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TRANSNATIONAL CORPORATE LAW LITIGATION

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ABSTRACT

For nearly half a century, a federal statute colloquially referred to as the Alien Tort Statute has served as a pivotal battleground over whether corporations violating law abroad can be subject to civil suits in the United States. The statute has been used to bring hundreds of lawsuits against corporations involved in some of the most heinous human rights abuses and environmental catastrophes taking place in foreign nations. Recent Supreme Court cases, however, have sounded the death knell for the viability of future cases by restricting the extraterritorial reach of federal statutes.

This Article presents a case for deterring corporate lawbreaking abroad through U.S. corporate law. Unlike Alien Tort Statute cases, corporate governance suits brought by shareholders would frame corporate lawbreaking in foreign nations not as torts actionable under

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a federal statute but as fiduciary duty claims under state law against directors and officers for enabling U.S. corporations to violate foreign law. In presenting a blueprint for litigators to bring what can be conceptualized as transnational corporate law litigation, this Article clarifies how violations of foreign law—including human rights laws, labor laws, and environmental regulations—can trigger powerful fiduciary duty claims against directors and officers in the United States. These suits promise to deter corporate lawbreaking by provoking the judicial articulation of norms governing transnational business operations with vast implications for understanding the social responsibility of modern corporations.

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INTRODUCTION

The modern corporate form is often celebrated as a breakthrough legal innovation.[1] Its emergence in the seventeenth century is widely regarded as an essential condition for the rise of significant business enterprises that underly the modern economy as we know it.[2] The rise of large firms, however, did not come without a charge. Some of the most prominent corporations in early America, for instance, played a pivotal role in the flourishing of slavery.[3] Long after Congress outlawed the slave trade in 1808, illegal slave trade continued to be rampant for decades.[4] Merchant firms like Abranches, Almeida and Co., based in New York, pooled capital from dispersed investors to undertake capital-intensive yet lucrative voyages between Africa and the Americas.[5]

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1. *See, e.g.*, Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1336–37 (2006) (noting the evolution of commercial entity shielding).

2. *See* Giuseppe Dari-Mattiacci, Oscar Gelderblom, Joost Jonker & Enrico C. Perotti, *The Emergence of the Corporate Form*, 33 J.L. ECON. & ORG. 193, 225 (2017) ("The corporate form is now the foundation of the modern market economy. Its benefits are well appreciated: permanent capital grants an autonomous and indefinite life, and a capacity for long-term investment.").

3. Harvard Corporation, chartered by the Commonwealth of Massachusetts in 1650, built its dormitories and academic buildings through the labor of enslaved people and continued to benefit financially from slavery even after it was outlawed in Massachusetts in 1783. *See* Nick Anderson & Susan Svrluga, *Harvard Leaders and Staff Enslaved 79 People, University Finds*, WASH. POST (Apr. 26, 2022, 6:47 PM), https://www.washingtonpost.com/education/2022/04/26/harvard-slavery-report [https://perma.cc/9QTB-C7MQ]; *see also* Zoe Thomas, *The Hidden Links Between Slavery and Wall Street*, BBC NEWS (Aug. 28, 2019), https://www.bbc.com/news/business-49476247 [https://perma.cc/B3C7-VTZV].

4. The continued slave trade was described as follows:

> [S]lave traders sustained their illicit industry, in large part, by strategically coordinating their financial arrangements against a rising tide of international suppression. One key tactic was for slave trade investors in the United States, Cuba, Africa, and Iberia to lower the risks of interdiction by joining forces and co-financing voyages.

John A. E. Harris, *Circuits of Wealth, Circuits of Sorrow: Financing the Illegal Transatlantic Slave Trade in the Age of Suppression, 1850–66*, 11 J. GLOB. HIST. 409, 409 (2016).

5. Manuel Barcia & John Harris, *The Slave Trade Continued Long After It Was Illegal—with Lessons for Today*, WASH. POST (Dec. 6, 2020, 6:09 AM), https://www.washingtonpost.com/outlook/2020/12/06/slave-trade-continued-long-after-it-was-illegal-with-lessons-today [https://perma.cc/UK5W-YEBE]; John Harris, *Voyage of the Echo: The Trials of an Illegal Trans-Atlantic Slave Ship*, LOWCOUNTRY DIGIT. HIST. INITIATIVE (2014), https://ldhi.library.cofc.edu/exhibits/show/voyage-of-the-echo-the-trials/the-echo-slave-traders [https://perma.cc/2ZC3-SXNS].

Centuries later, lawbreaking and misconduct by corporations remain prevalent.[6] It is not that corporate law—the body of law principally governing the relationship between shareholders and managers—provides no mechanism to deter illegal activities.[7] As a matter of black-letter law, shareholders can sue a corporation's directors and officers for breach of fiduciary duty if they cause the corporation to violate "positive law."[8]

Curiously underexplored in this important jurisprudence is what even constitutes violations of positive law. To date, federal and state law violations have routinely been used as predicates to support viable corporate governance claims.[9] For instance, violations of federal law—including the False Claims Act,[10] the Federal Aviation Administration ("FAA") regulations,[11] and Food and Drug Administration ("FDA") regulations[12]—have served as predicate violations giving rise to shareholder suits surviving a motion to dismiss.[13] Violations of state law are also widely used. For instance, California's criminal indictments

6. *See* Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 255 (2020).

7. *See* Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Balotti & Jeffrey M. Gorris, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 650 (2010) ("For a corporate director knowingly to cause the corporation to engage in unlawful acts or activities or enter an unlawful business is disloyal in the most fundamental of senses.").

8. *See, e.g.*, South v. Baker, 62 A.3d 1, 14 (Del. Ch. 2012) ("A plaintiff can plead the necessary connection by alleging with particularity actual director involvement in a decision or series of decisions that violated positive law."); Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) ("[O]ne cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey.").

9. This Article focuses on the viability of fiduciary duty suits in part because shareholder suits that survive a motion to dismiss often result in settlements with significant corporate governance reforms and in some cases even compensation for direct victims of corporate lawbreaking. *See, e.g.*, Stipulation of Settlement, City of Westland Police & Fire Ret. Sys. v. Stumpf (Wells Fargo Derivative Litigation), No. 3:11-cv-02369 (N.D. Cal. Apr. 21, 2014); *Shareholder Derivative*, ROBBINS GELLER RUDMAN & DOWD, LLP, https://www.rgrdlaw.com/pr intpilot-area-shareholder-derivative-litigation.pdf?1689701409 [https://perma.cc/H2R3-LS6E] (noting that Wells Fargo agreed to corporate governance reforms as well as to provide "$67 million in homeowner down-payment assistance, credit counseling, and improvements to its mortgage servicing system . . . concentrated in cities severely impacted by the bank's foreclosure practices and the ensuing mortgage foreclosure crisis").

10. Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. 2019-0816-SG, 2020 WL 5028065, at *8 (Del. Ch. Aug. 24, 2020).

11. *In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934, at *4 (Del. Ch. Sept. 7, 2021).

12. *In re* Clovis Oncology, Inc. Derivative Litig., No. 2017-0222-JRS, 2019 WL 4850188, at *2, *9 (Del. Ch. Oct. 1, 2019).

13. *See* Carliss Chatman & Tammi S. Etheridge, *Federalizing* Caremark, 70 UCLA L. REV. 908, 945 (2023).

against one of the largest midstream energy companies in the United States for a massive oil spill into the Pacific Ocean were used as a predicate to support a monumental shareholder suit.[14]

But litigators rarely present violations of foreign law as a predicate claim—naturally, judges do not consider it, and academics thus far have not intervened to ask for explanations.[15] In rare cases where foreign law violations are present in case law, they are complements to violations of state or federal law.[16] In other cases, lawyers fail to identify the specific source of law underlying the nature of the alleged illegal conduct with transnational elements, generically referring to the violation of "international regulatory standards."[17]

This state of affairs should not be particularly surprising. Foreign law maintains an uncomfortable status in U.S. courts. Numerous scholars and judges have written "against foreign law" and display moral outrage even about judges citing foreign law in judicial opinions.[18] Litigators specializing in corporate law in the United States

14. Inter-Mktg. Grp. USA, Inc. v. Armstrong, No. 2017-0030-TMR, 2019 WL 417849, at *2–3 (Del. Ch. Jan. 31, 2019).

15. Some legal scholars assume relevant "positive law," although not explicitly theorized, is applicable U.S. law. *See* Mercer Bullard, Caremark*'s Irrelevance*, 10 BERKELEY BUS. L.J. 15, 16 (2013) ("The expected costs of violating federal law, or non-corporate state or municipal law, will almost always exceed the expected costs of violating state corporate law, including the costs of violating the *Caremark* standard."). Throughout the Article, I use the term "foreign law" to refer to laws produced by foreign nations with internationally recognized lawmaking authority. I use the term "international law" to refer to the body of law principally derived from treaties and customary international law. *See* Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 204 (2010).

16. *See* Melbourne Mun. Firefighters' Pension Tr. Fund v. Jacobs, No. 10872-VCMR, 2016 WL 4076369, at *3 (Del. Ch. Aug. 1, 2016), *aff'd*, 158 A.3d 449 (Del. 2017) (alleging violations of antitrust laws of South Korea, Japan, and China—in addition to federal antitrust claims); City of Roseville Emps.' Ret. Sys. v. Crain, No. 11-2919 JLL, 2013 WL 9829650, at *3, *21 (D.N.J. Sept. 26, 2013) (dismissing a lawsuit claiming that Kid Brands' officers concealed information that they did not have "internal controls for compliance with U.S. Customs laws and local foreign laws in the jurisdictions where Kid Brands operates").

17. *See, e.g.*, Firemen's Ret. Sys. of St. Louis v. Sorenson, No. 2019-0965-LWW, 2021 WL 4593777, at *14 (Del. Ch. Oct. 5, 2021). In some respects, explicitly specifying the source of law may not only be good practice, but also doctrinally required. In a recent case, the Delaware Court of Chancery opined that "[s]imply listing statutes 'in vague, broad terms' without alleging what law was violated and how is insufficient." *Id.*

18. This critique is perhaps most prominent in the constitutional interpretation context. *See, e.g.*, Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291, 296 (2005). But general skepticism about the authority of foreign law in U.S. courts is more widespread. *See* Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 128, 129 (2005).

may also be unfamiliar with foreign law, and perhaps mildly allergic to the idea of having to determine the content of foreign law.

But plaintiffs' lawyers are leaving money on the table, shareholders are not effectuating a doctrinally sound remedy, and directors and officers of major corporations are not being held accountable for turning a blind eye to—or actively participating in—illegal conduct taking place abroad. Although shareholder suits alleging board oversight failure routinely follow multimillion-dollar fines and penalties imposed by federal agencies and state prosecutors, not a single shareholder suit followed Pfizer's $75 million settlement with Nigeria's Kano state government to resolve claims that the pharmaceutical company was responsible for the death or disabling of dozens of Nigerian children in a clinical study.[19]

These issues cannot be ignored for much longer. The largest U.S. corporations today operate not within the confines of U.S. territorial borders but maintain a truly global footprint. According to a recent study, almost all of the largest U.S. corporations—including Coca-Cola, Mondelez, and Johnson & Johnson—employ more than half of their employees outside of the United States or maintain more than half of their corporate assets outside of the United States.[20] Some U.S. corporations maintain most of their physical operations abroad. For example, Southern Copper Corporation, one of the largest copper companies in the world, declares its headquarters as located in Arizona but reportedly maintains all its "mining, smelting and refining facilities . . . in Peru and Mexico."[21] Newspaper headlines routinely showcase lawbreaking by these corporations overseas.[22] Lawsuits under local domestic law may proceed in the place of misconduct in foreign

19. *See* David Smith, *Pfizer Pays Out to Nigerian Families of Meningitis Drug Trial Victims*, GUARDIAN (Aug. 12, 2011, 6:08 AM), https://www.theguardian.com/world/2011/aug/11/pfizer-nigeria-meningitis-drug-compensation [https://perma.cc/N3UT-SB3F].

20. Mark J. Perry, *Many Large US Firms Sell, Hire, and Invest More Overseas Than in the US and Have to Think Globally to Survive*, AM. ENTER. INST. (June 22, 2020), https://www.aei.org/carpe-diem/many-large-us-firms-sell-hire-and-invest-more-overseas-than-in-the-us-and-have-to-think-globally-to-survive [https://perma.cc/3CWZ-M2W7].

21. S. Copper Corp., Annual Report (Form 10-K) 3 (Mar. 7, 2022).

22. *See, e.g.*, *infra* Section II.A (documenting Southern Copper's illegal activities in Peru); Oliver Balch, *Mars, Nestlé and Hershey to Face Child Slavery Lawsuit in US*, GUARDIAN (Feb. 12, 2021, 5:31 PM), https://www.theguardian.com/global-development/2021/feb/12/mars-nestle-and-hershey-to-face-landmark-child-slavery-lawsuit-in-us [https://perma.cc/4K93-JJ24] ("Eight children who claim they were used as slave labour on cocoa plantations in Ivory Coast have launched legal action against the world's biggest chocolate companies.").

nations, but the remedies are often insufficient to alter corporate behavior.[23]

This Article articulates a legal theory for deterring corporate lawbreaking abroad as a matter of U.S. corporate law. It presents a doctrinal blueprint explaining why violations of foreign law standing alone can amount to serious fiduciary duty violations for directors and officers of U.S. corporations.[24] As a matter of legal doctrine, there should be little distinction between U.S. antitrust laws or Japanese antitrust laws, at least for the purpose of ascertaining whether directors or officers betrayed shareholders by facilitating or engaging in illegal activities.[25]

This breed of shareholder suit constitutes an important paradigm shift in how corporate lawbreaking with catastrophic societal consequences committed outside of U.S. territory—including gross human rights violations or mass-scale environmental degradation—can be adjudicated in U.S. courts. To date, deterring corporate lawbreaking abroad has been pursued perhaps most prominently as a matter of a legal theory recognizing the extraterritorial application of U.S. tort law.[26] Relying on a federal statute colloquially known as the Alien Tort Statute ("ATS"),[27] litigators have brought hundreds of lawsuits

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23. *See* Rachel Chambers, *Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court*, 42 U. PA. J. INT'L L. 519, 532 (2021) ("The necessity for plaintiffs to have access to remedy in the courts of the home state of the parent company as a result of the widely acknowledged governance gap in corporate accountability is well covered in the literature."); *cf.* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 758 (2005) ("[T]he degree of legal compliance we actually get in society requires effective social and moral sanctions that supplement our imperfect legal and economic sanctions . . . . [T]he structure of the modern public corporation creates . . . important impediments to the enforcement of social and moral sanctions.").

24. Because of its importance to U.S. corporate law jurisprudence, this Article focuses on Delaware corporate law—the body of law that governs over half of all publicly traded companies in the United States and an increasing number of foreign companies incorporated in Delaware. Omari Scott Simmons, *The Federal Option: Delaware as a De Facto Agency*, 96 WASH. L. REV. 935, 950 (2021). The state's corporate law is highly influential for other U.S. states. *See* Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 19 (2008).

25. *See infra* Section I.B; *see also* Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc., 854 A.2d 121, 131 (Del. Ch. 2004) ("Under Delaware law, a fiduciary may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity.").

26. *See* MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE: ENFORCEMENT OF INTERNATIONAL LAW THROUGH US TORTS LAW 26 (2009).

27. The statute enables suits in federal court for "a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. For an excellent overview of

alleging violations of international law over the past several decades in federal court with varying degrees of success.[28] Countless law review articles have also been penned debating the normative desirability of these suits.[29] For better or worse, recent cases in the Supreme Court have sounded the death knell for these cases going forward.[30] In the latest ATS case, *Nestlé USA, Inc. v. Doe*,[31] the Court held that the plaintiffs, who were allegedly trafficked as children to engage in slave labor on cocoa plantations in the Ivory Coast, could not sue U.S. corporations that supported those plantations because most of the relevant conduct occurred abroad.[32]

The novel breed of corporate governance claims articulated in this Article may implicate corporations engaged or complicit in mass-scale human rights violations or environmental degradation outside of U.S. territory, thus sharing fact patterns with familiar ATS cases. But unlike ATS cases, shareholder suits would frame the illegal activities not as torts actionable under a federal statute but as fiduciary duty claims against directors and officers for enabling U.S. corporations to violate foreign laws. Intellectually, these suits can be conceptualized as a form of *transnational corporate law litigation* that seeks judicial articulation of norms governing director and officer behavior when it comes to U.S. corporations operating in foreign nations.[33]

Importantly, shareholder suits can directly impact the way movers and shakers of some of the most powerful corporations do business both in the United States and abroad. Although board members historically served a "ceremonial function with a minimal expenditure of time and effort,"[34] modern boards have the capacity to "challenge

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the Alien Tort Statute, see Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2193–97 (2012).

28. Christopher Ewell, Oona A. Hathaway & Ellen Nohle, *Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. 1205, 1235 (2022) (discussing theories for why the lawsuits have varying degrees of success).

29. A simple Westlaw advanced search for "Alien Tort Statute" filtered to Law Reviews and Journals on March 28, 2023, found 3,735 articles.

30. *See infra* Section I.A.

31. Nestlé USA, Inc. v. Doe, 593 U.S. 628 (2021).

32. *Id.* at 631.

33. The term honors Professor Harold Hongju Koh's influential work describing individual and governmental litigants challenging violations of international law in U.S. courts to seek "redress, deterrence, and reform of national governmental policies through clarification of rules of international conduct." *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2348 (1991).

34. Jill E. Fisch, *Taking Boards Seriously*, 19 CARDOZO L. REV. 265, 265 (1997).

entrenched management and redirect firm decision making."[35] Corporate governance suits have a substantial impact on directors' and officers' behavior by shaping the social norms governing fiduciary behavior[36] and by imposing reputational costs to those complicit in corporate lawbreaking.[37]

Although not without their own share of well-documented problems, shareholder suits carry with them several distinct advantages for deterring corporate lawbreaking abroad. First, fiduciary duty claims brought by shareholders under state law are not bound by the restrictive canon of statutory interpretation limiting the territorial reach of federal statutes.[38] Instead, U.S. corporate law applies extraterritorially due to a choice of law rule called the internal affairs doctrine, which mandates the application of the corporate law of the firm's state of incorporation regardless of the location of corporate activity.[39] Second, unlike other civil suits pleading the extraterritorial

35. *Id.* Like Professor Lisa Fairfax explains, boards "have an obligation to monitor corporate affairs, ensuring that corporate managers act in the best interests of the corporation, and that such managers do not misbehave or otherwise shirk their duties." Lisa M. Fairfax, *Government Governance and the Need to Reconcile Government Regulation with Board Fiduciary Duties*, 95 MINN. L. REV. 1692, 1693 (2011).

36. *See, e.g.*, Lynn A. Stout, *On the Proper Motives of Corporate Directors (Or, Why You Don't Want to Invite Homo Economicus to Join Your Board)*, 28 DEL. J. CORP. L. 1, 15 (2003) ("[J]udicial opinions in fiduciary duty cases can encourage directors to behave like reliable fiduciaries not primarily by threatening them with the prospect of personal liability, but by expressing and reinforcing social norms of careful and loyal fiduciary behavior.").

37. Like Professor Roy Shapira observes, corporate law's sanction impacts behavior "through imposing (uninsurable) non-legal costs, such as the emotional costs (stress, embarrassment) and the reputational costs (having details about your misbehavior dug out and made public, for all other market participants to see)." Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1881 (2021) [hereinafter Shapira, *New* Caremark]. Studies show that board members care deeply about safeguarding their reputation because it impacts their ability to serve on other highly desired board positions in the future. *See id.* at 1888 ("In yet another version, judicial scolding reduces third parties' willingness to do business with the defendant directors or company (reputational sanctions).").

38. *See* William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1389 (2020).

39. According to the Supreme Court, the internal affairs doctrine "recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders." Edgar v. MITE Corp., 457 U.S. 624, 645 (1982). Although the internal affairs doctrine was originally developed in the interstate context, courts have extended the doctrine to international settings. *See* P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1, 86 ("In choosing the law applicable to internal corporate affairs the states have drawn no distinctions between sister-state and foreign country corporations."); Hughes v. Xiaoming Hu, No. 2019-0112-JTL, 2020 WL 1987029, at *1 (Del. Ch. Apr. 27, 2020) (applying Delaware corporate law to a Delaware-incorporated corporation headquartered in China).

application of U.S. law that often do not survive jurisdictional challenges in U.S. courts,[40] courts of the firm's place of incorporation—most prominently Delaware in the United States[41]—typically adjudicate shareholder claims even for corporations that maintain no operations in the United States.[42] Fiduciary duty suits against directors and officers are fundamental corporate governance matters over which Delaware courts have repeatedly claimed jurisdiction, even when the suits involve predominantly foreign facts.[43] Finally, because shareholder suits are principally matters of state law,[44] they are largely immune from the intervention of the Supreme Court. Scholars have recently documented the current Court's "pro-business" jurisprudence, which has "often expanded corporate rights while narrowing corporate liability or access to justice against corporate defendants."[45] Delaware has historically crafted its own corporate law jurisprudence with relatively little direct intervention from the federal government,[46] enabling it to develop case law that can powerfully shape the behavior of corporate America.[47]

Of course, explicitly recognizing U.S. corporate law's "extraterritorial" reach, so to speak, is by no means a cause for universal celebration. Fiduciary duty suits brought by shareholders, even in the purely domestic context, are not all rainbows and

40. Charity Ryerson, Dean Pinkert & Avery Kelly, *Seeking Justice: The State of Transnational Corporate Accountability*, 132 YALE L.J.F. 787, 792 (2022) ("Civil litigation can be hampered by other jurisdictional and procedural restrictions as well. For example, the *forum non conveniens* doctrine has posed a significant obstacle for human-rights litigants in the United States.").

41. Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 590 (2003) ("Delaware has 'won' that race, as most large American firms incorporate there.").

42. *See infra* Section III.A.

43. *See id.*

44. *See* Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 709 (1987) (noting that "corporate law is still the domain of the states").

45. Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 225 (2021) [hereinafter Pollman, *Pro-Business*].

46. Omari Scott Simmons, *The Federal Option: Delaware as a De Facto Agency*, 96 WASH. L. REV. 935, 950 (2021); Ofer Eldar & Gabriel Rauterberg, *Is Corporate Law Nonpartisan?*, 2023 WIS. L. REV. 177, 177. Legal scholars vary in their assessment of whether the threat of federal intervention checks Delaware in how it shapes the content of its laws. *See* Roe, *supra* note 41, at 590.

47. For a classic exposition of how Delaware case law impacts the behavior of corporate managers, see Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1017 (1997) (arguing that "the judgments of the courts play an important role" because the standards they endorse are "communicated to managers by corporate counsel").

butterflies. Like Professor Stephen M. Bainbridge argues, the steady expansion of board oversight liability in recent years may "induce[] directors to take excessive precautions."[48] More broadly, leading corporate law scholars have long criticized shareholder litigation itself as "a house without foundation."[49]

To simply sweep violations of foreign law under the rug is an untenable proposition. In the domestic context, the fidelity to external law required by corporate law legitimizes corporate law. Like Professor Elizabeth Pollman explains, "Expressing legal compliance and oversight obligations within corporate law acknowledges societal interests in the rule of law and preserves the ability of courts to flexibly respond to particularly salient and egregious violations of public trust."[50] The truly global footprint of U.S. corporations means that corporate law's legitimacy does not stop at the U.S. border.[51]

In outlining how foreign law violations may trigger serious fiduciary duty claims in the United States, this Article enriches existing debates on some of the most important topics in corporate law. A perennial debate in corporate governance scholarship, for instance, concerns the purpose of the modern corporation: whether it exists merely to maximize shareholder value or if it ought to also incorporate societal interests more broadly.[52] Tacitly underlying this debate is a geographic assumption that society is territorially tethered to a particular political community—most prominently, the nation-state.[53] Transnational corporate law litigation unpacks that assumption and challenges us to think further about the domestic–foreign divide when it comes to the function of modern corporate law.

Rather than attempting to have the last word on the topic, this Article begins a dialogue for litigators to bring these claims, judges to develop case law, and academics to debate the merits—and perils—of this novel breed of shareholder claim. The remainder of this Article

48. Stephen M. Bainbridge, *Don't Compound the* Caremark *Mistake by Extending it to ESG Oversight*, 77 BUS. LAW. 651, 655 (2022) [hereinafter Bainbridge, *Don't Compound the* Caremark *Mistake*]. Moreover, corporate lawbreaking in some cases may also benefit society by pushing for innovation and legal reform. *See* Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 715 (2019) [hereinafter Pollman, *Corporate Disobedience*].

49. *See* Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 84 (1991) [hereinafter Romano, *The Shareholder Suit*].

50. Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2016–17 (2019) [hereinafter Pollman, *Corporate Oversight*].

51. *See infra* Section IV.B.

52. *See infra* Section IV.C.

53. *See infra* Section IV.C.

proceeds in four parts. Part I synthesizes existing legal frameworks for policing corporate lawbreaking abroad and advances a corporate governance framework for deterring corporate lawbreaking in foreign nations. Part II elaborates on corporate law's extraterritorial reach, articulating the different strands of fiduciary duty suits against directors and officers of U.S. corporations that may be predicated on violations of foreign law. Part III delves into the mechanics of litigating transnational corporate law claims in the United States. Specifically, it explores whether domestic courts would retain jurisdiction over these cases, how domestic judges would ascertain violations of foreign law, and whether transnational corporate law litigation can implicate U.S. corporations that operate in foreign nations through corporate subsidiaries. Part IV turns normative, offering rationales as to why corporate law must embrace societal interest embedded in sources of both domestic and foreign law.

I. CORPORATE LAWBREAKING AND REMEDIES

Touted as one of the greatest legal inventions of modern times, the corporate form is credited with enabling a long range of innovation and human collaboration that underlies the modern economy.[54] But a long history of lawbreaking has also almost invariably been associated with large-scale business enterprises spawned by the corporate form. The Dutch East India Company, often celebrated as the first multinational corporation in the world,[55] was built on the labor of enslaved people.[56] Centuries later, unsavory business practices and lawbreaking by corporations are all too often perceived as business as usual. Newspaper headlines implicate U.S. corporations with pervasive lawbreaking abroad, including allegations of forced labor, torture, sexual exploitation, involuntary medical experimentation, and mass-

54. *See* Andrew Verstein, *Enterprise Without Entities*, 116 MICH. L. REV. 247, 248–49 (2017).

55. Michael J. Kelly, *Atrocities by Corporate Actors: A Historical Perspective*, 50 CASE W. RES. J. INT'L L. 49, 52 (2018).

56. The company's officials routinely engaged in the legal and illegal slave trade throughout the company's operations to fuel its burgeoning business of importing silk, cotton, and spices from Asia to Europe, with slave raids routinely resulting in natives in Africa being "deported, driven away, starved to death, or massacred by the company." Markus Vink, *"The World's Oldest Trade": Dutch Slavery and Slave Trade in the Indian Ocean in the Seventeenth Century*, 14 J. WORLD HIST. 131, 164 (2003).

scale environmental degradation.[57] Although corporate lawbreaking can take place even with the most well-intentioned compliance systems in place, many illegal activities are enabled by directors and officers who turn a blind eye to misconduct or fail to implement effective compliance systems to deter illicit behavior. Others are byproducts of overzealous directors and officers actively participating in lawbreaking, conceptualizing penalties for lawbreaking as the price to be paid for doing business abroad as part of the firm's profit-maximization strategies.[58]

Although various legal and nonlegal approaches have been developed to police corporate lawbreaking abroad, we have yet to fully appreciate what corporate law can do to deter corporations from engaging in rampant misconduct abroad. This Part aims to synthesize existing approaches and suggests a new direction for policing corporate lawbreaking. Section A reviews existing approaches to deterring illicit activities abroad, including the ATS, corporate social responsibility ("CSR"), and the environmental, social, and governance ("ESG") movement. Section B advances the concept of transnational corporate law litigation, assessing how corporate law can play a more prominent role in deterring illicit behavior abroad.

A. Existing Frameworks for Policing Corporate Lawbreaking Abroad

For nearly half a century, the ATS has served as a pivotal battleground over whether corporations violating law abroad can be subject to civil suits in the United States.[59] The statute, which enables federal courts to adjudicate tort cases involving violations of international law, has been used to bring suits against corporations for engaging in or being complicit in some of the most heinous human rights abuses and environmental catastrophes taking place outside of

57. *See, e.g.*, Balch, *supra* note 22; *Top Tech Firms Sued Over DR Congo Cobalt Mining Deaths*, BBC (Dec. 16, 2019), https://www.bbc.com/news/world-africa-50812616 [https://perma.cc/6B59-72QR]; Richard Luscombe, *Mistrial in Case of US Military Contractor Accused of Abu Ghraib Abuse*, GUARDIAN (May 2, 2024, 5:31 PM), https://www.theguardian.com/us-news/article/2024/may/02/abu-ghraib-mistrial-verdict [https://perma.cc/4ZUG-CDF6]; Nicholas Kristof, *The Children of Pornhub*, N.Y. TIMES (Dec. 4, 2020), https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html [https://perma.cc/6S6H-6RUH]; Carliss Chatman, *Corporate Human Trafficking*, 102 TEX. L. REV. 1263, 1267–69 (2024) ("Unfortunately, the use of the internet for sexual exploitation is a systemic problem involving many individuals and companies globally.").

58. *See infra* Section I.B.

59. Ewell et al., *supra* note 28, at 1207.

the United States.[60] Although Congress originally enacted the ATS as part of the Judiciary Act of 1789, it was largely dormant for two centuries until human rights activists started bringing ATS suits as a vehicle for international human rights litigation in federal court.[61]

ATS litigation ignited a fierce intellectual debate among legal academics, producing a rich body of scholarship concerning its doctrinal viability and normative desirability over the past several decades.[62] Proponents of ATS litigation typically view the statute as a beacon of hope and way to seek justice against corporations that all too often appear to get away with heinous human rights violations outside of the United States.[63] Critics see it as an overreach of U.S. law run amok, assessing that international law "has never recognized the imposition of direct duties on private corporations."[64] Despite generating hundreds of cases in federal court—and at times providing significant remedies for plaintiffs[65]—recent cases in the Supreme Court have sounded the death knell for the viability of these lawsuits going forward.[66]

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60. *Id.*

61. *See* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 832–33 (2006).

62. The ATS has also been a fertile ground for academic debates over the status of international law in U.S. courts. *See generally* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1843–44 (1998) (relying on ATS jurisprudence to assess that customary international law is part of federal law); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 874 (1997) (critiquing ATS jurisprudence holding that customary international law is part of the "Laws of the United States" for purposes of Article III).

63. *See* Rebecca J. Hamilton, Jesner v. Arab Bank, 112 AM. J. INT'L L. 720, 724 (2018) ("In its heyday, some two decades ago, the ATS was a beacon of hope for survivors of human rights atrocities."); Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS U. L. REV. 971, 972 (2004) ("The ATS establishes the U.S. court system as one of the few fora in the world that is available to provide judicial enforcement of core international human rights norms . . . .").

64. Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 355 (2011).

65. Ewell et al., *supra* note 28, at 1254 (noting that ATS "plaintiffs can realize normative objectives such as exposing wrongful conduct").

66. Ryerson, Pinkert & Kelly, *supra* note 40, at 806 ("Most recently, in *Nestlé USA, Inc. v. Doe*, the Court did not find the alleged misconduct to be sufficiently connected to the territory of the United States to justify claims under the ATS . . . . In the absence of statutory reform, the ATS has functionally become a dead letter . . . ." (footnotes omitted)). To be sure, the door is not completely closed. *See* Tyler R. Giannini, *Living with History: Will the Alien Tort Statute Become a Badge of Shame or Badge of Honor?*, 132 YALE L.J.F. 814, 839–40 (2022) (noting that the *Nestlé* Court "implicitly signaled that U.S.-actor liability and something akin to nationality-based

Although the ATS deserves credit for providing victims a public forum to bring attention to heinous human rights abuses and environmental catastrophes, the seemingly insurmountable difficulty of bringing viable ATS claims under recent Supreme Court precedents means the ATS's impact will likely be limited going forward. More fundamentally, ATS cases have also been criticized for having limited influence on the behavior of key corporate decision-makers who actually run modern corporations.[67]

Fortunately, scholars in both law and social science have thus turned their attention to strategies aimed at influencing key decision-makers of corporations.[68] After all, corporations are mere juridical constructs. They cannot be jailed,[69] and the technical owners of corporations—the shareholders—are typically far removed from the management of the firm.[70] This separation is because, in modern corporations, directors and officers are vested with the power to make major decisions governing the corporation.[71]

Scholars have identified soft law as a potential tool to influence the behavior of those corporate decision-makers. For instance, scholars, have begun to document corporations *voluntarily* upholding certain international law norms. In a recent article, Professor Jay Butler documents the phenomenon of "a company's subscription to a

jurisdiction were not off the table"). There are also ongoing efforts to use state courts and state tort law to litigate similar claims. *See* Roger P. Alford, *The Future of Human Rights Litigation After* Kiobel, 89 NOTRE DAME L. REV. 1749, 1763 (2014) ("Common law state tort laws routinely are applied extraterritorially."); Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397, 399–401 (2018) (noting that "attention is turning to suits asserting human rights claims in state courts").

67. *See* Shayak Sarkar, Essays on Development, Finance, and International Law 32–33 (Apr. 2018) (Ph.D. dissertation, Harvard University) (on file with author). *But see* Ewell et al., *supra* note 28, at 1268 (noting that the "serious threat" of ATS suits "elevated human rights concerns within the companies and led the entire leadership to be more aware of the issue").

68. *See, e.g.*, Kishanthi Parella, *Enforcing International Law Against Corporations: A Stakeholder Management Approach*, 65 HARV. INT'L L.J. 283, 296–97 (2024); Patrick Velte & Martin Stawinoga, *Do Chief Sustainability Officers And CSR Committees Influence CSR-Related Outcomes? A Structured Literature Review Based On Empirical-Quantitative Research Findings*, 31 J. MGMT. CONTROL 333, 334 (2020).

69. *See* RENA STEINZOR, WHY NOT JAIL?: INDUSTRIAL CATASTROPHES, CORPORATE MALFEASANCE, AND GOVERNMENT INACTION 73 (2015).

70. Indeed, Judge Richard Posner has observed that shareholders are seldom held accountable for lawbreaking, even if they may financially benefit from the corporation engaging in illicit activities. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 398 (3d ed. 1986) (observing that "if the shareholders bear no responsibility for a manager's crime they will have every incentive to hire managers willing to commit crimes on the corporation's behalf").

71. MELVIN ARON EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS 1 (1976).

rule of international law, even though the company is not technically bound by that rule."[72] According to Butler, such subscription is derived from "external pressure from activists, internal pressure from employees or shareholders, internalized commitment from company managers to the international legal system, or company leadership decisions that international law aligns with and will further the company's own interests."[73] Similarly, Professor Kish Parella, in a recent article studying corporate boardrooms and C-suites, finds that "many corporations *do* incorporate international law into their governance and operations" although "compliance may dwindle for less visible issues or less visible corporations."[74]

Some scholars have extended the argument to assert that international law can automatically bind corporations. In a recent piece, Professor Cynthia Williams articulates the conception of a "duty of societal responsibility," calling for an expansion of the corporate board's duty to comply with international law.[75] But the difficulty remains with using international law to directly police corporations. Like Professor Erika George observes, "Conventional approaches to international law are inadequate for addressing the challenges that transnational corporations present" because international law "fails to adequately govern the conduct of private nonstate actors, such as transnational business enterprises."[76]

CSR is another influential soft law approach that has shaped the discourse both in academic circles and corporate boardrooms. CSR generally refers to business initiatives that "positively impact a wide range of local, national, and international stakeholders beyond just their shareholders and employees."[77] Although the idea had been kicked around for decades, "CSR" was coined in the 1950s by economist Howard Bowen, who argued that directors and officers had obligations to infuse societal interests into business decisions.[78]

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72. Jay Butler, *Corporate Commitment to International Law*, 53 N.Y.U. J. INT'L L. & POL. 433, 434 (2021).

73. *Id.* at 439.

74. Kishanthi Parella, *International Law in the Boardroom*, 108 CORNELL L. REV. 839, 845 (2023).

75. *See* Cynthia A. Williams, *Fiduciary Duties and Corporate Climate Responsibility*, 74 VAND. L. REV. 1875, 1895 (2021).

76. ERIKA GEORGE, INCORPORATING RIGHTS: STRATEGIES TO ADVANCE CORPORATE ACCOUNTABILITY 17 (2021).

77. Tom C. W. Lin, *Executive Private Misconduct*, 88 GEO. WASH. L. REV. 327, 349 (2020).

78. HOWARD R. BOWEN, SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN 6 (1953).

Within the past decade or so, calls for corporate social responsibility have taken on a new life through the meteoric rise of the ESG movement.[79] Although no consensus exists on what initiatives qualify as ESG, it is generally understood to include issues "ranging from environment and climate, to diversity and other workplace concerns, to privacy and supply chain management."[80] Leading voices have called for importing the ESG framework into corporate law. In a recent piece, former Delaware Supreme Court Chief Justice Leo Strine and coauthors argue that ESG goals should be an extension of a board's duty to implement and monitor a compliance program to do more than the legal minimum.[81] Under this framework, marrying existing corporate compliance programs with budding ESG programs would enable corporations to "meet growing societal demands in an effective and efficient manner that capitalizes on existing structures."[82] In another important project, Professors Stavros Gadinis and Amelia Miazad assess that "ESG serves shareholders' interests, not because of its upside potential to increase profits, but because it helps companies identify and manage social risks to their business."[83]

Incorporating ESG into corporate law is not without fierce opposition. Bainbridge, for example, observes that "[i]n the case of regulatory compliance, there is an objective measure of what commands the firm must obey—only those . . . promulgated by the appropriate government body are 'law.' In the case of aspirational commands, there is no such objective standard to tell us which aspirations are the correct ones."[84] There is also a potential darker reality: Management may use ESG initiatives to avoid accountability. According to Professor Jonathan R. Macey, "ESG investing is so

79. For an excellent overview on the origins and usage of ESG, see generally Elizabeth Pollman, *The Making and Meaning of ESG* (ECGI Working Paper Series in Law, Working Paper No. 659/2022, 2022), https://papers.ssrn.com/abstract_id=4219857 [https://perma.cc/P3YQ-GPK3] ("[F]rom the . . . coining of the term 'corporate social responsibility' in the mid-twentieth century, and the rise of 'corporate governance' and its linkage with shareholder primacy, . . . the duties of corporate directors, and externalities and impacts on stakeholders have taken many twists and turns.").

80. Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1401 (2020).

81. Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 IOWA L. REV. 1885, 1887 (2021).

82. *Id.* at 1885.

83. Gadinis & Miazad, *supra* note 80, at 1410.

84. Bainbridge, *Don't Compound the* Caremark *Mistake*, *supra* note 48, at 668.

complex and multi-faceted that almost any action short of theft or outright destruction of corporate property can be defended on some ground or another."[85]

Underexplored in this rich body of scholarship is the role that corporate law ought to play in deterring illegal activities abroad.[86] The next Section elaborates on how existing doctrinal tools in corporate law can play a more prominent role in policing corporate lawbreaking in foreign nations. While sharing some of the normative commitments identified by the burgeoning ESG movement, this framework does not necessarily rely on deontological reasoning; rather, it focuses on violations of laws on the books that are currently underappreciated among corporate law scholars and practitioners.

B. Transnational Corporate Law Litigation

This Section develops the concept of transnational corporate law litigation—shareholder suits brought in U.S. courts to hold directors and officers accountable for facilitating corporate lawbreaking in foreign nations. It explains why U.S. corporations violating foreign law can trigger powerful fiduciary duty claims against directors and officers as a matter of U.S. corporate law. Doctrinally, courts should recognize foreign law violations as predicates that can trigger shareholder suits in the United States because violations of foreign law constitute violations of "positive law." Violations of positive law matter because

85. Jonathan R. Macey, *ESG Investing*, 19 BERKELEY BUS. L.J. 258, 264 (2022).

86. To be clear, this is not the first time someone has written about policing unlawful corporate activities abroad from a corporate law perspective. Perhaps the most extensive examination proposing shareholder suits to remedy corporate lawbreaking was done by Kent Greenfield. In his important work, Greenfield argued that the concept of *ultra vires*—that illegal activities are "beyond the power" of corporations—applies to unlawful activity occurring in foreign jurisdictions. Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1281–83 (2001). Greenfield proposed that shareholders can bring derivative suits against corporations that violate foreign laws of the jurisdictions in which they do business even if governmental entities within those jurisdictions refuse to enforce the applicable law. *See id.* at 1282. Unlike fiduciary duty suits explored in this Article, *ultra vires* suits provide injunctive relief, not director or officer liability. *See id.* at 1283 n.6. For better or worse, the *ultra vires* suits have largely become toothless. *See* STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION 13 (2023) [hereinafter BAINBRIDGE, THE PROFIT MOTIVE] ("Over time, however, the *ultra vires* doctrine eroded and eventually became essentially toothless.").

courts use this critical element to assess whether directors and officers betrayed shareholders.[87]

At first glance, the concept of transnational corporate law litigation may seem like a radical reimagination of U.S. corporate law. A closer examination, however, suggests that it is merely a better understanding of the range of external laws that bind U.S. corporations today. In some respects, the nature of corporate governance rules necessitates the extraterritorial application of corporate law. Although U.S. corporate law remained local up until the twentieth century, state corporate law began to cross state lines during the twentieth century due to the surge in interstate economic activity.[88] And due to the surge in transnational business activity by U.S. corporations, the time has come to recognize the reality that U.S. corporate law transcends national boundaries.[89]

After providing a brief overview of shareholder suits, this Section lays out the doctrinal argument explaining why shareholder suits predicated on violations of foreign law are viable in U.S. courts. Because of its centrality to U.S. corporate law, this Section focuses on Delaware corporate law. Delaware courts, which have been referred to as "the Mother Court[s] of corporate law,"[90] produce case law that binds the over two-thirds of Fortune 500 companies that are incorporated in Delaware and even serves as de facto precedent for corporations chartered by other states.[91]

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87. *In re* Clovis Oncology, Inc. Derivative Litig., No. 2017-0222-JRS, 2019 WL 4850188, at *12 (Del. Ch. Oct. 1, 2019).

88. *See* Jack B. Jacobs, *The Reach of State Corporate Law Beyond State Borders*, 84 N.Y.U. L. REV. 1149, 1153–54 (2009).

89. Doctrinally, this result is also compelled by the internal affairs doctrine, which requires disputes regarding "internal affairs"—"those matters which are peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders"—be governed by the laws of the state of incorporation. McDermott Inc. v. Lewis, 531 A.2d 206, 214 (Del. 1987). Albeit principally in the interstate context, scholars have offered various explanations accounting for the internal affairs doctrine's near impeccable pedigree in U.S. courts. *See* Vincent S. J. Buccola, *Opportunism and Internal Affairs*, 93 TUL. L. REV. 339, 339 (2018); Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 266–67 (1993); Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMP. PROBS. 161, 161 (1985). Importantly, courts have also extended the internal affairs doctrine in international settings. *See, e.g.*, Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A., 34 A.3d 1074, 1078 (Del. 2011) (en banc) ("[T]he internal affairs doctrine . . . requires a Delaware court to apply the law of [the corporation's] state (or, in this case, country) of incorporation . . . .").

90. Kamen v. Kemper Fin. Servs., Inc., 908 F.2d 1338, 1343 (7th Cir. 1990), *rev'd*, 500 U.S. 90 (1991).

91. *See* John Armour, Bernard Black & Brian Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1346–47 (2012).

1. *Theory and Practice of Shareholder Suits in the United States.* Shareholder suits are procedurally unusual from garden-variety civil suits. Shareholder suits are typically derivative suits, meaning that shareholders bring suits against directors and officers in the name of the corporation—any recovery from the litigation, therefore, goes to the corporation itself rather than to the shareholders.[92] These suits, which were "recognized by [U.S.] courts as early as 1830,"[93] have long been understood to play an important stopgap role in corporate law. In theory, such suits impose personal liability on officers and directors for breaches of fiduciary duties, which "is thought to align managers' incentives with shareholders' interests."[94] Like Professor Verity Winship explains, "The underlying rationale for shareholder litigation is that it forms part of the portfolio of monitoring and enforcement tools for policing whether managers are acting as loyal agents."[95]

The obligation to obey the rule of law is at the heart of corporate fiduciaries' duty to manage modern corporations as loyal agents of shareholders.[96] Although directors and officers are vested with almost unlimited discretion to make business decisions on behalf of shareholders, that discretion stops at lawbreaking.[97]

Doctrinally, directors' and officers' obligation to obey the law is built on the idea of good faith.[98] A claim of oversight failure, most

92. *See* James J. Park, *Reassessing the Distinction Between Corporate and Securities Law*, 64 UCLA L. REV. 116, 150–51 (2017). After all, "defendants in derivative suits typically include the corporation's directors, who cannot reasonably be expected to sue themselves." Jessica Erickson, *The Lost Lessons of Shareholder Derivative Suits*, 77 WASH. & LEE L. REV. 1131, 1142 (2020).

93. Erickson, *supra* note 92, at 1141. The Supreme Court has described shareholder derivative suits as "the chief regulator of corporate management." Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 548 (1949).

94. Romano, *The Shareholder Suit*, *supra* note 49, at 55.

95. Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485, 493 (2016).

96. Although Delaware case law tends to focus on directors' duties, similar duties apply to corporate officers. *See In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 349–50, 358 (Del. Ch. 2023); Gantler v. Stephens, 965 A.2d 695, 709 (Del. 2009) (en banc) ("[T]he fiduciary duties of officers are the same as those of directors."); Pollman, *Corporate Disobedience*, *supra* note 48, at 722 ("[C]orporate directors and officers who engage in unlawful conduct on behalf of the corporation violate their fiduciary duties.").

97. Corporate law's canonical doctrine known as the business judgment rule generally protects directors even for mistakes in judgment. Shlensky v. Wrigley, 237 N.E.2d 776, 778 (Ill. App. Ct. 1968). The business judgment rule, however, does not apply to "directors' and officers' knowing violation of the law." Pollman, *Corporate Disobedience*, *supra* note 48, at 721.

98. These doctrines trace their intellectual roots to the famous Delaware case involving the Walt Disney Company. In the seminal case of *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27 (Del. 2006) (en banc), the Delaware Supreme Court established that "[a] failure to act in

prominently, provides a path for shareholders to hold directors and officers liable for failing to implement a system of monitoring in good faith to prevent lawbreaking.[99] This jurisprudence, known as *Caremark*[100] after the landmark case decided in 1996, typically involves allegations that the directors' oversight failure caused the corporation to violate "positive law."[101] Although legal violations are not a necessary condition to trigger oversight claims under *Caremark*,[102] recent shareholder suits that have survived the pleading stage typically are predicated on positive law violations.[103] Courts have also made clear that *Caremark* claims are particularly strong when a corporation fails to comply with a body of law that is "mission critical" to its success.[104]

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good faith may be shown . . . where the fiduciary acts with the intent to violate applicable positive law." *Id.* at 67.

99. *See In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d at 349 ("This decision clarifies that corporate officers owe a duty of oversight. The same policies that motivated Chancellor Allen to recognize the duty of oversight for directors apply equally, if not to a greater degree, to officers.").

100. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996). "*Caremark* was an innovation in its time, introducing for the first time the idea of a general duty to implement a system of monitoring and controls." John Armour, Jeffrey Gordon & Geeyoung Min, *Taking Compliance Seriously*, 37 YALE J. ON REGUL. 1, 7 (2020).

101. *See, e.g.*, *In re* Clovis Oncology, Inc. Derivative Litig., No. 2017-0222-JRS, 2019 WL 4850188, at *12 (Del. Ch. Oct. 1, 2019). The Delaware Supreme Court in *Stone v. Ritter* established two prongs for evaluating *Caremark* claims: "(a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." 911 A.2d 362, 370 (Del. 2006).

102. Stephen M. Bainbridge, Caremark *and Enterprise Risk Management*, 34 J. CORP. L. 967, 968 (2009) ("There is no doctrinal reason that *Caremark* claims should not lie in cases in which the corporation suffered losses, not due to a failure to comply with applicable laws, but rather due to lax risk management.").

103. *See* Nathaniel J. Stuhlmiller & Brian T.M. Mammarella, *Three Lessons From Three Years of Post-*'Marchand' *Caselaw*, DEL. BUS. CT. INSIDER (Nov. 16, 2022), https://www.rlf.com/wp-content/uploads/2022/11/Three-Lessons-From-Three-Years.pdf [https://perma.cc/VM4G-UQQC] ("*Caremark* claims premised on failure to oversee a business risk—as opposed to a violation of positive law—will usually fail.").

104. Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019); Miriam H. Baer, *Corporate Compliance's Achilles Heel*, 79 BUS. LAW. 791, 797 (2023) ("It remained difficult to prove a violation of such duty until a few years ago, when the Delaware courts expanded (or clarified) the *Caremark* duty to include more than ensuring the corporate compliance program's bare existence, particularly where 'mission critical' safety or regulatory issues were afoot." (quoting *Marchand*, 212 A.3d at 824)). The Delaware Supreme Court in *Marchand* held that *Caremark* "require[s] that a board make a good faith effort to put in place a reasonable system of monitoring and reporting about the corporation's *central compliance risks*." 212 A.3d at 824 (emphasis added). As clarified by the Delaware Court of Chancery's later opinion, "all 'essential and mission critical

Liability under *Caremark* remained largely dormant until 2019, in part due to seemingly insurmountable hurdles present at the pleading stage.[105] After all, a *Caremark* claim was originally described by the Delaware Court of Chancery as "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[106] It was for this reason that although *Caremark* and its progeny are almost universally taught in business associations courses in law schools, they were thought by many to be toothless to a point that scholars came to refer to the claim as "practical[ly] irrelevan[t]"[107] and "soft" law.[108]

In the past few years, however, corporate law professors across the United States had to make a substantial pivot in teaching Delaware's oversight jurisprudence. The ink was hardly dry in new editions of business associations casebooks when Delaware courts produced rulings that constituted a remarkable shift in its oversight jurisprudence. Described by one commentator as "a new era of enhanced oversight duties,"[109] an unusual number of recent shareholder suits—including *Marchand*,[110] *Clovis*,[111] *Hughes*,[112] *Boeing*,[113] *Chou*,[114] and *McDonald's*[115]—have managed to overcome motions to dismiss. An important ingredient accounting for this new *Caremark* jurisprudence is the broadening of shareholder rights "to inspect the corporation's books and records."[116] This broadening now permits shareholders to review not just official corporate documents,

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risks' qualify as 'central compliance risks,'" *In re* McDonald's Corp. S'holder Derivative Litig., 291 A.3d 652, 684 (Del. Ch. 2023) (citation omitted). These concepts are important when pleading a *Caremark* claim because "if a red flag concerns a central compliance risk, then it is easier to draw an inference that a failure to respond meaningfully resulted from bad faith." *Id.* at 680.

105. Shapira, *New* Caremark, *supra* note 37, at 1859.

106. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).

107. Bullard, *supra* note 15, at 43.

108. Claire A. Hill, Caremark *as Soft Law*, 90 TEMP. L. REV. 681, 681, 697 (2018).

109. Shapira, *New* Caremark, *supra* note 37, at 1857.

110. Marchand v. Barnhill, 212 A.3d 805 (Del. 2019).

111. *In re* Clovis Oncology, Inc. Derivative Litig., No. 2017-0222-JRS, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019).

112. Hughes v. Hu, No. 2019-0112-JTL, 2020 WL 1987029 (Del. Ch. Apr. 27, 2020).

113. *In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021) (mem.).

114. Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. 2019-0816-SG, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020) (mem.).

115. *In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343 (Del. Ch. 2023).

116. DEL. CODE ANN. tit. 8, § 220 (2024); *see also* Shapira, *New* Caremark, *supra* note 37, at 1859.

but more insular communications between directors as well, allowing shareholders to garner enough "particularized facts" to overcome the pleading obstacle.[117]

Consider *Marchand v. Barnhill*, a suit brought against directors of Blue Bell, one of the United States' largest ice cream manufacturers. The suit was predicated on the company violating Alabama and FDA health regulations.[118] A listeria outbreak in Blue Bell's manufacturing plants in Alabama resulted in the death of three people.[119] Blue Bell had "to recall all of its products, shut down production . . . and lay off over a third of its workforce."[120] In its holding, the court acknowledged that "*Caremark* claims are difficult to plead and ultimately prove out."[121] Yet the court found that the plaintiffs had met the tough standard because the board had undertaken absolutely no efforts to make sure it was informed of a compliance issue—the safety of its ice cream—that was "mission critical" to the corporation.[122]

Not all lawbreaking is a consequence of the board's monitoring failure. Some results from directors and officers *actively participating* in lawbreaking. For instance, lawbreaking may result from overzealous managers of a pharmaceutical corporation who make an informed decision to violate consumer protection laws to maximize profits.[123] So long as the expected penalty from the lawbreaking is lower than the expected profit in the long run, managers may make the case that the lawbreaking benefited shareholders by increasing firm value. When directors and officers actively cause the corporation to violate positive law, however, they have breached their duty of loyalty regardless of whether the conduct resulted in increased profits for shareholders.

Although claims involving allegations that managers actively participated in lawbreaking are often conflated with *Caremark* claims, recent Delaware cases have drawn a distinction between the two.[124] As

117. Shapira, *New* Caremark, *supra* note 37, at 1862, 1867.

118. Marchand v. Barnhill, 212 A.3d 805, 807 (Del. 2019).

119. *Id.*

120. *Id.*

121. *Id.* at 820.

122. *Id.* at 824.

123. *See* Thomas A. Uebler, *Shareholder Police Power*, 33 DEL. J. CORP. L. 199, 200 (2008).

124. *See In re* Genworth Fin., Inc. Consol. Derivative Litig., No. 11901-VCS, 2021 WL 4452338, at *14 (Del. Ch. Sept. 29, 2021) ("[T]he substance of Plaintiff's claim . . . [is] that the Board had direct knowledge of the contemporaneous wrongdoing *and participated in it* by endorsing the false and misleading disclosures and allowing them to stand uncorrected."); *see also*

to the latter, Delaware courts have clarified that such a claim "is not *Caremark*; it is, instead, a far less nuanced claim that Defendants acted in bad faith in breach of their duty of loyalty by causing the Company to engage in fraud in violation of positive law."[125] This claim generally requires a showing that directors or officers *intentionally* "picked up the proverbial red flag and led the charge."[126]

A shareholder claim alleging intentional violation of positive law comports with a longstanding corporate law doctrine in that corporations are chartered only to engage in lawful activity.[127] For instance, in a shareholder suit brought in the aftermath of the revelation that AIG's financial statements overstated the value of the corporation by billions of dollars, then–Vice Chancellor Leo Strine found that plaintiffs state a valid fiduciary duty of loyalty claim when a director is "directly complicitous in various fraudulent schemes."[128]

Shareholders alleging intentional violation of positive law have a powerful doctrinal argument because it can be viable even in the absence of a smoking gun indicating that directors or officers actually knew about the particular law violated by the corporation. Consider the case of *Kandell* ex rel. *FXCM, Inc. v. Niv*,[129] involving a foreign exchange brokerage firm.[130] Shareholders in that case alleged the FXCM directors breached their fiduciary duties for losses associated

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Pollman, *Corporate Oversight*, *supra* note 50, at 2044 ("[E]xamining the Delaware case law reveals that two separate doctrines have evolved within the duty of good faith—obedience and oversight.").

125. *In re* Genworth, 2021 WL 4452338, at *15. Federal courts applying Delaware law have also endorsed this view. *See* Konop v. El-Batrawi, No. 21-cv-00998 SVW, 2022 WL 17096694, at *3 (C.D. Cal. Sept. 19, 2022) ("Konop argues . . . that the defendant directors . . . breached their respective fiduciary duties of loyalty by participating [in] and furthering the alleged scheme . . . .").

126. *In re* Genworth, 2021 WL 4452338, at *15; *see also In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (Del. 2006).

127. Like the Delaware Supreme Court explained,

> A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, *where the fiduciary acts with the intent to violate applicable positive law*, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.

In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (Del. 2006) (emphasis added); *see also In re* Massey Energy Co., No. CIV.A. 5430-VCS, 2011 WL 2176479, at *20 (Del. Ch. May 31, 2011) ("Delaware law does not charter law breakers.").

128. *In re* Am. Int'l Grp., Inc., 965 A.2d 763, 798 (Del. Ch. 2009), *aff'd sub nom.* Tchrs' Ret. Sys. of La. v. PricewaterhouseCoopers LLP, 11 A.3d 228 (Del. 2011).

129. Kandell *ex rel.* FXCM, Inc. v. Niv, No. 11812-VCG, 2017 WL 4334149 (Del. Ch. Sept. 29, 2017).

130. *Id.* at *1.

with the so-called "Flash Crash" in the value of the Euro relative to the Swiss Franc, which happened when the Swiss National Bank unexpectedly decoupled the two currencies.[131] The problem arose because the company adopted a policy of informing customers that it would limit clients' trading losses, in direct contradiction to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act").[132] Specifically, the so-called "Regulation 5.16," enacted under the Dodd-Frank Act, prohibited a "retail foreign exchange dealer, futures commission merchant or introducing broker [from] in any way represent[ing] that it will, with respect to any retail foreign exchange transaction in any account carried . . . on behalf of any person . . . [l]imit the loss of such person."[133] On August 18, 2016, the Commodity Futures Trading Commission ("CFTC") brought a complaint against FXCM seeking damages in the billions of dollars, ultimately resulting in "a consent order with the CFTC in which it agreed to pay a $650,000 fine for, among other things, violations of Regulation 5.16."[134] Importantly, legal advisors did not provide notice to the board that the corporation's policy—soliciting customers by touting limited risk—was illegal.[135] The court still found bad faith on the part of directors: "Regulation [5.16] itself is so clear on its face that . . . the directors knowingly condoned illegal behavior."[136]

* * *

To recap, U.S. corporate law empowers shareholders to hold directors and officers accountable for enabling the corporation to violate positive law. Failures in oversight, including efforts by directors and officers designing legal compliance programs that predictably induce corporate crimes,[137] constitute a breach of the duty of loyalty.[138]

131. *Id.*

132. *Id.* at *2.

133. 17 C.F.R. § 5.16(a) (2010).

134. *Kandell ex rel. FXCM, Inc.*, 2017 WL 4334149, at *6.

135. *Id.* at *17.

136. *Id.* at *2.

137. Jennifer Arlen, *Evolution of Director Oversight Duties and Liability Under Caremark: Using Enhanced Information-Acquisition Duties in the Public Interest* (Eur. Corp. Governance Inst. Working Paper No. 680-2023, Feb. 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4202830 [https://perma.cc/EWE8-LDQE].

138. *In re* Am. Int'l Grp., Inc., 956 A.2d 763, 799 (Del. Ch. 2009); Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. 2019-0816-SG, 2020 WL 5028065, at *1–2 (Del. Ch. Aug. 24, 2020); South v. Baker, 62 A.3d 1, 6 (Del. Ch. 2012).

Moreover, directors and officers actively participating in lawbreaking—even when no evidence is present of direct knowledge of the relevant law—can amount to a duty of loyalty violation regardless of whether the lawbreaking financially benefited the corporation. This jurisprudence can powerfully shape the social norms governing director and officer conduct with vast implications for deterring corporate lawbreaking.[139]

Although the significance of Delaware's jurisprudence on legal obedience is widely appreciated, curiously unexplored is the law's global application. Most pressingly, what even constitutes positive law remains an open question. Some scholars understand positive law as derived from sources of domestic law,[140] but others have cautiously—and accurately—observed that applicable law may not be limited to sources of domestic law.[141] The next subsection aims to fill this gap, explaining why foreign law violations can trigger duty of loyalty claims against directors and officers as a matter of U.S. corporate law.

2. *Foreign Law as Positive Law.* Traditionally, corporate law did not have to concern itself with lawbreaking that occurred outside of the borders of the United States. U.S. corporate law—chiefly Delaware law—governed corporations that predominantly operated within the United States.[142]

The landscape has now substantially shifted. Corporations headquartered in the United States increasingly maintain mission-critical operations in foreign nations. Today, almost all of the largest corporations headquartered in the United States have close to half, or more than half, of their global staffing outside the United States.[143] For example, Coca-Cola has 88.3 percent of its workforce outside of the

139. *See* Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457, 522 (2009) (observing that Delaware's new conception of loyalty after *Stone v. Ritter* "will affect the social norms that govern director conduct"); *see also* Rock, *supra* note 47, at 1017 (explaining that Delaware courts plays an important role in evolving norms of conduct).

140. *See* Bullard, *supra* note 15, at 16 ("The expected costs of violating federal law, or non-corporate state or municipal law, will almost always exceed the expected costs of violating state corporate law, including the costs of violating the *Caremark* standard.").

141. Pollman, *Pro-Business*, *supra* note 45, at 255 ("As part of their duty of loyalty, corporate directors and officers have a duty to act in good faith, which prohibits decisionmaking with the intent to violate positive law. Corporate law does not limit the scope for legal obedience to domestic laws . . . ." (footnote omitted)).

142. *See* William J. Moon, *Delaware's New Competition*, 114 NW. U. L. REV. 1403, 1418–20 (2020).

143. Perry, *supra* note 20.

United States, which is a ratio of 7.5 foreign workers for every U.S. employee.[144] Kellogg employs 59 percent of its workforce overseas, while Del Monte employs more than 80 percent of employees "in Costa Rica, Guatemala, Kenya and the Philippines."[145] Many U.S. companies—including Chevron, Johnson & Johnson, Coca-Cola, and Mondelez—also maintain close to two-thirds of their assets in foreign nations.[146] Some U.S. firms maintain their most important operations in foreign nations. Consider, for instance, the mining company Freeport-McMoRan, headquartered in Arizona.[147] The company, which is incorporated in Delaware,[148] operates one of the world's largest copper and gold deposits in Indonesia, where it reportedly conducts 99 percent of its entire gold production.[149]

It remains critical, therefore, to understand the doctrinal contours of whether and to what extent directors and officers of U.S. corporations ought to be held accountable for turning a blind eye to illegal activities or actively partaking in illicit activities taking place abroad.

There is scant case law elaborating what sources of the law qualify as "positive law," but Delaware courts have roughly defined the contours of "positive law" by eliminating what it is not. Importantly, in *Freedman v. Adams*,[150] the Delaware Court of Chancery interpreted "positive law" to mean "enacted law—the codes, statutes, and regulations that are applied and enforced in the courts."[151] Thus, directors and officers violate their duty of loyalty through intentional violations of statutory laws and regulations, as opposed to "violations of general public policy."[152]

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144. *Id.*

145. Vanessa Fuhrmans, *Big US Companies Reveal How Much They Rely on Overseas Workers*, WALL ST. J. (Apr. 11, 2018, 8:00 AM), https://www.wsj.com/articles/big-u-s-companies-reveal-how-much-they-rely-on-overseas-workers-1523448000 [https://perma.cc/A4BR-KX5E].

146. Perry, *supra* note 20.

147. Freeport-McMoRan Inc., Annual Report (Form 10-K) 1 (Feb. 15, 2023).

148. *Id.*

149. *Id.* at 3.

150. Freedman v. Adams, No. 4199-VCN, 2012 WL 1345638 (Del. Ch. Mar. 30, 2012).

151. *Id.* at *11 (quoting *Positive Law*, BLACK'S LAW DICTIONARY (9th ed. 2009)).

152. *Id.* Like I have observed elsewhere, this definition of positive law likely makes it difficult for shareholder suits to be viable when *Caremark* claims are predicated on violations of "a rule of international law that has not been expressly incorporated as domestic law by a political branch." William J. Moon, *The Brussels Effect and the Extraterritoriality of Delaware Corporate Law*, 35 EUR. BUS. L. REV. 367, 377 (2024).

Courts have not directly commented on whether statutes or regulations need to be enacted by domestic lawmakers, but important insights can be gained from board oversight cases pleading violations of foreign law in conjunction with violations of domestic law. In a landmark case decided in 2017, the Delaware Court of Chancery adjudicated a shareholder claim alleging that Qualcomm directors damaged the company by repeatedly allowing and causing it to violate "international antitrust laws."[153] Notably, after observing that Qualcomm's biggest markets are the United States and Asia, the court went into an extensive analysis of not just alleged U.S. antitrust law violations[154] but also antitrust law violations in South Korea,[155] Japan,[156] and China.[157] The suit, like many other *Caremark* suits brought around the time, was dismissed at the pleading stage.[158] The court noted the board did not consciously disregard its fiduciary duties because "[it] consistently expressed—both verbally and through its actions—its view that its business practices were not violative of international antitrust laws and elected to address the relevant legal actions by focusing on educating industry participants and government officials as to why its practices were legal and by pursuing appeals."[159] The decision, which treated both foreign and domestic law violations as potential "positive law" violations, lends credence to the idea that Delaware courts will treat foreign law as positive law even when pleaded without federal or state law.

153. Melbourne Mun. Firefighters' Pension Tr. Fund *ex rel.* Qualcomm, Inc. v. Jacobs, No. 10872-VCMR, 2016 WL 4076369, at *1 (Del. Ch. Aug. 1, 2016), *aff'd*, 158 A.3d 449 (Del. 2017).

154. *Id.* at *3 ("Broadcom asserted antitrust claims against Qualcomm, stating that [it] . . . 'has monopolized certain markets for cellular telephone technology and components, primarily in violation of Sections 1 and 2 of the Sherman Act and Sections 3 and 7 of the Clayton Act.'").

155. *Id.* ("[T]he Korea Fair Trade Commission (the 'KFTC') concluded an investigation of Qualcomm and issued a decision imposing on Qualcomm corrective orders and a $208 million fine . . . .").

156. *Id.* at *4 ("[T]he Japan Fair Trade Commission (the 'JFTC') issued a Cease and Desist Order against Qualcomm (the 'JFTC Order'). That Order, which was issued after the JFTC performed an investigation pursuant to Japan's Antimonopoly Act (the 'AMA'), 'found [Qualcomm] to be in violation of Article 19 of the AMA.'" (alteration in original)).

157. *Id.* at *5 ("[T]he National Development and Reform Commission of the People's Republic of China (the 'NDRC') 'notified [Qualcomm] that it had commenced an investigation of the Company relating to the Chinese Anti–Monopoly Law' . . . . [and] concluded that Qualcomm has a dominant position in the wireless telecommunications markets and abuses that dominance." (alteration in original)).

158. *Id.* at *12–13.

159. *Id.* at *12.

In a more recent case, *Firemen's Retirement System* ex rel. *Marriott International, Inc. v. Sorenson*,[160] the Delaware Court of Chancery considered whether Marriott's failure to comply with the European Union's ("EU") General Data Protection Regulation constituted a failure of board oversight.[161] Like in *Qualcomm*, the plaintiff pleaded foreign law violations as a predicate to board oversight claims alongside domestic law violations—more specifically, Marriott's violations of federal securities laws, violations of state and federal consumer protection laws, and violations of state disclosure laws.[162] Although the court ultimately found that the plaintiff had not pleaded the particularized facts to show that the board members had knowingly violated the law, the court's consideration of EU law within the context of a board oversight claim suggests that under specific circumstances, foreign law violations alone could be sufficient to establish fiduciary duty suits against directors and officers.[163]

II. CORPORATE LAW'S EXTRATERRITORIAL REACH

This Part elaborates on how U.S. corporations violating foreign law can trigger powerful shareholder suits against directors and officers in the United States. These suits may implicate corporations actively engaged in or complicit in mass-scale human rights violations or environmental degradation outside of U.S. territory—thus sharing fact patterns with familiar ATS cases. This similarity is because human rights violations or environmental abuses committed in foreign nations may not only constitute torts in violation of international law (as required to trigger the ATS),[164] but often violate the domestic laws of the jurisdiction in which the alleged misconduct takes place.[165] Even when an ATS claim may not be viable under the Supreme Court's recent jurisprudence, the same misconduct can amount to a duty of loyalty violation for directors and officers as a matter of corporate law.

160. Firemen's Ret. Sys. *ex rel.* Marriott Int'l, Inc. v. Sorenson, No. CV 2019-0965-LWW, 2021 WL 4593777, at *1 (Del. Ch. Oct. 5, 2021).

161. *Id.* at *1.

162. *Id.* at *5.

163. *Id.* at *14.

164. KOEBELE, *supra* note 26, at 218.

165. Of course, the location of the misconduct may not always be outcome determinative about the applicable source of law. In modern financial transactions, for instance, territorial contact itself may misleadingly or arbitrarily track whether that jurisdiction has an interest in applying its law to a dispute related to that contact. *See* William J. Moon, *Regulating Offshore Finance*, 72 VAND. L. REV. 1, 50 (2019).

This discrepancy is in part because the method of statutory interpretation restricting the territorial scope of federal statutes does not apply to state-law-based corporate governance claims.[166] Instead, corporate law applies extraterritorially under a time-honored choice of law rule called the internal affairs doctrine.[167]

To that end, this Part draws on the factual record from well-known ATS cases to illustrate how illegal conduct abroad can trigger viable corporate governance claims in the United States.[168] Section A explores potential shareholder claims for directors known to have enabled mass-scale environmental catastrophes in foreign nations. Section B illustrates how directors who turn a blind eye to involuntary medical experimentation on human subjects abroad can trigger shareholder suits for board oversight failure. Section C explores possible corporate governance claims that can arise when directors and officers knowingly collaborate with private security forces to commit serious human rights violations against Indigenous people in foreign nations. These examples are not meant to be exhaustive of fiduciary duty claims with transnational fact patterns.[169] Rather, these categories are intended to serve as a proof of concept that shareholder suits may

166. *See* Dodge, *supra* note 38, at 1389.

167. *See* Kozyris, *supra* note 39, at 86 ("In choosing the law applicable to internal corporate affairs the states have drawn no distinctions between sister-state and foreign country corporations."); Moon, *Delaware's New Competition*, *supra* note 142, at 1420 ("[A] survey of domestic jurisprudential trends reveals that courts across the United States have already extended the internal affairs doctrine for American business entities incorporated in foreign nations."); *see also* Hughes v. Xiaoming Hu, No. 2019-0112-JTL, 2020 WL 1987029, at *1 (Del. Ch. Apr. 27, 2020) (applying Delaware corporate law to a Delaware-incorporated corporation headquartered in China).

168. There are, of course, limitations to this approach. Importantly, discovery in ATS lawsuits is related but often does not directly probe at elements necessary to establish colorable corporate governance claims. Even so, the extensive factual records developed in prominent ATS cases provide a useful window into thinking about the types of misconduct that might be ripe for transnational corporate law litigation.

169. Shareholder suits predicated on violations of foreign law are also not just limited to resurrecting ATS-flavored claims with a different source of law and remedy. For many corporations headquartered in foreign nations but incorporated in Delaware, the external sources of positive law that the board ought to be vigilant about complying with are principally foreign regulatory laws, rather than federal or state law. For instance, Coupang is a Delaware-incorporated South Korean conglomerate that maintains its operations principally in South Korea. *See, e.g.*, Coupang, Inc., Registration Statement (Form S-1) 50 (Feb. 12, 2021). The sources of external law that can trigger fiduciary duty suits are principally South Korean law. *Id.*

serve as an underappreciated yet powerful mechanism to deter corporate lawbreaking abroad.[170]

A. Mass-Scale Environmental Degradation

In the United States, environmental regulations codified over the past half century have significantly improved natural resource quality, visibility, human health, and ecosystem health.[171] Notwithstanding ongoing challenges, a remarkable burst of federal legislation has helped deter the release of toxic waste or pollutants that rampantly took place just a century ago.[172] This is not necessarily true abroad. Corporations—particularly in the extractives industry—have released toxic chemicals that devastate the environment and human health and that would be unfathomable in the domestic context.

In *Flores v. Southern Peru Copper Corp.* ("*Flores I*"),[173] residents of Peru brought an ATS suit alleging they had suffered acute lung disease as a result of environmental pollution from Southern Copper Corporation's mining and refinery operations in Peru.[174] According to the record, the company "had dumped large quantities of mine tailings in rivers near the plaintiff's home, causing the water to be unsuitable for bathing and drinking, destroying vegetation, contaminating aquatic life, and creating a high risk of floods and landslides."[175] Plaintiffs alleged, notably, that Southern Copper "installed primitive reverberatory furnaces without any air pollution controls or acid plant

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170. Although these examples focus on publicly traded corporations, Delaware corporate law imposes legal compliance duties that extend to private corporations. *See, e.g.*, Marchand v. Barnhill, 212 A.3d 805, 807 (Del. 2019) (permitting a shareholder suit alleging oversight failure against the board of Blue Bell Creameries USA Inc., a privately held ice cream producer).

171. Seema Kakade & Matt Haber, *Detecting Corporate Environmental Cheating*, 47 ECOLOGY L.Q. 771, 777 (2020).

172. Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159, 161–64.

173. Flores v. S. Peru Copper Corp., 253 F. Supp. 2d 510 (S.D.N.Y. 2002), *aff'd*, 414 F.3d 233 (2d Cir. 2003) (*Flores I*).

174. *Id.* at 512–13. Other environmental cases litigated as under the ATS include *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 166–67 (5th Cir. 1999) (dismissing for failure to state a claim on which relief can be granted a suit against a U.S. mining company for depositing tailings into the Aghwagaon, Otomona, and Akjwa Rivers in Indonesia and rendering them unusable for clean drinking water and bathing), *William v. AES Corp.*, 28 F. Supp. 3d 553, 559 (E.D. Va. 2014) (mem.) (filing a suit against Virginia-based electricity generation and distribution corporation for thousands of power outages that have led to fires, which have led to deaths in Cameroon), and *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842, 844 (S.D.N.Y. 1986) (dismissing on forum non conveniens grounds a suit against a subsidiary of a New York-based pesticide manufacturer for highly toxic gas killing over 2,000 and injuring over 200,000 in India).

175. *Flores I*, 253 F. Supp. 2d at 518.

to capture stack emissions."[176] As a result, dangerous levels of sulfurous gases and very fine particles of heavy metals were released into the air "at a rate absolutely unthinkable in the United States and Europe."[177]

A groundbreaking case for whether the massive release of environmental pollutants is actionable under the ATS, *Flores I* drew the attention of lawyers and academics around the globe as a beacon of hope for those committed to environmental justice.[178] Like many other ATS cases, however, the suit did not survive a motion to dismiss.[179] The district court held that the plaintiffs had failed to state a claim under the ATS because they had not pleaded a violation of any cognizable principle of international law.[180] Although the court appeared sympathetic to the human tragedy inflicted by Southern Copper, it was not convinced that "high levels of environmental pollution within a nation's borders, causing harm to human life, health and development" constituted a violation of international law.[181] The court also concluded that even if Southern Copper violated international law, dismissal on the ground of forum non conveniens would have been appropriate.[182]

A shareholder suit in Delaware—Southern Copper's place of incorporation[183]—would frame Southern Copper's conduct not as a violation of international law but as the board's oversight failure for knowingly enabling the corporation to violate Peru's laws. Like the

176. Complaint at ¶ 26, Flores v. S. Peru Copper Corp., 253 F. Supp. 2d 510 (S.D.N.Y. 2002) (No. 00 Civ. 9812 (GEL)), 2001 WL 34765640.

177. *Id.* at ¶ 24. According to the complaint, if Southern Copper had followed requirements applicable to U.S. smelters at the time, it would have eliminated ten million tons of sulfur dioxide emissions from the smelter in Peru. *Id.* at ¶ 27.

178. *See, e.g.*, Tony Kupersmith, *Cutting to the Chase: Corporate Liability for the Environmental Harm Under the Alien Tort Statute, Kiobel and Congress*, 37 WM. & MARY ENV'T L. & POL'Y REV. 885, 886, 909–10 (2013) (identifying the ATS as a "forum to enforce corporate social responsibility" and using *Flores I* as an example where the ATS has been used to invoke the "right to sustainable development").

179. *Flores I*, 253 F. Supp. 2d at 525.

180. *Id.*

181. *Id*.

182. *Id.* at 544. The forum non conveniens doctrine gives federal and state courts discretion to dismiss in favor of a foreign court if that court "is the more appropriate and convenient forum for adjudicating the controversy." Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 425 (2007). It is a powerful argument raised by defendants in cases involving transnational fact patterns. According to a study by Professor Donald Earl Childress III, motions to dismiss for forum non conveniens were granted in 48 percent of reported federal cases between 2007 and 2012. *See* Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT'L L. 157, 169 (2012).

183. *Flores I*, 253 F. Supp. 2d at 512.

Second Circuit noted in the ATS suit, "Peruvian environmental laws enacted in 1993" governed Southern Copper's operations in Peru.[184] Indeed, the Peruvian government's regulatory oversight of Southern Copper dates back to the very beginning of the company's copper mining operations in the country in 1960.[185] According to the Second Circuit, the Peruvian government's annual or semiannual reviews resulted in Southern Copper paying fines and restitution to area farmers, as well as "modify[ing] its operations in order to abate pollution and other environmental damage."[186] There were also several lawsuits filed against Southern Copper in Peruvian courts by the time litigators brought the ATS suit in federal court in Manhattan. According to the record, "[i]n several actions before Peruvian courts concerning its mining or smelting activities, [Southern Peru] has been held liable for damages and other remedies, and has made payments in settlement of claims that were asserted against it in Peru."[187] The existence of Peruvian environmental regulations on the books, along with a number of lawsuits and government findings of liability, may constitute important red flags indicating the board of directors of Southern Copper was aware—or at least should have been aware—of the firm's illicit activities in Peru.

It is also likely that Southern Copper's operations in Peru were "mission critical" to the company. An examination of Southern Copper's mandatory public disclosures around the time of the ATS litigation reveals the company extracted over 95 percent of its copper from Peru, which it sold to customers globally.[188] Although Delaware courts are still defining the contours of what operations constitute "mission-critical" operations,[189] there is no question that Southern

184. Flores v. S. Peru Copper Corp., 414 F.3d 233, 237, 238 (2d Cir. 2003) (*Flores II*).

185. S. Peru Copper Corp., Annual Report (Form 10-K) 2 (Feb. 25, 2005) ("The Company, incorporated in 1952 was reorganized in 1955, 1996 and 1998 and has conducted copper mining operations since 1960.").

186. *Flores II*, 414 F.3d at 238.

187. Brief for Defendant-Appellee at *5, Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003) (No. 02-9008), 2003 WL 23475680.

188. S. Peru Copper Corporation, Annual Report (Form 10-K) 5 (Feb. 25, 2005) ("During 2003, 2002 and 2001, substantially all of the Company's copper production was exported from Peru and sold to customers in Europe, the Far East, the United States and elsewhere in the Americas. Approximately, 96.2%, 95.6% and 95.5% of the Company's copper production for the years 2003, 2002 and 2001, respectively, was exported from Peru.").

189. H. Justin Pace & Lawrence J. Trautman, *Mission Critical:* Caremark*,* Blue Bell*, and Director Responsibility for Cybersecurity Governance*, 2022 WIS. L. REV. 887, 891 n.21.

Copper maintained substantial operations in Peru critical to the firm's long-term value.

B. Involuntary Medical Experimentation

Medical breakthroughs, including vaccines and lifesaving treatments, are often preceded by experimental trials. Unfortunately, a troubled history of *nonconsensual* human experimentation—particularly on prisoners, mental health patients, and people of color—haunts modern medical breakthroughs.[190] In the 1930s and 1940s, for instance, Johns Hopkins University conducted infamous human experiments called the Tuskegee and Terre Haute studies on poor Black individuals who were already infected with syphilis.[191] Although modern ethical and legal standards have largely prevented subsequent tragedies in the United States, the same cannot be said for experimentation by U.S. corporations in foreign nations.[192] Although the FDA requires adherence to informed consent principles for clinical trials in the United States, "FDA regulations effectively provide less stringent application of the informed consent standard for medical research conducted outside of the United States."[193] Nonconsensual medical experimentation abroad is reportedly widespread,[194] including

190. Mike Stobbe, *Ugly Past of U.S. Human Experiments Uncovered*, NBC NEWS (Feb. 27, 2011, 6:14 PM), https://www.nbcnews.com/health/health-news/ugly-past-u-s-human-experiments-uncovered-flna1c9465329 [https://perma.cc/2LCM-FZC9].

191. *See* Elizabeth Nix, *Tuskegee Experiment: The Infamous Syphilis Study*, HISTORY (May 16, 2017), https://www.history.com/news/the-infamous-40-year-tuskegee-study [https://perma.cc/L3NB-Q8QX].

192. Elizabeth J. Layman, *Historical Perspective of Breaches of Ethics in US Health Care*, 28 HEALTH CARE MGR. 354, 370 (2009); Arthur Caplan, *Risky Business: Human Testing for a Profit*, NBC NEWS (Mar. 20, 2006, 3:11 PM), https://www.nbcnews.com/id/wbna11927387 [https://perma.cc/RZ7L-UDLK].

193. Jacob Schuman, *Beyond Nuremberg: A Critique of "Informed Consent" in Third World Human Subject Research*, 25 J.L. & HEALTH 123, 135 (2012).

194. *See* Matiangai Sirleaf, *Disposable Lives: Covid-19, Vaccines, and the Uprising*, 121 COLUM. L. REV. F. 71, 81 (2021) ("This past is very much present, and unethical trials on Black and other people of color continue to take place on the African continent and elsewhere."); Joe Stephens, *Where Profits and Lives Hang in Balance*, WASH. POST (Dec. 17, 2000, 12:00 AM), https://www.washingtonpost.com/archive/politics/2000/12/17/where-profits-and-lives-hang-in-balance/90b0c003-99ed-4fed-bb22-4944c1a98443 [https://perma.cc/9ZFX-XPZR] ("A *Washington Post* investigation into corporate drug experiments in Africa, Asia, Eastern Europe and Latin America reveals a booming, poorly regulated testing system that is dominated by private interests and that far too often betrays its promises to patients and consumers.").

by U.S. corporations Bristol-Myers Squibb Company,[195] Merck,[196] and Pfizer.[197]

In *Abdullahi v. Pfizer*,[198] child victims of an experimental meningitis drug trial brought an ATS suit alleging that Pfizer conducted a clinical trial on them in Nigeria without their consent or knowledge.[199] Unable to find enough patients in the United States for what the company identified as a potential blockbuster drug,[200] Pfizer recruited two hundred sick children in Nigeria during a severe meningitis outbreak in Africa.[201] The company gave half of them an experimental drug called Trovan and the other half an already-approved FDA antibiotic called Ceftriaxone.[202] Trovan was administered on children despite animal testing that showed potential life-threatening side effects of the drug, including joint disease, cartilage growth, and liver damage.[203] Notably, Pfizer did not secure the informed consent of either the children or their guardians and failed to alert them of potential side effects or alternative treatments.[204]

After approximately two weeks, Pfizer's physicians, who administered the drugs, left Nigeria without administering aftercare.[205] Five children who received Trovan died, and dozens of others suffered from paralysis, deafness, brain damage, and blindness.[206] Pfizer ultimately withdrew its application for Trovan to be approved as a treatment for pediatric infections, and the EU subsequently banned its use.[207]

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195. Estate of Alvarez v. Johns Hopkins Univ., 275 F. Supp. 3d 670, 677 (D. Md. 2017).

196. Sharmeen Ahmed, *Accountability of International NGOs: Human Rights Violations in Healthcare Provision in Developing Countries and the Effectiveness of Current Measures*, 22 ANN. SURVEY INT'L & COMPAR. L. 33, 43–45 (2017).

197. Abdullahi v. Pfizer, Inc., 562 F.3d 163, 168 (2d Cir. 2009).

198. Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).

199. *Id.* at 168. Other involuntary medical experimentation cases litigated under the ATS include *Estate of Alvarez*, a suit brought against Johns Hopkins University—a corporation incorporated in Maryland—for engaging in nonconsensual human experimentation in Guatemala by infecting children, prisoners, psychiatric patients, and sex workers with syphilis. 275 F. Supp. 3d at 677.

200. Stephens, *supra* note 194.

201. Sirleaf, *supra* note 194, at 81.

202. *Id.*

203. *Abdullahi*, 562 F.3d at 169.

204. *Id.* at 170.

205. *Id.* at 169.

206. *Id.*

207. *Id.* at 170.

In the ATS litigation, the Second Circuit held that Pfizer's conduct—nonconsensual medical experimentation on humans—met the ATS standard by alleging a violation of international law.[208] The court looked to, among other sources, the history of the Nuremberg trials and the judgments rendered, which declared that "human experiments . . . *are contrary to the principles of the law of nations*."[209] Although the case marks one of the few instances in which a court held conduct constituted a violation of international law sufficient to trigger the ATS, recent jurisprudence from the Supreme Court throws cold water on the viability of similar ATS suits going forward.[210]

A corporate governance suit in Delaware—Pfizer's place of incorporation[211]—would frame Pfizer's actions not as a violation of international law but as directors' dereliction of their most basic duty to obey Nigerian law while operating in Nigeria.[212] Because Pfizer spent so much of its efforts during the ATS suit trying to dismiss the case on forum non conveniens grounds, ample evidence exists that Pfizer violated Nigerian law.[213] Indeed, as the district court observed in the ATS case, Pfizer agreed with the plaintiffs in the ATS suit that Nigerian law prohibited Pfizer's conduct:

> Pfizer further argues that Nigerian law provides an adequate remedy for plaintiffs' claims because it recognizes negligence, medical malpractice, and personal injury claims . . . . Plaintiffs do not dispute that Nigerian law prescribes those causes of action sounding in negligence with money damages as a potential remedy . . . . Thus, Nigerian law provides an alternative basis for recovery even if it does not recognize the specific claims alleged in this action.[214]

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208. The court reasoned that the prohibition against the practice is "specific, focused and accepted by nations around the world without significant exception." *Id.* at 177.

209. *Id.* at 178 (quoting United States v. Brandt, 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 183 (1949)).

210. Ryerson, Pinkert & Kelly, *supra* note 40, at 792.

211. Adamu v. Pfizer, Inc., 399 F. Supp. 2d 495, 503 (S.D.N.Y. 2005) ("Pfizer . . . is a Delaware corporation with its headquarters in New York."), *rev'd and remanded sub nom.*, *Abdullahi*, 562 F.3d 163.

212. *See supra* Section I.B.

213. Abdullahi v. Pfizer, Inc, No. 01 Civ. 8118, 2002 WL 31082956, at *6–7 (S.D.N.Y. Sept. 17, 2002) (*Abdullahi I*).

214. *Id.*; *see also* Oludamilola Adebola Adejumo & Oluseyi Ademola Adejumo, *Legal Perspectives on Liability for Medical Negligence and Malpractices in Nigeria*, 35 PAN AFR. MED. J., art. no. 44, 1 (2020) (assessing that under Nigerian law, "malpractices which may not amount to negligence but may suffice to give rise to a successful cause of action in other branches of

Several facts developed in the record further indicate a potential finding of bad faith. Importantly, former Pfizer physician Dr. Juan Walterspiel indicated that the company knew it was violating Nigerian law.[215] According to Dr. Walterspiel, the FDA conducted an unexpected inspection of Pfizer's research headquarters in Connecticut after the drug trial in Nigeria, which led to a series of "frantic preparations," including creating a falsified ethics committee approval letter.[216]

Pfizer also suffered a financial loss that was arguably mission critical. In 2009, Pfizer settled various suits brought by Nigeria's Kano state government for $75 million.[217] Aside from the financial payout, the now-infamous clinical trial demonstrably harmed the company's global brand, damaging a critical part of the company's mission according to its own statement: assuring the safety and efficacy of its drugs.[218] Almost immediately following the Trovan drug trial in Nigeria, mass-scale boycotting of the polio vaccines followed, resulting in Nigeria becoming one of the last countries in the world to be declared polio-free in 2000.[219] The mistrust was alive and well during the COVID-19 pandemic, for many Black people and other people of color both in the United States and abroad chose not to get vaccinated in part due to the historical mistrust of vaccines reignited by Pfizer's conduct in Nigeria.[220] These issues not only devastate marginalized communities across the globe but also directly affect the long-term profitability of U.S. corporations.

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substantive law including claims for breach of fundamental human rights; contract; and fiduciary relationship").

215. *See* Letter from Juan N. Walterspiel Amicus Curiae for Nigerian Children Plaintiffs to Judge William H. Pauley 3–4, Abdullahi v. Pfizer, No. 01 Civ. 8118 (WHP) (S.D.N.Y. Feb. 3, 2011), https://pdfserver.amlaw.com/cc/Pfizer_Letter020811.pdf [https://perma.cc/S77N-PJU9].

216. *Id.* at 4.

217. Smith, *Pfizer Pays Out*, *supra* note 19.

218. *Our Purpose*, PFIZER, https://www.pfizer.com/about/purpose [https://perma.cc/SU5J-US8Z].

219. Belinda Achibong & Francis Annan, *What Do Pfizer's 1996 Drug Trials in Nigeria Teach Us About Vaccine Hesitancy?*, BROOKINGS INST. (Dec. 3, 2021), https://www.brookings.edu/blog/africa-in-focus/2021/12/03/what-do-pfizers-1996-drug-trials-in-nigeria-teach-us-about-vaccine-hesitancy [https://perma.cc/TGX3-GWB7].

220. Nike Adebowale-Tambe, *How Pfizer Disaster Is Discouraging Some Kano Residents from Taking COVID-19 Vaccines*, PREMIUM TIMES (Jan. 4, 2023), https://www.premiumtimesng.com/investigationspecial-reports/573911-573911.html [https://perma.cc/89FE-YVCU]; Sirleaf, *supra* note 194, at 83.

C. Aiding and Abetting Human Rights Violations

In many parts of the world, private security forces vastly outnumber public police.[221] Private security forces are especially prevalent in geopolitically unstable regions rich in natural resources. Multinational corporations often hire local security forces—touted as essential human infrastructure—to guard facilities located in land that Indigenous people rightfully understand as their ancestral land.[222] Perhaps unsurprisingly, serious human rights violations of local inhabitants have been widely reported, for locals often find themselves entangled in "protracted conflicts with multinational companies over access to their land."[223] Corporations involved in such instances of land grabbing often violate local law,[224] which can trigger potential shareholder suits against directors and officers in the United States.

In *Doe v. Exxon Mobil Corp.*,[225] villagers from the Aceh Province in Indonesia filed an ATS suit against Exxon Mobil ("Exxon") alleging that during the late 1990s and early 2000s, Exxon security forces had tortured, sexually assaulted, raped, and beaten them.[226] Following the discovery of vast natural gas fields, Exxon built and operated one of the largest and most profitable natural gas facilities in the world in the

221. *Private Security Outnumber Police Around the World*, SECURITY TODAY (Sept. 7, 2017), https://securitytoday.com/articles/2017/09/07/private-security [https://perma.cc/NJ6R-BC4V] ("In at least half of the world's countries, private security workers outnumber police officers.").

222. *See* Lea Brilmayer & William J. Moon, *Regulating Land Grabs*, *in* RETHINKING FOOD SYSTEMS 123, 124 (Nadia C.S. Lambek, Priscilla Claeys, Adrienna Wong & Lea Brilmayer eds., 2014).

223. Nigel D. White, Mary E. Footer, Kerry Senior, Mark Van Dorp, Vincent Kiezebrink, Y. Wasi Gede Puraka & Ayudya Fajri Anzas, *Blurring Public and Private Security in Indonesia: Corporate Interests and Human Rights in a Fragile Environment*, 65 NETHERLANDS INT'L L. REV. 217, 217 (2018).

224. Brilmayer & Moon, *supra* note 222, at 124–25.

225. Doe v. Exxon Mobil Corp., 391 F. Supp. 3d 76 (D.D.C. 2019).

226. *Id.* at 78. Other aiding and abetting cases litigated under the ATS include: *In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 243 (S.D.N.Y. 2009) (suit brought against Daimler, Ford, and General Motors for supplying vehicles, parts, and equipment to security forces that were used to carry out extrajudicial killings in South Africa); *Romero v. Drummond Co.*, 552 F.3d 1303, 1311 (11th Cir. 2008) (suit brought against a U.S. mining corporation for its subsidiary hiring paramilitary forces that tortured and murdered union leaders in Colombia); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1083 (N.D. Cal. 2008) (suit brought against Chevron for violent attacks that occurred at an oil platform in Nigeria where security forces hired by Chevron allegedly killed and tortured several workers); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1245 (11th Cir. 2005) (suit against a U.S. food production and distribution company for hiring a security force in Guatemala that held union leaders hostage and threatened to kill them).

Aceh Province.[227] Exxon retained Indonesian soldiers as guards of the natural gas facility due to ongoing internal conflicts in the region.[228] Plaintiffs alleged that executives of Exxon in the United States were aware of the human rights abuses carried out by the military security.[229]

In 2019, the U.S. District Court for the District of Columbia dismissed the ATS claim.[230] Noting recent Supreme Court precedent vastly narrowing the causes of action that can be brought under the ATS, the court held that "[i]nternational law does not extend liability for human rights violations to corporations."[231]

A corporate governance suit in New Jersey—Exxon's state of incorporation[232]—would hold Exxon's directors accountable for causing Exxon to violate Indonesian law.[233] There are at least two theories of liability under Indonesian law as to whether Exxon violated positive law: direct liability for negligence in hiring and overseeing the actions of the military under Civil Code Articles 1365 and 1366[234] and vicarious liability for the torts committed under Indonesian Civil Code Article 1367.[235] Importantly, although the court in *Doe v. Exxon Mobil*

227. INT'L CTR. FOR TRANSITIONAL JUST., A MATTER OF COMPLICITY? EXXON MOBIL ON TRIAL FOR ITS ROLE IN HUMAN RIGHTS VIOLATIONS IN ACEH 3 (2008).

228. *Doe*, 391 F. Supp. 3d at 78.

229. *Id.*

230. *Id.* at 93.

231. *Id.* at 88.

232. *Id.* at 78.

233. A corporate governance suit brought against Exxon, unlike Pfizer or Southern Copper, would involve the application of New Jersey corporate law because Exxon is incorporated in New Jersey. Like many other states, New Jersey largely follows Delaware corporate law. *See In re* Schering-Plough/Merck Merger Litig., No. 09-CV-1099 (DMC), 2010 WL 1257722, at *10 (D.N.J. Mar. 26, 2010) ("In analyzing corporate law, New Jersey courts look to Delaware for guidance."); *see also In re* Johnson & Johnson Derivative Litig., 865 F. Supp. 2d 545, 556 (D.N.J. 2011) (applying Delaware's *Caremark* jurisprudence); *In re* Prudential Ins. Co. Derivative Litig., 659 A.2d 961, 968–69 (N.J. Super. Ch. 1995) ("Delaware is recognized as a pacesetter in the area of corporate law. Indeed, . . . 'Delaware corporate law has long been followed—almost reflexively—by other American jurisdictions.'" (quoting John C. Coffee, Jr. & Adolf A. Berle, *Derivative Litigation Under Part VII of the ALI Principles of Corporate Governance: A Review of the Positions and Premises*, C852 ALI-ABA 89, 114 (1993))).

234. *See* Indonesian Civil Code, art. 1365 ("An individual shall be responsible, not only for the damage which he has caused by his act, but also for that which was caused by his negligence or carelessness."). Under Articles 1365 and 1366, a direct liability claim requires proof of wrongful behavior: fault, loss, and causation. Doe v. Exxon Mobil Corp., No. 1:01-CV-1357-RCL, 2022 WL 3043219, at *13 (D.D.C. Aug. 2, 2022). These provisions permit recovery for losses that have factual causation and are foreseeable. *Id.*

235. *See* Indonesian Civil Code, art. 1367 ("An individual shall be responsible for the damage which he has caused by his own act, as well as for that which was caused by the acts of the

Corp. dismissed the ATS claim, the court concluded that both witness testimony and Exxon's internal documents would allow a reasonable jury to find that Exxon, acting together with Indonesian security forces, violated Indonesian law.[236]

Unlike cases involving Pfizer and Southern Copper, the Exxon case may be brought not as a *Caremark* claim but as a bad faith claim against directors and officers for actively partaking in lawbreaking. The factual record developed in the lengthy litigation indicates that Exxon's executives in the United States were potentially complicit in the legal violations.[237] For one, Exxon's board of directors held meetings "in New York and important decisions were made at these meetings 'related to Indonesia and the retention of military members as security personnel.'"[238] Exxon's executives also received briefings on abuses committed by Exxon security personnel in Aceh against the local population, but nevertheless "ordered the provision of supplies and vehicles for the Indonesian security personnel."[239] Such findings may support the inference of bad faith necessary to bring a viable corporate governance suit in the United States. This reasoning is particularly true because bad faith can be established even in the absence of evidence that directors knew about the law in question, so long as the positive law is "so clear on its face."[240]

Exxon suffered a financial loss that was arguably mission critical.[241] According to the company's own mission statement, Exxon's "principal business involves exploration for, and production of, crude

individuals for whom he is responsible . . . ."). Vicarious liability under Article 1367 requires that the perpetrator was an employee of the defendant, that the defendant could instruct the perpetrator to carry out work and give instructions as to how that work was to be carried out, or that the perpetrator was appointed, either formally or informally, by the defendant to represent the business of the defendant to third parties. *Exxon*, 2022 WL 3043219, at *15.

236. Aisyah Llewellyn, *ExxonMobil Bid to End Indonesia Lawsuit Found 'Meritless'*, AL JAZEERA (Aug. 5, 2022), https://www.aljazeera.com/economy/2022/8/5/exxonmobils-efforts-to-block-indonesia-abuse-lawsuit [https://perma.cc/ZX4Q-BZG5].

237. *See Exxon*, 2022 WL 3043219, at *15.

238. Doe v. Exxon Mobil Corp., 69 F. Supp. 3d 75, 96 (D.D.C. 2014). Exxon executives in the United States acknowledged their awareness of the human rights abuses that were reported to them in risk assessments that described detentions, killings, and torture. *Exxon*, 2022 WL 3043219, at *15.

239. Doe v. Exxon Mobil Corp., 391 F. Supp. 3d 76, 78–79 (D.D.C. 2019).

240. Kandell *ex rel.* FXCM, Inc. v. Niv, No. 11812-VCG, 2017 WL 4334149, at *2 (Del. Ch. Sept. 29, 2017).

241. Having established a presence in Indonesia for over 120 years, Exxon has maintained a global hub in the country for decades. *Indonesia*, EXXONMOBIL, https://corporate.exxonmobil.com/locations/indonesia [https://perma.cc/KL2M-2FNX].

oil and natural gas."[242] As a result of the ongoing conflicts in Indonesia, Exxon had to shut down the onshore fields for a prolonged period of time that had been generating over $1 billion a year in revenue.[243]

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At first blush, foreign law may be beyond the competency of what directors and officers of modern U.S. corporations ought to be concerned about. After all, the leadership of the largest U.S. corporations are typically experienced business executives who might know very little about legal compliance in general.[244] But the concept of transnational corporate law litigation should not be understood as requiring corporate leadership to be versed in the laws of every country. For a company like Starbucks, which maintains more than thirty-two thousand stores in eighty countries,[245] the board of directors cannot be held responsible for every legal violation that may arise routinely at any given retail location. The concept is, rather, a call that the management of firms that maintain significant operations in foreign nations put in good faith efforts to comply with local law. For instance, if a U.S. mining company derives its revenue principally from its mines located in Mexico, the board ought to implement systems in place for complying with Mexican law. In this regard, transnational corporate law litigation does not necessarily entail an expansion of existing oversight duties. It is a framework designed to better recognize the range of external laws that bind U.S. corporations in an increasingly globalized economy.

242. Exxon Mobil Corp., Annual Report (Form 10-K) 1 (Feb. 23, 2022).

243. Wayne Arnold, *Exxon Mobil, in Fear, Exits Indonesian Gas Fields*, N.Y. TIMES (Mar. 24, 2001), https://www.nytimes.com/2001/03/24/business/exxon-mobil-in-fear-exits-indonesian-gas-fields.html [https://perma.cc/YPL8-Y5D7].

244. *See* Bainbridge, *supra* note 48, at 668 ("Mandating that directors also take legal responsibility for oversight of ESG issues would require boards to develop expertise in such areas as cybersecurity, diversity, information technology, and even pandemic responses. It is difficult to imagine a manageably sized board that would have expertise in the full panoply of ESG issues."); Lisa M. Fairfax, *The Uneasy Case for the Inside Director*, 96 IOWA L. REV. 127, 164–65 (2011).

245. *About Us*, STARBUCKS, https://www.starbucks.co.uk/about-us [https://perma.cc/NY2F-57BB].

III. THE MECHANICS OF TRANSNATIONAL CORPORATE LAW LITIGATION

This Article has thus far focused on the doctrinal plausibility of litigating transnational corporate law claims in domestic courts. The fact that a claim is doctrinally plausible, of course, does not mean that it is practically feasible. Embedding foreign law into the U.S. corporate governance architecture entails thorny legal issues and practical challenges worthy of further scrutiny. This Part elaborates on the mechanics of litigating transnational corporate law claims in the United States. Three possible roadblocks are considered here. However, none of them prove insurmountable.

A. Accessing U.S. Courts

Civil suits in domestic courts involving substantial foreign facts are generally vulnerable to dismissal on jurisdictional grounds. Even where domestic courts can exercise jurisdiction, the forum non conveniens doctrine permits judges to dismiss a lawsuit with otherwise proper venue and personal jurisdiction in "cases they believe would be better heard by another country's courts."[246] According to Professor Pamela K. Bookman, U.S. courts in recent decades have embraced "broad rules that exclude substantial amounts of litigation that the United States has a sovereign interest in keeping in U.S. courts."[247]

Other than being able to plead a viable substantive law claim, transnational corporate law litigation carries the additional benefit of likely surviving jurisdictional challenges in U.S. courts. A typical *Caremark* claim involves shareholders in the United States bringing a suit against directors and officers for oversight failure allegedly committed in the United States as a matter of corporate law.[248] Personal jurisdiction is established in the state of incorporation for such suits—typically Delaware—even though directors and officers of

246. Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 391 (2017). Judges adjudicating a forum non conveniens motion consider "a number of public and private factors, all of which are concerned with whether the court should decline to hear a case because another forum would be a more appropriate venue for resolution of the dispute." Robin J. Effron, *Trade Secrets, Extraterritoriality, and Jurisdiction*, 51 WAKE FOREST L. REV. 765, 780 (2016). On the origins of the forum non conveniens doctrine, see William S. Dodge, Maggie Gardner & Christopher A. Whytock, *The Many State Doctrines of Forum Non Conveniens*, 72 DUKE L.J. 1163, 1166–69 (2023).

247. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1086 (2015).

248. *See, e.g.*, *In re* Boeing Co. Derivative Litig., No. CV 2019-0907-MTZ, 2021 WL 4059934, at *2–3 (Del. Ch. Sept. 7, 2021).

large public companies in the United States typically have no contact with Delaware other than their position in the Delaware corporation.[249] Like Professors Helen Hershkoff and Marcel Kahan explain, "[A]ny director or officer of a Delaware corporation by accepting that position is deemed to have consented to jurisdiction in the courts of that state for any claim concerning breach of fiduciary duty."[250] The fact that transnational corporate law litigation embeds the violation of foreign law as a predicate fact to ascertain potential bad faith conduct by directors and officers does not alter the equation.

It is for this reason that transnational corporate law litigation will likely survive jurisdictional challenges in U.S. courts.[251] Importantly, Delaware courts have repeatedly held that disputes involving "the internal affairs of a Delaware corporation [is] an area where Delaware's interests are paramount."[252] This holding is unsurprising because Delaware's courts play a pivotal role in progressively developing the state's renowned corporate law doctrines.[253]

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249. DEL. CODE ANN. tit. 10, § 3114(a) (2024) (providing that directors and officers of domestic corporations "shall . . . be deemed . . . to have consented" to personal jurisdiction in Delaware courts); *see also* Eric A. Chiappinelli, *Jurisdiction over Directors and Officers in Delaware*, *in* RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 316, 328 (Sean Griffith, Jessica Erickson, David H. Webber & Verity Winship eds., 2018) ("Delaware's statutes and cases have created a system that permits expansive jurisdiction over nonresident directors and officers of Delaware corporations. The principal mechanism for asserting jurisdiction is the implied consent statute (section 3114).").

250. Helen Hershkoff & Marcel Kahan, *Forum-Selection Provisions in Corporate "Contracts*,*"* 93 WASH. L. REV. 265, 296 (2018). Notwithstanding this longstanding practice, scholars have raised concerns about the constitutionality of Delaware's implied-consent statute as applied to directors and officers. *See, e.g.*, Eric A. Chiappinelli, *The Myth of Director Consent: After* Shaffer*, Beyond* Nicastro, 37 DEL. J. CORP. L. 783, 785 (2013); Verity Winship, *Jurisdiction over Corporate Officers and the Incoherence of Implied Consent*, 2013 U. ILL. L. REV. 1171, 1188–90.

251. Jacob J. Fedechko, Martinez v. Dupont: *A Look at the Future of* Forum Non Conveniens *in Delaware Commercial Litigation*, 40 DEL. J. CORP. L. 647, 670–71 (2016) ("Delaware corporations will most likely be unsuccessful in arguing *forum non conveniens* if there is an alleged breach of fiduciary duty, and any company that is involved in a document dispute will likewise lack compelling reasons necessary to justify dismissal.").

252. Hamilton Partners, L.P. v. Englard, 11 A.3d 1180, 1213 (Del. Ch. 2010). According to the Delaware Supreme Court, "Delaware has more than an interest in providing a sure forum for shareholder derivative litigation involving the internal affairs of its domestic corporations. Delaware has an obligation to provide such a forum." Sternberg v. O'Neil, 550 A.2d 1105, 1125 (Del. 1988) (citation omitted).

253. *See* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1064 (2000) (attributing "Delaware's success in attracting corporate charters" to "the unique lawmaking function of the Delaware courts"); Dammann & Hansmann, *supra* note 24, at 13–14.

A robust body of case law demonstrates Delaware's commitment to adjudicating cases involving the application of Delaware corporate law, even if they embed the interpretation of foreign law. In *VTB Bank v. Navitron Projects Corp.*,[254] for instance, the Delaware Court of Chancery refused to dismiss on forum non conveniens grounds a case involving a Ukrainian bank, notwithstanding the fact that necessary documents would be difficult to produce if litigation were to proceed in Delaware and all relevant witnesses resided outside of Delaware.[255] Despite acknowledging the defendant may suffer "overwhelming hardship,"[256] the court reasoned it had an "immutable responsibility to supervise the entities chartered and formed under Delaware law."[257] In another influential case involving the likely application of German law, the Delaware Supreme Court affirmed a lower court ruling declining to dismiss the case, reasoning that little weight is given to "the expense and inconvenience of translating pertinent legal precedent (assuming German law applies), retaining foreign lawyers, and producing foreign law experts to testify at trial."[258] Indeed, Delaware courts in recent years have shown their expertise and willingness to adjudicate high-profile cases involving corporations headquartered in foreign nations with no factual connection to Delaware other than being chartered by the state.[259]

To summarize, domestic courts will likely retain jurisdiction over shareholder suits against directors and officers of U.S. corporations even when they involve substantial foreign facts.[260]

B. Establishing Violations of Foreign Law in U.S. Courts

Establishing that a U.S. corporation violated foreign law in U.S. courts also raises a host of legal and factual questions that cannot be easily brushed away. How would federal or state judges know whether positive law has been violated abroad? To what level of determination is required and by whom? Foreign law may be difficult to ascertain,

254. VTB Bank v. Navitron Projects Corp., No. 8514-VCN, 2014 WL 1691250 (Del. Ch. Apr. 28, 2014).

255. *Id.* at *8, *12.

256. *Id.* at *11.

257. *Id.*

258. Warburg, Pincus Ventures, L.P. v. Schrapper, 774 A.2d 264, 271 (Del. 2001).

259. *See, e.g.*, Rich *ex rel.* Fuqi Int'l, Inc. v. Yu kwai Chong, 66 A.3d 963, 966 (Del. Ch. 2013); Hughes v. Xiaoming Hu, No. 2019-0112-JTL, 2020 WL 1987029, at *1 (Del. Ch. Apr. 27, 2020).

260. *See, e.g.*, *Warburg*, 774 A.2d at 266; Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC, 859 A.2d 989, 991 (Del. 2004).

and the laws on the books in many foreign nations might be ambiguous and different from the law in practice.

More fundamentally, adjudicating legal matters that turn on questions of foreign law may appear to be something beyond the ordinary competence of domestic judges. Hardly any law school in the United States requires aspiring lawyers to take even an introductory course on comparative law.[261] Many foreign legal systems, moreover, are constituted of esoteric features unfamiliar to jurists in the United States.[262] U.S. judges, therefore, may appear unqualified to determine the content of foreign law.

That viewpoint, however, relies on an unduly parochial conception about the role of domestic judges. To a certain extent, federal and state judges routinely determine the content of another sovereign's law. When federal courts exercise diversity jurisdiction, federal judges must interpret the laws of other sovereigns—fifty U.S. states—that they play no role in crafting.[263] Rather than serving as authoritative interpreters of the law—and at times engaged in unabashedly lawmaking functions—these judges engage in factual inquiries to ascertain other sovereigns' laws.[264] The difference between states on how the law is enacted, interpreted, and adjudicated does not

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261. *See* Michael P. Waxman, *The Comparative Legal Process Throughout the Law School Curriculum: A Modest Proposal for Culture and Competence in a Pluralistic Society*, 74 MARQ. L. REV. 391, 391 (1991) ("[A] survey of law school curricula reveals that comparative law is not specifically required for graduation at most law schools, a selective option from a restricted, required course grouping at only six law schools, merely elective at most law schools, and not even offered at a few law schools."). To be sure, there are signs of change. Beginning with students matriculating into the J.D. program in Fall 2019, Harvard Law School launched a program requiring J.D. students to take an international law or comparative law course as a graduation requirement. *J.D. Requirements Quick Reference Guide*, HARV. L. SCH., https://hls.harvard.edu/academics/curriculum/registration-information/j-d-degree-requirements-quick-reference-guide [https://perma.cc/S488-47DS].

262. Judges are attuned to this issue, dismissing cases that do not involve the application of U.S. corporate law. *See* Diedenhofen-Lennartz v. Diedenhofen, 931 A.2d 439, 441 (Del. Ch. 2007) ("I am an American-trained judge who speaks English. As such, it would be hubristic for me to conclude I would somehow do a better job of deciding this dispute than the German courts, whose jurists are steeped in German law and business context[.]"). Even in *Diedenhofen*, then–Vice Chancellor Leo Strine acknowledged that "Delaware courts . . . have been far less willing to defer to tribunals in other states when unsettled issues of Delaware law are at stake." *Id.* at 451.

263. *See* Lea Brilmayer, *The Other State's Interests*, 24 CORNELL INT'L L.J. 233, 238 (1991) ("When called upon to apply state law, federal courts are not interested in what state law ought to be; they are interested in what state law already is.").

264. *Id.* at 233 ("[W]hen a forum court sets out to ascertain another state's law, it is attempting to ascertain what the other state thinks is the best solution to a particular legal problem. This latter enterprise is more of a factual inquiry than the former, which is unabashedly a lawmaking function.").

prevent federal judges from determining the content of state law. That reality should ring familiar to those who have litigated cases in federal court in New Orleans, where federal judges routinely wrestle with Louisiana's legal system, which fuses both civil-law and common-law traditions.[265]

Moreover, both state and federal judges today routinely adjudicate cases involving the interpretation of foreign law.[266] This practice is particularly true of Delaware judges, necessitated by the state serving as a global hub for a large number of corporations headquartered in foreign nations.[267] Given the sheer volume of Delaware cases that involve foreign parties, there is also a robust body of case law on how to determine the content of foreign law. For one, the party seeking the application of foreign law "has the burden of not only raising the issue that foreign law applies, but also the burden of adequately proving the substance of the foreign laws."[268] In determining the content of foreign law, Delaware judges routinely consult expert depositions, affidavits, as well as live expert testimony.[269] When the trial court's determination of foreign law rests on the credibility of foreign law experts, "the trial court's predicate credibility findings will be accorded appropriate deference."[270]

Consider the case of *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co*.[271] The dispute, arising out of a joint venture involving a Saudi business entity,[272] required the trial judge in

265. Alvin B. Rubin, *Hazards of a Civilian Venturer in a Federal Court: Travel and Travail on the Erie Railroad*, 48 LA. L. REV. 1369, 1369 (1988).

266. *See* William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161, 161 (2002) ("It is common to find judges applying foreign tort law to decide a case, or enforcing a foreign judgment for breach of contract." (citation omitted)).

267. *See, e.g.*, Omari Scott Simmons, *Delaware's Global Threat*, 41 J. CORP. L. 217, 239 (2015); *see also Delaware Governor Markell Seeks to Attract Israeli Companies*, REUTERS (July 11, 2013, 6:51 AM), https://www.reuters.com/article/israel-delaware/delaware-governor-markell-seeks-to-attract-israeli-companies-idUSL6N0FH1HF20130711 [https://perma.cc/5H8P-XVGT] ("Thousands of Israel-based businesses are incorporated in Delaware, including high-tech companies Check Point Software Technologies, Amdocs, Ceva and Nice Systems.").

268. Republic of Panama v. Am. Tobacco Co., Nos. 05C-07-181-RRC, 05C-07-180-RRC, 2006 WL 1933740, at *4–5 (Del. Super. Ct. June 23, 2006).

269. *Id.* at 333–35.

270. Germaninvestments AG v. Allomet Corp., 225 A.3d 316, 330 n.58 (Del. 2020) (quoting Saudi Basic Indus. v. Mobil Yanbu Petrochemical Co., 866 A.2d 1, 30 (Del. 2005)). Like the Delaware Supreme Court recently articulated, "[T]he process by which foreign law is determined is necessarily context-specific, and trial judges have wide latitude in determining what evidence to consider and in what form." *Id.* at 333.

271. Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co., 866 A.2d 1 (Del. 2005).

272. *Id.* at 7.

Delaware to interpret Saudi law. Doing so was no easy task given that Saudi law does not embrace the common-law system of binding precedent and stare decisis.[273] Instead of relying upon statutes or decisional precedent to discern the applicable law, "Saudi judges use scholarly treatises as guides to identify a spectrum of possibilities on a given question, as opposed to a single correct answer."[274] The trial judge was meticulous in trying to determine the content of applicable Saudi law. To do so, she reviewed Saudi law experts from both sides and retained an independent expert who was deposed for a full day.[275] Noting that the trial judge "went to extraordinary lengths to understand the applicable Saudi law and to make rulings that were consistent with the numerous Saudi law sources," the Delaware Supreme Court approved the process by which she ascertained the relevant foreign law at issue.[276] *Saudi Basic* is hardly an anomaly. A review of recent cases indicates that Delaware courts are willing and able to adjudicate disputes involving the interpretation of foreign law.[277]

Of course, the administrative capacity of domestic courts to adjudicate matters involving the interpretation of foreign law does not ameliorate the possibility that U.S. corporations may be victims of arbitrary or discriminatory laws abroad. Countries' policies can change without notice, and some foreign governments are notorious for imposing arbitrary fines even in the absence of formal laws.[278] Although these possibilities cannot be ignored, if foreign law is arbitrarily applied or unclear, it likely cannot serve as a basis for a meritorious fiduciary duty claim because it will be almost impossible to deduce bad faith conduct by managers who had no notice. After all,

273. *Germaninvestments*, 225 A.3d at 334 ("In Saudi Arabia, judicial decisions are not in themselves a source of law, and with minor exceptions, court decisions in Saudi Arabia are not published or even open to public inspection.").

274. *Id.*

275. *See id.* at 333–34.

276. *Saudi Basic Indus.*, 866 A.2d. at 30.

277. *See, e.g.*, Pope Invs. LLC v. Benda Pharm., Inc., No. 5171-VCP, 2010 WL 3075296, at *5 (Del. Ch. July 26, 2010) (letter op.) (Chinese law); Vichi v. Koninklijke Philips Elecs. N.V., 62 A.3d 26, 53 (Del. Ch. 2012) (Dutch law).

278. *See* Jonathan P. Doh, Peter Rodriguez, Klaus Uhlenbruck, Jamie Collins, Lorraine Eden & Stanislav Shekshnia, *Coping with Corruption in Foreign Markets*, 17 ACAD. MGMT. EXEC. 114, 116 (2003) (explaining how Lockheed Martin had to pay nearly $25 million in fines after being accused of bribing a member of Egypt's parliament).

directors and officers cannot be found liable simply by miscalculating the legality of a particular activity.[279]

C. Corporate Groups and Corporate Governance

U.S. corporations often operate in foreign nations through corporate subsidiaries, which are separate economic entities that are either fully or majority owned by the U.S. "parent."[280] Together, the parent and its subsidiaries "function as a single economic enterprise, often with a common public identity."[281] Starbucks, for instance, operates in foreign nations through dozens of subsidiaries, including Beijing Starbucks Coffee Co., Ltd. (China), Starbucks Farmer Support Center Tanzania Limited (Tanzania), and Association Centro de Assessoria e Suporte da Starbucks Brazil (Brazil).[282] Because corporate law generally concerns itself with vesting rights to shareholders who own discrete legal entities,[283] corporate misconduct attributable to human decision-making at the foreign-subsidiary level may be beyond the reach of U.S. corporate law.[284]

More specifically, the nature of modern corporate group structures can pose challenges to transnational corporate law litigation for at least two reasons. First, claims of ignorance by directors and officers of the parent corporation working in the United States could undermine fiduciary duty claims, particularly if a distinct slate of directors in the foreign subsidiary is tasked to obey local law. After all, shareholders in the United States typically have ownership stakes in parent corporations, which are separate legal entities from their corporate subsidiaries.[285] Second, discovery may present a challenge. Shareholders of the parent corporation only enjoy a qualified right to

279. *See supra* Section I.B.

280. Carliss N. Chatman, *Corporate Family Matters*, 12 U.C. IRVINE L. REV. 1, 7 (2021); Phillip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295, 297 (1996).

281. Virginia E. Harper Ho, *Of Enterprise Principles & Corporate Groups: Does Corporate Law Reach Human Rights?*, 52 COLUM. J. TRANSNAT'L L. 113, 133 (2013).

282. SEC, Exhibit No. 21, Subsidiaries of Starbucks Corporation (Nov. 19, 2021), https://www.sec.gov/Archives/edgar/data/829224/000082922421000086/sbux-1032021xexhibit21.htm [https://perma.cc/R43L-78KD].

283. Harper Ho, *supra* note 281, at 113–14.

284. *Id.* at 140 ("Delaware law cannot directly reach a non-Delaware affiliate within the corporate group.").

285. *See, e.g.*, Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. CV 2019-0816-SG, 2020 WL 5028065, at *2 (Del. Ch. Aug. 24, 2020).

inspect the books and records of the corporation's subsidiaries.[286] Given that demands for books and records are critical for shareholders to gain access to relevant facts to plead viable corporate governance claims,[287] corporate group structures may hinder the ability of shareholders to bring claims against directors and officers of the parent corporation in the United States.

But directors and officers of parent corporations in the United States do not get a free pass merely by operating in foreign nations through subsidiaries. This fact is particularly true given that U.S. corporate law in recent decades has embraced what Professor Mariana Pargendler has described as "entity transparency."[288] In an eye-opening recent article, Pargendler documents how key corporate law jurisdictions around the world, including Delaware, have "increasingly disregarded entity boundaries to reach corporate subsidiaries in applying rules of investor protection such as shareholder rights to bring a derivative suit, approve major asset sales, or inspect corporate books and records."[289] This erasure of entity boundaries extends to Delaware corporate law jurisprudence that can hold directors and officers of parent corporations liable for legal compliance failures of subsidiaries. Pargendler observes that although the *Caremark* opinion paid little attention to whether directors of parent corporations are liable for legal violations at the subsidiary level, subsequent Delaware court opinions have made it clear that directors of parent corporations can be liable for misconduct at the subsidiary level.[290] For instance, in *Chou*, the Delaware Court of Chancery allowed a *Caremark* case against the directors of the parent corporation to proceed, even though criminal and civil penalties associated with alleged criminal activities took place at the subsidiary level.[291]

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286. *See* Weinstein Enters., Inc. v. Orloff, 870 A.2d 499, 512 (Del. 2005).

287. Shapira, *New* Caremark, *supra* note 37, at 1859.

288. Mariana Pargendler, *The New Corporate Law of Corporate Groups* 1 (Eur. Corp. Governance Inst. Working Paper, No. 702/2023, 2023), https://www.ecgi.global/sites/default/files/working_papers/documents/thenewcorporatelawofcorporategroups.pdf [https://perma.cc/W3XA-WSWD].

289. *Id.* at 3.

290. *Id.* at 26–27.

291. Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. CV 2019-0816-SG, 2020 WL 5028065, at *2 (Del. Ch. Aug. 24, 2020) ("Ultimately, the criminal activities at Pharmacy and other associated ABC subsidiaries were uncovered, and significant corporate criminal and civil penalties ensued. The question is whether, in allowing these conditions to obtain at Pharmacy and its associated entities, the ABC directors failed their duty to oversee operations, in bad faith.").

This line of jurisprudence appears sensible given that forming a subsidiary can be nothing "more than glorified paperwork,"[292] and directors and officers of the parent company can often dominate the decision-making process of subsidiaries.[293] Recall Exxon's involvement with human rights abuses in Indonesia arising from the company's efforts to secure a natural gas facility.[294] In the ATS litigation, the parent company Exxon (incorporated in New Jersey) was being sued as well as its wholly owned subsidiary, Exxon Mobil Oil Indonesia (incorporated in Delaware).[295] Importantly, the basis for including the parent company in the suit was that the "management decisions related to Indonesia are centralized and made in the United States."[296] Such "hands-on" involvement could trigger viable fiduciary duty claims against the directors and officers of parent corporations.[297] Although open questions remain, modern Delaware corporate law jurisprudence suggests that the mere presence of a corporate group structure, alone, would not preclude holding directors of parent corporations liable for legal compliance failures of foreign subsidiaries.

Reforms in the laws governing shareholder inspection rights in recent decades have also paved the way for transnational corporate law litigation. Historically, shareholders of parent corporations seldom got access to the books and records of corporate subsidiaries. Under the seminal case of *Saito v. McKesson HBOC, Inc.*,[298] "stockholders of a parent corporation [were] not entitled to inspect a subsidiary's books and records, '[a]bsent a showing of fraud or that a subsidiary is . . . the mere alter ego of the parent.'"[299] Following the Enron scandal in 2001, however, Delaware lawmakers amended its laws to explicitly grant

292. *See* William J. Moon, *Tax Havens as Producers of Corporate Law*, 116 MICH. L. REV. 1081, 1095 (2018).

293. Harper Ho, *supra* note 281, at 148.

294. *See supra* Section II.C.

295. Doe v. Exxon Mobil Corp., 391 F. Supp. 3d 76, 78 (D.D.C. 2019).

296. Doe v. Exxon Mobil Corp., 69 F. Supp. 3d 75, 96 (D.D.C. 2014). The court found previously that the Indonesian subsidiary "did not implement various security procedures without Exxon Mobil's significant guidance and participation." Doe v. Exxon Mobil Corp., 573 F. Supp. 2d 16, 31–32 (D.D.C. 2008).

297. Indeed, it is settled that shareholders of a parent company can bring a fiduciary duty claim for misconduct at the subsidiary level where "[a] parent and its wholly owned subsidiary have a complete unity of interest." Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984). Such suits, which are referred to as "double derivative" suits, are an "extension of shareholder enforcement rights down the chain of ownership." Harper Ho, *supra* note 281, at 148–49 n.158.

298. Saito v. McKesson HBOC, Inc., 806 A.2d 113 (Del. 2002).

299. *Id.* at 118 (quoting Skouras v. Admiralty Enters., Inc., 386 A.2d 674, 681 (Del. Ch. 1978)).

shareholders access to subsidiaries' books and records to the extent that "[t]he corporation has actual possession and control of such records of such subsidiary" or "[t]he corporation could obtain such records through the exercise of control over such subsidiary."[300] Recent Delaware cases also make clear that electronic communications between board members are potentially subject to discovery, which should aid shareholders of parent corporations in accessing relevant documents concerning overseas activities.[301]

Moreover, multinational corporations do not always operate through subsidiaries. Recall Pfizer's catastrophic incident in Nigeria with involuntary medical experimentation.[302] Pfizer was not working out of a subsidiary in Nigeria. Rather, Pfizer assembled its test protocol at its research headquarters in Connecticut and dispatched three of its U.S. physicians to work with four Nigerian doctors in Nigeria.[303] Such conduct that amounts to lawbreaking would directly trigger fiduciary duty claims against directors and officers of Pfizer.

Although complex corporate structures undoubtedly present a challenge to shareholder suits, they hardly immunize directors and officers of U.S. corporations who facilitate lawbreaking abroad.

IV. THE PROMISE AND PERILS OF TRANSNATIONAL CORPORATE LAW LITIGATION

To acknowledge corporate law's broader interest in the rule of law, domestic or foreign, does not alleviate normative tensions that necessarily arise when holding directors and officers accountable for corporate lawbreaking. This Part explores the promise and perils of embracing transnational corporate law litigation in the United States. Section A first acknowledges potential objections against domestic courts adjudicating fiduciary duty suits predicated on violations of foreign law. Section B engages with some of those objections and offers normative accounts underlying corporate law's commitment to the rule of law. Section C explores the implications. Rather than drawing

300. DEL. CODE ANN. tit. 8, § 220(b)(2) (2024). Like Professor George Geis has assessed, the 2003 amendment was designed to reverse the presumption that "shareholders were not allowed to examine a subsidiary unless they could prove fraud or demonstrate that the subsidiary was a mere 'alter ego' of the parent corporation." George S. Geis, *Information Litigation in Corporate Law*, 71 ALA. L. REV. 407, 422 (2019).

301. *See, e.g.*, KT4 Partners LLC v. Palantir Techs. Inc., 203 A.3d 738, 742 (Del. 2019).

302. *See supra* Section II.B.

303. Abdullahi v. Pfizer, Inc., 562 F.3d 163, 169 (2d Cir. 2009).

sweeping conclusions, it tees up various competing arguments that ought to be further explored in future scholarship.

A. Potential Objections

There are several legitimate objections that can be leveled against embracing transnational corporate law litigation in the United States. Even in the purely domestic context, a rich body of scholarship has viewed shareholder suits with a healthy dose of skepticism.[304] In some respects, transnational corporate law litigation amplifies some of those concerns and raises a novel set of concerns.[305]

First, compliance systems are not free. Any expansion of shareholder claims against directors and officers necessarily requires an increase in the expenditure of resources. "Nearly all public companies purchase D&O insurance."[306] As potential liability for directors and officers expands, the costs of director and officer insurance ("D&O insurance") and liability insurance will rise.[307] Corporations will also be forced to spend more on lawyers and other experts to ensure legal compliance.[308] Relatedly, there are opportunity costs.[309] Incentivizing directors to devote more time to legal compliance, at least in theory, also would force boards to divert time and energy away from strategic vision planning that could enhance the long-term value of the firm.[310]

Second, the costs of compliance are also not necessarily shouldered by corporations alone. There might be societal costs, as

304. *See* Bainbridge, *supra* note 48, at 661–62; Romano, *The Shareholder Suit*, *supra* note 49, at 84; Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 504–05 (1987).

305. Relatedly, even those who are convinced about the merits of transnational corporate law litigation should be cognizant of its limitations when it comes to providing a remedy for the direct victims of corporate lawbreaking abroad. Shareholder suits can be powerful tools to deter lawbreaking, but they are principally designed as litigation tools for shareholders to police the behavior of corporate managers. It inevitably raises distributional justice concerns given that the direct victims of corporate lawbreaking are not typically the ones with standing. *See* Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 STAN. L. REV. 87, 93–94 (2022).

306. Andrew Verstein, *Changing Guards: Improving Corporate Governance with D&O Insurer Rotations*, 108 VA. L. REV. 983, 995 (2022).

307. *See* Bainbridge, *supra* note 48, at 669.

308. *Id.* at 670.

309. In microeconomic theory, opportunity cost refers to "the economic cost of an alternative that has been foregone." ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 34 (2008).

310. Martin Petrin, *Assessing Delaware's Oversight Jurisprudence: A Policy and Theory Perspective*, 5 VA. L. & BUS. REV. 433, 473 (2011).

well. For one, a heightened risk of being sued for fiduciary duty violations may have a chilling effect on risk-taking—a feature not only beneficial from the firm's standpoint but also from the societal standpoint.[311] Indeed, canonical corporate law doctrines, including the concept of limited liability—the idea that the firm's co-owners risk no more than the money they invest into the business enterprise—stem from society's willingness to incentivize entrepreneurial risk-taking.[312] Risk-taking substantially benefits society by generating "financial returns to investors, jobs for employees, and desirable products and services for consumers."[313]

Finally, lawbreaking is not always socially undesirable. Corporations violate laws in a variety of contexts, including to pave the way for innovation or social change.[314] Fiduciary litigation is not a fine-tuned mechanism for filtering out lawbreaking that has the potential to provide some social value.[315] Consider Uganda's legislation passed in 2023 that "imposes the death penalty for those who commit so-called aggravated homosexuality."[316] The law implicates companies like Mastercard and Unilever that maintain operations in Uganda because it includes "a provision that would require companies to report those suspected of being LGBTQ."[317] Intentional violation of such laws possibly benefits shareholders—by ensuring that the companies stay

311. *See id.* at 458 ("[A] lower standard of director accountability flows from the justifications of the business judgment rule. The business judgment rule is 'the first protection against a threat of sub-optimal risk acceptance' . . . ." (quoting Gagliardi v. TriFoods Int'l, 683 A.2d 1049, 1052 (Del. Ch. 1996))).

312. STEPHEN M. BAINBRIDGE & M. TODD HENDERSON, LIMITED LIABILITY: A LEGAL AND ECONOMIC ANALYSIS 13 (2016).

313. David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1317 (2007).

314. *See* Pollman, *Corporate Disobedience*, *supra* note 48, at 712 (documenting how Uber, in its early years, "launched operations in cities around the world—often in violation of existing laws or, at best, in legal gray areas").

315. *See id.* at 717 ("Because shareholders are the only corporate constituents with the power to assert a breach of fiduciary duty through a derivative suit, fiduciary duty law is ultimately not an effective or fine-tuned mechanism for policing corporate disobedience.").

316. *Corporate Giants Say Anti-LGBT Law Would Hurt Uganda's Economy*, REUTERS (Mar. 29, 2023, 3:18 PM), https://www.reuters.com/world/africa/corporate-giants-say-anti-lgbt-law-would-hurt-ugandas-economy-2023-03-29 [https://perma.cc/JUT5-GZLQ].

317. *Id.*

consistent with their global brand image of being LGBTQ-friendly[318]—but also may usher in beneficial legal reforms.[319]

B. Corporate Law's Interest in the Rule of Law

Although objections to embracing transnational corporate law litigation should not be taken lightly, they do not justify throwing the baby out with the bathwater. In the domestic context, scholars have offered several reasons to think that lawbreaking undermines the overarching goal of the corporate fiduciaries—directors and officers—working on behalf of shareholders. In an important work, Professor Macey assesses that "the most plausible explanation for corporate crime, at least in the large, publicly held corporation, stems from a deviation of interest between managers and shareholders."[320] In some respects, corporate law doctrines mandating fidelity to external sources of law—domestic or foreign—can be understood as a mechanism for shareholders to ensure that managers operate the firm with the long-term interest of the corporation in mind.

But corporate law doctrines on legal compliance acknowledge not just the instrumental value in harnessing corporate law for shareholders but also a societal interest in the rule of law. Importantly, the obligations imposed on corporate fiduciaries to ensure that corporations obey the rule of law ought to be recognized from the standpoint that the corporate form—the legal recognition of business enterprises—is a privilege constructed by law and legal institutions.[321] A bit of history is useful here. According to Professors Taisu Zhang and John Morley, the modern state's development of the ability to

318. *Creating Limitless Possibilities for Everyone*, MASTERCARD, https://www.mastercard.us/en-us/vision/who-we-are/diversity-inclusion.html [https://perma.cc/Z9GR-6DJV] ("We support the LGBTQIA+ community and are committed to equal treatment, equal opportunities and equal rights."); *Building Equity and Equality with Pride*, UNILEVER, https://www.unilever.com/news/news-search/2022/building-equity-and-equality-with-pride [https://perma.cc/9KP5-R8UV] ("Recognising our own uneven landscape, in 2018 Unilever signed the UN LGBTQI+ Standards of Conduct for Business with the aim of accelerating positive change by adopting its five pillars of conduct for tackling discrimination at work.").

319. Pollman, *Corporate Disobedience*, *supra* note 48, at 715.

320. Jonathan R. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 315, 319 (1991).

321. Hansmann, Kraakman & Squire, *supra* note 1, at 1336–37; Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 391 (2003) ("Entity status for incorporated businesses meant that a chartered corporation was recognized as a distinct legal entity . . . for purposes of buying, selling, or holding property, of making contracts, and of suing and being sued.").

enforce the law was necessary for the rise of the corporation.[322] After all, capital-intensive enterprises rely on large groups of dispersed investors, and the modern state's legal authority has the unique capacity to solve the problem of trust that inevitably arises when a large group of strangers pool capital for business enterprises.[323] It is for this reason that the corporate form only became "a widespread institutional and economic phenomenon under the auspices of modern state-building in the eighteenth and nineteenth centuries."[324] In some respects, the mandatory nature of legal compliance doctrines embraced by modern U.S. corporate law jurisprudence reflects the understanding that corporations require continued blessings from society at large for their very existence.[325]

Of course, it may seem natural to question why corporate law even needs to police illicit activities: If regulatory law imposes enough penalties for illicit behaviors, a good argument could be made that corporate law need not be in the business of deterring illicit activities. Indeed, in an infamous piece of legal scholarship published more than forty years ago, then-Professors Frank Easterbrook and Daniel Fischel declared that corporate "managers not only may but also should violate the rules when it is profitable to do so."[326]

This viewpoint, however, underappreciates corporate law's expressive function. In the domestic context, expressing obligations of legal compliance and oversight within corporate law acknowledges the "societal interests in the rule of law and preserves the ability of courts to flexibly respond to particularly salient and egregious violations of public trust."[327] Today, violations of public trust are not invariably tied to lawbreaking in the domestic context. With accelerating global economic integration, humanitarian tragedies or environmental catastrophes abroad can instantly lead to consumer boycotts, protests, and divestment campaigns on a global scale with catastrophic

322. *See* Taisu Zhang & John D. Morley, *The Modern State and the Rise of the Business Corporation*, 132 YALE L.J. 1970, 1973 (2023).

323. *Id.* at 1989.

324. *Id.* at 1970.

325. *See* William J. Moon, *Beyond Profit Motives*, 122 MICH. L. REV. 1059, 1079 (2024).

326. Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1980).

327. Pollman, *Corporate Oversight*, *supra* note 50, at 2013. Like Elizabeth Pollman explains, "Corporate law . . . seeks to preserve the legitimacy of broad business discretion by setting minimal process thresholds for compliance and otherwise drawing a strict prohibition against the conscious or intentional managing of risk of legal enforcement." *Id.* at 2044.

consequences for the long-term viability of any given corporation.[328] Indeed, by many accounts, external laws alone suffer from inherent limitations in deterring corporate misconduct.[329]

Appreciating corporate law's role in deterring corporate lawbreaking is not to say that all sources of positive law are ideal or normatively desirable. A seemingly permanent feature of a law professor's job involves writing law review articles critiquing the current state of the law and floating sensible reform ideas. Yet a powerful virtue of corporate law embedding external "positive law"—domestic or foreign—is that positive law is tied "securely to the entity that created it, with that same official entity calling the shots when the time comes to apply, interpret, alter, or overrule it."[330] Scholars can critique all they want about the fallacy of certain foreign laws, but so can foreigners about U.S. law that has been accused of being infected with systemic racism and patriarchy.[331] With all its imperfection, positive law at least affords certainty as to who can call the shots in determining the content of the law. Positive law can also serve as a crude proxy for determining any given society's tolerance for a particular vision of corporate law and corporate purpose.

C. Implications: Reimagining the Purpose of Modern Corporations

A foundational debate in modern corporate law scholarship concerns the purpose of modern corporations: whether they exist purely to maximize shareholder value or if they also exist to enhance the welfare of other stakeholders and societal interests more broadly.

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328. William J. Moon, *Anonymous Companies*, 71 DUKE L.J. 1425, 1478–79 (2022) ("Forced public disclosure may enable consumers to . . . punish[] local business crooks who pollute the environment or enterprises that engage in unsavory labor practices. The threat of bad publicity, at least in theory, can thus shame certain actors from operating what many might view as morally reprehensible enterprises.").

329. David Ciepley, *Can Corporations Be Held to the Public Interest, or Even to the Law?*, 154 J. BUS. ETHICS 1003, 1003 (2019) (assessing that standard tools for holding corporations "even to bare legality, suffer from inherent limitations and fail adequately to deter corporate misconduct"); *see also* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 758 (2005).

330. Lea Brilmayer, *Untethered Norms After* Erie Railroad Co. v. Tompkins*: Positivism, International Law, and the Return of the "Brooding Omnipresence*,*"* 54 WM. & MARY L. REV. 725, 726 (2013).

331. *See generally* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 3 (2018) (assessing that racism is a permanent feature in the United States); MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 82 (2005) (examining the modern history of the states' police powers).

Generations of scholars in both law and social science have debated the merits of these legal frameworks.[332] Shareholder-centric theorists typically conceptualize the role of directors and officers as strictly maximizing shareholder value.[333] Stakeholder theorists, on the other hand, tend to advocate incorporating the interests of other stakeholders—most prominently workers, consumers, and the environment—into the decision-making process of corporate fiduciaries. Although shareholder primacy theory enjoyed its status as the conventional wisdom for decades,[334] the stakeholder theory is experiencing a rapid intellectual renaissance both in legal academia and on Wall Street.[335]

Within this important debate, the critical boundaries of who ought to count as stakeholders are often left vague or uninterrogated and, in some instances, assumed to be U.S. stakeholders or the interest of the United States. Consider the widely publicized statement released in 2019 by the Business Roundtable, an association composed of more than two hundred CEOs of the United States' leading companies.[336] The statement sent shockwaves throughout the ivory towers, for it potentially signaled that corporate leaders are warming up to stakeholder-centric views.[337] What got less attention is how the

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332. For a classic throwback, compare A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) (stating that managers should exercise power "only for the ratable benefit of all the shareholders"), with E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932) (stating that a corporation "has a social service as well as a profit-making function").

333. *See generally, e.g.*, BAINBRIDGE, THE PROFIT MOTIVE, *supra* note 86 (arguing that the purpose of the corporation is to maximize shareholder value).

334. *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.").

335. Marcel Kahan & Edward B. Rock, *The Emergence of Welfarist Corporate Governance* (Eur. Corporate Governance Inst. Working paper no. 683/2023, Feb. 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4328626 [https://perma.cc/8DAA-44BP]; Martin Lipton, *ESG, Stakeholder Governance, and the Duty of the Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 18, 2022), https://corpgov.law.harvard.edu/2022/09/18/esg-stakeholder-governance-and-the-duty-of-the-corporation [https://perma.cc/6LVS-A3SS].

336. *See About Us*, BUS. ROUNDTABLE, https://www.businessroundtable.org/about-us [https://perma.cc/XB27-LZFT] ("Business Roundtable members develop and advocate directly for policies to promote a thriving U.S. economy and expanded opportunity for all Americans.").

337. For a critical commentary on the Business Roundtable statement, see generally Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, 75 VAND. L. REV. 1031, 1033, *passim* (2022) ("[O]ur findings support the view that the BRT Statement was mostly for show and that BRT Companies joining it did not intend or expect it to bring about any material changes in how they treat stakeholders.").

Business Roundtable declared the purpose of a corporation as promoting "An Economy That Serves All Americans."[338] This is no coincidence. The Business Roundtable expressly defines the organization as developing and advocating "directly for policies to promote a thriving U.S. economy and expanded opportunity for all Americans."[339]

The domestic-oriented understanding of society permeates today's prominent legal scholarship.[340] The various strands of stakeholder accounts that have blossomed over the past century or so inevitably make assumptions about who counts as "the public" or "society."[341] Tacitly underlying this scholarly agnosticism is a subtle yet consequential assumption that society is territorially tethered to particular political communities—that is, U.S. corporations owe some duty to U.S. residents. Unfortunately, this assumption has subordinated stakeholders abroad who may bear the brunt of the impact of corporate decision-making that takes place within the United States.

The concept of transnational corporate law litigation suggests that as the subjects of those impacted by U.S. corporations are changing, so too should the outdated premises underlying orthodox viewpoints. Importantly, the communities in which corporations chartered by U.S. states—chiefly Delaware—operate have shifted dramatically over the

338. Press Release, Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy that Serves All Americans" (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/S78P-2HPM].

339. *About Us*, *supra* note 336.

340. This domestic orientation is not an entirely new phenomenon. Consider the classic writing of Professor Merrick Dodd during the 1930s—widely considered to be an essential intellectual building block to modern CSR theory and the ESG movement. To Dodd, corporations were run by professional managers seeking to serve not only shareholders but also the general public. *See* Dodd, *supra* note 332, at 1156 ("[T]hose who manage our business corporations should concern themselves with the interests of employees, consumers, and the general public, as well as of the stockholders."). The only way to defend capitalism, in Dodd's view, was "through leadership which accepts social responsibility and meets the sound needs of the great majority of our people." *Id.* at 1155–56 (internal quotation and citation omitted).

341. *See, e.g.*, Saijel Kishan, *Republican Attacks on ESG May Be Overlooking US Workers*, BLOOMBERG (Oct. 5, 2022), https://www.bloomberg.com/news/articles/2022-10-05/gop-attacks-on-esg-may-be-overlooking-us-workers-green-insight [https://perma.cc/BC94-2C87]; Marleen O'Connor, *Labor's Role in the American Corporate Governance Structure*, 22 COMPAR. LAB. L. & POL'Y J. 97, 97 (2000) (advocating for a greater voice for "American workers in corporate governance").

past century. Consequently, the societal interest in the rule of law is not necessarily bound to any given nation's territorial borders.

This understanding has immense implications for the ongoing debate concerning the contested purpose of modern corporations. If society can be conceptualized as broader than mere domestic constituents, the bourgeoning theories in corporate governance broadly built around a shared normative commitment to infusing societal interests into the purpose of modern corporations should accommodate a broader view of whose interests ought to count. Moreover, various CSR agendas and ESG movements ought to interrogate subtle geographic assumptions that often come at the cost of subordinating the interests of marginalized communities in foreign nations.

The framework also raises a host of important theoretical, doctrinal, and empirical questions ripe for future research. Should directors and officers be liable for violating the law of one jurisdiction when there are conflicting legal obligations across jurisdictions? What level of operations in foreign nations triggers the obligation of directors and officers to invest time and energy to comply with foreign law? Would alleged violation of international law—as opposed to foreign law—trigger similar corporate governance suits? Do Delaware courts have the administrative capacity and legitimacy to serve as a backup regulator for the world? Are there certain categories of legal violations more likely to be a fit for transnational corporate law litigation? And the list goes on. Like it or not, scholars, litigators, and judges should be prepared to address these issues head-on in the coming decades.

CONCLUSION

This Article presents a new doctrinal pathway to deter corporate lawbreaking outside of the United States by focusing on a source of law that has been underappreciated: corporate law. Like its domestic counterparts, transnational corporate law litigation relies on shareholders—and the pecuniary motive of plaintiffs' lawyers—to seek remedy against directors and officers of U.S. corporations in domestic courts. But these suits promise to do a lot more than help shareholders align their interests with those of the management for profit-maximization purposes. This Article relies on an increasingly important U.S. corporate law jurisprudence on legal compliance to provoke the judicial articulation of norms governing transnational business operations that can play a significant role in deterring

corporate misconduct rampant in foreign nations. To judges, litigators, and legal academics, transnational corporate law litigation ought to be recognized as a new frontier of U.S. corporate law with vast implications for understanding the social responsibility of modern corporations in an increasingly globalized economy.