HIDING IN PLAIN SIGHT: CORPORATE LEGAL RESPONSIBILITY

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Abstract

The purpose of the corporation is contested. The heart of the debate is whether corporations ought to maximize shareholder value, or rather balance shareholder gains against the welfare of other constituencies. Lawyers and policymakers alike commonly hold that most corporations rightly regard the interests of shareholders as their highest priority. Even after repeated challenges from scholars,[1] *high-profile statements from corporate executives,*[2] *and the promise of ESG investments,*[3] *the common view is that maximizing shareholder value is the law. And while other non-corporate legal fields such as labor law, tax law, consumer laws and environmental laws may strive to protect the interests of stakeholders, corporate law instructs officers and directors to prioritize shareholders.*

The paper challenges this interpretation of corporate law. It argues that even without any changes to current regulation, a constituency-oriented obligation to consider the social and economic impact of corporate conduct on corporate stakeholders exists within current corporate law.

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1. Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. REV. 164, 164 (2008); LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH (2012) [hereinafter STOUT, MYTH].

2. *Statement on the Purpose of a Corporation*, THE BUSINESS ROUNDTABLE (Aug. 19, 2019), https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationJuly2021.pdf.

3. ESG, an acronym for "Environmental, Social and Governance," is a term used to describe the ethical impact of financial investments. *See* Stuart L. Gillian, et. al., *Firms and social responsibility: A review of ESG and CSR research in corporate finance*, 66 J. OF CORP. FIN. 1, 1 (Feb. 2021).

By analyzing the legal framework of corporate law in Israel, the US, and the UK it is possible to show that corporate law itself is capable of a broader interpretation; and that such interpretation—one that considers the impact of corporate behavior on social welfare—is necessary for a sustainable society. With unprecedented corporate power, and the threats it poses to the environment and to democratic principles, its reinforcement of structures of privilege and its role in deepening inequality, the interpretation of corporate law needs to re-conceptualize corporate purpose. After a series of global crises has exacerbated and exposed the frailty of our social structures, a new interpretation of corporate law is required, one which identifies the duty to consider the wellbeing of the corporate constituencies. We argue that this duty is already embodied in current regulation. The law of corporations in all three jurisdictions allows for such a reading.

INTRODUCTION

On February 24, 2022, Russia launched a full-scale invasion to Ukraine.[4] A coordinated response by the West followed; many countries sent military and humanitarian aid,[5] and a unified front of the U.S., the EU,

4. *Ukraine Under Attack: Documenting the Russian Invasion*, N.Y. TIMES (Oct. 31, 2022), https://www.nytimes.com/article/russia-ukraine-war-photos.html.

5. The U.S., UK, Canada, Australia, the EU and other countries have sent military equipment, either in the form of weapons and ammunition, or as "unspecified" military gear.

and the UK implemented a series of economic sanctions against Russia. The U.S. banned Russian oil imports, and the UK joined in freezing the assets of Russia's central bank and in seizing assets of the oligarchs of Putin's inner circle**.** The objective of these sanctions was to cut Russian economy off from the global markets. Interestingly, the role of transnational corporations in Russia's isolation was vital. After only a few days of war, large multinational corporations have pulled out of the Russian economy. Oil and gas companies such as *BP*, *Shell,* and *ExxonMobil* cut their investments in Russian energy companies;[6] finance companies such as *Visa*, *MasterCard*, *American Express,* and *PayPal* suspended their business dealings in Russia;[7] tech giants *Samsung* and *Sony* suspended shipments to Russia, and *Apple* has restricted its Apple Pay services.[8] The most significant blow to Russian economy was its partial disconnection from SWIFT, the global messaging system for financial transactions. SWIFT is a non-state international cooperative of banks, linking more than 11,000 institutions in over 200 countries,[9] founded as a member-owned cooperative society under Belgian law, and is controlled and owned by its members.[10] While some central banks are also members of SWIFT, its governing structure guarantees that the control of the organization is proportional to the volume of usage of its services. As an organization comprised mostly of private banks, it is regarded as a "neutral third party" and in previous political crises, such as that of Iran in 2012, it was very late to respond to an international campaign pressing it to join the sanctions against Iran. In its attempt to stay neutral in 2012, SWIFT initially insisted

Many others, including Turkey and Israel, have sent humanitarian aid. The American government has authorized $13.6 billion dollars as emergency aid. *See* David E. Sanger, et al., *Arming Ukraine: 17,000 Anti-Tank Weapons in 6 Days and a Clandestine Cybercorps,* N.Y. TIMES (Mar. 6, 2022), https://www.nytimes.com/2022/03/06/us/politics/us-ukraine-weapons.html; Steven Erlanger, *NATO Countries Pour Weapons into Ukraine, Risking Conflict with Russia*, N.Y. TIMES (Mar. 2, 2022), https://www.nytimes.com/2022/03/02/world/europe/nato-weapons-ukraine-russia.html; Catie Edmondson, *House Approves $13.6 Billion in Emergency Aid for Ukraine*, N.Y. TIMES (Mar. 9, 2022), https://www.nytimes.com/2022/03/09/us/politics/house-emergency-aid-ukraine.html; Steve Hermon, *Ukraine Set to Get More Military, Humanitarian Aid from US,* VOA (Mar. 6, 2022), https://www.voanews.com/a/6472487.html.

6. *BP to offload stake in Rosneft amid Ukraine conflict*, BBC NEWS (Feb. 28, 2022), https://www.bbc.com/news/business-60548382; *Shell to sell Russian investments due to Ukraine conflict*, BBC NEWS (Feb. 28, 2022), https://www.bbc.com/news/business-60564265.

7. *Visa and Mastercard suspend Russian operations*, BBC NEWS (Mar. 6, 2022), https://www.bbc.com/news/business-60637429.

8. Beth Timmins, *Apple, Nike and Google join brands limiting service*, BBC NEWS (Mar. 2, 2022), https://www.bbc.com/news/technology-60579641.

9. *Swift History*, SWIFT, https://www.swift.com/about-us/history (last visited Oct. 21, 2022).

10. SUSAN SCOTT & MARKOS ZACHARIADIS, THE SOCIETY FOR WORLDWIDE INTERBANK FINANCIAL TELECOMMUNICATION (SWIFT) 16, 29-30 (2013).

that the system is "only a secure messaging service," and that its activities fell "beyond the remit of current law."[11] A press release from February of 2012 by SWIFT, along the same lines, stated that it was "committed in maintaining its role as a neutral global financial communications network."[12] It wasn't until the U.S. Senate Banking Committee proposed legislation to permit the sanctioning of SWIFT that it reluctantly joined the effort to cut off Iranian finance. On this occasion, however, SWIFT has joined the sanctions against Russia.

The significance of the private sector's cooperation with the embargo on Russia in 2022, illustrates the extent to which corporate discretion and conduct impacts geopolitical, economic, and social issues. While the majority of transnational corporations chose to join the opposition against Russia's aggression on this occasion, it seems that things might have turned out very differently had they acted only in accordance with their financial interests and refrained from acting on ethical grounds. In the past, more often than not, they turned a blind eye. The very same companies that withdrew from Russia have not only ignored, but have also, at times, benefitted from atrocities taking place in other parts of the world. *Boeing*, for instance, which suspended its operations in Russia in March of 2022,[13] has made huge profits from the war in Yemen,[14] a war that, according to the UN, has placed over 20 million people in need of humanitarian aid.[15] *Shell*, quick to divest from Russian oil and gas companies, has been accused of complicity in horrific crimes committed by the Nigerian military in the 1990s.[16] *BP* was responsible for the single largest environmental disaster ever, the oil spill in the Gulf of Mexico in 2010.[17] Other examples

11. *Swift Sanctions on Iran*, WALL ST. J. (Feb. 12, 2012, 12:01 AM), https://www.wsj.com/articles/SB10001424052970203718504577178902535754464.

12. SCOTT & ZACHARIADIS *supra* note 10, at 134.

13. *Ukraine conflict: Airbus, ExxonMobil and Boeing take action over Russia ties*, BBC NEWS (Mar. 2, 2022), https://www.bbc.com/news/business-60582367.

14. Since the war in Yemen broke out, in March 2015, in addition to Billions of dollars in profit Boeing's stock price has risen from about $150 to $360. *See* Alex Kane, *Here's Exactly Who's Profiting from the War on Yemen,* In These Times (May 20, 2019), https://inthesetimes.com/features/us-saudi-arabia-yemen-war-arms-sales.html.

15. UN OCHA, *Global Humanitarian Overview: Yemen*, https://gho.unocha.org/yemen (last visited Oct. 14, 2022).

16. *Investigate Shell for Complicity in Rape Murder and Torture,* AMNESTY INT'L (Nov. 28, 2017), https://www.amnesty.org/en/latest/press-release/2017/11/investigate-shell-for-complicity-in-murder-rape-and-torture/.

17. Campbell Robertson & Clifford Kraus, *Gulf Spill Is the Largest of Its Kind Scientists Say*, N.Y. TIMES (Aug. 2, 2010), https://www.nytimes.com/2010/08/03/us/03spill.html.

abound.[18] For better or worse, corporate impact far exceeds an imagined neutral and detached marketplace.

It is our contention that law does not do enough to hold private power responsible for undermining human well-being. The reason, however, lies not in law itself, but in its cultural environment.[19] This is true not only in the face of wars, a global pandemic, or the imminent climate crisis, but also in what may seem the most mundane of circumstances, that in fact shape our public sphere, communities, and lives.

Indeed, corporate power is everywhere. From *Google*, *Amazon,* and *Meta,* to *Pfizer* and *Moderna*, state regulators and legal scholars alike express growing concern~~s~~ with the overwhelming power of corporations.[20] But while countless articles and books are written on corporate excessive power, and while high-profile declarations by corporate leaders promise to "ensure a more inclusive prosperity" through corporate action,[21] not much real change is in evidence. Corporations rarely consider the detrimental impact of their conduct on other constituencies and focus on share value as the (almost) exclusive measure of their success. The law of corporations, as currently understood, is failing to respond. We argue that the reason for this is that corporate culture pushes the interpretation of law towards an assumption of shareholder primacy. But that this is neither the only possible interpretation of the law, nor a desirable one.

The paper challenges the conservative, dominant, interpretation of corporate law in the U.S., the UK, and Israel. It argues that the multifold, and growing, power of corporations, and the threats it poses to democratic principles and environmental issues, its reinforcement of structures of privilege and its role in deepening inequality, mandates the adoption of a different, constituency-oriented, reading of the law. We will show that the

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18. For corporate role in the Israeli-Palestinian conflict, see Ofer Sitbon, *Human Rights, Normative Pressure and Corporate Social Responsibility in the Israeli-Palestinian Conflict*, 52 GEO. J. OF INT'L LAW 215, 215 (2020).

19. Lund and Pollman term this culture "the corporate governance machine" and point to a system of institutional players who orient corporations toward shareholder interests through law, culture, and markets. *See* Dorothy Lund & Elizabeth Pollman, *The Governance Machine,* 121 COLUM. L. REV. 2653, 2565-68, 2578, 2602 (2021).

20. *See generally* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM, (2019); Ryan Calo *&* Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV., 1623, 1628 (2017) (arguing that Uber "can monitor and channel the behavior of all users" and that "their position as all-knowing intermediaries also presents unique opportunities for market manipulation"); Omer Tene & Jules Polonetsky, *Big Data for All: Privacy and User Control in the Age of Analytics,* 11 NW. J. TECH. & INTELL. PROP., 239, 250 (2013) ("[P]erhaps the most oft-cited example of the potential of big data analytics lies within the massive data silos maintained by the online tech giants: Google, Facebook, Microsoft, Apple, and Amazon.").

21. *Statement on the Purpose of a Corporation, supra* note 2.

law in all three jurisdictions already allows for such a reading and argue that adopting a constituency-oriented interpretation reflects an understanding of the corporate entity which is better fitted for today's challenges.

The paper proceeds as follows. It starts, in the first part, with a depiction of the growing corporate power, through the lens of a series of global crises that have both exacerbated and exposed much of the frailty of our social structures; it then moves to discuss the changing equilibrium between corporations and states, mainly through privatization in its many forms; the last section of the first part focuses on the rise of the CSR discourse and the changing social expectations from corporations, which have led, in part, to growing doubts about the dominant paradigm of shareholder value maximization. Special attention will be devoted to the web platform corporations, the global impact of which on people's lives has become unparalleled. The purpose of this part is to present the overwhelming increase of corporate power in the past few decades, in both magnitude and reach. This, we argue, mandates re-thinking the role of corporations that can be facilitated through a broader reading of corporate law.

The most urgent change, we believe, is to re-conceptualize corporate purpose. Corporations are not neutral economic spheres but social institutions, embedded within society. This must lead to recognizing their legal responsibility. The integration of a standard of responsibility into corporate regulation will naturally result in the rejection of the shareholder primacy norm as a legal imperative.

We will not engage with the economic case for rejecting the shareholder primacy norm. Rather, we will build on it, and focus our attention on highlighting the urgency of pushing back on corporate power by re-interpreting current law, and re-conceptualizing corporate purpose. We show that this transformation does not require any legislative amendments, as current law already includes a latent requirement for corporate responsibility and already allows for a broader reading of corporate purpose. What needs to change is the doctrines that coddle corporate interests.

The second part of the paper will analyze the legal status of corporations in Israel, the UK and the U.S. It will show that while much has been written about the purpose of the corporation as more than just a vehicle to enable investment or produce profits, and while the laws prescribing its status allow for a broader understanding than the shareholder primacy norm, these broader interpretations have not been applied.

Against this backdrop, the third part of the paper will offer a different perspective on corporate law. Its essence is a re-conceptualization of the place of corporations in society, one that denies their standing as a private entity operating in an allegedly neutral economic sphere, but rather highlights their status as socio-economic enterprises, inseparable from the broader social context in which they operate.

I. CORPORATE POWER

In 1995, when the Israeli Corporate Law Reform bill was introduced in Parliament, Larry Page and Sergey Brin had only just met, and the *Google* corporation was, at best, a vague idea. *Facebook* was founded as an open social network just two months prior to the enactment of the UK Companies Act of 2006, and *Apple*'s iPhone had not yet been released. The world we live in today, in which the total market value of the five big tech companies is at 7 trillion USD,[22] is different from any world the legislators of both company laws could have even imagined. The transformation in corporate power, its ubiquity and countless-manifestations, translates into an ever-growing impact on both global and local social realities. Corporate power, and its potential to cause harm, require a more suitable legal perception of the corporate entity. Dethroning the shareholder primacy paradigm as the overarching interpretive norm of corporate law is a necessary first step, as it impedes such change.

Corporate power, however, is only one aspect of the new global reality. The changing equilibrium between transnational corporations and states should be considered as well, as it exposes the diminishing power of people around the world to take part in shaping their own environment. The globalization process, which in many ways was only emerging when the Israeli corporate law reform bill was introduced, played a crucial role in these two parallel processes: on one hand, the boosting of corporate power—legally, economically and politically;[23] and on the other hand, the

22. J. Clement, *Google, Amazon, Meta, Apple, and Microsoft (GAMAM), statistics & facts,* STATISTA (July 18, 2022), https://www.statista.com/topics/4213/google-apple-facebook-amazon-and-microsoft-gafam/#dossierKeyfigures; *see also Market capitalization of the largest internet companies worldwide as of June 2022*, STATISTA, (July 27, 2022), https://www.statista.com/statistics/277483/market-value-of-the-largest-internet-companies-worldwide/.

23. For a discussion of corporate power, see Ronit Donyets-Kedar, *Rethinking Responsibility in Private Law*, *in* PRIVATIZATION, VULNERABILITY AND SOCIAL RESPONSIBILITY (Martha A. Fineman et al., eds., 2016); NOREENA HERTZ, THE SILENT TAKEOVER: GLOBAL CAPITALISM AND THE DEATH OF DEMOCRACY (2002); GEORGE MONBIOT, CAPTIVE STATE: THE CORPORATE TAKEOVER OF BRITAIN (2000); Sharon Beder, *The Corporate Assault on Democracy,* 4 INT'L J. OF INCLUSIVE DEMOCRACY, Jan. 2008, at 1, 1; DAVID ROTHKOPF, POWER INC.: THE EPIC

retreat of the state, and the erosion of its sovereignty in shaping independent socio-economic policies, especially in fiscal and monetary aspects, and, in turn, in terms of the robustness of welfare policies.[24] Globalization affects the power balance between corporations and governments in various ways: first, the global mobility of corporations induces a "race to the bottom," reflected in tax breaks and trade agreements, intended to draw corporate investment. Corporate global mobility also allows corporations to make use of tax havens and financial secrecy agreements and regulations. Both practices, in turn, reduce tax revenues for hosting states, and diminish the scale and quality of the social services it can offer.[25] In addition, aggressive tax planning allows further wealth accumulation by corporations, fortifying their economic power. This too works in their favor *vis-à-vis* states. Finally, trade agreements and regulatory contracts that corporations take a major role in drafting, and which are only loosely overseen by parliaments, leads to light, nontransparent regulation that usually serves the interests of capital, rather than those of the public.[26]

Another aspect of the effects of globalization on the erosion in state sovereignty is the impact of international institutions, such as the world bank and the IMF on the economic policies of many states. These have advanced a neoliberal agenda that has led many poor countries to eliminate trade barriers, as well as reducing subsidies in support of their local agriculture or industry. The direct beneficiaries were banks and transnational corporations.[27]

Yet another aspect of the weakening of the state is the privatization of public services. Under the neoliberal philosophy, "government is not the solution to our problem; government is the problem," as President Reagan

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RIVALRY BETWEEN BIG BUSINESS AND GOVERNMENT—AND THE RECKONING THAT LIES AHEAD (2012).

24. *See generally* JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002).

25. For further reading on tax evasion, see TAX JUSTICE NETWORK, THE TAX GAMES: ON TAX PLANNING, TAX EVASION, AND EVERYTHING IN BETWEEN (2014); see also the "global minimum tax" proposal.

26. An example for this is that the majority of trade agreements between states and private investors include an arbitration clause, determining that governments must respond to any claims brought against them by their corporate counter parties, before an international private tribunal (known as "investor-state dispute settlement" mechanism). These tribunals typically provide investors with comprehensive legal protection and possess the authority to rule hefty compensation, in case they find that state regulation had a negative effect on profits. *See The Arbitration Game*, THE ECONOMIST (Oct. 11, 2014), https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game.

27. STIGLITZ, *supra* note 24, at 6-8.

famously declared.[28] The implications are setting the "small government" as an objective, strengthening the private sector, and the recommodifications of goods and services. The culmination of this process is the privatization of services that are traditionally thought of as distinctively public, such as defense, incarceration, and policing.[29]

The assumption of superior private efficiency, and the quest for international economic competitiveness are important contributors to the retreat of the state from a variety of economic activities. The natural beneficiaries are corporations, who correspondingly acquire a more central position in the social and economic sphere.

The implications of these processes for the public interest are not encouraging. The IMF, in itself an agent of globalization for many years, published in 2017 a comprehensive study concluding that the mobility of capital and labor, coupled with the small government agenda, are a major cause of the rapid growth in inequality.[30] Research also shows that when governments are more involved in public services, inequality decreases, and economic growth is enhanced.

One of the most significant aspects of corporate dominance is the growth of the tech platform giants (*Google*, *Meta*, *Apple*, *Amazon,* etc.), who have become, in the past two decades or so, major actors in the global economy. The "Big Data" age, and the unprecedented monitoring of every aspect of human activity, has turned cyberspace into the most salient locus of the changing equilibrium between states and corporations. The platform corporations have become the gate keepers of the vast content available on the web. Through search engines, social networks, e-commerce and more, these platform corporations control, via nontransparent algorithms, the way information is presented, used, interpreted, and exposed to billions of users around the world. Their advantage in dictating the terms of agreement with individual clients, and the ability to take down, promote or block content or users, endows the platform corporations with de facto control over

28. Inaugural Address of President Ronald Reagan, 1 PUB. PAPERS 1, 1 (Jan. 20, 1981).

29. Private incarceration in Israel was deemed unconstitutional, after the High Court of Justice struck down an attempt by the government to privatize. *See* LAUREN-BROOKE EISEN, INSIDE PRIVATE PRISONS: AN AMERICAN DILEMMA IN THE AGE OF MASS INCARCERATION 185 (2017).

30. Prakash Loungani & Jonathan D. Ostry, *The IMF's Work on Inequality: Bridging Research and Reality*, IMF BLOG (Feb. 22, 2017), https://www.imf.org/en/Blogs/Articles/2017/02/22/the-imfs-work-on-inequality-bridging-research-and-reality.

knowledge, its hierarchy, its traffic, focus, and ultimately over public opinion, and its perception of reality—actual or imagined.[31]

Under the current interpretation of corporate law, these companies strive to maximize shareholder value, which often leads to harmful business strategies affecting personal autonomy, democracy, mental wellbeing, etc.[32] An example is *Facebook*'s exploitation of user information without their consent or knowledge in the Cambridge Analytica scandal to support Trump's presidential campaign.[33] In this sense, the power of these corporations transcends that of governments, and reflects the potential danger they pose to human rights and wellbeing. This new reality challenges the classic theory that considers the state as the major threat in this regard.

It is not surprising, therefore, that new attempts to better regulate these aspects of private power—in both antitrust and privacy[34]—are slowly becoming more common. As we will argue below, however, these specific regulatory additions are not enough. What is required instead is a new interpretive paradigm for corporate law—one that is not guided by the shareholder primacy norm but rather takes into account the broad implications of corporate conduct on society at large.[35]

We have thus far described the shift in power relations between states and corporations, especially as a result of the globalization and privatization processes, and with a focus on the unique position of platform corporations as significant agents of this change. These have resulted in the rise of the

31. See Shelly Kreiczer-Levy & Ronit Donyets-Kedar, *Better Left Forgotten: An Argument Against Treating Some Social Media and Digital Assets as Inheritance in an Era of Platform Power*, 84 BROOK. L. REV. 703, 706, 722 (2019), for a discussion of the power of the platform corporations on shaping memory through their post-mortem profile management policies.

32. *See also* Evan Greer, *Mark Zuckerberg Has to Go. Here are 25 Reasons Why*, THE GUARDIAN (May 8, 2019), https://www.theguardian.com/commentisfree/2019/may/08/mark-zuckerberg-has-to-go; The WSJ published a series of articles on Facebook and Instagram's conscience decision to increase traffic for the benefit of the business model, at the expense of harming young children. *See generally* Georgia Wells & Jeff Horwitz, *Facebook's Effort to Attract Preteens Goes Beyond Instagram Kids, Documents Show*, WALL ST. J. (Sept. 28, 2021, 1:24 PM), https://www.wsj.com/articles/facebook-instagram-kids-tweens-attract-11632849667.

33. The business model of these companies, and especially Google and Facebook, is based on gathering as much information on the users of their platform, selling it to whoever is willing to pay—from other companies to politicians. For a comprehensive discussion, see ZUBOFF, *supra* note 20.

34. *See* 2016 O.J. (L 119) 87.

35. See Donyets-Kedar, *supra* note 23, for a suggestion to consider platform corporations as legal institutions with public characteristics, rather than as conventional private entities. See also K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO. L. TECH. REV. 234, 234-35 (2018), for a similar line of argument.

corporate social responsibility movement and the changing expectations from corporations.

Since the end of the 1990s and especially following the uncovering of harmful practices by transnational corporations, the discussion of corporate social responsibility has made progress, especially among civil society organizations, but also among the general public. Stakeholder discourse is becoming more demanding and various civil-society campaigns are trying to rein in corporate conduct. As the private sphere expands into the public domain, the interest of the public in the private sphere grows. This includes a deeper scrutiny of harmful corporate practices, production conditions, employment terms, detrimental impact on the climate and human rights breaches. Civil society organizations push corporations to meet higher normative standards. Using consumer boycotts, urging divestments, fair trade campaigns, class actions, etc., these demands may resonate in corporate boardrooms.[36]

Another aspect of the same phenomenon is the "business and human rights" discourse that has also developed in recent years with an impact on social expectations from corporations. The business and human rights movement argues that human rights law, mostly restricted to states, should be extended to transnational corporations.[37] Its efforts are bearing fruit, and in 2011, the UN Human Rights council published guiding principles on Business and Human Rights, asserting that corporations, in addition to states, must also respect human rights.[38] While this is not a legally binding document, the UN principles enjoy wide support from leading corporations as well. In 2019, the UN Human Rights Council issued a draft-treaty aimed specifically at corporations in relation to human rights.[39] While there is still a long way to go before, and if, it is ratified, the draft is yet another signal

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36. *See generally* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS (1998); *see generally* Tim Bartley & Curtis Child, *Shaming the Corporation: The Social Production of Targets and the Anti-Sweatshop Movement*, 79 AM. SOCIO. REV. 653, 653-654 (2014).

37. *See generally UN Global Compact Strategy 2021-2023*, UNITED NATIONS GLOB. COMPACT, https://ungc-communications-assets.s3.amazonaws.com/docs/about_the_gc/UN-GLOBAL-COMPACT-STRATEGY-2021-2023.pdf (the Global Compact, a UN initiative that calls for corporations to respect human rights, and not to cooperate with their infringements, is an example); *see generally* OECD Guidelines for Multinational Enterprises (2011), https://www.oecd.org/daf/inv/mne/48004323.pdf (in 2000 the OECD published a parallel code of conduct for multinational enterprises).

38. John Ruggie*, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNITED NATIONS HUM. RTS. COUNCIL (Mar. 21, 2011), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

39. United Nations Human Rights Council Res. 26/9 (July 16, 2019).

for the growing understanding that private power must be restrained, and that managing the company to maximize shareholder value is no longer viable (if indeed it ever was).

In response, corporations themselves and especially those in the public eye, have started to voluntarily adopt a range of socially responsible practices,[40] which in turn further stimulated social expectations of responsible behavior. The academic managerial discourse, especially in Europe,[41] has also begun to focus more on questions of business ethics, corporate social responsibility, sustainability, and business-and-community relations, reflecting a shift from the contractual-corporate paradigm to a stakeholder model. It seems fair to say, then, the debate today no longer questions the necessity of corporate social responsibility, but rather considers its proper scope.

As will be shown below, however, these changes have not permeated into law itself, or, more accurately, have not informed a broader interpretation of equivocal legal concepts. Corporate and legal actors throughout are still prioritizing shareholder value.[42]

The first part of the paper focused on the profound transformation in the power relations between states and corporations, showing that globalization, privatization, and the rise of platform corporations have brought about an urgent need to review the overarching principles that inform corporate purpose. A change in public opinion, more aware of the

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40. A growing number of corporations, especially transnational ones, invest considerable capital and attention in socially beneficial projects, and leading businesses have become increasingly involved in various multi-stakeholder initiatives. Virtually all of the Fortune 500 companies have a CSR policy that commands compliance with human rights and environmental standards. Among the companies that have adopted some type of CSR guidelines, or have joined CSR initiatives, are *Intel, General Electric and Kimberly-Clark* (who are signatories to the Global Compact, The UN CSR guidelines initiative). For more information of Fortune 500 companies, see Kelly Seiz, *CSR: How Fortune 500 Companies Measure Up*, CSRHUB BLOG (Mar. 29, 2017), https://blog.csrhub.com/csr-how-fortune-500-companies-measure-up; for the Fortune 500 rankings of 2019, see *Fortune 500,* FORTUNE, https://fortune.com/fortune500/2019/search/; for a list of companies that have signed the Global Compact, see *See Who's Involved: Our Participants*, UNITED NATIONS GLOB. COMPACT, https://www.unglobalcompact.org/what-is-gc/participants/search?search%5Binitiatives%5D%5B%5D=121; another illustration of the prevalence of CSR among top corporations. Companies on the list are judged on a number of indicators, among which are the corporation's attitude towards customers, employees, the local community, minorities (including women), the environment and shareholders. *See 100 Best Corporate Citizens*, CR MAG. (2019), https://100best.3blmedia.com/wp-content/uploads/2020/04/100BestCorporateCitizens_2019.pdf.

41. ANDREW CRANE & DIRK MATTEN, BUSINESS ETHICS: A EUROPEAN PERSPECTIVE (2004).

42. *See generally* Jeff Schwartz, *De Facto Shareholder Primacy*, 79 MD. L. REV. 652, 652 (2020) (arguing that "Once corporations go public, the securities laws effectively require that corporations maximize share price at the expense of all other goals.").

problems of the unregulated power of large corporations and its potential to cause harm, have made possible a normative shift in which corporate social responsibility is now expected. In terms of law, this shift should translate into a new perception of corporate purpose.

It is impossible to discuss the role of corporations in society without mentioning the crises the world has gone through over the past few years—some of which are linked directly to corporate conduct. Most urgent is the climate crisis, defined by the UN as the "defining crisis of our time."[43] Human activity, mostly carried out by corporations, is responsible for the emission of greenhouse gas into the atmosphere. Mining, production, and use of coal, oil and gas releases billions of tons of CO_2 causing an unprecedented, and dangerous, rise in temperatures. The consequences are, and will become, devastating.[44] The arctic is melting, causing sea levels to rise, threatening the flooding of inhabited lands and cities across the globe; extreme weather conditions, natural disasters and non-perishable human trash lead to soil degradation and desertification. Hyper consumerism leads to reckless deforestation. Business as usual has, literally, devastating implications. However, the fossil fuel industry is still on course to invest billions of dollars into new infrastructure, and to further extract coal, oil and natural gas in both Europe and North America.[45] In Europe, it was only following the Russian invasion to Ukraine in February of 2022 that the Nord stream project, owned and led by a consortium of European energy companies, was re-considered. The Nord Stream gas pipeline, described as a climate disaster,[46] is one of the largest energy infrastructures in Europe. In addition to its detrimental effect on gas emissions when put to use by consumers, it is also putting the Baltic ecosystem in danger.[47] Energy corporations are making huge profits while we edge closer to an ecological disaster. A 2019 study shows that only twenty corporations are responsible

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43. *The Climate Crisis: A Race We Can Win*, UNITED NATIONS, https://www.un.org/en/un75/climate-crisis-race-we-can-win.

44. NAOMI KLEIN, ON FIRE: THE BURNING CASE FOR A GREEN NEW DEAL 25 (2019).

45. *Id.* at 76.

46. The Nord Stream is a consortium of energy companies, headed by the former German Chancellor Gerhard Schroeder, a position he took immediately after retiring from his public role, raising serious suspicions of conflict of interests. *See Former German Chancellor Gerhard Schroeder Becomes Chairman of Russian State-Controlled Nord Stream Pipeline Company Directly After Leaving Office*, ALLIANCE FOR SECURING DEMOCRACY, https://securingdemocracy.gmfus.org/incident/former-german-chancellor-gerhard-schra%C2%B6der-becomes-chairman-of-russian-state-controlled-nord-stream-pipeline-company-directly-after-leaving-office/.

47. *See* David Langlet, *Nord Stream, the Environment and the Law*, 59 SCANDINAVIAN STUD. IN L. 79, 92 (2014).

for 35% of the total CO_2 emissions since 1965, when the dangers of fossil fuel were already known.[48]

Corporations are accelerating the climate crisis by blocking regulatory initiatives. The hyper consumerist culture corporations strive to foster and spread drives societies across the globe to an excessive use of natural resources. The paradigm of maximizing shareholder value and short-term growth leads these corporations to externalize the costs to society and the environment. As the next part will show, current law allows a much-needed paradigm change. It is up to legal actors to apply a different interpretation to the law, one that corresponds better to the challenges.

II. A COMPARATIVE PERSPECTIVE: CORPORATE PURPOSE IN ISRAEL, UK, USA

1. Corporate Law in Israel

Two decades ago, the Israeli Companies Law was revised to include a new statement on the purpose of the corporation.[49] Its progressive language, allowing companies to consider the interests of its creditors, its employees, or the public in their business dealings, promised to reflect a new understanding of the purpose of the modern corporation, and legal room for corporate leaders to mitigate some of the detrimental effects of maximizing shareholder value. This opportunity was frustrated. Not only was it hardly ever applied in support of stakeholder interests, but it was also referred to by judges as the legal source of the shareholder primacy norm in Israeli law.

Article 11 reads as follows:

> "11 (a) The purpose of a company shall be to operate in accordance with business considerations in maximizing its profits, and within the scope of such considerations, the interests of its creditors, its employees and the public may be taken into account; similarly, the company may donate a reasonable sum for a proper objective, even if such donation is not within the scope of business consideration as aforesaid, if a provision for such is prescribed in its articles of association.
>
> (b) Section 11 (a) shall not be applied to a company incorporated for the benefit of the public."

48. *See generally 1965 President's Science Advisory Committee Report on Atmospheric Carbon Dioxide*, CLIMATE FILES (1965), https://www.climatefiles.com/climate-change-evidence/presidents-report-atmospher-carbon-dioxide/.

49. Companies Law, 5759-1999, § 11, 44 (Isr.).

Parliament's annotations for the bill stated that alongside the approach that mandates maximizing shareholder value, Article 11 should be interpreted in an "enlightened" manner, allowing the company and its directors, even of not imposing such a duty, to consider stakeholder interests in their considerations. According to the drafters, then, the legislative intention was to strike a balance between the shareholder primacy norm as the sole purpose of the corporate entity, and a broader view, suggesting that other stakeholders, affected by the company's conduct, can and should be considered.

The Israeli academic legal community was, at first, preoccupied with Article 11. While some scholars criticized it as a misguided departure from the Anglo-American shareholder primacy view, others thought it was not going far enough towards a stakeholder approach.[50] Goshen, a prominent corporate scholar, working within a law and economic analysis framework, argued that allowing corporate managers to consider the interests of different communities while these interests diverge from those of the company's shareholders reduces the aggregate social welfare achieved by maximizing shareholder wealth. This, he claimed, is the guiding principle of corporate law. Reiterating the conservative view of corporate purpose, Goshen claims that the shareholders, being the residual claimants, are best positioned to be viewed as the company owners, and that their ability and willingness to bear the risks involved in its activity ensure an efficient management of the company. The conclusion, he argues, is that the managers' discretion should be applied exclusively for shareholders' gain.[51] Goshen's view is informed by the principal-agent model of corporate law, which sees the role of corporate law as being to minimize "agency costs": the shareholders are seen as principals and are therefore exposed to agency costs by their agents, the managers. The opposite view, propounded by Stern, considers the company as its own entity. Building on the language of Article 11 — "the purpose of a company shall be to operate in accordance with business considerations in maximizing ***its*** profits"— Stern stresses that the Israeli legislature distinguishes between the company and its shareholders. In this sense, claims Stern, the firm has no owners. Its various constituencies all contribute their unique input, and their interests should therefore be taken into account when directing the firm. Yet another view claims that the disagreement does not revolve around the question of

50. Yehiel Bahat, *The Purpose of the Corporation and its goals in the Corporate Law Bill, 1995*, 1(2) SHAARE MISHPAT, 277 (1998) (In Hebrew); ELI BUKSPAN, THE SOCIAL TRANSFORMATION OF BUSINESS LAW (2007).

51. Z. GOSHEN, *A Critical View of the New Corporate Law: the Purpose of the Firm, Acquisitions and Class Action*, 32 MISHPATIM L. REV. 81, 383-95 (2001).

the company's purpose: it is clear that its purpose is to act to enhance the financial value of the company by applying business considerations. The real question is what is the proper measure to assess the company's value. While the orthodox view is that the worth of the company is captured by shareholder value, Article 11 allows for a broader evaluation, one that includes the interests of other constituencies.[52]

While the academic debate was heated (as far as academic debates go) the Israeli judiciary remained indifferent. At no time did the courts attempt to interpret the meaning of the phrase allowing the corporation to consider "the interests of its creditors, its employees and the public." Furthermore, courts have continued to interpret the Israeli companies' law within the pre-legislative framework of shareholder primacy—sometimes even referring to Article 11, without even mentioning its language. This is especially puzzling as Israel is a mixed legal jurisdiction of both Anglo-American and Continental tradition. Accordingly, statutes, rather than case law, are generally considered as the first in the hierarchy of sources of law.

Despite the academic controversy over the desirable interpretation of Article 11, there seems to be no disagreement about the potential to regard it as a departure from the Anglo-American view. However, as shown below, neither the judiciary nor potential claimants have made use of this potential. The next part will discuss the language of Article 11, focusing on its progressive possibilities. While recognizing that the language may also support a narrow, conservative interpretation, we argue that it naturally allows for an inclusive one as well. Keeping the structural power of corporations in mind, the progressive interpretation was, and is, vital. In Israeli law however, thus far, it is the road not taken.

As noted above, the language of Article 11 evidently supports an inclusive, constituency-oriented interpretation. While there are indeed some indications to the contrary, [53] we believe that the weight of numerous linguistic indications to support a progressive approach, together with the importance of the normative issue, outweigh them, and should have made an impact on the interpretation of the law.

The first indication for the (at least partial) abandonment of the shareholder primacy norm is the unequivocal statement that the interests of various constituencies are relevant to the decision-making process of managers. It would have easily been enough for the legislator to make do

52. YOSSI RAHAMIM, CORPORATE RESPONSIBILITY FOR WORKERS (2019).

53. Those include the use of the term "business considerations," not mentioning "social or environmental ones; and the mentioning of the possibility to donate a reasonable some for a worthy cause, which may indicate that this is not allowed with regard to day-to-day business. Companies Law § 11.

with the first part of Article 11, namely that "[t]he purpose of a company shall be to operate in accordance with business considerations in maximizing its profits." The choice to add the possibility that "within the scope of such considerations the interests of its creditors, its employees and the public" may be considered cannot be ignored.

Second, and contrary to the Anglo-American view that identifies the interests of the company with those of the shareholders, the Article clearly distinguishes between the two. Stating that "[t]he purpose of a company shall be to operate in accordance with business considerations in maximizing ***its profits***," rather than those of its shareholders, is a meaningful departure from the "residual claimants" position of the orthodox view. Indeed, even without any further linguistic anchors to sustain the inclusive position, this statement alone should have served as legal authorization for managers to take account of other stakeholders in their deliberations.

A third indication for the broad interpretation is that the language of Article 11 makes a clear distinction between the daily business dealings of the company, where constituencies may be considered, and its philanthropic agenda, mentioned separately (stating that "the company may donate a reasonable sum for a proper objective, even if such donation is not within the scope of business consideration as aforesaid"). Philanthropy, then, does not in itself constitute corporate social responsibility, which should be carried out routinely in the course of day-to-day business.

Importantly, the use of "***may*** be taken into account" rather than "should" be taken into account, expresses a choice not to mandate such consideration. However, it is clear that such considerations are part and parcel of the discretionary scope granted to managers. In addition, Israeli case law has more than once read the phrase "may" as "should" in some circumstances, stating that certain contexts impose a duty to act, rather than providing legal permission to do so. Context, the courts stress, outweighs the formal linguistic attributes of the authority granted by law.[54]

Despite these interpretive possibilities and the need of many stakeholders for protection from rising corporate power, which could have found some relief in a progressive and updated corporate purpose, neither the courts nor potential claimants have put Article 11 to use, to require more responsible conduct from corporations. A comprehensive review of Israeli case law demonstrates that while courts mention Article 11 in

54. JUST.YITZHAK ZAMIR, THE ADMINISTRATIVE AUTHORITY, 225 (vol. A 1996) ("the court states that while the language of the law grants authority to act, rather than sets a duty to do so, in some circumstances the said body must exercise its authority. The emphasis is on the circumstances at hand, and not on its linguistic characterization").

numerous cases, an in-depth discussion of its proper interpretation and the potential changes it has made to corporate law have never taken place. The same is true for other sections of the Israeli corporate law, which could have anchored a duty of responsibility for stakeholders in more specific contexts.[55]

One of the earliest mentions of corporate purpose in Israeli law is that of Justice Shamgar in *Penidar v. Castro*[56] in the early 1980s, prior to the enactment of Article 11. The case deals with the duty to act in good faith in contract negotiations, a duty the breach of which may generate an obligation to compensate the harmed party. In this case, the question was whether the manager of the appellant company was liable for such compensation while negotiating on the company's behalf. The question of the purpose of the corporation wasn't imminent for the court's decision. However, Justice Shamgar opined, in an *obiter dictum*, that "recent developments in corporate law teach us that the company and its managers, acting on its behalf, must take into account not only the interests of its shareholders […] but also that of the company's employees, customers, and the general public."[57] Cited by over 800 cases, and coupled with the subsequent enactment of Article 11, this statement by Justice Shamgar could have opened the door for a broad conception of corporate purpose. This, however, was not the case. Although Israeli legislation and early case law do not fully espouse a shareholder primacy view (we argue that the contrary is true), Israeli courts in recent years continually take it for granted that it does. Without any discussion, thorough explanations, or analysis, courts simply presume that the shareholder value view is the governing paradigm in Israeli corporate law. Here are a few examples.

In 2012, the Tel-Aviv District Court heard a case regarding dividend distribution in the amount of 3 billion ILS.[58] The appellant raised concerns that the defendant, *Bezeq Inc*., does not meet the required profit criterion,[59] and that it should therefore not be allowed to go ahead with the distribution. Interestingly, the appellants' advocate argued that the profits criterion whether to allow or deny dividend distribution signals that the legislator's

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55. *See* Companies Law § 6 (focusing on Article 11, as it deals directly with corporate purpose. However, a similar argument could be made for several other clauses that mention the corporate purpose. One such clause is Article 6 (a)(b)(1), which deals with piercing the corporate veil, stating that "piercing the veil would be allowed in the case where the separate corporate entity doctrine was misused, so as to harm the corporate purpose." Courts have never discussed the meaning of the phrase "corporate purpose" in this context).

56. CA 7/81 Penidar Inv. & Dev. Co. v. Castro, 37(4) PD 673 (1983) (Isr.).

57. *Id.*

58. CA (TA) 48067-01-11, A.L.A.N. Spa v. Bezeq Inc., PM (2012) (Isr.).

59. *See* Companies Law §§ 302(a)(2), 303(a).

aim was to make sure the company does not act solely in the interest of its shareholders and disregards other stakeholders. She also invoked Article 11, arguing that it should serve as a guiding principle as to the proper balance between shareholder value and the interests of other constituencies. The decision to distribute dividends in this case does not strike the proper balance and is likely to lead to the company's inability to pay its existing and anticipated debts. The court rejected these arguments, stating that Israeli law has adopted the Anglo-American approach to corporate purpose:

> "[i]n the Anglo-American world it is accepted that the main purpose of the corporation is to maximize shareholder gains. The company's profits are in fact derived from the profits of shareholders, who are the residual claimants of the company. The company must therefore focus on maximizing shareholder gains. …[Israeli] law, then, adopts the fundamental approach that governs English law regarding maximizing the company's profits."[60]

When trying to square this interpretation with the language of Article 11, the court states that "Article 11 is a declarative norm," and that the only relevant criteria to decide whether dividend distribution is allowed is the one set forth by clause 302(a)(2), which states that "the ability to pay its existing and anticipated debts when the time comes for so paying."[61]

We find the statement that Article 11 is merely declarative both questionable and unconvincing. First, there is nothing declarative about Article 11; it is the source of legal authority to act while running a company, determining, among other things, the legal scope of the considerations directors are allowed to take into account. Second, even if it were "merely declarative," its purpose would be exactly that—to guide legal actors, as well as courts, towards the proper interpretation of corporate purpose. The opportunity to consider Article 11 as a guiding principle for a balanced approach, one that takes into account the broad range of the communities influenced by the company's conduct, was passed over.

Liechtenstein v. AIG Holdings (2010),[62] heard before the Supreme Court, is another illuminating example of the courts' abstention from conducting an in-depth discussion of corporate purpose, avoiding the opportunity to challenge the narrow approach of maximizing shareholder value. In this case, the minority shareholders requested that their dispute with the majority shareholders should not be referred to arbitration, arguing, among other things, that since their claim against the majority shareholders touched on the latter's actions contrary to the "benefit of the company,"

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60. *A.L.A.N.*, 48067-01-11 (Isr.).
61. *See* Companies Law § 302(a)(2).
62. CA 9542/06 Liechtenstein v. AIG Holdings, PD (Jan. 14, 2010) (Isr.).

such a claim could not be a matter for arbitration. Their argument relied on Article 3 of the Arbitration Law, stating that an issue cannot be referred to arbitration if it cannot be the subject of an agreement between the parties.[63] Article 11, claimed the appellants, was cogent, and could not be overridden by an agreement between the parties. Since it could not be the subject of an agreement, it could not be subject to arbitration. This case provided an opportunity for the court to discuss the status and interpretation of Article 11, and to clarify whether it is indeed *jus cogens*. It was also an opportunity to determine the scope of the company's directors' discretion. However, as in many other cases, this opportunity too was missed. In a single paragraph, Justice Procaccia discusses Article 11:

> "[Article 11…] is a guiding norm of sorts, intended to direct the consideration and actions of a corporation. It isn't, in and of itself, a source to draw rights from."[64]

The meaning of this short statement by the court, again, is that Article 11 cannot be the source of claims brought against the company's decision-making process by any of its constituencies. However, even as a declaratory piece of legislation, it is unclear why it isn't a valid source for rights and duties. This decision reflects yet again a tacit adherence to the narrow view of the corporate purpose, barring stakeholders from claim standing in corporate deliberations processes.

Other cases follow suit. In some cases, the court wrongfully equates between the interests of the company and those of the shareholders, despite the clear distinction the law itself makes between the two;[65] it misquotes Article 11, simplistically stating that "the purpose of the corporation is to maximize shareholder gains (article 11)";[66] and opines that the question of the purpose of the corporation should be discussed as part of the desired law, but that current law grants shareholders a special status, and mandates the court to apply the shareholder wealth maximization approach.[67]

To sum up, we have shown that the language of Article 11 reflects a tension between the shareholder primacy norm and the stakeholder approach. However, it unarguably allows for, and possibly even invites, broadening the deliberative spectrum of the company's directors and officers, as well as the re-configuration of corporate purpose in such a way that would equip both claimants and courts with tools to push back on

63. *Id.*
64. *Id.* ¶ 15.
65. CA 1240/00 Assessor Tel-Aviv v. Sivan 59(4) 558 (2005) (Isr.).
66. CA (CT) 32223-03 Levite v. Wine-Growers Coop., PD (Nov. 3, 2015) (Isr.).
67. CA 9636/06 Boganer v. SofaWare Tech. PD (Nov. 18, 2009) (Isr.).

corporate power. Israeli courts, unfortunately, have not allowed this prospective change to take place.

2. Corporate law in the UK

Two landmark judgments, *Hutton v West Cork Railway Co.* (1883)[68] and *Parke v. Daily News* (1962),[69] have long reflected the primacy of the interests of shareholders over those of other stakeholders, mainly employees, in the daily management of the British company.[70] In *Hutton,* the Court of Appeal ruled invalid a shareholders' meeting resolution to compensate employees who lost their jobs after the company had transferred its business to another company. Money belonging to the company could be spent, the court said, only if it was "reasonably incidental to the carrying on of the company's business for the company's benefit."[71] In this case, in which the company was no longer carrying on business, the generosity towards the employees, to whom the directors held no duty, could have no prospect of a future benefit to the company. In a similar way, in *Parke*, the use of the proceeds of sale of two newspapers to compensate redundant employees (though, unlike *Hutton*, not by liquidating the entire business of the company) was declared ultra vires as it was not made in "the best interests of the company."[72]

The continuous focus of courts on the "best interests" was generally understood by leading company law scholars as referring essentially to the duty of directors to maximize the benefits of shareholders (or "members") as a whole, despite the separate personality of the company.[73] However, *Hutton* and *Parke* were much criticized and seen as increasingly out of touch with contemporary values.[74] Ultimately, they were reversed by the Companies Act of 1980, and, later, the Companies Act of 1985. Section 719

68. Hutton v. West Cork Railway Co. [1883] 23 Ch D 654 at 674 (UK).

69. Parke v. Daily News Ltd. [1962] Ch 927 (Eng.).

70. See, for example, In Re Lee, Behrens & Co. Ltd., [1932] 2 Ch 46 (UK), which invalidated a directors' decision to grant an annual pension to a widow of a former director, as it was taken without a shareholders' resolution and was not for the benefit and promotion of the company's prosperity.

71. *See Hutton*, 23 Ch D at 673 ("[T]he law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.").

72. *See Parke*, Ch 927 (Eng.).

73. *See, e.g.*, YEDIDIA STERN, CORPORATE GOAL 28 n.14, 31 n.21 (2009) (citing JOHN BIRDS ET AL., BOYLE & BIRDS' COMPANY LAW 192-93 (Anthony Boyle et al. eds., 2nd ed. 1987); ROBERT R. PENNINGTON, COMPANY LAW 789 (7th ed. 1995); PAUL L. DAVIES, GOWER'S PRINCIPLES OF MODERN COMPANY LAW 602 (6th ed. 1998).

74. LEN S. SEALY & SARAH WORTHINGTON, CASES AND MATERIALS IN COMPANY LAW 275 (8th ed. 2007).

of the Companies Act of 1985 provided that companies had the power to make gratuitous provisions for employees on the cessation or transfer of business, even if it was not in the best interests of the company.[75] It is notable that section 247(2) of the Companies Act of 2006 maintained this rule.[76]

Courts' use of the ultra vires doctrine with regard to various notions of corporate charity was criticized and gradually abandoned. Back in 1921, the court in *Evans v. Brunner, Mond and Co. Ltd.*[77] dismissed a shareholder's challenge to a chemical company's general meeting resolution to donate £100,000 to universities for general scientific research. But only in *Re Horsley & Weight Ltd.* (1982) case,[78] in which the Court of Appeal approved a memorandum's clause which granted pensions to employees, it was stated that the making of gratuitous payments could be considered as a substantive objective of the company if the memorandum was framed in sufficiently explicit terms.

In 1985, the Companies Act was ratified to include for the first time, in section 309(1), the obligation of directors to consider the interests of the company's employees in the performance of their functions. In 2006, company law underwent a major overhaul, "the most extensive of its kind since the modern foundations of company law were established in the middle of the nineteenth century."[79] At its heart stood the introduction of an "enlightened shareholder value" approach through the wording of section 172, relating to the duties of directors. According to the new section, directors must act in the way they consider, in good faith, would be most likely to promote the success of the company for "the benefit of its members as a whole." In doing so, they must have regard to a non-exhaustive range of factors. These focus mostly on stakeholders-oriented issues such as the likely consequences of any decision in the long term; the interests of the company's employees; the need to foster the company's business relationships with suppliers, customers, and others; the impact of the company operations on the community and the environment; and the desirability of the company maintaining a reputation for high standards of business conduct.

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75. *See* Companies Act 1985, c. 6, § 719 (Eng.).
76. *See* Companies Act 2006, c. 46, § 247(2) (Eng.).
77. Evans v. Brunner, Mond, & Co. [1921] 1 Ch 359 at 360 (UK).
78. Re Horsley & Weight [1982] Ch 442 (Eng.).
79. Robert Goddard, *"Modernising Company Law": The Government's White Paper*, 66 MOD. L. REV., 402, 403 (2003).

The legal and practical consequences of section 172 have been analyzed at length by many scholarly articles.[80] Their discussion oscillated, in general, between two poles: on the one hand, the introduction of section 172, a new mandatory norm, into a field traditionally characterized by voluntarism and self-regulation was of great significance, as it was a recognition that the company's interests could be harmed also by negative social—and not only financial—impacts. By the same token, the emergence of normative claims related to the societal role of companies and their evolving moral, and legal, duties created an environment in which directors could make decisions with reference to social and environmental concerns with greater certainty that they would not be sued for doing so.

However, the Companies Act of 2006 was clearly not accepted as a radical piece of legislation. Very much like the Israeli case, "stakeholding" was the road not taken. The mentioning of different constituencies that have to be taken into consideration still left them outside the company, whose

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80. *See, e.g.*, Cynthia A. Williams & John M. Conley, *Triumph or Tragedy? The Curious Path of Corporate Disclosure Reforms in the U.K.*, 31 WM. & MARY ENV'T L. & POL'Y REV. 317, 330 (2007); Alan Dignam, *Capturing Corporate Governance: The End of the UK Self-Regulating System*, 4 INT'L J. OF DISCLOSURE AND GOVERNANCE, 24 (2007); Lady Justice Mary Harden, *Companies Act 2006 (UK): A New Approach to Directors' Duties*, 81 AUSTL. L. J. 162 (2007); Andrew R. Keay, *Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach*,' 29 SYDNEY L. REV. 577 (2011); Charles Wynn-Evans, *The Companies Act 2006 and the Interests of Employees*, 36 INDUS. L. J. 188 (2007); Joan M. Loughrey et al., *Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance*, 8 J. OF CORP. L. STUD. *79* (2008); Gordon L. Clark & Eric R. W. Knight, *Implications of the UK Companies Act 2006 for Institutional Investors and the Corporate Social Responsibility Movement,* 11 U. PA J. BUS. L., 259, 281 (2009); Deryn Fisher, *The Enlightened Shareholder—Leaving Stakeholders in the Dark: Will Section 172 (1) of the Companies Act 2006 make Directors Consider the Impact of their Decisions on Third Parties*, INT'L CO. & COM. L. REV. 10 (2009); Alissa Mickels, *Beyond Corporate Social Responsibility: Reconciling the Ideals of a for-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe*, 32 HASTINGS INT'L & COMP. L. REV. 271, 293-94 (2009); Clifford Chance, *Corporate Law Tools Project*, SRSG (2009); Andrew R. Keay, *The Duty to Promote the Success of the Company: is it Fit for Purpose?*, UNIV.LEEDS, CTR. FOR BUS. L. AND PRAC. WORKING PAPER 1, 4 (2010); John K.S. Ho, *Is Section 172 of the Companies Act 2006 the Guidance for CSR?*, 31 CO. LAW. 207, 212 (2010); Ji Lian *Yap*, *Considering the Enlightened Shareholder Value Principle,* 31 CO. LAW. 35 (2010); Andrew R. Keay, *Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value, and All That: Much Ado About Little?*, 22 EUR. BUS. L. REV. 1 (2011); David Millon, *Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law,* WASH. & LEE PUB. LEGAL STUD. RSCH. SERIES (2010); Ngozi Okoye, *The BIS review and section 172 of the Companies Act 2006: what manner of clarity is needed?,* 33 CO. LAW. 15 (2012); Elaine Lynch, *Section 172: a ground-breaking reform of directors' duties, or the emperor's new clothes?*, 33 CO. LAW. 196 (2012); Nicholas Grier, *Enlightened shareholder value: did directors deliver?*, 95 JURID. REV. (2014); Andrew Johnston, *The Shrinking Scope of CSR in UK Corporate Law*, 74 WASH. & LEE L. REV. 1001 (2017); GEORGINA TSAGAS, *Section 172 of the Companies Act 2006: Desperate Times Call for Soft Law Measures*, *in* SHAPING THE CORPORATE LANDSCAPE: TOWARDS CORPORATE REFORM AND ENTERPRISE DIVERSITY 131 (Nina Boerger & Charlotte Villiers eds., 2018).

"members" remain, exclusively, the shareholders, and whose interests prevail in case of a conflict with the stakeholders' interests. The introduction of the "Enlightened Shareholders Value" concept that allowed directors to consider the interests of stakeholders did not truly contest the primacy of shareholders' interests in the daily life of the firm and the continuous pressures of short-termism. It also did not include enforcement tools, nor complementary moves in fields such as tax policy or the regulation of the labour market.

The few references to section 172 among UK courts generally stated that the section did not alter the pre-existing duties of directors. Thus, for example, in *Re West Coast Capital (LIOS) Ltd.*, the court argued that section 172 (with regard to the need to act fairly as between members of the company) did "little more than set out the pre-existing law on the subject."[81]

In *R* (on the application of People & Planet) v *HM Treasury*,[82] the Court stated that shareholders can use the section only in order to influence the board's decision-making process to have regard to the various factors mentioned in section 172(1), such as environment and human rights considerations, but not in order to force it to do so, as it might lead to litigation by minority shareholders. In a recent case, however, the Court of Appeal ruled that where a company's directors know or ought to know a company is insolvent or is likely to become insolvent, section 172(3) imposes on them a duty to act in the best interests of the company's creditors.[83]

Following the Government's demand, in its 2017 response to the Corporate Governance Green Paper, to strengthen reporting requirements on how company directors are having regard to stakeholders,[84] the Financial Reporting Council published in 2018 its new UK Corporate Governance Code,[85] which applies to "companies with a premium listing." This "soft law" tool addresses, among other things, section 172: it requires boards to understand the views of other key stakeholders and to describe in the annual report how their interests and the matters set out in section 172

81. West Coast Capital (LIOS) [2008] CSOH 72, [21] (Scot.), https://www.scotcourts.gov.uk/search-judgments/judgment?id=5caf8aa6-8980-69d2-b500-ff0000d74aa7.

82. R (on the application of People & Planet) v. HM Treasury [2009] EWHC (QB) 3020, [34] (Admin) (Eng.).

83. BTI 2014 LLC v. Sequana SA [2019] EWCA (Civ) 112 [169] (Eng.).

84. Department for Business, Energy, & Industrial Strategy, Corporate Governance Reform—The government response to the green paper consultation, 2017, BEIS, at 1, 4-6, 20, 28 (Eng.).

85. FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE 3 (2018).

have been considered in board discussions and in decision-making. With regard to its workforce, boards should dialogue with a director appointed from the workforce; a formal workforce advisory panel; or a designated non-executive director. In addition, it should provide information that enables shareholders to assess how the directors have performed their duty to promote the success of the company. Davies views this new requirement as a method to "nudge" large corporations towards the adoption of a more stakeholders-oriented approach.[86]

Finally, it is worth mentioning the "Better Business Act,"[87] a coalition of nearly 1,000 British companies, which campaigns for the amendment of section 172, so that the focus of the director's duty will change from being a duty to promote "the success of the company" to being a duty to advance "the purpose of the company." This purpose shall be to benefit the members of the company as a whole, "whilst operating in a manner that also (a) benefits wider society and the environment in a manner commensurate with the size of the company and the nature of its operations; and (b) reduces harms the company creates or costs it imposes on wider society or the environment, with the goal of eliminating any such harm or costs."

While section 172 of the Company's Act of 2006 allows for a broad spectrum of communities to be considered, courts in the UK have done little to revolutionize corporate conduct. With new initiatives pushing for a more robust stakeholder-oriented model, through amendments to the law to allow it, we believe that it already does just that. Hiding in plain sight, the stakeholder approach is already enacted in current law. All it needs is to be extracted, recognized, and applied.

3. *Corporate Law in the United States*

In the U.S., perhaps more actively than anywhere else, the debate on corporate purpose is persistent. Yet even as scholars write on the need to move away from the shareholder primacy model,[88] corporate leaders pronounce to the same effect,[89] and the ESG investment market is growing, the dominance of the shareholder primacy norm remains intact.

This, however, is not a consequence of law. As is the case in Israel and the UK, U.S. corporate law itself does not bind company officials and

86. PAUL DAVIES, INTRODUCTION TO COMPANY LAW 50 (3d ed. 2020).

87. *See Business Campaign Act*, BETTER BUSINESS ACT (2022), https://betterbusinessact.org/wp-content/uploads/2022/04/Better-Business-Act-Campaign-Overview.pdf.

88. Stout, *supra* note 1, at 163; STOUT, MYTH, *supra* note 1, at 1; Lund & Pollman, *supra* note 19, at 2565.

89. *Statement on the Purpose of a Corporation*, *supra* note 2.

directors to consider shareholder value as their ultimate aim, at the expense of broader social values. Rather, and again as in Israel and the UK, this priority arises from inertia, myopia and conservatively-inclined corporate legal culture.[90] In all three jurisdictions, shareholder primacy is an interpretive choice made by corporate and legal actors rather than a legally prescribed duty.

The complex framework of U.S. law requires an examination of several different sources: case-law driven doctrines, mostly those of the Delaware legal system, the most influential jurisdiction for corporate law;[91] relevant federal laws such as the Dodd-Frank and the Sarbanes-Oxley Acts; the guidelines of regulatory agencies, such as the SEC (the Securities and Exchange Commission); general American case law that deals with corporate purpose; and states legislation. We will show in what comes next that it is very difficult to find an unequivocal legal statement *mandating* primacy to shareholders. As in Israel and the UK, U.S. law itself can be read to accommodate both the shareholder primacy norm and the broader, stakeholder-oriented model. Thus, it is an active interpretive choice by legal and corporate actors to read the shareholder primacy norm into the law, rather than allow a broader view.

The high point for the doctrine of shareholder primacy in American academia can be traced back to the 1970s, when the perception of the corporation in terms of principal-agent relations was gaining ground.[92] Milton Friedman's renowned 1970 New York Times article, in which he referred to corporate social responsibility as "managers who illegitimately spend other people's (that is, 'shareholders') money,"[93] embodies this view. The influential article by Jensen and Meckling, *Theory of the Firm,* explained corporate structure in terms of agency relations between managers and shareholders.[94] Since the interests of the principal (shareholders) and those of the agent (managers) are likely to diverge, shareholders must protect their interests by way of monitoring and incentivizing managers to act on their behalf. In this view, the costs of aligning managers' interest with those of shareholders are termed "agency

90. *See generally* Lund & Pollman, *supra* note 19.

91. Approximately 68% of Fortune 500 companies are incorporated in Delaware. State of Del. Div. of Corp., *2020 Annual Report Statistics* (2020).

92. Michael J. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON., 305, 305, 308, 357 (1976); MELVIN A. EISENBERG, THE STRUCTURE OF THE CORPORATION 1-2 (1976).

93. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html.

94. Jensen & Meckling, *supra* note 92.

costs," which should be reduced to a minimum.[95] Corporate governance is required to achieve this goal, which is therefore taken to be the core of corporate law.[96]

The initial idea of the agent-principal model, and consequently of the shareholder primacy norm, then, was to prevent the rational pursuit of managerial interests from harming those of the shareholders. The problem, however, became the identification of protection from managerial self-seeking and maximizing shareholder value. A simple concept and relatively easy to apply, shareholder primacy—the proxy for keeping managers' potential self-interest in check—became the primary objective of corporate law.[97]

While the law does aim at keeping managerial conflict of interests at bay, it does not necessarily require that shareholder interest alone should be taken into account. As we demonstrate below, managerial discretion and duties, might very well take account of the interests of other constituencies.

i. Legal Doctrine

Shareholder primacy was the academic preference for decades to follow and even echoed in some statements by Delaware judges.[98] However, the very same courts refrained from holding directors legally accountable for failing to maximize shareholder wealth.[99] The reason is the long standing doctrine of the Business Judgment Rule, which states that as directors do not act primarily in their own self-interest, courts will not scrutinize their business decisions, including decisions that may eventually harm shareholder value.[100]

This standard of judicial review for directors' discretion is the best indication that the law does not mandate directors to maximize shareholder wealth: behind the veil of the business judgment rule, and as long as they are not acting exclusively for their own self-interest, directors can legally take account of the interests of other constituencies. They will not be legally liable for it. This is strong evidence for our claim that the concern of law was to protect shareholders from managerial self-interest. It was not, however, to prevent managers from taking into account the interests of the company as a whole, or to consider its constituencies in a balanced manner.

95. *Id.* at 313.
96. Lund & Pollman, *supra* note 19.
97. In practice, the solution was to turn managers into shareholders by paying them with stock.
98. STOUT, MYTH, *supra* note 1.
99. *Id*. at 3.
100. Shlensky v. Wrigley, 237 N.E.2d 776, 779-80 (1968).

The spectrum of considerations that is legally available for directors, then, is much broader than merely maximizing shareholder wealth. [101]

ii. Federal Regulation

Federal legislation can be understood in the same vein. While the federal government does not frequently take an active role in regulating corporate purpose, it has shown a growing interest in better oversight of corporate governance, especially following the 2008 financial crises.[102] The Dodd-Frank Act[103] introduced, among other constraints, the requirement that shareholders routinely vote on executive compensation ("say-on-pay") at public corporations. By way of tying directors' compensation to their performance, this mechanism was intended to better protect corporations from both excessive pay for directors, and to ensure that they were not motivated entirely by self-interest. The "say-on-pay" rule is usually interpreted as a "shareholder-friendly" regulation, "tilting the balance of power in favor of shareholders."[104] The reason is that it provides shareholders with a means to monitor management and thus dials back the latter's respective power. While indeed providing an incentive for managers to run the company in alignment with shareholder value, we believe that the conclusion that the Dodd-Frank Act re-asserts the shareholder primacy norm is an overstatement. Not a signal of shareholder primacy in the broad sense, it is yet another attempt to make sure that management self-interests are in check. Restricting management does not necessarily entail maximize shareholder wealth at any cost. While shareholders are granted legal standing to restrict management, it does not necessarily follow that shareholder wealth is the only available consideration for managers. A special position for shareholders does not necessarily imply shareholder wealth maximization, and value for shareholders could be broader than a short-term increase in the stock price. We will say more about the

101. Ann M. Lipton, *What We Talk about When We Talk about Shareholder Primacy*, 69 CASE W. RES. L. REV. 863, 865 (2019) (arguing that much of the literature on corporate purpose equates shareholder primacy with wealth maximization and claiming that shareholders, as a varied and heterogeneous class, can determine for itself what is its overall welfare).

102. *See* Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, 26 REG. 26 (2003) (arguing that as Congress and "market regulators" began implementing ideas of federal intervention in corporate governance, "[t]here has been a creeping—but steady—federalization of corporate law."); *see also* Kristin N. Johnson, *Addressing Gaps in the Dodd-Frank Act: Directors' Risk Management Oversight Obligations*, 45 UNIV. MICH. J. L. REFORM 55 (2011).

103. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 951, 124 Stat. 1376 (2010) (codified as amended at 15 U.S.C. § 78n-1 (2018)).

104. Lund & Pollman, *supra* note 19, at 2582.

distinction between shareholder wealth maximization and shareholder value below.

In support of our claim that the Dodd-Frank Act does not prescribe shareholder wealth maximization, note that it also expanded the whistleblower program first introduced by the Sarbanes-Oxley Act of 2002. By expanding protection to employees of subsidiaries and affiliated companies and creating a mandatory reward plan that allowed whistleblowers to receive a significant percentage of the proceeds of litigation,[105] employees too are given monitoring powers over management. This too signals that the primary focus of the legislation is improving oversight over management, rather than empowering shareholders to influence directors to maximize stock prices.

The Sarbanes-Oxley Act as well is thought to be shareholder-oriented, as it imposes various requirements on directors, thought to better position shareholders vis-a-vis managements. Among those are the obligation of corporate boards to have a majority of independent directors, and that an audit committee is to be made up solely of independent directors.[106] But again, while indeed placing a heavy onus on directors, the status of other constituencies is not directly affected. Here as well, restricting and monitoring management does not necessarily entail a duty to maximize shareholder~~s~~ wealth, and should not be considered as validating such a duty.[107]

iii. The Securities and Exchange Commission (SEC)

SEC regulations are also thought to serve as a catalyst of the shareholder wealth maximization model.[108] Specifically, the disclosure requirements on boards and the way they are interpreted by both regulators and courts, are thought to nudge corporate actors into the shareholder primacy model.[109]

The U.S. Securities and Exchange Commission requires all public corporations to supplement their financial statements with a report by the company's management, in which they are to disclose all "material" information. The main purpose of disclosure is to allow transparency for

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105. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376 (2010).

106. *Id*.

107. *Id.* (requiring that the audit committee must establish a system for employees to blow the whistle anonymously on accounting or auditing matters).

108. *See* Jeff Schwartz, *De Facto Shareholder Primacy*, 79 MD. L. REV. 652 (2020); Lund & Pollman, *supra* note 19, at 2602.

109. Lipton, *supra* note 101, at 867.

investors, issuers, and for the general public.[110] The definition of "materiality" may go a long way in determining the legitimate considerations for corporate management: if material information is interpreted broadly, it may, for instance, include information on the carbon footprint of the company's operations, or on its workplace diversity. These would signal the inclusion of other constituencies as having a legitimate interest in the report. If, on the other hand, interpreted narrowly, to include only financial data, it may indicate a restriction to investors only (or at least, their assumed interests). Courts have defined the "materiality" requirement rather narrowly, demanding a "substantial likelihood" that a "reasonable investor" would view the information as significant.[111] The SEC itself expressed a similar view, and its own definition of materiality pertains to matters of financial significance alone.[112] Lipton's analysis of SEC's enforcement of the materiality requirement shows not only that SEC's staff states that "required disclosures must be 'primarily addressed' toward information relevant to earning a 'satisfactory return', but that it also fended-off pressure to require companies to include social performance as well."[113]

By focusing on the financial aspects of the duty to include material information in the company's report, the assumption of both courts and SEC officials is that disclosure is only intended for shareholders and that shareholders are only interested in the financial aspects of the company's performance. Both assumptions are unwarranted and possibly even damaging. One example is that current global climate calls for corporate transparency. The public is increasingly aware of companies' irresponsible behavior in that regard and is interested in holding companies accountable. Whether as investors, employees, consumers, or environmentally conscious citizens of the world, the public too may have an interest in "material" information on companies' decision making, and the ethical trade-offs it engages in. The narrow interpretation currently adopted undercuts these

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110. *See* Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L. J. 1045, 1045 (2019) (noting that "although the structure is complicated, the premise is fairly simple. Corporate insiders know far more about the entity than those buying securities or those impacted by the sale of securities (a group, as we shall see, that is far larger than simply investors), resulting in an information asymmetry. Thus, requiring disclosures both before the sale of securities and on an ongoing basis can provide information to diminish those asymmetries."). For a different view, according to which the main purpose of disclosure is for the benefit investors, see Lund & Pollman, *supra* note 19, at 2602.

111. TSC Industries, Inc. v. Northway, Inc. 426 U.S. 438, 449 (1976) (noting that "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."). *See also* Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988).

112. Lipton, *supra* note 101, at 873.

113. *Id.* at 873-74.

aims, which, if acknowledged, might influence corporate behavior towards responsible choices. Importantly, the language of the law allows a broad interpretation, as "material information" could easily be interpreted to include all types of important data, for the benefit of a variety of corporate constituencies. The current, investor-oriented interpretation is an active choice—not a requirement of the law.

But even if we accept the primacy of investors in this respect, the assumption that investors are only interested in the financial aspects of the company's performance is not warranted. Ethical investments are steadily growing. Annual cash flow into sustainable funds, for instance, has more than doubled between 2019 and 2020.[114] But this is not merely a matter of empirical evidence: it matters on a conceptual level as well. The notion that shareholders are only interested in share price increase is obsolete. More than 80% of investors are investing through pension and mutual funds.[115] They are not risk-seeking day-traders. In the words of Chief Justice of the Delaware Supreme Court, Leo Strine, more often than not, these are "worker investors, who save for the long term, [and] often hold portfolios that are a proxy for the entire economy and depend on the economy's ability to generate good jobs and sustainable growth in order for them to be able to have economic security."[116] Indeed, the notion that "shareholder value" is a consistent idea, in the sense that shareholders are a consistent class, is difficult to justify. Shareholders, especially dispersed ones, wear many hats. When a company externalizes costs to maximize share price it does so at the expense of the very same shareholder who, as an actual living person and citizen, pays for those externalities through taxes, through breathing polluted air or drinking unhealthy water, or who endures climate change disasters. That shareholders are interested only in the financial aspects of the company's performance is no more than an assumption.

iv. Case law

A discussion of the law's stance on the purpose of the corporation — does it oblige management to maximize shareholder value, or does it allow a variety of socially-oriented considerations as well—is not complete

114. Alicia Adamczyk, *Sustainable Investments Hit Record Highs in 2020—and They're Earning Good Returns*, CNBC (Feb. 11, 2021), https://www.cnbc.com/2021/02/11/sustainable-investments-hit-record-highs-in-2020.html#:~:text=Sustainable%20funds%20reached%20record%20highs,newly%20invested%20money%20last%20year.

115. *Id*.

116. Leo E. Strine, Jr., *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans' Savings for Corporate Political Spending*, 79 HAR. L. REV. 1022, 1022 (Nov. 2019).

without at least a mention of the most renowned case linked with shareholder primacy, *Dodge v. Ford*.[117] In that case, the Michigan Supreme Court determined that assigning the company's revenues for philanthropic purposes and restricting dividends payouts was illegal, and did not correspond with corporate purpose. [118] The decision has been repeatedly cited by scholars in books, articles and textbooks as the source of the legal norm of shareholder primacy. The reliance on *Dodge v. Ford* as evidence that corporate law requires managers to maximize shareholder wealth, however, was heavily criticized. Lynn Stout, a prominent corporate scholar, argued first, that since not many modern cases have repeated the declaration that managers are to maximize shareholders value, and that no other purpose is legitimate, it makes little sense to rely on a century old case as setting the legal standard. Law is dynamic and changing, and if courts haven't found other instances where such a statement is relevant, it has lost its legal edge. Second, argues Stout, the Court's statement on corporate purpose was mere *dicta*. "The actual holding in the case, that Henry Ford had breached his fiduciary duty to the Dodge brothers and that the company should pay a special dividend, was justified on entirely different and far narrower legal grounds. Those grounds were that Henry Ford, as a controlling shareholder, had breached his fiduciary duty of good faith to his minority investors."[119] The case, therefore, should be viewed not as a corporate purpose case, but rather as a case that deals with the relations between minority and majority shareholders, and the duty of the majority to refrain from minority oppression.[120]

In her analysis of the body of Delaware corporate purpose case law, Stout concludes that only one case, *Revlon, Inc. v. MacAndrews & Forbes Holdings Inc.,* is a significant enough decision by the Delaware court, to be considered as a modern-day statement in favor of shareholder primacy. In this case, the court found a board of directors liable for not maximizing shareholder value. A closer examination of the distinctive facts of *Revlon* shows, according to Stout, that "it is the exception that proves the rule."[121] First, context is important: the legal climate of the 1980s, when the *Revlon* case was heard, was very different from previous times, when boards and executives had considerable autonomy, and were not vigilantly monitored

117. Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

118. *Id.* at 684 (ruling "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 to be employed for that end. The discretion of the directors is to be exercised in the choice of means to attain that end and does not extend to [...] other purposes").

119. Stout, *supra* note 1, at 167.

120. *Id*.

121. STOUT, MYTH, *supra* note 1, at 31.

for underperformance.[122] The *Revlon* case was a link in a chain of hostile takeovers that took place in the 1980s, and helped encourage a shift back to a shareholder-friendly direction. As Cheffins notes, "the surge in the number of hostile bids meant that the fate of publicly traded companies hinged on shareholder perceptions of the capabilities of the incumbent management team to an unprecedented extent."[123] Unsolicited takeover bids targeted failing companies, and management had a strong incentive to focus on the bottom line.[124] It is within this market atmosphere that the directors of Revlon had decided to sell the company. This meant that the public shareholders of Revlon were to give up their Revlon shares in return for compensation. The Delaware Supreme Court held that, under these circumstances, the business judgment rule did not apply, and Revlon's directors had violated their duty to secure the highest value for their stakeholders. "In other words," claims Stout, "it is only when a public corporation is about to stop being a public corporation that directors lose the protection of the business judgment rule and must embrace shareholder wealth as their only goal. Subsequent Delaware cases have made clear that, so long as a public corporation intends to stay public, its directors have no Revlon duty to maximize shareholder wealth."

To sum up: whether American case law mandates managers to maximize shareholder gains is at least controversial. A careful analysis of the cases that are usually cited as the legal source that binds directors' discretion to maximize shareholder value can be contextualized to apply in very unique circumstances. In the face of contradicting evidence, the acceptance of shareholder primacy norm is a choice, not a legal imperative.[125]

v. State Legislation

Interestingly, while the *Revlon* case is often cited as a source of legal authority for management's duty to maximize shareholder gains, the "constituency laws," enacted in the same legal and economic atmosphere of the 1980s takeover frenzy and the surge in hostile takeovers, are almost unnoticed in the literature. Constituency laws are state-level legislation that permits corporate directors to consider the interests of other groups linked

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122. BRIAN R. CHEFFINS, THE PUBLIC COMPANY TRANSFORMED 37 (2019).

123. *Id*.

124. This has led many states to formulate constituency laws to protect companies from these situations. Lund & Pollman, *supra* note 19, at 2575.

125. *Id.* at 2602.

with the corporation or impacted by it in their decision-making process.[126] While the language of constituency laws varies from state to state, their overall structure is the same, and, in many ways, resembles the language of Israeli Article 11 and British Article 172 discussed previously, which allow~~s~~ directors to consider the interests of other groups. The Ohio State law is a representative example, stating, in § 1701.59. titled "Authority of directors; bylaws; standard of care," that:

> (E) For purposes of this section, a director, in determining what the director reasonably believes to be in the best interests of the corporation, shall consider the interests of the corporation's shareholders and, in the director's discretion, may consider any of the following:
>
> (1) The interests of the corporation's employees, suppliers, creditors, and customers;
>
> (2) The economy of the state and nation;
>
> (3) Community and societal considerations;
>
> (4) The long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.

The swift enactment of these statutes across the U.S. was received with both anticipation and criticism. Proponents hoped that these laws would help the usually unprotected groups associated with the corporation and impacted by it.[127] Opponents were concerned that the broad discretion afforded to directors might allow them to neglect their duties to the "corporate owners"—the shareholders. The hopes were disappointed: constituency laws never made their mark on American corporate law and cannot be relied upon as a source of corporate accountability for other constituencies.[128]

The analysis of the legal foundation of the shareholder primacy norm in Israel, the UK, and the U.S., shows that the law in all three jurisdictions is far from conclusive. Rather, it allows, and sometimes even supports, a much broader theory of corporate purpose, one that invites managers and directors to consider the welfare of the corporation as a whole, as well as that of other groups tied to it, or impacted by its policies. In all three jurisdictions, however, legal and market actors as well as policy makers assume that the law mandates directors to focus on the interests of

126. Constituency laws are sometimes referred to as "stakeholder statutes," or "corporate constituency statutes." *See* Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO WASH. L. REV. 14, 16 (1992).

127. Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 85 (1999).

128. *Id.*

shareholders alone. This wide acceptance is not only unfounded on the legal status of directors' duties but is also misguided in its purpose.

III. FROM CORPORATE PURPOSE TO CORPORATE RESPONSIBILITY

i. Responsibility in Corporate Law

The discussion thus far demonstrates that the discourse on corporate purpose is unable to properly guide directors, judges, or regulators as to the appropriate deliberative process required by law when running the company. While shareholder primacy is widely accepted as the norm, others describe it as a mantra or ideology.[129] These commentators also suggest amendments to current law, in order for it accommodate broader duties. In the meantime, the legal status of corporate purpose remains indeterminate.[130]

As we have shown, the law need not be changed in order to facilitate a broader reading of directors' duties. In Israel, the UK, and the U.S., the duties are already prescribed. It is, rather, the mantle of the law (culture, habit, conservatism, and social power-relations) that impedes its application. We suggest thinking about corporate purpose within the context of responsibility as a legal principle. Instead of the thin legal and economic foundation that currently dominates corporate purpose discourse, we believe a richer, more robust understanding of the corporation as a socially embedded institution is required to better inform corporate law. Responsibility as an overarching legal principle provides just that: effective, normative, and practical tools to deal with what has been the most important issue all along: the detrimental impact of corporate power on the public interest.

The concept of responsibility we offer here can serve as a benchmark for corporate directors' legal duties. It is a more extensive concept than the one currently employed in private law. Instead of the traditional minimal standards of "fair play" duties, the type of responsibility we have in mind rests on active, other-oriented principles. Our attention to responsibility stems from the understanding that focusing on individual freedoms alone,

129. Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1953 (2017) ("corporate law scholars almost universally describe shareholder primacy as the norm, but rarely as law"); *see also* Lund & Pollman, *supra* note 19, at 2575; *see also* Eduardo Porter, *Motivating Corporations to Do Good,* N.Y. TIMES, (July 15, 2014) https://www.nytimes.com/2014/07/16/business/the-do-good-corporation.html ("Though legally dubious, the argument that it is an executive's fiduciary duty to maximize the company's share price became a mantra from the business school to the boardroom"), quoted in Lund & Pollman, *supra* note 19, at 2607 n.259.

130. Rhee, *supra* note 129, at 1953.

without a complementary concept of *obligations*, makes it difficult to ensure that all people in society are able to participate in shaping the public sphere and to thereby maintain an active and meaningful personal, social and political life. The capacity for such active and meaningful participation should be available to all in modern democracies. It is currently being threatened by unregulated corporate power. Unlike other forms of social power, that of corporations deserves special attention: since corporations are only an instrument to further human ends, their value is not intrinsic. They are not ends in themselves in the Kantian sense. There is therefore a reason to construct the law of corporations to align with this understanding. To do so, the concept of responsibility that is offered here is *constructive*: it is meant to reflect the social and civil partnership that grounds life in the public sphere. As Singer notes, "through both custom and law, our market system reconciles the pursuit of self-interest with the promotion of the public welfare by limiting our freedom of action to protect the legitimate interests of others. Corporations may be in the business of maximizing profits, but they are not and should not be in the business of undermining the social fabric by ignoring applicable law and legitimate moral limits on their conduct."[131]

As the background principle of a democratic society, a filament woven through its laws, responsibility should not be construed as a soft, voluntary concept. Rather, we think of it as a binding legal norm, to be read into corporate law as an interpretive directive.

This is not a radical idea; private law is already saturated with principles that aim to guarantee the fairness of market activity. Such, for example, is the contractual duty to act in good faith, or the principles of equal treatment and non-discrimination in the workplace, education, or services.[132] Responsibility should be recognized in corporate law in the same way. It is already there, already part of the moral code of the law. A corporation that fails to consider the impact of its activity on society, on the environment, and on those with whom it fosters mutual relations acts irresponsibly. It not only undermines the very conditions that make profit maximizing possible, but also "the social norms that underlie our way of life."[133] Those values are already part of the principles that are woven into our laws. Responsibility is one of those principles.

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131. Joseph Singer, *Corporate Responsibility in a Free and Democratic Society*, 58 CASE W. RES. L. REV. 1031, 1033-34 (2008).

132. Contract Law, 5731-1970/71, §§ 12, 39, 25 (Isr.); *see also* Civil Rights Act of 1964, codified at 42 U.S.C. § 1971 et seq. (2006).

133. Singer, *supra* note 131, at 1033-34.

ii. Implications for corporate purpose

The purpose of the corporation in all three jurisdictions is controversial and therefore indeterminate. Our proposal, of reading the principle of responsibility into corporate law as an overarching interpretive principle, would cast a different light on corporate purpose discourse, providing it with a much-needed normative framework to ensure that corporate power is kept in check.

How would that work? How would recognizing that the principle of acting in a responsible manner is a practical guide for directors on how to act, and which decision would be deemed the right ones? In which cases should management choose to prefer the interests of one group of stakeholders over those of shareholders? We propose a few indications as guidelines: *first*, the type of the relationships between the corporation and its connected communities matters. The more central the corporation is to social life, the more interwoven into the social fabric and the more responsible it is for harm caused by its conduct. We call this the "type of relations" test. *Second*, is the corporation's position in terms of preventing potential damage: the better the corporation is positioned to prevent potential harm that may be the result of its policies, the more responsible it is for its prevention. This will be referred to as the "best positioned to prevent harm" test; the *third* measure, is the "profits test": the more the corporation profits from the harmful conduct, the more demanding its responsibility to mitigate it.

An example for the "type of relations" test is the profound influence that platform corporations have within society. For many around the world, these corporations (*Google*, *Facebook*, *Apple*, *Microsoft*, etc.) are the gate to knowledge, entertainment, livelihood, connection with other people, and more. This profound relation, actively sought after by the corporations, mandates broader consideration of the impact they have over their constituencies. Directors of such influential companies who do not consider the impact of their decisions on society at large, should be potentially liable for not exercising their discretion properly. When the actions of *Facebook*, for example, place the mental wellbeing of their teen-aged users at risk, or wrongfully present~~s~~ fake news as truth, its managers should be viewed as violating their duty to consider these issues. Indeed, enhancing traffic on social media matters for share price and shareholder value, but the mental health of young adults, who engage with *Facebook* constantly, and are encouraged by the platform to do just that, matters as well. The profound impact *Facebook* has over those users' self-identity, relations to others, body image, etc., demonstrates the importance of embedding responsibility as a legal principle, rather than a voluntary choice for the company.

The ability to prevent harm should be considered along the same lines: sometimes a single action by a multinational corporation can prevent more harm that an entire consumer campaign, substantial behavior, change by individuals, etc. Going green, investing in renewable energy, refraining from deliberately making product changes to increase sales, but subsequently increasing electronic waste at the same time may be thought of as examples. Considering harm and being in a position to restrict or prevent it may already be mandated by the Israeli Article 11 or the U.S. constituency laws, and is not a corporate voluntary choice. Even if it causes short-term reductions in profits, it is likely to be in the long-term interests of corporate constituencies, and possibly those of the corporation as well. A corporation that makes socially detrimental choices should, under some circumstances, be held liable for breaching its duty to consider the welfare of all its stakeholders. An example for such a decision is KLM's policy to offer its customers a train ticket from Amsterdam to Brussels, as a greener alternative for a flight on the same route.[134] Despite the financial loss involved in cancelling one flight a day, KLM's decision reflects a better understanding of the term "value": the decision contributes a direct value for the environment and for society, and probably an indirect value for its shareholders.

The benefit test complements the legal architecture of responsibility: the more the corporation benefits from its detrimental policy, the more responsible it should be to mitigate it. An example is the food industry: adding sugar and sodium to food products increases consumption, as the products become more addictive.[135] Since these practices are detrimental to customers' health, it may be justified to demand that companies mark their products as unhealthy, or even have a duty to produce healthier choices of food.

CONCLUSION

Corporations bear multifold, growing, and often unrestrained power. In its current form, this power reinforces structures of privilege and inequality and poses a threat to the ability to cope with imminent environmental challenges around the world. Corporate law, as currently interpreted and applied through its legal and cultural environment, facilitates it. It does not

134. E. Leshem, *The airline that really doesn't want you to fly is offering train tickets*, HAARETZ (Oct.10, 2019), www.haaretz.co.il/travel/1.7900704.

135. On the food Industry and its irresponsible practices, see generally MICHAEL POLLAN, THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS (2006).

do enough to hold private power responsible for undermining human well-being.

As we have illustrated in this paper, however, the reason lies not in law itself, but in its cultural environment. Having analyzed the legal framework of corporate law in Israel, the U.S., and the UK, we have shown that corporate law in all three jurisdictions is capable of a broader interpretation and that such interpretation, one that considers the impact of corporate behavior on social welfare, is necessary for a sustainable society.

In the face of a series of global crises that has exacerbated and exposed the frailty of our social structures, a paradigm shift for corporate law is required. The one we have offered here finds that the duty to consider the wellbeing of corporate constituencies is already embodied in current law. Even without any changes to current regulation, a constituency-oriented obligation to consider the social and economic impact of corporate conduct on corporate stakeholders is hiding in plain sight.