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Creative Capitalism and Human Trafficking: A Business Approach to Eliminate Forced Labor and Human Trafficking from Global Supply Chains

Dana Raigrodski

CREATIVE CAPITALISM AND HUMAN TRAFFICKING: A BUSINESS APPROACH TO ELIMINATE FORCED LABOR AND HUMAN TRAFFICKING FROM GLOBAL SUPPLY CHAINS

DANA RAIGRODSKI*

ABSTRACT

A great amount of revenue generated by businesses in the global economy can be linked to the trafficking and enslavement of human beings. Yet, the current discourse on human trafficking fails to recognize the magnitude of benefit consumers, businesses, and economies gain from the work of forced and trafficked labor. Moreover, the limited efforts that seek to address this situation have focused on ways to encourage businesses to voluntarily adopt more socially responsible practices. These measures have had only limited success, and are generally believed to be in tension with the for-profit purposes of businesses. Hence, the task of convincing businesses to truly unearth and remedy human trafficking in their supply chains seems an uphill battle. This article challenges these prevailing views and offers a business approach to eliminate forced labor and human trafficking from global supply chains. Relying on a series of business studies that encourage strategic use of corporate social responsibility in order to increase competitiveness and pursue shared value, this Article makes the case for businesses to pursue supply chains clean of forced and trafficked labor as a core business strategy which is consistent with—and even advances—their profit-seeking goals. Many successful companies have incorporated environmental sustainability into their business models and achieved short-term profits and long-term added value. A few leading apparel manufacturers are similarly focusing on responsible yet profitable labor practices, and preliminary data from the International Labor Organization (ILO) Better Work Program

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*Lecturer and Director, General Law LL.M., University of Washington School of Law; Member & Chair of Continuing Education, UW Women's Center Anti-Trafficking Task Force; Commissioner, Washington State Supreme Court Gender & Justice Commission.

demonstrates linkages between better work conditions and improved market competitiveness. Using this data, this Article shows that business policies that minimize the incentives to use forced and trafficked labor do not inherently compromise profits and can also improve a business's bottom line. In doing so, it suggests that the task of convincing business leaders to adopt better policies may be less challenging if framed as a core business strategy in the pursuit of profit.

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INTRODUCTION

At the 2008 World Economic Forum, Bill Gates challenged corporations to engage in "creative capitalism."[1] He called for a system change in which capitalism can harness self-interest to serve the wider interest: "Such a system would have a twin mission: making profits and also improving lives for those who don't fully benefit from market forces."[2] To do so, Gates called for the use of market-based profit and recognition incentives.[3] Primarily, businesses should try to use profit incentives whenever possible, as such incentives will support a more sustainable capitalist system.[4] Where conditions make profits impossible (as in markets serving the very poor) or not immediately discernable, recognition can trigger market-based rewards for good behavior and can serve as an added incentive.[5] Gates envisioned that, under this new system of creative capitalism, governments, businesses, and non-profit organizations would work together to utilize the market forces of profits and recognition to extend the benefits of the global economy to all.[6]

Building on Gates's call for action, this Article advocates a paradigm shift for businesses to view the pursuit of supply chains clean of forced and trafficked labor as a core business strategy, which can enable both profit and reputational success. This Article focuses specifically on trafficked and forced labor because a great amount of revenue generated by businesses in the global economy can be linked to the trafficking and enslavement of human beings. At the same time, current discourse on human trafficking fails to recognize the magnitude of benefit consumers, businesses, and economies gain from forced and trafficked labor. Consequently, the efforts to engage businesses on this front have been surprisingly limited.

The limited legal discourse on corporate complicity in human trafficking, primarily through the use of forced and bonded labor in global supply chains, has focused on business' voluntary adoption

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[1] Bill Gates, *Prepared Remarks by Bill Gates, Co-Chair and Trustee*, GATES FOUND. (Jan. 24, 2008), http://www.gatesfoundation.org/media-center/speeches/2008/01/bill-gates-2008-world-economic-forum [https://perma.cc/47ZJ-TAN5].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

of social responsibility practices. A more recent trend sees legislators and regulatory bodies imposing disclosure rules to encourage clean supply chains.[7] However, not only have these measures had limited success in alleviating forced and trafficked labor across industries, but they are also generally viewed as competing with—and possibly undermining—the for-profit purpose of the business.[8]

In contrast, this Article challenges the prevailing view that businesses engaged in social purposes do so necessarily at the expense of profit making, and advances a "business case" for eliminating forced labor and human trafficking from global supply chains. Relying on a series of business studies that encourage strategic use of corporate social responsibility to increase competitiveness and pursue shared value, this Article makes the case for businesses to pursue supply chains clean from forced and trafficked labor as a core business strategy consistent with—and even advancing—their profit-seeking goals. Ensuring workers' well-being can improve supply chain efficiency, productivity, reliability, and overall resiliency, and ultimately has the potential to enhance both the short-term bottom line and long-term value creation for the business. This Article draws from industry efforts along these lines in the context of environmental sustainability, from a much smaller subset of efforts to address labor issues as part of the business strategy by leading apparel manufacturers. It also references preliminary data from the International Labor Organization (ILO) Better Work Program, which demonstrates links between better work conditions and business profitability and market competitiveness. Using this data, this Article shows that business policies that minimize the incentives to use forced and trafficked labor do not inherently compromise profits. Furthermore, these practices can also improve a business's bottom line. Thus, the task of convincing business leaders to adopt better policies may be less challenging if framed as a core business strategy in the pursuit of profit.

Part I begins by shedding light on the economics of human trafficking and forced labor. In particular, it focuses on the great amount of revenue generated throughout global trade in legitimate industries that link directly and indirectly to the trafficking and enslavement of millions of people. Such revenue often goes

[7] *See infra* Part II.
[8] *See infra* note 155.

unnoticed in the discussion about human trafficking. Businesses, specifically, facilitate and benefit from it. Part I also situates the prevalence of forced and exploited labor in today's global economy within the organizational and structural shifts to global outsourcing and complex supply chains. Part II then examines the current landscape of private and public efforts to address the risks of human trafficking stemming from the globalization of trade and the spread of global supply chains. It briefly examines the proliferation of voluntary Corporate Social Responsibility (CSR) practices and guidelines, as well as the emergence of state mandated CSR related regulation and state facilitated corporate forms of Benefit Corporations. Part III takes a closer look at the pursuit of profit by examining the tensions between CSR efforts and shareholders wealth maximization, in addition to the narrow and problematic conceptualization of profits and costs of doing business. Part IV, therefore, makes the case that clean supply chains do not necessarily jeopardize—and can even be good for—the bottom line. It starts by suggesting that the business case for clean supply chains is stronger than simply a matter of risk managements and reputational benefits. It then builds on perspectives from business studies and competitiveness theories, to advocate for strategic CSR and the pursuit of shared value as a core business agenda. Lastly, it considers concrete examples of businesses pursuing shared value while focusing on improving labor conditions and even providing fair wages, thus potentially minimizing key drivers that perpetuate human trafficking and forced labor.

I. THE BUSINESS OF HUMAN TRAFFICKING AND FORCED LABOR

A. Profiting from Exploitation

At its core, human trafficking entails the enslavement and exploitation of people for economic gain through force and coercion.[9]

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[9] While the formal definitions of "trafficking" can be narrow, such as the focus on the element of "movement" in the U.N. Trafficking Protocol or on "severe forms of trafficking" in the U.S. Trafficking Victims Protection Act, this Article takes a broader approach encompassing a wide range of forced and exploitive labor practices, which quite often amount to formal trafficking, but, as we shall see, are quite often excluded on purpose. *See* Anne T. Gallagher, *Understanding Exploitation*, 33 HARV. INT'L REV. 4 (2011).

Trafficked people are held against their will through acts of coercion and forced to work for or provide services to the trafficker or others.[10] The work or services may include anything from bonded

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The U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children defines trafficking as, essentially, the obtaining of persons, by means of coercion, deception, or consent for the purpose of exploitation such as forced labor or prostitution:

> "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs .... The consent of a victim of trafficking in persons to the intended exploitation set forth [above] shall be irrelevant where any of the means set forth [above] have been used.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, art. 3, Nov. 15, 2000, 2237 U.N.T.S. 319.

The Trafficking Victims Protection Act describes human trafficking as various activities when one person obtains or holds another person in compelled service such as involuntary servitude, slavery, debt bondage, and forced labor and commercial sex. The Act defines "severe forms of trafficking in persons" and "sex trafficking" as:

> (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
> (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.
>
> (10) The term "sex trafficking" means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.

Trafficking Victims Protection Act, 22 U.S.C. §§ 7102(8)–(9) (2012).

[10] Some may have "consented" to the initial arrangement but are then prevented from leaving or otherwise coerced to stay; others may have been tricked, threatened, or put by force into it. 93 Session Int'l Labour Conference, *A Global Alliance Against Forced Labour*, at 6 Report 1(B) (2005) [hereinafter 2005 ILO Report, Global Alliance], http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_081882.pdf [https://perma.cc/8FRX-J7JZ].

or forced labor to commercial sexual exploitation.[11] These arrangements may be structured as standard work but with little or no payment, or on terms that are highly exploitative and can amount to trafficking.[12] The line is often blurred: "*In fact*, many victims of human trafficking look quite like exploited agricultural laborers and factory workers, and *in fact* they are often one and the same."[13]

Numerous people are trafficked all over the world to be enslaved in a broad range of industries.[14] The ILO and the U.S. State Department estimate that at least 20.9 million adults and children are victims of forced labor, bonded labor, and commercial sexual servitude at any given time.[15] In fact, "[t]he vast majority of the 20.9 million forced laborers—18.7 million ... are exploited in the private economy[.]"[16] Of these, 4.5 million ... are victims of forced sexual exploitation, and 14.2 million ... are victims of forced labor exploitation, primarily in agriculture, construction, domestic work, manufacturing, mining and utilities."[17] No country is exempt from the pandemic of human trafficking: Asia and the Pacific are by far the

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[11] Int'l Labour Org., *Profits and Poverty: The Economics of Forced Labour*, at 16 (2014) [hereinafter ILO Profits and Poverty], http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf [http://perma.cc/3RH9-HRZL].

[12] It is not uncommon to see employment with the prospects of decent work evolving into forced labor and human trafficking. On the continuum of exploitation, work conditions and manifestations of coercion are in constant flux, making it challenging to draw a clear line of what falls within the formal legal prohibition against human trafficking. *See* Nicola Jagers & Conny Rijken, *Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations*, 12 NW. J. INT'L HUM. RTS. 47, 50 (2014) (citing KLARA SKRIVANKOVA, BETWEEN DECENT WORK AND FORCED LABOUR: EXAMINING THE CONTINUUM OF EXPLOITATION 19 (2010)).

[13] Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers,* 23 NOTRE DAME L.J. ETHICS & PUB. POL'Y 1, 44–45 (2009).

[14] ILO Profits and Poverty, *supra* note 11, at 7.

[15] Int'l Labour Org., *A Global Alliance Against Forced Labour and Trafficking in Persons*, at 1 (May 2012), http://www.ilo.org/wcmsp5/groups/pub lic/---ed_norm/---declaration/documents/publication/wcms_203446.pdf [https://perma.cc /8RBF-PRHR]; *see generally Trafficking in Persons Report*, 214 U.S. DEP'T STATE, http://www.state.gov/documents/organization/226844.pdf [https://perma.cc/BD4W-UQVE].

[16] ILO Profits and Poverty, *supra* note 11, at 7.

[17] *Id.*

main region for forced labor,[18] and in the industrialized world, the Middle East, and transition economies, the majority of forced laborers are also trafficking victims.[19]

There are many estimates of the illegal revenue the worldwide criminal industry generates annually from involvement in human trafficking and forced labor. In 2005 and 2009, the ILO estimated that annual profits from human trafficking are at least $32 billion, of which $15.5 billion is made in industrialized countries.[20] More current estimates put the total illegal profits obtained from the use of forced labor worldwide at $150.2 billion per year.[21] Of that, "[v]ictims of forced labor exploitation, including domestic work, agriculture, and other economic activities, generate an estimated [ ]$51 billion in profits per year ... [with] profits from forced labor in agriculture, including forestry and fishing, estimated to be [ ]$9 billion per year."[22] Mining, construction, and manufacturing account for $34 billion in profit per year.[23] The ILO also estimated that victims of forced labor forgo at least $21 billion each year in unpaid wages and illegal recruitment fees.[24]

More importantly, however, those numbers do not truly account for the substantial amount of [legal] commercial revenue that would not exist without the trafficking of billions of people around the globe.[25] They also do not account for the share of capital generated by trafficked and forced labor within the trillions

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[18] Jens Lerche, *A Global Alliance Against Forced Labour? Unfree Labour, Neo-Liberal Globalization and the International Labour Organization,* 7 J. AGRARIAN CHANGE 425, 427–28 (2007).

[19] *Id.* at 429.

[20] 2005 ILO Report, Global Alliance, *supra* note 10, at 55; *see also* Int'l Labour Conference, The Cost of Coercion, at 20, Report 1(B) (2009) [hereinafter ILO Cost of Coercion], http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_106268.pdf [https://perma.cc/YN8R-35E9]; *Trafficking in Persons Report*, 2008 U.S. DEP'T OF STATE 34, http://www.state.gov/documents/organization/105501.pdf [https://perma.cc/K7BX-4SRF] (sex trafficking alone is estimated to bring in between $7–19 billion annually).

[21] ILO Profits and Poverty, *supra* note 11, at 13.

[22] *Id.* at 15.

[23] *Id.*

[24] ILO Cost of Coercion, *supra* note 20, at 32.

[25] Trade in goods and services now accounts for more than 60 percent of the global GDP. STEPHANIE HAN & NATALIE SOROKA, U.S. DEP'T. OF COM., U.S. TRADE OVERVIEW, 2013, at 2 (Oct. 2014), http://www.trade.gov/mas/ian/build

of dollars in capital flowing across the globe.[26] First, the "business" of human trafficking directly contributes to the revenue of certain industries such as tourism, banking and financing, telecommunications and media outlets, and travel and hospitality—industries that traffickers regularly use in the recruitment, transportation, transfer, harboring, or receipt of trafficking victims.[27] Second, of the 300 billion dollars generated annually by migrant worker remittance, possibly as much as 20 percent goes to pay commissions and debt bondage to the traffickers and recruiters.[28] Third, and most importantly, businesses and economies all over the world import and export billions of dollars in products tainted by forced labor in manufacturing and raw materials procurement.[29] Of the products U.S. consumers regularly buy and use, "trafficking may

/groups/public/@tg_ian/documents/webcontent/tg_ian_002065.pdf [https://perma.cc/HQS9-7W3Q].

[26] Gross capital flow between 1990 and 2000 is estimated at $7.5 trillion; net capital flow more than doubled between 1990 and 2000, reaching $1.2 trillion. Patrick J. Keenan, *Financial Globalization and Human Rights*, 46 COLUM. J. TRANSNAT'L L. 509, 510 (2008) (citing Gerd Hausler, *The Globalization of Finance*, 39 FIN. & DEV. 1 (2002)).

[27] *See* Saskia Sassen, *Strategic Gendering as Capability: One Lens into the Complexity of Powerlessness*, 19 COLUM. J. GENDER & L. 179, 180, 196 (2010); *see also* E. Christopher Johnson, Jr., *Business Lawyers are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor*, 70 BUS. LAW. 1083, 1087 (2015) ("Forms of Labor Trafficking can include forced labor in underground markets and sweatshops, as well as in legitimate businesses, including those in the manufacturing, travel, entertainment, hospitality, agricultural, service, and extractive industries.").

[28] *See Trafficking in Persons Report*, 2008 U.S. DEP'T OF ST., http://www.state.gov/documents/organization/105501.pdf [https://perma.cc/K7BX-4SRF].

[29] Under the Trafficking Victims Protection Reauthorization Acts of 2005 and 2008, the U.S. Department of Labor Bureau of International Labor Affairs publishes an annual list of foreign goods believed to have been produced by forced labor or child labor. *The Department of Labor's List of Goods Produced by Child Labor or Forced Labor*, 2009 U.S. DEP'T. OF LAB. 2, https://www.dol.gov/ilab/reports/pdf/2009tvpra.pdf [https://perma.cc/4DDA-KBHV]. Each year has seen an increase in the numbers of goods and countries. The initial list published in 2009 includes 122 goods or products from 58 countries. *Id.* at 13. However, the 2014 list covers a total of 136 goods from 74 countries. *The Department of Labor's List of Goods Produced by Child Labor or Forced Labor*, 2014 U.S. DEP'T. OF LAB. 3, https://www.dol.gov/ilab/reports/pdf/TVPRA _Report2014.pdf [https:// perma.cc/ELV3-2MDA]. The goods, produced primarily in developing and under-developed economies, range from fresh produce and raw materials to footwear and apparel to precious metals and stones and so forth. *Id.* at 3–4.

be responsible for producing common products such as clothes, smartphones, computers, electronics, coffee, food, bricks, tires, and even cotton sheets."[30]

For example, the U.S. government alone spends between $350 and $500 billion a year to purchase goods and services, making it the largest single purchaser in the global economy.[31] As a global mega-consumer, the U.S. government procures products and services through those same global supply chains that have direct and indirect links to various human rights issues, including forced and trafficked labor.[32] The U.S. government spends about $74 billion annually on "off-the-shelf" information technology products, such as electronic equipment components or computers and data processing equipment.[33] Many of these products are made in Chinese factories known for their harsh working conditions, including extremely low wages, long working hours, hazardous conditions, and child labor.[34] Similar concerns exist with regard to the raw minerals found in many products which are obtained through forced and trafficked labor around the world.[35] The U.S. government is a major consumer of both the minerals themselves and the products that contain them.[36] The U.S. government spends between $1.5–$2.4 billion a year on apparel purchases manufactured in countries such as Bangladesh and Cambodia, where sweatshop conditions prevail throughout the apparel and textile industry.[37] Forced and trafficked labor, including bonded labor and child labor, permeate the supply chains of commercially available food, agriculture, seafood, and meat products that the U.S. government imports from India, Indonesia, Thailand, Pakistan, Cote d'Ivoire, Brazil, Ghana, and many other places.[38]

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[30] Johnson, *supra* note 27, at 1091.

[31] Robert Stumberg et al., INT'L CORP. ROUNDTABLE, TURNING A BLIND EYE? RESPECTING HUMAN RIGHTS IN GOVERNMENT PURCHASING 1 (Sept. 2014), http://icar.ngo/wp-content/uploads/2014/09/Procurement-Report-FINAL.pdf [https://perma.cc/LEL7-TPPH].

[32] *Id.* at 1.

[33] *Id.* at 8–10.

[34] *Id.*

[35] *Id.* at 10–11.

[36] *Id.*

[37] *Id.* at 13–14.

[38] *Id.* at 15–16.

I have argued elsewhere[39] that the current discourse on trafficking fails to admit that human trafficking is the "underside of globalization,"[40] and that human trafficking greases the wheels of the global economy.[41] The dominant narrative of trafficking as an aberrant underground activity of organized crime and other criminal traffickers serves to mask the direct complicity in and significant economic benefits of exploitation that governments, businesses, and members of society gain from the facilitation and furthering of human trafficking.[42] In a global market that seeks out cheap, unregulated, and exploitable labor to produce goods and services that generate GDP and propel economic growth, human trafficking is anything but limited to the illegal activity of criminals.[43]

B. Global Supply Chains

Exploitation and human trafficking thrive as part of the global economy while remaining "unseen" partially due to the complexity of global supply chains. Global competition serves as the catalyst for very complex and dispersed business models. In what some refer to as a "third industrial revolution," global outsourcing and subcontracting—a trillion dollar industry—resulted in sweeping structural reorganization across industries.[44] How a business

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[39] *See* Dana Raigrodski, *Economic Growth on the Backs of Human Trafficking Victims—The Dependency of Global Trade and Economic Development on Forced Labor and the Trafficking of Humans* (on file with author).

[40] *See Trafficking in Persons Report*, 2003 U.S. DEP'T OF STATE 5, http://www.state.gov/documents/organization/21555.pdf [https://perma.cc/5Y5G-A5D4] (internal quotations omitted).

[41] *See* Janie Chuang, *Giving as Governance? Philanthrocapitalism and Modern-Day Slavery Abolitionism*, 62 UCLA L. REV. 1516, 1520 (2015) ("comparing the political economy of slavery to our current globalized economy's reliance on exploitive migrant labor" and highlighting the uncomfortable truth about the exploitive underpinnings of developed economies).

[42] *Id.* at 1519–20.

[43] ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 432 (2010); *see also* Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 IND. J. GLOBAL LEGAL STUD., 137, 139–40 (2006); Jennifer Chaćon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3039 (2006).

[44] Galit Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L L.J. 419, 425 (2015) (citing management theory guru Peter Drucker and economist Alan Blinder).

manages its supply chains and manufacturing and purchasing practices is critical to its ability to compete in the market and meet consumer demands.[45] Current global supply chains often include multiple companies and suppliers in the production and delivery of a single product.[46] For example, the garment industry has undergone major restructuring over the last several decades, from smaller manufacturers overseeing all steps from the initial design to fulfilling orders, to giant (often U.S. and E.U. based) retailers contracting out apparel production to manufacturing contractors all over the world while dictating price point and turnaround time.[47] Those mid-chain garment suppliers may source the different components and raw materials, such as fiber, dye and weave, or zippers and buttons, from different countries, and send them to yet another country such as Thailand or Bangladesh for assembly.[48]

Given the constant drive to remain competitive by lowering prices and meeting market demands for year-round and speedy availability of products, retailers, suppliers, and employers compete and pass down the supply chain cost-cutting measures, which often translate to exploitive wages and working conditions for vulnerable workers, including conditions amounting to trafficking.[49] When H&M, the second largest global clothing retailer,[50] mapped the

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[45] Johnson, *supra* note 27, at 1091–92 ("[B]usinesses have increased the importance of supply-chain management, which can increase value and savings, build relationships and drive innovation, improve quality and reputation, reduce time to market, generate economic impact, and contribute to competitive advantage.").

[46] Federico Soda, *Labor Supply Chain Integrity and Ethical Recruitment: A Perspective from IOM*, BSR BLOG (Jan. 30, 2014), http://www.bsr.org/en/our-insights/blog-view/labor-supply-chain-integrity-and-ethical-recruitment-a-perspective-from-iom [https://perma.cc/K6VE-DD4E] ("Globalization has made corporate value chains even more multi-tiered and complex and expanded labor opportunities into new geographies.").

[47] *See* GARY GEREFFI & OLGA MEMEDOVIC, U.N. INDUS. DEV. ORG., THE GLOBAL APPAREL VALUE CHAIN: WHAT PROSPECTS FOR UPGRADING BY DEVELOPING COUNTRIES 6–7 (2003), https://www.unido.org/uploads/tx_templavoila/Global_apparel_value_chain.pdf [http://perma.cc/82JS-4MUS].

[48] *Id.* at 8.

[49] 2005 ILO Report, Global Alliance, *supra* note 10, at 52.

[50] H&M follows after Spain-based Inditex (parent company of Zara) and precedes the third-ranked U.S.-based Gap Inc. *Industry Ranking*, FAST RETAILING (Aug. 4, 2016), http://www.fastretailing.com/eng/ir/direction/position.html [https://perma.cc/S9VB-EESV].

social impacts throughout its supply chain, H&M identified concerning working conditions associated with the processing of raw material (cotton, for example) used in its apparel, with the production of yarn and final fabrics in supplying mills, and with the garment production itself.[51] The spinning mills in Tamil Nadu, India, for example, do not have direct business relations with H&M, but are a key sourcing market for the company.[52] In many of these spinning mills, women are held in forced labor arrangements called Sumangali schemes, where young women from rural areas commit to long-term working contracts in return for money paid to their families at the end of the period to be used for dowry.[53]

The global apparel sector has long been associated with harsh working conditions characteristic of sweatshops: threat of workplace injuries, low and unreliable pay, and/or excessive deductions, forced overtime hours and verbal and physical abuse.[54] Taken together, the manufacturing and sales of clothing, textiles, footwear, and luxury goods are vital to the global economy.[55] In 2011, the industry generated over $3 trillion in sales.[56] Buyers are increasingly "concentrated among well-known multinational brands, and fierce competition amongst suppliers all over the world puts a constant downward pressure on price, turnaround time, and orders fulfillment."[57] Power imbalances between those buyers and

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[51] *See* H&M, H&M CONSCIOUS ACTIONS SUSTAINABILITY REPORT 2014, 9–10 (2014), http://sustainability.hm.com/content/dam/hm/about/documents/en/CSR/reports/Conscious%20Actions%20Sustainability%20Report%202014_en.pdf [https://perma.cc/8NYK-S46L].

[52] *Id.* at 36.

[53] *Id.*

[54] *See* Drusilla K. Brown et al., *The Effects of Multinational Production on Wages and Working Conditions in Developing Countries*, *in* CHALLENGES TO GLOBALIZATION: ANALYZING ECONOMICS 279, 279 (Robert Baldwin & L. Alan Winters eds., 2004).

[55] The CERES *Roadmap for Sustainability: Footwear and Apparel*, CERES (2016), http://www.ceres.org/roadmap-assessment/sector-analyses/footwear-apparel [https://perma.cc/X257-ZKGQ].

[56] *See id.* (citing MarketLine, *Global Textiles, Apparel & Luxury Goods*, MARKETLINE (2012), http://store.marketline.com/Product/globaltextiles_apparel_luxury_goods?productid=MLIP0468-0001 [https://perma.cc/G6CX-R4N8]).

[57] Dana Raigrodski, *Presentation at the Economic Growth on the Back of Global Workers Conference*, UNIV. WASH. (Apr. 22, 2016), http://depts.washington.edu/womenctr/wordpress/wp-content/uploads/The-Role-of-Business-in-Human-TraffickingForced-Labor.pdf [https://perma.cc/QR8B-CJEN].

the first few tiers of suppliers give buyers both a high degree of control over their direct suppliers and the power to switch suppliers, leading to even more pressure on suppliers down the chains.[58] For the most part, this global industry relies heavily on manufacturers and labor in developing and under-developed countries.[59] As a result, issues of forced and exploited labor, including trafficked labor, are prevalent throughout the supply chain.[60]

It has long been known that workers in Bangladesh's apparel industry are chronically exploited in a manner that often amounts to human trafficking and forced labor.[61] In fact, Bangladesh's garment sector underwent tremendous growth and accounts for 13 percent of the country's GDP[62] because of its ability to meet demands of the global fast-fashion timelines that focus on cost and speed by "not-so-secretly" maintaining hostile working conditions which may amount to forced labor and human trafficking.[63] Similarly, in Jordan, the apparel industry accounts for nearly 20 percent of the country's total exports (mostly to brands and consumers in the U.S.).[64] The

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[58] Galit Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L L.J. 419, 432 (2015).

[59] *See* Better Work, *Towards 2017: Better Work Phase III Strategy*, at 2 (2016), http://betterwork.org/global/wp-content/uploads/ILO-1406-Strategy-Document-v9-28.7.pdf [https://perma.cc/FV8G-WJB5] (stating that 60 million workers in the developing world work in the garment industry).

[60] Gillian B. White, *All Your Clothes Are Made With Exploited Labor*, ATLANTIC (Jun. 3, 2015), http://www.theatlantic.com/business/archive/2015/06/Patagonia-labor-clothing-factory-exploitation/394658/ [https://perma.cc/K444-7XYQ].

[61] Human Rights Watch, *"Whoever Raises Their Head Suffers the Most": Workers' Rights in Bangladesh's Garment Factories*, at 21 (Apr. 2015), https://www.hrw.org/report/2015/04/22/whoever-raises-their-head-suffers-most/workers-rights-bangladeshs-garment [https://perma.cc/LKF7-WPW9].

[62] Racheal Meiers, *To Prevent Another Rana Plaza, Build Better Societies, Not Just Better Factories,* BSR BLOG (Apr. 24, 2014), http://www.bsr.org/en/our-insights/blog-view/to-prevent-another-rana-plaza-build-better-societies-not-just-better-factor [https://perma.cc/5Q6W-RYQ9].

[63] For example, "[i]n 2013, a labor rights group charged that a Bangladeshi Gap supplier forced workers to toil for more than 100 hours a week, kept 2 sets of books to cheat them of their pay and fired women who became pregnant." *See* Mark Gunther, *Protecting a Tangled Workforce that Stretches across the World*, GUARDIAN (Apr. 28, 2015, 3:20 PM), http://www.theguardian.com/sustainable-business/2015/apr/28/gap-kindley-lawlor-human-rights-workers-jobs-garment-industry [https://perma.cc/L4YZ-NEUT].

[64] *Better Work Jordan: Garment Industry 7th Compliance Synthesis Report*, 2016 INT'L LAB. ORG. & INT'L FIN. CORP. 7, http://betterwork.org/Jordan /wp-content/uploads/BWJ-CSR-Feb-2016-Final.pdf [https://perma.cc /QY8B-TT6A].

majority of those employed in the industry are migrant workers from South and Southeast Asia, particularly from India, Sri Lanka, Bangladesh and China.[65] Issues of forced labor include debt bondage, excessive overtime, restrictions on workers ability to come and go (particularly through mandatory nighttime curfew in the factories' housing), use of threats and violence to intimidate workers, wage withholding and deduction for recruitment fees, withholding of travel documents, and exits that are locked/blocked during work hours.[66] These are all considered strong indicators of human trafficking and forced labor.[67]

In recent years, stories of forced and trafficked labor have surfaced in the electronics sector. For example, one in three workers in the electronics industry in Malaysia works in conditions of forced labor.[68] Apple's supply chains have come under increased scrutiny following scores of suicides by young, overworked, and abused factory workers at facilities in China operated by Foxconn, the Taiwanese-based manufacturer of Apple's iPhone, iPad, and

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[65] INT'L LAB. ORG. & INT'L FIN. CORP., *Facts and Figures* 3, http://betterwork.org/jordan/?page_id=20 [https://perma.cc/9QUR-JVKL].

[66] *See* Better Work, *Better Work Jordan: Garment Industry 1st Compliance Synthesis Report*, at 8–15 (2010), http://betterwork.org/jordan/wp-content/uploads/Better-Work-Jordan-1st-Compliance-Synthesis-Report1.pdf [https://perma.cc/JJ7E-F9GB]; *see also* NAT'L LAB. COMM., U.S.-JORDAN FREE TRADE AGREEMENT DESCENDS INTO HUMAN TRAFFICKING AND INVOLUNTARY SERVITUDE 5–8 (2006), http://www.globallabourrights.org/reports/u-s-jordan-free-trade-agreement-descends-into-human-trafficking-and-involuntary-servitude [https://perma.cc/S2JE-53NZ] (reporting that tens of thousands of foreign guest workers in Jordan, mostly from South Asia, are stripped of their passports and trapped in involuntary servitude while sewing clothing for major U.S. brands including Walmart, Target, Kohl's, Victoria's Secret, L.L. Bean and others).

[67] *See generally* U.N. Office on Drugs and Crime, *Human Trafficking Indicators* (2016), https://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf [https://perma.cc/G3HK-GK32] (describing the United Nation's indicators of human trafficking); Int'l Lab, Office, *Operational Indicators of Trafficking in Human Beings* (Sept. 2009) (describing the European Commission and ILO's indicators of human trafficking), http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_105023.pdf [https://perma.cc/3W8V-RGAT].

[68] Verité's comprehensive two-year study demonstrated that forced labor is widespread in the Malaysian electronics industry, which manufactures many of the electronic products reaching American consumers. *See* VERITÉ, FORCED LABOR IN THE PRODUCTION OF ELECTRONIC GOODS IN MALAYSIA, 171–74 (Sept. 2014), http://www.verite.org/sites/default/files/images/VeriteForcedLaborMalaysianElectronics_2014_0.pdf [https://perma.cc/B6N9-ZFK6].

other hi-tech devices.[69] Allegations of harsh working conditions in Apple's supply chains continue to surface.[70] Similar issues are prevalent in the global food industry.[71] For example, in industries such as agriculture and fishing, which tend to be very labor intensive, global and local corporations are connected to human trafficking and forced labor. Poor men from Cambodia and Myanmar are sold to captains on Thai fishing boats and work in slave conditions to fulfill the global demand for inexpensive shrimp.[72] In Spain, illegal migrants live and work in grave conditions to pick fruit and vegetables sold in retail grocery chains throughout Europe.[73]

In sum, with their growing links across countries and industries, businesses are faced with human trafficking and forced labor as a significant issue within global supply chains. Consequently,

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[69] Over the years, CNN, for example, has published ongoing news stories chronicling the alleged labor rights violations at Foxconn and the details of the employee suicides. *See, e.g.*, Stan Grant, *Inside Story of Foxconn Shrouded in Secrecy*, CNN (Feb. 6, 2012, 4:51 PM), http://www.cnn.com/2012/02/06/world/asia/Foxconn-worker-difficulties/index.html [https://perma.cc/2JU8-YEVK] (reporting that a Foxconn factory worker told a reporter in early 2012, that at Foxconn "women work like men and men work like animals"); *see also* Paul Armstrong, *Report: Poor Working Conditions Continue at Apple's China Suppliers*, CNN (Jun. 1, 2012, 6:00 AM), http://www.cnn.com/2012/05/31/world/asia/china-foxconn-workers-report/index.html [https://perma.cc/3988-WSQE].

[70] *See* Susan Adams, *Apple's New Foxconn Embarrassment*, FORBES (Sep. 12, 2012, 2:38 PM), http://www.forbes.com/sites/susanadams/2012/09/12/apples-new-foxconn-embarrassment (discussing the deplorable working conditions at Foxconn plants throughout China and recent allegations that teachers forced vocational students to work on Foxconn assembly lines to make up for a labor shortage in the wake of orders for the iPhone 5).

[71] *See, e.g.*, Constance Thomas, *Addressing Child Labor in Agriculture Supply Chains within the Global Fight Against Child Labor*, 21 U.C. DAVIS J. INT'L L. & POL'Y 131, 147–48 (2014) ("A large enterprise may not employ child labor itself but it may knowingly or unknowingly source from enterprises that do. In the same way 'large agriculture buyers, often supermarkets, and processing firms source from small producers further up the supply chain. It is in these small farms, often known as out-growers, that child labour is most prevalent in the agriculture sector.'") (quoting Paul Vandenberg, Int'l Labour Org., *Guide One: Introduction to the Issue of Child Labour*, at 14 (2007), http://www.ilo.org/public/English/dialogue/actemp/downloads/projects/child_guide1_en.pdf [https://perma.cc/2V4U-LFKY]).

[72] *See, e.g.*, Jagers & Rijken, *supra* note 12, at 47.

[73] *Id.* at 48 (citing Felicity Lawrence, *Spain's Salad Growers are Modern-Day Slaves, Say Charities*, GUARDIAN (Feb. 7, 2011, 2:00 PM), http://www.theguardian.com/business/2011/feb/07/spain-salad-growers-slaves-charities [https://perma.cc/9UXB-LYQF]).

companies have begun to proactively manage the risks of human trafficking associated with globalization. As the next section explores, most are doing so through voluntary actions and Corporate Social Responsibility (CSR) initiatives, or in response to externally imposed regulatory compliance mechanisms.

II. The Current Landscape of Corporate Citizenship: From Voluntary and State-Driven CSR to Benefit Corporations

A. Voluntary CSR Measures Addressing Forced Labor and Human Trafficking

The concept of CSR or Corporate Citizenship generally refers to the integration of social and environmental concerns into business operations along with profitability.[74] CSR asks companies to consider both the social and financial impacts of their decisions, including, for example, the impact on environmental sustainability, labor rights, human rights, and overall impact on the local community.[75] The company is expected to both conduct its business as a "good citizen" and to be responsive to a broad set of stakeholders.[76] From an accounting/reporting perspective, CSR often manifests itself in the concept of "triple bottom line,"[77] i.e., taking

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[74] This Article interchangeably refers to the variety of socially responsible business conduct as CSR or Corporate Citizenship. Other names, including, Social Entrepreneurship and Creative capitalism, are frequently used as well. *See* Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem,* 44 ST. MARY'S L.J. 617, 620 (2013).

[75] Janet E. Kerr, *The Creative Capitalism Spectrum*, 81 TEMP. L. REV. 831, 834 (2008).

[76] *See* Virginia Harper Ho, *Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China*, 46 VAND. J. TRANSNAT'L L. 375, 382–83 (2013). Key principles of CSR include: Accountability; Transparency; Ethical behavior; Respect for stakeholder interests; Respect for the rule of law; Respect for international norms of behavior; and Respect for human rights. Int'l Org. for Standardization, *Discovering ISO 26000* at 14–15 (2014), http://www.iso.org/iso/discovering_iso_26000.pdf [https://perma.cc/LH9U-RJSA] [hereinafter *Discovery ISO 26000*].

[77] Iris H-Y Chiu, *Standardization in Corporate Social Responsibility Reporting and a Universalist Concept of CSR?—A Path Paved with Good Intentions*, 22 FLA. J. INT'L L. 361, 362 (2010) (citing John Elkington, *Enter the Triple Bottom Line*, *in* THE TRIPLE BOTTOM LINE, DOES IT ALL ADD UP?: ASSESSING THE SUSTAINABILITY OF BUSINESS AND THE CSR 1, 1–16 (Adrian Henriques & Julie

into account as equally important not only financial outcomes, but also social and environmental performance targets and outcomes in the company's reports.[78]

In the last decade, the study and practice of corporate social responsibility has grown immensely. In his 2005 book, *The Market for Virtue*, David Vogel catalogued some of the many multinational corporations with strong CSR programs: Nike monitors the working conditions in its international manufacturing plants; Ikea banned child labor in India and provides families with educational stipends to keep children in school; Starbucks carries only free-trade coffee; and Home Depot will not purchase timber from old-growth forests.[79] A 2010 survey suggested increased attention to CSR issues among boards of directors of major U.S. corporations, finding that that "sixty-five percent of S&P 100 and 28 percent of S&P 500 companies have board committees dedicated to social responsibility."[80] More importantly, thousands of companies are adopting the CSR label.[81]

It is worth noting, however, that the increased corporate attention to CSR has not been entirely voluntary and has often been in response to a specific business crisis and subsequent public outcry.[82] Nike, for example, faced an extensive consumer boycott in

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Richardson eds., Earthscan 2004)). In 1994, John Elkington, founder of British consulting firm SustainAbility, coined the phrase "triple bottom line," or "TBL." The theory underlying TBL is that the true cost of doing business is reflected in three dimensions of accountability: (1) accountability to profits, or shareholders; (2) accountability to people, or stakeholders; and (3) accountability to the planet. *Id.*

[78] *Id.*; *See also* E. Lynn Grayson & Gary P. Kjelleren, *The Business Case for Environmental Sustainability*, AM. BAR ASSOC. (Jan. 2015), http://www.americanbar.org/publications/blt/2015/01/03_grayson.html [https://perma.cc/8HX7-GBK2] ("Almost three-quarters of the U.S. companies on the S&P 500 publish [voluntary] corporate sustainability reports according to research from the Governance & Accountability Institute.").

[79] *See* DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 1–2 (2005).

[80] David Millon, *Human Rights and Delaware Corporate Law*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 173, 187 (2012) (citing to CALVERT ASSET MGMT. CO., INC. & CORP. LIBR., BOARD OVERSIGHT OF ENVIRONMENTAL AND SOCIAL ISSUES: AN ANALYSIS OF CURRENT NORTH AMERICAN PRACTICE 11, 14 (2010)).

[81] Blount & Offei-Danso, *supra* note 74, at 619–20.

[82] Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility,* HARV. BUS. REV., Dec. 2006, at 78, 80 [hereinafter Porter & Kramer, *Strategy and Society*].

the early 1990s after reports surfaced of abusive labor practices in some of its contract manufacturers in Indonesia.[83] Similar public outrage occurred more recently, after Bangladesh garment factories collapsed or caught on fire, killing over 1,000 workers.[84] These unsafe sweatshops, the factories were manufacturing for some of the largest western retailers, including Walmart, Gap, and H&M, to name a few.[85] Alongside increased attention to human rights, including human trafficking, tragedies such as these have led companies to consider the CSR implications involved in cross-border trade and global supply chains, especially among multinational and multi-divisional companies.[86] Moreover, since its launch in 2000, the UN Global Compact has functioned as an international CSR initiative and has more than 12,000 participants, including over 8,000 businesses in approximately 150 countries around the world.[87]

The global spread of CSR is now enabled by the adoption of guidelines, standards, and recommendations that apply specifically to international conduct and activities by multinational corporate enterprises.[88] For example, in 2011, the United Nations

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[83] *Id.*

[84] *See Disaster at Rana Plaza*, ECONOMIST (May 4, 2013), http://www.economist.com/news/leaders/21577067-gruesome-accident-should-make-all-bosses-think-harder-about-what-behaving-responsibly; *see also* Aron Cramer, *Lessons from Rana Plaza: Shocked, But Not Surprised,* BSR BLOG (May 28, 2013), http://www.bsr.org/en/our-insights/blog-view/lessons-from-rana-plaza-shocked-but-not-surprised [https://perma.cc/83JY-UCS3].

[85] *Id.*

[86] *See* Kate Abnett, *Three Years After Rana Plaza, Has Anything Changed?*, BUS. OF FASHION (Apr. 19, 2016, 10:12 PM), https://www.businessoffashion.com/articles/intelligence/three-years-on-from-rana-plaza-has-anything-changed-sustainability-safety-worker-welfare [https://perma.cc/3JZ2-AABX].

[87] *Our Participants*, U.N. GLOB. COMPACT, https://www.unglobalcompact.org/what-is-gc/participants [https://perma.cc/28GN-T3CG]. The World Bank, OECD, and the International Labor Organization all run similar initiatives with thousands of members. *See* Owen E. Herrnstadt, *Are International Framework Agreements a Path to Corporate Social Responsibility*, 10 U. PA. J. BUS. & EMP. L. 187, 196–200 (2007).

[88] For a survey of key CSR legal developments in 2011 and 2012, see Uche Ewelukwa Ofodile et al., *Corporate Social Responsibility*, 46 INT'L LAW. 181 (2012) and Mikhail Reider-Gordon et al., *Corporate Social Responsibility*, 47 INT'L LAW. 183 (2013). In addition to the 2011 endorsement by the U.N. Human Rights Council of the *Guiding Principles on Business and Human Rights* and the 2011 update of the OECD *Guidelines for Multinational Enterprises*, other

Human Rights Council unanimously endorsed the *Guiding Principles on Business and Human Rights* that operationalize the 2008 U.N. "Protect, Respect and Remedy" Framework.[89] These are ground-breaking principles as they express the expectations of the U.N. for corporate accountability, in addition to the duties of nations, and are an effort to expand the reach of the tripartite U.N. Principle to "Protect, Respect, and Remedy" in the global private sector.[90] Businesses can no longer ignore human rights violations in their operations and supply chains and must act with due diligence to avoid infringing rights and address negative impacts with which they are involved.[91] Similarly, the Guidelines of the

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non-binding international standards include the ISO 26000: 2010 Guidance on Social Responsibility, the revised IFC Performance Standards, and the revised OECD Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence. *See* Org. for Econ. Co-operation and Dev., *OECD Guidelines for Multinational Enterprises—Responsible Business Conduct Matters*, at 5 (2014), http://mneguidelines.oecd.org/MNEguidelines_RBCmatters.pdf [https://perma.cc/6BV4-C4U2]. The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, originally adopted in 1976 and revised in 2000, 2006 and 2014, similarly recommends to governments, multinational corporations and other employers and workers' organization, various employment and worker-focused recommendations for voluntary adoption. Int'l Labour Office, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, at 1–9 (2006), http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm [https://perma .cc/W5VX-WQX9].

[89] Human Rights Council Res. 17/4, ¶1 U.N. Doc. A/HRC/RES/17/4 (July 6, 2011) (adopting John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011)); *see also* Press Release, U.N. Human Rights Office of the High Comm'r, New Guiding Principles on Business and Human Rights Endorsed by the U.N. Human Rights Council (Jun. 16, 2011), http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-endorsed-16-jun-2011.pdf [https://perma.cc/J7AA-R8FP].

[90] John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 at 3–4, 13 (Mar. 21, 2011) (setting out the obligations and corresponding duties for governments and businesses to protect and respect human rights and for the remediation of business related human rights violations).

[91] The principles include the "State duty to protect against human rights abuses by third parties" and the corporations' responsibility to respect human

Organization for Economic Co-operation and Development (OECD) were adopted to clarify governments' expectations from the business sector, including in global operations and throughout their supply chains and business relationships.[92] These government-backed recommendations set voluntary baseline standards for how businesses should understand and address the risks of their operations in areas such as employment and industrial relations, human rights, environment, information disclosure, bribery, consumer interests, science and technology, competition, and taxation.[93] The guidelines have been updated five times since they were first adopted in 1976, most recently in 2011, to "ensure that they remain at the forefront of the globally responsible business conduct agenda and a leading tool in the ever-changing landscape of the global economy."[94]

The increasing global engagement with CSR is also evident in the development of ISO 26000: 2010 (Guidance on Social Responsibility) by the International Organization for Standardization (ISO).[95] ISO is an independent organization of expert members

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rights and their duty not to infringe in human rights of others as well as "to address adverse [human rights] impacts" they may cause or contribute to. *Id.* at 4. This duty applies to a business enterprise's own activities and to its relationships with third parties that are associated with those activities. *Id.* at 14. Under the duty to remediate, governments are required to provide effective enforcement mechanisms to hold corporations responsible for their actions. *Id.* For a detailed discussion of the principles as applied to corporations and human trafficking, see generally Jagers & Rijken, *supra* note 12.

[92] The OECD Guidelines are annexed to the OECD Declaration on International Investment and Multinational Enterprises, adopted in 1976 and revised in 1982, 1984, 1991, 2000 and 2011. *See* Org. for Econ. Co-operation and Dev., *OECD Guidelines to Protect Human Rights and Social Development* (2011), http://mneguidelines.oecd.org/text/ [https://perma.cc/4A8W-BWBJ].

[93] *See* Org. for Econ. Co-operation and Dev., *supra* note 92 at 2. Although enterprises are ultimately responsible for observing the Guidelines in their day-to-day operations, governments, intergovernmental organizations, and other stakeholders also have a vested interest in supporting such business practices and the implementation of the Guidelines. In addition, governments adhering to the Guidelines have specific obligations. *Id.*

[94] For example, one of the updates in 2011 was the addition of a new human rights chapter, consistent with the U.N.'s Guiding Principles on Business and Human Rights. *Id.* at 44.

[95] *See* Int'l Org. for Standardization *ISO 26000—Social Responsibility* (2010), http://www.iso.org/iso/iso26000 [https://perma.cc/HHD9-CFST].

and the world's largest developer of voluntary international (technical) standards.[96] The members, composed of the national standards bodies of 162 countries, develop international specifications and requirements for products, services and systems, to ensure their quality, safety and efficiency.[97] ISO offers technical and management standards "that can be used consistently to ensure that materials, products, processes, and services are fit for their purpose."[98] There are more than 21,000 international standards, covering almost every business and industry, from technology and food safety to agriculture and healthcare.[99] Recognizing that a business must take into account the environment and society in which it operates to operate effectively, ISO 26000 provides guidance to businesses and organizations on how to operate in a socially responsible way and contribute to sustainable development.[100] It aims to develop a common understanding of what social responsibility is, help businesses and organizations integrate the key principles of social responsibility into effective actions throughout the organization, and share the best practices relating to social responsibility.[101] Unlike other ISO standards, however, ISO 26000 only provides guidance rather than requirements and, therefore, does not serve as a basis for certification.[102]

The justifications for CSR typically fall into one of four types of arguments: (1) moral appeal; (2) self-interest in sustainability; (3) license to operate and stakeholder engagement; and (4) beneficial enhanced reputation.[103] There is extensive discourse (and

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[96] Int'l Org. for Standardization, *About ISO* [hereinafter *ISO 26000—Social Responsibility*] (2016), http://www.iso.org/iso/home/about.htm [https://perma.cc/39XG-4PVZ].

[97] Int'l Org. for Standardization, *Standards* (2015), http://www.iso.org/iso/home/standards.htm [https://perma.cc/KJY4-PMT3]; *see also* Int'l Org. for Standardization, *ISO figures in 2015* (2015), http://www.iso.org /iso/iso_in_figures_2015_en.pdf [https://perma.cc/NXN9-BUW9].

[98] *See supra* note 97.

[99] *Id.*; INT'L. ORG. FOR STANDARDIZATION, *Standards catalogue*, http://www.iso.org/iso/home/store/catalogue_ics/catalogue_ics_browse.htm [https://perma.cc/7HW4-6S2L].

[100] *ISO 26000—Social Responsibility*, *supra* note 96.

[101] *See Discovery ISO 26000*, *supra* note 76, at 1, 6.

[102] *ISO 26000—Social Responsibility*, *supra* note 96.

[103] Porter & Kramer, *Strategy and Society*, *supra* note 82, at 81–83.

discord) focused on the moral duty of corporations to "do the right thing" and act as good global citizens,[104] as well as their need to obtain "tacit or explicit permission from governments, communities and numerous other stakeholders to do business."[105] As this Article argues, however, regardless of their appeal, neither justification has been truly successful in moving corporations to more broadly integrate social and environmental considerations into their strategic business decision making.[106] Similarly, both the sustainability justification for CSR and the reputation enhancing justification seem to work best when they already align with otherwise beneficial business decisions of the corporations.[107]

B. State-Driven CSR: From Voluntary Initiatives to Mandatory Regulatory Compliance

The voluntary nature and limited success of CSR have prompted some regulators and policymakers around the world to try to change corporate behavior through laws and regulations requiring mandatory compliance.[108] Government regulation increasingly mandates social responsibility reporting, including reporting on issues related to forced and trafficked labor. For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)[109] requires persons to disclose whether "conflict minerals" are used in their products and what due diligence steps have been taken to prevent the use of such conflict minerals.[110] While Dodd-Frank does not directly apply to trafficking, the presence of conflict minerals in products may indicate that forced labor was used to obtain the minerals, as there is significant evidence that human trafficking

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[104] *Id.* at 81–82.

[105] *Id.*

[106] *See infra* Part III.

[107] *See infra* Part IV.

[108] Antonio Vives, *Corporate Social Responsibility: The Role of Law and Markets and the Case of Developing Countries*, 83 CHI.-KENT L. REV. 199, 210–11 (2008).

[109] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213–14, 2218 (2010) (codified as amended at 15 U.S.C. § 78m(p) (2012)).

[110] *Id.*

accompanies the mining of diamonds and other gemstones, especially in conflict-ridden areas such as the Democratic Republic of Congo (DRC).[111] The California Transparency in Supply Chains Act creates a similar disclosure requirement specifically with regards to trafficked and forced labor in the supply chain.[112] The California Act requires large retailers and manufacturers doing business in California to disclose to the public on their websites the efforts they are undertaking to prevent and root out human trafficking and slavery in their domestic and global supply chains.[113] Similar legislation was proposed at the federal level—The Business Transparency on Trafficking and Slavery Act[114]—but has stalled since 2011.[115] President Obama, however, issued a landmark Executive Order in 2012, Executive Order 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts, to pursue clean supply chains in federal government procurement.[116] The Modern Day

[111] *Id.* § 1502(a) (describing the purpose of the Act as to minimize indirect financial contributions to the civil conflict in the Democratic Republic of Congo). Section 1502 requires manufacturers to determine that their products do not contain certain metals, so-called "conflict minerals," originating from the DRC or adjoining countries. *Id.* § 1502(p)(1)(A). The company must disclose its determination to the Securities and Exchange Commission and on the company's website. *Id.* § 1502(p)(1)(E). Depending on whether or not the origin of the minerals is determined, the product will be labeled "DRC Conflict Free" or "Not been found to be DRC Conflict Free." *Id.* § 1502(p)(1)(B)–(C).

[112] CAL. CIV. CODE § 1714.43 (2016).

[113] *See The California Transparency in Supply Chains Act*, STATE OF CAL. DEP'T OF JUSTICE, http://oag.ca.gov/SB657 [https://perma.cc/DB9D-8SZJ].

[114] Business Transparency on Trafficking and Slavery Act, H.R. 2759, 112th Cong. (2011).

[115] *Id.*

[116] *See* Exec. Order No. 13,627, 77 Fed. Reg. 60,029 (Sept. 25, 2012). The Order requires federal contractors and subcontractors to certify, before receiving an award and annually thereafter during the terms of the contract or subcontract, that they have taken proactive steps to prevent trafficking in their supply chains. *Id.* at 60,031. The contractor must certify that, to the best of his knowledge and belief, neither he nor any of his subcontractors have engaged in any such activities. If abuses are detected, the contractor or subcontractor is obligated to make a referral or self-reporting action and take the appropriate remedial action. The Order also requires contractors and their subcontractors to cooperate with enforcement authorities and to remediate the problem. *Id.* at 60,030. Later, President Obama also signed the National Defense Authorization Act for Fiscal Year 2013, which contained Title XVII, entitled Ending Trafficking in Government Contracting. *See* National Defense Authorization Act for Fiscal Year 2013,

Slavery Act 2015 in the U.K., the first of its kind in Europe, also specifically targets forced labor and human trafficking in supply chains.[117] The Modern Slavery Act 2015 requires, amongst other things, businesses over a certain size to disclose annually what actions they have taken to ensure there is no modern slavery in their business or supply chains.[118] The U.K. Act was in fact informed by the California Supply Chain Act, but it goes further in covering all sectors—not just retail and manufacturing—and in covering both goods and services (whereas the California Act covers only supply chains for goods).[119]

Most state regulatory approaches focus on disclosure of existing practices (with the hope that consumer pressure will push companies to expand their efforts), but they do not otherwise mandate that companies adopt CSR measures or allocate funds towards such efforts.[120] Thus, while the European Union has been engaging with corporations and advocating for a wide adoption of CSR policies,[121] it

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H.R. 4310, 113th Cong. (2013) (enacted). The Act and the Executive Order are the basis for further rule-making to implement and expand anti-trafficking policies in federal contracting. *See* Federal Acquisition Regulation: Ending Trafficking in Persons, 78 Fed. Reg. 59,317, 59,318 (Sept. 26, 2013).

[117] The U.K. Companies Act 2006 does require the directors of every publicly listed company to disclose ethical, social, and environmental risks in its annual business review. *See* Gordon L. Clark & Eric R. W. Knight, *Implications of the UK Companies Act 2006 for Institutional Investors and the Market for Corporate Social Responsibility,* 11 U. PA. J. BUS. L. 259, 262–63 (2009). However, those disclosure requirements may have been driven by a desire to provide shareholders and institutional investors better market pricing information about the corporate value rather than a desire to expand the scope of mandated CSR. *Id.*

[118] Modern Slavery Act, 2015, c. 30, § 54 (Eng.), http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted [https://perma.cc/P2G6-CAJV].

[119] HOME OFFICE, MODERN SLAVERY AND SUPPLY CHAINS GOVERNMENT RESPONSE 1, 6 (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448200/Consultation_Government_Response__final__2_pdf.pdf [http://perma.cc/QQQ4-PCTP].

[120] China is often mentioned as exceptional in incorporating mandatory CSR in the 2006 amendments to its Company Law through Article 5 which mandates mainland Chinese companies to comply with social and business morality and bear social responsibilities. *See generally* Ho, *supra* note 76, at 383, 399–400, 406. While the Chinese national government has publicly endorsed CSR and has been engaged in advancing state-backed CSR initiatives and policies, the meaning of Article 5, is much debated and beyond the scope of this Article. *Id.* at 400.

[121] *See generally A Renewed EU Strategy 2011–14 for Corporate Social Responsibility*, EUR. PARL. DOC. (COM 681) (2011), http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52011DC0681 [http://perma.cc/H7ZX-67M6]; *see*

too only went as far as putting in place requirements for sustainability reporting. The new E.U. Directive on Disclosure of Non-financial and Diversity Information by Certain Large Companies, which passed in 2014 to be fully implemented by 2017, requires publicly traded companies with more than 500 employees to disclose in their annual financial reports the existence of policies, risks, and impacts regarding human rights, diversity, anti-corruption, environmental matters, and other social considerations.[122] These new reporting requirements will apply to 6,000 companies in the E.U. and will impact a number of U.S. businesses.[123]

In comparison, the government of India has now taken steps to proactively mandate CSR, including CSR spending.[124] In August 2013, India passed a series of comprehensive amendments to its Companies Act and, for the first time, included mandatory CSR provisions.[125] Under Section 135 of the Companies Act 2013,[126]

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also European Company Law and Corporate Governance: A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies, EUR. PARL. DOC. (COM 740) (2012), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012DC0740 [https://perma.cc/7VKA-MZA3]. For comprehensive resources on the European Union and CSR, *see Corporate Social Responsibility*, EUROPEAN COMMISSION, http://ec.europa.eu/growth/industry/cor porate-social-responsibility/index_en.htm [https://perma.cc/C3N8-JZAK].

[122] *Directive 2014/95/EU of the European Parliament and of the Council*, 2014 O.J. (L 330) 1–2, 6, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0095 [http://perma.cc/PMS7-PR52].

[123] *See Non-Financial Reporting*, EUROPEAN COMM'N, http://ec.europa.eu/finance/accounting/non-financial_reporting/index_en.htm [https://perma.cc/MU7H-B79W]; *see also* Jerome Chaplier, *EU to force large companies to report on environmental and social impacts*, GUARDIAN (Feb. 28, 2014, 12:21 PM), https://www.theguardian.com/sustainable-business/eu-reform-listed-companies-report-environmental-social-impact [https://perma.cc/D37U-8EWT].

[124] Esha Chhabra, *Corporate Social Responsibility: Should It Be A Law?*, FORBES (Apr. 18, 2014, 9:00 AM), http://www.forbes.com/sites/eshachhabra/2014/04/18/corporate-social-responsibility-should-it-be-a-law/#44e1449a7984 [https://perma.cc/U2NA-564X].

[125] More than 8,000 listed firms in India are covered by this provision, which went into effect on April 1st, 2014. *See* Ashish Dhawan, *Companies Bill 2012: How can India Inc make CSR a game-changer?*, ECONOMIC TIMES (Sept. 5, 2013, 4:00 AM), http://articles.economictimes.indiatimes.com/2013-09-05/news/41803586_1_csr-corporate-social-responsibility-india-inc [https://perma.cc/8N4A-SGBE]; *see also* PRICEWATERHOUSECOOPERS INDIA, THE COMPANIES ACT, 2013 at 9, https://www.pwc.in/assets/pdfs/publications/2013/companies-act-2013-key-highlights-and-analysis.pdf [https://perma.cc/Z452-TTLD].

[126] The Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India) at § 135, http://indiacode.nic.in/acts-in-pdf/182013.pdf [http://perma.cc/XJ2E-XZGA].

companies exceeding a certain size are required to establish a CSR Committee within their governing boards.[127] The CSR Committee will formulate and recommend to the full board a CSR policy for the company, recommend suitable CSR spending, and monitor the implementation of the CSR policy.[128] Moreover, each year the company is expected to spend at least 2 percent of its average net earnings on CSR initiatives[129] or explain in its annual reports why it has not done so.[130]

There are reasons to think the new requirements may not greatly improve CSR in India. By making CSR mandatory, companies may treat it as a "check the box" exercise rather than looking at ways to innovate and generate a return from doing social and environmental good. Similarly, most companies will likely comply by channeling funds to community organizations that are addressing one of the priority topics mentioned.[131] Most importantly, for the purpose of this Article, Section 135 defines CSR broadly and seems to emphasize corporate philanthropy rather than strategic CSR.[132] Indian companies already equate CSR with corporate philanthropy, and by reinforcing this view, the law could work against

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[127] *Id.*

[128] *Id.* Section 135 defines CSR as activities that promote poverty reduction, education, health, environmental sustainability, gender equality, and vocational skills development. Companies can choose which area to invest in or to contribute the amount to central or state government funds earmarked for socioeconomic development. However, the section does specify that companies shall give preference to the local area and areas around where it operates. *Id.* § 135(5). The company is also required to disclose its CSR policy and post it publicly on its website. *Id.* § 135(4).

[129] *Id.* § 135(5) The act does not provide any guidance on what constitutes acceptable reasons for which a company may avoid spending 2 percent on CSR. *See id.*

[130] For a discussion of the CSR Provision in the Companies Act and the backlash from companies and CSR proponents alike see generally Caroline Van Zile, *India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market*, 13 ASIAN-PAC. L. & POL'Y J. 269 (2012).

[131] Chhavi Ghuliani, *India Companies Act 2013: Five key points about India's 'CSR Mandate,'* ECO-BUSINESS.COM (Nov. 28, 2013), http://www.eco-business.com/opinion/india-companies-act-2013-five-key-points-about-indias-csr-mandate/ [https:// perma.cc/S4CC-CCLM].

[132] The Companies Act, 2013, *supra* note 126, § 135.

business leaders who are ready to embrace strategic CSR as an integral part of the company's business decisions.[133]

C. Business Entities with Profit+ Missions: Flexible Purpose and Benefit Corporations

Beyond voluntary or regulatory imposed CSR, emerging approaches within corporate law directly integrate social and environmental purposes into the stated purpose and structure of for-profit entities.[134] Rather than necessarily structuring social enterprises as non-profit entities, we are seeing the emergence of for-profit mission-oriented entities with a focus on the double or triple bottom line to the benefit of a broad set of stakeholders.[135] Moreover, what started as a certification framework by the non-profit organization B-Lab, designating certain for-profit businesses that met social and environmental performance standards as B-Corps (akin to fair trade certifications),[136] has evolved into formal legal incorporation as mission-driven business entities, enabled by Benefit Corporation statutes in many states.[137] In addition to the Benefit

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[133] Ghuliani, *supra* note 131. *See generally infra* Part III.B (discussing Strategic CSR).

[134] Blount & Offei-Danso*, supra* note 74, at 620.

[135] Christen Clarke, *California's Flexible Purpose Corporation: A Step Forward, A Step Back, or No Step at All?*, 5 J. BUS. ENTREPRENEURSHIP & L. 301, 307–08 (2012).

[136] *See What are B Corps?*, BCORPORATION.NET (Sept. 2, 2016), http://www.bcorporation.net/what-are-b-corps [https://perma.cc/8YEH-YS3G].

[137] As of September 2016, 31 states have enacted some form of benefit corporation statute and seven more states have introduced legislation to that effect. *See State by State Status of Legislation*, BENIFTCORP.NET (Sept. 2, 2016), http://benefitcorp.net/policymakers/state-by-state-status [https://perma.cc/5K9H-8D23].

For a more detailed discussion of the evolution of Benefit Corporations and social enterprises, as well as their perceived strength and limitations, see Blount & Offei-Danso, *supra* note 74, at 627–28; *see also* Ashley Schoenjahn, *New Faces of Corporate Social Responsibility: Will New Entity Forms Allow Businesses to Do Good?*, 37 J. CORP. L. 453, 458–59 (2012); Mystica M. Alexander, *Benefit Corporations—The Latest Development in the Evolution of Social Enterprise: Are They Worthy of a Taxpayer Subsidy?*, 38 SETON HALL LEGIS. J. 219, 242–44 (2014); Clarke, *supra* note 135, at 307–09.

Despite similar terminology and some common features, Benefit Corporations and B-Corps are quite different. Benefit Corporations can incorporate

Corporation designation,[138] there are several other incorporation forms for mission-driven corporations, such as L3Cs,[139] Special Purpose Corporations,[140] and Flexible Purpose Corporations.[141]

In general, the various statutes require the Benefit Corporations to identify as their purpose the pursuit of a public benefit of some sort.[142] Benefit/social purpose corporations should provide or generate a broader public benefit, and the corporate officers should balance the interests of a broader group of stakeholders (as opposed to necessarily prioritizing the financial interests of shareholders).[143] The benefit/social purpose corporation must expressly state in its articles of incorporation that it is, for example, a "Benefit Corporation."[144] It must also pursue social purposes[145]—at a minimum a general (socially and environmentally) public benefit or, in addition, specifically tailored public benefits.[146] As such, benefit/social purpose corporations are viewed as a hybrid business entity (between the traditional for-profit corporation and the non-profit corporation) that facilitates the pursuit of both profit and societal benefit.[147]

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because of a specific legal status in the states that authorize it under that state's law. In contrast, any business can seek to be certified as B-Corp by the non-profit B-Lab, if they meet B-Lab's rigid environmental, social and transparency standards.

[138] *See, e.g.*, B LAB, MODEL BENEFIT CORPORATION LEGISLATION WITH EXPLANATORY COMMENTS 2–3 (2016), http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_4_16.pdf [https://perma.cc/4KQ3-AN7S]; 8 DEL. CODE. ANN. tit. 8, § 362(a) (West 2015) (technically called Public Benefit Corporation); CAL. CORP. CODE § 14601 (West 2012).

[139] L3C stands for Limited Liability Low-Profit Company. *See* Schoenjahn, *supra* note 137, at 460–61. L3C legislation allows for limited liability corporations that considers charitable and education purposes. *Id.*

[140] *See, e.g.*, WASH. REV. CODE ANN. § 23B.25.005 (West 2012).

[141] *See, e.g.*, CAL. CORP. CODE §§ 2500–3503 (West 2015) (Corporate Flexibility Act of 2011).

[142] B LAB, *supra* note 138, at 8.

[143] Blount & Offei-Danso, *supra* note 74, at 638–39.

[144] B LAB, *supra* note 138, at 7.

[145] Unlike a traditional for-profit corporation that can pursue any legal purpose. *Id.* at 10.

[146] *Id.*

[147] Blount & Offei-Danso, *supra* note 74, at 620.

III. The Pursuit of Profit

A. The Limitations of CSR and Benefit Corporations: Tensions with the Ideology of Shareholders' Wealth Maximization

It is almost an axiom in law and economics and in corporate law that the sole purpose of for-profit business is to maximize profit for its shareholders.[148] Consequently, the shareholder wealth maximization ("SWM") norm is said to be driving the corporation's business decisions.[149] Leading corporate law scholars, such as Professor Lynn Stout, challenge SWM as an ideological myth,[150] but they acknowledge that the SWM thinking is a powerful norm that is engrained in the minds of many people and perpetuated in business decision making.[151] There is no clear and certain answer under corporate law about the proper role of corporations in society, and the shareholder versus stakeholder debate is far from settled.[152] Nonetheless, the strong hold of SWM on business entities

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[148] Michael J. O'Hara, *Governing for Genuine Profit*, 36 VAND. J. TRANSNAT'L L. 765, 765–66 (2003); *see also* Arthur Acevedo, *Responsible Profitability? Not on My Balance Sheet!*, 61 CATH. U. L. REV. 651, 654–60 (2012); Blount & Offei-Danso, *supra* note 74, at 633–38; Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Duties*, 21 STETSON L. REV. 23 (1991); Milton Friedman, *The Social Responsibility of Business Is To Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at SM17.

[149] *See* J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 18 (2012) ("The shareholder wealth maximization norm has infiltrated corporate America."). Accordingly, many argue the corporation's board of directors and its officers fulfill their fiduciary duties when they pursue SWM. *See* Acevedo, *supra* note 148, at 655; O'Hara, *supra* note 148, at 767.

[150] *See, e.g.*, Lynn Stout, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 21–22 (2012) (observing that "[s]hareholder primacy had become dogma" and discussing how shareholder primacy has triumphed over other theories on corporate purpose); *accord* David Millon, *supra* note 80, at 174–80 (arguing that Delaware law does not require shareholder primacy and that SWM is a myth).

[151] *See* Stout, *supra* note 150, at 34–35.

[152] *See generally* David Millon, *Two Models of Corporate Social Responsibility,* 46 WAKE FOREST L. REV. 523, 526–30 (2011). These long-standing debates are

seems to be a key driver behind pursuing corporate citizenship as a voluntary or philanthropic endeavor only, as long as it does not jeopardize monetary profits, as well as a key driver behind the emerging "alternative" forms of incorporation as socially/environmentally mission-driven corporations.

Benefit Corporations do advance us in the right direction by making social goals part of the core business mission, in addition to turning profit. At the same time, the resort to specific "shareholder approved" corporate forms perpetuates the notion of shareholder dominance.[153] It suggests that economic and social values are still competing, but that we are allowing for those exceptions because the shareholders approved.[154] Moreover, it perpetuates the false dichotomy between Benefit Corporations and traditional business entities—between businesses that are "doing good" and businesses that are "doing well" (profit-wise).[155] Hence, for all

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beyond the scope of this Article. Suffice it to say, that this Article takes shareholder primacy and SWM corporate goal as a given, and argues that it is exactly for those reasons that corporations should ensure clean supply chains.

For well-known representations of the two sides of the debate compare A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931), and A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932) (arguing that corporations exist solely for the purpose of making profit for shareholders, and that consequently, corporate officers must exercise their powers at all times solely for the benefit of the shareholders), with E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1151 (1932) (arguing that corporations have broader obligations to the community and are not mere private entities pursuing shareholder profit alone).

[153] *Cf.* Kevin V. Tu, *Socially Conscious Corporations & Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 174 (2016) ("[T]he existence of Benefit Corporation statutes may have the unintended consequence of being construed as a legislative mandate that, under corporate law, considering broader stakeholder interest and creating a public benefit is wholly prohibited unless a business has opted to organize or reincorporate as a Benefit Corporation. Such a fundamental misunderstanding of the law could operate to strengthen the profit maximization norm").

[154] *Id.* at 173.

[155] Blount & Offei-Danso, *supra* note 74, at 659; *see also* Clarke, *supra* note 135, at 309. (Hybrid organizations have received some raised eyebrows from those who doubt that an entity whose primary focus is stakeholders, rather than shareholders, can generate capital from traditional investors. There are others who consider it impossible for corporate decisions to have both positive societal and financial impacts without jeopardizing substantial capital.)

other corporations and business entities, the pursuit of social benefits is still viewed as a cost and as a constraint on the otherwise core mission of the business.[156]

Even for the Benefit Corporations themselves, "[a]lthough the benefit corporation does not abolish the profit motive, it does orient the organization around the vague and unquantifiable purpose of pursuing and creating a general public benefit rather than the primary goal of seeking profit."[157] One of the critiques leveled against Benefit Corporations is that they do not necessarily have a quantifiable value maximization goal:[158] "A business must operate in a profitable manner to generate sufficient cash flows to fund its ongoing operations .... The realities of running a business dictate that a corporation that does not seek and generate profit will ultimately have less ability to aid society than one that does."[159] This may in fact place the Benefit Corporation at a competitive disadvantage against a traditional corporation that has a quantifiable value maximization goal but may also seek out broader social benefit.[160] As this Article argues, "business corporations can, do, and should create benefits for society while seeking a profit, even if their objective is to maximize shareholder wealth,"[161] and they can do so while enhancing their bottom line and long-term value.[162]

B. Short-Term Versus Long-Term Profits and the True Cost of Doing Business

Largely, the problem stems from corporations viewing value creation narrowly, "optimizing short-term financial performance in a bubble while missing the most important customer needs and ignoring the broader influences that determine their longer-term success."[163] Be it institutional shareholders pursuing short-term

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[156] Blount & Offei-Danso, *supra* note 74, at 661.
[157] *Id.* at 651.
[158] *Id.* at 652.
[159] *Id.* at 650.
[160] *Id.* at 653.
[161] *Id.* at 659.
[162] *See infra* Part IV.
[163] Michael E. Porter & Mark R. Kramer, *Creating Shared Value,* HARV. BUS. REV. 62, 62, 64 (Jan.–Feb. 2011) [hereinafter Porter & Kramer, *Creating Shared Value*]; *see also* Millon, *supra* note 152, at 528–29 ("Although not required

investment strategies or corporate managers catering to such shareholders' preference for short-term stock price performance and quarterly earnings, "short-termism" seems to have become the norm.[164] Consequently, there is "a tendency for corporations to sacrifice long-run value for short-term stock price performance."[165] Driven by a focus on short-term earnings, corporations may look to enhance quarterly revenue while minimizing discretionary expenses that reduce the bottom line, including investments that are crucial for the corporation's long-run sustainability and competitiveness.[166]

Because corporations tend to focus on short-term goals of maximizing profits for their shareholders, corporations tend to ignore long-term risks and externalized costs.[167] From an accounting standpoint, both revenue and costs are tracked through transactional values internal to the corporations.[168] Here lies the key problem. Businesses tend to ignore externalities/spillovers, or values not internalized by the market system and by the business itself.[169] While spillovers can be both in the form of benefits for the business, such as brand recognition or reputation, and in the form of externalized costs, such as cost to the environment, too often have businesses ignored externalities to increase profits.[170]

Moreover, businesses often deliberately externalize costs to create the (false) appearance of increasing profits.[171] Clearly, there is nothing wrong with efforts to capture revenue. However, since capturing revenue is much harder than capturing costs, companies may artificially increase net revenue by depressing the true costs of doing business.[172] However, cash profits are only one measure of value and long-term shareholder wealth. Conceptualized in such

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to do so by law, management of U.S. corporations typically pursues short-term profit maximization as measured by quarter-to-quarter earnings .... Today's shareholders typically adopt a short-term perspective that manifests itself in a strong preference for immediate results measured in terms of current share price.").

[164] *See* David Millon, *Shareholder Social Responsibility,* 36 SEATTLE U. L. REV. 911, 911–17 (2013).

[165] *Id.* at 917.

[166] *Id.* at 918–19.

[167] O'Hara, *supra* note 148, at 765–66.

[168] *Id.* at 767–68.

[169] *Id.* at 768.

[170] *Id.*

[171] *Id.* at 769–70 ("Cash profits based on substantial spillovers are false profits.").

[172] *Id.* at 769.

a narrow manner, cash profit in the form of net out-of-pocket revenue "fails to account for spillover costs and spillover benefits."[173]

One specific area where businesses are more likely to ignore spillover costs is when the shared risks imposed by those costs seem to be someone else's risk, be it environmental degradation, exploited workforce, or, as Michael O'Hara points out, terrorism.[174] O'Hara therefore argues that corporations must internalize shared risks even if it means increasing internal costs.[175] Long-term, he argues, this ensures sustained profitability since the alternative is far more costly.[176] Every business has a duty to, and interest in, manage shared risks because these risks endanger the existence of the market in which businesses operate and the existence of business itself.[177]

To a limited extent, some businesses acknowledge that shared risk, such as environmental degradation and climate change, pose a specific risk to their business and take proactive steps to incorporate sustainable environmental practices into their corporate governance models. Seattle-based Starbucks, for example, is part of a coalition of businesses lobbying with the President and Congress to take action on climate change.[178] In so doing, Starbucks is taking the long view—decades down the road.[179] From a business perspective, Starbucks is concerned about depleting global supplies

[173] *Id.*

[174] For example, lessons learned from the 2008 financial markets meltdown and the global recession that followed show that much of the "culpability" lies with profit-seeking behavior, at the expenses of risk-management practices, that each of the failed market institutions aggressively pursued, consequently resulting in a "tragedy of the commons." *See id.* at 772. In a tragedy of the commons scenarios, shared resources are degraded and destroyed as a result of the aggregation of many individual users consuming the shared resource based on their individual needs without account to the overall impact on the sustainability of the shared resource. *Id.*

[175] *Id.* at 773–75.

[176] *Id.* at 773.

[177] *Id.* at 774–75.

[178] Suzanne Goldberg, *Starbucks Concerned World Coffee Supply Is Threatened by Climate Change*, GUARDIAN (Oct. 13, 2011, 4:17 PM), http://www.the guardian .com/business/2011/oct/13/starbucks-coffee-climate-change-threat [https://perma .cc/X4A5-AEWD].

[179] *Id.*

of coffee beans, which poses a significant risk to Starbucks's supply chains and to the profitability of its core business mission.[180]

O'Hara argues that corporations should shift their management paradigm from short-term pursuits of up-front cash profit value streams toward genuine sustainable profits that capture a multitude of value streams to manage shared risk.[181] While this Article agrees that a longer-term view of profitability and added value is key, this Article does not agree that it is prudent, or attainable, to move away from the pursuit of short-term financial gains. Instead, this Article suggests that it may be possible to maintain and even enhance short-term financial performance with socially and environmentally responsible business strategies.

As long as businesses continue to view CSR as a moral obligation or, at best, as a risk-management issue, focused on avoiding reputational harm and revenue loss, businesses will continue to be stuck in this vicious cycle, and the narrow perception of profits and costs and the dominance of the SWM ideology will continue to prevail.[182] What is needed, instead, is a paradigm-shift in how we construe SWM, taking into account the true costs of doing business and "[m]ore fully defining the net that is the business' profit."[183] Admittedly, such a paradigm shift will take time and significant commitment by companies, and it may not be attainable across the board. In the section that follows, this Article attempts to provide businesses with a modest preliminary framework to begin rethinking how they can pursue short-term profits, long-term value, and clean supply chains.

IV. A BUSINESS APPROACH TO CLEAN SUPPLY CHAINS

For the most part, the "business case," often presented to support corporate citizenship, has been fairly indirect and intangible,

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[180] *Id.*

[181] O'Hara, *supra* note 148, at 779.

[182] *Cf.* Porter & Kramer, *Strategy and Society, supra* note 82, at 82 ("These justifications have advanced thinking in the field, but none offers sufficient guidance for the difficult choices corporate leaders must make."); *see also* Acevedo, *supra* note 148, at 653 ("Without legislation mandating responsible corporate behavior, corporations will continue to engage in behavior that is socially undesirable, albeit profitable, for its shareholders.").

[183] O'Hara, *supra* note 148, at 766.

focusing on operational risk management and prevention of reputational harm and lost revenue or, at best, efforts to translate to revenue and capitalize on intangible enhanced reputation. As often is the case, however, both negative and positive spillovers remain externalized and incidental to the corporate pursuit of increased revenue, and consequently present a weaker business case. In order to make a strong business case, therefore, the goal should be to fully integrate corporate citizenship into the core objective of the company in tandem with its pursuit of profit.

A. A Broader Business Lens: Moving Beyond Risk Management and Reputational Benefits

For creative capitalism to generate sustainable change, Bill Gates suggested that profit-based market incentives should be used whenever possible.[184] A key limitation of many CSR frameworks lies in their almost exclusive appeal to the second type of market incentive—recognition for good corporate behavior, which hopefully triggers market-based rewards from consumers and regulators alike. Rather than expressly linking such business practices to increased long-term value, most businesses that adopt CSR practices stop short: "[M]ost companies remain stuck in a 'social responsibility' mind-set in which societal issues are at the periphery, not the core."[185] Unsurprisingly, companies have struggled to demonstrate on their financial reporting concrete return on investment stemming from CSR practices.[186] Companies have resorted to utilizing triple bottom line accounting and standalone CSR reports.[187]

Corporate citizenship has evolved from mere reactive responses to the business crisis and public outcries to proactive commitments.

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[184] Gates, *supra* note 1.

[185] Porter & Kramer, *Creating Shared Value*, *supra* note 163, at 64.

[186] *See* ECONOMIST INTELLIGENCE UNIT, CORPORATE CITIZENSHIP: PROFITING FROM A SUSTAINABLE BUSINESS 6 (2008), http://graphics.eiu.com/upload/Corporate_Citizens.pdf [https://perma.cc/UJG6-6HPE] [hereinafter 2008 ECONOMIST INTELLIGENCE UNIT REPORT].

[187] Many companies, including those that are in fact integrating CSR practices into their core business operations, separate their financial annual reporting to investors and their sustainability reports and often do not expressly draw linkages between them. *See* discussion *infra* Part IV.

Businesses are most often motivated either out of self-interest in sustainability and cost reduction, or for branding and reputation purposes. A common sentiment amongst scholars and business leaders is that CSR, when implemented in the right manner, can be used for corporate branding and publicity, and for contributing to an effective marketing strategy.[188] Globally, CSR initiatives have helped companies elevate their brand image, retain customers and employees, attract investors, increase sales and profits, and earn the goodwill of society at large.[189] There is even some evidence that many corporate executives believe that effective corporate citizenship can help improve the bottom line in addition to engendering positive reciprocity and building reputational value. In 2008, the Economist Intelligence Unit surveyed 566 U.S.-based executives, as well as interviewed 16 senior executives and experts in corporate citizenship.[190] Based on the survey responses, published in the report "Corporate citizenship: profiting from a sustainable business," 74 percent of respondents said corporate citizenship can help increase profits and provide a vital competitive advantage for companies.[191] Similarly, when asked for their firm's primary motivation for corporate citizenship, the top three answers all related to the bottom line: revenue growth (16 percent), increasing profit (16 percent), and cost savings (13 percent).[192] In another survey, 76 percent of CEOs espoused a belief that socially responsible and sustainable spending creates long-term shareholder value by improving their reputations and operational efficiency, reducing their risk exposure, and encouraging loyalty and innovation.[193]

Beyond perceived reputational benefits and risks, there has also been increasing emphasis on the need for companies to identify supply-chain risks involving trafficked and forced labor as

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188 2008 ECONOMIST INTELLIGENCE UNIT REPORT, *supra* note 186, at 20.

189 *See id.* at 4, 5, 17, 20.

190 *See id.* at 2, 6.

191 *Id.* at 22, 24.

192 *Id.* at 6.

193 *See How Companies Manage Sustainability: McKinsey Global Survey Results*, MCKINSEY & CO. (Mar. 2010), http://www.mckinsey.com/insights/sustainability/how_companies_manage_sustainability_mckinsey_global_survey_results [https://perma.cc/SE8Z-8ZMA].

part of the business's overall risk-management strategy. For example, E. Christopher Johnson, Jr., the retired General Motors North America Vice President and General Counsel, argues that businesses should be proactive about eliminating trafficking and forced labor from their supply chain as part of the business strategy to manage business and legal risks posed by unstable supply chains, reputational damage, consumer boycott, loss of investor confidence, stock-value loss, and potential financial impacts from legal exposure to litigation.[194] Johnson argues that "[m]aking a profit off of slavery presents unacceptable social, legal, litigation, and reputational risks that no corporation should accept as it could lead to significant erosion of a company's business...."[195] Johnson, who is the Current Chair of the ABA Business Law Section Task Force on Implementation of the ABA Model Principles on Labor Trafficking and Child Labor, argues that every business should conduct a risk assessment of its supply chains to identify supply chain risks involving labor trafficking and child labor, and should thereafter develop business policies centered on a risk-based compliance approach.[196] In fact, the ABA adopted *Model Business and Supplier Policies* on *Labor Trafficking and Child Labor* to serve as the basis of such risk-based compliance approach and to make a business case against child and labor trafficking.[197]

Many question whether CSR is a strong tool for maximizing profit.[198] While critics accept that CSR may make good business sense for companies that market themselves as sustainable enterprises and large corporations with strong brands and fragile

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[194] E. Christopher Johnson, Jr., *The Important Role for Socially Responsible Businesses in the Fight Against Human Trafficking and Child Labor in Supply Chains*, BUS. L. TODAY (Jan. 2015), http://www.americanbar.org/publications/blt/2015/01/02_johnson.html [https://perma.cc/A27V-3LT9].

[195] *Id.*

[196] *See generally* E. Christopher Johnson, Jr., *Business Lawyers are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor*, 70 BUS. LAW. 1083 (2015).

[197] *Id.* at 1086 (discussing in detail the ABA MODEL BUS. AND SUPPLIER POLICIES ON LABOR TRAFFICKING AND CHILD LABOR (Feb. 2014), http://www.americanbar.org/dam/aba/administrative/business_law/aba_model_policies.authcheckdam.pdf [https://perma.cc/BH77-PXLD]).

[198] *See, e.g.*, David Vogel, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 17, 35–40 (2005).

reputations, they argue that it is difficult to claim that CSR maximizes short- or long-term profits.[199] Similarly, others argue that the linkage between engaging in CSR to achieve reputational benefit or as a form of reputational insurance (in the event of crisis) is tenuous at best.[200]

Nonetheless, at least in the context of environmental sustainability,[201] there is growing evidence of corporations achieving both significant reduction in costs and increased revenue and growth; evidence that the use of sustainable environmental practices can generate visible effects on the bottom line.[202] More and more businesses are realizing that they can achieve significant operational savings from environment-related improvements ("eco-efficiency"), such as reductions in waste and increases in energy efficiency.[203] Several high profile U.S. and global companies have made significant strides regarding environmental sustainability in their business practices.[204] For example, DuPont's reduced energy use resulted in over $2 billion in savings between 1990 and 2006.[205] For The 3M Company, its Pollution Prevention Pays program

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[199] *Id.* at 20, 31–33. *Contra* Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk,* 41 J. CORP. L. 647, 665 (2016) ("[T]he vast majority (by some estimates upwards of 80%) of empirical studies to date find that although not all firm sustainability efforts translate into higher returns for investors, positive social performance has a positive or neutral effect on risk-adjusted returns, profitability, and other standard measures of financial performance at the firm and portfolio level.")

[200] Porter & Kramer, *Strategy and Society, supra* note 82, at 82–83 (looking at studies concerning the effect of a company's social reputation on consumer purchasing preferences or on stock market performance).

[201] The environmental sustainability justification for CSR practices initially suggests that corporations should act as stewards for society and the environment, and should avoid short-term behavior that is environmentally wasteful, detrimental to society, and jeopardizes the ability of future generations to meet their own needs. *See supra* Part II.A.

[202] *See generally Ecomagination*, GENERAL ELECTRIC, http://www.ge.com/about-us/ecomagination [https://perma.cc/73JH-39TD].

[203] *See* 2008 ECONOMIST INTELLIGENCE UNIT REPORT, *supra* note 186, at 7–8.

[204] *Id.*

[205] *Id.* For more details on DuPont's extensive Sustainable Solutions (DSS) approach, see *DuPont Sustainable Solutions (DSS)*, DUPONT, http://www.dupont.com/products-and-services/consulting-services-process-technologies/brands/sustainable-solutions.html [https://perma.cc/SHV7-R5CF].

saved the company over $1 billion in the thirty years since its launch.[206] A 2015 report by the World Economic Forum ("WEF") studied more than 25 consumer goods companies across seven industries that succeeded in increasing revenues by up to 20 percent, reducing costs by 9 to 16 percent, reducing company risk, and increasing brand value by 15 to 30 percent.[207]

Common to "the triple supply chain advantage" of the companies studied by WEF—their ability to "achieve profitability while benefiting society and the environment"[208]—is a comprehensive set of 31 supply chain practices that drive these companies' business strategies.[209] As this Article will highlight, initiatives such as those described above align well with the company's economic interests: "These [are] smart business decisions entirely apart from their environmental benefits." [210] In sum, both the sustainability justification for CSR or the reputation enhancing justification seem to work best when they already align with otherwise beneficial business decisions of the corporations.[211]

Despite the growing recognition amongst corporations and business leaders that corporate citizenship is important to the future of their businesses, enhances their competitive advantage, and increases revenues and growth, corporate citizenship and sustainable practices remain a "fringe activity" for most companies rather than being proactively integrated into the corporations' core strategy.[212] For example, compared to the 74 percent of surveyed executives who thought corporate citizenship can improve their bottom line, only 27 percent thought that the CSR initiatives

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[206] *See* 2008 ECONOMIST INTELLIGENCE UNIT REPORT, *supra* note 186 at 12.

[207] *See* WORLD ECON. FORUM, BEYOND SUPPLY CHAINS: EMPOWERING RESPONSIBLE VALUE CHAINS 4 (2015), http://www3.weforum.org/docs/WEFUSA _Beyond SupplyChains_Report2015.pdf [https://perma.cc/YV45-K73X].

[208] *Id.*

[209] *Id.* at 10–15 (including sustainable practices in packaging, product design, sourcing and supplier relations, production footprint and process, innovative distribution channels and vehicle optimization, logistics networks and warehousing, transport planning and execution, disposal and recycling, use of technology and data analytics, and labor standards) (internal quotation admitted).

[210] *See* Porter & Kramer, *Strategy and Society*, *supra* note 82, at 82.

[211] *See infra*, Part IV.B.

[212] *See* 2008 ECONOMIST INTELLIGENCE UNIT REPORT, *supra* note 186, at 23.

were core to their overall business strategy.[213] A more recent 2014 Economist Intelligence Unit cross-industry survey of 853 senior corporate executives suggests that companies similarly view their engagement with human rights issues as an ethical issue rather than a business issue.[214] According to the report, only 21 percent of the respondents said there was a clear business case driving their human rights policy.[215] As will be argued in the next section, treating CSR initiatives as stand-alone efforts is "short-sighted and risky because sustainability is implicated in nearly every corporate decision, from product design and delivery to supply chain management."[216] Moreover, CSR policies are not likely to succeed until they are accepted as a core corporate value.[217] In order to make a strong business case, the goal should be to fully integrate corporate citizenship into the core objective of the corporation so "that it becomes … 'just the way we do business.'"[218]

B. Advancing Clean Supply Chains—A Perspective from Business Strategy and Competitiveness Theory: Creating Shared Value

Strategic competitiveness theories generated in business schools can help bridge the gap in corporate law scholarship and minimize the shareholder-stakeholder tension. The most prominent approach is offered by Michael Porter and Mark Kramer at Harvard Business School.[219] For the past two decades, Michael Porter's work has redefined the field of competitive strategy.[220] In a series of articles

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[213] *Id.* at 9.

[214] *See* THE ECONOMIST INTELLIGENCE UNIT, THE ROAD FROM PRINCIPLES TO PRACTICE: TODAY'S CHALLENGES FOR BUSINESS IN RESPECTING HUMAN RIGHTS 4–5, 11, 17 (2015), https://www.eiuperspectives.economist.com/strategy-leadership/road-principles-practice [https://perma.cc/W4RG-G7GC].

[215] *Id.* at 5, 12. Moreover, 15 percent indicated that lack of action is due to concerns about increased costs and/or reduced profit margins. *Id.* at 12.

[216] *See* CERES, *supra* note 55.

[217] *Id.*

[218] *See* 2008 ECONOMIST INTELLIGENCE UNIT REPORT, *supra* note 186 at 14 (citing a DuPont executive).

[219] *See generally* Porter & Kramer, *Creating Shared Value*, *supra* note 163, at 62.

[220] Michael Porter, the Bishop William Lawrence University Professor at Harvard Business School, is a leading authority on competitive strategy and

published since the early 2000s, Porter and Kramer make a strong case for truly integrating social considerations as part of a company's strategy, rather than as a separate agenda, either through traditional philanthropy or CSR.[221] Porter claims that it is imperative that businesses

> find a way to engage positively in society, but this will not happen as long as it sees its social agenda as separate from its core business agenda. Instead of pushing through further CSR initiatives, business leaders must create shared value at the local level .... competing in ways that enhance competitiveness while simultaneously advancing economic and social conditions in the communities where companies operate.[222]

Key to Porter and Kramer's argument is the questioning of the assumptions implicit in the prevalent approach summarized in the oft-quoted article by Milton Friedman that the only "social responsibility of business" is to "increase its profits" to the benefit of its shareholders.[223] At the core of the Friedman approach is the implicit assumption that profit goals and social benefits are at

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the competitiveness of nations and regions. *Faculty & Research*, HARV. BUS. SCH., http://www.hbs.edu/faculty/Pages/profile.aspx?facId=6532 [https://perma.cc/ATQ7-SMPW]. According to the Harvard Business School website, Michael Porter "has brought economic theory and strategy concepts to bear on many of the most challenging problems facing corporations, economies and societies, including market competition and company strategy, economic development, the environment, and health care." *Id.* His extensive research is widely recognized in governments, corporations, NGOs, and academic circles around the globe. *Id.* His research has received numerous awards, and he is the most cited scholar today in economics and business. *Id.* While Dr. Porter is, at the core, a scholar, his work has also achieved remarkable acceptance by practitioners across multiple fields." *Id.*

[221] *See* Porter & Kramer*, Strategy and Society, supra* note 82, at 78–92; *see generally, e.g.*, Michael E. Porter & Mark R. Kramer, *Philanthropy's New Agenda: Creating Value*, HARV. BUS. REV. 121 (Nov.–Dec. 1999); Michael E. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, HARV. BUS. REV. 56 (Dec. 2002); Porter & Kramer, *Creating Shared Value*, *supra* note 163, at 62.

[222] Michael E. Porter, *How Big Business Can Regain Legitimacy*, BLOOMBERG BUSINESSWEEK (May 6, 2010, 7:00 PM), http://www.bloomberg.com/bw/stories/2010-05-06/how-big-business-can-regain-legitimacybusinessweek-business-news-stock-market-and-financial-advice [https://perma.cc/F2ZF-7RNZ]; *see also* Porter & Kramer, *Creating Shared Value*, *supra* note 163, at 64–65.

[223] Friedman, *supra* note 148, at SM17.

competition with each other—that if a corporation focuses (and spends) on social goals, it necessarily comes at the expense of its economic achievements.[224] Porter and Kramer argue that the distinction between economic and social goals is a false dichotomy.[225] Not only is there no inherent conflict between long-term economic performance goals and social improvement, the two are in fact integrally connected.[226] Thus, for example, some companies' productivity depends on having skilled and motivated workers, which may require workers who are educated, safe, healthy, and can afford decent housing.[227] Similarly, environmentally sustainable business practices can lead to more productive use of resources and long-term cost-cutting measures.[228]

It is vital to create "shared value"[229] or "a convergence of interests"[230] between the social goals and the company's economic goals, in a way that enhances the overall competitive context of the company.[231] Moreover, the pursuit of shared value needs to be

[224] Porter & Kramer, *Competitive Advantage of Corporate Philanthropy*, HARV. BUS. REV. 5–16 (Dec. 2002) (reprint R0212D) [hereinafter Porter & Kramer, *Competitive Advantage*]; *see also* Porter & Kramer, *Creating Shared Value*, *supra* note 163, at 64–65.

[225] Porter & Kramer, *Competitive Advantage*, *supra* note 224, at 2–3.

[226] *Id.* at 3; *see also* Porter & Kramer, *Strategy and Society*, *supra* note 82, at 78, 82–84.

[227] Porter & Kramer, *Competitive Advantage*, *supra* note 224, at 3.

[228] *Id.* at 3, 7.

[229] *See* Porter & Kramer, *Creating Shared Value*, *supra* note 163, at 64–65; *see also* Porter & Kramer, *Strategy and Society*, *supra* note 82, at 84.

Porter and Kramer define the concept of shared value as a set of company policies and operating practices through which the company seeks to create economic value and enhance its competitiveness, while at the same time advancing social and economic conditions for society and for the communities in which the company operates. Porter & Kramer, *Creating Shared Value*, *supra* note 163, at 65.

[230] Porter & Kramer, *Competitive Advantage*, *supra* note 224, at 3 (internal quotations omitted). The company can identify the areas of overlap between the social and economic goals by engaging in a close analysis of the four elements of competitive context. *Id.* at 6.

[231] *Id.* at 5–7 (referring to a corporation's "competitive context" as the quality of the business environment in the location where the corporation operates). According to Porter, there are four elements to such competitive context: (1) factor conditions, *i.e.*, the availability of high quality specialized inputs such as human and capital resources, various infrastructures, and natural resources; (2) demand conditions; (3) context for strategy and rivalry, as in the presence of open

at the center of what businesses do:[232] "[t]he more a social improvement relates to a company's business, the more it leads to economic benefits as well."[233] Shared value is not about a better or more just redistribution of the value already created by corporations. Instead, it aims to expand the overall amount of economic and social value—it "leads to a bigger pie of revenue and profits" that benefits both the companies and, for example, the communities and individuals who provide raw materials or services in the value chain.[234]

Accordingly, in their 2006 article *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, Porter and Kramer call on businesses to stop treating the relationship between business and social improvement as a zero-sum game, and they suggest that if corporations assess their CSR opportunities as any other core business decision, they will see the opportunities and competitive advantage that CSR can bring with it rather than just viewing it as a cost.[235] If corporations map their entire "value chain," the activities that the company engages in while doing business, to identify both the positive and the negative social impact of those activities, then they will be able to better identify operational problems and opportunities that can be addressed.[236]

At the same time, corporations need to prioritize which social issues to address strategically; "each company must select issues that intersect with its particular business."[237] Strategic CSR therefore focuses on the opportunity to create shared value for both the business and for society and not just on any worthy cause.[238] To help

vigorous local competition and the presence of local policies and regulatory incentives to encourage continued investment; and (4) the presence of related and supporting industries/suppliers and collaborative clusters. *Id.*

[232] Porter & Kramer, *Creating Shared Value*, *supra* note 163, at 64.

[233] Porter & Kramer, *Competitive Advantage*, *supra* note 224, at 3.

[234] Porter & Kramer, *Creating Shared Value*, *supra* note 163, at 65.

[235] *Id.* at 80, 84, 87.

[236] *Id.* at 84.

[237] *Id.*

[238] *Id.* at 80, 84, 91. Porter and Kramer distinguish "strategic" CSR where businesses pioneer innovations that benefit both society and the firms' own competitiveness, from "responsive" CSR, wherein the business acts as a good corporate citizen in general (for example, supporting local schools) and also mitigates the harm arising from its value chain activities. *Id.* at 85.

corporations choose amongst social issues, Porter and Kramer identify three categories of social issues: (1) generic social issues, which may be important to society but not related to the company's operation or long-term competitiveness; (2) value chain social impacts, which the company's ordinary course of business significantly impacts; and (3) social dimensions of competitive context, or external factors shaping the competitiveness in the specific local environment where the business operates.[239] The question of which category a specific issue falls into varies from business to business, between and within industries, and across time and place.[240] An issue, that may be generic for some may have a specific negative value chain impact for another or even be key to the competitive context of certain companies, industries, and places.[241]

In sum, companies should move from the typical responsive CSR, which tries to address general social impacts through good citizenship or to mitigate harm from value chain activities, to strategic CSR—an affirmative corporate social agenda—which both transforms value chain activities to benefit society and reinforces business strategy and leverage capabilities to improve the broader competitive context.[242]

In recent years, there has been growing recognition amongst sophisticated business and policy leaders about the potential of achieving shared value and reconnecting economic and social interests related to environmental sustainability.[243] This includes corporations "known for their hard-nosed approach to business," such as General Electric (GE), IBM, Intel, Johnson & Johnson,

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[239] *Id.* at 85.

[240] *Id.*

[241] *Id.*

[242] *Id.* at 85–89; *see, e.g.*, Constance Thomas, *Addressing Child Labor in Agriculture Supply Chains within the Global Fight Against Child Labor*, 21 U.C. DAVIS J. INT'L L. & POL'Y 131, 151 (2014) ("[T]o facilitate having a greater impact on reducing child labor, businesses need to do much more to integrate their corporate social responsibility policies into their business plans and practices. This means ensuring that their investment, purchasing, or subcontracting practices do not contribute to or exacerbate the child labor situation of a particular country.").

[243] Porter & Kramer, *Creating Shared Value*, *supra* note 163, at 64.

and Unilever.[244] Chevron, for example, views corporate responsibility and the pursuit of profit as compatible with each other.[245] It therefore makes business investments in societal and environmental areas that are directly relevant to Chevron's business to help the company grow and prosper.[246]

Triggered by spiking energy prices, awareness of opportunities for energy efficiency, as well as identification of an emerging market for energy-efficient products and services, business and policy makers around the world have been engaging in re-evaluation of energy use in processes, transportation, buildings, supply chains and distribution channels, and supporting industries.[247] Significant investments in developing and utilizing better technology, as well as numerous other practices, have led to substantial improvements in energy use and a broader shared value.[248] For example, in 2005, the American-based multinational conglomerate, GE,[249] launched "Ecomagination," the company's commitment to technology solutions that save money and "reduce the environmental impact" for its customers and GE's own operation.[250] By 2009, sales of Ecomagination products reached $18 billion,[251] and by 2013 have generated more than $160 billion in revenue.[252] On the cost savings side, GE's own operations reduced emissions by 32 percent and freshwater usage by 45 percent, resulting in $300 million in savings.[253]

As GE's Ecomagination's story alludes, fully integrated value chain innovations combined with investments in competitive context

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[244] *Id.*

[245] *See* Silvia M. Garrigo, *Corporate Responsibility at Chevron*, 31 UTAH ENVTL. L. REV. 129, 130 (2011).

[246] *Id.*

[247] Porter & Kramer, *Creating Shared Value*, *supra* note 163, at 69.

[248] *Id.*

[249] Known to consumers for its appliances and lighting products, GE's business includes: Power and Water, Oil and Gas, Energy Management, Aviation, Healthcare, Transportation, and Capital. *See Fact Sheet*, GENERAL ELECTRIC, http://www.ge.com/about-us/ecomagination/stragtegy [https://perma.cc/XJPS-GU8T].

[250] *See Ecomagination Strategy*, GENERAL ELECTRIC, http://www.ge.com/about-us/ecomagination [https://perma.cc/73JH-39TD].

[251] Porter & Kramer, *Creating Shared Value*, *supra* note 163, at 62, 67.

[252] *See* Deb Frodl, *Ecomagination Overview*, GENERAL ELECTRIC, http://www.ge.com/globalimpact2013/#/ecomagination [https://perma.cc/8TR9-7RGW]; *see also Ecomagination Strategy*, *supra* note 250.

[253] Frodl, *supra* note 252.

end up looking (and behaving) very much like any other business and regular operations of the company.[254] For those companies, corporate citizenship becomes part of their "corporate DNA."[255] Study of Nestlé's work in developing countries, investing in and sourcing from small farmers the basic commodities (primarily milk, coffee, and cocoa) needed for Nestlé's global business, serves as case in point.[256] When Nestlé wanted to enter the Indian market in the early 1960s, it had to significantly invest in the poverty-stricken and underdeveloped region of Moga.[257] Since Nestlé's value chain model, originating in Switzerland, depended on establishing local sources of milk from a large and diverse base of small farmers, Nestlé had to transform the competitive context in Moga: it built refrigerated dairies; provided medicines, nutritional supplements and veterinarians, agronomists, and quality assurance experts to ensure the health of the milk cows; and it provided training, technical assistance and financing for local farmers so that they could have better irrigation and crops to support their cows' diet.[258] Consequently milk production in Moga has increased 50-fold, sourced from more than 75,000 local farmers (compared to 180 initially).[259] The quality of the milk has improved as well, leading Nestlé to pay higher prices to the farmers and facilitate access to credit and a competitive industry.[260] As a result of improvements

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[254] *See* Porter & Kramer, *Strategy and Society, supra* note 82, at 89; *but see* 2008 ECONOMIST INTELLIGENCE UNIT REPORT, *supra* note 186, at 7 ("... [T]he tangible benefits are impossible to measure. Leading companies are also making it harder for themselves because they have integrated corporate citizenship into their core business, making it tough to separate and quantify.").

[255] *See* 2008 ECONOMIST INTELLIGENCE UNIT REPORT, *supra* note 186, at 10; *see also* H&M, *supra* note 51, at 5 ("[W]e think it is very important that sustainability is completely integrated into the business and part of the company's DNA and values.").

[256] Porter & Kramer, *Strategy and Society, supra* note 82, at 89–90. Nestlé has become the largest packaged food company in the world, with revenues reaching $110 billion in 2009. *See* Kate Robertson, *America's Biggest Food Companies*, FORBES, http://www.forbes.com/sites/investopedia/2010/11/02/Americas-biggest-food-companies/#23b69dd9bdb6 (last visited Oct. 15, 2016).

[257] Porter & Kramer, *Strategy and Society, supra* note 82, at 90.

[258] *Id.*

[259] *Id.*

[260] *Id.*

to water quality, crop yields, and local incomes, the overall standard of living in Moga has significantly improved.[261] Nestlé has duplicated similar practices and investments in its coffee and cocoa value chains in Brazil, Thailand, and China.[262]

Notably, "Nestlé came to Moga to build a business, not to engage in CSR."[263] The company was able to ensure reliable supply of high quality commodities, essential to its business, in a manner directly tied to its strategic commitment to work with small farmers. Both Nestlé and the communities where it operated prospered when "shared value" was created.[264]

C. Eliminating Forced and Trafficked Labor from Supply Chains—A Possible Profitable Business Strategy

Eliminating the use of forced and trafficked labor from global supply chains while pursuing profit may pose a harder challenge for various reasons. For one, the key drivers that perpetuate human trafficking and forced labor are intertwined with the broad spectrum of exploitive labor practices and harsh working conditions common in many industries. Moreover, the stiff global competition in certain markets and industries makes it less likely that all businesses can in fact generate sustainable short- and long-term profits without significant overhaul to trade policies and regulatory regimes. Lastly, it is difficult to predict which business strategies will lead to such shared value. Unlike environmental sustainability, we are yet to clearly identify supply chain practices that can lead to cost savings and growth in revenue while avoiding labor exploitation.[265]

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[261] *Id.*

[262] *Id.* Nestlé redesigned its coffee procurement processes, working intensively with small farmers in impoverished areas who were trapped in a cycle of low productivity, poor quality, and environmental degradation. *See* Porter & Kramer, *Creating Shared Value, supra* note 163, at 70. Nestlé provided advice on farming practices; helped growers secure plant stock, fertilizers, and pesticides; and began directly paying them a premium for better beans. *Id.* Higher yields and quality increased the growers' incomes, the environmental impact of farms shrank, and Nestlé's reliable supply of good coffee grew significantly. *Id.*

[263] Porter & Kramer, *Strategy and Society*, *supra* note 82, at 90.

[264] *Id.*

[265] *See supra* notes 202–11 and accompanying text.

Examples of businesses pursuing shared value while focusing on improving labor conditions and providing fair wages (thus potentially minimizing key drivers that perpetuate human trafficking and forced labor) are far less publicized than environmental sustainability practices. One promising effort currently underway is a benchmark project undertaken by KnowTheChain.[266] A collaborative network of organizations, KnowTheChain focuses specifically on educating businesses and investors on forced labor in supply chain.[267] In 2016, KnowTheChain began evaluating corporate policies and practices across three sectors where forced labor and human trafficking was particularly prevalent: information and communications technology, food and beverage, and apparel and footwear.[268] To date, it has published its benchmark of 20 information and communications technology companies and is currently in the process of benchmarking 20 global companies in each of the other 2 sectors.[269] In assessing the efforts to eradicate forced labor, the benchmarks examine and shed light on purchasing practices, recruitment, traceability and risk assessment, remedy and worker voice, monitoring, and commitment and governance.[270]

A comprehensive study of emerging supply chain labor practices across industries, though much needed, is beyond the scope of this Article. In the interim, this section seeks to highlight some of those instances and the particular challenges presented in the labor context. This section will highlight several examples specifically from the apparel and textile industries, where the prevalence of forced and exploited workers in deplorable conditions is a widely publicized global problem.

1. The Better Work Program

Better Work is a partnership between the United Nations' International Labour Organization (ILO) and the International Finance Corporation (IFC), which is a member of the World Bank

[266] KNOW THE CHAIN, https://knowthechain.org/ [https://perma.cc /F5DX-DBGS].

[267] *About Us*, KNOW THE CHAIN, https://knowthechain.org/about-us/ [https://perma.cc/R9F9-7A4V].

[268] *Benchmarks*, KNOW THE CHAIN, https://knowthechain.org/benchmarks/ [https://perma.cc/9XEW-68LK].

[269] *Id.*

[270] *Benchmarks Information & Communications Technology*, KNOW THE CHAIN, https://knowthechain.org/benchmarks/1/ [https://perma.cc/M8L2-FL7Q].

Group.[271] Better Work aims to improve garment workers' lives and working environment while promoting and boosting business benefits in the garment industry.[272] Many leading brands such as Gap Inc., H&M, and Levi Strauss work in partnership with Better Work[273] on Better Factories Cambodia.[274] Better Work currently operates in Cambodia, Jordan, Haiti, Vietnam, Indonesia, Lesotho, Nicaragua, and most recently Bangladesh.[275] According to ILO reports, Better Work practices have led to specific improvements relating in trafficked and forced labor issues in Jordan, including coercion and restriction on worker movement, withholding of passports, excessive overtime, and withholding of correct wages.[276] Similar improvements were seemingly achieved in "sweatshop" working conditions in Vietnam, where workers were regularly coerced to produce through physical and verbal abuse, and subjected to sexual harassment, dangerous working environment, excessive pay deductions and unreliable payment of wages.[277]

Better Work data and research have focused on making a strong business case for companies to invest in improving working conditions and wages.[278] Ongoing research in Better Work factories in Vietnam and in Cambodia indicates that better working conditions can drive greater productivity, leading to higher profits and improving the chances of a factory's survival in an economic downturn, such as the one that hit the global garment industry

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[271] Dennis Arnold, *Better Work or 'Ethical Fix'? Lessons from Cambodia's Apparel Industry*, GLOB. LABOUR COLUMN (Nov. 2013), http://column.global-labour-university.org/2013/11/better-work-or-ethical-fix-lessons-from.html [https://perma.cc/B3KS-NqK2].

[272] *See* Better Work, *supra* note 59.

[273] *See Better Work*, INT'L LABOUR ORG., http://www.ilo.org/washington/areas/better-work/lang--en/index.htm [https://perma.cc/U4Z3-6SWE].

[274] Better Factories Cambodia was established by ILO in 2001. *See* Jereon Merk, Clean Clothes Campaign, *10 Years of the Better Factories Cambodia Project*, at 5, 7 (2012), https://cleanclothes.org/resources/publications/ccc-clec-betterfactories-29-8.pdf/view_download/file [https://perma.cc/U76P-QZB3].

[275] Better Work, *supra* note 59, at 4.

[276] *Id.* at 5.

[277] Better Work, *Working Conditions, Productivity and Profitability: Evidence from Better Work Vietnam*, at 2–3 (2015), http://betterwork.org/global/wp-content/uploads/2015/03/ILO-1513-Research-Brict-V3-2.pdf [https://perma.cc/R8SB-RFYH] [hereinafter *Working Conditions*].

[278] Better Work, *supra* note 59, at 8.

in 2008.[279] Moreover, in Vietnam, factories in which workers trust that they are paid correctly and report low verbal abuse are almost 8 percent more profitable than those factories in which workers do not report these conditions.[280] 62 percent of factories have increased production capacity and 60 percent have expanded employment.[281] Furthermore, the data suggests that profitability can increase even with wage increases to the workers. In Vietnam, for each 1 percent increase in wage levels, factories purportedly show a 0.6 percent increase in revenues over their costs.[282] Higher wages appear to boost the bottom line of factories by fostering greater productivity among workers that more than compensates for the added cost.[283]

At the same time, the earlier experience in Better Factories Cambodia demonstrates the ongoing challenge in achieving sustainable improvements in working conditions and in wages without strong profit—or other market incentives—and without buy-in from the global buyers.[284] Better Factories Cambodia was set against the backdrop of the 1999 U.S.-Cambodia Textile and Apparel Trade Agreement, under which the U.S. offered to expand access to its market, which had quotas on garment imports under the Multi Fibre Agreement, if Cambodia improved labor standards.[285] The 2005 phase-out of the Multi Fibre Agreement quota system under the WTO left ILO and the Better Factories program without much leverage to pressure factories.[286] Without the financial and market incentives in the form of increased exports to the U.S.

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[279] *See* Drusilla Brown, Rajeev Dehejia & Raymond Robertson, *Working Conditions and Factory Survival: Evidence from Better Factories Cambodia,* at 2–3, 13, 17, 22, 30 (2011), http://betterwork.org/global/wp-content/uploads/Discussion-Paper-Series-No-4-Working-Conditions-and-Factory-Survival.pdf [https://perma.cc/3M57-6KDN]; *see also* Drusilla Brown et al., *Are Sweatshops Profit Maximizing? Answer: No. Evidence from Better Work Vietnam*, at 30 (2015), http://users.nber.org/~rdehejia/papers/DP%2017%20web.pdf [https://perma.cc/R9D7-QCP7] [hereinafter *Better Work Vietnam*].

[280] *Working Conditions*, *supra* note 277, at 3–4 (the brief provides summary of the key findings of Brown et. al, *supra* note 279).

[281] Better Work, The Business Case for Quality Jobs Evidence from Better Work, at 3, http://betterwork.org/global/wp-content/uploads/Quality-jobs-policy-brict-V2-print.pdf [https://perma.cc/4EHL-TPLF].

[282] *Id.* at 4.

[283] *Id.*

[284] Arnold, *supra* note 271.

[285] *Id.*

[286] *Id.*

that drove many of the initial factory level improvements, factories tended to fall back to poverty wages and harsh working conditions.[287] In fact, global competition and rising costs in Cambodia have now led to decreases in real wages, continued blocking of collective bargaining and unionization, and increases in perilous overtime and contract work.[288]

A key weakness of the Better Work model is the limited role of global buyers.[289] The main focus of ILO is on monitoring and pressuring the manufacturers and direct employers.[290] Global buyers, on the other hand, have few obligations, despite, for example, placing orders "representing almost 90 percent of Cambodia's total export earnings."[291] Amongst other things, the common purchasing practices of global buyers, such as short lead and turnaround time on orders, fragmented orders, sudden order cancellations, and constant pressure to reduce costs or meet falling prices, are key drivers of harsh working conditions, including those amounting to human trafficking and forced labor.[292] As the next section further explores, global companies must examine their purchasing and supply chain practices and recognize their role in undermining living wages and work conditions.[293]

2. *Corporate Buy-In: Emerging Approaches by Leading Companies*

The question remains whether endeavors such as those of Better Work can be duplicated by individual companies. Any effort to

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[287] *Id.*

[288] *Id.* For a detailed evaluation and critique of the Better Factories Cambodia model, *see generally* STAN. INT'L HUM. RTS. AND CONFLICT RESOL. CLINIC & WORKER RTS. CONSORTIUM, MONITORING IN THE DARK: AN EVALUATION OF THE INTERNATIONAL LABOUR ORGANIZATION'S BETTER FACTORIES CAMBODIA MONITORING AND REPORTING SYSTEM (Feb. 2013), https://humanrightsclinic.law.stanford.edu/wp-content/uploads/2013/03/Monitoring-in-the-Dark-Stanford-WRC.pdf [https://perma.cc/W6KA-YUKF].

[289] *Id.*

[290] *Id.*

[291] *Id.*

[292] Merk, *supra* note 274, at 23.

[293] *See* STAN. INT'L HUM. RTS. & CONFLICT RESOL. CLINIC &WORKER RTS. CONSORTIUM, *supra* note 288, at 6, 16–17.

reach out more broadly to businesses to rethink how they can pursue short-term profits, long-term value, and clean supply chains will require corporate buy-in and willingness to take a close look at existing supply chain practices. The examples below look into current efforts by two leading companies.

a. Gap Inc.

Gap Inc., the parent company of Gap, Banana Republic, and Old Navy, sells about $16 billion worth of clothing a year and is amongst the largest global clothing retailers.[294] Most of its products are made in Asia, by roughly one million workers in approximately 900 factories in China, India, Vietnam, Cambodia, Bangladesh, Sri Lanka, and Indonesia.[295] For more than a decade, Gap, Inc. has been fairly proactive at trying to address labor-related issues in its supply chains, particularly in Bangladesh.[296] As Kindley Walsh Lawlor, the Vice President of Global Sustainability for Gap Inc. observed, "[i]ncreasingly, brands and suppliers recognize the business value of treating workers at the bottom of the supply chain decently."[297]

While the company does not necessarily pay more for apparel as a way to reward supplier factories that meet high social and environmental standards, it does try to steer more work their way.[298] Lawlor says, "the key lever you can pull is volume."[299] At the same time, the company has been putting increasing efforts on evaluating its purchasing practices and their impact on suppliers and workers.[300]

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[294] *See The World's Biggest Public Companies*, FORBES (May 2016), http://www.forbes.com/companies/gap/ (last visited Oct. 15, 2016).

[295] Mark Gunther, *Protecting a tangled workforce that stretches across the world,* GUARDIAN, (Apr. 28, 2015, 3:30 PM), https://www.theguardian.com/sustainable-business/2015/apr/28/gap-kindley-lawlor-human-rights-workers-jobs-garment-industry [https://perma.cc/CPC8-ZS7Y].

[296] GAP INC., GAP INC. 2011/2012 SOCIAL & ENVIRONMENTAL RESPONSIBILITY REPORT 11–12, http://www.gapincsustainability.com/sites/default/files/2011-12 Report.pdf [https://perma.cc/978C-PCFY].

[297] Gunther, *supra* note 295.

[298] *Id.*

[299] *Id.*

[300] *Id.*

Gap Inc. has been particularly forthcoming in acknowledging that "decisions made by production and sourcing teams at Gap Inc. can have significant impacts on workers in our supply chain."[301] It is committed to reexamining its purchasing practices and their impacts on workers and working conditions inside supplier factories, and working to incorporate this knowledge into the company's decision-making.[302] For example,

> [I]f we make a last-minute change to an order of 500,000 T-shirts, such as an alteration to the type of stitching used, the factories where we place our orders must ensure they have the right number of workers on hand to complete the order. If such a change is poorly planned or projected, this type of decision can mean that workers are pressed to work longer hours or lose their days off in order to meet shipping deadlines.[303]

Consequently, Gap Inc. created a Brand Integration and Vendor Performance project team, which analyzes data about vendor and factory performance to improve Gap's own production planning and order placement.[304] Furthermore, as of 2012, Gap Inc.'s sourcing strategy fosters deeper ongoing partnerships with a smaller, consolidated vendor base, in a way that creates longer-term sustainable incentives for the suppliers to improve their conditions rather

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[301] GAP INC., *supra* note 296, at 56.

[302] *Id.*

[303] *Id.*; *see also* LEVI STRAUSS & CO., IMPROVING WORKERS' WELL-BEING: A NEW APPROACH TO SUPPLY CHAIN MANAGEMENT 14 (2012) [hereinafter CERES-LS&CO REPORT] https://www.ceres.org/resources/reports/improving-workers-well-being-a-new-approach-to-supply-chain-engagement [https://perma.cc/P6FJ-DAEU] ("Decreasing lead times have put many factories under intense pressure. If this trend for shorter lead times is combined with lower prices for product, the result will be a situation in which sustainability improvements are not possible. Stakeholders recommended taking a fundamental and honest examination of product pricing and purchasing practices—from design to finishing ...."); Constance Thomas, *Addressing Child Labor in Agriculture Supply Chains within the Global Fight Against Child Labor*, 21 U.C. DAVIS J. INT'L L. & POL'Y 131, 151 (2014) ("There is no point making demands on a supplier if the company's purchasing policy means they will seek the lowest possible labor costs and provide poor working conditions. Such a business practice only serves to perpetuate family poverty, risks safety and health, and encourages child labor.").

[304] GAP INC., *supra* note 296, at 56.

than continuously compete for orders from multinational buyers at the workers' expense.[305]

b. Levi Strauss & Co.

Driven by the recognition that a company is only as strong as the weakest link in its supply chain, Levi Strauss & Co. (Levi's), one of the world's largest brand name apparel companies,[306] has been advocating for a paradigm shift in the way companies address the needs of workers in the supply chain.[307] Key to this paradigm shift is the belief that "a focus on worker well-being will not only benefit individual workers and their families, but strengthen the factories in which they work, improving efficiency and productivity, and ultimately Levi Strauss & Co.'s bottom line."[308] More than an ethical commitment, it is good business and a key to long-term value creation.

Importantly, Levi's new approaches to supplier engagement, which focus on creating local, factory-level programs to increase workers' well-being, are an integral part of the company's business strategy.[309] Levi's five-year strategy focuses on supplier engagement, business decision-making, and building partnerships.[310] In closely examining its own decision-making processes, Levi's specifically focuses on improving purchasing practices to decrease negative impacts on supporting suppliers who improve factory productivity and efficiency, and on developing a stronger business case by identifying metrics and measuring return on investment for the worker programs put in place.[311]

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[305] *Id.*

[306] Levi's designs and markets jeans, casual wear, and related accessories under several brand names. Its products are sold in more than 110 countries worldwide and its net revenues (in 2011) were $4.8 billion. *See* Levi Strauss & Co., 2011 ANNUAL REPORT 4–5, http://levistrauss.com/investors/annual-reports/2011-annual-report.

[307] *See* CERES-LS&CO REPORT, *supra* note 303, at 2.

[308] *Id.* at 3.

[309] *Id.* Levi's piloted these initiatives in Bangladesh, Cambodia, Egypt, Haiti, and Pakistan. *Sustainability*, LEVI STRAUSS & CO., http://www.levi strauss/com/sustainability/people/ [https://perma.cc/A5BZ-7M6S], last accessed Sept. 15, 2016.

[310] CERES-LS&CO REPORT, *supra* note 303, at 17.

[311] *Id.* at 13–14.

Levi's 2013 and 2014 Annual Reports show a continued growth in both revenue and profit.[312] For two consecutive years the company reported growing both revenues and profit, having a strong cash flow, paying debt, and strengthening the balance sheet overall.[313] During 2013, the company introduced the Wellthread™ process that "combines sustainable design with environmental practices and a strong focus on worker well-being."[314] It also found, for example, that for every dollar it invested in women workers' health, there was a $3 payback in productivity, manifested through quality improvements to reduced turnover and absenteeism.[315] In 2014, the company introduced financial incentives to its global suppliers, tying increased financial rewards to higher social and environmental performance on the company's code of conduct.[316] There is no claim that increasing workers' well-being drove short-term profits up, but it would also seem that the company's competitiveness was not negatively impacted by the above strategies. In fact, the company emphasized that making its cost structure more competitive is one of the four key strategies it employs to drive consistent profitable growth and create long-term value for its shareholders.[317]

D. Removing the Incentive to Exploit: H&M and New Approaches to Internalizing Labor Costs and Enhancing Cash Net Revenue

Some business have started to develop "a deeper understanding of productivity and a growing awareness of the fallacy of short-term cost reductions (which often actually lower productivity or

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[312] *See* LEVI STRAUSS & CO., 2013 ANNUAL REPORT 4 (2014), http://www.levistrauss.com/wp-content/uploads/2014/04/levistrauss-annual-report-2013.pdf [https://perma.cc/R6V2-PZW2] [hereinafter LEVI 2013 ANNUAL REPORT]; *see also* LEVI STRAUSS & CO., 2014 ANNUAL REPORT 4–5 (2015), http://levistrauss.com/wp-content/uploads/2014/01/annual-report-2014.compressed.pdf [https://perma.cc/9LW3-U9HR] [hereinafter LEVI 2014 ANNUAL REPORT].

[313] *See* LEVI 2013 ANNUAL REPORT, *supra* note 312, at 4; LEVI 2014 ANNUAL REPORT, *supra* note 312, at 4–5.

[314] LEVI 2013 ANNUAL REPORT, *supra* note 312, at 18.

[315] *Id.* at 19.

[316] LEVI 2014 ANNUAL REPORT, *supra* note 312, at 6–7.

[317] LEVI 2013 ANNUAL REPORT, *supra* note 312, at 5. This has translated into strong value creation for Levi's shareholders, with the stock price more than doubling between December 2011 and December 2014. *See* LEVI 2014 ANNUAL REPORT, *supra* note 312, at 4.

make it unsustainable)" in the value chain.[318] For example, a comparison of wage and benefits practices at Walmart's Sam's Club and at Costco demonstrates that suppressing wages and benefits doesn't necessarily translate to lower costs in the long run.[319] Both businesses are direct competitors in the warehouse retail space, offering low-price merchandise.[320] In 2006, Costco's average pay was 42 percent higher than Sam's Club, and between 80–90 percent of Costco employees had employer-sponsored health coverage and retirement benefits, compared to around half at Walmart/Sam's Club.[321] While on its face Costco's generous practices are more expensive, it results in one of the most loyal and productive workforces in retail, with an unusually low turnover rate and the lowest employee theft figures in the industry.[322] Costco's stable, productive workforce offsets the higher costs, so that in 2005, for example, Costco generated double the profits per employee than Sam's Club.[323]

Instead of cutting wages and benefits, especially in offshore developing and underdeveloped locations, some companies are recognizing the positive effects that a fair living wage and safe working conditions have on productivity.[324] Setting and meeting a fair living wage, however, is a hot-button issue for all companies with global supply chains.[325] Very few companies have made concrete

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[318] Porter & Kramer, *Creating Shared Value*, *supra* note 163, at 69.

[319] Wayne F. Cascio, *The High Cost of Low Wages*, HARV. BUS. REV., Dec. 2006, at 23.

[320] *Id.*

[321] *Id.*

[322] *Id.* (In contrast, turnover at Walmart/Sam's Club is 44 percent a year, more than twice the 17 percent turnover rate at Costco).

[323] *Id.*

[324] Porter & Kramer, *Creating Shared Value*, *supra* note 163, at 71.

[325] A living wage affords a worker the ability to meet the most basic necessities of life—food, clothing, shelter, healthcare, and education. Wages in the major producing countries such as Bangladesh, Cambodia, India, and Indonesia only amount to 14–36 percent of that needed minimum. *Id.* In fact, in the Asian manufacturing hubs in Bangladesh and Sri Lanka the set minimum wage is 1/5 of the living wage, and most companies do not comply and pay significantly less. *Id*; *See also* WORLD ECON. FORUM, BEYOND SUPPLY CHAINS: EMPOWERING RESPONSIBLE VALUE CHAINS 24 (2015) [hereinafter *Beyond Supply Chains*], http://www3.weforum.org/docs/WEFUSA_BeyondSupplyChains_Report2015.pdf [https://perma.cc/68PA-FV5M].

commitments to providing fair wages throughout their supply chains or more equally distributing profit margins across all suppliers.[326]

Even companies such as Gap Inc. or Levi Strauss & Co., who have been proactive in ensuring workers safety and improving working conditions overall, have not made specific commitments to fair wages or better pricing for their overseas suppliers (which may remove some of the pressures to cut costs by suppressing wages for the factory employees).[327] Levi's, for example, acknowledges that the success of many of the programs envisioned under Levi's new approach to engaging suppliers is inescapably tied to the challenge of providing workers with a living wage.[328] At the same time, Levi's has taken the position that this is something the whole

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[326] The WEF report emphasizes the space some companies have within their margins to share the costs between retailer and subcontractors more equitably. *See Beyond Supply Chains*, *supra* note 325. For a t-shirt that is manufactured in Bangladesh and sold to consumers in Germany, for example, the garment workers receive about 0.6 percent of the retail price, the manufacturer profits 12.5 percent per unit cost, and the retailer has a 42.6 percent margin compared to a 4 percent margin for subcontractors. *Id*. at 25. In comparison, Knights Apparel, the largest supplier of collegiate apparel in the United States, established in 2010 a new Alta Gracia brand, which replaced a Korean-owned operation in the Dominican Republic that made baseball caps for major footwear companies. Jackie Northam, *Can This Dominican Factory Pay Good Wages And Make a Profit*, NPR (June 20, 2013, 2:58 AM), http://www.npr.org/sections/parallels/2013/06/20/193491766/can-this-domincan-factory-pay-good-wages-and-make-a-profit [https://perma.cc /5N4W-Z6FS]. Alta Gracia is the only apparel company in the developing world that is independently certified in paying a living wage—a wage that is more than 300 percent of the minimum wage in the Dominican Republic. *See* ALTA GRACIA, http://altagraciaapparel.com/about.html [https://perma.cc/V936-HG4P]. Knights Apparel was prepared to accept a lower profit margin as it built demand for the Alta Gracia brand over several years and only in 2014 did it reach its break-even point for production and profit. Nayelli Gonzales, *Why This Top College Apparel Company Pays Living Wages*, TRIPLE PUNDIT (Jan. 22, 2015), http://www.triplepundit.com/special/sustainable-fashion-2014/top-college-apparel-company-pays-hiring-wages. The Alta Gracia model aims to offset that margin by lowering employee turnover and training costs and increasing overall productivity.

[327] *See* CERES-LS&CO REPORT, *supra* note 303, at 7; *see also* GAP INC., GAP INC. 2011/2012 SOCIAL & ENVIRONMENTAL RESPONSIBILITY REPORT 34–36, http://www.gapincsustainability.com/sites/default/files/2011-12%20Report.pdf [https://perma.cc/2QWT-ZAUZ].

[328] *See* CERES-LS&CO REPORT, *supra* note 303, at 7.

industry, in collaboration with unions, NGOs, and governments needs to tackle together.[329]

In 2013, another global leader in the apparel and textile industry—H&M—launched an ambitious roadmap to pay all workers in its global supply chains a fair living wage.[330] H&M, a Swedish multinational fast-fashion retail-clothing company, is ranked the third largest global clothing retailer.[331] Like many others in this global industry, H&M does not own any of the factories that manufacture its products; instead, H&M products are manufactured by around 820 independent suppliers, around 20 percent of which are in Europe and 80 percent in Asia, with around 1,900 factories in total.[332] Those factories employ about 1.6 million people, of which about 64 percent are women.[333] H&M believes that employees in the textile industry must be able to earn a fair living wage.[334] It has been advocating for a change in industry practices, as well as engaging with governments in its production countries to support increased pay in the textile industry.[335] Acknowledging that "[t]he entire garment industry sourcing model is predicated on low wages," H&M calls on fashion brands to take a leading role in transforming the industry:

> [fashion brands'] sourcing practices and the price that they pay to their suppliers determine the conditions for workers. What we have seen over many years is prices being squeezed, leaving

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[329] *Id.*

[330] *Fair Living Wage*, H&M, http://sustainability.hm.com/en/sustainability/commitments/choose-and-reward-responsible-partners/fair-living-wage.html [https://perma.cc/9UBY-VCKH].

[331] *See The World's Biggest Public Companies*, FORBES, http://www.forbes.com/global2000/#/industry:Apparel_2FFootwear%20Retail (Spain-based Inditex, parent company of Zara, is ranked first).

[332] *The Textile Industry and H&M*, H&M, http://sustainability.hm.com/en/sustainability/about/hm-conscious/the-textile-industry-and-hm.html [https://perma.cc/6EZJ-8DM9].

[333] *See* H&M, H&M CONSCIOUS ACTIONS SUSTAINABILITY REPORT 2014 at 27, http://sustainability.hm.com/content/dam/hm/about/documents/en/CSR/reports/Conscious%20Actions%20Sustainability%20Report%202014_en.pdf [https://perma.cc/7VZ8-676Z] [hereinafter H&M CONSCIOUS ACTIONS SUSTAINABILITY REPORT 2014].

[334] *Fair Living Wage*, *supra* note 330.

[335] *The Textile Industry and H&M*, *supra* note 332.

> very little room for pay increases to be negotiated. This must stop. Brands must be prepared to pay a fairer price for the clothes they sell.[336]

In 2013, H&M took its efforts one significant step forward by committing to work with its strategic suppliers[337] to put in place pay structures that would provide a fair living wage to around 850,000 textile workers by 2018.[338]

According to the roadmap, H&M will support factory owners in developing fair living wage pay structures, ensuring correct compensation, and reducing overtime.[339] By improving H&M purchasing practices and by having "a skilled workforce that have their wages negotiated and annually reviewed, involving democratically elected trade unions or worker representatives," H&M is enabling its vision.[340] As the first stage in implementing and testing a fair living wage network, H&M introduced three model factories, two in Bangladesh and one in Cambodia.[341] H&M will source 100 percent of the products manufactured in the three factories for a period of five years, and has begun implementing a Fair Wage Method in each of the three model factories.[342] Starting

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[336] *See* H&M CONSCIOUS ACTIONS SUSTAINABILITY REPORT 2014, *supra* note 333, at 42.

[337] H&M identifies 750 factories, which produce around 60 percent of its product, as its strategic suppliers. *See* H&M, H&M'S ROADMAP TOWARDS A FAIR LIVING WAGE IN THE TEXTILE INDUSTRY [hereinafter H&M'S ROADMAP TOWARDS A FAIR LIVING WAGE IN THE TEXTILE INDUSTRY], http://sustainability.hm.com/content/dam/hm/about/documents/masterlanguage/CSR/Others/Roadmap%20Achievements%202014.pdf [https://perma.cc/69GX-LHXQ]. H&M rewards strategic suppliers by providing training and support and by rewarding the suppliers' good sustainability performance with better business. *See* H&M CONSCIOUS ACTIONS SUSTAINABILITY REPORT 2014, *supra* note 333, at 27.

[338] *Fair Living Wage*, *supra* note 330.

[339] H&M'S ROADMAP TOWARDS A FAIR LIVING WAGE IN THE TEXTILE INDUSTRY, *supra* note 337.

[340] *Id.*

[341] *Milestones 2014*, H&M, http://sustainability.hm.com/content/dam/hm/about/documents/masterlanguage/CSR/Others/Milestones%202014.pdf [https://perma.cc/QT78-9RUN].

[342] H&M'S ROADMAP TOWARDS A FAIR LIVING WAGE IN THE TEXTILE INDUSTRY, *supra* note 337.

The Fair Wage Method helps the supplier and the workers reach a fair living wage through regular and fair adjustment of the wages according to both price increases and performance. *Id.* The Fair Wage Method starts with worker in 2014, H&M improved its purchasing practices in two key ways: (1) by developing a price method that is true to the cost of the labor, which means paying suppliers a price which allows them to pay their textile workers a fair living wage and to reduce overtime, and (2) by improving purchasing practices to reduce production peaks for the suppliers, which allows them to better plan the capacity of their factories.[343] H&M also supports enhanced communication and social dialogue between the management and workers' representatives to ensure that wages are regularly negotiated and adjusted.[344]

Data from the very first 2014 evaluation of the role model factory in Cambodia shows that as a result of improved dialogue between factory management and elected employee representatives, they have started to create a new wage structure in the factories and salaries are paid according to skills and performance bonuses for efficiency, innovation and quality.[345] Wages increased and overtime reduced by 40 percent, but productivity nonetheless increased due to better production planning and incentives.[346] H&M intends to implement the Fair Wage Method at 60 of its strategic supplier factories in Cambodia, Bangladesh, and China.[347]

H&M does not forecast that the roadmap on the fair living wage will have a negative impact on the price of its products. Rather, H&M is prepared to reflect higher wages in higher sourcing costs

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and management interviews. The purpose is to identify the perception on what the existing wage covers in terms of basic needs including rent, food, clothing, and education. *Id.* It also evaluates if the worker feels that there is fair correlation in regards to their skills, education, and so on. After the factory has implemented a remediation plan, follow up interviews takes place to measure if the worker's perception of his or her wage has changed, and also the gap between worker and management perception on wage level.

[343] *Id.*

[344] *Id.*

[345] *Id.*

[346] *See* H&M CONSCIOUS ACTIONS SUSTAINABILITY REPORT 2014, *supra* note 333, at 3. For example, H&M provides all suppliers seasonal production plans with H&M following up to ensure execution and to make timely revisions. *See* *Roadmap Achievements*, H&M, http://sustainability.hm.com/content/dam/hm/about/documents/masterlanguage/CSR/Others/Roadmap%20Achievements%202014.pdf [https://perma.cc/WS2K-ZPJK].

[347] *See* H&M CONSCIOUS ACTIONS SUSTAINABILITY REPORT 2014, *supra* note 333, at 45.

and see it as an investment in its customer offer that will benefit H&M in the long term.[348] Wages are only one of several factors that influence sourcing costs and prices to the consumer.[349] H&M is willing to pay more so that suppliers can pay higher wages, and believes that better purchasing practices and a skilled stable workforce will lead to better efficiency and productivity.[350]

Indeed, H&M did not necessarily need to sacrifice short-term profits. Over the last three years, H&M has continued to grow in profit and in market share.[351] In 2014, it reported a sales increase of 18 percent, a gross profit increase of 17 percent, and a profit after financial items increase of 15 percent.[352] The H&M Full Year Report for December 1, 2014, through November 30, 2015 (released on January 28, 2016) shows an increase of 19 percent in sales, an increase of 16 percent in gross revenue, a 5 percent increase in profit after financial items, and an overall significant increase in overall profit and market share.[353] At the same time, as H&M CEO Karl-Johan Persson emphasizes, "it's very important to dare to take a long-term view. Good sustainability work will require big investments. We will have to be prepared to sacrifice short-term profits for long-term success."[354]

CONCLUSION

Current efforts to address business and corporate complicity in human trafficking and the use of forced labor in various industries have had a rather limited reach and success in alleviating the widespread use of forced and trafficked labor around the world. Much of the focus has been on the voluntary adoption of

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[348] *Id.* at 46.

[349] *Id.* at 41–42.

[350] *Fair Living Wage*, *supra* note 330.

[351] H&M, H&M HENNES & MAURITZ AB FULL-YEAR REPORT DEC. 1, 2013–NOV. 30, 2014, http://about.hm.com/content/dam/hm/about/documents/en/cision/2015/01/1460341_en.pdf [https://perma.cc/6AN2-T8P2] [hereinafter H&M 2014 FULL-YEAR REPORT]; *see also* H&M, H & M HENNES & MAURITZ AB FULL-YEAR REPORT FOR DEC. 1, 2014–NOV. 30, 2015, http://about.hm.com/en/news/newsroom/news.html/en/financial-reports/2016/1/2095206.html [https://perma.cc/DEM4-V98U] [hereinafter H&M 2015 FULL-YEAR REPORT].

[352] *See* H&M 2014 FULL-YEAR REPORT, *supra* note 351.

[353] *See* H&M 2015 FULL-YEAR REPORT, *supra* note 351.

[354] *See* H&M CONSCIOUS ACTIONS SUSTAINABILITY REPORT 2014, *supra* note 333, at 5.

socially responsible practices by businesses, with or without the impetus of mandated regulatory compliance or, more recently, through creative corporate law approaches. Instead, this Article attempted to make a business case for eliminating forced labor and human trafficking from global supply chains. It suggested that ensuring the workers' well-being can improve supply chain efficiency, productivity, reliability and overall resiliency, and ultimately the bottom line as well as long-term value creation for the business. Building on competitive strategy business theory, particularly on Porter and Kramer's theories on strategic CSR and shared value creation, this Article advocated for a paradigm shift: Companies should view clean and sustainable supply chains as a core business strategy, which could lead to short- and long-term shareholder wealth maximization and value creation for both the corporation and society as a whole. Consequently, it could minimize the incentives to use forced and trafficked labor in global supply chains. The Article then put the theory to the test, by highlighting emerging business efforts, particularly in the global apparel industry, which are beginning to demonstrate real life linkages between better wages and work conditions and business profitability and market competitiveness. The ability to generate profit while treating all workers with dignity is the true promise of Creative Capitalism.