

SRI—SHIBBOLETH OR CANARD (SOCIALY RESPONSIBLE INVESTING, THAT IS)

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Editors' Synopsis: This Article takes a look at the new and increasingly popular phenomenon of socially responsible investing. A topic that has garnered a lot of attention recently, the Article focuses on the intersection of socially responsible investing and trust law. The author's research includes an eclectic array of interesting and socially relevant sources that culminates in a stimulating analysis of how this new philosophy of investing is likely to affect traditional notions of fiduciary duties in trust investing.

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*Professor of Law, School of Law, University of California, Davis. No one is responsible for the thoughts expressed here (especially the people with whom I have been privileged to meet and the entities with which I have been associated), except for me. I got help I didn't deserve from Jack Ayer, Evelyn Brody, Carolyn Clark, Holly Doremus, Chris Elmendorf, Katherine Florey, Jim Garland, John Hunt, Nancy Jacobs, Paul Jacobs, Tom Joo, David Levine, Al Lin, Rob Sitkoff, and Dick Wydick. I got good research assistance from Nicholas Godlove, James Hazlehurst, and James Yi and financial support from Deans Rex Perschbacher and Kevin Johnson of the University of California, Davis School of Law. Some of these ideas emerged in my preparations for a mini-conference sponsored by the National Center on Philanthropy and the Law, New York University School of Law and The Investment Fund for Foundations. I learned a lot from the participants at that conference. Anything good here I likely unintentionally stole from them and anything bad surely came from me. As always, I've learned a lot from Harvey Dale, Jim Garland, John Langbein, David Levine, and Bevis Longstreth.

I. “THE BUSINESS OF BUSINESS IS BUSINESS.”¹

The financial innovation and prosperity of recent years, among other things, have rewritten the Socially Responsible Investing (SRI) script. Conduct is changing, and the scene is set for a change in the law. In this Article, the author engages this new and intriguing world of investing from a trust law viewpoint.

This is a set of personal thoughts about SRI begun in May of 2007. I might also have subtitled it, “Slouching Towards Bethlehem.”² Take them or leave them as you will.

SRI is what you make of it, though it can be defined. Let’s say it’s “managing money according to ethical criteria”³ just to have a definition. Or, if you want,⁴ “doing well by doing good.”⁵

¹ See wikipedia.org, *Alfred P. Sloan, Jr.*, http://en.wikipedia.org/wiki/Alfred_P._Sloan (last visited Nov. 26, 2007). But this quote often is attributed to Milton Friedman. See Frederick Rawdon Dalrymple AO, Graduation Address at the University of Sydney (May 18, 2007), available at <http://www.usyd.edu.au/senate/gradsDalrymple.shtml> (last visited Nov. 26, 2007). If you prefer, Calvin Coolidge said: “The business of the American people is business.” Calvin Coolidge Memorial Foundation, Inc., *The Presidency in the Popular Imagination*, http://www.calvin-coolidge.org/html/the_presidency_in_the_popular_.html (quoting ANDREW CLAYTON ET AL., *AMERICA: PATHWAYS TO THE PRESENT* 601 (3d ed. 2002)).

² William Butler Yeats wrote, “[W]hat rough beast, its hour come round at last, slouches towards Bethlehem to be born?” WILLIAM BUTLER YEATS, *The Second Coming*, in *THE YEATS READER: A PORTABLE COMPENDIUM OF POETRY, DRAMA, AND PROSE* 68, 69 (Richard J. Finneran ed. 1997). Or, if you prefer, Joan Didion wrote a book of that title. See JOAN DIDION, *SLOUCHING TOWARDS BETHLEHEM* (1968).

³ Michael S. Knoll, *Ethical Screening in Modern Financial Markets: The Conflicting Claims Underlying Socially Responsible Investment*, 57 *BUS. LAW.* 681, 683 (2002). See generally Henry Blodget, *The Conscientious Investor*, *ATLANTIC*, Oct. 2007, at 78 (discussing the goals of SRI and instructing investors on how to conduct SRI). SRI is also called ethical investing and environmental, social and governance investing (ESG Investing). See CAPGEMINI & MERRILL LYNCH, *WORLD WEALTH REPORT* 18 (11th ed. 2007). SRI is to be distinguished from corporate social responsibility (CSR). See generally N. Craig Smith & Halina Ward, *Corporate Social Responsibility at a Crossroads?*, 18 *BUS. STRATEGY REV.* Spring 2007, at 17 (providing a summary and analysis of current thinking about CSR in Great Britain via interviews with business insiders, which, *inter alia*, suggest the term CSR may be too vague to be useful). Of course, what is ethical and the applicable criteria are determined by the investor.

⁴ I have a friend who says SRI is whatever the loudest person in the room says it is. There surely are disputes. See generally B.R. Meyer, *Hard to Swallow*, *ATLANTIC*, Sept. 2007, at 112 (examining moral judgments regarding the food people eat); Vanessa O’Connell, *The New Politics of Purses*, *WALL ST. J.*, Aug. 4, 2007, at P3 (discussing whether a good person buys anaconda rather than python).

⁵ Knoll, *supra* note 3, at 683.

II. WHY DO PEOPLE DO SRI?

As a friend put it to me, they do it:

- (1) TO FEEL GOOD. This includes boasting rights and sleep-at-night rights.
- (2) TO MATCH THE MISSION. The United Nations doesn't invest in arms makers.
- (3) FOR BETTER RETURNS. The thought is that clean, caring corporations, those that are "best in class," will have brighter futures than dirty, noncaring corporations.⁶
- (4) TO CHANGE CORPORATE BEHAVIOR.⁷
- (5) TO INFLUENCE THE SOCIAL POLICY OF CORPORATIONS AND GOVERNMENTS.⁸

But, surely there are those who see SRI as a tool from the Devil's workshop, just as there are those who see standard financial tools as just as devilish.⁹

III. WHY NOW?

Why now? Why is SRI worth writing about today? Because social investing is hot.¹⁰

⁶ A reasonable idea, but at best only for very long term investors. If clean, caring corporations will have brighter futures than dirty, noncaring corporations, it may still take a decade or two or three for the two groups' returns to differ by a noticeable margin.

⁷ Shareholder activism may be a more efficient technique than just selling the stocks.

⁸ Engagement is primarily a political act or gesture, more a signaling technique just to keep issues in the headlines. For example, Coke sells soft drinks in Sudan. Protesting these sales will not change Coke's profitability to any noticeable extent. If Coke stopped the sales, that would have no effect on the civil war. And the protests may not even cause Coke to change its policy. But it's a convenient way to keep Sudan in the public eye.

⁹ A cruel view might be that SRI is a sales strategy and a belief system more than it is a way to make money.

¹⁰ See JULIE HUDSON, *THE SOCIAL RESPONSIBILITY OF THE INVESTMENT PROFESSION* (2006). UBS clearly has a major commitment to SRI. *See id.* I'd been asleep at the switch and hadn't noticed the growth of SRI. "In 2005, SRI assets under management (AUM) totaled US\$2.29 trillion—or roughly one out of every ten dollars invested in public equities in the United States . . ." CAPGEMINI & MERRILL LYNCH, *supra* note 3, at 19. *See also* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *2007 OECD ROUNDTABLE ON CORPORATE RESPONSIBILITY: RECENT TRENDS AND REGULATORY IMPLICATIONS IN SOCIALLY RESPONSIBLE INVESTMENT FOR PENSION FUNDS* (2007), <http://www.oecd.org/dataoecd/3/0/38550550.pdf> (last visited Nov. 26, 2007); THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW,

Here's why it's hot (in other words, herewith the executive summary for Rip van Winkle¹¹).

1. Current international issues and events have put SRI on the table. Sudan and the environment come to mind¹² and institutional investors love of timber investing come to mind.¹³

Simply put, bad things are happening to innocent people in Sudan and thoughtful people want to see it stopped. Student agitation to have universities divest their endowments of "Sudanese" securities has put the issue front¹⁴ and center, just as events in South Africa had the same effect in the 1980s.¹⁵

As to environmental concern, it's convenient to claim that the Al Gore movie, *An Inconvenient Truth*,¹⁶ started that ball rolling.¹⁷ And the

Doreen McBarnet, Aurora Voiculescu & Tom Campbell, eds., Cambridge University Press, 2007; Ron Alsop, *Hass Takes New Tack on Investing, M.B.A. Students to Run Fund Focusing on Socially Responsible Firms*, WALL ST. J., Sept. 18, 2007, at B8.

¹¹ Rip van Winkle is Washington Irving's titular protagonist who slept for 20 years and awoke to find the world had changed. In 1986, I wrote *Arguments in Favor of Fiduciary Divestment of "South African" Securities*, 65 NEB. L. REV. 209 (1986). Basically, it's been 20 years. There are a lot of interesting factoids available for the knowing in the SRI area. For example, a lot of the exclusion is of tobacco stocks. It's not professors of cultural anthropology insisting that their pension not be invested in the stock of corporations that support neocolonialism. Excluding tobacco may lose you some profits but it won't seriously harm diversification.

¹² This is what is called "a specific event catalyst." See generally HUDSON, *supra* note 10.

¹³ See Jeremy Grantham, Special Topic: *Let's All Look Like Yale*, Part II, GMO Quarterly Letter, Apr. 2007, at 1. One might argue that the Hershey case focused people on one facet of social investing—implied duties toward collateral stakeholders of charities. See Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence From Hershey's Kiss-Off* 108 COLUM. L. REV. (forthcoming May 2008).

¹⁴ See generally David B. Kopel, Paul Gallant & Joanne D. Eisen, *Is Resisting Genocide a Human Right?*, 81 NOTRE DAME L. REV. 1275 (2006) (discussing the Sudan). The leader of the University of California effort was Adam Rosen, University of California, Davis, School of Law Class of 2006, who was then the University of California student regent.

¹⁵ See generally Dobris, *supra* note 11. Divesting, as used in the 1980s, meant selling the bad stuff. We've gotten more sophisticated. You can sell bad stuff short or construct synthetics that have the characteristics of the bad stuff but allow you not to own it. Divestment is a neutral term, although one grows used to seeing it primarily in an SRI context. See Jane Croft, *Good Resolution for Divestment*, FIN. TIMES (London), July 25, 2007, at 6. Blood diamonds also come to mind for a tainted product and a rallying point. See BLOOD DIAMOND (Warner Brothers 2006).

¹⁶ AN INCONVENIENT TRUTH (Lawrence Bender Productions 2006). Some other inconvenient truths come to mind: bankers will often lend foolishly; charities will often

weather in the summer of 2007 didn't hurt either.

As to timber, institutional investors have been having a love affair with timberland as an investment, and protesting about mismanagement of timber works for some environmentalists¹⁸ and students.

As to students more generally, it seems students are more interested than in the recent past in doing good as well as doing well. For instance, it is said there is a growing population of newly minted MBAs who prefer meaning to money.¹⁹

2. The SRI folks have gotten a lot more sophisticated in presenting their ideas and in slicing and dicing the SRI salami.²⁰ The taxonomy has become quite impressive. For instance, it is commonly suggested that companies that adopt best practices from an environmental²¹ or corporate governance viewpoint are likely to do better in the new world of the 21st century. SRI investors now consult numbers as well as emotions.

3. The SRI folks have gotten a lot better at SRI investing. They can exclude “bad” stocks²² (or include “good” ones) in portfolios and match, or even exceed bench-marked returns, over short periods of time. It would appear they got these returns during the period measured at a cost of taking on more risk, but they tend to ignore the risk part of the equation in

take dirty money and fret; and professional investors of note will often turn out to be barrow boys.

¹⁷ The useful over-simplification in the text is expanded in PAUL HAWKEN, *BLESSED UNREST* (2007) (a chronicle of recent social movements in the popular culture). I am convinced that the essence of SRI is public relations. I am then reminded of John Langbein's dictum, put in my words, that SRI is just politics in another place. See John H. Langbein, *Social Investing of Pension Funds and University Endowments: Unprincipled, Futile, and Illegal*, in *DISINVESTMENT: IS IT LEGAL? IS IT MORAL? IS IT PRODUCTIVE?: AN ANALYSIS OF POLITICIZING INVESTMENT DECISIONS 1* (1985) [hereinafter LANGBEIN, *Social Investing of Pension Funds and University Endowments*]. See also John H. Langbein & Richard A. Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72 (1980).

¹⁸ See Matt Weiser, *CalPERS Vineyard Venture Attacked*, SACRAMENTO BEE, Aug. 5, 2007, at A1.

¹⁹ See Paul Jansen, Letter to the Editor, *Bright Business Talents Who Prefer Meaning to Money*, FIN. TIMES (London), June 30, 2007, at 6; Chrystia Freeland, *Doing Well or Doing Good?*, FIN. TIMES (London), June 23, 2007, at 22.

²⁰ Continuing with the food images, one might argue that there's nothing new here; that we are just dealing with mutton dressed as lamb.

²¹ See *The Greening of T. Boone Pickens*, FIN. TIMES (London), July 19, 2007, at 8 (“As unlikely as it sounds, Pickens [a noted corporate raider and nonSRI activist investor] sees profits in environmentalism.”).

²² By “bad” I mean offensive to the SRI investor in question.

presenting the SRI case,²³ call the risk a risk worth taking,²⁴ or make the claim there is no increase in risk.

In the old days, SRI easily could be dismissed as a low return²⁵ venture, but less so lately, when recent returns are used²⁶ and when the focus is on return.

Thus, I am tempted to say modern SRI is more about risk than it is about return. And then I suggest we are left with the question: “When can a fiduciary take extra risk, in all likelihood by screening out unloved assets, and not get successfully sued?”²⁷ A return obtained at the cost of

²³ Over longer periods of time the extra risk should lead to lower returns.

²⁴ Risk is usefully defined in JONATHAN R. MACEY, AN INTRODUCTION TO MODERN FINANCIAL THEORY 18 (1st ed. 1991) (“[T]he concept of risk is best understood as the variance among possible outcomes associated with a particular investment.”). If you’d prefer a different Macey quote: “[I]n thinking about risk, one should be aware of the fact that the idea of risk not only refers to the possibility of default, but also to the degree of dispersion among possible outcomes.” *Id.* at 13. See John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 642 n. 21 (1996) (citing *An Introduction to Modern Finance Theory* with approval). See generally BEVIS LONGSTRETH, MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE (1986) (“[I]dentif[ying] and . . . explor[ing] the gap that exists between legal notions of prudence in investment management by fiduciaries . . . and the teachings of financial economics and sound practices of investment professionals.”).

²⁵ The case against SRI is that returns are lower or that even if not lower they are obtained at a greater risk. If one is hostile to charities with perpetual existence, perhaps because of concerns about dead hand control (a big “if”), then lower returns, especially when coupled with 5% payouts mandated by private foundation rules (or paid out because of a belief that 5% payouts can be sustained) will eventually undermine the charity. For some that would be a good thing.

²⁶ See UBS, FACT SHEETS, UBS SOCIAL RESPONSIBILITY FUNDS (2007), <http://fundgate.ubs.com/searchtree.do?selectedNode=emwh.srfu&expandNode=emwh.srfu&cty=CH&lang=en> (last visited Nov. 26, 2007). Generally, it is to be noted that an important commentator on SRI is Peter Kinder. See PETER D. KINDER, “SOCIALY RESPONSIBLE INVESTING”: AN EVOLVING CONCEPT IN A CHANGING WORLD (2005), available at <http://www.kld.com/resources/papers/SRIevolving050901.pdf> (last visited Nov. 26, 2007).

²⁷ The problem is, a wise friend said, the unloved assets offer the better return because no one wants them. Often they draw the dividend investor or the value investor or the contrarian. See generally Arne Alsin, *Inside Curve: Deals Get Left in the Basement by Short-Sighted Bargain-Hunters*, FIN. TIMES (London), July 28, 2007, at 4.

Screens, filters, exclusion, and aversion investing, they’re all the same thing I believe.

As to the statement in text, the point may be when a fiduciary can get a lawyer to bless the investment. Successful suits for lost opportunity outside the ERISA arena may be more imaginary than real at this time.

One might argue that given enough Graham and Dodd analysis, cleverness with

derivatives, or both, SRI portfolios could be constructed that give up little or no gross return and that take on board little extra risk. But, “Oh the cost!” If so, then one might hope for reduced transaction costs over time. How? Several ways come to mind. Perhaps our friends, the machines, will help us: artificial intelligence, enhanced computers, better algorithms. Maybe volunteers will help us. Computer time could be donated. SRI law students and MBA students could take up tasks, and SRI could be improved the way Linux is or a Wiki is. Small tasks could be done for pay. If every pension fund in the country bought SRI advice, the product might well improve and the price might go down. SRI and pensions are considered in Keith Ambachtsheer, *Pension Funds and the ‘SRI’ Movement: Still Ships Passing in the Night*, THE AMBACHTSHEER LETTER # 254 (Mar. 2007) available at http://www.kpa-advisory.com/pdf_documents/254-still_ships_passing_in_the_night.pdf. Interestingly, Ambachtsheer’s daughter is an SRI advocate, as the cited newsletter makes clear. She is the head of SRI investing for Mercer Consulting. See Mercer, *SRI: What Do Investment Managers Think?*, <http://www.mercer.com/summary.jhtml?idContent=1174905> (last visited Nov. 26, 2007).

Lists of clean funds that make no SRI claim could be published and lists of stocks as well. The truth is that if no SRI claim was made by a trustee and if he was willing to fib and say SRI was the farthest thing from his mind, then who’s to say that a non-SRI “SRI” fund or portfolio was chosen for forbidden SRI purposes. This “truth” suggests that some SRI might be done for bragging rights. Similarly, the trustee who invests in well governed corporations because she believes they are likely to be the most profitable, likely is less open to successful suit than the trustee who made the same investments because of a personal belief in SRI as a matter of morality. Put another way, if I, a fiduciary, invest in Costco silently or because I think their compassionate labor policies will lead to increased profit for them and my trust, then I am much less likely to be successfully sued than if I invest in them because it makes me feel better to invest in a company that is kind to its workers.

If a fiduciary invests in SRI at a cost in risk or return to please himself, that is a breach of the duty of loyalty. If he does it to please some of the beneficiaries and there is a financial cost, he’s breaching his duty of impartiality (to the non-SRI beneficiaries) and his duty to invest competently. If truly all of the beneficiaries want SRI investing, they can set aside any relevant duties, or it could be claimed they were in receipt of psychic income. For a recent non-American view of the duty of loyalty, see Rebecca Lee, *In Search of the Nature and Function of Fiduciary Loyalty: Some Observations on Conaglen’s Analysis*, 27 O. J. L. S. 327 (2007).

The trustee who is making money can theoretically be sued for making it the wrong way or (less likely) for not making enough, but that suit is unlikely to be brought, and if brought it is unlikely to be won. If the suit is for not making enough money, will it ever succeed? Is it possible that there’s no monster in the closet? At least in up markets? The trustee who has lost money may or may not be sued successfully. Two trustees could make the same investment in a loss-making investment and one properly might be surcharged and the other might not. How so? First, because what’s right for one trust might be wrong for another. Second, because it’s not whether you win or lose, it’s how you play the game. If trustee A gives the matter serious consideration, trustee A may well get off the hook. If trustee B makes the investment in a cavalier fashion, trustee B may be surcharged.

If A made the investment after performing a meaningful and rational investigation

higher risk when the same return is obtainable at lower risk is inferior. Let me say such a return is second best.²⁸

4. Tons more assets are under, and will come under, something called SRI management.²⁹ The decision of more and more people to invest in something they call SRI inevitably makes SRI less about biodynamic farming and more about the mainstream. And that current in the mainstream is leaching into the world of fiduciary investing.³⁰

And, there's gold in them thar hills.³¹ Rich people, especially outside the United States, seem very interested in SRI for their own portfolios.³²

and going through a meaningful and rational process of thought, she is unlikely to be sued successfully. If B made the investment because the Tarot cards told him to, B is likely to be sued successfully if there is a loss (if there are gains, most folks will look the other way).

Until recently, SRI was, for many people, in the Tarot card category. Now many people are much slower to dismiss SRI.

Forbidding SRI when it's so easy to explain a clean investment without referring to SRI leaves us with a situation where trustees are indirectly encouraged to lie. This is socially unwholesome and wasteful of judicial resources—we have to reserve court time for determining the trustee's state of mind when he bought the Stanhope & Hopeworth Growth and Income Fund (a fund that just happens to conveniently be a clean fund from an SRI viewpoint).

²⁸ And then I am moved to ask what are the situations where a brave trustee might eschew "best" for "second best" and hope to escape a successful lawsuit (or even a costly unsuccessful law suit). I have often thought that second best is actually often best in the trusts and estates world, and perhaps this is one of the places that that is the case.

²⁹ See Knoll, *supra* note 3, at 681. Having said that, I am less than certain that large percentages of capital are under SRI management. Cf. Andrew C. Revkin & Matthew L. Wald, *Solar Power Captures Imagination, Not Money*, N.Y. TIMES, July 16, 2007, at 1.

³⁰ See William Baue, *Institutional Investors Drive Research on Mainstreaming of SRI by Investment Managers*, SOCIAL FUNDS, Oct. 21, 2005, <http://www.socialfunds.com/news/article.cgi/1840.html> (last visited Nov. 26, 2007) (interviewing Jane Ambachtsheer). Not all worthy considerations of SRI are mainstream. See, e.g., Benjamin J. Richardson, *Protecting Indigenous Peoples Through Socially Responsible Investment*, 6 INDIGENOUS L.J. 1 (2007).

³¹ KLD Research & Analytics, Inc. (KLD) is a leader in the SRI investing industry. In June 2007, KLD claimed that more than \$10 billion was invested using KLD SRI/ESG indices. See Press Release, KLD Reports June 2007 Index Returns, http://www.kld.com/newsletter/archive/press/pdf/200706_Index_Performance.pdf. Of course, \$10 billion is not a lot of money. As of December 2005, the Gates Foundation had \$35 billion. See Gates Found., Annual Report, at 37 (2006). KLD is the leading SRI indexer; however, they have competition. There now exists the FTSE4GoodIndex. See FIN. TIMES. Advertisement, Aug. 15, 2007, at 1.

³² See CAPGEMINI & MERRILL LYNCH, *supra* note 3, at 18. Similarly, Norway has a huge amount of oil money invested according to SRI principles, and companies take it seriously. See Peter Wilson, *Knut Cracks the Fund Manager Pay Myth*, WEEKEND

For instance, UBS (an international Swiss based bank) seems to have a major commitment to the sector.³³ Then it seems appropriate to say: “Don’t stand between a banker and her profits.”³⁴

And it seems likely that more assets will come under SRI management. How so? The death of the defined benefit pension plan and the rise of the defined contribution plan mean that individuals³⁵ can hold SRI investments for their pensions without the intervention of fiduciary law.³⁶

AUSTRALIAN, Nov. 18, 2006, at 38. *See also* David Ibson, *Norway Sets Standard in Investment World*, FIN. TIMES (London), Aug. 31, 2007, at 5 (explaining how Oslo’s clean and open approach to asset management is a lesson to others).

³³ A leading proponent of SRI is Julie Hudson, an employee of UBS. *See* HUDSON, *supra* note 10, at vi.

³⁴ Show the bankers on the sales side of the trust department that there is profit in SRI and stand back. “Bankers get what they want from state legislatures.” Joel C. Dobris, *Why Five? The Strange, Magnetic, and Mesmerizing Affect of the Five Percent Unitrust and Spending Rate on Settlers, Their Advisers, and Retirees*, 40 REAL PROP. PROB. & TR. J. 39, 51 (2005).

³⁵ It’s never suggested that the claims of SRI investment sponsors are tortious or even criminal. Huh? “You can get superior returns with an SRI portfolio.” Just puffing. And SEC regulations undoubtedly make the documents that underlie any SRI mutual fund very informative.

³⁶ *See Does Your Company’s Retirement Plan Include an Ethical-Investing Option?*, CHRISTIAN SCI. MONITOR, June 18, 2007, <http://www.csmonitor.com/2007/0618/p25s01-wmgn.html> (last visited Nov. 26, 2007). Query how many folks will make the election; 15% of TIAA-CREF participants do so. The percentage is low because of performance concerns. *See id.* I am reminded of a friend of mine who was trustee for her siblings. She initially invested in an SRI mutual fund but saw the returns were lower. She felt, contrary to her hopes and general beliefs, that she couldn’t penalize her siblings for her desire to invest in an SRI fund. *See* Diana Ransom, *Starting Out: Ways to Do Your Share*, WALL ST. J., Aug. 5, 2007, at D7 (“19% of defined-contribution plans include an SRI option. And at 41% of other defined-contribution plans, the sponsors intend to add an SRI fund option within three years.”).

SRI pension investing is considered in a number of places. *See, e.g.*, LANGBEIN, *Social Investing of Pension Funds and University Endowments*, *supra* note 17.; PAUL PALMER ET AL., *SOCIALLY RESPONSIBLE INVESTMENT: A GUIDE FOR PENSION SCHEMES AND CHARITIES* (Charles Scanlan ed. 2005); Edward S. Adams & Karl D. Knutsen, *A Charitable Corporate Giving Justification for the Socially Responsible Investment of Pension Funds: A Populist Argument for the Public Use of Private Wealth*, 80 IOWA L. REV. 211 (1995); Stephen P. Ferris & Karl P. Rykaczewski, *Social Investment and the Management of Pension Portfolios*, AM. SOC’Y. CHARTERED LIFE UNDERWRITERS J., Nov. 1986, at 60; Ian D. Lanoff, *The Social Investment of Private Pension Plan Assets: May It Be Done Lawfully Under ERISA?*, 31 LAB. L.J. 387 (1980); Robert J. Lynn, *Investing Pension Funds for Social Goals Requires Changing the Law*, 53 U. COLO. L. REV. 101 (1981); Benjamin J. Richardson, *Do the Fiduciary Duties of Pension Funds Hinder Socially Responsible Investment?*, 22 BANKING & FIN. L. REV. 145 (2007); S. Prakash

This change also means that those who would defend the defined pension benefit fortress will find that fortress disappearing into the sands. As my friend said, “Our time is passing into history.”

Private defined benefit pensions are the toughest nut to crack for SRI snackers. Plan sponsor and trustee hunger for return is huge, so there’s little room for sentiment, and the guardians are many.³⁷ Plus, ERISA and its interpretations leave only a dime to stand on. Having said that, I feel compelled to note that the United Nations’s pension fund does not invest in arms manufacturers.³⁸ Of course! The idea that the United Nations is supposed to invest for superior return in armaments is ludicrous.³⁹ Duh.⁴⁰

And we just seem to be in a moment when the claims of SRI make more sense to more people.⁴¹ People “want to make a difference” and they like the “two-fer” of their investments doing it for them. Why earn dirty money and then make clean donations? Look for the win-win situation. Chalk it up to the environment and the quick spread of information.

Sethi, *Investing in Socially Responsible Companies Is a Must for Public Pension Funds—Because There Is No Better Alternative*, 56 J. BUS. ETHICS 99 (2005); Thomas A. Troyer et al., *Divestment of South Africa Investments: The Legal Implications for Foundations, Other Charitable Institutions and Pension Funds*, 74 GEO. L.J. 127 (1985).

³⁷ John Langbein comes to mind. See LANGBEIN, *Social Investing of Pension Funds and University Endowments*, *supra* note 17.

³⁸ See Steve Johnson, *Hands-On Investor: Matchmaking at the Double*, FIN. TIMES (London), June 30, 2007, at 4.

³⁹ Basil Zaharoff to the contrary notwithstanding. Or, that a manufacturer of Catholic raiment has to invest its pension fund in contraceptive makers for superior returns.

⁴⁰ ERISA doesn’t affect the United Nations, but it is instructive.

⁴¹ See Observer, *Sell Signal?*, FIN. TIMES (London), Aug. 15, 2007, at 10:

[A] recent survey shows that investors say they would sell shares in companies if they knew unethical practices were taking place - even if the shares were rising. Three out of four investors say they would pull their money if they found out a company was profiting from unethical activity. The question asked by Pepperdine University was about acts that were unethical yet legal, thus with no potential for stock-price-depressing lawsuits. Nearly 40 per cent of the 500 investors that Pepperdine polled said they would definitely move their money, and an additional 38 per cent said they would probably move it.

As it turns out, the big individual investors - those polled had at least Dollars 100,000 in stocks and mutual funds - also favour putting corporate officers and board members behind bars.

Nine out of 10 investors said convicted officers and board members should serve some jail time. Only 7 per cent of investors said they shouldn’t be required to go to jail.

Of course, these are all hypothetical situations. It might be a slightly different question when you’re actually holding a soaring stock.

Focusing on my second point, global warming and environmental concern are causing more and more people to want to be SRI investors. And the feeling of political powerlessness in 2007 America felt by many contributors, I would submit, to the need to have some impact.

It's a world gone mad, and people want to do something about it.⁴²

5. There is always a population of people who see their wealth as an extension of themselves and who want to vote with their money. This is a time of prosperity and inheritance and so the population of rich people is expanding and so, inevitably, is the population of people who want to invest "responsibly."

More specifically, there's a generation of young people who have money and are uncomfortable investing it only for financial gain. There is a population of people who are earning their money in their youth, inheriting in their youth, or both, and SRI investors,⁴³ I believe, tend to be young.⁴⁴

The thought extends to human capital as well. There is a population of young MBAs who want to invest their human capital in goodness.⁴⁵

6. Thinking about SRI and associated topics has gotten more interesting for academics. For example, in the parallel universe of corporate governance, corporate law/business/finance professors seek to understand

⁴² See *Does Your Company's Retirement Plan Include an Ethical Investing Option?*, *supra* note 36. Professor Vandenberg of Vanderbilt tells us that we should take more responsibility as individuals in reducing pollution. See Michael P. Vandenberg, *The Individual as Polluter*, 35 ENVTL. L. REV. 10, 723 (2005); I think it is fair to say, in the same vein, that some of us feel the urge to boycott when we spend and perhaps when we pick individual stocks but not when we invest in pooled funds. The feeling of individual responsibility pales as one moves along that spectrum. See, e.g., Daniel A. Farber, *Controlling Pollution by Individuals and Other Disbursed Sources*, 35 ENVTL. L. REV. 10, 745 (2005). Some people say they are ethical spenders when they aren't. See Michael Skapinker, *There Is Good Trade in Ethical Retailing*, FIN. TIMES (London), Sept. 11, 2007, at 15 (discussing the 30:3 rule—30% of shoppers in the UK claim to think about ethical issues when shopping but only 3% actually do). John Authers, a leading investment columnist for the *Financial Times*, seems almost at peace with SRI. See John Authers, *There Are Clear Arguments for a Clear Conscience*, FIN. TIMES (London), July 28, 2007, at 16.

⁴³ See CAPGEMINI & MERRILL LYNCH, *supra* note 3, at 18–21.

⁴⁴ Or young at heart.

⁴⁵ See Freeland, *supra* note 19; Rebecca Knight, *Why the Good Life Could Turn Out to Be the Hardest Sell of All*, FIN. TIMES (London), Aug. 20, 2007, at 12. See also Bruce Piasecki, *The Social Responsibility Revolution*, CHRISTIAN SCI. MONITOR (BOSTON), Aug. 9, 2007, at 9.

if obsessive profit maximization carries unacceptable social costs,⁴⁶ and they are investigating whether implementing corporate governance regimes leads to enhanced market values⁴⁷ and whether hedge funds⁴⁸ have an effect on corporate governance.⁴⁹

Similarly, the writing about SRI on both sides of the argument has advanced beyond chanting slogans across the table at faculty dinner

⁴⁶ See generally Irene Lynch Fannon, *The Corporate Social Responsibility Movement and Law's Empire: Is There a Conflict?*, 58 N. IR. LEGAL Q. 1 (2007).

⁴⁷ See, e.g., Bernard S. Black & Vikramaditya S. Khanna, *Can Corporate Governance Reforms Increase Firms' Market Values? Evidence From India* (John M. Olin Center for Law and Economics, Discussion Paper No. 07-002), available at <http://ssrn.com/abstract=914440> (2007). Commercial entities seek to rate companies on the quality of their corporate citizenship to allow for increased investing profit. See Phred Dvorak, *Theory & Practice: Finding the Best Measure of 'Corporate Citizenship'*, WALL ST. J., July 2, 2007, at B3. Limited data suggests that screening for good corporate citizenship leads to excess returns. See *id.* "Skeptics say studies of governance practices and share performances are skewed by other factors, such as an industry's results." *Id.* The same complaint could be lodged against short term studies of SRI results.

If a corporation's SRI policies are costing it profits, that does not suggest that it is priced improperly in the stock market. Anything is a bargain at the right price. Highly diversified portfolios will likely include such corporations. Ben and Jerry's, with its unusually high contributions to charity, is priced properly. Ben & Jerry's Homemade, Inc., *Ben & Jerry Foundation: Greening the Grassroots Since 1985*, <http://www.benjerry.com/foundation/index.html> (last visited Nov. 26, 2007) (stating that Ben & Jerry's gives in excess of \$1.1 million annually to charity, "adjusted upward annually for sales growth and inflation"). Everyone knows it gives away some profits, reducing the company's value. No one buys the stock thinking they will get the full return on earnings. The problem comes when the investor constrains her portfolio to include only SRI companies, all properly priced by the market. This is not a problem, only if those who plead for unconstrained portfolios are wrong or if fancy derivative or synthetic arrangements can cure the constraint weakness. For an article taking the position that SRI constraints reduce optimized return, see Eric Girard, Hamid Rahman & Brett Stone, *Socially Responsible Investments: Goody-Two-Shoes or Bad to the Bone?*, 16 J. INVESTING, Spring 2007, at 96.

⁴⁸ "Hedge funds . . . typically invest in liquid securities, with no control. They have the flexibility to take both long and short positions . . ." *Relative Values*, FIN. TIMES (London), July 9, 2007, at 16. For a straightforward discussion of hedge funds, see Triphon Phumiwasana, Tong Li, James R. Barth & Glenn Yago, *The Hedge Fund Behemoth*, MILKEN INST. REV., First Quarter 2007, at 81.

⁴⁹ See William W. Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L. J. 1375 (2007); Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021 (2007) (asserting that hedge funds are more suited to active involvement in corporate governance than mutual funds). Hitching a free ride on the hedge fund bandwagon would yield quite a ride for those who would change corporate conduct. One does not toy with hedge fund managers.

parties on Saturday night.⁵⁰

7. The tools of SRI have been co-opted for mainstream purposes.⁵¹ For instance, the Securities and Exchange Commission has adopted and adapted the SRI tool of “blacklisting” corporations that enhance terrorism.⁵² If it’s good enough for Uncle Sam it’s good enough for the SRI folks. As Lionel Trilling wrote: “Time has the effect of seeming to quiet the work of art, domesticating it and making it into a classic. . . . [U]niversity study tends to accelerate the process by which the radical and subversive work becomes the classic work.”⁵³ We’ve gotten used to it.

8. Activist investing is in fashion. Activist investing comes in many forms.⁵⁴ In broad form, it’s about investors who take a position in a company’s shares and then start telling the managers what to do, usually how the new investor-owner wants the company run, usually to improve performance—the performance in question usually being financial performance. SRI is just a sub-form of (currently fashionable) activist investing.⁵⁵

⁵⁰ Compare HUDSON, *supra* note 10, with Knoll, *supra* note 3.

⁵¹ See Maria Markham Thompson, *Pro & Con: Moral Considerations in Investing: Socially Responsible Investing Has Become a Mainstream Practice*, CHRON. HIGHER EDUC. (Wash., D.C.) May 28, 2004, at 24.

⁵² See Jeremy Grant, *Outrage Over SEC Terrorism ‘Blacklist,’* FIN. TIMES (London), June 29, 2007, at 1. The SEC was having second thoughts in late July, but the point remains valid, nonetheless. See Floyd Norris, *S.E.C. Rethinks Lists Linking Companies and Terrorist States*, N.Y. TIMES, July 21, 2007, at C2. It is easy to think of divestment as a tool of the “progressive” left. The use of divestment by the Bush government suggests this is not so. Indeed, right of center politicians in state legislatures have been calling for divestiture by public pension funds of the shares of corporations that do business in Iran. This has led, I believe, pension trustees to press Shell Oil to leave Iran (so that they are not forced to divest their portfolios of Shell stock). See Rebecca Bream, *US Funds Criticise Shell for Iran Activities*, FIN. TIMES (London), July 26, 2007, at 16. See also Posting of Randy O’Neil to The KLD Blog, *Sudan and Iran Divestment Campaigns*, <http://blog.kld.com/sudan/sudan-and-iran-divestment-campaigns> (Aug. 7, 2007) (discussing Iran exclusions); G. Jeffrey MacDonald, *Social Conservatives Rally an Investor Army*, CHRISTIAN SCI. MONITOR, Apr. 23, 2007, at 13.

⁵³ LIONEL TRILLING, *On the Teaching of Modern Literature*, in *BEYOND CULTURE 10* (The Viking Press 1965) (1955).

⁵⁴ Activist investing is a broad and abstract term. A useful definition might be taking a (usually meaningful) stake in a corporation and then agitating for conduct designed to increase profits. Often that means agitating for better corporate governance. For a useful essay on hedge fund moguls as wholesome corporate activists, see Bratton, *supra* note 49.

⁵⁵ It seems to be a moment in time when a subpopulation feels responsible for its actions as investors and charitable contributors. It’s reminiscent of the 60s. See Dashka Slater, *Resolved: Public Corporations Shall Take Us Seriously*, N.Y. TIMES, Aug. 12,

9. So-called mission investing has come to the fore in the nonprofit world, making fuzzy the formerly clear boundary between investing for gain and granting for charitable purposes. “Mission investing is the practice of using financial investments as tools to achieve a foundation’s mission. Mission investing is a more specific type of social investing—the broader approach of considering social and environmental factors, whether or not directly related to mission, in investment decisions.”⁵⁶ This use of investment funds to advance social goals has the potential for leaching into “pure” fiduciary investing. When mission investing is merged with traditional investing, this hybrid makes the bitter pill of SRI easier to swallow and has the potential of making less clear the border between ordinary investing for pecuniary gain and SRI.

10. Fourth sector/hybrid investing/venture philanthropy⁵⁷ is in vogue,

2007, (Magazine), at 22 (discussing SRI activist investing). *See also* Siew Hong Teoh et al., *Effect of Socially Activist Investment Policies on the Financial Markets: Evidence from the South African Boycott*, 72 J. BUS. 35 (1999).

⁵⁶ SARAH COOCH & MARK KRAMER, COMPOUNDING IMPACT: MISSION INVESTING BY US FOUNDATIONS 6 (2007). *See also* Jed Emerson, Where Money Meets Mission, STANFORD SOC. INNOVATION REV., Summer 2003, at 38; Jed Emerson & Mark Kramer, *Maximizing Our Missions*, CHRON. PHILANTHROPY, Jan. 25, 2007. The Gates Foundation was scolded for investing against their mission. They chose to ignore the fuss. *See A Moral Sense; Divestment from Sudan*, ECONOMIST, May 12, 2007, at 31; Charles Piller, *Buffett Rebuffs Efforts to Rate Corporate Conduct*, L.A. TIMES, May 7, 2007, at A15; Charles Piller, *Berkshire Wealth Clashes with Gates Mission in Sudan*, L.A. TIMES, May 4, 2007, at A1; Charles Piller, *Money Clashes with Mission*, L.A. TIMES, Jan. 8, 2007, at A1; Charles Piller, et. al., *Dark Cloud Over Good Works of Gates Foundation*, L.A. TIMES, Jan. 7, 2007, at A1.

⁵⁷ One definition of venture philanthropy is foundations investing in experimental drugs both for profit and to insure the drug comes to market when normal methods for funding experimental drugs fail. *See A Different Sort of Venture* (American Public Media Broadcast June 8, 2007). Broader definitions exist. New forms of philanthropy are fashionable. “This new generation [of] . . . philanthropists is looking to give back to society through a much broader range of activities than was previously the case.” CAPGEMINI & MERRILL LYNCH, *supra* note 3, at 21. Another definition of venture philanthropy is applying business metrics to purely charitable donations. Is the soup kitchen getting the best deal on carrots? *See generally* Rachel Emma Silverman, *Young Money: A New Generation Reinvents Philanthropy*, WALL ST. J., Aug. 21, 2007, at D1 (“Blogs, Social-Networking Sites Give 20-Somethings a Means To Push, Fund Favorite Causes.”); Sean Stannard-Stockton, *Philanthropy Not Just for the Ultra-Rich*, FIN. TIMES (London), Aug. 24, 2007, available at <http://search.ft.com/ftArticle?queryText=Sean+Stannard-Stockton&y=4&aje=true&x=10&id=070824008355&ct=0> (last visited Nov. 26, 2007) (“Some tactical philanthropists argue that you can make a profit while advancing your philanthropic interests. San Francisco-based Good Capital operates like a venture capital fund. It invests money from wealthy individuals and distributes earnings back to

and it bangs up against SRI.⁵⁸ This is about combining attitudes, structures, methods, and metrics of the profit and nonprofit corporate worlds. It's a loose amalgam of ideas, notions, outlooks, and the like, which includes: charities are sleepy and need a good kick in the butt from folks who understand modern business methods; well run businesses produce so much excess profit that some of the excess profit (or the ability to make profit) can be shared; the new generation of technocrat entrepreneurs are somehow better people and better managers than the J.P. Morgans of the world (and even the Andrew Carnegies and John Rockefellers of the world); this new generation wants to and easily can share their human capital and a bit of their cash in new and exciting ways with those less fortunate through investing in the so-called fourth sector via hybrid entities and bespoke venture capitalism;⁵⁹ managing risk and

investors. The difference is that Good Capital invests in non-profit organisations as well as for-profit ones that perform functions associated with non-profit charities.”)

⁵⁸ See Kate Burgess, *Companies Buy into the Notion of Giving Something Back*, FIN. TIMES (London), July 2, 2007, at 7; James Mackintosh, *Feared Fund Turns to Business of Charity*, FIN. TIMES (London), July 2, 2007, at 7 (“[B]ringing business rigour and a private sector approach into development.”); Stephanie Strom, *Make Money, Save the World*, N.Y. TIMES, May 6, 2007, at BV1. One vague definition is “a hybrid organizational form—part nonprofit, part for-profit—what some are calling ‘the fourth sector,’ a social-benefit enterprise.” Clint Wilkins, *A Nonprofit Leader Builds His Encore Career*, CHRON. PHILANTHROPY, Sept. 14, 2006, at 44. See Briefcase, BRISBANE CITY NEWS (Australia) Oct. 6, 2005, speaking of a particular enterprise: “. . . [the founder’s] philosophies are imbedded in the fairly new ‘fourth sector’ concept and its ultimate aim is to produce entrepreneurs with businesses that are not only profitable but which also operate in a socially, culturally and environmentally responsible way.” Contra John S. Koppel, Letter to the Editor, *Salve for the Conscience*, N.Y. TIMES, May 13, 2007, at BV7:

To the Editor: The corporate/nonprofit hybrids of the “fourth sector” (“Make Money, Save the World,” May 6) are a sure-fire formula for confusion, conflict of interest, deception and outright fraud. They join “eco-friendly tourism” and “carbon credits” for guilt-stricken, environmentally conscious travelers.

Such feel-good substitutes for meaningful government action are themselves inadequately regulated, and merely lull people into the mistaken belief that they are making a significant contribution to curing social ills that can be dealt with effectively only through legislative, regulatory and judicial means.

Further discussion is to be found in Kathryn Tully, *Charity That Offers Fair Profit*, FIN. TIMES (London), July 27, 2007, available at <http://www.ft.com/cms/S/4acd33d4-3bcb-11dc-8002-0000779fd2ac.html>. See also Stephanie Strom, *Ex-Wall St. Executives Go to Bat to Help Nonprofits*, N.Y. TIMES, Aug. 3, 2007, at C3 (using Wall Street ways to raise funds for charity).

⁵⁹ See Richard C. Morais, *Charity Made Efficient*, FORBES, June 25, 2007,

adapting to new markets can be enhanced by philanthropic and partner activities with nongovernmental organizations and nonprofits;⁶⁰ and business corporations can grow and renew themselves by better understanding the nonprofit world.⁶¹ There, in a paragraph, is the fourth sector. Whew.

Fourth sector investing is good for the business with which it is associated. It is good branding. I propose that Google and GE's fourth sector investing makes Google and, to a lesser extent, GE cool, hip, and cutting edge, which makes it easier to attract and keep top employees, something that is a constant concern of those companies and any company that needs to recruit and hold technocratic minded workers.

11. Beneficiary rights are in fashion these days, and SRI in private

http://www.forbes.com/personalfinance/philanthropy/2007/06/25/philanthropy-charity-technology-pf-philoin_rm_0625philanthropy_inl.html (last visited Nov. 26, 2007). See also *Book Value*, *ECONOMIST*, July 21, 2007, at 66 ("He also happens to believe—rather as Google's young founders do—that he can, and should, change the world."); James Flanigan, *Community Investment in San Jose*, *N.Y. TIMES*, July 19, 2007, at C13; *Leader of the Swarm*, *ECONOMIST*, July 14, 2007, at 74.

⁶⁰ For an intriguing story on Proctor & Gamble's venture into hybridicity, see Claudia H. Deutsch, *A Reverse Profit Strategy Faces a Commercial Test*, *N.Y. TIMES*, July 24, 2007, at C7. See also David Watts Barton, *Desert Green*, *SACRAMENTO BEE* Aug. 24, 2007, at J1, 8 ("We're marrying venture capital with social capital to give poor communities a seat at the renewable energy table.").

⁶¹ Google.org and General Electric's Ecomagination come to mind. The following extract from a help wanted ad for an Investments Researcher position at Google.org might help:

Google.org is looking for an Investments Researcher to assist with evaluating "triple bottom line" investments in companies and projects, the primary goal of which will be positive and scalable impact on global public health, economic development and climate change. . . . [Y]ou will work . . . identifying and evaluating partnership and investment opportunities consistent with Google.org's mission. . . . Responsibilities: Play an integral role in evaluating investment opportunities and projects consistent with Google.org's philanthropic mission. . . . [Assist] with decisions relating to investments in the areas of public health, economic development and climate change. . . . Requirements: . . . Strong knowledge of issues surrounding climate change, global economic development and/or public health.

Google, Google Jobs, <http://www.google.com/support/jobs/bin/answer.py?answer=71684> (on file with author). For a fascinating tale of an ad agency that was founded to pitch for nonprofits, which found a much larger clientele among profit clients, see Stephanie Kang, *Agency's Social Responsibility Focus: Ethos Helps Companies Gain Market Benefit From Do-Good Efforts*, *WALL ST. J.*, Aug. 17, 2007, at 3B.

trusts is, I believe, beneficiary driven. I say SRI is beneficiary driven because if the settlor was so inclined, he'd likely have put SRI boilerplate in the trust. Beneficiaries are empowered by the times,⁶² and because a number of trusts are formed for tax reasons only, beneficiaries are often full fledged adults, and they're pushy. They are not grateful and weak widows and orphans. They are assertive. So, when a beneficiary says, "Grampie's money in the trust he set up for me, as invested by you, makes me feel dirty,"⁶³ something may have to be done about it.⁶⁴

Simplest of recaps: A lot of people are investing their own money in something called SRI, and some people are investing other people's money (OPM) in something called SRI, and it ain't going away.

IV. LOOKING AHEAD

1. I imagine that SRI will become ever more respectable, for a variety of reasons, and that it will be more acceptable in the investing of trustee capital in particular in some but not all situations. In other words, a more "relaxed" and situational standard (or standards) of fiduciary duty, as to SRI, will emerge.

2. Lawyers and judges will more easily come to see an implicit setting aside, in part, of the fiduciary duties that currently seem to forbid (or at least frown on) SRI.

3. Spine-endowed trustees will ignore conservative legal advice and make investments their lawyers don't like. And no one will die. And more such investments will be made. And one day it will be more acceptable.

Most fiduciaries, and fiduciary investors more specifically, are conservative, and they are advised by conservative lawyers.⁶⁵ Thus, investors

⁶² See, e.g., Heirs, Inc., *Heirs Personal Trust Handbook*, <http://www.heirs.net/handbook.html> (last visited Nov. 26, 2007).

⁶³ "[M]ost carbon offsetting schemes resembled the medieval system of indulgences, in which corrupt priests absolved sins for haggled fees." Jonathan Guthria, *How I Was Deluded by My Carbon Footprint*, *FIN. TIMES* (London), May 3, 2007, at 15. This may be a proper point to speak of mutton dressed as lamb. The 2007 graduating class of the Yale School of Forestry & Environmental Studies bought carbon offsets for their family members coming to graduation from three organizations: The Conservation Fund, Native Energy, and CarbonFund.org. See *Graduates Offset Travel Emissions*, *YALE ALUMNI MAG.*, July/Aug. 2007, at 83.

⁶⁴ If an investment makes someone feel dirty and activism leading to change is out of the question, the only solution is to sell the investment—divesting.

⁶⁵ Lawyers sell what-if advice and focus on the negative outlier, the black swan. What if a yellow dog wearing a blue collar bites a beautiful baby with malaria and then steals the neighbors' dinner, you just might be liable, so I wouldn't do that. Sometimes a

in charge of funds set aside for nonprofit purposes⁶⁶ like their lawyers to bless their conduct, especially their unconventional financial acts. Lawyers don't like to bless the unknown and refuse. Most trustees stop at that point—they won't act without a lawyer's blessing. Nonprofiteers often blame this state of affairs (no SRI investing) on the lawyers. I would suggest there's also room to blame spineless trustees.⁶⁷

client needs to say thank you and disobey her lawyer. Yellow dog, black swan, it's all the same. See generally NASSIM NICHOLAS TALEB, *THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE* (2007); NASSIM NICHOLAS TALEB, *FOOLED BY RANDOMNESS: THE HIDDEN ROLE OF CHANCE IN THE MARKETS AND IN LIFE* (2d ed. Random House Trade Paperbacks 2005) (2004). See also Gillian Tett & Anuj Gangahar, *Why Computer Models Proved Unequal to Market Turmoil*, FIN. TIMES (London), Aug. 15, 2007 (discussing the piling up of several 100,000 years events in system error).

A few greater truths in regard to this footnote and the associated text: Trustees of charities are likely to have lawyers and seek legal advice. See Sheri Qualters, *Nonprofits Scramble Under New Scrutiny*, NAT'L LAW J., Sept. 3, 2007, at 1. Ditto for bank trust officers acting for the bank as trustee of private trusts. Individuals acting as trustees of family trusts are likely to act without legal advice and so might very well engage in SRI investing. A friend of mine did that very thing and switched out of SRI investing when she saw it was reducing income for her siblings. Perhaps one of these trustees will be sued someday, and we'll get some law on the subject.

The world of trust fund and charity fund investing, unlike the world of college endowment investing, is often as conservative as the world of real estate titles. Most trustees are risk averse, and so are most lawyers who represent trustees. And everyone is doing the world a favor by acting as a charitable trustee or lawyer for a charitable trustee—it's often pro-bono or quasi-pro-bono. So why should a trustee take a risk and act without a lawyer's blessing? And why should a lawyer bless a questionable act when he's working for free or less than his normal rate? "I can't believe that the only time I got sued for malpractice was the time I told a charity it was OK to ____; I'd cut my time by 50% for the SOBs, and they sued me."

⁶⁶ I am being purposely vague in the text. For discussion of nonprofit investing, see for example, Harvey P. Dale, *Nonprofit Directors and Officers—Duties and Liabilities for Investment Decisions*, in NEW YORK UNIV. TWENTY-SECOND CONFERENCE ON TAX PLANNING FOR 501(c)(3) ORGANIZATIONS 4-1 (Carolyn C. Clark ed. 1994); SUSAN N. GARY, REVISIONS TO THE UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT: DRAFTING COMMITTEE DECISIONS MADE JANUARY 22, 2004 http://www.abanet.org/rppt/meetings_cle/2005/spring/pt/UniformManagementUMIFA/GARY_hand.pdf (last visited Nov. 26, 2007); Harvey P. Dale & Michael Gwinnell, TIME FOR CHANGE: CHARITY INVESTMENT AND MODERN PORTFOLIO THEORY, 3 CHARITY L. & PRAC. REV. 89 (1995); Susan N. Gary, *Symposium: State-Level Legal Reform of the Law of Nonprofit Organizations: Charities, Endowments and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 GA. L. REV. 1277 (2007).

⁶⁷ I believe the following story to be true. Many years ago a young lawyer went to work in the legal department of a large and adventurous foundation. He didn't understand that he had to develop a clientele within the charity. Program officers would bring him their projects and ask for his lawyer's blessing and he would say "no, you can't do that."

Lawyers are rule obedient, and ultimately, SRI folks seem to accept that. The SRI community focus has been on changing the rules—changing the law of fiduciary investment through law reform.⁶⁸ The *Restatement (Third) of Trusts*, Uniform Trust Code and Uniform Prudent Management of Institutional Funds Act have given them little cause for joy. What little hope there is, is to be found in the *Restatement*. It is no surprise that the Uniform Acts haven't done much for SRI. The National Conference of Commissioners on Uniform Statute Laws is populated by a very conservative bunch. They move slowly.

How about the common law? There's very little litigation about SRI and this means that the law is unclear and that it hasn't caught up with any trustees on the ground who are doing new things. A trustee who has acted reasonably but in a new way has to get sued and successfully defend herself before the common law changes. SRI needs an unsuccessful attack on a very sympathetic defendant trustee, whom no judge or jury wants to nail or jail, so the law can grow.⁶⁹

I will make a wild guess and suggest that if there is such a suit that the law will change in favor of SRI.⁷⁰ In the abstract, that is a way we may get

Lawyers like to say “no” and justify it with “what-if” analysis. Eventually, program officers stopped coming to him for advice (his blessing, really), and he was a lawyer without clients instead of an attorney. He moved on.

⁶⁸ See John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069 (2007).

⁶⁹ In the 1960s, tenants rights lawyers waited for the perfect plaintiff—the saintly tenant suffering the neglect of a Dickensian landlord. Common law is good for an emerging standard. If my hypothetical saintly defendant has done something relatively harmless and totally explainable and if a number of individuals with standing are not complaining or even support the fiduciary, I can imagine a court saying, “We are not prepared to say that having given careful consideration to modern theories of investment and the desires of a number of current beneficiaries, that this trustee has actionably breached a duty to the trust. While we might have invested this fund differently . . .”

⁷⁰ What if a Catholic priest as grantor establishes a trust for his Catholic family, the trust is silent, the trustee invests in an Ave Maria Catholic values mutual fund or funds, and the return is not satisfactory to a plaintiff with standing? I would guess a law suit by a disgruntled beneficiary would not succeed even if the return was less than that of a similar unconstrained fund (the return being less either because of the constraints or the transaction costs). Would it be implied beneficiary remission of duties or implied intent of the settlor? And add what if, what if, what if? If only the trustee feels the need to invest in Ave Maria for his own sake, it is disloyal. See generally, *infra* Part VI; Ave Maria Fund, <http://www.avemariafund.com> (last visited Nov. 26, 2007) (providing information on the Ave Maria Fund). The Ave Maria Fund takes advice from Phyllis Schafly and Tom Monaghan. The social indexing organization KLD Research & Analytics has a Catholic values index. See Press Release, KLD Research & Analytics, Inc., KLD Launches the

to a world where there is more flexibility in regard to SRI.

Forward looking charities coming to the attention of a state's attorney general may be able to negotiate with that attorney general and derive an administrative policy for charitable trusts that allows for some SRI investing in a jurisdiction. If that happens it could spread to other states. Or, a charity not under investigation could initiate negotiations with a progressive attorney general.

In lieu of litigation, I believe we need to know what SRI investors are doing, and the world needs to be told. We need facts, facts, facts. The only way to know what SRI investors are doing, so that our picture of "prudent SRI investing" can evolve without litigation, is for accounts and studies to emerge. Lawyers are snobs; lawyers love facts. Fact-rich SRI tales redolent with accounts of big numbers and big banks can have a very positive effect. Perhaps a business reporter of repute and ability will author a book or report for a foundation that is credible and dehorns SRI.⁷¹

4. Switching gears, there's room to argue that the whole question of SRI may become moot. How so? The basic premise of SRI efforts involving other people's money is that fiduciary owners of publicly traded equity securities can be convinced to expand their fiduciary investment duties and, by exhortation or shaming, be convinced to act as socially responsible investors.

One might argue that changes in the world of investing suggest that this model is flawed for future use.

Putting it differently, I wonder if SRI is less relevant than ever. How so? My sense is that institutional investing is changing so much that even as more assets come under SRI management, the institutional investors are doing things that make SRI irrelevant, which make it hard to think about and apply SRI. Oversimplifying, I am suggesting that hedge funds and private equity (PE) have nothing to do with the current model of SRI. If hedge funds and PE are in another galaxy from SRI, then as Mr. Hedge and Ms. PE become more important, SRI becomes less relevant. I am having trouble imagining how an SRI advocate attacks Mr. Hedge and

KLD Catholic Values 400 Index (Aug. 13 2007), *available at* http://www.kld.com/newsletter/archive/press/pdf/cv400_Press_Release081307.pdf (last visited Nov. 26, 2007). All screens have a cost.

⁷¹ *But see* Joe Nocera, *Well Meaning but Misguided Stock Screen*, N.Y. TIMES, Apr. 7, 2007, at C1. Similarly, a bibliography of close studies of profitable SR businesses that yield good returns might comfort some fiduciary investors, as would a best seller on a poster child SR business.

Ms. PE except as tools from the Devil's workshop (which is what some of them are doing).⁷² It's all in French for the typical SRI guy when it comes to fighting demons Hedge and PE. The basic attack becomes: "Stop Using the Devil's tools for the Lord's work." And I fear that may be boring.

Expanding on my point, I suggest we are witnessing what might be called (oversimplifying) the de-equitization of the market. What does that mean? It means several things. Most importantly, there is less classic equity out there to be responsible about. De-equitization, as I am using the term, is a mix of public companies going private⁷³ (for example, corporations are selling themselves to private equity⁷⁴ investors who do not have to disclose their activities at this time and in this place); ownership remaining public but consolidating; sales of publicly traded equity⁷⁵ (and, more importantly) sales of private equity⁷⁶ taking place on private mar-

⁷² In the summer of 2007, one has to wonder how long alternate investments of the sorts discussed in the text will remain front and center.

⁷³ See *Briefing: Public v Private Equity: The Business of Making Money*, ECONOMIST, July 7, 2007, at 68–69 ("Life is no longer much fun in a publicly quoted company. Executives have to suffer the slings and arrows of intrusive media coverage, the oppressive tedium of 'box-ticking' corporate-governance codes, the threats of activist investors and short sellers, and the scrutiny of single-minded political campaigners. . . . Public companies have to reveal a lot more than private ones. Pressure groups can pore over every detail of company policy from the use of child labour to carbon emissions."). Decreasing liquidity in the summer of 2007 may signal changes in private equity investing.

⁷⁴ There is said to be something called private equity in SRI investing, but returns are said to be 10% short of "regular" private equity investing, and I am tempted to guess it's just close corporation do-good investing. Corporations are also buying back their own securities, which reduces the amount of equity in public hands. It's possible that private equity's day has come and gone. See James Politi & Francesco Guerrera, *Not Dancing Anymore: How the Music Stopped for Buy-Out Buccaneers*, FIN. TIMES (London), Aug. 14, 2007, at 7. Efforts to open up the process have been at least partially successful—as when the *San Jose Mercury News* and others sued California public pension funds to reveal fund management fees. See Tod Wallack, *CalPERS Reveals Payments; Coalition Forced Transparency on Fees for Funds*, S.F. CHRON., Dec. 8, 2004, at C1. If the reputations of public figures might be undermined, then the complexity of their finance dealings need not be told. See Alec MacGillis & John Soloman, *Edwards Says He Didn't Know About Subprime Push*, WASH. POST, May 11, 2007, at A6.

⁷⁵ I am referring to so called big boy letters often used when insiders sell to sophisticated investors who sign a letter waiving their rights to claim wrongdoing because the seller is an insider and knows more. The buyer is ignoring the information asymmetry and saying, in essence, "I am a big boy. I can take the pain. I know what I'm doing."

⁷⁶ "Private equity is a heavily geared, 'long only' investment in illiquid assets (whole companies), with high levels of control and a multi-year time horizon." Relative Values, *supra* note 48. See John Plender, *Private Equity Cannot Escape the Public Eye*, FIN.

kets, outside public purview;⁷⁷ sophisticated investors of the sort SRI advocates are always lobbying being attracted to derivative investments that don't lend themselves to SRI analysis;⁷⁸ and a small, but growing, movement to fund pension obligations with bonds not stock (so-called asset-liability matching—matching pension liabilities to a bond portfolio).⁷⁹ Bonds (debt) are boring, and the holding of bonds does not lend itself to SRI campaigning (“student rally at noon to protest the university’s buying short term commercial paper in the secondary market of a company accused of polluting” doesn’t quite do it). Derivatives that are classified as debt can be given equity like characteristics so that one can have one’s cake and eat it too. Such derivatives would be hidden behind two curtains: (1) complexity and (2) “We’re debt, we’re boring.”

Additionally, synthetic/virtual/derivative investments theoretically allow the replication of the risk and return profiles of socially unwholesome assets and portfolios without actually owning the unwanted assets.⁸⁰

TIMES (London), Apr. 24, 2007, at 13. (“[L]arge chunks of the global corporate sector are becoming less transparent. In jurisdictions such as the US, where there is no requirement for private companies to make accounts publicly available, much information about business activity is disappearing into a black hole.”).

⁷⁷ Goldman Sachs has established a private stock exchange where holders of large stakes in private equity can sell to entities that want to be holders of large stakes in private equity. Hedge Fund A can sell to Hedge Fund B without having to sell over the counter, A to B in a private transaction. See Timothy Taylor, *Recommendations for Further Reading*, 21 J. ECON. PERSP., Spring 2007, at 239–40 (“Private equity firms, almost non-existent in 1980, sponsored more than \$200 billion of capital commitments last year alone.”). Also note that “5% of the value of global initial public offerings was raised in the U.S. last year, compared to 50% in 2000.” *Id.* See also *Private Stockmarkets: Hail the Hybrids*, ECONOMIST, June 9, 2007, at 86 (“Another [attraction of private equity] is the possibility of raising capital while avoiding the less desirable trappings of full public ownership, such as class-action litigation, compliance with the Sarbanes Oxley law on corporate governance, and pressure to make quarterly numbers.” And one might add pressure from SRI investors.). Goldman has also established a small SRI unit.

⁷⁸ See Gillian Tett & Paul J. Davies, *Unbound: How a Market Storm Has Seen Derivatives Eclipse Corporate Bonds*, FIN. TIMES (London), Aug. 8, 2007, at 7. See generally SATYAJIT DAS, *TRADERS, GUNS & MONEY: KNOWN AND UNKNOWN IN THE DAZZLING WORLD OF DERIVATIVES* (2006) (providing a good explanation of derivatives).

⁷⁹ The inventor, or rediscoverer, of this idea is John Ralfe, the actuary for the Boots pharmacy pension plan in England, who got a lot of attention for selling all equities in the plan and substituting bonds. See generally John Ralfe Home Page, <http://www.johnralfe.com/> (last visited Nov. 26, 2007).

⁸⁰ See John Cassidy, *Hedge Clipping*, NEW YORKER, July 2, 2007, at 28 (explaining why Cass Business School Professor Harry Kat questions why anyone would pay hedge-fund fees); Eleanor Laise, *The Hedge-Fund Clones: Wall Street Concocts Products with Fewer Barriers, But Will Returns Match*, WALL ST. J., July 21, 2007, at B1. Similarly, the

Although this is not happening in 2007, as a matter of purposeful SRI, as far as I know, it is quite possible and could sound the death knell of negative (or exclusion) SRI. This will end shaming by direct exclusion and not starve evildoers of capital.⁸¹

So, there is less public equity now. Sophisticated investors are buying other things besides shares of public companies, and less of that public equity is held by pension trustees. The defined benefit pension plan is a dying beast; trustees of such plans often buy alternative investments, and many SRI investing pleas are aimed at such trustee funds. As self-directed, defined contribution pension plans take over, it will be the pensioner herself who does or doesn't choose the SRI investment.⁸² Trying to convince trustees of defined benefit pension plans to engage in SRI will become a dying trade. So, it could be argued that SRI is based on a model that is, at best, volatile and, at worst, also a dying beast.⁸³

And, if I may, it seems to me that the public relations efforts, proxy battles, and shareholder motions seeking socially just corporate action are more efficient ways of changing corporate behavior than selling or refusing to buy the shares of offending corporations⁸⁴ or even engaging in

ease with which equity exposure can be converted to debt like instruments makes the tracing of clean and unclean investments by marching students all the harder. *See* Mohamed El-Erian, *How to Reduce Risk in the Financial System*, FIN. TIMES (London), July 10, 2007, at 15. Ditto for the transfer of the risk traditionally associated with traceable equity or junk bonds, which are understood to have equity-like characteristics. Complexity is management's friend when avoiding SRI demands is concerned. *See, e.g.*, John Plender, *There Can Be No Return to 'Normality' of a Freakish Bubble*, FIN. TIMES (London), Aug. 30, 2007, at 38 ("[A] peculiar feature of this 21st century financial crisis is its opacity. Nobody knows where risk has ended up . . ."). *See also* Jasmina Hasanhodzic & Andrew W. Lo, *Can Hedge-Fund Returns Be Replicated?: The Linear Case*, 5 J. INVESTMENT MGMT. 2 (2007); Steve Johnson, *The Sector That Arrived Late to the Party*, FIN. TIMES (London), July 31, 2007, at 6.

⁸¹ *See generally* HUDSON, *supra* note 10, at 5–6; Knoll, *supra* note 3.

⁸² *See generally* Samuel Estreicher & Laurence Gold, *The Shift From Defined Benefit Plans to Defined Contribution Plans*, 11 LEWIS & CLARK L. REV. 331 (2007) (stating that the shift to allowing participants decision-making authority will fail to provide adequate retirement income and a possible solution); David Wighton, *Pensions Worry CEOs*, FIN. TIMES (London), July 25, 2007, at 3 (discussing the current changes occurring in the operation of U.S. company pension plans).

⁸³ If the topic is beasts, I cite Tony Jackson, *Monsters Are Trampling the Divisions Set Up to Protect All*, FIN. TIMES (London), July 16, 2007, at 18 ("Other financial institutions are becoming monsters as well."). Monsters are not swayed by SRI arguments.

⁸⁴ I have concluded on casual reading that activists propose a scary annual meeting shareholder's resolution and then immediately withdraw it when management agrees to negotiate. Thus Marriott has agreed to train employees to spot exploited minor sex

more sophisticated SRI activities.⁸⁵ I think it's no accident that these days major pension funds seek to convince major corporations to stop doing business in a place like Iran rather than to threaten to sell the stock.⁸⁶ The traditional tools of SRI are weak devices for effecting corporate change when compared to the semi-strong tool of shareholder resolutions and the stronger tool of bad public relations.

5. Even if pension trustees will listen to SRI pleas, the pressure on pension fund trustees to earn every last dime will impede the acceptance of SRI. Constrained portfolios are second best. The universe is diminished. There are fewer opportunities. Diversification might be affected. Even pro-SRI pension trustees are very hungry for return, and some of them are concluding that SRI constrained portfolios are called constrained for a reason—they're constraining return.⁸⁷

workers. See Melissa Stee, *Churches Pressure Travel Industry on Sex Trafficking*, RELIGION NEWS SERVICE, Apr. 4, 2007. Engagement, activism, and advocacy play an important role in SRI.

⁸⁵ Warren Buffett was asked to divest shares of PetroChina because of its activities in Sudan. He refused. Soon thereafter, he reduced his PetroChina holdings. Coincidence? You decide. See Francesco Guerrera, *Buffett Cuts Back PetroChina Stake*, FIN. TIMES (London), July 28, 2007, at 19. KLD offers a Sudan compliance product. See KLD Research & Analytics, Inc., *Sudan Compliance Product*, <http://www.kld.com/compliance/sudan/index.html> (last visited Nov. 26, 2007). And there is a reform Sudan exchange traded fund. See G. Jeffrey MacDonald, *More ETFs Aim to Please the Socially Minded: Two New Exchange Traded Funds Are Geared Toward Alternative Energy Firms and Pressuring for Reform in Sudan*, CHRISTIAN SCI. MONITOR, July 23, 2007, at 13.

⁸⁶ See e.g., Tim Martin, *Divestment Efforts Take Root*, DAVIS ENTER., July 25, 2007, at 1 (discussing how pension funds lean on Shell to get out of Iran, rather than threaten to sell Shell shares).

⁸⁷ See Gilbert Chan, *CalPERS To Ease Up on Social Activist Role*, SACRAMENTO BEE, June 19, 2007, at A1; Gilbert Chan, *CalSTRS Rethinks Tobacco Investment Ban*, SACRAMENTO BEE, Sept. 6, 2007, at D1. Cf. Tony Jackson, *Perfect Recipe for Swings Between Greed and Fear*, FIN. TIMES (London), July 9, 2007, at 18 ("For years, desperately low real yields have pushed institutions such as pension funds . . . into risky assets, as a means of fulfilling rash promises to pensioners."). Interestingly, the competition for poorly run companies is fierce. Oh what is an investor to do? Sell them short? Buy them because private equity will pay you a premium because the PE lads want to take the poorly run operation private and fire everyone, clean up the balance sheet, and take it public again and make a lot of money? Or buy them because corporate activists will buy them and clean them up without taking them out of the public arena and the price will rise? One might argue that only the terminally ill corporations should be sold short, for fear the price will rise when the lemonade makers discover the short seller's lemon. For the proposition that it will be harder for private equity types to make money buying and cleaning up lackluster corporations, see Jeremy Grantham, *After the Calm, Private*

6. SRI will get better.⁸⁸ SRI folks will continue to close the risk adjusted return gap between what SRI can do and what pure financial investing can do. To the extent that is not possible, they will make better arguments about why their goals are more important than making money.⁸⁹ Public attitudes will change.

7. More and more aspects of the nonprofit process will be quantified and subjected to metrics. Metrification, if you will, will be the order of the day. That is the world of the modern non-SRI investor. And in the broader world of nonprofits we see charitable donation advisers, and we know that sophisticated foundations seek to know quantitatively the impact and efficiency of their grants. I expect the further metrification of SRI. To me, this is an extension of the world of hybrid investing and fourth sector notions.⁹⁰ The importing of venture capital and PE ways of doing things into the world of charity is one more example of shining a quantitative

Equity Must Now Brace for the Storms, FIN. TIMES (London), Aug. 22, 2007, at 34 (Hot hands cool down, it's natural law.).

Another interesting point goes like this. It is said that SRI campaigns are attempts at pseudo-state governance or regulation of corporations. See LANGBEIN, *Social Investing of Pension Funds and University Endowments*, *supra* note 17, at 9–12. It was said in 2007, by a learned commentator, that misbegotten, targeted attempts to regulate derivatives can lead to the undoing of our global financial system. See El-Erian, *supra* note 80. It was further implied that all such regulation is inevitably incompetent, especially when it is politically motivated (which SRI arguably is). See *id.* So, one might argue that SRI, insofar as it properly labeled pseudo-regulation, runs the risk of bringing down the whole financial system. For an article about governance and SRI, see Phil Angelides, *Born in Sacramento: The 'Green Wave' of Clean Environmental Investing Began Here*, SACRAMENTO NEWS REV., Aug. 16, 2007, at 27 (stating that a former elected official claims to have taken up SRI early in the game).

⁸⁸ See Rob Bauer, Kees Koedijk & Roger Otten, *International Evidence on Ethical Mutual Fund Performance and Investment Style* 13 (LIFE Working Paper No. 02.59, 2002), available at <http://ssrn.com/abstract=297882>. Professor Bauer is a frequent writer on SRI.

⁸⁹ For the most part, people who do money well don't do SRI. If they do it, they segregate in special units or limit the involvement either to indices or to very traditional exclusions (tobacco, alcohol, and arms), which are easy to do and do not dramatically reduce opportunity or diversification.

If SRI becomes more common, it surely will represent an opportunity for non-SRI investors to profit. The more common SRI becomes, the more the prices of SRI shares will be bid up (and the lower shares of non-SRIs will fall) and the greater the relative return on non-SRIs (chiefly because dividends will be higher than on SRIs and will contribute meaningfully to total return, even as the dividend return on SRI stocks decreases). One would want the capital gain from the newly wanted SRI stocks and the dividends (and put income) from the unloved non-SRI stocks.

⁹⁰ See *supra* notes 54–58 and accompanying text.

MBA light on things.

8. Points of view that have been labeled hortatory law may well become normative or prescriptive. I have in mind “expressive law” and “constitutive law.” Expressive law is law that is meant to do more than regulate conduct and behavior; it is also meant to make express ideas about law and change values.⁹¹

Proponents of constitutive law would tell us that one cannot act one way and be something else—that a “good” nonprofit cannot make bad investments and remain good.⁹² For instance, mission and investments must be harmonious; there must be harmony at the inner core.⁹³ This applies to personnel and to institutions. The law of fiduciary investing will take these arguments into account. At the moment, these arguments go unheard in law offices, but their day may well come. In any event, these bodies of thought will be brought to bear, to one degree or another. SRI seeds will be sown on the rocky soil of fiduciary investing and will take at least shallow root.

9. New ideas will be brought forth. Old ideas will be rephrased in new ways that are or seem to be more respectable in the halls of modern finance. Money will be made and lost.

V. SOME THINGS NEVER CHANGE

1. Every investor who has an SRI cast of mind and owns imperfect assets still must choose between exit and voice when corporate management is doing something unattractive. SRI investors still must face the question of which is better for society. To exit, vote with your feet, and sell the stock, probably has less impact than to socially vote proxies or offer an outrageous shareholder’s motion and then withdraw it and negotiate with management or campaign in some other fashion for a change in corporate conduct. The next buyer of the shares won’t care about the

⁹¹ See Jane B. Baron, *The Expressive Transparency of Property*, 102 COLUM. L. REV. 208, 225–29 (2002) (examining expressive law with regard to property); Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENVTL. L.J. 295, 310 (2003) (“[L]aw . . . does more than directly regulate conduct. It also, and inevitably, conveys endorsement or rejection not just of the conduct regulated but also of the values that inform that conduct. The messages law sends . . . can be as important as its direct regulatory power.”) (footnote omitted).

⁹² See, e.g., Doremus, *supra* note 91, at 314–18.

⁹³ See, e.g., *id.* A constitutive perspective calls for a nonprofit to choose investments consistent with its values. Apologies to those who give these ideas more weight than this Article gives them.

exit,⁹⁴ and it seems unlikely the cost of capital for the divested corporation will go up (that being the SRI financial justification for the divestment),⁹⁵ although there may be a public relations justification for a noisy sale—to generate bad press for the “villainous” corporation whose stock is sold.⁹⁶

2. Dirty money still remains the bane of every charity’s existence. If it isn’t soliciting donations from some wicked capitalist it’s earning the best return via sin stocks⁹⁷ or getting research grants from sin stock com-

⁹⁴ See generally Knoll, *supra* note 3.

⁹⁵ See HUDSON, *supra* note 10, at 59–61; Knoll, *supra* note 3, at 703.

⁹⁶ As a young man I thought voice was the equivalent of staying a member of a restricted country club. I am trying to change them from the inside. As a not young man I no longer think that. It is to be noted the Yale handbook on how to manage Yale’s investments ethically takes the position that it’s not the university’s job to support publicity campaigns against corporate miscreants, even if they have divested ownership of that corporation’s stock. See JOHN G. SIMON, CHARLES W. POWERS & JON P. GENNEMANN, *THE ETHICAL INVESTOR: UNIVERSITIES AND CORPORATE RESPONSIBILITY* 95–100 (1972).

⁹⁷ See *id.* at 26 (quoting GEORGE BERNARD SHAW, *MAJOR BARBARA* 18 (Dadd, Mead & Co. 1941) (1907)):

We share George Bernard Shaw’s point of view reflected in his comment on the clergyman who would accept money only from sweet old ladies: “He has only to follow up the income of the sweet ladies to its industrial source, and there he will find Mrs. Warren’s profession and the poisonous canned meat and all the rest of it. His own stipend has the same root. He must either share the world’s guilt or go to another planet.” Too many people, however, let the matter rest here: because one cannot avoid contamination, one cannot do anything at all.

I put the point less elegantly in Dobris, *supra* note 11, at 224 (“If I have a bad knee and a bad back it is absurd to say that since I will not fix the back, there is no purpose to fixing the knee.”). Along the same lines, Evelyn Brody also noted Shaw’s ridicule of the notion that clean money can be separated from tainted money:

Some of [my critics] thought that the [Salvation] Army would not have taken money from a distiller and a cannon founder: others thought it should not have taken it: all assumed more or less definitely that it reduced itself to absurdity or hypocrisy by taking it. . . .

[The Army] must take the money because it cannot exist without money, and there is no other money to be had. Practically all the spare money in the country consists of a mass of rent, interest, and profit, every penny of which is bound up with crime, drink, prostitution, disease, and all the evil fruits of poverty, as inextricably as with enterprise, wealth, commercial probity, and national prosperity. The notion that you can earmark certain coins as tainted is an unpractical individualist superstition.

Evelyn Brody, *Institutional Dissonance in the Nonprofit Sector*, 41 *VILL. L. REV.* 433, 469

panies.⁹⁸

3. SRI is still primarily about OPM—other people’s money in capital pools. I’ve never been asked by a human being to put my money into an SRI fund, and I don’t have any memory of getting SRI solicitations by mail or email.⁹⁹ But there are always folks wanting the funds backing my pension invested in SRI investments. I suppose that may change in the future.

VI. IF I WERE AN SRI GUY¹⁰⁰

1. I’d want to get out the story of the current state of affairs in the world of SRI investing. I think a lot of people are mentally stuck in the 1980s and assume that a small amount of money is badly being mismanaged under the (leaky) SRI umbrella. As long as most investors want to fail conventionally,¹⁰¹ get the word out that, “We’re conventional.” Make SRI a boring, conventional thing to do.

Drive into the popular imagination the seemingly large size of the pool of funds under SRI management and the commitment of major financial operations like UBS to the SRI market. Nothing, except perhaps a pin striped suit and a two hundred dollar tie,¹⁰² impresses trusts and estates, nonprofit lawyers, and money managers as much as big numbers.¹⁰³

To the extent major banks like UBS are selling SRI, try to tap into their sales force to make the point.

2. Try to meet quant¹⁰⁴ arguments as well as can be done. But then

n.179 (1996) (quoting George Bernard Shaw, *Major Barbara*, pref. (1911)).

⁹⁸ See, e.g., *Ban Up in Smoke*, STAN. MAG., July/Aug. 2007, at 22 (“Stanford researchers remain free to accept funding from any source . . .”).

⁹⁹ I have friends at another school in a left leaning department where salespeople come calling. I believe there was a meeting where SRI investments for 403(b) were touted and, I believe, sold in what was a successful camp meeting type sign up of investors. I would imagine it was hard not to buy in that context. One of my colleagues who read this piece tells me he has.

¹⁰⁰ “If I were a carpenter, and you were a lady.” BOBBY DARREN, *If I Were a Carpenter*, on IF I WERE A CARPENTER (Atlantic Records 1966).

¹⁰¹ See JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY*, 158 (1936).

¹⁰² See Peter Gumbel, *London vs. New York Smackdown*, FORTUNE, Aug. 6, 2007, at 36, 39; Observer, *Do Clothes Make the Bank?* FIN. TIMES (London), Aug. 14, 2007, at 8.

¹⁰³ In the summer of 2007 much was being made of the idea that agents wear suits and principals wear what they want. See Felecia Williams-Scott, *Casual Attire Can Still Be Powerful*, TIMES (Shreveport, LA), July 12, 2007, at 20.

¹⁰⁴ As used in this Article, the word quant (or quants) means an “expert in

stop pretending when the conversation is an informed one. Stop citing return history without discussing risk. Stop pretending that absolute return exists independent of risk. Have an answer to negative arguments against SRI, for example, that SRI and currently successful styles simply have overlapped for a moment in time and that is the reason for SRI's apparent success. Stop chanting slogans. It's not Saturday night at a faculty dinner party. Stop saying SRI is as good as modern portfolio theory and capital asset pricing model when it comes to making money. It's not. It's second best. It may be OK to say it's best to customers and true believers, but it's not going to convince quants.¹⁰⁵

quantitative analysis" (Dictionary.com, Quant, <http://dictionary.reference.com/browse/quant> (last visited Nov. 26, 2007)); or if you prefer, "[a]n expert in the use of mathematics and related subjects, particularly in investment management and stock trading" (THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1431 (4th ed. 2000)); or, "A person who has strong skills in mathematics, engineering, or computer science, and who applies those skills to the securities business. For example, a pension fund may employ a quant to put together an optimal portfolio of bonds to meet the fund's future liabilities. Also called rocket scientist." DAVID L. SCOTT, WALL STREET WORDS: AN A TO Z GUIDE TO INVESTMENT TERMS FOR TODAY'S INVESTOR 299 (3d ed. 2003). I would say the likeliest expertise is in statistics or computer simulations. See Gillian Tett, *Crunch Time: When the Computer Gets It Wrong*, FIN. TIMES (London), Sept. 1, 2007, at Life & Arts 1.

It's business slang. See Dictionary.com, Quant, <http://dictionary.reference.com/browse/quant> (last visited Nov. 26, 2007). Oversimplifying, it's someone who looks at the numbers and the theories and not at the story. Someone with a preference for numbers and whatever particular statistical or computer technique that makes sense to him or her. Hard guys. Someone who, when investing, is bloodless, indifferent to human considerations. A friend of mine defines it thusly, "A quant is someone who bases investment decisions on mathematical algorithms rather than on traditional research techniques such as company visits, management, interviews, etc." Or, if you prefer, I quote Peter Bernstein from an interview, "Professional investing has become much more quantitative and much less based on gut." *Once-Arcane Theories Drive Investment Innovation, Risks*, VANGUARD (The Vanguard Group), Summer 2007, at 1.

I believe there is another definition—someone who runs a so-called quant fund that is based on computer trading. I do not use the word in that sense. I also do not use the word to describe "quantitative hedge funds, or quants, which use computers to make trades based on mathematical equations." Anuj Gangahar & Peter Smith, *Quants 'Victims of Own Success'*, FIN. TIMES (London), Aug. 17, 2007, at 2. The meaning of the word is always up for grabs. See Emanuel Derman, *Business Bookshelf: Finance by the Numbers*, WALL ST. J., Aug. 22, 2007, at D10 (reviewing the book RICHARD R. LINDSEY & BARRY SCHACTER, *HOW I BECAME A QUANT* (2007)). Mr. Derman is the author of *My Life as a Quant* (2004).

¹⁰⁵ An SRI advocate might want quants on board because it will reduce opposition to fiduciaries investing in SRI portfolios. See generally Thomas W. Joo, *Race, Corporations*

3. Encourage intrepid trustees to act as SRI investors and see if they get sued.

4. Fund research on using derivatives to replicate the return of tainted portfolios or securities if the conclusion is that there's no return as good as the return on dirty money.

5. Fight hard for the transparency of the investments of PE and hedge funds.¹⁰⁶ Black box investing is bad for SRI because so many SRI tactics are based on shame and blame. It's hard to demonize a hedge fund that invests in a portfolio of collateralized debt obligations backed by asset-backed securities and synthetic collateralized debt obligations with counter party risk taken up by the Kingdom of Denmark and a Houston based hedge fund rumored to be backed by someone who used to work for the Bass family.¹⁰⁷ The unions and some politicians understand this.¹⁰⁸

6. Understand that one of the things SRI folks are doing is calling for the recognition of principles of expressive¹⁰⁹ and constitutive law. Encourage someone to write a fancy article on such versions of hortatory law as

and Shareholder Value, 54 J. LEGAL EDUC. 351, 360–64 (2004) (discussing similar tactics to those laid out in the text in connection with the value of diversity in the corporate world).

¹⁰⁶ Although hedge funds bring to mind rapacious investing done without regard to social values, there is no reason why hedgers cannot be socially responsible. See Simon Hildrey, *Strategy Selection: Socially Responsible Investment—Taking Responsibility*, FIN. TIMES MANDATE, June 1, 2005, available at http://www.ftmandate.com/news/fullstory.php/aid/710/Taking_responsibility_.html (referring to an SRI fund of [hedge] funds).

¹⁰⁷ Cf. Richard Beales & Gillian Tett, *The Real Risks Emerge When Pandora's Investment Box Is Opened*, FIN. TIMES (London), June 29, 2007, at 41; Stacy-Marie Ishmael, *A PIK of the ABCDs of Arcane Credit Derivative Terminology*, FIN. TIMES (London), June 29, 2007, at 41; René M. Stulz, *Hedge Funds: Past, Present, and Future*, 21 J. ECON. PERSP. 175, 176 (2007) (“Mass selling of hedge fund strategies is much harder because hedge fund strategies are too complex for the typical mutual fund investor to understand.”). See also Michael Kaplan, *A Game of Bluff and Bluster for Extravagant Reward*, FIN. TIMES (London), July 2, 2007, at 11 (“Private equity is different. Its very secrecy carries us away . . .”). Complexity is management's friend when avoiding SRI complaints is concerned. See *supra* note 80. There's an emerging view that dividend derivatives constitute their own asset class. Masking an S & P 500 investment in such a derivative might put some SRI hounds off the trail. Or, given that such derivatives are custom made, how much extra effort would it take to drop the dividend from the tobacco company that uses child laborers addicted to alcohol? In the same vein, such derivatives are often written around single stocks, so it becomes trivial to avoid my fake tobacco company. See Chris Hughes, *Dividends—The Accidental Asset Class*, FIN. TIMES (London), July 12, 2007, at 15.

¹⁰⁸ See *Crocodile Tears for Private Equity Titans*, FIN. TIMES (London), Aug. 30, 2007, at 8; *Walker's Way: Private Equity*, ECONOMIST, July 21, 2007, at 73.

¹⁰⁹ See Doremus, *supra* note 91, at 311.

they affect SRI. Exploring expressive and constitutive law and their relationship to and effect on SRI is likely to advance the SRI cause.

7. Understand in that context, and more generally, that there is a generation of young law professors that is economically literate, literate in hortatory law, and not necessarily obdurate about SRI investing—especially if approached from an environmental, social, and corporate governance (ESG) point of view.¹¹⁰ This is a growing audience of nondismissible folks that will at least listen respectfully to the semi-strong claims of SRI. They are not deaf to such claims.¹¹¹ There is a generation gap here—not all law professors who are open to SRI majored in sociology.¹¹² Recognize it and work it. There’s potential for forward motion here. There are some folks out there waiting to meet you.

8. Let’s talk about transaction costs. Step up to the plate and deal with the argument that SRI is, at best, too expensive. For example, even if screening for best ESG, to take an example, worked as a technique for obtaining alpha,¹¹³ the screening cost is awfully high.¹¹⁴ And, in a similar vein, can I, the trustee, justify purging the large and highly profitable oil stocks from my trust, thereby losing (say) 10% of the trust’s capital to capital gains taxes, in order to make the beneficiaries happy and try for a higher return?

Make the case for incurring high transaction costs in pursuit of justice or find ways around those costs.

Get funding to absorb the high transaction costs incurred in the pursuit of justice.¹¹⁵ Found and fund something one might call “The SRI Fund for the Future” that might make distributions to entities that incur excess transaction costs in pursuit of SRI justice.¹¹⁶

¹¹⁰ For a discussion of ESG standards, see FRESHFIELDS BRUCKHAUS DERINGER, A LEGAL FRAMEWORK FOR THE INTEGRATION OF ENVIRONMENTAL, SOCIAL AND GOVERNANCE ISSUES INTO INSTITUTIONAL INVESTMENT (2005) *available at* http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf (last visited Nov. 26, 2007).

¹¹¹ Quants love to be dismissive. See Daniel Gross, *Fifteen Dollars’ Worth of Smug*, SLATE, July 17, 2007, <http://slate.com/id/2170561/> (last visited Nov. 26, 2007).

¹¹² Apologies.

¹¹³ Alpha is the return achieved in excess of a benchmark return, after adjusting for any additional risk taken to achieve the return.

¹¹⁴ See Joe Nocera, *Well-Meaning But Misguided Stock Screens*, N.Y. TIMES, Apr. 7, 2007, at C1.

¹¹⁵ My colleague Tom Joo suggests considering seeking a tax credit.

¹¹⁶ Transaction costs may be going down. There are bound to be economies of scale. And one is tempted to say that the internet makes research cheaper. The dream would be

Alternatively, find funding for research into an SRI method that yields risk and gross return figures equivalent to a non-SRI portfolio, and then work on getting the transaction costs down, or as stated, move the transaction costs over to a nonprofit or low profit entity.

9. Get someone to write up the best modern case for SRI aimed at lawyers and trustees with spines. The aim should be to produce a brief that allows lawyers to opine that SRI is a legitimate activity and puts such folks in a defensible position if they are sued for engaging in SRI or for malpractice in blessing SRI.

10. In the same vein, encourage a credible law firm to set up as special counsel to opine as to the propriety of various social investments in various social contexts. Spine-endowed trustees could seek the opinion of such competent special counsel when it came to SRI matters.

In the same vein, encourage that lawyer or firm to constantly publish in support of SRI.¹¹⁷

11. Fuss about the Einer Elhauge point, which is, I believe, that corporations have wiggle room to do good, there really is no duty to profit maximize to the last dime in the corporate world, and corporate fiduciaries actually have some profit sacrificing discretion.¹¹⁸ Then argue that if what Elhauge says is so, then why not say the same about nonprofits and, to the extent it can be said, trusts?¹¹⁹ Taking Elhauge as gospel, one might argue from his paper that historically, corporations have been controlled by people who had a sense of duty to society and “felt the burn” of any social impositions they would impose by rapacious profit maximization. The urge to profit maximize was internalized. So, the Bush family steel mill corporation gave corporate funds to charity in the name of the corporation, sponsored Bushville’s July Fourth fireworks, etc. The corporation

returns equivalent to non-SRI returns obtained with transactions costs that were minimally larger than non-SRI transaction costs.

¹¹⁷ One could imagine a law professor playing a similar role.

¹¹⁸ See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738 (2005). One is tempted to tell the tale of Anita Roddick, the founder of the Body Shop, famed for its ethical business practices, and General Electric’s Ecoimagination program. See Adam Jones, *Trailblazer for the Disadvantaged*, FIN. TIMES (London), Sept. 12, 2007, at 23 (discussing the buy-out of the Body Shop and the death of its founder).

¹¹⁹ See Elhauge, *supra* note 118, at 738. For one thing, trust beneficiaries are more sentimentally appealing than corporate stakeholders. Widows, orphans, and 80 year old pensioners deserve special consideration. While corporate fiduciaries may (or may not) have profit sacrificing discretion, trustees do not. One might commission a business historian to Brandeis Brief the case for Elhauge’s point.

let a little profit leak away for the home team, society got a free ride, and only a very few corporate captains sought to earn the last corporate dime.¹²⁰ We were free to worship and adore a capitalist system under which we did not live—we were free (like boys in a schoolyard) to say we were something we were not—total profit maximizers. Those who controlled corporations did take social needs into account. They did “breach their duties” to shareholders every day. Managers considered social and moral norms all the time, whether we admitted it or not. When they stopped doing that, when they became profit maximizers, in fact, then commentators and some courts, in dictum, said that profit maximization was required even though it really wasn’t historically and arguably isn’t today. Corporations historically did sacrifice corporate profits all the time, although it is done less today.¹²¹

Assuming the Elhauge argument is accepted, then one might argue that it’s not a big leap to move it over to the nonprofit corporations arena. Indeed, it’s almost what you’d expect of nonprofit managers.

One could argue that society is entitled to its leakage of profit for social good, even if it is an inefficient way to get money spent on social good.¹²² That is, SRI investing by foundations and nonprofits is good for

¹²⁰ And those that did were pilloried in the movies. *See, e.g., IT’S A WONDERFUL LIFE*, (Liberty Films (II) 1946). *See generally* Fannon, *supra* note 46. To the extent I am correct in this regard, the current (2007) pattern of selling family businesses is arguably unfortunate. *See* Francesco Guerrera, *Out of the Picture: Why Many of America’s Big Family Businesses Are Looking to Sell Up*, *FIN. TIMES* (London), July 23, 2007, at 9.

¹²¹ *See* Thomas W. Joo, *Corporate Hierarchy and Racial Justice*, 79 *ST. JOHN’S L. REV.* 955 (2005). *See also* Kahn v. Sullivan, 594 A.2d 48 (Del. 1991) (upholding the approval of a settlement agreement regarding a lawsuit brought by shareholders concerning a donation to an art museum). In their own context, Jonathan Klick and Robert Sitkoff point out Posner’s observation that “neither the trustees nor the staff of a charitable entity has a ‘strong incentive to maximize value.’” Klick & Sitkoff, *supra* note 13 (forthcoming May 2008) (quoting RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 547 (7th ed. 2007)). One might argue, in the context of nonprofit endowment investing, that if this is the order of the day for charities, in fact, why not extend that attitude to SRI. Isn’t it a bit silly to cabin off endowment investing in the midst of all this unpunished lackadaisicalness? Indeed, profit or nonprofit, so many mistakes are made, so many agency costs are paid without anyone being successfully sued. Why are poor old nonprofits always told they can’t engage in social investing? T’ain’t fair.

Put another way, can it be in this new world that heralds the wisdom of crowds, celebrates behavioral finance, and gives us financial failure of experts in the summer of 2007, that the growing number of fans of SRI know something that many readers of this Article have been missing?

¹²² Child labor may be efficient and profitable, but we don’t allow it. Brothels in Nevada may be very profitable, but we don’t require trustees to invest in them. We’ll

society even when it doesn't profit maximize.

Putting it another way, to the extent that recent efficiencies in corporate management have led to our losing the modest leakage of the last dime of profit to charity, how about redeeming that lost leakage via SRI? Can it not be said that that SRI is the 21st century version of the family corporation paying for the July fourth fireworks in the park? We're entitled to our leaks. And, the truth be told, it's all about second best systems in any event, and one might argue that there is not much point in arguing about which second best solution is better, at least not at the margins.¹²³

Putting it a little bit differently, if business corporations can sacrifice a bit of profit why can't nonprofit corporations?¹²⁴

This may work for nonprofit corporations, but it is less likely to work for trusts. There are, however, approaches that might bear fruit for private trusts short of arguing that every trust has the right, if not the duty, to leak a little for society.

12. Preach to the middle. There's room for compromise on SRI. Find that compromise. I suspect it goes like this: a bit of SRI is OK for charitable endowments and private trusts where a meaningful number of current beneficiaries request it.

13. Continue to press for enabling statutes that allow more SRI, recognizing that the organized law reform establishment is fairly conservative. Consider moving from the national stage to individual states, where the legislature may be more receptive to change than the national law reform establishment.¹²⁵

14. Building on the preceding paragraph, see if a state can be induced to make SRI appropriate in silent instruments, perhaps, if need be, under a 5% de minimus exception, and then, speaking the unspeakable, hope that trustees consider the wisdom of changing the situs of their trusts to that

trade a little inefficiency for social good. There are limits on corporate valuing.

¹²³ One might be prepared for the argument that such do-good expenditures might be better made through increased taxes or charitable contributions.

¹²⁴ See Elhauge, *supra* note 118; FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 110. Larry Mitchell advocated the same basic idea in the 1990s (before "norms" discourse was developed enough to make this all sound scientific). See Joo, *supra* note 121, at 964 (citing Mitchell, Elhauge, and Eisenberg).

¹²⁵ Consider weak legislation in one or more states. Get the camel's nose in the tent. An example is to be found in Manitoba: "In Manitoba, one of the Canadian provinces, trustee legislation and pension legislation state that non-financial considerations are not prohibited, so long as trustees and administrators still satisfy the requisite standard of care." ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 10, at 19.

state.¹²⁶ Speaking cynically, a state might do this to generate business for banks, bench, and bar. In other words, try to establish a (compromise) 5% rule—that a fiduciary can invest 5% of her portfolio in SRI investments without further meaningful inquiry, so long as the investment decision and choice of assets are made in a dutiful manner.¹²⁷ Such a rule would offer efficiency in the time saved for judges, trustees, and lawyers.

15. Seek to encourage the creation of as quantitatively sound an SRI approach to investing as can be found. Get a quant to design the best SRI fund possible from a quant viewpoint. For example, what would a starving quant who needed to put food on the table grudgingly do if he was given the job of coming up with the best SRI fund or screen or what-have-you? In other words, get a quant to design an African Queen for SRI—an inferior, second-best vessel, but one that will get down the river and into the lake.¹²⁸

16. Answer the following questions: When is reducing return for SRI purposes not a breach of duty? When is not reducing risk, for SRI purposes, not a breach of duty?¹²⁹ Is it possible to quantify how much can be

¹²⁶ See UNIF. TRUST CODE § 202 (2005), 7C U.L.A. 458 (2006) (stating that the trustee submits to personal jurisdiction in the state in which the principal administration of the trust occurs or is moved). Alaska strikes me as the state to approach. Similarly, there may be SRI virtue in the Alaska statute that creates an informal system for releasing a trustee from liability upon the termination of a trust, by giving the beneficiary a window in time to complain and terminating his rights if he doesn't complain in a timely manner. See ALASKA STAT. § 13.36.100 (2007). This offers some protection for the trustee who is willing to indulge in a bit of SRI if the change of situs is not, itself, a breach of fiduciary duty. If it's cheaper to run an Alaska trust than a northeast corridor trust, then this savings in transaction costs might be claimed to offset increased transaction costs or return because of SRI activities. *Cf. supra* note 125.

¹²⁷ For further commentary on the magic 5%, see Dobris, *supra* note 34. Race to the bottom motives might inspire such legislation. See Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 417 (2005); Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1060, n.126 (2000).

¹²⁸ See THE AFRICAN QUEEN (Horizon Films 1951). Call it the African Queen, Second Best, SRI, Quant Fund of America. If you screen for nonfinancial reasons, you will get a worse return or the risk will increase and ten million Monte Carlo simulations will prove that. Your claim is based on a sampling error. See MARK KRITZMAN, THE PORTABLE FINANCIAL ANALYST 13–43 (2d ed. 2003) (discussing Monte Carlo simulations). Prospectively, it seems likely that the constrained returns that can be demonstrated for past periods will not be found in the future.

¹²⁹ In early Summer of 2007 there was room to argue that systemic risk was at an all time low, however, by the end of the summer it was easy to argue that it was actually higher than ever. See El-Erian, *supra* note 80.

spent on transaction costs without there being a breach of duty? How much of that transaction cost amount can be allocated to SRI without breaching a duty? Is there a mechanical de minimus rule, or must the dead weight be born in pursuit of pecuniary profit?

17. Push Long Horizon Investing (LHI) and let others make the connection to SRI investing. There is an almost superstitious reverence for long term investing, a bred-in-the-bone love of it.¹³⁰ And, I would submit that thinking about LHI automatically leads to thinking about SRI.¹³¹

18. Get SRI arguments into the trusts and estates and the nonprofit corporations casebooks. Change the thinking of the next generation of lawyers by reaching today's law students.

19. Recognize that run of the mill lawyers are busy and distracted. Get form language allowing SRI out into the world so that a lawyer with

¹³⁰ One of the supposed advantages of private equity investing is the long-termism. *But see* Francesco Guerrera & James Politi, *Moodys Joins Growing Chorus of Criticism of Private Equity*, FIN. TIMES (London), July 9, 2007, at 17; *Relative Values*, *supra* note 48 (“[Speaking of private equity,] assets are tied up long-term. Kohlberg Kravis Roberts . . . says 73 per cent of its assets are committed for as much as 18 years. . . . [I]t does give huge flexibility to ride out tough times.”).

¹³¹ David Swensen of Yale is said to be a fan of LHI. Tap into the reverence for LHI. Dance like a New England trust banker of yesteryear. *Cf.*, John Authers, *Cockroach Strategy for Hedge Funds*, FIN. TIMES (London), Aug. 6, 2007, at 10. (“[T]he species most likely to survive in the long-term, avoiding catastrophic changes in their environment, are ‘coarse’ organisms, with a simple survival strategy.”) (reviewing RICHARD BOOKSTABER, *A DEMON OF OUR OWN DESIGN* (2007)). Very long-term investing of endowments and the like is considered astutely in James G. Garland, *The Fecundity of Endowments and Long-Duration Trusts*, 31 J. PORTFOLIO MGMT 44 (2005). *See generally* LOUIS S. AUCHINCLOSS, *THE LANDMARKER IN TALES OF MANHATTAN* 233 (1967) (telling a story of a doyenne determined to wreck her landmark cast-iron building in Soho, New York City, against the stated goals of a preservationist in her social circle. She commissions the demolition of the building and so the story ends. But we know he was likely right. Were she alive today, her cast-iron building would likely be worth more than whatever she built in its place, or so say I).

LHI is always appropriate: for the 30 year old (obviously), for even the healthy 80 year old (is an actuarial life expectancy of eight years short?), and even for the terminally ill with a few weeks to live (you can't spend it, but you're likely leaving it to someone with a long horizon). Horizon affects things like asset allocation (which has nothing directly to do with SRI). One should always be optimizing return vs. risk. LHI often suggests a large allocation to equity in a portfolio. *See generally*, David Salem, President, The Investment Fund for Foundations, *Why Not 100% Stocks?*, in *QUARTERLY REPORT* (The Investment Fund for Foundations), Mar. 31, 1995, at 17–23, *available at* http://www.tiff.org/TEF/articles/why_not_100_percent_stocks.html#top (last visited Nov. 26, 2007).

an SRI client can adopt the form. Try to get promulgators of trust form books to include the language in their form books. Similarly, consider trying to get the question “Do you want your trustee to have the power to make SRI investments?” into trust lawyers’ checklists. Of course, these suggestions could force anti-SRI sentiments out of clients and into their instruments, which would defeat SRI goals if SRI became acceptable under silent instruments.

20. It may be time to unbundle SRI and seek a laxer standard for foundations and charities than for pensions and private trusts.¹³²

21. Push the ideas of nonfinancial trust income (i.e., of psychic income,¹³³ of social return, of nonpecuniary return); of implied setting aside by the grantor of the fiduciary duties that forbid SRI; and the usefulness of the argument that a majority of the beneficiaries can set aside the duties that forbid SRI, which morphs into the argument that virtual representation can be used to tie the hands of minor and unborn beneficiaries

¹³² It could be argued that the business judgment rule means that the lowest SRI standard is applied to the profit seeking investments of for-profit corporations. There is no cause of action for not making tennis balls. As to a change in nonprofit endowment investing, see generally, MARK KRAMER & SARAH COOCH, SHELL FOUNDATION INVESTING FOR IMPACT: MANAGING AND MEASURING PROACTIVE SOCIAL INVESTMENTS (2006), available at <http://www.fsg-impact.org/app/content/ideas/item/287> (last visited Nov. 26, 2007); Peter D. Kinder, *New Fiduciary Duties in a Changing Social Environment*, J. INVESTING, Fall 2005, at 24; KINDER, *supra* note 26, at 30; Mark R. Kramer, *Foundation Trustees Need a New Investment Approach*, CHRON. PHILANTHROPY, Mar. 26, 2006, at 43. For discussion of the idea that nonprofits are different than for-profits in another context, see Linda Sugin, *Resisting the Corporatization of Nonprofit Governance: Transforming Obedience into Fidelity*, 76 FORDHAM L. REV. 893 (2007).

¹³³ I think the idea of psychic income is captured in the expression: utility function beyond return and risk. See KRITZMAN, *supra* note 128, at 78–79 (discussing utility function). It also can be called noneconomic factors in investing; or “other impacts.” The term is not mine. The screening out of stocks that offend is called by some aversion investing. This catches the psychic part of psychic income to my satisfaction.

My research assistant in the summer of 2007, Nicholas Godlove, University of California, Davis Class of 2009, has taken a shine to the idea of an Islamic SRI fund. He proposes a fund with low volatility and high return. Let us take that to be the case. What if the trustee of a private trust for religious Jewish beneficiaries buys this fund? Can they successfully claim that the psychic pain requires a court to order the recalcitrant trustee to sell the fund? To pay damages? Is it proper to use this fund as a benchmark when trustees are sued successfully by beneficiaries who are discontent with their trust’s return?

My colleague Chris Elmendorf suggests that a university or a charity may have no duty to create a bandwagon but may have a duty to get on one that impacts their mission or their effectiveness. There is a duty to pick your battles.

who might complain at a future date about SRI.¹³⁴

a. Let's talk about psychic income.¹³⁵ It seems to me that if SRI proponents can get recognition for psychic income, they have achieved a major victory. There are three currencies, I would submit: time, money, and happiness.¹³⁶ The only one recognized in the trust world, historically, is money. Thus, I assume that the default rule is that the trustee is to invest without regard to the mental well being of the beneficiary(ies) if the trust is silent. So my thought for SRI folks is to try to get some recognition for happiness—or psychic income for the beneficiaries.

Psychic income can be negative or positive. Let's go negative first. Assume an Islamic SRI fund¹³⁷ with low volatility and high return. What if, without animus, the trustee of a private trust for beneficiaries who happen to be Jews who are offended by the investment buys this fund? Can the beneficiaries successfully claim that the psychic pain this investment causes them requires a court to order a recalcitrant trustee to sell the fund? To pay damages? Is there a difference between claimed mental pain and claimed physical illness? Will a doctor's certificate make the difference?¹³⁸ The law's experience with tort damages for mental anguish

¹³⁴ Assuming that psychic income is given credence, what do we do about the doctrine of virtual representation? I want the psychic income of SRI. Does that bind my son who is my successor in interest? His child (unborn)? Can a guardian ad litem appointed to represent the incompetent or the unborn do anything but fight psychic income for her wards? Especially if the ward is incapable, by virtue of limits of mind, of "spending" the psychic income. A conservative statute dealing with virtual representation is N.Y. EST. POWERS & TRUSTS LAW § 7-1.9 (McKinney 2002). There are also statutes dealing with "decanting" the trust into a new trust that has new terms, which in some circumstances, allow for action without beneficiary approval. *See, e.g.*, ALASKA STAT. § 13.36.157 (2006); DEL. CODE ANN. tit. 12 § 3528 (2001); NY EST. POWERS & TRUSTS LAW § 10-6.6(b) (McKinney 2002); 2007 S.D. Sess. Laws 1288; TENN. CODE ANN. § 35-15-816(b) (2007).

¹³⁵ One can argue that psychic income ideas lurk in the SRI concept of the "triple bottom line." *See HUDSON, supra* note 10, at 49 (stating that the triple bottom line accounts not just for the economic bottom line but also for social externalities and stakeholder issues).

¹³⁶ The economics of happiness has taken off as a topic worthy of academic concern in recent years. *See, e.g.*, LUIGINO BRUNI & PIER LUIGI PORTA, HANDBOOK ON THE ECONOMICS OF HAPPINESS (2007).

¹³⁷ I suppose it's really an RRI fund (religiously responsible investing). *See generally* Joanne Slater, *Growing Interest: When Hedge Funds Meet Islamic Finance*, WALL ST. J., Aug. 9, 2007, at A1 (discussing the financial markets striving to provide Islamic-friendly products).

¹³⁸ Would it be proper to use this fund as a benchmark when trustees are successfully sued by Jewish beneficiaries who are discontent with their trust's return?

suggests it will be an uphill climb.¹³⁹

Let's talk about positive psychic income.¹⁴⁰ Here's one that could be either negative or positive. If the trust income beneficiary is a public figure who is being pilloried for being the beneficiary of a trust that invests in "Sudanese" securities, can the trustee divest and not breach his fiduciary duties? I assume the answer is yes if our public figure is the only beneficiary, and I assume we are talking about some kind of psychic income.¹⁴¹ Turn it around. What if the beneficiary can obtain public esteem by being the beneficiary of a trust that is being run "wisely" in accordance with SRI principles?¹⁴² Again, I assume the answer is yes (SRI is OK), if he is the only beneficiary. Indeed, the beneficiary can always set aside the duty to earn more money for the income account. But what if the divestment increases the (calculated) risk to the portfolio or reduces the return? That affects the remainder too.

I assume that if a grantor required the trustee to take income beneficiary Aunt Dorothy's mental sense of well being into account in making trust investments, a court would enforce that as long as it wasn't waste.¹⁴³ If a 100% equity portfolio concerned Aunt Dot quite meaningfully, then my hypothetical trustee ought to be able to add enough bonds to let her

¹³⁹ See Albert Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WIS. L. REV. 897, 941–42 (2006).

¹⁴⁰ Thomas W. Joo discusses the analogous issue of shareholders' nonpecuniary interests in Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L.Q. 1, 61–62 (2001).

¹⁴¹ Cf. Christopher Cooper, *Edwards, Foreclosure Critic, Has Investing Tie to Subprime Lenders*, WALL ST. J., Aug. 17, 2007, at A1 (reporting the discovery that John Edwards invests in a hedge fund that is foreclosing on poor people in New Orleans); Matthew Yi, *Global Warming Watchdog Invests in Oil, Coal, Utilities*, S.F. CHRON., Aug. 18, 2007, at A1 (reporting that the California Air Resources Board chair was scolded for her investments in oil, coal, and utility companies).

¹⁴² What about the net positive social effect of numerous trusts acting as sin eaters or professional mourners by engaging in SRI investing?

¹⁴³ The ultimate article about waste is Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005). It is tempting to wonder if the income beneficiary's ability to forgo income in the name of SRI (if there is no harm done to principal beneficiaries) is best understood as waste by an owner (of the income interest). It is also tempting to wonder if a spendthrift provision precludes such a blessing of SRI by an income beneficiary. See *Matter of Pope, Bowes and Citibank, N.A.*, N.Y.L.J. at 27 (unpub. opinion 1996), as discussed in Joel C. Dobris et al., *ESTATES AND TRUSTS* 1135 (2007).

Can the trustee conceal aspects of the trust's investment policy for wholesome psychic purposes? Its investment policy? (Sudan; or taking more risk than Aunt Dorothy might like). Aunt Dorothy can't be worried about what she doesn't know about.

sleep at night even if there was money to be gotten for taking more risk. In the hypo, the grantor specifically allowed for some laziness of trust money, which is arguably all that the negative review of SRI is about—lazy money for a good reason. If the trust was silent and Aunt Dorothy was miserable because the trust was 100% in equity, many readers would see the trustee as a jerk for not getting some bonds so Aunt Dorothy could get a good night's sleep, and a court might even remove the trustee for lack of compatibility with the beneficiary, but I wouldn't expect a court to say, at this time, that the trust income beneficiary is entitled to psychic income as well as pecuniary income.

b. So, let's talk about implied setting aside of the general rule that SRI is only proper in a silent trust when the return and the risk are the same as an unconstrained portfolio. Everyone has always assumed that the silent trust requires an unconstrained portfolio or its equivalent. At one time this meant getting the same return. Now it seems the return and the risk must be the same. SRI folks might hope to change the default rule—to put us in a world where a silent trust can be invested in an SRI portfolio.¹⁴⁴ Or, they might hope for a world where an equivalent return, without regard to risk, is what a silent trust allows (or requires).

If the default rule remains unchanged, then the questions become: When do the circumstances allow a court (or a lawyer rendering an opinion or a trustee taking a chance) to conclude that the duty to get an appropriate full return has been impliedly set aside? When does the situation suggest that the grantor would have wanted such a set aside? When is economic gain outweighed by other impacts?¹⁴⁵ When is there a utility function beyond return and risk that was taken into account by the grantor and that should be taken into account in determining the propriety of the trustee's investment policy?¹⁴⁶

Here is a hypothetical illustration: "I am the beloved widow. Widows always win. The risks you are taking are killing me. My late husband Joe would have written into the trust a direction not to make me miserable if he'd thought of it. So that is his undeclared intent. Now honor it." Or, "my late wife devoted her life to saving the environment and this bank's investing in polluters besmirches her memory. The guardian of our un-

¹⁴⁴ Ignore the pipe dream of a default rule that all silent trusts must be invested in an SRI portfolio unless the grantor otherwise provides. Neither this idea nor the one in the text is mine. I have forgotten who put the "change the default rule" forward. Apologies.

¹⁴⁵ Milton Friedman's hippie grandchildren might have trouble arguing grantor's intent. I thank Tom Joo for the point.

¹⁴⁶ See KRITZMAN, *supra* note 128, at 78–79 (discussing utility function).

born grandchildren's remainders refusal to agree to divestment is a disgrace. Please read this trust as containing an implied setting aside of the duty to hold an unconstrained portfolio."¹⁴⁷

c. Let's talk about virtual representation.¹⁴⁸ Virtual representation exists when a jurisdiction, by common law or statute, allows a particular beneficiary to virtually represent other beneficiaries so that the other beneficiaries (perhaps unborn) need not be represented by a guardian ad litem. If the current income beneficiary wants an SRI portfolio she can immunize the trustee against her suing for a lower return, but she cannot bind her successors in a silent trust absent a determination that she virtually represents them—that her interests are the same as theirs and her self-interested agreement to trustee conduct protects her virtual wards. To the extent that virtual representation doctrine is expanded, the opportunities exist for current pro-SRI trust beneficiaries to bind future beneficiaries. The problem is that if the SRI beneficiary is embracing SRI for nonpecuniary reasons, then it is hard to say there is virtual representation. It's different if you are the next income beneficiary. My agreement to an investment may well protect your financial interests. But, I can't fall in love for you, and I can't approve SRI for you for nonpecuniary reasons either, is the thought. But if a legislature or a common law judge says I can, well then maybe I can.

Thus, SRI folks might seek to convince a legislature to extend the local virtual representation regime to allow some trust beneficiaries to approve SRI for all. Or a defendant trustee might successfully make the claim.

An intriguing sub-version of this might be if a private trust was converted from a traditional "income to A, remainder to B" trust into a unitrust and the "income" beneficiary then allowed the trustee to engage in SRI investing. Would the income beneficiary virtually represent the remainder beneficiary? There are arguments that she would. They go as

¹⁴⁷ Nonpecuniary aspects of pecuniary interests are discussed extensively in Evelyn A. Lewis, *Struggling with Quicksand: The Ins and Outs of Co-tenant Possession Value Liability and a Call for Default Rule Reform*, 2 WIS. L. REV. 331 (1994). If an income beneficiary is dependent on a trust, then the smoothness of the income is very important. If the income beneficiary is elderly and a worrier and, as a result, dependent, the smoothness becomes all the more important. I would propose there is a psychic income element to this. One might sacrifice return for smoothness without any specific authorization in the trust or in local law.

¹⁴⁸ See generally RESTATEMENT (THIRD) OF TRUSTS § 65, reporter's n. on § 66, cmts. b & c (2007); UNIF. TRUST CODE § 304 (2005), 7C U.L.A. 473 (2006).

follows. The whole point of a unitrust is to put income and remainder beneficiaries on the same page, to end the conflict of interest and to make them both interested in the same thing—the total return (growth) of the overall trust portfolio. They are “partners” in the same venture with the income beneficiary being the junior partner. Indeed, in a long term unitrust, when you do an actuarial calculation, their interests may be closer than first appear when one calculates the present discounted value of the remainder interest. I would be pretty open to the argument that many unitrust income beneficiaries can wisely be said to virtually represent the remainder when purely pecuniary issues are involved. Query when the issue is SRI, because the psychic income for the unitrust income beneficiary may not pay off for the remainder beneficiary.

22. Seek to have SR concerns added to the lists of nonfinancial measures of performance that determine the compensation of senior executives of major corporations. Such measures are becoming ever more common, and it is at least theoretically possible that SR concerns can be added to compensation schemes.¹⁴⁹

23. Seek the design of an SRI investment that “magically” reduces income but not principal. Then if the trust says “income to A for life, remainder to B” and if A is content to forswear income for social responsibility, B’s OK is not required. Easier said than done.

24. Seek to encourage the creation of a complete SRI bibliography by an academic librarian. It would make research easier, and I believe the thickness of the book and the count of pro-SRI articles would move SRI forward.

25. Reach out to the quants. Somehow, obtain the conversion of a high visibility quant to SRI. It should have no positive effect but it might. Figure out a way to reach the decent quants who run a lot of money. By decent quants I mean folks who stay with their first spouse, give a lot to charity, value education, invest in their children, belong to their equivalent of the Rotary club, yada yada. They cannot be reached by missionary zeal, twisting their vocabulary, or attacking their religion.

¹⁴⁹ See Stefan Stern; *Hidden Ingredients of a Better Board Performance*, FIN. TIMES (London), Aug. 14, 2007, at 12 (discussing the trend of more companies than in the past taking notice of nonfinancial measures of performance for purposes of calculating senior executive bonuses).

VII. CONCLUSION

SRI has come a long way since the 1980s. There are several SRI cases to make in different courts. The quantitative case for SRI is less dismissible than it once was. There are gaps in the case. Accept it. One gap filler is the idea that increased risk for the good of society can be justified. Risk for a reason is not unwholesome in today's world.