In Defense of an "Ethics Judgment Rule"

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According to the conventional wisdom among business ethicists, the "Business Judgment Rule" gives corporate leaders the discretion needed to abide by the firm's moral obligations. In the first part of the paper, I challenge this view: managers have compelling reasons to believe that the Business Judgment Rule (and corporate law more generally) allows corporate leaders to pursue ethically motivated decisions only when these decisions are expected to be profit-enhancing. This is problematic because it instrumentalizes ethics, pushes ethically motivated corporate leaders to dissemble, and corrupts the quality of our public discourse. In response, I propose that corporate law should incorporate ethics into the Business Judgment Rule, explicitly giving managers discretion to make ethically motivated decisions that are profit-sacrificing. After responding to concerns about implementing such a rule, I contend that such a rule would be an important step to put corporate ethics in its proper place.

Key Words: corporate law, Business Judgment Rule, Ethics Judgment Rule, shareholder value maximization, corporate governance

Even though business ethicists disagree on the precise ethical obligations that bind corporations, nearly all agree that corporations have ethical obligations that go beyond the bare minimum imposed by the law. Corporate law, however, does not explicitly recognize that corporations are required to abide by these additional moral obligations. Interestingly, most management and business ethics scholars seem untroubled by this. They explain their apparent nonchalance by arguing that the "Business Judgment Rule" (BJR) gives corporate leaders the necessary discretion to implement any corporate moral obligation that goes beyond what the law mandates. This paper takes issue with this view.[1]

Section 1 argues that corporations have ethical obligations beyond their legal obligations and that these obligations will sometimes be profit-sacrificing. Section 2 explains what the BJR is and why it gives so much deference to corporate leaders. Sections 3 and 4 show that there are compelling reasons to think that the BJR allows corporate leaders to pursue ethically motivated decisions only when these are profit-enhancing. Section 5 discusses how managers can use the BJR to pursue ethical decisions that may be profit-sacrificing and provides several reasons why this is

[1] I will use "corporate leaders" or "senior leaders" to refer to those tasked with the corporation's primary decision-making responsibilities, i.e., board members and corporate executives. I will use "ethical" and "moral" as interchangeable terms. While the scholarship has sometimes distinguished them, these distinctions will not be particularly relevant here (cf. Moriarty 2022, 4; von Kriegstein 2022, 379).

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troubling. Section 6 proposes to address some of these worries by incorporating into the BJR an "ethics judgment rule." Section 7 discusses potential objections to my proposal, and Section 8 concludes by highlighting some of the valuable consequences of implementing it.

This article will focus on Delaware's corporate law. Delaware is the "favoured state of incorporation for U.S. businesses" (Black 2007), where more than half of Fortune 500 companies are incorporated (Stout 2012, 27; Morabito 2023), and "[m]ore than 90% of U.S.-based companies that went public in 2021 were registered" (Morabito 2023). Most corporations that go public incorporate in Delaware because its Court of Chancery has "more than 200 years of history, a circle of expertise in Wilmington, and a hard-earned reputation for impartiality in corporate disputes" (Financial Times 2024). This partly explains why Delaware is considered the "de facto leader in corporate law which other jurisdictions regularly imitate" (Mocsary 2017, 1335; cf. Bainbridge 2023a, 13; Sharfman 2017, 32).

1. LAW, ETHICS, AND PROFITS

1.1. Ethics in the Corporate Context

In contemporary public discourse about corporate behavior, "ethics" is frequently identified with pro-social or altruistic activities. In some cases, ethics is associated with corporate charitable contributions or sponsorships. In other cases, ethics is associated with companies with "purpose," whose primary aim is to promote pro-social goals or the well-being of the corporation's stakeholders.

This is not how I will use "ethics" in this paper. When I talk about "ethics" in the context of corporations' activities, which is arguably the primary sense of this term, I will have in mind the duties and obligations owed by corporations (and the individuals acting on their behalf). Such obligations have more to do with avoiding evil than with doing good; they are rooted mostly in what one may call "basic decency," not in "altruism."[2]

These ethical imperatives apply to any organization regardless of its purpose; they do not require a profit-oriented firm to endorse pro-social purposes or make significant investments in charitable causes. Such imperatives, however, do impose constraints (sometimes significant) on the available strategies that for-profit firms can use to pursue profit.

In what follows, I will defend, first, that the corporation's moral obligations often go beyond its legal obligations and, second, that these moral obligations will sometimes be profit-sacrificing in the short and long term.

1.2. Law and Ethics

Sometimes it is argued that abiding by a country's legal standards is sufficient for a corporation to ensure appropriate ethical conduct. Several arguments can be

[2] This is not to deny that ethics sometimes requires corporations to promote positive duties, including positive duties of beneficence (Mejia 2021b); it is to deny that the realm of ethics is limited to, or primarily about, such positive duties.

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buttressed to defend this perspective. On the one hand, there is a tight connection between law and ethics. In any well-developed legal system, much of what is unethical in business is also illegal. On the other hand, the regulative power of the law goes beyond the strict limits of what is actually encoded on the books; there are many instances where the law will not explicitly prohibit certain unethical behavior, but the risks of engaging in it are high enough to prevent corporations from doing so (Paine 1994, 108). First, companies will sometimes avoid engaging in legal and unethical conduct, given that such conduct invites regulation that will be costly and unwelcome. Second, unethical conduct that is considered legal may turn out to be illegal because of the clever ways in which regulators can apply existing law to new cases. Finally, in countries like the US, executives of corporations that violate ethical norms find during lawsuits that what their lawyers considered legal, a jury may determine to be unlawful.[3]

However, even though it is unquestionable that one of the law's most important functions is to constrain unethical behavior, believing that the legal system will constrain all such behavior fails to recognize a variety of instances where there are gaps, often significant, between the legal and ethical obligations of corporations (Heath et al. 2010, 446; McAdams 2015, 144–47; Moriarty 2022, 5; Paine 1994, 111; von Kriegstein 2019, 112, 120–24). There are at least five different sets of reasons for this.

First, in a well-functioning legal system, the law is meant to reflect a certain social agreement on the duties and obligations that society *wants the state* to enforce (McAdams 2015, 144). However, not all duties and obligations on which there is social agreement should be enforced by the state. Moreover, there are ethical issues on which there is no social agreement and which are not encoded into law. Consequently, a legal regime should be seen as reflecting, at best, a moral minimum that lays out the legal obligations by which all members of society agree to be held accountable by the state, a moral minimum that does not (and should not) regulate everything taking place in our moral landscape.

Second, equating a corporation's ethical obligations with its legal obligations presupposes a well-developed and uniform legal system. However, in our global economy, corporations often operate in countries that fail to properly regulate the ethical obligations by which business actors should abide (Paine 1994, 110). In addition, most laws are local to particular jurisdictions and, thereby, only constrain the corporation's behavior within it. It is misguided to think that the patchwork of laws across jurisdictions will capture the moral obligations of global corporations or provide clear moral guidance on how they should behave in the global environment.

In addition, equating law and ethics is naive about the lawmaking process, even in countries with well-developed legal systems. While some laws reflect an agreed moral minimum that society wants the state to enforce, other laws are the product of messy political processes that reflect the influence of special interests, not the ethical

[3] I thank John Boatright for pressing me to address some of these issues.

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concerns of society. There are countless instances where corporations have influenced policy in their favor, sometimes causing significant public harm.[4]

Furthermore, laws are often reactive. There are indeed cases where companies comply with moral obligations that are not encoded into law to prevent costly or burdensome regulations. But, it is overtly optimistic to think that this will always be the case; many companies are willing to explore how far they can push the envelope.[5] In addition, there are also many laws that lag behind technological advances (Paine 2024). Some of these lags are valuable in that they allow the technology to develop without interference from legislators and regulators that may cripple its potential. But these lags open up opportunities for corporations to act against moral obligations that may not have been encoded into law.

Third, even when society may agree on certain moral obligations and prohibitions, there are sometimes very good reasons to avoid legislating or enforcing them. The law is a blunt instrument, a powerful club to prevent serious ethical violations, not a precise scalpel to track all the complexity and nuance of our ethical landscape (Hart and Zingales 2017; Heath 2007; Mejia 2021a; Moriarty 2022; von Kriegstein 2019). Many important ethical issues are difficult to regulate, "cumbersome to enact, and costly to enforce" (Heath 2023, 15; cf. Macey 2008, 181; Moriarty 2022, 5; Hughes 2023, 478). Moreover, because regulation sometimes "imposes nonnegligible compliance costs," there will be cases where "simple feasibility constraints preclude a regulatory solution" (Heath 2023, 15). For instance, it is very difficult to regulate respect for human dignity (Hart and Zingales 2017, 249) or advertising that is deceptive without being false (Heath 2007).

Fourth, because "the law is intrusive and bothersome" (Moriarty 2022, 5), there are good reasons to keep some ethical obligations out of the reach of the state. In addition, there are corporate actions whose ethical credentials are contentious, actions where there may be significant disagreements among reasonable people on whether they should be obligatory, permitted, or prohibited. These types of actions should not, for good reason, be regulated by the legal system. But corporations will sometimes need to take a stance concerning them and act accordingly.

Finally, the idea that the law can, on its own, ensure proper ethical conduct fails to recognize the important role that ethics plays in legal compliance. As Heath eloquently writes:

> [T]he suggestion that markets should be governed only by law is fundamentally unserious. Even within the domain of regulated conduct, a great deal of legal constraint

[4] In this respect, Strine and Walter (2015) highlight that, after the Supreme Court's decision in *Citizens United*, corporations have an undue influence on politics. This makes it more difficult for the state to regulate some of their morally problematic behaviors.

[5] For instance, before 1998, no laws forbade companies from penalizing their employees for taking a bathroom break during their shifts. It was only when it was reported that Nabisco was imposing a three-day suspension on female employees who used the bathroom during their shifts, forcing them to use diapers or urinate in their clothes, that such a law was passed (Robin 2012). Arguably, legislators had not passed such a law beforehand because they assumed that companies would respect what is arguably a basic norm of decency.

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is actually self-regulation, with the law serving primarily an expressive or hortatory function. Because of this, the claim that market behavior is exempt from moral constraint not only encourages immoral behavior, but can also undermine the effectiveness of legal regulation (Heath 2023, 15–16; cf. O'Neill 1996, 9; von Kriegstein 2019, 122–24).

All of this entails that the law is insufficient to constrain all unethical corporate behavior. Therefore, if we want corporations' activities to pass ethical muster, it is insufficient to ask them to merely comply with the letter of the law. They also need to uphold a variety of moral norms that are not encoded into law.

1.3. Ethics and Profits

It is sometimes suggested that reputational and financial costs associated with unethical behavior are enough to ensure proper corporate moral compliance. Influential scholars have argued that a corporation that intends to maximize its long-term market value will need to maximize the value created for all stakeholders or, at the very least, make sure not to mistreat them (Bainbridge 2023a, 129, 133; Jensen 2002, 246; Sharfman 2017, 60). There is some truth to this view, but the truth is partial. There are, of course, multiple examples where corporations decrease their pollution or provide safer working conditions to attract consumers, avoid boycotts from employees, or prevent reputational backslash. But it is naive to think that market forces alone will be sufficient to force profit-maximizing corporations to always comply with their moral obligations (Fancy 2021).

For instance, while it is true that a firm needs to offer compensation that is sufficiently attractive to entice contractors or employees, there are myriad cases where their lives are so precarious that what will attract them involves deeply exploitative conditions that are morally unacceptable (Berkey 2021, 46; Vrousalis 2018, 2; Zwolinski 2012, 156). Furthermore, while certain reputational concerns may lead a corporation to comply with some moral obligations, these concerns will not always guarantee proper corporate moral compliance. After all, not all unethical corporate behavior involves high reputational costs, and some reputational costs are lower than the costs of complying with what morality demands (Chandler et al. 2020).

1.4. Four Examples

Let me conclude this section by discussing four hypothetical examples that illustrate instances where the law and the pressure of markets are insufficient to ensure that a corporation will fulfill all of its moral obligations. In a liberal society, one should expect individuals to have divergent views about these obligations. Thus, not all readers will agree that, in all four examples below, corporations have the ethical obligation that their executives claim. In other words, the point of these examples is not to present unequivocal examples of corporate unethical behavior but to motivate that there are ethical convictions that may lead shareholders and corporate leaders to support profit-sacrificing decisions not required by law because they consider them morally obligatory.

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Example 1. Ethosphere Social

Ethosphere Social is a social media company whose user-engagement algorithm has proven highly effective, contributing to the platform's popularity, advertising revenue growth, and market leadership in many countries.

Growing allegations about the algorithm's negative externalities led the company to commission a confidential study investigating them. The study's findings confirm that the algorithm is directly responsible for causing a variety of social ills. Most executives (and most shareholders) believe that causing such harms knowingly is morally impermissible. As a result, corporate leaders decide to reform the algorithm.

The overall effects of this reform on company profits are expected to be negative. Such reform would position the company as a moral leader in the industry, attract users who value such moral leadership, and give the company a regulatory advantage in countries that will mandate such reforms. However, these benefits are expected to be more than offset by the reduction in user engagement in the short term and by the long-term defection of many users who will be attracted to products with more addictive algorithms.[6]

Example 2. Competitive Tech

Competitive Tech was an early entrant into a market that involves high fixed costs, low marginal costs, and significant network effects.[7] Standard microeconomics theory suggests that ensuring adversarial competitive behavior among self-interested firms ensures that such behavior benefits society (Friedman 1990; Jensen 2002; Zingales 2012). This widely accepted economic insight explains why many jurisdictions have competition and antitrust laws. Prominent business ethics scholars have relied on these economic insights to defend the idea that for-profit corporations have a moral obligation to compete with one another (Heath 2014). I will assume that a majority of Competitive Tech's shareholders agree with this.

Competitive Tech's main rival has reached out to Competitive Tech's board to assess the feasibility of a strategic takeover. The deal has a high chance of being approved by regulators because it will not increase prices for consumers (Competitive Tech's services are offered for free), and the company is not required to notify the Department of Justice (DOJ) or Federal Trade Commission (FTC) about the acquisition because the law exempts US companies to report acquisition of international companies which have few assets in the US (Fernholz 2013). Such a deal would give Competitive Tech an almost total monopoly power in this market, significantly enhancing its profitability. The board, however, declines the offer because it believes that increasing the corporation's profitability by acquiring its main competitor is an instance of impermissible rent-seeking (cf. Munger and Russel 2018, 113).[8]

[6] For a variation of this example, consider a company that, without being required by law, invests in resources to reduce their negative externalities, investments that are ultimately profit-sacrificing.

[7] This example is based on a counterfactual of Google's acquisition of Waze, Google Maps' main competitor (Fernholz 2013).

[8] In a variation of this example, the board declines to pursue certain profitable opportunities that involve securing preferential treatment from regulators.

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Example 3. Democratic Financial

Democratic Financial owns several local banks and insurance companies in a conservative US state. Business ethicists have argued that when companies operate in a democratic environment, they have a moral obligation to respect and preserve the democratic order (Ron and Singer 2024; Silver 2022, 2025). A majority of Democratic Financial's shareholders agree with this principle, and this has led the board to make the difficult decision to stop providing banking and insurance services to LCO, a conservative organization that, in their opinion, is having an illegitimate influence in the political process. The board is convinced that LCO has used its financial and political muscle to get legislatures to repeal measures that have strong support from citizens across the political spectrum, interfere with the proper functioning of regulatory agencies tasked with a mission that has been democratically sanctioned, and prevent the state from conducting empirical studies that would provide valuable data to understand and regulate the issues promoted by LCO.[9] Terminating their business with LCO will hamper LCO's undue influence over the political process. However, because LCO is an important client, Democratic Financial's profits will take a hit. Moreover, their decision has long-term risks. If LCO uses its public influence to portray Democratic Financial's decision as motivated by partisan considerations (and not by their concerns about LCO's objectionable antidemocratic practices), this may lead to a customer backslash that may be very costly for the company in the long term.[10]

Example 4. Pro-Life Pharma

Pro-Life Pharma has been developing two promising formulas for a drug for hair loss.[11] The first requires higher R&D investments and is more expensive to produce. During early trials, it had no tangible side effects. The second (and cheaper) formula was derived from a drug used in abortion due to its altering of hormonal activity. Such hormonal activity showed promising results for hair generation, given its effects on follicle stimulation. Researchers suspect that this second formula may also be effective as an abortifacient and could be used for this purpose in jurisdictions where abortion medications are prohibited. Although the board expects the profitability of the second formula to be higher, it decides to focus its efforts on the first, given the pro-life values to which the founders (and a majority of its shareholders) are committed.[12]

These different examples illustrate instances of ethical obligations that are expected to be profit-sacrificing in the short and long term. They are also not encoded into law,

[9] Many elements of LCO are modeled on reports about the National Rifle Association (NRA) (Molla 2022; Watkins 2018; Cook and Goss 2014, 199).

[10] One could vary the case by flipping the politics: Democratic Financial operates in a liberal state, and LCO is an anti-democratic liberal organization. In another variation of this example, the company believes that all corporations have a moral obligation to ensure that the workers in their supply chain are paid living wages. This leads the company to stop working with suppliers that, despite their low prices, compensate their workers inadequately.

[11] I thank George Mocsary for suggesting a version of this example.

[12] One could vary this example by picking another important value that guides the company, and which leads it to pursue a less profitable opportunity because the more profitable alternative conflicts with such a value.

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often for good reasons. Some involve contentious social issues that, lacking sufficient social agreement, should not be regulated by the state (Pro-Life Pharma). Others deal with practices that, while unethical, should nevertheless be kept legal (Ethosphere Social and Democratic Financial).[13] Finally, others may involve loopholes that the state may have had good reasons to allow (Competitive Tech).[14]

2. WHAT IS THE BUSINESS JUDGMENT RULE (BJR)?

2.1. What Is the BJR?

Shareholders have several ways to hold senior leaders accountable. One is the derivative suit, which allows any shareholder to sue on behalf of the corporation. Derivative suits are very often used by minority shareholders who need to challenge a board's decision.

The BJR is a standard of *judicial review* that courts use to evaluate the merits of a judicial scrutiny into the facts of the derivative suit. I emphasized "judicial review" to highlight that the BJR is not used to evaluate whether the behavior of corporate leaders was appropriate; it is used to determine whether the plaintiff's claims warrant an assessment by the court. According to one of the most frequently cited court decisions in this context, the BJR instructs judges to *presume* "that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company" (*Smith v. Van Gorkom*, 488 A.2d at 872 [Del 1985]; cf. *Aronson v. Lewis*, 473 A.2d 805, 812 [Del. 1984]).[15]

The idea behind the BJR is that courts will abstain from evaluating corporate decisions by senior leaders unless the plaintiff can show that they breached their fiduciary duties (Sharfman 2017, 68). Instances of this include cases where there is evidence that the decision may have involved fraud, potential self-dealing, lack of good faith, abuse of discretion, lack of independence, or gross negligence to become informed (Bainbridge 2023a, 34, 48–49; Horton 2020, 861; Sharfman 2017, 30, 39, 55).[16]

[13] In the case of Ethosphere Social, one may argue that regulating the design of social media algorithms may encroach on free speech, given that it will affect the visibility and distribution of user-generated content and impose state-mandated limits on how content is prioritized, restricted, and amplified. In the case of Democratic Financial, one could argue that the political influence by LCO should be legal because their legality allows the state to regulate and, thereby, limit the potential negative effects of corporate political influence ("Sunlight is the best disinfectant").

[14] The exception to notify the DOJ or FTC about acquiring an international company with few US assets was, arguably, motivated by the need to allow US companies to expand globally without much intervention from the federal government. It is unclear whether this justification is still valid with the advent of e-commerce; when this exception was passed, US assets provided a good proxy to identify companies that did not have significant operations in the US.

[15] It may be worth clarifying that the Business Judgment "Rule" is not a formal rule provided by legislatures but a principle of judicial review established through precedent.

[16] Most legal scholars argue that the BJR only applies to duty of care issues (see, for instance, Bainbridge 2004; Hill and Conaglen 2018; Horton 2021). Other legal scholars argue that the BJR is not only focused on the duty of care but should "be understood as an abstention doctrine, requiring the court to abstain from a

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It follows that while corporate law gives shareholders the legal means to sue senior leaders, the BJR makes it very difficult for them to succeed except in a narrow set of circumstances (Elhauge 2005; Horton 2020; Marens and Wicks 1999; Noked 2012; Stout 2012). The very limited set of cases under which courts will review a decision by corporate leaders explains why the BJR has been described as "nearly an iron-clad shield for directors of public corporations" (Smith 1998, 286), a rule that provides "a safe harbor that makes both directors and their actions unassailable if certain prerequisites have been met" (Branson 2002, 632), and an "abstention doctrine" that will typically require courts to abstain from reviewing directors' decisions (Bainbridge 2004; Branson 2002, 631; Sharfman 2017, 55).

2.2. The BJR's Significant Deference

Legal scholars have provided several reasons to explain why the BJR gives so much deference to senior leaders.

1. The BJR recognizes that courts should not second-guess management decisions (Boatright 2017, 63; Horton 2020, 859). Judges are not particularly qualified to assess the business decisions of corporate directors and officers; "they lack information, decision-making skills, expertise, and vested interest (i.e., stake in the company) relative to corporate management" (Sharfman 2017, 46). Thus, it has been argued that judges' deference to the authority of senior leaders appears as a necessity (Bainbridge 2023a, 34; Macey 2008, 180–81; Horton 2020, 860; Sharfman 2017, 28; Smith 1998, 318).

2. A deferential BJR incentivizes qualified individuals to serve as corporate directors or officers "without the fear of constantly facing potential liability for honest mistakes in judgment" (Sharfman 2017, 30, 33, 37, 69; cf. Arsht 1979, 97). In addition, the BJR's deference also encourages risk-taking by directors (Bainbridge 2004, 110; Horton 2020, 860; Horton 2021, 74–82).

3. The BJR prevents derivative suits from flooding the courts, ensuring that courts are not confronted with an unreasonable influx of lawsuits (Horton 2020, 861; Arsht 1979, 95). From this perspective, "the rule is a means for conserving judicial resources, thereby permitting courts to avoid being weighed down in rehashing decisions that are inherently subjective and ill-suited for judges, as opposed to business men and women" (Branson 2002, 632).

4. Finally, corporate law is meant to regulate private commercial exchanges. The BJR reflects courts' "respect for the private ordering of corporate governance arrangements" (Sharfman 2017, 43–44, 55). The reason why courts should stay out of these private exchanges is not merely, as Macey (1997) suggests, that laws

fairness review unless some sort of director misconduct or taint surrounding the decision is found" (Sharfman 2017, 55). For the purposes of this paper, nothing of significance hinges on taking a stance on this subtle distinction. What is important is that the BJR gives deference to senior leaders except in a very specific and narrow set of circumstances. For further discussion of the different ways in which the legal scholarship has characterized the BJR, see Velasco 2015, 651, 653.

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that try to regulate private exchanges are often welfare-reducing. In liberal societies, there is an understanding that the protection of individual liberties requires the state to refrain from interfering and regulating private affairs. Consequently, "[c]ourts understand that this private ordering has been agreed to under the sanction of statutory corporate law and will feel compelled to respect the wishes of those parties to have the Board manage the company with minimal interference, including interference from the courts" (Sharfman 2017, 44).

3. DENYING SHAREHOLDER VALUE MAXIMIZATION

3.1. Profit Maximization and the BJR

Nearly all scholars agree that, as a practical matter, the BJR ends up giving senior leaders the necessary wiggle room to make decisions motivated by moral considerations, even if these considerations are not encoded into law and complying with them is expected to be profit-sacrificing in the short and long term (Boatright 2017; Elhauge 2005; Kraakman et al. 2017; Marens and Wicks 1999; Stout 2012).[17] However, even though nearly all scholars in the debate agree that the BJR has the effect of giving senior leaders such necessary leeway, they disagree about the extent to which senior leaders can do this transparently.

The disagreement about the extent to which senior leaders can transparently pursue decisions that are profit-sacrificing is rooted in a much more general disagreement concerning whether managers are supposed to focus their efforts on maximizing profits or whether there are other ends that they can also pursue. More precisely, the disagreement concerns whether Delaware's standard of *managerial* conduct is (or is not) shareholder value maximization. In what follows, I will use SVM as an acronym for "shareholder value maximization standard of managerial conduct." Scholars sometimes refer to SVM as "stockholder welfare maximization," "shareholder value," "profit maximization," or "wealth maximization." While each of these formulations has slightly different conceptual contours, what is important for my discussion is whether managers have an imperative to maximize shareholders' return on their investment.[18]

One group of scholars defends SVM as Delaware's standard of managerial conduct (e.g., Bainbridge 2008, 2023a; Clark 1986; Easterbrook and Fischel 1991; Horton 2020; Mocsary 2017; Sharfman 2014, 2017; Yosifon 2013). The other group denies it (e.g., Blair and Stout 1999; Elhauge 2005; Marens and Wicks 1999; Stout 2012). Nearly all business ethics scholars agree with the second group. Because this is such a widely held belief in the field of business ethics, I will need to

[17] Marens and Wicks (1999) defend this explicitly, Stout (2012) comes very close to saying it, and Elhauge (2005) and Boatright (2017) could be read as agreeing with it.

[18] Most scholars who defend SVM defend *long-term* shareholder value maximization (e.g., Bainbridge 2023a, 1, 33, 133; Jensen 2002, 235–236, 239–241; Mocsary 2017, 1355). As Mocsary (2017, 1356) argues, this is reasonable "given the value-destroying potential of shorttermism." To make my argument as ecumenical as possible, however, I will not take a stance on whether SVM needs to be oriented exclusively toward the long term. I thank Azish Filabi for suggesting that I take this more ecumenical position.

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spend some time closely discussing the arguments that have been used to substantiate it. In this section, I will present what are arguably the two most important arguments provided by critics of SVM. The first seeks to undermine the legal weight that most Delaware corporate law scholars have given to *Dodge v. Ford.* The second suggests that the BJR allows managers to pursue objectives other than profits. In the subsequent section, I will show why these arguments are mistaken.

3.2. Dodge v. Ford

The Michigan Supreme Court's 1919 decision in the famous *Dodge v. Ford* case has been "routinely offered as Exhibit A" to defend the profit-maximization standard of managerial conduct (Stout 2012, 26; cf. Marens and Wicks 1999, 278). This case has been cited approvingly by influential legal scholars such as Bainbridge (2008, 141) and Clark (1986, 678–679). Although *Dodge v. Ford* is a Michigan case and, as such, does not provide binding legal precedent for Delaware courts, this case has played a very prominent role in the discussion among legal scholars defending or criticizing whether Delaware law supports SVM.[19] Any discussion of this issue would be amiss if it did not engage with it.

The judge's opinion in this case offers what most corporate law scholars have taken to be a very clear formulation of SVM:

> There should be no confusion … a business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are employed for that end (*Dodge v. Ford Motor Company*, 204 Mich. 459, 170 N.W. 668 [Mich. 1919]).

Lynn Stout, whose work "established her as the twenty-first century's leading critic in the legal academy of shareholder value maximization on both positive and normative grounds" (Bainbridge 2023a, 14), has been very influential in downplaying the importance and relevance of this case. She does not deny that the judge's opinion supports SVM. However, she highlights that such opinion appears in the ruling as "mere dicta—a tangential observation that the Michigan Supreme Court made in passing" and should, therefore, not be seen as constituting legal precedent (Stout 2012, 26).

Moreover, Stout argues that the implications of this case have been misinterpreted. According to her, the case is not about the legal duties that managers owe to shareholders in a public company; it is about the legal duties that controlling majority shareholders owe to minority shareholders, in this case, the fiduciary obligations of Henry Ford to the Dodge brothers (Stout 2012, 26; cf. Blair and Stout 1999; Elhauge 2005).

Finally, Stout highlights that this case took place in Michigan, a state that has become "something of a backwoods of corporate jurisprudence" (Stout 2012, 27). Moreover, she mentions that, in the 30 years before she wrote her criticism, the Delaware court had cited *Dodge v. Ford* only one time, and had cited it in a case concerning the duties that controlling shareholders owe minority shareholders, not a case about the standard of managerial conduct (Stout 2012, 27).

[19] In fact, *Dodge v. Ford* is cited in *eBay v. Newmark*, a really important Delaware case I will discuss below.

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3.3. The BJR's Discretion

A second influential argument offered to challenge SVM hangs on the discretion provided by the BJR. According to this argument, "under the business judgment rule, courts are extraordinarily willing to sustain decisions that apparently sacrifice profits" (Elhauge 2005, 771).

The force of this argument is often bolstered by appealing to *Shlensky v. Wrigley*, a case where the court upheld the decision of the board of the corporation owning the Chicago Cubs to avoid holding games at night (80 percent of its stock was owned by its president, Phillip K. Wrigley).[20] The plaintiff alleged:

> that defendant Wrigley has refused to install lights, not because of interest in the welfare of the corporation but because of his personal opinions "that baseball is a 'daytime sport' and that the installation of lights and night baseball games will have a deteriorating effect upon the surrounding neighborhood." It is alleged that he has admitted that he is not interested in whether the Cubs would benefit financially from such action because of his concern for the neighborhood, and that he would be willing for the team to play night games if a new stadium were built in Chicago (*Shlensky v. Wrigley*, 237 N.E.2d 776, 778 [Ill. 1968]).

Scholars who reject SVM believe that *Shlensky v. Wrigley* provides strong arguments against SVM, given the compelling reasons that the plaintiff gave to support a profit-enhancing rationale for installing lights (I cite directly from the case):

1. "[A]ttendance at Cubs' home games has been substantially below that at their road games, many of which were played at night."
2. A comparison of the attendance at Cub's and White Sox's games shows that "The weekend attendance figures for the two teams were similar [when both teams played day ball]; however, the White Sox week-night games drew many more patrons than did the Cubs' weekday games."
3. "[T]he funds for the installation of lights can be readily obtained through financing and the cost of installation would be far more than offset and recaptured by increased revenues and incomes resulting from the increased attendance."

4. AFFIRMING SHAREHOLDER VALUE MAXIMIZATION

Several scholars have provided powerful objections against the two arguments I provided above. It is worth noting that some of these scholars are critical of SVM (e.g., Mocsary 2017; Silver 2022; Wishnick 2012; Yosifon 2018). These scholars argue that, despite their own normative views on the matter, SVM happens to be

[20] It is worth noting that I am engaging closely with this case because the scholarship frequently discusses it when they discuss Delaware's standard of managerial conduct. However, like with *Dodge v. Ford*, this is also not a Delaware case. Stout (2012, 30) also appeals to *Air Products Inc. v. Airgas, Inc.*, a Delaware case, to defend her view. This second case, however, only shows that senior leaders have no obligation "to maximize shareholder value in the short term" (*Air Products and Chemicals, Inc. v. Airgas Inc.*, Civ. 5249CC, 5256-CC [Del. Ch., Feb. 15, 2011] 92). As such, this case cannot be used to challenge the view that managers don't have an obligation to maximize profits in the long term.

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Delaware's standard of managerial conduct. As I said, because the received wisdom among most business ethics and many management scholars is that there is no legal requirement to maximize shareholder value, I will dwell on these responses carefully.

4.1. Reply to Dodge v. Ford

In response to Stouts' claims on *Dodge v. Ford*, Macey (2008, 178) has argued that "[t]he case is not a doctrinal oddity. *Dodge v. Ford* still has legal effect, and is an accurate statement of the form, if not the substance, of the current law that describes the fundamental purpose of the corporation." Bainbridge (2023a, 65) mentions that even though the case concerns controlling shareholders oppressing minority shareholders, "[t]he bulk of contemporary scholarship treated *Dodge* as stating a rule applicable to corporations generally rather than as one announcing a rule confined to close corporations." Bainbridge has also argued that the judge's value maximization remark was not an offhand remark that should be interpreted as dicta (Bainbridge 2023a, 51) and that the SVM was well established at the time, as shown by the fact that "[i]n a number of pre-*Dodge* cases, acts that today would be regarded as socially responsible were challenged as being ultra vires" (Bainbridge 2023a, 51–52). Mocsary, in turn, argues that even if the case's explicit statement of corporate purpose were dicta, this dictum "made explicit that which had been an implicit and axiomatic part of the common law and general societal agreement" (Mocsary 2017, 1344). He cites, for instance, several Michigan cases that support SVM.[21] In addition, he provides some historical background to substantiate that the managerial scandals of the beginning of the twentieth century "provided an opportunity for all facets of society to express their views on the topic" (Mocsary 2017, 1346). However, during such debates, SVM was not challenged. Mocsary adds that this understanding continues to this day, something that Stout acknowledges when she grants that SVM is the received view among journalists, economists, business observers, and legal scholars. Moreover, and as Sharfman (2014, 393) notes (following Gordon 2007), SVM has actually "been reinforced by the transition over the last sixty years from a typical corporate board of a public company comprised of a minority of independent directors to one that is dominated by them, allowing for a dramatic shift in board focus from managerialism, i.e., the goals of management, to shareholder wealth maximization."

What is perhaps more important, however, is that *Dodge v. Ford* is no longer "Exhibit A" (Stout 2012, 26) to establish Delaware's profit-maximization standard of managerial conduct. Exhibit A for SVM is now Delaware's 2010 decision in *eBay v. Newmark*, a case that has been described as "a decisive affirmation that shareholder wealth maximization is the only legally permissible objective of a for-profit corporation" (Boatright 2017, 52; cf. Mocsary 2017; Silver 2022; Wishnick 2012).[22] Craig Newmark, Craigslist founder, was an active participant in the Whole Earth 'Lectronic Link virtual community (WELL), "whose counterculture ethos sought to

[21] *City Lumber Co. v. Traverse City*, *Stroh v. City of Detroit*, *Ackenhausen v. People's Sav. Bank*, *Butterfield v. Beardsley*, and *Hunter v. Roberts, Thorp & Co.*

[22] According to (Macey 2008, 189–90), *Lacos Land Co. v. Arden Group, Inc.* provides another recent Delaware version of *Dodge v. Ford.*

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realize the liberating potential of personal computing" (Boatright 2017, 53). "[H]is almost total lack of interest in wealth and his genuine desire to help others were reflected in the way the new company did business" (Boatright 2017, 53). While he initially considered incorporating as a not-for-profit, "he decided that nonprofits were too confined by rules and that he could always give away his money if he made too much" (Boatright 2017, 54). To this day, Craigslist claims to use a ".org" domain because "[i]t symbolizes the relatively uncommercial nature of craigslist, as well as our service mission and non-corporate culture."[23] The company website describes its chief executive officer, Jim Buckmaster, as "[p]ossibly the only CEO ever described by the business press as anti-establishment, a communist, and a socialistic anarchist."[24]

Because of a turn of events that Craigslist founders did not anticipate, eBay acquired a minority stake in the company in 2004. eBay wanted Craigslist to pursue various profitable opportunities (such as charging for more services and expanding internationally) that Jim and Craig, the majority owners, resisted.[25] To stop eBay from gaining control of the company, Jim and Craig instituted a series of defensive measures, including a poison pill. These defensive measures led eBay, in 2008, to sue Jim and Craig for breaching their fiduciary duties they owed to eBay as a minority shareholder.[26]

In the lawsuit, Craig was clear that eBay's profit-maximizing ambitions were opposed to Craigslist's distinctive culture, a culture that was not focused on maximizing profits but on providing a useful public service (Boatright 2017, 53).

When reviewing the poison pill, the judge was very clear that poison pills "are defensive devices that, if used correctly, can enhance stockholder value but, if used incorrectly, can entrench management and deter value-maximizing bidders at the stockholders' expense" (*eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 28 [Del. Ch. 2010]). Throughout his discussion, the judge repeated again and again that this poison pill would have been acceptable if it had been instituted with the goal of promoting stockholder value (*eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 28, 29, 31, 33, [Del. Ch. 2010]). Towards the end of his analysis of the poison pill (i.e., the Rights Plan) the judge was unequivocal:

> Having chosen a for-profit corporate form, the craigslist [sic.] directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for

[23] https://www.howtoselloncraigslistebook.com/craigslist-fact-sheet/ (visited on March 26, 2024).

[24] https://www.craigslist.org/about/jim_buckmaster (visited on March 26, 2024).

[25] I will follow the judge's opinion and will use Jim's and Craig's first name for convenience and ease of reference (*eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 6 [Del. Ch. 2010]).

[26] The legal saga does not end there. Bay used its position on the board to acquire strategic information that helped them build up Kijiji, a direct competitor to Craigslist. This appropriation of Craigslist's information led, in turn, to a counter-lawsuit for unfair competition. I will leave aside this second lawsuit because it sheds no light on our issues.

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the benefit of its stockholders (*eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 [Del. Ch. 2010]).

The judge criticized the defendants because they failed to show "that there was a sufficient connection between the craigslist 'culture' (however amorphous and intangible it might be) and the promotion of stockholder value." It concluded that Craigslist founders "failed to prove at trial that they acted in the good faith pursuit of a proper *corporate* purpose" (*eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 [Del. Ch. 2010], emphasis in the original). The court added that Jim and Craig found the possibility of eBay acquiring a controlling interest in Craigslist "unpalatable, not because of how it affects the value of the entity for its stockholders, but rather because of their own personal preferences" (*eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 [Del. Ch. 2010]).[27]

Thus, even if we remove *Dodge v. Ford* from the face of corporate purpose jurisprudence (something that, as I mentioned, is far from clear we are justified to do), *eBay v. Newmark*, a relatively recent Delaware's court decision, provides additional and very strong evidence to support SVM.[28]

[27] Someone may argue that my discussion of *eBay v. Newmark* makes this case sound more decisive than it is. They may argue that the court invalidated Jim and Craig's poison pill, but it did not order Craigslist to make the profit-oriented changes eBay had suggested to Jim and Craig, allowing the two co-founders to continue operating Craigslist as they wanted.

I don't think that this weakening of my conclusion is correct. The lawsuit did not ask the judge to review whether Craigslist founders could continue operating the company as they wanted. eBay's lawsuit only challenged three governance measures taken by Craigslist's board (which, at the time, consisted of Jim and Craig). These three governance measures were the only facts that the judge had to adjudicate.

Second, although the judge did not adjudicate on the appropriateness of Jim and Craig's general management practices, he did not seem to think that they resulted in suboptimal financial outcomes. The judge recognized that Craigslist was driven by a community service approach that "run counter to the strategies used by the titans of online commerce" (*eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 8 [Del. Ch. 2010]), but he also highlighted that this strategy was probably what explained the company's success at the time (*eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33 [Del. Ch. 2010]).

In other words, *eBay v. Newmark* required the judge to adjudicate on the legality of a particular board decision, i.e., the introduction of a poison pill. To evaluate this, he considered whether the board had used the poison pill "in a good faith effort to promote stockholder value" (*eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 28 [Del. Ch. 2010]). The defendants, Jim and Craig, argued that the poison pill was necessary to preserve Craigslist culture. However, in the judge's opinion, they "failed to prove that craigslist possesses a palpable, distinctive, and advantageous culture that sufficiently promotes stockholder value to support the indefinite implementation of a poison pill" (*eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33 [Del. Ch. 2010]).

In his decision, the judge explicitly mentions that while he personally appreciates and admires people's desire to run organizations to serve the community, a for-profit Delaware corporation is not the appropriate corporate form to do this. He adds: "Having chosen a for-profit corporate form, the Craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders" (eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 [Del. Ch. 2010]).

[28] Exhibit B for the profit-maximization norm is *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* While reasons of space do not allow me to describe this case carefully, it is worth citing a critical fragment from the Delaware court's decision:

> A board may have regard for various constituencies in discharging its responsibilities, *provided there are rationally related benefits accruing to the stockholders.* However, such concern for

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4.2. Reply to the BJR's Discretion

Let me now respond to the claim that the BJR's discretion shows that SVM is not mandated by Delaware. As I mentioned above, nearly all scholars involved in this debate recognize that, under the BJR, "directors have close to a free hand when considering matters … [with] broader social or environmental implications" (Noked 2012) and that "the business judgment rule makes plain that the duty of care cannot be enforced in a way that would bar managers from exercising discretion to sacrifice corporate profits in the public interest" (Elhauge 2005, 770).

However, this is a flawed argument to challenge SVM; it conflates a standard of *managerial conduct* with a standard of *judicial review* (Bainbridge 2023a, 59, 67–70; Mocsary 2017, 1349). As Sharfman (2017, 67) argues, a corporate "decision will rarely lose the protections of the [Business Judgment] Rule just because the decision was sub-optimal in terms of SVM. … However, this does not mean that the courts are not focused on SVM as the objective of a Board's fiduciary duties per se; it simply means that courts must restrain themselves in making such a determination."[29] In an ideal world, where courts had unlimited resources and judges were omniscient and impartial, it would be possible for both standards to coincide. However, and as Macey (2008, 190) points out, "the rule of wealth maximization for shareholders is virtually impossible to enforce as a practical matter." In addition, there are good reasons (provided in Section 2.2) that explain why the BJR provides such a level of discretion to managers.

None of this undermines the fact that, when it comes to Delaware's standard of *managerial conduct* (not the standard of judicial review), *eBay v. Newmark* provides strong support for SVM.[30] And while *Shlensky v. Wrigley* may initially lead one to doubt SVM, a closer look at this case actually supports it. As I will now argue, many of the judge's arguments dismissing the plaintiff's case are grounded precisely on considerations about SVM.

For instance, the judge provided an explanation of how installing lights may affect the long-term profitability of the Cub's franchise.

> Plaintiff … argues that the directors are acting for reasons unrelated to the financial interest and welfare of the Cubs. However, we are not satisfied that the motives assigned

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non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder (*Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 [Del. 1986], cited by Silver 2022; my emphasis).

Sharfman (2017, 64–66) points out that there are additional Delaware Court Cases that spell out SVM with clarity. For instance, in *NACEPF v. Gheewalla*, stockholders are described as "the ultimate beneficiaries of the corporation's growth and increased value" (*N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 101 [Del. 2007]). Similarly, *In re Trados Inc. Shareholder Litigation*, states that "directors owe duties to the corporation for the ultimate benefit of the entity's residual claimants. Nevertheless, stockholders' best interest must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to advance that end" (*In re Trados Inc. S'holder Litig.*, 73 A.3d 36–37 [Del. Ch. 2013]).

[29] Sharfman refers to SVM as SWM. For consistency, I have replaced his acronym with the one used in this article.

[30] Mocsary (2017, 1342–68) provides a battery of additional arguments substantiating that "Delaware courts have repeatedly reaffirmed the shareholder wealth maximization norm" (Mocsary 2017, 1343).

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> to Philip K. Wrigley, and … the other directors, are contrary to the best interests of the corporation and the stockholders. For example, it appears to us that the effect on the surrounding neighborhood might well be considered by a director who was considering the patrons who would or would not attend the games if the park were in a poor neighborhood. Furthermore, the long run interest of the corporation in its property value at Wrigley Field might demand all efforts to keep the neighborhood from deteriorating (*Shlensky v. Wrigley*, 95 Ill. App. 2d 173, 182 [Ill. App. Ct. 1968]).

Additionally, the judge criticizes the plaintiffs for failing to provide sufficient evidence that installing these lights would produce long-term profits.

> There is no allegation that the night games played by the other nineteen teams enhanced their financial position or that the profits, if any, of those teams were directly related to the number of night games scheduled. … [Also] no allegation is made that there will be a net benefit to the corporation from such action [installing lights], considering all increased costs.
> Plaintiff claims that the losses of defendant corporation are due to poor attendance at home games. However, it appears … that factors other than attendance affect the net earnings or losses. …
> The only cost plaintiff was at all concerned with was that of installation of lights. No mention was made of operation and maintenance of the lights or other possible increases in operating costs of night games.
> Plaintiff made no allegation that these teams' night schedules were profitable or that the purpose for which night baseball had been undertaken was fulfilled (*Shlensky v. Wrigley*, 95 Ill. App. 2d 173, 183 [Ill. App. Ct. 1968]).

Thus, the judge's opinion on this case is strongly grounded on SVM. If anything, what *Shlensky v. Wrigley* may be said to establish is that managers are not required to maximize profits in the short term. As such, *Shlensky v. Wrigley* is one among many other cases that reject short-term shareholder value maximization as a managerial standard.[31]

It is worth noting that several of the scholars who deny SVM seem to acknowledge this point. Noked (2012), for instance, claims that "for the vast majority of corporate decisions, there is no legal restriction on directors' ability to consider the interests of other stakeholders. [However, Delaware courts require] that a business decision *bear some rational relationship to a long-term corporate and shareholder interest* before applying the business judgment rule to shield the decision from shareholder challenge" (my emphasis). Similarly, Elhauge (2005, 770) grants that "under the business judgment rule, courts are extraordinarily willing to sustain decisions that apparently sacrifice profits (at least in the short run) *on the ground that they may conceivably maximize profits* (at least in the long run)" (my emphasis).

I have responded to what are, arguably, the two most influential arguments against SVM. My discussion, however, is not meant to establish in a definite way that SVM is Delaware's standard of managerial conduct. Doing so would require me to engage

[31] Other such examples include *Paramount Communications, Inc. v. Time Inc.*; *Air Products & Chemicals, Inc. v. Airgas Inc.*; and *Unocal Corp. v. Mesa Petroleum Co.* (Mocsary 2017, 1354–55).

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with several additional arguments that challenge it.[32] My aim is more modest: to destabilize the received view among many management and business ethics scholars that senior leaders are not required by law to maximize profits. Although my discussion does not unequivocally establish that SVM is Delaware's standard of managerial conduct, it should have shown that SVM represents a compelling interpretation of the law. As I will show, this has important implications for how senior leaders will justify corporate decisions motivated by morality.

4.3. SVM and the Ethical Limits to Profit Maximization

Before doing so, however, I would like to pause to discuss a peculiar feature of the scholarly discussion of the ethical limits to profit maximization, a feature that is also frequently reflected in popular discussions on the topic.[33] By and large, the discussion about the role that, according to Delaware law, ethics plays in corporate decision-making has been divided into two camps. On the one side are those who (sometimes disapprovingly) argue that Delaware corporate law is committed to SVM. These scholars often assume (either tacitly or explicitly) that, because of Delaware's commitment to SVM, managers should only try to uphold ethical values when this is instrumental to increasing profits. On the other side of the debate are scholars who argue that Delaware allows managers to pursue a broader set of ends beyond profit maximization, goals that may include the promotion of certain ethical ideals.

What is peculiar about this discussion is that, by conceptualizing ethical values as an additional goal beyond or in addition to profit maximization, this discussion offers a false dichotomy that does not canvass the full conceptual space. In particular, it misses the specific (and important) possibility we have been exploring here: having profit maximization as the sole managerial goal, but recognizing that this goal is limited by legal and ethical constraints.

Take, for instance, *The Profit Motive*, Stephen Bainbridge's recent book examining the purpose of the corporation. He opens the book's second half by stating that he will review "the century-old debate over corporate social responsibility and shareholder value maximization" (Bainbridge 2023a, 85). He is correct that the dichotomy between corporate social responsibility and SVM characterizes a "century-old debate." But he fails to recognize that this is a false dichotomy. SVM is opposed to corporate social responsibility only when one thinks of the latter as an additional goal that competes with SVM. But if one thinks of corporate social responsibility, not in terms of additional responsibilities that one takes for the well-being of society and its members, but in terms of the basic moral obligations that should guide the goal of profit maximization, then there is no opposition between the two.

This blind spot seems reflected in Delaware's corporate law. Delaware courts are muted with respect to the issue I have been discussing. I know of no Delaware case or

[32] For additional criticisms against SVM, see Blair and Stout (1999), Elhauge (2005), Marens and Wicks (1999), Noked (2012), and Stout (2012). For responses to many of these criticisms, see Bainbridge (2023a), Mocsary (2017), and Sharfman (2014, 2017).

[33] I want to thank an anonymous referee for pushing me to clarify this.

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statute that defends or rejects that Delaware law permits (or requires) corporations to sacrifice profits when such profits violate ethical norms. Whenever the issue of corporate ethics comes up, it is typically conceptualized as an additional goal alongside profit maximization. As I elaborate below, the court's silence on this matter is concerning and should be addressed.

5. USING THE BJR TO PURSUE PROFIT-SACRIFICING ETHICAL CORPORATE DECISIONS

5.1. How Managers Can Use the BJR to Promote Ethical Issues

Many scholars writing about the BJR acknowledge that the BJR allows senior leaders to make ethical decisions that may be profit-sacrificing in the short and long term. The laxity afforded by the BJR gives senior leaders "wide latitude to further the interests of non-shareholder constituencies" (Kraakman et al. 2017, 99), "considerable implicit and explicit discretion to sacrifice profits in the public interest" (Elhauge 2005, 733), "a free hand when considering matters that are most likely to have broader social or environmental implications" (Noked 2012), and the power to pursue "social responsibility and even … a social benefit mission" (Boatright 2017, 53).[34]

Most of these scholars, however, also acknowledge that managers are allowed to do this only when "these actions are reasonably believed in good faith to promise some shareholder benefit" (Boatright 2017, 63) and "bear some rational relationship to a long-term corporate and shareholder interest" (Noked 2012; cf. Kraakman et al. 2017, 99; von Kriegstein 2019, 115–16). From a practical perspective, however, it is easy for a CEO to show that the decision meets this requirement because "virtually any act that does not financially threaten the survival of the business could be construed as in the long-term best interest of shareholders" (Marens and Wicks 1999, 281). As Macey (2008, 190) has argued, "wealth maximization for shareholders is virtually impossible to enforce as a practical matter. The rule is aspirational, except in odd cases. As long as corporate directors and CEOs claim to be maximizing profits for shareholders, they will be taken at their word because it is impossible to refute these corporate officials' self-serving assertions about their motives."

If this is correct, it entails that managers, motivated to make ethical decisions that they expect to be profit-sacrificing, cannot be transparent about their motives. In other words, and as Moriarty (2014, 838) highlights, the corporation's directors are free to implement ethically oriented decisions that are expected to be profit sacrificing "as long as they do not tell anyone about it. And if someone asks the directors why they made a particular decision? If they really did make it because they thought it was the right thing to … but not the best decision for [the economic interest of] shareholders, then they must conceal this information" (cf. Marens and Wicks 1999, 281).

[34] For more remarks along this line, see Marens and Wicks (1999, 273), Stout (2012, 32), and Boatright (2017, 53, 63).

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Would this change if, as Stout suggests, SVM is an incorrect interpretation of the law and senior leaders are actually under no legal obligation to justify their ethical decisions by appealing to SVM? I don't believe so, given how current corporate law is interpreted. Any prudent corporate leader (and their legal counsel) recognizes that SVM is not only a compelling interpretation of the law but one that is widely accepted. As Marens and Wicks (1999, 281) themselves acknowledge, "no competent attorney would allow her client to argue in court that their corporation made a decision because it 'was the right thing to do' in the face of evidence that management knew of legal alternatives whose impact on the bottom line … were indisputably superior" (cf. Macey 2008, 182–84). Thus, even if senior leaders (and their legal counsel) believe that SVM is a mistaken interpretation of the law, they would nevertheless act as if it was the correct interpretation.

Let me illustrate what I have been discussing in the context of our examples. In all four of them, senior leaders pursue a policy expected to be profit-sacrificing (in the short and long term) because they believe such a policy is morally obligatory (even if not mandated by law). While the policy has support from a majority of shareholders, it has left a minority shareholder disgruntled by the adverse financial effects on his investment. This shareholder files a derivative suit against the company's senior leaders for breaching their fiduciary duties. In particular, he asks the judge for injunctive relief to compel the board to (in each example):

1. Require Ethosphere Social to use its more engaging algorithm, despite its negative externalities.
2. Pursue the rejected merger with Competitive Tech's main rival despite its anticompetitive nature.
3. Resume Democratic Financial's business with LCO despite LCO's antidemocratic methods and influence.
4. Get Pro-Life Pharma to undertake the development of the cost-effective drug despite its likely abortifacient side effects.

How would the boards of these companies respond to such a challenge? Not by candidly acknowledging that these policies were motivated by moral reasons and were expected to be profit-sacrificing in the short and long term. As Macey (2008, 180) notes, "CEOs who testify in depositions and trials are better coached and more willing to dissemble than Henry Ford was." Their lawyers would tell them that a candid admission may be interpreted by the court as an admission of breach of their fiduciary duty, given that Delaware courts have often equated the fiduciary responsibility to act "in the best interests of the company" with the mandate to "maximize shareholder value."

Of course, any senior leader who is not utterly lacking in imagination would be able to come up with a plausible account that connects the pursuit of these policies with the maximization of profits. The bar to do this successfully is quite low because Delaware courts have been willing to defer to senior leaders' words, even when external observers would find their accounts far-fetched or implausible.

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Thus, if challenged in court:

1. Ethosphere Social's senior management could argue that these reforms were meant to enhance the company's goodwill, strengthen its brand, and attract a larger and more loyal group of users.
2. Competitive Tech's leaders could say that they did not pursue the merger because they were confident it would be cheaper for the company to achieve market dominance by out-competing their rival.
3. Democratic Financial's leaders could say that they stopped working with LCO because this association was a liability for their plan to expand their operations into liberal states.
4. Pro-Life Pharma's executives may say that they avoided developing the abortifacient hair-loss treatment because they were afraid of becoming entangled in the cultural wars.

5.2. Why Using the BJR to Pursue Ethical Decisions Is Problematic

The lack of candor that the BJR seems to require is morally problematic. As Boatright (2017, 63) notes, "[e]nabling corporate social responsibility is not the purpose of the business judgment rule." The purpose of the BJR is to respond to practical considerations faced by judges needing to evaluate the standard of managerial conduct (Section 2.2). If, as most corporate law scholars believe, Delaware's standard of managerial conduct is SVM, this means that senior leaders who use the BJR to fulfill profit-sacrificing corporate moral obligations would be undermining the spirit of law by acting against such standard. What is more, concealing and lying about the motivations and justifications for their decisions, in particular about the fact that they expect these ethically motivated decisions to be profit-sacrificing, can (and sometimes will) be considered corporate fraud.

Scholars like Marens and Wicks (1999, 281) don't seem particularly bothered by using the BJR in this fashion. They suggest that "courtrooms are not forums for the expression of deeply held moral philosophy. Lawyers are trained to make the most conservative, precedent-supported argument that can plausibly defend a particular act or policy." Their view, however, is problematic in at least two ways.

First, this view fails to recognize that the law's power and influence are not limited to what happens in the courtroom. Laws play a critical role in the moral education of citizens (Aristotle 2013, 1179b–1180a); they provide guidance to individuals about "how to organize their affairs" (Hughes 2013, 235); and they play an important communicative social role. For instance, the public's understanding of seat belt usage is different in a jurisdiction that mandates it than in one that doesn't (McAdams 2015).

Second, and perhaps more importantly, the BJR does not merely influence what takes place within the courtroom. It also affects what takes place outside of the courtroom. Corporate leaders' word in court would have little weight if it contradicted their regular public pronouncements. Consequently, their lawyers would

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instruct executives to justify their ethical decisions based on their expected profit-enhancing potential in their annual and quarterly reports, earnings calls, regulatory filings, press releases, and so on (cf. Moriarty 2014, 838).

Senior managers are extremely influential. They act as role models who subordinates emulate, and their behavior and communications often set standards of corporate conduct (Brown and Treviño 2006; Brown et al. 2005; Mejia and Skorburg 2022). That corporate leaders are always justifying their ethically motivated activities based on how such activities impact the bottom line has led to an impoverishment of the role that ethics is meant to play in corporate activity. By justifying ethical corporate decisions because of their alleged profitability, the important role of ethics in the business context has been hollowed out. An EJR would play a valuable role to correct this by encoding into the law the role that ethical norms should play in corporate activity.

Ethical norms are not instrumental. They are supposed to be followed because they are demanded by morality (because it is wrong not to follow them); they are not meant to be followed because they are profitable or instrumental for some ulterior end. Moreover, ethical norms have an overriding normative force and involve considerations that trump one's preferences, tastes, and personal interests (Mejia and Bonaldi 2025, 6; cf. Hausman and McPherson 1993, 688; Mejia 2024; Sen 1977, 329). An ethical norm ought to be followed for its own sake, even if it is inconvenient and gets in the way of our desires and goals (Baker 2019, 48; Hodgson 2013, 78; Wight 2019, 80). Having to ground an ethical decision on its expected profitability is instrumentalizing ethics and, thereby, undermining it.

When ethics is instrumentalized, it is effectively misconstrued, distorting the role it should play in our social life. As I suggested, ethical norms, unlike other types of norms and imperatives, are not instrumental. They are supposed to override and thwart one's prudential goals and desires because morality demands it (not because doing so will be to one's benefit or the benefit of shareholders). By instrumentalizing ethics, one also wrongs many of those with whom one interacts. Instrumentalizing ethics leads one to interact with others as mere means, basing one's interactions with them only on the merits of the potential benefits they will bring to shareholders, and thereby failing to recognize their intrinsic worth.

6. INTRODUCING ETHICS INTO THE BUSINESS JUDGMENT RULE

As I mentioned earlier (Section 1), corporations have moral obligations that are not encoded into law. Corporate law ought to recognize this. The standard of managerial review cannot be one that requires senior leaders to pursue *any* decision that maximizes corporate profits, come what may. Managers should be required to pursue decisions that maximize corporate profits *only* when these decisions are ethically permissible (Mejia 2021a). In other words, the standard of managerial review, properly understood, should be E-SVM ("*ethical* shareholder value maximization standard of managerial conduct"). According to such a standard, corporate leaders are required to maximize profits, *provided that* they are also abiding by the corporation's ethical obligations.

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As I suggested above, it is unclear whether this revised standard is the standard endorsed by Delaware law. Some scholars, recognizing that the law should allow corporations to act responsibly, seem to suggest that it is (Macey 2008, 179). However, as I said before (Section 4.3), there does not seem to be any Delaware case or statute clarifying whether Delaware law permits (or requires) corporations to sacrifice profits when such profits violate ethical norms. What is more, in most discussions about corporate ethics, conformity with ethical norms is often conceptualized as an additional goal alongside profit maximization. When construed in this way, a case like *eBay v. Newmark* would suggest pursuing such ethical norms would be impermissible. Consequently, prudential lawyers and managers will interpret SVM narrowly.

The current BJR provides judges with a standard to determine when to review the profit-maximizing decisions of senior leaders. By assuming that their decisions are made in good faith, the BJR gives quite significant deference to senior leaders. If one recognizes E-SVM as the legitimate managerial standard, it follows that corporate law should recognize that the BJR should have an ethical dimension, a dimension that I will characterize as the "Ethics Judgment Rule" (EJR).

It is important to emphasize that that the EJR is a *dimension* of the BJR, not a separate rule alongside the BJR. To think that it is a separate rule suggests that there is business on the one hand (falling under the purview of the BJR) and ethics on the other (falling under the purview of the EJR). But this is conceptually problematic because it commits one to think that business is separate from ethics (cf. Freeman 2017); ethics, however, is integral to business and the *Business* Judgment Rule ought to recognize this.[35]

If the EJR, the ethical dimension of the BJR, uses the same standard of judicial review as the BJR, it would give senior leaders a similar degree of deference for making decisions that discharge the corporation's moral obligations (even if such decisions are profit-sacrificing). In other words, the EJR would instruct judges to assume that senior leaders' decisions are made in good faith.[36]

For those who believe that corporate Delaware law already allows managers to make corporate decisions that are morally obligatory but profit-sacrificing, the EJR would make explicit what is already implicit in the BJR. For those who see the BJR as a (problematic) loophole that morally oriented managers are forced to use to make such decisions, the EJR actually empowers such managers to make these ethical decisions and be transparent about them.

It is worth emphasizing that the EJR would not relinquish shareholder value as the corporate goal. The EJR would only permit appeals to moral obligations when such obligations are compatible with SVM. In fact, a commitment to *E*-SVM entails that

[35] I thank Hasko von Kriegstein and Aaron Ancell for pushing me to clarify this.

[36] Some corporate law scholars have suggested that the discretion that the BJR gives senior leaders when they make profit-related decisions applies with less force to decisions that involve ethical or social issues (Horton 2021). If one endorses this perspective, the EJR would provide a more demanding standard of judicial review than the standard provided by the BJR for profit sacrificing activities. In what follows, I will work under the assumption that the EJR provides the same kind of deference to senior leaders than the BJR gives to profit-related activities.

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the aspiration to maximize shareholder value constitutes a foundational ethical principle for corporate leaders. The EJR simply recognizes that there are moral limits to pursuing this goal. As we will see below, there are limits on the kind of ethical arguments, principles, or frameworks that corporate leaders would be able to deploy. Just like courts reject corporate objectives that relinquish shareholder value maximization, so would they reject ethical arguments, principles, or justifications that are incompatible with this managerial imperative. Thus, certain moral frameworks (including certain versions of stakeholder theory) would not be accepted by Delaware judges.[37]

7. OBJECTIONS

7.1. The EJR undermines managerial accountability

It has been said that decades of corporate governance in the US have sought to "strike an equilibrium between shareholder power and managerial accountability" (Mocsary 2017, 1349). One may think that the EJR breaks this balance, for example, by allowing corporate leaders to cloak self-serving decisions as motivated by the corporation's moral obligations.

While this worry appears to have merit in theory, it is overstated in practice. The EJR would make very little difference to shareholders' ability to hold senior leaders accountable because the current BJR already gives corporate leaders an enormous amount of deference, acting as a "nearly an iron-clad shield for directors of public corporations" (Smith 1998, 286).

First, the bar for courts to review senior leaders' decisions is very high. Mere negligence, for instance, is not enough to warrant courts' review; shareholders need to show that *gross* negligence was involved. Second, in the very few cases where courts will be willing to review a shareholder complaint against senior leaders, they do not seek to evaluate whether senior decisions were optimal; they merely evaluate whether they were reasonable. And, here, again, the bar for a decision to be reasonable is very low. Third, when courts review corporate leaders' decisions, their evaluation focuses on the process by which these decisions were taken, not on the content of such decisions. And, once again, the court's review will clear senior leaders of wrongdoing if they secure what are often perfunctory and minimal procedural steps. Thus, if the EJR operated along the guidelines used by the BJR to evaluate profit-related activities, it would not significantly alter shareholders' current limited ability to hold corporate leaders accountable.[38]

It is worth noting that with the recognition of the EJR as a dimension of the BJR, courts' decisions on some of the most important cases concerning corporate purpose would not change. In particular, if the court adopted the EJR, the outcome of the

[37] I thank Joseph Heath and an anonymous reviewer for pressing me to make this explicit.

[38] If one agrees with Horton (2021) that an EJR should provide a more demanding standard of judicial review than the standard of review for profit-related decisions (see n. 36), then it would follow that the EJR would actually make senior leaders more accountable to shareholders than they currently are because judges would be more willing to review shareholder derivative suits.

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decision in *Dodge v. Ford* and *eBay v. Newmark* would be the same. As I mentioned, the EJR does not relinquish profit maximization as the corporate objective. It simply recognizes that there are moral limits to how profits can be achieved. In *Dodge v. Ford* and *eBay v. Newmark*, the defendants acknowledged that they were relinquishing profit maximization as the corporate goal. Ford explicitly stated that his corporate policies aimed "to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes" (*Dodge v. Ford Motor Company*, 204 Mich. 459, 170 N.W. 668 [Mich. 1919]). Similarly, the founders of Craigslist made it clear to the court that "craigslist should not be about the business of stockholder wealth maximization, now or in the future" (*eBay Dom. Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 [Del. Ch. 2010]).

Scholars have argued that Ford or Newmark would have avoided the court's negative decision if they had defended that their decisions had been motivated by an effort to maximize the company's profits in the long term (Boatright 2017; Macey 2008). If Delaware were to adopt an EJR, and one agrees that *E*-SVM captures Delaware's standard of managerial conduct, Ford and Newmark could have avoided the court's negative decision by arguing that, while they recognized that their managerial imperative was to maximize profits, the decisions for which they are being sued respond to ethical constraints on this imperative.

These two cases, however, have interesting features concerning the plausibility of some of the arguments that senior leaders could adduce. The EJR would permit Ford to pay higher wages to its employees if this responds to a recognition that the current wages are exploitative. Under an EJR, however, the court's verdict would not change if Newmark were to argue that the board's reluctance to charge for more services was guided by the company's "communist and socialistic" ethical principles or by the view that "corporations should not have a commercial nature." Neither of these two justifications are compatible with an imperative to maximize shareholder value. Consequently, the court would not accept them as a legitimate application of the EJR.

7.2. The EJR Is Unnecessary

Some readers may suggest that an EJR is not necessary. They would argue that Delaware corporate law allows any corporate founder or majority group of shareholders to add to their corporate charter language empowering their corporate leaders to make ethically motivated decisions that can be profit-sacrificing in the short and long term. As such, the ability of managers to take moral considerations into account could be implemented on an ad hoc basis, without the need for an across-the-board implementation of the EJR by Delaware courts.[39]

There are two main problems with this proposal. First, it is risky. Not all changes in a corporate charter will be accepted as legitimate by a Delaware judge. Minority shareholders who disagree with this charter amendment (given its potential or real negative financial effects) may pursue a derivative suit or assert an appraisal rights

[39] I thank an anonymous referee for pressing me to address this point.

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claim. It is an open question whether the judge dealing with this challenge will find merit in the minority's challenge. If there were an EJR, the judge would not find merit. But without any such rule, and because there is no precedent on this matter, this may lead the judge to interpret SVM narrowly, ruling that incorporating a clause allowing managers to make ethically motivated profit-sacrificing decisions into the corporate charter is incompatible with the profit-maximizing imperative of a general corporation.

Of course, Delaware judges may also rule that it is permissible to add into the corporate charter a clause empowering corporate leaders to make ethically motivated decisions expected to be profit-sacrificing in the short and long term. But this raises a second and important problem with this proposal: its ad-hoc nature.

According to this ad-hoc proposal, ethical norms should limit profit maximization only if this is explicitly added to the corporate charter. In doing so, courts would be expressing the view that the default managerial standard of conduct is SVM narrowly conceived. In other words, in this proposal, Delaware courts would be effectively saying that unless language is explicitly added to the corporate charter, ethical norms have no bearing on how companies may choose to maximize profits. Such a view is highly problematic because it misconstrues the role that ethics plays (and ought to play) in our social life. In particular, it fails to recognize that there are a variety of ethical duties and obligations that restrict how companies may be permitted to profit, duties that should be recognized by *all* corporate managers. After all, and as has been argued by numerous normative ethics scholars, if managers are acting on behalf of shareholders, this entails that they should not only promote their interests but also fulfill many of their moral obligations (Bowie 2010; Dietsch 2020; Goodpaster 1991; Hughes 2019; Langtry 1994; Mansell 2015; Mejia 2019; Ohreen and Petry 2012; Pogge 1992; von Kriegstein 2016). Thus, what is particularly problematic about this ad-hoc proposal is the kind of institutional message that it sends: it suggests that responding to moral norms is optional and that profits trump moral norms unless a majority of shareholders have explicitly chosen otherwise.

8. THE VALUABLE BENEFITS OF AN EJR

Many scholars have suggested that the deference afforded by the BJR gives directors, executives, and managers the necessary discretion to make ethical decisions to discharge the corporation's moral obligations. However, as I have argued, there are good reasons for practitioners to believe that courts will only defer to senior leaders when they say that their ethical decision was motivated by profit maximization. This, as I argued, puts ethically minded managers in a difficult moral position, requiring them to dissemble their justifications for their ethically motivated decisions. Moreover, and perhaps more importantly, this tendency to justify all corporate moral obligations by appealing to the bottom line instrumentalizes ethics and, thereby, corrupts our moral discourse.

I proposed to infuse into the BJR an EJR, a rule giving senior leaders leeway to make profit-sacrificing but morally obligatory ethical decisions in good faith without fear of liability. This, I suggested, involves recognizing that the proper standard

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of managerial review is not SVM but E-SVM. I argued that the EJR, properly implemented, would make little practical difference in the effective leeway that the current law affords to corporate leaders in Delaware. However, the EJR would make a significant difference in our public discourse.

On the one hand, the EJR would provide a clear indication to law-abiding citizens about the role that ethics ought to play in corporate activity. As Hughes (2023) has compellingly argued, the law is a powerful way to authoritatively clarify the moral duties that we should recognize as a society (Hughes 2023, 477). "[I]n a society in which citizens are coauthors of the laws that govern them, using law to articulate public standards of conduct is a way for citizens to express their commitment to treating each other with respect" (Hughes 2023, 477). On the other hand, the EJR would give ethically oriented managers a way of explaining their profit-sacrificing decisions to shareholders and other stakeholders who recognize the law's authority (cf. Hughes 2023, 473).

Thus, the EJR is necessary, not merely because it stops pushing leaders to obfuscate or lie about their ethically motivated decisions. It would also enhance the quality of the conversations among the practitioners and citizens concerning the role that ethics should play in corporate activities.

The way in which the nature of ethics has been corrupted in the public discourse within the business community can be illustrated by two phenomena. First, there has been a tendency to formulate ethical norms and decisions as grounded on individuals' "ethical values" (Gentile 2010) or "ethical preferences" (Hart and Zingales 2017). Formulations like these tend to suggest that ethical norms are voluntary and subjective. This, however, mischaracterizes ethical norms and obligations, which have a mandatory dimension (Mejia and Bonaldi 2025).

Second, most appeals to abide by ethical norms among business practitioners and academics nowadays are rooted in the idea that companies "do well by doing good." In fact, a good deal of the popularity of Environmental, Social, and Governance (ESG) initiatives was rooted in this idea. As Bainbridge (2023b) points out, "the three largest institutional investors—asset managers BlackRock, State Street, and Vanguard—all claim to have embraced ESG because they believe that ESG factors are positively correlated with firm performance." However, the uncritical acceptance of the idea that ethics pays off is a misguided form of magical thinking that assumes that corporations will never need to engage in trade-offs between profits and ethics. While there are, undoubtedly, many cases where "the power of and" leads companies to do well by doing good (Freeman et al. 2020), it is naive and wrong-headed to think that this will always be the case (Fancy 2021; von Kriegstein 2019, 109). Such magical thinking is problematic because it muddles our moral discourse and corrupts the ability of the business community to recognize that ethical norms will sometimes require ethical decisions that need to be implemented despite being profit-sacrificing in the short and long term.

The EJR would be an important step to put ethics back in its proper place. It helps business practitioners recognize that, even if the company's purpose may be to maximize profits, ethical duties and obligations impose limits on how this purpose can be achieved. As such, the EJR recognizes that ethics is (and should be) an

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essential dimension of business. It also empowers directors, executives, and managers to make necessary profit-sacrificing ethical decisions without fear of potential negative repercussions and to communicate these decisions transparently to the corporation's stakeholders. This, in turn, allows us to reconceptualize the notion of corporate success. It helps us recognize that a successful company is not merely a profitable one; it is a profitable company that displays moral integrity.

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