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EASING “[T]HE BURDEN OF THE BRUTALIZED”:
APPLYING BYSTANDER INTERVENTION
TRAINING TO CORPORATE CONDUCT

Jena Martin⁺

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⁺ Professor of Law, West Virginia University. Debts of gratitude are owed to the following friends: Valarie Blake, Amber Brugnoli, Amy Cyphert, Atiba Ellis, Joshua Fershee, Tara Van Ho, and Elaine Wilson. Special thanks go to Kelly Behre for providing me with the initial insights on campus-based bystander intervention training programs and encouraging me to explore the concept in my work regarding the TNC as bystander. Additional thanks go to Kendis Paris (Executive Director) and Laura Cyrus (Operations Director) of Truckers against Trafficking for their willingness to discuss the TAT model with me. Final thanks go to Kristen Pennington for her assistance with research and citation development. This Article was funded, in part, by a Hodges Fund Faculty Research Grant.

I. INTRODUCTION

“*[T]he burden of the brutalized is not to comfort the bystander.*”
—Jesse Williams¹

On June 26, 2016, Jesse Williams received the Humanitarian Award during the Black Entertainment Television (BET) awards show.² In his acceptance speech, Williams provided an insightful and at times scolding analysis of the many players who are involved in a system of injustice—including the oppressors and the victims.³ Williams’s speech also evoked a lesser discussed, but equally important player in the discussion of oppression and social justice: that of the bystander. Too often, in conversations on conflicts generally, and negative human rights impacts specifically, bystanders have been relegated within the rhetoric—just as they are, by definition, relegated in the action itself—to the sidelines, as witnesses with no defined, specific role to play.

The last few years, however, have borne witness to a shift in many advocacy circles regarding how to address issues of oppression and social injustice. Across many different advocacy points—from police brutality to sexual violence—there seems to be a consensus that simply engaging the oppressor or the victim is not enough to effect real social change. The consensus itself is not new: it has been at the heart of many social justice movements over the years.⁴ However, what *is* new is the explicit evocation of the bystander within this framework. As the Williams quote above demonstrates, there appears to be a shifting strategy, one that involves calling on and calling out bystanders by name, to effect social change. In short, calling bystanders to action. The call recognizes that, while bystanders may have no legal duty to act, their intervention in the conflicts that they are witnessing can nevertheless turn the tide in the struggle between the oppressor and the oppressed. As such, there is a growing focus on training bystanders to remain alert to potential conflicts that they see and, in appropriate circumstances, to act in a way that de-escalates the conflict or ideally, causes it to stop entirely.

But what happens when the bystander is a corporation?

In previous articles, I have stated that the rhetoric and posture that transnational corporations (TNCs) maintain vis-à-vis human rights impacts is

1. See Megan Lashner, *Read the Full Transcript of Jesse Williams’ Powerful Speech on Race at the BET Awards*, TIME (June 27, 2016), <http://time.com/4383516/jesse-williams-bet-speech-transcript/>. Williams received the BET Humanitarian Award for his work on issues of systemic injustice within African American communities, including the documentary, *Stay Woke: The Black Lives Matter Movement*. *Id.*

2. *Id.*

3. *Id.*

4. Witness for instance, the strategies at the heart of the civil rights movement: encouraging a steady increase in the involvement of the wider community (which was neither directly involved in the attacks nor the recipients of the oppression).

that of a bystander.⁵ Frequently, when human rights abuses occur, TNCs find themselves in the position of having to acknowledge their presence in the area of the underlying conflict, while profusely maintaining that none of their actions caused the harm against the community.⁶ Further, many instruments in the business and human rights landscape—of which the Protect, Respect and Remedy (Ruggie Framework or Three Pillar Framework) and the UN Guiding Principles (UNGPs or Principles) are key authorities⁷—are beginning to find important implications and potential responsibilities for corporations even when those responsibilities arise only from the corporations’ relationship with the actors involved.⁸ More recently, this increased focus on corporate societal responsibilities has been taken up by shareholders themselves. Witness for instance, Larry Fink’s January 16, 2018 letter to corporate CEOs.⁹ In that letter, Mr. Fink, the founder and chairman of BlackRock, one of the largest institutional investment firms in the world, stated:

[T]he public expectations of your company have never been greater. Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive

5. See, e.g., Jena Martin Amerson, “*The End of the Beginning?*”: *A Comprehensive Look at the U.N.’s Business and Human Rights Agenda from a Bystander Perspective*, 17 *FORDHAM J. OF CORP. & FIN. L.* 871, 875 (2012) [hereinafter Martin, *UN BHR*] (applying the bystander narrative to the UN’s work on business and human rights); Jena Martin Amerson, *What’s in a Name? Transnational Corporations as Bystander Under International Law*, 85 *ST. JOHN’S L. REV.* 1, 2 (2011) [hereinafter Martin, *TNC*] (developing the framework for TNCs as bystanders).

6. Martin, *TNC*, *supra* note 5, at 5.

7. The UN Guiding Principles were developed in 2011 and unanimously endorsed by the UN Human Rights Council. Martin, *UN BHR*, *supra* note 5, at 873. The Principles were the culmination of the work of John Ruggie, then the U.N.’s Special Representative on business and human rights issues. *Id.* at 873–74. Ruggie’s work also included the development of a framework resting on three pillars: the State’s duty to protect individuals from business and human rights related abuses, businesses’ responsibility to respect an individual’s human rights, and the obligation of both to remedy any business related human rights abuses. See generally *id.* at 911 (providing a comprehensive overview of the history of the Three Pillar Framework and the Guiding Principles); see John Ruggie (Special Representative of the Secretary-General), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter Ruggie, *Framework*] (Three Pillar Framework); see also *Guiding Principles on Business and Human Rights*, U.N. HUM. RTS. (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [hereinafter *Guiding Principles*] (UN Guiding Principles).

8. Martin, *UN BHR*, *supra* note 5, at 929–930.

9. Larry Fink, *Larry Fink’s Annual Letter to CEOs: A Sense of Purpose*, BLACKROCK, <https://www.blackrock.com/corporate/en-no/investor-relations/larry-fink-ceo-letter> (last visited Oct. 5, 2018). Blackrock is one of the largest institutional investors in the world, managing more than \$6 trillion in assets. Andrew Ross Sorkin, *BlackRock’s Message: Contribute to Society or Risk Losing our Support*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html>. As the New York Times notes, this makes BlackRock, “one of the most influential investors in the world.” *Id.*

contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate.¹⁰

In many ways, Mr. Fink's letter takes up the cry issued by Mr. Williams in his speech, implicitly recognizing that there is an important role for bystanders to play.

The collision of these seemingly disparate trends—the discussion of increased activism for bystanders in other contexts, and the emphasis of the importance of relationships for corporations in witnessing negative human rights impacts, makes the following question ripe for analysis: are there lessons that can be learned from bystander intervention training in other contexts, that can be used by TNCs within the field of business and human rights? Specifically, is there a training methodology that can be adapted to the business and human rights field that would provide an appropriate program for allowing TNCs to intervene in negative human rights impacts in a way that alleviates “the burden of the brutalized?” This Article seeks to answer these questions. Specifically, by examining the use of bystander intervention in other contexts, I conclude that what is lacking in the current discourse on corporate policies regarding addressing negative human rights impacts is an articulation regarding when, and under what circumstances, it is appropriate for corporations to intervene in negative human rights disputes. This goes beyond the current proposals for human rights due diligence frameworks in that, rather than merely undergoing an assessment and then reporting this information out, as is required by most current legal frameworks that address business and human rights reporting, this would help corporations—informed by a bystander intervention framework—to engage with either the oppressor or the oppressed in a way that directly minimizes human rights abuses.

Part II of this Article will examine how bystander intervention training has been used in other areas. In particular, this Part will examine what, if any, impact bystander intervention training has in reducing sexual violence on college campuses and reducing the occurrence of human trafficking in the United States. This section will also examine whether these training programs impact the behaviors, attitudes, or prejudices that affect the bystander themselves.

Part III will turn to the business and human rights field. It is in this Part that I discuss the idea of the TNC as a bystander. Largely drawing on other writing I have done in this area, this Part will explain why the use of bystander rhetoric is effective in the business and human rights (BHR) field. Part IV will provide an initial survey of trainings that have already been developed within the BHR context and provide a preliminary analysis on how they fall short.

Part V will then return to bystander intervention training. Specifically, Part V will examine what, if any, lessons that were gleaned from other disciplines can be applied to the business and human rights field. This Part will examine

10. Fink, *supra* note 9.

whether TNCs can adapt the training and methodologies used in other disciplines to either improve the trainings that they currently have in place, or develop new, more effective trainings.¹¹

By using a bystander lens for examining the engagement of TNCs to human rights abuses, this Article will provide an initial step to a more nuanced view regarding how TNCs can engage with communities in a way that will alleviate the burden of the brutalized.

II. BYSTANDER INTERVENTION TRAINING IN OTHER DISCIPLINES

“Bystander intervention strategies are emerging as a popular proposed solution to complex social problems like bullying in schools and online, sexual misconduct on college campuses, and harassment in the workplace.”

—Sarah L. Swan¹²

There was a time when, in relation to sexual assault, the standard methodology for prevention was to focus on the behavior of two major parties involved: the attacker or the victim. In the first scenario, campaigns were launched stating “no means no”—presuming that the underlying cause of most cases of sexual assault was a misunderstanding on the part of the attacker regarding the meaning of consent.¹³ For an even longer period of time, there has been a tendency to blame the victim, either explicitly or implicitly, and focus on measures to eradicate sexual violence on preventive techniques that involve changing the victim’s behaviors.¹⁴ However, if the measure of success is determined by the

11. Without the availability of empirical data on BHR trainings, the idea of what is effective will naturally be a subjective one. Nonetheless, this section will provide some preliminary observations on what an effective training should be and how the current training programs compare.

12. Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975, 975 (2015). Swan’s analysis of bystander interventions tracks beyond simply sexual assault campaigns to intervening in other situations of negative human rights impacts. However, as Swan notes:

Ironically, at the same time as law is starting to require the implementation of bystander intervention initiatives, law also functions as an impediment to successful bystander intervention. First, while bystander intervention programs try to create a norm of intervention, most legal norms support non-intervention, giving rise to a ‘competing norms’ problem most commonly resolved with inaction. Second, a lack of legal accountability for the surrounding institutions and organizations indirectly discourages bystander intervention. Finally, a perceived risk of liability associated with intervention immobilizes many bystanders. Unless these legal impediments are minimized, bystander intervention is unlikely to be a successful solution to social problems.

Id.

13. Suzanne L. Osman, *Predicting Men’s Rape Perceptions Based on the Belief That “No” Really Means “Yes”*, 33 J. OF APPLIED SOC. PSYCHOL. 683, 683 (2003).

14. See generally Jessica Wolfendale, *Provocative Dress and Sexual Responsibility*, 17 GEO. J. GENDER & L. 599 (2016) (discussing the underlying constructs for many sexual violence

decrease of overall sexual violence on campus, then neither strategy has been effective. As one writer notes: “Rates of sexual violence on college campuses have remained steady since the 1980s. Today, many activists and experts in the prevention field think ‘No means no’ lectures are a waste of time and energy.”¹⁵

As a result, in more recent years, a new trend has emerged—one that recognizes that even in instances where sexual assaults occur in acquaintance or dating situations—oftentimes the person committing the attack is in fact a predator who, as such, will probably not benefit from direct pleas or rhetoric.¹⁶ Nor will incidents be reduced by telling potential victims not to put themselves in dangerous situations.¹⁷ As such, the focus has shifted to another often overlooked party to the conflict: that of the bystander.

narratives involves blaming the victim either explicitly or implicitly through the use of the word “provocative dress”). Even with bystander training, this trend continues today.

15. Tyler Kingkade, *This is Why Every College is Talking About Bystander Intervention*, HUFFPOST (Feb. 8, 2016, 3:06 PM), http://www.huffingtonpost.com/entry/colleges-bystander-intervention_us_56abc134e4b0010e80ea021d [hereinafter Kingkade, *Bystander Intervention*]. In fact, bystander intervention training programs were developed, in part, in response to the indication that the number of sexual assaults on campus had been steadily holding at 21% since the 1980s. *Id.*; Tyler Kingkade, *There’s No More Denying Campus Rape is a Problem. This Study Proves It.*, HUFFPOST (Jan. 20, 2016, 10:08 AM), http://www.huffingtonpost.com/entry/college-sexual-assault-study_us_569e928be4b0cd99679b9ada [hereinafter Kingkade, *Campus Rape is a Problem*]. The numbers are alarming: “As many as one in four women experience sexual assault at college, though the vast majority never report it, according to a study of students at nine schools released Wednesday by the Bureau of Justice Statistics.” Kingkade, *Campus Rape is a Problem*, *supra* note 15.

16. The idea that “no means no” came about as a result of people recognizing that most sexual assault occurred between people who knew each other ahead of time. *See Perpetrators of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/perpetrators-sexual-violence> (last visited Oct. 5, 2018) (noting that in 7 out of 10 cases of rape the victim knows the perpetrator). The underlying assumption therefore in many situations was that the assault was the result of a miscommunication. Osman, *supra* note 13, at 683. Now, however, research shows that many of the perpetrators in sexual assaults are engaging in deliberate, predatory behavior—necessitating bystander interventions as the more effective strategy. *See, e.g.*, David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 80 (2002) (stating that “a majority of undetected rapists in this sample were repeat offenders”). In the United Kingdom, the two narratives—that of the perpetrator and the bystander—collide in a graphic commercial that was launched in 2012. *See* David Howard, *New Ad Targets Rape and Sex Abuse in Teen Relationships*, BBC UK (Mar. 5, 2012), <http://www.bbc.co.uk/newsbeat/article/17230648/new-ad-targets-rape-and-sex-abuse-in-teen-relationships>. The advertisement, entitled “if you could see yourself” depicts the beginnings of an encounter that then turns violent before finally showing the perpetrator standing outside a one-way window banging at it, telling himself to stop. *Id.*; *see If You Could See Yourself*, YOUTUBE (March 1, 2012), https://www.youtube.com/watch?v=YPC-Q2NMwJw&oref=https%3A%2F%2Fwww.youtube.com%2Fwatch%3Fv%3DYPC-Q2NMwJw&has_verified=1 (full ad video).

17. There are other normative reasons (outside the scope of this Article) that many scholars have discussed for not focusing on potential victims’ behavior as a way of lowering the number of sexual assaults. Chief among them is how this will frequently give rise to victim blaming. Amy

Bystander intervention training first emerged in the mid-1990s as a way to engage the wider community in issues of sexual violence.¹⁸ However, even while these programs were being developed, the victim or oppressor paradigm remained dominant across college campuses. As such, while bystander intervention trainings were being developed during those decades, they were relegated to the sideline and generally not a part of the popular discourse.¹⁹ The concept of bystander intervention became much more widely accepted in 2014 when a White House Task Force released a report discussing the merits of bystander intervention to reduce the number of sexual assaults on college campuses.²⁰ Since then, the idea of using bystanders as a tool to raise awareness and reduce sexual assault has taken hold in the mainstream narrative.²¹ As a result, there have been training programs fashioned to engage with college campuses and other communities.

A. The Mechanics of Bystander Intervention Training: A Spotlight on Green Dot

So, what is bystander intervention training?

Grubb & Emily Turner, *Contribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity and Substance Use on Victim Blaming*, 17 *AGGRESSION & VIOLENT BEHAV.* 443, 448–50 (2012).

18. Ann L. Coker et al., *Evaluation of Green Dot: An Active Bystander Intervention to Reduce Sexual Violence on College Campuses*, 17 *VIOLENCE AGAINST WOMEN* 777, 778–79 (2011) [hereinafter Coker, *Evaluation 2011*]. As another scholar notes, although bystander training has been, to some degree, a part of preventative education programs for over twenty years, it “is not part of the lexicon of the core training of advocates in many DV and SA organizations.” Barbara Hart, *DV and the Law*, 17 No. 8 *QUINLAN, NAT’L BULL. ON DOMESTIC VIOLENCE PREVENTION* art. 6, Aug. 2011.

19. Kingkade, *Bystander Intervention*, *supra* note 15. Kingkade writes:

For decades, two messages were used to stop campus rape. For women, that meant being warned to carry mace and travel in groups to avoid being assaulted. Men were told what the law was so they wouldn’t get in trouble. In short, you were either a potential victim or a perpetrator, and it didn’t work.

Id.

20. Nancy Cohen, *Training Men and Women On Campus To ‘Speak Up’ To Prevent Rape*, NPR (Apr. 30, 2014, 3:31 AM), <http://www.npr.org/2014/04/30/308058438/training-men-and-women-on-campus-to-speak-up-to-prevent-rape>; Tanya Somanader, *President Obama Launches the “It’s on Us” Campaign to End Sexual Assault on Campus*, WHITE HOUSE PRESIDENT BARACK OBAMA (Sep. 19, 2014, 2:40 PM), <https://obamawhitehouse.archives.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus>.

21. See, e.g., Matt Kieityka, *UBC Grad Students Training ‘Active Bystanders’ to Stand Up to Sexual Assault and Harassment*, VANCOUVER METRO (July 6, 2016) <http://www.metronews.ca/news/vancouver/2016/07/06/ubc-grads-train-active-bystanders-against-sexual-assault.html>; Kingkade, *Bystander Intervention*, *supra* note 15 (discussing the rise of bystander intervention trainings).

At their core, “[b]ystander prevention programs share a common philosophy that all members of a community have a role in shifting social norms to prevent violence.”²² As such, bystander training engages individuals within the larger community to intervene in potentially harmful situations, and either prevent the harm from occurring or minimize the damage if it has occurred already.²³

Not everyone thinks bystander interventions are effective.²⁴ For some, intervening in an underlying dispute, while noble, could in some instances lead to an escalation rather than a de-escalation or mitigation of the harm.²⁵ For instance, in a recent study of bystander interventions and their effect on the bystander, researchers found that there were negative consequences in almost 20% of the interventions.²⁶ Recognizing that it is not enough to intervene but it is important to also have a successful intervention, organizations have developed and implemented training to teach individuals how to be successful active bystanders—enabling them to intervene in an underlying harm effectively.

One of the most well-known bystander intervention programs is the Green Dot intervention program (Green Dot), developed by researchers at the University of Kentucky.²⁷ The program, which focuses on sexual assault prevention on college campuses, has been lauded as one of the “most widely-used sexual assault prevention programs.”²⁸ At its core, Green Dot “seeks to train individuals as potential bystanders to identify effectively and safely

22. Coker, *Evaluation 2011*, *supra* note 18, at 779.

23. *Id.*

24. See Lauren Chief Elk & Shaadi Devereaux, *The Failure of Bystander Intervention*, NEW INQUIRY (Dec. 23, 2014), <http://thenewinquiry.com/essays/failure-of-bystander-intervention/> (arguing bystander intervention is no more than “an evolved form of victim blaming” because of the prevalent culture of normalized violence in today’s society). However, others refute this notion. For instance, Jesse Singal, writing for the New York Times Magazine, notes that the paradigm presented by Elk and Devereaux is a false dichotomy. Jesse Singal, *The Wrong Way to Look at Rape and Bystander Intervention*, CUT (Dec. 14, 2014), <https://www.thecut.com/2014/12/wrong-way-rape-and-bystander-intervention.html>. According to Singal, an individual can both fight the larger question of normalized violence while still intervening one body at a time. *Id.* I also think that Chief and Devereaux’s rhetoric ignores the change in systemic thinking that can occur on a fundamental level when one engages in such interventionist approaches. In that regard, bystander training is effective not just in preventing violence or harm but also in shifting societal norms. See *infra* Section IV (discussing how this might impact the business and human rights field).

25. See, e.g., Alison Krauss et al., *Adverse Consequences to Assisting Victims of Campus Violence: Initial Investigations Among College Students*, J. OF INTERPERSONAL VIOLENCE 1, 3 (2017) (“Unfortunately, these recommendations [for bystander intervention] have been made with almost a complete absence of scientific research exploring possible adverse consequences of bystander behavior, particularly among college students. Many examples exist in the media documenting how witnesses who have intervened to prevent violence become physically hurt or otherwise in trouble.”).

26. *Id.* at 2.

27. Coker, *Evaluation 2011*, *supra* note 18, at 780.

28. Kingkade, *Bystander Intervention*, *supra* note 15.

potentially violent situations and effectively intervene to prevent violence.”²⁹ Green Dot is based on the premise that:

Each significant stride in human rights has been fueled by and built upon a social movement, consisting of enough individuals simply raising their voices saying, “This is no longer acceptable. Today is the day we reclaim our fundamental right to something better.” One Green Dot at a time, this is our moment in history to reclaim our right to live free of violence and fear of violence.³⁰

The Green Dot³¹ program, as designed, involves several steps to raise bystander awareness on college campuses and is geared specifically to reduce sexual violence.³² First, interested individuals participate in an initial four-day training program, designed to teach instructors who will then return to their home institutions and implement the trainings for their constituents.³³ During the training, instructors are trained on the Green Dot curriculum—which allows them to, in turn, instruct students—and on the four key characteristics that highlight the role of an effective bystander.³⁴ The four characteristics are: (1) Relationships; (2) Connection; (3) Knowledge; and (4) Skills.³⁵ For relationships, developing and maintaining authentic relationships within the training—in essence “show[ing] up fully”³⁶—allows participants to engage with the larger message of the training program. For connection, Green Dot notes “[r]esearch suggests that people are most likely to engage in this issue if they feel a personal level of connection and responsibility. Therefore, in order to

29. Patricia Cook-Craig et al., *Challenge and Opportunity in Evaluating a Diffusion-Based Active Bystanding Prevention Program: Green Dot in High Schools*, 20 VIOLENCE AGAINST WOMEN 1179, 1181 (2014).

30. *2018-2020 Green Dot Facilitator Memorandum of Understanding*, LIVE THE GREEN DOT 1, 2, <http://greendot.tamu.edu/wp-content/uploads/2018/05/2018-2020-Green-Dot-MOU-final.docx> (last visited Oct. 8, 2018).

31. The notion behind the Green Dot nomenclature rests on the assumption that there are a thousand moments (what the developers call “red dots”) that occur in an individual’s time where they are witness to a negative impact or violence but fail to intervene. *Ending Violence . . . One Green Dot at a Time*, IDAHO COALITION AGAINST SEXUAL & DOMESTIC VIOLENCE, 3–4 (2012), https://idvsa.org/wp-content/uploads/2013/01/Teacher-Workshop_Green-Dot.pdf. As a result, in the words of one instructor, “The solution must be a reflection of the problem.” *Id.* at 11. As such, the program teaches instructors (and by extension members of the community) how to make small interventions that prevent the escalation of violence and also increase awareness within the community. *Id.*

32. Ann L. Coker et al., *Evaluation on the Green Dot Bystander Intervention to Reduce Interpersonal Violence Among College Students Across Three Campuses*, 21 VIOLENCE AGAINST WOMEN 1507, 1510–11 (2015) [hereinafter Coker, *Evaluation 2015*].

33. *Green DOT Institute for College*, ALTERISTIC (2018), <http://alteristic.org/wp-content/uploads/2018/05/college-gdi-springfield-july-2018-official.pdf>.

34. *2018-2020 Green Dot Facilitator Memorandum of Understanding*, *supra* note 30, at 2.

35. *Id.*

36. *Id.*

most effectively implement a prevention program, instructors need to be acutely aware of the stakes and urgency of this issue.³⁷

The knowledge component offers an interdisciplinary approach to the issue, allowing instructors to be “trained on the current research across relevant fields of study”³⁸ as well as encouraging those with a particular expertise to enhance the program by applying the knowledge from their disciplines to the training that they then implement across campus.³⁹ Finally, Green Dot trains instructors on developing communication skills, allowing them to effectively communicate the program to an ever-widening circle of participants.⁴⁰ All of these characteristics come together to provide what the training calls a “Model of Influence,” allowing bystanders to leverage those characteristics later in a potential crisis situation.⁴¹

Once instructors have completed the four-day training, implementation occurs across campus through a number of different delivery methods, including an initial speech open to all members of the community and a follow-up, more intensive training (taught by the instructors trained in the first stage) that is open to students, faculty, and staff.⁴² The purpose of the program is to “engage [the community], through awareness, education, and skills-practice, in proactive behaviors that establish intolerance of violence as the norm, as well as reactive interventions in high-risk situations—resulting in the ultimate reduction of violence.”⁴³ With these tools, researchers hope that the training becomes “diffused through [the] trainees’ peer networks to *change norms* supporting violence and its acceptance, *identify risking situations*, and *increase bystander behaviors* to interrupt or prevent violence.”⁴⁴

B. *Bystander Intervention in Human Trafficking Cases: Spotlight on Truckers Against Trafficking*

One variation on the bystander model is found on the highways of the United States. The organization, Truckers Against Trafficking (TAT), which was founded in 2009, provides training to workers in the trucking industry to enable them to recognize human trafficking and report it as necessary.⁴⁵ Kendis Paris, the Executive Director for TAT, believes that the program is so effective in part

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 2–3.

41. *Id.*

42. *Id.* at 3.

43. *Id.* at 1.

44. Cook-Craig et al., *supra* note 29, at 1185 fig. I.

45. *Who We Are, TRUCKERS AGAINST TRAFFICKING*, <http://truckersagainstrafficking.org/who-we-are/> (last visited Oct. 8, 2018) [hereinafter TAT *Who We Are* Video].

because of its use of truckers (ubiquitous bystanders in many trafficking situations) to intervene.⁴⁶ As Paris notes:

Truckers Against Trafficking is a grassroots organization. It comes alongside the trucking industry recognizing that they are the eyes and ears of our nation’s highways. They’re in places that most people aren’t and that they can recognize potential victims of human trafficking more than the rest of us. And so we equip them with tools so that they can recognize, identify, potential human trafficking victims and then a number to call the national hotline number . . . so that when they see human trafficking situations they can report those and hopefully get the victims recovered and perpetrators arrested.⁴⁷

Although geared to the trucking industry, Paris believes that this paradigm could extend far beyond.⁴⁸ For Paris, that would mean expanding the training to taxi drivers, bus drivers, gas station attendants, and oil and gas workers where boomtown effects happen.⁴⁹ Unlike many other bystander intervention models, TAT’s basic training is available to the public.⁵⁰ Any interested persons may watch the video, take the quiz, and if they pass, earn a certification from TAT.⁵¹ In addition, the model for intervention requires relatively little training compared to other bystander intervention programs. Under the TAT model, bystanders are encouraged to look for certain signs that sex trafficking⁵² is occurring and then report⁵³ their suspicions to the trafficking hotline.⁵⁴ As Special Agent Evan Nichols of the FBI states, there are specific red flags that demonstrate an increased likelihood of trafficking:

So where your truckers can help out, at their rest stops. They know who’s coming in. When you see a car pulling in or a Navigator pulling in, well why is a Navigator pulling in with ten girls in it and one guy

46. *Truckers Against Trafficking Training Video*, TRUCKERS AGAINST TRAFFICKING, <http://truckersagainstrafficking.org> (last visited Oct. 8, 2018) [hereinafter TAT Training Video].

47. *Id.*

48. *Id.* Paris states, “What if we could train all of these armies across the United States to identify and recognize human trafficking and report it immediately when they see it? Where are the traffickers? What place are they gonna [sic] have to go?” *Id.*

49. *Id.*

50. *See id.*

51. *Online Training Portal*, TRUCKERS AGAINST TRAFFICKING, <https://education.truckersagainstrafficking.org/lesson/the-tat-training-video/> (last visited Sept. 9, 2018).

52. The TAT model focuses on sex trafficking. TAT *Who We Are* Video, *supra* note 45. As such, it only deals with a small subset of the trafficking population. David Feingold, *Think Again: Human Trafficking*, FOREIGN POLICY (Oct. 20 2009), <https://foreignpolicy.com/2009/10/20/think-again-human-trafficking/>.

53. *See supra* Part II, Section A (analyzing the consequences of intervening in various situations).

54. TAT Training Video, *supra* note 46.

behind the wheel and all of the sudden you've got a bunch of young girls walking out in revealing or lingerie clothing?⁵⁵

Kendis Paris continues and discusses more red flags:

So if you're in a parked location and you happen to see lights that are flashing, perhaps signaling that somebody is saying, "I'm an available buyer." That should be a red flag, if you happen to hear CB chatter about commercial company or somebody needing to make a quota or somebody referencing their daddy or that boyfriend figure in their life. Or if you're that local driver who is loading at a business front and you happen to see that unaccompanied minor or that minor who looks fearful or potentially is under the control of somebody else. What about branding? Do you see tattoos? That is potentially claiming ownership over this person.⁵⁶ This is a potential sign that you are interacting with a human trafficking victim.⁵⁷

In this sense, TAT's model is significantly different from models such as Green Dot, in that the primary intervention that the bystanders in TAT are requested to make is reporting the behavior. As such, while the truckers are engaging, they are not directly intervening in the underlying criminal activity. In that sense, the model is more akin to homeland security campaigns that developed in the wake of the 9-11 attacks, exhorting individuals by stating, "If You See Something, Say Something."⁵⁸ One possible reason for that could lie in the nature of the perpetrator. Both terrorist and sexual crime organizations are often organized and well-structured; as such, intervening in such a situation can lead to many unintended consequences. However, in campus sexual assault situations, it is often just one predator who is looking for one specific victim in that moment and thus intervention would be less likely to lead to other consequences.

55. *Id.* Nichols also states:

The trucking industry is in a unique position because they actually will be in the locations that pimps will bring in their victim to be prostituted out. Pimps are very transient; they move around a lot. So do your girls; your victims are being moved constantly whether it's through planes or cars that they'll just drive or bus tickets or through trucks. Any way that they can get to their money, that's how they get there.

Id. This brings up an interesting issue. One of the reasons why TAT is so effective is because often times many of the victims will be there; they will be at the truck stops because there is a market there. So, while some truckers are acting as bystanders, others are engaging in the tools of oppression. As such, the use of the TAT model implicitly echoes the goal of Green Dot: that part of the underlying teaching point of the training is to not only make true bystanders aware but also to raise awareness for those who may have engaged or thought of engaging in that behavior; it is a non-confrontational way of having potential complicit actors (or oppressors) confront their behavior.

56. This narration was done over an image of a bar code tattoo.

57. *Id.*

58. *If You See Something, Say Something*, DEP'T OF HOMELAND SEC., <https://www.dhs.gov/see-something-say-something> (last visited Aug. 27, 2018).

For instance, under the Green Dot model, initial trainers are required to attend a four-day training.⁵⁹ In contrast, the TAT model merely requires the viewing of a 26-minute training video and successful completion of a test before a viewer will be a certified “trucker against trafficking.”⁶⁰ There are advantages and disadvantages to each approach. On one hand, the TAT model facilitates widespread dissemination of the information and generally increases the awareness of the underlying issue with the general public. The minimal time commitment allows bystanders to become quickly engaged in the underlying narrative and the low level of intervention (in that they must merely report suspicious behavior to the hotline) is generally less risky for a bystander. On the other hand, Green Dot’s more in-depth training will almost certainly lead to more knowledgeable and effective interventions, one that seems appropriate given the types of interventions that are often needed in potential sexual violence situations—namely immediate and direct interventions with either the perpetrator or the victim.⁶¹

C. Impacts of Bystander Training

Programs such as Green Dot could be considered a success if they accomplished three goals. First, if they raise awareness among individuals to see potential negative situations in the community at large, or perhaps even as contributing individuals. Second, and more importantly for researchers, if they change the behavior of the bystanders, leading them to intervene.⁶² Third, if they change the behavior and norms of the community, shifting the overall culture at large, leading to a decrease in the incidents of violence. As the Green Dot researchers note: “While it is encouraging that bystander interventions may impact individuals’ attitudes and bystander behaviors, these findings will have little meaning if the bystander interventions fail to impact violence rates.”⁶³

There has been some initial research into the effectiveness of bystander intervention training programs generally, and the Green Dot training program

59. *A Sign of the Times*, YWCA CENTRAL MAINE (Apr. 2017), <https://ywcamaine.org/wp-content/uploads/2017/04/April-2017-newsletter.pdf>.

60. *Industry Training Program*, TRUCKERS AGAINST TRAFFICKING, <http://truckersagainsttrafficking.org/industry-training-program/> (last visited Aug. 31, 2018).

61. Each of these interventions has its place in a corporate bystander intervention program. *See generally* Section IV.

62. Other reasons why bystanders remain passive include: “fear of losing friendships, fear of loss of privacy, fear of ‘bad consequences,’ fear of getting too involved. Bystanders may believe that nothing good will happen if they speak up. They may fear retaliation or be concerned about embarrassing their work-group, or a colleague, or their superior.” Maureen Scully & Mary Rowe, *Bystander Training within Organizations*, 2 J. OF THE INT’L OMBUDSMAN ASS’N 1, 3 (2009). Many of these can also apply to the TNC as a bystander. Martin, *TNC*, *supra* note 5, at 10–13 (discussing more fully the TNC as a bystander and the application of social science research to this concept).

63. Coker, *Evaluation 2015*, *supra* note 32, at 1510.

specifically.⁶⁴ The results are encouraging. Several studies of bystander intervention show that the programs result in “increased knowledge about violence and feelings of self-efficacy at taking action to prevent violence after attending” intervention programs.⁶⁵ According to Dr. Barbara Hart, a scholar in the field:

Preliminary research suggests that people are more likely to intervene in sexual or domestic violence when they: 1) apprehend the risk or danger in a situation; 2) can quickly identify possible options to mitigate the risk or interrupt the violence; and 3) are confident they have the skills required to intervene effectively.⁶⁶

The TAT program has also achieved some significant successes. According to the organization, 606 likely human trafficking cases, involving 1,123 trafficking victims, have been identified.⁶⁷ Of those 1,123 victims, 48.5% were minors.⁶⁸ Two potential reasons why TAT’s bystander intervention model may be working is that, unlike other intervention models, the TAT model only requires that the bystander call in to activate law enforcement. Specifically, there is a toll-free number that bystanders can use to report any suspicious behavior.⁶⁹ Moreover, the organizers encourage bystanders to make the call even if they are uncertain whether or not what they are witnessing is an actual trafficking event.⁷⁰ In that sense, the intervention is much less invasive than those that are used in sexual assault interventions, which may often require engaging with both the victim and the predator.⁷¹ As Special Agent Nichols notes:

We’re not saying go out there and grab the girls and try and drive away with them, no—don’t try and rescue them on your own—but even the

64. *Id.*

65. Coker, *Evaluation 2011*, *supra* note 18, at 780.

66. Hart, *supra* note 18. In this sense, the bystander training is effective at counteracting the diffusion of responsibility that many bystanders face: the notion that if many people are present, the bystander is less likely to act. See Martin, *TNC*, *supra* note 5, at 13 (discussing the research on this aspect of bystanders).

67. *TAT By the Numbers*, TRUCKERS AGAINST TRAFFICKING, <https://www.truckersagainsttrafficking.org/making-an-impact/> (last visited Oct. 8, 2018).

68. *Id.*

69. TAT Training Video, *supra* note 46. The toll free number is 1-888-3737-888. *Id.*

70. *Id.*

71. In contrast, in most situations with truckers, their primary interaction will be either in witnessing the event from a distance or interacting with the victim. In fact, TAT’s training also includes potential questions that truckers can ask when being solicited. These questions include:

Are you traveling by yourself? And, if they’re not, who are they traveling with? When’s the last time they’ve seen their family? Do they get to keep any of the money? Are they free to come and go as they please? These are important questions because they are going to help you determine whether or not this person has the freedom to walk out the door or not.

Id.

smallest kind of little details that you guys have that you can provide us with would help and have helped to recover girls.⁷²

To the extent that the bystander interacts with any of the two parties at all, they will primarily be interacting with the victim.

III. THE VIEW OF THE TNC AS BYSTANDER

The concept of the TNC as a bystander stems from previous research I have conducted on developing paradigms for TNCs under international law.⁷³ Specifically, the bystander framework was developed after examining the rhetoric of corporations who were often surrounded by negative human rights impacts.⁷⁴ Often in these cases, the TNCs would acknowledge that they were witnesses to the negative impacts, yet they would disavow any specific actions within their own operations that contributed to the negative human rights impacts—in essence claiming a bystander status vis-a-vis the underlying occurrence.⁷⁵ In addition, there has been a gap noted in international law where TNCs, as non-state actors, generally do not have legal obligations⁷⁶ to protect individuals from negative human rights impacts (in contrast to traditional state actors who have various human rights related duties to protect, respect, and fulfill the human rights of individuals).⁷⁷ This gap is frequently exacerbated by the fact that many of the worst atrocities occur in national regimes that have been dubbed weak governance zones—those areas where the rule of law and the power of the government is frequently dwarfed by the power of the TNC.⁷⁸ As such, the bystander rhetoric naturally encapsulates the current gap under international law that prevents TNCs, as non-state actors, from being held accountable. Further, the bystander framework—conceptually, at least—has the

72. *Id.*

73. Martin, *TNC*, *supra* note 5, at 7.

74. *Id.* at 5.

75. *Id.*

76. Although, there is a movement afoot to change that. For instance, there has been robust discussion within various functionalities at the United Nations to develop a business and human rights treaty that would conceivably, at least in part, place direct legal duties on businesses for actions that led to negative human rights impacts. See Surya Deva, *Scope of the Legally Binding Instrument to Address Human Rights Violations Related to Business Activities: A Working Paper of the ESCR-Net & FIDH Treaty Initiative 3* (2016), https://www.escri-net.org/sites/default/files/scope_of_treaty.pdf. To that end, a zero draft of a business and human rights treaty was submitted in July 2018. *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, U.N. HUM. RTS. (July 17, 2018), <https://www.business-humanrights.org/sites/default/files/documents/DraftLBI.pdf>.

77. Martin, *TNC*, *supra* note 5, at 33.

78. John Ruggie (Special Representative of the Secretary-General), *Promotion and Protection of Human Rights: Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 9, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter Ruggie, 2006 *Interim Report*].

potential to sidestep the primary challenge that human rights advocates and litigators have for holding the corporation accountable in negative human rights abuses that often occur across borders—that is, the challenge of proof. Specifically, the construction of the TNC (with its separate legal personality, subsidiary relationships, and complicated organizational structure) often makes gathering evidence that will implicate a corporation or its employees in wrongdoing next to impossible. Developing jurisprudence that focuses on a bystander relationship may overcome this obstacle.

In previous works, I have discussed three different constructions of a TNC as a bystander that have implications for international human rights law. It is worth summarizing the three concepts here. First, there is the passive TNC as a bystander.⁷⁹ This is the most intellectually straightforward analysis where both the corporation—with its separate legal personality—and the agents of the corporation—executives, workers, and perhaps contractors for the corporation—are not actively involved in the underlying human rights violation at issue.⁸⁰ Second, I promulgate a theory of the Active TNC as a bystander.⁸¹ Under this construction of the TNC as bystander, “[although] human rights violations have been actively attributed to TNCs, the TNC will still label itself an innocent bystander, standing helplessly by as individuals commit atrocities in the corporation’s name.”⁸² Under the final construction, I argue that there are situations where “the TNC itself, through its culture . . . is causing the human rights violation,”⁸³ while passive employees act as bystanders to the actions of the corporation are “morally complicit perhaps, but only in the way that employees of a murderous regime are complicit in the slaughter, by pushing the paperwork along that makes the deaths of individuals easier to pursue.”⁸⁴ In those situations, the personality of the TNC has become so saturated with a corporate culture that ignores, or even embraces, illegal (or morally repugnant) activity that it supersedes the tenure of any one CEO or executive (although its roots may have originally come from one particularly dominant executive or founder of the corporation).⁸⁵

79. Martin, *TNC*, *supra* note 5, at 22.

80. *Id.*

81. *Id.*

82. *Id.* at 26. I have begun to colloquially refer to this construction of the TNC as the “bad apple defense”: namely where representatives of the corporation, when faced with wrongdoing, simply argue that a few “bad apples” did the horrible things on behalf of the corporation and urge people not to hold it against the corporation itself. Of course, for many, this defense (and the construction on which its based) is incredibly problematic. See *ASIC Chair criticizes ‘bad apples’ defence*, YAHOO! FIN. (Mar. 20, 2016), <http://www.msn.com/en-au/news/other/asic-chair-criticises-bad-apples-defence/ar-BBqIceJ>.

83. Martin, *TNC*, *supra* note 5, at 29.

84. *Id.*

85. For instance, in the wake of the Upper Big Branch Explosion that killed 29 mine workers in West Virginia, investigators cited a corporate “culture in which wrongdoing became acceptable [and] where deviation became the norm.” J. Davitt McAteer, et. al., *Upper Big Branch: Report to*

While each of these constructs is useful for understanding how TNC behavior can be understood through a bystander lens, it seems that, for the purposes of developing practical strategies for bystander interventions, the first construct of the TNC (the passive TNC as bystander) is the one that is most useful at this stage.⁸⁶ To that end, much of the developments on the international stage regarding TNCs seem to have embraced the traditional bystander rhetoric on an implicit level. For instance, much of the commentary for the UN Guiding Principles has focused on businesses’ responsibility⁸⁷ within the context of its relationships with other actors.⁸⁸ Under the narrative of the Guiding Principles, TNCs should be aware of the negative impacts that they cause through the relationships that they have with others, particularly others who would be directly responsible for negative human rights impacts.⁸⁹ Applying bystander intervention research to this narrative, the actors who cause the negative human rights impacts would be considered the oppressor, the community or individual

the Governor, NPR 2, 101 (May 2011), <https://media.npr.org/documents/2011/may/giip-massey-report.pdf>; see Howard Berkes, *Report Blasts Massey for ‘Deviance’ in Safety Culture*, NPR (May 19, 2011, 10:00 AM), <https://www.npr.org/2011/05/19/136426906/report-blasts-massey-for-deviance-in-safety-culture> (discussing the report).

86. Although it is outside the scope of this current Article, there are many applications for the other constructions of the TNC as bystander. Future researchers could explore the ramifications regarding which construction of the “TNC as bystander” best fits the particular situation and apply different models as appropriate. For instance, if the bystander in the scenario is an Active TNC, the underlying training program should be different than if the construction is one of the passive TNC as bystander.

87. The responsibility to respect under the Guiding Principles holds that TNCs have the moral (but not legal) responsibility under international law to respect human rights as it applies to their operations and relationships. *UN “Protect, Respect and Remedy” Framework and Guiding Principles*, BUS. AND HUM. RTS. RESOURCE CTR., <https://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles> (last visited Oct. 8, 2018). In that regard, it is a close but distinct conceptual framework from the states’ Responsibility to Protect (“R2P”) that has emerged in international human rights discourse regarding the broader, more diffuse notion of state responsibilities vis-à-vis the global community. According to Professor Monica Hakimi, “R2P’s key innovation is its second proposition: that the broader international community should step in, when necessary, to help at-risk populations,” which Hakimi states “is widely understood not to be legally operative.” Monica Hakimi, *Toward a Legal Theory on the Responsibility to Protect*, 39 YALE J. INT’L L. 247, 248 (2014).

Although a full analysis of the R2P is outside the scope of this Article it is worth noting here that, just as this noted diffusion has come in R2P discourse, in the same way, corporations might have a mandate (other than a legally operative one) to respect human rights. The responsibility to respect in this case is viewed as one that is more of a moral imperative rather than a legal one. As such, corporations that are intervening in the wider community can be viewed as bystanders in much the same way that countries that are intervening in the larger international community were viewed as bystanders during WW2 but were still welcomed by the victims in those communities.

88. See Martin, *UN BHR*, *supra* note 5, at 922–24 (discussing the UN Guiding Principles within a bystander framework).

89. *Id.* at 923–24.

who has had its human rights negatively impacted would be the victim, and the TNC within this scenario would be considered the bystander.⁹⁰

The bystander framework is largely implicated in the practice of outsourcing. Take for instance, the 2013 Rana Plaza building collapse that killed over 1,100 people.⁹¹ The workers that produced the garments in the building were not employees of Western publicly traded corporations that would be subject to regulations and laws here.⁹² Neither was the building owned by a TNC.⁹³ Rather, it was owned by Sohel Rana, a native Bangladeshi who, according to reports, intimidated rivals, bribed local officials, and ignored safety concerns in building the factory that subsequently collapsed.⁹⁴ Mr. Rana's plaza housed "five garment factories that manufactured goods for major retail companies in Europe and North America."⁹⁵ Retailers included Wal-Mart, Dress Barn, Benetton, and Cato Fashion.⁹⁶ Nevertheless, as the fallout from the Rana collapse and other similar business and human rights scandals show, it is these corporations that suffered reputational damage for negative human rights impacts, even though they were not the actual the perpetrators of the violence.⁹⁷ Instead they had outsourced the manufacturing and development of the goods to weak governance zones⁹⁸ where other parties within the supply chain

90. Of course, depending on the situation involved, the same actor—whether it's a corporation, a state or a worker can either be a victim, a transgressor, or a bystander. Understanding what role each party has within the specific context will be key to understanding how the bystander paradigm can be applied in a given situation.

91. Ashley Westerman, *4 Years After Rana Plaza Tragedy, What's Changed for Bangladeshi Garment Workers?*, NPR (Apr. 30, 2017, 7:00 AM), <https://www.npr.org/sections/parallels/2017/04/30/525858799/4-years-after-rana-plaza-tragedy-whats-changed-for-bangladeshi-garment-workers>.

92. *Id.*; see also Syed Zain Al-Mahmood & Tom Wright, *Collapsed Factory Was Built Without Permit*, WSJ (Apr. 25, 2013, 5:06 PM), <https://www.wsj.com/articles/SB100014241278873237897045784442806661545310>.

93. Jim Yardley, *The Most Hated Bangladeshi, Topped from a Shady Empire*, N.Y. TIMES, (April 30, 2013), <http://www.nytimes.com/2013/05/01/world/asia/bangladesh-garment-industry-reliant-on-flimsy-oversight.html?pagewanted=all>.

94. *Id.* (reporting that, "Upstairs, workers earned as little as \$40 a month making clothes for retailers like J. C. Penney. Downstairs, Mr. Rana hosted local politicians, playing pool, drinking and, the officials say, indulging in drugs").

95. Westerman, *supra* note 91.

96. Gwynn Guilford Quartz, *Here Are the Western Retailers that Source Clothes from the Bangladeshi Factories Where More Than 200 Workers Died*, HUFFPOST (Apr. 25, 2013, 1:06 PM), https://www.huffingtonpost.com/2013/04/25/western-retailers-bangladesh-factory_n_3156055.html.

97. Scandals involving global apparel companies often involve organizations within their supply chain, rather than the corporations themselves. Westerman, *supra* note 91.

98. To be clear, I am *not* contending that corporate practices and demands of its suppliers have no consequences or negative effects on the behavior of the suppliers. In fact, it is quite clear that the opposite is true. For instance, the rise of the "fast fashion industry," whereby retailers in the garment industry have shortened the production cycle in order to get styles to stores as soon as possible, has directly contributed to the pressure that often leads suppliers to make shortcuts in building construction and push their workers without adequate safety protocols or compensation.

perpetuated the negative human rights impacts.⁹⁹ Nevertheless, through their relationships, TNCs as bystanders remain complicit. Indeed, much of the related activities that have implicated human rights issues have come through relationships with vendors and suppliers;¹⁰⁰ so much so that the relationship between a business enterprise and third parties was noted in both the Ruggie Framework¹⁰¹ and the UN Guiding Principles.¹⁰² As a result, there have been efforts, on both an international and regional scale, to train TNCs on how they may detect human rights abuses in which they are directly or indirectly involved and prevent, mitigate, or remedy these abuses. Two training programs in particular merit further analysis: an online course developed by the UN specifically for businesses and a multi-stakeholder project created in the United Kingdom that offers preliminary guidance for companies. These programs will be discussed below.

IV. CURRENT BUSINESS AND HUMAN RIGHTS TRAINING PROGRAMS

In the BHR field, much work has been done since John Ruggie, then Special Representative of the Secretary-General on business and human rights issues, developed the Three Pillar Framework¹⁰³ and Guiding Principles.¹⁰⁴ The work that Ruggie left behind has been taken up by the five-member UN Working Group on Business and Human Rights,¹⁰⁵ as well as by other UN offices, and partnerships between non-state actors.¹⁰⁶ In addition, the Guiding Principles

See Richard Locke & Monica Romis, *Improving Work Conditions in a Global Supply Chain*, 48 MIT SLOAN MGMT. REV. 54, 54–55, 60–61 (2007) (discussing the pressures in the supply chain); see also Nikki Gilliland, *Four Factors Fueling the Growth of Fast Fashion Retailers*, ECONSULTANCY (July 7, 2017), <https://econsultancy.com/blog/69216-four-factors-fuelling-the-growth-of-fast-fashion-retailers> (defining fast fashion).

99. Meredith R. Miller, *Corporate Codes of Conduct and Working Conditions in the Global Supply Chain: Accountability Through Transparency in Private Ordering*, in THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 432, 433 (Jena Martin & Karen E. Bravo eds., 2016).

100. Locke & Romis, *supra* note 98, at 55, 60.

101. Ruggie, *Framework*, *supra* note 7, at 17 (discussing the scope of corporations’ due diligence activities to include an assessment of whether corporations “might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies and other non-State actors”).

102. *Guiding Principles*, *supra* note 7, at 15.

103. Ruggie, *Framework*, *supra* note 7, at 1.

104. *Guiding Principles*, *supra* note 7, at iv.

105. *Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. ON HUM. RIGHTS, <https://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> (last visited Oct. 9, 2018) [hereinafter *Issue of Human Rights*].

106. The partnerships have developed so much that a guide was developed to assist businesses in partnering with the UN and NGOs. *Business Guide to Partnering with NGOs and the United Nations*, U.N. GLOB. COMPACT & DALBERG GLOB. DEV. ADVISORS 1, 3 (2007/2008), <https://business-humanrights.org/sites/default/files/media/bhr/files/Business-guide-to-partnering->

also discuss the evaluation of the risks—not just within a corporation’s operations—but also within its relationships.¹⁰⁷ In that sense, it is ripe for a review within the context of a bystander framework.

A. *The UN BHR Course*

At the international level, the UN Office of the High Commissioner for Human Rights (OHCHR), in association with the UN Global Compact office, has developed a course that “is designed to help managers in companies to understand the importance and relevance of human rights” (UN BHR Course).¹⁰⁸ The course consists of five modules that each deal with one facet of the business and human rights agenda.¹⁰⁹ The first module introduces the concept of human rights.¹¹⁰ The second module builds on the second pillar of the UN Guiding Principle by discussing the corporate responsibility to respect human rights.¹¹¹ The third module specifies how business can support human rights.¹¹² The fourth module analyzes complicity and the fifth module focuses on remedies.¹¹³ As part of the course (which anyone can freely access) there is a review of learning through a self-assessment test that users can take to see if they have learned the intended materials.¹¹⁴

The UN BHR course does not just contemplate assessing external risk. It also encourages businesses to implement due diligence models to reduce future risks within their operations. For instance, in module 2.4 of the training, the BHR course states that:

Once you have identified potential or actual human rights impacts, it is essential that the findings are integrated across the relevant functions and processes in the company. Without effective integration, the findings may not be acted upon and policies and processes that can lead to human rights risks may continue. For example . . . sales or procurement teams may not know the risks of entering into relationships with certain parties.¹¹⁵

w-NGOs-UN-Global-Compact-Jul-2007.pdf. Although in many, but certainly not all cases, there is significant overlap between these organizations.

107. *Guiding Principles*, *supra* note 7, at 14–15. The Guiding Principles are clear however that, in those instances where there is a conflict in precedence between risk (or profit) to the company and risks to the individual or community, the risk to the individual or community must be given higher priority. *Id.* at 25.

108. *Human Rights & Business Learning Tool*, U.N. GLOB. COMPACT, <http://human-rights-and-business-learning-tool.unglobalcompact.org/site/overview/> (last visited Sept. 14, 2018) [hereinafter *UN BHR Course*].

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *UN BHR Course*, *supra* note 109, § 2.4.

The idea of evaluation, assessment, and follow-up permeates the UN BHR course. In order for programs to see if their competency and ability to succeed has been achieved, both evaluation and assessment will be critically important. As such, some formal mechanism should be established within each business to determine if their interventions have been responsible for: (1) raising the profile of the BHR agenda (as can be documented through surveys); (2) raising the level of sensitivity to BHR issues throughout the organization; (3) decreasing the overall negative human rights impacts; and (4) decreasing the company’s overall liability for human rights related impacts.¹¹⁶

B. *The U.K. BHR Guide*

The idea that training needs to be tailored to one’s role in the organization can also be seen in a move made by the United Kingdom. Specifically, the UK Equality and Human Rights Commission recently published *Business and Human Rights: A Five-Step Guide for Company Boards* (The UK BHR Guide or Guide).¹¹⁷ The Guide offers targeted advice to company executives that trains them to:

- (1) [E]mbed[] the responsibility to respect human rights into its culture, knowledge and practices[;]
- (2) identif[y] and understand its salient, or most severe, risks to human rights[;]
- (3) systematically address[] its salient, or most severe, risks to human rights and provides for remedy when needed[;]
- (4) engage[] with stakeholders to inform its approach to addressing human rights risks, and[;]
- (5) report[] on its salient, or most severe, human rights risks and meet[] regulatory reporting requirements[.]¹¹⁸

The Guide also offers some preliminary analysis and examples of ways to implement the five steps.¹¹⁹ In that sense, it offers comprehensive guidance for each of the steps that a company’s board would undergo.¹²⁰ In addition, at the

116. The UN Training Program outlines a list of thirteen objectives that should be met in order to effectively communicate human rights training protocols to individuals. U.N. HIGH COMM’R FOR HUMAN RIGHTS CTR. FOR HUMAN RIGHTS, HUMAN RIGHTS TRAINING: A MANUAL ON HUMAN RIGHTS TRAINING METHODOLOGY, at 1–2, U.N. Doc. HR/P/PT6, U.N. Sales No. ISSN 1020-16888 (2000) [hereinafter *Human Rights Training*]. The full list includes: (1) Collegial presentations; (2) Training the trainers; (3) Interactive pedagogical techniques; (4) Audience specificity; (5) A practical approach; (6) Comprehensive presentation of standards; (7) Teaching to sensitize; (8) Flexibility of design and application; (9) Competency-based; (10) Evaluation tools; (11) The role of self-esteem; (12) Linkage to organizational policy; and (13) Planned follow-up. *Id.*

117. *Business and Human Rights: A Five-step Guide for Company Boards*, EQUAL. AND HUM. RTS. COMM’N 2 (May 2016), <https://www.equalityhumanrights.com/en/publication-download/business-and-human-rights-five-step-guide-company-boards> [hereinafter *The UK Guide*].

118. *Id.* at 4.

119. *Id.* at 5–14.

120. *Id.*

end of the Guide, there are sample questions that members of the board can use to discuss the issue with executives regarding negative human rights impacts.¹²¹ Step two of the Guide suggests that the company develop a policy that assesses risk.¹²² The Guide expands upon this notion as follows: “Companies can use their influence to reduce risks to human rights occurring through their value chains and other business relationships.”¹²³ As part of a company’s business and human rights initiative, step four of the Guide exhorts corporations to engage with multiple stakeholders.¹²⁴ This can allow the corporation to influence others more actively involved in this level of work.

V. LESSONS LEARNED: BYSTANDER INTERVENTION TRAINING PROGRAMS FOR TNCs

There is a growing awareness in BHR circles that corporations need to be trained on issues in which they may not directly participate. For instance, Erika George and Scarlet Smith, in their discussion of the sex trafficking industry, have noted that one way to reduce the potential of sex trafficking incidents is by properly training employees in the hospitality industry, where much of the exploitation in sex trafficking occurs, to recognize the signs of exploitation and intervene as necessary.¹²⁵ George and Smith implicitly evoke the need for bystander intervention training within the context of business and human rights. They write: “Further complicating [the lack of awareness regarding trafficking recognition is that] law enforcement and others, such as hospitality industry employees, that may be in a position to disrupt transactions *or otherwise intervene to prevent crime* are not receiving the needed training to identify a

121. *Id.* at 17–18.

122. *Id.* at 7. Each company should “[e]nsure the company systemically addresses its salient, or most severe, risks to human rights and provides for remedy when needed.” *Id.* at 9.

123. *Id.* The guide identifies five different ways that companies can use their influence to manage this third step: “(1) Commercial influence . . . (2) Business influence . . . (3) Influence through action with business peers . . . (4) Influence through action via local and international organizations . . . [and] (5) Influence through multi-stakeholder initiatives[.]” *Id.* at 9–10. In this sense, this emulates a key portion of the bystander paradigm—namely the idea that companies are using their influence and leverage in ways that can ensure positive rather than negative outcomes. This has a dual effect. First, if the corporation is large and is operating in a weak governance zone, then its impact as a bystander can be particularly powerful. This is the same as when the US and other Western countries finally intervened in the Holocaust in Germany. That these countries were viewed as such powerful nation-states made their intervention all the more significant. Second, it prevents the opposite effect from occurring—namely, that when these same corporations that have a tremendous amount of power and influence fail to use that power in the surrounding communities and instead watch as the atrocities happen, they simply reinforce the power of the transgressor over what he is doing.

124. *Id.* at 11.

125. Erika R. George & Scarlet R. Smith, *In Good Company: How Corporate Social Responsibility can Protect Rights and Aid Efforts to End Child Sex Trafficking and Modern Slavery*, 46 N.Y.U. J. OF INT’L L. & POL. 55, 77 (2013).

situation of sex trafficking.”¹²⁶ As such, this next section provides some preliminary assessments regarding how a bystander intervention model can apply to the BHR context. Specifically, the next section offers an analysis of both the UN BHR Course and the UK BHR Guide from a bystander perspective.

The UN BHR Course and the UK Guide are certainly positive developments. Moving beyond rhetoric to implementation is one of the leading goals of scholars and practitioners.¹²⁷ It is also part of the UN’s mandate to the Working Group on the issue of human rights and transnational corporations and other business enterprises (UN Working Group).¹²⁸ In addition, both the UN BHR Course and the Guide take additional steps forward in evoking the bystander rhetoric vis-a-vis TNCs. For instance, at the outset of the UK Guide, the authors note that the idea of negative human rights impacts comes not just from businesses’ own activities, but also from their business relationships.¹²⁹ This also echoes the work of former Special Representative of the Secretary-General, John Ruggie, who discussed business relationships as one of the key ways that corporations can be involved in minimizing human rights impacts.¹³⁰ However, examining these courses and developments through a bystander lens would provide further analysis on where these programs could improve by drawing on the research and empirical data from current bystander intervention programs.

126. *Id.* (emphasis added). Later, George and Smith become more explicit in their call, stating that a discussion is needed “[t]o fully appreciate the opportunities for industry to intervene and aid efforts to end the abuses inherent in child sex trafficking.” *Id.* at 82. To that end, George and Smith argue for businesses, specifically those in the tourism industry, to adopt a policy commitment “to combat human trafficking and modern slavery.” *Id.* at 89. Unfortunately, while George and Smith are clear in their advocacy for training programs for workers in the industry, they do not provide detailed specifics regarding what a training would look like (although they do seem to favorably reference a training program developed by the Carlson group—a major hospitality business). *Id.* at 100–01. Instead, George and Smith advocate for two “key elements” that they believe are successful for implementing social responsibility within a company on these issues. *Id.* at 95. First, to create awareness within the industry. *Id.* Second, having tailored programming that is developed by the business themselves. *Id.* In this regard, George and Smith’s recommendations align perfectly with research in other disciplines; both of these elements are key to successful bystander intervention training.

127. Justine Nolan, *From Principles to Practice: Implementing Corporate Responsibility for Human Rights*, in *THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK* 411 (Jena Martin & Karen E. Bravo eds., 2016) (discussing the shift in the BHR framework to specific achievable goals); see generally Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14 *J. OF HUM. RTS.* 237, 240 (2015) (discussing the evolution of the business and human rights framework from a practitioner’s perspective).

128. The 2011 mandate given by the Human Rights Council to the Working Group included a request to implement the “Protect, Respect and Remedy” Framework. See *Issue of Human Rights*, *supra* note 105.

129. *The UK Guide*, *supra* note 117, at 3.

130. Ruggie, *Framework*, *supra* note 7, at 3, 20.

A. *The Course and the Guide Through a Bystander Lens*

Throughout each program's materials, the emphasis has been on flexibility, adaptability, and most importantly, tailoring each program to the specific needs of the audience.¹³¹ This would be in line with any successful intervention training program on college campuses.¹³² For instance, the training at a small liberal arts college would probably not be the same as the training program at a large university. As such, both courses have positive characteristics that align well with bystander intervention programming. Having ways for individuals within business to access information and materials is a helpful first step in raising awareness.¹³³

The first part of the Guide requires companies to embed the responsibility to respect human rights into its corporate culture,¹³⁴ which is critical to any bystander intervention training. Having this become a part of the culture will then allow for increased awareness at a corporate level for all of the issues that may negatively impact human rights. This is one of the many reasons for bystander intervention training. Often times people do not even know what would be considered a negative human rights impact, or may be bringing their own cultural biases into the situation. Having a bystander training that is tailored to a corporation's location and discusses these issues and how they affect it, not only raises the bar but also allows for employees to become better at spotting the underlying issue.¹³⁵ This will also permit corporations to bring in all the different aspects of their business model into the world of bystander intervention training. For instance, it can allow companies to review and reform their code of conduct in light of the UNGPs and other works to make sure that their training conforms to these issues. It can also allow a corporation to move forward in a

131. Coker, *Evaluation 2011*, *supra* note 18, at 779–80. Throughout the course, there are many examples provided regarding how each training should be tailored. *Id.* For instance, the course emphasizes the need to tailor training to certain industries and also specific audiences. *Id.* As such, this tailoring would allow developers to think about what exactly bystander training really means. For instance, for one business, it could mean that it will develop training programs to go out into the community and train people within the community. For another, it might result in the corporation's employees being trained on how to recognize a potential negative human rights impact and intervene when necessary.

132. *See id.*

133. One of the main purposes behind the Green Dot model is to create a diffusion of impact: an ever-widening circle that can be used to shift perceptions, culture and behaviors. In that regard, the Green Dot model evokes the controversial rhetoric of the UN Global Compact (and the failed Norms) regarding the "sphere of influence" for TNCs. *See* John Ruggie (Special Representative of the Secretary-General), *Clarifying the Concepts of "Sphere of Influence" and "Complicity"*, ¶¶ 5–6, UN. Doc. A/HRC/8/16 (May 15, 2008) (discussing John Ruggie's view on the language of the sphere of influence).

134. *The UK Guide*, *supra* note 117, at 4.

135. Positive behaviors can also be embedded in corporate culture. *See* Jena Martin, *Walking the Walk – A Retrospective*, W.V.U. (Feb. 1, 2013), <https://www.law.wvu.edu/the-business-of-human-rights/2013/02/01/walking-the-walk-a-retrospective> (discussing Johnson and Johnson in the 1980s).

way that attaches risk assessment and risk management to bystander intervention training. In short, bystander intervention training can go a long way not only in changing the dynamic of a community, particularly in weak governance zones, but also in changing the corporate culture.

The Guide does a good job in articulating the language of the bystander. It identifies five variant risk types within the business and human rights world: (1) Business model risks; (2) Business relationship risks; (3) Operating context risks; (4) Workforce risks; and (5) Public policy risks.¹³⁶ While each of these may have an implication in bystander intervention training, a few are particularly salient: the first is business relationship risks; the second is operating context risks. Therefore, these two risks will be examined in turn.

The Guide provides salient examples of what business relationship risks may look like: “a company in a joint venture with a government that has a poor human rights record may find its license to land or mineral rights is awarded without due process and consultations with local communities, or that police or military suppress community opposition.”¹³⁷ In that scenario, the bystander paradigm seems clear: assuming there were no side deals or undue inducements from the TNC, the company would be a witness (and a beneficiary) to the actions by the state.

The second place where the bystander rhetoric is implied is in areas that the Guide identifies as operating context risks. The Guide’s example of an operating context risk is “a company working in regions with high levels of conflict, corruption or weak rule of law [that] is likely to face increased risk of involvement with human rights abuses, which arise more easily and are less likely to be remedied in these contexts.”¹³⁸ In those cases, the bystander context, if left unchecked, can easily lead to a situation where a corporation becomes a contributor (unwittingly or not) to the negative human rights impacts being perpetrated.¹³⁹

As mentioned earlier, there are two characteristics that have been noted on the effect of bystander intervention programs within the larger community. First, a bystander intervention program like Green Dot has resulted in less overall violence within a specific community (suggesting that the results of the training get diffused throughout the organizational structure).¹⁴⁰ Second, the training has been shown to be effective in reducing the violence specifically related to the person who underwent the training, allowing for an eventual shift in culture and

136. *The UK Guide*, *supra* note 117, at 7–8.

137. *Id.* at 7.

138. *Id.* at 8.

139. The other risks that are identified in the Guide are obviously important but do not necessarily implicate the bystander model on the same level. For instance, the public policy risk example placed by the Guide uses the idea of a company actively lobbying for more lenient laws that could lead to an increase in negative human rights abuses. *Id.* In those cases, the TNC would be an active participant in the underlying action rather than a bystander.

140. Coker, *Evaluation 2015*, *supra* note 32, at 1522.

change in norms.¹⁴¹ This could have specific applications for BHR training. In applying these issues to a BHR dynamic, one hopes that a bystander intervention program would reduce the overall instances of negative human rights impacts within larger communities.¹⁴²

What would the reduction of negative human rights impact look like on the ground for corporations operating within the larger communities? There are many potential applications. For instance, it could reduce instances of dangers within a corporation's operations or decrease human trafficking within its supply chain. As such, an effective BHR bystander training course would need to produce specific outcomes that would contravene any negative human rights impacts that a community is currently experiencing. As authors Scully and Rowe note, bystander training can be used for many different types of behavior,¹⁴³ so why not for business-related human rights prevention?

In addition, Scully and Rowe make the point that “[b]ystander training also permits discussions about the ‘underlying issue’ in a scenario.”¹⁴⁴ Rather than dealing with the substantive issue head on (which might often lead people to take a defensive stance and worry about liability or recrimination), having discussions of these issues flow organically could lead to insights that may come out as a “scenario is unpacked—creating a spontaneous, focused, productive dialogue” about the various challenges that the organization is facing, whether it is diversity, sexual harassment or, more pertinent here, human rights abuses within the community.¹⁴⁵

Although the bystander intervention training that is the focus of this Article deals with ways that a corporation can intervene in larger community issues, the actual bystander training for people within the TNC may have an ancillary effect, in that it might help people within the organization recognize where negative human rights impacts are also happening within the TNC itself and take appropriate actions to respond. Some of the types of human rights abuses that

141. *Id.*

142. In that regard, the nature and point of intervention in the underlying conflict might affect the effectiveness of the impact. For instance, in the Green Dot model the intervention will take place within the situation itself—in other words the bystander is intervening between the oppressor and the victim and getting aid to the victim. In contrast, in TAT's program, the bystander is intervening in the situation but interacting almost exclusively with the victim—not the oppressor. Both models have some applicability to the business and human rights context. In some instances, the TNC as bystander will have the opportunity to leverage its relationship with the oppressor (particularly if the oppressor is within the TNC's supply chain; if it's the State it can be slightly more difficult). In other cases, the TNC may only be interacting with the impacted community directly, in that they are coming in and working with them but may not be aware what forces are at work behind the scene. In that case, the reporting model (currently at play in many national frameworks) may be an initial first step in bringing light to the issue—so long as it is understood that reporting alone is typically not enough.

143. Scully & Rowe, *supra* note 62, at 1.

144. *Id.* at 5.

145. *Id.*

may be occurring include worker safety and labor issues, as well as discrimination and harassment.

B. Where the Current Models Fall Short

In the UN BHR Course, there is much emphasis placed on assessment.¹⁴⁶ Specifically, Module Two of the course contains an assessment regarding what a company’s relationship is to human rights impact.¹⁴⁷ At the start there are three scenarios: (1) whether a company contributed to the impact; (2) whether a company caused the impact; or (3) whether the impact is directly linked to the company’s operations, products, or services because of a business relationship.¹⁴⁸ There are then paths that a trainee can take that would provide guidance for the company regarding how to proceed.¹⁴⁹ There are two interesting things about this. First, I would argue that the current model is missing an additional layer: why the company is where it is in the first place. For instance, most corporations have taken the position that they are merely passive witnesses to an underlying harm. If that is true, then an assessment would map easily within the current construct of the bystander. However, if an internal assessment shows that the negative human rights impact is linked to corrupt executives or a deficient corporate culture, then perhaps a different, internal intervention will need to take place before the company can engage with the broader community.

Second, in each of the three scenarios, the final potential step is a variation of the following action: either to terminate the behavior that led to the negative human rights impact or to terminate the relationship.¹⁵⁰ Other than vague references about mitigating consequences or “taking into account potential adverse human rights impacts”¹⁵¹ that would be done if a company terminated the relationship—no explicit discussion is given on *how* effective training would positively impact the affected community.

In contrast, bystander intervention training programs have, at their center, the community itself—either through raising awareness of the negative conduct within the community or actually intervening to prevent harm by the oppressor to specific victims. In that sense, it seems that the focus of bystander intervention training in this context would be more on helping the victim rather

146. *UN BHR Course*, *supra* note 108, § 2.1.

147. *Id.* § 2.4.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

than managing the oppressor. While these may not be mutually exclusive,¹⁵² the focus is on reducing the risk to the victim.¹⁵³

This appears to be the most significant difference between current BHR training programs and training programs that would draw from bystander intervention theory. By having the victim or the community at the center of the training, this could effectuate meaningful change in otherwise weak governance zones where states cannot or will not act. There is precedence for this. Under the Guiding Principles, companies are exhorted to engage in human rights due diligence.¹⁵⁴ As the Guiding Principles note, human rights due diligence is different from traditional notions of corporate due diligence in that the focus under the Guiding Principles is on the risk to the victim, not the risk to the company.¹⁵⁵ Similarly, an effective BHR bystander intervention would require:

152. In fact, part of what makes bystander intervention training so successful is that it uses different interventions (including distracting the oppressor while rescuing the victim). See Coker, *Evaluation 2015*, *supra* note 32, at 1508–09.

153. *Id.*

154. *Guiding Principles*, *supra* note 7, at 7.

155. *Id.* However, human rights due diligence is not the same as bystander intervention trainings for several reasons. Human rights due diligence was an attempt by Ruggie to bring in traditional concepts of due diligence found in corporate governance jurisprudence and adapt the concepts to a business and human rights field. Under the human rights due diligence model, corporations gather information and perform an assessment of *their* risks and impacts on affected communities. See, e.g., *Human Rights Due Diligence*, CONOCOPHILLIPS, http://static.conocophillips.com/files/resources/16-0343-sd-charts_human-rights.pdf (last visited Sept. 15, 2018) (discussing grievance mechanisms that make clear that: “[w]here appropriate, business units, assets or projects have communicated with and engaged communities and their representatives on how to contact the company, and how to address any concerns or grievances. In addition, all interested stakeholders may access the ConocoPhillips Ethics Helpline to report a potential violation of our Code of Business Ethics and Conduct, which is publicly available on our website.”) However, unlike traditional business due diligence models, the risks that corporations should be evaluating must be the risks to the individual or community that may be negatively impacted rather than the risk of damage (reputationally or otherwise) to the corporation. Since the Guiding Principles first launched, scholars, practitioners and organizations have spent a significant amount of time attempting to develop specific guidelines for implementing human rights due diligence, either as a stand-alone conceptual tool or within a larger framework that discusses corporate compliance in a business and human rights framework. See, e.g., Blair Kanis, *Business, Human Rights, and Due Diligence: An Approach for Contractual Integration*, in *THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD AND LOOKING BACK* 414 (Jena Martin & Karen E. Bravo eds., 2016). Although the proposals vary in contexts, many of them do share one key characteristic—their comparative passivity on issues where they are not directly complicit. In short, most due diligence and risk assessment programs are data-gathering endeavors, requiring the corporations to gather information on potential risks, and if possible, take internal steps to minimize those risks. Mechanisms for outside engagement with stakeholders (either through engaging with the affected community or engaging with the perpetrator—often the State or State actors) typically only occur: (1) after the corporation has been made aware of the potential concerns and (2) if the corporation is facing risks associated with its relationships (i.e., through accusations of complicities with the State actor or allegations of direct abuses). In contrast, a bystander intervention model is proactive; it is actively relying on the relationships that the corporation has developed with members of the communities and state actors—so with the oppressor and the oppressed—and uses

(1) recognizing the harm to the individual (either through human rights risk assessment or other programs) and then (2) *either* engaging with the oppressor or engaging with the victim, depending on the particular circumstance of the case.¹⁵⁶

Another hallmark of the Green Dot intervention program is that, rather than focus solely on helping the victims, active bystanders are also trained to recognize “high-risk potential perpetrator behavior.”¹⁵⁷ Clearly this has an enormous application for business and human rights. In fact, the BHR literature may shed some light on where we can begin. For instance, during his time as Special Representative, John Ruggie, identified areas where increased negative human rights impacts were more likely:¹⁵⁸ these so-called weak governance zones were seen as geographical locations that could be particularly problematic for corporations who had activities engaged in this area.¹⁵⁹ Allowing these areas to become the litmus test for bystander intervention programs could go a long way in determining whether this type of program would, in fact, be effective. If a bystander intervention training is effective, it will need to be effective particularly in those weak governance zones.

In that regard, the UN BHR course does not contemplate the level of integration needed to address comprehensively negative human rights impacts. Rather, it is part of the initial campaign (similar perhaps to the preliminary speech given on college campuses to interest students in becoming a part of the Green Dot system). While it may adequately raise awareness of human rights impacts for people in business, without more, it probably will not achieve a significant level of effectiveness for mitigating negative human rights impacts.

C. Remaining Questions

In adding the bystander intervention perspective to the TNC as bystander paradigm, additional questions still remain. First, are there additional outcomes (and, perhaps, unintended consequences) that occur in applying this model of intervention to an organization? For instance, would we want the bystander (i.e., the TNC) to “speak up” and explain to the perpetrator (presumably a State actor) that what it is doing is wrong? In weak governance zones in particular, TNCs would certainly have the leverage to be able to do so, but are there political consequences in having the TNC directly engage in the social sphere in that

this relationship to encourage corporations to actively step in and protect the victim, even if it means protecting them from state actors. See generally Jena Martin, *Business and Human Rights: What’s the Board got to Do With It?* 2013 U. ILL. L. REV. 959 (2013) (comparing the concepts of due diligence and risk assessment in corporate governance and human rights literature).

156. This in turn would be informed by training that tells a person when it is best to intervene by engaging the oppressor and when it is best to intervene by engaging the victim.

157. Coker, *Evaluation 2011*, *supra* note 18, at 782.

158. Ruggie, *Framework*, *supra* note 7, at 5–6.

159. See *id.*

way?¹⁶⁰ Would we want the TNC to intervene actively in situations where human rights abuses seem imminent so that they might distract or prevent the perpetrator from getting involved? How might this be effectuated? Finally, what is the impact of the size of the TNC? Specifically, because TNCs are such big bystanders with an enormous amount of leverage, will the consequences of their intervention (or non-intervention) be even greater than if the bystander were a human with relatively little power? While each of these questions can lead to specific interventions—the lack of current answers does not undercut the value of the bystander intervention model for TNCs.

VI. CONCLUSION

In launching the task force that led to the “It’s on Us” campaign (one of the most widely known forms of bystander intervention), President Obama stated:

[S]exual violence is more than just a crime against individuals. It threatens our families, it threatens our communities; ultimately, it threatens the entire country. It tears apart the fabric of our communities. And that’s why we’re here today—because we have the power to do something about it as a government, as a nation. We have the capacity to stop sexual assault, support those who have survived it, and bring perpetrators to justice.¹⁶¹

The rhetoric invoked by President Obama can easily be applied to the BHR context. Replacing the words “sexual violence” with “human rights” would encapsulate why bystander training for TNCs is so needed.¹⁶² Particularly in weak governance zones where governments are often ineffectual, TNCs have a particular role in making changes. Far more than any other actor (either on the national or the international stage), TNCs have both the relationships and the manpower on the ground to: (1) understand the dynamics, and (2) step in and do something about it.

In many ways, there is an irony to how current BHR training programs have developed. While the UN Guiding Principles had, at their heart, a focus on the individual and the community in guiding a corporation’s responsibility to act,

160. See generally Larry Cata Backer, *Corporate Social Responsibility in Weak Governance Zones*, 14 SANTA CLARA J. INT’L L. 297 (2016) (discussing generally the debate surrounding the TNC’s role in social norms).

161. *Remarks by the President and Vice President at an Event for the Council on Women and Girls*, OBAMA WHITEHOUSE (Jan. 22, 2014, 2:05 PM), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/22/remarks-president-and-vice-president-event-council-women-and-girls>.

162. Former Vice President Joe Biden made the connection even more explicit when he stated, in connection with the Task Force, “Freedom from sexual assault is a basic human right . . . a nation’s decency is in large part measured by how it responds to violence against women . . . our daughters, our sisters, our wives, our mothers, our grandmothers have every single right to expect to be free from violence and sexual abuse.” *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault*, WHITE HOUSE (Apr. 2014), <https://www.justice.gov/ovw/page/file/905942/download> (emphasis added).

something seems to have become lost in translation.¹⁶³ Even while we still discuss mitigating negative human rights as a corporation’s responsibility, doing so in a way that does not focus the narrative firmly on the individual will invariably make corporations bystanders to harm.

Williams’s words—“the burden of the brutalized is not to comfort the bystander”—ring true.¹⁶⁴ In the midst of all of the struggles that victims of human rights have to face, providing comfort to their witnesses should not be one of them. Instead, the burden (whether a legal burden or merely a moral one) of the bystander should always be to comfort the brutalized—ideally by intervening before any significant harm occurs or, absent that, to provide comfort after the fact should brutalization occur. That is at the heart of the movement toward progress. That is at the heart of justice.

163. Many have feared that this might happen when discussing the “business case” for human rights. See, e.g., Tom Campbell, *Corporate Social Responsibility: Beyond the Business Case to Human Rights*, CAN. BUS. ETHICS RES. NETWORK, https://www.cbern.ca/content/uploads/2016/06/Corporate-social-responsibility_-Beyond-the-business-case.pdf (last visited Oct. 10, 2018). While I still believe that there is value in translating human rights concepts into languages that businesses can understand, if the individual or community is not at the center of the dialogue, then, invariably the training will become ineffective. See Michael Addo & Jena Martin, *The Evolving Business and Society Landscape: Can Human Rights Make a Difference?*, in *THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK* 348 (Jena Martin & Karen E. Bravo eds., 2016). As such, like many of the issues within the BHR context, bystander intervention training must also tackle the business case for business and human rights; on a practical level, corporations who are busy running their operations and dealing with direct potential violations might wonder why they would want to tackle the issue of intervening in community issues and taking on the role of bystander. This also seems to be mimicked in the general human rights context. For instance, in its training manual on human rights, OHCHR states that “trainers must recognize that professionals will also want to know ‘what is in it for them?’. That is, what value can a better understanding of human rights bring to their work? Training efforts which ignore either of these areas are likely to be neither credible nor effective.” *Human Rights Training*, *supra* note 116, at 1. The question is not an unfair one. Especially since, in some jurisprudential climates taking an active role as a bystander might *theoretically* expose a corporation to liability in a way that merely witnessing the event may not. Putting aside that it is just the right thing to do, there are many practical reasons why a corporation should engage in this debate. First, there is increasing movement to hold corporations liable for human rights abuses even based on their relationships. See, e.g., Ashton Phillips, *Transnational Businesses, the Right to Safe Working conditions and the Rana Plaza Building Collapse: Towards a Tort-Based Solution to the Global Race to the Bottom Problem*, in *THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK* 468 (Jena Martin & Karen E. Bravo eds., 2016). This can be seen on both a national and an international level. As such, businesses that take a proactive stance by engaging with these communities may in fact ward off the impending accountability glare (or at least have a larger part in shaping the conversation by demonstrating their willingness to do so and the credibility behind their actions). Second, apart from the legal liability that may be in the future, currently corporations are undoubtedly exposed to very real financial harm from reputational damage that may occur if they are somehow linked to the negative human rights impact.

164. Lashner, *supra* note 1.

