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The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights

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This article examines the potential for transparency programs to improve corporations' human rights performance. The primary focus is on "general" transparency programs such as the inclusion of human rights issues in sustainability reports. Regulators increasingly rely on such programs, one of which is the EU Directive on the Disclosure of Non-financial Information, which many commentators view as a model for legislation in other countries and for a business and human rights treaty. This article identifies several problems with this approach. The human rights metrics used in current sustainability reporting standards often lack validity or are based upon data that is most easily collected, rather than most important. Moreover, the empirical evidence on sustainability reporting shows continued problems of selective disclosure, impression management, incomparable disclosures, and the use of disclosure as an end in itself (as opposed to a process that leads to organizational change). To move forward, regulators should shift focus to a model grounded in regulatory pluralism. Under this approach, regulators would combine a selection of targeted transparency mechanisms to create a more complete regulatory system that corrects for one disclosure mechanism's weaknesses by including others that have complementary strengths.

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Introduction

The regulation of business through mandatory public disclosures is ubiquitous. For instance, the primary tool of the Securities and Exchange Commission (SEC) is disclosure, not substantive regulation of a company's governance.[1] Armed with information on the company, investors are expected to protect themselves against fraud and mismanagement, which is expected, in turn, to lead to improved corporate behavior.[2] Similarly, food and beverage companies must place nutrition labels on the products they sell.[3] The government requires this disclosure to allow consumers to improve their well-being and encourage corporations to produce healthier foods.[4] Other areas of business regulation by disclosure include vehicles' risk of rollovers, exposure to chemicals in the workplace, and the release of toxic chemicals into the environment.[5]

These few examples demonstrate the wide range of uses for transparency policies. Surprisingly, however, governments continue to enact mandated disclosure regulation even though the effectiveness of such policies is questionable. Professors Ben-Shahar and Schneider—commenting on required disclosures for lenders, doctors, police, and others—bluntly state that "'[m]andated disclosure' may be

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[1]Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 Wash. U. L.Q. 417, 427 (2003).

[2]*Id.* at 418.

[3]Diana R. H. Winters, *The Magical Thinking of Food Labeling: The NLEA as a Failed Statute*, 89 Tul. L. Rev. 815, 816–17 (2015).

[4]Winters argues, however, that nutrition labels do not work. *Id.* at 819. As a simple illustration of her point, Winters states the simple fact that "[h]ealth outcomes directly related to nutrition have worsened dramatically since [the enactment of the Nutrition Labeling and Education Act (NLEA)]." *Id.* at 818. Others argue that nutrition labels are only moderately successful at achieving their goals. *See* Andrea Freeman, *Transparency for Food Consumers: Nutrition Labeling and Food Oppression*, 41 Am. J. L. & Med. 315, 318–19 (2015) (reviewing the evidence on nutrition labels and concluding that labeling "only facilitates better choices for middle and high-income consumers, the Whole Foods shoppers who already engage in healthy eating habits"); Archon Fung et al., Full Disclosure: The Perils and Promise of Transparency 84–85 (2007) (reviewing the empirical evidence and company responses and concluding that the program was "moderately effective").

[5]Fung et al., *supra* note 4, at 186–88, 194–96.

the most common and least successful regulatory technique in American Law."[6]

Governments continue to rely heavily on transparency policies for several reasons, despite these doubts. First, many policy makers hold the basic assumption that information will lead to better decision making, and therefore even more information must lead to even better decision making.[7] This belief is reflected in commentators' frequent use of Justice Louis Brandeis's quote, "Sunlight is said to be the best of disinfectants."[8] Second, the costs of transparency are typically borne by the disclosers and users of the information, not the government.[9] Third, disclosure laws are typically appealing to all legislators regardless of where they may fall on the political spectrum.[10] Fourth, passing a transparency policy gives legislatures a sense of satisfaction that they are taking action on the identified problem.[11] Many view mandated disclosure as "a kind of magical minimalism that delivers significant rewards at little cost."[12]

Moreover, political feasibility is not the only reason legislatures pass transparency laws. Depending on the policy issue, traditional forms of government regulation may not be suited to address a particular problem.[13] For especially complex problems, other stakeholders beyond the

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[6] Omri Ben-Shahar & Carl E. Schneider, More Than You Wanted to Know: The Failure of Mandated Disclosure 3 (2014).

[7] *Id.* at 138–39. Ben-Shahar and Schneider argue that if a transparency policy fails, an initial reaction by policy makers is likely to be that it failed because not enough information was disclosed and further, or better timed, disclosure is needed. *Id.* at 140.

[8] The author's recent search of that quote in LexisAdvance returned more than 350 results in the "secondary materials" category in just the last ten years. Searching for paraphrased versions of the quote returned numerous additional citations.

[9] Ben-Shahar & Schneider, *supra* note 6, at 139, 145–46. It is not uncommon for the alternatives to disclosure to require significant government resources dedicated to an enforcement agency, for example, and still have the risk of ineffectiveness. *Id.* at 145.

[10] *Id.* at 139, 146–48. Likewise, in many situations, businesses would likely prefer to face disclosure requirements rather than more intrusive regulation, and would have less opposition to such laws. *Id.* at 149.

[11] *Id.* at 141.

[12] Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 Stan. L. Rev. 351, 354 (2011).

[13] Fung et al., *supra* note 4, at 14.

government may be necessary to address the risks, which can be facilitated through transparency.[14]

Not surprisingly then, transparency policies have become the default way to regulate the complex issues related to a corporations' social and environmental performance.[15] One commentator stated that in the area of corporate social responsibility (CSR), "the necessity for transparency is taken for granted and is very seldom questioned."[16] However, the question Professors Ben-Shahar and Schneider raised must be considered—are these policies also shaping up to be the "least successful"?[17]

This article focuses on one area of CSR—corporations' responsibility to respect human rights[18]—and argues that policy makers' dependence

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[14]*Id.* at 15.

[15]One of the first uses of transparency policies in the area of CSR was the Toxic Release Inventory (TRI) in 1986, which the U.S. Congress enacted in response to the chemical leak in Bhopal, India, that killed over 2000 people in 1984. *See generally* James T. Hamilton, Regulation Through Revelation: The Origin, Politics, and Impacts of Toxics Release Inventory Program 5, 178 (2005). The TRI requires businesses to publicly disclose information on the release of certain chemicals. *Id.* at 35–38. In the 1990s, Denmark, the Netherlands, Norway, and Sweden started requiring corporations to disclose information on their broader environmental performance. David Hess, *Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability through Transparency*, 17 Bus. Ethics Q. 453, 459 (2007). This soon was followed by France requiring disclosure on social impacts in addition to environmental issues. *Id.* The most significant recent development occurred in 2014, when the European Union directed all member countries to adopt legislation requiring CSR disclosures. *See infra* notes 75–87 and accompanying text (discussing the requirement of the EU Directive on non-financial disclosure).

[16]Dominique Bessire, *Corporate Social Responsibility: From Transparency to 'Constructive Conflict,' in* The Ashgate Research Companion to Corporate Social Responsibility 65, 65 (David Crowther & Nicholas Capaldi eds., 2008).

[17]*See supra* note 6 and accompanying text (quoting Ben-Shahar and Schneider).

[18]The International Organization for Standardization's (ISO) guidance on social responsibility includes "respect for human rights" as one of its seven principles of social responsibility. International Organization for Standardization, ISO 26000: Guidance on Social Responsibility 13–14 (2010). In addition, the guidance also lists human rights as one of its seven "core subjects" of social responsibility. *Id.* at 19. The other core subjects are organizational governance, labor practices (which includes human rights issues), the environment, fair operating practices (e.g., corruption and political involvement), consumer issues, and community involvement and development. *Id.* For a discussion of the relationship between the fields of BHR and CSR and their overlap and differences, see generally Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14 J. Hum. Rts. 237 (2015); Florian Wettstein, *CSR and the Debate on Business and Human Rights: Bridging the Great Divide*, 22 Bus. Ethics Q. 739 (2012).

on transparency in the form of sustainability reporting is a trap. Although requiring corporations to disclose their efforts to respect human rights may be an easy and politically acceptable regulatory intervention, a review of the empirical evidence shows that transparency as currently used is not increasing corporate accountability or encouraging positive organizational change. Thus, to the extent that policy makers rely on general transparency initiatives[19] to improve companies' human rights performance and exclude consideration of alternative policy interventions (including other transparency-based regulatory options), they create a "transparency trap" that does not further their stated goals.

Now is an especially important time to consider the risks this transparency trap creates in the area of business and human rights (BHR), which is still early in its development. Although corporations have long struggled with human rights issues, businesses did not have a clear framework for understanding their responsibilities until the United Nations *Guiding Principles on Business and Human Rights* in 2011.[20] Since that time, corporations have struggled to implement the principles. At the same time, governments are adopting various transparency programs to help ensure corporations are respecting human rights.[21] In fact, the ongoing negotiations on a BHR treaty[22] are expected to include discussions on whether to include disclosure requirements.[23] Thus, this is an important time in the development of the BHR field, and transparency policies

[19]*See infra* notes 71–74 and accompanying text (discussing the distinction between general transparency initiatives and targeted transparency initiatives).

[20]*See infra* Part I (describing the BHR field and UN *Guiding Principles*).

[21]*See infra* notes 219–32 and accompanying text (discussing the UK Modern Slavery Act, the California Transparency in Supply Chains Act, and other legislation).

[22]In 2014, the UN Human Rights Council decided "to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises." G.A. Res. 26/9, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (July 14, 2014), http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9.

[23]Douglass Cassell & Anita Ramasastry, *White Paper: Options for a Treaty on Business and Human Rights*, 6 Notre Dame J. Int'l & Comp. L. 1, 19–20 (2016).

are likely to be a significant mechanism that helps shape the business response.[24]

This article proceeds by first outlining a corporation's responsibility to respect human rights in Part I. Part II discusses the push for transparency in the BHR area, including the recent EU Directive implementing a mandatory general transparency program (as opposed to more targeted transparency programs), and the standards that provide guidance for companies' disclosure practices. The next part considers the challenges with creating BHR metrics and reviews the empirical evidence relating to the potential effectiveness of general transparency programs. The article evaluates studies conducted since sustainability reporting became a mainstream activity among large corporations and compares those studies' findings to the earlier empirical work on the topic. Part III finds that the new studies mostly confirm past evidence and suggest that sustainability reporting often results in disclosure for impression management purposes, without a connection to meaningful organizational change. Part IV provides recommendations for policy makers on how to best use mandatory transparency policies to improve corporations' human rights performance. The proposals include focusing on targeted transparency requirements and combining different transparency initiatives to form a more complete, multistrategy information-based regulatory system.

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[24]In addition, this article limits its focus to BHR disclosures because the challenges in developing the appropriate indicators and metrics for corporate human rights disclosures can be different from other CSR indicators. For example, many aspects of a corporation's environmental performance can be accurately measured by quantitative indicators, such as energy consumption, greenhouse gas emissions, water usage, and other emissions and discharges. This is not the case for human rights indicators, which are more likely to require more qualitative indicators. Karin Buhmann, *Neglecting the Proactive Aspect of Human Rights Due Diligence? A Critical Appraisal of the EU's Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action*, 3 Bus. Hum. Rts. J. 23, 25 (2018). In addition, a company's improvement on environmental performance can often improve its financial performance (such as through energy efficiency), whereas that is less likely to be the case for human rights issues. *Id.* at 25–26. That said, most of the studies reviewed in this article consider organizations' disclosure on all aspects of CSR (also referred to as environmental, social, and governance (ESG) issues). That does not diminish the insights from those studies for this article's focus on human rights. In fact, studies focused on environmental issues likely present a best-case scenario on the effectiveness of transparency programs.

I. The Business Responsibility to Respect Human Rights

Businesses face a wide range of potential human rights problems, which can vary depending on their industry and location of operations.[25] The most well-known human rights violations involve the treatment of labor, including forced labor, child labor, unsafe working conditions, or discrimination (based on gender or religion, for example).[26] Nonlabor rights violations include exposing the local community to health-harming toxins, actions that degrade local farmland and lower the local community's standard of living, and involvement in a local government's taking of private land without adequate compensation or its violation of community members' right to personal security.[27] These violations can involve action taken directly by multinationals or indirectly through their complicity with government actors or supply chain partners.[28]

Most human rights violations related to business occur in countries with low incomes, weak governance (i.e., high corruption and weak rule of law), and/or that face (or recently emerged from) armed conflict.[29] Thus, the primary focus of the BHR field is on multinational corporations and the

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[25]The human rights that are relevant to business include, at a minimum, those in the International Bill of Human Rights and the International Labor Organization's Declaration on Fundamental Principles and Rights at Work (ILO Declaration). *Guiding Principles*, *infra* note 39, at 13–14 (Principle 12). The International Bill of Human Rights refers to the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights*. *Id.* The ILO Declaration covers such matters as the right to collective bargaining, forced labor, child labor, and discrimination in employment. International Labour Organization, *Declaration on Fundamental Principles and Rights at Work*, 86th Sess., Geneva (June 18, 1998), http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_467653.pdf.

[26]John Gerald Ruggie, Just Business: Multinational Corporations and Human Rights 20–21 (2013).

[27]*Id.* at 21–23. For a thorough list of issues and examples from a wide variety of industries, see United Nations Global Compact, *Human Rights and Business Dilemmas Forum*, https://hrbdf.org (last visited Oct. 5, 2018).

[28]Ruggie, *supra* note 26, at 26–27. Ruggie's review of human rights allegations against business from 2005 to 2007 found that fifty-nine percent of complaints involved direct allegations, eighteen percent involved a corporation's supply chain, and twenty-three percent were "other" (which primarily included complicity with government action). *Id.* at 19, 26–27.

[29]*Id.* at 28–29.

problem of the "governance gap." When home country governments cannot effectively regulate multinationals and their foreign subsidiaries, and the host country government is also unable or unwilling to enforce its laws against those corporations, the result is a governance gap.[30] As John Ruggie stated, "[m]ultinational corporations became the central focus of business and human rights concerns because their scope and power expanded beyond the reach of effective public governance systems, thereby creating permissive environments for wrongful acts by companies without adequate sanctions or reparations."[31]

The first attempt to address these problems and define corporations' responsibilities with respect to human rights was the United Nations *Global Compact* in 2000.[32] Prior to the *Global Compact*, most corporations challenged the notion that human rights were even relevant to the operation of their businesses.[33] The *Global Compact* required corporations to respect and support human rights and to avoid complicity in human rights abuses, in addition to adhering to principles on the environment, labor rights, and anticorruption.[34] Critics, however, argued that the *Global Compact's* lack of clear guidelines and accountability mechanisms would allow corporations to claim social responsibility without having to meaningfully change their operations.[35]

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[30]*Id.* at *xxiii* & *xxxiii*.

[31]*Id.* at *xxiii*.

[32]Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14 J. Hum. Rts. 237, 243 (2015).

[33]Dorothee Baumann-Pauly & Justine Nolan, *Preface*, *in* Business and Human Rights: From Principles to Practice xix, xix (Dorothee Baumann-Pauly & Justine Nolan eds., 2016). For example, in response to allegations of sweatshop conditions in its factories, Nike famously denied any responsibility for human rights conditions in its suppliers' factories by stating "we don't make shoes." David Hess, *Combatting Corruption in International Business: The Big Questions*, 41 Ohio N. U. L. Rev. 679, 693 (2015).

[34]United Nations Global Compact, *The Ten Principles of the UN Global Compact*, https://www.unglobalcompact.org/what-is-gc/mission/principles. The principle on anticorruption (Principle 10) was not one of the original principles but was added in 2004. United Nations Global Compact, *Principle 10: Anti-Corruption*, https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-10 (last visited Oct. 30, 2018).

[35]Jena Martin Amerson, *"The End of the Beginning?": A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective*, 17 Fordham J. Corp. & Fin. L. 871, 892–94 (2012).

During the time the *Global Compact* was being launched, a similar attempt to define corporations' human rights obligations was under way at the United Nations.[36] In 2003, this effort resulted in the United Nations Sub-Commission on the Promotion and Protection of Human Rights approval of the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*.[37] However, the U.N. Commission on Human Rights never held a vote to approve the *Norms*, due, in significant part, to criticisms that its placement of human rights obligations directly on corporations was too onerous.[38] Thus, the *Norms* did not move past this stage and remain only a draft.

The debate over the *Norms* led the U.N. Commission on Human Rights to appoint John Ruggie as a Special Representative on business and human rights. Ruggie's work culminated in the 2011 United Nations *Guiding Principles for Business and Human Rights* (UNGPs).[39] To provide guidance to businesses on how to implement their responsibility to respect human rights, the UNGPs contain both foundational principles and operational principles. The foundational principles set

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[36]David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 9 Am. J. Int'l L. 901, 903–04 (2003).

[37]Sub-Comm'n on the Promotion and Protection of Human Rights Res. 2003/16, U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003).

[38]David Kinley et al., *"The Norms Are Dead! Long Live the Norms!" The Politics Behind the UN Human Rights Norms for Corporations*, *in* The New Corporate Accountability: Corporate Social Responsibility and the Law 459, 465–67 (Doreen McBarnet et al. eds., 2007).

[39]Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciples BusinessHR_EN.pdf [hereinafter *Guiding Principles*]. The UNGPs are the implementing guidance for the 2008 United Nations *Protect, Respect, and Remedy Framework*. Special Representative of the Secretary-General, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights*, P 17, U.N. Doc. A/HR/8/5 (Apr. 7, 2008), https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf. Under this framework, the duty to protect human rights falls on the state (often referred to as pillar one). The responsibility of business is to respect human rights (pillar two). Finally, both the state and business have a responsibility to provide victims of human rights abuses with access to remedies (pillar three).

out what it means to respect human rights[40] and how to meet that responsibility.[41] The operational principles provide guidance on how to implement the foundational principles—including guidance on what to include in a policy statement,[42] how to conduct due diligence,[43] and how to use impact assessments.[44] As a comprehensive approach to the business and human rights issue, the UNGPs have been called a "watershed moment in the business and human rights movement,"[45] and have moved commentators from questioning whether corporations have human rights responsibilities to how to define and implement them.[46]

Companies have responded to the UNGPs by accepting that business has a responsibility for human rights[47] and, to a lesser degree,

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[40]In brief, the responsibility to respect human rights requires business to "[a]void causing or contributing to adverse human rights impacts through their own activities" and to "prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts." *Guiding Principles*, *supra* note 39, at 14 (Principle 13). "The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure." *Id.* at 15 (Principle 14).

[41]Principle 15 states that for a business to meet its responsibilities, it should adopt a policy that commits the organization to respecting human rights, implement a "due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights," and develop "[p]rocesses to enable the remediation of any adverse human rights impacts they cause or to which they contribute. *Id.* at 15–16 (Principle 15).

[42]*Id.* at 16 (Principle 16).

[43]*Id.* at 17–19 (Principle 17).

[44]*Id.* at 20–21 (Principle 19).

[45]Barnali Choudhury, *Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements*, 38 U. Pa. J. Int'l L. Rev 425, 425 (2017).

[46]Florian Wettstein, *Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment*, 14 J. Hum. Rts. 162, 163–64 (2015). This is not to say that the UNGPs have not faced significant criticism. *See* Choudhury, *supra* note 45, at 441 (briefly reviewing the major criticisms).

[47]A survey of 863 senior corporate executives in November and December 2014 found that eighty-three percent of respondents agreed that human rights are a matter for business, and that seventy-one percent stated that business's responsibility extends beyond just compliance with local laws. Economist Intelligence Unit, *The Road from Principles to Practice: Today's Challenges for Business in Respecting Human Rights* 2 & 4 (2015), https://www.universal-rights.org/urg-policy-reports/the-road-from-principles-to-practice-todays-challenges-for-business-in-respecting-human-rights.

committing to adhere to the UNGPs.[48] The primary reasons that companies give for taking action to respect human rights involve "longer-term issues of brand and reputation management[.]"[49] This voluntary commitment to respect human rights is a positive development. However, the risk remains that companies will not adequately adopt the requirements of the UNGPs[50] and will let short-term business goals trump human rights concerns. As described in the following part, policy makers have sought to reduce this risk by adopting transparency initiatives to hold corporations accountable for their human rights commitments and to encourage improved performance over time.

II. The Use of Transparency to Hold Corporations Accountable for Respecting Human Rights

Governments have turned to transparency initiatives to regulate corporate behavior in a wide variety of areas,[51] including issues of human rights.[52] The following section explains how policy makers expect transparency to improve corporate performance on social issues. This is followed by a discussion of the importance that the UNGPs place on transparency. The final section sets out the requirements of the most significant development in mandatory corporate disclosure in the BHR area—the European Union Directive on the Disclosure of Non-

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[48]In a 2018 survey of business leaders, fifty-three percent of respondents indicated that their company had a made a public commitment to adhere to the UNGPs. GlobeScan & BSR, *The State of Sustainable Business 2018* 39 (2018), https://www.bsr.org/reports/BSR_Globescan_State_of_Sustainable_Business_2018.pdf.

[49]Economist Intelligence Unit, *supra* note 47, at 12. In a survey, the following were the most common reasons given for taking action to respect to human rights (with the percentage of the 863 respondents listing that factor): "building sustainable relationships with local communities (48%); protecting the company brand and reputation (43%); meeting employee expectations (41%); and moral/ethical considerations (41%)." *Id.*

[50]*Id.* at 13–14.

[51]*See supra* notes 1–6 and accompanying text.

[52]Adam S. Chilton & Galit A. Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 Stan. J. Int'l L. 1, 3–4 (2017).

financial Information—and the leading voluntary standards on non-financial disclosure.[53]

A. Improving Corporate Behavior Through Transparency

Transparency initiatives typically seek to improve corporate behavior by facilitating external pressures. If the company is not meeting societal expectations of responsible behavior, then market or nonmarket-based pressure from stakeholders may provide incentives for the company to reform its behavior. Often, transparency policies are based on performance (or outcome) measures. For example, due to the disclosures required by the Nutrition Labeling and Education Act (NLEA), consumers can easily determine the number of calories, grams of sugar, and other nutrition information in food items for sale, which in turn is expected to encourage companies to develop ways to make their food healthier or to offer healthier alternatives.[54] Likewise, under the Toxic Release Inventory program, companies are required to disclose a facility's discharge of certain chemicals, which allows interested stakeholders to easily determine a company's performance and pressure it to change its operations to reduce the level of those discharges.[55] Transparency programs can also include process (or behavioral) measures, which become important when a desired outcome is difficult to measure or even to specify. An example of a process measure in the context of BHR would be the percentage of the company's employees that have received human rights training or the percentage of suppliers that the company has screened using human rights criteria.

Together, performance and process measures can do more than just open the corporation to outside scrutiny. First, by going through the disclosure process, corporations may start to change their operating ethos.[56] Thus, the value of transparency policies arises not simply from disclosure to market

[53]It is worth noting that the term "non-financial information" is a misnomer, as the ESG issues that make up the non-financial information have a significant impact on a corporation's financial performance. *See generally* Gunnar Friede et al., *ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies*, 5 J. SUSTAINABLE FIN. & INV. 210 (2015) (reviewing empirical studies on the connection between ESG criteria and financial performance and finding that most studies find a positive relationship).

[54]FUNG ET AL., *supra* note 4, at 84–85.

[55]David Hess, *The Three Pillars of Corporate Social Reporting as New Governance Regulation: Disclosure, Dialogue and Development*, 18 BUS. ETHICS Q. 447, 451–52 (2008).

[56]*Id.* at 460.

and nonmarket participants that can apply economic or political pressure on the corporation, but also from the internal development and learning process that the corporation goes through.[57] Building on reflexive law rationales for transparency,[58] Park states that this learning process "can add social meaning to abstract legal mandates."[59] Through this process of learning its direct impact on human rights, a corporation gains a greater, and firm-specific, understanding of the value of transparency, which adds legitimacy to the social values behind the policy.[60] Overall, the policy can help the company adopt an organizational culture that places intrinsic value on respecting human rights.[61]

Second, appropriately designed performance and process measures can support actual engagement between the company and its stakeholders, as opposed, for example, to the company simply responding to feedback from the marketplace about disclosed facts. The latter case is essentially an adversarial process—the consumer will not purchase products from the company until it improves its human rights performance.[62] True dialogue, however, should be focused on collaborative problem solving and continuous improvement.[63] As Park states, non-financial disclosure should be viewed as an "inherently social process."[64]

B. Transparency Under the UNGPs

The UNGPs place a high value on transparency, as seen by the multiple mentions of the need for communication by business. For instance,

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[57]*Id.* As another example, Park develops a model of constructive discourse. Stephen Kim Park, *Targeted Social Transparency as Global Corporate Strategy*, 35 Nw. J. Int'l. L. & Bus. 87, 114 (2014). This model has an integrative and expressive dimension. The integrative dimension "focuses on what corporate managers learn about the MNEs' social impacts through the disclosure process." *Id.* at 115.

[58]*See* David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. Corp. L. 41 (1999); Eric W. Orts, *Reflexive Environmental Law*, 89 Nw. U. L. Rev. 1227 (1995).

[59]Park, *supra* note 57, at 116.

[60]*Id.*

[61]*See* Hess, *supra* note 55, at 461 (discussing sustainability more generally).

[62]*Id.* at 460.

[63]*Id.*

[64]Park, *supra* note 57, at 118.

regarding the state's obligation to protect human rights, Principle 3 states, "[i]n meeting their duty to protect, States should … (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts."[65] The commentary to Principle 3 provides that such communication requirements "can range from informal engagement with affected stakeholders to formal public reporting."[66] The commentary goes on to state that "[a] requirement to communicate can be particularly appropriate where the nature of business operations or operating contexts pose a significant risk to human rights."[67]

The UNGPs emphasize that business should be able to both "know" it is respecting human rights and "show" that it is doing so.[68] With respect to "showing," Principle 21 states,

> In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:
> (a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;
> (b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;
> (c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.[69]

As it does in Principle 3, the commentary to Principle 21 notes that these communications can range from the informal to the formal, and that "[f]ormal reporting by enterprises is expected where risks of severe human rights impacts exist, whether this is due to the nature of the business operations or operating contexts."[70]

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[65]Guiding Principles, *supra* note 39, at 4 (Principle 3(d)).

[66]*Id.* at 6.

[67]*Id.*

[68]*Id.* at 23–24.

[69]*Id.* at 23.

[70]*Id.* at 24.

The UNGPs express the expectation of communication with impacted stakeholders and the importance of showing how the company is respecting human rights. These are, of course, general principles and do not provide specific guidance. The next section discusses more detailed mandatory disclosure requirements—as mentioned in Principle 3—with a focus on the recent EU directive. This discussion is followed by a description of the leading standards for voluntary sustainability reporting, which are available to provide corporations with a framework that can be applied to comply with the EU requirements.

C. Mandating Transparency for Human Rights

The approaches to mandatory non-financial disclosure can be roughly divided into two categories: targeted and general. Targeted transparency programs focus on a specific issue or geographic area, for example, and provide corporations with little discretion on the information that must be disclosed.[71] Examples of these types of instruments include disclosures on a company's efforts to ensure that its supply chain does not include conflict minerals or the use of trafficked labor.[72]

The primary example of a general transparency instrument is a standalone sustainability report. A sustainability report can go by many names, including non-financial reporting; CSR reporting; environmental, social, and governance (ESG) reporting; triple bottom line reporting; and others.[73] No matter the name, sustainability reporting involves a corporation's disclosure of information to its stakeholders regarding its performance on environmental and social (including human rights) issues, information that is not typically included in a corporation's financial reports. Although the report should be comprehensive, corporations are expected to focus significant attention on those issues of most importance to that specific corporation and its stakeholders.[74]

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[71] *See* Park, *supra* note 57, at 102 (building off of Fung and colleagues' use of the term "targeted transparency" to develop the term "targeted social transparency").

[72] *See infra* notes 219–32 and accompanying text (discussing the UK Modern Slavery Act, the California Transparency in Supply Chains Act, and other legislation).

[73] Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. Corp. L. 59, 91 (2010).

[74] *See infra* note 95 and accompanying text (discussing the concept of material information in the context of sustainability reporting).

This article focuses on general transparency through sustainability reporting for two reasons. First, as discussed in the next subsection, the most significant recent development in mandated disclosure was the EU directive requiring non-financial disclosure for companies of a certain size. Second, this article's next part reviews the empirical literature on non-financial disclosure to determine its effectiveness, and this research is primarily on corporate disclosures under general transparency instruments. In Part IV, however, the article will return to targeted transparency programs and consider their use as an alternative to general transparency programs.

1. The EU Directive on the Disclosure of Non-Financial Information

The largest development in mandatory general transparency was the 2014 EU Directive on non-financial disclosure,[75] which some commentators suggest could serve as a model for a disclosure requirement in a treaty on business and human rights.[76] This Directive requires member states to adopt legislation mandating that all large corporations—defined as those with five hundred or more employees—provide disclosure on ESG issues in their annual reports, starting in 2018.[77] Specifically, the EU Directive states that companies should provide non-financial disclosures

> containing information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including:
>
> (a) a brief description of the undertaking's business model;
> (b) a description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented;
> (c) the outcome of those policies;

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[75]Directive 2014/95/EU of the European Parliament and of the Council of 22 Oct. 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, O.J. (L 330), 1 [hereinafter *Parliament and Council Directive on Non-financial Information*].

[76]Cassell & Ramasastry, *supra* note 23, at 19–20.

[77]*Parliament and Council Directive on Non-financial Information*, *supra* note 75, at art. 19a para. 1.

> (d) the principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks;
> (e) non-financial key performance indicators relevant to the particular business.[78]

The Directive grants companies significant flexibility for determining what information to disclose, and how. It lists a variety of principles and frameworks that companies may rely upon, including the Global Reporting Initiative (GRI), which is the leading standard for corporations to use to produce sustainability reports.[79] In addition, in 2017 the European Commission supplemented the Directive with nonbinding guidelines on company methods for reporting.[80] These guidelines provide six key principles for disclosure: (1) "Disclose material information;"[81] (2) "Fair, balanced and understandable;"[82] (3) "Comprehensive but concise;"[83] (4) "Strategic and forward-looking;"[84] (5) "Stakeholder orientated;"[85] and (6) "Consistent and

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[78]*Id.*

[79]*Id.* at *whereas* para. 9.

[80]*Communication from the Commission—Guidelines on Non-Financial Reporting (Methodology for Reporting Non-Financial Information),* 2017/C 215/01 (July 5, 2017), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0705(01)&from = EN [hereinafter *Commission Communication*].

[81]*Id.* at 5–6. In brief, material information is information necessary for a stakeholder to understand the impact (both direct and indirect) of the company's activities. *Id.*

[82]*Id.* at 7. This means that the information should include both positive and negative information. *Id.* In addition, the information should be presented in a manner that can be understood by the relevant stakeholders, including the use of qualitative information in addition to quantitative information. *Id.*

[83]*Id.* at 7–8. The company should focus on material information and avoid discussion of generic or nonmaterial information that "may make the non-financial statement less easy to understand." *Id.* at 8.

[84]*Id.*at 8–9. The company's disclosures "should provide insight into the strategic approach to relevant non-financial issues; what a company does, how and why it does it." *Id.* at 8.

[85]*Id.* at 9. The company should focus on "the information needs of all relevant stakeholders" and also disclose how it has engaged with the relevant stakeholder groups. *Id.* The relevant stakeholders "may include, among others: investors, workers, consumers, suppliers, customers, local communities, public authorities, vulnerable groups, social partners and civil society." *Id.*

coherent."[86] After articulating those principles, the EU guidelines then provide a general overview of the content of a report, which requires each company to include a discussion of its business model, its policies and due diligence processes, the outcome of those policies, the principal risks to its business model and how they are managed, and key performance indicators.[87]

The EU Directive is consistent with the use of sustainability reports as a general transparency instrument, but it does not provide specific guidance. Fortunately, two leading standards provide actual indicators that a company could report against—the GRI and the Sustainability Accounting Standards Board (SASB).

2. General Transparency Standards

The leading framework for voluntary non-financial reporting is the GRI Standards.[88] The GRI—a nonprofit organization focused on sustainability reporting—published its first set of guidelines in 1999. By 2004, it had established itself as the "*de facto* standard for sustainability reporting."[89] The GRI published updated versions of its guidelines—with the fourth version (the G4) published in 2013[90]—until the guidelines were replaced with the GRI Standards in 2016.[91] The Global Sustainability

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[86] *Id.* at 9. The company should present the information in a consistent form over time (to allow users to more easily evaluate the company's performance improvements) and the company should discuss the linkages with other elements of its management reports to help create one complete, coherent report on the company's activities. *Id.*

[87] *Id.* at 9–18.

[88] A 2017 survey found that seventy-five percent of reports from the Global 250 (that is, the world's largest 250 companies) used a version of the GRI framework. KPMG, The Road Ahead: The KPMG Survey of Corporate Responsibility Reporting 2017 28 (2017), https://home.kpmg.com/content/dam/kpmg/campaigns/csr/pdf/CSR_Reporting_2017.pdf. Ninety-three percent of the Global 250 publish sustainability reports. *Id.* at 9.

[89] Dror Etzion & Fabrizio Ferraro, *The Role of Analogy in the Institutionalization of Sustainability Reporting*, 21 Org. Sci. 1092, 1097, 1101 (2010).

[90] Press Release, GRI, G4 Is Future of Sustainability Reporting, Say Business Leaders (May 22, 2013), https://www.globalreporting.org/information/news-and-press-center/Pages/G4-is-future-of-sustainability-reporting-say-business-leaders.aspx.

[91] Press Release, GRI, First Global Sustainability Reporting Standards Set to Transform Business (Oct. 19, 2016), https://www.globalreporting.org/information/news-and-press-center/Pages/First-Global-Sustainability-Reporting-Standards-Set-to-Transform-Business.aspx.

Standards Board, under the auspices of the GRI, now oversees the standards, which are to be updated on an ongoing basis.[92]

A corporate report produced in accordance with the GRI must comply with the requirements in three general categories of disclosures.[93] First, required general disclosures cover such matters as the company's general business, strategy, governance structure, and stakeholder engagement practices.[94] Second, the company must report on its general management approach for each specific ESG topic that it has determined to be material for that company.[95] This includes a discussion of such matters as its policies, goals, grievance mechanisms, specific processes or programs,[96] and an evaluation of the effectiveness of that management approach.[97]

Third, for each material topic, the GRI provides specific standards that are grouped under the general headings of economic, environmental, or social. Specific standards under the social heading include a variety of human rights issues, including nondiscrimination,[98] freedom of association,[99] child labor,[100] forced labor,[101] indigenous peoples,[102] and complicity through the actions of security forces.[103] The social heading also contains a more general standard on assessing human rights risks,[104] which requires companies to report on the "[t]otal

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[92] GRI, *Global Sustainability Standards Board*, https://www.globalreporting.org/standards/gssb-and-standard-setting/ (last visited Oct. 7, 2018).

[93] GRI 101: Foundation 23 (2016).

[94] GRI 102: General Disclosures 2–6 (2016).

[95] GRI 103: Management Approach 5 (2016). "Material topics are those that reflect an organization's significant economic, environmental and social impacts; or that substantively influence the assessments and decisions of stakeholders." *Id.* at 6.

[96] *Id.* at 8 (Disclosure 103-2).

[97] *Id.* at 11 (Disclosure 103-3).

[98] GRI 406: Non-discrimination (2016).

[99] GRI 407: Freedom of Association and Collective Bargaining (2016).

[100] GRI 408: Child Labor (2016).

[101] GRI 409: Forced or Compulsory Labor (2016).

[102] GRI 411: Rights of Indigenous Peoples (2016).

[103] GRI 410: Security Practices (2016).

[104] GRI 412: Human Rights Assessment (2016).

number and percentage of operations that have been subject to human rights reviews or human rights impact assessments, by country."[105] It also mandates disclosure on the percentage of employees trained on human rights matters (and total number of hours),[106] and the number of significant investment contracts that include clauses requiring certain human rights expectations.[107]

For the specific human rights issues that a company considers to be material, the following are examples of the GRI's indicators. For indigenous peoples, in addition to a discussion of the company's general management approach on the issue,[108] the company must report on the number of incidents involving rights violations of indigenous peoples and how those incidents were remediated.[109] For both child labor and forced labor, the organization should report on operations and suppliers that have a significant risk, and then the measures the organization takes to eliminate the problem.[110]

The next most well-known set of voluntary standards is produced by SASB—a nonprofit standards-setting organization.[111] SASB standards apply to corporations that must make public disclosures under U.S. securities laws. Under the SEC rules, in addition to specifically

[105]*Id.* at 7 (Disclosure 412-1).

[106]*Id.* at 8 (Disclosure 412-2).

[107]*Id.* at 9 (Disclosure 412-2).

[108]GRI 103: Management Approach 5 (2016).

[109]GRI 411: Rights of Indigenous Peoples 7 (2016) (Disclosure 411-1).

[110]GRI 408: Child Labor (2016) (Disclosure 408-1); GRI 409: Forced or Compulsory Labor 6 (2016) (Disclosure 409-1).

[111]Sustainability Accounting Standards Board, Annual Report 7 (2017), https://www.sasb.org/wp-content/uploads/2018/09/SASB-Annual-Report-2017.pdf. According to the chief executives of the GRI and SASB, the two sets of standards have different but complementary missions. Tim Mohin & Jean Rogers, *How to Approach Corporate Sustainability Reporting in 2017*, GreenBiz (Mar. 16, 2017, 2:11 AM), https://www.greenbiz.com/article/how-approach-corporate-sustainability-reporting-2017. The GRI is focused on the needs of a wide variety of stakeholders and therefore has a broader scope of disclosure requirements. SASB, by contrast, is focused only on investors and their information needs, including industry-specific, comparable information. Rather than choose one standard or the other to follow, these chief executives suggest that companies should use both standards to meet the needs of different audiences, and state that the "standards are not mutually exclusive; they are mutually supportive." *Id.*

detailed required disclosures, corporations must also disclose any information that may have a material impact on the organization's business.[112] To help corporations determine what sustainability-related information is likely material for their industry, SASB has developed provisional standards for seventy-seven industries.[113] Generally, SASB views its purpose as helping "public corporations disclose financially material information to investors in a cost-effective and decision-useful format."[114]

One example of the provisional SASB standards is in the apparel, accessories, and footwear industry.[115] Under the topic of "Labor Conditions in the Supply Chain," corporations are expected to disclose the percentage of their suppliers that were audited (either by the company or a third-party auditor) for compliance with a labor code of conduct (that the company specifies).[116] Next, the corporation must disclose the rate of noncon-

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[112]The Supreme Court defined materiality under U.S. securities laws as follows:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. … It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). On challenges determining materiality, see generally Yvonne Ching Ling Lee, *The Elusive Concept of "Materiality" Under U.S. Federal Securities Laws*, 40 Willamette L. Rev. 661 (2004).

[113]SASB, https://www.sasb.org/standards-overview/download-current-standards/ (last visited Oct. 7, 2018). Based on formal SEC guidance, many corporations should disclose business risks related to climate change under current SEC rules. SEC Release No. 33-9106, *Commission Guidance Regarding Disclosure Related to Climate Change*, http://www.sec.gov/rules/interp/2010/33-9106.pdf. Corporations, however, have ignored the guidance without consequence. Christina Carlson et al., *Stormy Seas, Rising Risks: What Investors Should Know About Climate Change Impacts at Oil Refineries* 1, 20 (2015), https://www.ucsusa.org/center-science-and-democracy/fighting-misinformation/stormy-seas-rising-risks-what-investors-should-know-climate-change-impacts-refineries#.WvX4JYgvyUk.

[114]SASB, https://using.sasb.org/ (last visited Oct. 7, 2018).

[115]SASB, *Apparel, Accessories & Footwear: Sustainability Accounting Standard* (Sept. 2015, provisional standard), https://www.sasb.org/wp-content/uploads/2015/09/CN0501_Apparel-Accessories-Footwear_Standard.pdf.

[116]*Id.* at 19–20.

formance from the audits and the rate of corrective action.[117] In addition to those quantitative indicators, the final indicator requires a discussion of the "greatest (1) labor and (2) environmental, health, and safety risks in the supply chain."[118] The company is obligated to list the top three risks in each of those two categories, and then "may choose to include a discussion of strategies and efforts to reduce the occurrence" of those risks.[119] As another example, a company in the mining industry is expected to disclose the amount of its reserves in or near conflict areas or indigenous land, and then provide a discussion of the engagement and due diligence practices used in those areas to respect human rights.[120]

The next part turns to an evaluation of the use of these standards for BHR purposes. An examination of BHR metrics and a review of the empirical evidence on sustainability reporting suggest that despite the promise of organizational change that many observers hoped would result from the EU directive, its approach appears unlikely to lead to a positive change in corporate behavior.

III. The Transparency Trap

Policy makers' reliance on general transparency programs creates a trap. Unfortunately, the expectation that general transparency programs will increase corporate accountability and encourage positive organizational change with respect to human rights issues is misplaced, as will be shown in this part. First, there are significant limits on the ability of available metrics to convey a meaningful picture of a company's performance on human rights issues to external stakeholders. Second, in practice, problems such as selective disclosure, impression management, incomparable disclosures (over time and between companies), and treating disclosure as an end in

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[117] *Id.* at 22. "A corrective action is defined as an action to eliminate the cause of a detected non-conformance, including the implementation of practices or systems to eliminate any non-conformance and ensure there will be no reoccurrence of the non-conformance as well as verification that the corrective action has taken place." *Id.* at 21.

[118] *Id.* at 22.

[119] *Id.*

[120] SASB, *Metals and Mining: Sustainability Accounting Standards* 29–32 (June 2014, provisional standard), https://www.sasb.org/wp-content/uploads/2014/06/NR0302_ProvisionalStandard_MetalsMining.pdf.

itself (as opposed to a process that leads to organizational change) limit the effectiveness of these programs. Thus, policy makers who rely heavily on general transparency initiatives to change corporate behavior, without considering or implementing alternative policy interventions (including other transparency-based regulatory options), fall prey to the deception that their efforts will result in positive change. To avoid a transparency trap, we must alter our expectations of what general transparency programs can achieve. This article concludes that general transparency should be treated as a complement to other regulatory approaches, but not a substitute.

A. The Challenge of Business and Human Rights Metrics

As the reliance on transparency programs as a policy tool has increased, the use of metrics to incentivize performance is also on the rise, appearing in a wide range of fields, including police work, primary school education, hospitals, and many others.[121] Professor Muller describes the appeal of metrics as follows: "The most characteristic feature of metric fixation is the aspiration to replace judgment based on experience with standardized measurement. For judgment is understood as personal, subjective, and self-interested. Metrics, by contrast, are supposed to provide information that is hard and objective."[122] The use of metrics can prove valuable in many situations, but, like transparency policies in general, when relied upon without full consideration of their limitations, "metric fixation" can create false hope in the value of the program and may even cause it to become counterproductive.[123]

The use of metrics to measure a corporation's human rights performance can be particularly problematic. As shown above in the brief overview of the GRI and SASB standards,[124] corporations are expected to disclose a mixture of qualitative and quantitative information. Users of the information (such as shareholders, nongovernmental organizations (NGOs), or consumers) or intermediaries between the disclosing company and the end user often transform the qualitative information into quantitative information to allow comparison between companies.[125] As discussed below, these

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[121] Jerry Z. Muller, The Tyranny of Metrics 1–6 (2018).

[122] *Id.* at 6.

[123] *Id.* at 7–8.

[124] *See supra* Part II.B.2.

[125] Hess, *supra* note 15, at 466–67.

quantitative metrics have significant shortcomings.[126] Without awareness of these limitations, the appearance of scientific accuracy and objectivity created by metrics[127] can create the false impression that transparency initiatives are an accurate picture of a corporation's human rights performance, for at least several reasons.

First, there is the problem that "not everything that can be counted counts, and not everything that counts can be counted."[128] Reports on the complex issues surrounding the responsibility to respect human rights often include a selection of metrics that are based on data that can be most easily collected, as opposed to the most important.[129] This often results in a focus on company policies and procedures, not performance outcomes.[130] For example, metrics on the percentage of employees receiving human rights training or the percentage of suppliers screened for human right issues are easy to create, but they do not capture the effectiveness of those efforts.[131] This problem, created by an evaluation of corporations based on available data and easy to construct metrics, is an example of the "streetlight effect," which is the tendency for people to rely upon the most convenient information rather than the most relevant information.[132]

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[126] *See infra* notes 128–43 and accompanying text.

[127] MULLER, *supra* note 121, at 34.

[128] *Id.* at 18 (quoting William Bruce Cameron).

[129] Damiano de Felice, *Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities*, 37 HUM. RTS. Q. 511, 537 (2015); CASEY O'CONNOR & SARAH LABOWITZ, PUTTING THE "S" IN ESG: MEASURING HUMAN RIGHTS PERFORMANCE FOR INVESTORS 25 (2017).

[130] O'CONNOR & LABOWITZ, *supra* note 129, at 25. The authors based their conclusions on a review of both (1) frameworks available for companies to communicate their human rights practices and (2) frameworks used by others to evaluate corporate efforts. *Id.* at 11–17.

[131] *See* de Felice, *supra* note 129, at 537–38 (discussing metrics on the screening of suppliers).

[132] The "streetlight effect" is also known as the "drunkard's fallacy," and is based on the following joke.

> Late at night, a police officer finds a drunk man crawling around on his hands and knees under a streetlight. The drunk man tells the officer he's looking for his wallet. When the officer asks if he's sure this is where he dropped the wallet, the man replies that he thinks he more likely dropped it across the street. Then why are you looking over here? the befuddled officer asks. Because the light's better here, explains the drunk man.

David H. Freedman, *Why Scientific Studies Are So Often Wrong: The Streetlight Effect*, DISCOVER MAG., Dec. 10, 2010, http://discovermagazine.com/2010/jul-aug/29-why-scientific-studies-often-wrong-streetlight-effect.

Second, the validity of the metrics may be problematic. Validity requires that the indicator actually measure what it was designed to measure.[133] For example, under the GRI Standards for indigenous peoples, corporations are required to disclose the "[t]otal number of identified incidents of violations involving the rights of indigenous peoples" and then the remedial measures taken in response to those violations.[134] The GRI guidance to the indicator notes that "an 'incident' refers to a legal action or complaint registered with the reporting organization or competent authorities through a formal process, or an instance of non-compliance identified by the organization through established procedures."[135] Under this metric, a low number of incidents, or a reduction in the number of incidents from a prior time period, is intended to indicate that the company has implemented effective procedures to respect the rights of indigenous peoples. However, the low number could also be due to repressive actions by the local government that prevent rights holders from complaining, or that the organization's grievance procedures—which should allow the company to identify incidents—are ineffective.[136] In either of those situations, the metric faces validity problems because a low number of incidents are due to a human rights problem, not improved performance. In addition, the local context can have a significant impact on how one should interpret the metric, which makes it difficult to compare the performance of corporations operating in different regions of the world by simply using the indicator.[137]

Lastly, the data used for reporting on the agreed-upon metrics may be unreliable. For instance, the SASB provisional standards for the apparel, accessories, and footwear industry include an indicator on the percentage of suppliers audited for compliance with a code of conduct on labor and the rate of nonconformance.[138] Under this indicator, a higher percentage of suppliers audited and a lower rate of nonconformance supposedly show

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[133]de Felice, *supra* note 129, at 540.

[134]GRI 411: Rights of Indigenous Peoples 7 (2016).

[135]*Id.*

[136]de Felice, *supra* note 129, at 541.

[137]*Id.* at 541–42.

[138]SASB, *supra* note 115, at 19–21.

higher performance. The audits of factories that determine the rate of non-conformance have significant potential problems, however, which significantly reduce the usefulness of those numbers. For example, structural features of the audit process—such as auditors' conflicts of interest or limited power—create ineffective audits.[139] Moreover, in highly corrupt environments, bribery can lead to the creation of false or misleading audit reports.[140] Managers of the factories being audited also have a variety of ways to effectively game the system (e.g., claiming that apparel made in an unaudited factory was actually made in the factory currently being audited).[141] Thus, not surprisingly, such audits have achieved limited results in improving human rights.[142] Issues like this cause LeBaron and Lister to argue that the "growing public and government trust in the metrics generated by audits ends up concealing real problems in global supply chains."[143]

Thus, the creation of a comprehensive set of metrics on business and human rights issues is limited by the difficulty in ensuring the validity of those metrics and the related questions about the quality of the data that support them. Although these potential faults do not render non-financial reporting worthless, policy makers must be aware of these

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[139]Genevieve LeBaron et al., *Governing Global Supply Chain Sustainability Through the Ethical Audit Regime*, 14 GLOBALIZATIONS 958, 960 (2017). One director of an NGO the authors interviewed stated, "there is a whole industry of ethical auditors out there now who will find nothing if you pay them to go and find nothing." *Id.* at 970.

[140]David Hess, *Business, Corruption, and Human Rights: Towards a New Responsibility for Corporations to Combat Corruption*, 2017 WISC. L. REV. 641, 668–69.

[141]*Id.* at 668. *See also* LeBaron et al., *supra* note 139, at 970 (finding through their field research that "[m]any suppliers now hire former auditors as consultants to help them meet—and beat—the system").

[142]*See, e.g.*, GENEVIEVE LEBARON & JANE LISTER, ETHICAL AUDITS AND THE SUPPLY CHAINS OF GLOBAL CORPORATIONS, 1 (2016) (stating that "[a]udits are ineffective tools for detecting, reporting, or correcting environmental and labour problems in supply chains. They reinforce existing business models and preserve the global production status quo."); Richard Locke et al., *Virtue out of Necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains*, 37 POL. & SOC'Y 319, 327 (2009) (finding that supplier factories go in and out of compliance with conduct codes, in part due to factors not covered in an audit, and that overall "even if one could afford to design and implement a rigorous monitoring system, it is not at all clear that a factory audit would be the most appropriate method of collecting—let alone communicating—up-to-date information about factory conditions").

[143]Genevieve LeBaron & Jane Lister, *Benchmarking Global Supply Chains: The Power of the 'Ethical Audit' Regime*, 41 REV. INT'L STUDIES 905, 908 (2015).

limitations when setting policy and choosing between alternative regulatory approaches. The next sections look more closely at the empirical literature on the quality of corporations' non-financial disclosures through general transparency reports to determine whether the disclosure process has changed organizational behavior.

B. The Empirical Evidence on Non-Financial Disclosure Practices

The EU Directive provides key principles to guide corporate disclosure of non-financial information. These principles include disclosure of all material information, providing a fair, balanced, and understandable view of the company, and being comprehensive.[144] Likewise, commentators regularly state that if sustainability reporting is to be an effective transparency program, then the disclosed information must provide complete (as opposed to selective) disclosure, and the information must be in a form comparable to other companies.[145] The following review of empirical studies shows that these requirements are not being met, and companies are producing low-quality, unbalanced reports. The evidence shows that these problems existed when non-financial reporting was in its infancy and have continued even though sustainability reporting is now a mainstream practice. Moreover, the process of producing a sustainability report has not led to meaningful, positive organizational change.

1. The Continuing Problems of Corporations' Non-Financial Disclosure

Many of the prior studies on non-financial disclosure relied upon legitimacy theory, which, as used in these studies, claims that corporations often use disclosure to influence external stakeholders' perceptions of the corporation's behavior.[146] A company that does not

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[144]*See supra* Part II.B.1. Likewise, the GRI sets out principles for determining the report content and for defining the report quality. GRI 101: Foundation 7 (2016). The principles for reporting content are stakeholder inclusiveness, sustainability context, materiality, and completeness. *Id.* The principles for defining the quality of the report are accuracy, balance, clarity, comparability, reliability, and timeliness. *Id.*

[145]David Hess & Thomas W. Dunfee, *The Kasky-Nike Threat to Corporate Social Reporting: Implementing a Standard of Optimal Truthful Disclosure as a Solution*, 17 Bus. Ethics Q. 5, 25 (2007).

[146]Charles H. Cho et al., *Organized Hypocrisy, Organizational Facades, and Sustainability Reporting*, 40 Acct, Orgs. & Soc'y 78, 80 (2015).

meet societal expectations of responsible behavior may selectively disclose certain non-financial information to present a factually accurate but misleading picture of the company to influence stakeholders' perceptions. The early research on non-financial disclosure generally supported this view.[147] The findings showed that companies facing a legitimacy challenge (such as negative coverage in the media due to a scandal or incident) would increase their level of positive disclosures.[148] The conclusions supported the view that a company's goal in disclosure was often not accountability but the presentation of an image of a corporation that had reformed itself, or was at least making significant progress toward meeting society's expectations.[149]

More recent studies on non-financial disclosure sought to determine whether the increased experience with sustainability reporting, now that it has become more mainstream,[150] has improved the quality of information and reduced strategic behaviors. These studies generally confirm the legitimacy factors of prior studies. For example, a company that

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[147]For a literature review, see Craig Deegan, *The Legitimising Effect of Social and Environmental Disclosures—A Theoretical Foundation*, 15 Acct, Auditing & Accountability J. 282, 297–98 (2002); *see also* Charles H. Cho et al., *CSR Disclosure: The More Things Change . . .?*, 28 Acct, Auditing & Accountability J.1, 14, 17 (2015). Using an empirical study based on data from 2010, the authors argue that legitimacy factors continue to influence environmental disclosure but not social disclosure. *Id.* at 25–26. However, their study is limited by using only the following variables to measure legitimacy factors: firm size (relative to other firms in the sample, which were all Fortune 500 companies) and membership in one of the following industries: paper, chemicals, petroleum, or metals. *Id.* at 22, 24.

[148]Breeda Comyns et al., *Sustainability Reporting: The Role of "Search", "Experience" and "Credence" Information*, 37 Acct. Forum 231, 232 (2013).

[149]Deegan, *supra* note 147, at 292–98, 297 (providing an overview of legitimacy theory and reviewing the empirical evidence (prior to the article's publication in 2002) to find "[t]he result has been that, more often than not, corporate social and environmental disclosure strategies have been linked to legitimising intentions").

[150]This article does not propose an exact date for when sustainability reporting became a mainstream activity or even a definition of "mainstream." Generally, however, for purposes of this article, we can say that sustainability reporting became mainstream when it became more commonly used than not by large corporations. This date would be sometime between 2003 and 2008. For the largest 250 corporations in the world, more than fifty percent published sustainability reports sometime between 2003 and 2005. KPMG, *supra* note 88, at 9 (based on representations in the graph). For the top one hundred companies in the forty-nine countries surveyed by KMPG, the number of companies publishing sustainability reports exceed fifty percent in 2008. *Id.* (based on representations in the graph).

suffered a negative event, or is part of an industry facing significant public issues, will often engage in selective positive disclosure.[151]

In addition to the findings on legitimacy theory, this new evidence indicates that non-financial reporting has not improved significantly in terms of quality, comparability, and comprehensiveness. Researchers have not found evidence of improvement, despite the increased use of and experience with the GRI guidelines and non-financial reporting in general. A common problem is that companies seek to gain legitimacy with external stakeholders by simply disclosing an increased quantity of information and claiming to have complied with the GRI, even though a closer examination casts doubt on the quality of the disclosures. For instance, Michelon and colleagues studied 112 UK company reports to determine if a standalone sustainability report produced in accordance with the GRI and receiving external assurance[152] improved the quality of disclosure.[153] They found that the standalone report approach increased the quantity of non-financial information (though it was also diluted with additional irrelevant information), but none of the three factors studied (standalone report, use of the GRI, and external assurance) increased the quality of the information.[154] The authors argued that these conclusions supported the legitimacy theory prediction that corporations simply disclose to manage their corporate image.[155]

Another study found that companies often misleadingly claim that the increased quantity of disclosed information complies with the GRI standards. Parsa and colleagues studied the sustainability reports of

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[151]*See, e.g.*, Jean-Noel Chauvey et al., *The Normativity and Legitimacy of CSR Disclosure: Evidence from France*, 130 J. Bus. Ethics 789, 799–800 (2015) (finding that legitimacy factors influenced the amount of disclosure and breadth of issues covered); Cho et al., *supra* note 147, at 22–26 (finding that legitimacy factors influence environmental disclosure but not social disclosure).

[152]External assurance involves an independent party conducting a review of the disclosure process and the disclosed information with the goal of increasing "the robustness, accuracy and trustworthiness of disclosed information." Global Reporting Initiative, The External Assurance of Sustainability Reporting 6 (2013), https://www.globalreporting.org/resourcelibrary/GRI-Assurance.pdf.

[153]Giovanna Michelon et al., *CSR Reporting Practices and the Quality of Disclosure: An Empirical Analysis*, 33 Critical Persp. Acct. 59, 60–61 (2015).

[154]*Id.* at 62, 73–74.

[155]*Id.* at 62.

131 companies from the 250 largest companies in the world.[156] In each report, the companies included a GRI index indicating the degree to which they had disclosed against each indicator (full, partial, or none).[157] Comparing the companies' claimed level of disclosure on the labor and human rights indicators against the authors' evaluation of the actual disclosures, the authors found that companies consistently overclaimed disclosure.[158] For example, the GRI indicator on child labor (from the G3 version) asks companies to report on operations at risk for child labor and the measures taken to prevent it.[159] One company claimed full compliance with that indicator even though it simply stated that the company complied with local law, the relevant ILO convention, and the U.N. Global Compact, without providing any additional details.[160] The authors argued that this overclaiming is a legitimation tool that allows a company to associate itself with a positive symbol (the GRI standards) but not actually to change its practices.[161] Their conclusion is consistent with other critics who argue that many corporations are rewarded by external stakeholders for only producing more disclosures, which then promotes the companies' self-perception that it is working toward sustainability even if its actions have not meaningfully changed (or even if its actions are doing the opposite).[162]

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[156]Sepideh Parsa et al., *Have Labour Practices and Human Rights Disclosures Enhanced Corporate Accountability? The Case of the GRI Framework*, 42 ACCT. FORUM 47, 53 (2018).

[157]*Id.*

[158]*Id.* at 60.

[159]*Id.* at 56.

[160]*Id.* at 59–60.

[161]*Id.* at 49–50.

[162]*See* Markus Milne & Rob Gray, *W(h)ither Ecology? The Triple Bottom Line, the Global Reporting Initiative, and Corporate Sustainability Reporting*, 118 J. BUS. ETHICS 13, 19 (2013) (arguing that the various awards and recognitions for companies that simply produce more disclosure can best be described as "an industry of endeavor [that] is successfully constructing—and rewarding—sustainable performances and achievements of sustainability by many of the world's largest corporations in a hyper-reality which is entirely divorced from any planetary or human realities"); Hess, *supra* note 55, at 463 (noting that companies had a strong incentive to engage in the practice of focusing on quantity because they were receiving positive recognition from external ratings organizations simply for disclosing against more GRI indicators, without regard to the quality of those disclosures or the actual social and environmental performance of the company).

Moreover, the information contained in sustainability reports is often not comparable between companies within a given industry. Comparable information is important for allowing stakeholders to determine the leaders and laggards in an industry, and then push the laggards to improve their performance.[163] Boiral and Henri studied the comparability of information in sustainability reports by examining twelve companies from one industry (mining) that all used the same GRI guidelines.[164] Surprisingly, the authors found that "quantitative indicators are not necessarily the most comparable [indicators]."[165] One reason for this result was that companies used different measurement scales for the same issue.[166] A second reason was the different contexts in which the companies operated[167]—a potentially common problem for many human rights metrics.[168] These results were supported by another study in which thirty-three practitioners in the socially responsible investing field generally agreed that the GRI indicators were too vague and allowed each corporation to adapt disclosure to their needs,[169] resulting in disclosures that were incomparable across time and across companies.[170]

In addition to vagueness, the GRI indicators as a whole have been accused of being too complex.[171] Thus, corporate attempts to comply with the GRI standards result in such unwieldy reports that Boiral and Henri conclude that it would be impossible for a reader of the reports to compare performance unless it was done in a manner approaching academic research.[172] In fact, their study indicated that a

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[163] Hess, *supra* note 15, at 466, 471.

[164] Olivier Boiral & Jean-Francois Henri, *Is Sustainability Performance Comparable? A Study of GRI Reports of Mining Organizations*, 56 Bus. & Soc'y 283, 294–96 (2017). The twelve mining companies came from nine different countries. *Id.* at 296.

[165] *Id.* at 300.

[166] *Id.* at 300–01. This appeared to be a common problem for environmental indicators. *Id.* at 301.

[167] *Id.*

[168] *See supra* note 137 and accompanying text.

[169] Dominique Diouf & Olivier Boiral, *The Quality of Sustainability Reports and Impression Management: A Stakeholder Approach*, 30 Acct., Auditing & Accountability J. 643, 653 (2017).

[170] *Id.*

[171] Boiral & Henri, *supra* note 164, at 304.

[172] *Id.*

reader simply trying to determine if a company has complied with the GRI guidelines will face a difficult time. Consistent with the Parsa and colleagues study,[173] this inquiry also found that the reports "contained a great deal of information that seemed pertinent at first glance but, on closer review, was found to be noncompliant with GRI guideline specifications."[174]

One consistent finding across the many studies is that non-financial disclosure, including disclosures in standalone reports in accordance with the GRI, continues to focus on positive information and ignore the negative.[175] In the study of socially responsible investing practitioners, almost ninety percent of the interviewees agreed that "the majority of the companies do not publish information that could contribute to tarnishing their reputation."[176] Thus, to ensure that they have an accurate picture of the company, these practitioners must supplement the information from reports with other sources of information.[177]

The most dramatic example of companies refusing to disclose negative information comes from a study of twenty-three sustainability reports from the energy and mining sectors.[178] The author compared the content of those reports against 116 significant negative news events involving those companies and matters covered by a GRI indicator and found that the reports provided little or no mention of

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[173]*See supra* notes 156-61 and accompanying text.

[174]Boiral & Henri, *supra* note 164, at 303.

[175]In addition to the studies discussed in the text, see Boiral & Henri, *supra* note 164, at 305 (finding the sustainability reports of mining companies devote a disproportionate amount of space to positive achievements); Chauvey et al., *supra* note 151, at 790, 799 (finding that the disclosure of negative information decreased over the two time periods studied); Sarah George Lauwo et al., *Corporate Social Responsibility Reporting in the Mining Sector of Tanzania: (Lack of) Government Regulatory Controls and NGO Activism*, 29 Acct., Auditing & Accountability J. 1038, 1062 (2016) (studying the disclosures of the two of the most well-known mining MNCs in Tanzania and finding little mention of the "ongoing social unrest and grievances in these communities").

[176]Diouf & Boiral, *supra* note 169, at 653.

[177]*Id.*

[178]Olivier Boiral, *Sustainability Reports as Simulacra? A Counter-Account of A and A+ GRI Reports*, 26 Acct., Auditing & Accountability J. 1036, 1037–38 (2013).

ninety percent of those news events.[179] Largely, the examined companies focused on positive achievements and "managers' virtuous statements" in the reports, even though negative information about the company was easily accessible by stakeholders, and its exclusion called into question the credibility of the reports.[180]

Another study analyzed whether mandatory reporting requirements, such as those now required under the EU Directive, have improved their quality. Chauvey and colleagues analyzed the changes in the non-financial disclosures of eighty-one corporations in France between 2004 and 2010.[181] Since 2001, France has mandated CSR disclosures by certain firms (though the disclosures do not have to be in a standalone report), but the law has been criticized for its vague standards and lack of enforcement penalties.[182] While companies significantly increased their disclosure of CSR issues between the two time periods (both in terms of pages devoted to the topic and the breadth of issues covered),[183] the study indicated that the quality of the information remained low (though some evidence indicated slight improvement).[184] Any improvement came from those companies that chose to make CSR disclosures in their financial reports, not a standalone report.[185]

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[179]*Id.* at 1051–52. The study found that the reports either omitted mention of the news event (fifty-four percent of the events) or only mentioned the event in a "very incomplete fashion" (thirty-six percent). *Id.* at 1051.

[180]*Id.* at 1061.

[181]Chauvey et al., *supra* note 151, at 790.

[182]*Id.* at 790–91.

[183]*Id.* at 796–97. The only exception was that companies that produced standalone sustainability reports (as opposed to only providing CSR disclosures in their financial reports) in 2004 did not see a change in the number of issues covered due to their already high breadth of issues disclosed. *Id.* at 797. Another study also found significant improvement in the amount of disclosure by corporations due to the French law. Mohamed Chelli et al., *Normativity in Environmental Reporting: A Comparison of Three Regimes*, 149 J. Bus. Ethics 285, 287 (2018). By comparison, a Canadian securities exchange requirement on disclosure did not produce as significant of improvements. *Id.* Overall, however, the authors found that substantive disclosure (which they defined as "firms explain[ing] how their environmental reporting initiatives positively affect environmental issues") remained low. *Id.* at 303.

[184]Chauvey et al., *supra* note 151, at 797–99. To determine quality, the authors developed measures for relevance, comparability, verifiability, clarity, and neutrality. *Id.* at 793.

[185]*Id.* at 798–99.

An additional practice that has been expected to improve the quality of non-financial reporting is the outside assurance of a company's report. Only a small number of studies on this issue have been done, but the evidence points toward a legitimacy theory explanation. Michelon and colleagues' study of UK firms' sustainability reports in accordance with the GRI found

> [O]ur analysis suggests that the assurance of the CSR reports is not used as a substantive practice, as we find no relationship between such assurance and any dimension of disclosure quality. Therefore, assurance could also be seen as a symbolic practice that firms use to influence stakeholder's perceptions of corporate commitment to CSR reporting.[186]

A study by Birkey and colleagues—which did not examine the quality of the information in a sustainability report—found that outside assurance of a company's standalone report was associated with higher performance in Newsweek's environmental reputation ranking.[187] Combined, the Michelon et al. and Birkey et al. studies indicate that using outside assurance increases the credibility of a company's reports,[188] even if it does not impact their quality.[189]

2. The Reporting Process Does Not Lead to Organizational Change

The empirical evidence discussed so far shows there is a reason why the old management saying is that "you manage what you measure," rather than "you manage what you disclose," as disclosure seems to have little relationship to how companies actually manage the issues behind the disclosures. Many of the referenced studies explain this behavior through the intentional, strategic behavior that legitimacy theory predicts. Although a company's disclosure for impression management reasons (including collecting and analyzing the company's information on how it manages sustainability-related issues) still has the potential to catalyze internal change,[190] if the emphasis is only on disclosing what the corporation has already done,

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[186] Michelon et al., *supra* note 153, at 75.

[187] Rachel N. Birkey et al., *Does Assurance on CSR Reporting Enhance Environmental Reputation? An Examination in the U.S. Context*, 30 Acct. Forum 143, 150 (2016).

[188] *Id.* at 46.

[189] Michelon et al., *supra* note 153, at 75.

[190] *See supra* notes 56–61 and accompanying text (discussing how a corporation going through the reporting process has the potential to lead to positive organizational change).

without a focus on how it will improve, then organizational change is unlikely.[191] This appears to be what is happening.

Institutional theory provides a way of understanding why this is occurring. This theory is related to the legitimacy theory scholars apply to study sustainability reporting, but it is less cynical about the intentions of the corporate actors. This theory suggests that sustainability reporting has become an institutionalized practice in which companies produce reports to meet the norms and expectations of what a responsible company does.[192] Thus, a company's sustainability report looks like those produced by the other companies in its industry not because of a strategic decision based on the "business case" for doing so, but because that is what the others are doing.[193] The resulting reports are not related to issues that are material to that company, but instead are modeled upon the disclosure practices of others or determined simply by what information the company can most easily collect.[194] Due to this decoupling

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[191]Buhmann, *supra* note 24, at 27 (criticizing the EU Directive on non-financial disclosure as it applies to human rights issues by arguing that it emphasizes "*ex-post* compliance with disclosure and reporting requirements instead of measures to induce *ex-ante* organizational change and pro-active [human rights due diligence] and communication as part of the reporting process . . . .").

[192]Colin Higgins et al., *Is Sustainability Reporting Becoming Institutionalised? The Role of an Issues-Based Field*, 147 J. Bus. Ethics 309, 311 (2018). For an overview and analysis of institutional theory and a discussion of the institutionalization process for sustainability reporting, see generally Etzion & Ferraro, *supra* note 89 (discussing the institutionalization tactics used by the GRI); Kareem M. Shabana et al., *The Institutionalization of Corporate Social Responsibility Reporting*, 56 Bus. & Society 1107, 1110 (2017) (discussing three stages of institutionalization, where in the final, mimetic isomorphism stage "reporting is not done from a goal-oriented perspective as much as it is from a desire to be consistent with firms that the manager considers to be peers or aspires to identify with as peers").

[193]Higgins et al. *supra* note 192, at 310.

[194]*See* Ralf Barkemeyer et al., *On the Effectiveness of Private Transnational Governance Regimes—Evaluating Corporate Sustainability Reporting According to the Global Reporting Initiative*, 50 J. World Bus. 312, 313, 323 (2015) (including in their study 933 GRI reports from 30 countries and 7 industries, and finding very uniform reporting practices, which indicates that "materiality" for each specific company is not taken into account); Charl de Villiers & Deborah Alexander, *The Institutionalisation of Corporate Social Responsibility Reporting*, 46 Brit. Acct. Rev. 198, 210 (2014) (comparing Australian and South African mining companies and concluding that the reader of reports "should assume that the disclosures are based on global templates and that the volume of contents are not necessarily indicative of management intent or of company-specific characteristics, such as actual (social and environmental) performance").

between practice and disclosure, the reporting process is unlikely to lead to positive organizational change.[195]

This decoupling problem is illustrated by an in-depth case study of a company's use of the GRI guidelines.[196] The authors argued that the GRI changed how the company managed its CSR performance by causing it to focus on "documenting its CSR activities and translating them into a report, rather than by assessing and improving the CSR activities."[197] Management's goal became to "increase their level of disclosure rather than actual CSR performance."[198] CSR grew into a retrospective activity focused on collecting data, rather than a prospective activity focused on improved performance.[199]

Interestingly, this study shows that the short-termism problem commonly seen in financial reporting (where a corporation is unwilling to adopt long-term changes because it may jeopardize its ability to meet short-term earnings targets)[200] also shows up in sustainability reporting. In this case, the annual cycle of sustainability reporting caused the company not to take actions that may have improved its long-term CSR performance. For example, the company cut short its engagement processes with stakeholders so it could include those discussions in that reporting cycle.[201] This shows that not only are corporations not disclosing information that stakeholders could use to hold them accountable, but they also are also not learning and engaging in self-reflection from the process.

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[195] *See supra* Part III.B.2.

[196] Laurence Vigneau et al., *How Do Firms Comply with International Sustainability Standards? Process and Consequences of Adopting the Global Reporting Initiative*, 131 J. Bus. Ethics 469, 470 (2015).

[197] *Id.*

[198] *Id.* at 478. The authors note that "[d]iscussions in the CSR committee conference calls are centered on the improvement of reporting activities, not the actual CSR performance itself." *Id.*

[199] *Id.*

[200] David Hess, *Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development,* 2 Va. L. & Bus. Rev. 221, 224, 227–29 (2007).

[201] Vigneau et al., *supra* note 196, at 479.

3. Implications from the Evidence

The academic empirical evidence suggests that general transparency programs will not be very successful in improving the human rights performance of business. Most companies will use disclosure as a tool to manage the public's impression of the company rather than to make meaningful changes regarding its respect for human rights. Selective disclosure emphasizing the good a company has accomplished will often present a distorted image of it that downplays any negative impacts from its activities. This is especially problematic in the area of business and human rights because the UNGPs state that a company cannot let positive impacts on human rights "offset a failure to respect human rights throughout their operations."[202] For many companies, disclosure may become an end in itself, which could result in unintended negative consequences on how the company manages human rights issues.

Although the evidence has presented a very negative view of the current practices in sustainability reporting, there are likely some benefits. For example, theoretical research suggests that some corporations will engage in selective disclosure in their sustainability reports to strategically manage conflicting stakeholder demands in the short term,[203] obtaining the time and space they need to work toward their aspirational statements.[204] This suggests that a less negative interpretation of hypocritical sustainability reports may be warranted in some cases if viewed through a long-term lens. However, the benefit derived from this approach seems to be limited at best. The empirical studies do not reveal the high level of corporate accountability that many are hoping for. Instead, the evidence available indicates that continued reliance on general transparency in its current form risks "upholding the status quo of insufficient governance and supporting industry actors' claims that new forms of [regulation] are unnecessary."[205]

In summary, policy makers' expectations of the benefits of general transparency programs are still too high. Mandatory general transparency

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[202] *Guiding Principles*, *supra* note 39, at 13 (commentary to Principle 11).

[203] Cho et al., *supra* note 146, at 81, 91.

[204] *Id.*

[205] Genevieve LeBaron & Andreas Rühmkorf, *The Domestic Politics of Corporate Accountability Legislation: Struggles over the 2015 UK Modern Slavery Act*, Socio-Econ. Rev. at 5 (forthcoming).

programs, such as those required by the EU Directive, should not form the cornerstone of a state or treaty[206] approach toward business and human rights. Instead, general transparency programs are likely best used as a complement to, rather than a substitute for, other regulatory approaches.[207] A general transparency approach, however, is not the only option for using transparency to improve corporations' performance on human rights issues. The next part provides suggestions for how to best incorporate targeted transparency programs into a regulatory structure designed to improve corporations' human rights performance.

IV. Improving Transparency: Transparency and the Need for Regulatory Pluralism

Regulators should move away from mandating general transparency programs and toward creating a system of targeted, complementary transparency programs that work together to form a more complete regulatory approach. The basic goals of a business and human rights regulatory system based on transparency should be to (1) encourage corporations to continuously evaluate their policies and practices related to human rights, including any new polices and/or practices implemented after the prior review period, (2) increase meaningful engagement on human rights issues with the relevant stakeholder groups, and (3) facilitate the use of market and nonmarket forces to improve corporate behavior. Sustainability reporting can play a role in helping to achieve all three goals,[208] but meaningful progress can only occur if sustainability reporting is one part of a broader transparency system that includes both

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[206]*See* Cassell & Ramasastry, *supra* note 23, at 19–20 (reviewing the potential options for a treaty on business and human rights and stating that one option may simply involve a non-financial reporting requirement modeled after the EU Directive).

[207]*See* Fung et al., *supra* note 4, at 176 (stating that transparency programs should not be a "replacement for other forms of public intervention" and instead should be viewed as "an increasingly important, but complementary, mechanism of public governance").

[208]*See* Hess, *supra* note 55, at 457 (discussing how sustainability reporting can be structured as a process for corporations to "engage with their stakeholders to determine the shared values they will commit to live up to (dialogue), that those values must be 'integrated into the organization' (development), and that the report provide a 'picture' of the organization that allows them to be held publicly accountable for how well they have lived up to those shared values (disclosure)").

voluntary initiatives and government mandates. The role of government should be to help shape that transparency system. Rather than requiring general sustainability reporting, as the EU Directive does, government mandates should focus on different initiatives that together come closer to creating a whole information-based regulatory system.[209] Under this "regulatory pluralism" model, each aspect of the transparency system is not considered in isolation, but as part of a mix of regulatory approaches that help achieve the three goals of transparency.[210] This includes not only mixing the disclosure of non-financial information with other regulatory approaches (e.g., requiring human rights due diligence),[211] but also finding the right mix of different transparency initiatives within an information-based regulation system. Rather than treat the approaches below as alternatives to each other and to sustainability reporting, they must be designed to work in combination.[212]

A. Targeted Social Transparency

To improve the effectiveness of a mandatory transparency program, governments should move away from general transparency programs—such as GRI standards-based disclosure—and toward mandating more targeted social transparency that focuses on one stakeholder group, one country, one issue, and/or one industry.[213] The evidence presented in Part III on general transparency programs suggests that giving corporations the

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[209]It is important to note that although most large corporations have adopted voluntary reporting on non-financial issues (though, to a limited level of quality), they are expected to file legal challenges to mandatory requirements. *See generally* Lucien J. Dhooge, *The First Amendment and Disclosure Regulation: Compelled Speech or Corporate Opportunism?*, 51 Am. Bus. L.J. 559 (2014) (reviewing various challenges to disclosure laws, including an in-association challenge to the conflict minerals provisions (section 1502) of the Dodd-Frank Financial Reform Act).

[210]Neil Gunningham & Darren Sinclair, *Regulatory Pluralism: Designing Policy Mixes for Environmental Protection*, 21 Law & Pol'y 49, 49 (1999) (different regulatory instruments are mixed with the goal of seeking to "harness the strength of individual mechanisms while compensating for their weaknesses by the use of additional instruments").

[211]*See infra* Part IV.B (discussing human rights due diligence mandates).

[212]*See* Gunningham & Sinclair, *supra* note 210, at 50 (noting the tendency to treat regulatory instruments as alternatives).

[213]*See supra* note 71 and accompanying text (discussing Park's definition of targeted social transparency).

freedom to address a variety of stakeholder groups and to include a wide assortment of issues results in reports that focus almost exclusively on their positive efforts and provide information that is incomparable between companies (and even incomparable for purposes of tracking the performance of one company over time). This argument against general transparency parallels the common argument that boards of directors should not have responsibilities to any stakeholders beyond shareholders because "making management accountable to everyone, they may become accountable to no one."[214] Likewise, with respect to general transparency programs, corporations that have disclosure obligations to all stakeholders end up producing reports that no stakeholders can use to hold the corporation accountable.

Therefore, mandatory non-financial disclosure requirements with respect to human rights should be targeted directly toward shareholders.[215] Shareholders are increasingly demanding ESG information (which includes human rights issues),[216] and they have the resources available to process this information and to engage with corporations. Although a disclosure system focused on the needs of shareholders may not produce the amount of information that some human rights advocates believe is necessary to hold corporations fully accountable, if the system is valuable to shareholders, then their use of the information will both create a demand for additional

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[214]Hess, *supra* note 58, at 60.

[215]For other commentators making a similar argument, see O'Connor & Labowitz, *supra* note 129, at 29 (arguing that shareholders should be the primary audience for non-financial disclosures and stating that "[c]ompanies are accountable to their investors for best use of their capital. This relationship empowers investors to influence companies to adopt business practices that result in greater respect for human rights"). *See also* Hess, *supra* note 55, at 469 (arguing that any indicators for mandatory sustainability reporting should be developed with the needs of a particular stakeholder group in mind, such as investors or well-recognized NGOs); Hess, *supra* note 15, at 466–67 (arguing that indicators should be developed for sophisticated users of the non-financial disclosures, not the general public).

[216]*See, e.g.*, Gunnar Friede et al., *ESG and Financial Performance: Aggregated Evidence from More Than 2000 Empirical Studies*, 5 J. Sustainable Fin. Inv. 210, 211 (2015) (finding that "50% of the total global institutional asset base . . . [is] currently managed by Principles for Responsible Investment (PRI) signatories"); CFA Institute, *Environmental, Social and Governance (ESG) Survey* 3, 5 (2017) (finding in a survey of CFA Institute members with 1,588 responses that 73% of respondents indicated that they "take ESG issues into account in their investment analysis and decisions").

information[217] and provide an incentive for corporations to move beyond using the system only for impression management. Focusing on shareholders at this stage will help create a disclosure system that grows and becomes robust, as opposed to one that stagnates. Of course, there is a significant risk that most investors will view BHR issues through only a business case lens, which will further limit the impact of this targeted transparency initiative. Thus, complementary initiatives, such as the following, are necessary.

B. Transparency Coupled with Mandatory Due Diligence

Targeted social transparency programs can also be focused on a specific issue, such as human trafficking in the supply chain or the use of conflict minerals in a company's products.[218] This form of targeted transparency has been an area of active government legislation. For example, the UK Modern Slavery Act and the California Transparency in Supply Chains Act (CTSCA) both require corporations to disclose information on their voluntary efforts to eliminate the use of human trafficking and modern slavery in their supply chains.[219] However, these acts do not require the company to undertake specific due diligence practices, and they impose no penalty on companies who do not adopt a due diligence plan.[220]

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[217] It is important to think of transparency programs as dynamic. Although initial disclosures may not be ideal, they need to be designed sufficiently for the system to improve over time due to demand by users and benefits to some disclosers. Hess, *supra* note 15, at 471.

[218] For further discussion of disclosure (and due diligence) requirements under the conflict minerals provisions of section 1502 of the Dodd-Frank Financial Reform Act, see generally Galit A. Sarfaty, *Shining a Light on Global Supply Chains*, 56 Harv. Int'l L.J. 419 (2015); Park, *supra* note 57.

[219] Modern Slavery Act 2015, c. 30 (Eng.), http://www.legislation.gov.uk/ukpga/2015/30; Cal. Civ. Code § 1714.43 (West 2017). Under the CTSCA, a company must disclose what actions it has taken (and if none, affirmatively state that is has taken no actions), in the following five areas: (1) verification, (2) audit, (3) certification, (4) internal accountability, and (5) training. Kamala D. Harris, Att'y Gen., Cal. Dep't of Justice, The California Transparency in Supply Chains Act: A Resource Guide 4 (2015), https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf. The Resource Guide provides information and examples on recommended disclosures and inadequate disclosures for each topic. *Id.* at 11–22.

[220] LeBaron & Rühmkorf, *supra* note 205, at 11.

Commentators have criticized the potential effectiveness of these acts due to these weaknesses.[221] LeBaron and Rühmkorf argued that companies actually lobbied for the Modern Slavery Act to avoid more stringent legislation but still appear as if they were in favor of combating slavery.[222] The authors also argued that the statute "effectively gives a statutory backing to generic and promotional CSR reporting which, so far, has not achieved much in terms of eradicating forced labour by suppliers."[223] The early empirical evidence supports this claim, and further suggests that the problems with the disclosures under the CTSCA and the Modern Slavery Act closely parallel the problems with general transparency disclosures.[224]

To create a more effective targeted transparency program that fixes rather than duplicates the problems of general transparency programs, states should couple a disclosure requirement with a mandate that companies develop, implement, and disclose a human rights due diligence plan.[225] Without government mandates, companies may be reluctant to disclose the human rights risks disclosed by a due diligence plan "both in order to avoid having to take remedial or mitigating action and because

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[221]For example, various commentators have criticized CTSCA for being ineffective due to a lack of clear disclosure requirements and ineffective enforcement mechanisms. *See, e.g.*, Chilton & Sarfaty, *supra* note 52, at 40 (noting the significant lack of compliance with CTSCA and blaming it on lack of enforcement); Marcia Narine, *Disclosing Disclosure's Defects*: *Addressing Corporate Irresponsibility for Human Rights Impacts*, 47 Colum. Hum. Rts. L. Rev. 84, 117–19 (2015) (noting lack of standards for disclosure and ineffective enforcement mechanisms); Alexandra Prokopets, Note, *Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010*, 37 Hastings Int'l & Comp. L. Rev. 351, 364–65 (2014) (noting ineffective enforcement mechanisms).

[222]LeBaron & Rühmkorf, *supra* note 205, at 3.

[223]*Id.* at 26.

[224]For the CTSCA, see Rachel N. Birkey, *Mandated Social Disclosure: An Analysis of the Response to the California Transparency in Supply Chains Act of 2010*, J. Bus. Ethics at 11 (forthcoming) (finding that company disclosures under the act were "quite limited" and were "more symbolic than substantive"). For the Modern Slavery Act, see The Chartered Institute of Building, Construction and the Modern Slavery Act: Tackling Exploitation in the UK 42 (May 2018) (finding that companies disclose on basic business structures and policies, but not on risk assessments, monitoring, training, or remediation. In addition, the report found that some companies appeared to copy other's explanations of their due diligence process.).

[225]This has been mentioned as one potential option for a treaty on business and human rights. Cassell & Ramasastry, *supra* note 23, at 21–22.

of the potential reputational costs involved in acknowledging the risks involved[.]"[226]

The 2017 French Duty of Vigilance law is the most recent example of this approach.[227] It requires corporations to act in compliance with a standard of reasonable care when conducting activities that could foreseeably cause human rights violations. It also provides any victims of the breached duty with the right to a civil law remedy.[228] To demonstrate compliance with a standard of care, French companies are required to develop a vigilance plan that includes "reasonable vigilance measures to adequately identify risks and prevent serious violations of human rights and fundamental freedoms, risks and serious harms to health and safety and the environment."[229] This plan must be published, and if the company does not comply, then any person with a legitimate interest in the matter may initiate a proceeding to have a court order the company to publish a plan.[230] Other nations in Europe, such as Switzerland[231] and the Netherlands,[232] are considering similar laws. These are promising developments. Governments could even go a step further and provide more direct guidance on

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[226]Olivier De Schutter et al., Human Rights Due Diligence: The Role of States 43 (2012), http://corporatejustice.org/hrdd-role-of-states-3-dec-2012.pdf.

[227]Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des societes meres et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 Law on the Duty of Due Diligence of Parent Companies and Main Contractors], Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], Mar. 28, 2017 (Fr.), https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte.

[228]Sandra Cossart et al., *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All,* 2 Bus. Hum. Rts. J. 317, 318–19 (2017).

[229]*Id.* at 320. The law provides additional details on the measures a company should take, including identifying risks in the supply chain and developing a plan to monitor the effectiveness of the adopted measures. *Id.*

[230]*Id.* at 321–22.

[231]Nicolas Bueno, *The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability, in* Accountability and International Business Operations: Providing Justice for Corporate Violations of Human Rights and Environmental Standards (L.F.H. Enneking et al. eds., forthcoming).

[232]Jo Becker, *The Netherlands's Plan to Cut Child Labor Out of Products: Dutch Law Would Make Companies Address Exploitation*, Human Rights Watch (Mar. 3, 2017 12:01 AM), https://www.hrw.org/news/2017/03/03/netherlandss-plan-cut-child-labor-out-products.

what due diligence should require, such as the OECD's diligence guidelines for different industry sectors.[233]

C. Transparency to Facilitate External Monitoring

In addition to mandatory disclosures and due diligence requirements, a government could improve its transparency system by supporting external monitoring in two ways. First, the government could provide direct support for stakeholder initiatives that allow the users of information to serve as surrogate regulators.[234] Second, the government could require and enforce disclosures that are not directly related to a company's performance but that help external stakeholders monitor outcomes.

1. Supporting the Users of Disclosure

The government's role in transparency programs does not have to be limited to mandating disclosure. Instead, the government can help develop initiatives to support users of corporate disclosures. For example, the UK government played a significant role in supporting the multistakeholder initiative that became the Extractives Industry Transparency Initiative (EITI) to fight government corruption related to oil, gas, and mineral extraction.[235] A similar initiative that governments could help support to further BHR is the Corporate Human Rights Benchmark (CHRB), a nonprofit organization that ranks corporations based on their human rights performance.[236] The CHRB is governed by

[233]As of this writing, the OECD has created due diligence guidelines for the following areas: the extractive sector, mineral supply chains, agricultural supply chains, garment supply chains, and the financial sector. *Due Diligence*, OECD, http://mneguidelines.oecd.org/duediligence (last visited Oct. 30, 2018).

[234]On surrogate regulators, see generally Neil Gunningham et al., *Harnessing Third Parties as Surrogate Regulators: Achieving Environmental Outcomes by Alternative Means*, 8 Bus. Strategy & Env't 211 (1999).

[235]David Hess, *Catalyzing Corporate Commitment to Combating Corruption*, 88 J. Bus. Ethics 781, 788 (2009).

[236]Corp. Human Rights Benchmark, https://www.corporatebenchmark.org. Another potential example is KnowTheChain, an organization that ranks companies based on their practices related to eliminating forced labor in their supply chains. KnowTheChain, https://knowthechain.org (last visited Sept. 28, 2018).

investor groups and BHR NGOs,[237] and funded by governments and investors (the organization does not take funds from corporations).[238]

In 2017, the CHRB released its first report that ranked the human rights performance of the ninety-eight largest public companies from the agricultural products, apparel, and extractives industries.[239] Using data collected from public sources or submitted by the companies in the rankings,[240] the CHRB provided each company with a total score of up to one hundred points[241] and made available a spreadsheet explaining each score.[242] Companies earned points based on an assessment of their performance against eighty-seven indicators divided into six themes: governance and policies, embedding respect and human rights due diligence, remedies and grievance mechanisms, performance (company human rights practices), performance (responses to serious allegations), and transparency.[243] Following the release of the report, the CHRB worked with an investor coalition of eighty-five investors to send a letter to each company in the ranking informing them of their rank and encouraging them to respond regarding how they might use the information to improve their performance.[244]

Notably, the CHRB's engagement with companies helps move transparency programs away from just ex post accountability (where

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[237]Corp. Human Rights Benchmark, Progress Report 5 (2018), https://www.corporatebenchmark.org/sites/default/files/documents/CHRB%202018%20Progress%20Report%20Web%20Final.pdf.

[238]*Id.* at 4.

[239]*Id.* The report started with one hundred companies, but the total number was reduced to ninety-eight due to mergers or acquisitions. *Id.*

[240]Company disclosures to the CHRB are made publicly available. *Company Disclosures to the Corporate Human Rights Benchmark*, Bus. & Human Rights Res. Ctr., https://www.business-humanrights.org/en/company-disclosures-to-the-corporate-human-rights-benchmark (last visited Oct. 30, 2018).

[241]Corp. Human Rights Benchmark, *supra* note 237, at 4.

[242]The scoring spreadsheets are available at *Data*, Corp. Human Rights Benchmark, https://www.corporatebenchmark.org/data (last visited Oct. 30, 2018).

[243]*Id.* at 14, 30. The methodology was slightly revised for 2018 based on the experience in 2017, consultations, and requests for feedback (receiving over 300 responses). *Id.* at 60. With respect to the scoring, the CHRB acknowledged that companies that disclosed more information publicly were more likely to receive higher score. *Id.* at 16.

[244]Corp. Human Rights Benchmark, *supra* note 237, at 18–19.

the company is held accountable for harm it has caused) and toward the implementation of compliance programs and the management of corporate culture issues that will help companies avoid causing harm in the first place.[245] The CHRB encourages companies to use the *UN Guiding Principles Reporting Framework* for reporting on human rights issues.[246] The *Reporting Framework* provides comprehensive guidance on implementation of the UN Guiding Principles,[247] including questions that guide companies to encourage respect for human rights throughout the organization.[248] Building off of the *Reporting Framework*, the CHRB also includes indicators on board-level responsibility, human rights due diligence, and "embedding respect for human rights in culture and management systems."[249] The indicators include questions related to the use of incentive schemes for board members and managers for their performance on human rights issues,[250] clear lines of responsibility for human rights,[251] and proactive assessment of risk on an ongoing basis.[252] Collectively, these questions use the disclosure process to push corporations to determine how to best implement organizational changes to prevent

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[245]Buhmann, *supra* note 24, at 40.

[246]Corp. Human Rights Benchmark, *supra* note 237, at 17.

[247]The UN Guiding Principles Reporting Framework is available online at https://www.ungpreporting.org/framework-guidance/ (last visited Sept. 28, 2018). The framework was developed by two consulting firms in consultation with a wide range of stakeholders. *About Us*, Human Rights Reporting & Assurance Framework Initiative, https://www.ungpreporting.org/about-us/ (last visited Oct. 20, 2018). In addition, the Initiative has produced guidance on assurance of the reports. UN Guiding Principles Reporting Framework, Guidance Part II: Assurance of Human Rights Performance and Reporting (2017), https://www.ungpreporting.org/wp-content/uploads/UNGPRF_AssuranceGuidance.pdf.

[248]UN Guiding Principles Reporting Framework with Implementation Guidance 35–46 (2015), https://www.ungpreporting.org/wp-content/uploads/2015/02/UNGuidingPrinciplesReportingFramework_withimplementationguidance_Feb2015.pdf.

[249]Corp. Human Rights Benchmark, Methodology 2018, 32 (2018), https://www.corporatebenchmark.org/sites/default/files/documents/CHRB%202018%20Methodology%20Web%20Version.pdf.

[250]*Id.* at 50, 58.

[251]*Id.* at 57.

[252]*Id.* at 61.

harm.[253] This is especially important for human rights issues, where the harm caused may be irremediable.[254]

Thus, rather than just mandate corporate disclosure, the government can work to facilitate improved transparency programs by providing financial support to the CHRB, or similar initiatives, as a way of regulating in the business and human rights space. Consistent with its nonprofit status, the CHRB makes its data freely available to the public and hopes to maintain that approach.[255] However, lack of funding not only prevents the CHRB from ranking additional companies and industries, but may force it to charge fees for the use of its data,[256] which would limit its availability.

It is, of course, too early to judge the CHRB's impact on the companies it ranks, or if it will have a broader impact in the business community, but it suggests a promising alternative to general transparency. Rather than rely on companies to push out data as they see fit, the CHRB pulls the data from the companies through engagement (and possibly from its public rankings) and makes it available to the public. These activities serve as a complement to the proposed mandatory human rights disclosures directed toward shareholders discussed earlier.[257] Although problems will remain with human rights performance metrics,[258] the CHRB's information supplements any mandatory information disclosed to shareholders and provides another avenue of pressure on corporations to prevent selective disclosure of information and avoid treating disclosure as an end in itself without leading to meaningful organizational change.[259]

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[253]As Buhmann states, "the 'knowing and showing' company understands its impact on human rights *ex-ante,* takes responsibility, and shows this." Buhmann, *supra* note 24, at 39.

[254]*Id.* at 25.

[255]Corp. Human Rights Benchmark, *supra* note 237, at 62.

[256]*Id.*

[257]*See supra* Part IV.A (proposing that governments focus any mandatory disclosure requirements on shareholder needs).

[258]*See supra* Part III.A (discussing the problems with human rights metrics).

[259]*See supra* Parts III.B.1 and III.B.2 (reviewing the empirical evidence on sustainability reporting practices).

2. Improving Information About Outcomes

The government can also use transparency programs to require companies to disclose information about external matters that others can use to evaluate the overall performance of companies or industries. As O'Connor and Labowitz state, evaluating the actual impact and performance of companies "will require looking beyond companies themselves to assess companies' performance."[260] One example of this approach would be a requirement that companies disclose detailed information about the factories in their supply chains, including the factory names, addresses, and ownership.[261] This approach facilitates the monitoring of those factories by labor and human rights advocates and improves the flow of information to companies.[262] For example, interested civil society organizations may identify rights violations or unauthorized subcontracting (a common source of human rights violations),[263] and can then notify the company.[264] These types of monitors would likely be more effective than the ethical audits discussed above.[265] Many companies already make these disclosures voluntarily,[266] but mandated disclosure would increase those numbers and ensure the accuracy and completeness of the data.

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[260] *See* O'Connor & Labowitz, *supra* note 129, at 28.

[261] Human Rights Watch et al., Follow the Thread: The Need for Supply Chain Transparency in the Garment and Footwear Industry 15 (2017), https://www.hrw.org/report/2017/04/20/follow-thread/need-supply-chain-transparency-garment-and-footwear-industry (requesting that companies sign a pledge to disclose the factories in their supply chain).

[262] *Id.* at 4.

[263] *See generally* Sarah Labowitz & Dorothée Baumann-Pauly, Business as Usual Is Not an Option: Supply Chains and Sourcing After Rana Plaza 42 (2014), http://www.stern.nyu.edu/sites/default/files/assets/documents/con_047408.pdf (discussing the role of subcontracting in the garment industry in Bangladesh, and the problems associated with the practice).

[264] Human Rights Watch et al., *supra* note 261, at 4.

[265] *See supra* notes 138–43 and accompanying text (discussing the problems with social audits as a source of information on the conditions at factories).

[266] *See* Human Rights Watch et al., *supra* note 261, at 20–29 (reviewing the factory disclosure practices of seventy-two apparel and footwear companies).

Conclusion

As with many other areas of business regulation, governments hope that transparency will work as an important mechanism to encourage corporations to meet their responsibility to respect human rights wherever they operate. An influential and far-reaching example of transparency in this area is the EU Directive on non-financial reporting. The potential effectiveness of this approach is in question, however. Developing indicators that appropriately measure a corporation's human rights performance is difficult. Attempts to package these indicators into comprehensive guidelines for companies have led many to disclose only for the sake of disclosure and create reports that are unbalanced, incomprehensive, and inconsistent.[267] More targeted transparency programs, such as the UK Modern Slavery Act and the California Transparency in Supply Chains Act, face similar challenges.

At the same time,[268] governments are demanding more and more disclosure without adequate consideration of how to most effectively design a transparency system. This creates a transparency trap: the inaccurate belief that more transparency, in the form of sustainability reporting, will lead to corporate accountability. Policy makers should begin to focus on targeted transparency initiatives, and to view such initiatives as a complement, not a substitute, to other potential regulatory approaches (such as mandatory due diligence). An appropriately designed system of targeted transparency programs will be more likely than a general transparency approach to encourage companies to develop business strategies that respect human rights.

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[267] *See supra* notes 81–86 and accompanying text (stating that the EU Directive's principles on disclosure require reports that are "fair, balanced, and understandable;" "comprehensive but concise;" and "consistent and coherent").

[268] *See supra* Part III.B.2.