

Modern Anti-Capitalist Thought in Corporate Social Responsibility

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INTRODUCTION

Throughout the last few decades, and particularly after the Global Financial Crisis in 2008, the eyes of the world have been on the corporate sector and the ethical guidelines that it follows, particularly in terms of corporate governance. Corporate governance schemes determine how companies are directed and determine how each board of directors sets the values and goals of the company.¹ While distinct from day-to-day operations, corporate governance sets the tone for the corporation. The rise of two major movements nearly coincide with each other: the focus on corporate social responsibility (CSR) as part of corporate governance and the anti-capitalist movement. The legal field is not immune to these movements, and attorneys who work with corporations may find themselves at a crossroads between the two.² When faced with corporate governance decisions that will impact a corporation's CSR standards, attorneys should assess their views on capitalism and the anti-capitalist movement to best serve their clients or employers, as well as advancing social good and protecting the consumer.

CSR is “about developing a strong company culture that empowers employees to do social good and embrace diversity by being kind and open-minded.”³ It is a set of internal procedures:

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1. *What is Corporate Governance?*, INST. OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES, <https://www.icaew.com/technical/corporate-governance/principles/principles-articles/does-corporate-governance-matter> [https://perma.cc/P54A-LXQP] (last visited Nov. 20, 2021).

2. *See Corporate Social Responsibility Compliance in 2018, and Beyond – An Overview for In-House Legal Counsel*, ROPES & GRAY (Mar. 12, 2018), <https://www.ropesgray.com/en/newsroom/alerts/2018/03/Corporate-Social-Responsibility-Compliance-in-2018-and-Beyond-An-Overview-for-In-House-Legal-Counsel> [https://perma.cc/XX8U-YESF]; Rex Nutting, *Opinion: Capitalism's Dirty Secret: It Was Built By Lawyers, Not By The 'Invisible Hand'*, MARKETWATCH (May 2, 2019), <https://www.marketwatch.com/story/capitalisms-dirty-secret-it-was-built-by-lawyers-not-by-the-invisible-hand-2019-05-01> [https://perma.cc/JTP3-EZ7B]; Aamna Mohdin, *Legal Threat Over Anti-Capitalist Guidance for Schools in England*, THE GUARDIAN (Oct. 1, 2020) <https://www.theguardian.com/education/2020/oct/01/legal-threat-governments-anti-capitalist-guidance-schools-political> [https://perma.cc/URL6-HNTA].

3. Carl Hung, *Three Reasons Why CSR and ESG Matter to Businesses*, FORBES (Sept. 23, 2021), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/09/23/three-reasons-why-csr-and-esg-matter-to-businesses/?sh=6358458e39b9> [https://perma.cc/MF7W-MMGD].

[W]hereby commercial entities deploy social and environmental policies that go beyond their formal legal duties and potentially beyond their goal of maximizing profits for shareholders In this respect, CSR is at once a field of action that presumably exists outside law and a terrain constitutive of new types of legality.⁴

Because CSR exists outside law and is concerned with the social good, it must holistically consider all facets of the corporation and the societal culture and trends the corporation is adapting to.⁵

As corporations continue to refocus on CSR to benefit both the corporation's finances as well as public image and impact, more and more attorneys will face the dilemma of determining what actions will best serve both the corporation and the public. An attorney's decision-making should be grounded in a consistent ideological and ethical foundation influenced by philosophers and political economists.

Anti-capitalist thought is a direct rejection of and response to the profit-driven focus of capitalism.⁶ Anti-capitalism is more concerned with promoting the social good for all, and this shift in priorities is reflected in modern times, particularly with younger people.⁷ Particularly in light of the younger generation's gravitation toward anti-capitalism, this Note proposes anti-capitalism as the attorney's decision-making foundation.

This Note will present the landscape of capitalist and anti-capitalist philosophy, as well as a broader analysis of the modern political economy of anti-capitalism, to aid in informing attorneys about how an anti-capitalist philosophical foundation would positively impact the development and implementation of CSR standards. Part I elaborates on a few examples of failures of modern capitalism. Part II explains the foundations as to why modern capitalism cannot sustain itself as it is and how CSR may serve as a solution to this issue. Part III provides the context for this Note by laying out a broad philosophical, political, and economic overview of anti-capitalism and will put forward the tie between anti-capitalism and the corporate legal field and why it matters for CSR. Part IV proposes solutions for situations that corporate social responsibility officers and corporate lawyers may find themselves in when creating and implementing CSR standards to best serve the corporation as informed by anti-capitalism, while also respecting the *Model Rules of Professional Conduct*.

4. Ronen Shamir, *Capitalism, Governance, and Authority: The Case of Corporate Social Responsibility*, 6 Ann. Rev. L. & Soc. Sci. 531, 532 (2010).

5. *Id.*

6. See JAMES FULCHER, *CAPITALISM: A VERY SHORT INTRODUCTION* 2 (2nd ed. 2015).

7. See Clare Malone, *The Young Left's Anti-Capitalist Manifesto*, *FiveThirtyEight* (Jan. 22, 2019), <https://fivethirtyeight.com/features/the-young-lefts-anti-capitalist-manifesto/> [<https://perma.cc/B4SZ-D4TD>].

I. FAILURES OF CORPORATE GOVERNANCE STANDARDS UNDER MODERN CAPITALISM

As it stands, corporations remain susceptible to corruption and greed, whether internally driven by a board of directors or a CEO, or externally driven by share prices.⁸ Massive corporations have been rocked by scandals that indicate internal control failures to the detriment of corporation and consumer alike: Wells Fargo, a corporation that generated an image of a hometown bank for over a century;⁹ Boeing, a well-established player in the aircraft market;¹⁰ and Theranos, a blood testing company perceived as “groundbreaking” and valued at billions of dollars before its ultimate end with the fraud indictments of its leadership.¹¹

A. WELLS FARGO

In 2013, when the Los Angeles Times initially broke the story of Wells Fargo bankers inflating sales numbers and opening pressured or unauthorized accounts for various financial products, the scale of the issue was still unclear.¹² Over time, investigation revealed that a “pressure-cooker” sales environment impacted millions of existing Wells Fargo customers, who were signed up for checking and savings accounts, credit cards, mortgages, and credit lines that they “didn’t want, didn’t need, and often didn’t even know about.”¹³ The roots of the issue were unreasonable sales quotas, increasingly harsh expectations of bankers and managers, and a dissemination of pressure from the very top down to the tellers to enroll or cross-enroll customers in accounts.¹⁴

One business reporter, when investigating what these pressures were, spoke to a Wells Fargo banker who explained that: “There were only about 11,500 potential customers in the area and 11 other financial institutions. Her quotas totaled

8. See e.g., *Corporate Greed*, AFL-CIO, <https://aflcio.org/issues/corporate-greed> [https://perma.cc/NZ7E-9U6V] (last visited Jan. 9, 2022); Chet Wade, *Big Business: Greed Still Good, But So Are Other Things*, FORBES (Aug. 19, 2019), <https://www.forbes.com/sites/chetwade/2019/08/19/big-business-greed-still-good-but-so-are-other-things/?sh=4ce186f93066> [https://perma.cc/6CNV-W4Y7]; Lawrence Mishel & Julia Wolfe, *CEO Compensation Has Grown 940% Since 1978*, ECON. POL’Y INST. (Aug. 14, 2019), <https://www.epi.org/publication/ceo-compensation-2018/> [https://perma.cc/J872-3PVP].

9. Bryan Tayan, *The Wells Fargo Cross-Selling Scandal*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 6, 2019), <https://corpgov.law.harvard.edu/2019/02/06/the-wells-fargo-cross-selling-scandal-2/> [https://perma.cc/3LTF-9PBH].

10. Matthew Yglesias, *The Emerging 737 Max Scandal, Explained*, VOX (Mar. 29, 2019), <https://www.vox.com/business-and-finance/2019/3/29/18281270/737-max-faa-scandal-explained> [https://perma.cc/93VR-2WLF].

11. Rachel Lerman & Jacob Bogage, *Blood, Labs, and Fraud: Theranos’s Elizabeth Holmes is on Trial*, THE WASH. POST (Sept. 23, 2021), <https://www.washingtonpost.com/technology/2021/08/26/elizabeth-holmes-theranos-trial/> [https://perma.cc/VV32-CKVF].

12. See E. Scott Reckard, *Wells Fargo’s Pressure-Cooker Sales Culture Comes at a Cost*, L.A. TIMES (Dec. 21, 2013), <https://www.latimes.com/business/la-fi-wells-fargo-sale-pressure-20131222-story.html> [https://perma.cc/8B2G-NY8G].

13. Justin Peters, *How Wells Fargo Became Synonymous with Scandal*, SLATE (Nov. 28, 2020), <https://slate.com/business/2020/11/wells-fargo-scandal-history-karen-attiah.html> [https://perma.cc/3Z9T-TFMA]. See also Reckard, *supra* note 12.

14. Tayan, *supra* note 9.

12,000 daily solutions each year, including almost 3,000 new checking accounts. Without fraud, the numbers just didn't work."¹⁵ The quotas, which at some points were logistically impossible, were enforced harshly from all levels of management, to the detriment of millions of consumers and thousands of Wells Fargo employees.¹⁶ A January 2020 Office of the Comptroller of the Currency (OCC) report found that the business model 'imposed intentionally unreasonable sales goals and unreasonable pressure on its employees to meet those goals and fostered an atmosphere that perpetuated improper and illegal conduct.'¹⁷

For the consumer, even one who had accounts open that they did not want, this did not have much of an impact beyond a betrayal of trust, and the financial impact was minimal.¹⁸ Wells Fargo continues to operate and thrive today. However, the ramifications for corporate culture, corporate governance, and financial institutions were wide-reaching. Specifically, this scandal exposed a weakness in Wells Fargo's corporate governance and ethics schemes, and a broader weakness in the corporate system—both were still built on the altar of profit and success that threw ethics aside as a sacrifice.¹⁹ The product of this scandal—increased sales numbers and inflated, fraudulent success—allowed Wells Fargo to make gains in reputation and value.²⁰ As business reporter Bethany McLean described:

It enabled Wells Fargo to go to Wall Street, its investors, and say, 'Look, we're better than all these other financial firms because our customers do so much more business with us than they do with other financial firms'. . . . It was part of Wells Fargo's brand, and it was part of the reason that Wells Fargo stock for a long time traded at a higher multiple—meaning it was more valuable than other financial firms, because investors believed they'd figured out the secret sauce, that Wells had this miraculous way of getting customers to do more business with them.²¹

This was not an issue that Wells Fargo was not aware of, nor unprepared for—Wells Fargo had controls in place to prevent abuse, handbooks that explicitly forbade the practices that occurred, and incentive systems that were built to discourage this kind of behavior.²² Upper management, from the board of directors and CEO down, was built to ensure that no single person was in charge of decisions

15. Peters, *supra* note 13.

16. *Id.*

17. *Id.*

18. Tayan, *supra* note 9.

19. Peter Whoriskey, *Former Wells Fargo Chief Executive Barred from Banking Industry*, THE WASH. POST (Jan. 23, 2020), <https://www.washingtonpost.com/business/2020/01/23/banned-life-former-wells-fargo-chief-executive-barred-banking-industry/> [<https://perma.cc/6YVX-5LNF>].

20. Peters, *supra* note 13.

21. *Id.*

22. Tayan, *supra* note 9.

and that senior management decisions were made collectively and as a team.²³ In 2017, the board of directors conducted an independent investigation that “sharply criticized the bank’s leadership, sales culture, performance systems, and organizational structure as root causes of the cross-selling scandal” and “blamed management for, ‘tolerating low quality accounts as a necessary by-product of a sales-driven organization.’”²⁴ This scandal touched Wells Fargo from the board to the tellers to the consumers, driven by profit and an executive need for success at all costs.²⁵

B. BOEING

Boeing’s 737 Max scandal revealed another horrific collapse of internal corporate governance—one that ultimately caused the deaths of hundreds. Much like Wells Fargo, Boeing’s board of directors largely side-stepped the initial reports of harm, seemingly considering the issue as one of management rather than of overall corporate governance.²⁶ However, Boeing’s board has largely escaped repercussions for their actions—of the current Boeing board members, seven of the thirteen members were in place during the initial 2011 decisions that directly led to the 737 Max crashes.²⁷

There is, of course, an issue in delineating between what issues may have arisen from a day-to-day business decision versus a board decision—likely because it is almost always difficult to pin down the actual role of any board of directors—“[b]ut one responsibility surely is to set goals and incentives that serve a company’s long-term interests,” and these goals and incentives drive all decisions in a corporation.²⁸ The corporate governance system at Boeing, stating that no director should hold more than four board seats, only prevented so much over-extension of board members in their management—four board seats is certainly enough to stretch any person past the point of making careful and informed decisions for all board duties.²⁹

It is clear that Boeing’s board could not manage this, as indicated by a lack of action after not just the first, but the second 737 Max crash.³⁰ Certainly, pulling the 737 Max design out of the air was costly, tedious, and detrimental to Boeing’s reputation.³¹ But preemptive board action along those lines could have prevented

23. *Id.*

24. *Id.*

25. See Reckard, *supra* note 12.

26. Michael Hiltzik, *Column: Boeing’s Board Shouldn’t Escape Blame in 737 Max Scandal*, L.A. TIMES (Jan. 3, 2020), <https://www.latimes.com/business/story/2020-01-03/boeing-board-bad-management> [<https://perma.cc/C7R5-UBC8>].

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. See generally Leslie Josephs, *Airline Chiefs Grow Frustrated as 737 Max Grounding Costs Near \$1 Billion*, CNBC (Oct. 24, 2019), <https://www.cnbc.com/2019/10/24/airline-chiefs-frustrated-as-boeing-737->

hundreds of deaths had the board acted in a way that had not encouraged the CEO to focus on “reduc[ing] economic risk and bolster[ing] profit” rather than designing a safer aircraft than the 737 Max, not to mention preventing the second crash after becoming aware of the fault that caused the first.³²

C. THERANOS

Perhaps the most sensational of corporate governance failures is the fall of Theranos, the blood testing company led into the ground by CEO Elizabeth Holmes. John Carreyrou, the journalist who broke the Theranos story, described Theranos’ fall from grace as “[o]ne of the most epic failures in corporate governance in the annals of American capitalism.”³³ Holmes allowed the “fake it until you make it” mantra of Silicon Valley to permeate every aspect of the company, building the company value up to \$9 billion in 2015, partnering with Walgreens and almost with Safeway before it was revealed that Theranos’ technology was not capable of what it reported.³⁴ The issues within the company were made clear to upper management and the board of directors:

When two would-be whistleblowers told the Theranos board that Holmes had exaggerated revenue projections, the board considered replacing her with an experienced executive. “They decided the company needed to be led by an adult,” Carreyrou said. But Holmes talked her way out of the decision and prevented subsequent intervention by multiplying the voting rights of her shares to give her 99% of total voting rights.³⁵

Holmes and the former president of Theranos, Sunny Balwani, were later charged with wire fraud for allegedly lying to investors and patients in order to gain investments, which continued to inflate the value of the company and make Holmes millions of dollars.³⁶

These are just a few examples of how a societal valuation of profit over ethics, fundamentally driven by modern understandings of capitalism, undermines corporate governance schemes in burgeoning and established companies across a spectrum of industries. As one journalist noted about Boeing: “The shortcomings of Boeing’s board may have set a standard in 2019, but they’re not unique.

max-grounding-cost-nears-1-billion.html [https://perma.cc/9RXD-ECF2]; David Schaper, *737 Max Scandal Cuts Boeing’s Once Rock-Solid Image*, NPR (Nov. 26, 2019), <https://www.npr.org/2019/11/26/783197253/737-max-scandal-cuts-boeings-once-rock-solid-image> [https://perma.cc/7XMB-M7M5].

32. Hiltzik, *supra* note 26.

33. Sachin Waikar, *What Can We Learn from the Downfall of Theranos?*, STAN. GRADUATE SCH. OF BUS. (Dec. 17, 2018), <https://www.gsb.stanford.edu/insights/what-can-we-learn-downfall-theranos> [https://perma.cc/SY4H-QRJ3].

34. Lerman & Bogage, *supra* note 11.

35. Waikar, *supra* note 33.

36. Lerman & Bogage, *supra* note 11.

Business setbacks generally bring the flaws in a corporation's governance into the open the way a receding tide exposes underwater wrecks to the open air."³⁷

This makes sense, to an extent—America is a capitalist society and market capitalism carries the economy. However, modern capitalism, which values profit over all else, is a far cry from traditional capitalist philosophy and an even further cry from a system that values ethical behavior and serving the consumer, the basis of the marketplace.

II. TRADITIONAL CAPITALISM, HOW MODERN CAPITALISM FAILS ITSELF, AND CORPORATE SOCIAL RESPONSIBILITY AS A SOLUTION

To understand anti-capitalism, there must be an understanding of capitalism, both historically and in its modern form. Over the centuries in which the Western world has engaged in some form of capitalism, the system has been transformed again and again, shifting and morphing in tandem with the world it was changing.³⁸ Capitalism, at its core, is concerned not with any particular activity or course of business, but rather with profit—a capitalist society is one wherein economic activity centers around opportunities to make a profit.³⁹

Profit, however, can be made in a variety of ways and under various circumstances. Beginning with industrial capitalism in the Eighteenth and Nineteenth centuries, capitalism “was anarchic because the activities of capitalist entrepreneurs were relatively unchecked either by organized labour or the state.”⁴⁰ In Europe, regulation was scarce, spawning the creation of labor unions and inspiring the state to begin to regulate worker conditions, a clear move toward the protection of the worker.⁴¹ This move toward worker protection was an early indication that capitalism could, at least in some ways, adapt to society's ethics and expectations. In fact, capitalism would be forced to do so to sustain itself, even if that necessitated some strengthening of the state rather than letting the market be completely free, “for market forces could operate freely only within an orderly society, which required a strengthening of the state at a time when industrial capitalism was generating great disorder.”⁴²

After anarchic capitalism was adapted, there was a distinct shift to a managed capitalism, which “showed that it was possible to protect people from at least some of the worst consequences of the operation of market forces.”⁴³ In the 1980s and 1990s, American society shifted back away from management, though the nature of the American “welfare capitalism” largely undermined the

37. Hiltzik, *supra* note 26.

38. See FULCHER *supra* note 6, at 38.

39. See *id.* at 2.

40. *Id.* at 38–39.

41. See *id.* at 39.

42. *Id.* at 40.

43. *Id.* at 55.

European understanding of managed capitalism in which aspects of welfare were publicly managed, but just as in Britain, inequality increased nonetheless.⁴⁴

Perhaps the biggest change came about through a shift to the still popular “shareholder value” doctrine, which shifted management incentives in order to promote not a long-term investment in the company’s future, but “only to maximize its share price by increasing profits.”⁴⁵ This shift has proven to be rather detrimental: the managerial incentives in the form of their own personal shares removed a degree of separation between owners and managers.⁴⁶ There was an observed practice of companies “divert[ing] their operations into complex financial activities and fraudulent inflation of their share prices.”⁴⁷

Though there may be a desire to blame the malpractice that followed on individuals, “Geoffrey Ingham has argued that [the malpractice was] actually symptomatic of ‘the financialization of modern capitalism in the sense of the increasing dominance of financial practices and the fusion of business enterprise with financial engineering.’”⁴⁸ This is where modern capitalism finds itself: as a marketized version that allows for exploitation of factors outside of the corporation in order to increase corporate financial value.⁴⁹

This is not sustainable in the long term and, if left unchecked, indicates a process of decline caused by capitalism itself:

Capitalist enterprises can only make profits because they pass on the massive environmental, infrastructural, and social costs of their operations to society Ironically, in pursuit of short term profits private capital uses its considerable power to promote policies that actually weaken the institutions and structures on which capitalism’s long term viability rests. According to Craig Calhoun: “[C]apitalism is destructive of conditions on which capitalism depends—and extreme financialization and neo-liberalism exacerbate this tendency. The future survival of capitalism depends on whether ways can be found to limit or reverse this destruction without eliminating capitalism.”⁵⁰

At this rate, capitalism is running itself into the ground by relying on the processes that it is actively destroying: the health of the environment, social stability, and equality.⁵¹ If capitalism cannot adapt and change itself to match modern wants and needs again as it has in the past, the decline of capitalism is inevitable.⁵² How, then, must capitalism change? Capitalism relies heavily on outside

44. *Id.* at 64–65.

45. *Id.* at 68.

46. *Id.*

47. *Id.*

48. *Id.* at 69.

49. *Id.*

50. *Id.* at 123.

51. See Craig Calhoun, *What Threatens Capitalism Now? DOES CAPITALISM HAVE A FUTURE?* 89, 99 (2013).

52. See FULCHER, *supra* note 6, at 123–24.

actors to bear the costs of necessary conditions such as infrastructure or damage done by the corporation, like damage to the environment by pollution—without those outside actors, the corporation cannot sustain itself, and the outside cannot support these costs forever.⁵³ As Calhoun states: “Capitalism has flourished, and secured widespread legitimacy, on the basis of institutions and social relations that have been damaged in recent decades; its renewal will depend on their renewal.”⁵⁴

Capitalism, to maintain its standing as the dominant economic system, “relies on critiques in order to alert it to threats, to neutralize opposition, and, moreover, to develop new moral justifications for the increase of profitability.”⁵⁵ CSR has emerged as a response to those critiques, and can be used to respond to the previous critiques.⁵⁶ Renewal of institutions and social relations is the concern of CSR schemes, which serve the two-fold purpose of aligning the corporation with what is considered “right” and creating a profitable business strategy.⁵⁷ The use of a CSR scheme to renew and support outside institutions rather than a sole focus inward aligns with classic tenets of capitalist philosophy as well; in his *Two Treatises of Government*, John Locke articulated that what we now understand as a capitalist system includes a duty to preserve mankind.⁵⁸ It is the ultra-modern, hyper-profit focused version of capitalism that does not align with this, and now necessitates a mass overhaul in order to preserve itself in the long-term.⁵⁹

III. BASICS, TRADITIONS, AND MODERN TRENDS OF ANTI-CAPITALISM

If capitalism cannot sustain itself, it follows that operating within a strictly capitalist mindset will not allow for the changes that are required. This Note’s proposed solution is that an attorney should go throughout their work with a mindset that, while operating within a capitalist system, embraces anti-capitalism in CSR schemes. Capitalism is the default not because of human nature, but rather because of tradition, and “even under advanced industrial conditions private ownership of production existed side-by-side with public ownership”⁶⁰ Discussions of this form of capitalism—one that recognizes the role that public ownerships and society as a whole plays rather than a corporate individualist viewpoint—take place from a more classical utility point of view, which argues that “a (capitalist) market society is not only a free society . . . it is also a

53. See Calhoun, *supra* note 51.

54. *Id.* at 100.

55. See Shamir, *supra* note 4, at 537.

56. *Id.*

57. *Id.* at 543.

58. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 31 (McMaster University Archive of the History of Economic Thought 1999) (1689); *Locke’s Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 6, 2020), <https://plato.stanford.edu/entries/locke-political/#Bib> [<https://perma.cc/PF3D-P2BY>].

59. See, e.g., Calhoun, *supra* note 51, at 99-100; FULCHER, *supra* note 6, at 123-124.

60. SIMON TORMEY, ANTI-CAPITALISM: A BEGINNER’S GUIDE 14 (2013).

productive society. It works, and in working it provides employment, dynamism, opportunity.”⁶¹ This form of capitalism can benefit from a reformist anti-capitalist influence.

Reformist anti-capitalism, while influenced by radical anti-capitalism, does not call for “a commitment to *a substantial or complete transformation of global capitalism*.”⁶² Anti-capitalism is not like other movements, ideologies, or systems: it is a patchwork of “various ideological currents . . . [and] forms of activism and different types of grouping that consciously eschew ‘ideology’ altogether.”⁶³ Reformist anti-capitalism is considered by others to be a more mild version of anti-capitalism, one referred to broadly as “social democracy,” which “describes all those committed to making capitalism work for the interests of society generally, as opposed to the interests of big business and the well-off.”⁶⁴ Social democracy is a form of anti-capitalism that can *influence* capitalism to morph into something better and, as a response to the above challenges identified with sustaining capitalism, to prolong it overall.⁶⁵

Social democracy fits neatly with CSR schemes, as:

Social democracy thus enacts a kind of social *quid pro quo*. Business is able to get on with making money as long as in doing so it helps society and makes the lives of ordinary people, those who work for ‘business’, better. In turn business is furnished with a workforce that is better educated, healthier and thus is less likely to regard continuing inequalities as a reason to resist the *status quo*.⁶⁶

In order for capitalism to renew the institutions it relies upon in order to continue to function, this *quid pro quo* must be leveraged to its fullest degree, and it must be presented in a way that actually encourages society to participate; current society will accept nothing less, particularly as the younger generations come of age.⁶⁷ The younger generations, particularly the young left, are openly and loudly uncomfortable with the current free market capitalist system, and they are mobilizing against it in large numbers.⁶⁸

Modern society and the younger generations will not be satisfied with a *quid pro quo* that does not treat economic growth as “a means to an end, which is the enrichment of society and the development of equality of opportunity” at the least.⁶⁹ The corporate attorney, tasked with creating and maintaining this *quid pro quo* through CSR, must not only be aware of this, but must also actively

61. *Id.* at 29.

62. *Id.* at 77.

63. *Id.* at 75-76.

64. *Id.* at 89.

65. *Id.*

66. *Id.* at 90.

67. See Malone, *supra* note 7.

68. *Id.*

69. TORMEY, *supra* note 60, at 90.

incorporate it.⁷⁰ Though it may seem counterintuitive to promote corporate growth and success by incorporating anti-capitalism, it is the only way to prevent capitalism from collapsing in on itself as it will on its current trajectory.⁷¹

The reformist, social democracy that would revive capitalism is not as radical as Marxism or anarchism, but it is still a form of anti-capitalism, and is still influenced by radical thinking that cannot be ignored. Marx, in *The Communist Manifesto*, observed a phenomenon that reflects the current state of capitalism eroding its own foundations:

Modern bourgeois society with its relations of production, of exchange and of property, a society that has conjured up such gigantic means of production and of exchange, is like the sorcerer, who is no longer able to control the powers of the nether world whom he has called up by his spells.⁷²

Emma Goldman, in her writing on anarchism in 1908, stated that “[a]narchists are by no means passive spectators in the theater of social development; on the contrary, they have some very positive notions as regards to aims and methods.”⁷³ Echoes of this are found in modern anti-capitalist thinking. Maurice Mitchell, the national director of the Working Families Party, explained that:

We’re in a moment of political realignment and it’s disorienting People are looking for solutions, and people instinctively understand—even people working in centrist think tanks—that the solutions of the past will not take us out of this moment of realignment and will not take us into the future.⁷⁴

Model Rule 2.1 states that when representing a client and rendering advice, “a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”⁷⁵ This is sometimes thought of as the lawyer playing the “wise counselor” role.⁷⁶ The wise counselor role incorporates moral and ethical considerations into the role of general counsel in order to bolster the role as the technical legal advisor.⁷⁷ This aligns with Rule 2.1 as “[p]roviding such moral and ethical-grounded advice is entirely consistent with the professional rules of conduct, as well as with the increasingly accepted view of the general counsel as a ‘wise counselor’

70. *Id.*

71. See FULCHER, *supra* note 6, at 123-124.

72. KARL MARX, *THE COMMUNIST MANIFESTO* 7 (Friedrich Engels, ed., Lerner Publishing Group, Inc. 2018) (1848). See also Calhoun, *supra* note 51, at 100.

73. Emma Goldman, *What I Believe*, EMMA GOLDMAN ARCHIVE, <https://www.marxists.org/reference/archive/goldman/works/1908/what-i-believe.html> [https://perma.cc/ZZ7W-JXEQ] (last visited Jan. 9, 2022).

74. Malone, *supra* note 7.

75. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2016) [hereinafter MODEL RULES].

76. Michael W. Peregrine, *The General Counsel as Key Corporate Social Responsibility Advisor*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jun. 24, 2018), <https://corpgov.law.harvard.edu/2018/06/24/the-general-counsel-as-key-corporate-social-responsibility-advisor/> [https://perma.cc/XRD2-LC7C].

77. *Id.*

and not just a technical legal expert.”⁷⁸ The second Comment to Rule 2.1 goes so far as to state that “[a]dvice couched in narrow legal terms may be of little value to a client,” and may be “inadequate.”⁷⁹

Therefore, when approaching a situation in which CSR is being used to its fullest, to do both what is “right” and what is sound business practice, the attorney may go outside of the constraints of technical legal advice.⁸⁰ In embracing their role as a wise counselor and giving legal advice that includes ethical and moral considerations, the corporate attorney must be aware of all the influences at play.⁸¹ They must be cognizant of the precarious nature that capitalism finds itself in, the competing values of acquisition of profit and a commitment to the betterment of the corporation, and a society that is ripe to overrun all of that if not properly considered.

Understanding and incorporating anti-capitalist, specifically social democratic, philosophy into CSR can only benefit the corporation when all of these are considered. This is not a call to abolish capitalism, but to “nurture and promote capitalism’s productive potential” for the benefit of the corporation and society both.⁸²

IV. ANTI-CAPITALIST INFLUENCES IN CORPORATE SOCIAL RESPONSIBILITY SCENARIOS

Corporations are already working toward this direction, particularly with environmental and social issues, though clear problems remain.⁸³ Without the consideration of anti-capitalism, however, these efforts either fall flat or are transparent in their posturing or capitalization on certain issues.⁸⁴ One of the major problems with these efforts to capitalize on social and environmental issues in CSR is the inability to distinguish between genuine and opportunistic support. While some argue that a corporation’s choice to state their support for social or political issues should be considered a positive decision no matter the motivation,⁸⁵ this

78. *Id.*

79. MODEL RULES R. 2.1 cmt. 2.

80. MODEL RULES R. 2.1 cmt. 2.

81. Peregrine, *supra* note 76.

82. TORMEY, *supra* note 60, at 89.

83. See Lily Zheng, *We’re Entering the Age of Corporate Social Justice*, HARV. BUS. REV. (Jun. 15, 2020), <https://hbr.org/2020/06/were-entering-the-age-of-corporate-social-justice> [<https://perma.cc/DBB4-PL2P>]; Danielle Bersen, *Corporate Environmentalists: Green Business Strategy*, PEPP. SCH. OF PUB. POL’Y, <https://publicpolicy.pepperdine.edu/academics/research/policy-review/2008v1/corporate-environmentalists.htm#f1> [<https://perma.cc/S8CJ-64NX>] (last visited Jan 9, 2022).

84. See Peter Eavis & Clifford Krauss, *What’s Really Behind Corporate Promises on Climate Change?*, THE N.Y. TIMES (May 12, 2021), <https://www.nytimes.com/2021/02/22/business/energy-environment/corporations-climate-change.html> [<https://perma.cc/X6Y7-87BZ>].

85. See Brian Bolton, *Hitching a Ride on Social or Political Movements Can Help Firms Profit, and Change for the Better*, IMD (Nov. 2018), <https://www.imd.org/research-knowledge/articles/hitching-a-ride-on-social-or-political-movements-can-help-firms-profit/> [<https://perma.cc/A7NT-H8JW>].

argument lacks the awareness of the broader societal viewpoint, one that is deeply dissatisfied with meaningless talk and surface-level solutions.⁸⁶

Satisfactory CSR must remember that “[c]onsumers and other stakeholders want companies that see social good as a necessity, not just a marketing strategy.”⁸⁷ Modern capitalist thought does not value social good in the way that it should, and incorporating anti-capitalist thought that prioritizes an equal quid pro quo between societal and corporate good is the solution.⁸⁸

With “green corporations,” there is increased attention on an inability to follow through on lofty language and ambitious targets.⁸⁹ Green corporations are meant to be the corporations of the future, ones that recognize the challenges of climate change and adapt to be better both socially and fiscally: “Green corporations, manufacturing, investment, and innovation will bring about the next great industrial revolution of our time and will serve not only as a platform for a cleaner environment, but also as a worldwide economic stimulus.”⁹⁰ Companies are shifting to embrace environmental responsibility through investments, operations, and increased transparency and making all of this a focal point of their marketing strategies.⁹¹ However, if corporations and their advisors are not careful, they can swiftly be called on inadequate and performative CSR:

“You can look at a company’s website and see their sustainability report and it will look great,” said Alberto Carrillo Pineda, a founder of Science Based Targets initiative, a global effort to assess corporate plans to reduce emissions. “But then when you look at what is behind it, you’ll see there is not a lot of substance behind those commitments or the commitments are not comprehensive enough.”⁹²

This “greenwashing” can backfire on corporations quickly, like in Chevron’s case—though they may have believed that environmentalism was a good look for them, a Federal Trade Commission complaint accusing them of “misleading consumers about its efforts to reduce greenhouse gas emissions” was not.⁹³ Society is not generous to corporations found to be greenwashing and “[t]he allure of

86. See Malone, *supra* note 7.

87. Zheng, *supra* note 83.

88. See TORMEY, *supra* note 60, at 89-90.

89. Eavis & Krauss, *supra* note 84.

90. Bersen, *supra* note 83.

91. *Id.*

92. Eavis & Krauss, *supra* note 84.

93. Kevin Crowley, *Chevron ‘Greenwashing’ Targeted in Complaint Filed With FTC*, BLOOMBERG GREEN (Mar. 16, 2021), <https://www.bloomberg.com/news/articles/2021-03-16/chevron-greenwashing-targeted-in-complaint-filed-with-u-s-ftc> [https://perma.cc/23DK-C29U]. See also Ryan Schleeter, *Greenpeace Jointly Files FTC Complaint Against Chevron*, GREENPEACE (Mar. 16, 2021), <https://www.greenpeace.org/usa/news/greenpeace-jointly-files-ftc-complaint-against-chevron/> [https://perma.cc/5FNJ-4XNB]; Valerie Volcovici, *Green Groups File FTC Complaint Against Chevron Over Climate Claims*, REUTERS (Mar. 16, 2021), <https://www.reuters.com/article/us-usa-ftc-greenwashing/green-groups-file-ftc-complaint-against-chevron-over-climate-claims-idUSKBN2B82D7> [https://perma.cc/74GB-9KTK].

greenwashing sustainability initiatives often taps into what CEOs are best at: projecting confidence, managing risk, and creating followership. However, the implications of these skills being used in a non-transparent way to greenwash are increasingly risky in terms of public perception – and ultimately, loss of market share.”⁹⁴

When advising on environmental issues in CSR standards, attorneys must be aware of the sometimes-conflicting capitalist motivations of the corporation profit maximization, corporate commitment to social good, and outward legal commitments to agencies like the Federal Trade Commission. To marry all these considerations, attorneys should consider the anti-capitalist, socially democratic *quid pro quo*—businesses may only continue to make money if society is stable and satisfied, particularly in the modern age of environmentalism.⁹⁵

For companies that have hinged marketing campaigns on their politics of social issues, such as Ben & Jerry’s, an inconsistency in business practices and outward commitment to issues may result in calls of hypocrisy and social backlash.⁹⁶ Companies who are successful in their bids to incorporate social issues into their business and marketing strategies find themselves meshed into the zeitgeist of the modern era, reaping the benefits from aligning themselves with the priorities of consumers: “‘Consumers have been judging companies more and more by their social policies, their economic policies; that’s become a big part of decision-making’ of where they spend their money.”⁹⁷ In addition to direct consumer benefit, genuine support for social issues through corporate responsibility values can help gain and retain employees—“[a] study from 2016 highlighted how 64% of millennial workers wouldn’t take a job if a company doesn’t have strong corporate responsibility values, and 83% would be more loyal to a company that helps them contribute to social and environmental issues.”⁹⁸

94. Beau River, *The Increasing Dangers of Corporate Greenwashing in the Era of Sustainability*, FORBES (Apr. 29, 2021), <https://www.forbes.com/sites/beauriver/2021/04/29/the-increasing-dangers-of-corporate-greenwashing-in-the-era-of-sustainability/?sh=44578eac4a32> [https://perma.cc/WZ38-SSEA].

95. See *id.*; TORMEY, *supra* note 60, at 90.

96. In 2021, Ben & Jerry’s, an ice cream company that has often lauded itself as a leader on leftist social issues, received backlash about its decision to sell ice cream in the Israeli-Occupied Territories of Palestine. The sales were seen as a betrayal of the leftist movement that the brand claimed to champion. See Eric Nagourney, *Ben & Jerry’s to Stop Selling Ice Cream in Israeli-Occupied Territories*, THE N.Y. TIMES (Sept. 16, 2021) <https://www.nytimes.com/2021/07/19/world/middleeast/israel-ben-jerrys-ice-cream.html> [https://perma.cc/PGC7-3H6A]; Ben & Jerry’s Will End Sales of Our Ice Cream in the Occupied Palestinian Territory, BEN & JERRY’S (Jul. 19, 2021), <https://www.benjerry.com/about-us/media-center/opt-statement> [https://perma.cc/KE54-6LLF].

97. Sarah Halzack & Drew Harwell, *Companies Are Speaking Out on Social Issues and Getting Results*, THE WASH. POST (Jul. 1, 2015), https://www.washingtonpost.com/business/economy/companies-are-speaking-out-on-social-issues-and-getting-results/2015/07/01/4693fe76-2009-11e5-aeb9-a411a84c9d55_story.html [https://perma.cc/7QXZ-AWDP].

98. Erika Johnson, *How Corporate Stances on Social Issues Affect the Workplace Culture*, FORBES (Apr. 29, 2021), <https://www.forbes.com/sites/forbeseq/2021/04/29/how-corporate-stances-on-social-issues-affect-the-workplace-culture/?sh=3a91fc697a57> [https://perma.cc/JA7F-WA28].

However, as in the case of environmentalism and greenwashing, there is a danger in mishandling these issues, both within the workplace and outside of it.⁹⁹ If these corporate responsibility issues are meant just to promote profit, not only does the corporation fail its duty to mankind, but its failure will not go unnoticed by society:

Consumers want companies that see these social issues as genuinely essential matters, not just another easy marketing ploy. Only when we look past messaging to the actualities, recognizing virtue signaling for what it is, can corporations be held accountable and systemic issues be confronted in a genuine manner. Actions speak louder than words.¹⁰⁰

It is not only consumers that will punish corporations for their posturing—research indicates that investors may find themselves running a loss if corporations take a hit to their public image and this risk of loss “serve[s] as a way for investors, especially asset managers, to hold managers’ feet to the fire with respect to potential cheap talk about corporate purpose.”¹⁰¹ Modern capitalism encourages a focus on profits rather than social good, and consumers and other stakeholders will not be satisfied with that moving forward.¹⁰²

In order to counteract this, crafters of CSR responsibility standards and other corporate attorneys must think outside of the capitalistic box by considering and embracing reformist anti-capitalist thought to better serve society and, as a result, the corporation.¹⁰³ This serves not only the social good, but the corporation as well, and is an accurate reflection of the role that general counsel must play.¹⁰⁴ As a “wise counselor,” an attorney upholds the professional conduct standard set out in Rule 2.1 when they consider all of the factors that go into a decision, rather than just technical legal advice.¹⁰⁵ Reformist anti-capitalism can provide the ethical and moral foundation in a way that satisfies all of the goals of the attorney creating a CSR scheme.¹⁰⁶

99. *Id.*

100. Ashley Te, *Corporate Moral Posturing is Detrimental to Social Issues*, MEDIUM (Mar. 30, 2021), <https://medium.com/perceive-more/corporate-moral-posturing-is-detrimental-to-social-issues-632bfecf268f> [https://perma.cc/TD8T-RZPA]. See also LOCKE, *supra* note 58.

101. *Purpose or Posturing: Do the Socially Responsible Walk the Talk?*, COLUM. BUS. SCH. (Oct. 13, 2020) <https://www8.gsb.columbia.edu/privateequity/news/9857/purpose-or-posturing-do-the-socially-responsible-walk-the-talk> [https://perma.cc/L6T5-BNJA].

102. See FULCHER, *supra* note 6, at 12; Te, *supra* note 100.

103. See Bolton, *supra* note 85; TORMEY, *supra* note 60, at 89.

104. See Peregrine, *supra* note 76.

105. *Id.*

106. *Id.*

CONCLUSION

Modern capitalism is reaching its breaking point, one that aligns with the younger generations' growing interest in anti-capitalism.¹⁰⁷ A corporate social responsibility scheme does not exist separately from these circumstances, and it would be a disservice and likely a violation of an attorney's responsibilities to act as though it does.¹⁰⁸ When faced with corporate governance decisions that will decide a corporation's CSR scheme, attorneys must consider anti-capitalism and its concern with the social good in order to fully realize both capitalism and the corporation's potential while doing what is right for the future of our society.

107. See FULCHER, *supra* note 6, at 123; Malone, *supra* note 7.

108. MODEL RULES R. 2.1.