The Social Responsibility of Business Is Not Social Responsibility: Assume That There Are No Angels and Allow the Free Market’s Touch of Heaven

Marianne M. Jennings

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The Social Responsibility of Business Is Not Social Responsibility: Assume That There Are No Angels and Allow the Free Market’s Touch of Heaven

Marianne M. Jennings*

ABSTRACT

The issues in corporate social responsibility are now developing through a pattern of ubiquitous social media demands, threats, and boycotts. The facile screens for “ethical corporations” have now morphed into issue resolution of social issues via Twitter. Businesses are responding to these activist activities by succumbing to demands without regard to the validity of those demands by external third parties. The trend of having social issues resolved in such serendipitous fashion is dangerous for business stability. A review of the history of social responsibility demonstrates that businesses have used appropriate means to address social issues in a meaningful fashion with reliance on correct information and input using what businesses know and utilize: risk analysis. A review of that history also and demonstrates that the social responsibility movement is sloppy and superficial in its screens, research, and certification. There are no angels in any of the stakeholders. Self-interest still governs even the most righteously indignant. As business returns to a model of managing social issues through strategic planning and risk analysis, its ethical focus will be on the Friedman model of “absent fraud or illegality.” However, a business model will raise many issues and concerns not raised in the insurrections launched via social media. Business returning to a model of virtue removes the ever-shifting emotional demands of external forces and affords businesses the moral authority to address the fear launched by sudden shifts and misinformation. Bringing missing stakeholders into the review of issues and demands, with all interests and conflicts duly disclosed and without the assumption of angelic qualities on one side can bring about rational and longer term responses and solutions.

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INTRODUCTION AND OVERVIEW

The past two years have brought a strange twist into what has become an increasingly obligatory social responsibility of business. The white-hat/black-hat test for good and evil businesses that dominated the early social responsibility debates has been falling short of the new standards. The smug clarity in that early line of demarcation between good and evil business looks foolish under new ever-evolving standards. Social responsibility demands descend rapidly on companies with unanticipated consequences. The ubiquity of social media (e.g. Facebook, Twitter, Instagram) has produced fast moving waves of business boycotts and banishment. In the blink of an eye, a company is paralyzed because of its failure to behave in a newly imposed socially responsible way. The company just did not know of the standard it violated until the social media deluge. The rapid changes brought about by social media activity are not always vetted, tested, debated, or questioned for their safety, wisdom, or consequence. Not only have the definitions for social responsibility varied, the rate of their creation and, too often, unchallenged adoption have accelerated.

For example, buying local with its farm-to-table freshness and economic support for small business has been the mantra of markets, artisans, restaurants, and Chipotle. In theory, “local” and “farm-to-table” sound responsible and...
healthy. In practice, Chipotle got into a wee bit of trouble with its dedication to local purchasing mandates in its chain restaurants. Locavores did not quite understand the risk of their good intentions.

The regulatory exemptions for all those small sellers who were harvesting organic and living their best natural lives as they sold to national chains brought E. coli and norovirus to the Chipotle table and a nose dive in the chain’s stock. E. coli on the heels of norovirus in an era of social media compounded the damage to a national chain during an unfortunate series of naturally occurring events. In responding to increasing popular demands for local and fresh sourcing by restaurants, a major food chain still struggles three years later for survival.

The free-range chicken movement has also had unintended, but serious consequences. Based on pressure from animal rights activists, companies such as Walmart, Costco, and McDonald’s pledged to buy only cage-free eggs in the years to come. In cages, hens would live a lifetime without spreading their wings or even seeing sunlight. So, in order to be socially responsible, farmers rose to the occasion and moved the chickens into quarters where they could run free.

However, chickens running free still have problems, just slightly different ones, with health hazards. In their new aviaries, the hens have taken to nesting on the floor, with all of its ergonomic downsides as well as the health problems introduced as workers are forced to gather eggs from the floor. Hens live in the

4. “Wee bit” is defined to be customer illness, stock price drops, and plummeting revenue. As one analyst observed, “... sickness is always a bit of a risk for patrons of any restaurant where fresh, unprocessed ingredients are handled by fallible human beings.” Holman Jenkins, Jr., Chipotle Seeks a ‘Kill Step,’ WALL STREET J., July 29-30, 2017, A11.

5. Chipotle had a norovirus outbreak at several of its restaurants in 2015-16, an outbreak that raised concerns about the chain’s fresh-food safety. Shortly after, the restaurant experienced a multi-state E. coli outbreak. Julie Jargon, New Outbreak Chills Chipotle’s Rebound, WALL STREET J., Dec. 28, 2015, B1. The result was an almost 30% drop in sales, which later rebounded but sales growth in the third quarter of 2017 increased by only 1%. Justin Lahart, Reality Bites for Chipotle and Investors, WALL STREET J., Oct. 25, 2017, B16.

6. As Chipotle’s CEO noted, Jack in the Box (with its E. Coli outbreak due to undercooked meats), “never had to deal with Facebook and Twitter.” Stephanie Strom, To Woo Back Customers, Chipotle Sweats Details of Food Safety, N.Y. TIMES, Sept. 22, 2016, B2.

7. The movement is called cage-free or free-range, but whatever the label is it refers eggs from chickens not in cages and chicken meat obtained through slaughtering those chickens raised with free and open grazing rights. Zak Franklin, Giving Slaughter Houses Glass Walls: A New Direction in Food Labeling and Animal Welfare, 21 ANIMAL L. 285 (2015). There is a layer of complexity to “cage-free” and “free-range” in the labeling. Many a label has claimed “cage-free” and “free-range” for products that were neither or that stretched the definition of such. Ironically, sometimes the deception was for purposes of collecting the price premium that “cage-free” and “free-range” bring. Id. Social responsibility does not always involve angels or even the completely honest. See infra notes 415-452 and accompanying text.

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dirt, kick up dust, and that dust goes into their lungs as well as those of the workers. Both the workers and the hens developed more respiratory diseases as a result of living and gathering in the aviary dust. There also were problems with socialization. The struggle for space for that wing spreading and sunlight finds the hens in the midst of cat fights (forgive the species analogy to one that is antithetical to birds), pecking each other to death. In fact, the mortality rate for aviary hens is higher than that for caged hens. In short, a cage-free existence isn’t exactly Old McDonald’s farm, except for the cluck-clucks everywhere. The free and open range can be a hard-knock life.

Plastic straws became yet another target of rapid moving social responsibility demands. Because of their alleged effect on the environment, activists began targeting companies to abandon their use. For example, Lonely Whale engaged in a sleeper of a campaign to ban single-use plastic straws (as opposed to the hygienically challenged reusable ones). The issue was dragging along with little corporate response. However, when reality-TV star Kim Kardashian West posted on her Instagram account (for her 115 million followers) that she was no longer using plastic straws in her household, Alaska Airlines, American Airlines, Starbucks, Marriott International, Royal Caribbean Cruises, Walt Disney, and Hyatt Hotels quickly jumped onboard (Royal Caribbean being most prepared for an on-board venture). The effect of the straws on the environment remains unclear, but the businesses could not risk either the boycotts or the tongue-lashings from providing these “utensils non grata.” Other companies that announced that they had or would eliminate the use of plastic straws included McDonald’s, Dunkin’ Donuts, and Chipotle. McDonald’s response was the result of shareholder proposal to eliminate plastic straws. McDonald’s had already begun using paper straws in Great Britain, something that resulted because Queen Elizabeth was no longer pleased with the plastic straws. Most

9. The rate of sick days for workers increased with the introduction of aviaries. Id.
10. Id
11. For those who may not be familiar with some of the players in the social responsibility movement, Lonely Whale is an incubator of ideas “to drive impactful change on behalf of our ocean.” Note the singular “ocean.” That there is only one ocean now should delight children studying geography. Memorization that was once necessary (all seven seas) is a thing of the past. For more information on Lonely Whale, see LONELY WHALE, https://www.lonelywhale.org. (Last visited September 18, 2018).
13. Zlati Meyer & Chris Woodward, McDonald’s Might Have to Bend on Plastic Straws, USA TODAY, May 23, 2018, I.A. Starbucks will eliminate straws by 2020. The chain already has strawless lids. Christina Caron, Starbucks Has Plan to Reduce Pollution, and Change Slurping Forever, N.Y. TIMES, July 10, 2018, B3. For remaining companies, see id. For Chipotle, no social responsibility cause goes unadopted. Note that those in the print media were unable to resist straw-like plays on words in their article titles.
14. McDonald’s already had a program in place for reducing plastic materials in its containers. Meyer & Woodward, supra note 13.
15. Arie Tsang, Paper Straws Are Coming to Britain’s McDonald’s, N.Y. TIMES, June 18, 2018, B2.
of the other companies listed announced their withdrawals from plastic straws in response to the Kardashian West Instagram post.16

In all of the adopted bans, relevant information, information that should be used in rational decision processes, is buried in the rush to nouveau causes.17 For example, the straw ban is based on data that Americans use 500 million straws per day. However, the data were developed by a nine-year-old boy from Vermont and his mother.18 There has been little resistance to the movement, with the exception of information provided by those who are advocates for the disabled, who need the solid straws to avoid choking hazards.19 Some cities have also made exceptions for bubble tea shops because of the tapioca in their drinks that require the wider plastic straws. In other words, an Instagram movement proceeded and businesses acquiesced without accurate evidence and without input from those stakeholders who relied on the plastic straws.

These three examples, with many more to yet unfold, illustrate the unintended consequences of social responsibility obligations imposed on businesses willy-nilly by external social responsibility activists.20 Cowering beneath the madness and frenzy of Twitter, Facebook, and Instagram, business leaders have been switching gears swiftly, without full reviews and consideration of the impact on either shareholders or stakeholders.21 Regardless of where one sits in the social responsibility debate, these knee-jerk movements and sudden twists and turns carry resulting harms to shareholders and stakeholders. Indeed, some stakeholders are never considered in the rush to meet the demands of the hash-tag world. Emotional moments and movements have been driving business change and, ironically, often result in more harm precisely because of sudden shift to responding to social media campaigns that have been given the imprimatur of “socially responsible.”22 Succumbing to market forces has taken

16. Ramey & Tita, supra note 12 (“Ms. Kardashian West introduced what has come to be called the “summer of the plastic-straw ban,” also known as #StopSucking. Business leadership has reached a new pinnacle: When Kim Kardashian West speaks . . . businesses follow. Although media outlets refer to her as Kim Kardashian, Mrs. West’s Twitter account, the force that banished millions of straws, is called Kim Kardashian West (no hyphen).”).

17. The Kardashian family has clearly influenced social culture, but it remains unclear whether those cutting-edge talents extend to their determination of environmental/social responsibility tenets and practices.

18. Id. The Wall Street Journal and the National Park Service have relied on that data, not understanding the source or its accuracy. Ramey & Tita, supra note 12.

19. Id. The choking hazard comes via the personal knowledge of the author whose daughter with disabilities required strong plastic straws in order to ingest fluids. As she grew, the only type of straw that avoided the choking hazard was one made from the tubing used in fish tanks. Note: No fish in tanks suffered as a result of the purchase of such tubing for human use.

20. The impact of social movements on organizational responses and the wisdom of those rapid responses is discussed further infra in Section II.D. For a general discussion of social responsibility movements and responses see SARAH A. SOULE, CONTENTION AND CORPORATE SOCIAL RESPONSIBILITY (2009).

21. The limiting and tribal nature of social media as a means for tracking issues and gauging public pulse and concerns is discussed infra in Section II.D.

22. Section III discusses these difficulties.
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on a new air of wisdom and stability when compared with the emotional irrationality of activist bullying that has replaced the analytical and steady processes of business decisions.

For its own wellbeing, business needs a new model for social responsibility; one that does not weave hither and yon to whatever demands and reactions *du jour* emerge in social media. This new model is based in the confidence of self-identification: That business is business and social responsibility is social responsibility, but the former is not the tool or mechanism for achieving the latter. The corporate social responsibility (CSR) of business is not social responsibility, particularly the social responsibility movement of today that springs from social media campaigns, activist movements, shareholder proposals, and unilaterally applied regulatory forces, as accomplished through processes that dwell outside the boundaries of the legal constraints of due process.\(^{23}\) In order to make the case for removing businesses from the obligations of social responsibility the first necessary step is to make public case against social responsibility. The social responsibility movement is fraught with sloppiness in terms, research, and processes. It is a dictatorial movement in a free society, even as it is cloaked in goodness. However, CSR and virtue ethics do not have the same standards. CSR is grounded in ideology and political movements and virtue ethics is Aristotelian in origin. The purpose of this analysis is to halt what has become a nearly inexorable march to business self-destruction being orchestrated very cleverly in the name and use of social responsibility. Those behind the destruction of business autonomy are leading it to its own demise through the clever ploys of perceived public demand and the use of the ever-emotional social media sources.

Part I of this discussion covers the history of the social responsibility movement and its tenets and demands on business. Part II analyzes the flaws in the current social responsibility movement and the impact on both targeted organizations and the goals of those within the movement. Part III presents the new model for businesses that shifts from the requirement of business social responsibility to its necessary abandonment with a free market approach to wrest control from the corrupt motives of the social responsibility movement.\(^{24}\) Part IV

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23. The author uses the acronym "CSR" throughout the discussion because screens, funds, and other aspects of the social responsibility movement use "CSR." The author is, however, referring to all businesses in this discussion even though the target of the CSR movement is largely large corporate organizations. The model is also applicable to nonprofits, religious organizations, NGOs, and government agencies, especially those that might be at odds with the tenets of social responsibility. Some examples of social responsibility demands and their application to these other forms of organizations appear throughout this discussion. However, both the author’s expertise and concerns rest with the survival of businesses. The author’s hope is that these other organizations will easily see the self-application of the model and proceed accordingly in order to preserve their good works.

24. Just as all types and sizes of businesses can benefit from the application of management, analytics, logistics, finance, and marketing knowledge and models, all businesses should be able to use a model for ethics and social responsibility. That is, ethics and social responsibility are not limited to the Fortune 500.
offers conclusions and insights on the shift from CSR to virtue ethics through responses to free market demands.

I. THE HISTORY OF SOCIAL RESPONSIBILITY

There have been four phases of the corporate social responsibility movement (CSR). The beginning phase, active in the 1930s and 1940s, was a movement advanced by the Berle and Dodd debate. The second phase was a renewed effort with the work and theories of management professors and economist Milton Freidman. The third phase was one based in specific issues such as sweatshops, environmentalism, and diversity. The fourth phase is the focus of this discussion of and call for reform and was highlighted in the opening examples of the single-issue movements that proceeded through the use of social media.

A. Phase 1: 1900-1930: Labor’s Voluntary and Legislative Movements

The issue of the social responsibility is far more aged than most proponents acknowledge. Further, the changes brought about because of CSR issues arise in different ways, ways that reveal differences in how CSR issues are resolved. There are voluntary changes by businesses, there are legislative and regulatory changes brought about because of needs on both sides of CSR issues, and there are changes that come through public demand that often carries CSR issues through to litigation and/or regulation for their resolution. The CSR issues in the labor movement were resolved differently, but involved all three methods.

25. In the early research in the field the term corporate social performance (CSP) was used. However, post-2009, the term CSR became the preferred term. Samuel B. Graves & Sandra A. Waddock, Institutional Owner and Corporate Social Performance, 37 ACAD. MGMT. J. 1034 (1994).

26. The author is skipping the pre-social responsibility debate in England and that of the 1700s in the United States. There really was not a debate on the social responsibility of business, but there is historical data. When corporations were first formed in the United States (and England) they were formed for profit, but they were also all for the benefit of the community: mostly for banking, transportation, insurance, and water. Professor James Willard Hurst has the definitive work on these formative years. Professor Hurst was not engaged in debate but simply documented the nature of corporations in the United States in the 1700s (noting also that things were the same in England). JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970. (1970). His data are as follows: “Of the 317 separate-enterprise special charters enacted from 1780 to 1801 in the states, nearly two-thirds were for enterprises concerned with transport (inland navigation, turnpikes, toll bridges); another 20 per cent were for banks or insurance companies; 10 per cent were for the provision of local public services (mostly water supply); less than 4 per cent were for general business corporations.” Id. at 15. (as cited in A.A. Sommer, Jr., Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later, 16 DEL. J. CORP. L. 33, 36 n. 8 (1991)). However, as Hurst was quick to point out, the businesses served the community and had a community purpose, but they were formed as for-profit enterprises. Also, the businesses formed were providing products that a developing country needed: water, transportation, as well as money and insurance for the first three. Good purposes and gain often walk on the same side of the street. In fact, it is a great deal easier to make money if you sell what people need. No authority needed here.
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1. Voluntary Changes by Business

There are times when, sensing the impact of CSR issues and forces on profits and individuals, businesses make changes unilaterally. For example, in the early 1900s, General Electric (GE) plants became what were referred to as “fertile grounds” for union organizers. With turnover rates of 100 percent because of the increasing speed demands on production lines, GE experienced a strike in 1917 at its Lynn plant in Massachusetts that was organized by the International Workers of the World. GE’s general counsel, Owen Young, sent in a representative to determine the origins, purposes, and demands of the strikers. The report characterized the strikers as “Socialists, the Russian Labor Union, the IWW, the anarchists, the Bolsheviks, and the more radical men of the established labor unions.” Despite the rhetoric, the representative for general counsel still concluded that GE needed a new approach in its personnel policies.

When Mr. Young became GE’s chairman of the board, GE began experimentation in its personnel policies in order to develop employee loyalty. The policy changes included health care, grievance boards, mortgage assistance, and life insurance. GE led a different approach to treatment of employees, treatment that was designed to address the high cost of turnover, but which also addressed the social issues at that time such as job security and safety. Those voluntary changes came in 1922 following GE’s study of the issues and employee desires in order to address the problems of high turnover and strikes.

2. Tandem Changes: Business and Labor Obtain Mutually Beneficial Regulatory Changes

This GE era of voluntary corporate personnel changes in response to labor activity followed a stream of state-level legislation that had resulted in the worker compensation system. However, those changes came about in different way. The initial push on worker compensation regulations initially came from the business side because of the costs of litigation and the desire to limit employer liability for workplace injuries. The industrial age had brought levels of injuries, in both numbers and type, which far exceeded those in what had been an agrarian society. The interests of employees in being covered (medically and in missed

28. Id. at 1.
29. Id.
30. The irony of GE being at the forefront of labor reforms and social responsibility carries a certain irony because GE would later become a target in the CSR movement. From 1977 on, GE dealt with the fallout from decades of dumping waste into waterways. It would take decades from that discovery for the cleanup, in terms of the physical removal as well as settlements with the government and private litigators. Daren Fonda, GE’s Green Awakening, TIME – INSIDE BUSINESS, Aug. 2005, A10, at A11.
32. CHRYSTAL EASTMAN, WORK ACCIDENTS AND THE LAW (1910).
income) and the employers in limiting liability were addressed through legislative means with the passage of various forms of injury compensation systems.\textsuperscript{33}

The type of legislation adopted to address the injury coverage and liability issues ranged from requirements that employers maintain private insurance for coverage of worker injuries to state funds created to pay government-determined levels of injuries and resulting coverage and compensation.\textsuperscript{34} The legislation was a response to the concerns of both sides. The interests of employers and employees walked on the same side of the street, although their motivations were different.\textsuperscript{35} Neither side could solve the overarching issues and concerns without some form of governmental action. Employers could not be assured of limited liability and employees could not be guaranteed financial compensation without legislative mandates because individually executed agreements or company programs were not guarantees.\textsuperscript{36} This historical example illustrates that not all CSR issues can be solved through voluntary actions because some issues require legal protections in order to blend and address the concerns and interests of all

\begin{itemize}
\item \textsuperscript{33} “[t]he adoption of workers’ compensation was not the result of employers’ or workers’ “capturing” the legislation to secure benefits at the expense of the other. Nor can the adoption of workers’ compensation simply be attributed to the success of Progressive Era social reformers’ demanding protective legislation. The legislation was enacted so rapidly across the United States in the 1910s because most members of the key economic interest groups with a stake in the legislation anticipated benefits from moving from employers’ liability to workers’ compensation.” Fishback & Kantor, supra note 31, at 306-307.
\item \textsuperscript{34} Besides the public pressure, there were other factors that brought about a legal system of responsibility for workplace injuries. Those other factors included systems adopted in England and Germany, and the liability of and costs to employers from an increasing number of tort lawsuits by injured employees. David B. Torrey, \textit{100 Years of Pennsylvania Workers’ Compensation: History, the Current Scene, and Challenges Ahead}, 87 Pa. B.Q. J. 6, 8-9 (2016). The first legislation in the United States was introduced in New York in 1898 and was patterned after an 1897 British law. The United States lagged behind other industrial countries in the adoption of workers’ compensation. By 1900, Austria, Denmark, Finland, France, Germany, Great Britain, Italy, and Norway had instituted workers’ compensation schemes. And by 1907 Belgium, Greece, Hungary, Luxembourg, Netherlands, New Zealand, Russia, Spain, Sweden, and various British colonies also had enacted legislation. U.S. BUR. LAB. STATS., Workmen’s Compensation Laws of the United States and Foreign Countries, 126 U.S. BUR. LAB. STAT. BULL. 132 (1913).
\item \textsuperscript{35} “Economic theories of the development of regulation suggest alternative reasons for government intervention. Interest groups might compete for legislation that enables them to redistribute income in their favor at the expense of others (for example, the “capture” or “rent-seeking” models); or, faced with some set of market problems, interest groups might develop a cooperative solution whereby they all gain; or alternatively, regulations might be enacted as part of the broad-based agenda of a political-economic coalition.” Fishback & Kantor, supra note 31, at 307.
\item \textsuperscript{36} “In essence, the legislation established an \textit{ex ante} “contract” between workers and employers, who promised to pay a specified set of benefits for all accidents arising out of or in the course of employment. Further, the legislation raised the expected post-accident payments that workers received as a result of their workplace accidents. In return for relatively more certain and more generous average post-accident benefits under workers’ compensation, however, workers forfeited their rights to common-law negligence suits. Because of the financial protection that workers’ compensation provided injured workers and their families, it has been considered the first widespread social insurance program in the United States. . .” Id. at 305.
\end{itemize}
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stakeholders. However, those legal protections were brought about following input from all stakeholders.

3. Compulsory Change: Resolution of CSR Issues by Regulation Opposed by Business

In contrast to the initial era of CSR is the labor law movement, where there was a follow-up movement of imposed changes. When employees initially organized against their employers as a way to, for example, increase wages, their efforts were met with charges and criminal convictions because strikes had been criminalized. The social issues involved in the labor disputes that led to federal regulation included poverty, housing, and the societal impact of low wages. Because of the disparity in bargaining power between employers and employees and employer resistance to employee strength derived from their organized effort, a series of federal laws governing the right to and processes for worker unionization emerged despite business efforts to stop it.

In *NLRB v. Jones & Laughlin*, the U.S. Supreme Court noted, “Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.”

In addition, the U.S. Supreme Court noted that Congress had stepped in to eliminate the strife and violence that resulted from suppression of employee organizational efforts, noting that “the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, ‘instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.’”

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37. Insurance companies were also part of the coalition for reform because of their interest in reducing payouts. *Id.* at 312-313. Worker compensation has continued to evolve. Through the 1930s changes expanded coverage from injuries only to include diseases acquired as a result of workplace exposures. Again, these changes required legislation because of the burden of determining case-by-case what was to be included under the guaranteed compensation/limited liability system that had developed.

38. The first recorded labor case in the United States (1806) involved a demand for wages increases by shoemakers that ranged from 25 cents to 75 cents per pair of boots. Those participating in the organized demand and strike were charged and convicted of criminal conspiracy. *Commonwealth v. Pullis*, 3 Doc. Hist. 59 (1806), as discussed in 3 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59-248 (J.R. Commons, et al. eds., 1910).

39. N.L.R.B. v. & Laughlin Steel Corp., 301 U.S. 1, 33 (1937)

40. *Id.* at 34. The violence that led to the eventual labor legislation is beyond the scope of this discussion but is well documented. Kenneth Casebeer, *Aliquippa: The Company Town and Contested Power in the Construction of Law*, 43 BUFFALO L. REV. 617 (1995). The article documents the efforts of
The employer resistance to employee organization that ripened into violence and deaths was an example of an issue that resulted in governmental mandates for business. The passage of the National Labor Relations Act (the Wagner Act) was the beginning of a series of federal labor laws that resulted in a complete regulatory framework for employer and employee contracting when employees exercised their statutory rights to organization. From oversight of the processes for organization to the subject matters in collective bargaining agreements, the relationship of employers and employees who choose to organize is highly structured and heavily regulated.

On unionization and underlying wage and work conditions, there was no voluntary reform, nor did stakeholder interests coalesce to develop acceptable protections and solutions.

4. The Trends of the Initial Era of CSR

During this era of CSR, there were voluntary movements by business as well as cooperative movements on varying issues by all stakeholders for changes in operations, safety processes, compensation, benefits, and work hours. There were, however, also tensions that resulted in legislative and regulatory solutions for CSR concerns. However, these varying resolutions of CSR issues are the patterns in the evolution of CSR. The voluntary changes were the result of business’s recognition of the impact of employee conditions and treatment on the bottom line. Involuntary changes were the result of social pressures that fueled a regulatory cycle that continued to evolve.

However, whether voluntary, cooperative, or regulatory in nature, the changes discussed here evolved over time and were based on studies, data, and input. There were no sudden turns. In the case of GE, the company developed its own internal data (the 100% turnover rate) and responded because of the costs that resulted from loss of employee due to working conditions. In the case of worker compensation, the legislation and regulation resulted from studies by independent third parties that documented the harm to employees and the cost to employers. In the case of the labor movement, there were iterations of change

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Jones & Laughlin to cut off outside contact with its company town north of Pittsburgh (Aliquippa) and the resulting violence.
42. Those patterns are discussed infra in Section III.B and accompanying notes. The discussion of CSR patterns generally can be found in Soule, supra note 20.
43. The regulatory cycle and its components are discussed in Section I.B and accompanying notes.
44. Another issue that evolved through regulation, first at the state level and then in the 1930s at the federal level, is that of child labor. Emotions ran high, but children worked side-by-side with their parents and the loss of income in that period, as is the case in many other countries today, presented a difficult challenge to reforms. The regulation proceeded slowly, first in the form of contracts with children that included certain state protections, and then eventually with laws and regulations on hours, types of jobs, and pay across the states and eventually (once Commerce Clause constitutional issues were resolved) at the federal level. For a full history of the child labor movement and its international status today, see James

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that evolved from prosecution of employees involved in strikes to protection of the right to organize and strike.

In this phase, there were specific social issues that needed to be addressed. The pattern that emerged was the recognition of issues (and the time for recognition varied with the longest period being in the labor movement) and their need for resolutions, with those resolutions eventually being developed by businesses, by stakeholders, and, when those avenues did not effect change, by courts, legislators, and regulators. Resolutions came either through business self-awareness and resulting self-correction or through external pressures for reform brought about through public awareness of documented harms from business practices. The overarching theme of good vs. evil was absent, but the result was a practical approach undertaken because of recognized costs and harms of unresolved issues and concerns.45

B. Phase 2: The 1930s and 1940s and the Berle and Dodd Theories and Debates

Amidst the evolving employer-employee issues of the 1930s, legal scholars first trotted into CSR on a theoretical basis. The legal debate was not directed at specific issues (as with the labor movement). Rather the legal debate set up the resolution of CSR issues as an either/or conundrum based on the notion that businesses faced a false choice of profits vs. goodness.

In 1932, the Berle and Dodd debates emerged.46 Dodd maintained that businesses owed a responsibility to community whereas Berle rejected that duty. Professor Berle opened the debate with his view that managers are trustees operating the corporation and utilizing its assets for the stockholders as sole beneficiaries.47 Dodd’s response recognized a practical reality of social demands:


45. At this point in the evolution of CSR the distinctions between and among negotiated social responsibility (as with union contracts), mandatory social responsibility (as with government laws and regulations) and voluntary social responsibility were not the focus of public attention. If GE made the changes because it saved them the costs of high turnover, that profit incentive did not detract from the fact that the changes were made voluntarily. Eicher, supra note 27, at 7. Today, the absence of social intentions and presence of profit motive permits the conclusion that the action taken does not reflect social responsibility. Good outcomes, as determined by CSR standards, are not counted unless undertaken for noble reasons. See infra Section II.B and accompanying notes for discussion of this modern CSR approach.

46. Some scholars take the CSR movement back to the post-Civil War era when the United States (and earlier England) went through a long phase of industrialization, urbanization, and capitalism. However, the CSR movement at that time was a journalism movement that was focused on the growth itself, the size of companies, and monopolization. The movement into labor issues and safety began around the turn of the century as described in the GE discussion. See supra notes 27-30 and accompanying text.

47. A.A. Berle, Jr., Corporate Powers as Powers in Trust, 44 H. Rev. L. Rev. 1049 (1931). This was Berle’s actual first salvo in a case that did not involve social responsibility but did discuss the basic proper structure of authority of directors in corporations.

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[p]ublic opinion, which ultimately makes law, has made and is today making substantial strides in the direction of a view of the business corporation as an economic institution which has a social service as well as a profit-making function. [This] view has already had some effect upon legal theory, and that it is likely to have a greatly increased effect upon the latter in the near future.  

Dodd’s point was accurate. Public opinion and activism do drive laws and regulations. There is a regulatory cycle based on public activism, a cycle that follows a consistent pattern from the issue’s emergence to regulatory action or litigation. That process resulted in the concerns of both sides either being fully litigated or becoming the impetus for legislative and regulatory change. The discussion of the unionization movement illustrates the evolution of the regulatory cycle, something that results when there is no voluntary solution or resolution by a coalition of those who are affected by corporate actions or inactions.

The regulatory cycle begins when an issue of public concern emerges, which is preceded by significant awareness in the academic and business worlds. In other words, the public concern emerges when the research becomes known or business inaction, occurring despite awareness, continues. If business inaction continues or business remains intransigent towards reforms, as it did with the labor organization movement, the public becomes activated. The public’s social issue proceeds to regulation and litigation, again, as it did with labor. Indeed, the fear of litigation and liability brought about the compromise reforms in worker compensation regulation. Business has a choice, as the cycle progresses, to voluntarily change or to wait and be forced to change through legislative and judicial mandates, the results of which come without their input and because of their resistance.  

48. E. Merrick Dodd, Jr., For Whom Are Corporate Managers Trustees, 45 HARV. L. REV. 1145, 1148 (1932).

49. In fact, the phases of CSR follow some type of national crisis. Berle & Dodd were debating in the aftermath of the 1929 stock-market crash, a painful economic period that found many questioning corporate conduct and responsibility. The reforms put into place in the national securities markets reined in conduct related to the sales and resales of corporate securities. Ironically, the Berle-Dodd debate was really the result of the mergers and acquisition movement and was resurrected during the 1980 frenzy of mergers and acquisitions. Phase 2 responded to increasing environmental concerns and ushered in environmental reforms, Phase 3 followed international business expansion and labor issues, with consumer purchasing chic driving the CSR agenda, and Phase 4 has followed and has run in tandem with major corporate crisis surrounding the 2008 market collapse, the BP Deepwater Horizon explosion (see infra notes 156-160, and increasing racial tensions). Phase 4 has also folded in the environmental issues of Phase 2.


51. Id.

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In the introductory examples, the power of public opinion is driving CSR behavior (although, as noted, the question of the extent of public opinion can be distorted through social media). The distinction between Dodd’s underlying public opinion theory of CSR through laws and the current social media forces is the extent of the vetting/SAUSAGE-making processes that precede promulgation of laws and regulations. In Phase 1, the vetting came from corporations, the public, and third parties, such as the unionization groups. When the issues remained unaddressed (the voluntary or cooperative resolutions), the legal process began in response to continuing public activism. Dodd put CSR issue resolution under the constraint of legal process, ignoring or unaware of alternative resolutions.

This legal process, a consistent process, is required prior to any of the CSR tenets becoming mandatory, i.e., law. For example, environmental laws and regulations followed a slow and steady flow of information from the public, research, and businesses. Similarly, the Consumer Product Safety Commission does not ban products on the basis of the number of online posts the agency sees. Should the agency become aware of online posts, the agency could then commission research, hold hearings, release reports, and take responses from the public through the comment periods afforded by administrative law.

Berle’s follow-up concern to Dodd’s position was that even if Dodd’s proposition of public influence was correct, there were no means being offered for businesses to follow in answering the call of public opinion. Berle wanted some clear and definitive list of responsibilities, how those would be determined, and who would determine them. Ironically, Berle conceded Dodd’s point after

53. The process was lengthy and the road to federal legislation was paved with significant upheaval. For example, boycotts formed the American Anti-Boycott Association to develop a network of lawyers who could assist businesses in halting. Founded in 1902 by two hat manufacturers in Danbury, Connecticut, the Association was behind the litigation against unions. In fact, the Danbury Hatters case was the first major piece of litigation in the labor movement and was the result of cooperation among businesses to resist legal changes. For more on the history of business resistance in the labor movement, see Andrew Wender Cohen, Business Myths, Lawyerly Strategies, and Social Context: Ernst on Labor Law History, 23 L. SOC. INQUIRY 165 (1998).

54. Id. Although GE and some other companies made voluntary decisions on their labor practices, those practices were not uniformly adopted and the structure, rights, and purposes of unions as well as the rights and obligations of employers were largely the result of legislation that resulted from social tensions, litigation, and violence.

55. See Jedediah Purdy, The Long Environmental Justice Movement, for a discussion, details, and resources on the environmental movement. 44 ECOLOGY L.Q. 809 (2018).

56. There is a great deal in the legal literature about the need for voluntary recalls, ahead of agency action. For example, in the General Motors (GM) defective ignition switch litigation, evidence emerged that GM was aware of the defect in its cars for 13 years prior to issuing a recall. Marianne M. Jennings & Lawrence J. Trautman, Ethical Culture and Legal Liability: The GM Switch Crisis and Lessons in Governance, 22 BOSTON UNIV. J. OF SCIENCE & TECHNOLOGY L. 187 (2016). The lack of voluntary responses is a focus of academic debate with the goal of removing the obligation to recall away from regulatory action to voluntary action. See, e.g., Jill Wiener Lens, Product Recalls: Why Is Tort Law Deferring to Agency Inaction?, 90 ST. JOHN’S L. REV. 329 (2016). Under the Restatement Third of Tort Law, evidence that a recall could have prevented a plaintiff’s injury is not admissible in tort recovery. Restatement (Third) of Torts: Product Liability, § 11(a)(1) (AM. L. INST. 1998).
20 years of debate.57 His limited embrace, however, related to the role of lawyers in working with corporations:

Unchecked by present legal balances, a social-economic absolutism of corporate administrators, even if benevolent, might be unsafe; and in any case it hardly affords the soundest base on which to construct the economic commonwealth which industrialism seems to require. Meanwhile, as lawyers, we had best be protecting the interests we know, being no less swift to provide for the new interests as they successively appear.58

In other words, lawyers had a duty to protect the interests of clients as public policy issues arose. Berle inserted a means of voluntary action into the debate, actions that lawyers might spur in pointing out to their clients the evolving interests of the public and their communities on particular issues that could affect those clients.

C. Phase 3: The 1950s-1970s and Drucker and Friedman

By the 1950s, the Berle and Dodd debate had moved from a legal scholar/law review focus into the areas of management and economics. The legal process, and its start and finish, were no longer the focus of the debate. The debate migrated to an either/or proposition on one side and economic analysis on the other. Either business has a social responsibility or it does not, but, in some cases, it will not know the answer unless and until there is an economic analysis of any benefits of being socially responsible.

1. The Bowen Proposition of Cost and Benefit Analysis

This movement is sometimes marked by the publication of economist and Professor Howard Bowen’s book, Social Responsibilities of the Businessman.59 Professor Bowen did not see the CSR debate as an either/or conundrum. Rather, he saw the CSR decisions through the eyes of an economist, recommending that

57. For a full look at the Berle-Dodd debate, see Berle, supra note 47; Dodd, supra note 48. Had there been social media, Berle probably would have been toast after 24 hours. For authority on the 24-hour cycle see Kristie Aschwanden, Leaving Social Media Taught Me How Broken the News Cycle Is, FIVETHIRTYEIGHT, (June 6, 2017), https://fivethirtyeight.com/features/leaving-social-media-taught-me-how-broken-the-news-cycle-is/; and Garth Sundem, Have 24-hour News Stations Affected Society?, HOWSTUFFWORKS, https://people.howstuffworks.com/culture-traditions/tv-and-culture/24-hour-news-stations-affected-society.htm. For more discussion of the effect of social media and misunderstandings about its power and ability to reflect public concerns, see Section II.D and accompanying notes.

58. A.A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 169 (1954). Professor Berle did not acknowledge actual agreement with Professor Dodd by noting, “It is one thing to agree that this is how social fact and judicial decisions turned out. It is another to admit this was the ‘right’ disposition; I am not convinced it was.” A.A. Berle, Jr., Foreword to THE CORPORATION IN MODERN SOCIETY xii (E. Mason ed. 1959) (as discussed in A.A. Sommer, Jr., Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later, 16 Del. J. Corp. L. 33, 37 (1991)).

59. HOWARD BOWEN, SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN (1953). The book was republished in 2013 by Professor Bowen’s son, Peter Geoffrey Bowen, at the suggestion of a number of colleagues who had used the book in their teaching. Id. at vii.
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decisions be made on the basis of economic costs and benefits. The focus of the Bowen book is on a simple proposition:

\[ \ldots [s]ome of the many socially desirable improvements in business practice have been found to “pay” in the sense of cutting costs or increasing revenues of the individual firm. There has never been any doubt, of course, that if a given change in business practice reduces costs or increases revenue, self-interest will lead to adoption of the practice. Thus, when it was discovered that shorter hours or better light or cleaner washrooms increased the efficiency of workers and reduced unit labor costs, there was little hesitation in adopting these measures which were good from both commercial and social viewpoints. \]

Bowen recognized that gains are not necessarily measured solely by increases in production. However, Bowen’s concern was whether the accepted standards of society would influence business decisions even though there might be minimal economic benefit. For example, if a culture accepts a 12-hour work day as being “reasonable and proper,” then shortening the workday may reduce production. But, in a culture in which a 12-hour work day is perceived to be too long, reduction of that work day may increase production.\(^\text{61}\) In one cultural milieu, a business may find gains in reducing work hours, but in another, experience a reduction.\(^\text{62}\) Cultural attitudes affect the benefits and costs of CSR initiatives.

A current example illustrates the Bowen position on cultural issues and the difficulties of businesses trying to address CSR issues with resulting losses. In 2016, now-former San Francisco 49ers quarterback Colin Kaepernick “took a knee” during the playing of the national anthem prior to the start of his team’s final National Football League (NFL) preseason game.\(^\text{63}\) “Taking a knee,” according to Mr. Kaepernick, was his way of protesting “wrongdoings against minorities.” The symbolic action spread throughout the NFL, with various team owners struggling to determine the appropriate response to Mr. Kaepernick and the social justice movement, as well as to the fans (customers), many of whom were offended by what they perceived to be Mr. Kaepernick’s disrespect for the national anthem and the U.S. flag.\(^\text{64}\)

The NFL flailed about, and team owners made different decisions on what to do with their players following Kaepernick’s symbolic action, ranging from joining the players to implementing bans on “taking a knee.”\(^\text{65}\) The effect was the reduction in the value of NFL franchises because of declining popularity,

\(^{60}\) Id. at 111.

\(^{61}\) Id.

\(^{62}\) Id.


\(^{64}\) Social media played a significant role in the kneeling controversy. Galin Clavio, For NFL Players, Social Media Is the Key for Winning PR Battles Over Anthem Protests, THE CONVERSATION (May 23, 2018), http://theconversation.com/for-nfl-players-social-media-is-key-to-winning-pr-battle-over-anthem-protests-97292.

\(^{65}\) Andrew Beaton, NFL Declines to Change Anthem Policy, WALL STREET J., October 19, 2017, at A14.
along with a reduction in both ad revenues for NFL networks because of reduced ratings and ticket sales.\textsuperscript{66} Nonetheless, the NFL's Commissioner joined with the players in their social justice efforts.\textsuperscript{67} Cultural attitudes do influence business decisions. However, business decisions on CSR issues have varying economic consequences, including impact on revenues.

2. \textit{The Drucker Management Perspective (With a Touch of Philosophy)}

During this period, Peter Drucker, the management guru, weighed in with his views on CSR. Dr. Drucker had an overarching principle of \textit{primum non nocere}, a motto that is part of the Hippocratic oath, meaning to above all not knowingly do harm.\textsuperscript{68} Just don’t hurt anybody, was the colloquial translation of the Drucker 30,000-foot overview of CSR.

Drucker also subscribed to what he described as the Eton graduate level of expectations for businesses. If an Eton graduate is convicted of drunken driving, his punishment should be harsher than that doled out to a common bloke because there are higher expectations for those who have been given the imprimatur of education.\textsuperscript{69} Likewise, businesses should receive harsh punishments for doing harm because they have been given a level of license for operation in society. That vaunted position of business carries an additional responsibility of accountability to the society that granted the privilege to the business. Drucker viewed business as an “organ of society” which owes an obligation to society.\textsuperscript{70} That obligation was to not knowingly lie, cheat, or steal, and also to not knowingly harm society.


\textsuperscript{67} Nancy Armour, \textit{Goodell Joins NFL Players in Fight Over Issues}, USA TODAY, Sept. 14, 2018, at 1D.

\textsuperscript{68} Peter F. Drucker, \textit{Management: Tasks, Responsibilities and Practices} 367 (1973).

\textsuperscript{69} Id. at 366.

\textsuperscript{70} Peter F. Drucker, \textit{The Practice Of Management} 37 (1954).
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The Drucker Eton theory remains part of the CSR debate today. During her ultimately successful U.S. Senate campaign in Massachusetts, Elizabeth Warren made what would become the “you didn’t build that” speech:

“I hear all this, you know, ‘Well, this is class warfare, this is whatever. No. There is nobody in this country who got rich on his own. Nobody.

You built a factory out there? Good for you. But I want to be clear: you moved your goods to market on the roads the rest of us paid for; you hired workers the rest of us paid to educate; you were safe in your factory because of police forces and fire forces that the rest of us paid for. You didn’t have to worry that marauding bands would come and seize everything at your factory, and hire someone to protect against this, because of the work the rest of us did.

Now look, you built a factory and it turned into something terrific, or a great idea? God bless. Keep a big hunk of it. But part of the underlying social contract is you take a hunk of that and pay forward for the next kid who comes along.”

Senator Warren appeared to advance a Drucker-like theory that would involve greater government control over businesses, including reimbursement via taxes for the use of roads and other community resources in operating a business.

3. The Friedman View: Agents of Corporations and Their

71. Elizabeth Warren, Speech in Andover, Massachusetts (Aug. 2011). For the video of the speech, see Awakening 3648, Elizabeth Warren’s You Didn’t Build That Speech as Made Famous by Obama HD, YOUTUBE (July 7, 2014), https://www.youtube.com/watch?v=0AMoB7IFUA. Then-Professor Warren’s thoughts were picked up by President who used them in a campaign speech in Roanoke, Virginia during the 2012 presidential campaign: “If you were successful, somebody along the line gave you some help. There was a great teacher somewhere in your life. Somebody helped to create this unbelievable American system that we have that allowed you to thrive. Somebody invested in roads and bridges. If you’ve got a business, you didn’t build that. Somebody else made that happen.” Aaron Blake, Obama’s ’You Didn’t Build That’ Problem, WASH. POST (July 18, 2012), https://www.washingtonpost.com/blogs/the-fix/post/obamas-you-didn’t-build-that-problem/2012/07/18/gJQOaJxyotW_blog.html?noredirect=on&utm_term=f188b630ae05.

72. The speech was actually a restatement of the views of Berkeley professor George Lakoff, a cognitive linguist and philosopher and an architect of the “Occupy Wall Street” movement and progressive. George Lakoff, How To Frame Yourself: A Framing Memo for Occupy Wall Street, HUFFINGTON POST (Oct. 9, 2011; updated Dec. 19, 2011), https://www.huffingtonpost.com/george-lakoff/occupy-wall-street_b_1019448.html. See also George Lakoff & Elisabeth Wheling, The Public: Obama’s and Romney’s Opposite Visions for a Free America, GEORGELOKOFF.COM (Sept. 16, 2012), https://georgelakoff.com/2012/09/. Professor Lakoff’s views are evident in this excerpt: “The Internet didn’t get invented on its own. Government research created the Internet so that all the companies could make money off the Internet. (...) when we succeed, we succeed because of our individual initiative, but also because we do things together. There are some things, just like fighting fires, we don’t do on our own. (...) So we say to ourselves, ever since the founding of this country (...) there are some things we do better together. That’s how we funded the GI Bill. That’s how we created the middle class. That’s how we built the Golden Gate Bridge or the Hoover Dam. That’s how we invented the Internet. That’s how we sent a man to the moon. We rise or fall together as one nation and as one people (...) I still believe in that idea. You’re not on your own, we’re in this together. (...) If you were successful, (...) somebody helped to create this unbelievable American system that we have that allowed you to thrive.” Id. Interestingly, the response to the “you didn’t build that” movement was classic economics and the rule of law: the concept of private property is central to economic development. Katherine Mangu-Ward, Publicly Traded Companies Are Still Private Property, REASON (Nov. 2018), https://reason.com/archives/2018/10/11/publicly-traded-companies-are.
Responsibilities

However, oddly, Milton Friedman’s clearest statement on his views on CSR appeared in a Playboy interview. That interview would bring about the never-ending either/or debate that pitted social responsibility against free markets. The interview was a pithy summary of Friedman’s longer article in the New York Times Magazine that referred to social responsibility as a form of socialism with decisions being made for businesses by those not involved in those businesses, or even in general economic development. Dr. Friedman’s theme was along the lines of the Bowen’s view that decisions for businesses on issues of CSR are best made by the business on economic grounds. Friedman added the Berle component in noting that it is possible that voluntary action by a business, beyond compliance, may be an economically sound thing for a business to do, regardless of that decision’s contribution to CSR.

However, Friedman did not believe that simply succumbing to cultural forces should be the grounds for business decisions:

I wouldn’t buy stock in a company that hired that kind of leadership. A corporate executive’s responsibility is to make as much money for the shareholders as possible, as long as he operates within the rules of the game. When an executive decides to take actions for reasons of social responsibility, he is taking money from someone else – from the stockholders, in the form of lower dividends, from the employees, in the form of lower wages, or from the consumer, in the form of higher prices.

Friedman’s discussion in Playboy provided an example of how his views on CSR should be applied. The example was the pollution from the steel mills in Gary, Indiana. At the time of the interview, there were no environmental regulations that controlled the emissions from the U.S. Steel plants located there. Reducing the emissions would be voluntary and costly for U.S. Steel. However, Friedman added, “it’s to the company’s advantage to do something about it. Why? Because if it doesn’t, workers will prefer to go where there is less pollution, and U.S. Steel will have to pay them more to live in Gary, Indiana.”

Since the time of that interview, the debate has been vibrant, controversial, emotional, and, as will be discussed, often conducted in a vacuum. Friedman’s

75. Norman, supra note 73.
76. Id.
77. It is certainly odd in this era of #MeToo that the shot heard round the world when it comes to social responsibility was fired in the pages of Playboy. And it certainly gives us academics pause as we labor to gain acceptances of our work in Tier 1 journals to realize that a one-paragraph comment in Playboy by a respected economist generated decades of debate whereas the average readership rate on an academic Tier 1 journal is 7 people, including the author checking to see if there were missed typos. For the source of Dr. Friedman’s quote, see Norman, supra note 73 (the pertinent part of Friedman’s quote is that “[a] corporate executive’s responsibility is to make as much money for the shareholders as is possible, as long as he operates within the rules of the game.”). Dr. Friedman had expressed his views in other outlets, but such a mention only cements the notion that while only 7 people are reading scholarly articles, Playboy reaches a wider audience. Same theories touted, different audience and responses. MILTON
view was definitive, but still misunderstood. His concerns centered on the “lack of rigor” and loosely analytical qualities of social responsibility. Some of the concerns about business exercise of CSR initiatives are summarized in the following question format:

- What is the scope of social responsibility?
- Who makes the decisions about what is and is not socially responsible behavior?
- How far does social responsibility take the company? Are companies, for example, required to refrain from price increases because of inflation in the name of its social good for society? And are they required to hire the hard-core unemployed over hiring on the basis of qualifications?

Friedman saw the actions of companies responding to social good as really being the imposition of a tax on the company’s owners, its shareholders, because they were being required to pay for decisions that spent their investment in the company. The imposition of a tax for social programs was, in Dr. Friedman’s view, the province of government, not private entities or citizens acting unilaterally. 78

One portion of Friedman’s views was particularly relevant for the discussion that will follow in Part IV regarding the new methodologies for presenting CSR issues via the pressures of social media forces to influence the timing and acceptance of corporate CSR actions and decisions:

The businessmen believe that they are defending free enterprise when they declaim that business is not concerned “merely” with profit but also with promoting desirable “social” ends; that business has a “social conscience” and takes seriously its responsibilities for providing employment, eliminating discrimination, avoiding pollution, and whatever else may be the catchwords of the contemporary crop of reformers. In fact, they are—or would be if they or anyone else took them seriously—preaching pure and unadulterated socialism. Businessmen who talk this way are unwitting puppets of the intellectual forces that have been undermining the basis of a free society these past decades. 79

4. The Coase Theorem: Private Property Rights Negotiations

Also emerging during this economic/management era was the work of Ronald Coase, a University of Chicago professor and Friedman colleague. Coase held a different view from Friedman on CSR and voluntary actions by businesses on issues that were primarily social issues. The Coase Theorem was grounded in the right of free exchange, the idea that “the initial allocation of legal entitlements does not matter from an efficiency perspective so long as they can be freely exchanged.” 80

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78. Friedman, N.Y. TIMES, supra note 77. This summary was prepared from Dr. Friedman’s longer discussion that he wrote for the New York Times as opposed to the pithier interview in Playboy.
79. Id.
The Coase Theorem is best understood through Coase’s application to his example of the wood and coal burning locomotives that emitted sparks whilst traveling along the tracks across the agricultural heartland. The sparks from the train’s engines could, at times, start fires in the farmers’ fields located on both sides of the train tracks. The railroad could reduce or prevent the fires through several different means, all of which would increase their costs, including installing spark arresters, using different fuel (spark-free) to power the engines, or running fewer trains or running trains only during those times when the fields are not dry. The farmers, on the other hand, could leave the land closest to the tracks fallow, planting their crops farther back. The farmers could also locate any farm structures farther away from the tracks so as to minimize the fire risk or the costs of a fire. Both sides have solutions that involve costs but solve the safety issues.

Under property rights, the farmers have a legal remedy through the law of nuisance that allows them to collect damages caused by the railroads to their land and crops. The railroad has the risk of additional costs by means of payment of, or insurance for, the farmers’ possible recovery. There is also the possibility that, as a result of a successful public nuisance claim by the farmers, the railroads’ activities could be enjoined when the court balances the interests of the farmers against the interest of continuing the railroad’s operations. There are community benefits and costs on both sides in a public nuisance case. Though there is a legal remedy, Coase viewed the law in this situation as an artificial and inefficient substitute for what the parties could accomplish themselves.

The Coase Theorem holds that, given the ability to negotiate, the farmers could sell their right to recover for the nuisance, thus compensating them for the crop setback and possible damages to buildings or the expense of moving the buildings. The farmers could also pay the railroads for reducing the spark risk through the suggested solutions. There is no limit to the possible rights and allocations that the parties could negotiate for their protection up until they reach the point of equilibrium. That is, the point of equilibrium is reached when the parties agree upon a settlement that allocates their rights efficiently under market standards (i.e., costs and benefits to each side). Coase believed that government intervention interferes with the ability of the parties with rights and costs to reach the point of equilibrium. \(^{81}\) Third-party intervention would be akin to government involvement because the Coase Theorem is based on the economic theory that those who have a property interest have motivation for efficient resolution of conflicts in the use of their resources. \(^{82}\)

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81. _Id_. The discussion here is a summary of the Coase article and theorem.
82. “Despite the obvious nature of the legal rights and the economic realities of balancing interests and costs, neither corporations and their shareholders nor various stakeholder groups have been particularly efficient or proficient in understanding or executing their positions of entitlement under law. Indeed, there appears to be evolving sympathy for ultra vires legal intervention atop existing legal entitlements. Stakeholders and proponents of stakeholder theory are not content to permit market
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The Coase theorem could be seen in application and practice when businesses were permitted, under the Clean Air Act, to sell emissions rights. To the extent the businesses reduced their emissions, they were able to sell those emission rights on an open market to other businesses. Those businesses could do the same. The demand for emissions rights resulted in choices and behaviors among businesses to adopt voluntary controls, beyond statutory environmental minimums, because the transfer of their entitlement resulted in greater revenue. The government intervention was limited to establishment of the exchange itself, a business structure that permitted the sale and purchase of emission rights.

Coase believed that all social issues could be more efficiently addressed by businesses through the free market. However, one of the drawbacks to the Coase Theorem is the assumption that regulators will allow the free market to work or that the parties involved will reach equilibrium in a timely fashion, with timely being defined by the patience of regulators and the public movement of the regulatory cycle. In that sense, Coase, by implication, recognized the role of public input and culture on the adoption of voluntary or involuntary resolution of CSR issues.

The failure to renegotiate legal entitlements in a timely manner can prove costly, but the parties on both sides of a CSR issue are often not thinking through the future costs (of regulation and litigation), focusing only on the expense of the present. For example, Johns-Manville enjoyed a near monoplosistic run in the insulation market with its asbestos products. However, there had been, over centuries, significant health questions related to the effect on the lungs of asbestos workers (from production to installation). When the health effects became clear in the 1930s (as documented in board records), the company took no voluntary actions to reduce the levels of exposure or provide warnings. From the time that the clear medical studies on health effects were received by the Johns-Manville board, over thirty years would pass. Those thirty years were filled with significant litigation that forced the company into Chapter 11 bankruptcy when the company’s external auditors could no longer certify its financial statements because of the likelihood that the litigation would be efficiencies to run their course, and corporations and shareholders, oddly, seem all too unwilling to recognize the economic costs of not addressing the issues and concerns of the stakeholder/farmer. The railroads are waiting too long to act, and the farmers are impatient and not cognizant of their bargaining position under current legal entitlements.” Marianne M. Jennings & Stephen K. Happel, The Post-Enron Era for Stakeholder Theory: A New Look at Corporate Governance and the Coase Theorem, 54 MERCER L. REV. 873, 912 (2003).


84. This summary is based on the work of Paul Brodeur, The Asbestos Industry on Trial, NEW YORKER, June 10, 1985, at 63-69.
resolved against the company.\textsuperscript{85} The parties had missed the equilibrium point for renegotiating legal entitlements.

The unrecognized future costs of litigation were not factored into the Coase equilibrium period, and the company ignored the medical studies, keeping them hidden for decades.\textsuperscript{86} The ultimate cost was that Johns-Manville had to pay twenty-five percent of its net income to a trust fund used to cover personal and property damages caused by asbestos, with cases still pending now 70 years later.\textsuperscript{87}

Despite the voluntary nature of the actions of affected parties under the Coase theorem, it was still viewed as an economic theory that did not address the public concerns of CSR issues.\textsuperscript{88} The next phase brought those concerns into the CSR debates.

\textbf{D. Phase 4: The 1980s-2010 –From Stakeholder Theory to the Topical Social Responsibility Movement}

\textbf{1. Stakeholder Theory Origins}

Following the either/or debates and decades of Dodd, Berle, Bowen, Friedman, Drucker, and Coase, CSR moved into a different era. CSR transferred fully from the fields of economics and law into the management arena, even as it added the component philosophy. Friedman noted in 1996 that the debate over CSR had died down 20 years earlier.\textsuperscript{89} However, if it had died down, it was perhaps only in economics and it was resurrected amongst the philosophers in

\textsuperscript{85} The litigation moved to national levels with the first appellate decision on the issue, Borel v. Fibreboard Paper Products, 493 F.2d 1076 (5th Cir. 1973). Victor E. Schwartz & Mark A. Behrens, \textit{Asbestos Litigation: The Endless Search for a Solvent Bystander}, 23 WIDENER L.J. 59 (2013). The asbestos cases have trained three generations of young lawyers.

\textsuperscript{86} While the board was aware of the health issues in the 1930s, it took no action. The board minutes verifying the knowledge of the board were later uncovered during litigation. Brodeur, supra note 84.


\textsuperscript{88} One could argue that Coase would see public relations and the fallout from customer dissatisfaction as a cost that should be considered in determining equilibrium points.

\textsuperscript{89} In a reflective mode, Friedman noted about social responsibility, “It was a very fashionable topic some 20 years ago, and then it sort of died down. I think it is all rhetoric.” John F. Dickerson, Adam Zagorin, Stacy Perman & Jane Van Jessel, \textit{The New World of Giving}, \textit{TIME}, May 20, 1996, at 40-41. It may indeed have been all rhetoric, but that has never stopped academics from theorizing, hypothesizing, and publishing. A trio of academics, in 2017, wrote a series of “hoax papers” and got them placed in academic journals. One of the papers consisted of several pages from \textit{Mein Kampf} with current feminist jargon inserted and it was successfully placed in a journal on feminist social work. Another hoax paper was on Hooters and another was on the mating habits of dogs in dog parks. The articles were retracted, but the trio explained that the purpose of their exercise was to demonstrate that something “has gone wrong in the University – especially in certain fields in the humanities.” Jennifer Schuessler, \textit{With Canine Sex and Hooters, Pranks Jab at Academic Papers}, N.Y. TIMES, Oct. 5, 2018, at A1.
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1984 when R. Edward Freeman’s work on stakeholders appeared. Freeman’s work, which he has modified over the years, was grounded in a utilitarian approach, which was that corporations should function for the good of the whole. The definition of “good of the whole” was dependent upon a definition of stakeholder, and there was considerable debate in the literature following Freeman’s initial work on who and what constituted a stakeholder.

2. Stakeholder Definitions

Freeman’s definition in his initial work was “any group or individual who is affected by or can affect the achievement of an organization’s objectives.” The definitions by other scholars have been broad and varied:

“an individual or group that asserts to have one or more stakes in a business,”

“any individual or group who feel that they have a stake in the consequences of management’s decisions and who have the power to influence current or future decisions,”

“an individual, a coalition of people, or an organization whose support is essential or whose opposition must be negated if major strategic change is to be successfully implemented.”

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90. R. Edward Freeman & David L. Reed, Stockholders and Stakeholders: A New Perspective on Corporate Governance, 25 CAL. MGMT. REV. 88 (1983). For a summary of the expansion of stakeholder theory, see Robert A. Phillips, Stakeholder Theory and a Principle of Fairness, 7 BUS. ETHICS Q. 51 (1997). See also, Stakeholder Capitalism, THE ECONOMIST, Feb. 10, 1996, at 23. Freeman is actually not the originator of the term “stakeholder.” The term was originally coined in a 1963 internal research memorandum of the Stanford Research Institute and was defined there as “a member of the “groups without whose support the organization would cease to exist.” See Freeman & Reed, supra note 90.

91. One of the revisions that Freeman has made in his work on stakeholders is that the origins of stakeholder theory lie more in management practices than in the desire to address interests of others, including CSR issues. Recent research indicates that the management practices at Lockheed in its efforts to respond to its changing environment were a significant part of the original Stanford research that led to the stakeholder concept. The stakeholder theory was not developed for survival of companies; it was a theory advanced for better management practices. GILES SLINGER, STAKEHOLDING AND TAKEOVERS: THREE ESSAYS (2001). An abridged version of the essays can be found in Spanning the Gap: The Theoretical Principles Connecting Stakeholder Policies to Business Performance, Centre for Business Research, Department of Applied Economics, Working Paper, University of Cambridge, 1998. It is difficult to obtain permission to reproduce Professor Freeman’s works (such as William R. Evan & R. Edward Freeman, A Stakeholder Theory of the Modern Corporation: Kantian Capitalism, and R. Edward Freeman, The Politics of Stakeholder Theory, 4 BUS. ETHICS Q. 409 (1994). His work appeared in three editions of the author’s Business Ethics: Cases and Selected Readings, but Professor Freeman refused to grant permission for the latest edition because he felt that his views had changed.

92. Indeed, Freeman engaged in debate with himself. He went from a utilitarian “good of the whole view” to a Kantian view. Freeman & Reed, supra note 90.

93. ARchie B. CarROLL, Business and Society: Ethics and Stakeholder Management 60 (2nd ed. 1993).


“persons that have, or claim, ownership, rights, or interests in a corporation and its activities, past, present, or future.”

“stakeholders are persons or groups with legitimate interests in procedural and/or substantive aspects of corporate activity.”

Based on these definitions, there appeared to be several large groups of stakeholders, such as employees, vendors, employees of vendors, vendors of employees, community where the corporation is located, customers, communities where the customers are located, and next generations. Some academics believe that competitors should be considered stakeholders. Others include flora and fauna. With the broad expansion of stakeholder theory from its initial use in strategic planning to protection of both human and non-human interests, there was a significant shift in the application of stakeholder theory. Its application was used on an issue basis. For example, stakeholder theory during this time was used for analysis of downsizing, with full exploration of the effect on employees, communities, and vendors. However, stakeholder theory was not used in discussions of unionization, i.e., corporations were not stakeholders in consideration of the unionization votes.

The underlying assumption of this shift toward broad protections under stakeholder theory was that businesses, by taking advantage of all of the


98. Elaine Sternberg, The Defense of Stakeholder Theory, 5 CORP. GOV. INT’L REV. 3 (1997). There was some scholarly objection to competitors as stakeholders:

There is a tendency in some of the stakeholder literature to broaden the concept to include all persons or groups who are touched in any way by the activities of the firm, and specifically to include competitors. This inclusion is logically incorrect. Stakeholders are those who have a “stake” in the successful operation of the firm, and firms should be managed for their mutual benefit. Good performance (which may have many different dimensions, including reduction of environmental impact, etc., as well as growth and profitability) benefits some or all stakeholders, poor performances injures some or all of them. By contrast, the marketplace success of the firm may well result in reduced benefits or even losses for competitors. It is ludicrous to suggest that firms should be managed so to produce benefits for competitors; hence, competitors cannot be considered “stakeholders” in any operational sense. The inclusion of competitors and other extraneous groups as “stakeholders” indicates a confusion between “stakeholder management” and “ethical business behavior.” Lee E. Preston & James E. Post, Author Response, 35 BUS. & SOC’Y 479 (1996).

The irony is that it remains unclear from the objection to competitors as stakeholders in the quote whether the authors believe that not addressing the interests of competitors remains an ethical issue, just not a stakeholder issue.

99. This definition is “any naturally occurring entity which affects or is affected by organizational performance.” Mark Starik, Should Trees Have Moral Standing? Toward Stakeholder Status for Non-Human Nature, 14 J. BUS. ETHICS 207, 210 (1995). Philosopher Peter Singer has argued that the interests of animals are no less than the interests of humans and should not be discounted simply because they cannot speak. See generally, PETER SINGER, IN DEFENSE OF ANIMALS (1985).

100. Stakeholder theory resulted in the evolution of CSR issues, with some issues going by the wayside while others received increased attention. Marianne M. Jennings, Teaching Stakeholder Theory: It’s For Strategy, Not Business Ethics, 16 J. LEGAL STUDIES ED. 203, 206 (1998).
resources in a community (water, roads, employees, educational facilities, transportation, waste management), entered into an implied contract to give back to that community and involve that community in their decisions.101 Referred to as “fairness” or “social contract” theory, it is summarized as follows:

Whenever persons or groups of persons voluntarily accept the benefits of a mutually beneficial scheme of cooperation requiring sacrifice or contribution on the parts of the participants and there exists the possibility of free-riding, obligations of fairness are created among the participants in the cooperative scheme in proportion to the benefits accepted.102

In other words, during this phase, stakeholder theory traveled from utilitarianism through Kant and into normative principles, and perhaps over to “you didn’t build this,” as enforced by informal sanctions and mechanisms.103

3. Which Stakeholders and What Priority?

If the definitional hurdle of “stakeholder” could be clarified, and the nature of a corporation’s responsibilities to those stakeholders could also be carefully outlined, there remained the issue of the hierarchy of stakeholders. Which of the stakeholders would or should have ultimate say when the interests of the various stakeholders were conflicting? Who would set the controlling factors? Who would be the stakeholder with the final say on the social contract? The inherent assumption in stakeholder theory is that there would be clarity in assessing the differing interests and the impact on each group of stakeholders as well as on the business itself.

For example, in 1992, Smith & Wesson, a gun manufacturer in the United States, was struggling to survive. There were class-action product liability suits against gun manufacturers seeking recovery for the injuries and damages experienced by victims of crimes committed while the perpetrator was using a gun. It was unclear that Smith & Wesson, owned by Tomkins, P.L.C., a British manufacturer of plumbing supplies and lawn mowers, would survive. To find its way out of its financial crunch, Tomkins decided to have Smith & Wesson break rank with its fellow gun manufacturers who were fighting the suits.104 Tomkins settled the suits with agreements to make donations, put safety locks on all

101. This approach of applying the philosophical view of a normative contract between businesses and society for the use of roads, community resources, and capital was the management version of the Warren/Obama/Lakoff theorem “you didn’t build that,” which entitled the government to collect compensation from companies in the form of taxes. See supra notes 71-72 and accompanying text. The distinction here is that the obligation is implied and voluntary as an ethical obligation as opposed to a government taking (with all the issues related to protection of personal property).

102. Phillips, supra note 90.


pistols, and, among other things, stop selling guns that could accept large capacity ammunition magazines.

Financially, Smith & Wesson had saved itself from bankruptcy. Business ethicists and the British heralded the decision as an example of corporate social responsibility. However, as a result of the decision, Smith & Wesson experienced a boycott by outraged consumers and was forced to shut down two facilities and lay off a substantial amount of its work force. Its sales dropped by one-third in less than a year. Tomkins was forced to sell Smith & Wesson to a U.S. firm for $15 million (Smith & Wesson had $97 million in assets at the time). The praise came because the CSR screen of “guns” and “weapons” is a given prior to application of the stakeholder theory. If the company itself is involved in the production and/or sale of products that are screened out by CSR investors and consumers, then stakeholder analysis dismisses stakeholders with the goal of sacrificing the company, its stakeholder employees, and the communities in which they reside.

If the fate of the company is examined using stakeholder theory, we are left with the question: Whose interests were served by the actions of Tomkins? A large number of Smith & Wesson employees lost their jobs, and the communities with the two factories lost that portion of their economy. Yet, the actions were responsive to a critical CSR issue, that of the elimination of handguns. The downward spiral was exacerbated by the stakeholder decision to change the company’s products in response to public pressure through the litigation and the general public attitude about handguns, particularly those with high-capacity magazines. The appeasement of one group of stakeholders harmed the remaining stakeholders to such an extent that the company was nearly destroyed. The CSR screens are a means of eliminating stakeholders from the calculus when evaluating the impact of corporate decisions.

Apart from the lack of clarity on who stakeholders are and how the stakeholder model is applied, there remains the question of which issues (and, ergo, also which stakeholders) are those for which corporations are held

107. The CSR screens are covered infra at notes 116-35 and accompanying text.
109. Eventually, President George W. Bush labeled the Smith & Wesson agreement as only a “Memorandum of Agreement,” and Smith & Wesson was released from its provisions. However, by the time of this release, the company had experienced a $57 million loss in its income. Westphal & Wheeler, supra note 104.
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accountable. In the case of Smith & Wesson, their product was the issue.\textsuperscript{110} Whether corporations are affected by CSR screens and demands depends on the decisions of outside groups that examine particular products, certain aspects of business operations, and sales techniques. These outside groups then develop the CSR screens for the products and companies. Those companies that do not meet those screens, as with Smith & Wesson, are targeted as socially irresponsible. During this phase of CSR, certain CSR issues were nonstarters for purposes of stakeholder analysis. That is, employees of companies that make guns are not considered stakeholders for purposes of making decisions about the future success of the companies. The screens would become the measures for determining both stakeholder standing and priority.\textsuperscript{111}

4. **Topical CSR: Predetermined Virtue Via Screens for Investors and Consumers**

This era of the CSR movement followed from the definitional, standing, and priority weaknesses of the stakeholder model. That is, the lack of clarity on aspects of stakeholder theory necessitated third-party creation of some measurement mechanism for what were and were not socially responsible corporations. The broadness of the stakeholder model did not provide guidelines for investment or customer purchasing. Through the guidelines, third parties could influence purchasing and investing, and thus exert control over the choices of businesses in their products, operations, and sales. How does one define CSR for corporations with the general overview of a responsibility to utilize economic resources in business activities in order “to provide and contribute to its internal and external stakeholders”?\textsuperscript{112} CSR evolved into more specifics in this era. The result was the development of third-party criteria for CSR and resulting lists of CSR companies, and, by their exclusion, non-CSR companies. There was market power in the criteria and lists. That power of ranking and rating social responsibility priorities permitted control of the capital inflow to corporations as well as influence over customer purchasing decisions (sales and revenue). In

\textsuperscript{110} Recently Smith & Wesson had a showdown with Blackrock, one of its institutional investors concerned that the company’s position in support of the Second Amendment might tarnish the company’s reputation. A group of Catholic nuns also confronted the company about its position. Based on its history the company issued a report to both the investment fund and the nun and concluded that alienating customers would result in “immediate and possibly irreparable damage.” James Langford, Smith & Wesson Sticks to Its Guns, WASH. EXAMINER, Feb. 19, 2019, at 43. The company indicated it would keep its customers rather than pursue the “vague goal of improving the company’s reputation among non-customers or special-interest groups with an anti-Second Amendment agenda.” Id. at 44.


\textsuperscript{112} Peter Kok, Ton Van der Weele, Richard McKenna & Alan Brown, A Corporate Social Responsibility Audit Within a Quality Management Framework, 31 J. BUS. ETHICS 285, 288 (2001). The authors developed a process for CSR audits, different from the CSR screens.
effect, CSR resorted to the free markets as a means of exercising control over businesses.

There are three prongs to CSR guidelines: the screens for investment, the screens for consumer products, and the screens for corporate philanthropy. Investors, both individual and institutional, respond to CSR screens developed by third-party groups.113 Consumers respond by buying the products of companies that they are led to believe sell CSR products or that behave according to the tenets of CSR.114 Finally, many companies use their CSR donations as a corporate strategy for taking on the mantle of CSR.115

a. Initial Topics and Screens for CSR Investment

The initial screens for socially responsible investment focused on two criteria: No weapons and no vices.116 Any company that was involved with weapons, war, or defense contracts could not be ranked in any of the surveys for the most ethical companies nor could they survive the CSR investment fund screens.117 Today, these basic bans and screens, however unwittingly, continue as measures of CSR. For example, faced with an employee rebellion, Google announced that it would end its contracts with the U.S. military for the development of artificial intelligence (AI) tools,118 Google made the decision to be accountable to its employee stakeholders and forego revenue opportunities in its work with the U.S. military.119

The vice screens for CSR investing excluded companies involved with alcohol, tobacco, gambling, or pornography. The CSR investment screens developed by various organizations focused on these big four as well as defense contractors.120 Under these bans, the stakeholder model simply excluded certain

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113. The issue of the efficacy of CSR classifications for investors is discussed infra at notes 126-143 and accompanying text.
114. Consumer buying patterns in response to CSR classifications of products and companies are discussed infra at notes 159-182 and accompanying text.
115. The use of corporate philanthropy as a strategic tool for positive CSR positioning is discussed infra Section III.C.6.
117. Founded in 1989, Kinder, Domini, and Lydenberg (KDL) was one of the first firms to develop social screens for investment and was used by Business Ethics to develop its list of CSR organizations. In 1990, KDL developed the Domini 400 Social Index (DSI), a common stock index of 400 corporations that have passed multiple, broad-based social screens for Socially Responsible Investing (SRI). The DSI specifically excludes companies that deal with alcohol, gambling weapons, nuclear power, and tobacco.
119. See infra notes 334-337 and accompanying text for more information on this employee issue.
120. The KDL social screens evaluate corporations on the basis of the following issues:
   • the environment
   • military contracting
   • employee relations
   • community involvement
   • product safety
   • quality programs
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companies from rankings thereby resulting in an investment boycott of these third party-defined non-CSR companies. The companies that did not pass these investment screens were not rated by the various ranking organizations as being suitable for the CSR label nor were they qualified for CSR investment funds.

b. Expansion of the CSR Screens

Following the weapons and vice grouping came other screens that focused on products and practices: Greenhouse Gases, Mining, Nuclear Power, Ozone Layer Depletion, Pesticides, Road Builders, Tropical Hardwood, Water Polluters, Animal Testing, Fur, and Meat/Dairy Production. The screens have now evolved into new labels, including the Environmental, Social, and Governance (ESG) screens. Presently, some companies and third parties have proposed a Sustainability Accounting Standards Board (SASB), a standards board similar to the Financial Accounting Standards Board (FASB) that would develop disclosure and reporting standards for the Securities Exchange Commission (SEC) to adopt as part of its proposed regulation to mandate an annual Corporate Social Responsibility Disclosure (CSRD) by all publicly traded companies. This effort is not a company classification per se. Rather, it is a means of measuring the adequacy of activities and discussion of such in companies’ required SEC filings.

- excessive compensation of executives
- diversity
- nuclear power

ANPI’s Global Trust unit had the following description of its investment screens: The Global Care Unit Trust invests in companies according to a number of positive criteria. It also avoids companies operating in some areas which we believe are unacceptable to investors wishing to adopt an ethical strategy. The criteria are classified into three categories.

- Impact on people
- Impact on the environment
- Impact on animals

This general description was then translated into specific areas. ANPI’s areas of avoidance for investment were: Alcohol, Gambling, Irresponsible Marketing, Armaments, Oppressive Regimes, and Pornography. Rory O’Brien, Kinder, Lydenberg, Domini & Co. (last updated Sept. 12, 2000), http://web.net/~robie/papers/sri/players/kid.html.


123. The Securities Exchange Commission (SEC) is still in the midst of comments on its proposed Regulation S-K, which would require publicly listed companies to include sustainability activities and information as part of its annual SEC filing requirements. Business and Financial Disclosure Required by Regulation S-K, Release No. 33-10064; 34-77599; File No. S7-06-16 (Apr. 13, 2016) [81 FR 23916 (Apr. 22, 2016)].

124. The issue of disclosure generally under Regulation S-K has become what has been called “murky,” because the SEC is exploring everything from the health of the CEO (“Should the CEO of a large corporation be required to disclose whether or not he or she eats oranges?” “Similarly, . . . environmentalists want corporate boards to inform investors of the amount of greenhouse gas emissions produced by its business.” Chandler Crenshaw, Murky Skies Ahead! Analyzing Executive Authority and
i. The Power of the Investment Screens

Because of the CSR screening formulas, third parties influence investor choices and, as a result, the flow of capital to certain businesses on the basis of factors over which the company has no control as opposed to its financial metrics. There is some research that indicates that the presence of just a CSRD by companies increased the number of institutional investors in the corporation. The explanation for the larger number of institutional investors in CSRD companies is a result of individual investors, armed with CSR ratings, pressuring institutional investors’ portfolio structure because of their requirements of CSR investment choices. However, there is also research that finds the opposite and raises questions about the fiduciary obligations of fund managers in their investment decisions when they CSR funds over funds that would bring clients higher rates of return when the clients have no input, as with state and local government pension plans.

CSR screens are imposed despite a lack of clarity in standards and whether such investments do actually bring higher returns. For investment clients who seek CSR investment opportunities, there may not be full disclosure and/or understanding of the nature and quality of the screens. For example, Pacific Gas

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125. As of 2009, there was even a Sustainable Stock Exchange Initiative. The purpose was to work with the stock exchanges to develop rules for listed companies regarding CSR issues including ESG requirements on transparency and disclosure with regard to the factors listed as screens for CSR and Environmental Social, and Governance (ESG) investing. Jason Park & Sonia Kowal, Socially Responsible Investing 3.0: Understanding Finance and Environmental, Social, and Governance Issues in Emerging Markets, 18 GEO. PUB. POL’Y REV. 17, 22-23 (2013). In other words, the influence is being used at the private governance level through the influence of exchange rules that require companies to follow CSR and ESG standards.

126. Kok, et al., supra note 112; and Susan A. Berson, Green Grows the Portfolio, 95 ABA J. 25 (Nov. 2009).

127. See, e.g., Abigail McWilliams & Donald S. Siegel, Corporate Social Responsibility and Financial Performance: Correlation or Misspecification, STRATEGIC MGMT. J. (May 2009). The authors suggest that the screens that define CSR may not be as clear as they should be in order to determine correlation. Another study suggests that there is no way to know whether any company is behaving in an environmentally sound fashion because the only certain information is whether they have had any violations and the screens do not measure present activity. David Monisma & John Buckley, Non-Financial Corporate Performance: The Material Edges of Social and Environmental Disclosure, 11 U. BALI. ENVTL. L. 151 (2004). See also Maria O’Brien Hylton, “Socially Responsible” Investing: Doing Good vs. Doing Well in an Inefficient Market, 42 AM. U. L. REV. 1 (1992). The piece raises serious questions about how it is possible to obtain market returns on a pension fund when the fund is investing in housing projects that could not obtain funding from other sources. Also, the question the author poses is whether it is ethical for pension funds to invest in CSR funds and projects when they provide a lower rate of return when the fiduciary duty is to the pension holders as well as the government entities funding and managing the plan.
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and Electric (PG&E) was rated very highly by the various environmental investment screens because of the utility’s moves toward renewable energy. PG&E was rated in the top 10 percent of its utility peers. The Global Sustainable Investment Alliance estimated that assets invested in such companies rose 25 percent between 2014 and 2016. However, PG&E’s stock lost 70 percent of its value between November 2018 and February 2019 because of the California fires and PG&E’s admitted liability for some of those fires because of problems with its equipment. PG&E is now in bankruptcy. The ESG ratings find funds plunging into such companies because of clients’ desires for green investments. Sadly, however, the ESG models do not address other risk factors. In analyzing how so many funds could be caught in such a failed investment, Harvard Business School Professor George Serafeim noted that there are the problems discussed here such as self-reporting of data, incomplete data, narrow focus, and resulting blind spots with this conclusion, “The whole field is very messy.”

ii. The Flaws in the Investment Screens and Rankings

(1) Virtue Is Not Part of the Screens

These facile CSR measurements (the black hats and white hats of business based on screens, not behaviors), that eliminated certain companies from qualifying as socially responsible through the use of broad labels, did carry market consequences. Further, the screens do not address the Aristotelian virtues of honesty, fairness, and even the underlying virtues that fueled many of the labor, safety, and health disclosure actions that business have done (as in the 1940s era) and have continued to do. Those companies that are excluded from the lists could not attract or retain certain investors, whereas other companies could obtain preferred status and ranking simply because of the nature of their products, regardless of the merits of the company in terms of investment returns or quality. CSR screens create markets where there otherwise might not be a market.

(2) A Look At the Methodology and Content of the Screens

The screens today can produce some interesting and surprising rankings that could be misleading to investors. For example, a website for CSR ratings (CSRhub) uses the following CSR and ESG factors to give companies a grade on the basis of a scale from 1-100:

4. Community Development and Philanthropy

130. Curran, supra note 128.
131. See supra Sections I.A and I.B.
CSRHub collects data from other groups that do CSR ratings in these areas, and it must have at least two ratings in each category to be able to provide its computation. These ratings groups that provide CSRHub with information all have different factors and standards in their ratings. As a result, CSRHub cannot make any representations about the accuracy or focus of its input, but still stands by its output: the rankings.

The CSRHub are composites of CSR scores developed by other ranking groups and services, such as “100 Low Carbon Pioneers” and “Best Workplace for Commuters.” The number of ratings, the consistency of the ratings, and even the number of companies rated by each source varies. Those who use the CSRHub service can suggest new rating services to be added to the CSRHub component. There are disclaimers issued in the CSRHub site about the constraints and limitations on its rankings:

“We face several methodological challenges:

A. Our sources track different topics in different ways. For instance, one source might measure how a company treats its community by measuring how much money it contributes to local charities. Another might ask if a company has programs that allow its employees to take time off for charitable work. A third source might count the number of charity board memberships held by the company’s board members. All are valid estimates of a single aspect of corporate social performance—and each might give a different reading for any given company.

B. Our sources each have their own rating and measurement methodology. Some sources given companies a numerical score (e.g., between 0.0 and 1.0). Some use “+” or “-” signs. Many sources offer only a relative ranking (e.g., “Top 50” or “Best Performing”).

132. Tesla Motors, Inc. CSR/ESG Ranking, CSRHub, https://www.csrhub.com/CSR_and_sustainability_information/Tesla-Motors-Inc. (accessed Dec. 2, 2018) The company doing the rankings sells CSR tools so that companies can track their CSR and ESG scores. Conflicts of interest are not problematic in the world of CSR third-party standards.

133. The following is a general explanation of CSRHub: “Our objective is to provide consistent ratings of Corporate Social Responsibility (CSR) performance for as broad a range of companies as possible.” The CSRHub Ratings Methodology, CSRHub, https://esg.csrhub.com/csrhub-ratings-methodology ga=2.163531324.1842269830.1539806017-2067709574.1539649465 (accessed Oct. 17, 2018).
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C. Each source tracks a different universe of companies. Some sources cover only specific industries. Many sources focus on one region or a single country. None of our sources offer data on more than about 60% of the companies we cover.

D. Company performance changes over time. Many of our sources update their information only once per year. If a controversy arises regarding a particular company, it may take as much as two years for its effect to be reflected among all of our sources.

E. Some sources rate company subsidiaries or individual products. Our ratings are given at the parent level of a company. It is difficult to fit together sometimes conflicting ratings on a company’s subsidiaries or on its products.”

A current example of the impact of the limitations in the use of a CSR screen such as CSRHub would be its ratings for Tesla. One would assume that Tesla, both because of its electric cars, but also because of its ownership of SolarCity, would be ranked relatively high because of its environmentally sound and sustainability-focused vehicles, especially in comparison with other car companies. However, Tesla’s overall ranking is in the red, at 24 (with 80-100 being the highest level). The two issues that cost Tesla in the rankings were: (1) military contractor; and (2) gay and lesbian rights sensitivity. The impact of how to prioritize stakeholder issues becomes evident in a review of the factors that “demote” a company’s ranking. There are significant variations among the differing inputs because of the priorities of the ranking organizations that are used in computing the composite score.

iii. What Is Missing From the Screens

(1) Financial Analysis

A surprising concern about the CSR rankings is what is not covered in the rankings and therefore not part of the overall rating of a company. One such omission is financial reporting transparency and current financial status. The CSR ratings are done annually (the time frame for CSR ratings), which means that events that develop during the year will not be reflected in the rankings. As a result, the CSR screens may not give an accurate picture of either a company’s CSR and ESG practices or its financial position. For example, for a significant time, Tesla’s stock price seemed to defy its ongoing poor financial performance and high levels of debt. The problem of Tesla’s high debt and a stock price far

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134. *Id.* Thoughts on further flaws in this and other rankings are offered in the discussion of the financial research on CSR screens *infra at Section II.A.1.*

135. *Id.* In the Tesla individual screen, its score appears in the red at 24. However, in the chart for the auto industry, its number is 46. Without a paid subscription to CSRHub, it is impossible to understand why the difference or which ranking is correct.

too high for its value make its capital structure risky.\textsuperscript{137} Tesla’s announcement in May 2018 that its revenue and earnings beat projections was a head-turner. A company that has never posted a profit in its history suddenly had a revenue surge of 26.3%\textsuperscript{. All of this was achieved without any appreciable gain in sales. Yet, despite its financial performance mysteries and its low ratings on CSRHub, Tesla ranks in the Top Ten companies that consumers perceive to be socially responsible companies.\textsuperscript{138} Tesla’s CSR ranking in the minds of consumers is a result of the company’s focus on sustainability and its products, with financial performance and CSRHub rankings having little impact on consumer views.\textsuperscript{139}

(2) Legal and Ethical Issues

The ranking systems are also not fully focused on evolving ethical and legal issues (different from CSR and at a more granular level than ESG issues) at the companies that are ranked. For example, Tesla’s conflicts of interest among the board members in their close connections on multiple boards and controls is not covered in the governance screens, despite the claims of ESG focus. As a result, CSRHub gave Tesla one of its best rankings (at the 50 range) for its governance despite the directors’ conflicts, such as Musk’s brother running SolarCity even as he served on the Tesla and SolarCity boards, even as the Tesla board approved the purchase of SolarCity.\textsuperscript{140}

(3) Leadership Issues

CEO behaviors are not part of the governance screen, but can fundamentally alter the course of a corporation. Tesla’s founder and CEO, Elon Musk, has had a series of professional gaffes, an indication of a lack of board oversight. Tesla was forced to settle with the SEC (in the best interests of the company) because of CEO Elon Musk’s misleading public statements, via Twitter, about what he represented to be a funded and upcoming process for going private at a

\textsuperscript{137} \textit{Id.} \\
\textsuperscript{138} In the Harris poll rankings, based on the views of 23,000 consumers, the Top Ten Socially Responsible Companies are Wegmans, Publix Super Markets, Amazon.com, Tesla Motors, Lowe’s, UPS, L.L. Bean, Walt Disney Company, and Whole Foods Market. The bottom ten of the Top 100 (from #100 up to 91) are Monsanto, Wells Fargo, Goldman Sachs, Halliburton, Takata, BP, Exxon-Mobil, Volkswagen Group, Bank of America, and AIG. THE HARRIS POLL, Top and Bottom 10 Corporate Social Responsibility Rankings, MARKETING CHARTS (June 2007), https://www.marketingcharts.com/harrispoll-top-bottom-10-corporate-social-responsibility-rankings-june2017. If the poll is broken out by millenials, Tesla is ranked the #1 socially responsible company.

\textsuperscript{139} Just to add to the confusion about the state of Tesla, CSRHub results show that Tesla ranks below all other major auto manufacturers, 13 points below GM and nearly 20 points below BMW. Before the SEC and post-marijuana stock declines, Tesla’s stock was worth more than GM’s. However, in 2017, GM sold 9.6 million cars and trucks and made $12.8 billion in pretax profit. In the same year, Tesla sold 100,000 cars and lost $2.2 billion. Boudette, \textit{supra} note 136. See also Tesla, Inc., Proxy Statement (Schedule 14A) (June 6, 2017), at 20; and SolarCity Corporation, Proxy Statement (Schedule 14A) (Apr. 23, 2014). SolarCity merged with Tesla in 2016.

\textsuperscript{140} Ziaat Meyer, \textit{This Musk Brings Farms to the City with Square Roots,} USA TODAY, Feb. 19, 2018, at 2b.
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significantly higher price than the company’s trading price at the time. That event was in tandem with Mr. Musk’s posting of a video of his wide-ranging discussions whilst using marijuana.¹⁴¹

(4) Inconsistency Issues
The CSR screens are a facile list, largely based on ideologies. The focus of the screens remains the company’s product or operations. Even those firms, such as Tesla, that meet some of the screens on environmentalism and sustainability because of their electric cars find that missing other screens negates the fact that the very purpose of their business is environmentalism. Worse, the screens seem to be disconnected from the factors that affect company financial performance, such as high debt levels, high cash burn rates, and share price issues. In Tesla’s case the screen’s accuracy appeared to luck out in terms of the predictive worth of the methodology because of the two factors that resulted in a low rating for Tesla. The two factors that tanked Tesla in a CSR sense were completely divorced from the company’s financial issues and resulted in a lower rating despite the company’s much touted and believed environmental strengths.¹⁴²

c. The Possibility of Gaming the CSR Classification Systems
In response to these facile screens and their flaws, CSR classifications, and the belief that there was some connection between ROI and institutional ownership, the free market was bound to capitalize, as it were, on the opportunities available for those who meet the qualifying screens.¹⁴³ When businesses understand what gets a good rating, regardless of what is being rating, the business works to achieve the ratings, and not necessarily the goal of such ratings. In other words, when there are ill-defined or poorly defined metrics or the metrics are malleable, there will be some “gaming” of the system.¹⁴⁴ In order to obtain a ranking or be ranked or listed as a CSR company that meets CSR

¹⁴¹. The great irony of the drug use is that, as a federal contractor, Mr. Musk would require high security clearance, part of which is drug testing as well as acknowledgement that the use of marijuana, while permissible in many states, is still prohibited under federal law and by federal contractors. The military contracts were restrictive in many ways, well beyond the CSR’s veto power.

¹⁴². CSRHub uses 3,000 different rating sources. However, up until a recent announcement, some of those rating sources used a self-disclosure survey methodology for their ratings. Only 20% of companies even returned the surveys. It is only in the last year that some of the rating firms have switched to the use of public disclosure information rather than relying on the surveys, CYNTHIA FIGGIE & BAHAR GIDWANI, RATINGS AND FRAMEWORK: WHERE IS THE PUCK GOING? 7 (2017).

¹⁴³. The debate over whether the CSR screens overperform other stocks remains a subject of debate. The DSI 400 claims that the 400 companies’ shares have outperformed the S&P 500. The DSI 400 tracks the S&P 500, but is slightly higher with the dips and climbs tracking at the same time and to the same levels. JOHN J. WILD, FINANCIAL ACCOUNTING FOR DECISIONS (6th ed. 2013). The tracking ran from 1990-2006. However, there are contra studies. In the 10 years since 2006, the performance has been below or at the same rate of return as the S&P 500. Performance and Risk: DSI, FIDELITY, https://screener.fidelity.com/fgw/etf/goto/snapshot/performance.jhtml?symbols=DSI (accessed Oct. 18, 2018).

¹⁴⁴. Indeed, there are books written for businesses on how to “up” their CSR scores and ratings. See supra note 142.
screens, some companies simply used the screens as their strategy for attracting investors and customers. For example, based on the DSI screens, Business Ethics ranked Fannie Mae as one of the top 10 corporate citizens (number 9 in 2000; number three in 2001 and 2002) and the top corporate citizen in 2004. Fannie Mae was ranked high for its commitment to community, with over 51% of its financing going to low- and moderate-income households. Fannie Mae scored high in the following rankings in addition to the more general DSI factors:

- Fortune: Best Companies for Minorities
- Working Mother: Best Companies for Working Mothers
- American Benefactor: America’s Most Generous Companies

Fannie Mae was, in effect, in the business of making loans to consumers who did not otherwise qualify for traditional or FHA mortgage loans. However, meeting the CSR screens is actually a very different task from running a company with ethical standards as measured by the basic virtue of honesty. By 2004, Fannie Mae’s CEO would resign as the company issued a restatement of its earnings. Those earnings had been overstated by $6.3 billion, and the company paid a $400 million fine.

The federal government’s report on the cause of the accounting improprieties uncovered conflicts of interest between board members and the mortgage companies writing the loans that Fannie Mae guaranteed, deception on the nature of volatility the company faced, large bonuses tied to stock price, lax internal controls, insufficient capital, and the failure of senior officers to monitor the activities and accounting practices by managers within the company.

The harsh reality of this collapse was that prior to the discovery of the accounting improprieties, and despite the efforts of an internal whistleblower, Fannie Mae was protected by the CSR community, the regulators, and the legislators because of the perceived good Fannie Mae was accomplishing in those communities that had been generally left without opportunities for mortgage borrowing. The screens of CSR seemed to cause those

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145. In 2003, Fannie Mae was number 12 in the top corporate citizens list. BUSINESS ETHICS, May/June 2000-2004.
147. Id.
148. Priya Raghubir, John Roberts, Katherine N. Lemon & Russell S. Winer, Why, When, and How Should the Effect of Marketing Be Measured? A Stakeholder Perspective for Corporate Social Responsibility Metrics, 29 J. PUB. POL’Y & MARKETING 66 (2010). E.g., “Firms use CSR initiatives to build and strengthen relationships with multiple stakeholder groups beyond the customer, suppliers, channel members, and competitors to include investors, employees, boards of directors, society, regulators, media, and financial markets.” Id. at 66. For more on the basic virtue model and virtue ethics, see infra Section III.C.
150. JENNINGS, supra note 146, at 156.
151. By the near-end of the boom housing market, Fannie Mae was not even fulfilling its role of providing backing for government-based mortgages. It was in the business of buying mortgages from private lenders and the underlying loans had not been made in underserved communities. The assumption
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dedicated to the causes and definitions of CSR to turn a blind eye to Fannie Mae’s
court as well as its actual performance.152

Another example of the incongruity of CSR rankings and actual performance
was BP and its perceived dedication to environmental and sustainability tenets
that had the company dominating the rankings. BP was #1 on Fortune’s top
socially responsible companies in 2006, and #2 in 2007.153 Under the leadership
of Lord John Browne, BP had sent all the right signals and said all the correct
things that earned them their position in the rankings, a ranking, that, oddly
enough did not measure carbon emissions.154 However, BP became the poster
child for corporate image facades in 2010 when BP’s Deepwater Horizon
platform exploded, followed by an oil spill. Eleven workers lost their lives, and
the oil would eventually reach the shores of Alabama and Lake Ponchartrain in
Louisiana as BP spent $7 million per day trying to contain the spill. The company
lost $30 billion in market capitalization.155

The Deepwater Horizon spill followed an explosion at BP’s Texas City
refinery, a plant that was under significant pressure from federal regulators to fix
its safety issues. Preceding Deepwater Horizon BP had other safety and
environmental issues, including a spill that resulted from a break in the Prudhoe
Bay pipeline due to both a lack of maintenance and safety processes.156 One final
event was the explosion at BP’s Atlantis rig, also located in the Gulf Coast. That
rig had the same, high-risk single-thread pipe design as Deepwater Horizon. A
BP internal investigation into the cause of that explosion found that:

“[M]anagers put off repairing the pump in the context of a tight cost budgetFalse
Leadership did not clearly question the safety impact of the delay in the repairs. . . .
A BP safety officer told company investigators, ‘You only ever got questioned on
why you couldn’t spend less.’”157

However, the public/CSR face of BP was very different, and, apparently, very
believed. Almost a decade later, former BP CEO Lord Browne made the
following remarks in a Fortune article in 2016:

of noble purpose cut off inquiries from even the government’s oversight agency, responsible for the audit
of Fannie Mae’s finances. End of Illusions, THE ECONOMIST (July 17, 2008)
152. Julie Creswell, Long Protected by Washington, Fannie and Freddie Ballooned, N.Y. TIMES,
153. Telis Demos, Our Second Annual Ranking of Global 500 Companies, FORTUNE (Oct. 23, 2006),
http://archive.fortune.com/magazines/fortune/fortune_archive/2006/10/30/8391850/index.htm. BP was
ranked #36 in 2007 of Fortune’s World’s Most Admired Companies. World’s Most Admired Companies
2007,
FORTUNE (Mar. 19, 2007),
154. Id.
155. Guy Chazan, Benoit Faucon, & Ben Casselman, Safety and Cost Drives Clash as CEO
156. Jim Carlton, BP’s Alaska Woes Are No Surprise for One Gadfly, WALL STREET J., Aug. 12-13,
2006, at B1, B5; and Justin Scheck & Selina Williams, BP: The Makeover, WALL STREET J., Oct. 25,
2013, at B1.
In 1997, at Stanford, I made a speech acknowledging that the link between fossil fuel emissions and climate change could no longer be ignored. I committed BP to taking action and in the four years that followed we successfully engaged NGOs in our efforts to reduce carbon emissions. We won respect, along with a seat at the negotiating table when new rules were being written. It meant that our customers could see us planning for change, rather than seeking to preserve the status quo. And it meant we had the upper hand in the market for talented young people with a vision for the future.\(^{158}\)

In a look back at how the CSR rankings had failed to capture the essence of CSR, Ethical Corporation published an article that included a similar analysis of the rankings and BP, albeit with a slightly different take:

BP was named #1 on Fortune and AccountAbility’s annual rankings of the world’s most responsible companies in 2007. Even after receiving the record OSHA fine, the company still ranked #9 on Fortune and AccountAbility’s 2008 list.

And even as recently as May 2010, determined long before the Deep-water Rig exploded—BP was named as a runner-up for the ‘Openness and Honesty’ reporting category at the Corporate Register’s 2010 CR Reporting Awards.

It’s a case study in how not to practice CSR. And it’s a timely example of just how hollow many of the central “benchmarks” of CSR have become.

BP, as many commentators have emphasised [sic] and as I’ve demonstrated above, regularly topped ethical rankings and indices. These exist to drive linkage between the financial, environmental and social priorities of corporations.

They are also meant to harness the competitive forces of the marketplace, using the rationale that if a company is consistently rewarded, it will generate pressure for increased responsibility across that company’s industry.\(^{159}\)

BP had been recognized for its environmentally sound programs prior to 2009 and the explosion of the Deepwater Horizon offshore rig.\(^{160}\) The measurements there did not include discussions of evolving problems at the company: the events at Prudhoe (2006), the refinery (2005), and Atlantis (2008).\(^{161}\)

d. CSR Consumer Product Screens: Rain-Forest Chic

Jennings and Entine used the phrase “rain-forest chic” to describe the companies that emerged in the late 1990s and early 2000s as the list of CSR companies by which consumers do their conscientious shopping.\(^{162}\) Jennings and

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160. JENNINGS, * supra* note 146, at 73-77.
161. *Id.* at 67-73. BP also had significant, non-environmental, non-CSR issues, including its deferred prosecution agreement entered into with the Justice Department for price manipulation by its traders (some of whom were indicted and entered guilty pleas) and the resulting impact on investors (2006). Memorandum Opinion and Order, United States v. Mark David Radley, *et al.*, 2009 Criminal Action H-08-411 (T.X.S.D. Sept. 7, 2009). See also Tom Fowler, *How the Case Against BP Traders Went Wrong*, *Houston Chronicle* (Sept. 8, 2009), http://www.chron.com/disp/story.mpl/business/energy/6626251.html.
162. “Rain-forest chic” was a term originally coined by Mr. Entine in his piece, *Rain-forest Chic: A Look at the Underside of Ethical Marketing*, *TORONTO GLOBE & MAIL REP. ON BUS. MAG.* 39 (Oct. 1995).
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Entine explained that, “rain-forest chic” might also be descriptive of a then developing trend in business ethics that utilized social issues as a standard for measuring business ethics. The icons of corporate social responsibility (CSR) are still familiar brand names: The Body Shop International cosmetics; Ben & Jerry’s Homemade ice cream; Starbucks coffee; Tom’s of Maine toothpaste; Working Assets long distance company; Celestial Seasonings teas; Esprit, Patagonia, and Nike. Jennings and Entine characterized the CSR-as-ethical-companies, “These companies, all of which have engaged in marketing campaigns to promote their social consciousness, represent a coterie of ‘60s entrepreneurial companies with charismatic founders who have grown niche businesses into multi-national corporations.”

Star-Kist made the list of CSR companies because its tuna was “Dolphin-free.” Companies that could put “no animal testing” on their labels were also CSR companies. “Rainforest chic” marketing provides a compelling two-for-one sale: buy hair conditioner or ice cream made with nuts from the rainforest and get social justice for free.”

Even those companies, like Ben & Jerry’s and Starbucks, whose products were not a target of the green movement but who took positions on issues such as fair trade gained top rankings as CSR companies.

In 1991, there were 11 green retailers in the United States. By 1992 the number had climbed to 123 and by 1995 to 400. In 1995, various certifications for “green” products began to take hold.

By 2000, the concept of CSR was woven into the notion of sustainability, a broader concept that permitted more companies to earn the certification. Today the term is “eco-friendly” is used in lieu of “green.” The increasing number of certification organizations and resulting CSR/sustainability/green/ eco-friendly certification has resulted in confusion about the labels and their meanings. Governmental certifications for eco-friendly products also took hold during this period:

1. Energy Star – a federal government label (Environmental Protection Agency (EPA) for appliances and electronics that are energy saving.

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163. Id. (citations omitted). One is unclear on how a long-distance company is “green,” but that is one of the weaknesses in this movement.

164. The phenomenon of green labeling, or emphasizing environmental aspects of a particular product, is well documented. See, e.g., Green Marketing Isn’t Dead, In BUSINESS 27 (Jan/Feb. 1996); JACQUELYN OTTMAN, GREEN MARKETING: CHALLENGES AND OPPORTUNITIES FOR THE NEW MARKETING AGE (1993).

165. Jennings & Entine, supra note 111, at 3.

166. Id.

167. There is a moving target in many ways here. With certifications growing and terms changing, the lack of clarity is exacerbated and, most likely, the system gained more.

2. USDA Organic Seal – another federal government label (U.S. Department of Agriculture) for cosmetics and foods that truly are organic.169

As with investment screens, private certifications began and increased. Those certifications were then rated by consumer groups for their reliability:

3. Green Seal – The Green Seal organization develops Environmental Leadership Standards for goods and services that are safe for the environment. Those goods and services that qualify can then carry the Green Seal.170

4. Forest Stewardship Council Logo – for paper and wood products171

5. The US Green Building Council (USBGC) is a global sustainable development organization (despite its U.S. name) that owns and operates the LEED certification program.172

6. Cradle to Cradle Products Innovation Institute – administers the Cradle to Cradle product standard (a process that evaluates product from origins to disposal).173

The certification organizations for certifications for eco-friendly companies is too lengthy to list here, but the extent of label certification and approval processes have made certification an industry in and of itself.

There was also the Council on Economic Priorities (CEP), which was one of the first certification organizations directing eco-friendly shopping and had as its mantra, “Shopping for a better cause.”174 In tandem with the investor screen development, the CEP used the following areas to rate products:

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170. Green Seal, What We Do, Green Seal, http://www.greenseal.org/AboutGreenSeal.aspx (accessed Oct. 3, 2018). Green Seal has been certified as meeting the ISO standards, the standards of the Global Ecolabelling Network’s Internationally Coordinated Ecolabelling System (GENICES). Now there are certifications for the certification/label organizations. Also, Consumers Union has analyzed what makes a good ecolabel.

171. FSC, https://us.fsc.org/en-us (accessed Dec. 2, 2018). This is the U.S. council, but there is also an international council. The council offers everything from certification to arbitration to awards to individuals for showing leadership in forest sustainability.


173. Cradle to Cradle, www.c2ccertified.org (last visited Oct. 18, 2018). There are levels of c2c products, rankings that mirror American Airlines’ frequent flyer categories: Platinum, Gold, Silver, Bronze, and Basic. There are no products that have met the platinum standards, but there are 220 bronze and 13 basic. Pacific Jeans is at the gold level with another 90 companies, recognized for its “apparel for goodness,” as opposed to other clothing manufacturers who produce “apparel for evil.” You can also choose from three clutch disks or purchase a scarf for your baby – 100% organic cotton, all four products certified, including in the category of social fairness because one can hardly utter “clutch disk” without thinking “social fairness.”

174. The Council on Economic Priorities (CEP) began generating rankings in the late 1960s and early 1970s. The initial list that the CEP provided as of the pollution controls of 24 companies. The CEP then expanded its efforts from largely the pulp and paper industry to a broader perspective. Nonetheless, its data base was softens used as a basis for the financial research in the CSR field. B.H. Spicer, Investors, Corporate Social Performance, and Information Disclosure: An Empirical Study, 53 ACCT REV. 94 (1978). The title of the CEP’s first general publication was COUNCIL ON ECONOMIC PRIORITIES, SHOPPING FOR A BETTER WORLD (1992). The book listed the companies that met all or certain of the screen areas. The idea was perfect for the “yuppie” movement of that era (young upwardly mobile professionals) because it enabled social consciousness through buying stuff.
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- the environment (recycling, green energy sources, green products, and packaging)
- women & minority advancement (at least three women and two minorities in the executive ranks or on the board)
- disclosure of information (full disclosure of all social programs and efforts)
- labor relations, family benefits (flex time, child/dependent care, education, seminars, good union relationships and no union busting)
- charitable giving, community outreach (at least 2% of net income, volunteerism)
- military contracts, nuclear power (none)
- tobacco, product liability, animal testing (for top rating, had to be no animal testing)
- South Africa and Third World concerns (no investment in South Africa)\(^{175}\)

The goal of having consumers make their shopping and purchasing decisions according to the screens was to influence company behavior through consumer demand, or the lack thereof. Or, as phrased in the marketing literature, to “punish” those firms that were not behaving in a manner consistent with the screens.\(^{176}\)

Presently, the eco-friendly certification has developed many tributaries for specific products. The web of certifications and certifications of certifiers is so layered and complex that it is almost impossible to determine what the labels on products and services mean, who is providing the authorization for those labels.\(^{177}\) There are now university programs for becoming a certified environmental specialist.\(^{178}\)

The terms evolve, the organizations evolve, and the certification processes seem to increase in length. Eco-friendly, née “green,” is no longer a one-word label. For example, there is not just “green’ coffee now, there is “Bird Friendly Coffee,” which certifies that a “coffee has been grown using shade management practices that provide good bird habitats. Shade characteristics must meet science-based criteria developed from ornithological field work. In addition, only those growers who are certified as organic can be issued the Bird Friendly

\(^{175}\) Id.
\(^{176}\) Marylyn Carrigan, Isabelle Szmigin, & Joanne Wright, *Shopping for a Better World? An Interpretive Study of the Potential for Ethical Consumption Within the Older Market*, 21 J. CONSUMER MARKETING, 401, 405.
\(^{177}\) The EPA has its own program for certification and various offices maintain their lists of certified products, services, and programs. If the EPA does not do the certification, its web pages recommend certification services. *Getting Certified by EPA*, EPA, https://www.epa.gov/home/getting-certified-epa (accessed October 19, 2018). There are some quick reference guides such as this book: Leo Raudy, *The Cheap Guide To Sustainability & Corporate Social Responsibility* (2016). The book offers lists of programs, individuals, and NGOs that are resources for “navigating the convoluted world of sustainability.” Id. at 7. The chairman and executive editor of Greenbiz Group calls the book “a succinct, sometimes sassy, guide to who’s who and what’s what in the world of CSR and sustainable business.” Id. at back-cover endorsements.
\(^{178}\) New York University’s Stern School of Business has an online certification program. *Certificates*, N.Y. UNIV. STERN, https://www.stern.nyu.edu/programs-admissions/certificates (accessed October 19, 2018).
label on their organically certified coffees.” For some certifications there can be a multi-step process that will (eventually) lead to the desired certification. A coffee cannot be certified as “bird friendly” unless and until the grower has shade certifications.

Just this singular product of coffee has a host of labels, initiatives, and certifications. Starbucks was the driving force behind current coffee certification, the Coffee and Farmer Equity (C.A.F.E.) standards, which has as its goal to make coffee the first sustainable agricultural product. Starbucks indicates that it uses only “ethically sourced” coffee and that it is involved in the “fight for Coffee’s future.” The brochure for the Sustainable Coffee Initiative begins with the phrase, “We need coffee to thrive.” The fast-changing nature of certifications and eco-friendly, bird-friendly coffee has a competitor – the Global Coffee Platform, whose members are primarily from countries other than the United States and Europe.

180. There are so many initiatives, labels, and certifications that one is tempted to suggest that those involved should perhaps cut back on coffee consumption because the zeal of the movement and sheer amount of coffee causes one to scream, “Too much caffeine.” On the bright side, there is a certified product for quitting coffee and, hence, caffeine. 20 Awesome Benefits of Quitting Caffeine or Coffee, CAFFEINE INFORMER, https://www.caffeineinformer.com/benefits-quitting-caffeine.
181. The C.A.F.E. standards are actually part of SCS Global Services that is a certification firm for various products and Starbucks has it SCS certification, but has taken on its own initiative beyond the generic SCS imprimatur. Starbucks’ program and efforts for reforming coffee production can be found here: Ethical Sourcing: Coffee, STARBUCKS, https://www.starbucks.com/responsibility/sourcing/coffee (accessed Oct. 3, 2018).
182. The author has seen the lines at Starbucks and is not sure that coffee is in a fight for its life. The author was not aware the coffee and other agricultural products were in danger of extinction. Coffee appears to have sustained itself fairly well, being discovered in Ethiopia in the 11th century. History of Coffee, TURKISH COFFEE WORLD, https://www.turkishcoffeeworld.com/History-of-Coffee-s-60.htm (accessed Oct. 3, 2018). There is no indication of any Turkish or Ethiopian initiatives for the preservation of coffee. Starbucks may not understand that its entry makes it a Johnny-come-lately in the world of coffee. Other sustainable agricultural products include the man-made commodity, corn. Although discovered through the voyage of Columbus, corn was created at least 7000 years ago and has sustained itself fairly well. Sean B. Carroll, Tracking the Ancestry of Corn Back 9,000 Years, N.Y. TIMES (May 24, 2010), https://www.nytimes.com/2010/05/25/science/25creature.html. And all of this sustainability was accomplished without an ecofriendly or green label.
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Starbucks’ dedication to sustainable coffee was not something undertaken *ab initio* in its business. Starbucks, the boutique Seattle-based coffee retailer was given the International Human Rights Award by the CEP at its annual “Corporate Conscience” ceremonies. Actually, Starbucks and its treatment of coffee bean pickers in other countries is very different from its image:

To earn enough to afford a pound of Starbucks’ coffee, a Guatemalan worker would have to pick 500 pounds of beans, about five days of work. During 1994, Starbucks was the target of protestors because its beans came from export houses that paid Guatemalan workers below a living daily wage, about $2.50 a day. Starbucks was targeted for this effort because of its “green” claims. As a result, Starbucks undertook its review of its supply chain and began its efforts to sustain coffee and the farmers who grow it.  

Despite the pervasiveness of certifications, labels, and shopping recommendations, researchers disagree about their efficacy in moving consumer behavior. Some studies concluded that value and quality still remained the main factor in consumer purchases. In one study, only 18% of consumers could name a company that had behaved in an unethical or socially irresponsible way and showed low awareness of what and who were ethical firms.

II. POST-2010: THE FLAWS AND ISSUES IN THE CURRENT CSR MOVEMENT

There are a number of issues that have emerged since 2010 that lay bare some inherent flaws in the CSR movement, its strategies, success with consumers, and the screening methodologies. Those issues are discussed in the following sections.

A. *The Muddled Mess of Definitions, Terms, and Research Studies*

Apart from the shortcomings and inconsistencies in defining CSR in the fields of law, finance, economics, and philosophy and ethics, there is the additional problem of other fields that conducting their research based on other definitions of CSR behaviors and different measures. For example, the fields of financial research (focusing on the efficacy of CSR screens and returns on investment) and that of marketing research (focusing on the efficacy of CSR branding and consumer behaviors in relation to CSR labels and brands) do not intersect. That is, the researchers in these fields are using their own definitions of CSR behaviors, branding, and companies as the basis for their work. There are two areas of CSR research that attempt to make the connection between financial performance or sales success, which could be measured as share price, profits, and returns on investment and CSR behavior, i.e., the fields of finance.

186. *See infra* Section II.A for discussion of the studies on consumer preferences and buying habits with respect to certification and sustainability.
188. *See infra* Sections II.A and II.B for discussion of the shortcomings.
and marketing. The following sections provide an overview of that research and its weaknesses.

1. The Finance Research: Financial Performance in Relation to CSR

a. Questions in the Research Approach

The question of whether it pays to be a morally good person has long been a subject of philosophical debate, and, as yet, remains unresolved.\(^{189}\) The difficulties lie in the measurement mechanisms and even the challenge from some schools of thought in philosophy that unless one does good just to do good and not for the expected personal benefit, gain, or recognition, goodness does not count as goodness.\(^{190}\) The research on correlations between CSR and financial performance vs. non-CSR firms or whether a focus on CSR improves a company’s financial performance is a study in and of itself in inconsistent research results. A primary obstacle, as is pervasive in the CSR field, is the problem of definitions. A literature review of the financial research on CSR/financial performance begins by noting, “There is no consensus on what exactly should be included in the social responsibility of organizations.”\(^{191}\) Nonetheless, many have tried, and just the definitions of CFR that are used in the literature are instructive in the challenges researchers face in developing financial models to test the proposition that CSR improves financial performance:

A. “the obligation of organizations to be accountable for their environment and for their stakeholders in a manner that goes beyond mere financial aspects.”\(^{192}\)

B. “Corporate Social Responsibility is the continuing commitment by business to behave ethically and contribute to economic development, while improving the quality of life of the workforce and their families as of the local community at large.”\(^{193}\)

C. Companies must focus on environmental, social, and governance goals “that have the greatest impact on the firm’s ability to create shareholder

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\(^{190}\) “Social performance may be good for society, but does it pay?” is an offensive question to many of the CSR/CSP field. However, that correlation, whether based on solid empirical foundations is necessary to attract investors and attach CSR ratings to corporations. See Sections III. and IV. for more discussion of this issue of the importance of even tenuous correlations.


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value; and produce major innovations in products, processes, and business models that prioritize those concerns.\footnote{194}

D. companies in which managers make deliberate choices to act in a socially responsible way\footnote{195}

A second obstacle to be overcome in the financial CSR research relates to attempts to tie the financial literature definitions of CSR with the economic, marketing and philosophy/ethics literature on CSR. In the finance literature, beyond the definitional obstacle is the simple observation that the terminology is different. The financial research focuses on corporate social performance (CSP) and corporate financial performance (CFP). CSP was intended as an effort to incorporate measurables into evaluation of a company’s CSR with the acknowledgement that “CSR is not a variable and therefor impossible to measure. CSP, on the other hand, though difficult to measure, can be transformed into variable measures.”\footnote{196} Corporate social performance metrics vary from study to study, with the following factors being used, variably, from study to study:

C. Investments in pollution control equipment

D. Treatment of women and minorities

E. Relationships with customers

F. Community relationships

G. Philanthropy

The distinction between this list and the lists of CSR factors appears to be the tangible measurable of pollution control equipment. However, installation and the expensing of pollution control equipment is not always a reliable measure of results, and, hence an accurate and measurable CSP factor. Volkswagen was investing significantly in pollution control equipment for its vehicles (including its Audi brand), but that investment was countered by the manipulation, through software programs, of emissions tests.\footnote{197} Even the measurable measurements for CFP may suffer from accuracy because they are susceptible to human manipulation.

In addition to the definitional limitations, there are financial performance measures used in the research that introduce the problems of apples and oranges comparisons. The following measures have been used in the CSR/CFP studies:


\footnote{195} Irene Goll and Abdul A. Rasheed, The Moderating Environmental Munificence and Dynamism on the Relationship Between Discretionary Social Responsibility and Firm Performance, 49 J. BUS. ETHICS 41 (2004). Measuring which management teams are making deliberate as opposed to serendipitous choices on CSR matters remains a question and a problem in the research.

\footnote{196} Van Beurden & Gössling, supra note 191, at 409.

• Investor returns via stock price
• Investor returns via stock price plus dividends
• Investor returns via stock price plus dividends plus risk
• Accounting returns (EPS; P/E)

The measures used could explain differences in the conclusions, but some of the studies using the same financial measures resulted in different conclusions about the effect of CSR on financial performance.

b. Findings in the Financial Correlation Research

Some of the research finds a positive correlation between CSR and corporate financial performance (CFP in the financial literature). Others find a negative correlation. Still others document why the findings are so different. For example, while there are many explanations for the inconsistent results, scholars seem to agree on several points:

(1) When research in finance concludes that CSR firms do or do not provide a greater ROI on investment, those conclusions are dependent upon how the researchers defined CSR firms.

198. Stanley C. Vance, Are Socially Responsible Corporations Good Investment Risks?, 64 MGMT REV. 18 (1975) and Milton R. Moskowitz, Choosing Socially Responsible Stocks, 1 BUS. & SOC. REV. 71 (1972). The flaw in these studies (using changes in price per share) is a very basic mistake made in financial analysis and was quickly noted in this research. Price per share is one measure, but dividends are a return for investors and should be factored into the ROI.


200. Gordon J. Alexander & Rogene A. Buchholz, Corporate Social Responsibility and Stock Market Performance, 21 ACAD. MGMT. J. 479 (1978) and John C. Anderson & Alan W. Franklin, Voluntary Social Reporting: An Iso-Beta Portfolio Analysis, 55 ACC. REV. 467 (1980). These studies included the beta adjustments but failed to take into account that when companies announce changes or make changes, the market takes that future into account in its pricing.

201. Joseph H. Bragon & John A. T. Martin, Is Pollution Profitable?, 19 RISK MGMT. 9 (1972); Edward H. Bowman & Mason Haire, A Strategic Posture Toward Corporate Social Responsibility, 18 CAL. MGMT. REV. 49 (1975). The issue with this measure is that rate of growth and accounting practices affect these measures.

202. The failure to look at risk or different measurements of risk resulted in the different conclusions between Moskowitz, supra note 198 and Vance, supra note 198, who appeared to use the same measure of share price along with a beat, but their betas were different. Their work had different market periods.


204. Christopher Gecey et al., Institutional Investing When Shareholders Are Not Supreme, 5 HARV. BUS. L. REV. 73, 88 (2015) (about 11% of total assets under management in the United States are funds devoted to ESG/CSR investing); Benjamin J. Richardson & Maziar Peihani, Universal Investors and Socially Responsible Finance: A Critique of a Premature Theory, 30 BANKING & FIN. L. REV. 405, 410 (2015) (institutional investors hold more equity than all individual shareholders combined in the United States meaning that the impact of ESG/CSR is only discernible when funds adopt ESG/CSR standards).

205. See supra Section I.D.4. for a discussion of the challenges of differing financial screens and definitional issues.
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(2) Some studies conclude CSR is driven more by “unobservable firm characteristics than by financial performance.”

(3) No one has developed a study that is not later questioned and a research model for testing the relationship between CSR and financial performance (CFP) does not exist.

(4) The one conclusion that keeps percolating in the literature is that there is, at best, “weak evidence of a positive correlation between CSR and financial performance.”

Further, there is a financial factor not yet noted that provides explanations for differences in performance. For example, the number of institutional investors in a company affects share price, independent of CSR factors. Because of this institutional investor financial factor, the types of screens used by institutional investors would affect investment decisions, which leads to a process of circular reasoning: CSR companies have better financial performance because CSR screens are used to lure clients to investment funds thereby creating institutional investor presence in CSR companies because of the presence of institutional investors. Somewhere in that process the actual financial performance of the company is lost for purposes of comparison. The hypothesis of the correlation between CSR and corporate financial performance may or may not be true, but the feeding of the criteria used to determine CSR in corporations and by investment firms has induced investment behaviors that affect stock price because of large institutional presence in corporations which then produces reports (studies) that there is a correlation, albeit one driven by the original hypothesis of better CSR financial performance.

c. The Consequences of the Correlation Research

One of the many dangers of the highly assailable assertion that there is a correlation between CSR and financial performance is that the research will be used to lure investors. For example, presently, there are concerns about “greenwashing” in the issuance of bonds. There is a market for selling financial

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208. Richardson & Peihani, supra note 204.
209. One is reminded of the recent difficulties at the Federal Bureau of Investigations (FBI). The agency obtained an affidavit from a source that many within the agency deemed to lack credibility. Several agents fed the affidavit to the news media, some of which ran stories about the content of the affidavit. The FBI then used the news stories to corroborate their application for search warrants and surveillance. The underlying facts for establishing probable cause were never there, but the piling on of additional sources gleaned from the original questionable foundation gave the affidavit credibility. John Solomon, Did the FBI Get Bamboozled By Multiple Versions of the Trump Dossier?, The Hill (July 10, 2018), https://thehill.com/hillv3/rising/396307-did-fbi-get-bamboozled-by-multiple-versions-of-trump-dossier\%3F.
instruments to those with a desire to support environmentally friendly and sustainable projects, with the result being the issuance of “green bonds.” The goodness of the underlying purpose of the bonds is not, however, immunity from charlatans. That is, altruism does not provide a shield against securities fraud. Investors who put their money where their hearts and concerns can be blinded to material problems with those issuing the bonds.

With this type of investor vulnerability, regulatory forces generally step in to keep the issuers clean. However, with green or climate bonds, investors are dependent upon the same mechanisms used for rating CSR companies and CSR investment funds. The oversight is private in nature (particularly in the international investment funds) and voluntary, with the usual inconsistencies that characterize the CSR movement. The problems with private regulation and oversight of financial markets are the same problems highlighted in the introductory examples and in the history to this point of CSR: private regulation by third parties, whether NGOs or self-proclaimed accreditation bodies, is that private regulators are not subject to the review and scrutiny that public regulators are. The issues with green bond certification are the same as the issues for CSR product and company certifications. There are no overseers or oversight mechanisms for the self-designated and self-defined private overseers of CSR standards for green bonds for rigor, conflicts, or validity of the factual basis for their standards, requirements, or self-regulatory mandates.

2. **CSR Marketing and Consumer Behaviors, Patterns, and Responses**

Like the research in finance, when research in marketing concludes that CSR branding is or is not effective in attracting consumers or that consumers do or do not base their purchasing decisions on the CSR of the sellers, those conclusions are dependent upon their definitions of CSR.

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214. In some cases, the private governing bodies do not have the simplest of effective governance mechanisms for their operations, such as internal controls. Dana Brakman Reiser & Claire R. Kelly, *Linking NGO Accountability and the Legitimacy of Global Governance*, 36 BROOK. J. INT’L L. 1011, 1025-26 (2011).
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a. Academic CSR Marketing Research

In the marketing research literature, the definition of a CSR consumer has had a long history and remains a subject of debate despite the recognition of an older definition as the foundation for consumer behavior research on CSR factors as an influence in consumer behavior. That definition is: “a consumer who takes into account the public consequences of his or her private consumption or who attempts to use his or her purchasing power to bring about social change.”

However, despite the seeming acceptance of this definition, the definition remains unclear. “Social change” is a broad term, and there is little agreement on the components, elements, or requirements of social change in marketing research.

In addition, it appears that the studies are structured so as to leave the definition of “social change” up to the individual consumer. That is, the studies do not, for the most part, address specific CSR issues. However, what is not widely discussed in releasing the data from the studies is that the results are not based upon defined issues or categories of CSR but upon each individual consumer’s definition of what social changes need to be made and in which areas.

These are the academic studies that attempt to develop patterns and theories regarding the connection between consumers and CSR marketing.

Many studies focused on how to break down the barriers in getting consumers to embrace social cause marketing and branding. Still other studies recognized that political views influenced consumer receptiveness to CSR marketing.

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215. This definition, from 1975, is used by researchers to determine if a consumer is a CSR consumer. Frederick E. Webster Jr., Determining the Characteristics of the Socially Conscious Consumer, 2 J. CONSUMER RES. 188 (1975). However, the research definition fails to recognize findings that there is disagreement as to whether the CSR standard is met according to singular dimension definitions or multiple dimension definitions. Lois A. Mohr, Corporate Social Responsibility: Competitive Advantage or Disadvantage?, in PROCEEDINGS OF THE 1996 MARKETING AND PUBLIC POLICY CONFERENCE 48-49 (Ronald Paul Hill & Charles Ray Taylor eds., 1996). An example of a multiple dimension CSR consumer is one who makes decisions based on the four areas of economic, legal, ethical, and philanthropic issues. Archie B. Carroll, The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders, 4 BUS. HORIZONS 39, 39 (1991).

216. Despite the generic nature, researchers continue to conclude that the “socially responsible consumer” is “now defined.” Lois A. Mohr, Deborah J. Webb, and Katherine E. Harris, Do Consumers Expect Companies to Be Socially Responsible? The Impact of Corporate Social Responsibility on Buying Behavior, 35 J. CONSUMER AFFAIRS 45, 47 (2001).

217. For example, the Journal of Consumer Research has published only two CSR research pieces since 2013.

218. By dang, even if consumers do not embrace it, we will find a way to make them love it. See, e.g., Michael J. Polonsky, Transformative Green Marketing: Impediments and Opportunities, 64 J. BUS. RES. 1311 (2011); and Andrea Prothero, Susan Dobscha, Jim Freund, William E. Kilbourne, Michael G. Luchs, Lucie K. Ozanne, & John Theegerson, Sustainable Consumption: Opportunities for Consumer Research and Public Policy, 30 J. PUB. POL’Y & MARKETING 31 (2011). This article is 7 pages long and has 7 authors. Just an aside and observation on rigorous standards in the academy.

219. Jesse Graham, Jonathan Haidt, & Brian A. Nosek, Liberals and Conservatives Rely on Different Sets of Moral Foundations, 96 J. PERSONALITY & SOC. PSYCHOL. 1029 (2009); Blair Kidwell, Adam Farmer, & David M. Hardesty, Getting Liberals and Conservatives to Go Green: Political Ideology and Congruent Appeals, 40 J. CONSUMER RES. 350 (2013). Indeed, political views could be said to have
Following a period of active research in CSR marketing in the late 1990s and early 2000s, the CSR marketing research slowed. That reduction in research efforts may have come as a result of significant findings that indicate consumers are either skeptical or reluctant to embrace CSR marketing. A line of work on skepticism flew under the radar with few U.S. scholars willing to explore these consumer attitudes until recently. A wave of research, mostly from scholars outside the United States has emerged that raises questions about green marketing.

Even as that research continues to emerge, there has been dedication to proving that consumer reluctance on green marketing initiatives is no longer in existence. There is now a body of survey research by commercial, nonprofit, and NGO organizations that concludes that CSR not only matters to consumers but that they embrace it fondly. That research is covered in the subsequent section.

b. Commercial, Nonprofit, and NGO Survey Research

In addition to the academic studies, there are a number of private organizations that do consumer survey studies to provide companies with data on consumers, with some providing general consumer data and then drilling down into social cause branding. As new CSR firms and organizations are created, so do the number of surveys that deal with CSR and sustainability issues. Other private organizations focus not on general consumer profiles, but focus only on CSR consumer surveys. These commercial, nonprofit, and NGO studies conclude that consumers say social change is important to them but do not specify what they have in mind for social change. As the following overview of these research studies demonstrates, “social change” in marketing studies closely parallels the list in the literature in management, economics, ethics, and

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formulated the CSR screens and the shopping for a better world list of products. See infra Section V for further discussion of the role of politics and ideology in CSR.


221. See, e.g., Jiří Cerkasov, Jan Huml, Lucie Vokáčová, & Klára Margarisoňová, Corporate Social Responsibility and Green Marketing, 65 ACTA UNIVERSITATIS AGRICULTURAE ET SILVICULTURAE MENDELIANAЕ BRUNENSIS 1865 (2017). The abstract of the article has a Friedmasesque ring to it (please note translation has awkward phrasing). “As responsible in economic area respondents consider such firms which are profitable for owners and via taxes bring benefit for all of society.” Id. at 1865. To the extent the authors found social responsibility obligations, they were related to investment in technology and “energetic efficiency.” (energy efficiency). Id.

222. There are clearly divergent paths in the findings and focus of academic vs. commercial research. The divergent findings could be the result of the research mechanisms (survey vs. structured hypothesis research) or it could be the result of the way questions are worded, asked, or reported.

223. There is a singular website, ENGAGE FOR GOOD, www.engageforgood.com. (accessed Oct. 23, 2018) that compiles study information from various other websites and groups that do consumer survey types of research.

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philosophy.224 Given that the definitions are unclear, what is being measured is equally unclear.

The studies ask generically whether social change is important to them. Those questions are phrased differently: “likely to buy,” “extremely likely to buy” or “extremely important.” Despite their generic nature, those studies are then used to support a connection between consumer decision-making, desires, and purchasing motivations as a means of convincing businesses to adopt CSR standards.

Even if the definition of CSR or social change could be made clear in this form of marketing research, these studies do not have the rigor or clarity to provide conclusive proof that social change behaviors by companies or marketing or branding for social change drives consumer behaviors. Many of the studies simply conclude that “support of a cause” was a primary reason for consumer choices or their likelihood to try a new brand.225 The consumer research and surveys do not focus on the types of social causes. In fact, the studies that have consumers evaluating and ranking CSR issues are the exception, rather than the norm.

The research on the connection between consumers and CSR behaviors by companies has been turned into a multi-billion dollar industry referred to as social-cause marketing. The following list is a series of survey results made by various social-cause marketing organizations, some of which are unclear, some of which appear to be inconsistent, and many of which do not necessarily provide causation between consumer views and purchasing decisions in favor of CSR firms:

A. 64% of consumers choose, switch, avoid, or boycott a brand based on its stand on societal issues226

224. The usual areas, as covered supra in Sections II.A. and II.B., include environmental concerns, human rights, fair trade, philanthropy, employment, diversity, etc.

225. John K. Ross III, Mary Ann Stutts, & Larry Patterson, Consumer Perceptions of Organizations That Use Cause-Related Marketing, 1 J. ACAD. MARKETING SCI. 93 (1992). Consumers were shown a cause-related ad and their responses were measured. On average, those participating said that the ad would make them more willing to purchase products from the company. On a 7-point scale, the mean response was 4.92.

226. Edelman’s Earned Brand 2018: Brands Take a Stand, EDELMAN, https://www.edelman.com/sites/g/files/aatus191/files/2018-10/2018_Edelman_Earned_Brand_Global_Report.pdf. The data simply appear on the Engage for Good website, but to determine the validity of the study, a key is to look at the actual studies. The actual term used in the Edelman study is “belief-driven buyers.” There are leaders, joiners, and spectators as classifications according to their tendency to purchase based on beliefs in social issues. Leaders make their decisions on buying based on a company’s position, i.e., whether it agrees with their views on social issues. They see their purchases as a way to express their views. Joiners change purchasing based on a stand – they respond to company actions, but are not looking affirmatively on their purchases. Spectators watch the leaders and joiners and buy on the basis of, say price or quality. They are not interested in stands. There is no definition of social cause, social issue, or beliefs except perhaps in the ads chosen as illustrations in the report, including its Colin Kaepernicks “Believe in something, even if it means sacrificing everything” advertisement and Benetton’s Act Up Paris 1993 advertisement. Id.
B. 86% of consumers believe that companies should take a stand for social issues.227
C. 64% said it is “extremely important” for companies to take a stand on a social issue and that they were very likely to purchase a product based on that commitment.228
D. 57% of Hispanics said that they were more likely to purchase a brand that supports a cause they care about.229
E. 76% of “young people” said that they have purchased (53%) or would consider purchasing (23%) a brand or product of a company that supported a cause they care about.230
F. 67% of “young people” said that they have stopped purchasing (40%) or would stop purchasing a product or a brand of a company that said or did something that did not align with their values.231
G. 77% feel a stronger emotional connection to Purpose-driven companies over traditional companies.232

227. The data here are from the Shelton Group’s study. Brands & Stands: Social Purpose Is the New Black, SHELTON GROUP (2018), https://sheltongrp.com/insights/brands-stands-social-purpose-is-the-new-black. The examples used in this report included Dick’s Sporting Goods making a decision to discontinue sales of assault-style rifles in the wake of the shootings at Marjory Stoneman Douglas High School in Parkland, Florida; Hellman’s mayonnaise supporting only the use of cage-free eggs in its products; TOMS “One for One” program of giving one pair of children’s shoes for every pair of shoes purchased; and Stella Artois sending clean drinking water as part of its “buy a chalice” promotion. However, the study has some data that undercut the strength of consumer statements on social-cause buying: 92% of those surveyed could not identify the social cause with the correct company that was taking that position.

228. Id. There is a difference between the importance of a company taking a stand (86%) and whether taking a stand influences actual purchasing behavior. (64%). Also, taking the stand is extremely important, but purchasing because of a stand is only “very likely.” Id.

229. Descubrimiento Digital: The Online Lives of Latinx Consumers, NIELSEN (Oct. 8, 2018), https://www.nielsen.com/us/en/insights/reports/2018/descubrimiento-digital-the-online-lives-of-latinx-consumers.html. Nielsen uses “Latinx” to “connote unspecified gender.” The report refers to the use of the term as a “nod toward greater inclusion of women, LGBT+ and non-binary Hispanics and the growing popularity of the term in social media and academic writing. The survey notes that U.S. Hispanics over index whites on the likelihood that they would purchase brands that support a cause they care about, but in comparison to the Shelton study, U.S. Hispanics under index by 7% and the Nielsen wording in “more likely” vs. the Shelton 64% which is “very likely.” There appears to be an apples-to-oranges comparison as well as differences in wording in the data gathering. The only social cause identified in the survey was a company’s environmental record (53% “agreed” that such a record was important in making their buying decisions). The remainder of the survey focused on social issues defined as those that are important to the respondents individually.

230. 2018 Survey of Young People and Social Change, DO SOMETHING STRATEGICS (May 13, 2018), https://medium.com/dosomethingstrategic/dollars-change-young-people-tap-brands-as-agents-of-social-change-26128717c5f7. Young people are defined as those between the ages of 13 and 25. The use of “would consider” is different from “very likely” and “more likely.” Ergo, it appears less likely that young people are motivated to purchase a brand or product to support issues that the brand supports. Types of issues for which young people might show support are not clear, but the causes listed on the Engage for Good website include General Mills/Betty Crocker eliminating food waste; H&M’s bras for breast cancer survivors; Newman’s Own nutrition campaign; Call of Duty Nation; Colgate Climate Week; Microsoft and Unicef; Delta Airlines and Habitat for Humanity; and Grindr and sexual assault.

231. Id.

232. 2018 Cone/Porter Novelli Purpose Study, PORTER NOVELLI (June 1, 2018), http://www.conecomm.com/2018-purpose-study-pdf. The study focuses on the purpose driven company and that investment in “social causes” results in stronger emotional connections between consumers and the company and their desire to defend the company. A “purpose-driven company” is one that is committed “to both making money and making a positive impact on the world (e.g. strong environmental practices, being a good employer, supporting critical issues, giving back to the community).” Critical
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H. “Nearly 2/3” of millennials and Gen Z express a preference for brands that have a “point of view and stand for something.”
I. 28% of U.S. adults have stopped using a brand because of something negative they learned about in the news.
J. 33% of consumers buy from brands doing social or environmental good.
K. 33% of Americans think a company’s reputation is just as important as the products it makes.
L. 9/10 Gen Z would buy a product with a social or environmental benefit.
M. 66% of consumers want brands to take stands on socio-political issues and 58% say social media is the place to do it.

Just a bird’s eye view of the numbers from the survey research reveals a wide range of numbers and that the questions posed to consumers are not uniform. When asked if they do buy products from companies that do social or environmental good, the number is 33%. The higher response rates that seem impressive are not querying actual consumer behavior. Most of the surveys are

issues are not defined. The high percentages on buying from and supporting purpose-driven companies drop when respondents were asked whether they would invest in purpose-driven companies (54%).


234. Amanda Silvia, Spotlight on CSR: Millennials More Prone to Punish Brands for Scandals, MEDIAPOST, (Mar. 19, 2018), https://www.mediapost.com/publications/article/316225/spotlight-on-csr-millennials-more-prone-to-punish.html. The brands that suffered the most: Wells Fargo, Target, Papa John’s, Uber, FedEx, Nike, Walmart, the NFL, and Chick-Fil-A. 21% of those over 65 are likely to boycott a brand for scandals. 69% are willing to pay more for a brand that does not have a scandal but that they believe is made by a company with higher ethical standards. However, the majority of those respondents never bother to research the companies they are purchasing from. 68% said “shared values” with the companies from which they purchase is important.

235. How to boost business growth through brands with purpose, UNILEVER (Aug. 8, 2018), https://www.unilever.com/news/news-and-features/Feature-article/2017/how-to-boost-business-growth-through-brands-with-purpose.html. The study was conducted as part of a Unilever campaign to “make purpose pay.” Actually, the Unilever study was specifically directed at sustainability, asking respondents about “buying sustainably.” Unilever makes Hellman’s mayo. Cage-free eggs make eggs or chickens more sustainable? However, for the contra view on cage free and the sustainability of chickens, see supra notes 7-10 and accompanying text. The study concludes that companies sell more products if they make the connection in their branding and ads to sustainability.


237. 2017 Cone Gen Z CSR Study: How to Speak Z, CONE COMM, http://www.conecommm.com/2017-cone-gen-z-csr-study.pdf. 94% of Gen Z believe that companies should address environmental issues. Figures for other generations are: 87% millennials; 83% Gen X; 89% Baby Boomers; and 88% general population.

238. #Brands Get Real: Championing Change in the Age of Social Media, SPROUT SOCIAL (2018), https://sproutsocial.com/insights/data/championing-change-in-the-age-of-social-media/ This study did break down types of socio-political issues: Education, environment, gender equality, health care (one word in the survey: healthcare), human rights, immigration, labor laws, LGBTQ rights, poverty, and race relations. The highest percentage believing this topic to be an important issue for companies to always take a stand? Human rights (58%) and Labor laws (55%). The lowest? LGBTQ. The study also broke down these topics by: 1. All brands should take a stand; 2. Only if it relates to products or services; and 3. No, it’s not a brand’s place. The issues that earned the highest percentage of “No, it’s not a brand’s place” were LGBTQ and immigration.
querying “would buy” or are measuring the likelihood of buying. Some surveys are not asking about buying but whether they want brands to take stands on issues. The open questions are which issues and which stand to take on those issues.

B. Consumer Confusion on Certification

With the evolution of third-party standards and certification for eco-friendly, accuracy has declined while consumer confusion has increased. Consumer confusion defeats the theoretical purpose behind the label and certification movement. The movement was a response to the Adam Smith economic theory that businesses will, as they pursue profits, address social issues if they are important to business survival (whether important in the profit sense or in the sense of society’s survival) because the invisible hand guides the marketplace to the good of the whole.\(^2\)

Those in the CSR movement have responded that there are certain market conditions that impede achievement of that equilibrium of social good, one of which is full information. The lack of complete and accurate information impedes the movement of the invisible hand.\(^3\) Lack of information translates into imperfect competition.\(^4\)

In order for consumers to make purchases based on knowledge about the sellers’ CSR status and activities, consumers must be aware of two things: the concept of social responsibility and the companies’ dedication to social responsibility. Based on the definitional struggles for CSR noted here in all research fields, getting those two levels of CSR knowledge out to consumers is a tall order.

There are no studies that demonstrate consumer awareness of the general concept of social responsibility.\(^5\) Consumers are aware of cause-related marketing campaigns by companies. Cause-related marketing is a company

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239. See generally, ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1863).

240. Friedman believed that markets functioned efficiently and toward goodness, absent fraud and/or illegality. If there is fraud, then participants in the market have been deprived of information necessary for rational choices and decisions. Decisions based on limited or false information do not produce the efficiencies necessary for an efficient market. “. . . there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.” MILTON FRIEDMAN, CAPITALISM AND FREEDOM 291 (1962).


242. Lois Morh, Deborah J. Webb, & Katherine Harris, Do Consumers Expect Companies to be Socially Responsible? The Impact of Corporate Social Responsibility on Buying Behavior, 35 J. CONSUMER AFFAIRS 45, 48 (2001). There are survey types of research that indicate consumer concerns about particular CSR issues, as defined by the survey administrators, but as discussed there are inconsistencies in those survey results. See supra notes 223-37 and accompanying text.
promoting sales by pledging that a percentage of profit from sales will go to support a specific cause or nonprofit organization.\textsuperscript{243} Research concludes that about half of consumers could recall a cause-related marketing campaign.\textsuperscript{244} Interestingly, even after cause-related campaigns are explained to consumers only 79 percent were able to describe it accurately.\textsuperscript{245} Since the time of these academic studies, there are the survey types of studies that seem to indicate higher consumer awareness of CSR issues, but those studies do not explore the issues of consumer knowledge, retention, or causation in terms of purchasing motivations.\textsuperscript{246}

The creation of the certifications and labels was some response to the consumer CSR knowledge deficit as a means of providing consumers with additional information about products. The additional information given, through the labels and certifications, was that certain products and their manufacturers contributed to the good of the whole through adherence to standards of sustainability, animal treatment, or the operations and governance principles of their producers.

There are, however, flaws in the “full information” purpose of certifications and labels. The first flaw is that there are so many certifications and labels offered by so many different organizations that consumers need an additional level of certification for the labels and certifications. The second lies in the underlying assumptions about the validity of the standards for labels and certifications.

1. Authenticity of Labels and Certifications.

The number of labels, certifications, and standards has resulted in the area of eco-friendly labeling to be one of the “Wild West.”\textsuperscript{247} Running throughout the eco-friendly labeling are the following questions:

- Who is responsible for allowing the use of the label?
- Who developed the label?
- Who is checking to see if there is compliance with the standards of the label?
- With some of the standards so costly to measure, (i.e., sufficient shade for the birds, how is it possible to check all the fields of coffee plants? No dolphins in the tuna nets?) is there some assurance of accuracy?

\textsuperscript{244} John K. Ross III, Mary Ann Statts, & Larry Patterson, \textit{Tactical Considerations in the Effective Use of Cause-Related Marketing}, 2 J. OF APPLIED BUS. RESEARCH 58 (1990-91).
\textsuperscript{246} See supra notes 223-37 and accompanying text.
Certification labels do not always match facts. For example, “Rainforest Crunch” ice cream was the flagship product of Ben & Jerry’s, a company that was one of the original “shopping for a better world” darlings. The ice cream was touted as the partnering of American business with Amazon preservationists. “Rainforest Crunch” was created in part to help indigenous peoples find an alternative to selling their timber rights to mining and forestry industrialists. In reality, Ben & Jerry’s purchased no nuts for its ice cream from rainforest aboriginals; “more than 95% of the Brazil nuts it sourced were purchased off commercial exchanges supplied by businesses, not indigenous peoples, in Latin America that now dominate the Brazil nut market.”

For some companies, the label is self-developed, as with Starbucks leading the Sustainable Coffee Challenge, which is a program of Conservation International. The certification standards were motivated and supported by an industry leader and have the trappings of sustainability but may be difficult requirements for smaller competitors to meet. “Fair trade” is another CSR issue that lacks clarity, even with certification. There are layers of ethical complexities in the CSR topic of fair trade. And it is not clear how much “fair trade” a company must do before earning a “Fairtrade” certification? For example, Starbucks is a “Fairtrade” company, but it actually only sources about 3% of its coffee purchases from “Fairtrade” farmers.

2. Label vs. Goodness vs. Political Issues

In the area of consumer CSR focus and, specifically, the “shopping for a better world” certification there appears to be, as is true in all aspects of CSR research, no consensus about what constitutes a “good company.” For example, some designated CSR “shopping” companies are those that make the correct

248. See supra notes 165-66 and accompanying text.
249. Jennings & Entine, supra note 111 at 42-44. “Moreover, many anthropologists maintain that the harvest has actually contributed to falling nut prices and an increase in the selling off of land rights to industrialists to compensate for the economic short-fall. The Ben & Jerry’s program actually exacerbated the very problem it was purported to address. In early 1995, Ben & Jerry’s pulled the claims on its Rainforest Crunch label.” Id. at 45.
251. Friedman or Hayek might say, “What if there are consumers who just want cheaper coffee?” There is no citation for this comment, just a basic knowledge of economics that is grounded in years of experience. There are still people who will buy a car that seems to be more of a large roller skate than vehicle precisely because it is cheaper, albeit much more dangerous and perhaps costly in the long run.
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choices on matters of conscience such as animal welfare, fair trade, labor standards, organic foods, human rights, weapons, and fair wages. But other shopping (and investment) screens focus on avoiding tobacco, alcohol, or pornography companies and products, the sin stocks. Philip Morris (PMI) is screened out because it is a tobacco company, but it is also a company that has a remarkable history and practices in workplace diversity and employee rights, including its treatment of tobacco farmers around the world. Its exclusion for its product makes PMI an unethical company in the CSR world. Despite its stated commitment in its strategy to a smoke-free world, it cannot earn CSR certification because of its current products that it is working to phase out.

There is a black hat/white hat approach to certification and screens that takes on a simplistic approach in an ethically nuanced world. Shampoo companies can always qualify for certification but defense contractors cannot. This definitive approach introduces into CSR the concern that the classifications are grounded in political views rather than in ethical theory. For example Ben & Jerry’s newest ice cream flavor is called “Pecan Resist,” and was launched with the following statement, “The company cannot be silent in the face of President Trump’s policies.” Some of the proceeds of the sales of the ice cream will go to a women’s group, Native Americans, and people of color.

On the consumer side, the research on the efficacy of CSR shopping certification in avowed consumer interest in shopping for a better world and actual consumer purchasing habits is, as in other research areas, a mixed bag. Some research concludes that consumer interest in CSR purchasing is high and

253. “Fair trade” here should really be “Fairtradr,” which is an organization that certifies Fairtrade products. Fairtrade has no relationship to fair trade, as in the sense of tariffs and other governmental treaties on exports and imports. Rather, Fairtrade is an organization that provides its certification to companies that are connected to the original source of their goods and use Fairtrade farmers and producers. The goal of Fairtrade is to have a connection between company sources and the providers with a focus on small farmers. Fairtrade has a general assembly (made up of 50% farmers) that votes on standards and minimum prices. Why Fairtrade, FAIRTRADE, http://www.fairtradeamerica.org/What-is-Fairtrade/What-Fairtrade-does (accessed Oct. 31, 2018).


255. PMI has 34.4% women in its management team, with a goal to reach 40% by 2022. Its lost time injury rate for 200,000 hours worked is 0.10.

256. PMI has developed a manifesto to have a smoke-free world by offering alternative products. That manifesto is online and explains the company’s dedication to research, products, and going smoke-free because it should and it can. Designing a Smoke-Free Future, PMI, https://www.pmi.com/who-we-are/designing-a-smoke-free-future (accessed Oct. 31, 2018).

257. This issue emerged in the work of Carrigan et al., supra note 176. “The problem lies in the colonization [sic] of the concept of ethics to fit what is, in essence, a political agenda.” Id. at 402. Respondents in their work raised concerns about political underpinnings in their responses.

aligns with their purchasing habits. Other research concludes that the two do

not align.

3. Underlying Assumptions: The Fluctuating Models, Goals, and Terms of CSR

Even if the certification terms, labels, and terms could be made clear, the impact of such certifications on either companies or consumers is not. For example, one typical standard is whether an organization is “family friendly.” Apart from the components of such a generic term being unclear, it is a concept that is difficult to measure. What would be measured? And would measurements such as flex-time, parent leave, and on-site day care truly advance the families or is it simply an HR tool for employee satisfaction? And would the family

friendly policies exist regardless of the company policies because of legal

requirements?

Again, assuming that the terms used as CSR standards for purposes of either consumer responses or certification could be defined, there is the additional problem of no two CSR models for research or certification containing the same standards or areas of focus. There is no agreement on what issues or characteristics should be included in CSR lists, or even on the terminology to be used as brief descriptors. As a result, the science behind rankings or ratings based on the standards is soft, and malleable, as standards fluctuate and certification organizations shift their list content perhaps on the basis of outside influences. For example, Goldman Sachs explains its Environmental, Social, and Governance standards, standards for its own CSR standing as well as for evaluation of its investments, as follows:

a. Combat climate change.


262. “Climate change” is itself a shift in terminology. Until about 1998, the CSR term was “global warming.” The first time the term “global warming” was used was in the work of geochemist Wallace Broecker, Climate Change: Are We on the Brink of a Pronounced Global Warming? 189 SCI. 460 (Aug. 8, 1975). Broecker’s use was a break from the traditional scientific language of “climate change.” However, in 1988, NASA scientist, James E. Hansen, testified before Congress and used the term, “global warming.” Greenhouse Effect and Global Climate Change, part 2, 100th Cong. 44 (1988) (statement of James E. Hansen, NASA). See also What’s In A Name? Global Warming vs. Climate Change, NASA, https://pmm.nasa.gov/education/articles/whats-name-global-warming-vs-climate-change. Global
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b. Bridge the gaps 263
c. Advance ESG and impact investing 264
d. Foster our inclusive, service-oriented culture 265
e. Lead with ideas 266

Goldman has established metrics for its CSR standards, metrics used to evaluate investment opportunities for their CSR standing. The metrics include percentage of women and minorities in the workforce, LEED certification, ISO certification, percentage of green power. 267

Examining just one set of CSR values illustrates the differing standards used to determine if a company is a CSR company. The focus on green certification, or the eco-mark era it is known, as a CSR standard appears to have taken hold in 2007. 268 The current trends in CSR can be tracked by examining the registration of trademarks from the various certifications, and the green labels and eco-marks began to increase dramatically at this time. 269 There is not full information for consumers or investors on CSR standards, and certainly not consistency. For consumers to make informed choices about goods, the CSR standards require clarification, disclosure, and definition.

263. According to the Goldman ESG report, supra note 261, this component of CSR is economic and social development. Goldman accomplishes this goal by underwriting government bond issuances, providing loans to small businesses post-hurricane activity, providing capital sources for international funds that sponsor vaccine programs, providing capital sources to cancer centers, and making loans for inner city development.

264. This value relates to increasing efficiency in business through environmental remodels for Goldman real estate properties in its asset portfolio and also includes effective management of investments in companies by voting at shareholder meetings and on shareholder proposal (109,000 proposals voted on in 2017). Id. at 22.

265. This value includes the goal of gender pay equity, service by employees, and grant programs for Goldman analysts working with nonprofits of their choice. Id.

266. Id. One cannot help but wonder how the rest of us lead if Goldman’s distinction is leading with ideas. The implication is that the rest of the world plods along aimlessly or leads with some other tool in the leadership toolbox not as groundbreaking as “ideas” such as free coffee, certified as bird-free, as certified by the ornithology certification groups. Goldman includes under “Lead With Ideas”: sustainability proposals and the Goldman Sachs Sustain summit (where one assumes the ideas flow).


268. The trend was not entirely consumer motivated, i.e., the movement to green was, how ironically, not an organic one. It appears to have been a marketing strategy by companies to distinguish themselves in the minds of consumers. JOHN GRANT, THE GREEN MARKETING MANIFESTO 10 (2007) (“a creative opportunity, to innovate in ways that make a difference and at the same time achieve business success”).

C. The Deceptions, Fraud, and Consequences of CSR

Apart from the inherent confusion in green labeling, CSR standards, and certification, there remains the possibility that the system could be gamed by companies seeking the potential goodwill of this imprimatur. An underlying leap-in-logic assumption in green branding is the goodwill and forthrightness of all participants. Angels are assumed in the world of CSR. This assumption of inherent goodness in all CSR actors is a fallacy. An inherent assumption in CSR is that third parties, angels can swoop in and impose CSR standards as a means of accomplishing more fairly or quickly. However, what the free market is able to accomplish, through slower movements by participants instead of mandates by third parties, being subject to the market guardrails, of the regulation of fraud, can always be done more efficiently and with less collateral damage than the angels doing good as they pull strings from the outside. The following discussion illustrates that even when businesses adopt CSR standards, their motivations and the motivations of those establishing standards may not be entirely pure or successful in purpose and outcomes.

1. Greenwashing: The Label and Certification Deceptions

When companies take on the appearance of a CSR organization without meeting the actual CSR screens and standards, they are engaged in greenwashing, also known as “sheep’s clothing principle” in CSR. The sheep’s clothing principle is the term that describes the actions of companies that adopt CSR standards and engage in philanthropic activities as a type of clever advertising scheme. With the flexibility of CSR definitions and the weak causal links between consumer choices and CSR (green) marketing, there is a wide and tempting opening for those lacking good faith to step in and use the supposed CSR advantage. It was perhaps inevitable that the loosely defined CSR system would be gamed. As a result, corporations have engaged in and still utilize the CSR link to benefit their branding, however established or not established. These companies assume the mantle of attributed CSR goodness, something that benefits both their investment rankings for purposes of those CSR and their consumer relations (if there is a causal link).

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270. The black hat/white hat syndrome assumed in research has granted the lesser angels in CSR a wide swath for deception. See supra II.A and II.B for the research assumptions.

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“Greenwashing” is formally defined as “false, deceptive, misleading, or vague” representations about a company, its products, or practices. Consumer and federal and state agency actions against companies accused of greenwashing are grouped under the term “eco-litigation.” There are various forms of greenwashing, such as contradictions in terms: “organic cigarettes” and “green herbicides.” Another example is when companies tout that their products contain no _____, and the company has filled in some substance that was long ago banned by regulation from use, such as CFCs.

Some claims are ill-defined or not defined, thereby misleading consumers, which results in litigation over unfair trade practices. Examples include “chemical free” or “natural.” Ben & Jerry’s got into a bit of a dust-up with the Center for Science in the Public Interest over its all-natural labeling, because its ice cream contained dextrose, alkaliized cocoa, corn syrup, hydrogenated oils or other artificial flavors and chemically modified ingredients. Those ingredients were disclosed, but in the fine print on the container whereas the “All Natural” label was highly visible. The CSR company avoided any FDA action because the FDA did not and does not have a clear definition of “natural,” but leans toward a synthetic constraint as opposed to not permitted refined natural ingredients in “all natural” human food products.

Some claims of greenwashing come because the company did not understand the full requirements for claiming green or complete all of the underlying steps for use of the word “green.” For example, paper cannot carry a green label simply because it comes from sustainable forests, which is one part of paper certification. The company must also meet standards related to the emissions from its vehicles that are used in the harvest and hauling processes. In addition, the green label cannot be used if the paper-processing portion of production is not reviewed for establishing that no chlorine was used there. Failure to certify

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272. The term is a combination of the CSR term of “green” and “whitewashing.” And it means make false or fraudulent claims about supposed environmentally friendly products and services. Terrachoice Environmental Marketing, The Seven Sins of Greenwashing: Environmental Claims in Consumer Markets I (2009) [herein after The Seven Sins], http://sinsofgreenwashing.org/findings/greenwashing-report-2009/.

273. “Greenwashing” was also used, supra notes 210-212, was also used to describe the practices of selling green bonds or climate bonds under the guise of an investment in certified environmental or sustainability projects that were, in fact, not being done or not as represented.

274. The Seven Sins, supra note 272. In the world of CSR, these two products cannot exist. Cigarettes can never have any CSR label, nor matter how many birds were saved as the tobacco leaves grew or how much certified mulch was used in growing the crop. Likewise, herbicides are not part of the CSR world.

275. Id.

276. Id.

277. Most ‘All Natural’ Ben & Jerry’s Flavors Have Unnatural Ingredients, CTR. SCI. PUB. INT. (Aug. 12, 2010), https://cspinet.org/new/201008121.html. In all fairness to Ben AND Jerry, the Center for Science in the Public Interest is a bit of a scold. They are the ones who wanted to take buttered popcorn out of theaters.

278. For full details on the “natural” debate and an update on FDA actions, see infra notes 470-473.
in all aspects of production but still using the green label is misrepresentation unless the label qualifies by noting the limitation to sustainable forest sources of the raw materials.\textsuperscript{279}

In some cases, the label cannot be used without disclosing actual percentages. For example, “Made from recycled materials” is a green certification that cannot be claimed unless the percentage of recycled materials is noted and there is third party certification of that percentage. Labels and eco-marks that lack third-party certification are a form of fraud referred to as “fake labels.”\textsuperscript{280}

There is a final form of green fraud, more comparable to traditional marketing fraud. An example of this type of fraud has come when companies claim that a product has the U.S. government’s Energy Star certification when it does not.\textsuperscript{281} These types of misrepresentations are common on appliances such as washers, dryers, and refrigerators.\textsuperscript{282}

2. \textit{The Unwitting Damage and Negative Impact of CSR Good Intentions}

Another danger of the blind adherence to certain CSR issues, positions, and ideologies is the failure to fully explore the consequences of their imposed central planning of CSR programs. Good intentions without the backdrop of market movements and their realities can do more harm than good. Ironically, the harm comes to those the CSR movement/label/certification was attempting to protect. For example, biofuels were developed as clean and green alternatives to fossil fuels. Cars powered by clean agricultural products! What could possibly go wrong? Enter the free market.

Unintended consequences are frequent when CSR standards, imposed by external forces to economic and natural systems send a shock through economic systems. One characteristic of the CSR movement is its inability to understand the economics of markets and, most particularly, the impact of their sustainability and CSR initiatives on those who were intended as stakeholder beneficiaries.

a. Biofuels: Starving Farmers and Rain Forest Disruption

Because biofuels are made from corn, the demand for corn by biofuels producers has driven corn prices higher, particularly in poorer nations. The demand for corn exceeds the supply, thus driving corn prices higher producing market shifts. With the levels of profits in corn sales, large corporate farmers have entered corn markets that would not have been touched in the past because development of resources in agricultural countries was often cost-prohibitive.

\textsuperscript{279} Id.
\textsuperscript{281} Id.
\textsuperscript{282} Id.
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Guatemala has seen a surge in multinational presence as conglomerates purchased farms and farmland there. Family farmers have benefited from the large cash payments. But, then they have no future source of income. Those who are leasing farmland find themselves ousted as the owners sell to multinational companies. Farmland is now so scarce for Guatemala’s family farmers that they are planting the food they grow for themselves anywhere they can find soil. Food crops grow on highway medians with this explanation given by one of the median-occupying farmers, “There is no other land, and I have to feed my family.”283 The photo accompanying the article shows the farmer’s children, ages four and six, who appear to be victims of chronic malnutrition.

In Guatemala, the price of eight tortillas was one quetzal (about 15 cents USD) in 2010. Today, one quetzal will buy just three tortillas. The price of eggs has tripled because chickens feed on corn, and the cost of the feed is passed along in the price of eggs.284 Even those who purchased their food, as opposed to growing it themselves, now experience prohibitive cost levels. Before the biofuel movement and the resulting demand on corn crops used for sustainable energy, the poor in Guatemala spent two-thirds of their income on food. With a nearly 33% increase in food prices, the amount of food that Guatemalans can purchase, has been reduced by one-third, assuming that food is even available for purchase.

*Scientific American* has documented the collateral damage of this CSR biofuel movement to eliminate fossil fuels in a presentation, “Biofuels Land Grab: Guatemala’s Farmers Lose Plots and Prosperity to ‘Energy Independence.’”285 Residents in Guatemala have awakened to the consequences of the CSR biofuels movement and have begun their own resistance movement. Protestors in Guatemala carry banners that read, “Don’t gamble with our food.”286 Guatemala’s labor movement has been working with the EU to possibly ease the biofuels mandate until Guatemala can better absorb and respond to the crisis that began with the good intentions of the clean fuel movement.

While it is true that the biofuel demand (and resulting underlying demands for corn) has resulted in 60,000 new jobs for Guatemala, poverty-level individuals and families are not the beneficiaries of the jobs that result from the large multinational growers. With no jobs and the inability to grow their own food because of the land-grabs for biofuels, poverty levels in Guatemala have increased.

The same shortages of land and resulting spikes in food prices can be found in Asia, Africa, and Latin America. Guatemala is the epicenter for these

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284. Id.


286. Id.
unintended consequences because the corn-growing activity is more intense there. Guatemala’s location has resulted from its relatively easy access to countries on both sides of the Atlantic—the United States and Europe countries that have biofuel requirements.

Yet, as these consequences unfold, vehicle manufacturers in the United States and Europe are facing increasing government-imposed renewable fuel standards. That is, they need more biofuel vehicles, and their countries need more biofuels as the number of biofuel cars increases. The U.S. requirements for biofuels go up each year, and the EU has a 10% mandate of auto manufacturers for biofuel vehicles by 2020. The underlying demand for biofuels has resulted from the central planning CSR imposed governmentally. Unless and until that demand wanes, the worldwide impact on agriculture cannot be solved. Like Guatemala, agricultural countries have been left to sort through the consequences of externalities that have crippled their economies and disrupted the lives of those at the bottom rung of the economic ladder. As ThinkProgress has noted in its efforts to address the impact of biofuels:

In short, Guatemala is a microcosm for the damage Western food-based biofuels are doing to food supplies for the global poor. The United States is currently on track to devote nearly 40 percent of its own corn crop, and 15 percent of the world’s corn supplies, to biofuels.287

Nor is the world finished with the collateral damage from biofuel production. Biofuels are also made from palm oil, and Sumatra is a major source of that palm oil. Presently, there is a “say no to palm oil” campaign because of the impact expanding palm oil plantations are having on the rain forests in Sumatra and, particularly, the orangutan population as plantation owners clear the land and kill or imprison the animals.288 There is little acknowledgement in the battle to save Sumatra that the demand for biofuels is driving the demand for palm oil. The result is one CSR sustainability program (biofuels) now at war with the CSR desire to sustain the rain forest and the orangutans.

b. Product Sourcing That Crushes the Source

Another form of CSR externality that shocks economic systems occurs when CSR companies use their sourcing as a competitive advantage and CSR marketing tool. In touting product sourcing, companies seek to sell more products by appealing to consumers to contribute to the company’s efforts to save the source. For example, Ben & Jerry’s “Rain Forest Crunch” ice cream was a flavor developed because of the company founders’ interest in a popular CSR

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movement of the 1990s to “save the rain forests.” Rather than have the rain forests destroyed by those trampling through seeking to harvest the nuts, Ben & Jerry’s developed a program to purchase the Brazilian nuts from cooperatives run by the indigenous people of the Amazon, notably the Xapuri tribe.

The assumption was that the indigenous peoples would be willing and grateful to forage for nuts for the ice cream maker. With the prices Ben & Jerry’s were willing to pay, the harvest attracted outside companies (that had significant and often violent labor issues). These outside companies, not the tribe, ended up furnishing 95% of the nuts used in Rain Forest Crunch. The prices Ben & Jerry’s paid the tribe for the nuts resulted in infiltration of the forests by commercial nut growers, and land deals with the Xapuri tribe. The Brazilian government then cut off most of its aid to the tribe because it benefiting from these outside lucrative deals. The tribe attempted to make up for the lost government assistance by selling off more forest rights. Finally, the market was flooded with nuts, the price of nuts dropped significantly, and the entire harvesting operation shut down. The tribes then were forced to undertake more sell-offs of the Amazon forest because the tribe lost its revenue from leases from the now-departed growers.

There is a naivety that accompanies CSR movements and all of their good intentions. That naivety is partially rooted in a lack of knowledge about how free markets work. The imposition of CSR externalities, whether through price or demand, ironically becomes destructive to those the CSR movement was attempting to help. One expert has a fable that summarizes the imposition of non-market forces on an economic system. “Green businesses are like elephants, and indigenous people are like ducks and their eggs. The duck was killed by an encroaching colonist, leaving her eggs unattended. The kind-hearted elephant [rainforest capitalists] decided to do his friend the duck a favor. He sat on the eggs.”

c. Good Intentions vs. the Laws of Nature

CSR good intentions are not only hampered by the principles of economics. They are constrained by the laws of nature, ironically. For example, when ice-

289. Jon Entine, supra note 162.
290. The story of Ben & Jerry’s and the Rain Forest Crunch initiative can be found in a number of books, including JOHN STRAUSBAUGH, ROCK ‘TIL YOU DROP: THE DECLINE FROM REBELLION TO NOSTALGIA 216 (2002); and BRAD EDMONSON, ICE CREAM SOCIAL: THE STRUGGLE FOR THE SOUL OF BEN & JERRY’S 79 (2014).
291. STRAUSBAUGH, supra note 290.
292. Id.
293. Id. This information was also detailed in a report commissioned by Ben & Jerry’s on its social progress. Paul Hawken authored the report. Confessions, Ben & Jerry’s, BUSINESSWEEK, June 26, 1995, at 8.
cream makers clean their equipment with hot water, the run-off ice cream is washed down the drain. Ben & Jerry’s decided that it was better to collect the ice cream water waste and give it to local farmers for feeding their piglets. The move, by one of the 1990’s leaders of progressive companies, was praised by the media, even internationally. However, the pigs developed the equivalent of human arteriosclerosis. When the pigs were slaughtered, the farmers found that their meat was fattier. The pig farmers suffered because of the failure of a CSR leader to think through the implications of a well-intentioned program, largely because they were not familiar with all aspects of animal husbandry. CSR third parties addressing issues without input from those who are or could be affected is costly. The premium ice cream remnants were unhealthy for the pigs, bad for the quality of the meat, and economically harmful for the farmers.

This form of well-intentioned programs, where the activities were recommended and lauded, with the resultant recognition and branding for companies, has been perhaps the most insidious in the CSR movement. The deception regarding the benefits was not as obvious because it was revealed over time and seems to be excused in the name of original good intentions. When the harm caused by CSR is discovered, the information about the consequences is difficult to discover and not widely disseminated.

D. The Sudden, Rapid, and Unchallenged Use of Demands and Boycotts

Apart from the flaws and issues in the organized CSR movement (that portion that develops the screens and certifications), there is an additional type of CSR process that has evolved in an issue-by-issue format. The pattern for its use is fairly consistent. An issue emerges organically, as it were, with one person or one group. By using ubiquitous social media, the issue grows in its coverage, number of followers, and power. That power is then wielded to force change because of the pitchfork atmosphere, without proper vetting of the validity of the demands. The process is akin to one of shaming, with the assumed authority that the demands are universal. Sometimes the demands are based on faulty facts. For example, People for the Ethical Treatment of Animals (PETA) began an international campaign to stop the use of wool in products. A tag for Lucky Brand clothing boasted, “Sheepless Fleece. Not a single sheep was sheared in the

295. STRAUSBAUGH, supra note 290, at 216.
296. AP, Ben & Jerry’s Find a Solution to Ice Cream Waste Problem-Pigs, AP NEWS (June 26, 1987), https://www.apnews.com/83e4fc9ef1c67150856b5482fe060b8b. Just a note of trivia, the piglets would not eat the mint Oreo cookie flavor. The mint was an appetite killer for the little dears.
297. Id.
298. Id. Further, these problems did not end with these discoveries in the 1990s. Discussion of current problems in the dangers and negative impacts of CSR screens, certifications, and efforts are discussed supra Section II.C.2.
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making of this garment.” Duluth Trading’s label read, “No smelly animal fur here, just soft, furnace-warm 200-gram polyester.” However, the sheep farmers stepped up and contacted Lucky Brand and Duluth Trading via social media to explain using polyester instead of wool meant they were using non-biodegradable plastic. Further, the sheep farmers explained that shearing is good for sheep because, “You try putting on three sweaters in the summer and see how it feels.” Without shearing, sheep suffer heat stress, are unable to feed their lambs, cannot see, and become infested with maggots. The campaign to banish wool was based on incomplete information and both Lucky and Duluth have returned to wool because of a social media response by organized sheep farmers that saved the sheep, or at least their healthy shearing.

In addition to this example and those in the introduction, there are a number of other illustrations of this new CSR tool used to bring about changes in corporate behavior. The examples illustrate the pressures brought to bear to force corporate participation in CSR issues. The pressure comes through litigation, boycotts, and shaming.

1. Climate-Change Disclosure: Litigation as a Fast-Track CSR Tool

The attorney general for the state of New York has filed suit against Exxon for engaging in a “longstanding fraudulent scheme” to deceive investors, analysts, and underwriters “concerning the company’s management of the risks posed to its business by climate change regulation.” The suit is actually focused on the failure of the company to make risk disclosures about the impact of proposed climate-change regulations when those climate-change regulations not only do not yet exist, but would be unclear in terms of possible content. The interesting aspect of the suit is the allegation that Exxon kept two sets of books, one for public consumption that indicated that Exxon was prepared for more stringent regulations that would inevitably come with global warming. Privately, however, the company’s internal estimates discounted the future costs of climate-change regulations. Exxon had disclosed a risk that it did not believe was as real as others saw it because of the unknowns in climate science as well as in potential regulation, dependent upon the findings of scientists. As the Wall

300. See notes 12-16 and accompanying text supra for a complete discussion of the plastics concerns.
301. Id.
Street Journal put it, “the AG claims Exxon was telling the truth to the public but lying to itself.”

The initiation of such litigation results in companies’ advance expensing of anticipated costs that are not easily nor accurately determined and allocations for unknown and uncertain events, with resulting loss in the value of the target companies; stocks. With Exxon, if and when the climate-change unknowns become “knowns,” then Exxon could be sued for its overly pessimistic financial disclosures based on predictions that never came true.

The pressure applied here through multi-year investigations and from resulting litigation placed a publicly traded company in an untenable position. The effect of unilateral action by state attorneys general from litigation similar to the New York Exxon lawsuit is that markets were moved because of political views or ideology. As other companies witness the Exxon suit they are faced with a Hobson’s Choice. If they disclose too much to protect themselves from future litigation for overly pessimistic financials, but they do not believe it internally, they can be sued for fraud. If they disclose too little they are subject to litigation for the failure to quantify a future energy market in which the science and regulation remain unsettled.

Exxon responded to the New York suit by calling it “a product of closed-door lobbying by special interests, political opportunism, and the attorney general’s inability to admit that a three-year investigation has uncovered no wrongdoing.” The SEC had already ended its two-year investigation into the same climate-change accounting issues at Exxon in August 2018 through a letter to the company that indicated it would not be taking any enforcement action. The SEC had full access to all the documents that Exxon had furnished to the New York Attorney General’s office.

At the heart of the investigations was an unresolvable difference. Exxon based its forecasting and risk assessment on a belief that there would still be a need for fossil fuels as an energy resource. Even if the planned goals for alternative energy were adopted (an unknown), reasonable minds do agree that complete elimination of fossil fuels in the time frames planned is not possible. However, the groups calling for the Exxon investigation and subsequent

304. Peak Embarrassment in War on Oil, WALL STREET J., October 26, 2016, at A14. Exxon used a proxy cost of $80 per ton of carbon in 2040 in developed countries and between $20 and $40 per ton in developing countries, but used much lower numbers internally for its computations.
307. Id.
308. Id.
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litigation believe that fossil fuels will be eliminated during the period of Exxon’s projections. 309

Nonetheless the public pressure that comes from the climate-change movement is vocal and effective in moving forward changes and reforms using strategies that do not involve consensus. 310 In Juliana v. U.S., 21 plaintiffs aged 11 to 22 have filed suit against the federal government demanding regulation on climate change. 311 The plaintiffs argue that they are being deprived of their substantive due process right to a climate system capable of sustaining life. 312 The theory of their case is that inaction by the federal government has created dangers that deprive them of the same quality of life and opportunities that were available to previous generations. In response to a motion to dismiss, the federal district court held that there is a difference between political question cases and cases that involve politically charged issues. 313 The court framed the case as one that fundamentally centered on a substantive due process question, a question that can be resolved by the courts. 314 However, the lower court also added a Tocqueville quote, “[t]here is hardly any political question in the United States that sooner or later does not turn into a judicial question.” 315 The concern expressed by the Justice Department is, “The lawsuit is an unconstitutional attempt to use a single Oregon court to control the entire nation’s energy and climate policy.” 316

Still, the question returns to whether the courts can order the federal government to address an issue that will require significant public and scientific input when questions within the scientific community about causation and resolution remain.

The use of litigation is different from the historical types of CSR resolution because of the absence of consensus. Litigation, as in the case of Exxon, is the decision of a single elected or appointed official. Litigation by an attorney general is always, ultimately, that elected official’s decision. However, in the

309. One of the legal issues that emerges in cases such as this one is that of the political question doctrine. Federal courts lack subject matter jurisdiction over political questions because of the underlying constitutional principle of separation of powers. The courts are not legislative bodies, subject to the input and representation processes of that branch. Baker v. Carr, 369 U.S. 186 (1962). Indeed, the fundamentals of the doctrine take us back to the beginning of the republic, Marbury v. Madison, 5 U.S. 137, 170 (1803) (“[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”).


312. Id.

313. Id. at 1236.

314. The U.S. Supreme Court has allowed the case to proceed despite the Article III arguments of the executive branch. In re United States, 139 S. Ct. 452 (2018). Justices Thomas and Gorsuch did not believe that the suit should go forward and would have granted a stay.

315. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 440 (2012).

case of Exxon, the litigation is grounded not in existing laws and regulations but rather in what the attorney general believes will or should be the laws and regulation in the future. Under this CSR litigation approach, a company could be sued for the failure to assess the risk of living wage requirements being passed in the future. A strategic organization would be involved in the legislative processes for such initiatives and would be planning for the shift to the use of the machines now being used in fast-food restaurants. That same organization could be planning for HR changes that would see a faster system for training and promotions so that entry-level wages are a stepping stone for employee progression. However, litigation at the time of this strategic planning for the failure to make accounting changes would undermine the voluntary, market-based solutions and affect the company’s ability to use its resources for addressing the concern. The use of litigation as a hammer is a means of central planning that creates disturbance in the markets and limits voluntary changes.

2. Social Media Battles as a Fast-Track CSR Tool

a. San Francisco Homeless Crisis and Twitter: CSR via Internet Bullying

Twitter CEO, Jack Dorsey, stated publicly his opposition to a referendum to raise San Francisco’s business gross receipts tax in order to address the public health and safety issues of the city’s sprawling homeless population. Mr. Dorsey’s Tweet was about the business implications of the tax and stated: “Taxes would grow at rates multiple times our adj. revenue, which no company can sustain.” Even the city’s mayor, London Breed, expressed concern about the tax, predicting “the inevitable flight of headquarter companies—and jobs—from San Francisco.” Salesforce CEO Mark Benioff began a Twitter backlash with his response, “Homelessness is all of our responsibility. CEO@jack created $50B in market cap in Twitter & Square & 6B personally in our city & received a special Mid Market Tax Break. Exactly [sic] much have companies & personally given back to our city, our homeless programs, public hospitals, & public schools?” He then committed $2 million to help the initiative pass and chastised tech moguls for “not caring.” Mr. Benioff said that he learned in business school to oppose all taxes, but after discussing seeing the homeless on their walks to work with his co-CEO Keith Block, they decided to contribute the $2 million and announce it. That announcement resulted in Mr. Dorsey’s response and a Twitter fury of condemnation for Mr. Dorsey.

318. Id.
320. Id.
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One of the questions raised by Mr. Dorsey and a handful of other CEOs condemned via Twitter is whether the city has a comprehensive plan for dealing with the homeless population? Upon raising legitimate questions about the tax, including about its efficacy for solving such a significant social issue, reasonable minds have been condemned on social media. The same unilateral control achieved through litigation comes through social media, with the end result being dissenting views with some legitimate questions are silenced in the CSR debate.

b. Economic CSR Bullying: Boycotts Both Ways

The social media boycott has been used as a means for changing corporate behavior. For example, Twitter CEO Jack Dorsey used his new CASH app to buy food at Chick-Fil-A, and proudly posted his adventure on Twitter. Mr. Dorsey was taken to task on Twitter for what cable news anchor Soledad O’Brien said, “This is an interesting company to boost during [LGBT] Pride month, @jack.” Ms. O’Brien was perhaps the mildest of the critics. Chick-Fil-A’s CEO Dan Cathy has publicly supported the traditional religious definition of marriage as between a man and a woman. Mr. Dorsey then apologized, “You’re right. Completely forgot about their background.” The Twitter response did not end, and a boycott of Chick-Fil-A (yet another one) began. But, supporters of the CEO’s position joined together to take their meals at Chick-Fil-A. It remains unclear why Twitter was not boycotted.

CSR screens fluctuate with current events that light up social media. McKinsey & Company ended its work with the U.S. federal government agency, Immigration & Customs Enforcement (ICE) because of public backlash. At the time of the cancellation, there were frenetic nationwide calls and social media activity for the elimination of ICE because of its enforcement of a regulation that resulted in what was believed to be the separation of children from their parents at the borders.

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322. Mayor Breed has noted, “I do not believe in doubting what we spend on homelessness without new accountability, when we don’t even have what we spend now efficiently, is good government.” Id. at B2.
325. See WALL STREET J., supra note 323.
327. Id.
329. Id.
The boycotts that result from CSR screens can also be secondary in nature. A Texas nonprofit organization refused a $250,000 donation from Salesforce because Salesforce has contracts with ICE.\(^{330}\)

Some boycotts involve corporate boycotts by customers such as the actions of Delta Airlines, FedEx, Lifelock, Walmart, and Dick’s Sporting Goods.\(^{331}\) The Delta experience was perhaps most instructive about the power of boycotts. Delta announced its termination of its NRA member discounts, and after push-back on the wisdom of the business decision, announced that only 13 NRA members/customers had ever taken advantage of the NRA discount. However, in response to the Delta termination of the NRA discount, lawmakers in Georgia ended the company’s $40 million tax break that had been approved only a week earlier, just prior to the NRA relationship termination.\(^{332}\) In discussing the Delta actions, CEO Ed Bastian said, “I knew there would be backlash—but I didn’t anticipate the strength of the backlash from the NRA movement.”\(^{333}\) He added, “I’m not trying to be a politician. I’m not looking to be a social activist. I am looking to run the best airline on the planet. As part of that we have a responsibility to our customers, employees, and community partners to do the right thing.”\(^{334}\) He added, “… society expects things of leading companies and sometimes we should take a stance on something.”\(^{335}\)

Following the shooting at a Parkland, Florida high school and the news that the gunman had purchased a gun (not the one used in the shootings), Dick’s Sporting Goods stopped selling guns to anyone under 21 and continued its controls on the sales of assault-type weapons in response to the public backlash.\(^{336}\) Dick’s gun sales were affected by the earlier assault-weapon ban and the age ban, and by the end of the year, its total sales were down.\(^{337}\) Walmart announced a similar under-21 sale restriction, as well as an ammunition sale

\(^{330}\) Elizabeth Weise, Immigration Nonprofit Says ‘No’ to Salesforce, USA TODAY, July 20, 2018, at 1B.


\(^{333}\) Id.

\(^{334}\) Id.

\(^{335}\) Nassauer, supra note 332.

\(^{336}\) Sarah Germano, Dick’s CEO Spurs Change on Guns, WALL STREET J., Apr. 7-8, 2018, at B3. CEO Edward Stack said that neither his board nor his managers were happy about the decisions.

\(^{337}\) Austen Hufford, Dick’s Gun Policy Hits Sales, WALL STREET J., Mar. 14, 2018, at B2; and Sarah Nassauer, Dick’s Sporting Goods Sales Hurt by Tougher Gun Stance, WALL STREET J., Nov. 29, 2018, at B1. Total sales fell 3.9%, with dropped sales in the hunting department contributing to over one-half of the decline. Dick’s also lost employees, some vendors stopped selling guns to Dick’s, and the National Shooting Sports Foundation voted to expel Dick’s from its membership. Tiffany Hsu, Dick’s Scales Back Guns Even as Sales Lag, N.Y. TIMES, Mar. 13, 2019, at B1, B4. Despite the consequences, Dick’s has eliminated guns from more stores even as sales were down $0.45 billion. Sarah Nassauer, More Dick’s Stores to Drop Guns, WALL STREET J., Mar. 13, 2019, at B1.
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restriction.\(^{338}\) Walmart’s executive vice president of public affairs, Dan Bartlett, has a practical side, indicating that his goal is customers, moving consumers from the “hard no” to the “undecided column.”\(^{339}\) However, in getting that movement, Walmart lost customers who had purchased their ammunition at Walmart.\(^{340}\)

Walmart was the target of a boycott when consumers discovered that a former Walmart in Brownsville, Texas, was a licensed holding center for immigrant children.\(^{341}\) Walmart CEO Doug McMillon issued a statement of hope that the nation’s leaders could come together on immigration reform. The Confederate flag remains an untouched issue for the company.\(^{342}\)

c. Employee CSR Bullying: Pressures and Work Boycotts

Companies do not just experience external pressures. There is now a growing movement of employees seeking to change the behaviors of their companies. For example, Google Cloud ended its artificial intelligence contract with the Department of Defense and its Project Maven to head off a rebellion by employees who learned that their work could be used for lethal purposes.\(^{343}\) Four thousand employees had signed a petition objecting to the contracts, and Google withdrew, leaving the contract to Google’s competitors. However, the irony is that Google’s search engine and YouTube have been used for military purposes around the world.\(^{344}\) Google, with its original “Don’t be evil” slogan, finds itself increasingly challenged by employees in what has become a rancorous work environment that presents recruiting challenges.\(^{345}\) The problem of a censored search engine in China has proven to be another sore spot with employees, particularly with the possibility that other countries will likely demand the same control. Google employees find the posture troublesome because of the of its inconsistency with the company’s mission statement to “organize the world’s

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338. Id. Walmart was not affected in total sales by its decisions.

339. Id.

340. Id. at A9.

341. Id.

342. Id.

343. Wakabayashi & Shane, supra note 118. The AI project would be used to improve drone strikes. Interestingly, shortly after its decision to end its defense contracts, Google had to shut down its Google Plus venture, an effort to compete with Facebook, due to a serious security breach that affected its users. The seven-year venture was a $545 million financial loss for the company. Daisuke Wakabayashi, Google Plus Shutting Down After User Data Was Exposed, N.Y. TIMES, Oct. 9, 2018, at B1. The company did not immediately make disclosures to users about the breach and did so only after the company became aware that the Wall Street Journal would be running an article about its failure to disclose the breach and its extent. There was no employee objection voiced about the dangers of privacy breaches.

344. Wakabayashi, supra note 343.

information and make it universally accessible and useful." Google has pledged to adopt “ethical principles” for future projects.

Facebook has faced internal criticism because of what is referred to as the problem of a “political monoculture” within the company. A 527-word memo about political diversity posted on the company’s internal message board included, “you can either keep quiet or sacrifice your reputation and career.” The memo also explained that being entrusted by the world “to be impartial and transparent carriers of people’s stories, ideas, and commentaries” was at risk. One example was the ban on accepting vote “No” ads on a constitutional referendum in Ireland on abortions. Because of the fear of being blamed for the referendum’s defeat, Facebook refused to accept any ads from outside Ireland in order to “ensure a free, fair, and transparent vote on this important issue.” Google also refused to accept any ads on the referendum.

Yet, like the consumer issues and boycotts, it becomes impossible to know which types of contracts and work will trigger employee objections. In some cases, the issues do not involve the company’s business, but rather the personal views of employees on particular issues, such as gun control. As discussed earlier in the changing nature of screens, McKinsey & Company ended its contracts with Immigration and Customs Enforcement (ICE) but an additional part of the motivation was a response to “drama” among employees and alumni of the firm because of immigration policies of the Trump administration. Silicon Valley venture capital firms have returned to the initial CSR screens, now

346. Id. See also, Kate Conger & Cade Metz, Tech Workers Take a Stand Over the Uses of Their Work, N.Y. TIMES, October 8, 2018, at B1. There are indeed ethical issues and a need for ethical principles in the development of AI tools by the Department of Defense. Secretary of Defense, Jim Mattis, has requested that President Trump develop ethical principles for the United States on their development and use. Having Department of Defense standards could help business in its development of ethical principles for contracts that involve AI development by government agencies. Cade Metz, As Pentagon Turns to A.I., Will Big Tech Lend a Hand?, N.Y. TIMES, Aug. 27, 2018, at B1.

347. Christine Rosen, Big Tech’s Fake Ethics, WEEKLY STANDARD, May 28, 2018, at 8, 9. Interestingly, Microsoft will continue its contractual relationships with the Department of Defense. David E. Sanger, Microsoft Will Supply Technology to Pentagon, N.Y. TIMES, Oct. 27, 2018, at B1. An issue missed in the Microsoft employee uprising was that former Secretary of Defense James Mattis commissioned Microsoft to develop IVAS, a device that has sensors to offer heads-up displays for the soldiers on possible enemy locations, allowing the soldiers to avoid being ambushed and use the location devices to surround and conquer without taking lives. Robert H. Scales, The Geeks vs. the Infantrymen, WALL STREET J., Feb. 27, 2019, at A17.


349. Id. at B4.

350. Id.


352. Id. at 8. Google’s handle on employee supervision appears to be slipping. Employees staged a walk-out in objection to payouts to executives accused of sexual harassment. Daisuke Wakabayashi & Kate Conger, Workers Take Google to Task Over Payouts, “N.Y. TIMES, Oct. 27, 2018, at B1.


354. Forsythe & Bogdanich, supra note 328, at B2. See supra notes 328-29 and accompanying text for additional information.
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shunning Juul, an electronic cigarette company, but are willing to invest in Lucy and Ro, nicotine gum companies.355

There is a trend among employees to demand that their companies take a public position on social issues beyond the company’s line of business. There are even secondary boycotts of companies when their positions on social issues are at odds with other organizations’ views. For example, Refugee and Immigrant Center for Education, a Texas nonprofit, refused a $250,000 donation from Salesforce because it has contracts with U.S. Customs and Border Protection.356 Prior to the refusal, Salesforce CEO Marc Benioff had received a memo from 600 employees asking that the company withdraw from its contract with the agency because of U.S. immigration policies.357 Mr. Benioff, who had favored increased taxes for programs to aid the homeless, now found himself the target on an immigration issue.358

d. The Risks of the Social Media, Boycott, and Employee CSR Bullying

The final circular examples in the previous section illustrate the confusion, inconsistencies, and chaos that have resulted from attempts to achieve CSR goals by demand, social media, and economic bullying. The examples have the feel of self-inflicted wounds that result from decisions made under pressure through emotional existential CSR tantrums. The announcement by Yale Law School that President Trump had nominated Brett Kavanaugh, a Yale Law graduate, for a seat on the U.S. Supreme Court did not bring either the usual pride or donations. Instead, Yale Law School students, alumni, and professors wrote a memo stating that they were “ashamed of our alma mater.”359 A law school touting one of its graduates making it to the high court was, from a sheer business perspective, a means of placing a feather in Yale’s cap. However, the moniker of “conservative” and the religion of Catholicism were the baggage Justice Kavanaugh carried, two characteristics that are generally assumed to mean that the individual holds a pro-life view. In the ongoing, contentious, emotional, and litigious battle over states’ legislation on abortions, the personal views of a judicial nominee, whether stated or implied, have become a litmus test for approval of nominations. The memo was motivated by pro-choice social and

356. Weise, supra note 330.
357. Id.
358. See supra notes 32021 for the discussion of that Twitter firestorm.
359. Notable & Quotable: Yale Law, WALL STREET J., July 15, 2018, at A19 (quoting an article from Andrew Ferguson, WEEKLYSTANDARD.COM (July 13, 2018)). Note: the public allegations about Justice Kavanaugh’s alleged high school behaviors had not yet emerged at the time of the Yale letter. The objections were purely against Justice Kavanaugh on the basis of his 300+ judicial opinions, which were characterized as “conservative.” The memo also noted that the “true stakes of his nomination” made it an “emergency” and asked, “Is there nothing more important to Yale Law School than its proximity to power and prestige?”
political outrage and demanded retraction and shunning of the nominee by the law school administration.

Companies and/or CEOs that take positions on social issues, no matter how compelling the issue, will experience backlash regardless of the position taken. If a company or CEO takes a position one way, there are supporters and there are detractors, but there will be emotions, demands, boycotts, and bullying. If there is an apology or reversal of the position, the sides switch, but the same behaviors will follow. This reality illustrates the dangers of CSR-on-demand, as implemented by social media and the other tools noted here. When a company dips its toe into the treacherous waters of political and social issues, there are business consequences. Penzey’s Spices has perhaps tied its products most directly to the political environment with hundreds of anti-Trump posts (that include free merchandise offers) on Facebook. The result has been an increase in traffic on the company’s Facebook page, both negative and positive.\textsuperscript{360} The goal of the CEO’s posts against President Trump is to “heal the world.”\textsuperscript{361} From an Adam Smith perspective, such positions, if the company knows its customers, can increase sales and loyalty.\textsuperscript{362} However, on political and social issues, the business risks not being able to attract new customers or losing current customers who are Trump supporters.

The increasing alignment of business with divisive political and social issues, by social media demand, is hardly the stuff of wise business strategies. When emotions run high and are combined with issues that occupy citizens’ minds and hearts, a business will experience bottom-line impact. For example, In-N-Out was boycotted for a $25,000 donation to the Republican Party, and a Tweet disclosure bemoaned the donation.\textsuperscript{363} If the donation had gone to the other party, Tweets would have bemoaned that action too. Mary Bono, just days into her appointment as the head of U.S.A. Gymnastics, stepped into a hornet’s nest when she tweeted a photo with the following caption, “Playing in a charity golf tournament raising money for our nation’s Special Forces operators and their families. Unfortunately had these shoes in my bag. Luckily I had a marker in my...”


\textsuperscript{361} \textit{Id.} The opening salvo appeared just after the 2016 elections and was directed at Trump voters, “You just voted for an openly racists candidate for the presidency of the United States.” \textit{Id} The company’s new slogan is, “Cooking trumps racism.” The commentary from CEO Bill Penzey includes everything from voting to the Affordable Care Act to Earth Day. Bill Penzey, \textit{Holiday 2017}, PENEYS.COM (2017), https://www.penzeys.com/cook/themes/holiday-2017/.

\textsuperscript{362} According to a survey from Sprout Social, 66% of customers want the leaders of companies to take positions on social issues. \textit{SPROUT SOCIAL, supra} note 238.

\textsuperscript{363} The Tweet was, “E’ tu In-N-Out? Tens of thousands of dollars donated to the California Republican Party . . . it’s time to #BoycottInOut – let Trump and his cronies support these creeps . . . perhaps animal style.” Amie Tsang, \textit{In-N-Out’s Political Donation Attracts Boycott Calls}, “ N.Y. TIMES, Sept. 2, 2018, at A14.
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bag too. . .”364 The photo showed Ms. Bono blacking out the Nike logo on her golf shoes. Just days before Bono’s Tweet, Nike had launched an ad campaign featuring Colin Kaepernick, who began the controversial practice of NFL players kneeling during the national anthem before games.365 A Nike boycott began as a result of the ad campaign, causing a 3% drop in the value of Nike stock.366

The Twitter storm over Ms. Bono’s photo and post was large in numbers and even bigger in outrage. Ms. Bono resigned her USA Gymnastics leadership position, stating: “My withdrawal comes in the wake of personal attacks, that, left undefended, would have made me leading the U.S.A.G. a liability for the organization.”367 The result was that the U.S.A.G. had its fourth leader in 19 months. Ms. Bono, a former gymnast, former member of the U.S. House of Representatives, and a businesswoman who founded a successful restaurant in Palm Springs was seen as a credible and experienced leader with the gravitas to move U.S.A.G. forward. Now, because of leadership instability, the U.S. Olympic Committee has begun proceedings to revoke U.S.A.G.’s recognition as a governing body.368

In the wake of these last examples, the wisdom of public outrage being used to control even the most peripheral dips by companies into the social and political issues of the day is being used as a means of organizational destruction. There are risks for businesses and the socially conscious organizations behind the issues in a system of CSR imposition. There is also the possibility that what may be perceived as a grass roots movement requiring an immediate business response may actually be an astroturf moment, hyped through the ubiquity of social media. Reports of social media outrage could be greatly exaggerated and not the work of angels.

This type of astroturf movement is not new in other fields and has already infiltrated and been used effectively, although perhaps not wisely, in issue campaigns in the legislative branch. Ostensibly organic movements may in actuality stem from sinister and synthesized roots. In government, the practice of “transfer calling” or “push-through calling” is used by telemarketing firms to push consumers who agree with certain positions on legislative issues to speak

365. The kneeling was to protest social injustice and police brutality. The ad commended Mr. Kaepernick for his courage, “Believe in something even if it means sacrificing everything.”
366. Nike’s stock has since recovered.
367. Julie Macur, *Days After Appointment, the Latest Head of the U.S.A. Gymnastics Resigns*, N.Y. TIMES, Oct. 17, 2018, at B11. In fairness to all involved, there were additional questions about Ms. Bono’s connection to a law firm that advised U.S.A.G. as it delayed revealing what it knew about the sexual abuses committed by its then team doctor, Dr. Lawrence G. Nassar (who is now in prison for 40-175 years).
with legislators. The telemarketing firms then transfer or push through the consumer directly to congressional staffs where they can make their opinions known. With this commercial push, legislators then respond with their actions and votes after their staffers present a tally of pro and con calls.

What feels like a constituent movement may actually be an expensive recruiting effort that is led and paid for by lobbying firms and their clients. The perceived constituent angels, self-motivated by the passion of an issue, may actually be the product of lobbyists. Those lobbyists have both company and special interest clients. But the push-through strategy works because these efforts mean that the bulk of the calls received by members of Congress are one-sided because of this type of commercial recruiting. Some telemarketing firms are so embedded in this tactic that they have developed analytics for determining where to place calls in order to spend less time persuading and getting more calls to legislators. The legislators are unaware of anything beyond the tally because the recruiters for the calls remain unknown. For example, the Center for Individual Freedom, a firm working against net-neutrality legislation, was able to move legislators to consider alternatives to net neutrality. The efforts of the Center were possible because of its support from the telecommunications companies and their obvious interest in net neutrality.

Groups with telemarketing phone programs include the Environmental Defense Fund, the Wilderness Society, and the ACLU. Statistics indicate that 95% of constituents never make a call to a legislator. As a result, when legislators receive calls generated through the push-through strategy, the legislators rely on the call tallies as their gauges for how they should vote.

Similar techniques that involve less effort can be used, including e-mail, Twitter, and Facebook posts. The use of bots is a remarkably successful recruiting tool when it comes to running up the numbers. For example, the Wilderness Society disclosed the following about its efforts with voters: “Nothing we do is rocket science. But I confess that we do use the telephone as well as emails, Twitter, Facebook [and] the U.S. mail to inspire Americans to care for their public lands and protect them for future generations.”

370. Id. The whole effort was uncovered when the Jolly Roger Telephone Co. program was being used by one of the consumers contacted. Jolly Roger is a paid service that detects telemarketing calls and uses bots to keep the telemarketers on the line so that they make fewer calls. When a recruiter transferred what she perceived to be a consumer willing to talk with a congressional staffer, the Jolly Roger program kept giving nonsensical answers to a congressional staff and the astroturf nature of the anti-net neutrality was exposed. Id.
371. Id. at 14.
372. Id. at 14.
373. Id. at 15.
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Further, the social media feeds have been successful in backing companies into one-way decision corners in response to assumed and unified external voices about social issues. That force causes companies to abandon the usual structured processes for decisions that include weighing risk and facts. For example, the public support for renewable energy sources has been placed at 75%. Yet, the 2018 state ballot initiatives offered a completely different public view. The voters in Washington state rejected a carbon tax for the second time. Arizonans rejected a proposal to require 50% renewable energy sources in the state by 2030 in a 70%-30% defeat. Montana rejected an initiative for stronger regulations on hardrock mines. Colorado voters rejected a proposal that would have shut down oil and gas exploration in that state. Non-social media and recruiter views of consumers are different from what the social media and phone-call data show.

Bully pressure for driving organizational CSR achieves results, but the impact of the social media demands on both business and society is not reviewed because of the lightning speed and firestorm nature of social media. In some cases, the data to which the company is responding (such as the number and anger level of threats on social media) may not be organically generated, but companies respond as if it is. For example, the Kaepernick kneeling Twitter controversy appeared to be feverish and organic. While it may have been feverish, its organic nature was, perhaps, greatly exaggerated. There were 24 accounts linked to one Internet Research Agency (based in Russia) that managed to fuel the controversy with Tweets such as “VIDEO: Trump SHREDs NFL Anthem Protesters,” and “Trump Supporters SACK NFL Commish Roger Goddell for Attacking Trump.” The data sources used for business decisions made on the basis of social media storms may not fully reflect either consumer or societal views. Businesses, driven by data, analytics, and risk, have developed hair-trigger responses to unverified and, too often, incorrectly sourced information.

Further, not everyone in the CSR movement has angelic motives. Competitors do use hot-button CSR issues to distinguish themselves. For example, Victoria’s Secret has been an ongoing target for CSR campaigns. It was the victim of an online petition with 20,000 signatures protesting its “Perfect Body” ad campaign. The ad was intended to showcase perfect fit, but the models did indeed have perfect physiques. Victoria’s Secret changed the campaign name

375. Id.
376. Id.
377. Id.
378. Andrew Beaton, Trolls Fueled Controversy, WALL STREET J., Oct. 23, 2018, at A12. The accounts have been shut down, but more will emerge.

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to “A Body for Every Body.” The pressure continued to have plus-size women featured in the company’s ads and Change.org vowed to continue pushing for further reforms by the company. Victoria’s Secret declined to diversify its television special with plus-size women and transsexuals, and the show is a social media target every year. Its CEO was then ousted upon the announcement that the company’s sales have continued to decline. There is a shame factor for those who shop at Victoria’s Secret; a shame factor that has resulted from the intense social media campaigns against it.

Clif Bar recently ran a full-page ad in the New York Times, which was a letter to KIND Snacks, a division of Mars Candy, with a challenge to Mars to make a pact that the two largest nutrition bar companies in the world join together and “go organic.” Clif Bar offered to share its expertise because it is already organic, although the definition of such remains unclear.

ThirdLove, a competitor in women’s lingerie, took out a full-page ad in the New York Times to shame Victoria’s Secret for its actions and to encourage women of all types to shop at their company. The ad consisted of a chastising letter to Victoria’s Secret written by the CEO of ThirdLove and included the line: “You market to men and sell a male fantasy to women.” The purity and moral indignation of ThirdLove and its CEO is the essence of CSR and admirable, but such self-righteousness also sells ThirdLove bras. The free market operates using CSR as a strategy. The angels of protection are not immune from inspiration for sales that comes from seeing a competitor at a point of competitive CSR vulnerability. CSR is used as a competitive tool to define and distinguish products.

Similarly, Volvo used an ad campaign to chastise it competitors. Volvo ran an ad of two full-pages in the Wall Street Journal with this title, “It Shouldn’t Take An Act of Congress to Make Cars Safe. And It Shouldn’t Take An Act of Congress To Make Cars Sustainable.” Then came the pièce de résistance of the ad—a dig at its competitors: “Now who would you rather buy a car from? A

380. Id.
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company that builds a sustainable car because someone else made them do it? Or a company that builds a sustainable car because it’s their purpose? 386

III. A NEW MODEL: THE ETHICAL FREE MARKET BUSINESS, SANS SOCIAL RESPONSIBILITY

A. Reviewing the Inherent Flaws in CSR

With the history of CSR grouped into the three approaches, an underlying question emerges: Does the CSR movement achieve its goals of social responsibility, sustainability, and effective corporate governance, or does it create, however unwittingly, additional issues and problems? There is certainly forgiveness for all who try with good intentions, but throughout its history, there is a troubling lack of intellectual curiosity about the general efficacy of the CSR movement and its tenets, screens, and certifications. There is a tolerated sloppiness throughout all aspects of the CSR movement, from companies’ depictions of their CSR dedication and the behaviors of nonprofit CSR organizations to the certification processes and the investment screens. Even the academic research on CSR investment returns is plagued by inconsistencies and definitional confusion.

1. The Sloppiness and Inconsistencies in CSR Investments and Analysis

The result is near comical inconsistency in the application of CSR standards. For example, the Generation Investment Management firm, founded by Al Gore and David Blood, recruited investors by promising sustainability research with rigor in investment analysis. The returns for Mr. Gore and Mr. Blood, as well as the investors, have been remarkable. However, Google is a large part of the firm’s portfolio and the electricity needs of its data centers cannot be met by wind farms or solar panels. The bottom line is that the fund’s research put the investors in service firms such as Microsoft, Amazon, and the other best service organizations without exploring the underlying sustainability costs of those companies. 387 There is a cottage industry of investment funds and Wall Street firms capitalizing on the CSR movement, for better or worse. There remains no objective truth about CSR funds. 388

Some research touts the ability of ESG funds to outperform the market. However, closer examination reveals that their decisions on purchasing stocks are governed more by old-fashioned business standards than by CSR/ESG

386. Id.
screens. For example, *Fortune* touted Arabesque as an example of an outstanding performer using ESG screens, noting that the fund avoided Wells Fargo, Facebook, and Volkswagen as investments.\(^{389}\) However, ironically, the VW board was well known for its board weaknesses because of the structure of German boards, including a strong presence of employees on its boards.\(^{390}\) With CEO Mark Zuckerberg holding 60% of the shares of Facebook, any board’s input, authority, and tendency to act would be tamped down.\(^{391}\) Alongside Facebook, the CEOs of Tesla, Theranos, Groupon, and Uber are business school case studies on the risk of entrepreneurial CEOs remaining in charge, hardly issues of CSR or ESG uniqueness.\(^{392}\) The grownups have difficulty managing the headstrong young ‘uns running the company.\(^{393}\) As for Wells Fargo, its board was so weak in composition and oversight that government intervention was required.\(^{394}\) Given the obvious weaknesses of governance in these companies, there would be nothing uniquely CSR or ESG about a fund’s ability to screen out these companies.

The capitalization of the free market on CSR screens and investment guidelines reveals a logic-defying point of silliness. When results run contra to your originally stated goals, it may be time for a review of the goals and conduct.\(^{395}\) In addition, there is the caveat for many of those investing the funds that they are using other people’s money to fund their personal views and beliefs. For example, when Goldman Sachs first announced its ESG standards in 2007, there were some little noticed disclaimers. The first was the disclosure of Goldman’s inherent conflicts in adopting its standards and then determining which companies met those standards:

The Goldman Sachs Group, Inc. does and seeks to do business with companies covered in its research reports. As a result, investors should be aware that the firm may have a conflict of interest that could affect the objectivity of this report. Investors

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390. This board structure is the way Senator Elizabeth Warren’s Accountable Capitalism Act would require U.S. boards to go, with 40% of the boards of U.S. companies with $1 billion of more in revenue. Richard A. Epstein, *Unions Have Stakeholders, Too*, WALL STREET J., Sept. 2, 2018, at A17.
392. For case studies on these companies, see generally JENNINGS, supra note 146, and MARIANNE M. JENNINGS, *The Seven Signs of Ethical Collapse* (2006).
394. See notes 554-55 and accompanying text for discussion of the Wells board.
395. For example, Peter A. Nadosy, former vice chairman of Morgan Stanley, noted, “I’m on two boards (of nonprofit organizations) where clean technology and pollution are big issues. We invested in some ventures going back five or six years. They’ve been money losers, by and large. They were good people and good ideas, but they haven’t worked out.” He adds that the be-all and end-all should not be maximizing the size of the organization’s endowment. A puzzling stance for a fiduciary. James B. Stewart, *Social Investing Entices Converts*, N.Y. TIMES, Apr. 14, 2017, at B1.
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should consider this report as only a single factor in making their investment decision.396

A second warning/disclaimer found in the initial report warned of the previously discussed issue that financial performance and CSR correlations do not exist:

No correlation between ESG alone and financial metrics or stock market performance
We have found no correlation across sectors or within sectors between any of our ESG metrics and share price performance. In part, we believe that this is due to the inadequate timeframe and mismatch in terms of timing in relation to the analysis: It takes some time for superior performance on ESG metrics to feed through into financial performance and stock market recognition.

However, the poor performance of indexes such as Dow Jones Sustainability Index and FTSE4Good (both -10% since 2000) suggests that a simplified approach of picking stocks on an ESG basis alone will not lead to stock market outperformance.397

The simplest translation of these disclaimers is, “Darned if we can find any connection between CSR/ESG and investment returns, but that is not going to stop us from capitalizing on the gullibility of those who want the feel-goodism of poor investments.”

The Dow Jones Sustainability Index, noted by Goldman as an index of poor performers, is largely based on the SAM index (Sustainable Asset Management) and much of its information about companies is based on a self-assessment survey that companies complete.398

Those involved in creating screens and evaluating companies for meeting or not meeting them have concluded that reliance on CSR standards is perhaps not the best investment strategy, and advise accordingly.399 It is, as is true with solid investment analyses, one of many factors to be considered.400 All the work put into the Goldman ESG screens was a bit of a, “for what it’s worth, we’ve done our part, and you can bet we will profit from it.”

397. Id. at 7.
399. However, in the same report, Goldman touted a study of 44 companies using its ESG screens that showed these firms outperformed other non-ESG firms by 25%. GS Sustain, supra note 396. It was, however, critical to look at the companies and screens used: there were energy companies in the group including 5 oil companies, four mining companies, 5 pharmaceutical firms, Pepsi, Nestlé, and Genentech.
400. Based on the information provided here, checking Twitter for comments about companies may actually provide a better predictor of investment quality. Look for hash tags that begin #boycott.
2. The Flawed Assumptions of Angelic and Productive CSR

There are also inherent flaws in the assumption that businesses need to be socially responsible, embracing the structured umbrellas of CSR and ESG, with their criteria, screens, and standards. The SPDR S&P 500 Fossil Fuel Free fund still carried an interest in Transocean, the offshore drilling company that worked with BP on Deepwater Horizon and in Southern Co., a utility that has 80% of its generation from oil and gas. The adoption of CSR and ESG metrics, goals, and evaluation criteria assumes that social responsibility is beneficial for society and, ergo, necessary for businesses. However, the research has not reached defensible conclusions on the connections between the two. And history and examples cited here have shown that the standards of CSR, however they are developed, have not been shown to be a panacea for the evils those standards were designed to address. The fluid nature of CSR and ESG and how changes and requirements are made do make implementation a tall order.

3. Inconsistent CSR Outrage and Application

A third flaw is the lack of clarity as to whom social responsibility requirements or recommendations apply, which is not discussed. For example, Nike was boycotted for its sweatshops, at the wholesale and retail levels. However, there are many retail stores that sold Nike clothing or other clothing that was produced in sweatshops similar to those of Nike’s, but those stores (many of them much smaller merchants) were not subjected to the boycotts. There is a line of demarcation on social responsibility that treats the tiers of businesses differently. The mom-and-pop convenience store functions as a stand-alone island, immune from the requirements imposed on chains such as 7-11 and Circle K. For example, the mom-and-pop store could hardly be held accountable for governance standards and philanthropy when mom and pop are the board (if the business is incorporated), and the executives, the employees, and the money for any charitable contributions comes from their pockets. CSR appears to be a movement targeted at large corporations for shake-downs as the mom-and-pop businesses fly under the radar. If there are concerns about the ethics of businesses or their role in society, it would seem that there should be some principles with universal application.

401. “It’s a very slippery space. There’s no consensus on what’s ultimately good or bad, nor is there any consensus on how to measure it.” Asjlyn Loder, Ethical Funds Are Hard to Define, WALL STREET J., May 5, 2017, at B1 (quoting Elisabeth Kashner, head of ETFs for FactSet (a data and analytics firm).

402. Id.

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4. The Lack of CSR Processes for Standards

A fourth flaw is the lack of process in the development of CSR and ESG standards. Certification generally involves licensing, and upon receipt of a license, the responsibility to follow the rules and regulations of the certifying body.\(^{404}\) Within CSR, certification is voluntary, standards vary, and losing a label or certification does not mean that a product or service can no longer be offered. Enforcement of CSR issues is left to the generic body of law on deceptive branding, advertising, or selling.

5. The Missing Component of Virtue Ethics in CSR

A final flaw is that virtue ethics are neither part of the screens nor are they taken into account when determining which companies deserve a CSR imprimatur. The CSR label presumes forthrightness and virtue on the part of those companies that earn that status, however blithely earned. Virtue ethics consist of character traits with universal applicability. Without enforcement under the typical CSR labels and certifications and no ability to judge what amounts to the character of a company, buyers and investors have difficulty doing their own screening of companies. A form of company evaluation based on factors other than fluid CSR standards could provide a baseline of ethical conduct from which company claims, practices, and outcomes could be reviewed with confidence in representations, whatever those representations may be. With those types of measurements, all stakeholders can assess independently the actions or inactions of companies in specific areas. If dolphin-free tuna is important to a buyer of tuna fish, the honesty of the seller is critical in satisfying that buyer’s questions about the seller’s practices. Buyers can determine virtue qualities of companies prior to investing or purchasing. CSR/ESG claims without virtue have proven hollow through the history of CSR.

B. The Four Historic Approaches to Social Responsibility

Based on the historical discussion, the current states, and flaws in CSR there are four possible approaches to reforming the dictatorial laxity of CSR and ESG and shifting toward the virtue of companies, as opposed to ideology.\(^{405}\)

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\(^{404}\) Think Certified Public Accounts, Certified Financial Planner, Certified Financial Analyst, and on it goes through the medical profession. There are education requirements, exam requirements, and character screening. When all the components come together, the individual becomes a CPA, CFA, or CFP, subject to rules, regulations, standards, and discipline for the breach of those, including up to revocation of license. There is no certification for CSR or ESG.

\(^{405}\) See Section III.A for discussion of this issue.
1. Central Planning CSR

Central Planning CSR is government-based CSR in which the government, through its ability to regulate and tax, makes decisions about the issues and screens for CSR. Then, through enforcement, tax collection, and even incentives for companies that follow governmental CSR goals (such as solar), society conforms to CSR goals, as determined by the government’s central plan. The CSR decisions of central planning are subject to the same forces of influence as other forms of legislation. For example, the activism of state attorneys general in litigating CSR goals comes about because of the personal views or the views of campaign donors on those issues.\footnote{See Section I.I.D for discussion of the sources of social media firestorms. See Section III.C.6 for discussion of philanthropy as a means for obtaining political access.} Indeed, the cases may result because competitors use the power of government litigation (and campaign donations) to affect the products, operations, or strategies of their competitors. CSR angels have shown their darker sides in the historical discussion. For example, Dodd-Frank’s coverage of small community banks, in many cases, eliminated that form of competition, something that benefited large banks.\footnote{The regulation was so costly for compliance that the cash drain made it difficult for the smaller banks to compete. Only the national banks could bear the costs of compliance. Marshall Lux & Robert Greene, \textit{Dodd-Frank Is Hurting Community Banks}, N.Y. TIMES (Apr. 14, 2016), \url{https://www.nytimes.com/roomfordebate/2016/04/14/has-dodd-frank-eliminated-the-dangers-in-the-banking-system/dodd-frank-is-hurting-community-banks}. The modifications made during the first two years of the Trump administration have eased the Dodd-Frank burden. John R. Allison & Lydia Washburn, \textit{Restoring Accountability to the Business of Banking}, \textit{WASH. TIMES} (May 28, 2018), \url{https://www.washingtontimes.com/news/2018/may/28/dodd-frank-reform-reunites-community-banks-and-sma/}.} Ironically, the goal of local sourcing in banking is not a CSR objective.

Those who have an interest in the effects and benefits of adopted policies are often the strongest voices in central planning. Exactly who is doing the central planning is not clear, given the initiatives of lobbyists discussed earlier.

a. The Pressures and Emotion of Central Planning and Misguided Results

The central planning that results from legislative action can produce an end product that suffers from similar weaknesses of policy that evolves in response to emotional campaigns that pressure lawmakers. An examination of witness panels used in the legislative process reveals the same types of emotional approaches being used to influence behavior, which, in central planning, is the drafting and passage of legislation. For example, Meryl Streep was a witness when Congress reviewed the issue of whether Alar was safe. Ms. Streep’s expertise for the panel appeared to be that Ms. Streep was a mother and had played mothers in some of her movie roles, thus qualifying her as an expert on banning Alar.\footnote{\textit{The Lessons of the Alar Scare}, CHI. TRIB. (June 14, 1989), \url{https://www.chicagotribune.com/news/ct-xpm-1989-06-14-8902090470-story.html}.}
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Ms. Streep, an environmental activist, added to the pop culture fear of Alar that began when the television show, 60 Minutes, ran a segment on the pesticide. The segment was based on “science” released by the Natural Resources Defense Council (NRDC) that indicated 6,000 preschoolers would eventually get cancer from ingesting the residual Alar pesticide on the apples they ate and the apple juice that they drank. The 60 Minutes story and Ms. Streep’s subsequent television interviews were part of an NRDC plan that was spearheaded by David Fenton. The Wall Street Journal uncovered the motivation for the NRDC in launching the anti-Alar campaign:

“We designed [the Alar Campaign] so that revenue would flow back to the Natural Resources Defense Council from the public, and we sold this book about pesticides through a 900 number and the Donahue show. And to date there has been $700,000 in net revenue from it.”

Apart from the funds that came in for the NRDC via Alar panic, organic and “natural” food producers experienced a spike in sales during this period.

Even without the benefit of the Internet at that time, schools quickly removed apples from their menus, the EPA began its rulemaking to outlaw Alar, and, eventually, Uniroyal, the company that produced the product, withdrew it from the market. The science showed that there were higher levels of natural carcinogens in a peanut butter sandwich or a mushroom than in apples grown using Alar. The fear and panic resulted in voluntary action by Uniroyal that resulted in de facto centralized control by Uniroyal. A product was eliminated based on science that had not been subject to the rigors of peer review and that was part of a public relations plan designed to benefit a nonprofit and a certain segment of growers.

Further, with the emotional fervor at high pitch, the consequences of pulling the product were not fully discussed nor understood. Without Alar, apple growers would switch to alternative pesticides that might actually be more likely to cause cancer. In addition, one of the reasons apple growers preferred Alar was because it also prevented apples from falling prematurely, which results in unhealthy mold toxins in the apples that then make their way into apple juice.

The central planning process is not one of measured action and substantial proof. Exaggerated fears, emotions, and a lack of full information and analysis

409. Id.
410. The NRDC paper that estimated the cancer deaths was written by two non-doctoral students and was never published or peer reviewed. WILLIAM P. KUCEWICZ, THE GREAT APPLE SCARE: ALAR 20 YEARS LATER 7-9 (2009).
411. Id. at 9-10.
413. Id.
414. Id. supra note 408.
415. Id.
often lead to regulation and legislation or voluntary actions by those affected that can result in greater harm.\textsuperscript{416} In short, to use Friedman’s term, one cannot assume angels in environmental groups, government, Hollywood actresses, and consumer movements. Self-interest exists even in the seemingly noblest of causes.

b. The Opportunists in Central CSR Planning

Another weakness of central planning is that the tools of governmental incentives, programs, and taxes do allow opportunists to take advantage of the well-intentioned programs. However, their gains are government losses and outcomes that, ironically, often create the same problems the CSR legislation was intended to address.

For example, The U.S. government has taken an active role in promoting renewable generation. The 1978 Public Utility Regulatory Policies Act required electric utilities to purchase power generated from solar, wind, geothermal, and other renewable sources and to interconnect with renewable energy companies.\textsuperscript{417} The renewable energy companies operated in a regulatory-free environment as public utilities struggled under both state and federal regulation, including the mandate to buy renewable power.\textsuperscript{418} The mandate proved to be too much, and was ended in 2005 and the renewable energy companies were forced to survive without mandatory buyers for their product.\textsuperscript{419} From the time of PURPA’s passage through 2011, the federal government would pass 20 amendments to the portion of the legislation on renewable energy companies.\textsuperscript{420}

The federal tax credits for renewable energy sources include the production tax credit (PTC) started in 1992, the investment tax credit (ITC) in the Energy Act of 1978, the manufacturing tax credit (MTC) for companies that manufacture the parts used in renewable energy production (wind, solar, and geothermal), three tax credits for ethanol that bring that industry over $0.50 in tax credits per gallon for that alternative fuel or a choice of a tax grant, and special PTCs for wind power.\textsuperscript{421} Experts in the energy sector conclude that all of the industries involved in the development of alternative energy sources cannot survive without

\textsuperscript{416} There is the underlying issue of what actually constitutes “testimony” for purposes of the legislative process. For example, Jessica Lange testified on the plight of farmers because she had recently played a farmer’s wife in the movie, \textit{Country}. The problems with such types of testimony are discussed in KELLY OLIVER, WITNESSING: BEYOND RECOGNITION (2001). The discussion of the Lange testimony can be found \textit{id.} at 107.

\textsuperscript{417} 16 U.S.C. § 824a-3(a) (2017).


\textsuperscript{420} Herrick & Elias, supra note 418, at n. 24.

\textsuperscript{421} \textit{Id}. at 671-685.
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the tax credits and other federal support. And as these federally subsidized new energy businesses are supported and develop, the reality of periods of darkness and the lack of wind mean that coal and gas generating plants must be kept on standby to cover the renewable sources shortfalls. When there are periods of low demand, solar and wind gut the markets, driving down wholesale prices. They must pay consumers to burn unwanted energy, which makes nuclear, coal, and gas generation unprofitable. Those plants will need government subsidies for the role they must play.

Worse than the scope and amount of investment tax credits are the government investments in alternative energy projects. The Department of Energy (DOE), the U.S. Navy, and the U.S. Department of Agriculture have programs that provide financial aid in the form of everything from grants to loan guarantees. The financial investments have proven disastrous. The Chinese were able to produce solar energy panels more rapidly and cheaper than the U.S. firms that were financially supported by the federal government. For example, Solyndra defaulted on loans of $535 million, leaving the federal government with the responsibility of payment. Following Solyndra’s default and bankruptcy declaration, the FBI raided its office to recover records for a fraud investigation. What emerged was a web of incestuous relationships in obtaining funding for Solyndra. Rockport Capital, one of Solyndra’s largest investors, had a seat on the U.S. Navy’s panel that found the companies for investing federal funds or providing guarantees. Kevin Kopczynski, a principal in Rockport, sat on the Navy panel, and recommended Solyndra for Navy contracts. While Mr. Kopczynski did disclose Rockport’s interest in Solyndra to the Navy, he did not offer complete and accurate information about Solyndra’s financial condition, which was knowledge he gained as a Solyndra board member. The conflicts that existed could not be managed because of conflicting fiduciary duties. Angels outside of government who provide government service are often self-serving angels, if such is not an oxymoron.

Other projects ended in similar ignominious fashion. The Obama administration’s clean coal efforts were a central part of its climate plan. Its investment in the Kemper power plant (Southern Co.) has been called “the Solyndra of clean coal.” The project was $4 billion over budget when the SEC stepped in for a fraud investigation in what was deemed a project with gross mismanagement, safety violations, and shoddy work. The demands for

422. Id. at 689.
423. Rupert Darwall, When There’s Too Much Sun and Wind, WALL STREET J., Mar. 11, 2019, at A17.
426. Id. at A7.
meeting time frames on the project in order to secure the federal support resulted in pressures and shortcuts.

Southern Co. runs natural gas now at the Kemper plant. The total cost of the failed project was $7.5 billion, and subsequent litigation and regulatory review established that the managers were aware five years before the suspension of the project that there were problems that would prevent its operation as a clean coal plant. By 2014, engineers had written a report that indicated the plant would be offline 45% of the time during its first five years, not the 25% the company had used when selling the project. Mississippi ratepayers ended up with the bulk of the bill for the failed project.

The allegations now being made are that Southern Co. overstated the plant’s cost effectiveness. Good environmental intentions do not always demand rigor in supervision or admission that a project will not work.

Perhaps worse than the government investments themselves are the misrepresentations and unreliable data of various levels of government in deciding upon their central plans for energy sources. In mandating solar panels on all new home construction in California by 2020, the California Energy Commission did not rely on an independent and objective study as its cost justification for the requirement. Its figures used a cost of $2.93 per watt. However, Lawrence Berkeley National Laboratory estimated the average cost would be $4.50 per watt for the 2- to 4-kilowatt systems the Commission was mandating. The result is that the cost of the panels will be $4,000 more than the figures the Commission used in implementing the mandate. And the falling costs of power costs due to solar energy of 4-5% that the Commission used are actually much lower given production problems. The real cost estimate of falling prices is 1%. Further, the cost-savings for consumers assume that generation subsidies for homeowners hold. In reality, states are considering reversing the generous cash given back to homeowners for their excess power. California has no control over the prices out-of-state utilities are willing to pay. The cost-shifting to non-solar households of these subsidies has created political firestorms over solar panels.

Once again, the angels seemed to be cooking the solar books. Assuming arguendo that there are angels that guide governmental central planning, those angels still seem to be subject to the cunning of businesses that seek relief from...

427. Southern Co. filed an 8-K with the SEC disclosing the suspension of the project on June 28, 2017. The project lasted 9 years. The Southern Company, Current Report (Form 8-K) (June 28, 2017).
429. Id. The information about the management failures and cost overruns at Kemper came to light through a whistleblower who was subsequently fired by Southern Co. Urbina, supra note 425, at A7.
430. Id.
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the demands of the bottom line and market forces. The lack of financial expertise among government officials in reviewing proposals, investments, and companies permitted what is correctly described as a swindle. Federal tax dollars allowed those who had led the company and obtained the federal funding to escape via bankruptcy, and all without bearing any of the loss. They were actually repaid for their investments by federal tax monies because the federal government was the guarantor on many of the projects.

There was one additional irony in the solar situation. In the Solyndra bankruptcy proceedings, the landlord for Solyndra’s California facility filed a claim for past due rent and also for the cost of its environmental cleanup necessary because of Solyndra’s failure to comply with environmental regulations in its operations. The angels of CSR do not always practice what they impose on others.

The DOE did not have any better luck in its decision to back loans to Fisker Automotive for the development of batteries for electric cars. The DOE issued a $528.7 million Conditional Commitment Letter and allocated $169.3 million for Fisker Automotive to complete its first vehicle, the Fisker Karma, and $359 million to complete a low cost plug-in hybrid, the Fisker Nina. There were production delays, continuing cash-flow issues, and then a recall of the batteries by the National Highway Traffic Safety Commission due to fire hazards. After a series of layoffs and failing to obtain additional financing, Fisker filed for bankruptcy. The shareholder litigation for alleged false statements about Fisker’s financial condition are still proceeding.

The subsidized and required electric car planning has another ironic twist. The CSR wisdom behind electric cars is the promise of the death of the internal combustion engine. Reports of that death have been greatly exaggerated. Indeed, moving to electric cars may actually cause more environmental harm than the combustion engine. Bloomberg ran a story entitled, “The Dirt on Clean Electric Cars: New research shows some drivers of electric cars might spew out less CO2 with a diesel engine.” Because every carmaker is planning on manufacturing electric cars, the need for lithium-ion batteries has escalated. China, Thailand, Germany, and Poland are the countries producing the batteries, countries that use non-renewable energy sources. That mass production of the batteries makes for

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434. Id. at 7.
435. Id.
quite a carbon imprint. The break-even point on carbon emissions between a German electric car and an efficient carbon engine is 10 years. There is currently congressional hesitation to renew the credits. Despite the generous federal support, progress in bringing the energy sources to mass-market status is slow to non-existent.

Further, these examples of solar and electric car forays illustrate that businesses game governmental programs in order to obtain a competitive advantage or just to get into a line of business in which there is a safety net for losses. The lack of government expertise in managing conflicts, collecting information from recipients, and reinning in spending means that the wolves of Wall Street roll the government. An angelic heart in pursuing solar and other alternative energy projects is not necessarily born of a pure heart.

Business-government partnerships are steadily proposed and approved, but low on yield. The arrangements that Amazon was able to secure with the New York and Washington D.C. areas provided tax breaks and support for the company to locate new facilities that resulted in billions in lost revenue for the entities and a competitive advantage for the already monopolistic Amazon. Citizens, who are stakeholders in these partnerships, are affected in their taxes and the impact of adding large facilities to their neighborhoods, but there is no mechanism for input in these types of behind-closed-door deals. The end result of the government-negotiated deal in New York was that a member of Congress led a social media/protest campaign, a campaign that resulted in Amazon’s withdrawal from the deal. There were factions opposed to the deal and factions seeking to retain the deal, but the ultimate result was that the deal ended because of the social media pressures placed on Amazon, and its unwillingness to continue the battle. The angels in government subsidize the businesses of their choice on terms that favor the business, but the deals have proven tentative recently as factions use social media to end the government deals. A deal negotiated without the structure of formal government processes ended through the unstructured pressure of social media.

2. Consumer-Driven CSR

Consumer-driven CSR is actually derived from perceived consumer demands. Like storm-tossed boats, the topics of consumer demands shift,

437. Id.
439. Id. The leaders were taken by surprise when the deal with Amazon was announced and there was pushback.
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presently, through social media. As the discussion in Section II.D. illustrated, these types of movements are difficult to gauge in terms of actual support and, as the examples illustrate, may be movements based on inadequate or incomplete information.

Consumer-driven CSR crosses over into investment funds. The feel-good investment screens discussed in Section II.A have real consequences for investors, who, again, may have little say in the CSR focus of the funds that are managing their investment portfolios. For example, the California Public Employees Retirement System (Calpers) voted in 2002 to divest itself of tobacco stocks. A consultant hired to evaluate the investment decisions of the fund (with the hope of restructuring the portfolio) found that the tobacco decision/divestment cost Calpers $3 billion in gains.442 The consultant noted that decisions made based on ideological and/or political agendas (as determined by CSR screens) can be costly.

Further, these top-down CSR decisions do not provide opportunities for stakeholder input. The Calpers beneficiaries are not given any options on their investments. When given the opportunity to control the leadership in Calpers, these stakeholders held different views from the fund managers. In October 2018, California employees voted to oust the sitting Calpers president to put in place a police-union official to stop the focus on environmental, social, and governance investing.443 As one author noted, “And there’s some entertainment value in watching social investors learn the harsh realities of pouring money into woman-owned sub-Saharan wind farms.”444 Colleges and universities screened out investments in companies doing business in South Africa because of CSR pressures.445 Yet, those companies that remained in South Africa, such as Kellogg’s, may have provided the bridge for employment when apartheid ended. Today, a movement on college and university campuses is one for pulling investments out of and boycotting Israel.446 For a time, colleges and universities pulled their investments in and contracts with Nike. Today, Nike is a sure bet for

443. Id. The newly elected president ran on a platform of a fiduciary duty to maximize investor returns.
445. Jonathan Hyslop, Salim Vally, & Shireen Hassim, The South African Boycott Experience, 92 ACADEME 59 (2006). One of the most interesting aspects of the boycotts were the exceptions made for scholars to visit South Africa. Id. at 60. It was, in a phrase, just kind of a boycott. CSR is a self-defining and fluid standard.
446. Ginger O’Donnell, BDS Movement Causes Backlash Against Jewish College Students and Employees, INSIGHT INTO DIVERSITY (Apr. 19, 2018), http://www.insightintodiversity.com/bds-movement-causes-backlash-against-jewish-college-students-and-employees/. The movement is called BDS, an acronym for Boycott, Divest, and Sanction. There are votes on college campuses seeking divestment of college and university funds from companies doing business in Israel. More than 1,000 faculty members in the United States have endorsed BDS. Id.
These investment decisions run parallel to the social-media-CSR issues of the day. Ironically, there is no way of confirming at the time investment funds dispose of stocks as a matter of conscience or social conformity whether those investment decisions will prove to be prudent. If the divestment is done for the purpose of risk aversion, then the managers are fulfilling a fiduciary duty. If divestment is undertaken for purposes of a political statement, the managers have made a decision that brings personal recognition and media attention but could prove costly to the stakeholders in the future. These CSR decisions impact the very stakeholders the funds serve without seeking or providing opportunities for consideration of the impact on their investments.

Logic dictates that pooled funds or portfolios developed without restrictions will perform better than those that have restrictions. However, social-media driven causes induce those who make investment decisions with others’ funds to plunge into the ESG/CSR screens under the unsubstantiated claims that CSR-driven businesses outperform non-CSR businesses. 

Ironically, stakeholder theory is not relevant in these decisions on CSR/ESG focus. Oddly, for a field focused on stakeholder theory, there is a top-down decision structure on fund allocations that is driven by social media causes, a type of avant-garde attitude on where pension and endowment funds are placed. Avant-garde is not necessarily the same as sound investments made within the constraint of fiduciary duty.

3. Negotiated CSR

Negotiated CSR is rooted in the Coase theorem whereby parties affected by CSR issues work together to develop a solution that addresses concerns and impact as each side negotiates on the basis of their costs and benefits. There is a reason the one example the Coase theorem offers is one of farmers and railroads negotiating rights-of-way. That reason is perhaps that no one has been able to negotiate addressing conflicting issues in an effective way since that era of railroad vs. agricultural interests. In short, compromise, even when grounded in economic benefits is not in the climate, as it were, in this era of CSR.

447. See supra notes 62-66 and accompanying text.

448. See Section II.A for the discussion of this issue. See also the 2015 Global Impact Investing Network study that found restricted funds had a rate of return of 6.9% between 1998 and 2014. Abhilash Mudaliar, Hannah Schiff, & Rachel Bass, Annual Impact Investor Survey, GLOBAL IMPACT INVESTORS NETWORK (2016), https://thegiin.org/assets/2016%20GIN%20Annual%20Impact%20Investor%20Survey_Web.pdf. Nonrestricted funds’ rate of return for that same period was 8.1%. Id. Plunk extra 1.2% onto to a couple of billion here and there and you are talking real money, perhaps the difference between states with adequately funded pensions and those without such (Think Calpers). Id.
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Given the boycotts and protests of this era, there is little room for negotiation. Behaviors are now dictated. The shift comes because of the self-perception of the CSR movement of its own goodness. All rights, stakeholders, and due process are subjugated to the CSR screens. For example, WeWork issued a company memo that prohibited serving any meat at catered events and implemented a no-reimbursement policy for employee meals that contained meat. The memo explained, “New research indicates that avoiding meat is one of the biggest things an individual can do to reduce their personal environmental impact, even more than switching to a hybrid car.”\textsuperscript{449} The company has made not eating meat a virtue, and intends to enforce that virtue, no matter how many receipt police it must hire to be certain no meals with meat are unwittingly reimbursed. As the saying goes on \textit{Star Trek}, “Resistance is futile.”\textsuperscript{450}

The Coase theorem is thus left out of the reform proposal because it is just that – a theorem that cannot be implemented in an era in which social media is used for destructive purposes against those who are unwilling to walk in lockstep with those who demand compliance with their views on any issue \textit{du jour}. Failure to comply finds resisters on the harsh side of Internet salvos. And if employees, stakeholders though they may be, cannot be reimbursed for meals whilst on company travel if they engage with meat, how can their company leaders engage in meaningful negotiations for resolution of conflicting interests where CSR views are at stake?

4. Free Market CSR

The free-market solution for handling CSR/ESG is also no longer workable. The go-to tactic beyond social media or in addition to social media is relying on government forces to move changes, rather than the persuasive powers of the free market. For example, in Switzerland, Armin Capaul, an organic farmer, developed the “Horned Cow Initiative,” which was a ballot proposal to have farmers receive $190 (francs) annually per adult cow or goat with horns. The purpose was to provide incentives for farmers to refrain from dehorning their cattle and goats, a process that is painful and involves burning off the horns with a hot iron.\textsuperscript{451} The Swiss rejected the ballot proposition.

There is also the lack of understanding of economic impact. The CSR issues foisted upon others are so foisted without consideration for the impact on economic systems, industries, businesses, and individuals (i.e., stakeholders suffer at the hands of CSR movements as well as at the hands of business


\textsuperscript{450} The phrase “Resistance is useless,” was originally “used” by a Vogon guard in \textit{Douglas Adams, Hitchhiker’s Guide to the Galaxy} (1985), at 27. Resistance is futile was a response by The Borg to Captain Picard in a \textit{Star Trek} episode, \textit{The Best of Both Worlds}.

\textsuperscript{451} Brian Blackstone, \textit{Swiss Reject Bid to Save Cow Horns}, \textit{USA Today}, Nov. 25, 2018, at A8.
executives). For example, The Broadway musical, *Natasha, Pierre, & the Great Comet of 1812* (based on Tolstoy’s *War and Peace*), originally starred Josh Groban in the male lead. When Mr. Groban left the show to return to his tours, actor/singer Okieriete Onaodowan took over the lead. When Mr. Onaodowan left, actor/singer Mandy Patinkin was signed to take over the role. The producers needed a name that would draw an audience. There was an immediate rush to Twitter and outrage because Mr. Patinkin is white, and he was replacing Mr. Onaodowan, who is black.452 Mr. Patinkin announced that, in solidarity with those in social media, he had changed his mind and would not accept the lead.453

The show needed a star, and without Mr. Patinkin, the show closed, leaving all the actors and support staff without work. Investors in the show lost $14 million and 100 people were out of work. Ironically, the cast of the show had been one of the most diverse to play Broadway. The free market never had a chance to allow the play to continue to succeed or fail, for Mandy Patinkin, although he carried box-office gravitas, was persona non grata on social media. Social media made that decision for the free market, however economically punishing it may have been. The show needed a star to survive; it folded sans star. Diversity is a noble goal, but so also is economic survival. The lack of understanding of economic negotiation is not possible when survival is not on the table.

**C. Shifting from CSR and ESG to Virtue Ethics: The Elimination of Social Responsibility Mandates and Bullying**

With the historic approaches struggling amidst the impact of social media, the CSR debate returns full circle to the free market, free from the emotional boycotts, governmental intervention, and the CSR measurements, in their inconsistent and flexible application. As history demonstrates and as social media destroys, there is an ironic solution. Resting the decision process in the hands of those running businesses is the best path to CSR. Just as the free market has efficiently determined price, quality, and the need for new products, it does find its way to survival. To the extent that CSR shares that goal, and it appears to with its umbrella concept of sustainability, the free market and CSR walk on the same side of the street. The paths, mandates, demands, and foci of CSR have brought neither the desired results nor the widespread adoption of the CSR agenda, except when government mandates intercede, complete with resulting unintended consequences. The CSR standards, certifications, and correlations with financial performance are an ironic force, seeking to preserve products that cannot be sold or produced competitively with the hope of driving change.

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452. That the original star, Mr. Groban, was also white, did not come up in the midst of the outrage.
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Further, as a measurement of business ethics, CSR has been gamed and its followers have made some poor ethical judgments in the way that they conduct business even as they enjoy CSR recognition. Ethical lapses do cut short the sustainability goal of businesses.

The field of CSR is ripe for taking a secondary seat to ethics in business. CSR and ethics are not the same thing. The former is an externally developed ideology and political philosophy. The latter has been with us since at least Aristotle in philosophy and theologically since Moses and Mt. Sinai. The best strategy for any business to retain its reputation, serve society, and achieve sustainability is to steer clear of the CSR agenda and pursue a path of Aristotelian virtue ethics with ethical standards that are clear, universal, and measurable.

For too long, CSR and business ethics have been melded together as if they produced the same kinds of behaviors and results. In fact, as this history has illustrated, CSR standards are relatively easily manipulated and are used for competitive advantage. The CSR movement is honoring companies that behave in fashions antithetical to the CSR movement, and that are not all together honorable. In fact, most of the companies have not even reached the low bar of compliance with the law.

Instead of applying the CSR artificial political and ideological agenda tests for ethics, those who evaluate the behaviors of companies should have a universal and standardized format. The format should contain measures applicable to all businesses, large and small. The format should not be based on their products or the personal views of their managers. For example, given that the world is going to have weapons because of the need for defense and, in some cases, for protection of citizens, would it not be best to have the reassurance that those developing and selling those weapons follow some simple ethical standards? The decisions on war are societal ones that require a process involving all stakeholders, not just those taking to social media to demand peace or employees demanding that their employers cease Department of Defense contracting. Through the processes of democracy, the decisions on war can be addressed with input from individuals, businesses, and anti-war activists. Stakeholders in waging war include those who have views on survival in a dangerous and duplicitous world. When peace has had its chance and is returned with missiles, the societal debate deserves more than social-media outrage and boycotts.

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454. See supra notes 317-22 for a discussion of views of CEOs being the target of social media campaigns.

455. John Lennon & Yoko Ono, Give Peace a Chance (1969). Interestingly, the song, part of Lennon’s first solo effort, sans fellow Beatles, was copyrighted with Mr. Lennon being a sole author. Mr. Lennon later confessed that Yoko Ono was actually the talent behind the song and gave her co-author status in a later interview. Some fans were relieved that Mr. Lennon was not entirely responsible for the repetitive chanty. However, Paul McCartney later took credit as a co-author, something that resulted in an ongoing battle with Yoko. Gil Kaufman, Beatles Credit Feud Continues, ROLLING STONE (Dec. 16, 2003), https://www.rollingstone.com/music/music-news/beatles-credit-feud-continues-178487/. Mr. Lennon had
Having a uniformly applicable standard in place gives more than a simple
imprimatur, one that is too easily controlled by external forces and which can be
obtained through manipulation. Rather, these new ethical measurements offer a
better indication of how a company interacts with its employees, its communities,
customers, and vendors (there are those stakeholders again). These standards are
based on actual behaviors, not promises, certifications, or ad campaigns, and they
are devoid of the political and social agenda items that have dominated CSR
standards.

As this history has demonstrated, the line of demarcation between companies
with ethical standards and those at the top of CSR rankings are stunning. The
two lists are not the same. In fact, there is great irony in comparing the two
lists. A proposal for universal ethical standards capable of application to all
organizations, of all sizes, and without regard to the nature of their products ends
the facile profits vs. social responsibility rigid framework that has damaged both
businesses and the causes of CSR. Removing political measures and ideology
provides a level playing field for the evaluation of the ethics of companies. Perhaps,
most importantly, these ethical standards, as opposed to those of CSR,
cannot be gamed.

1. Does the company comply with the law?

Compliance with the law is a fairly low bar for assessing the ethics of a
company. Yet, the history of companies’ compliance standards does not appear
to be a factor in assessing their CSR or ESG. For example, the following
companies are listed as industry leaders in the Dow Jones Sustainability Index.

1. Siemens
2. UBS
3. Waste Management
4. British American Tobacco Group
5. United Health Group
6. Abbott Laboratories
7. Unilever
8. Newmont Mining Corp.

Taking the list and researching the backgrounds of the companies provides a
potpourri of legal violations by these companies, often across the globe:

Siemens—A company that was responsible for the largest Foreign Corrupt
Practices Act (FCPA) scam in U.S. Department of Justice history involving years
difficulty getting along with his three Liverpudlian band members who had taken him to worldwide fame,
and the band’s split was ugly with years of dispute to follow. Mr. Lennon’s moral authority on peace
should spur some pushback.

456 See supra notes 441-51 and accompanying text.
457 Given the behaviors of the industry leaders, some possible and intriguing studies would be to
examine the behaviors of the also-rans in the same industries. Given the history of violations, another
possible study could be whether the lack of compliance establishes either sustainability or profitability.
458 Industry Leaders 2018, supra note 398.
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of bribery to foreign government officials for purposes of securing contract business.459

UBS—The international banking firm paid nearly one-half billion to settle charges that its traders rigged interest rates in order to increase the bank’s profits.460

Waste Management: The company’s founder and five others were charged with a massive accounting fraud.461

British American Tobacco—A tobacco company that has had ongoing issues on recruiting young people to tobacco.462

United Health Group—The CEO and board members were removed because their stock-option manipulation was uncovered. Executives were involved in backdating options so as to increase their value to them but did not disclose the activity, something that affected earnings and required restatements for three years.463

459. Mike Esterl, Corruption Scandal at Siemens May Derail Restructuring Drive, WALL STREET J., Feb. 18, 2006, at A1. The article carries the caption “Ethics Hurdle.” The case would eventually entangle KPMG Germany, the company’s longtime auditor, for its failure to flag what amounted to one-half billion dollars (what was believed at the time of the initial discovery) in bribes and suspicious laundering activities companywide. David Crawford & Mike Esterl, KPMG Germany Is Faulted in Siemens Probe, WALL STREET J., May 4, 2007, at A10. The company would eventually pay €201 ($284 million) to Germany in fines. David Crawford & Mike Esterl, Siemens Fine Ends a Bribery Probe, WALL STREET J., Oct. 5, 2007, at A2. The company would also pay still another $300 million in Germany and $800 million in the United States to settle the case for a total of $1.36 billion. Eventually, the company uncovered $1.6 billion in bribes. Siemens Pays Up, BUSINESSWEEK, Dec. 29, 2008, at 6.

460. Ben Protess & Mark Scott, UBS Is Reported to Be Near Deal on Rate Rigging, N.Y. TIMES, Dec. 3, 2012, at A1. One client duped in the scandal was First Lutheran Church. There were damning e-mails uncovered in the investigation that reflected the activities of the traders in their quest to make the bank’s balance sheet look better than it actually was. Aaron Pressman, The Investment ‘Albatross’ at UBS, BUSINESSWEEK, Aug. 11, 2008, at 22. UBS would eventually enter a guilty plea to bid-rigging and settle the case for a $1 billion penalty. David Enrich & Jean Eaglesham, UBS in Talks Over $1 Billion Penalty, WALL STREET J., Dec. 14, 2012, at A1.

461. The SEC described the actions as “one of the most egregious accounting frauds we have seen.” Waste Management Founder, Five Other Former Top Officers Sued for Massive Fraud, SEC (Mar. 26, 2002), https://www.sec.gov/news/headlines/wastemgmtw.htm.

462. Note that while most screens eliminate the sin stocks, this company has met the Dow Jones sustainability standards. The scandals of BAT (as it is known) are too numerous to list, but involve bribery, marketing practices, class-action litigation, and undermining the Muslim ban on tobacco use. Wikipedia is a treasure trove of information. British American Tobacco, WIKIPEDIA, https://en.wikipedia.org/wiki/British_American_Tobacco, (last updated June 15, 2019).

463. The company had a three-year restatement of earnings because it had to reprice the stock options awarded to executives of the company. A report by Wilmer Hale, an external law firm hired by the board to investigate, concluded that it was likely that the executives had backdated their stock option awards in order to increase the value of those options. The restatements resulted in a reduction in earnings of 4.5% for those years. Julie Appleby, CEO’s Stock Options for Restatement at UnitedHealth, USA TODAY, May 12, 2006, at 8B. There was a shareholder rebellion, a shareholder derivative action, and the termination of both officers and directors. James Bandler, UnitedHealth’s Board Is Under Fire, WALL STREET J., Apr. 25, 2006, at A10. William McGuire, the CEO, was forced to resign and surrender $200 million of the $2 billion in compensation that he had earned. The company then requested $250 million more as the investigation revealed the extent of the backdating. James Bandler & Charles Forelle, How Giant Insurer Decided to Oust Hugely Successful CEO, WALL STREET J., Dec. 7, 2006, at A1.

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Abbott Labs—Abbott hired a physician with questionable credentials and has had questions raised about its reasons for recalls.464

Unilever—Along with two other companies, Unilever settled price-fixing charges and imposed a 20% downsizing program without acknowledging its impact on employees and morale.465

Newmont Mining Corp.—An international company that has had numerous environmental violations.466

If compliance with the law were a test of the ethical behavior of a company, none of the Dow screen companies would meet that screen test. It is the failure to apply a screen of compliance with the law that permits the gaming of the CSR standards. Rather than focusing on the basics of business operations, such as avoiding fines and the resulting public relations issues, these companies are able to tout their rankings and achievement of softer objectives. This type of screen: Is the company in compliance with the law? is an example of one that cannot be gamed. Part of the measurement of a company’s contribution to society is its willingness to follow the rules established by that society through a consensual, participative process rather than through the pressures brought to bear by political, ideological third parties who seek different standards of measurements that they establish and then measure.

For example, the Catholic church has been focused on the issues of racism, climate change, and immigration, but there have been ongoing revelations about the church’s failure to report sexual abuse of young boys by Catholic priests over decades.467 The church had the enveloping arms of CRS on its posture on climate

464. Abbott hired a Baltimore-area cardiologist as a sales consultant after the doctor was accused of placing heart stents in patients who did not need them and was barred from practicing at a local hospital. Alicia Mundy & Thomas M. Burton, Abbott Hired Barred Doctor, WALL STREET J., Dec. 6, 2010, at B1. Abbott also withdrew its diet drug, Meridia, from the market under pressure from the FDA because of negligible results. Andrew Pollack, Abbott Labs Withdraws Meridia, Its Diet Drug, from the Market, N.Y. TIMES, Oct. 9, 2010, at B3.

465. Unilever systematically reduced its work force, by 20%, affecting morale, and resulting in strikes. One employee noted, “It used to be a great place to work. We make good profits, but for Unilever, it’s never enough.” Deborah Ball & Aaron O. Patrick, How Unilever Executive Is Thinning the Ranks, WALL STREET J., Nov. 26, 2007, at B1, B3. In 2011, there was the price fixing of laundry detergent in Europe that both Procter & Gamble and Unilever were fined ($455 million). German-based Henkel blew the whistle on their activities, thus giving Henkel immunity. Nikki Tait & James Wilson, P&G and Unilever Fined for Price Fixing, FINANCIAL TIMES (Apr. 13, 2011), https://www.ft.com/content/e0c21f9a-65b3-11e0-bace-00144fca49a.

466. Newmont has received numerous awards recognizing its ethical behavior. However, it is also the target of many transnational protests for environmental issues. For a list of the protest and legal events, see Corporate Research Project, https://www.corp-research.org/. From Colorado to Peru, the list of environmental issues is long and troubling.

change, but the CSR activities were a defection from the basic issue of compliance with the law.

This question on legality is a measurable application of the Friedman standard, which is absent fraud or illegality a company should be about its business. The noted breaches by companies throughout the history of CSR demonstrate that neither the companies nor society are served financially or otherwise by ignoring or pushing legal boundaries. For the shareholders, the fines are a cost through cash layout, but include other longer term costs such as their impact on share price, value, brand, and trust of the company. Under the Coase theorem, the companies are, by compliance with the law, meeting their point of equilibrium. Violating the law results in the extra costs as well as the possibility that there will be additional and costly regulatory burdens when companies dabble in pushing the envelope on gray areas of the law.

The use of compliance with the law is an objective, measurable, and “rankable” test of a company’s willingness to follow the vetted, clear, and established standards of society. Should those standards fall short of society’s goals, both companies and individuals have a process to follow in order to revise the legal standards. The shift of CSR movements documented here to one that responds to social media reaction as the basis for change results in standards based on emotions and outcry from one perspective. That perspective may contain diagnosis bias in terms of cause and effect and in its rush may not review adequately unintended consequences. The collaborative and often “sausage-making” process of passing laws and regulations was established and continues to be the means to avoid the unilateral imposition of third-party solutions.

2. How honestly do product claims match with reality?

The claims a company makes publicly to obtain sales are a measure of the character of a company and how it views its role and relationship with society. For example, Dannon yogurt claimed in ads featuring Jamie Lee Curtis, that one daily serving of Activia yogurt relieved irregularity. While yogurt contains the beneficial bacteria called probiotics, it is simply a part of yogurt and not peculiar to Dannon or Activia. Customers took Dannon’s ad claims to mean that the yogurt was a sort of “superfood.” The Federal Trade Commission (FTC) and 39 state attorneys general settled charges of deceptive advertising about Activia with Dannon for a payment of $21 million.468

The Friedman standard of absent fraud or illegality is the guardrails for his view of social responsibility. “Absent fraud” covers the virtue of truth in advertising. Gaining business through deceptive or questionable claims upsets the Coase equilibrium. When businesses make decisions about product claims, their goal is not social responsibility, but the best way, strategically, to position

468. Bruce Horovitz, Dannon’s Health Claims Take a Hit,” USA TODAY, Dec. 16, 2010, at 1A.
products in the public eye in order to maximize returns for shareholders. False advertising claims maximize in the short term. Over the long term, false or deceptive claims harm shareholders through damage to brand and reputation as well as in the loss of consumer trust, something that brings more regulation and greater third-party activism in order to force behavioral changes in businesses.

A present controversy in product claims centers around the term “natural.” Several of the labels and claims that have raised eyebrows and consumer protests include, “All Natural 7Up,” “Pop-Tarts Baked with Real Fruit,” and “Crystal Light Natural Lemonade.” As the Food and Drug Administration (FDA) debates whether to define the term “natural” via regulation and litigants settle cases (General Mills changed its “100% Natural” claim on Nature Valley granola bars to “Made With 100% Natural Whole Grain Oats”), there is a strategic opportunity for businesses. It is clear that no one can agree on how “natural” should be defined. When the FDA attempted regulation in 2015, it received 7,600 public comments.

There is a Coase equilibrium opportunity for companies in this third-party series of events related to claims of “natural.” There is also the Friedman opportunity of eliminating fraud from company ads. If the product does not contain all natural ingredients, then the label “all natural” is misleading. However, if Dannon claims that its yogurt is “all natural,” and the statement is true on the basis of its ingredients, it may still face backlash for a false claim. This issue is one that a business could wisely address in a proactive way. Presently, there is a new consumer movement au natural. The goal is to ban the use of “natural” claims if the cows providing the milk for the yogurt were fed genetically modified feed. And there will be and has been litigation over the use of the term “natural” on yogurt. The term “natural” is moving through the food chain. With the complexities of “all natural” and the evolving regulatory cycle demanding a definition, a business thinking strategically might make the decision to stay out of the “natural” label business and capitalize on the deception of others making the “natural” claim as a means of ensuring compliance as well as a marketing tool.

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469. Julie Creswell, Is It ‘Natural’? Consumers, And Lawyers, Want to Know, N.Y. TIMES, Feb. 17, 2018, at B1. The companies subsequently modified these claims as a means of settling litigation.

470. Id. at B4. Now, consumers are clear that the oats are naturally grown as opposed to other oats that are grown unnaturally. Perhaps just knowing that there are oats in the granola bar is what consumer need to know?

471. Id. The FDA comment period seeking help in defining “natural” was extended and then eventually closed May 10, 2016. The comments are colorful with salty language and demands such as taking “natural” off Cheeto labels. So controversial is the term “natural” that there is still no rule promulgated. Use of the Term “Natural” in the Labeling of Human Food Products, Docket, https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PR%2BRS&d=FDA-2014-N-1207.

472. Id.
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3. How forthcoming is the company with information?

Many of the companies that would survive the strictest of CSR screens have difficulty with candor in their disclosures. The types and content of disclosures are a reflection of character, whether for companies or individuals. This metric is also observable, measurable, nonpolitical, non-ideological, and has universal application. The less-than-forthright disclosures are a reflection of virtue. The denial, deflection, and failure to acknowledge business actions or events are measured under this standard.

a. No Dribbs, Drabs, and Misleading Denials

Facebook denied a negative story in the New York Times about Facebook’s activities in response to its failure to address the issues surrounding its marketing of users’ personal data as well as security issues involving Russian users.473 Saying that there were “inaccuracies” in the story, Facebook took the posture of dismissing its allegations.474 However, on a Wednesday, on the eve of the Thanksgiving holiday weekend, Facebook’s new communications and policy chief, Elliot Schrage, posted a memo admitting that the thrust of the Times story was true, including Facebook’s hiring of Definers Public Affairs, which investigated George Soros.475 The memo also acknowledged that Sheryl Sandberg, the chief operating officer of Facebook, was aware of the hiring of the firm and some of its questionable work. In addition, Ms. Sandberg did not recall any interaction with Definers or about the firm’s work, but there may have been some e-mails. That statement changed to direct involvement with the firm and direction of its work in a matter of two weeks.476 Facebook’s new communication director, Mr. Schlage, fell on his sword over the events and resigned.477 Facebook’s slow, incomplete releases regarding its actions, events, and policies harms the credibility of both the leaders and the company, because with each

475. Id. Employees were notified of the truth on the Tuesday before Thanksgiving, but the information distributed to employees was not posted publicly until Thanksgiving Eve. Id.
477. Bowels & Wichter, supra note 474.
correction, clarification, and follow-up, the initial information becomes more obviously misleading.

When the Justice Department announced the indictment of two Goldman Sachs executives in connection with the Malaysian embezzlement and money laundering scheme of Jho Low, Goldman issued a statement indicating that the actions taken by the indicted executives were limited to a few “rogue” Goldman employees. However, three weeks later, chairman Lloyd Blankfein’s denial (or no recollection) of any interaction of Mr. Low, was reversed, and Goldman admitted that a private meeting had occurred between Mr. Low and Mr. Blankfein. The same day, International Petroleum Investment Co filed suit against Goldman for its financing role in 1MDB (1Malaysia Development Bhd). The suit accuses Goldman of engaging in bribery in the transactions. The two Goldman executives have now been barred from the banking industry by the Federal Reserve for their actions related to the Malaysian scheme. The dribs and drabs ranged from the beginning “we knew nothing” in New York to its Board ordering clawbacks in compensation from several senior executives in New York because of their failures to adequately supervise the Malaysian operations. Admissions that follow denials chip away at credibility and trust.

Some businesses lack the understanding that truth percolates. In fact, the willingness to be truthful in times of crises is a virtuous trait. When companies face bad news, their strategy of dealing with that bad news is the stuff of ethical fiber. The inevitability of disclosure is not a matter of probability; it is a function of time. The slow dribs and drabs are different from a forthright admission of involvement, events, or problems. A review of forthrightness is quantifiable, a factor easily measured that can be applied to all sizes and types of businesses.

b. Accounting and Financial Reporting: Not Being Forthcoming

(1) Changes in Accounting Methods

When a company changes its financial reporting methodologies or categories, there is generally an underlying reason, and the reason may not be offered or clear, i.e., the company is not forthcoming on the impact of its changes. For example, Apple recently changed its reporting to not reflect sales by units

478. Id.
480. Emily Flitter, Matthew Goldstein, & Kate Kelly, Goldman Chairman Linked to Fugitive, N. Y. TIMES, Nov. 23, 2018, at B1.
481. Bradley Hope, Goldman Faces 1MDB Suit, WALL STREET J., Nov. 23, 2018, at B10. Goldman was the bond underwriter for the deals with Low.
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(iPhones, iPads, etc. by category). That change was dramatic, given the company’s past bragging on unit sales. The change seems incongruent with Apple history and culture. But, the sting of reduced iPhone sales is lessened temporarily even as investors are coaxed into believing that there are no changes in revenue in the company’s core products.

The change at Apple is similar to an accounting change that Coach made in 2008 when it stopped reporting sales from regular stores and factory outlets separately. The statement from the company said that the change was made to give investors a better picture of how the company is doing overall. Yet, the hard truth in such changes is that they do disguise changes in the strength of the brand and its draw. The Coach change in financial reporting, as well as that done by Apple, do not allow investors to see the strength of the brand. The strength of the Coach brand comes from the data on how many buyers are willing to pay full retail prices for the brand as opposed to the growth that may be occurring in reduced-price sales and outlets. In the case of Apple, the release of full financial information on sales provides investors with insights into how new products are performing in comparison to past figures. Do customers buy Coach only on sale? Are Apple’s new products selling as well as they have in the past? The answer to that question is evidence of the strength or weakness of the brand, but the company touted the change in a way that attempted to make it seem like a benefit.

This type of accounting change is generally made when the outlet activity is good but shopper traffic in retail stores is down. With Apple, the fear of investors is that sales of the new model may not be at the same clip as other releases of new products. Both companies carry CSR credibility. Still, both companies were less than forthcoming in their disclosures on their financial situations.

(2) GAAP vs. Non-GAAP Reporting

Despite the possible misconceptions, companies continue to use non-GAAP (Generally Accepted Accounting Principles) measures to provide a rosier look at their numbers. A 2016 study found that companies with the widest gaps between their GAAP numbers and non-GAAP numbers are the companies that underperform in the months following the non-GAAP revelations. Known as “sugarcoating results,” the effect is the same: the financial picture for the

484. Overheard, WALL STREET J., Nov. 6, 2018, at B11.
487. Id.
488. Id.
company looks better financially, in some cases as much as 59% better in non-GAAP numbers.\textsuperscript{490} Companies that have had a 50-cent per share earnings differential (or more) between their GAAP and non-GAAP numbers include Halliburton, Newell Rubbermaid, Caterpillar, Kellogg, and United Technologies.\textsuperscript{491} Generally, slow sales and slow growth but larger debt use the non-GAAP numbers as a means of looking better. As former SEC Chairman, May Jo White, explained, “Your investor relations folks, your CFO, they love the non-GAAP measures because they tell a better story.”\textsuperscript{492}

(3) Restatement Fervor

Apart from company changes in accounting processes, there are also the problems with restatements. Companies restate previously released financial information, and the number and type of restatements are telling of character. For example, and although there was no fraud involved, renewable power firm SunEdison, the number 2 solar installation firm in the United States, had to announce that its annual report would be delayed because of the belief that it had misrepresented certain aspects of its financial performance.\textsuperscript{493} The Justice Department found that while there was no fraud, the company was “overly optimistic” about its cash projections. However, the same year that the issues with its financials emerged, the company, with $11 billion in debt, declared bankruptcy. After a public offering, in 2012, the company’s stock climbed 2,200%. Following its emergence from bankruptcy, the company is now an OTC stock. The excitement over the first major solar company, complete with Samsung as an investor, allowed the company to release financial information that defied investor faith in its performance.

The tech companies, often CSR darlings, often have restatements and questions about their accounting because the real costs of the stock-based compensation for executives were not disclosed.\textsuperscript{494} For example, Salesforce.com, a provider of customer management software and services, recorded a $146-million loss despite increases in revenue growth of 32% during 2015. The losses were attributed to stock grant expenses, which took a $574 million profit into that $146 million loss. A 2015 study found that the number of large-cost items excluded from 104 tech, health care, and telecom companies rose to 504 in 2013, an increase from 365 in the same group in 2009.\textsuperscript{495} Some argue that these kinds of expenses are not relevant. The companies’ performance

\textsuperscript{490} Id.
\textsuperscript{491} Id.
\textsuperscript{492} David Michaels & Michael Rapoport, \textit{Adjusted Earnings in SEC Hot Seat}, \textit{WALL STREET J.}, May 17, 2016, at C3.
\textsuperscript{493} Nathan Boney, \textit{No Fraud Found in SunEdison Probe}, \textit{USA TODAY}, Apr. 15, 2016, at 2B.
\textsuperscript{494} Gretchen Morgenson, \textit{Tech Companies Fly High on Fantasy Accounting}, \textit{N.Y. TIMES}, at BU1, BU5.
\textsuperscript{495} Id. at BU5.
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is relevant, and as one expert noted, “This stuff doesn’t matter, until it does.” At the company’s annual meeting in 2015, 47% of the shareholders voted against the company’s costly pay plan.

The accounting issues are separate and apart from whatever social good a company may be espousing. However, that so many of the companies that meet the CSR screens suffer from an inability to be transparent in their financial reporting, a question about their ability to be transparent in their efforts that are much more difficult to measure presents questions about their dedication to the simple Aristotelian virtue of honesty.

4. How does the company treat its employees?

One of the central tenets of CSR is how a company treats its employees. From the beginning of the CSR movement, documented here, there was the tension between organizations and their employees. The resolution of those problems, as discussed, ranged from voluntary changes by companies to violence-induced reforms to government intervention. Today, there is significant government control over employee relations and continuing demands for further reforms from the CSR movement.

To borrow an old chestnut from the annals of marriage relationships: Happy wife, happy life. For companies, happy employees, successful companies. That simple principle of management has eluded too many business leaders. Whether due to the pressures of competition and costs or the detachment from employee working conditions, the voluntary and strategic respect for employees has not always been addressed in timely and sufficient manners.

Most companies topping the CSR-touted lists of the best companies to work for include as their measures of treatment of employees the Silicon Valley CSR standards. The frills, such as ping-pong tables, buffets, complimentary dry-cleaning, and unlimited vacation days are deemed as indicative of how companies treat employees. However, treatment of employees should be measured by more than the facile offering and enticements of perquisites. Author Dan Lyons documents the harsh environment of Silicon Valley with its terminations to make way for those who offer more than hard work with their innovative ideas. According to Lyons, no job in Silicon Valley, where CSR is worshipped, is ever secure. “High performance” is the value, and firings are used to make way for finding “stars.” You can play all the ping-pong you wish, but if you do not “wow” them, you are terminated.

496. Id.


498. Id. See also generally, Dan Lyons, Lab Rats: How Silicon Valley Made Work Miserable For The Rest Of Us (2009).
Amazon and Sears are a study in contrasts in terms of how business decisions, policies, and behaviors affect the lives of employees. Fifty years ago, a Sears salesman could retire from Sears with a retirement nest egg of over a million dollars. The reason for the large retirement savings was Sears giving employees an interest in the company. The company had an egalitarian approach to compensation. Sears matched employee contributions to their retirement plans. At the beginning the match was dollar for dollar, but the longer an employee stayed with Sears, the greater the company’s contribution. For long-term employees, Sears was putting in $3 for every $1 the employee contributed. The people who produced or sold Sears products were given top priority in terms of retention and compensation. Vacations were generous and the pension plan held a diverse group of stocks that cushioned employees from the all-in-one-bucket risk of single-stock plans. One employee described his experience as a Sears appliance salesman, “It was like working in heaven.” The program began its curtailment in the 1970s, and the Sears story went downhill from there to its October 2018 bankruptcy. The income equality that is touted today was a reality during the Sears program.

But, since the time of that share-the-wealth philosophy that distributed company gains to employees, a “winner take all” approach has landed. On October 2, 2018, Amazon announced its minimum wage increase to $15, a move that was lauded as a CSR-type thing to do. The announcement was met with cheers and its YouTube video was viewed over 400,000 times. However, with that wage hike, Amazon stopped giving stock to employees. For longer term employees, the result was a net loss. The company also ended monthly attendance and productivity bonuses. The stock share bonuses (generally 2 per

500. Id.
501. Id. at A17.
502. Karen Weise, Amazon Lauded for Raises, But Workers Are at a Loss, N.Y. TIMES, October 10, 2018, at B1. Amazon produces an annual sustainability report and hired a director of social responsibility in 2015. Amazon had been under fire for its business practices and went all in with the dashboard measures of CSR. Interestingly, Amazon hired Christine Bader, who believes that large corporations can be a force for good, and shepherded BP for 10 years. Ms. Bader left BP 2 years before Deepwater Horizon, but apparently missed all the safety, drilling, and trading issues that were going on during her tenure because she had led the company to its recognized position as a leader in both safety and CSR. Christine Bader, Amid Criticism, Amazon Appoints a Director of Social Responsibility, PCWORLD (Sept. 8, 2015), https://www.pcworld.com/article/2981838/amid-criticism-amazon-appoints-director-of-social-responsibility.html. AP praised the act as Amazon getting ahead of its rivals. Joseph Pisani, Amazon Jumps Out Ahead of It Rivals and Raises Wages to $15, APNEWS (Oct. 2, 2018), https://www.apnews.com/222764af06535a9c7ce7a17cb2c7405361f2.
503. Once Amazon was alerted to the issue and its effect on employees, it appeared to have been caught flat-footed. The head of public policy at Amazon did not know the answer and had not yet received an answer from Amazon. In a general statement, Amazon indicated that hourly wages are more “immediate and predictable.” Amazon also pledged to make adjustments for employees who were negatively affected. Id., at B3. Employees shared their pay stubs with the New York Times reporter to prove their decline in compensation but refused to be identified for fear of retaliation.
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year) would be worth about $3,725 at today’s prices. Amazon matches employee retirement contributions up to $680 per year. Sears match figure was, in today’s dollars, $2,744 per year.504

One company developed a loyal and productive workforce. The other was not even aware of the impact of its decision on the compensation of its most valued and loyal employees. Which compensation practices benefited the business most and which benefited society the most?

Perhaps the lesson from the two contrasting studies of major companies and their treatment of employees is that one had a longer-term plan grounded in the strategic goals of retaining excellent employees. The other was responding to the CSR pressures of a societal movement for much higher minimum wages. The minimum wage is a CSR measurement, a measurement put into place without considering the consequences. When Seattle mandated a minimum wage of $13 per hour, inexperienced workers suffered. They spent less time on the clock because their employers could not afford to pay them; many resorted to two jobs.505

In making decisions about employee compensation, those running the business will respond to market forces, including both the forces of competition for qualified employees as well as the costs of turnover and training vs. the costs of compensation that builds loyalty. One size does not fit all businesses, but all business can be held ultimately accountable to the market forces that set equilibrium.

5. How does the company handle third-party ethics issues?

When third parties believe that existing laws are insufficient protection against harms, whether health, financial, or social in nature, there is a point of potential upset of the Coase equilibrium and a necessary move into the Friedman sanctioned voluntary movement by corporations into voluntary or new regulation. Third parties concerned about the behavior of companies and the lack

504. Schwartz & Corkery, supra note 499 at A17.
505. Univ. WASH., The Minimum Wage Study, https://evans.uw.edu/sites/default/files/MWS%20overview_final.pdf. The overview is found at this site. The project consists of several studies both before and after the minimum wage hike. The mandated minimum wage studies are all over the maps, much like all CSR studies. In fact, in response to the Seattle study, a Berkeley study reached the opposite conclusion – that minimum wage hikes do not cost jobs. Jacqueline Sullivan, New Study: High Minimum Wages in Six Cities, Big Impact on Pay, No Employment Losses, INST. RES. ON LAB. & EMP. (Sept. 6, 2018), http://irel.berkeley.edu/high-minimum-wages-in-six-cities/. The differences are beyond the scope of this discussion, but there are clearly differences among the studies that can explain the different conclusions researchers have reached about positive vs. negative effects of mandatory minimum wages, “living wage” in CSR lingo. Explanations include that no two labor markets are alike, franchise operations vs. mom-and-pop stores, differing labor markets, and theories about equilibrium on wage pricing. Dee Gill, Why It’s So Hard to Study the Impact of Minimum Wage Increases, QUARTZ WORK (Oct. 5, 2018), https://www.washingtonpost.com/news/work/wp/2018/02/05/raising-the-minimum-wage-doesnt-cost-jobs-multiple-studies-suggest/?utm_term=.b44b21a9c63d.
of regulatory oversight are the source of CSR changes and standards. However, the adoption of standards due to company self-promotion or as a result of social media pressure is not necessarily a risk-averse response.

The business responsibility of any company with strategic vision is to note evolving risks and take appropriate action in response in order to protect the business. However, the steps to take are those that protect the business as its reviews all possible outcomes of third-party movements that could affect trust, costs, reputation, and brand. For example, when the first studies emerged on the effects of overhead power lines (electromagnetic field or EMF studies), there were few or no regulations (apart from government permissions in certain areas) on the placement of those power lines. Power lines were critical to development through the expansion of the availability of electricity. The societal goal, and an important social goal, was getting everyone on the grid.

Nonetheless the initial studies were devastating, studies that indicated the health effects of children living in residences located near power lines. The public outcry had effects on the value of properties located near power lines. Electric utility companies, thinking strategically, engaged quickly because of the risks to health, the potential class-action litigation by those with health issues attributed to proximity to power lines and those whose property values had declined. With the deep pockets of utilities, the recovery had the potential of a Johns-Manville decades-long series of suits and a trust in perpetuity settlement. Understanding the issue to be one that affected the costs, value, brand, and reputation of their companies, the industry responded with voluntary action. EMF was a health issue and the placement of the power lines presented environmental issues. However, EMF was also a business issue.

The strategy that electric utilities developed at the time was prudent placement. In placing overhead power lines, the companies spent the additional funds required to place the lines away from homes, offices, and population areas. The utilities continued their programs to move lines underground because the earth reduces the EMF levels naturally. The industry also sponsored studies to determine whether the initial studies were correct in their conclusions and whether there were possible health effects to line workers that had not been detected in the past. When those studies were released, the flaws in the initial studies became clear. The initial studies were epidemiological in nature and failed to take into account other environmental conditions in assessing the impact

507. *Id.*
508. See *supra* notes 85-85 and accompanying text for the discussion of the Johns-Manville asbestos exposure health litigation.
of proximity of overhead power lines on children’s health. There were other factors, such as poor diets and the quality of their housing.

Other studies found that electric line workers, those who worked in close contact with power lines in the epicenter of the EMF, actually had a lower cancer rate than the general population. The evidence was overwhelmingly on the side of the utilities. No litigant was ever able to convince a jury that the medical problems experienced by the plaintiffs were the result of the EMF from overhead power lines.

The initial emotional reaction to the CSR issues raised by third parties in this example could have resulted in a complete restructuring of the electrical grid and decades of liability for the utilities had they followed the simple ethical standard of compliance. Rather, the utilities took voluntary steps to address a business risk, sensing a Coase equilibrium movement and a Friedman opportunity to avert costs. To state it simply, the response of businesses to third-party CSR and ethics issues and studies should be on of guarding the business with this simple approach: If what they are saying is true, we have a problem. If what they are saying, we also have a problem, the problem of an emotional, high-pressure campaign affecting our cost of doing business, our stock value, our brand, and our reputation.

The distinction, as cold and calculating as it seems, between becoming a CSR-ranked company and being an ethical one, is that the business comes first. Putting business first has been defined by the CSR movement as antithetical to being ethical. However, in dealing with third party assertions, putting CSR first has resulted in rankings with false positive and ironies, allowing those without commitment to ethical business practices to top the CSR lists. What the history and current practices in CSR teach is that putting the business interest first and there is resultant, naturally occurring (rather than belabored) CSR commitment. This principle dates back to the writings of Bernard Mandeville, circa 1714. Mandeville maintained that envy, one of the seven vices, could be turned to virtue, when that envy was harnessed through economic liberty. That is, to the extent that those who experience envy turn to opportunities in business, they emulate the rich by seizing on the right to go into business for themselves. And their efforts benefit society. Indeed, it appears the putting the business interest first and CSR often walk on the same side of the street. The free market system of rewards is grounded in excellence, an achievement that is rewarded by the free market with financial success. If the business continues the pursuit of excellence (to borrow a phrase from a management book) the reward of success continues.

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510. Id.
511. Id.
The contra is also true. A company that pursues a subsidized product area is not refined by the buffettings of the free market nor is it pushed to excellence. A business that is forgiven for missteps in the form of CSR investment funds despite shortcomings or is permitted to continue operating with subsidies is deprived of the opportunity to reach excellence and success. As in the cases of Solyndra, Solar Tech, and SolarCity, all the CSR rankings and subsidies could not keep them from bankruptcy and/or acquisition. If solar power makes economic sense, the market will beat a path to the door of any companies pioneering this technology. However, all the subsidies, imprimatur, screens, and social media chatter that the CSR movement can muster has not been able to keep these Humpty Dumpty’s from falling to failure.

Part of excellence is the willingness of managers to adopt a strategic course in addressing third-party externalities. Business managers do such assessments continually. Businesses respond to the movements of competitors, using a skill set that recognizes both the competitors’ strengths and vulnerabilities. Businesses change course based on the need to address the competitive threat, but those course changes are not made through governmental force, protests, or boycotts. The course changes are made as businesses evaluate, through a logical and data-based process, the risk, rewards, and consequences of changes.

The goal for businesses is not to assume that third-party issues are based on factual findings and proceed accordingly with changes, adjustments, and address the resulting exposure based on any flaws in third-party assertions or factual clarifications. Businesses engage in this kind of analysis when they study the ads for the products of competitors, studying prices, terms, and considering possible changes. When businesses behave like businesses across the board on all externalities they do reach CSR equilibrium.

6. What is the company’s approach to philanthropy?

In answering this question, the purpose is not to determine virtue or ethics. Screens focus on whether companies are philanthropic. Those screens assume virtue in philanthropy. The focus in this new approach for companies is on how it is spending its philanthropic dollars and why a company is spending on certain philanthropic causes. The insights on the “Why?” and “How?” questions provide an accurate picture of company intent, and within the examination of the intent are better measures of the company’s strategic acumen without the assumption of inherent goodness made by this element of CSR screens in corporate donations.

Philanthropy and CSR do not walk on the same side of the street under current screens. For example, the vilified Exxon (because it is an oil and gas company) makes multi-million dollar contributions to end malaria deaths and provide training for women in countries where they have not had educational
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opportunities.\textsuperscript{513} No marks in the credit column on goodness are given to Exxon for working to reduce carbon emissions in China and protect forestlands in the United States.\textsuperscript{514} Walmart is trying the PR route for a CSR ranking, but receives little recognition.\textsuperscript{515} Dow Chemical is a generous donor to Habitat for Humanity.\textsuperscript{516} Dow still experiences backlash for Vietnam and its Napalm and Agent Orange products, so that whatever charitable work or contributions the company makes will be accompanied by its history in military chemical contracts.\textsuperscript{517} Some businesses are recognized under CSR standards for their philanthropy; others are not because of problems with other screens.

The motivation for business giving varies significantly upon examination of the why question. Those motivations offer insight into the character of a company, and demonstrate that philanthropy is used strategically, not generously. At times it is even used as penance. Nothing buys redemption more than making a donation to compensate for a misstep.

Beyond the penance motivation for philanthropy are the strategic uses of philanthropy. A recent study found that of 1,087 corporate donations to charities, 451 of those charities had close connections to members of Congress.\textsuperscript{518} Philanthropy translates into political access. Some corporate donations are made


\textsuperscript{514} Id.

\textsuperscript{515} See supra notes 329-31, and accompanying text.

\textsuperscript{516} Id.


in response to errors and public reaction. For example, Mark Cuban donated $10 million to an organization that assisted victims of domestic violence after what he referred to as the “disturbing, heart-breaking” findings of an investigation of his Mavericks club that revealed serious workplace misconduct and harassment. 519 Angel moguls sometimes have corporate difficulties and resort to philanthropy.

If the philanthropic involvement of companies is examined from a strategic and PR perspective, what emerges is that companies are using Friedman principles in their philanthropic strategies. That is, philanthropy is not used by companies for the sake of CSR goodness. There really are not angels in philanthropic giving either. The motivation behind the donations is a measure of strategy, not inherent goodness. Some companies take the bragging rights of their philanthropy, but other companies gain nothing from their philanthropy because of the nature of their business, which occurs when philanthropy is used strategically. Using philanthropy as a screen for goodness is a superficial measure. Indeed, the bragging rights on philanthropic endeavors by many businesses are being used as an advertising campaign to restore reputations or attract business.

a. Steve Jobs and Apple’s School Infiltration

As an example, Steve Jobs, shortly after the founding of Apple, realized that Apple did not have the resources to get at least a single computer into every school. What Jobs & company found was a federal law that permitted the donations with a tax deduction. Jobs described Apple’s efforts as follows:

But we studied the law and it turned out that there was a law already on the books, a national law that said that if you donated a piece of scientific instrumentation or computer to a university for educational and research purposes you can take an extra tax deduction. That basically means you don’t make any money, you lose some but you don’t lose too much. You lose about ten percent. We thought that if we could apply that law, enhance it a little bit to extend it down to K through 8 and remove the research requirements so it was just educational, then we could give a hundred thousand computers away, one to each school in America and it would cost our company ten million dollars which was a lot of money to us at that time but it was less than a hundred million dollars if we didn’t have that. We decided that we were willing to do that. 520 Companies like Apple have simply recognized the halo effect of social responsibility. 521 While most executives believe and consumers agree that philanthropy and CSR have a positive impact on brand and reputation, that


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impact does not translate, as noted earlier, into sales of products and services. Nonetheless, the quest continues because of the facile nature of adopting CSR initiatives and relatively rapid uptick in positive public perception.

b. Wells Fargo and Redemption Through Philanthropy

Wells Fargo’s behavior post-regulatory sanctions for the 3.5 million fake accounts created by its employees using a host of auditor- and security-deceiving methods has been in full philanthropic/CSR promotion mode. It appears that the bank is using CSR as a means of restoring trust in a bank that has produced a case study for business ethics that will last as long or longer than Enron. The bank’s restoration ads are a study in distraction and misdirection, a sort of self-promoting CSR campaign designed to tug at the CSR-committed with the hope that the deflection will bury the serious ethical lapses of the bank and its failure, or perhaps inability, to fix its own culture. The ads, some two-full pages in the major national newspapers, include the following content in the order in which they appeared in the ads:

1. Wells Fargo served over 433,800 meals over the holidays
2. Wells Fargo ups donations to more than $1 Million a day to charities
3. 50 years of support, Wells Fargo commits another $50 million to American Indian/Alaska Native communities
4. Climate Action: Wells Fargo commits $200 billion in sustainable financing by 2030
5. Purple Heart vet gets home donated by Wells Fargo, refurbished by team member volunteers
6. Wells Fargo commits $200 billion to sustainable financing
7. AHF: Wells Fargo Named Top Affordable Housing Investor

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522. Wells Fargo ad, N.Y. TIMES, June 29, 2018, at A5. The identical ad was placed again in the Times on July 1, 2018, at A14-A15. In a McKinsey & Co. survey of CFOs and investment analysts, the vast majority believe that CSR programs create value by enhancing the company’s reputation. MCKINSEY & CO., The Role of the CFO, 61 MCKINSEY ON FINANCE (2017), https://www.mckinsey.com/-/media/McKinsey/Business%20Functions/Strategy%20and%20Corporate%20Finance/Our%20Insights/Strategy%20and%20corporate%20finance%20special%20collection/Final%20PDFs/McKinsey-Special-Collections_RoleoftheCFOashx. The majority also believed that they had not impact on product performance. 86% of consumers say that CSR behaviors do not influence product performance. Id.

523. MCKINSEY & CO., supra note 522.

524. Id.

525. Id. Sustainable financing was defined as grounded in Wells Fargo’s “commitment to tackling climate change,” and Wells Fargo’s plans to spend on renewable energy, clean technologies, sustainable transport, and green bonds. CEO Tim Sloan announced that Wells Fargo was “committed to taking a leadership role in supporting the transition to a low-carbon economy and promoting environmental sustainability through our products and services, operations and culture and philanthropy.” Id.

526. Id.

527. Wells Fargo ad, N.Y. TIMES, July 5, 2019, A5. The ad was repeated again on July 22, 2018, A5 and July 25, 2018, A25.

528. Id. The figure is $9 billion for Wells Fargo’s total investment in low-income housing tax-credit programs. Please note: tax breaks do apply for companies that participate in LIHTC projects. This story also appeared in the New York Times on June 29, 2018 and in the July 1, 2018 ad. Supra note 522.
8. Wells Fargo helps bring solar power to D.C. apartments\textsuperscript{529}
9. Wells Fargo and NextEra Energy join together to fuel low-carbon economy throughout the U.S.\textsuperscript{530}
10. Guardian Cap tackles football injuries with Wells Fargo financing\textsuperscript{531}

The ad campaign was one of the more blatant attempts by a company to obtain redemption via CSR commitment for the fraud that Wells Fargo perpetrated on account holders whose names and information were used to create accounts without their permission and upon investors who believed that Wells Fargo did indeed have 6.1 products per customer, a figure well above the 2.7 average in the banking industry.\textsuperscript{532}

For the most part, business philanthropic giving is self-serving. For some in the CSR/ESG movement, that statement is troubling. Perhaps, the self-serving nature of philanthropy is not troubling. When businesses behave as businesses, they find opportunities for branding, for free advertising, and for customer recruiting in many ways, and finding it in a tax-deductible form is further testament to the power and operation of free-markets. Wells may or may not be able to rebrand and/or re-establish itself through philanthropic and sustainable activities and ads touting such.\textsuperscript{533} Whatever the outcome for Wells, many will have benefited, including the newspapers that received revenue for the ads.

This question also requires data and precision in evaluating companies with an eye on the role of business in society. Business, as philosopher Michael Novak wrote, is not a philanthropic organization.\textsuperscript{534} Given the unique role of business in society, to have philanthropy as its primary goal once again deprives the business of the opportunities for financial success. That financial success, when

\textsuperscript{529} Id. Wells made a $2 million grant to the solar program. The program gives college students the opportunity to install solar equipment during their summers. In between these highlighted programs Wells placed an ad for itself, “Re-affirming our commitment to communities.” and “Established 1852 Re-Established 2018.” “Visit wells Fargo.com/renew.”

\textsuperscript{530} Wells Fargo ad, N.Y. Times, Sept. 9, 2018, at A5. The same ad appeared in the Wall Street Journal, September 6, 2018, at A7.

\textsuperscript{531} Id. This ad also included the 1/3 part of the page on Wells, and included 2 news items on its expansion into the Northeast and its investment in an online fashion company in London’s Wimbledon Village and that Wells has been incredibly supportive to the company. So, the ads moved from CSR commitments, slowly, to customer support and the planned expansion of Wells Fargo’s geographic scope. The slow walk from CSR to “this really is all about the business.”

\textsuperscript{532} Geoff Colvin, Inside Wells Fargo’s Plan to Fix Its Culture, Post-Scandal, FORTUNE (June 11, 2017), http://fortune.com/2017/06/11/wells-fargo-scandal-culture/. The Wells mantra for employees, including the 5,500 fired, was “Go for G-eight!” The phrase was motivation to go beyond 6.1 products per customer to 8 for every customer.

\textsuperscript{533} In February, Wells did roll out a new stagecoach logo and ads that were two full pages in all of the national newspapers indicating that their focus was now on customers. The ads did not contain any references to social responsibility. This is about real change . . . , USA TODAY, Feb. 1, 2019, at A4-AB and N.Y. TIMES, Jan. 27, 2019, at A13-14. The ads followed a period of criticism of Wells for not stepping up to help federal employees during the government shutdown as credit unions and other banks had done with interest-free loans touted in ads and on Twitter. The criticism labeled the bank’s lack of efforts as a “missed opportunity.” Ron Lieber, Shutdown is a Missed Opportunity for Wells Fargo, N.Y. TIMES, Jan. 5, 2019, at B1.

\textsuperscript{534} Michael Novak, Business as a Calling: Work and the Examined Life (1996).
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shared with employees, will permit it or its employees to succeed in their individual endeavors. The contributions of business cannot be measured solely by formal philanthropy. The contributions come through the success of all the stakeholders.

7. How does the company react when faced with mistakes?

The art of public relations is practiced in many different ways. Some practitioners use word choice as a way of making company actions seem less troublesome. Other practitioners follow a path of complete contrition and promises to make things right. Lawyers often control the practitioners’ choices as well as the content of the messaging when liability issues loom. Still other companies use gaming. Many companies turn to the protection of CSR as a means of redemption. Many companies assume that they are ethical because of their high CSR rankings and acceptance. Many companies develop a blind eye to their unethical internal conduct because of their external cloak of CSR ethics.

There are three cases studies that illustrate the blind eye to ethics and business that develop in companies that are perceived externally or self-perceived as vaunted in the world of CSR.

a. Facebook: Management Weaknesses Protected by CSR

From its founding, complete with all the litigation surrounding whose idea was whose, Facebook made much of its original mission statement, a societal goal: “Thefacebook [sic] is a directory that connects people through social networks at colleges.”535 As the network grew, the mission statement changed. By 2006 (with other changes in between), the mission statement was, “Facebook is a social utility that connects you with people around you.”536 By 2009, the statement was, “Facebook gives people the power to share and make the world more open and connected.”537 CEO Mark Zuckerberg simplified that message in 2017 to: “Give people the power to build community and bring the world closer together.”538 By 2017, Facebook had moved to a CSR mission statement. Its original founding was not so altruistic.

What happened to change the Facebook mission from one of college hook-ups to that of world unity? In 2016, Facebook engineers discovered Russian-linked activity on its site, and there were both Congressional and FBI and CIA investigations that were ongoing that would expose the Facebook weakness in

536. Id. There were three mission statements in between the original in 2004 and this second one in 2006. The evolving statements can all be found at this same site.
537. Id.
managing its site.\(^{539}\) The then-security chief at Facebook, Alex Stamos, told the Board in 2017 that Facebook has failed to contain the Russian infiltration.\(^{540}\)

The reaction of Mr. Zuckerberg and his chief operating officer, Sheryl Sandberg, was one of outrage at their team for “throwing them under the bus” to the board by disclosing more to the board than they should have.\(^{541}\) The management team also made no disclosures about their security issues. Rather, the company continued to ride the wave of growth. Neither Mr. Zuckerberg nor Ms. Sandberg developed an effective strategy for moving forward or for the eventual public relations crisis that would emerge. The company’s reputation for duplicity because of the difference between the content of its public statements and its private actions began with this management failure.\(^{542}\)

However, as the external investigations continued, more damaging revelations emerged. By the spring of 2018, Facebook users learned that the data Facebook had amassed about them through their use of the site was being packaged and sold to various firms, with little to no supervision by Facebook on how those firms were using the personal data.\(^{543}\) The agreements perhaps violated a 2011 consent decree that Facebook entered into with the Federal Trade Commission (FTC) on privacy protections for users and users’ friends.\(^{544}\) That agreement required Facebook to stop misrepresenting to its users who could see their information. Facebook’s privacy policy stated that the Facebook Profile Privacy Settings allowed users to “control who can see” their profile information, by specifying who can access it, e.g., “Only Friends” or “Friends of Friends.” A member of congress revealed that Facebook had been warned about its lax policies on privacy in 2013 by a monitor who had been appointed as a result of its 2011 consent decree, but those issues and the monitor’s findings were not disclosed to users at the time.\(^{545}\)

During the interim period between 2016, when the Facebook engineers found the Russian activity and the 2018 public revelations about Facebook’s sharing of

\(^{539}\) Frenkel, et al., supra note 473.

\(^{540}\) Id.

\(^{541}\) Id.

\(^{542}\) When the full story of Facebook’s actions and inactions emerged, a principal in an ad company, commented, “Up to now, whatever you said about Facebook, you couldn’t say it was a two-faced company. It says one thing to you and does something completely different. This is very hard if you are a marketer.” Saphna Maheshwari, ‘No Morals: Advertisers Voice Criticism of Tech Giant,” N.Y. TIMES, Nov. 16, 2018, at B4.

\(^{543}\) Gabriel J.X. Dance, Nicholas Confessore, & Michael LaForgia, Device Makers Got Vast Access to Facebook Data, N.Y. TIMES, June 4, 2018, A1. Facebook had sharing partnerships with 60 device makers, including Apple, Amazon, BlackBerry, Microsoft, and Samsung. partnerships that date back a decade. Apple CEO Tim Cook issued a statement of righteousness indignation about Facebook’s conduct, noting that, “Privacy to use is a human right. It’s a civil liberty.” Id. at A15. Mr. Zuckerberg, angered by the duplicity of Mr. Cook because of its partnership with Facebook, ordered only the use of Android phones by his management team under the guise of more universal usage. Id. Always reassuring to have a CEO who, at 34, is mature in reaction to the CEOs with whom he does business.


\(^{545}\) Nicholas Confessor, Michael LaForgia, & Gabriel J.X. Dance, Facebook Didn’t Police Use of Data, N.Y. TIMES, Nov. 13, 2018, at B1.

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user data, Mr. Zuckerberg and Ms. Sandberg engaged in lobbying activities. Their efforts at managing the crisis with Congress included hiring a firm to conduct opposition research on U.S. senators as the Senate held hearings on possible legislation to curb Facebook’s and other sites’ use of data and to regulate reporting and monitoring by sites.546

Even as Ms. Sandberg testified before the Senate Committee that Facebook was ready for regulation, her private conversations indicated that no regulation was necessary because Facebook was managing the issues.547 Advertisers began to grumble because many of their ads were appearing next to content that would be considered hate speech.548 Public revelations about Facebook’s use of consumer information and its ongoing failure to manage content continued. As Facebook began implementing policies on content it was met with criticism for banishing conservative commentators from the network but permitting Holocaust denials to remain posted.549 Experts referred to Facebook’s evolving techniques for monitoring and removing content as a “hodgepodge of declarations,” and Facebook continued to struggle with what it was doing, how it was doing it, and why it was doing it. 550 Some journalists were taken aback by the lack of preparation by Mr. Zuckerberg in answering basic questions about its efforts and policies.551 Editorials reflected media skepticism about Facebook’s ability to self-correct.552

During this period, Facebook began a “We Get It” campaign, but inside the company the effort was to disclose as little as possible.553 However, as that campaign was launched, court documents revealed that Facebook was still striking data-sharing deals with select companies for access to user records after it had pledged in 2015 that user information was walled off.554 As noted, the company

546. Jack Nicas & Matthew Rosenberg, How Facebook’s Attack Dog Tried to Undermine Senators, N.Y. TIMES, Nov. 16, 2018, B5. The firm hired was Definers Public Affairs, and the firm distributed research documents to reporters that linked anti-Facebook activists to funding from George Soros. Facebook fired the firm after the New York Times printed a story that detailed its tactics. For more details on the PR aspects of this issue see supra notes 458-61 and accompanying text.

547. Frenkel et al., supra note 473.


549. Farhad Manjoo, Once Nimble Facebook Trips Over Calls to Control Content, N.Y. TIMES, July 20, 2018, at A1, A11. Facebook apologized to Diamond and Silk, two pro-Trump commentators for its unfair treatment of their page, but stuck with the Holocaust denial pages because in response to questions about such content, Mr. Zuckerberg said Facebook would not banish the material because, “there are things that different people get wrong.” Id. at A1. Ryan Suppe, Conservatives Think Tech Firms Are Biased, Pew Survey Shows, USA TODAY, July 2, 2018, at 3B.


551. One reporter referred to Mr. Zuckerberg being “comically tripped up by some of the most basic questions.” Id.


554. Deepa Scetharaman, Facebook Gave Out User Data Despite Pledge, WALL STREET J., June 9-10, 2018, at A1. The internal documents were known as “whitelists” that permitted certain companies to

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modified its mission statement and could not seem to address the content or security issues in a way that quelled the ongoing media assaults and protests. The impact of the crises on its reputation resulted in slower growth. Its stock price, upon the revelations of its duplicity, continued to drop, along with other online companies (Google) because of the privacy concerns. From a high in the summer of 2018 of $220 per share (when the revelations about the use of data and the congressional hearings began), Facebook dropped to $134 per share following the revelations about its duplicity and lack of forthrightness.

There are two critical business issues in this unfortunate series of events. The first is the ethical issue of the lack of candor of Facebook with its customers. Facebook’s employees struggled with working for the company and disclosed in media interviews, “I don’t really want to work for Facebook . . . the privacy stuff, fake news, personal data, all of it.” Recruiters find that, for a host of reasons, potential job candidates want to avoid working for social media companies because the combination of politics and privacy is not something that is easily addressed. The employees appear to have had a significant epiphany, an awakening that CSR is not the same as the basic virtue of honesty, “Now it’s like, just because it does what you want doesn’t mean it’s doing good.” Along with that awakening is a perceived impossibility of reckoning politics in the workplace. One mid-level executive of Facebook asked a career coach, “How do I message this?” The issue may be that the introduction of CSR assumptions has given license for behaviors and ethical inconsistencies that cannot be messaged.

The executive’s thought on messaging leads to the second business issue. Apart from the self-perceived righteousness of the Facebook mission and the CSR halo, there are serious management weaknesses and a lack of experience on the top two executives at the company. It remains unclear whether Mr. Zuckerberg and Ms. Sandberg have the gravitas to lead a company back from a crisis that was largely a result of their poor leadership and decisions. CSR standing is not a metric for management skill or leadership qualities. The post-crises starts and stops and the drips and drops of duplicity are the hallmarks of inexperienced leaders who suffer from the hubris of success come too easily, questions avoided, and the halo of CSR.

have access to additional information about users’ Facebook friends. The whitelist included companies that advertised on Facebook (Nissan Motor Co. and Royal Bank of Canada) or were otherwise valuable to Facebook.

557. Id.
558. Id.
559. There are those who disagree and put Facebook in the “too big to fail” category. “Even if Mr. Zuckerberg—as Facebook’s founder, chief executive, chairman, and most powerful shareholder [60%]—bore most of the responsibility for the company’s cataclysmic recent history, he alone possessed the stature
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b. Starbucks: Operational Weakness and CSR Band-Aids

Starbucks, perhaps at the top of the company CSR list, ran into a bit of a buzz-saw problem when its loitering policy caused a Philadelphia manager to have two African-American men arrested for loitering because they were sitting in a Starbucks sans a latte or other purchase. The gentlemen were there for a meeting and were waiting for a colleague before ordering anything.560 The firestorm of controversy that followed caused Starbucks’ chairman, Howard Schultz, to issue a mea culpa and announce that all 8,000 Starbucks locations would be closed and all 175,000 baristas and other employees would have a stand-down, four-hour meeting for racial-bias cleansing.561 Starbucks also pledged an open-door policy, including free (no purchase required) restroom use, free sleeping (no purchase required), and Internet/sitting around use (no purchase required).562 That policy change opened the door to drug use in the bathrooms and online complaints from customers that their local Starbucks would turn into homeless shelters with riff-raff who cannot afford expressos.563 So, Starbucks added clarifying language to the new policy that permitted employees to take action when “someone is behaving in a disruptive manner, such as smoking, using drugs or alcohol, using restrooms improperly or sleeping.”564

to fix it.” Farhad Manjoo, How Mark Zuckerberg Became Too Big Fail, N.Y. TIMES, Nov. 1, 2018, at B1. Once a CSR hero, always a CSR hero.

560. Given the lines issues at every Starbucks, the gentlemen should have seized the moment when a manager had nothing better to do than scuttle patrons out the door. They could have seized the moment and gotten their Double Chocolate Chip Marshmallow Sour Cream Frappuccinos while the steamer was hot and the line was short. Nicholas Confessore, Michael LaForgia, & Gabriel J.X. Dance, Facebook Didn’t Police Use of Data, N.Y. TIMES, Nov. 13, 2018, at B1. In a review by PriceWaterhouseCoopers commissioned by the FTC, the firm found little evidence that Facebook had monitored the activities of those partnerships with device makers and others, such as Cambridge Analytica, a British firm that subsequently provide information to the Trump presidential campaign.


563. CSR has its place, but not in my local Starbucks. Howard Schultz, in announcing the policy, said, “[W]e’re going to make the right decision 100 percent of the time and give people the key. Because we don’t want anyone at Starbucks to feel as if we are not giving access to the bathroom because you are ‘less-than.’ We want you to be ‘more than.’” The author believes Mr. Schultz meant “less than welcome” and “more than welcome.” The author is convinced Mr. Schultz was not making class distinctions on those who can afford $5 coffees being “more than,” and those who cannot afford or are not convinced that it is the best use of their money, “less than.” Twitter erupted. One tweeter said that the new policy reflected the fact that no executive had ever used a Starbucks bathroom. The Scrapbook, An Open Bathroom Door Policy, WEEKLY STANDARD, June 4, 2018, at 2.

564. Id. The new policies required employees to verify with another employee if any of the “disruptive” descriptions apply before taking action. Talking too loudly, playing loud music, and viewing inappropriate conduct were also added to the list based on customer feedback about the types of conduct at Starbucks. Jargon, supra note 562. With all these things taking place at Starbucks, exactly why are the lines so long? Jack-in-the-Box does not tolerate this kind of behavior. Also, Starbucks would have had to install blue lights in its bathrooms – most of the finest gas stations add this feature because the blue lights make it more difficult for drug users to find their veins. Gas stations do not have policies or training; they just install the deterrence equipment. No source here, just years of interstate travel experience on the author’s part.
With the restroom policy clarified, Howard Schultz and the nearly 200,000 employees, executives, and baristas sat down for their training. Mr. Schultz had full-page ads in the major national newspapers on the day of the training. Some key points from the letter, which was signed by Mr. Schultz, “with deep respect.”:

a. I wanted our stores to be comfortable, safe spaces where everyone had the opportunity to enjoy a coffee, sit, read, write, host a meeting, date, debate, discuss or just relax.

b. After investigating what happened (at the Philadelphia store), we determined that insufficient support and training, a company policy that defined customers as paying patrons—versus anyone who enters a store—and bias led to the decision to call the police.

c. The incident has prompted us to reflect more deeply on all forms of bias. Starbucks held the four-hour training. The feedback was that it made employees feel “uncomfortable.” The emphasis was on relations between black and white, and Filipino workers felt excluded. Some African-American employees felt uncomfortable. Mr. Schultz added after that training, “It takes moral courage to do this.” Little word since the training on how things are going with the Schultz pledge to “continue the conversation” and incorporate the issues into training. He also added, “We want to lead the company through the lens of humanity.”

The feel-good effort was the CSR cover for management deficiencies. Throughout the crisis, the company did not address the shortcomings of its policies and guidelines. Nor did anyone address the issue of the termination of the Philadelphia manager. She was following the policy that was in place at the time at Starbucks. That policy did not address what an employee who feels threatened should do. Nor did the company address whether the manager enforced the policy uniformly against all races, creeds, colors, and national origin. The follow-up bathroom policies provided a key to the unfolding of a company crisis: the disconnect between those at the corporate level and the operations level of the company. The daily reframing of issues and policies in response, other social media, and the winds and whim of social justice found the company twisting in the wind as it tried to be all things CSR to all people.

From a business perspective, the company needed leaders on the ground to witness the challenges of those in the branches and what they were experiencing.

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566. Id.
568. Id.
569. Ziya Meyer, Starbucks’ CEO Joins in Racial-Bias Education, USA TODAY, May 30, 2018, at 1B.
570. Schultz, supra note 565.
571. Id.
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The company, oddly enough, needed to understand the perspective of a front-level manager struggling to enforce standards, however unclear, in a uniform fashion based on policies written to provide the atmosphere MR. Schultz described in his ad. Not every event at a Starbucks is a matter of social justice. More importantly, not every event at Starbucks or any other company need be a matter of social justice if the business is operated under clear and uniformly applied policies, rules, and regulations.

Referring back to the components of this question provides the insight into the type of ethical culture that exists at a business. There was an acknowledgement of a problem with the incident, but it was blamed on the employee and then placed as a burden on all Starbucks employees – a charge of insensitivity. The responsibility of the company on its policies and awareness of local operations was not the focus. The company appeared to focus on the issue that would most easily quell the social media storm, and a short-term public fix with the cost of a nationwide shutdown, along with all of the pledges related to diversity. The public relations option was one not designed to address the root cause but to demonstrate sincerity and dedication. However, the change on operations, just from the need for on-ground observations was never discussed. The only housecleaning done was forcing a front-line manager out of her job. Those responsible for the policies and operations attended the training, spoke of being moved, and will continue in their positions. The progress remains to be seen because there have been no follow-up ads reporting in on the CSR responsibility of social justice.

c. Wells Fargo: Masking Ethical Lapses with CSR Righteousness

As noted in the earlier discussion, Wells Fargo engaged in a shallowly transparent struggle and misguided effort to desperately overcome the damage to trust and reputation from the fake account debacle. The resort to CSR rhetoric in repetitive ads heightened the presence of an ethical tin ear. Wells, relying on the CSR component of ethics, continued through a series of ethical mishaps under a regulator’s microscope.

The list of mishaps include: (1) a required Justice Department investigation into the bank’s wealth management division pursuant to a whistleblower report on inappropriate referrals or recommendations to clients on their 401(k) accounts into Wells products572; (2) a whistleblower suit by a call center employee who reported that the bank’s collection efforts from customers lacked documentation on the bank’s claims on the customers’ debts573; (3) a settlement with the Justice


Department for $2 billion for misrepresentations in the sales of mortgage-backed securities (about the quality of the mortgages)$^{574}$; (4) a confession to a municipal client (Chattanooga Fire & Police Pension Fund) that it had pocketed rebates from mutual fund investments that should have been returned to the client$^{575}$; (5) problems with added or altered information on corporate customers without their knowledge or permission$^{576}$; (6) a Labor Department inquiry into whether the bank was forcing 401(k) participants into bank products$^{577}$; (7) a Federal Reserve Board prohibition on Wells from growing its balance sheet until it resolved its “risk and compliance” processes$^{578}$; (8) a federal investigation into its foreign-exchange operations$^{579}$; (9) Comptroller of the Currency required removal of two Wells executives from its operating committee for their failure to oversee problems at the bank$^{580}$; (10) termination of an executive for bad-mouthing federal regulators to other employees who then reported the remarks$^{581}$; (11) refunds had to be issued to auto loan customers for requiring them to carry insurance that many of them already had but for which Wells billed them$^{582}$; (12)

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574. Emily Glazer, *Wells Settles Mortgage Case for $2 Billion*, Wall Street J., Aug. 2, 2018, at B1. Wells failed to disclose that the loans were not income-verified. That is, the loans were made to individuals who merely represented their income. The loan files did not have independent verification of income.

575. Gretchen Morgenson & Emily Glazer, *Wells Kept Client’s Fund Fee Rebates*, Wall Street J., May 10, 2018, at B1. The confession came following months of questioning of Wells by officials. Wells attributed the retention to “a system set-up error.” Wells lost the Chattanooga pension fund and a number of municipal and county government clients terminated their relationships with Wells because of this problem. Wells ran full-page ads again recently trying to win back clients by emphasizing investment knowledge vs. CSR appeal: “Yield matters in munis. Until volatility rears its ugly head. Then a focus on total return may suddenly look pretty compelling. See the power of perspective. Wfam.com/muni.” Wall Street J., Nov. 16, 2018, at B5.

576. Emily Glazer, *Wells Fargo Faces More Woes Over Client Data*, Wall Street J., May 18, 2018, at B1. The information added included birth dates, Social Security numbers, and relatively routine types of data. However, the employees did not follow the bank processes that are required for all addition of information, which are regulatory requirements. The data were added during a period when Wells was trying to meet deadlines on a regulatory consent order related to internal controls as the bank.


582. Emily Glazer & Ryan Tracy, *Wells Could Face More Sanctions*, Wall Street J., Aug. 5-6, 2018, at B9. Of the 800,000 customers affected by the insurance misrepresentation, 274,000 were forced into delinquency as a result of the unnecessary charges. Gretchen Morgenson, *Wells Fargo Required Borrowers to Buy Needless Auto Insurance*, N.Y. Times, July 28, 2017, at A1. In addressing this problem, the bank sent letters promising refunds to customers who did not have the insurance, paid those entitled to refunds the wrong amounts, and requiring that the customers apply for the refund. To follow through on the bank’s infamous stage-coach symbol and Western origins, this truly is a bank that cannot shoot
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the Federal Reserve required Wells Fargo to replace four board members in addition to the previous resignations of four other board members, and (13) more than one dozen employees in the Wells securities division were fired and others put on administrative leave for altering time stamps on e-mail meal receipts in order to obtain unauthorized reimbursement for dinner expenses.

However, the Lucky 13 are not the end. As Wells continued to work its way through these issues, the Comptroller took the unusual step of rebuking two Wells executives (whom the bank put on administrative leave) for their failures in oversight. The Comptroller notified Wells that it did not believe that the bank had the right people in place to “clean up the mess.” Those within the bank referred to the actions taken against the two regulators as them being “victims” of regulators. The Wells response was that the two had “worked so hard.” Perhaps so, but executives referring to proposed reform actions at the bank as “kooky” may not signal the best of intentions.

The Wells story is a tragic one, a business that became a victim of its CSR. Self-perception and its ad-touted reputation as a “good” business have blinded those within the organization to its ethical issues. The CSR movement has created a false sense of ethics, defined by lax standards imposed on ideological bases with political undertones. A movement of good intentions has spawned businesses with false senses of morality that ignore the basic seven questions that should be applied universally, all without the problems of clarity, conflicts, and imprecision of CSR.

IV. FINAL THOUGHTS AND CONCLUSIONS: THE SOCIAL RESPONSIBILITY OF BUSINESS IS TO AVOID SOCIAL RESPONSIBILITY

A. What CSR Hath Wrought

The landing point of CSR history on the social media trend carries a danger of self-destruction. As companies struggle to address whatever seed planted via social media forces as it grows into a full-blown public relations crisis, they twist

583. Emily Flitter, Binyamin Appelbaum, & Stacy Cowley, Rebuking Wells Fargo for Abuses, Fed Demands Shake-Up of Board, N.Y. TIMES, Feb. 3, 2018, A1. In issuing the order, then-Fed chair, Janet Yellen noted, “We cannot tolerate pervasive and persistent misconduct at any bank and the consumer harmed by Wells Fargo expect that robust and comprehensive reforms will be put into place to make certain that the abuses do not occur again.” Ryan Tracy & Emily Glazer, Fed Orders Wells Fargo To Change Board, WALL ST. J., Feb. 3–4, 2018, at A1.
586. Id.
587. Id.
588. Id.
in the wind. Whatever strategic plans many businesses might have had are lost to the whims of these social media demands. For example, Disney has internal strife because of concerns that their cartoon storylines about princesses, damsels, and blasted princes to the rescue. No matter what storyline Disney chooses, someone takes offense. Because of internal concerns about keeping princesses relevant, one of Disney’s latest animated features, “Ralph Breaks the Internet,” showed Snow White with Coke-bottle glasses, Cinderella breaking her glass slipper and using it as a weapon against another girl, and Rapunzel asking, “Do people assume all your problems are solved because a big, strong man showed up?”

Disney employees let out an audible gasp. What they could see was destruction of a successfully cultivated princess franchise, one of women, men, relationships, and love. However, that franchise has been labeled as outdated and criticized. Parents are concerned when a prince kisses Snow White as she is sleeping, a #MeToo movement moment. The Disney experience represents a type of business paralysis that results from the hither and yon beckoning demands of social media. There is outrage in every direction. Starbucks joins the anti-straw movement in a very public way only to find attention focused on the plastic linings in its recycled paper cups. Now Starbucks is moving to reusable cups. However, customers actually do not want reusable cups, so Starbucks has been forced to scale back its reusable goal from 25 percent of all sales to 5 percent.

Companies cannot survive in an environment in which they are bending to the desires reflected in social media. Long-term strategic planning is hampered when the issues emerge suddenly. For example, the plastic battle has now shifted to coffee pods. It is apropos that the conclusions on CSR here end with examples that are cartoonish and irresolvable. In this era, issues, products, statements, charities, and even the weather can set off a social media firestorm against a business. A business that responds to instantaneous CSR demands will not survive. When emotional outbursts driven by ideology or political views are guiding businesses, those running the business are not in charge. The basic principles of risk aversion and studied decision processes are pushed aside in order to quell insurrection. Further, there is little to no follow-up on the impact of business decisions that are responsive to external demands. Social media silence is the metric used to determine the efficacy of sudden strategic swerves.

590. Id.
591. Ziai Meyer, Starbucks Plans to Scrap Plastic Straws by 2020, USA TODAY, July 10, 2018, at 1B.
593. Dalvin Brown, Controversy Brews Over Coffee Pods, USA TODAY, Mar. 15, 2019, at B1. CSR coffee maker, Green Mountain Coffee is at the heart of this latest Twitter surge.
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The usual process of collecting data on the impact of succumbing to the rapid reaction movements is put aside with the hope that a follow-up PR campaign can restore any loss of trust. The “pleasing all the people all of the time” axiom is applicable here, with the end result being no one is pleased.

B. The Strength of Being Just an Ethical Business, Not a CSR Automaton

In one of his latest iterations on the role of business in society, Freeman points to the need for a new capitalism. The three cornerstones of his new capitalism are:

a. Profits aren’t the purpose of business
b. Business ethics isn’t a contradiction
c. People are complicated

I. Profits Are the Purpose of Business, But Profits Are a Product of Decisions for Long Term Survival

Freeman hauls out the old chestnut associated with everyone’s favorite CSR companies (John Mackey [Whole Foods], Steve Jobs [Apple], and Bill Gates [Microsoft]) as examples of the real purpose of business: They are on fire about their business ideas. Mackey defines “on fire as the desire “to create something of relevance, resonance, and permanence – a business that will far outlive them, that delivers real value of multiple kinds to everyone it touches.” Thus, the real purpose of business is not to make as much money as possible. The real purpose is to serve society with a new store, new products, and new conveniences. Freeman asserts that these businesses did not begin with the idea of making money. Rather, their founders were driven by their passions. Freeman overlooks, in his limited data set, that none of them turned down the money either. Facebook began with a mission of connecting the world, which was perhaps a passion of Mark Zuckerberg. Facebook ended up being an international marketing firm that sold data in ways not imagined by its users. Mackey sold his passion to Amazon. The passion to create the difference between an iPhone 8 and an iPhone 10 is not as compelling as the creation of the initial Apple computer. The passion of Microsoft seems reduced to renewing as many Office

595. Id. at 8-10.
596. JOHN MACKAY & RAJENDRA SISODIA, CONSCIOUS CAPITALISM 89 (2011).
597. Id.
598. Freeman’s idealism gets in the way of reality. The owner of a bail bond business or a septic tank pumping service did not begin with the passion of running an operation that involves worrying about whether someone charged with a crime will show up for court or the desire to pull who knows what from the ground. They saw a need, they needed income, and they built a business doing, in both cases, what amounts to terribly worrisome and risky work that involves less-than-desirable interactions.

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subscriptions as possible. Whatever drove the founders initially, a business survives because of its profits and dies without them.

The fire in entrepreneurs gives them their energy; the profits give them their reason to keep going and their rewards for doing so. John Mackey, founder of Whole Foods, explains the fire as follows, “But I’ve known lots of entrepreneurs in my life—hundreds of them—and very few of them started their businesses simply to make money. They had some kind of dream or vision they wanted to realize.” 599 Adam Smith’s simple butcher and baker motivational mantra remains true nearly three centuries later. 600 One loves carving meat and the other is an artist with dough; both still need the cash. The other flaws in the Freeman premise include the fact that while the original founders of the same cited businesses were bundles of idealism, energy, and entrepreneurial spirit, they are still accountable to those who work for them and those employees are in it for the cash. 601

The second part of the Freeman framework is that business ethics is not a contradiction. 602 This part, broken down into two parts for purposes of discussion here, is really stakeholderism and CSR restated. Freeman’s own words describe it best:

You need employees who are not there just to make a paycheck but are there to make your business better. You need them not to be unengaged or actively engaged, as many studies have found in the case of a lot of businesses. 603

There is an idealism that results in a fallacy in this cornerstone of the new capitalism. Where exactly will these employees be recruited? HR departments do not exist to plan enlightening activities for a dedicated work force. 604 They
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exist to deal with absenteeism, tardiness, harassment, evaluations, and the host of issues that result when humans work for someone else. 605 Unengaged employees who perhaps show up is not what studies show; it is what every business experiences and manages. This fallacy assumes that there are employees with the fervor of Barney Fife and the honesty of Bob Cratchett. When Friedman was challenged in an interview about the need for government intervention and controls rather than reliance on free market, his response was that there are no angels in government to trust to run things. 606 One cannot assume the presence of angels in humans, whether as employees or in government. Employees are not engaged in their work as Freeman envisions, and government corruption in awarding projects and in providing adequate oversight was documented above in Section III. B. 1.

Freeman describes the second part of part two of his new capitalism as follows:

And, you need to be a good citizen in the community. If you’re not a good citizen in the community, communities will pass restrictive laws or ordinances to prevent your business from operating well there. 607

It remains unclear what a good citizen is in Freeman’s model. If Professor Freeman equates being a good citizen with CSR, the history presented here that his model has inherent weaknesses. The stunning aspect of the full history and current CSR movement, apart from its sheer imprecision, is its focus and reliance on sustainability when, as revealed in the case studies here and throughout its history, the biggest problems in business result from the most basic ethical breaches. While Freeman speaks of, perhaps aspiring to, an engaged workforce, major U.S. corporations are engaged in treatment of employees and vendors that

605. From the time that the concept of employee engagement was introduced (MARCUS BUCKINGHAM & CURT COFFMAN, FIRST BREAK ALL THE RULES (1999)), HR has been pursuing the elusive goal of employee engagement. See Shuck & Wollard, supra at note 604; see also 2017 Employee Job Satisfaction and Engagement: The Doors of Opportunity Are Open, SOC. HUM. RESOURCE MGMT. (Apr. 24, 2017), https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Pages/2017-Job-Satisfaction-and-Engagement-Doors-of-Opportunity-Are-Open.aspx. The studies show that employee engagement (however it is defined, and like CSR, the definitions differ) matters, but despite all efforts, employee disengagement remains as high as 89%. A Gallup 2018 survey finds that 34% of employees are “engaged.” Only 13% are engaged – and that figure is down for 2018. Jim Harter, Employee Engagement Is on the Rise in the U.S., GALLUP NEWS (Aug. 18, 2018), https://news.gallup.com/poll/241649/employee-engagement-rise.aspx.

606. In a February 11, 1979 interview on The Phil Donahue Show, Friedman had the following exchange with Mr. Donahue. Phil Donahue: [in speaking about capitalism and the free market] Seems to reward not virtue as much as the ability to manipulate the system. Milton Friedman: And what does reward virtue? You think the Communist commissar rewards virtue? You think a Hitler rewards virtue? Do you think . . . American presidents reward virtue? Do they choose their appointees on the basis of the virtue of the people appointed or on the basis of political clout? Is it really true that political self-interest is nobler somehow than economic self-interest? You know I think you are taking a lot of things for granted. And just tell me where in the world you find these angels that are going to organize society for us? Well, I don’t even trust you to do that.” Milton Friedman & Phil Donahue, Phil Donahue Interviews Milton Friedman, PHIL DONAHUE SHOW (Feb. 22, 1979).

607. Id.
harks back to issues from the early 1900s that GE addressed voluntarily prior to labor laws. There are companies that hold stellar CSR reputations that are using trucking companies that, in turn, are using independent contractor drivers with so many financial constraints that the drivers are violating federal anti-fatigue laws. 608 Target, Costco, Hewlett-Packard, and many others have benefited from the exploitation of these drivers in terms of the lower costs they pay for transporting their merchandise. 609 The violations by the trucking companies for excessive trucker hours are as high as 500 in three years. 610 Worse, in what amounts to what could be described as a feudal sort of indenture, the companies finance the truckers’ rigs and charge so much in lease payments that drivers feel that they have “no choice” in terms of compliance with the law because the companies repossess their rigs if they miss payments. 611 Good citizenship generally begins with obeying the law, not with just philanthropic work or sustainability efforts.

The difficulty with the new Freeman model is its presumption of idealism. Perhaps businesses could focus on law before moving on to saving the planet and banishing straws. Indentured servitude is some distance from an engaged workforce. There is quite a distance between Freeman’s model and current business compliance. If we examine, however, the companies using the trucking companies with these “engagement plans” for drivers, they are the companies touting their contributions to causes, efforts, and, of course, their dedication to the planet. Of the two dozen retailers contacted for comments on the trucker leasing program, seventeen declined to comment or offered a terse statement, such as Nike, “I wanted to let you know we aren’t going to be able to help with this story.” 612 Home Depot noted that it was investigating the issue. 613 There are no angels among the saints of CSR.

2. Business Ethics is a Contradiction in Terms When CSR is the Standard for Business Ethics

Freeman is correct in the sense that business ethics need not be an oxymoron. However, his focus is on CSR as the measurement of ethics, and, as the history presented here reveals, a company carrying the imprimatur of CSR (from whatever screens or certifications have been applied) may not be acting ethically in the sense of virtue ethics. The focus on the basics of business ethics, such as

608. Brett Murphy, Trucker Tells His Story—and Is Fired for It, USA TODAY, July 10, 2017, at 1A.
609. Brett Murphy, Retail Giants Enabled Trucker Exploitation, USA TODAY, June 30–July 2, 2017, at 1A.
610. Id. Morgan Southern is the trucking company with that total.
611. Id. Drivers who complain face retaliation in terms of assignments, something that reduces their income and causes them to miss payments, which then leads to repossession of the rig as well as the loss of all lease payments made. Id.
612. Murphy, supra note 609.
613. Id.
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compliance with the law, honesty, and honoring promises, has been lost as companies have taken on the shield of CSR initiatives as a means of deflecting from their current conduct and practices. Fraud by a solar company is no less of a fraud because it is a solar company.

3. People May be Complicated, but the Free Market Reins in Their Tendencies Toward Corruption

Freeman’s proposal for a new capitalism remains unclear from his summary of his new theory. The basic thrust of his new capitalism remains the stakeholders, but he adds that stakeholders are interdependent.614 Indeed, they are. The latter acknowledgement is critical. As this discussion has noted, stakeholders are indeed interdependent, but CSR dictates which of those stakeholders should hold final sway, even at the expense of the other stakeholders. The priority of the CSR standards in that interdependence does not permit consideration or discussion of the impact on the stakeholders who are not a focus of the CSR movement. There remains the reality that not all stakeholders will be satisfied with true stakeholders analysis, including a discussion of the unintended (or intended) consequences on the stakeholders whose needs will not be addressed.

The free market has mechanisms for curbing even the activities that CSR seeks to force upon businesses. If we look back to the great chicken dilemma, there is a current dilemma that the free market has caused so-called corporate farmers to address. The chicken growers have been breeding birds that grow faster on less feed, a classic cost-saving approach. 615 These genetically engineered chickens have large breasts, which means wider margins per bird. However, the result has been what the industry refers to as either “spaghetti meat,” because the chicken breasts fall apart easily, or “woody breasts” that are leathery.616 The industry is now spending $200 million in order to identify and divert these poor quality chicken breasts.617 For those who have opposed genetic engineering, the free market accomplished what they were unable to force upon the growers. Consumers did not like the chicken and refused to buy it. The breasts are in everything from chicken strips to nuggets, and consumers are complaining about the quality of the meat.

Businesses sometimes have to make decisions that irritate one group of stakeholders. For example, General Motors is focusing on electric cars in the future. Such a decision pleases those in the CSR movements and a host of NGOs. But a battery cell for medium batteries still costs $13,000 and takes 8 hours to

614. Freeman, supra note 594, at 11-12.
616. Id.
617. Id.
That amount of $13,000 is what a consumer could shell out as the total cost for a gas-fueled Hyundai. To level the competitive playing field, the government has stepped in with subsidies. Indeed, GM is demanding that the government step in and subsidize, and continue to subsidize even when the government has eased regulations of fleet fuel economy because once a carmaker has made the investment in electric vehicles, well, whether they sell or not, the companies want compensation. Taxpayers foot the bill for GM’s government-mandated and supported projects. We all pay for the electric cars, not including the cost of power generation and all those affected by its societal costs so that the subsidized car owner can complete the eight hours of charging. Those who buy the cars, those who pay taxes, those who generate electricity, those who build the batteries, those who produce and sell gas-fueled cars, and those who have to sit around in Flagstaff, Arizona, waiting for a charging station to open up for their Teslas are all stakeholders in GM’s CSR decision to focus on electric vehicles. There certainly is interdependence, but who wins the priority contest as top-rung stakeholder?

Clif Bars had a strategy of “going organic,” but soon found itself on the defensive because in sourcing cacao from small farms in West Africa, it learned that child slavery was a common source of labor on those farms. Its competitor, KIND (Mars Candy), began an initiative to have cacao buyers work together to not use such farms. But Clif was calling out Mars to join them in “going organic.” Which stakeholders win the battle over cacao sources and farming practices? Ironically, the lack of clarity on stakeholder priorities gives competitors an edge in the market with certain buyers. CSR conflicting objectives results in a resort to the free market to determine which stakeholders win because of the companies’ need for profits.

Boeing has signed an agreement to sell jetliners to Iran, a deal worth an estimated $25 billion. The deal was one of the first following the U.S. lifting economic sanctions against Iran. The stakeholders include Boeing employees, Boeing suppliers, and the communities where Boeing factories are located. However, the stakeholders also include the people of Iran who are living under

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619. Id.
620. Shortly after announcing its commitment to electric vehicles, GM announced that it would be closing plants and cutting jobs (14,800). The employees as stakeholders were lost in this CSR/government shuffle. Mike Colias, GM to Close Plants, Cut Jobs, WALL STREET J., Nov. 27, 2018, at A1.
623. See supra note 384 for details on the Clif full-page ad challenges to Mars.
624. Kim Hjelmgard, Nathan Bomey, & Oren Dorell, Boeing Signs a Deal to Sell Jetliners to Iran Air, USA TODAY, June 22, 2016, at 1B.
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despotict leaders and in the absence of the most basic human rights. The U.S. lifted the sanctions as part of an agreement to achieve denuclearization of Iran. Under a different U.S. presidential administration, the sanctions were reinstated. The stakeholders affected were all those in the Boeing economic chain, from its employees to its vendors, but they lost out to stakeholders who re-imposed the sanctions because of Iran’s failure to stop production of nuclear weapons. Who wins the battle varies in situations and changes over time, and it remains unclear that there is any deliberative body or vote that decides which stakeholders prevail.

If we examine both of these scenarios from a free-market perspective, the scenarios unfold differently. With electric cars, when their development is controlled by demand, not subsidy, companies make choices based on the needs and desires of consumers, not on the basis of central planning. The infrastructure for charging facilities, for their location, develops in tandem with sales. As demand increases, so does competition. As competition increases, one of those competitors will develop something cheaper than a $13,000 battery.

In the second example, businesses should make decisions about entering into contracts in countries with unstable regimes on the basis of risk, not because governmental sanctions have been lifted. With or without denuclearization agreements or sanctions, economic factors of risk alone signal instability that runs counter to the need for the long-term planning and production of airliners. Governmental imprimatur do not alleviate business risk nor should governmental encouragement be the impetus for undertaking contractual risks in countries where there are only theoretical promises of governmental restraint.

There are no angels in government, business, or the CSR movement. Self-interest motivates complicated people across political and ideological sectors as well as in business. However, the current CSR movement has created a risk by permitting the emotions of the moment to fuel social media movements that seek to impose responses to issues that, because of their risks, require deeper thought and more input. Businesses that weave to and fro, trying to satisfy the demands of the moment, find that they harm their ability to adhere to strategic plans and their very purpose, which is to operate their businesses in a way that promotes survival, or in popular terms, their sustainability. Ironically, the sustainability of business is at risk without the ability of businesses to make decisions based on measurable market factors and trends.

Pursuing the seven areas of ethics proposed here allows businesses to operate with honor and forthrightness. Given the social media mania and dueling

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boycotts, every business will, at some point, encounter the wrath of Twitter. If businesses succumb to social media pressures, despite the wisdom of the action demanded, they risk their survival and impose a form of governance on society that ignores the stakeholders it purports to serve. However, steady leadership of a business that behaves with basic principles of Aristotelian virtues creates reputational capital with the moral authority and necessary confidence to explain and resist sudden shifts and demands that come with the changing winds of CSR.