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CONCEPT PAPER

On the Human Rights Responsibilities of Universities: Concept Paper for a Global Survey of University Engagement With Principles of Business and Human Rights

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Introduction.

In recent years, global public actors have begun to expand the focus of compliance with emerging standards of business and human rights to small and medium sized enterprises, even those with fairly small cross border footprints.¹ In the usual course of discussion about the application of human rights principles to the operations of business enterprises, universities are usually excluded from the conversation. Yet, as employers and significant actors in the marketplace, universities ought not be excluded from consideration as an economic actor of some significance to global markets for knowledge production, invention, the exploitation of technology and the exploitation of the productive capacity of its labor force--faculty, graduate students, research assistants, and staff.



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¹ See, e.g., European Commission Directorate for Enterprise and Industry, “Opportunity and Responsibility: How to Help More Small Business to Integrate Social and Environmental Issues Into What They Do” (2007), available http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/ree_report_en.pdf, and European Commission, “My Business and Human Rights: A Guide to Human Rights for Small and Medium Sized Enterprises (2012), available http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/human-rights-sme-guide-final_en.pdf.

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In recent years the European Commission has expressed the view that corporate social responsibility, including those responsibilities centered on the human rights impacts of business activity, ought not to add regulatory burdens but can be recognized as an opportunity for corporations and their stakeholder communities. This is particularly important for universities, which serve as the great training grounds for future leaders of public and private enterprises, develop useful models and theories of citizenship, and serve as role models for future generations. Yet little is known about the role that business and human rights, and CSR generally, plays in the operations of the modern, globally oriented, university. This study is meant to provide a first and important step to generate data on the engagement by universities of business and human rights. It is also meant to help universities think about their efforts towards responsible entrepreneurship by raising questions on the possible ways they could improve their business in a sensible manner compatible with their teaching, research and service mission. The questionnaire will also help universities identify further actions they might take to strengthen their operations, reputation and performance

Methodology.

We expect to develop the survey in a way that harmonies with prior survey efforts, particularly that of the E.U. Commission's "Awareness Raising Questionnaire on Corporate Social Responsibility for Small and Medium Size Business,"² and the University of West Virginia Business and Human Rights Survey of Small and Medium Sized Enterprises.³ We expect to have IRB approval as necessary. We will distribute the survey via internet but also provide hard copies on request and follow up via telephone, e-mail and personal visits. We will also use social media as useful to "get the word out".

² See, European Commission Directorate General for Enterprise and Industry "Awareness Raising Questionnaire on Corporate Social Responsibility for Small and Medium Size Business," available http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/campaign/documentation/download/questionnaire_en.pdf (the object of the questionnaire was both to generate useful data and to "This questionnaire will help you think about your company's efforts towards responsible entrepreneurship by raising questions on the possible ways you could improve your business in a profitable and sensible manner. The questionnaire will also help you identify further actions you can take to strengthen your business, its reputation and performance." Ibid., p. 2).

³ West Virginia University College of Law, B&HR 2013 Survey, available <http://law.wvu.edu/bhr2013/bhr-survey>.

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Clearly, we will not be able to initially sample all universities globally. We intend to derive our samples from a blended group derived from a cross section of several major global university ranking systems. These will include The Academic Rankings of World Universities produced by Shanghai Jiao Tong University; the QS World University Rankings (HQ in London); and the Times Higher Education University Rankings (U.K.). From these rankings we will divide our sample regionally (Latin America; Asia; North America, Europe and Africa), expecting to sample about 300 of the top ranked universities from each region from the last decade. We will also then consider the global implications of our sample regional data.

We expect to develop a survey of about 30 questions, all optional and all anonymous. The survey questions will seek distinct types of information grouped around (1) awareness issues and (2) structure and implementation issues. With the first the focus will be on determining the extent of knowledge of human rights international soft law instruments. With the second we will seek information about corporate structures for identifying and dealing with human rights issues, including human rights due diligence. Part of the anticipated difficulty of crafting survey questions will be one of communication. We have sensed that the term “human rights” has become politically charged. While it is important to further the objectives and knowledge of human rights, part of what we will be collecting data on is the potential divergence between “engaging” in human rights (what universities do) and conceptions of human rights (what universities think human rights actions are).

The Importance Of The Issue—The Example Of University New Style Eugenics Programs.

While a university’s responsibility to respect human rights is broad, it might be helpful to contextualize the nature of that responsibility by an example from the heart of the developed world. The example is meant to suggest the breadth of the issue and its importance not just in the developing world and traditional host states, but in developed states as well. The issue of the human rights responsibilities of universities has become acute recently at universities like the Pennsylvania State University, in the context of the conditions of employment related to its health and wellness programs. These programs have spotlighted an emerging issue in private governance centering on the embrace by economic actors on eugenics programs applied to their labor forces

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meant to significantly affect the lifestyle and personal choices of their employees as a condition of continues employment.⁴

While universities may be unaware, there are substantial international human rights dimensions of university eugenics programs used instrumentally to affect deeply personal life style choices of employees for the benefit of the employer and with the objective of increasing the operating margins of the university. It suggests that though legally permissible within the domestic legal orders of most states, these programs may tend to violate the social license of these institutions and may adversely impact the human rights of its employees under emerging principles of corporate social and human rights responsibilities. For many universities the breach of social license norms, and human rights expectations may start with a lack of consultation, and the willingness to bend these new eugenics programs to benefit the enterprise rather than the individuals for whose welfare these programs are ostensibly created.⁵ The issues are not confined to the university, but touch on an increasingly popular means of using the management of employee health and wellness as a technique of reducing the production costs of operating a business.⁶

As a matter of core principle, and consistent with emerging principles of international human rights norms, I continue to emphasize that, like any other institutional organ, an enterprise (like a university) must exercise substantial restraint and sensitivity when it seeks to manage or to appropriate to itself a power to manage or control the personal choices of individuals in ways that touch on the human dignity and personal autonomy of the individual. In many highly developed Western states, the protection of human dignity and personal autonomy is a matter of constitutional commitment. At its limit, of course, that protection serves as a rationale for the suppression of slavery and the incidents of slavery as a matter of law. But between slavery and complete personal freedom there is a large space within which the state, and the enterprises it permits to operate within its borders, permit some control of autonomy. That space, of course, is essential for the operation of a free society, and is usually grounded, in the area of human economic activity, on the

⁴ See, e.g., Larry Catá Backer, "The New Eugenics--The Private Sector, the University, and Corporate Health and Wellness Initiatives," *Monitoring University Governance*, July 16, 2013, available <http://lcbpsusenat.blogspot.com/2013/07/the-new-eugenics-private-sector-and.html>.

⁵ See Larry Catá Backer, Penn State's New "Wellness Program" in the News (UPDATED Through 8 August 2013," *Monitoring University Governance*, August 1, 2013, available <http://lcbpsusenat.blogspot.com/2013/08/penn-states-new-wellness-program-in-news.html>.

⁶ The New Eugenics, *supra*.

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boundaries within which enterprises may hire labor to meet its specific objectives.

However, the existence of this discretionary space is not meant to produce a place where autonomy and human dignity may be completely disregarded in the drive toward enterprise welfare maximization. To permit that freedom would be to allow slavery by other means--and the state of peonage, the closest model for that sort of society, has also been suppressed in most civilized states. As a consequence, enterprises ought to be sensitive to the detrimental effects of the instrumental use of their authority over their employees when they seek to that power to manage and control the human beings they employee. This responsibility to be sensitive to the detrimental effects of employer self interested actions ought to be especially strong where the mechanisms of control and management touch deeply on matters of human dignity and autonomy. That responsibility to respect the human rights of their employees may not be strictly required by law but is central to the social license of enterprises to claim a right to legitimate operation within the societies in which they operate. This notion reflects emerging consensus at the international level around the responsibilities of enterprises for the human rights effects of their activities. (e.g., *United Nations Guiding Principles on Business and Human Rights* (2011)) These are no less binding on universities where they act as economic actors.

Where enterprises rely principally on their raw power and expand their control of elements of production, especially human beings, for reasons other than to respect their human dignity and autonomy (for example for reasons of cost reduction or productivity gains, both quite respectable in their own right of course), the enterprise ought to bear a special duty to be sensitive to human dignity concerns in fashioning such programs. That duty increases as the human dignity and autonomy effects of these actions increase, including potential violations of privacy interests and the effects of the appropriate of the right to exploit employee information by employers. When the enterprise fails to exercise this sensitivity in its imposition of dignity and autonomy affecting projects, it may rely on its coercive power, supported perhaps the discretionary space permitted by law, to impose its will. But it will also act in ways inconsistent with the sort of respect for human dignity and autonomy at the core of our values. Individuals may conform because they must, but trust is lost and the willingness of individuals to cooperate may decrease.

Corporate eugenics programs sit at the very core of human dignity and personal autonomy. Corporate activity that affects these core issues touch on the sort of human rights effects at the center of human rights due diligence and the corporate responsibility to respect human rights. Absent substantial and comprehensively explained reasons, these merit

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substantial sensitivity and engagement before they are either formed or imposed. That an enterprise may impose its will in these matters in this country as a matter of law does not necessarily mean that it is the right thing to do, or that by complying with the law of the nation it has complied with its human rights responsibilities under international norms. This survey is meant to help uncover both the extent of awareness of this disjunction between the conscious scope of a university's sense of its human rights obligations and the realities of its implementation across the regions of the globe.

Survey Project Team:

Larry Catá Backer is the Executive Director of the Coalition for Peace & Ethics. He is the W. Richard and Mary Eshelman Faculty Scholar and Professor of Law & International Affairs at the Pennsylvania State University (B.A. Brandeis University; M.P.P. Harvard University Kennedy School of Government; J.D. Columbia University). He serves as Chair of the Faculty Senate of the Pennsylvania State University (2012-2013). He is the founder and director of the Coalition for Peace & Ethics, and has visited at the University of California, Hastings College of the Law (1998) and Tulane Law School (2007-2008). His research focuses on governance related issues of globalization and the constitutional theories of public and private governance, with a focus on institutional frameworks where public and private law systems converge. He is particularly interested in issues of corporate social responsibility, the relationship between state-based regulation and transnational systems of "soft" regulation, state participation in private markets and the emerging problems of polycentricity where multiple systems might be simultaneously applied to a single issue or event. He teaches courses in corporate law, transnational law, and International Organizations. Shorter essays on various aspects of globalization and governance appear on his essay site, "Law at the End of the Day," <http://lcbackerblog.blogspot.com>. His publications and other work are available on his personal website: <http://www.backerinlaw.com/Site/> or through the Social Science Research Network: <http://ssrn.com/author=259226>.

Keren Wang is the Assistant Director for The Coalition for Peace & Ethics and a doctoral fellow in Penn State University's Department of Communication Arts & Sciences. Keren holds a master's degree in International Affairs from Penn State University, and a B.A. in International Area Studies from Drexel University and Sophia University in Tokyo, Japan. As a researcher, Keren's interdisciplinary background has enabled him to employ pluralistic methods to the study of global problems, where he has engaged in a wide range of research projects involving constitutionalism, transnational governance, socio-economic rights, and social movements. Prior to joining the CPE, Keren worked at University of Pennsylvania's Wharton School of Business as the manager of the student support office, and as a research intern at the Global Security Institute, Philadelphia.

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Tomonori Teraoka, University of Tokyo, is a researcher and program associate for the project initiative committee at The Coalition for Peace & Ethics. He received Bachelor of Law (L.L.B) in 2010 from Tohoku University, Japan and Master of International Affairs (M.I.A) in 2013 from the Pennsylvania State University, U.S.A. where he focused upon transnational governance and nuclear arms control. Starting this fall, he will enroll in the Department of Interdisciplinary Cultural Studies (Culture and Representation Research) at the University of Tokyo and join the Graduate Program on Global Society (GSP). His research focus at the University of Tokyo will be on political, social, and economical cultures and discursive practices in East Asia under globalization.

Arianna F. Backer is a researcher and program associate for the project initiative committee at The Coalition for Peace & Ethics. She received a Masters in Public and International Affairs degree from the University of Pittsburgh's Graduate School of Public and International Affairs' (GSPIA). With the international political economy major and advanced certificates in International Development & Asian Affairs and Japanese studies, Arianna has focused her secondary educational career on East Asia—and Japan specifically. Her skill and understanding have not only been developed through rigorous academic effort, but also through ample study abroad experience in Japan at Sophia University in Tokyo and the Kobe University Graduate School for International Cooperation Studies in Kobe. Working with the United States Embassy in Tokyo under the United States Department of State and also with the Japan America Society of Pennsylvania have helped develop Arianna's interests in foreign diplomacy and cooperation. Other research interests include the development of corporate social responsibility in East Asia, the international political economy of Japan in relation to a growing China, and international diplomacy and trade as it relates to the Asia-Pacific.

Nabih Haddad is a doctoral candidate at the Michigan State University School of Education and a research and program associate for the project initiative committee at the Coalition for Peace & Ethics. Nabih is a Michigan native and earned his B.A. in Political Science, with a minor in Psychology, from Wayne State University. He has his master's in International Affairs from The Pennsylvania State University. While at Penn State, has done extensive research with Professor Backer focusing on human rights, international law and public policy, as well as being an associate editor for the Penn State Journal of Law & International Affairs (JLIA). Prior to joining CPE, Nabih was a visiting research associate at the National Forum on Higher Education for the Public Good at the University of Michigan- Ann Arbor.

Jasmine Siyu Zai is a post doctoral fellow at the Institute of Law of Chinese Academy of Social Sciences (CASS). Her research focuses on civil and commercial law of both China and the US, especially in the circumstances of cross-border transactions. Jasmine received her J.D. from Penn State Law in May 2011, where she was a Dean's Scholarship recipient, a law review associate editor, a moot court member, and a research assistant to Professor Larry Catá Backer. Before joining CASS, she was working in a New York law firm, practicing law in the areas of corporate law and cross-border business litigation.