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## **The Fight for Better Rules** **Reflections of a Reluctant Realist**

### **Abstract**

Rules are a basic property of human societies and yet they occupy a historically contested place in the modern narrative about what makes us human. Rules are infinitely malleable and ambivalent, at the same time a reflection of power inequities, a mechanism for reinforcing these inequities and a means to challenge them. Transgressing them can both create new spaces of freedom and reinforce the norms that they seek to establish. Reframing rules as potentialities helps break this spell. It allows us to ask not what we should do but what we can do, and to take the measure of the limits of our actions, as humans and as social scientists.

Keywords: rules, contestation, governance, legal systems, social sciences

In the U.S., it seems there's a rule about how to begin a conference: "open with a joke". It's the kind of rule that I would like to explore with you today. It's situated somewhere between the two semantic poles of the word "rule": orders, commands, imperatives, on the one hand; generalizations, regularities, averages, on the other. Should I, must I open with a joke? Or is that simply what people generally do, what they do "as a rule"? Opening with a joke is neither: it's a recommendation, a gentle suggestion, a statistically unverifiable tendency, the way it would be nice if the world were. If I break this rule, nothing will happen to me; indeed, my audience might not even notice that I haven't provided them with an occasion to be amused. In addition, there's probably another rule of equal force (or feebleness) that says the opposite: your opening statement should be clear, no-nonsense, and immediately provide the audience with a sense of where we are going. I am afraid I will have to transgress *that* rule, if it exists.... Indeed, I'm afraid I already have! We'll see what happens to me now.

Here is the joke, a one-liner from the collected *bons mots* of Groucho Marx: "I'm not crazy about reality, but it's still the only place to get a decent meal". Spoiler alert: that punchline is actually the main punchline of my paper, the general point I'd like to make about rules. How's that for a clear, no-nonsense statement of where we are going?

## **2020: Rules and unruliness of historic proportions**

The two years we have just experienced seem to be one of the most rule-filled moments in human history. The COVID pandemic has called forth a proliferation and hardening of state-based rule-making such as we hardly thought possible: the generalized confinement of human populations around the world; the closing of borders, schools, shops, restaurants, factories and offices; the isolation of the dying; and the downsizing of sociability to the nuclear family. I am certainly not the first to notice that this kind of massive government intervention into what we consider to be the normal workings of society is characteristic of periods of war, not of peacetime, and, for better or for worse, went way beyond what even the most totalitarian governments have ever attempted. It is also serving as a kind of thought experiment for the intensification of state power in other social domains, in response to what are perceived as extreme risks for the stability of human societies: the fight against terrorism, on the one hand, through increased cyber-surveillance and spying; the environmental crisis, on the other, through moves toward polluter-payer taxation schemes and active state intervention into modes of production and consumption.

Remarkably – and, I believe, coincidentally – this enormous flexing of state-based muscle came at a particularly charged normative moment for civil society. Before and during the pandemic, social movements around the world

were more active than ever, expressing themselves through massive non-violent demonstrations in favor of democratic reform, environmental regulation and for protection of women and minority rights. These demands that the rules of the game be reset opened up a new sense of optimism that the forces of democratic society were alive and well. More remarkable still, this new urgency was sociologically rooted, leading to calls for change that went far beyond the formal rule-making powers of the state to strike at the heart of the informal social, economic and political norms that create and sustain injustice. Whether it be Extinction Rebellion, Black Lives Matter or the #MeToo movement – to take only a few, Euro-American-centric examples – these social movements produced sophisticated analyses of how the state, corporations and dominant social norms combine and collude to perpetuate gendered, racialized, environmental, economic, social and symbolic violence and injustice.

### **Breaking the Rules?**

In light of what precedes, exploring the issues raised in this SIEF 2021 Congress is one of most important things the cultural and social sciences can do. In their presentation of its main objectives, the organizers rightly point to the complexities and ambiguities that their question – “Breaking the Rules?” – opens up, emphasizing, with Michel Foucault, the creative as well as constraining effects of rules, and the new forms of power, knowledge and subjectivity produced through discipline(s). As they argue (reference?): “Breaking the rules can strip people of the protections provided by mutually agreed ethical principles. It can thus be dangerous or perhaps generate something new and better”<sup>1</sup>.

Despite this complex and multi-faceted approach to rules, there is, it seems to me, a discernable anti-rule orientation in the presentation of this organizing theme, a preference for “breaking” rather than “making” the rules, and a (comprehensible) identification with those upon whom the force of rules is exercised rather than with the exercisers. This is evidenced, for example, in the opening quotation from notorious French rule-breaker François Rabelais: “We always long for the forbidden things, and desire what is denied us.” The question this raises is simple: who is the “we” in this statement? I will argue that we as social and cultural scientists must be extremely wary of this vague and general “we”, and this psychologizing reading of what breaking the rules is all about. “Who breaks which rules, when, where and why?” must be our guiding question.

Once again, a general hostility to rules is thoroughly understandable. Just take a look at the semantic fields associated with the Indo-European root for the word “rule”: “reg-”. According to the *American Heritage Dictionary* over the

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1 See «Theme» at <https://www.siefhome.org/congresses/sief2021/> (last consulted 2023-04-02).

course of time, “reg-” has provided the root for such unappealing words as “realm”, “anorexia”, “rich”, “interrogate” and “reckless”. Coming to us through the Germanic “\*rankaz”, “reg-” leads to “rank”, and as a suffixed form, “\*rog-a”, “reg.” has provided us with a multitude of unpalatable bureaucratic possibilities: “rogatory”, “abrogate”, “arrogate”, “corvee”, “prerogative”, “subrogate” and “supererogate”. Who can be in favor of all that nonsense?

In addition, I would argue that there is another source of implicit hostility towards rules within the cultural sciences. As most of us practice qualitative or hermeneutic methods – carefully situating our interpretations of texts, discourses, social interactions and performances within their historical and socio-cultural contexts – we have a tendency to be suspicious of generalizations. Few of us put much stock in cultural laws or in the calculation of standard deviations, and thus, the entire descriptive pole of the term “rules” leaves us rather cold as well. “No man is an island”, of course, but neither is she an average.

This anti-rule sentiment explains why the congress organizers emphasize the positive and creative aspects of rule-breaking: “To break the rules is to be an agent of change, exposing fault lines, establishments, hegemonies, and vulnerabilities.” And of course, I get it. I have no hesitations affirming that the powerful social movements I mentioned in my introduction were and are legitimate agents of change, challenging gender-based norms of acceptable behavior, corporate-dictated laws privatizing public resources and externalizing pollution, or race-based policies for profiling and policing national citizenries.

Nonetheless, in this congress, I would like to swim against this tide of distrust and disdain for rules by highlighting other, more sinister kinds of transgressions. I will examine one particular but powerful reconfiguration of the discourse and practice of rules that dominates the transnational political-economic order: the notion that corporations should be held to be “responsible” through something called “soft law” – agreements, compacts, standards, audits, multi-stakeholder initiatives, certification schemes and the like – but that holding them “accountable” under so-called “hard law” is neither realistic nor desirable. My development will concentrate on this new discourse around law and rules in U.S. corporate circles, and I apologize for this Americano-centric perspective, but as this discourse has had wide-ranging implications for the global political economy as a whole, I would argue that the U.S. example is relevant to all of our reflections here.

Thus, though I won’t go so far as to argue in favor of “Law and Order”, I would like to interrogate some of the way that critiques of rules have fed into this corporate discourse, creating enormous obstacles to the pursuit of corporate accountability. In sum, paraphrasing Groucho Marx, I would like to say: “I’m not crazy about law and order, but it’s still the only place to get a taste of justice.”

### **Rules: the social and cultural sciences' primal scene**

The subject of rules is at the very origins of the social sciences in the late 19<sup>th</sup> century. From Henry Sumner Maine's *Ancient Law* (1861) to Johann Jakob Bachofen's *Das Mutterrecht* (1961), not to mention Max Weber, Emile Durkheim and Lewis Henry Morgan, the comparative study of normative systems was central to understanding the evolution, functions and diversity of human societies. In the anthropology of law, this interest translated into a sustained inquiry into what anthropologist Paul Bohannan (1965) called the "double institutionalization of norms and customs that comprises all legal systems" (p. 33). In Bohannan's scheme, double institutionalization implies that a society possess legal institutions charged with three discrete and definable tasks: (1) they must disengage conflicts or wrongs from their social settings; (2) they must provide definable and regular avenues for handling the social disruption within strictly legal institutions; and (3) they must have means for "reinjecting" their solutions back into the social settings from which the problem arose (p. 35). In other words, legal rules are a special subset of social rules, rules that are "capable of reinterpretation, and actually must be reinterpreted [...] so that the conflicts within nonlegal institutions can be adjusted by an 'authority' outside themselves" (p. 35).

In Bohannan's understanding, legal institutions can be found in every society and cannot be ranked in terms of more or less developed. Nonetheless, certain evolutionary overtones have often crept (and continue to creep) into common sense and even scholarly understandings of comparative legal systems. The story goes something like this: "before", human societies were governed by the largely implicit social norms of "tradition", which were themselves linked to traditionally defined statuses: first born, member of such-and-such moiety, of the blacksmith cast, etc. With time (and progress), as the story goes, there emerged in the enlightened West the ideal of the rational, rights-bearing individual. The fundamental paradigm of legal regimes shifted, in Maine's terms, from "status to contract", and legal institutions became more and more specialized and formalized. With the invention of parliamentary democracy, societies were provided a forum for debating the choices of norms and procedures, making law both more rational and more just. Thus, so-called "advanced societies" developed complex and independent legal institutions, while less developed societies struggled to "disembed" legal from social norms.

Early ethnographies in the anthropology of law have shown that this evolutionary understanding is ethnocentric and erroneous. Despite its subtitle, Karl Llewellyn and E. Adamson Hoebel's famous ethnography *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (1941) demonstrates that disputes amongst the Cheyenne and other neighboring Native American so-

cities were not settled simply “according to tradition” but rather gave rise to debates about what tradition says, and/or what it should say, and thereby create “jurisprudence”: reflexive solutions to disputes, conflicts and injustice that were both cumulative and innovative.

Stepping back: it seems that it is not simply our capacity to conceive of and enforce rules that makes us human, it is also their double institutionalization, through specialized legal institution that disembed some conflicts from the “normal” workings of social interaction. Furthermore, it is human societies’ tendency to debate, contest and argue about the legal, as much as to emit, follow or disobey rules, that leads to the surprising dynamism and creativity of rulemaking.

### **Marxist perspectives: The semi-autonomy of law**

But there is more, for as we all know, law is not simply institutionalized social norms about which we debate. Law is also an object of strategy and an instrument of domination at the disposal of the powerful. We might call this the “triple institutionalization of norms”, by which the abstract and general principles of law are bent, tamed and rearticulated to fit with and serve the needs of what we should properly call “the rule-ing classes”. Much of the justifiable suspicion about the role of legal rules in modern society stems from this Marxist or Marxist-inspired critique of the role of the legal “superstructure” in maintaining and legitimizing the capitalist mode of production and the domination of the bourgeoisie. An up-to-date and fine reworking of this thesis has indeed been making quite a splash in legal and political circles in the U.S.: legal scholar Katharina Pistor’s *The Code of Capital: How the Law Creates Wealth and Inequality* (2019). As the other Marx, Groucho, succinctly put it: “This isn’t a particularly novel observation, but the world is full of people who think they can manipulate the lives of others merely by getting a law passed.”

The use of law to fit the needs of capitalism is as evident today as it was when Marx was writing. However, as neo-Marxists have argued, the law also enjoys a form of “semi-autonomy” that makes it difficult to predict and to control. Anthropologist Sally Falk Moore (1973) has argued that the law is a “semi-autonomous social field”, simultaneously shaped by its own internal logics and by social forces from without. Thus, while law is a powerful tool in the hands of the already powerful, through its principles of reflexivity, abstraction and generalization, it is also available to the less powerful seeking to contest perceived injustices. Indeed, an impressive body of empirical work in the social sciences has analyzed how law is mobilized by the dominated to combat oppressive social orders, both in industrialized countries in the Global North and in agrarian or industrializing countries in the Global South. Furthermore, whether or not the “little guy” comes out on top in these legal battles, the law

continues to hold out the promise of justice through the public recognition of wrongdoings committed by powerful actors such as states and corporations.

### **The corporate critique of the law: rewriting the evolutionary narrative**

One clear example of the systematic use of law to combat social injustice was the emergence and proliferation of public interest lawsuits in the United States. Building on the energy of the social movements that challenged the prevailing social order in the 1960s and '70s, public interest lawyers began filing consumer class action complaints and civil-rights, anti-discrimination, sexual harassment and environmental litigation became important avenues for social activism. This proactive and progressive use of the law brought systematic discrimination, corporate theft and human rights violations into public view through the powerful idioms of equal rights and due process.

The “semi-autonomy of law” as expressed through public interest lawyers and lawsuits did not escape the ever-calculating eye of corporate America, who began a long-game campaign to win adherents to their cause within the judicial establishment. As public interest lawsuits were gaining in popularity, certain members of the U.S. legal community suddenly began to worry about backlog and overload within the court system, ascribing it, in strongly culturalist terms, to the “litigious” nature of American society. The Chief Justice of the U.S. Supreme Court began complaining about what he called “the garbage cases”, by which he meant public interest litigation in the areas of race- and sex-based discrimination, consumer protection and the environment<sup>2</sup>. While the courts did experience significant overload during this period, legal sociologist Marc Galanter has pointed out (1983) that the reasons for this massive use of judicial resources lay not with the complaints of “the little guys”, but rather with corporations themselves, busy activating the “codes of capital” through complex litigation about securities, intellectual property and corporate ownership structures. Nonetheless, the notion that Americans were somehow slowing down their economy through constant bickering in courts became quickly integrated into the common-sense discourse of legal reform in the late 1980s.

This attack on law from the corporate right came at a particular moment in U.S. history, creating a kind of “perfect storm” for questioning the effects of binding rules for governing societies and creating wealth. Japan and the so-called “Asian Tigers” were becoming a serious competitive threat to the he-

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2 For a particularly enlightened analysis of this turning point in U.S. legal history, see anthropologist Laura Nader’s account in *The Life of the Law: Anthropological Projects* (2005).

gemony of Euro-American industries. These Asian countries promoted an alternative vision of productive society, presenting themselves as tradition- and status-bound, with collective effort and social harmony as their core values. Thus, the rise of Asian economies not only put Western industrial economies under severe competitive strain, it also called into question the model of the rights-based social order at their core.

As Laura Nader has forcefully demonstrated in her work on “harmony ideology” (1990), as the social movements of the 1960s took their fights for social justice to the courts, formal legal institutions began to lose their charm in the eyes of the rule-ing classes, just as the U.N.’s International Court of Justice lost its charm in American eyes when Latin American countries started suing them in it. Step by step, the evolutionary narrative was reversed: as the story went, courts and the complex legal machinery invented by the advanced industrial societies in the West were perhaps not the culmination of civilization; perhaps, to the contrary, they were its bane, and more socially embedded “harmonious” models for resolving disputes should replace them.

It is in this context that, for a variety of reasons and with a variety of motives, different interest groups within U.S. society began pushing for new forms of “alternative dispute resolution”, based not in the complex and public procedures of litigation before a court, but in the more “human” interactions that took place outside its walls: “dialogue”, negotiation, and more or less public and formal procedures before third parties, such as mediation and arbitration. Numerous works of popular science in management, law and economics touted the virtues of negotiation, mediation and win-win solutions that would allow America to pull together to beat common threats.

### **Research on corporate accountability: rules without rights**

It is not difficult to see how the anti-law rhetoric fed into U.S. corporate agendas, promoting a regime of transnational private governance that sociologist Tim Bartley (2018) has labelled “rules without rights”. To understand the relation between rules and corporate-driven globalization, we need to step back a moment and examine what was happening at the global level. At about the same time that harmony ideology was being peddled in the U.S., the Reagan-Thatcher revolution was setting in motion major social transformations on a global scale. With the deregulation of financial markets, the mounting costs of labor in the industrialized West and the liberalization of international trade, Western-based corporations began outsourcing to those same “emerging economies” that they were competing with, taking advantage of cheap labor and lax regulatory environments abroad to boost corporate profits at home.



Early on, it was remarked that these transformations created a global “governance gap”: transnational corporations could relocate production to avoid the constraints of stricter national laws and regulation in Europe and the U.S., while no binding law or norms governed their operations at the international level. Troubled by this “race-to-the-bottom” in the areas of labor, environmental and human rights, NGOs, international organizations, states and even some business associations began calling for corporations to assume responsibility for the effects of their actions globally. After initially resisting the “responsibility” paradigm, many transnational corporations, particularly brands with name-recognition and reputations to maintain, began to see its advantages. Thus, over the course of the late 20<sup>th</sup> century, high visibility brands such as Nike and The Body Shop, in conjunction with international organizations, NGOs and states, set out to create voluntary schemes for self-regulation. They argued that though binding law was inappropriate or impossible at the international level, they were uniquely situated and committed to designing appropriate norms and “compliance mechanisms” so as to guarantee respect for human and labor rights and the environment “throughout their supply chains”.

And thus was born what political scientist David Vogel calls the “market for virtue” (2005): a flourishing economic sector in services such as non-financial reporting and compliance, reputational risk management, sustainability and human rights training, ethical investing and stakeholder dialogue. These private governance initiatives were (and still are – this is on-going!) variously labeled “corporate social responsibility” (CSR), “environmental, social and governance” oversight (ESG), “human rights compliance”, “sustainability stewardship”, “triple bottom line” (3BL), accounting with respect to people, the planet and profits (“PPP accounting”), “corporate citizenship” or “creating shared value” (CSV). They involve a plethora of measures (norms, standards, audits, platforms, multi-stakeholder initiatives, certification schemes, capacity building programs) and an ever-expanding series of actors (NGOs, IOs, charitable foundations, universities, private consultancies, public administrations). Though they differ somewhat in their objectives, vocabulary and instrumentation, these initiatives all take the form of voluntary, non-legally binding rules and procedures for corporate self-regulation. They represent the kinds of rules that I discussed in my opening remarks, rules like “open with a joke”, that carry as their only sanction loss of reputation. (Now isn’t that a joke!). But though they deliver no clear disciplinary results, they do produce multiple discursive and material effects, moving the entire corporate governance paradigm away from the rule of law and towards the laws of the market, or, as I have written previously, “turning liability into responsibility, government into governance, development into ‘market inclu-

sion' and social justice into a phantasmagorical win-win 'social dividends'" (Hertz 2020: 111).

Critical accountant scholar Peter Miller and sociologist Nikolas Rose (1990) have linked corporate "responsibilization" to regimes of neo-liberal governmentality that are reconfiguring relations between economies and societies across the globe. Political economist Grahame Thompson (2007) and anthropologist Ronan Shamir (2008) have shown that this "responsibility-speak" (Shore 2017: 104) reroutes accountability away from obligations and sanctions, and towards an ideal of "values" and their "ownership", whereby social order will flow from corporate interiorization of the norms of ethical capitalism, often called "soft law". Soft law invokes good will and builds on moral claims and promises, but specifically exempts itself from a right-based governance regime. Anthropological fieldwork (see Dolan & Rajak 2016) has further demonstrated how "soft law" and corporate responsibilization work to depoliticize struggles for social justice, replacing conflict and disputes with techniques dominated by companies and based on voluntariness. Soft law in these contexts mimics hard law in form (sets of rules and procedures that present as stable and comprehensive) but differs fundamentally in function. It is not simply a milder or more flexible version of "hard law", but rather a series of governance techniques based in a radically different vision of regulation, social control and the public good (Zerilli 2010).

### **Researching corporate social responsibility in China**

In 2007, I was invited to a meeting convened by the International Labor Organization (ILO) in which just such a process of "responsibilization" was up for discussion. It revolved around the ILO's observation that labor conditions within the global electronics industry were highly problematic, involving underpay, overwork, dangerous levels of exposure to chemical substances and low levels of democratic or union participation. As this meeting brought together a number of research themes I was working on, I attended with enormous interest (see account in Hertz 2010a).

From the outset, it became clear that corporate participants had the upper hand in setting both the agenda and the tone of discussions. Treated with great gratitude for simply showing up, they expressed their dominant position by threatening at all moments to leave the meetings if certain of their demands were not met. These included choices of wording – such as banning the words "problem" or "difficult", in favor of "challenge" and "challenging" – and interventions into procedures. Indeed, one representative of a large U.S.-based brand complained that he had "decided to attend the meeting expecting social dialogue but found herself engaged in debate". The Secretary-General of

the Meeting was forced to intervene, very politely, to “clarify” that “the Meeting and the ongoing debate were representative of social dialogue” within the ILO framework. In sum, corporate representatives expected their contributions to the “dialogue” to go entirely unchallenged by the international labor unions and state representatives present at the table.

Intrigued, I decided to launch a research project to investigate the discourses and mechanisms around corporate social responsibility (or CSR) in the electronics manufacturing sector<sup>3</sup>. The question we set ourselves was not “does CSR work?”, but what does it do, discursively and normatively? To study this, we followed CSR programs from corporate headquarters to supplier firms in China, but also to the consultancies, NGOs and professionals working to design, implement, audit and assess these programs. We conducted participant observation within consultancies and NGOs working in the area of CSR in the Pearl River Delta area, including numerous interviews with CSR “officers”, professionals hired by businesses to guarantee that their operations are in conformity with the basic documents on human and labor rights, and the environment.

My research began as the global business community was busy integrating the new “gold standard” for transnational governance in the area of business and human rights, the “U.N. Guiding Principles on Business and Human Rights” (GP), also known as “the Ruggie Principles”, after their chief architect, John Ruggie. Ruggie had hammered out the GPs over the course of five years traveling the globe attempting to establish “dialogue” with business organizations, states, international organizations, labor unions and major NGOs in order to come up with a set of binding standards that would be acceptable to all, or at least to most. Amongst this “most”, the mostest figured prominently, of course, by which I mean the powerful business lobbies represented by organizations such as the International Chamber of Commerce. In Ruggie’s understanding, reflecting that of the U.N. Human Rights Council, getting the international business community behind a guiding document with normative force was crucial to making any real progress in this area, and many of its limitations and compromises from this constraint.

The principal compromise in this otherwise impressive document has, of course, to do with the question of law, and whether it should apply to transnational corporations. In choosing the language for the Guiding Principles, Ruggie performed remarkable rhetorical contortions aimed to suggest that corporations should be bound to respect human rights throughout their supply chains without ever actually saying this. He did, however, make one crucial addition to the otherwise hortatory text that was in many ways similar to previous and

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3 For the final report and a short documentary film explaining this research, both available on line, see Hertz (2010b) and Fuhrer & Hertz (2020).

clearly unsuccessful efforts to bind corporations through “soft law”, Kofi Anan’s “Global Compact” being the most high-profile example. This innovation comes with the document’s insistence on “remedies”, that is, on the availability of complaint mechanisms for injured parties, provided by the national laws of the countries in which corporations operate. The Ruggie Principles insist, in other words, that transnational corporations should be governed by some form of *double institutionalization*, as explained by Bohannon (1965) – through specialized institutions able to disembed complaints from their social contexts and submit them to independent consideration by a third party.

Despite this innovation, or perhaps because of it, the presentations of the U.N. Guiding Principles that I was able to attend put very little emphasis on law, particularly when they were being given to an audience of business representatives. As one special envoy stated very clearly: “We’re trying to move people past the ‘voluntary/non-voluntary’ debate: law is one tool but not the only tool – there are also social obligations and expectations.”

The dominant paradigm for “moving people past the ‘voluntary/non-voluntary’ debate” at the time was the notion of “compliance”.



**COMPLIANCE + CONVICTION = CORPORATE SOCIAL RESPONSIBILITY**

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The compliance regime, as pictured here, has all the features of “responsibilization”: a blurred field of economic, legal, ethical and “community” obligations; a valuing of “voluntary” over “simple obedience”, and an emphasis on interiorization, evident in the notion of “conviction”. “Simply” obeying the rules is not interesting, in this worldview, and leads to a mechanical and bureaucratic mindset that lacks “passion”, “engagement” and “ownership”.

In their discussions of the problems that they encountered in their jobs, the CSR officers whom we followed to supplier firms in China talked a lot about this “compliance mentality”, whereby firms in producing countries merely “jumped through the hoops” of CSR conformity because it was imposed by

the brands they were supplying. Thus, supplier firms in China, for example, tended simply to “check the boxes”, doing what was expected of them and no more. CSR professionals blamed the compliance regime for their failure to “take ownership” of corporate responsibility as a project that was relevant to their own firms, independently of brand or government pressure. Thus, rather than looking at the structural conditions that prevented suppliers and subcontractors in developing countries such as China from respecting human rights, or, more relevant still, looking at their own purchasing practices, which frequently required the production of enormous quantities of goods under impossibly short deadlines, brand-name firms with CSR programs tended to look “beyond compliance”, aiming to create “conviction” in the hearts and minds of the subordinate firms they were working with.

The desire to go “beyond compliance” was based not only in CSR officers’ psychologizing and moralistic worldviews. It was also based in their own need to feel meaningful and effective in their jobs. Simply put, these professionals were getting tired of going from factory to factory in Southern China, repeating the same ineffectual message about the necessity to respect Chinese labor law, or checking to make sure that there were no under-aged workers on the production line and that the ventilation system was working more or less properly. They were also tired of the various ruses and tricks that supplier factories the world over invented to get around “compliance”, often simply to meet the extreme demands for just-in-time production that these same brands were issuing. Going “beyond compliance” for these professionals was a way of “engaging” their “discretionary responsibility” to “contribute” rather than control, to create “shared value” rather than verify wage stubs, and to produce “win-win” outcomes rather than sanctions. Thus, they set about inventing and implementing what are essentially local development projects and programs that had little or nothing to do with their corporations’ core businesses. These experiments with even “softer” mechanisms for CSR implementation, generally called “capacity building” programs, were all intended to offset the “legalized” approach to CSR, and to create what these professionals considered to be a more “sustainable” model for respecting human, labor and environmental rights in the countries in which they were producing.

One example of these “capacity-building programs”, is a project that our research followed from its beginnings in corporate headquarters in Europe through CSR consultancies in Hong Kong, down to a Chinese NGO tasked with inventing and implementing it and then further afield, to the Chinese countryside where it was implemented. It involved responding to complaints by workers that they were losing contact with their children “left at home” in the rural villages where they originated because of Chinese laws preventing them from bringing their families to the coastal cities where they were work-

ing. Imagined by a couple of transnational firms, this program involved sending “monitors” to the villages where these children were living, in boarding schools or with their relatives, to give them telephones and teach them how to talk correctly to their parents when they called. Thus, rather than insisting that they would not invest in China if it continued to implement these harmful and discriminatory labor practices, Western-based firms invented ways to “do good” within this structure, thereby naturalizing its arbitrary and unjust characteristics.

## **Conclusion**

It is time to conclude, for I think you get the general gist of the corporate strategies around rules that I have been outlining. My main point is this: when we as cultural and social scientists critique laws and rules, we need to be aware that powerful actors in society may be doing the same, and for reasons diametrically opposed to those we might have in mind. Corporations continue to manipulate the law to work for their own interests, of course. However, they also manipulate “non-law” and invent new ways to transgress the law’s constraints so as to run free in the global business landscape.

In Switzerland where I work, the debate about the principles, mechanisms and effects of “hard” versus “soft” law is not simply academic. To the contrary, they figured centrally in recent popular federal initiative that sought to impose hard-law obligations on transnational corporations based in this country, using the “Ruggie Framework” as its basis<sup>4</sup>. In lobbying against this Initiative, Swiss business associations advanced the argument that imposing hard-law obligations on Swiss corporations would, among other things, make them less “responsible”, as it would take away their incentive to self-regulate. Hard law was portrayed not as the logical endpoint of soft-law approaches, but rather as its opposite: an impediment to corporations taking “ownership” of their responsibilities for guaranteeing high standards in the areas of work, human rights and the environment. Thus, in a position paper entitled “Solutions rather than Litigation” and prepared by *economiesuisse* (2016), one of this country’s main business associations, it is argued that: “An excessive extension of liability would [...] transfer the constructive discussion about corporate responsibility to the courtrooms and stifle positive developments” (p. 1). “The initiative”, the paper continues, reduces corporate responsibility to

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4 In order to bring our empirical research on how CSR works into the public debate around this popular initiative, my colleague Yvan Schulz and I published a general audience book in French and German (see Hertz & Schulz 2020). It may be of interest for its content, but also as a model for those looking to bring the results of social science research more prominently into the public sphere.

purely legal questions. Constructive dialogue to solve social and ecological challenges is destroyed”.

In sum, corporations have set about, and largely succeeded for the time being, in undoing the double institutionalization of social norms in the area of transnational governance. They have created a regime in which social problems, environmental injustices and human rights violations remain embedded in the very same contexts that create them, placing themselves in the role of players and umpires in the corporate responsibility game. It is not surprising, thus, that the recommendation of the U.N. Guiding Principles that they resist with the most fervor is the requirement that countries provide “remedies” to victims of corporate irresponsibility and malfeasance. Remedies do not create “win-win” solutions, in which everyone can be a good guy. Remedies, pursued in independent legal institutions, create good guys and bad guys, and though the good guys don’t always win, they at least have a chance at a public hearing based in principles that are separate from and may even run contrary to, business interests.

In my view, this suggests that in some areas of social life, we should not be fighting against rules, but fighting for better rules. To paraphrase Groucho Marx one final time: “The world is full of people who think they can manipulate the lives of others merely by getting a law passed”. I say, in certain circumstances, and under certain conditions, more power to them!

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## **BIBLIOGRAPHY**

- Bachofen, Johann Jakob. 1961. *Das Mutterrecht: eine Untersuchung über die Gynäiokratie der alten Welt nach ihrer religiösen und rechtlichen Natur*. Stuttgart: Verlag von Kraiss und Hoffmann.
- Bartley, Tim. 2018. *Rules without Rights: Land, Labor, and Private Authority in the Global Economy*. Oxford: Oxford University Press.
- Bohannon, Paul. 1965. “The Differing Realms of the Law”, *American Anthropologist*, 67 (6): 33-42.
- Dolan, Catherine and Dinah Rajak (eds.). 2016. *The Anthropology of Corporate Social Responsibility*. New York: Berghahn Books.

- economiesuisse. 2016. "Solutions rather than Litigation", *Dossierpolitik* 10/16. Accessed March 29, 2022. <https://www.economiesuisse.ch/en/dossier-politics/loesungen-statt-gerichtsprozesse>
- Fuhrer, Bernhard and Ellen Hertz. 2020. *Complex Connections. CSR in China*. Accessed March 29, 2022. <https://www.youtube.com/watch?v=w1ZAMJMsDNs>
- Galanter, Marc. 1983. "Reading the Landscape of Disputes: What We Know and Don't Know (and What We Think We Know) About Our Allegedly Contentious and Litigious Society", *University of California Law Review* 31: 4-71.
- Hertz, Ellen. 2020. "Corporate Social Responsibility. The Great Shell Game", *Journal of Legal Anthropology* 4 (2): 110-115.
- Hertz, Ellen 2010b. "Corporate Social Responsibility in the Electronics Manufacturing Industry: The Implications of 'Soft Governance' for Labor Standards", SNIS website accessed March 29, 2022. <https://snis.ch/projects/corporate-social-responsibility-in-the-electronics-manufacturing-industry-the-implications-of-soft-governance-for-labor-standards/> ).
- Hertz, Ellen 2010a. "Excessively Up at the International Labour Organisation: Notes on 'Note on the Proceedings TMITI/2007/10'", *MAPS Working Papers*. Accessed March 29, 2022 <http://www.unine.ch/maps/home/publications/workingpapersmaps.html> ).
- Hertz, Ellen and Yvan Schulz. 2020. *Entreprises et droits humains: les limites de la bonne volonté / Unternehmen und Menschenrecht. Die Grenzen des guten Willens*. Zürich: Seismo (series: "Penser la Suisse").
- Llewellyn, Karl N. and E. Adamson Hoebel. 1941. *The Cheyenne Way. Conflict and Case Law in Primitive Jurisprudence*. Norman: University of Oklahoma Press.
- Maine, Henry Sumner. 1861. *Ancient Law, Its Connection with the Early History of Society, and Its Relation to Modern Ideas*. London: John Murray.
- Miller Peter and Nikolas Rose. 1990. "Governing Economic Life", *Economy and Society* 19 (1): 1-31.
- Moore, Sally Falk. 1973. "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study", *Law & Society Review* 7 (4): 719-746.
- Nader, Laura. 2005. *The Life of the Law: Anthropological Projects*. Berkeley, CA: University of California Press.
- Nader, Laura 1990. *Harmony Ideology. Justice and Control in a Zapotec Mountain Village*. Stanford, CA: Stanford University Press.
- Pistor, Katharina. 2019. *The Code of Capital: How the Law Creates Wealth and Inequality*. Princeton, NJ: Princeton University Press.
- Shamir, Ronan. 2008. "The Age of Responsibilization: On Market-embedded Morality", *Economy and Society* 37 (1): 1-19.
- Shore, Chris. 2017. "Audit Culture and the Politics of Responsibility: Beyond Neoliberal Responsibilization?". In *Competing Responsibilities: The Ethics and Politics of Contemporary Life*, edited by Susanna Trnka and Catherine Trundle. Durham & London: Duke University Press.
- Smith, Clayton, Carson Babich & Mark Lubrik. 2020. *Leadership and Management in Learning Organizations*. Pressbooks, licensed under a Creative Commons Attribution. Accessed April 2, 2023: <https://ecampusontario.pressbooks.pub/educationleadership-management/chapter/5-4-modern-corporate-social-responsibility/>
- Thompson, Grahame. 2007. "Responsibility and Neo-liberalism", *openDemocracy*. Accessed March 29, 2022: [https://www.opendemocracy.net/en/responsibility\\_and\\_neo\\_liberalism/](https://www.opendemocracy.net/en/responsibility_and_neo_liberalism/)
- Vogel, David. 2005. *The Market for Virtue. The Potential and Limits of Corporate Social Responsibility*. Washington, DC: Brookings Institution Press.
- Zerilli, Filippo M. 2010. "The Rule of Soft Law: An Introduction", *Focaal*, 2010 (56): 3-18.