chain due diligence obligations and provisions of WTO law regarding minerals regulation).

laws relating to worker health and safety. The workers are employees of the subcontractors of FTS, or perhaps FTS itself, but they are not employees of Western Company. Further, they are subject to health and safety laws in a faraway country.⁵⁴ Assuming that there are violations, then, they are violations of laws of a different jurisdiction from Western Company, and those laws apply to different companies (i.e., FTS or subcontractors, but not Western Company). In short, violations of those laws do not subject Western Company to liability, at least not in any obvious way, and certainly they are little threat compared to violations of U.S. laws that apply expressly to Western Company.⁵⁵ This is a practical as well as a legal explanation for why worker health and safety may receive less attention at Western Company. Western Company has no compliance obligation itself.

There is another reason too, which is practical and moral rather than practical and legal. Much regulation of worker health and safety requires measures that, with luck, will never be put to use. For instance, adequate and unlocked fire exits are necessary only if there is a fire (to state the matter simply). As long as there is no urgent need to evacuate, ordinary exits are perfectly adequate. In other words, they function like insurance functions: one only “needs” fire insurance if there is a fire. To be sure, not all regulation of worker health and safety works this way: some violations are likely to cause serious and immediate harm (e.g., exposure to dangerous glues or other toxic chemicals), and violating those regulations would be an evil in itself, or *malum in se* to use the formulation of the criminal law. Something like fire exits, however, is subject to the vagaries of moral luck. As long as there is no fire, everything is fine (sort of), and Western Company has not done anything terrible.

To understand the concept of moral luck better,⁵⁶ consider an example. If I leave the baby in the bath with the water running to fetch

54. Most often supply chain contracts simply require subcontractors to obey local law. See LOCKE, *supra* note 4, at 19.

55. For a more detailed and nuanced consideration of potential liability, see Ramona L. Lampley's contribution to this symposium, *Mitigating Risk, Eradicating Slavery*, 68 AM. U. L. REV. 1707 (2019).

56. For the basic ideas, see generally THOMAS NAGEL, *MORTAL QUESTIONS* ch. 3 (1979); Thomas Nagel, *Moral Luck*, in *MORAL LUCK* 57 (Daniel Statman ed., 1993); BERNARD WILLIAMS, *MORAL LUCK* (1981); Bernard Williams, *Moral Luck*, in *MORAL LUCK* 35 (Daniel Statman ed., 1993); Bernard Williams, *Postscript*, in *MORAL LUCK* 251 (Daniel Statman ed., 1993). For a consideration in legal contexts, see generally John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007); Tony Honoré, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 LAW

a toy downstairs, and then I become distracted while the tub fills, and the baby drowns, I have done something terrible. I have not murdered my child, but I have killed her, and I will bear the moral responsibility for having caused her death by my negligence (at least). On the other hand, if the baby is perfectly fine and is sitting happily in the bathwater when I am struck by my error and run, panic stricken, up the stairs, then I have been careless, but I have not done anything terrible. I have not killed my child. At least so it would seem,⁵⁷ and this is often our experience.

To translate this idea and experience to the supply chain context: if Western Company traffics in persons, it is committing evil practices, and the same is arguably true if the trafficking is performed by subcontractors in the supply chain. (The latter situation will receive more attention below, as there are a variety of issues, like remoteness, causation, and knowledge or intent, that make the moral situation less clear.) Trafficking is not subject to moral luck. If Western Company does not provide adequate unlocked fire exits, and there is no need for them as things turn out, the moral situation is less clear because Western Company has been morally lucky. The concept of moral luck is the philosophical equivalent of “no harm, no foul.”

For many reasons, then, Western Company may be less concerned with worker health and safety than with trafficking. Cognitive biases, and particularly the availability of information coupled with an optimism bias, may reinforce this.⁵⁸ Likely thinking goes like this: “While there have been factory fires and building collapses in Bangladesh, and in New York a century ago,⁵⁹ those are distant and unlikely events. They will not happen with our subcontractors in Thailand or Costa Rica (or wherever). We need to be attentive, and duly diligent, of course—but trafficking is an issue that everyone is talking

Q. REV. 530 (1988). For a consideration of the ideas in the context of contract law, see Aditi Bagchi, *Managing Moral Risk: The Case of Contract*, 111 COLUM. L. REV. 1878 (2011).

57. As should now be apparent, how to assess my moral standing with philosophical rigor in these two situations is a problem. Should my moral standing really be so different because I have been lucky or unlucky? In addition to Nagel and the sources just cited, consider, for example, NICHOLAS RESCHER, *Moral Luck*, in Statman, *supra* note 56, at 141; Brynmor Browne, *A Solution to the Problem of Moral Luck*, 42 PHIL. Q. 345, 351 (1992); Margaret Urban Walker, *Moral Luck and the Virtues of Impure Agency*, 22 METAPHILOSOPHY 14 (1991). But there is little if any disagreement that my experience, my understanding of my moral situation, and society’s understanding of it will differ quite markedly between the two situations.

58. See KAHNEMAN, *supra* note 37, at 249–52.

59. See, e.g., Mark C. Niles, *Punctuated Equilibrium: A Model for Administrative Evolution*, 44 J. MARSHALL L. REV. 353, 379–92 (2011) (discussing the Triangle Factory fire).

about, that is featured in signs in airports and restrooms, and subject to a serious legal regime not unlike drug enforcement.” The individuals who run Western Company will probably see things this way; trafficking involves an evil act that should not be done. That the company might not get caught is a small consolation, as there is real harm. That various code violations take place with respect to worker health and safety is a bit of a problem, but not a big one so long as nothing bad happens. The violation is not evil in itself. And this intuition is reinforced by the knowledge of experienced individuals that the best Western factories, and indeed headquarters buildings, in the most developed countries, will have any number of building code violations. And the same is true for these individuals’ homes—even the CEO’s lavish residence no doubt has any number of building code violations if anyone were to look for them. So health and safety do not get the same priority.

2. *Crafting agreements in the absence of consensus*

There are two sets of problems here. One is that the actors in the developed world do not agree on the human rights standards that ought to apply. Partly this might be characterized easily, and largely accurately, as political, and some of this may be a matter of status. Management can be expected to hold different views from labor. But partly the matter is one of background, upbringing, and the like, for these are moral opinions, and they may well vary based on geography. In a rural setting where children in farming families routinely “help with chores,” i.e., work on the farm, general views on child labor may vary considerably from those held in the affluent suburbs in large metropolitan areas.⁶⁰

With geography, status, and socioeconomic context in mind, the second set of problems should be quite apparent: views and priorities may differ considerably between the developed world and developing countries. What may seem like immoral exploitation could also seem like economic opportunity that is far better than the alternatives. On top of this are arguments about protectionism, which always lurks in such discussions. It is easy to see how imposing environmental, labor, or similar standards, thus raising costs of production in the developing world, will result in protection for industries in the developed world. This phenomenon has been dubbed

60. M. Neil Browne et al., *Universal Moral Principles and the Law: The Failure of One-Size-Fits-All Child Labor Laws*, 27 HOUS. J. INT’L L. 1, 3 (2004) (recognizing different perspectives on child labor and arguing that policymakers should avoid “imposing a universal moral vision upon other groups in situations as emotionally, economically, culturally, and developmentally complex as that of child labor”).

the *New Protectionism*, and there is no shortage of literature and argument.⁶¹ While most of the discussion centers on environmental standards,⁶² the same arguments can and have been made with respect to labor standards.⁶³ Free trade advocates generally see these sorts of standards as non-tariff barriers to trade,⁶⁴ and while some make serious efforts at reconciling environmental and labor protections with the benefits of free trade,⁶⁵ there is no doubt that at least in theory labor and environmental protections will also have a trade protectionist valence. In such situations, the effort to raise labor standards in developing countries may hurt workers more than it helps them, as the argument goes.⁶⁶ And even those sympathetic to raising

61. Indeed, there appear to be at least two pieces entitled *The New Protectionism*, including Carl J. Green's from 1981, 3 NW. J. INT'L L. & BUS. 1 (discussing "bilateralism" and "legal protectionism" as forms of new protectionism), and Moira L. McConnell's *The New Protectionism and Environmental Barriers to Trade Liberalization: Assessing the Bona Fides of Government Action*, 2 KAN. J.L. & PUB. POL'Y 43 (1993) (examining whether environmental regulation can constitute either a trade barrier or a subsidy, and whether an adjudicator can go beyond the face of the legislation and assess the bona fides of a state's legislation).

62. See, e.g., Seymour J. Rubin, *A Predominantly Commercial Policy Perspective*, in ENVIRONMENT AND TRADE: THE RELATION OF INTERNATIONAL TRADE AND ENVIRONMENTAL POLICY 3 (Seymour J. Rubin & Thomas R. Graham eds., 1982) (noting that pollution control requires higher production costs, resulting in less competitive goods); Don P. Clark, *The Greening of Protectionism—Industry and Environmental Coalitions to Oppose Trade Pacts*, 19 WORLD COMPETITION L. & ECON. REV. 105 (1995); McConnell, *supra* note 61, at 45.

63. See generally Lance Compa, *Labor Rights and Labor Standards in International Trade*, 25 LAW & POL'Y INT'L BUS. 165 (1993); Amit Dasgupta, *Labour Standards and WTO: A New Form of Protectionism*, 1 S. ASIA ECON. J. 113 (2000); Brian A. Langille, *Eight Ways to Think About International Labour Standards*, 31 J. WORLD TRADE 27 (1997); Benn Steil, 'Social Correctness' is the New Protectionism, 73 FOREIGN AFF. 14 (1994).

64. See *Labour Standards: Consensus, Coherence and Controversy*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm (last visited June 1, 2019) ("[E]fforts to bring labour standards into the arena . . . are little more than a smokescreen for protectionism."); see also Compa, *supra* note 63, at 187 ("[T]he labor rights argument is just a cover for blocking exports . . ."); Dasgupta, *supra* note 63, at 124 ("[T]rade restrictive policies based on humanitarian considerations were . . . camouflage for . . . protectionism."); Moonhawk Kim, *Disguised Protectionism and Linkages to the GATT/WTO*, 64 WORLD POL. 426 (2012) (states impose labor regulations that purposefully restrict international trade, but with the appearance of an acceptable domestic policy).

65. Frank Emmert, *Labor, Environmental Standards and World Trade Law*, 10 U.C. DAVIS J. INT'L L. POL'Y 75 (2003); McConnell, *supra* note 61.

66. See Gary Burtless, *Workers' Rights: Labor Standards and Global Trade*, BROOKINGS (Sept. 1, 2001), <https://www.brookings.edu/articles/workers-rights-labor-standards-and-global-trade>; Stephen S. Golub, *Are International Labor Standards Needed to Prevent Social Dumping?*, 34 FIN. & DEV. 20 (1997).

standards for working conditions recognize the strong link to anti-globalization.⁶⁷

So even within the same developed society, people of good will differ on how best to address these issues. Further, there can even be disagreement on the issues themselves, as with child labor. Everyone is against child labor—put in those terms. But they are not necessarily against a fifteen-year-old spending time working on the family farm if he is not missing school at the time. The United States permits quite a lot of child labor, despite serious injuries to some of those child workers.⁶⁸ Outside the developed world, a child who works may be a child who is better nourished and whose family has prospects; that child may have no meaningful opportunity to go to school anyway; and the question may not be whether the child works but where and in what conditions.

This lack of consensus is exacerbated by rhetoric that can hide areas of substantial agreement. Not all human rights violations are the same, either practically or morally. Death and crippling injury are worse than very long working hours and a six- or seven-day workweek. We hesitate to make these judgments, and the examples can be manipulated to turn them around, but recognizing differences of degree can help because it can allow second-best solutions where first-best solutions—much less ideal ones—are impossible. It is useful to think of a spectrum of problematic issues ranging from the worst—such as death, slavery, or forced labor—to the controversial and arguably reprehensible that are nevertheless not as bad as death. Candor is helpful for closing deals and for achieving some consensus. If all can agree that forced labor should be eradicated from the supply chain, regardless of the indifference of public authorities, then there ought to be forward movement with respect to that issue. That deal can be closed. If there is disagreement with respect to some other issue, and no deal can be closed on it, then we have to take what we can get.⁶⁹

67. Richard A. Greenwald, *Labor, Liberals, and Sweatshops*, in *SWEATSHOP USA: THE AMERICAN SWEATSHOP IN HISTORICAL AND GLOBAL PERSPECTIVE* 77, 77 (Daniel E. Bender & Richard A. Greenwald eds., 2003) (“[I]n fact, the current antisweatshop movement is intimately connected to the anti-globalization movement.”); see also *GLOBALIZATION FROM BELOW: THE WORLD’S OTHER ECONOMY* (Gordon Mathews et al. eds., 2012).

68. See *supra* note 8.

69. Unionization and collective bargaining rights require careful observation and thought. Theoretically, they may be separate from, say, issues of forced labor or health and safety. If a contractual regime may help improve matters with respect to forced labor and worker safety, it probably ought to be pursued, even if it does not lead to unionization rights. This argument sees the issues as independent, or at least separate. On the other hand, either theoretically or empirically, achieving significant

As it turns out, there is plenty of room for agreement, and a serious desire to make the situation better. Those facts have been the force carrying forward the MCCs. Whatever can be agreed goes into the standards for a particular contract, or (more likely, we hope) in all the contracts for a particular company. The MCCs do not attempt a “one size fits all” prescription. In any event, a company that wants such a set of standards can choose from already existing offerings.⁷⁰ In short, the company can choose whatever standards it likes.

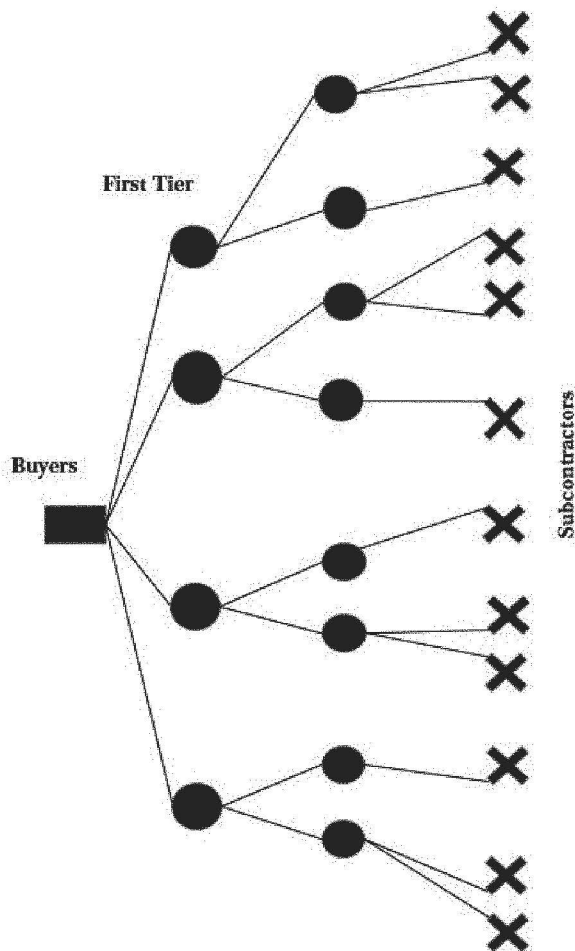
Visualizing how this might work can be helpful.⁷¹ The first idea, which involves just the company’s own policies, might be considered one-dimensional. The policy may or may not include a commitment that is legally enforceable, but it is in any case a single point. When the company requires its suppliers to commit to protecting human rights, then the commitments might be considered two-dimensional: the policies adopted by one company—a single point—branch out across a plane of suppliers, and perhaps their suppliers and contractors as well. There is thus a web of commitments, but they all originate at the single point of the buyer who has required the commitments through the supply chains that are part of its business. See Figure 1.⁷²

improvement with respect to forced labor and worker safety (for example) may be impossible without unions that will protect workers. In other words, unionization rights may be “enabling rights” that allow workers to improve their rights against forced labor and unsafe working conditions. See LOCKE, *supra* note 4, at 18. In the end, though, Provost Locke’s empirical argument seems most tightly linked to public protections for workers—in combination with private protections. See *id.* at 17 *passim*. These public protections may protect unionization among other things. In any case, the evidence suggests that private compliance is well worth pursuing, and this conclusion holds even if private compliance alone is insufficient to lead to significant improvements. Private efforts are a part of the solution, and the MCCs aim to allow companies to pursue that part effectively.

70. See *supra* notes 9–12 and accompanying text (discussing the UN Guiding Principles and other efforts).

71. The following is discussed in DAVIES & SNYDER, *supra* note 16, at 239–42.

72. Thanks to Adrian Simion for help with the figures for this Article.

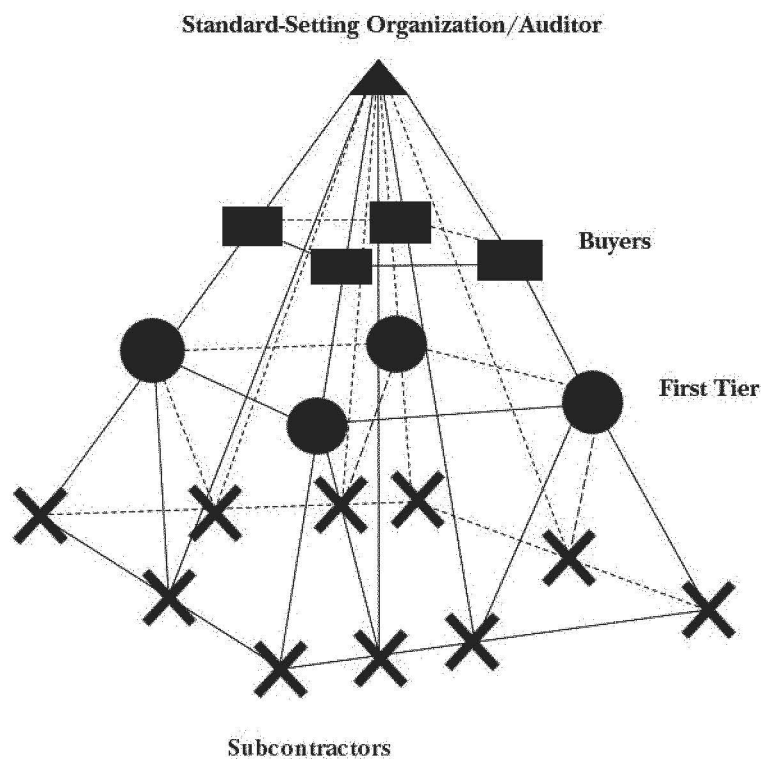
Figure 1: Two-Dimensional Model

A more complex and interesting three-dimensional model might also be visualized. A company (call it Buyer A) might belong to an organization (like the Fair Labor Association or the Worker Rights Consortium) that sets standards, audits compliance, and probably provides a label or a certification mark or a seal of approval to show consumers that the products are sustainable, or free of forced labor and child labor, and the like.⁷³ It

73. See Margaret M. Blair et al., *The New Role for Assurance Services in Global Commerce*, 33 J. CORP. L. 325 (2008). For a thorough consideration of labeling in this regard, see *WORKERS' RIGHTS AND LABOR COMPLIANCE IN GLOBAL SUPPLY CHAINS: IS A SOCIAL LABEL THE ANSWER?* (Jennifer Bair et al. eds., 2014).

may require its suppliers and their suppliers and subcontractors to belong as well. But other companies (Buyers B and C, for example) may also belong to the organization and require their suppliers, and their suppliers and subcontractors, to belong. Thus, many companies (consider Buyers A, B, and C) and their respective suppliers and subcontractors belong to a single organization—so the branches are not limited to a single plane or web of supply chains but multiple webs on multiple planes. Many of the members of the organization are not linked contractually to each other at all. This model can be visualized as a pyramid, with the standard-setting organization (like FLA or WRC) at the apex, with below that a plane of Western buyers (A, B, and C), and below that their suppliers (first tiers), and below that further suppliers and subcontractors. See Figure 2.

Figure 2: Three-Dimensional Model



The three-dimensional model is interesting not only for its complexity but also for its function and polity. First, it might be argued that the standard-setting organization here, as elsewhere, serves a lawmaking function. The organization sets rules that are binding for many parties. To be sure they are in some sense voluntary rather than mandatory, but in practice they are not especially more voluntary than many default or suppletive rules, and in many contexts, they are considerably less voluntary (i.e., they are more nearly mandatory for those who want to do business in a particular industry). The rules serve much the same function as law, although they are privately made rules.⁷⁴ The polity adds further interest. Notably, each standard-setting organization is extraterritorial. Further, there can be—and there are in fact—multiple competing organizations. If we assume for a moment the validity of the first argument, i.e., that each organization is like a private lawmaker, then we can see that with competing lawmakers a little federalist system arises. This private regulatory competition has many of the same features as public regulatory competition, or federalism. In short, a company may choose a pro-business, pro-employer standard setter (for obvious reasons), or a company may choose a pro-labor organization (e.g., because of labor pressure, or from public, NGO, or competitive pressure, or for protectionist reasons),⁷⁵ or it may choose a lax standard-setter, and so on—just as a corporation may choose to incorporate in Ohio, or New York, or Delaware, or elsewhere.⁷⁶

A company might therefore choose a two- or three-dimensional model, or both, depending on its views on particular standards. Despite the absence of more general consensus, and regardless of disagreements on various issues, the parties can arrange their own legal regimes through the institution of contract, sometimes simply in a web of two-party contracts and sometimes in much more complex ways. It

74. This kind of argument is considered at length in a different context in David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371 (2003). For a recent consideration, see Steven L. Schwarcz, *Soft Law as Governing Law*, 104 MINN. L. REV. (forthcoming 2019), <https://ssrn.com/abstract=3307418>.

75. Conventionally the FLA is associated with the first characterization (pro-buyer) and the WRC with the second (pro-labor). See, e.g., ESBENSHADE, *supra* note 3, at ch. 7, and particularly at 12, 183 (noting an NGO parody of the FLA with a “Sweatwash” so-called award). Other forms of corporate organization, even ones that provide for contractual liability for Western buyers, have been criticized for allowing further whitewashing. See generally Salminen, *supra* note 27.

76. This kind of argument is considered in David V. Snyder, *Molecular Federalism and the Structures of Private Lawmaking*, 14 IND. J. GLOBAL LEGAL STUD. 419 (2007).

is all an effort to make the standards on which they agree legally binding—provided they can solve the doctrinal issues through careful drafting. That is the subject of the next section.

3. *Drafting legally effective clauses*

The doctrinal problems and drafting challenges are considerable. There is a mismatch between the applicable law, which centers on goods, and the goals at the forefront here, which center on people. The mismatch has its greatest effect on the related issues of warranties or quality obligations; breach; remedies; and mitigation.⁷⁷ In addition, further obstacles arise from U.S. tort and statutory law. The goal of the MCCs is to navigate this trap-laden landscape as well as possible.

The first difficulty can be summed up in one horrific phrase: Child slaves might make great soccer balls. The balls may well be fit for their ordinary purpose (playing soccer) or their ultimate buyers' particular purposes. Although it is true that a Western company buying the balls for resale may find the balls unfit for that company's purpose—resale—the balls are unfit only if their method of manufacture becomes public, and the businesses involved have every economic incentive to assure that such information never becomes public. Absent careful drafting, then, soccer balls made by child slaves may breach no obligations of quality, at least not in the usual sense.

Even assuming that the contract contains adequate provisions about the conditions in which the balls are produced, a host of remedial problems then arise, both legal and practical. Is there a fundamental breach⁷⁸ or the like,⁷⁹ allowing termination of the contract, if the balls are perfectly good (in some sense) for playing soccer? Again, assuming proper drafting to allow termination, what other remedies are then appropriate? Damages are problematic; again, the balls will sell for full value unless the nature of their production becomes public.

On a related and even more troublesome note, the buyer is under a duty to mitigate (very strongly and widely under U.S. law⁸⁰ and also under international law).⁸¹ This may be another reason for a buyer not to disclose the conditions of production. And mitigation could

77. See Martin, *supra* note 33.

78. See United Nations Convention on Contracts for the International Sale of Goods, art. 25, Apr. 11, 1980, 1489 U.N.T.S. 59 [hereinafter CISG].

79. See, e.g., U.C.C. § 2-612 (AM. LAW INST. & UNIF. LAW COMM'N 2017).

80. RESTATEMENT (SECOND) OF CONTRACTS § 350 (AM. LAW INST. 1981); see also U.C.C. § 2-715(2)(a).

81. CISG art. 77.

arguably require resale of the goods. If the tainted methods of manufacture have become known, however, reselling the goods could do grave reputational damage to the buyer, although the extent of that damage may not be quantifiable with reasonable certainty.⁸² Given this problem, the buyer may be able to argue that refusing to resell the goods in these unusual circumstances is actually a step toward mitigation, and indeed, this is the approach of the MCCs.⁸³ Although such a stance is open to question in terms of mitigation, resale may sometimes be prohibited under some laws, as when forced or indentured labor is involved.⁸⁴ But not all situations are so straightforward; public law tends to be quite narrow in scope, so if the violations by the supplier are related to health and safety (causing building collapses and factory fires and thus injury and death, but not forced labor), public law would not necessarily protect the buyer's refusal to resell. Some might think that the best course of action for the buyer would be to donate the goods to a charity like the Boys and Girls Clubs. Arguably this helps prevent reputational harm and is thus a step toward mitigation (although there are obvious counterarguments); but again, if forced labor is involved, public law would prevent donation and would require return of the goods.⁸⁵

From this point the remedial problems only become further complicated. Many of the damages and mitigation issues could be of purely speculative interest because many potential defendants will be unable to respond in damages, even if they are subject to suit. Specific performance is no more promising, at least as a coercive remedy. It will frequently be unavailable under U.S. law⁸⁶ or other common law

82. RESTATEMENT (SECOND) OF CONTRACTS § 352.

83. *Model Contract Clauses*, *supra* note 2, ¶ 5.5(b) & 1104 n.45.

84. Federal law prohibits resale when the goods are made by forced labor. *See* Tariff Act of 1930, 19 U.S.C. § 1307 (2012) ("All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited . . ."); *see also* Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 910, 130 Stat. 122, 239 (2016) (repealing the consumptive demand exception from § 307 of the Tariff Act).

85. *See id.*

86. *See generally* U.C.C. § 2-716 (AM. LAW INST. & UNIF. LAW COMM'N 2017). For an insightful consideration of the issues around specific performance and injunctions, including the value of such clauses even when relief may not be available, see Jonathan C. Lipson, *Something Else: Specific Relief for Breach of Human Rights Terms in Supply Chain Agreements*, 68 AM. U. L. REV. 1751 (2019).

systems⁸⁷ because theoretically damages may be an adequate remedy and equitable relief might arguably be unnecessary. And aside from the extraordinary nature of equitable relief in common law systems, even civil law systems and international tribunals are likely to deny relief that cannot practically be achieved.⁸⁸

Regardless of the interesting legal and equitable issues, it would appear that most who are involved in this field do not consider damages, specific performance, or even termination to be the best responses in most situations (although termination may be required in some instances where the suppliers are beyond hope). Rather, remediation—helping the supplier to comply with the required principles—generally seems preferable. A termination, after all, may leave the workers in even worse shape. Consider an inquiry after the scandals of the 1990s:

Caroline Lequesne of Oxfam, a British charity, has just returned from Bangladesh, where she visited factories to determine the impact of American retailers' human-rights policies. She reckons that between 1993 and 1994 around 30,000 of the 50,000 children working in textile firms in Bangladesh were thrown out of factories because suppliers feared losing their business if they kept the children on. But the majority of these children have, because of penury, been forced to turn to prostitution or other industries like welding, where conditions pose far greater risks to them.⁸⁹

Remediation is more a matter of commercial relationships and economic leverage, and while law may be relevant, it plays a tertiary role. For example, high switching costs will push buyers strongly toward remediation rather than termination for purely economic reasons in addition to the human and moral reasons just outlined in the Oxfam inquiry. This will be true even when buyers have high degrees of leverage over the suppliers. Still, the bargaining position for the buyer who is pushing for remediation can be buttressed by appropriate contract drafting, as reflected in the MCCs.⁹⁰ The point

87. See generally John P. Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495, 495–96 (1959) (common law became a system “committed to damages as its mode of relief,” although specific performance could be available in a few instances or when damages are inadequate).

88. See *Soinco v. NKAP*, Zürich Chamber of Commerce Arbitration Award ZHK 273/95 (May 31, 1996), <http://cisgw3.law.pace.edu/cases/960531s1.html> (considering Swiss and Russian law as well as the CISG).

89. *Ethical Shopping: Human Rights*, 335 ECONOMIST 58, 58 (1995).

90. The phrasing in the text is purposely vague because the best contract-drafting strategy in this context poses an interesting question of contract design that is outside the scope of this Article. The party with greater bargaining power may prefer a straight

becomes finer when considering the practical context: frequently the violation will be apparent only in recordkeeping. The obvious question then becomes whether the violations are confined to bookkeeping practices or instead reflect serious issues with working conditions, human trafficking, or other issues. And there is a world of difference between the two, with the gravest human cost hanging in the balance.

These issues are not the usual stock-in-trade of commercial lawyers; controlling clients' exposure, however, is more familiar, and it is just as necessary here. Certainly, moral obligations and, to some degree, legal requirements push companies and their lawyers to do what they can to protect workers in international supply chains. But this is not a riskless task, and companies in some respects face increased exposure when they attempt to improve supply chain conditions but fail to be sufficiently effective. Some potential liability sounds fundamentally in tort, although some of the theories are statutory or even contractual. Plaintiffs have pressed claims of negligence, deceptive advertising, and trafficking, as well as suits under the Alien Tort Statute. They have also asserted third-party beneficiary theories. Defendants have for the most part prevailed, often reasonably easily, but some cases are going forward still, and companies are understandably nervous about the potential for liability as the suits move into discovery and further phases of litigation.⁹¹

termination clause in the contract even if that party contemplates addressing defaults through much more constructive, relationship-preserving measures. See generally Lisa Bernstein, *Merchant Law in Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1796–97 (1996). To take a common example, a bank may draft its loan documents to allow it to call the loan (demanding immediate repayment in full) even if in many circumstances it will give borrowers a second or third chance and will indeed have a whole “Workouts” department devoted to administering loans that are in default. Of course, if circumstances dictate a different course, the termination (or in the loan context, acceleration) clause can be invoked by the bank, triggering the “end-game norms” instead of the “relationship-preserving norms.” See *id.* Similarly, a Western buyer in a supply chain relationship may prefer a termination clause even though it contemplates remediation of human rights problems rather than outright termination (except in the most hopeless or egregious circumstances). Alternatively, the supply contract may be better designed if it reflects expectations more closely, providing for remediation in most circumstances rather than termination. The contract might do so by providing for a notice of default followed by a period during which the supplier is allowed (and helped) to cure the default. If the cure is successful, the contract remains in place. The MCCs give parties both options. It provides for termination in ¶ 2.3, *supra* note 2, at 1099, but points out the benefits (as well as the drawbacks) of a notice-and-cure mechanism, *id.* at 1100 n.30. Which course is better presents an intriguing issue for further exploration.

91. These issues and the litigation associated with them are discussed thoroughly in Lampley, *supra* note 55.

Concern stems particularly from the trenchant observation of Judge Johnston that current tort doctrine encourages Western buyers to divorce themselves from the supply chain as much as possible and to “ignore[] workplace safety” as a means to “escape liability.”⁹² Judge Johnston remarks on the law’s perversion of public policy, noting that “the better rule would be to encourage general contractors to take all reasonable measures to ensure the safety of all workers”⁹³ Judge Johnston’s point is a salient call for law reform; it is also a warning bell for companies who want to encourage health and safety in their supply chains. The MCCs attempt to manage this kind of exposure through appropriate disclaimers, but disclaimers can only go so far, and companies that are subject to the Federal Acquisition Regulation probably cannot use many of them.⁹⁴

4. *Aiming for operational likelihood in the corporate political landscape*

Part of the impetus for the MCCs is a recognition of corporate politics; another part is a desire to reach toward operational implementation in addition to formal adoption. To understand, consider Chris Johnson’s eloquent argument that business lawyers are uniquely well situated to achieve corporate change with respect to human rights protections.⁹⁵ The general counsel often sits on the board or at least has a seat at board meetings; this is an important part of the paradigm. The general counsel will be close to the CEO, and they will strategize together, typically forming a common vision. The two working together are in a good position to put forward helpful policies for adoption by the board, and once they become policies, they can be implemented through the procedures and routines used to implement other corporate policies.

Alternatively, however, once the policies are adopted, they can languish. They may be recorded in corporate minutes, where they will never see the light of day, or they may be advertised through the

92. *Rahaman v. J.C. Penney Corp.*, No. N15C-07-174 MMJ, 2016 WL 2616375, at *9 n.68 (Del. Super. Ct. May 4, 2016). The complaint was originally filed in the United States District Court for the District of Columbia and it named Bangladesh as a defendant, (No. 15-CV-00619-KBJ (D.D.C. filed Apr. 23, 2015)).

93. *Id.*

94. See *Model Contract Clauses*, *supra* note 2, ¶ 5.7; FAR § 52.222-56(c) (2018) (requiring contractor certification (within threshold limits) that requires the contractor to “monitor, detect, and terminate the contract with a subcontractor or agent engaging in prohibited activities”).

95. Johnson, *supra* note 7.

corporate web site, where they may do more good. But the paradigm assumed above suggests that for better implementation, the policies need to make it into the supply contracts themselves. On the website the policies may be simply aspirational, inspirational, or marketing. On the other hand, the contracts in the paradigm are used by Western Company for planning and management of its supply chains. The factories where the goods are made use the contracts—particularly their schedules or appendixes—to make the goods and to comply with their various obligations to Western Company, not only with respect to manufacturing, but also with respect to timing, quality control, IP protection—and now, we hope, human rights protections. A key part of the strategy behind the MCCs is to put the standards—whatever they are (on fire exits, forced labor, recordkeeping, and so on)—into the operational part of the transaction, where they will be seen and used by the supervisors in the factories, and perhaps by some of the workers as well (depending on how the manufacturing process is structured).

Another strategy behind the MCCs is to focus the attention of the general counsel. It might be too easy for Western Company to assign these tasks to the CSR department and then to leave the matter there. Because the supply contracts in which the MCCs will be included are under the supervision of the general counsel and not just the CSR department, the general counsel will need to be conversant with the basic issues. Between the contractual piece and the compliance pieces arising from various legislation,⁹⁶ these issues will be part of the portfolio of the general counsel, who can help keep these matters from being shunted too far aside. Paying attention to human rights becomes part of what the company will need to do, legally, because of its own contracts. This provides a concrete way for policies to be implemented and routinized and not simply to languish unseen among other corporate policies or to be plastered prettily but ineffectively on the corporate website.

In short, a contractual approach is meant to garner attention from corporate actors who have the power to implement policies, as well as to put those policies in a place where they can make a difference—not just at the corporate headquarters or on the corporate website. In the end, the strategy of focusing on the contract follows the simple maxim of many who have experience in what the corporate world calls *Purchasing*: “The purchase order is king.” If the purchase order is king, then the standards need to be in the purchase order. That such a

96. See *supra* notes 48–53 and accompanying text.

quotidian point could potentially carry so much operational weight is telling: it is the everyday routine that will enable goals to be operationalized. Practical results come from paying attention to actual practice. That is no less true here, where the technical legalese and operational outlook of the MCCs provide an avenue for moral attentiveness. That idea brings us to the next section.

II. THE NEW SOCIAL CONTRACTS IN INTERNATIONAL SUPPLY CHAINS

Perhaps it is surprising that simple matters of everyday routine and grimy details of operations can carry such moral weight. Supply contracts would seem to be a far cry from the high and ancient theory of the political philosophers. But this Article suggest that these mundane but large matters resonate with some of the classical ideas of the social contract. This section does not attempt a thorough consideration, which has engendered untold volumes over several centuries. But this Article sketches a particular view of social contracts and attempts to place these supply chain agreements under that rubric. To be clear, supply contracts that aim (among other things) to protect the human rights, health, and safety of workers are not the same as or a substitute for the singular social contract as classically theorized. Still, these international supply chain contracts supplement the classical social contract, and they share important virtues and goals with it: they attempt to organize a complex cooperative arrangement that has moral and social aspects as well as economic ones. But these supply contracts have moved forward into contemporary society and economics. They recognize and harness the power of multinational enterprises, not just nation-states and individuals. And they are transnational, crossing (and largely ignoring) geographic boundaries, making them in many ways extraterritorial. Before reaching these points, though, it will be best to begin at the beginning.

A. *Thinking in Classical Terms*

The theory of the social contract, as understood here, is that members of society need to organize themselves to enable cooperation and thus to improve their lives. Contract (writ large) is the appropriate vehicle; contract is the device through which persons, by the exercise of their will or their consent, arrange their relationships with others. The contract is a creation of persons; it is not imposed upon them. So in the first instance, it is organizational and enables cooperation. Further, the contracts are motivated by self-interest. In modern terms,

the contract creates value; it gives the parties to the contract something they want that they would not otherwise have enjoyed. The making of a social contract is a moral or normative act, and the contract itself is a moral and normative artifact. The making of the contract recognizes other parties and their interests; it effectuates the will of the contracting parties, fulfilling in some measure their desires; and the contract establishes acceptable future action (or norms). Typically the social contract includes assumed norms thought to be self-evident, so obvious as to be thought part of the natural order; these are often denominated natural rights. They may be so obvious that they remain unstated but are nevertheless important to be recognized, naturally, and perhaps legally.

So far, this description characterizes both ordinary contracts and social contracts. The difference is that the traditional social contract is conceived as existing between persons who come together to establish law in order to achieve justice, as in Plato;⁹⁷ to justify a Sovereign as with Hobbes⁹⁸ or a government as with John Locke;⁹⁹ or (less practically) a small democracy, as with Rousseau.¹⁰⁰ These ideas are justifications and descriptions of the foundation of the state. For the most part these writers were thinking about the theory of government and the foundation of the state at the advent of the modern notion of states, considered both domestically and internationally, the latter typically pegged to the Peace of Westphalia in 1648. This so-called Westphalian system assumes territoriality, the current challenge to which is internationalism (denoting the idea that rulemaking and governance should be on an international level, often involving international organizations like the UN), globalization (denoting a global marketplace

97. PLATO, *supra* note 29, perhaps published in the late 370s B.C.E. The Greek (at 359a) δικαιοσύνη or τὸ δίκαιον is rendered *justice*, which is achieved through “laws” (νόμοι) and “contracts” (Allen) or “covenants” (Paul Shorey trans. 1930 in Loeb ed., vol. I) or compacts (translating ξυνθήκαι), etymologically, things that are put together. Similarly, etymologically *covenant* suggests a coming together, or a *compact* suggests promising together, or a *contract* suggests drawing together. For the English etymology, see the OXFORD ENGLISH DICTIONARY entries.

98. 2 THOMAS HOBBS, LEVIATHAN 165 (1651) (G.A.J. Rogers & Karl Schuhmann eds., 2003).

99. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT ch. 8, ¶ 97 (1698), in TWO TREATISES OF GOVERNMENT (Mark Goldie ed., 1993).

100. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT in BASIC POLITICAL WRITINGS bk. 2, ch. 9 (Donald A. Cress trans., 1987).

and a global economic order), and the corporate power of multinational enterprises (which should be obvious).¹⁰¹

This Article suggests that in this new order a new kind of social contract is necessary, not to supplant the social contract expounded by the classical theorists, but to supplement it. A globalized order needs a contract that transcends sovereign nations or geographical boundaries, and it must involve business enterprises as well as natural persons, governments, sovereigns, or even bodies-politic. The new social contracts do not involve or constitute a state, but they are social contracts nonetheless. They are *social* in that they address social needs, possibly because of self-interest but also for moral reasons. Indeed, they are *social* because they express and seek to fulfill moral obligations. And they follow from some of the classical social contract theory because they simultaneously seek to further self-interest and at the same time are other-regarding, helping contractual parties as moral agents show and act on the human and moral need for compassion (as expounded by Rousseau). These new social contracts share many (but certainly not all) of the characteristics of the older ones, which will be considered in turn.

Social contracts organize members of society to allow them to cooperate with each other and to better their prospects as a society in a normative sense. The classical theorists (like Plato, Hobbes, Locke, and Rousseau) centered their thoughts on natural persons who would enter a social contract to better their individual lives, and ultimately, the lives of individuals must remain central. But society now is composed of members that include juridical persons, not just of the governmental kind that the theorists conceived¹⁰² but the modern business enterprise. These for-profit business corporations (themselves to a degree

101. This Article does not attempt to catalog the extensive contemporary writings on the social contract, the post-Westphalian world order, or the multinational enterprise. Each has its own extensive literature. Nevertheless, a particularly relevant entry should be highlighted as it considers issues in a similar context and provides a good entry into the literature. See DENNIS PATTERSON & ARI AFILALO, *THE NEW GLOBAL TRADING ORDER: THE EVOLVING STATE AND THE FUTURE OF TRADE* (2008); see also Horatia Muir Watt, *Governing Networks: A Global Challenge for Private International Law*, 22 MAASTRICHT J. EUR. & COMP. L. 352 (2015).

102. Hobbes, Locke, and Rousseau were all considering states of different sorts. Plato, much earlier, at least considered a collective when he thought of a city, although it may not have been an entity in the same sense as a sovereign or a government considered by the early modern thinkers. See PLATO, *supra* note 29, bk. II, at 368e–369a, at 50 (considering cities in addition to individuals).

contractarian, but that is a subject for another day)¹⁰³ were created and allowed to flourish because of the economic growth they foster. The law now treats them as persons not simply with traditional juridical capacities like being able to hold assets and incur liabilities, and to sue and be sued, but to speak and advocate as part of the body-politic.¹⁰⁴ Aside from these legal and political rights, there can be little dispute that business corporations act as influential members of society. The valence of this action is certainly subject to debate (is it good or bad?), and the granting of political rights like free speech is assuredly controversial, but there is little doubt that corporations, factually, act as members of society. The new social contracts in international supply chains accommodate this reality. Corporations make these contracts.

The reason they make international supply contracts is to enable cooperation and to create value. At least at first blush, this seems obvious. The contracts establish a commercial relationship, often a complicated one whose complexities in the context of supply chains merit a whole field of study. But the point of the contract (or contracts) is to allow persons to work together, to create economic benefits for each other, and to improve their lives when without the contracts they would be strangers living independently and without an ability to render benefits to each other. The contracts enable and effectuate that mutually beneficial relationship. That, at least, is the motivation for the contracts; that is what the parties want. In Adam Smith's classic phrase summing up the idea of "bargain," each party is saying, "Give me that which I want, and you shall have this which you want."¹⁰⁵ The buyers are looking for manufacturing, to make money; the suppliers are looking for a market, to make money; the workers are looking for jobs, to make money—and perhaps to do more than make money. (It is perhaps worth noting that manufacturing supply chains that capture the value of labor seem perfectly if ironically orthogonal to

103. *Contractual Governance: The Role of Private Ordering* was the title for a panel held by the Association of American Law Schools (Jan. 4, 2019). The published papers are Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373 (2018); Yaron Nili & Cathy Hwang, *Shadow Governance*, 108 CALIF. L. REV. (forthcoming 2020); Megan Wischmeier Shaner, *Interpreting Organizational "Contracts" and the Private Ordering of Public Company Governance*, 60 WM. & MARY L. REV. 985 (2019).

104. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010) (holding that non- and for-profit corporations, labor unions, and other associations enjoy the rights granted by the Free Speech Clause); *see also* U.S. CONST. amend. I.

105. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 7 (5th ed. 1789).

John Locke's ideas about labor, value, and property.)¹⁰⁶ This—the money and the economic advantage—is the motivation, and in classical (if outmoded) contract theory, this may be sufficient; it is certainly necessary.¹⁰⁷ In their inception and their aggregate effects, supply chain contracts, like the classical social contract, are motivated by self-interest.

Moving from motivation and effects of the contracts to their characteristics, note that the supply contract—or the web of contracts that make up a supply chain—organize complex, multifaceted and often multi-dimensional commercial relationships¹⁰⁸ just as a social contract organizes the polity of a society. This is no small task, either with respect to political and constitutional organization or to the establishment of complex supply chains that may span the globe and that do not subsist in just one political or legal jurisdiction. But they do take on that organizational task, and they are often successful, and this remarkable fact resonates deeply in Hobbes. In his theory no one can force members of society to cooperate when they are in a state of nature; they need the social contract to constitute the common-wealth and a Sovereign who can extract human cooperation if need be.¹⁰⁹ In the time of the classical theorists, the cooperation happened in the nation-state that was constituted by the social contract. International supply chains are largely divorced from nation states, or even nations and national boundaries. The nation-state and its laws are not entirely outmoded—the rule of law that they provide is necessary for the contracts to have legal force, and their authoritative rulemaking power may be necessary to effectuate the social goals of these supply contracts¹¹⁰—but the supply contracts in their global and transnational character provide a necessary supplement. The supply chain relationship is voluntarily constituted, and it is successful (economically), motivated by

106. LOCKE, *supra* note 99, ¶¶ 27–28, at 128 (“[w]hatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property,” i.e., “excludes the common right of other men”). I suggest that international supply chain contracts are orthogonal to the labor theory because they intersect with that theory but go in a different direction: the workers realize some value from their labor, but much is captured by the employers or Western buyers.

107. ROUSSEAU, *supra* note 100, bk. II, ch. 4, at 157 (“[C]ommitments that bind us to the body politic are obligatory only because they are mutual, and their nature is such that in fulfilling them one cannot work for someone else without also working for oneself.”).

108. See *supra* notes 71–76 and accompanying text.

109. HOBBS, *supra* note 98, at 101 (no one can “over-awe” man in a state of nature), 115 (justice and propriety start with the constitution of the common-wealth).

110. See LOCKE, *supra* note 4, at 17 *passim*.

self-interest and human reason. Perhaps too it is remarkably Hobbesian, in the pejorative sense—which is to say that it is marked by misery as well as felicity, to borrow his words.¹¹¹ That problem leads to the next section.

B. The Moral Nature of Social Contracts

There is more to the social contract (and at least arguably, all contracts): they have a moral or normative component. Contracts consist of promises; legally enforceable promises invoke duties both legal and moral in nature.¹¹² Supply contracts are sets of promises, and promising is a moral act. This is true not only in the sense that breaching a contract and thus breaking a promise is immoral (or at least so it seemed before Holmes, and so it still often seems, as to Fried).¹¹³ It is also true that making a promise and accepting a counter-promise is itself a moral act and reveals the morality of the promisors; contracting is an “exercise of moral agency.”¹¹⁴

Yet there is an additional moral dimension for a contract that is properly a social contract. It takes into account, and seeks to achieve, a broad, far-reaching order that involves many people (members of society), and it seeks to achieve social obligations, perhaps even social justice, of which equality is a part. Indeed, one of the most striking aspects of Hobbes’s exposition is the equality on which he insists for all men.¹¹⁵ In his account, to be sure, this is hardly the happy equality of childhood platitudes, and indeed this equality is part of the explanation for war and misery.¹¹⁶ But equality is there, nevertheless, by nature.¹¹⁷

And where Hobbes is surprisingly founded on equality, Rousseau is surprisingly rooted in compassion. Man is naturally compassionate, Rousseau argues, and this compassion tempers the ferocity of his

111. HOBBS, *supra* note 98, at 99.

112. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007) (arguing that promises are moral in nature, even in contracts, so contract doctrine should accommodate the need to act morally).

113. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (2d ed. 2015).

114. Aditi Bagchi, *Voluntary Obligation and Contract*, 20 THEORETICAL INQUIRIES L. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171189 (responding to HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* (2017)).

115. HOBBS, *supra* note 98, at 99 (men by nature are equal).

116. *Id.* at 100–05.

117. *Id.* at 99.

egocentrism.¹¹⁸ The motive for compassion is greater than a mere feeling of pity, for compassion allows the “pleasure of doing good.”¹¹⁹ With this compassion, man can exercise his ability to choose how to live after the fall from the state of nature and the ills borne of the advent of property.¹²⁰ This choice he can exercise through entering into the social compact.¹²¹ Similarly, companies can fulfill their social obligations, and can reach for a more just society, by attending to fundamental moral matters in their contracts. If they are to have political rights like free speech,¹²² they also ought to have duties rooted in human compassion. Their supply contracts can thus be a new kind of social contract. This seems well worth doing.

In reality the picture, notoriously, is not entirely rosy. Society without question falls far short of the ideals. The Enlightenment writers saw as much themselves, and Rousseau is perhaps best known for the first sentence of *The Social Contract*: “Man is born free; and everywhere he is in chains.”¹²³ Certainly even the most ambitious and idealistic supply contract will pale next to any utopian conception. Whether in discussing the state or a supply chain, it can hardly be said that we all place our power in the general will, nor do we all receive “an indivisible part of the whole.”¹²⁴

Beyond these obvious facts, the vision of the classical theorists themselves was limited. As Charles W. Mills observes, “in keeping with the Roman precedent, *European humanism usually meant that only*

118. ROUSSEAU, *supra* note 100, at 177 (English), 119–20 (French). The word *pitié* is usually and perhaps best translated as *pity* but I will use *compassion* or *compassionate*, which seems fair in that Rousseau uses the adjective *compatissant* to explain what he means by *pitié* (*reconnaître l'homme pour un être compatissant et sensible*). Examination of a related passage also suggests compassion: man has an “innate repugnance to seeing a fellow-creature suffer,” and indeed, man will himself suffer if he cannot help a mother and child who are under attack (as seen in the Fable of the Bees). Discourse on the Origin of Inequality (the Second Discourse), pt. 1, at *XV (1754), in *THE BASIC POLITICAL WRITINGS OF JEAN-JACQUES ROUSSEAU* 53 (Donald A. Cress ed. & trans. 1987), and in *DISCOURS SUR L'ORIGINE ET LES FONDEMENTS DE L'INEGALITE PARMI LES HOMMES* 38 (Jean-Louis Lecercle ed. 1983) (in French).

119. ROUSSEAU, *supra* note 100, at 201, penultimate paragraph of the 2d discourse (in English), in French at 43 (*le plaisir de bien faire*).

120. On the ills of property and the consequences of the fall, see ROUSSEAU, *supra* note 100, at 202.

121. *Id.* at 111 (in English), which is *On the Social Contract*, bk. IV, ch. 2 (1762).

122. See *supra* note 104 (discussing *Citizens United*).

123. ROUSSEAU, *supra* note 100, at 35.

124. *Id.* at 24.

Europeans were human."¹²⁵ From a feminist rather than a racial standpoint, Carol Pateman argues that the social contract is preceded by an earlier "pact" subjecting women to men,¹²⁶ and the role of gender seems particularly relevant here as so many workers in international supply chains are women.¹²⁷ This gender division internationally accords with trends in the United States as well.¹²⁸ Virginia Held, from a different feminist perspective, observes that using contracts as a paradigm for human relations is dreadfully constrained.¹²⁹ "[C]ontractual theories," she says, "hold out an impoverished view of human aspiration."¹³⁰ Contractarian thought also fails to account for the experience of many people, particularly women.¹³¹

These points can hardly be refuted, but they can perhaps be taken into account. No doubt Professors Mills and Pateman and countless others will consider it a paltry response, as they have more radical solutions in mind, but any contractarian approach, such as the one suggested in this Article, must count all humans as equals. Of course, in practice they are not, and this fact founds the arguments for radical change. But this Article takes a pragmatic approach and rests on a belief that radical solutions (even assuming that they would be justified and effective) are not within the realm of current possibility. Contracts are what are used to institute and organize supply chains. Their contractual nature resonates with the learning of the social contract theorists. And those theories teach important moral as well as legal and political lessons, although their moral nature is often overlooked. In short, following Hobbes's insistence on equality and expanding it to everyone, and taking John Locke's rejection of patriarchal society seriously, translating it to our contemporary conceptions, will be necessary for a morally justifiable use of social contract theory to ground our views of supply contracts.

125. CHARLES W. MILLS, *THE RACIAL CONTRACT* 27 (1997).

126. CAROLE PATEMAN, *THE SEXUAL CONTRACT* 2 (1988).

127. For the effect of the Bangladeshi disasters, see *supra* note 5 (many garment workers are women). It appears that the vast majority of garment workers, at least, are women. *Sweatshops in Bangladesh*, WAR ON WANT, <https://waronwant.org/sweatshops-bangladesh> (last visited June 1, 2019) (noting that 85% of garment workers are women).

128. DANIEL E. BENDER, *SWEATED WORK, WEAK BODIES: ANTI-SWEATSHOP CAMPAIGNS AND LANGUAGES OF LABOR* (2004); JENNY MORRIS, *WOMEN WORKERS AND THE SWEATED TRADES: THE ORIGINS OF MINIMUM WAGE LEGISLATION* (1986).

129. VIRGINIA HELD, *FEMINIST MORALITY: TRANSFORMING CULTURE, SOCIETY, AND POLITICS* 193–95 (1993).

130. *Id.* at 194.

131. *Id.* at 194–95.

I would suggest a different response to Professor Held's argument. She would re-center our paradigm from contract to something else, and she explores the mother-child relation as one alternative.¹³² This caring relationship fits well with Rousseau's exploration of natural human compassion. If we can take account of these three critics, the contracts at issue—international supply chain contracts—must treat all parties as equals and must allow for rights and duties of compassion. These are moral rights and duties, not legal ones, but the supply chain contracts can allow the parties to meet their moral duties and to make them legal.¹³³ In this sense the supply chain contracts are social contracts, in a sense that is partly the same and partly different from the classical ideas. But they are designed to achieve justice, to enable cooperation, to organize a large, complex, and far-flung cooperative relationship, and to be mutually beneficial. And they seek to reach out in societal directions, not to constrain themselves to ordinary two- or three-party contractual relations.

These new social contracts, then, share some aims of the social contract—organizational and moral goals across a diffuse polity—but they are new in some ways, more modest in some ways, and more ambitious in others. The new social contracts are made by multinational enterprises, where the classical social contract was made by individuals (and perhaps the political entity they thus formed, like the nation-state or the sovereign). In that way, these supply chain contracts are *new* social contracts. In that they do not seek to form an entire political system, they are more modest, of course. At the same time, they are more ambitious in that they stretch across borders and beyond states, fitting a world more global than could have been conceived in early modern times. These contracts are also more modest in that they are more time-constrained; they do not seek to be permanent or even (typically) indefinite. But they are iterative: a contract for one set of shirts can lead to a contract for another set, and another, and so on. As the contractual process repeats, the parties have the opportunity to learn and grow, to adjust their relationship, and to build a shared vision and purpose.¹³⁴ In an ordinary contract, this learning is geared to a commercial purpose. In the kinds of contracts envisioned here—these new social contracts—that learning

132. *Id.* at 195.

133. *Cf.* Shiffrin, *supra* note 112, at 709 (advocating for contracting principles that encourage morality).

134. *See generally* MACNEIL, *supra* note 3.

and building can move the parties not only to greater economic efficiency but also toward shared moral commitments, even though they come from vastly disparate societies.

C. The Special Moral Duties that Attend Supply Chain Relationships

Having argued that contracts have essential moral aspects and that social contracts even more so, the moral obligations particular to supply chain contracts deserve special consideration. There is a problem here: ordinarily contracts are not conceived as being entered to achieve broad social effects, much less social justice,¹³⁵ and indeed that is part of the argument for why supply chain contracts with human rights protections are properly considered *social* contracts. But what of the relationship between Western Company and the people who work in its supply chain, when they are separated by thousands of miles and several (if not many) legal links, separating and insulating Western Company? Relationship, causation, and proximity are all central to both legal analysis and moral reasoning.

Whatever moral responsibility Western Company has toward geographically and legally distant workers might seem weak. To be sure, Western Company receives a benefit from the workers, and this benefit might found a claim in justice. Following Aristotle's reasoning, that claim becomes even stronger if the workers are harmed while conveying that benefit.¹³⁶ These ideas are behind some of the litigation around the disasters in Bangladesh,¹³⁷ and these kinds of ideas also pervade the literature that seeks to hold Western buyers responsible for injuries to workers in supply chains.¹³⁸ That a two-party contract can have innumerable effects on many who are not party to the

135. The same has traditionally been true for business corporations, as discussed briefly *infra* note 141.

136. ARISTOTLE, *THE NICOMACHEAN ETHICS*, bk. V, 1130a14-1133b28 (David Ross trans., 1980). See generally Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349 (2002).

137. E.g., *Rahaman v. J.C. Penney Corp.*, No. N15C-07-174MMJ, 2016 WL 2616375, at *9 n.68 (Del. Super. Ct. May 4, 2016).

138. See, e.g., David Kinley & Jahan Navidi, *The Long Arm of Human Rights Risk: Supply Chain Management and Legal Responsibility*, 3 BUS. & HUM. RTS. REV. 10 (2013); Justine Nolan, *Business and Human Rights: The Challenge of Putting Principles into Practice and Regulating Global Supply Chains*, 42 ALT. L.J. 42 (2017); Ryan J. Turner, *Commentary, Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier*, 17 MELB.J. INT'L L. 188 (2016).

contract is certainly a familiar notion,¹³⁹ and there is no doubt about the far-reaching effects of supply contracts in international supply chains.¹⁴⁰ Whatever merit these arguments may hold, I explore a different moral and legal calculus based on considerations of whether there should be a duty to rescue.

To begin, observe that Western Company (assuming that corporations have moral as well as legal duties)¹⁴¹ probably has a

139. See, e.g., Aditi Bagchi, *Other People's Contracts*, 32 YALE J. ON REG. 211 (2015) (examining how third parties—such as downstream buyers, suppliers, and consumers—are affected by contract).

140. See, e.g., Alice Evans, *Hope for Reform: Strengthening Corporate Accountability in Global Supply Chains*, RESEARCHGATE (Mar. 2019), https://www.researchgate.net/publication/326293484_Hope_for_Reform_Strengthening_Corporate_Accountability_in_Global_Supply_Chains.

141. Finding a moral duty in a typical business corporation, particularly one organized under Delaware law, requires some acknowledgment of a possible conflict between a moral duty and the traditional duty of the board to maximize wealth for shareholders. Whether the board owes only duties of wealth maximization to shareholders or instead owes broader duties to countless and potentially diffuse other stakeholders (e.g., with respect to environmental sustainability) is a large and controverted topic. There is considerable current recognition of potential corporate duties aside from shareholder wealth maximization. The Supreme Court recognized as much in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 711–12 (2014), which found that “modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so.” This opinion accords with some current scholarly conceptions. See, e.g., Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. PA. L. REV. 579, 615 (2018) (“[T]he systems approach does not focus on profits alone, and does not direct managers to try to maximize them.”); Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1593 (2018) (“Contemporary corporate social activism . . . shifts businesses from their traditional singular, amoral purpose of profit maximization to a new multivariate aim that takes into greater consideration social impact and social value on an equivalent or nearly equivalent basis as profit maximization.”). Views are divided, however. Many scholars continue to adhere to shareholder primacy. See Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 563 (2003) (“[M]ost corporate law scholars embrace some variant of shareholder primacy.”). And crucially, Delaware adheres to shareholder primacy and profit maximization. See *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010). For the classic statement of the traditional view, see *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders.”). Nevertheless, fulfilment of moral duties may in fact be profit-maximizing corporate strategies, see Lin, *supra*, at 1595, in which case corporations would have further reason to pursue their moral goals. Stephen Bainbridge, *Case Law on the Fiduciary Duty of Directors to Maximize the Wealth of Corporate Shareholders*, STEPHEN BAINBRIDGE’S J.L., RELIGION, POL., & CULTURE (May 5, 2012), <https://www.professorbainbridge.com/professorbainbridgecom/2012/05/case-law-on-the-fiduciary-duty-of-directors-to-maximize-the-wealth->

relatively weak moral duty to, say, children who are dying of starvation and disease in a part of the world where it has no operations, no personnel, no contracts (directly or indirectly), and in short, no connection, except insofar as Western Company is a citizen of the world. To be sure, some moral duty may be present. Individuals may feel morally obligated to send money to responsible aid agencies to work toward fulfilling such a duty. But those who choose not to do so are not castigated as evil, or even morally irresponsible. Perhaps there is some moral duty to rescue those starving children, but in practice it seems weak. Few feel the need to sell their cars and forego their other comforts to raise money to send to famine-ridden parts of the world.

On the legal side, to say that there is no duty to rescue is a fair statement of the general rule, but the rule is subject to a variety of exceptions. Helpfully, the rescue scenarios are factually, morally, legally, and socially similar to supply chain relationships. In this context, the common law has (so far) largely refused legal cognizance for duties that the law considers (at most) moral and social, and in a number of fact-situations, there may be no generally accepted moral or social duty at all. But a variety of facts can affect the analysis and may change the outcome: whether the magnitude of harm is great; whether the rescue is difficult and whether it is likely to succeed; whether the potential rescuer caused the problem; whether the parties have a relationship with each other; whether the victim is reasonably relying on the rescuer; and finally, the degree of inconvenience or danger to the rescuer.¹⁴² Each of these factors is worth consideration, and as will become apparent, some of them probably need to be viewed through a normative lens to be morally intelligible. The “just and reasonable” test will help give moral grounding where necessary.

1. The magnitude of harm to the victim

This factor is the easiest in the paradigm assumed, for the magnitude of potential harm is infinite in moral terms—loss of life, grievous injury, all multiplied by hundreds or thousands—and quantifiable but

of-corporate-shareholders.html. This conclusion seems particularly plausible in the case of supply chains for companies in consumer-facing industries, where companies who ignore the human rights of the workers in their supply chains may suffer serious punishment at the hands of their consumer buyers, with considerable damage to their brand value. The same may be true even outside consumer markets. But extended exploration of these questions is beyond the scope of this Article.

142. See McCall Smith, *supra* note 1, at 87. I follow McCall Smith’s analysis throughout this section of the Article.

still large in economic terms. The economics are calculable and amenable to application of the Hand formula from *United States v. Carroll Towing Co.*¹⁴³ More specifics would require empirical quantification, but in the paradigm it is safe to say that frequently the burden of preventing the harm is significantly less than the magnitude of harm multiplied by its probability. In other words, frequently this factor will militate toward imposing a duty to improve working conditions. This factor is only one of many, though, and it may be defeated by the complications that arise in the analysis of the other factors.

2. *The difficulty of rescue and its likelihood of success*

This factor is terrifically complex, although the complexity can be conveyed briefly. Bookend hypotheticals clarify the situation. A company that says, “There is nothing we can do to help,” does not make a credible statement. A company that commits to eradicating labor problems in its supply chain takes on what is at least a daunting, multigenerational task, if not an impossible one. A company that commits to a middle position—improving working conditions in its supply chain and eliminating the most egregious problems—takes on a task that seems possible, reasonable, and perhaps necessary, although change may be incremental. To be sure, for many the middle ground is insufficient, and such companies in their eyes deserve to be pilloried for their lack of commitment to a full-scale ideal. But to many a commitment to the ideal seems impractical if not impossible.

These hypotheticals suggest that there is a reasonable likelihood that a company could succeed in improving working conditions to a meaningful degree some of the time. The task appears difficult, complex, and unlikely to succeed all of the time. The available evidence suggests, in short, that some progress is possible but that it falls far short unless it is bolstered by public efforts.¹⁴⁴

143. 159 F.2d 169 (2d Cir. 1947). The usual formula is $B < PL$, meaning that if the burden of preventing the harm (B) is less than the probability of harm (P) multiplied by the magnitude of the harm (or liability) (L) then the defendant has a duty of care to the plaintiff. *Id.* at 173; *see also* *The T.J. Hooper*, 60 F.2d 737, 739–40 (2d Cir. 1932) (holding the cargo barge and tugboat owners were both liable to the cargo owner because the boats were unseaworthy: they leaked, the pumps were not inspected, and there were no radios to receive weather reports).

144. LOCKE, *supra* note 4, at 19–20 *passim*.

3. *Causation*

Obviously, if a potential rescuer put the victim in the predicament, the rescuer's obligation to rescue becomes stronger. But if the putative rescuer can say, "Your damage has got nothing to do with me. I did not cause it," the courts will be quite reluctant to impose liability.¹⁴⁵ Liability would challenge common notions even on the traditional rescue example of the stranger walking by the person drowning. Arguably the putative rescuer's inaction—his failure to rescue—causes the damage, and theoretically this is factually true. To apply the "but for" test: but for the failure to rescue, the victim would not have drowned. Yet to say that the passerby caused the victim to drown does serious damage to the language. Put more concretely: If I say Cooper caused Alex to drown, it sounds like Cooper threw Alex in the water, not that Cooper failed to rescue him (although that understanding is still possible). In this example, then, it seems that causation is absent, but the position is not entirely clear.

The position in the context of international supply chains differs from the example of drowning and is in some ways clearer, although the conclusion is hardly crystalline. Western Company did not put the workers in a position of great desperation for a job. That was a matter of circumstantial luck (another instance of moral luck),¹⁴⁶ and Western Company has no greater moral duty than anyone else in the world to improve the workers' initial situation. By providing employment that improves the workers' lives, collectively and in the aggregate at least, Western Company has made matters better, not worse. Let us suppose that Western Company does not provide a "living wage," although wages in working (indirectly) for Western Company are higher than otherwise would be available. It would seem ambitious to argue that Western Company must provide a living wage, although the argument is appealing and is frequently made. It is not clear why it is wrong to take an incremental step in the right direction, even if it does not reach the goal that might be hoped for, given the starting position that Western Company owes no particular duty to these workers (before they started working, at least indirectly, for Western Company) in the first place. Probably the strongest argument for a duty to provide a living wage is the same as the one that applies in any context: if Western Company is making profits and paying some people wages well above a living wage, then there are moral reasons to require the

145. McCall Smith, *supra* note 1, at 88 (quoting a hypothetical speaker).

146. See *supra* notes 56–57 (discussing moral luck).

pie to be split differently, to equalize pay, and to assure that everyone can at least subsist above the poverty level. This argument is beyond the scope of the current inquiry. If it holds outside the context of international supply chains, it presumably should hold within that context. But such a showing has not been widely accepted.

On the other hand, if the (indirect) operations of Western Company put workers in harm's way—depriving them of their liberty, their health, or their lives—the causal connection is different. No longer can Western Company say, “Your damage has got nothing to do with me. I did not cause it.”¹⁴⁷ The case is strongest with respect to forced labor: the need to satisfy the production requirements caused traffickers to force the victim to work. Less obvious is the worker who is injured or killed in the factory over which Western Company has no direct control (a point that we will return to).¹⁴⁸ If the factory catches fire or collapses because of poor management by those with direct control, arguably Western Company did not “cause” the damage, but it is debatable. In any case Western Company cannot say, “Your damage has got nothing to do with me.” The damage has at least something to do with Western Company. This would suggest a moderate causal connection: not the strongest case, but not the weakest either.

The causal prong, then, suggests that Western Company owes a moral duty to prevent forced labor and to avoid endangering workers. Still, each of these statements has been parenthetically qualified with the indirect nature of the relationship between Western Company and international workers. Legally, the intermediated nature of the relationship has (so far) largely insulated the companies from monetary liability.¹⁴⁹ But perhaps the most salient question is whether the supply chain itself provides a sufficient relationship to ground the moral duty even in the absence of the strongest causal connection: while it is useful to separate cause and relationship, a link should also be recognized. Where there is a sufficiently close and strong relationship, we may say that one person has caused harm to another even though the first has only failed to act. A parent who fails to provide food and shelter to a young child may well be said to have caused the child's death. But it is unlikely that many would say I have caused the death of a child with whom I have no relationship and who lives on another continent. The relationship between Western Company and its workers is considered in the next section.

147. See *supra* note 145 and accompanying text.

148. See *infra* Section II.C.4.

149. See Lampley, *supra* note 55.

4. *The relationship between Western companies and workers in the developing world*

“Proximity” may not sound like a term which carries a great deal of moral baggage,¹⁵⁰ but it does, and every lawyer who has struggled through the study of proximate cause knows the central place of proximity in legal reasoning. To tweak the scenario that concluded the previous section: I may owe a greater duty to someone in immediate need of my assistance if he is on my doorstep than I owe to a child starving on another continent. For example, if to save someone’s life I need to do something that would result in the complete and immediate uninsured loss of my car, I would do so in an instant and would be blameworthy if I do not do so. But I do not need to sell my car to donate the proceeds to save ten starving children on another continent.

This, at least, is our intuition and experience (for most of us—with occasional saintly exceptions). Whether this can withstand moral and philosophical scrutiny, however, is controversial. Peter Singer, for instance, argues that I ought to take care of those ten starving children on another continent if I can; I ought to sell my car, particularly since I am perfectly capable of taking public transportation or riding my bicycle.¹⁵¹ If we are to take human equality seriously, as Hobbes insists and as was happily conceded above,¹⁵² it would seem, at least at first, that Singer must be right.¹⁵³

Such a conclusion offends our common experience, however, and other philosophers would justify our intuition. We all may recognize some duty to distant victims of famine, but that duty may be overshadowed by more immediate needs. In deciding how to act, we will need to distinguish between what is required by duty and what goes beyond what duty requires (i.e., what is supererogatory).¹⁵⁴ In assessing moral duties, we have to remember that humans have limited capacity, and efforts to aid will be limited in scope. In deciding what efforts are required, efficiency ought to be considered, and while the world is shrinking through technological innovation, our resources can be deployed more

150. McCall Smith, *supra* note 1, at 86.

151. See Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229, 231, 239 (1972) (arguing that people should sacrifice “anything of comparable moral importance” if necessary).

152. HOBBS, *supra* note 98, at 99; see also *supra* notes 115–17 and accompanying text (on equality).

153. Singer, *supra* note 151, at 232, 239 (basing his argument on equality).

154. See F.M. Kamm, *The New Problem of Distance in Morality*, in INTRICATE ETHICS: RIGHTS, RESPONSIBILITIES, AND PERMISSIBLE HARM 12, 14 (2007); F.M. Kamm, *Does Distance Matter Morally to the Duty to Rescue?*, 19 LAW & PHIL. 655 (2000).

efficiently when the need is proximate. It is not a mistake to invest most heavily in those near us,¹⁵⁵ especially when the realities of human psychology—our likely responses and empathy—are considered.¹⁵⁶

These ideas reinforce the duties of Western buyers to workers in their supply chains. Even if Professor Singer's far-reaching notions of moral duty are rejected, the supply chain creates a connection¹⁵⁷ and brings Western Company into much closer proximity to workers in the supply chain. Supply chains are in fact about the efficient deployment of resources; that very efficiency can be brought to bear to protect human rights as it is harnessed to manufacture goods. However it is considered, from the standpoint of moral proximity there is enough connection between Western Company and supply chain workers to found a moral duty to provide safe and healthy working conditions for free women and men.

The irony is that the law does everything it can to push the parties apart and to break the link of proximity. As proximity founds a moral duty, it can bring a legal one, and Western Company is safest if it has as little to do as possible with the operations in its supply chain. Legal considerations will repel Western Company from involvement with what is happening in its factories, as recent litigation underscores; the more control Western Company exerts, and the more steps it takes to improve working conditions in supply chain factories, the greater its legal exposure.¹⁵⁸ This seems counterproductive and raises questions about the legal liability regime.¹⁵⁹ Arguably human rights duties, given this policy consideration (as opposed to the moral consideration) should be taken on voluntarily and should be in the nature of contractual rather than delictual obligation. In other words, the moral duty should not be imposed as a legal duty, but the law should allow it

155. See Arnold Burms, *Proximity and Particularism*, 3 ETHICAL PERSP. 157 (1996).

156. See Per Nortvedt & Marita Nordhaug, *The Principle and Problem of Proximity in Ethics*, 34 J. MED. ETHICS 156 (2008).

157. One way to establish a relationship, of course, is by voluntarily undertaking one. See *R v. Stone & Dobinson* [1977], 1 QB 354 (Eng.); McCall Smith, *supra* note 1, at 63–64 (citing *R v. Instan* [1893], 1 QB 450 (Eng.)).

158. See *Rahaman v. J.C. Penney Corp.*, No. N15C-07-174MMJ, 2016 WL 2616375, at *9 n.68 (Del. Super. Ct. May 4, 2016) (noting that “as long as the general contractor ignores workplace safety, the general contractor is shielded from liability to the employees of independent contractors”).

159. See *id.* Although the context is entirely different, the problem is discussed thoroughly in NICK GILL, NOTHING PERSONAL? GEOGRAPHIES OF GOVERNING AND ACTIVISM IN THE BRITISH ASYLUM SYSTEM 23 (2016) (“[E]xplor[ing] the issue of moral distance as it relates to administering . . . bureaucracy.”).

to be assumed when there is an express manifestation of assent or other evidence of the willing and voluntary assumption of a legal duty.¹⁶⁰ Indeed, assumption of such duties perhaps should even be promoted by rules like Good Samaritan statutes, encouraging companies to take active measures to improve conditions rather than impelling companies to stay as far away as possible.¹⁶¹ In some jurisdictions such a duty might be undertaken even through promises that might not be considered contractual under U.S. law.¹⁶² This strategy might achieve the right policy result and probably promotes (although is not the same as) the correct moral result. It also promotes the employment of poor workers in the developing world, which is also a good result as a matter of policy and morality.¹⁶³ That idea will be discussed shortly.

5. *Reliance*

It is certainly possible to conceive of a victim as relying on the potential rescuer.¹⁶⁴ In one sense, the drowning man is relying on the stranger walking by to throw him the life preserver that has been helpfully placed by the authorities at the waterside. But in another sense, particularly for those used to thinking in contractual terms, the idea of reliance suggests that the person relying made a decision in reliance on another person, and that in this way reliance does not make sense as a justification for finding a duty to rescue. It is true that

160. Allowing Western Company to assume the duty would comport with Shiffrin, *supra* note 112, at 719, 736, 742. The “willing and voluntary” nature of the undertaking should be emphasized, and clear and convincing evidence might be required: if the courts are too quick to imply an undertaking, the judiciary will again push Western buyers away from their supply chains.

161. See *infra* Section II.C.6.

162. See PRINCIPLES OF EUROPEAN CONTRACT LAW art. 2:107 (2005); PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE, bk. II, arts. 1:103(2), 4:301–4:303 (Christian von Bar et al. eds., 2010); Muriel Fabre-Magnan, *Les Fausses Promesses des Entreprises: RSE et Droit Commun des Contrats*, in ETUDES EN L'HONNEUR DE PHILIPPE NEAU-LEDUC: LE JURISTE DANS LA CITE 451, 454 (2018). Similar ideas have been litigated in the United States. See Order Denying Defendant's Motion to Dismiss, Nat'l Consumers League v. Wal-Mart Stores, Inc., No. 2015 CA 007731 B, 2016 WL 4080541, at *11 (D.C. Super. Ct. July 22, 2016) (holding that the complaint stated a claim based on defendants' allegedly misleading statements with respect to human rights audits). Other claims, however, were dismissed on defendants' motion, see *id.*, and the case was later dismissed entirely, with prejudice, based on the parties' joint stipulation. See Order Granting Consent Joint Motion for Judgment, *id.* (D.C. Super. Ct. July 14, 2017).

163. Ian Ayres, *Monetize Labor Practices*, in FUNG ET AL., *supra* note 27, at 80 (“[I]f the terms are fair, contracting with the poor can be a good thing.”).

164. McCall Smith, *supra* note 1, at 87.

the victim who drowned *depended* on the putative rescuer, but this seems a more accurate statement than to say that he *relied* on the rescuer, and more natural linguistically.

A reliance argument also goes too far in that reliance would always be present if dependence and reliance are the same. Is it just and reasonable to rely on someone? Probably so, if someone has promised or committed to help. In this way, promises can matter, even if they are not contractual promises.¹⁶⁵ In that case someone may well rely; perhaps we think so because that reliance is now foreseeable and thus reasonable and justifiable.¹⁶⁶ Someone may make a decision in reliance on the promise. But someone who needs rescue, and who thus depends on the rescuer, is in a different position, and the potential rescuer is too, if the rescuer has simply happened onto the scene afterwards. The rescuer did not do anything that results in the claimed reliance, so to say there is any reliance at all seems strange. It is true of course that the law may impose liability on one person when another person depends on him. Dependence by itself, however, cannot be enough. Then we would all be liable to everyone in the world who needs our help.

In the context of supply chains, there may be no reliance, then, especially in the legal and contractual sense. But there might be in some circumstances, and if Western Company were to make commitments to the workers—as it should—then they might rely, and Western Company should probably be liable. On the other hand, Western Company may prefer to attempt ameliorative measures without committing to do so; it may prefer to limit its exposure. In that case, if the workers rely on the bona fide efforts of Western Company, should their reliance be legally cognizable? Traditionally the law would in fact recognize such claims in that a person would have no duty to rescue, but if he undertook a rescue, he owed a duty of reasonable care and could be liable for, say, negligent failure to

165. Order Denying Defendant's Motion to Dismiss, *Nat'l Consumers League*, 2016 WL 4080541, at 11 (qualifying language such as "expect," "goal," and "ask" shows an aspiration rather than a promise or commitment).

166. This thinking grounds liability for promissory estoppel, RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981), as well as similar doctrines in other legal systems. See generally David V. Snyder, *Hunting Promissory Estoppel*, in MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND 281 (Vernon Valentine Palmer & Elspeth Christie Reid eds., 2009).

complete the rescue.¹⁶⁷ That doctrine, however, gives a serious disincentive to rescue and is subject to considerable statutory reversal. Those matters are considered in the next section.

6. *The oddest inconvenience*

If I can rescue a stranger at no danger or inconvenience to myself, it is hard to imagine why I would not do it, and for that reason, it is hard to imagine that my society would not consider it just and reasonable that I rescue the victim. Should I ignore the victim, I would probably seem callous to the point of immorality to my friends and compatriots. Yet when this, the seemingly most straightforward factor is considered in the supply chain context, the fact-situation falls apart.

At first it seems that the inconvenience of taking responsibility for workers in the supply chain is really a matter only of finance and marketing. Arguably the poor working conditions and other ills are linked to, if not entirely caused by, the drive for profits and the imperative to bring new goods to market speedily.¹⁶⁸ Dismissing such matters is easy—they are mere business considerations that pale when put next to human health, safety, and liberty. But these considerations are the force behind the very existence of any relationship at all between the Western buyers and the workers in the developing world. Were it not for the economic attraction of the labor markets and production facilities in the developing world, Western buyers would not have operations or contracts there. Only if the economic forces draw the Western buyers do those buyers have any link with those particular workers (assuming that the common link of humanity is too diffuse to ground a strong enough moral duty for anyone other than saints, as discussed above).

In that light, pale economic inconvenience turns existential. If taking steps to ameliorate working conditions—i.e., the rescue—erases the profitability and speed of production that engendered the relationship, the relationship disappears. The danger or inconvenience of rescue, then, is a fundamental factor militating against finding a duty. And while danger is the wrong word where the question is one

167. 2A STUART M. SPEISER ET AL., AMERICAN LAW OF TORTS § 9:23 (1983) (“Generally, the law did not impose liability upon those who stand idly by and fail to rescue a stranger Under modern law, a duty to use reasonable care to assist another in danger has been imposed. However, Good Samaritan statutes may modify this duty or provide for nonliability of rescuers.”). Good Samaritan laws are discussed in the next section. See *infra* Section II.C.6.

168. E.g., LOCKE, *supra* note 4, ch. 6.

of economic duties or hardships rather than jumping into a roiling river, the word is appropriate in that it indicates that whatever benefits, economic or otherwise, accrue to the workers because of the supply chain could vanish. Given that in some cases those benefits are crucial to the workers' livelihood (in the literal sense), an imposed duty to rescue is questionable. Western companies would need to assume any such duties voluntarily.

True, once the relationship is started perhaps the moral duties attach and cannot be freely escaped. This conception fits well into the doctrine on the duty to rescue; traditional analysis holds that while there is no duty to rescue, once a rescue is undertaken it must be performed with reasonable care.¹⁶⁹ But this common law thinking has proved faulty as a matter of policy and has been reversed over time as a matter of doctrine by Good Samaritan statutes. Every jurisdiction in the United States has adopted a Good Samaritan statute of one kind or another; typically they protect the rescuer from liability.¹⁷⁰

Assuming moderately rational decision making by Western companies, then, even without assuming perfectly efficient markets, imposition of duties and liability could dry up future markets if the economic incentive were to disappear. Indeed, at least in the environmental context, the most success may come from easing rather than increasing liability, provided the companies are transparent and disclose their environmental problems.¹⁷¹ For this reason, rather than imposing liability for failure to meet mandated standards, an approach similar to these environmental contexts—essentially Good Samaritan statutes for supply chains—may be better.¹⁷²

169. See AMERICAN LAW OF TORTS § 9:23.

170. See Danny R. Veilleux, Annotation, *Construction and Application of "Good Samaritan" Statutes*, 68 A.L.R. 4th 294 (1989) ("Good Samaritan statutes are generally designed to protect individuals from civil liability for any negligent acts or omissions committed while voluntarily providing emergency care."). See generally Eric A. Brandt, *Good Samaritan Laws—The Legal Placebo: A Current Analysis*, 17 AKRON L. REV. 303, 303 (1984). A current sampling includes GA. CODE ANN. § 51-1-29 (West 2015); MINN. STAT. ANN. § 604A.01 (West 2001); N.J. STAT. ANN. § 2A:62A-1 (West 1987); OKLA. STAT. TIT. 76, § 5 (West 1979); TEX. CIV. PRAC. & REM. CODE ANN. § 74.151 (West 2013); WIS. STAT. ANN. § 895.48 (West 2017).

171. See Matthew Potoski & Aseem Prakash, *The Regulation Dilemma: Cooperation and Conflict in Environmental Governance*, 64 PUB. ADMIN. REV. 152, 152 (2004); see also LOCKE, *supra* note 4, at 24 (collecting authorities).

172. A careful consideration of this idea is beyond the scope of the present Article, but for the reasons stated in the text and the preceding footnote, this approach appears to be among the most promising.

This logic would seem to be borne out by more granular analysis based on a combination of the costs of improving working conditions and the strength of corporate conscience. Let us assume two possibilities.

- (1) Improving working conditions erases economic incentives to make goods abroad.
- (2) Improving working conditions reduces but does not eliminate economic incentives to make goods abroad, but improving conditions and thus reducing incentives in Developing Country A provides an incentive to shift production to Developing Country B.

Let us further assume that corporate conscience is strong enough to justify incurring some cost. In other words, the Western Company would not buy cotton picked by child slaves even if it were the least expensive option and there were no legal obstacles. Let us further assume that there are no relevant legal obstacles.¹⁷³ In the first scenario, goods will not be made abroad over the long run. The experience of moving production to non-unionized factories in the American South, only to see the work migrate away from the South and to other countries¹⁷⁴ suggests that this possibility is more than theoretical. In either case, the benefits of the economic relationship disappear in the long run. The only way to avoid this result is to impose legal regulation worldwide, to impose legal regulation widely enough that the only unregulated countries are plagued by conditions that are

173. See *supra* note 141.

174. There are a tremendous number of articles and papers on this subject. Some are rigorous. E.g., Thomas J. Holmes, *The Effect of State Policies on the Location of Manufacturing: Evidence from State Borders*, 106 J. POL. ECON. 667 (1998); Edward L. Glaeser & Kristina Tobio, *The Rise of the Sunbelt* (Nat'l Bureau Econ. Research, Working Paper No. 13071, 2007), <http://www.nber.org/papers/w13071> (attributing data on Southern housing supply and prices to the rise in Sunbelt jobs). Some are scholarly but are not quantitative. Consider the section on "Sweatshop Migrations" in SWEATSHOP USA, *supra* note 67, including Greenwald, *supra* note 67, at 77; Xiaolan Bao, *Sweatshops in Sunset Park: A Variation of the Late-Twentieth-Century Chinese Garment Shops in New York City*, *id.* at 117; Edna Bonacich et al., *Offshore Production*, *id.* at 141; Immanuel Ness, *Globalization and Worker Organization in New York City's Garment Industry*, *id.* at 169; Kenneth C. Wolensky, "An Industry on Wheels": *The Migration of Pennsylvania's Garment Factories*, *id.* at 91. Others are recent but more journalistic. E.g., Justin Fox, *Manufacturing Moved South, Then Moved Out*, BLOOMBERG (Oct. 7, 2015, 3:53 PM), <https://www.bloomberg.com/view/articles/2015-10-07/manufacturing-moved-south-then-it-moved-to-china> (tracking the movement of manufacturing jobs from the Rustbelt to the Sunbelt then to China); Howard Schneider, *U.S. South, Not Just Mexico, Stands in Way of Rust Belt Jobs Revival*, REUTERS (Apr. 7, 2017, 1:15 AM), <https://www.reuters.com/article/us-usa-trump-south-insight/us-south-not-just-mexico-stands-in-way-of-rust-belt-jobs-revival-idUSKBN1790HO> (attributing the decline in rust belt jobs to cheaper labor and more land availability in the South).

so bad that either economic constraints (e.g., incompetent workers or unreliable production facilities) or corporate conscience would prevent shifting production to those countries. In the paradigm assumed for this Article, however, such widespread regulation is impossible in the foreseeable future. So, the bottom line is that the inconvenience or danger of rescue might prevent the imposition of a duty to rescue, i.e., a duty to improve working conditions. Still, such duties should be voluntarily assumed, perhaps with some incentives from Good Samaritan-like immunity.

III. IMPLICATIONS

A. *Preservation of the Non-Legal Channel of Relationships*

The previous section argued that there is a moral duty to protect the human rights of workers in international supply chains, although that duty may be stronger or weaker depending on a variety of factors. Despite this moral duty, the case for public legal protection of workers in international supply chains is surprisingly ambivalent. In an ideal world, there is no question that there would be such protection. But in an ideal world it would not be necessary, and this Article takes a pragmatic approach that includes current political, geographical, economic, and commercial realities.

The obvious argument is to impose as much in the way of human rights protections as possible. This would seem strong. The moral reasons for it are intuitive, and a careful consideration, like that attempted above, corroborates the intuition. Further, the leading empirical work by Provost Locke suggests that significant progress is possible only if private efforts and public involvement can come together.¹⁷⁵ This carefully researched finding itself corroborates another intuition: that public and private efforts will be more successful together than either could be separately. All of this would suggest that public regulation would be beneficial as a matter of policy, as well as a matter of morals.

I am not in the end sure, however. Although the UN Guiding Principles¹⁷⁶ managed to achieve the goals of garnering corporate commitments and establishing a broad framework, the Principles

175. LOCKE, *supra* note 4, at 17 *passim*. This conclusion is perhaps clearest with respect to the positive relationship between a country's laws and regulations, on the one hand, and Nike M-Audit scores for its suppliers, based on extensive and rigorous data collection and statistical analysis, on the other. *See id.* at 58.

176. *See supra* note 9.

themselves are general and vague. An outside observer, bewildered by the plethora of standards from the NGO side alone, would note a lack of consensus, and when the corporate side is added, it appears that no agreement can be reached with respect to what public regulation would provide. The sort of minimal duties enacted in some places already (due diligence, or disclosure)¹⁷⁷ may do little harm, but they may also do little good,¹⁷⁸ and they are not costless. With a lack of consensus, public regulation may well wind up being expensive and ineffective. In addition, the disagreement may lead to a law that is hopelessly compromised, making it even more expensive and ineffective than a law that is merely bromidic or disclosure-oriented. In other words, efforts at public regulation may not be productive, and they could distract from private efforts that might establish standards or norms that, after experience with implementation, could eventually be turned into public regulation.

The concern that ambitious regulation could also hurt the economies of developing countries, deprive workers of desperately needed jobs, and result in a de facto protectionist regime is another reason militating against adoption of unduly ambitious public regulation.¹⁷⁹ Such arguments must be approached with caution, even skepticism: taken to their extreme, they would suggest that no regulation at all is ever a good idea. But these arguments do require a robust and forthright response—either that those costs are worth bearing, which would require a careful empirical examination, or that the arguments themselves are flawed and that there are no such costs, at least not of significance. But my research has not disclosed such a robust response. To be sure, the literature disparages the arguments and casts them in pejorative terms,¹⁸⁰ but what I have not found is an answer to them.

A final concern is that publicly imposed liability for human rights problems in supply chains could, in fact, be counterproductive. This is what Judge Johnston decried in *Rahaman*.¹⁸¹ If a corporation like

177. See *supra* note 11.

178. See Chilton & Sarfaty, *supra* note 26, at 20–25, 45 (arguing supply chain disclosures are unlikely to help decrease human rights abuses).

179. See *supra* notes 61–64 and accompanying text (on protectionism).

180. Consider HAPKE, *supra* note 36, at 132–35.

181. *Rahaman v. J.C. Penney Corp.*, No. N15C-07-174MMJ, 2016 WL 2616375, at *9 n.68 (Del. Super. Ct. May 4, 2016). In short, tort doctrine encourages buyers to distance themselves from the supply chain and to “ignore[] workplace safety” as a means to “escape liability”; “the better rule would be to encourage general contractors

Western Company exposes itself to liability by undertaking to improve working conditions in its supply chain, it will have every reason to divorce itself from such matters, or to move its operations somewhere safer. The first alternative is certainly not desirable; the second is at best debatable. True, if public regulation were to require the company to improve working conditions, then the company would have to do so and (we will assume) could not escape. But if nothing else, that does not seem a likely possibility at present, and the paradigm that applies in this Article assumes as much.

None of this is a great surprise, although it is not the answer that many would like to hear. Differing countries, cultures, expectations, stages of development—all can be expected to make harmonized standards difficult. And supply chain problems have been intractable for decades. But there is a more fundamental aspect, based on the law's own limits. The classical theorists of obligations recognized centuries ago the practical problems of turning all moral obligations into legal ones. The common law for these reasons has long held moral obligations to have limited legal effects.¹⁸² Typically such obligations are binding in the forum of the conscience but not in a legal forum.¹⁸³ In this the common law is following (or parallels) thinking in the civil law.¹⁸⁴ In short, we are on familiar ground when contract law separates legal obligation from moral duty and provides the latter with limited legal effects. And this may be a good result, given differing views on moral commitments. The moral obligations of the common law and the natural obligations of the civil law (so called because they are based on natural law)¹⁸⁵ are infamously difficult to define, so it is typical for them to be left to non-legal enforcement. In the eyes of the law, they can be only “imperfect” obligations, and judicial efforts to incorporate them into law (such as the efforts of Lord

to take all reasonable measures to ensure the safety of all workers.” *Id.*; see *supra* notes 92–93 and accompanying text.

182. *E.g.*, *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (1825); RESTATEMENT (SECOND) OF CONTRACTS § 86 (AM. LAW INST. 1981).

183. *Mills*, 20 Mass. (3 Pick.) at 209 (*in foro conscientiae*).

184. See 2 ROBERT JOSEPH POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACTS 2 n.(a) (William D. Evans trans., 1806) (*le for de la conscience*).

185. In civil law theory and history, natural obligations are typically tied to the views of the Romans. *E.g.*, PIERRE CORNIOLEY, *NATURALIS OBLIGATIO: ESSAI SUR L'ORIGINE ET L'EVOLUTION DE LA NOTION EN DROIT ROMAIN* (1964); Marcel Planiol, *Assimilation Progressive de l'Obligation Naturelle et du Devoir Moral*, 62 *REVUE CRITIQUE DE LEGISLATION ET DE JURISPRUDENCE* 152 (1913).

Mansfield) are typically disparaged.¹⁸⁶ Although few in the world of human rights welcome it, the decision of the Supreme Court in *Jesner v. Arab Bank, PLC*¹⁸⁷ will accord with this side of the argument as it makes legal liability against corporations more difficult to impose.

These arguments against public regulation need to be recognized, and ideally, answered. At the same time, there are strong arguments in favor of public regulation, put forward most convincingly by Provost Locke based on his extensive empirical investigation. At present, then, the case seems unclear with respect to public regulation, particularly when geopolitical realities are taken into account. That makes the effective use of private regulation all the more important.

B. The New Social Contracts, New Governance, and New Model Contract Clauses—Toward a Version 2.0

The discussion so far shows the hope that may be pinned on the MCCs, but the empirical studies, the theoretical literature, and the advocacy pieces all seem to underscore the limits of the approach taken by the MCCs. This is particularly true with respect to their emphasis on punishing noncomplying suppliers¹⁸⁸ and their concentration of power in the hands of grasping Western (or Northern) buyers subservient to their greedy Western (or Northern) markets. Yet a successful business lawyer must cling to optimism; otherwise, no big deal would ever close. Even knowing the compromises, holes—and thus risks—of the last deal, new deals await, and in this case the research points the way.

To the extent the musings in the previous section are correct, the “braiding” of formal and informal contractual obligations suggests a promising path for a new approach, extrapolating from the research of Professors Gilson, Sabel, and Scott. They show how such structures have worked in contracts for innovation,¹⁸⁹ and the strategies they explore might be transposed to the supply chain context. There

186. A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 323 (1975).

187. 138 S. Ct. 1386 (2018).

188. Compare LOCKE, *supra* note 4, at 20 (on the limits of deterrence mechanisms), with Dadush, *supra* note 27, at 1534–46 (on the buyer’s contribution to violation through purchasing practices).

189. Ronald J. Gilson et al., *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377 (2010) (arguing braided contracts involve low-powered sanctions for formal contractual obligations that complement, not crowd-out, the informal contractual obligations).

should be room for formal and enforceable obligations as well as informal ones that are not legally enforceable, although they may be implemented by the parties themselves through contractual mechanisms that they set up themselves. The parties effectuate this strategy through formal governance structures—in essence, the contracts are more about establishing joint governance structures than about setting rules.¹⁹⁰ This organization allows for learning¹⁹¹ and for the development of rules and norms as the parties learn from each other in an echo of the “reflexive regulation” or “experimentalist governance” practices that have been of so much interest to political scientists. Similarly, William Simon has shown how John Dewey’s pragmatism can combine with liberal politics and emerging business practices.¹⁹² As lawyers devote more time and energy to understanding supply chain operations,¹⁹³ these insights can be harnessed to improve not only product innovation and manufacturing but also human rights protections for workers. Buyers have plenty of reasons to have their own personnel on factory floors in their suppliers’ countries; as the parties learn in each other’s presence, they can improve efficiency, quality, and human rights.¹⁹⁴ This reflexive (or reflective) governance, mutual learning, and mutual disruption may be the most promising path forward. These are large matters with a deep, multifaceted, and evolving literature, and taking advantage of their insights and power will require further work. But incorporation of Model Contract Clauses 2.0, if the clauses establish governance mechanisms to enable the kind of learning and improvement envisioned by these thinkers, will make the supply contracts even more like social contracts. Social contracts are, after all, about instituting structures of governance and not simply about establishing rules and norms.

190. See *id.* at 1382–83.

191. E.g., GARY HERRIGEL, *MANUFACTURING POSSIBILITIES: CREATIVE ACTION AND INDUSTRIAL RECOMPOSITION IN THE UNITED STATES, GERMANY, AND JAPAN* (2010).

192. See William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 63 (Gráinne de Búrca & Joanne Scott eds., 2006); William H. Simon, *The Institutional Configuration of Deweyan Democracy*, 9 *CONTEMP. PRAGMATISM* 5 (2012).

193. See, e.g., Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 *J. LEGAL ANALYSIS* 561 (2015); see also Charles F. Sabel & Jonathan Zeitlin, *Neither Modularity nor Relational Contracting: Inter-Firm Collaboration in the New Economy*, 5 *ENTERPRISE & SOC’Y* 388 (2004).

194. See LOCKE, *supra* note 4, at 60 (explaining that more Nike personnel visits at a supplier factory correlate with higher M-Audit scores); see also *id.* at 19 (harnessing “experimentalist governance” and “responsive regulation” for protecting workers in supply chains).

CONCLUSION

The MCCs are a strong and important step in a complex terrain. They encourage and enable private efforts to improve conditions in supply chains, with sensitivity to legal and pragmatic issues like the need to manage risk, limit client exposure, and navigate corporate politics. In that landscape, there is a strong temptation to do nothing, or as little as possible, but serious strides are required not only because of growing legal obligations but because of the pressing moral duty to act, the human impetus for compassion, the crucial commitment to equality—and the (assumed) unlikelihood of widely effective public regulation in the foreseeable future. Particularly because effective public regulation, given practical and political realities, is less certain than might be thought, an avenue for private action is especially critical. The MCCs aim to put companies on this road in a way that they will find not only practical but valuable.

As the previous section suggests, a second version of the MCCs, radically revised and wholly reoriented, beckons with a sense of further hope. For some, the current MCCs may seem like a step that is unduly short and cautious. But it is a strong step, and a first step enables a second, and hope springs from the knowledge that second steps can be longer. The learning from the last few years might be brought to bear on the next version of the MCCs, but those insights contemplate a different kind of supply chain management, implemented currently by some companies but not by many, along with different kinds of contracts. Next steps will also likely take into account movements into distributed ledger technology (often called block chain), a powerful tool both for managing supply chains and potentially for monitoring human rights.

But those are next steps. In the meantime, the current MCCs allow companies to start moving now, whether on their own or in concert with (or at the prodding of) public authorities and civil society. The project provides a valve through which human rights and humane compassion can enter the legal and operational realms of the corporate world, harnessing natural self-interest and shared morality into a legal and social structure that spans heedlessly across national boundaries and that pulls multinational enterprises into social contracts previously constrained by geographic borders and old-fashioned notions of nation-states. Whether in their current version or the next, the MCCs offer hope, but both now and for as long as we can see, the work will need to continue.