INTERFACES BETWEEN CSR, CORPORATE LAW AND THE PROBLEM OF SOCIAL COSTS

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**Interfaces between CSR, Corporate Law and the Problem of Social Costs**

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Abstract: CSR is an increasingly seen as the preferred approach to addressing the social impacts of industrial production. These social impacts, however, come in the first instance from production and not the corporation. The legal corporation facilitates social costs secondarily. Much of the thinking about CSR fails to adequately take account of the systemic nature of social costs, the legal nature of the corporation and social costs and the so the systemic failure of law to deal with them. This article addresses the interface between the three concepts and related issues of CSR, social costs and corporate law.
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1. Introduction

With the increasing pressure from civil society, government and business itself to engage in CSR,¹ the significant investment by all types of businesses from large businesses such as Microsoft, Wal-mart and Apple, to small and medium sized enterprises and the response by governments around the world,² the relationship between corporate law and CSR becomes increasingly significant. CSR is seen as an answer to a wide array of issues associated with the corporate form.³ These issues, referred to in legal terms as harms, are discussed in broad business literature in terms of economists’ terminology “social costs,” are the result of industrialisation.

Despite the ubiquity of CSR and the massive resources—both public and private—expended upon it, CSR often fails to live up to its promise. Indeed, while the new initiatives and successes are being celebrated in one area,⁴ spectacular failures portending its demise and death are being discussed in others.⁵ Why? The hypothesis of this paper is that the theoretical landscape underlying assumptions about CSR, corporate law

⁴ The celebration surrounding the United Nations Global Compact and the plethora of annual CSR awards suggest there is something worth celebrating.
and social costs are incoherent and at times incompatible. Not only is there a lack of clarity about the interaction of three distinct phenomena, their parameters and interfaces, but also a lack of clarity about the core conceptual constructs. These problems with respect to assumptions, interactions and constructs, it will be argued, undermine the struggles to make CSR achieve its widely acknowledge potential. To make this argument, one needs to begin at an earlier point in history.

The Industrial Revolution, which provided the foundation for contemporary industrial activity and social organisation, is a watershed in human history. It has had a profound impact not only on productive activities and their organisation, but also on social organisation generally and the natural environment. Perhaps the most momentous change in society stems from the rise of the large industrial organisation. Whereas prior to that time, the only large organisations were church and state—eleesymonary and political organisations—contemporaneous with the advance of the industrial revolution was the dawn of the large industrial organisation.

From a broad historical perspective, it is hard to overstate the significance of the rise of the large industrial organisation. It has been both a cause and result of massive changes in society since the industrial revolution, including entrenching reorganised political systems based on capitalist economics and the Marxist response, spelling the end of aristocracy and significant changes in law. Asserting that large industrial organisation caused the enormous changes in human life and living

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6 While some may argue that the issue is simply a matter common to interdisciplinary analysis, I argue that it is not only an interdisciplinary problem, between law, economics and business organizational studies, but a broader and more complex social issue which does not limit itself to disciplinary thinking in the first place.


9 MARC W. STEINBERG, Marx, formal subsumption and the law, 39 THEORY AND SOCIETY (2010).
conditions is to state the obvious but necessary foundation for the argument. Specifically, the large industrial organisation has simultaneously allowed for mass consumption raising the physical standards of living\textsuperscript{10} created a new capitalist political class while destabilising the social structures of thousands of years.\textsuperscript{11}

With their demand for labour, large industrial organisations created mass wage based employment and changed the work habits and lives of billions of people as humans changed from the habits of diurnal agrarian and subsistence living, to regimented factory wages of shift-work,\textsuperscript{12} and later office work. They have changed the way humans interact with the natural environment by changing the ways in which the earth’s resources are used, extracted, refined and allocated. They have change what goods are valued, how they are valued and how goods are produced and distributed.\textsuperscript{13} The large industrial organisation has both created new types of waste and pollution and the ways in which waste is disposed of.\textsuperscript{14}

In terms of the impact of industrialisation on law, one can identify significant changes to corporate law, trust law and tort law, and the creation of whole new areas of law, such as securities law, labour law, and environmental law have both allowed and been a result of these large industrial organisations.\textsuperscript{15}

Indeed, it is not too much to say that all of the foregoing social, industrial and environmental changes have been undergirded by law. Law, understood as the institutionalisation of political decisions, addresses the

\textsuperscript{14} ERIC HOBBSBAWM, INDUSTRY AND EMPIRE: FROM 1750 TO THE PRESENT DAY, REV. AND UPDATED WITH CHRIS WRIGLEY (New Press 2nd ed. 1999).
establishment, maintenance and reform of social orderings and interactions with the natural environment. Over the course of the last centuries law has established, maintained and reformed social order to provide the least disruption to and greatest advantage for those with the power to reform law.\textsuperscript{16}

In this context, jurists’ discourses about law’s justice and fairness are incomplete. There are indeed limited situations in which justice and fairness were driving principles; however, they were limited not only to particular situations, but also restricted in terms of who could access them.\textsuperscript{17} Those with the power to establish, maintain and reform law are those with the most resources—economic and political—and for the most part, they are the ones who have been able to take control of and dominate the large industrial organisations.\textsuperscript{18} Where industrialists hold greater power, they are able to consolidate more areas of law and so concentrate those benefits to themselves while imposing costs on others.\textsuperscript{19} Where other members of society are able to group themselves and hold the balance of power, those groups are able to engage in law reform to address their needs--i.e. focus law reform on middle and lower class interests.\textsuperscript{20} They are able to shift the distribution of industrialisation’s costs and benefits to suit themselves as opposed to elite leaders.\textsuperscript{21}


\textsuperscript{20} C.A. HARWELL WELLS, ‘Corporations Law is Dead’: Heroic Managerialism, the Cold War, and the Puzzle of Corporation Law at the Height of the American Century, 15 UNIVERSITY OF PENNSYLVANIA JOURNAL BUSINESS LAW REVIEW (2013).

The role of the corporation in this context is contentious. Some scholars argue that the corporation has been the vehicle which allowed the great positive strides forward in development\textsuperscript{22}; however, others point out that the negative consequences of industrial activity are a problem readily equated with corporate activity.\textsuperscript{23} Those concerned with the negative consequences propose either the reform of corporate law,\textsuperscript{24} or in the more extreme, the end of the legal corporation.\textsuperscript{25} Yet characterisations of both the benefits and negative consequences of industrial activity as consequences of corporations is both misguided and a conflation of incompatible ideas. The issue in the first instance is neither the benefit nor the problem of the corporation per se.\textsuperscript{26} It is first and foremost a matter of industrial production and related social costs. As for the corporation, it must be noted that for several hundred years, corporate law had nothing to do with industrial production and even it was once so used, it was some time before the wider social impacts of corporations became a matter of particular concern.

The use of the corporate form for industrial production only became common practice in the late nineteenth century in the UK and early twentieth century in the USA which had favoured trusts.\textsuperscript{28} While corporate law, some may argue, should be reformed to shift the centres

\textsuperscript{22} See for example, MICKLETHWAIT & WOOLDRIDGE, The Company: A Short History of a Revolutionary Idea. 2003. There is a whole literature spawned to identify and support the use of the corporate form. The argument in its narrow, idealised legal form can be found in FH EASTERBOOK & DR FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (Harvard Univ Press. 1991 ).

\textsuperscript{23} DAVID C. KORTEN, WHEN CORPORATIONS RULE THE WORLD (Kumarian Press. 1995).

\textsuperscript{24} JONATHON PORRITT, CAPITALISM: AS IF THE WORLD MATTERS. (Earthscan. 2005).


\textsuperscript{26} D LITOWITZ, Are Corporations Evil?, 58 U. MIAMI L. REV (2004).


of corporate decision making, or have new norms to re-direct or limit liability shifting, these corporate law issues are distinct from the negative consequences of industrial production. From a legal perspective, corporate law is not designed to address the industrial activities which may be carried on by corporate entities; nor is it designed to address many of the consequences of corporate decisions reflected in industrial production. Rather it has different purposes.

The foregoing is not say that it is not well recognised that industrialisation has been greatly facilitated by the corporation, and in this regard, the utility of the corporation in industrialisation, with its potential for both good and harm, has long been recognised. As the noted corporate law scholar, Adolph Berle, observed, the corporation is “capable of becoming one of the master tools of society—[and] capable also of surprising abuse.”

Rather, it is the connection between these related phenomena of industrialisation, social costs and the corporation that remains poorly understood despite a significant literature in each area. One area which remains under-theorised is the set of legal relationships between the corporate form, social costs and CSR. In part the connection and interrelationship is misunderstood because of a failure to clearly delineate and distinguish between: the social phenomena of the legal corporation and directors and shareholders; between the legal corporate form and industrial organisations, between social pressure and legal obligation; and to appreciate the nature and array of law’s approaches to problems including the problem of social costs.

One problem in the literature is that some see the issue of social costs as especially a failure of corporate law. They argue that corporate law fails because it fails to limit the negative externalities of corporate

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industrial activity. This failure of corporate law, it is argued, has driven people to propose significant reforms to draw corporations law into line with the larger principles of law, and to other mechanisms and approaches to regulating the corporation. Among those approaches CSR has come to command a significant amount of attention and resources, as well as holding special promise because it engages directly with the business sector including its corporate entities, in the issue of externalities.

Yet CSR itself raises a number of difficult theoretical issues in law, and seldom is it asked: what are the legal implications of CSR? There are significant problems for corporate law, particularly in terms of theory of the corporation as well as implication of CSR for corporate law. Further, lawyers must answer what happens when CSR’s “soft law” obligations conflict with opposing “hard” law obligations. As well, investigation is required to answer questions such as the rights and duties created or implied by CSR and in particular, those which may conflict with corporate law. Accordingly, this paper seeks to answer two preliminary questions: is corporate law focused on the control the same issues that concern CSR? To answer the question requires a consideration of the purpose and scope of corporate law. The second question asks: how should corporate law approach social costs?

33 See, for example, D McBarnet, Corporate social responsibility beyond law, through law, for law, in THE NEW CORPORATE ACCOUNTABILITY (D McBarnet, et al. eds., 2009 ).
35 Notable exceptions include JOE (CHIP) PITTS, Corporate Social Responsibility – A Legal Analysis (LexisNexis 2009), MATTHEW SEEGER & STEVEN HIPFEL, Legal Versus Ethical Arguments: Contexts for Corporate Social Responsibility, in THE DEBATE OVER CORPORATE SOCIAL RESPONSIBILITY (Steve Kent May, et al. eds., 2007). and J LLEWELLYN, Regulation: Government, Business, and the Self in the United States, see id. at (. See also BENEDICT SHEEHY, Directors’ Legal Duties and CSR: Prohibited, Permitted or Prescribed?, 37 DALHOUSIE LAW JOURNAL (2014).
37 See for example, SHEEHY, DALHOUSIE LAW JOURNAL, (2014).
Examining these questions requires the paper to be set out as follows. The next section provides the institutional context for the discussion. The section which follows addresses the concepts and nature of social costs. The fourth section examines corporate law in some detail and is followed by a fifth section on CSR. The sixth section examines the legal approach to social costs, and the final two sections examining the boundaries and reforms to corporate law, followed by the conclusion.

2. The Context

CSR is a range of concepts that have changed over time. At times it appears to be on the ascendancy while at other times is looks obsolete and about to disappear altogether. Certainly, there is a host of reasons for these phases; however, one reason may well be an inadequate theorising about the nature and relationship of the phenomena under discussion—social costs, law and the corporation. The current interest and debate about CSR arises in the context of institutional transformation and transition, both locally and globally. At the local level, the decline of other civic institutions, intermediate associations, from religious bodies to trade unions, has left government alone to contest industrial interests. While this situation is not new in the sense that it was noted in the pioneering work of C. Wright Mills and others in the 1950’s, it has been exacerbated by the financialisation of the economy, particularly since the 1980’s as an aspect of the larger driver of economic globalisation. The rise of the ubiquitous MNC and innovations in telecommunications and logistics brought knowledge to various parties who have variously used

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41 JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE (2nd ed. 1972)..
43 The invention of the container ship is a very important but often overlooked part of the globalization phenomenon.
it for economic exploitation as well as advocacy for social justice. These issues can be loosely categorised as debates about and efforts to control corporations, or more accurately, large industrial organisations.

In this context, earlier CSR had been promoted by business leaders themselves as a function of business in response to privilege bestowed on it by society and as an acknowledgement of the power inherent in the control of vast assets and the power to dictate the terms of the working lives of millions of employees. This model, referred to as “heroic capitalism”\(^{44}\) has given way to a narrower view in which corporate finance is the driving force, in which “the business case” is the main driver or sole determinant of a CSR program.\(^{45}\) These shifts in the debate and in focus coalesce with shifts in corporate legal theory which fell under the sway of neo-classical economic orthodoxy. The economists were particularly concerned with the main topic of their study, namely the allocation of scarce resources, and a peculiar branch which arose in response to Berle and Means separation of ownership and control, the “agency problem.”\(^{46}\) Their concern was that managers, as agents of shareholders, had considerable discretion and were likely to use that discretion to benefit themselves to the detriment of the principals they were engaged to serve. Their solution was developed by Fama,\(^{47}\) and applied by Meckling’s and Jensen’s theory of the firm\(^{48}\) and Jensen’s “objective function”\(^{49}\). In essence, they drove the shareholder primacy model of the corporation.

The law academy and business scholarship took up the model with alacrity.\(^{50}\) In essence the economic aspect of this model makes the

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\(^{44}\) WELLS, UNIVERSITY OF PENNSYLVANIA JOURNAL BUSINESS LAW REVIEW, (2013).
\(^{47}\) Id. at.
\(^{49}\) MICHAEL C. JENSEN, Value Maximization, Stakeholder Theory, and the Corporate Objective Function, 7 EUROPEAN FINANCIAL MANAGEMENT REVIEW (2001).
assumption that the sole purpose of the corporation, and hence directors, is to maximise shareholder wealth. The legal aspect is that shareholders dominate the corporation with respect to rights to control fundamental transactions, and hence directors’ duties should likewise be focused on this particular corporate constituent.\(^{51}\) In essence, this debate is more of a battle about control of the corporation—“whom should it serve”.\(^{52}\) It has been a story of private initiatives, by well-meaning business people, opportunistic strategists and a concern among various academics.\(^{53}\) It is a story of cycles with fits, stops and starts.\(^{54}\)

The law, which creates and regulates the corporation, the preferred body for the large industrial organisation, has been derived from a combination of *lex mercatoria*, ecclesiastical, Roman and common law systems.\(^{55}\) The doctrines and principles of these legal systems and their particularised bodies of law governing corporations, in addition to the laws of contract, property and tort, have contributed to the control and direction the corporate form as well as the large industrial organisations that often use it. These bodies of law have historically reinforced the social order, distributed risks and opportunities, and costs and benefits in accord with the prevailing balance of power.\(^{56}\)

In this historical context, the medieval struggle over control of the corporation reflected a medieval battle between the two competing institutional powers: the church and the secular powers of monarchs and

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\(^{56}\) Law was not seen to be an independent system at in this period MICHAEL LOBBAN, The Politics of English Law in the Nineteenth Century (Keynote address) (2007). The legal realists first attacked the idea of law as an independent sphere.
emperors, for each realised the importance of the control of bodies—both legal aggregates and human. That battle was a conflict “primarily political and economic”. \(^{57}\) The current battle over control of the corporation too is a political one, but one between economic elite on the one hand and democratic powers of activists, NGO’s and some parts of government on the other.

The present battle was foreshadowed in the 1860’s by Abraham Lincoln. Writing a civil war colleague, Lincoln stated:

corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavour to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed.\(^ {58}\)

Thus despite the contemporary appearance of the conflict concerning corporate as a highly beneficial economic institution and a threatening political one with its potential to harm society and popular democratic governance, the contest is not a new phenomenon.

Social costs have been evident since the time of the industrial revolution, but were misdiagnosed.\(^ {59}\) More recently, however, the social costs of industrial activity have become increasingly evident and drawn significant public attention.\(^ {60}\) Indeed, they have become a concern to many business executives themselves.\(^ {61}\) In part the intensity of the contest may have been exacerbated by institutional change. The collapse of other institutions in the mid-twentieth century is an important part of


\(^{60}\) KARL POLANYI, *The Great Transformation* (Beacon Press. 1944, 2001)., pp90-101

\(^{61}\) Global warming, environmental disasters, sweatshops, NGO activism facilitated information transfer through the internet have all contributed to greater awareness and concern.

the story of the institutional context for CSR. This collapse left only the dyad of government and large industrial organisations to contest and settle governance of western societies.

While labour and socially oriented progressive political parties attempted to address these externalities through the political process, business executives did so in through a variety of programs and private initiatives such as ISO 26000, international public programs such as the UN’s Global Compact, and publicly sponsored private organisations such as the Global Reporting Initiative. Others business executives have done so through personal efforts to take account of and ameliorate the greater negative social impacts of industrial activity. The negative externalities were most evident to communities directly affected by a specific industrial activity as well as to some degree, those corporate directors and managers directly confronted with those effects. The less evident but arguably more important social issues are the takeover of public space and the political system.

While CSR has become a part of the dialogue within and surrounding the business community and industrial production, its interaction with and potential as corporate law has received inadequate

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63 Id. at.
67 Nadar discussions WELLS, UNIVERSITY OF KANSAS LAW REVIEW, (2002-2003)., 116
69 Although the terms corporate citizenship and global compact may have greater currency, the term CSR is better understood. LISA WHITEHOUSE, Corporate Social Responsibility, Corporate Citizenship and the Global Compact: A New Approach to Regulating Corporate Social Power?, 3 GLOBAL SOCIAL POLICY (2003 ).
70 Indeed, there is concern that the term “CSR” may become meaningless from overuse.CHENEY, et al., Overview. 2007. 3
71 I include in this term the production of both goods and services.
attention. It is often assumed that corporate law coalesces with CSR and that CSR will simply or readily act as an adjunct around the periphery of corporate law, enhancing and particularising the law to the specifics of a particular corporate context. Other scholars assume CSR provides a normative framework for interpreting corporate law and in particular directors’ duties. Neither position is in fact correct. CSR is among other things an effort to provide modified normative guidelines for corporate managers’ decision making. But the issue of whether such restraints, however, are tolerable let alone justified within corporate law has been hotly debated.

With this background and context, the paper now turns to examine the issues driving the debate: social costs.

3. Substantive Framing of Social Costs

The social costs of large industrial organisations are significant. From issues such as global warming, concentrations of wealth and political power among a privileged elite, to ubiquitous marketing, colonisation of public space and commoditisation of vast swathes of human activity, to a labour force that has no control over working conditions, the hand of the large industrial organisation on human society is evident. While there may be no golden era, the social costs of the current era are increasingly leading to corruption of democratic political

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72 McBARNET, Corporate social responsibility beyond law, through law, for law. 2009
73 This view is consistent with thinking about private regulation, and CSR understood as “voluntary regulation” or self-regulation. BENEDICT SHEEHY, Understanding CSR: an empirical study of private self-regulation, 38 MONASH UNIVERSITY LAW REVIEW (2012).
systems, environmental collapse and social disruption on an unprecedented scale.  

There are a variety of approaches to addressing social costs. The three major approaches are economic, legal and political. Orthodox economics deals with social costs as a type of market failure. It explains social costs in terms of imperfect commoditisation and allocation of property rights and it contends that they could be mitigated by institutional arrangements that tend towards a perfectly individualised and competitive world. The solutions, from an economic perspective, are fairly simple. The economic approach is readily represented by Ronald Coase. His approach, suggested in his famous article on the topic, is that social costs are a problem caused by inappropriate (government) allocation and provision of private property rights and inadequate provision for trading of these rights. Law, he argued, constrained economically optimal, and impliedly, normatively and socially desirable allocations. Applying Coase’s view to the economist’s nexus of contracts model of the firm, the issue is simply expanding the number of participants with contractual rights in the nexus of contracts corporation.

Institutional ecological economists in the tradition of Karl William Kapp and others provide a more robust definition of social costs. Rather than seeing social costs as a matter of costs external to the corporation in the Pigouvian tradition, these scholars argue that social costs are the share of the total costs of production not borne by producers

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80 Current urbanization in China is a clear current example. BENEDICT SHEEHY & JACKSON MAOGOTO, China-Australia free trade agreement: new icing on an old cake - a new opportunity for fair trade?, 2 MACQUARIE JOURNAL OF BUSINESS LAW (2005).
83 Id. at.
but shifted instead onto 3rd parties, be they particular parts of contemporary society, future generations, or society at large. Kapp defines them as

all direct and indirect losses sustained by third persons or the general public as a result of unrestrained economic activities. These social losses may take the form of damages to human health; they may find their expression in the destruction or deterioration of property values and the premature depletion of natural wealth; they may also be evidenced in an impairment of less tangible values.  

In this view, the corporation has no specific or particular role. Its significance could only arise as the premier economic actor, and as a part of the economic institutional landscape rather than as a legal body. Although orthodox economists continue to examine the relationship between CSR and economic theories of the firm they come no closer to a real solution.

The second major approach to social costs is through law. Law does not distinguish the harms of social costs of large industrial organisations from harms caused by any other parties or resulting from any one of the myriad of activities in which humanity engages. Law approaches these harms not through the lenses of production or consumption, or collective societal good as it might have if corporate law had not changed directions, but as matters of individual rights and duties, violation and remedy, and it does so on principles such as entrenched privileges.

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89 This is essentially the consequence of Nozick's circular argument R. NOZICK, ANARCHY, STATE, AND UTOPIA (Basic Books. 1974).
fairness and justice\(^90\) as understood in western liberal philosophy. Law provides a number of solutions to the problem of social costs through private law remedies such as those available through tort and property, and public law remedies such as those available through criminal, environmental, tax and social security laws. Indeed, the first regulatory agency was established for the purpose of addressing social costs stemming from employment conditions in factories.\(^91\) In terms of social costs and corporate law only a few aspects of the latter have been reformed, primarily relating to setting matters of internal governance and finance, but beyond these, reform has been limited to the periphery.\(^92\) Further, in some instances directors’ personal liability has been extended; however, such extensions have been minimal and have had little if any impact.

The third and final approach to social costs, the political approach,\(^93\) is an approach which relies on both private politics\(^94\) and public politics, as well as public opinion generally, formal and informal political response and institutional pressure. Public political responses are formal, in the sense of governmental response including law and private politics informal, through the discourse between of the two main institutional participants in CSR—large industrial organisations and civic society.\(^95\) Much of the CSR discourse is dominated by the large industrial organisations through their ability to purchase media, advertising and programming as well as their hiring of political lobbyists—a multibillion dollar exercise itself. In terms of their treatment of the connection between social costs and the corporation, the large industrial organisation divorces them completely. The issues are discussed in terms of “consumer


\(^{91}\) On the Factories Act 1802, 42 Geo.III c.73 and subsequent revisions as well as the factories inspectorate established, see J.L. HAMMOND & BARBARA HAMMOND, THE RISE OF MODERN INDUSTRY (Harcourt, Brace and Co. 1926). 255-56.

\(^{92}\) BRYAN HERRIGAN, CORPORATE SOCIAL RESPONSIBILITY IN THE 21ST CENTURY: DEBATES, MODELS AND PRACTICES ACROSS GOVERNMENT, LAW AND BUSINESS (Edward Elgar 2010).


\(^{94}\) SOULE, Contention and Corporate Social Responsibility. 2009.

\(^{95}\) Although see WELLS, UNIVERSITY OF PENNSYLVANIA JOURNAL BUSINESS LAW REVIEW, (2013).
choice”, ethical consumption,\textsuperscript{96} and “brand” issues, such as brand management, brand reputational risks and management concerns. The second part of CSR discourse comes from civil society groups, NGO’s, local community groups and academic debate and scholarship.\textsuperscript{97} This second participant is a large uncoordinated group with diverse demands. In terms of social costs and the corporation it tends to elide the two almost to the point of first making them synonymous and then rejecting them both equally completely.

Although each of these three approaches proposes solutions, each has limitations and poses problems for those interested in mitigating the social costs of industrial production. Accordingly, a wider ranging solution which reaches deeper into the origins and causes of social costs holds significant appeal, and where social cost are seen to originate within the corporation, some type of corporate control or reform as the preferred solution. An objective of the CSR movement is to address the failure of corporate law and reform corporate law so that it addresses social costs.\textsuperscript{98} In order to understand this agenda, however, it is important to understand corporate law.

4. Substantive Focus of Corporate Law

The main complaint against corporate law made by advocates of CSR concerns corporate law’s failure to regulate the corporation’s negative externalities.\textsuperscript{99} They point to any one or more of a long list of such things as pollutants, harmful workplace practices, and the impact of these things on human and natural environments. This failure, in their view, is a failure of corporate law. This section identifies the nature and

\textsuperscript{97} See for example, the discussion in PETER UTTING, Corporate responsibility and the movement of business, 15 DEVELOPMENT IN PRACTICE (2005).
\textsuperscript{98} WELLS, UNIVERSITY OF KANSAS LAW REVIEW, (2002-2003).
scope of corporate law, which in part answers the criticism of these concerned parties. It does so by identifying the concerns and parameters of corporate law.

A positive analysis of corporation law identifies three main tasks. In the first instance, corporate law creates a legal identity for a group or endeavour.\(^{100}\) It identifies and marks out a space in the social sphere for this group or endeavour, and grants that to the group a distinct identity. A few historical examples from the medieval era from which the modern corporation is derived may help illustrate this task.\(^{101}\) The abbot and the monks form a corporation distinct and apart physically and spiritually from the surrounding community.\(^{102}\) The Merchants of Venice were a body corporate, distinct and apart from the rest of the populace of London and a body whose endeavour was marked out and protected by the grant of corporate status.\(^{103}\) The King of England is a corporation sole, marking out as distinct from the king as a human body a special position in the social space.\(^{104}\) In the contemporary era, *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886) in the USA and *Salomon v. A. Salomon & Co. Ltd* (1897) AC 22 in the Commonwealth world establish the separate entity doctrine.

This creation of social space and in particular, its legal recognition, is significant as it allows and facilitates humans to engage in different endeavours and allows people to occupy different offices or roles within society. One may be a member of the borough of Aylesworth, a member of a family, an employee and a member of a church at the same time. None of these roles needs to contradict or preclude the other. The corporation allows this to occur and this is the first task of corporate law.

\(^{100}\) With the exception of the corporation sole, discussed within.


\(^{102}\) *MAITLAND, The Corporation Aggregate: The History of a Legal Idea*. 1893. 10–12

\(^{103}\) *KYD, A Treatise on the Law of Corporations*. 1793-1794.

Corporate law’s second task is distinguishing the corporation from its members. It does so in two aspects. First, it must distinguish the corporation’s the rights and duties and set those apart from those of its members. This distinction caused considerable difficulty for medieval lawyers and arose again in the nineteenth century on both sides of the Atlantic as the “corporate personality” and “metaphysical fiction” debate. In terms of identifying the corporation’s powers, again it is helpful to return to medieval corporate history. Maitland discusses a case from the 1481 Yearbook in which the Abbot of Hume was in litigation with the corporation of the Mayor, Sheriffs and Commonalty of Norwich for non-payment of a bond. The abbot had extracted the bond from an imprisoned mayor as a condition for the latter’s release. Maitland notes that the lawyers struggled through the logic that a body corporate is not the same as a human body, and in particular, that the powers exercised and duties of the humans were not co-terminus with those of the corporation. Only by delimiting the two could the group proceed with the execution of its concern, and corporate law accomplishes this task. In the nineteenth century, as the corporate legal theory changed from viewing the corporation as a mechanism for development of public works in exchange for a grant of monopoly trading rights, to a private finance mechanism, the law again struggled to find a foundation for private rights in the corporation which it did through doctrines of private property.

An additional aspect of this second task is to distinguish the corporation’s property from that of its members. This second aspect of the task is less difficult. That is, the law more easily distinguished, for example, the land and church buildings belonging to St Bartholomew, administered by the Abbot as distinct from the property of the Abbot.

106 Abbot of St Benet’s (Hulme) v Mayor and Commonalty of Norwich Y.B. 21 Edw IV, 7, 12, 26, 67
Again, in the prior mentioned example of the Abbot and the Mayor of Norwich the law had no difficulty in recognising who owed the debt. It was clearly the corporation. The issue in that case was “who was the corporation.” As noted, this was part of the struggle of the late nineteenth century resolved through an analysis of the corporation utilising the doctrines of private property. This distinction has been reified through the doctrine of limited liability which has been enacted in corporate legislation worldwide.

Corporate law’s third task concerns creating the rules which regulate the actors within the corporate group. These rules create the corporate organs distinguishing directors and members, create and allocate corporate powers and stipulate how those powers are to be exercised. This role of internal governance role of rule-making recognised, since medieval times has developed over time by the efforts of legislatures and lawyers in rendering services to specific corporations and the development of common law. In contemporary law, the case of Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame [1906] 2 Ch 34 and in legislation as for example, the Delaware General Corporation Law §141(a), CBCA, Companies Act UK, and Corporations Act 2001 establish such.

These positive tasks of corporate law, however, do not satisfy those concerned with the normative issues stemming from the negative consequences of industrial production. Their basic criticism is that corporate law should address “outsiders.” While corporate law does address outsiders, it does so tangentially or only in very limited instances—as through indoor management established in Turquand’s Case, and in liquidation when corporate law may tip interests and

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109 Id. at 69-76
113 Royal British Bank v Turquand (1856) 6 E&B 327
controls away from insiders to favour creditors.\textsuperscript{114} The former doctrine establishes that parties external to the corporation can assume that the internal rules have been complied with in its actions with respect to outsiders. The latter rule rules out corporate free-riding on outsiders in terms of credit—a different matter from free riding on the natural or social environments, or even free-riding on employees whose wages are subject to theft by employers in contemporary USA.\textsuperscript{115} Laws limiting opportunities for corporate financial fraud have been developed in connection with, but separate from, the core corporate legislation\textsuperscript{116}, leaving only the doctrine of piercing the corporate veil for those very rare instances in which judges can be persuaded to do so.\textsuperscript{117}

Yet the political and normative dimensions of corporate law are more subtle. They include social privileges to members, rights to externalise costs and the political power that comes with the economic power of concentrated wealth.\textsuperscript{118} Corporate law’s failure to explicitly deal with these normative matters have led to substantial support for the CSR movement.\textsuperscript{119} They are the corollary of the issues of CSR concerns: privileging the rights of capital over labour, economics over environment and political concentration of power on economic bases over democratic and rights based distributions.

The foregoing positive analysis of corporate law provides a functionalist account which makes it clear that corporate law developed

\textsuperscript{114} E.g. Australian Corporations Act 2001 (2001), s. 566G
\textsuperscript{119} SOULE, Contention and Corporate Social Responsibility. 2009;IRELAND & PILLAY, Corporate Social Responsibility in a Neoliberal Age. 2009.
for purposes other than the control of negative externalities. The concerns about these externalities are not related to the concerns of those driving corporate law per se. Such concerns are directed exclusively to the consequences of industrialisation which have been exacerbated by the corporate form which facilitates, both through allowing the great industrialisation to occur by the pooling of capital and the protection of directors and shareholders from the consequences of those negative actions, at least potentially encouraging more of the same in order to increase benefits internalised.\textsuperscript{120} As Greenfield explains it, these corporate law doctrines concentrate power in the hands of the few for the benefit of a few, with the result that “law has created an entity that is guaranteed to throw off as many costs and risks onto others as it can.”\textsuperscript{121}

This positive analysis is not a normative argument for either reforming or keeping corporate law as it is; rather, it is an explanation of the current configuration of the law of corporations. The point of the descriptive analysis is that corporate law has developed with a different focus and different objective than the social issues. It is not designed to control of social costs. CSR, however, has a different agenda which is addressed next.

5. Substantive Focus of CSR

The substantive focus of CSR has been less clear. Although CSR in some ways incorporates all three approaches to social costs, that is to say, legal, economic and political, it often struggles because of the basic definitional issue. CSR has been defined in a variety of ways,\textsuperscript{122} from a marketing opportunity referred to as “greenwash” and a dialogue among the various interests to private regulation, and public international law.\textsuperscript{123}

\textsuperscript{120} SHEEHY, JOURNAL OF LAW & COMMERCE (2004).
\textsuperscript{121} GREENFIELD, The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities. 2005., p. 17
\textsuperscript{122} BENEDICT SHEEHY, Defining CSR: Problems and Solutions, JOURNAL OF BUSINESS ETHICS (2014).
\textsuperscript{123} ANDREW CRANE, et al., The Corporate Social Responsibility Agenda, in OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY (Andrew Crane, et al. eds., 2008), see also SHEEHY, JOURNAL OF
It encompasses a wide range of interests from academics interested in theoretical concerns, to financiers concerned about maximising returns on debt and equity, corporate executives concerned about reputational matters, as well as social issues, to NGO’s concerned with such issues as toxic emissions, slave labour and labour conditions generally such as health and safety matters.

A review of the academic CSR literature illustrates the difficulty of defining CSR because of the normative and hence political nature of the debate as represented by the variety of interests, as well as the range of disciplines approaching its development, critique and reform. For example, the business related disciplines normatively adopt economically determined values norms and preferences and substantively focus on issues such as the relationship between corporate financial performance (“CFP”) and corporate social performance (“CSP”) marketing implications of CSR management system and organisational issues. Academic lawyers’ analysis may adopt either economic norms or conflicting legal equitable norms and substantively focus on the related derived rights and duties. Or they may examine it as a form of voluntary private regulation. Political scientists may focus on norms surrounding the legitimacy of private regulation and its negative implications for
democracy and democratic politically generated normative solutions to the consequences of industrial production. Finally, sociologists may see CSR as a matter of changing institutional norms and organisational response to the environment.

These diverse approaches harbour a number of disagreements. There is not an agreement about the objectives of CSR or about the extent to which operational effects of CSR are desirable. Nor is there agreement about the extent and nature of responsibility of industrial enterprises or measures of effectiveness. All parties have ideas about what constitutes responsible behaviour, whether CSR can or should force large industrial organisations to achieve socially desirable non-profit oriented goals and how individual enterprises should be organised and measured. Although there are a few who wish to continue to be able to claim CSR credentials while engaging in mere “greenwash” the consensus has moved beyond that view such that CSR has real goals such as protection of human rights, labour rights and environmental sustainability.

The foregoing survey emphasising the diversity and disagreement, however, fails to identify the increasingly significant underlying social facts. Underlying the disagreement is rather coherent set of well established legal norms. These include such instruments as the UN conventions on the environment, human rights, OECD Principles of

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Corporate Governance, OECD Principles for Multinational Enterprises and similar documents.\textsuperscript{137}

What this discussion of CSR demonstrates is that CSR starts from a different point than corporate law and addresses a wider array of different issues many of which are unrelated to corporate law. In sum, CSR addresses a range of social costs through prescribing behaviour and advocates various organisational reforms businesses engaged in industrial production.

Thus the starting point of CSR is social rather than legal. It starts with the large footprint, both in terms of environmental impact and society’s orderings of the large industrial organisation. The existence of the broadly based CSR dialogue is an acknowledgement by both those within the corporation, as well as those external to the large industrial organisation of the significant impacts of the operations of large industrial organisations. That acknowledgement includes to varying degrees an acknowledgement of the political power that large industrial organisations’ economic power is facilitated in the first instance by the legal rights and duties including economic, political and property rights of the corporate form.\textsuperscript{138}

CSR is also distinguished from corporate law by its focus. CSR is focused on the industrial enterprise, and large industrial enterprises in particular,\textsuperscript{139} and not the legal corporation per se. That is to say, the focus of CSR is on the enterprise as a whole, not individual legal bodies, and indeed, the focus not just on any enterprise but on those large enterprises which have objectionable social costs.\textsuperscript{140} Further, CSR emphasises the human actors’ personal ethics and grants less weight to the legal protection afforded to people acting as agents in and their

\textsuperscript{137} See Appendix id. at.


\textsuperscript{139} Id. at.

\textsuperscript{140} WELLS, UNIVERSITY OF KANSAS LAW REVIEW, (2002-2003). at 80
distinct roles as corporate officers. The discrete and strict division between roles from the perspective of corporate law is critical to legal orderings and to ignore those distinctions undoes one of the major innovations of medieval corporate law—the distinction of office from individual.

While as noted corporate law does allow, in very limited circumstances, personal liability of directors and officers through its doctrine of piercing the corporate veil, these limited circumstances allow directors to focus on the corporate objects as distinct from their own personal agendas of keeping their personal assets secure and maintaining their individual social status. From the medieval perspective, the issue was distinguishing corporate assets from the assets of the members, and as noted, distinguishing accountability for corporate acts from the person.

CSR is further distinguished from corporate law in that it is not overly concerned with the organisation’s internal rules. The exception to this generalisation is in the important area where discussion shifts focus to stakeholders in the distribution of rights beyond the more narrow corporate law focus on shareholders associated with shareholder primacy. Further CSR has little interest in matters of corporate constitutions or corporate property, again with the exception of the stakeholder dialogue’s interest in the larger concern of the social impact of industrial uses of the corporate form.

The normative debate in CSR concerns the issues of: whom, in what capacities, in what ways, and for what purposes the corporation’s power

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142 Usually limited to instances of fraud or misuse of the corporate form: Gilford Motor Co Ltd v Horne [1933] Ch 935; Perpetual Real Estate Services, Inc. v. Michaelson Properties, Inc. 974 F.2d 545 (4th Cir. 1992)
143 Empirical studies referred to earlier see n 99.
144 Additional personal liabilities may attach for certain breaches of corporate obligations for tax, securities fraud and environmental matters.
147 SHEEHY, UNIVERSITY OF MIAMI BUSINESS LAW REVIEW (2005).
should be used where the corporation is engaged in industrial
production. Corporate conservatives prefer to continue to exercise
power directly themselves for their own private interests, whereas CSR
advocates believe the community should be granted some form of rights
as stakeholders to exercise some corporate power to ensure that the
community receives not only costs, but also benefit from industrial
activity. Corporate law, however, as noted above, has been settled in
favour of certain corporate insiders—the officers and members. This
position is contested in the CSR debate. Further, the implications let alone
desirability of that very political debate of re-opening the corporation to
the polity are not clear. Opening the corporation may be an important
part of the solution to social costs. It would require a significant reform of
corporate law; however, that political discussion is beyond the scope of
this paper.

In positive terms, CSR is posited as both an alternative to what are
perceived to be failures of public law, and an effort to avoid public law.
It is seen as a remedy to the failure of corporate law, and more broadly,
public law in general. It is committed to the use of private regulatory
means, without democratic input as to its objects or standards, and not
reliant on public resources of authority and treasure.

In this vein, some more recent sophisticated analyses of CSR view it
as an effort to re-embed industrial production using the corporation back
into the social system. This approach in some way addresses a

148 A.A. JR SOMMER, Whom Should the Corporation Serve--The Berle-Dodd Debate Revisited Sixty
150 STOUT, U. SEATTLE L. REV., (2013), R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A
STAKEHOLDER APPROACH (Pitman. 1984). SHEEHY, UNIVERSITY OF MIAMI BUSINESS LAW REVIEW
(2005), ANDREW CRANE, et al., Oxford Handbook of Corporate Social Responsibility (Oxford
University Press 2008).
151 HANLON, Rethinking Corporate Social Responsibility and the Role of the Firm--On the Denial of
Politics. 2007. RONEN SHAMIR, Corporate Social Responsibility: A case of hegemony and counter-
hegemony, in LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY
(Bonaventura De Sousa Santos & César A. Rodríguez-Garavito eds., 2005). WEBB &
152 SHEEHY, MONASH UNIVERSITY LAW REVIEW, (2012).
153 MARC AMSTUTZ, The Double Movement in Global Law: The Case of European Corporate Social
Responsibility, in KARL POLANYI, GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL
fundamental problem in corporate law expressed by jurists of a bygone era who lamented that it has “no body to kick or soul to be damned”\textsuperscript{154} — or in more recent times, “psychopathic.”\textsuperscript{155} As an invention of the legal sphere,\textsuperscript{156} the corporation has no necessary non-economic, non-legal social activities. As an intangible legal actor it suffers no social inhibitions and may pursue unrestrained self-interest.\textsuperscript{157} Where CSR has been effective in re-connecting the industrial enterprise with local community CSR limits the disembedding that the use of the corporate form has allowed.\textsuperscript{158} To a significant degree the CSR discussion has missed the well established regulatory and legal framework that is already in place. There are a number of international and transnational public and private legal norms and regulatory systems in place.\textsuperscript{159} The law may well be often overlooked because the CSR discussion has been dominated by management scholars who rightly focus on organisational issues. In sum, CSR may be defined as “private self-regulatory initiative, incorporating public and private international law norms seeking to ameliorate and mitigate social costs and promote public good by industrial organisations.”\textsuperscript{160}

Having examined the nature and parameters of social costs, corporate law and CSR discretely, the article now turns to an analysis of the interface of the concepts.

6. Law and Social Costs
The analysis has demonstrated that the real issue under discussion is not the corporation per se; rather, it concerns the negative externalities, some tangible and measurable, others less so, consequent to industrial production *exacerbated* by the corporate form.¹⁶¹ Contrary to the supposition of some involved in the CSR debate,¹⁶² many of these social costs are not without legal remedy. The problem from, however, is that such remedies are not part of corporate law—the result perhaps of an incomplete shift of the corporation from public to private side of the divide.¹⁶³ Rather, these remedies have been assigned to other areas of law, namely tort, contract, environmental law, labour and employment law, and at the societal level, through the legal institutions sustaining the economic system¹⁶⁴, the political system,¹⁶⁵ and ultimately the electoral process.¹⁶⁶ Each of these areas of law deals with the externalities starting from different principles utilising different doctrines. Why is this the case?

There is a *prima facie* case for this organisation of law in that torts, contracts and other areas of law deal with a range of human problems that are not limited to the scope of corporate industrial activity. These areas of law address distinct types of problems and provide both principles and process for their remedy through the organisation and distribution rights and duties throughout society. The principles and processes have been developed to address these issues in a consistent manner, regardless of how particular problems were produced or who produces them—whether individuals or collectives. Torts, breaches of contracts, social disruption and destruction of the natural environment are regularly committed by ordinary human persons apart from the corporate form. From this point of view, as the events are not peculiar to the

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corporation, there is no need to make these peculiarly corporate law issues.

It is at this point that the interface between corporate law and CSR becomes discordant. Some CSR advocates suggest that these issues—i.e. legal control of social costs—should be core aspects of corporate law.\textsuperscript{167} Essentially, they see a solution in expanding the law of corporations to encompass all the activities carried on by corporate actors to include the consequences of those activities. In this vision, corporate law will regulate not only the rights of the corporation to enter contracts, but also prescribe substantive content such as the rights and duties to and of employees. Further, corporate law in this vision will restrict the nature and type of industrial activities carried on by the corporation, so as to limit environmental consequences and to take account of other community concerns. In other words, the corporation which has seen dramatic reform since its medieval inception through the nineteenth century including the reforms of limited liability, protection of directors as agents and a great increase in financial and political power will have these expanded rights and benefits in an industrial society matched by an expansion of its duties with respect to the protection and maintenance of that society. In this vision an expansion of rights and power should have a matching restraint on and accountability for the rights and that power. A corollary of this proposition is that the corporate controllers, i.e. the directors and officers will not only have greater power and greater responsibilities, but to discharge those responsibilities they will need the expanded discretions—with of course more clearly articulated parameters than general fiduciary duties and a duty of care.\textsuperscript{168} This discussion leads to consideration of the seminal debate within the law on the issue which has run since Berle and Dodd started it in the 1920’s.\textsuperscript{169}

\begin{footnotesize}
\textsuperscript{167} See historical discussion in Ireland \& Pillay, Corporate Social Responsibility in a Neoliberal Age. 2009. 82-85
\end{footnotesize}
Both of these academic lawyers were concerned about the corporation of their day. They noted the great power and wealth amassed by these corporations. They also noted the great impacts of corporate activity on society. Finally, they both worried about the power of directors who controlled the corporations, and more specifically, how to ensure that directors used their power benignly if not benevolently.\footnote{170 SOMMER, DEL. J. CORP. L., (1991). AMIR N LICHT, The Maximands of Corporate Governance: A Theory of Values and Cognitive Style, 29 DELAWARE JOURNAL OF CORPORATE LAW 649(2004).} Berle focused more narrowly on the power of directors and managers in the exercise of their discretion over the vast assets of the corporate empires, and the potential use those powers to divert corporate power and assets to serve their own personal ends.\footnote{171 BERLE, HARVARD LAW REVIEW, (1931).} Clearly these corporate law concerns resonate with the CSR debate; however, the debate was carried on within the confines of the parameters of corporate law and their historical context,\footnote{172 Wells 2013} without the socio-political debate of contemporary practices. Berle expressed his concern as a concern that the parties whose money these managers were dealing with had little control over those managers—an issue he identified along with the economist Gardiner Means as the separation of ownership and control.\footnote{173 BERLE & MEANS, The Modern Corporation and Private Property. 1968., p. 6} Berle’s proposition for reigning in directors and protecting investors was to make directors accountable to shareholders. His view was a view shared by others from the same era and has become the basis for the economic orthodoxy of shareholder primacy.\footnote{174 WELLS, UNIVERSITY OF KANSAS LAW REVIEW, (2002-2003). at 80 SHEEHY, DALHOUSSIE LAW JOURNAL, (2014)., STOUT, U. SEATTLE L. REV., (2013)., SMITH, J. CORP. L., (1997)., MATTHEW T BODIE, AOL Time Warner and the False God of Shareholder Primacy., 31 JOURNAL OF CORPORATION LAW (2006).} Indeed, in terms of corporate law reform, Berle suggested in his work with Means, that the law of corporations, accordingly, might well be considered as a potential constitutional law for the new economic state, while
business practice is increasingly assuming the aspect of economic statesmanship.\textsuperscript{175}

Dodd focused on the broader issue of political power of large corporate empires.\textsuperscript{176} He argued that corporate law should “protect the nation from corporations”.\textsuperscript{177} Dodd, like Berle, focused his discussion of corporate law reform on directors’ duties; however, his view was that shareholders were not uniquely vulnerable to corporate exploitation an issue now discussed as “incomplete contracts”\textsuperscript{178} and foundational to the team theory of production.\textsuperscript{179} He suggested that the directors of corporations take account of social needs, and according to Chen and Hanson, saw the separation of ownership and control as an opportunity to exploit corporate wealth for the betterment of society.\textsuperscript{180} Again, Dodd’s view is amenable to transformative CSR advocates; however, it is to be remembered that he, like Berle, worked within the constraints of positive corporate law.

These and opposing views on corporate law have been advanced over the intervening decades by a variety of legal scholars, both conservative\textsuperscript{181} and progressive.\textsuperscript{182} Unlike some CSR advocates, the legal scholarship has not sought to destroy the corporate form, nor has its intention been to eject shareholders from the corporation; rather, its objective has been to add other parties whose rights and interests are affected by the corporation but inadequately protected. These legal

\begin{thebibliography}{99}
\item Berle & Means, The Modern Corporation and Private Property. 1968. P 313, 1932 ed, a position taken more recently by some, see for example, Scialli, Corporate Power in Civil Society: An Application of Societal Constitutionalism. 2001.
\item Dodd, Harvard Law Review, (1932).
\item Oliver Hart & John Moore, Incomplete Contracts and Renegotiation, 56 Econometrica (1988).
\item Margaret M. Blair & Lynn A. Stout, A Team Production Theory of Corporate Law, 85 Virginia Law Review, (1999).
\item Chen & Hanson, Michigan Law Review, (2004). p. 36
\end{thebibliography}
scholars have argued that it is a matter of fundamental justice: where people’s rights are to be effected, whether by taxation or imposition social cost, such rights must either be recognised as legitimate in the political arena or people will have the right and legitimate reason to take to the streets.

The core issue and therefore the interface between CSR, corporate law and social costs is the nature and role of the corporation as a legal, economic and political institution. The question can be put succinctly: Is the corporation’s role the unimpeded creation of wealth irrespective of distribution as orthodox economists and political conservatives would have it? This position views social costs as irrelevant to the corporation and something to be addressed by government or other parts of society. Alternatively, if the role of the corporation in society is viewed as an governance institution, an intermediate association regulating working lives. It may be conceived of as a vehicle for the production and distribution of goods and services. Such a vision of the role of the corporation in society supplements, modifies or substitutes the financial view of the corporation. This socio-political view of the corporation is founded on a different normative basis the corporation to be charged with balancing wealth creation with provision of jobs, goods and services within ecological limitations, more equitable distribution of social costs, and a wider public distribution of the private benefits of corporate law.

In terms of the overall discussion, a clear understanding has been developed by institutionalists and political economists. Institutionalists

183 Corporate models express the different disciplinary, political and ethical perspectives. Each model proposes a different understanding of the corporation. In particular, each model proposes a different 1) nature of the corporation, 2) purpose, 3) boundaries—who is included and excluded, and 4) connection to society. These four analytical serve as compass points for understanding the implications of models for CSR. The models compete seeking to propose alternative ways of thinking and each has its own embedded normative implications. The normative dimension of these models is critical because it indicates what the corporation “should” be like, in contrast to an explanatory model which simply serves to illustrate or enlighten the users. A matter I have dealt with elsewhere BENEDET SIEFEEHY, The Importance of Corporate Models: Economic And Jurisprudential Values And The Future Of Corporate Law, 2 DEPAUL BUSINESS & COMMERCIAL LAW JOURNAL (2004). SCIULLI, Corporate Power in Civil Society: An Application of Societal Constitutionalism. 2001.


view the problem as ultimately a matter of a disembedded economy\textsuperscript{186} separating the production of goods and services from their social context, and then further removing labour form the equation through the financialisation of the economy.\textsuperscript{187} The better approach in this view solves social costs by a re-organisation and re-ordering of the institutions of industrial production including the legal corporate form. Thus, that form which has led to ecological destruction and ignoring the concerns of less powerful parties which make up the majority of society\textsuperscript{188} must be reformed to re-embed the corporation and its industrial enterprise in society. It is thought that such re-embedding would lead to a decline in social costs.\textsuperscript{189}

In sum the interface between corporate law, CSR and social costs cannot be reconciled from within any particular dialogue, literature or discipline. Rather, it is only by stepping back from the particular discourses and taking a broader view that the dissonant conceptual constructs that the discordant nature of their interfaces comes into clear view.

7. Refining the Constructs and Redrawing the boundaries


This review of the constructs of and interfaces between corporate law and CSR and various approaches to social costs suggest that a discussion of whether institutional reform might be desirable. The basic question is which approaches to reform is preferable: is a broad public socio-political institutional reform, a private CSR approach or a more narrow corporate law approach to reform more desirable? Broad socio-political institutional change is a much larger proposition. Such changes are always opposed by powerful elites because it threatens their position and they have the most to lose. Contemporary society lacks the cultural consensus, coordinated governance mechanisms and due to a variety of factors from increased inequalities to virulent nationalisms, the sense of solidarity necessary to create a society wide solution such as 17th century Tikopia, which agreed to slaughter all its pigs because the land used to produce animals would not leave enough land for rich and poor to eat. Although the ultimate solution to dramatic environmental change which certainly will come to pass will be a significant change in socio-political orderings, given the obstacles to changing social and political systems, lesser incremental steps will at least start the process of adaptation.

CSR is focused on re-conceptualising of the nature of large industrial organisations’ obligations and re-ordering of interests without attention to the parameters of existing corporate law and unclear idea of social costs and a vague multipronged agenda. While CSR has proven an important concept for public discussion, political action and corporate strategic response for all parties it has been less effective in achieving significant changes in the business practices of large industrial organisations. Significant and effective reform for which CSR holds

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potential needs settled problems, a clear focus on institutions and a better recognised normative core to provide a definite pathway forward—all of which CSR lacks although the recognition of the settled normative core is underway. CSR approaches to reform of enterprises are unfocused, and miss the core issues of fundamental corporate law reform.¹⁹³

If the problem is as framed, a matter of the control of social costs of large industrial enterprises, then the nature of the constructs and the general parameters for redrawing are clearer, and further, there are more answers available. The basic problem stems from the structure and processes of the legal system. In law’s solution to social costs are limited in terms of time frames to ex post solutions. Law’s remedies depend on being driven through a legal system which is slow, procedure bound, expensive and adversarial. This approach to social costs can hardly be described as optimal from a broader social perspective or particularly effective in terms of either preventing or redistributing social costs more fairly. Rather, such a system seems to favour their production—a system which allows profits to be made and then compensation to be paid post facto on an ad hoc basis in those relatively rare instances when injured parties have the resources, determination and patience to litigate a matter through to its conclusion and to receive and enforce a judgement from the court. Accordingly, if the boundaries are to be redrawn, that redrawing should address the creation of those social costs in the first instance—i.e. a matter of decision making within the corporation. Such a redrawing of boundaries which CSR advocates would move parties or at least the related rights and duties currently outside corporate law to a position within. Further, CSR would shift the boundaries of the construct of the large industrial organisation to include the surrounding community require it to crystallise and disclose its politics and force it to the integrate community concerns into the politics of corporate decision making.

Reforming decision making structures and processes within the corporation would allow an ex ante preventative approach rather than

post facto remedying of harm once they have occurred. Such an ex ante approach has much to recommend it. An ex ante approach provides opportunity for a broad spectrum of holistic preventative measures and a wider consultation about the limits of and affected parties or community’s perspectives, trade-offs and views as well as their evaluation of costs and benefits rather than simply being subjected to the views and values of management imposed upon their lives by management fiat. Thus a different reformed construct of the industrial enterprise of model could be developed. Such a model could use an ex ante approach which prevents injury in the first instance rather than depending on the post facto, ad hoc, inefficient legal process of discovery of harm, requiring the initiative of injured parties to litigate, an extended hearing and determination of rights, adjudication, judgement, enforcement and remediation.

Advocates of corporate reform encounter the objection that the public social concerns of CSR are outside the boundaries of private corporate law and that law must follow its own centuries old normative pathway and method, following doctrines and precedents which form a coherent body of law. In this view, law cannot be ruled by social facts. Yet corporate law, like all law, has often needed to do just that: to rely on social facts to find ways to articulate and justify outcomes.

Indeed, the law of corporations like all law is a trajectory of development and change. As social philosopher John Dewey observed in relation to the problem of corporate personality,

we often go on discussing problems in terms of old ideas when the solution of the problem depends upon getting rid of the old ideas, and putting in their place concepts more in accord with the present state of ideas and knowledge.

Oliver Wendell Holmes put the issue succinctly: “It is revolting to have no better reason for a rule of law than that so it was laid down in

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the time of Henry IV.” Examining this specific issue of CSR and corporate law, C. Harwell Wells observes that the pressures of the Cold War had led to considering the corporation as a social institution and led courts to approve of corporate charitable giving in *A.P. Smith Mfg Co v Barlow*. Indeed, contemporary directors’ duties certainly do recognise that social fact generally.

In his discussion of large industrial organisations, Selznick notes that the development of law from a sociological perspective is not based on abstract postulates; nor does it reflect the moral preferences of the observer. Incipient law is emergent positive law, responsive to, and made possible by, particular social circumstances.

The changing social circumstances driving legal change are the industrialisation, changes in technology of manufacture and distribution, the increased size of firms such that they have resources to address costs. Perhaps most importantly Selznick observes: “the growing importance of large-scale organisations carries with it the likelihood that new claims of right will emerge.”

Indeed, the necessity for corporate law to change to address changed social circumstances and these new rights claims have been remarked upon in the courts. Acknowledging the reality of corporate power and social responsibility and adjusting corporate law norms, Berger opined in *Teck Corp Ltd v Millar*:

“a classical theory that once was unchallengeable must yield to the facts of modern life. In fact, of course, it has. If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting bona fide in the interests of the company itself. Similarly, if the directors were to consider the consequences to the

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198 WELLS, UNIVERSITY OF PENNSYLVANIA JOURNAL BUSINESS LAW REVIEW, (2013). pp24-27
201 Id. at. 33
community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of the shareholders.... if they observe a decent respect for other interests lying beyond those of the company’s shareholders in the strict sense, that will not, in my view, leave directors open to the charge that they have failed in their fiduciary duty to the company.” 203

Law, as noted, entrenches certain privileges and obligations and corporate law is no different. 204 As Kent Greenfield observes: “corporate law, just like every other area of common and statutory law, is predicated upon our collective political decisions about what we want our society to look like.” 205 The law’s task therefore is to define, delimit and distribute rights and duties, in this instance, of the corporation to reflect broad society values. The appropriate questions to ask are: what rights and duties has corporate law created for the corporation and its insiders? And can it continue to prefer insiders’ private claims and ignore the claims of outsiders concerning the generation of social costs?

Greenfield observes that within the corpus of law corporate law is unique in this sense:

instead of creating a governance system that would help internalize the concerns of customers, employees, or society in general, the system of corporate governance ... establishes shareholder interests as supreme and centralizes decision making so that those interests are served. Other stakeholders are left to depend on mechanisms outside corporate law, primarily in the form of express contracts or government regulation, both seriously imperfect, to protect their interests. 206

203 Teck Corp. Ltd. v. Millar (1972), 33 DLR (3d) 288 (BCSC) See discussion in id. at.
206 Id. at., p. 17
Yet, this position is neither inevitable contra some,207 nor unchangeable. As noted all law including corporate law changes and such changes, far from being the smooth methodical evolutionary process208 is a chaotic, politically charged process209 which answers to the political needs of its day.210

8. Reforming corporate law

With this background, it is appropriate to consider how corporate law might be reformed. There are a number of corporate models available.211 One model that would allow such a reform could be based on a reconceptualisation proposed by Blair and Stout.212 Their model of the corporation, called the team production model, could provide the basis for reform allowing governance which takes better account of social costs. Blair and Stout argue that the corporation is effective because it concentrates and secures firm specific investment allowing specialisation and hence leveraging of productivity.213 If these team members were to be given a role in governance, that is at a higher level decision making, they would be able to provide ex ante controls for at least some of the social costs incurred by large industrial enterprises. Taking Blair and Stout’s model further, there is no reason to limit consideration narrowly to the immediate economic factors of production—and it is important to note that the current laws of tort do not. Indeed, the air employees breathe, the water they drink and more broadly the local community upon whom they rely for their physical and psychological well-being have tort and other rights and may well be considered contributors to the team. Accordingly, they too could be included to varying degrees. Essentially, a
stakeholder model which allows better inclusion of social costs ex ante is preferable to a shareholder model.\textsuperscript{214}

Recalling that a core CSR issue is the extent to which stakeholder considerations can and normatively should be expected to determine operations of a large industrial organisation a structured change can be proposed drawing on Blair and Stout’s team production model. While communities are not dedicated to the making of profit for distant shareholders, the employee team members are concerned with the sustainability of their communities—the economic wellbeing through jobs, tax revenues, and related benefits—as well as ecological and social sustainability. These stakeholders need not be involved in all financial decisions, but only in those major decisions which alter the enterprises environmental or social impact—the social costs—and in certain instances, such as a plant closure there is reason to argue that they should be given some type of rights such as a purchasing or a type of right of first refusal in a takeover or a right of veto.

In cases where current organisational structuring does not allow on-going profitability other options such as employee buyout and reorganisation of ownership structures putting workers in control of production often do provide viable solutions.\textsuperscript{215} While a veto would be designed to be used only occasionally, its location in the hands of stakeholders would work as a caution and a brake on directors who might be inclined to take riskier more potentially harmful decisions for the benefit of shareholders at the expense of the effected communities—precisely the issue of social costs. While such a proposal for reform of the boundaries is certainly to invite much criticism, particularly from those

\textsuperscript{214} SHEEHY, UNIVERSITY OF MIAMI BUSINESS LAW REVIEW (2005).
who view the status quo as optimal, it provides an alternative to the ex post solutions, limited in scope as they are and subject to the slow, formal procedure bound, expensive and less predictable outcomes of the adversarial system of common law jurisdictions. The proposed reform allows ex ante prompt, informal, markedly less expensive, collaboratively negotiated solutions by affected parties—and hence both politically legitimate and practically preferable—to the problems of social costs.

We turn next to examine some corporate law reform that is already afoot, both legislatively and in common law and briefly a variety of proposals. Perhaps the most significant recent example of legislative reform is the new s. 172 of the *Companies Act* UK places obligations on a company director to

...act in the way he [sic] considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to— ...(d) the impact of the company’s operations on the community and the environment.

Although the interpretation of this section is debated, it points in a certain, clear direction. It may well be that such provisions re-drawing the boundaries and shifting the interfaces may find themselves adopted in other common law jurisdictions.

From a broad view, Bryan Horrigan has identified ten areas where corporate law could be reformed to integrate CSR. His list follows:

1. preconditions for incorporation and continued corporate existence (eg revocable corporate charters);
2. corporate objectives and powers (eg corporate philanthropy and corporate community investment);
3. directors’ and officers’ duties and defences (eg stakeholder-sensitive business judgments);

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217 An interesting provision has appeared in India’s Companies Act s 135
4. business risk management requirements (eg CSR-related business risk drivers);
5. corporate disclosure and reporting obligations (eg non-financial and sustainability reporting requirements);
6. shareholder (and stakeholder) participation in corporate decision-making and governance;
7. consideration and treatment of employee, creditor, and other stakeholder interests in corporate governance and decision-making;
8. creation of incentives and removal of disincentives for socially responsible corporate behaviour (eg matching regulatory treatment and business opportunities to business regulatory compliance and corporate citizenship track records);
9. standards for corporate behaviour (eg corporate conduct meeting SRI requirements); and
10. conferral of standard-setting authority on others (eg legal backing for CSR-related accounting, auditing, and other standards set by official and professional regulators).  

Others have made more specific recommendations. David Millon has made proposals that would reduce short-term pressures which would facilitate CSR expenditure,  

as has Lawrence Mitchell. Mitchell suggests such things as: changes to capital gains taxation regimes redefining short term to something like ten years for the automobile industry; director elections being held every five years; capitalising workers and changing deductions available among others. These proposals draw new boundaries around directors to facilitate CSR concerns in decision making. They would allow directors to reduce social

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219 MILLON, GEO. WASH. L. REV., (2002). Recent analysis challenges these proposals MARK J. ROE, Corporate Short-Termism--In the Boardroom and in the Courtroom, 68 BUSINESS LAWYER (2013).
220 MITCHELL, The board as a path toward corporate social responsibility. 2006. 303-
costs and generate true productive as opposed to financialised benefits for society including wealth.

Such reforms may go a considerable distance in ameliorating the production of social costs of industrial production where those production processes are housed in corporations. To achieve them, requires incorporating a number of CSR concerns. Such reforms, however, requires fresh thinking about the social institutions, the organisation of production including industrial enterprises, including a broad social consensus social construct and legal invention of the corporation, a better definition of CSR, including a broad social consensus about the need for preservation for future generations the earth’s ecology through limiting levels of environmental harm permissible in the production of industrial goods and services necessary for contemporary life.

9. Conclusion

A better understanding of these constructs and their interfaces ensure that the investment of public government and private company funds can be more wisely directed and policy makers of all types are more effectively able to shape policy for the broader societal goals which are required of them. At their core, these concepts are all related to the problems of industrial production. Fortunately, none of them are unchangeable natural phenomena. They are all social inventions and subject to intentional change. What drives both the harm and its innovative resolution are human decisions. The systems and value structures of a society channel these drivers and it is up to every society to configure its systems and institutions in a way that sustains its people both in the present and in the future. Resolving or at least understanding these issues is an important first step in achieving value from CSR investment and progressing toward CSR’s normative objectives of a cleaner planet, fairer society and a better workplace.

The corporation is certainly one of law’s finest inventions. However, like incantations used by a sorcerer’s apprentice, allowing those in charge of the corporate vehicle to ignore its appropriate context—i.e. its social and ecological context—is to set loose a great force with highly destructive potential in the arenas critical for human survival. The boundaries between corporate law and social costs demand a re-visiting, a re-thinking particularly in the current context of a runaway social costs. We live in a world which faces a combined ecological collapse, corporate capture of democratic government and fragmentation of society through inequalities. It is not that corporate law cannot be made to address these problems. Rather, given its historical place on the private side of the public-private divide, it has not had to account for the externalities generated by its use in industrial production—a situation exacerbated by the disembedding of the economy as a whole.

The question to be addressed by legal thinkers, CSR advocates, political scientists, economists, and ultimately legislators, is whether reform of corporate law to internalise externalities can and should be undertaken, and if so, how such reform is to be done. This paper has suggested that while all of these issues fit comfortably under the CSR umbrella, the disconnect between the distinct concepts of corporations, social costs and CSR hamper efforts to do more good and less harm in the processes of industrial production. While the core of the problem might be described as a disembedding of the economy, a significant contribution to its resolution comes from CSR combined with an appropriate understanding of the relationship between corporate law, large industrial organisations and social costs.

Examining the constructs and interfaces leads to the conclusion that a fundamental re-norming and reform is necessary, and further, that such reform needs to lead to a re-embedding of the economy in its social context rather than having society follow the economy. The reason for

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this position is one of the basic premises underlying CSR: namely, the economic system is to serve society, and must above all preserve the ecology for the long term survival of the species.

The current state of affairs has driven marked social changes and significant environmental harms. It is hoped that by providing a better understanding of the boundaries and interfaces of CSR, law and social costs, some direction for reform becomes clearer and that this paper contributes toward finding the way forward in this important endeavour—the sustenance of human society by ecologically sustainable industrial organisation and effective use of the social invention of corporations law.

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