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Caroline Kaeb

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# CORPORATE ENGAGEMENT WITH PUBLIC POLICY: THE NEW FRONTIER OF ETHICAL BUSINESS

*Caroline Kaeb\**

## I. INTRODUCTION

In light of recent policy developments domestically and globally, a new phenomenon has gained momentum as the new frontier of corporate social responsibility. Company practice has increasingly demonstrated that the human rights function of business is developing beyond mere risk management towards a more proactive approach by companies in terms of engaging in—if not advocating for—fundamental human rights issues in the very societies in which they operate.<sup>1</sup> In fact, *Forbes* has identified key CSR trends for 2017 and 2018, which include “corporations ... stepping up as advocates and problem-solvers” and more companies “bringing CSR into the C-suit” as a matter of corporate leadership.<sup>2</sup> This essay argues that the CSR paradigm has been evolving and expanding in the face of increasingly glaring governance gaps on issues of pivotal societal importance and an international shift towards extremism. In that vein, public policy priorities that have become areas of corporate engagement (irrespective of meaningful government action and regulation) include immigration issues, gender bias, sexual harassment, climate change,

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\*. PhD, Senior Fellow, Zicklin Center for Business Ethics Research, The Wharton School.

1. Corporate engagement as discussed in this essay does not deal with a company’s contributing money to influence elections, which poses a risk to its reputation and brands, especially in today’s polarized political environment, a recent report by the Center for Political Accountability shows. See CTR. FOR POL. ACCOUNTABILITY, COLLISION COURSE: THE RISK COMPANIES FACE WHEN THEIR POLITICAL SPENDING AND CORE VALUES CONFLICT 24 (2018), [http://files.politicalaccountability.net/reports/cpa-reports/Final\\_Draft\\_Collision\\_Report.pdf](http://files.politicalaccountability.net/reports/cpa-reports/Final_Draft_Collision_Report.pdf) [<https://perma.cc/7M55-7CCB>].
2. Susan McPerson, *6 CSR Trends to Watch in 2017*, FORBES (January 19, 2017), <https://www.forbes.com/sites/susanmcperson/2017/01/19/6-csr-trends-to-watch-in-2017/2/#3065bd8952ae> [<https://perma.cc/Y39Y-PWK3>]; Susan McPerson, *8 Corporate Social Responsibility (CSR) Trends to Look For in 2018*, FORBES (January 12, 2018), <https://www.forbes.com/sites/susanmcperson/2018/01/12/8-corporate-social-responsibility-csr-trends-to-look-for-in-2018/#1412572f40ce> [<https://perma.cc/K73T-GGW2>].

LGBTI rights, police brutality, freedom of expression and national security, and broader human rights issues in general.<sup>3</sup>

While litigation and accountability are an indispensable base line for corporate conduct in society,<sup>4</sup> there is an important additional complementary dimension to corporate responsibility, which has not received due attention in recent years, namely the moral responsibility of corporations. Doctrinal issues of corporate moral agency have been discussed in-depth in the literature.<sup>5</sup> This essay, on the other hand, examines a recent phenomenon, which can be understood as manifestation of corporate morality on public policy issues of topical prominence, namely top corporate executives using their corporate voice and influence to proactively stir public policy for the advancement of societal/public values.<sup>6</sup> There is a healthy cynical

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3. See Caroline Kaeb & David Scheffer, *The Corporate Joust with Morality*, OPINIO JUR (June 6, 2016) <http://opiniojuris.org/2016/06/06/the-corporate-joust-with-morality/> [https://perma.cc/39R2-LNPL] (describing this early phenomenon).
  4. See, e.g., Donald Kochan, *Corporate Social Responsibility in a Remedy-Seeking Society: A Public Choice Perspective*, 17 CHAPMAN L. REV. 413, 452-63 (2014) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2342810](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2342810) [http://perma.cc/72AW-UL6H] (examines how an interest-group dynamic informs the development of a “corporate social responsibility-driven liability regime”); see also PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE (2009) (providing an analysis of human rights litigation under the Alien Tort Statute, including liability under the Statute); see also David Scheffer, *The Impact of War Crimes Tribunals on Corporate Liability for Atrocity Crimes under US Law, in CORPORATE SOCIAL RESPONSIBILITY? HUMAN RIGHTS IN THE NEW GLOBAL ECONOMY* 152, 163–64 (Walker Said & Kelly eds., 2015) (examining how U.S. courts have relied on the jurisprudence of the international criminal tribunals for guidance in Alien Tort Statute cases against corporate defendants for violations of international law).
  5. See e.g., ERIC ORTS, BUSINESS PERSONS: A LEGAL THEORY FOR THE FIRM (Oxford ed. 2013) (discussing a new legal theory of the firm, and how these legal foundations inform their purpose); See also R. E. Erwin, *The Moral Status of the Corporation*, 10 J. BUS. ETHICS 749 (1991) (explaining the limitations of the moral personality of corporations); see also Kenneth E. Goodpaster & John B. Matthews, Jr., *Can a Corporation Have a Conscience?*, 60 HARV. BUSI. R. 132 (Jan. 1982) <https://hbr.org/1982/01/can-a-corporation-have-a-conscience> [https://perma.cc/B45A-RWGG?type=image] (“Organizational agents such as corporations should be no more and no less morally responsible... than ordinary persons.”); see also Manuel Velasquez, *Debunking Corporate Moral Responsibility*, 13 BUS. ETHICS Q. 531 (Oct. 2003) (arguing that “the issue of corporate moral responsibility is an important one for business ethics” and challenging the collectivist assumptions).
  6. See WEBER SHANDWICK & KRC RESEARCH, CEO ACTIVISM IN 2017: HIGH NOON IN THE C-SUITE, 1-2 (2017) <https://www.webershandwick.com/uploads/news/files/ceo-activism-in->

view of how corporate behavior intersects with public policy, which most dominantly has manifested itself through lobbying where narrow corporate interests are pursued. And while special interest lobbying has long been part of the corporate and political reality, that is not what this essay investigates.

The controversy about the roll back of Deferred Action for Childhood Arrivals (DACA) led to an outcry of corporate executives across business sectors about the detrimental implications of this decision for their business and the bedrock values of the country.<sup>7</sup> This corporate response has vividly and forcefully illustrated that there is a strong interrelation between business and human rights and that there is a need to further define this relationship.<sup>8</sup> Corporate engagement on public policy is not equivalent to traditional lobbying efforts aimed at regressively supporting or opposing legislation for the primary pursuit of corporate self-interest. Rather, the phenomenon discussed here concerns how corporations, individually or jointly, seek to shape public policy in ways that constructively address issues of societal importance. Under the paradigm of corporate public policy engagement, business serves as an agent for positive social change.<sup>9</sup> Recent accounts suggest a tangible impact of this CEO activism as state legislatures in the U.S. are competing for investments by out-of-state businesses and show the first signs of being wary of the pronounced corporate backlashes in the form of boycotts and

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2017-high-noon-in-the-c-suite.pdf [https://perma.cc/G4Y7-6FQB]  
(describing the rise in CEOs taking public positions on societal issues).

7. See Wattles & Kopan, *Business leaders to Congress: DACA's 'valuable talent' at risk*, CNN MONEY (January 10, 2018), <http://money.cnn.com/2018/01/10/news/companies/trump-daca-letter-apple-facebook/index.html> [https://perma.cc/R8Q2-LQV2] (detailing chief executives and leaders from several companies putting pressure on Congressional leaders to pass legislation in support of protection for Dreamers).
8. See UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMMISSIONER, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 13 (2011) [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) [https://perma.cc/V9FL-3WF7] (Asserting that business “can have an impact on virtually the entire spectrum of internationally recognized human rights”).
9. Proactive corporate engagement on topical issues of public policy can also be driven by narrow corporate self-interest rather than the broader public good. See Scheffer & Kaeb, *supra* note 3; see also Chen Guangchengjian, *Apple Can't Resist Playing by China's Rules*, NEW YORK TIMES (January 2, 2018) <https://www.nytimes.com/2018/01/23/opinion/apple-china-data.html> [https://perma.cc/Z6MK-TPX7] (illustrating the discrepancy in Apple's corporate engagement on freedom of expression issues at home and abroad).

cancellations of business deals.<sup>10</sup> Legislatures in conservative states are experiencing the pressures of the market and are increasingly desisting—for the time being—from further legislative action on polarizing social issues, such as same-sex marriage and other LGBTI rights.<sup>11</sup> With their voice, company executives seem to have slowed down the momentum for repressive bills in state legislatures.<sup>12</sup>

This essay makes a first attempt to lay out the main parameters of a normative framework for corporate engagement with public policy as part of a broader corporate responsibility paradigm. In that respect, the essay provides some guideposts for companies to identify and engage on public policy issues affecting their stakeholders and shaping their business environment. It complements the U.N. Guiding Principles on Business and Human Rights<sup>13</sup> (“U.N. Guiding Principles”), which focus on the corporate responsibility to address negative impacts on society, but do not substantiate for companies whether and how to engage on broader public policy issues in order to advance human rights and societal values.<sup>14</sup> This essay provides a framework of thinking and contextualizing that aims to fill this gap.

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10. See Shandwick, *supra* note 6 (describing the rise in CEOs taking public position on societal issues).
  11. See Jon Schuppe, *Corporate Boycotts Become Key Weapon in Gay Rights Fight*, NBC NEWS (Mar. 26, 2016) <https://www.nbcnews.com/news/us-news/corporate-boycotts-become-key-weapon-gay-rights-fight-n545721> [<http://perma.cc/LLQ7-VA7R>] (examining states’ attempts to attract corporate investments by halting to adopt or implement new anti-LGBTI legislation).
  12. See Alan Blinder, *Wary, Weary or Both, Southern Lawmakers Tone Down Culture Wars*, N.Y. TIMES (Jan. 22, 2018), <https://www.nytimes.com/2018/01/22/us/transgender-bathroom-bill-religious-freedom.html> [<http://perma.cc/PE9H-R44P>] (discussing how states are halting “hot bottom social bills” in light of corporate backlash); see also *The anti-gay backlash in the American South: Big business must lead the way in fighting a rash of discriminatory laws*, THE FINANCIAL TIMES (April 12, 2016), <https://www.ft.com/content/187d66d8-009d-11e6-99cb-83242733f755> [<https://perma.cc/4R23-NQ4T>] (explaining how corporate pressure is halting southern legislators from passing discriminatory legislation).
  13. Hum. Rts. Council, *Report of the 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).
  14. *Id.* at 13-22.

## II. A NEW TREND IN CORPORATE LEADERSHIP

An article in *The New York Times* from August 2017 put the spotlight on CEOs as leaders who have expressed their “moral voice more forcefully than ever” and demonstrated a new level of C-suite activism.<sup>15</sup> This activism is driven by values, or as the rhetoric of corporate leaders has suggested, by morality and the universal values that bind us beyond party lines.<sup>16</sup> The news article hit the nerve of this recent phenomenon of CEO activism when it postulated the “Moral voice of Corporate America.”<sup>17</sup> The concept went viral and contributed to a lively debate.<sup>18</sup>

Recent examples of corporate leadership taking a proactive stand on public policy issues pertaining to the fundamental rights in those societies in which businesses operate are plentiful. The narrative told by CEOs and popular news coverages seems to insinuate that this conduct by corporate officers is increasingly guided by a moral imperative rather than a legal mandate or a business rationale.<sup>19</sup> This notion is not entirely new—see, for example, the divestment movement in the mid-1980s in response to the South African apartheid regime<sup>20</sup>—but the consistency and frequency of engagement

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15. David Gelles, *The Moral Voice of Corporate America*, N.Y. TIMES (Aug. 19, 2017), <https://www.nytimes.com/2017/08/19/business/moral-voice-ceos.html> [<http://perma.cc/LSW4-2ST3>].
  16. *See id.* (“In recent days, after the Charlottesville bloodshed, the chief executive of General Motors, Mary T. Barra, called on people to ‘come together as a country and reinforce values and ideals that unite us – tolerance, inclusion and diversity.’”).
  17. *Id.*
  18. *See e.g.* Aaron K. Chatterji & Michael W. Toffel, *The New CEO Activists*, HARV. BUS. R. (Jan.-Feb. 2018) <https://hbr.org/2018/01/the-new-ceo-activists> [<https://perma.cc/4RTW-7M59>] (outlining the emergence of CEOs advocating for social causes).
  19. More empirical research, such as in the form of a sentiment analysis, is required to conclusively establish this trend, but there is certainly clearly observable anecdotal evidence to support this development. *See e.g.* Andrew Ross Sorkin, *Apple’s Tim Cook Barnstorms for ‘Moral Responsibility,’* THE NEW YORK TIMES (August 28, 2017), <https://www.nytimes.com/2017/08/28/business/dealbook/tim-cook-apple-moral-responsibility.html> [<http://perma.cc/C84S-RUAB>] (outlining Tim Cook’s perspective on corporate moral responsibility); *see also* Gelles, *supra* note 15 (discussing corporations’ changing dynamic to meet new social and political expectations).
  20. *See* RALPH STEINHARDT, CORPORATE RESPONSIBILITY AND THE INTERNATIONAL LAW OF HUMAN RIGHTS: THE NEW LEX MERCATORIA, *in: Non-State Actors and Human Rights* 177-81 (Philip Alston ed., 2005) (discussing the Sullivan Principles as an alternative to the anti-apartheid divestment movement and as a public commitment to human rights).

across the political spectrum as well as across industry sectors, has undeniably established an emerging pattern of corporate responsibility with important practical and normative implications.

There are many ways how this proactive corporate engagement on public policy issues has been described, as a form of corporate advocacy, political CSR, or as a “counter-attack” standing up against government overreach and failures.<sup>21</sup> No matter what the normative framing, in essence, they all describe a new reality where business speaks truth to power on public policy of topical prominence in society.

Already in 2014, a survey showed that 83% of corporate executives agree that human rights are a matter for business as well as governments.<sup>22</sup> A recent global survey across all demographics finds that “[n]early 7 in 10 respondents say that building trust is the No. 1 job of CEOs, ahead of high-quality products and services.”<sup>23</sup> The public sentiment is evidently shifting, and corporate executives have increasingly put this realization into action. There has been an emerging pattern of CEO’s and other top corporate executives speaking out on timely topics and using their public notoriety to take a stand on issues not directly related to their business.<sup>24</sup> It is a new path to leadership born out of widening governance gaps in many prominent areas of public policy, which concerns not only their

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21. See Florian Wettstein & Dorothea Baur, ‘*Why Should We Care about Marriage Equality?*’: *Political Advocacy as a Part of Corporate Responsibility*, 138 J. BUS. ETHICS 199, 200 (2016) (analyzing types of corporate political involvement, denoting it as corporate political advocacy); see also David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT’L L. 334, 335 (2011) (discussing the different levels of corporate social responsibility (“CSR”) compliance, including a proactive approach to advance CSR objectives); see also Andreas Georg Scherer et al., *Managing for Political Corporate Social Responsibility: New Challenges and Directions for PCSR 2.0*, 53 J. MGMT STUD. 273, 273 (2016) (outlining a new approach to political corporate social responsibility).
  22. THE ROAD FROM PRINCIPLES TO PRACTICE: TODAY’S CHALLENGES FOR BUSINESS IN RESPECTING HUMAN RIGHTS, THE ECONOMIST INTELLIGENCE UNIT 10 (2015) [http://weisermazars.com/pdfs/Mazars%20&%20EIU%20global%20report%20on%20Human%20Rights%20and%20Business\\_March%202015.pdf](http://weisermazars.com/pdfs/Mazars%20&%20EIU%20global%20report%20on%20Human%20Rights%20and%20Business_March%202015.pdf) [<https://perma.cc/J8DL-87KZ>].
  23. Richard Edelman, *The Battle for Truth*, EDELMAN.COM, (Jan. 21, 2018) <https://www.edelman.com/post/the-battle-for-truth> [<https://perma.cc/WZ63-Z858>].
  24. Marc Filippino, *Why CEOs are Becoming Activists*, PUB. RADIO INT’L (Feb. 5, 2018), <https://www.pri.org/stories/2018-02-05/why-ceos-are-becoming-activists> [<http://perma.cc/S9YJ-2G4L>] (discussing why CEOs are becoming more socially active).

customers and employees, but all of us as citizens and as members of society.<sup>25</sup>

Examples of CEOs standing up for universal values and fundamental rights include corporate responses to the U.S. President's controversial immigration policies. For instance, one prominent example was Starbuck's commitment to hire 10,000 refugees following the President's executive order indefinitely halting the admission of refugees from Syria as well as temporarily suspending the U.S. Refugee Admissions Program and temporarily barring people from seven Muslim-majority countries to enter the United States while a review would be conducted.<sup>26</sup> There also were strong reactions by Silicon Valley leaders, including Netflix's CEO calling the actions "so un-American it pains us all" while many others from the ICT industry echoed these concerns.<sup>27</sup> Furthermore, over 400 CEOs, including Mark Zuckerberg, signed a letter asking the President and U.S. Congress to save DACA.<sup>28</sup> Most recently, business leaders spoke out against the U.S. policy to separate families at the U.S. border; several major airlines asked the government not to use their flights to transport migrant children who were separated from their parents.<sup>29</sup>

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25. See Frank Bruni, *Corporations Will Inherit the Earth*, N.Y. TIMES (Feb. 10, 2018), <https://www.nytimes.com/2018/02/10/opinion/sunday/corporations-will-inherit-the-earth.html> [<https://perma.cc/2YYL-XYZV>] (advocating for corporations to "pick up the slack" of the government in terms of innovation and social policy).
  26. See Ed O'Keefe, David Weigel, '*Deeply concerned*': *Corporate America responds to Trump's immigration ban*, WASH. POST (January 30, 2017), [https://www.washingtonpost.com/news/on-leadership/wp/2017/01/30/deeply-concerned-corporate-america-responds-to-trumps-travel-ban/?utm\\_term=.49392f20dd1d](https://www.washingtonpost.com/news/on-leadership/wp/2017/01/30/deeply-concerned-corporate-america-responds-to-trumps-travel-ban/?utm_term=.49392f20dd1d) [<https://perma.cc/54N4-RYXC>] (detailing corporations that opposed the travel ban); see also Tory Newmyer, et al., *23 Huge Companies That Have Responded to President Trump's Immigration Ban*, FORTUNE (January 31, 2017) <http://fortune.com/2017/01/31/donald-trump-immigration-ban-responses/> [<https://perma.cc/8MTK-QN6P>] (outlining responses of major corporations to the President's immigration ban.).
  27. David Streitfeld et al., *Silicon Valley's Ambivalence Toward Trump Turns to Anger*, THE N.Y. TIMES (January 29, 2017), <https://www.nytimes.com/2017/01/29/technology/silicon-valleys-ambivalence-toward-trump-turns-to-anger.html> [<https://perma.cc/FHN9-HLN9>].
  28. See *Open Letters from Leaders of American Indus. to Congress*, <https://www.businessleadersdreamletter.com/> [<https://perma.cc/49PB-KJLQ>] (last visited Mar. 19, 2018) (featuring an open letter calling on Congress to pass the Dream Act or similar legislation and listing the entrepreneurs' and business leaders' signatories).
  29. See Monica Rodriguez, *Business Leaders Denounce Family Separations at Border*, FORTUNE (June 19, 2018), <http://fortune.com/2018/06/19/business-leaders-respond-to-family-separations/> [<https://perma.cc/EYR4-U59J>]; see also Cleve R. Wootson



In addition, a number of major companies pulled out investments in states with discriminatory LGBTI legislation, such as North Carolina and Mississippi.<sup>30</sup> Factors like a state's performance on LGBTI rights can be a decisive factor in securing investment from major out-of-state companies, such as Amazon, which launched a public bidding process to identify a city to serve as the home for its second headquarters.<sup>31</sup> With its CEO, Jeff Bezos, being very outspoken about his support for marriage equality, the tech giant has become the fulcrum of the LGBTI movement.<sup>32</sup> An advocacy campaign has urged the company to forego cities for its second headquarters in states which do not have anti-discrimination laws

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Jr., *Airlines demand feds stop using their flights to transport migrant children separated from parents*, THE WASHINGTON POST (June 20, 2018), [https://www.washingtonpost.com/news/dr-gridlock/wp/2018/06/20/airlines-demand-feds-stop-using-their-flights-to-transport-migrant-children-separated-from-parents/?utm\\_term=.6790b8870cfe](https://www.washingtonpost.com/news/dr-gridlock/wp/2018/06/20/airlines-demand-feds-stop-using-their-flights-to-transport-migrant-children-separated-from-parents/?utm_term=.6790b8870cfe) [<https://perma.cc/T3B8-BW8X>].

30. See Katz & Eckholm, *Anti-Gay Laws Bring Backlash in Mississippi and North Carolina*, THE NEW YORK TIMES (April 5, 2016), <https://www.nytimes.com/2016/04/06/us/gay-rights-mississippi-north-carolina.html>; see also Edward Helmore & Matt Kessler, *Leading businesses take stand against states' new anti-LGBT laws*, THE GUARDIAN (Apr. 10, 2016), <https://www.theguardian.com/world/2016/apr/10/business-protest-anti-lgbt-laws-mississippi-north-carolina> [<https://perma.cc/MRU8-6XAX>] (reporting on corporations which voiced opposition against discriminatory legislation in North Carolina and Mississippi).
31. See Jill Disis, *The controversy that could hold back some Amazon HQ2 contenders*, CNN MONEY (Nov. 7, 2017), <http://money.cnn.com/2017/11/07/technology/business/amazon-hq2-state-laws/index.html> [<https://perma.cc/V5DZ-VVNP>] (outlining how states passing discriminatory legislation could affect contention for Amazon's next headquarter); see also Laura Stevens, *Amazon Says 238 Places Want to Host Its New Headquarters*, THE WALL ST. J. (Oct. 23, 2017), <https://www.wsj.com/articles/amazon-says-238-places-want-to-host-its-new-headquarters-1508772669> [<http://perma.cc/KGL5-HWGN>] (reporting that Amazon received 238 bids from cities and regions across the United States—with proposals from states, provinces, districts and territories—to host Amazon's new headquarters).
32. See e.g. Nick Wingfield & Nellie Bowles, *Jeff Bezos, Mr. Amazon, Steps Out*, THE N.Y. TIMES (Jan. 12, 2018), <https://www.nytimes.com/2018/01/12/technology/jeff-bezos-amazon.html> [<https://perma.cc/EX37-PBZJ>] (detailing how CEO Jeff Bezos is starting to emerge into the spotlight on the issues of marriage equality and beyond); see also Amanda Holpuch, *Amazon CEO Jeff Bezos pledges \$2.5m to same-sex marriage in Washington*, THE GUARDIAN (July 27, 2012), <https://www.theguardian.com/world/us-news-blog/2012/jul/27/amazon-bezos-gay-marriage-washington> [<https://perma.cc/NZX2-YNLE>] (detailing Amazon founder and CEO Jeff Bezos' large donation to campaign for same-sex marriage).

that would protect against discrimination based on sexual orientation and gender identity.<sup>33</sup> Companies and their executives have increasingly become advocates for fundamental rights, as demonstrated prominently in the case of *Evans v. Georgia Regional*<sup>34</sup> in which 76 major corporations (including American Airlines, Starbucks, Deutsche Bank, Google, Apple, Uber, and Facebook to name a few) submitted an amicus brief urging the U.S. Supreme Court to hear the case and recognize that federal anti-discrimination laws also include the prohibition of discrimination based on sexual orientation.<sup>35</sup> The “moral voice of corporations” has reverberated loud and clear through the halls of policy making.<sup>36</sup> Over 140 CEOs and business leaders (including from Facebook, Bank of America, and Apple) signed an open letter to the North Carolina governor to protest the discriminatory law against transgender people, for example, by denying them access to bathrooms and other facilities consistent with their gender identity.<sup>37</sup>

In regards to environmental policy, 365 companies and major investors collectively signed a plea to the American President not to abandon the Paris Climate Accord and reaffirmed their commitment to reducing their carbon footprint regardless of the steps taken by the

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33. See Reid Wilson, *Gay rights groups pressure Amazon over HQ2 location*, THE HILL (Feb. 7, 2018), <http://thehill.com/homenews/state-watch/372647-gay-rights-groups-pressure-amazon-over-hq2-location> [<https://perma.cc/3T8W-VZ2M>] (discussing how certain gay advocacy groups are pressuring Amazon to drop certain locations over anti-gay legislation); see also NO GAY? NO WAY!, <https://nogaynoway.com/> [<https://perma.cc/Z4RN-EKU5>] (last visited Mar. 11, 2018) (questioning why Amazon would consider locating its HQ2 in a state that does not protect LGBT people or their families).
34. Petition for a Writ of Certiorari, *Evans v. Georgia Regional Hospital*, 850 F. 3d 1248 (11th Cir. 2017) (No. 17-370).
35. See Allison Turner, *Seventy-Six Companies Sign Brief Supporting Lesbian Worker in Evans v. Georgia Regional Hospital* (Oct. 11, 2017), <https://www.hrc.org/blog/76-companies-sign-brief-supporting-lesbian-worker-in-evans-v-georgia-case> [<https://perma.cc/4CTT-ZAMP>] (listing the businesses that have joined to file a brief in support of lesbian workers); see also Motion for Leave to File Brief as Amici Curiae and Brief of 76 Businesses and Organizations as Amici Curiae in Support of Petitioner, *Evans v. Georgia Regional Hospital*, 850 F. 3d 1248 (11th Cir. 2017) (No. 17-370) (the brief filed by the 76 businesses that share an interest in ending discrimination in the workplace).
36. Gelles, *supra* note 15.
37. Open Letter from Human Rights Campaign & Equal N.C. to Governor McCrory, available at [https://assets2.hrc.org/files/assets/resources/NC\\_CEO\\_Letter\\_\(3\).pdf?\\_ga=2.104848135.60563488.1518762386-1509828135.1518762386](https://assets2.hrc.org/files/assets/resources/NC_CEO_Letter_(3).pdf?_ga=2.104848135.60563488.1518762386-1509828135.1518762386) [<https://perma.cc/2B5M-SVMJ>].

administration.<sup>38</sup> Patagonia and other outdoor retailer openly opposed the limitations of national monuments by the U.S. President in Utah by posting on its website a full-screen pronouncement with white letters on a black background: “The President Stole Your Land.”<sup>39</sup>

There has also been significant corporate response to racial unrest and the rise of the so-called “Alt-Right” movement in the United States.<sup>40</sup> It appears the litmus test was the violence in Charlottesville and the President’s remarks blaming “many sides” and thus equating neo-Nazis with those protesting them. CEOs of major corporations, such as Merck, Intel Under Armour, IBM, General Motors, among others, made public statements of intolerance for racism and resigned from the president’s prestigious advisory councils in protest.<sup>41</sup> Furthermore, in response to allegations of police brutality against African-Americans, some NFL players and owners started a movement of kneeling or locking arms together—as well as making

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38. See Hiroko Tabuchi, *U.S. Companies to Trump: Don’t Abandon Global Climate Deal*, THE N.Y. TIMES (Nov. 16, 2016), <https://www.nytimes.com/2016/11/17/business/energy-environment/us-companies-to-trump-dont-abandon-global-climate-deal.html?mtrref=undefined&gwh=E24A99A1A1ED8CD72DC77518CABB5CE8&gwt=pay> [<https://perma.cc/Z8UB-6R9R>] (describing the 365 companies and major investors that pleaded to President-Elect Trump, President Obama, and members of Congress that they leave in place low-emissions policies).
39. Travis M. Andrews, ‘*The President Stole Your Land*’: Patagonia, REI blast Trump on national monument rollbacks, THE WASH. POST (Dec. 5, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/12/05/the-president-stole-your-land-patagonia-rei-blast-trump-on-national-monument-rollbacks/?utm\\_term=.a5a4de23487e](https://www.washingtonpost.com/news/morning-mix/wp/2017/12/05/the-president-stole-your-land-patagonia-rei-blast-trump-on-national-monument-rollbacks/?utm_term=.a5a4de23487e) [<https://perma.cc/8L2E-C723>].
40. See Jena McGregor & Damian Paletta, *Trump’s business advisory councils disband as CEOs abandon president over Charlottesville views*, THE WASH. POST (Aug. 16, 2017), [https://www.washingtonpost.com/news/on-leadership/wp/2017/08/16/after-wave-of-ceo-departures-trump-ends-business-and-manufacturing-councils/?utm\\_term=.52ca19a33c4b](https://www.washingtonpost.com/news/on-leadership/wp/2017/08/16/after-wave-of-ceo-departures-trump-ends-business-and-manufacturing-councils/?utm_term=.52ca19a33c4b) [<https://perma.cc/P7XB-JNRP>] (detailing why the President’s business advisory councils, namely the —the Strategy & Policy Forum and the Manufacturing Council—disbanded).
41. See *id.* (“Merck chief executive Ken Frazier, one of the few African Americans represented among the business leaders advising Trump, was the first to resign from the manufacturing council.”); see also *What Executives Rebuking Trump’s Response to Charlottesville are saying*, THE N.Y. TIMES (Aug. 16, 2017), <https://www.nytimes.com/2017/08/16/business/ceo-statements-trump.html> [<https://perma.cc/AY6X-LWS9>] (discussing what executives said about the President’s response to Charlottesville).

public statements—in solidarity with the victims during the playing of the national anthem during professional football games.<sup>42</sup>

Recently, in the wake of several accounts of sexual assault by Harvey Weinstein, major corporations such as Apple, ended their collaborations with the Weinstein Company.<sup>43</sup> The Weinstein scandal gave rise to the “Time’s Up” movement spearheaded by 300 prominent women leaders and entrepreneurs in the entertainment industry as an effort to bring “change from women in entertainment for women everywhere” across industries by addressing systemic gender inequality and injustice in the workplace through relevant legislative action and a drive to gender-parity in the industry.<sup>44</sup> More than \$19 million was raised for a legal defense fund (providing subsidized legal support to victims) by more than 19,000 donors in one month making it one of the most successful crowdsourcing efforts on the popular platform.<sup>45</sup> We see a similar trend in Europe, where 36 German companies joined together in the “We Together” initiative to

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42. See Euan McKirdy, *NFL players, owners come together to denounce Trump’s anti-protest rant*, CNN POLITICS (Sep. 25, 2017), <https://edition.cnn.com/2017/09/25/politics/nfl-protests-weekend/index.html> [<https://perma.cc/U5A6-6GEA>] (reporting how members of the NFL are protesting social and racial injustice especially with regard to police brutality); see also Julie Hirschfeld Davis, *Trump Calls for Boycott if N.F.L. Doesn’t Crack Down on Anthem Protests*, N.Y. TIMES (Sep. 24, 2017), <https://www.nytimes.com/2017/09/24/us/politics/trump-calls-for-boycott-if-nfl-doesnt-crack-down-on-anthem-protests.html?mtrref=undefined&gwh=9698BFF7035E4A4A99946AE1F95949AA&gwt=pay> [<https://perma.cc/3SPP-NZK8>] (illustrating the President’s response to the kneeling of NFL players in protest during the national anthem).
43. See Don Reisinger, *Apple Said to Pull Plug on The Weinstein Company Elvis Deal*, FORTUNE (Oct. 10, 2017), <http://fortune.com/2017/10/10/apple-the-weinstein-company-elvis/> [<https://perma.cc/VVX9-HSBF>] (describing Apple’s decision to stop pursuing the development of an Elvis biopic series with The Weinstein Company).
44. See e.g. TIME’S UP, <https://www.timesupnow.com/#ourmission-anchor> [<https://perma.cc/2ASQ-SD9M>] (last visited Mar. 11, 2018) (detailing the “Time’s Up” movement and its goals).
45. See Bloomberg Law, *Hundreds of Attorneys Join Time’s Up Legal Defense Fund*, KAPLAN & COMPANY, LLP (Jan. 31, 2018), <https://www.kaplanandcompany.com/newsroom/hundreds-attorneys-join-time%E2%80%99s-legal-defense-fund> [<https://perma.cc/35L7-52K5>] (detailing lawyers who donated free consultations to victims of sexual harassment); see also Cara Buckley, *Powerful Hollywood Women Unveil Anti-Harassment Action Plan*, THE N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html?mtrref=undefined&gwh=9D52E8799D882897F2FE69C9CE532562&gwt=pay> [<https://perma.cc/RB7L-F5VH>].

promote the integration of refugees.<sup>46</sup> Also, it is not just CEOs and C-suite executives taking a stand, but also shareholders. For example, Exxon experienced numerous shareholder resolutions in recent years urging management to address realities of climate change in its operations and investments.<sup>47</sup> In May 2017, shareholders eventually passed a resolution with 62.3 percent of shareholder support to instruct Exxon to report on its measures to keep climate change to 2 degrees C.<sup>48</sup>

Corporate leaders—and occasionally their shareholders—are increasingly taking on a role as agents of social change and as outspoken advocates on human rights. Granted, the motivations for doing so are complex, including strong reputational considerations with very tangible business implications and a more in-depth inquiry into specific drivers and motifs behind this emerging pattern of corporate leadership is merited. Yet, it is a reality that corporate leadership has evolved in how it intersects and engages with public policy, which has important normative implications and calls for operational guidance for companies on how to navigate this newly self-proclaimed mandate. Whether this constitutes a new lasting trend remains to be seen but it certainly is an observable pattern of corporate behavior in recent times. All of which begs the question, are we dealing with a primarily American phenomenon here? It is undeniable that the majority examples of corporate public policy engagement involve U.S. companies. One reason could be the current stark ideological divide and increasing governance gaps.<sup>49</sup> Also, the

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46. See Patrick McGee, *German billionaire rallies business to migrant cause*, FINANCIAL TIMES (Jan. 8, 2017), <https://www.ft.com/content/4264220e-c78d-11e6-9043-7e34c07b46ef> [<https://perma.cc/5H2K-7VHS>] (describing the German “We Together” movement); see also “*We together*” (“*Wir-Zusammen – Integrations-Initiativen der deutschen Wirtschaft*”) [Initiatives for Integration by German businesses] WIRTSCHAFT ZUSAMMEN, <http://www.wir-zusammen.de/home> [<https://perma.cc/7XDA-YA6X>].
47. See John Schwartz, *Climate Change Activists Either Prod Exxon Mobil or Dump It*, NEW YORK TIMES (May 25, 2016), <https://www.nytimes.com/2016/05/26/science/exxon-mobil-annual-meeting.html?emc=eta1> (detailing efforts of shareholder activism at ExxonMobil).
48. Ed Crooks, *ExxonMobil bows to shareholder pressure on climate reporting*, FIN. TIMES (Dec. 11, 2017), <https://www.ft.com/content/8bd1f73a-dedf-11e7-a8a4-0a1e63a52f9c> [<https://perma.cc/WD7Z-GG4C>] (“ExxonMobil... will start publishing reports on the possible impact of climate policies on its business, bowing to investor demands for improved disclosure of the risks it faces.”).
49. See, e.g. Jeffrey Sonnenfeld, *Commentary: Post-Parkland Courage: Why CEOs Aren’t Mything the Moment*, FORTUNE (Feb. 27, 2018), <http://fortune.com/2018/02/27/parkland-florida-school-shooting-business-leaders/> [<https://perma.cc/EBN5-NTEM>] (noting that “...ad-

notion of corporate responsibility is different in the United States and Europe and that difference might offer some insight into how companies discharge their responsibilities towards society. While corporate responsibility in Europe is stirred to a large extent by regulatory mandates, it is far more investor-based and business-driven in an American context.<sup>50</sup> Yet, it is important to note that European companies have engaged proactively on challenges relating to the Syrian refugee crisis as one of the most severe humanitarian crisis of our times.<sup>51</sup> The future will tell whether this display of corporate morality will persist as a regional or global pattern or whether this is simply the function of a very specific moment in time.

### III. GOVERNANCE GAPS

These examples of corporate advocacy do not occur in a vacuum. There have been glaring governance gaps in capitals around the world on pressing societal challenges, which show no sign of narrowing any time soon. Tim Cook, CEO of Apple, has emphasized the significance of this reality for a more proactive corporate stance on public policy and human rights issues.<sup>52</sup> He speaks to “[t]he reality...that government, for a long period of time has for whatever set of reasons become less functional and isn’t working at the speed that it once was.”<sup>53</sup> He continues with the self-proclaimed mandate for business:

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hoc actions by individual CEOs filled the void left by politicians and trade associations”).

50. See Dirk Matten & Jeremy Moon, ‘Implicit’ and ‘Explicit’ CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility, 33 ACADEMY OF MANAGEMENT REVIEW 404, 407-08 (2008) (delineating Corporate Social Responsibility in Europe and the United States and arguing that American businesses’ reliance on the stock market requires them to provide “a high degree of transparency and accountability to investors”).
51. See, e.g. *Why German Business Supports, Trains and Hires Syrian Refugees*, Cold Call Podcast, HARV. BUS. SCH. (Apr. 6, 2017), <https://hbswk.hbs.edu/item/why-german-business-supports-trains-and-hires-syrian-refugees> [https://perma.cc/YW7V-RTZX] (German businesses have integrated Syrian refugees into the workforce through apprenticeship programs—investing in training that supports the “well-being of the entire industry” and the long-term professional future of the workers.).
52. See, e.g. Andrew Ross Sorkin, *Apple’s Tim Cook Barnstorms for ‘Moral Responsibility’*, THE N. Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/2017/08/28/business/dealbook/tim-cook-apple-moral-responsibility.html> [https://perma.cc/UM9W-FAM6] (stating that businesses have a “moral responsibility...to contribute to this country and to contribute to other countries that we do business in”).
53. *Id.*

“[S]o it does fall, I think, not just on business but on all other areas of society to step up.”<sup>54</sup>

The Edelman trust barometer, an often-consulted source tracking the state of trust globally across all sectors of society for 18 years, has empirically confirmed this development.<sup>55</sup> Through the collection of survey data in 28 countries, this trust study finds for the year 2017 that the growing governance gaps, failures of governments, and gridlocks of legislatures on both sides of the Atlantic have led to a steep decline in trust in the system and its institutions, namely government, media, NGOs, business.<sup>56</sup>

While trust in government presents itself to be at an all-time low, trust in business is found to be slightly higher, yet it is considered to be “on the brink of distrust.”<sup>57</sup> According to experts, “business is on notice” with the stakes being high for business as are the public “expectations that it will act.”<sup>58</sup> Business is looked to as the “last retaining wall,” which injects an expanded set of non-financial factors into business strategy and decision making.<sup>59</sup> This presents business with an opportunity to play an active role in addressing pressing issues confronting society, but it also establishes a newly defined responsibility against which business will be judged. Public expectations confer a greater responsibility on corporations to act boldly, stand up, and speak out on behalf of public values and fundamental rights as the bedrock of democracy. This inadvertently blurs the boundaries between the public and private sector, which raises questions about the legitimacy, reasonable limitations, and form of corporate engagement or non-engagement on public policy priorities. People’s distrust across all institutions in society remains largely unchanged in 2018, according to the most current cross-country survey.<sup>60</sup>

#### IV. AN EXPANDED CORPORATE RESPONSIBILITY PARADIGM

The broader question pertains to how this new form of corporate leadership fits in with the corporate social responsibility doctrine of recent decades. Corporate responsibility has manifested itself as a spectrum of different efforts and commitments ranging from traditional corporate philanthropy to a more strategic notion in the

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54. *Id.*

55. 2017 EDELMAN TRUST BAROMETER (Edelman, 2017).

56. *Id.* at 10.

57. *Id.* at 15.

58. *Id.* at 37.

59. *Id.* at 43.

60. 2018 EDELMAN TRUST BAROMETER (Edelman, 2018).

form of social innovation and ultimately social enterprise generating shared value for business and society alike.<sup>61</sup> Due diligence processes and compliance have been considered an indispensable central requirement for companies to discharge their responsibility to respect human rights and “do no harm” under the U.N. Business and Human Rights Framework (“U.N. Framework”).<sup>62</sup> While the proactive public policy engagement on the part of companies builds upon this pillar 2 of the U.N. Framework and the corporate responsibility to respect human rights thereunder, it adds an additional dimension, which further reinforces Guiding Principle 11.<sup>63</sup> As such it clearly goes beyond the expectation of not inflicting harm; rather, it makes corporations agents for social good. This has normative implications under the U.N. Framework as well as domestic corporate laws.<sup>64</sup>

Traditionally, corporations and their C-suite executives have strictly adhered to Milton Friedman’s mantra of shareholder profit maximization as the main basis for their business decisions and in fact as the main function of their social responsibility.<sup>65</sup> The new rhetoric

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61. See *Good Practice Note on Strategic Philanthropy*, U.N. GLOBAL COMPACT (2011), at [https://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Human\\_Rights\\_Working\\_Group/Strategic\\_Philanthropy\\_GPN.pdf](https://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/Strategic_Philanthropy_GPN.pdf) [<https://perma.cc/MUB7-9NFV>] (noting that corporations are increasingly embracing both profit maximization and the promotion of human rights as “dual challenges”); see also Sarah Altschuller, *An Attorney’s Perspective on Corporate Social Responsibility and Corporate Philanthropy*, CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS 471-79, 482-86 (Blecher et al. eds., 2014); see also Porter & Kramer, *Creating Shared Value*, HARV. BUS. REV. (2011) (arguing that “[c]ompanies could bring business and society back together if they redefined their purpose as creating “shared value”—generating economic value in a way that *also* produces value for society by addressing its challenges”).
62. See U.N. Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights*, Principle at 17 (calling for businesses to “identify, prevent, mitigate, and account for” their adverse impacts on human rights).
63. *Id.* at 17.
64. For a helpful analysis of the corporate law implications of and limitations to the doctrine of human rights responsibility of corporations under international law, see Peter Muchlinski, *Implementing the New UN Corporate Human Rights Law Framework: Implications for Corporate Law, Governance, and Regulation*, 22 BUS. ETHICS Q. 145, 162 (2012) (suggesting that one particular challenge is encouraging corporate responsibility under the shareholder primacy model as widely reflected in corporate law).
65. See Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, THE N. Y. TIMES MAGAZINE (Sept. 13, 1970) <https://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html> [<https://perma.cc/QZ6U-H2H5>] (citing MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962)) (arguing that “the



of the “moral responsibility” of business marks an important shift in terminology and framing. It also represents an important development in light of the sharp focus on strengthening the legal dimension of corporate responsibility through an increasing proliferation of legal standards pertaining to corporate responsibility issues through an increase in disclosure and due diligence requirements.<sup>66</sup> The new phenomenon of corporate leaders taking a moral stand on issues not directly connected to their business operations merits further examination from a doctrinal perspective and moreover requires providing guidance on how to operationalize corporate public policy engagement in managerial decision making and implementation. It exemplifies and highlights the human rights dimension of ethical business.

In the spirit of the Universal Declaration of Human Rights, human rights are the essence of human dignity and the inalienable rights guarantees that comes with it.<sup>67</sup> Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family are the foundation of freedom, justice, and peace in the world.<sup>68</sup> A leading business ethics scholar argues that integrating human rights into the study of ethical business conduct would emphasize the inherently moral dimension of business decisions.<sup>69</sup> It is important to recognize that human rights are based on a moral

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corporate executive would be spending someone else’s money for a general social interest;” and therefore, “there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud”).

66. See Berger-Walliser & Inara, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 AM. BUS. L. J. 3, 167-218 (analyzing the “legalization of CSR”—with “many governments” mandating more socially responsible behavior “intended to further strengthen CSR” and arguing for a “redefinition of CSR that includes an express commitment to corporations’ social and ethical responsibility to society”).
67. See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) (“inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”).
68. *Id.*
69. See Florian Wettstein, *CSR and the Debate on Business and Human Rights: Bridging the Great Divide*, 22 BUSINESS ETHICS QUARTERLY 739-770 (Oct. 2012) (arguing that “[r]esulting from a[n] [...] integration of the two debates, then, is an extended focus on proactive company involvement in the protection and realization of human rights – not as a matter of voluntariness or philanthropy, but as an actual moral obligation of companies”).

“conception of rights” as much as on a legal or political one.<sup>70</sup> The moral mandate that CEOs across the board have seemingly accepted in their recent responses and reactions to current policy developments, puts a laser sharp-focus on the impact that business can have on the realization of these fundamental and universal rights. This reinforces the multi-dimensional character of the concept of corporate responsibility, combining elements of ethics and moral responsibility, legality and compliance, and economic responsibility.<sup>71</sup> This understanding needs to inform a further fine-tuning of the international framework on business and human rights.

## V. THE NEED FOR NORMATIVE GUIDANCE

At the heart of the debate of corporate responsibility and especially business and human rights has long been the concern that calling upon business to take on more responsibility with regard to human rights might have the unintended consequence of diluting the responsibility of states as the primary obligation holders with regard to human rights.<sup>72</sup> Underlying this debate is an alleged legitimacy problem if the private sector becomes too involved in core government functions shaping public policy and using its leverage to this end.<sup>73</sup> While there is certainly merit in discussing the role of private business in society and public policy, it does not resolve the need for normative guidance on the question whether to engage or not to engage and how

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70. See *id.* at 741 - 747 (describing moral rights as both “pre-positive,” “pre-political,” and human rights as “the most important and fundamental category of moral rights”).
71. See Archie Carol, *A Three-Dimensional Conceptual Model of Corporate Performance*, 4 ACAD. OF MGMT. REV. 499 (1979) (“For a definition of social responsibility to fully address the entire range of obligations business has to society, it must embody the *economic, legal, ethical, and discretionary* categories of business performance.” (emphasis in original)).
72. See Hum. Rts. Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, at ¶ 27 (April 7, 2008) [hereinafter *A/HRC/8/5*] (reaffirming that the “human rights regime rests upon the bedrock role of States“ and arguing that governments should promote corporate cultures which respect human rights “at home and abroad”).
73. See Larry Catá Backer, *On the Evolution of the United Nations’ “Protect-Respect-Remedy” Project: The State, the Corporation and Human Rights in a Global Governance Context*, 9 SANTA CLARA J. INT’L L. 37, 74 (acknowledging that “for some, the preferred course may well entail a rejection of an autonomous source for any corporate responsibility to respect human rights that is not filtered through and managed by the state”).

to reach a decision on the issue. Material guidance is needed on how to identify and prioritize public policy issues, how to weigh competing stakeholder interests and legitimacy concerns, and, overall, how to conduct a corporate engagement (or non-engagement for that matter) in a sensitive and impactful way. Latest data has shown that silence on issues of prominent societal importance “is now deeply dangerous,”<sup>74</sup> so for corporate executives to take a narrow business approach in their managerial decision making, simply does not seem to cut it anymore in this day and age.

The U.N. Framework and corresponding U.N. Guiding Principles have been key in establishing a normative framework on the corporate responsibility to respect human rights.<sup>75</sup> While this sets an indispensable baseline for business’ human rights responsibility, the U.N. Guiding Principles focus primarily on mitigating and preventing adverse impacts that business enterprises have contributed to or that are “directly linked to its operations.”<sup>76</sup> They do not, however, put forward nuanced decision points for companies on how to engage proactively with public policy in order to advance societal values and human rights. The U.N. Guiding Principles speak to the use of leverage by business enterprises (or increase their leverage, if necessary) for the advancement of human rights (Principle 19), which offers a normative starting point for corporate engagement with public policy.<sup>77</sup> On the issue of the relationship between passive and active forms of corporate human rights responsibility, the U.N. Guiding Principles extrapolate:

*Furthermore, because the responsibility to respect is a baseline expectation, a company cannot compensate for human rights harm by performing good deeds elsewhere. Finally, ‘doing no harm’ is not merely a passive responsibility for firms but may entail positive steps - for example, a workplace anti-*

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74. Edelman, *supra* note 23.

75. See Ben Rutledge, *Protect, Respect and Remedy: what does Ruggie’s framework mean for ethical trade in 2017?*, ETHICAL TRADING INITIATIVE (Apr. 13, 2017), <https://ethicaltrade.org/blog/protect-respect-and-remedy-what-does-ruggies-framework-mean-ethical-trade-2017> [<https://perma.cc/4EMP-ZJ83>] (noting that the UNGPs “provided clarity and an internationally agreed normative framework around the role and responsibilities of States and business enterprises”).

76. U.N. Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, Remedy” Framework*, at 14, HR/PUB/11/04, Guiding Principle 13 (2011).

77. *Id.* at 20-21.

*discrimination policy might require the company to adopt specific recruitment and training programmes.*<sup>77</sup>

The recent examples of corporate engagement on public policy priorities vividly demonstrate that there is a broader spectrum of scenarios where companies use their leverage not merely to respect, but to advance human rights, which has not been the main focus of the corporate responsibility under the U.N. Framework of 2008. This provides the empirical basis/momentum for a fresh articulation of the corporate responsibility under the U.N. Guiding Principles and merits a more in-depth and granular treatment as part of the U.N. Framework. The U.N. Framework was the result of comprehensive multi-stakeholder consultations and as such can be considered a living document, which needs to be construed in the light of evolving expectations by society and the self-proclaimed role of business in society.<sup>78</sup> One can only speculate that—were new multi-stakeholder consultations conducted today—the concept of corporate responsibility might likely account for this form of proactive public policy engagement in a more pronounced and elaborate way. Whether this new pattern of corporate behavior by top executives suggests that the responsibility to respect is evolving to encompass a responsibility to protect or even promote human rights, requires an empirical examination and normative analysis in future scholarship.

A shift towards a more fulsome concept of corporate human rights responsibility beyond mere risk management and due diligence, also finds support in the Sustainable Development Goals as a metrics for business performance in the 21<sup>st</sup> century.<sup>79</sup> The policy nature of the SDGs lends itself well to serve as a guidepost for questions of corporate engagement (or non-engagement) on public policy issues of societal significance.<sup>80</sup>

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77. A/HRC/8/5, *supra* note 73 at ¶ 55.

78. See John Ruggie, *Human Rights Policies and Management Practices of Fortune Global 500 Firms: Results of a Survey 2* (Corp. Soc. Resp. Initiative, Working Paper No. 28, 2006), [https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper\\_28\\_ruggie.pdf](https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_28_ruggie.pdf) [perma.cc/F5AM-MGJP].

<sup>79</sup> See, e.g. *How Your Company Can Advance Each of the Sustainable Development Goals*, U.N. GLOBAL COMPACT, at <https://www.unglobalcompact.org/sdgs/17-global-goals> [<https://perma.cc/XU2Q-AF4W>] (explaining the sustainable development goals for business and providing businesses with resources to implement principles of the SDGs).

80. Critics have voiced concern over the SDGs' lack of explicit commitment to human rights objectives and their reliance on implicit human rights' goals and key targets. See, e.g. Thomas Pogge & Mitu Sengupta, *Assessing the Sustainable Development Goals from a Human Rights Perspective*, 32/2 J. INT'L & COMP. SOCIAL POL'Y 83 (2016) (considering

Corporate advocacy (by C-suite executives) is not merely a matter of international law. It has important normative implications under corporate law and sensitive effects on corporate governance.<sup>81</sup> Normatively, under predominant corporate law doctrine, corporate officers face significant limitations in their ability to use their corporate voice in order to stand on important public policy issues, especially if the latter are not directly linked to the business.<sup>82</sup> The legal fiction of one unified shareholder interest, namely profit maximization, still holds firm.<sup>83</sup> Whether C-suite activism as we have recently seen marks the beginning of a new era of corporate practice, and thus provides possible momentum for a doctrinal shift, or whether it merely produces new pressure points in the shareholder/stakeholder debate remains to be seen. Equally sensitive are the possible effects on corporate governance, especially as it concerns the relationship between the C-suite and the board of directors on issues of public policy issues, which are not only extremely topical but often times also polarizing.

## VI. CONCLUSION

Corporate executives using their corporate voice and influence to affect public policy illustrates forcefully that “not every business decision is an economic one,” as Howard Schulz, chairman of

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the SDGs a “failure” because they miss an opportunity to “articulate our present moral responsibilities” and “inspire[e] and guid[e] a concerted international effort to realize the human rights of all”).

81. See Lorenzo Sacconi, *Corporate Social Responsibility (CSR) As a Model of “Extended” Corporate Governance. An Explanation Based on the Economic Theories of Social Contract, Reputation, and Reciprocal Conformism*, REFRAMING SELF-REGULATION IN EUROPEAN PRIVATE LAW 289–343 (Fabrizio Cafaggi, ed., 2006) (based on an extended social contract analysis, defining “CSR as a model of extended corporate governance whereby who runs a firm (entrepreneurs, directors, managers) have responsibilities that range from fulfilment of their fiduciary duties towards the owners to fulfilment of analogous fiduciary duties towards all the firm’s stakeholders.”).
82. See, e.g., STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 419–29 (2002); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 NYU L. REV. 733, 740 (June 2005) (arguing that managers should instead be allowed to use “their agency slack [to make profit-sacrificing decisions in the public interest] to respond to social and moral sanctions”).
83. *Id.* at 735–36; See also MICHAEL KERR, RICHARD JANDA, AND CHIP PITTS, CORPORATION SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS, 113, 162 (2009) (noting that the governance of Anglo-American corporations has been “dominated” by problem of ensuring that “managers remain faithful to owners”).

Starbucks, put it.<sup>84</sup> It might well serve a company's economic self-interest for its top management to take leadership on such social and political issues, which go to the heart of a society's values systems and legal order, and yet it is also a display of self-proclaimed morality if one can trust recent statements by C-suite executives.<sup>85</sup>

This suggests a shift from corporate leadership to a more holistic concept of *leadership*. Companies seem to have accepted the mandate by the public (as shown by empirical evidence) to step in and fill the governance void and serve as the trust broker in times when trust in institutions is at an all-time low globally.<sup>86</sup> It is too early to tell how this evolving pattern of corporate behavior will impact normative thinking and ultimately legal design. In the meantime, companies will require guidelines on how to make these decisions. Business schools would be looked to as the first responders to educate the managers of tomorrow and equip them with the skills they need to make their

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84. *Read Former Starbucks CEO Howard Schultz's Commencement Address at Arizona State University*, TIME (May 10, 2017), <http://time.com/4773797/howard-schultz-commencement-address-arizona-state/> [<https://perma.cc/9SV7-KK8W>].

85. The decision to engage or not to engage can have economic impact directly or indirectly, long-term or short-term. On an empirical plane of analysis, more in-depth inquiry is necessary to determine the financial impact of the company's decision to engage or not to engage on prominent issues of public policy. A preliminary examination of the stock performance of companies, whose CEOs spoke out on prominent public policy and social issues, show no clear evidence of a negative stock performance in the immediate aftermath of their engagement on the issue. It seems that respective companies have, for the most part, seen no effect on their stock prices—neither in a negative nor a positive way—while some have in fact seen a negative impact such as Target—taking a position on bathroom use by LGBT people—and Amazon—announcing that it will fight the travel ban imposed by the White House in late January 2018 by all legal means. *See, e.g. Continuing to Stand for Inclusivity*, A BULLSEYE VIEW, TARGET CORPORATE (Apr. 19, 2016), <https://corporate.target.com/article/2016/04/target-stands-inclusivity> [<https://perma.cc/AT5E-DKDJ>] (supporting “team members and guests to use the restroom or fitting room facility that corresponds with their gender identity”); *see also, Amazon Pledges Legal Support to Action Against Trump Travel Ban*, THE GUARDIAN (Jan. 31, 2017), <https://www.theguardian.com/technology/2017/jan/31/amazon-expedia-microsoft-support-washington-action-against-donald-trump-travel-ban> [<https://perma.cc/6WTM-ZYY4>] (detailing Amazon CEO Jeff Bezos' efforts to fight the travel ban that instituted by presidential executive order against seven nations).

86. *See Edelman Trust Barometer*, *supra* note 56 (finding that “uncertain” respondents trust businesses the most as compared to NGOs, the media, and government).

business excel in times of distrust, governance grid logs, and policy fatigue.<sup>87</sup>

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87. See, e.g. David Gelles & Claire Cain Miller, *Business Schools Now Teaching #MeToo, N.F.L. Protests and Trump*, THE NEW YORK TIMES (Dec. 25, 2017), <https://www.nytimes.com/2017/12/25/business/mba-business-school-ethics.html> [<https://perma.cc/2X83-EJHT>] (describing the growing practice of teaching corporate advocacy in business schools).