“The absence of considerations of fairness and loyalty from standard economic theory is one of the most striking contrasts between this body of theory and other social sciences – and also between economic theory and lay intuitions about human behavior.”

Daniel A. Kahneman, Jack L. Knetsch & Richard H. Thaler, *Fairness and the Assumptions of Economics*,59 JOURNAL BUSINESS, S285,S285–S300. (1986)

Stakeholder Fairness and Corporate Social Impact: The Behavioral Economic Structure of Corporate Law

*Eli Bukspan**

ABSTRACT

This study aims to bridge the gap between stakeholder capitalism, manifested today in the evolving corporate social impact paradigm and the shareholder-focused history of corporate law. The main thesis of the article is that the new view of corporate purpose and stakeholder capitalism is closely related to the notion of fairness and hypothesizes that certain foundational concepts, which were developed in the realm of behavioral economics, rather than traditional economic theory, describe and justify the newfound prominence of the stakeholder approach and the rejuvenated discourse around corporate social impact and purpose. The article concludes with the idea that the fairness principle provides a good foundation for assimilating stakeholder expectations into the DNA of modern corporations and managerial discretion by reframing the underlying approach to Companies Law—the primary legislation that regulates business sector activities through artificial legal entities.

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1. Introduction

Even before the COVID-19 pandemic, corporate social impact and "ESG" (Environmental, Social and Governance) initiatives, had reached a turning point.[1] A review of the past four years shows that alongside the drastic increase in ESG-motivated investments,[2] corporate actors have tried to turn ideological statements[3] into practical initiatives. Emerging one after another at a dizzying pace, these initiatives, accompanied by regulatory activity, create metrics that allow companies to measure and report on impact and ESG matters in a comprehensive, consistent, and comparable manner.[4]

The European Union is also currently discussing an ambitious reform to assimilate ESG considerations and reassess corporate directors' and officers' scope of discretion.[5] These changes are just the tip of the iceberg; and the business practices of companies, institutional investors, international organizations, and regulators are becoming increasingly impacted upon by the greater perceptual change within the general discourse on corporate purpose in modern society. Without a doubt, ESG corporate impact, purpose, and stakeholder fairness

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[1] Colin Mayer, *The Future of the Corporation and the Economics of Purpose*, 58 JOURNAL OF MANAGEMENT STUDIES 887 (2020) 887; Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020)

[2] *The US SIF Foundation's Biennial "Trends Report" Finds That Sustainable Investing Assets Reach $17.1 Trillion*, US SIF: The SUSTAINABLE INVESTMENT FORUM (Nov. 16, 2020), https://www.ussif.org/blog_home.asp?Display=155.

[3] *Our Commitment*: *Statement on the Purpose of a Corporation*, BUSINESS ROUNDTABLE (Aug. 19, 2019), https://opportunity.businessroundtable.org/ourcommitment/. This article joins Kahan and Rock's conclusion that "Even if the signatories of the 2019 statement did not truly mean what they said, the fact that they nevertheless issue the statement reflects an erosion of the norm of shareholder primacy, a norm that is foundational to shareholderism" *see* Marcel Kahan & Edward B. Rock, *Corporate Governance Welfarism* (European Corporate Governance Institute - Law Working Paper No. 683/2023, NYU Law and Economics Research Paper No. 23-17, 2022), https://ssrn.com/abstract=4328626 or http://dx.doi.org/10.2139/ssrn.4328626. *See also* Oliver Cann, *World Economic Forum 50th Annual Meeting in Davos: Defining Stakeholder Capitalism,* WORLD ECONOMIC FORUM (Oct. 17, 2019), https://www.weforum.org/press/2019/10/world-economic-forum-50th-annual-meeting-in-davos-defining-stakeholder-capitalism/?DAG=3&gclid=Cj0KCQiA9YugBhCZARIsAACXxeIcts1zQI9Vkij3PwsEqZ12gPHjKrzJ4UinjcvinqTYEaoqvWtBsnsaAletEALw_wcB.

[4] IFRS S1– IFRS Sustainability Disclosure Standard (General Requirements for Disclosure of Sustainability-related Financial Information) (International Sustainability Standard Board (ISSB), June 2023); IFRS S2 – IFRS Sustainability Disclosure Standard (Climate-related Disclosure) (International Sustainability Standard Board (ISSB), June 2023).

[5] EY, Study on directors' duties and sustainable corporate governance: final report, European Commission, Directorate–General for Justice and Consumers, (2020), https://data.europa.eu/doi/10.2838/472901.

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(employees, customers, suppliers, creditors, and the environment) have become mainstream in both academic and practical fields.

Indeed, there is no consensus on the meaning of these changes, especially due to the absence of a theoretical framework that comprehensively describes and justifies the increased discourse. Critics claim that while existing trends are significant, they are symbolic trends that reflect transient behavior related to the company's image and perception of its corporate brand rather than transformative for stakeholder treatment.[6]

This study claims that the new view of corporate purpose and stakeholder-oriented capitalism is closely related to the concept of fairness.[7] It hypothesizes that certain foundational concepts that have been developed by behavioral economists can help describe and justify the newfound prominence of the stakeholder approach and the rejuvenated discourse around the framing of corporate purpose. Although behavioral economics has achieved a place of honor in academic literature, including legal academia,[8] and even though social responsibility of the business sector revolves around issues that are at the core of behavioral economics research, the connection between the two has yet to be directly and systematically made. This gap becomes clear as the key issues of the current increased commitment to stakeholders by dominant corporate actors (including shareholders, stakeholder groups, institutional investors, directors, officers, judges, and regulators) is closely related to the fairness preference and its influence on decision-making.[9]

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[6] *See, e.g.,* Bebchuk & Tallarita, *The Illusory Promise of Stakeholder Governance*, *supra* note 1, at 157; Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467 (2021); Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders*, 75 VAND. L. REV. 1031(2022). *See also* Luca Enriques, *The Business Roundtable CEOs' Statement: Same Old, Same Old,* OXFORD BUSINESS LAW BLOG, (Sept. 12, 2019), https://www.law.ox.ac.uk/business-law-blog/blog/2019/09/business-roundtable-ceos-statement-same-old-same-old. *Cf.* Colin Mayer, *Shareholderism versus Stakeholderism – A Misconceived Contradiction*, 106 CORNELL L. REV. 1859 (2021).

[7] *See and compare* Robert A. Phillips, *Stakeholder Theory and A Principle of Fairness*,7 BUSINESS ETHICS QUARTERLY (1997) 51, 57, *see infra*, texts to fn. 73–76; Karla Hoff, *Fairness in Modern Society*, 327 SCIENCE 1467–68 (2010); Leo E. Strine, *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 BUS. LAW., 397 (2020).

[8] Cass R. Sunstein, Christine Jolls, & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, STAN. L. REV. 50 1471, 1473 (1998); EYAL ZAMIR & DORON TEICHMAN, eds., THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW (2014).

[9] Daniel A. Kahneman, Jack L. Knetsch & Richard H. Thaler, *Fairness and the Assumptions of Economics*, 59 JOURNAL BUSINESS, S285, S285–S300. (1986).

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Understanding human decision-making is the heart and soul of behavioral economics, thus, research from this field offers a strong foundation for a theoretical approach that provides a justificatory and descriptive foundation of the current corporate impact discourse in financial and business sectors. Furthermore, the fairness preference and the manner a problem is framed, contextualizes the evolution of "stakeholderism" within corporate law.[10] After all, corporate law attributes human characteristics to entities that not only lack all human capacities, but also might be involved in wrongdoing that are disconnected from its human decision makers.[11] Put differently, the relationship between corporate purpose and impact and behavioral economics is synergistic. First, ideas from behavioral economics support the widespread interest in corporate social impact and ESG issues. Second, observing corporate activity and corporate law through behavioral economics offers additional support for behavioral economists' claims on the descriptive and normative influence of the fairness principle on human decision-making, even within non-human entities.

The first two sections of the article are devoted to demonstrating how key insights from behavioral economics—which contradict several basic assumptions of neoclassical economics—and the proliferation of declarative and practical corporate impact initiatives are linked together. The third section analyzes the interrelationship between behavioral economics and corporate trends, and the legal regulation of stakeholders and corporate purpose. The significance of this part is especially challenging as corporations, unlike many of its stakeholders, are artificial entities that were traditionally driven towards shareholders' profits and self-interest and lack discretion that stands at the heart of behavioral economics. Therefore, the mechanisms of law in general, and corporate law in particular, may play a crucial role in implementing fairness considerations on such institutions in an effective and credible manner. Accordingly, the third section concentrates on a descriptive review of these

[10] This is in contrast to the traditional view expressed, for example by Bebchuk and Tallarita, that the protection of stakeholders is not part of corporate law and should find its place outside corporate law, by specific regulation and appropriate taxation system. *See* Reinier Kraakman & Henry Hansmann, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 442 (2001).

[11] David Luban, Alan Strudler & David Wasserman, *Moral Responsibility in the Age of Bureaucracy* 90 MICH. L. REV. 2348, 2355 (1992); Roy Shapira, *The Challenge of Holding Big Business Accountable* 44(1) CARDOZO L. REV. 203, 244–250 (2022). The idea that shareholders themselves have social preferences is not new but this argument is not intuitive regarding artificial and bureaucratic entities. *See, e.g.* Oliver Hart & Luigi Zingales *Companies Should Maximize Shareholder Welfare Not Market Value,* 2(2) J. OF L. FIN. AND ACCT. 247 (2017), and Ronald Benabou & Jean Tirole *Individual and Corporate Social Responsibility* 77 ECONOMICA 1 (2010),

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legal mechanisms. Most of these mechanisms are found within the basic doctrines of corporate law (a separate legal personality, piercing the corporate veil, and director oversight duties) but also in non-corporate fields (specific legislative acts, contract law principles of good faith and public policy, class action suits, and taxes). These mechanisms impose obligations on stakeholders as an effective part of the evolving broader conception of corporate impact and purpose. This section rests on the observation that the explored legal doctrinal shift is based on the decline of "will theory" in modern contract law and the related weakening of the "nexus of contracts" conception of the corporation. The article concludes with the importance of grappling with the fairness principle, as emphasized by behavioral economics research. This research provides a solid foundation for legal implementation of considerations of fairness into the modern corporation's DNA by reframing the underlying approach to the Companies Law, the primary legislation that regulates business sector activities and externalities. This type of legal reframing of corporate purpose that is based on stakeholder expectations and profit-enhancing interests,[12] integrates desired social and business norms vis-à-vis an alternative culture of fairness and trust.

2. On Law, Behavioral Economics, and Fairness

2.1 Behavioral and Neoclassical Economics

The two primary approaches to economics—behavioral and neoclassical—vary significantly from each other in their underlying assumptions of human nature. Neoclassical economics assumes rational decision-making;[13] behavioral economists believe that neoclassical economics is plagued by misconceptions about human behavior, which is often irrational.[14] While traditional economics examines hypothetical human behavior according to abstract assumptions from theoretical and normative conclusions,[15] behavioral economics examines

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[12] THE AMERICAN LAW INSTITUTE, *Restatement of the Law: Corporate Governance* (Tentative Draft No. 1, Apr, 2022, Sec. 2.01).

[13] GARY S. BECKER, THE ECONOMIC APPROACH OF HUMAN BEHAVIOR 14 (Chicago, The University of Chicago Press, 1976).

[14] *See, e.g.*, David Hirshleifer, *Behavioral Finance* 7 Annual Review of Financial Economics 133 (2015). For examples of implications of irrationality in the economics and financial realms, *see* Ayal, Shahar, Daphna Bar-Haim, and Moranmoran Ofir. "Behavioral biases in peer-to-peer (P2P) lending." *Behavioral finance: The coming of age* (2018): 367–400; Moran Ofir, & Yevgeny Mugerman, *(Un) intended Consequences of Macroprudential Regulation*, 11 LAW AND ECONOMICS OF REGULATION. 183–202 (2021).

[15] A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (5th ed., 2019).

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it in an empirical manner and finds that decision-making processes are biased. This challenges the assumptions and conclusions of traditional economics regarding value maximization, consistent preferences, rational expectations, and optimal information processing.[16]

In other words, neoclassical economics models are rooted in the assumption of human rationality. On the other hand, behavioral economics, a discipline that grew out of social psychology, criticizes the assumption of rationality because it does not accurately portray observed reality. According to this approach, there is a marked difference between actual human behavior and the rational model of action upon which traditional economic theories are based. Subsequently, homo economicus is a fictitious character that does not faithfully reflect the nature of human behavior.[17] Instead, behavioral economics focuses on vulnerabilities to external forces—such as systematic biases that are persistent and even predictable under certain circumstances—which deviate greatly from perfect rationality that limit a person's ability to make decisions based solely on rational thinking.

According to behavioral economists, these biases are not random or arbitrary, but rather result from cognitive limitations in the gathering, processing, and analyzing information, and are influenced by emotional and motivational factors. Humans have limited resources to focus, process, and remember information and use constant and encompassing stimuli that has been accumulated through intuition and heuristics to trigger information.[18] According to Kahneman's dual-system approach,[19] two systems shape a person's functioning, judgment, and decision-making processes: a conscious, logical, and moderate system (reminiscent of homo economicus and consistent with many people's perceptions of themselves) and a fast,

[16] Jolls, Sunstein & Thaler, *A Behavioral Approach to Law and Economics supra* note 8, at 1476. *See, e.g.,* RICHARD H. THALER, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS (New York, NY: W.W. Norton, 2015).

[17] *See* Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory,* 6 PHILOSOPHY AND PUBLIC AFFAIRS 317, 336 (1977); Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. Pa. L. Rev. 1735 (2001).

[18] Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, Id.; Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY, 3, 11 (Daniel Kahneman, Paul Slovic, & Amos Tversky eds, Cambridge University Press, 1982).

[19] DANIEL KAHNEMAN, THINKING, FAST AND SLOW (NEW YORK, FARRAR, STRAUS & Giroux, 2013); JONATHAN EVANS & KEITH FRANKISH, eds., IN TWO MINDS: DUAL PROCESSES AND BEYOND (New York: Oxford University Press, 2009); Marcel Adam Just & Patricia A. Carpenter, *A Capacity Theory of Comprehension: Individual Differences in Working Memory*,99 PSYCHOL. REV. 122 (1992).

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automatic, emotional, and subconscious that operates on the basis of unclear knowledge and allows for quick judgment with minimal cognitive effort, through the use of heuristics and "gut feelings."[20] Although the second system is a necessary mechanism for functioning in a world full of stimuli, this mechanism inevitably (and frequently) leads to behavior that deviates from what is expected under the assumption of rationality.[21] Risk aversion and expectations of fairness are among the emotional factors that influence people, and their motivational factors include: reduced aversion to profit as opposed to loss,[22] bias to specific outcomes, and more.[23]

2.2. Law and Behavioral Economics[24]

Traditional economics assumes that agents—consumers, firms, and other organizations (including the state)—recognize agents' personal preferences and act rationally to meet these preferences. [25] The traditional economic approach's purpose for **law** is to determine the legal implications of human behavior on markets, legal systems, and other institutions.[26] In recent decades scholars and professionals have promoted a behavioral-economics-based approach to legal analysis. The behavioral economics approach to law uses statistical tools to predict human behavior. It forecasts human behavior and provides improved indicators about the law and the manner it influences human behavior, especially rational thought and benefit maximization,[27] And justifying regulatory interventions when people make systematic mistakes.[28]

Behavioral economics is based on three pillars: **First**, "bounded rationality," deems that humans have impaired computational skills, deficient memories, and sensitivities to biases

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[20] Kahneman, THINKING, FAST AND SLOW, *supra* note 19, at 20.

[21] *See* Avishalom Tor, *Correcting biases through law: When and How?,* 12 LAW AND BUSINESS 45, 45–48 (2010), [in Hebrew].

[22] Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979). At its core is the claim that in decision-making people give more weight to loss than to profit (and therefore are more afraid of losing).

[23] Richard H. Thaler, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS *supra* note 16; Kahneman, *Thinking, Fast and Slow, supra* note 19.

[24] It goes without saying, that behavioral economic theory has implications in the legal world that far exceed those related to ESG and corporate law that this article seeks to address.

[25] Gary S. Becker, THE ECONOMIC APPROACH OF HUMAN BEHAVIOR, *supra* note 13, at 14.

[26] Sunstein, Jolls, & Thaler, *A Behavioral Approach to Law and Economics*, *supra* note 8, at 1476. Eyal Zamir & Doron Teichman, eds., *supra* note 8.

[27] Sunstein, Jolls, & Thaler, *A Behavioral Approach to Law and Economics*, *supra* note 8, at 1474, 1481, 1484.

[28] Eyal Zamir & Doron Teichman, eds., *supra* note 8, especially in Part IV.

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and heuristics especially when considering the probability that an event will occur. These limitations significantly impact upon decision-making involving environmental issues,[29] negligent behavior,[30] risk assessment,[31] negotiation,[32] contractual interactions (in particular standard contracts),[33] and more. The **second** is "bounded willpower," according to which human beings often act in a manner that conflicts with their long-term interests—e.g., in criminal behavior benefit is perceived to outweigh risk, or in standardized contracts with large institutions in which consumers lack information that could lead to non-beneficial transactions.[34] The **third** is "bounded self-interest" according to which human beings care (or act as though they care) about others, even strangers, and are willing to cooperate at the expense of their material self-interest in contrast to expected behavior in traditional rational choice.[35]

A noteworthy example of the inadequacy of traditional economics in legal analysis is the experiments that challenged the validity of the famous Coase Theorem, which remain perhaps the most cited legal idea rising out of the traditional Chicago School of Law and Economics. The Coase Theorem states that in the absence of transaction costs, and assuming that both parties have all the relevant information about the transaction, resources will flow to those who attribute to them the highest value.[36] According to the Coase Theorem, one of

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[29] Sunstein, Jolls, & Thaler, *A Behavioral Approach to Law and Economics*, , *supra* note 8, at 1518–1522.

[30] The effect of "retrospective" bias: In many cases, behavior will be defined as negligent even though the likelihood of damage occurring in advance was unlikely, only because the damage did occur in practice (i.e., the realization of the damage would increase the perceived likelihood of it occurring in ex-post analysis). *See* Sunstein, Jolls, & Thaler, *A Behavioral Approach to Law and Economics*, *supra* note 8, at 1523–1527; Baruch Fischhoff, Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty, 1 JOURNAL OF EXPERIMENTAL PSYCHOLOGY: HUMAN PERCEPTION AND PERFORMANCE 304 (1975); Jeffery J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 619 (1998).

[31] *See* Sunstein, Jolls, & Thaler, *A Behavioral Approach to Law and Economics*,1533, *supra* note 8; Tversky & Kahneman, "J*udgment Under Uncertainty: Heuristics and Biases*, *supra* note 22, at 277–279.

[32] Russell Korobkin, *Wrestling with the Endowment Effect, or How to Do Law and Economics without the Coase Theorem,* in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW, 300 (EYAL ZAMIR & DORON TEICHMAN eds., OXFORD UNIVERSITY PRESS 2014).

[33] Russell Korobkin, *Behavioral Economics, Contract Formation and Contract Law*, in BEHAVIORAL LAW & ECONOMICS 116 (Cass R. Sunstein ed., CAMBRIDGE UNIVERSITY PRESS, 2000); Melvin A. Eisenberg, *Behavioral Economics and Contract Law,* in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW, 438, 442 (EYAL ZAMIR & DORON TEICHMAN eds, OXFORD UNIVERSITY PRESS 2014).

[34] Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts,* 68 LA. L. REV. 117, 119, 168 (2007).

[35] Sunstein, Jolls, & Thaler, *A Behavioral Approach to Law and Economics*, *supra* note 8, at 1480, 1545; YOCHAI BENKLER, THE PENGUIN AND THE LEVIATHAN: How Cooperation Triumphs OVER SELF-INTEREST (2011); LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE (2010).

[36] R. H. Coase., *The Problem of Social Cost,* 3 JOURNAL OF LAW AND ECONOMICS 1–2 (1960).

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the main preferences that devalues the effectiveness of traditional economic prediction is the principle of fairness, which I discuss above. An unfair offer could cause a party to the transaction to act putatively, regardless of transaction costs.[37] Unfairness can harm the parties' interest in executing it for seemingly irrational considerations, especially in one-time transactions in which parties are not "repeat players." Clearly, observed human behavior does not align with the Coase Theorem outcomes. It is, therefore, possible that the justification of the Coase Theorem for legal non-interference in market interactions does not reflect observable human behavior.

The principle of fairness deviates from the assumption that a person will always choose what is in her best interest and is thus crucial at the behavioral economics and law junction. This is true as well with the impact and ESG discourse which are based on the concept of fair treatment of stakeholders, as opposed to traditional economic theory that does not take such human preferences into account and assumes that humans are rational and selfish. Put differently, the fairness principle presents a counterpoint to traditional economic theory to corporate law that does not recognize non stockholder expectations as having intrinsic importance.[38]

According to the behavioral economics approach, the principle of fairness greatly influences humans, even to the point that people are not always driven to maximize benefits. This principle illustrates "bounded self-interest" that is discussed above and is based on the understanding that humans often act in ways contradicting with their long-term wellbeing.[39] This approach emerged after extensive studies in the fields of social psychology and behavioral economics that measured the impact of judgment errors and emotional considerations on decision-making, and in particular, attested to the power of the principle of fairness.[40] More surprisingly, people may even act irrational and suffer disproportionate

[37] Russell Korobkin, *Wrestling with the Endowment Effect, or How to Do Law and Economics without the Coase Theorem*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW (EYAL ZAMIR & DORON TEICHMAN eds, OXFORD UNIVERSITY PRESS 2014); Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. of POL. ECON. 1325 (1990).
[38] *Id*. at S285, 286, 297–299.
[39] This tendency is also supported at the neurological level- in areas associated with emotion and cognition: *See* Alan G. Sanfey, James K Rilling, Jessica A. Aronson, Leigh E. Nystrom, & Jonathan D. Cohen, *The Neural Basis of Economic Decision-Making in the Ultimatum Game*, 300 SCIENCE 1755 (2003),
[40] *See also*, Richard H. Thaler, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS *supra* note 16; Sunstein, Jolls, and Thaler, A Behavioral Approach to Law and Economics, *supra* note 8.

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personal costs – all for reasons of fairness and morality and in order to express displeasure at the "bad" behavior of others.[41]

This is the case in the "Ultimatum Game," that is often mentioned in studies on behavioral economics.[42] Parties to the game remain anonymous. The offeror makes an offer which the offeree can either accept or refuse. Since this is a one-time game that is not based on lasting relationship, the offeror and offeree can only profit; they cannot suffer any losses. The results of the study suggest that offerors tend to make fair offers, and offerees tend to reject low offers even though, from a strictly rational perspective, there is no reason to make a fair offer and no reason to reject an unfair one. The Ultimatum Game, therefore, illustrates the phenomenon of "bounded self-interest": Decision-makers tend to reject proposals that seem unfair, even when rejecting the offer has no consequences on the unfair offeror. This rejection "punishes" the offeree, is contrary to their economic interests, and is observed even in one-time, anonymous interactions. These experiments also show that offerors usually make fair offers to begin with,[43] based upon the perceived fairness of the offer. This observed behavior indicates a willingness to "sacrifice" a "good" outcome just to be perceived as fair by others and to forego material self-interest to punish unfair behavior.[44]

In another experiment measuring fairness, the offeree is completely passive. Unlike the previously discussed study, the offeror is not obligated to make an offer and can keep the entire deal. Interestingly, results of this experiment indicate that offerors chose not to keep the entire amount for themselves, and maximize their personal benefit, but instead opt to share the funds with a passive offeree, thus reducing the amount of money that they received.[45]

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[41] Lynn Stout, *Law and Prosocial Behavior, in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 195–212 (EYAL ZAMIR & DORON TEICHMAN eds, OXFORD UNIVERSITY PRESS 2014).

[42] Colin F. Camerer & Richard H. Thaler, *Anomalies: Ultimatums, Dictators and Manners,* 9 J. ECO. PERSPECTIVES 209 (1995); Werner Güth, Rolf Schmittberger & Bernd Schwarze, *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367, 371–72, 375 tbls.4 & 5(1982); Kahneman, Knetsch, & Thaler, Experimental Tests of the Endowment Effect and the Coase Theorem, *supra* note 37, at S285, S291 tbl.2.

[43] Richard H. Thaler, *Anomalies: The Ultimatum Game*, *of Economist Perspectives* 2 195–196 (1988).

[44] Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AMERICAN ECONOMIC REVIEW 1281 (1993).

[45] Richard H. Thaler, *supra* note 16, at 125–129; Camerer & Thaler, *Anomalies: Ultimatums, Dictators and Manners, supra* note 42, at 209.

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It seems that a party may often prefer to pay to “punish” another party who is acting unfairly. This is the rationale behind boycotts, in which consumers refrain from purchasing a product that they desire—simply to punish the offending party. It would seem that fairness promotes parties to look for a solution that embodies a sense of justice, regardless of economic loss.[46]

Indeed, there are alternative explanations for the subjects’ behavior including, altruism, fear of rejection or being portrayed as greedy, or not to be perceived by the offeror as spineless.[47] Still, these experiments support the assertion that fair conduct is in practice extremely important. Fair behavior, whether rational and planned, subconscious, or influenced by mistakes or preferences rooted in perceptions of fairness, is a central concern that often prefers to choose justness, even at the expense of material gain.

Prosocial behavior relates to the tendency to encourage fair behavior.[48] Thus, for example, when research subjects were rewarded for a team task, as the reward increased, they made more of an effort and were more successful in the task. Interestingly, teams that were not rewarded surpassed the degree of effort and success than was observed in the groups that were rewarded. This shows that under certain circumstances, social norms possess more of an incentive than economic rewards. When subjects were rewarded with chocolate and not with money, the gaps between the different groups narrowed. Yet, when subjects were made aware of the chocolate's value, their behavior replicated the results from the first experiment. Moreover, in another experiment on priming, an action that causes a stimulus and makes people think about a topic indirectly, subjects who underwent monetary priming, as opposed to weather priming were less willing to assist the experimenter or help another person. Monetary priming decreased the subjects’ desire to assist others.[49]

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[46] Sunstein, Jolls & Thaler, *A Behavioral Approach to Law and Economics*, *supra* note 8, at 1477, 1480.

[47] Richard A. Posner, Rational Choice, Behavioral Economics and the Law, 50 STAN. L. REV. 1551, 1564 (1998).

[48] Still, the mentioned examples do not necessarily mean that fairness and efficiency are mutually exclusive, even if they are often time described as contradictory. Taking values and sustainability interests into consideration when making decisions may have short-term costs, but could increase long-term advantages for all stakeholder groups— including shareholders—through positive factors such as relative stability during times of crisis; employee satisfaction, which increases productivity; and other measures of corporate resilience and excellency, *see*, Doron Teichman, *Justice and Fairness in Corporate Law: Comments following CA 4263/04,* 40 MISHPATIM: THE HEBREW UNIVERSITY LAW JOURNAL 701 [in Hebrew]; ALEX EDMANS, GROW THE PIE: HOW GREAT COMPANIES DELIVER BOTH PURPOSE AND PROFIT (CAMBRIDGE UNIVERSITY PRESS, 2020).

[49] Kathleen Vohs, Nicole Mead, & Miranda Goode, *The Psychological Consequences of Money*, 314 SCIENCE 1154 (2006).

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These examples, and others, shed light on the centrality of fairness and prosocial behavior in interpersonal interactions.[50] The powerful influence of these forces is not lost on corporate actors.[51] These points are developed in the next section and demonstrate how the behavioral economic framework serves to insert fairness into the business sector. Section four then applies this concept into the corporate legal realm.

3. The Link between Stakeholder Fairness, Corporate Purpose, and Behavioral Economics

3.1 Recent Background in a Nutshell

Recent trends in the business sector, especially in the last four years, indicate a desire to reshape the framework that governs corporate purpose and the significance of stakeholder expectations. As claimed in the previous section, the transition to "stakeholder capitalism,"[52] on which this new conception is based, challenges the basic assumptions of traditional economics[53] and corroborates evidence found in behavioral economics on the role that fairness and prosocial preferences play in human interaction.[54]

This section aims to explore a sample of the many initiatives that demonstrates that the current world of corporations adopts a more complex ideological approach than that of the traditional shareholder primacy model. This evolution can be found in comments made by global senior corporate executives, in academic literature, the rise of social-oriented

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[50] Kahneman, Knetsch &. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, *supra* note 37, at S297; Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 THE JOURNAL OF BUSINESS S251–S278 (1986). (The Behavioral Foundations of Economic Theory).

[51] On the importance and ability of the idea of fairness, mutual trust and the fulfillment of expectations to prevent economic failures, encourage cooperation and influence economic performance in large organizations *see* Kenneth J. Arrow, *Gifts and Exchanges*, 1 PHILOSOPHY AND PUBLIC AFFAIRS 343 (1972). Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Trust in Large Organizations*, 87 THE AMERICAN ECONOMIST REVIEW 333 (1997); FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY (New York: NY, Free Press, 1996).

[52] Klaus Schwab, *Why We Need 'Davos Manifesto' for a Better Kind of Capitalism*, WORLD ECONOMIC FORUM, (Dec. 1, 2019), https://www.weforum.org/agenda/2019/12/why-we-need-the-davos-manifesto-for-better-kind-of-capitalism/.

[53] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 35–39 (BOSTON: HARVARD UNIVERSITY PRESS, 1996); Lucian A. Bebchuk, *Competing Views on the Economic Structure of Corporate Law*,1 U. CHI. BUS. L. REV. 29 (2022).

[54] Kahneman, Knetsch, &. Thaler, Experimental Tests of the Endowment Effect and the Coase Theorem, *supra* note 37, at 299. For the moral and normative justification of the idea of fairness for stakeholder theory, *see* Philips, *Stakeholder Theory and A Principle of Fairness*, *supra* note 7.

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investments,[55] social impact indices and disclosure standards,[56] the development of the corporate purpose discourse, the engagement of stakeholders and institutional investors in impact and ESG initiatives, and the increasingly frequent practice of adopting internal corporate policies such as codes of ethics. Public discourse around these initiatives have become amplified by social media. This system of considerations comes together in a new framework in which fair play is a compelling business strategy that is used to mitigate negative public and legal exposure.

The August 2019 Business Roundtable's **Statement on the Purpose of a Corporation—** which was signed by almost all of CEOs of the two-hundred-member companies, including giants such as American Airlines, American Express, Amazon, Apple, Boeing, Bank of America, and BlackRock—is indicative of an important extrajudicial development governing corporate fairness. This statement replaced the organization's previous 1997 **Statement on Corporate Governance** that declared the corporation's purpose, and the responsibility of the directors and officers, to act to maximize shareholder profit. The 2019 document therefore marks a significant prosocial shift in corporate purpose and reframes it to serve all stakeholder groups involved in its activities, including customers, employees, suppliers, and the community, and not just shareholders who were the only stakeholders mentioned in the 1997 Statement.

This statement, made by an organization representing supereminent corporations in the U.S. economy and those very corporations most closely associated with traditional capitalism and the shareholder primacy model, cannot be ignored. Its value is not just in emphasizing the stakeholder-oriented perspective, but as stated, in emphasizing the overall social framework of the integrative purpose and its subordination to liberal and democratic principles of

[55] ESG investments in the U.S. rose from $ 12 trillion in early 2018 to $ 17.1 trillion in early 2020 - an increase of 42%, the highest increase since 2012, *see* The US SIF Foundation's Biennial "Trends Report" on US Sustainable and Impact Investing Trends (Nov. 16, 2020, 03:24 PM). https://www.ussif.org/trends.

[56] Measuring Stakeholder Capitalism: Towards Common Metrics and Consistent Reporting of Sustainable Value Creation, WORLD ECONOMIC FORUM (Sep. 2020) https://www3.weforum.org/docs/WEF_IBC_Measuring_Stakeholder_Capitalism_Report_2020.pdf; IFRS S1– IFRS Sustainability Disclosure Standard (General Requirements for Disclosure of Sustainability-related Financial Information) (International Sustainability Standard Board (ISSB), June, 2023); IFRS S2 – IFRS Sustainability Disclosure Standard (Climate-related Disclosure) (International Sustainability Standard Board (ISSB), June 2023); Sustainable and Resilient Finance – OECD Business and Finance Outlook 2020 (OECD, Sep. 2020).

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freedom and liberty, i.e., an economic and social "higher" order. According to this perspective, corporations are economic instruments that are designed to create financial benefits. While these liberal principles are central in Western economics and politics, their framing and explicit inclusion at the outset of the statement is important. Linking economic purpose with the fulfillment of liberal human rights is a relatively new way to frame the traditional "binary" question about the functional prosocial objective of the business corporation that were used to present shareholder and stakeholder interests as a zero-sum game.

Even if the text of the Business Roundtable has only declarative significance, this declaration cannot be ignored especially in conjunction with other important documents such as the November 2019 British Academy report on **Principles for Purposeful Business**[57] and the **Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution**.[58] These reports contribute to the sense that this discourse has reached a turning point, reflecting in-depth processes that have reached maturity in the past years and which the COVID-19 crisis has only amplified.[59] These processes have not occurred in a vacuum; rather they have occurred under the influence of social and financial factors (public pressure and change in investor preferences), legal (regulators and courts changing expectations),[60]

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[57] "The Future of the Corporation programme is one of the largest and most ambitious ever conducted by the British Academy, the UK's national academy for the humanities and social sciences. It lies at the heart of the future of capitalism, the future of humanity and the future of our planet." *see* P*rinciples for Purposeful Business - How To Deliver The Framework For The Future Corporation*, THE BRITISH ACADEMY (Nov., 2019), https://www.thebritishacademy.ac.uk/sites/default/files/future-of-the-corporation-principles-purposeful-business.pdf (hereinafter: **The British Academy**); *Policy & Practice for Purposeful Business: The Final Report of the Future of the Corporation Programme*, THE BRITISH ACADEMY: FUTURE OF THE CORPORATION (2021) https://www.thebritishacademy.ac.uk/documents/3462/Policy-and-Practice-for-Purposeful-Business-The-British-Academy.pdf.

[58] "The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders—employees, customers, suppliers, local communities and society at large." Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, WORLD ECONOMIC FORUM (Dec. 2, 2019) https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution. Eli Bukspan, *Corona Sharpens Corporate Social Responsibility*, THE MARKER (Jun. 1, 2020), https://www.themarker.com/opinion/1.8887134 [in Hebrew]; Martin Gelter & Julia M. Puaschunder, *COVID-19 and Comparative Corporate Governance,* 46 THE JOURNAL OF COPORATION LAW (2021).

[59] Martin Gelter & Julia M. Puaschunder, id; Mayer, The Future of the Corporation and the Economics of Purpose, *supra* note 1, at 887.

[60] EY, *Study on Directors' duties and Sustainable Corporate Governance*, *supra* note 5; Sustainable Finance and the Role of Securities Regulators and IOSCO: Final Report, OICU-IOSCO (Apr., 2020); EU Sustainable

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and have combined together to pressure the business sector to recognize that present day best industry practices include acting in a more holistic and fair manner. Based on this approach, many dominant corporate actors have committed to an additional set of values that had previously been perceived to be under the exclusive purview of state institutions or civil society organizations. In making such value-based commitments, corporations have created voluntary self-regulation by developing and implementing employee ethic codes and ethic codes for interacting with other corporations—while internalizing considerations of social responsibility and integrating them into business decisions.

This phenomenon is not surprising, given the fact that the financial, political, and social power held by corporations is currently at an all-time high. And expectations of fair conduct seem to have increased accordingly. Still, the novel framing of corporate prosocial purpose and responsibility for present challenges is not only found in global and mega-corporations. It is not uncommon to find companies appointing social responsibility managers and adopting corporate policy documents such as codes of ethics and similar documents,[61] which are published in social and environmental reports according to various impact and ESG indices.[62] Interestingly, voluntary and mandatory ESG disclosure is being adopted by regulators and various institutions around the world.[63] Additionally, institutional investors, such as

Finance Disclosure Regulation SFDR) 2019/2088 (Mar. 10 2021); Disclosure of Corporate Social Responsibility (CSR) and ESG Risks – A Proposed Outline (Israel Securities Authority, Apr. 2021); Letter from Yair Avidan, The Supervisor of Banks regarding "Environmental risk management" (Dec. 1, 2020); Draft circular on the subject of "Investment considerations relating to environmental, social and corporate governance aspects and evolving risks, cyber risks and technological risks" (Capital Market, Insurance and Savings Authority, Feb. 2, 2021). Hans Bonde Christensen, Luzi Hail & Christian Leuz, *Mandatory CSR and Sustainability Reporting: Economic Analysis and Literature Review* 26 REVIEW OF ACCOUNTING STUDIES 1176 (2021).

[61] For more information and examples, *see* The BSR (Business for Social Responsibility) website https://www.bsr.org/en/about (last visited Jul. 28, 2023); BSR, and the Ethics & Compliance Initiative: Ethics & Compliance Initiative, https://www.ethics.org (last visited July 28, 2023).

[62] DENISE WALLACE, HUMAN RIGHTS AND BUSINESS: A POLICY-ORIENTED PERSPECTIVE, 90–119 (2014),; John G. Ruggie, *Corporate Purpose in Play: The Role of ESG Investing*, HARVARD KENNEDY SCHOOL FACULTY RESEARCH(2019); FTSE4Good Index https://www.ftserussell.com/products/indices/ftse4good (last visited Jul. 28, 2023); Dow Jones Sustainability World Index https://www.spglobal.com/spdji/en/indices/esg/dow-jones-sustainability-world-index/#overview (last visited July 28, 2023).

[63] For a recent development *see* IFRS S1– IFRS Sustainability Disclosure Standard (General Requirements for Disclosure of Sustainability-related Financial Information) (International Sustainability Standard Board (ISSB), June 2023); IFRS S2 – IFRS Sustainability Disclosure Standard (Climate-related Disclosure) (International Sustainability Standard Board (ISSB), June 2023).

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BlackRock,[64] are increasingly adopting socially, environmentally, and ethically responsible investment policies. This phenomenon is attributed, among other factors, to investors' increased preferences for socially responsible investments,[65] social reporting rules, and an active discourse on strategic change in managerial thinking.[66] Public and social pressure have also translated into shaming strategies and public condemnation of problematic practices, which becomes even more effective with social media. Public pressure has created a new kind of nonfinancial business risk, especially regarding the corporation's reputation vis-à-vis consumers, investors, and employees.[67]

Another basic social element that stems from the heightened influence of corporations in all areas of life is corporations' growing commitment to protect human rights,[68] which extends beyond "classic" human rights violations, such as slavery and oppressive working conditions to issues of privacy, mental and economic wellbeing, and gender and minority equality. With this in mind, it comes as no surprise that the increased status and influence of corporations has sparked expectations and calls for the application of human rights protections in the business sector, regardless of the company's size, type of industry, geographical location, ownership, or control structure.[69] Meanwhile, a variety of international organizations have invested heavily in the development of different models to ensure that human rights are respected by the business sector, particularly the Protect, Respect, Remedy Initiative proposed by Ruggie and adopted by the UN in 2011 in a groundbreaking document titled

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[64] *See* Sustainable Investing at BlackRock, https://www.blackrock.com/ch/individual/en/themes/sustainable-investing (last visited July 28, 2023).

[65] Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. Cal. L. REV. 1243 (2020); Michal Barzuza, Quinn Curtis & David H. Webber, *The Millennial Corporation: Strong Stakeholders, Weak Managers*, (2021), available at SSRN: https://ssrn.com/abstract=3918443 or http://dx.doi.org/10.2139/ssrn.3918443.

[66] E.g., Enacting Purpose Initiative http://enactingpurpose.org (last visited Jul. 28, 2023).

[67] ROY SHAPIRA, LAW AND REPUTATION, (CAMBRIDGE UNIVERSITY PRESS, 2020).

[68] Eric De Brabandere & Maryse Hazelzet, *Corporate Responsibility and Human Rights: Navigating Between International, Domestic and Self-Regulation* LEIDEN LAW SCH. RESEARCH – Grotius Center Working Paper No. 056-HRL, 2–6 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2913616; Eli Bukspan & Asa Kasher, *Human Rights in the Private Sphere: Corporations First*, 40 U. PA. J. Int'l L. 419 (2019).

[69] John G. Ruggie & Tamarin Nelson, *Human Right and the OECD Guidelines for Multinational Enterprises: Normative innovations and Implementation Challenges*, 22 BROWN JOURNAL OF WORLD AFFAIRS 99 (2015). For more on corporate social responsibility and its influence on different forms of capitalism: Nadia Bernaz, BUSINESS AND HUMAN RIGHTS: HISTORY, LAW AND POLICY – BRIDGING THE ACCOUNTABILITY GAP (Routedge, 2017). This approach is also reflected in the international discourse - a well-known "manufacturer" of soft legal norms: Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L, REV. 706, 707 (2010).

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Guiding Principles on Business and Human Rights.[70] The UN guidelines reaffirm and illustrate the effects of framing expectations that support claims by behavioral economists. This famous document—which has influenced governments, the OECD,[71] businesses, labor unions, NGOs, and other organizations—is based on three pillars: state duty to protect human rights, corporate duty to respect human rights, and shared state and corporate legal responsibility for violations of human rights.

These guidelines were adopted by the UN Human Rights Council. For the first time, a UN body adopted a normative text without extended negotiations between governments.[72] Furthermore, the Council established a working group to promote the effective implementation of the guidelines, particularly for small and medium-sized enterprises, illustrating the importance of corporate responsibility to the protection of human rights.[73]

According to the UN guidelines, a corporation's purpose is not only to generate profits but also to meet the public's expectations to protect human rights through fair and ethical conduct. This approach considers human rights protections to be an inherent component of a corporation's objectives and activities and is reflected clearly in the Business Roundtable **Statement on the Purpose of a Corporation** as well.[74] While, the UN guidelines, rightfully considered the central global standard for business and human rights, are not a legal instrument that imposes new and operative obligations on countries or corporations,[75] they

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[70] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (U.N, 2011).

[71] The OECD has produced guidelines similar to those of the UN. OECD Guidelines for Multinational Enterprises, 2011 Edition; *see* Ruggie & Nelson, *Human Right and the OECD Guidelines for Multinational Enterprises: Normative innovations and Implementation Challenges*; id; *See also,* IFC http://www.ifc.org (last visited Jul. 28, 2023) and ISO 26000 Social Responsibility, https://www.iso.org/iso-26000-social-responsibility.html (last visited July 28, 2023).

[72] Ruggie & Nelson, *Human Right and the OECD Guidelines for Multinational Enterprises: Normative innovations and Implementation Challenges*, *supra* note 69, at 5.

[73] *Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNITED NATIONS: HUMANS RIGHTS, http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx.

[74] "Americans deserve an economy that allows each person to succeed through hard work and creativity and to lead a life of meaning and dignity." *Our commitment*, *supra* note 3.

[75] UN Human Rights Commission Res. 2004/11, U.N. Doc. E / CN.2 / 2014 / L.73 / Rev.1 (Apr. 20, 2004). Nevertheless, some are calling for granting legal validity to the guidelines, *see* Surya Deva and David Bilchitz, eds., BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS (CAMBRIDGE UNIVERSITY PRESS, 2017).

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are a key indicator of international policy and an increasing universal expectation regarding the regulation of the business sector.[76]

3.2 Stakeholderism, the Concept of Fairness and Framing the Corporate Purpose

The central thesis of this article relies heavily on the notion that the current stakeholder capitalism and the corporate purpose discourses are intrinsically linked to the idea of prosocial preferences and corporate fairness. To substantiate this argument, consider the attributes of fairness suggested by Phillips and relying on the writings of Hart, John Stuart Mill, and John Rawls:

> *Whenever persons or groups of persons voluntarily accept the benefits of a mutually beneficial scheme of co-operation requiring sacrifice or contribution on the parts of the participants and there exists the possibility of free-riding, obligations of fairness are created among the participants in the co-operative scheme in proportion to the benefits accepted.*[77]

Phillips uses this definition as normative justification for the idea of fairness that he proposes for stakeholder theory in corporate discourse,[78] while emphasizing that all stakeholder groups are involved, to one degree or another, in the same joint economic venture. Thus, stakeholder success is intertwined with and often directly dependent upon the success of others. Phillips terms this thinking "Stakeholder Fairness."[79]

While Phillips' approach connects the idea of fairness as a **moral and ethical** resource justifying the stakeholder perspective, this article suggests that in the recent years beavioral economics adds another important and **descriptive** layer to the relationship between fairness and the rigorous discourse on corporate impact and corporate purpose. After all, business and academic discourse seem to transform the narrow debate on the economic metric of profit and self-interest, to a broader mix of values and prosocial behavior. This shift is explained exceptionally well by the findings of behavioral economics research that is discussed in this

[76] Bukspan & Kasher, *Human Rights in the Private Sphere: Corporations First, supra* note 68; Many countries (such as the United Kingdom, the United States, Italy, Germany and France) have already begun to create each NAP (National Action Plan), which includes recommendations for the practical adoption of guidelines in the local context – *see*, State National Action Plans on Business and Human Rights, UNITED NATION: HUMAN RIGHTS, http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx
[77] Phillips, *Stakeholder Theory and A Principle of Fairness*, *supra* note 7, at 57.
[78] *Id*. at 63.
[79] *Id.* at 64.

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article. The concept of stakeholder fairness offers a general guideline for decision-makers who wish to examine the impact of their decisions on stakeholder groups. To be sure, this suggested framework emphasizes the mere consideration of stakeholders' expectations without specifying the specific **content** of the corporation's obligations to stakeholders.[80]

Descriptively, the policy documents from the business sector discussed above indicate the centrality of the idea of stakeholder fairness, as defined by Phillips. In this manner, the **Business Roundtable** statement focuses on corporations as economic instruments for self-fulfillment,[81] and uses value-based terminology to encourages morality. Larry Fink of BlackRock wrote it clearly: "Companies that fulfill their purpose and responsibilities to stakeholders reap **rewards** over the long-term. Companies that ignore them stumble and fail. This dynamic is becoming increasingly apparent as the public holds companies to more exacting standards."[82] A similar trend is also seen in the 2020 Davos Manifesto of the World Economic Forum, which views corporations as a tool for fulfilling human and social aspirations in order to improve the state of the world, and not just as an economic unit for wealth creation, as well as a means to create common value, fair competition, equality, human dignity, human rights, trust, and credibility.[83]

The importance of framing fairness into corporate discretion can be demonstrated by the following anecdote. Thaler wrote that he was asked to help a family-owned ski resort increase its income while simultaneously reducing its debts. The challenge remained to justify the price increase even though this ski resort was less impressive than neighboring competitors and the resort's cliental was mostly local and were sensitive to price increases. Thaler's solution—a gradual plan for raising prices with measures to sweeten the bitter pill—addressed both the need to raise prices and the fear of customer flight. The ski resort acted to improve skiers' experiences (new trails, free instruction during idle hours, and discount costs

[80] *Compare id.* at 65.
[81] *See, e.g.,* Colin Mayer, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD, 9–11 (OXFORD UNIVERSITY PRESS, 2019).
[82] *Larry Fink's 2019 Letter to CEOs: Purpose & Profit*, BLACKROCK (2019), https://www.blackrock.com/americas-offshore/en/2019-larry-fink-ceo-letter
[83] Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, WORLD ECONOMIC FORUM (Dec. 2, 2019), https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution.

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on future visits). In this way, prices were raised after customers felt that they had received more services and were being treated fairly.[84]

Indeed, many consider the fairness approach, i.e., taking stakeholder interests into consideration, a zero-sum scenario that necessitates costs to shareholders and company profits, and thus is undesirable.[85] Yet in reality, short term costs may be outweighed by long-term benefits. Multiple approaches emphasize the manner long-term market interests and increased aggregate welfare can be efficiently and holistically achieved by modern corporations that are required to behave in a more fair-minded, humane manner than that of their twentieth century predecessors.[86]

The importance of fair treatment of stakeholders has become an increasingly important component of corporate business and law strategy. It is also a sound business practice as behavioral economists have found that incorporating fairness into corporate decision-making improves customer, employee, and creditor relations, as well as that with potential institutional investors, regulators, and the court. In this sense, the prosocial and fair thinking framework functions as "preventive medicine" against negative consequences from unfair actions and in the long run, promotes corporate and societal prosperity.

This approach is prominent in management studies discourse.[87] For example, Alex Edmans and Colin Mayer reason that stakeholderism belongs within the preliminary corporate purpose: Just as humans have goals and values that influence their behavior so too do corporations. Corporate goals are influenced by the values that they attribute to both their nonfinancial and financial decisions:

> *Likewise* [to people]*, companies have purposes that determine the values attached to their non-monetary as well as monetary measures.*[88]

And:

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[84] Jolls, Sunstein & Thaler, *A Behavioral Approach to Law and Economics supra* note 8.
[85] Teichman, *Justice and Fairness in Corporate Law: Comments following CA 4263/04*, *supra* note 48.
[86] Sayyedeh Parisa Saeidiet al., *How Does Corporate Social Responsibility Contribute to Firm Financial Performance? The Mediating Role of Competitive Advantage, Reputation, and Customer Satisfaction*, JOURNAL BUSINESS RESEARCH 341 (2015).
[87] Edmans, GROW THE PIE, *supra* note 48, p. 38, 83–87 (viewing corporations as integrative and taking stakeholders into account, and as such serve as an effective decision-making tool in a world full of uncertainties).
[88] Mayer, , *supra* note, 81.

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> *[Directors] act according to the reasons why the company was created and exists and what it is there to do, namely its purposes. They are the guiding star of the board, not rigid rules of shareholder rights or primacy that trump all else and it is against those purposes and their associated values that their actions and performance should be judged.*[89]

This approach provides a novel framework for impact purpose-driven corporate strategy, one which closely relates to the notion of integrating trust and stakeholder fairness into corporate leaders' discretion. Such an approach is a far cry from the model that prioritizes profit maximization as the primary objective of the corporation. According to Mayer:

> *The shareholder/stakeholder contradiction is not a contradiction at all. … They are in general complementary ways of delivering the plurality of outcomes that we should be seeking of our economic systems, particularly in an era where the dire consequences of promoting one at the expense of the other has become all too clear.*[90]

While these two scholars view corporate purpose in a broader human context than the classical context that prioritizes shareholder profits, the idea of "stakeholder capitalism" remains controversial. This strife was evident in the December 2020 debate that was hosted by the London Business School and placed Alex Edmans and Lucian Bebchuk on opposite sides.[91] Although Edmans and Bebchuk agree on the importance of protecting stakeholder interests, due to substantial differences in each scholar's respective framing of the issue, they hold very different views on how to do so.

Bebchuk calls for the regulation of stakeholder protection outside of corporate law, e.g., through tax law (by way of pigovian tax) and specific and targeted reforms and statutes. According to Bebchuk, external intervention is needed due to the lack of existent incentives for corporate executives to sufficiently concern themselves with the protection of stakeholder interests. Edmans' approach, on the other hand, emphases conditions of uncertainty. Considering stakeholder interests, according to Edmans, is a better decision-making principle for the benefit of *both* shareholders and stakeholders and to increase society's aggregate welfare. Edmans' approach, therefore, enriches the traditional narrow profit-seeking model

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[89] *Id.*, 3.
[90] *Id.*, 11.
[91] London Business School, Alex Edmans, & Lucian Bebchuk, *Stakeholder Capitalism: The Case for and Against*, (Dec. 15, 2020)- https://www.youtube.com/watch?v=3tMYfLLzoi4&feature=youtu.be

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of corporate law by emphasizing the importance of expanding the pie and advocating for a shift from a corporate mentality of pie-splitting to one that rewards value creation fairly.

In other words, while Bebchuk advocates that the best means to correct market failure is through regulation external to corporate law, Edmans argues in favor of a deeper change in the decision-making processes, one that considers shareholder, stakeholder, and societal interests. According to Edmans' approach, stakeholder considerations should be taken into account inherently and instrumentally, and especially under conditions of uncertainty which necessitate evaluating circumstances whose impact on the corporation are unforeseeable and not predictably quantifiable.[92] Thus, Edmans' approach seeks to transform the narrow shareholder-oriented perspective, that is solely motivated by shareholders' self-interest in quantifiable profits, and which in his opinion creates a chilling effect on shareholders' willingness to make decisions that go beyond clear, immediate monetary gain.

Mayer's principled approach on the objectives of corporate governance and corporate law to fulfil corporate purpose is also substantially different than the one advocated for by Bebchuk and Tallarita and justifies the renewed framing of corporate purpose to goals that are broader, more integrative, will serve the intrinsic and creative purpose of the corporation, and extend beyond those of the stakeholders. Mayer claims that while money and profits are important, they are not substitutes for the corporation's commitment to its impact purpose,[93] which serves as the rationale for the corporation's existence. According to this view, stakeholders, as well as shareholders, are both players who help the corporation achieve its purpose, so the focus on shareholders alone, under the traditional model of corporate purpose, has created, in Mayer's opinion, a serious limitation and distraction.[94] The assumption of rationality is outdated and inaccurate, and the focus on accumulating wealth in and of itself is a distraction from new discoveries as well as from the central motivator for human beings, which is not to make profits, consume products, or generate income. The main motivator is instead to meet goals, feel meaningful, and create value and worth, which ultimately allow people to feel like they have left a legacy. These elements, which deviate, as does the fairness principle, from the self-interesdt assumption at the basis of traditional economics, form the basis for a

[92] Edmans, GROW THE PIE, *supra* note 48, at 3.
[93] Mayer, *supra* note 81.
[94] *Id.* at 4, 6–7.

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philosophical position that prioritizes creativity, development, and innovation in modern society. Accordingly, Mayer considers the corporate form to be integral for humans to contribute and receive the benefits of shared cooperative efforts.[95]

Mayer's academic approach is reinforced by the British Academy's **Principles for Purposeful Business** document (2019) and **Policy and Practice for Purposeful Business** (2021).[96] According to these documents, the corporate purpose is an expression of means by which the corporation can contribute profitable solutions to social and environmental problems and create value for shareholders and stakeholders alike. The purpose defines how the corporation helps people, organizations, societies, and nations address challenges that they face, while helping minimize problems that corporations may cause.[97]

In sum, the ideological proximity between fairness and corporate social impact and responsibility to stakeholders is represented today by the business and academic discourse and reveals a change in the business sector's values. This change also reflects a more eminent change and is connected to one of the most fundamental preferences of human nature, the (perhaps unconscious) prioritization of fairness and trustworthiness over behavior that seems manipulative, unfair, or overly egocentric. This perspective is extremely significant since until very recently, rational and profit-motivated self-interests were prominent. This approach concurs with behavioral economics literature that inter alia supports the contention that fairness holds a rightful place in framing corporate, as well as human beings, impact purpose.

4. Legal Implications

4.1 Preface

The trends in the business world described above correspond with similar trends in the legal world. In the last few years, regulation implementing the impact and prosocial approach has

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[95] Mayer, *supra* note 81, at 10–11; Victor E. Frankl, MAN'S SEARCH FOR MEANING: THE CLASSIC TRIBUTE HOPE FROM THE HOLOCAUST (Verlag für Jugend und Volk (Austria), 1946).
[96] Policy & Practice for Purposeful Business – The Final Report, *supra* note 55.
[97] *Id*. at 16.

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increased,[98] and augments the existent legal infrastructure for the safeguarding of stakeholder interests. This infrastructure, which for the most part has received less recognition in academic literature, indicates a shift toward the corporation as an entity with an integrative business purpose, implemented through a series of legal mechanisms that target corporate actors through explicit and implicit fairness-based rhetoric. Accordingly, and from a legal point of view, framing a purpose-driven strategy and adopting a stakeholder mindset should be an advantageous path. This is not only because of the business case for incorporating ethical and social considerations alongside economic ones,[99] or the development of the "Millennial Investors," a new breed of investor who is interested in socially responsible investments as a tool for social change,[100] but also because the stakeholder approach can help mitigate exposure to increasing legal ESG risks that have serious potential to harm profits if left unmonitored.[101]

This section illustrates these legal changes, some of which directly apply to corporations, within the most basic principles of corporate law (such as the separate legal personality doctrine, piercing the corporate veil doctrine, and director oversight duties), and others indirectly using doctrines external to corporate law. These trends, which are also dominant in the Israeli legal system, though seems to be eclectic, share a common denominator in theirs mission to push towards a prosocial impact compass – consistent with the fairness concept – for corporations, by integrating stakeholder interests into the ongoing discretion being exercised by corporate actors.

The descriptive legal analysis in this section discusses the manner that existing legal systems regulate corporate behavior using a "stick" (legal liability) and "carrot" (legal incentives)

[98] Latham & Watkins, ESG Litigation Roadmap: What You Need to know (WBCSD, Fall 2020). https://www.lw.com/thoughtLeadership/ESG-litigation-roadmap; ESG Litigation – How Companies Gan Get Ready, Respond and Resolve Claims (Ahurst, Oct. 28, 2021). https://www.ashurst.com/en/news-and-insights/insights/esg-litigation---get-ready-respond-and-resolve/; Catherine Clarkin & Melissa Sawyer, *ESG Trends and Hot Topics*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Aug. 25, 2021) https://corpgov.law.harvard.edu/2021/08/25/esg-trends-and-hot-topics/.

[99] Bukspan & Kasher, *Human Rights in the Private Sphere: Corporations First*, *supra* note 68; Michael E. Porter & Mark R. Kramer*, Creating Shared Value - How to Reinvent Capitalism and Unleash a Wave of Innovation and Growth*, 89 HARVARD BUSINESS REVIEW 62 (2011); Edmans, GROW THE PIE, *supra* note 48, at 101–224.

[100] Barzuza et al, *Shareholder Value(s): Index Fund Activism and the New Millennial Corporate Governance, supra* note 65, Barzuza et al., *The Millennial Corporation*, *supra* note 65.

[101] *Compare: In re The Boeing Company Derivative Litigation*, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021).

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approach. This legal description in effect confirms conclusions reached by behavioral economists on the importance of fairness. They also support the position that the legal framework for stakeholder protection belongs **within** the realm of laws that directly affect corporate purpose and the responsibilities of corporate actors and reflect, contrary to the claim made by Bebchuk and Tallarita, that the evolving stakeholders' discourse is not illusory. Since corporations lack the ability of human judgment, the legal angle aims to induce corporations, legal entities that have been constructed to externalize risks - to include the fairness preference into decision-making and corporate activities.

Before discussing the details of this section, a preliminary note is required about the background behind these legal changes that seems to correspond with the weakening of the "nexus of contracts" conception following its peak in the twentieth century.[102] Its decline came about after the unprecedented changes in the corporate power structure and from the decreasing prominence of the will theory and the principle of freedom in contract law.[103] These changes raise the need for an alternative legal framework to regulate externalities imposed upon potential stakeholders.

This article presents the many manifestations of corporate stakeholder-related responsibilities in the legal world as a natural progression for the "post-contractual" corporation age.[104] Traditional legal analysis viewed the corporation as a "nexus of contracts" between different stakeholder groups.[105] This paradigm believed that the externalities imposed on stakeholders would be freely and fairly negotiated in the contractual relations between stakeholders and the corporation. However, in the new corporate era, this assumption has lost its validity because stakeholders are unprecedently significantly weaker

[102] Brian R. Cheffines & Richard William, *Team Production Theory Across the Waves,* (U. OF CAMBRIDGE FAC. L. RESEARCH PAPER No. 2/2021, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3751392; Brian R. Cheffines *The Trajectory of (Corporate Law) Scholarship,* 63 CAMBRIDGE L. J. 456, 485–486 (2004); Brian R. Cheffins, THE PUBLIC COMPANY TRANSFORMED (OXFORD UNIVERSITY PRESS, 2018).
[103] James Gordley*,* THE Oxford Handbook of Legal Studies 3 (OXFORD UNIVERSITY PRESS; 2003). *Cf* . Mayer, , The Future of the Corporation and the Economics of Purpose, *supra* note 1, at 12 (in the 20th Century "problems of size and monopoly, dispersion of ownership and efficient governance, globalization and national regulation, and financialization and short-termism became acute"). E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACT (ASPEN LAW & BUSINESS Publishers, 3th ed., 1998); Andrew Robertson, *The Limits of Voluntariness in Contract*,29 MELBOURNE UNIVERSITY LAW REVIEW 179 (2005).
[104] This trend is amplified by governments failures to effectively respond to broad societal problems created by modern corporate activities. *compare*: Jonathan R. Macey, *ESG Investing: Why Here? Why Now?,* (YALE L. & ECON. RESEARCH PAPER NO. 21–22, 2021). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3942903.
[105] EASTERBROOK & FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW, *supra* note 51.

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than mega corporations. It is not in vain that the question of fairness toward stakeholders was all but ignored by the neoclassical economic analysis of corporate law,[106] which assumed that stakeholders had sufficient contractual power to independently ensure the protection of their reasonable expectations. Accordingly, the growing power of corporations and the diminishing Coasian approach amplified the potential for externalizing risk onto stakeholders, and the acute need to create an alternative framework to achieve fairness for exposed stakeholders.

In an unavoidable manner—and as described by Kraakman and Hansmann[107] and Bebchuk and Tallarita[108]—in the modern era there has been a significant increase in the number of legal doctrines regarding corporate contracting parties (including employees, creditors, suppliers, customers, and so forth) who have lost their ability to negotiate or calculate their potential risks—even under the assumption of rationality.

While critics of stakeholder capitalism claim that legislation **external** to corporate law, such as pigovian tax, is the better mechanism to ensure stakeholder protection, this article points to advantages of integrating corporate fairness to stakeholders **within** corporate law itself. Instead of stakeholder protection through external legislation, which indiscriminately regulates stakeholder interests in a generic way, framing the stakeholder fairness concept into corporate law and adopting an internal corporate purpose and stakeholder approach incentivized corporate actors to formulate tailor made, prosocial and stakeholder groups' protection in accordance with the unique characteristics of each corporation.

As implied by behavioral economics, as well as by the arguments made by Edmans and Mayer, framing the idea of corporate fairness within the function of any given corporation's **legal** purpose better guides routine corporate decision-making—enabling trust and cooperation with its own core business and relevant stakeholders. This legal framing will help systematically manage the evolving ESG legal risks that are explored in this section. It will also unify the business and financial integrative discourse, which is present in almost every industry and sector today, with the legal discourse, and guide the business sector, by

[106] *See* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON 425 (1993) and Lucian Arye Bebchuck *Contractual Freedom in Corporate Law,* 89 COLUM. L. REV. 1395, 1416 (1989).
[107] Kraakman & Hansmann, *The End of History for Corporate Law, supra* note 10.
[108] Bebchuk & Tallarita, *The Illusory Promise of Stakeholder Governance*, *supra* note 1.

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the most relevant law regulating corporate conduct, "to take proactive, preventative action to ensure that the corporation complies with society's fundamental expectations."[109]

4.2 Stakeholder Litigation Within Corporate Law – "Social Impact Direct Application"

4.2.1 The Principle of Separate Legal Personality, the Theory of Corporate Organs, and Stakeholderism

The separate legal personality of a corporation from its shareholders is a foundational element of corporate law and one of its most significant **economic** contributions to the business world.[110] Today, however, it is also used to implement prosocial judgments and stakeholder fairness within corporations by using the "organ theory", which casts human attributes on these artificial entities.

In essence, the organ theory declares that any acts and intentions of a corporate organ are equivalent to the acts and intentions of the corporation. Without attributing human elements to the corporation, it would be difficult to articulate a company's legal standing—which allows it to be a central participant in society through its business activity. An expression of this approach was determined in in the Israeli **Modi'im** case, which discussed the imposition of criminal liability on a corporation, finding that a corporation has rights and obligations as does a human, and as such, has the legal capacity required for criminal liability.[111]

Interestingly, the organ theory's original approach was extended to include the corporation's public responsibilities that stretch beyond the interests of shareholders in two different Israeli court opinions.[112] In these cases, unlike other traditional cases that used the organ theory to

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[109] Chris J. Brummer & Leo E. Strine, Jr. *Duty and Diversity* 75 VAND L. REV. 1 (2022). Jennifer Arlen, *Evolution of Director Oversight Duties and Liability under Caremark: Using Enhanced Information-Acquisition Duties in the Public Interest* NYU Law and Economics Research Paper No. 23-05, European Corporate Governance Institute - Law Working Paper No. 680/2023 (2022), available at SSRN: https://ssrn.com/abstract=4202830 or http://dx.doi.org/10.2139/ssrn.4202830

[110] ROBERT C. CLARK, CORPORATE LAW 15 (ASPEN LAW & BUSINESS, 1986).

[111] CrimA 3027/90 Modiim Construction and Development Ltd. v. State of Israel, 45 (4) 364, 384 (1991).

[112] Further Hearing 8062/12 Ministry of Environmental Protection v. Israel Ports Company - Development and Properties Ltd. (published in Nevo, Apr. 2, 2015) (Isr.) RCA 8487/11 Israel Ports Company - Development and Properties Ltd. v. Ministry of Environmental Protection, PD 65 (3) 845 (2012) (Isr.) and CivA 50155–08–10 The Guarding Company Ltd. – State of Israel–Ministry of Industry, Trade and Employment (published in Nevo, Nov. 6,..2012) (Isr.) (overturning the company's conviction in lower court that had found the company guilty for rejecting a potential employee on grounds of her gender and religious views contrary to §2 of the Israeli Employment (Equal Opportunities) Law, 5748–1988.). The decision was supported by the fact that the claimant

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sanction behavior (the stick approach) broadening the corporation's capacity and liability, the courts used the organ theory as a "carrot," to encourage corporate actors to maintain social order and public interest. Similar to human criminals, courts applied corporate liability to indict, but not convict, corporate entities that took preventive ESG compliance measures. In both cases, the court believed that the corporations were being run in a socially responsible manner and had tried to prevent illegal activity (vis-à-vis stakeholders) using "reasonable measures" and thus chose not to penalize the corporations for their behavior.[113] By doing so, the courts used the organ theory in order to implement incentives for the corporations to consider stakeholders' expectations, as does the fairness principle with regard to human actors.

4.2.2 The Principle of Limited Liability – Piercing the Corporate Veil

The principle of limited liability associated with corporations and considered as one of the fundamental developments of modern times[114] Originally, this principle had a similar objective to that of separate legal personality and focused primarily on corporate **business** objectives. As this principle protects shareholders, it is inherently related to corporations' traditional economic purpose —to maximize shareholder profit, as the corporation residual claimants.[115] Alongside advantages of the limited liability principle, this principle has two central disadvantages that have been amplified by the growth of corporate activity. First, it exacerbates the agency problem's negative effects to third parties and encourages externalizing suboptimal risk to stakeholder groups which often do not have sufficient power to contractually protect themselves. Second, and as indicated by behavioral economics research, it is unclear if stakeholder groups, which have expectations to be treated fairly, are fully aware of these externalities, and even less certain how many actually make rational

was rejected at the discretion of lower management, and in violation of the company's stated policy and explicit guidance, including guidelines in the company's code of ethics that opposed all types of discrimination.

[113] For how such mechanisms can minimize legal risks *see* §17 of the Israeli "Prosecution Policy in Criminal Prosecution and Punishment of a Corporation" State Attorney's Guidelines 1.14 (1997); Criteria for recognizing an internal enforcement plan in the field of securities and investment management (Securities Authority, Aug. 15, 2011).

[114] "The limited liability corporation is the greatest single discovery of modern times […] Even steam and electricity are far less important than the limited liability corporation." Nicholas Murray Butler, long-serving President of Columbia and future Nobel Peace Prize recipient, in his 1911 speech before the Chamber of Commerce of New York.

[115] Kraakman & Hansmann, *The End of History for Corporate Law*, *supra* note 10.

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decisions based on this information. There is no doubt that the limited liability principle challenges the balance between shareholders and stakeholders, as well as the contractual-consensual approach that served as the initial justification for limited liability in light of the scale and extent of social externalities of modern corporate activity. This evolution of corporate law is closely related to the descent of classic contract law that is based on parties' will. This is especially true today when contract law is no longer limited to the regulation of consensual relations or the principle of freedom of contract in its classical definition, but rather the wider and more complicated web of economic, social, and public interactions.

As was developed in case law, piercing the corporate veil is an extreme measure that allows directly assigning company obligations (i.e., to stakeholders) instead to its shareholders. In practice, it appears that this doctrine is used more often in order to lessen externalities towards stakeholders.[116]

As the number of cases increase in which piercing the corporate veil is granted as a remedy so too does support for the claim that a significant prosocial impact legal change is taking place. These developments suggest the pursuit of an integrative business management that focuses on enhancing shared value for all connected to corporate activities.

This perspective was supported by the Israeli Supreme Court.[117] Justice Proccacia ordered piercing the corporate veil in a company with thin capitalization because she considered the corporation risky and subordinated the shareholder's loan to the company. This ruling raised the question of "appropriate measures for corporate management and the framework in which shareholders and other holders of authority may act effectively". Justice Procaccia based her decision on deeper social changes in corporate law and the perception that a business corporation is a "dual" entity. On the one hand, she noted that businesses are and should be "guided by considerations of efficiency and benefit," and on the other that businesses are faced with "the existence of obligations of fairness and good faith in relation to various groups with which the corporation comes into contact." This legal rhetoric supports

[116] Moran Ophir, Tomer Pelach, & Uriel Proccacia, *Piercing the Corporate Veil: A Theoretical and Empirical Examination* 42 TEL AVIV UNIVERSITY L. REV. 199 (2019) [in Hebrew]. Moran Ofir, Tomer Felach, & Uriel Proccacia, *Piercing the Corporate Veil: Some Misfits Between Theory and Practice* Working Paper.
[117] CivA 4263/04 Mishmar Ha'Emek v. Manor, Adv., Liquidator of Efrochei Ha'Tzafon Ltd (published in Nevo, Jun. 21, 2009) (Isr.).

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stakeholder interests also noted in the August 2019 Business Roundtable statement.[118] Yet the rhetoric now also has legal implications, not only declaratory ones, through one of the most basic corporate law doctrines.

4.2.3 Fiduciary Duties, Oversight Duties - The Duty of Care(mark)

Fiduciary duties have the most open and elastic civil liability regimes—the duty to act in good faith, and the tort of negligence. As such, the content of these duties for each corporation naturally derives from that corporation's purpose. Indeed, in Israel and in the U.S. new draft of the Restatement on Corporate Governance,[119] corporate purpose, the goal for which directors and officers aim to serve, is defined in a different provision from that defining the duties of the director and officers.[120] Yet clearly, corporate purpose has direct implications on duties of loyalty and care. A review of the evolution of these duties, which are challenged by private litigants, supports the approach that director and officer discretion should being exercised in a manner that also considers additional stakeholders, employees, consumers, environment, community, etc.[121]

The doctrine of corporate directors' oversight duties, known also as the *Caremark* duty-of-oversight—after the famous 1996 Delaware case, is central in the theoretical and practical discourse surrounding corporate law in general, and fiduciary duties in particular. Since the judgment that first recognized it, this doctrine has been classified as "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[122] Still, the decisions of the Delaware courts in recent years, including the *Marchand* case of 2019,[123] and most recently the 2021 *Boeing* case,[124] indicate an increasing willingness to

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[118]And similar to managerial approaches regarding "shared value" - Porter & Kramer, *supra* note 99.
[119] The American Law Institute, *Restatement of the Law: Corporate Governance, supra* note 12.
[120] *Compare to* §172 to the U.K Companies Act 2006 (C 46) (U.K).
[121]Jennifer Arlen, *supra* note 109; *Compare*: Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253–254 (1999); Brian R. Cheffines, & Richard William, *Team Production Theory Across the Waves, supra* note 102, at 31–34. *See also* Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law,* 166 U. PA.. L. REV. 579 (2018). Cremers, K. J. Martijn, Scott B. Guernsey & Simone M. Sepe., *Directors' Duties Laws and Long-Term Firm Value*, (2018) available at: https://conference.nber.org/conf_papers/f117072.pdf (indicating that the introduction of constituency statutes – legal measures that allow directors to factor stakeholder interests into business decisions – bolsters firm value and endorses a fairness perspective).
[122] Id. Caremark, 698 A.2d, at 967.
[123] *Marchand v. Barnhill* 212 A.3d 805 (Del. 2019).
[124] *In re The Boeing Company Derivative Litigation*, *supra* note 101.

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impose liability on directors (and recently on officers sush as CEOs and CFOs)[125] for breach of this duty.[126]

According to this doctrine, corporate directors have a **proactive** duty to ensure that the legal obligations that regulate corporate activity are fulfilled.[127] This obligation, which interprets traditional director fiduciary duties to include the oversight of obligations that is often enshrined in external, non-corporate legislation, challenges the traditional theory of corporate law. In other words, the end goal of the oversight duties' doctrine is to steer director discretion to additional consideration for stakeholder protections: "*Caremark's primary value is in the incentives it provides to corporate fiduciaries to proactive, preventative action to ensure that the corporation complies with society's fundamental expectations*".[128]

This is especially true of stakeholders who are closely involved in company activities. For example in *Marchand v. Barnhill*, a claim was made against the Blue Bell ice cream company after a listeria outbreak at a production lines led to three deaths, a to total recall of certain products, closure of production lines, layoffs of one third of the company's workforce, and finally liquidity issues that led to an infusion of cash that diluted shareholder holdings in the company. The directors' oversight duty was recognized because food quality control "entails a sensitivity to compliance issues intrinsically critical to the company."[129]

The *Boeing* case discussed safety measures in place prior to the October 2018 and March 2019 crashes in which directors violated their oversight duties because they were so rectors who were so focused on maximizing profits and the rapid manufacture of aircrafts, instead of on maintaining safety and engineering standards. The violation of the oversight duty in this case resulted in combined damage to stakeholders and shareholders alike. *Boeing* and its

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[125] In re McDonald's Corp. Stockholder Derivative Litigation (Del. Ch., Jan. 25, 2023).

[126] Roy Shapira, *The New Caremark Era: Causes and* Consequences, 98 WASH. U. L. Rev. 1857 (2021) ; Edward D. Herlihy & William Savitt *Boeing's MAX Woes Reach the Boardroom* HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Sep. 13, 2021) https://corpgov.law.harvard.edu/2021/09/13/boeings-max-woes-reach-the-boardroom/.

[127] *Marchand v. Barnhill*, 821. For the purpose of establishing the claim, "a plaintiff must allege particularized facts that satisfy one of the necessary conditions for director oversight liability articulated in *Caremark*: either that (1) 'the directors utterly failed to implement any reporting or information system or controls'; or (2) 'having implemented such a system or controls, [the directors] consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention" *In Re The Boeing Company Derivative Litigation*, *supra* note 101.

[128] Chris J. Brummer & Leo E. Strine, *supra* note 109.

[129] *Marchand v. Barnhill*, 822.

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shareholders, who faced billions of dollars in damages were in substance "secondary" victims. These losses and damages could have been avoided if appropriate ESG supervision and monitoring had been carried out.[130]

While these cases involved extreme gross negligence against stakeholders' interests, these landmark cases are expected to incentivize directors to ex-ante implement corporate-purpose-based stakeholderism and avoid legal risks.[131] The current trends in oversight duties act as the missing "legal link" to integrate stakeholder awareness into traditional fiduciary duties. Therefore, the *Caremark* oversight duty is a good example of a transformative legal mechanism to advance stakeholder fairness.

The oversight duty demonstrates—perhaps more than any other corporate law doctrine—the inherent complexity and interdependency between the corporation's bureaucratic nature and its traditional objective to maximize shareholder profits while implementing stakeholders expectations that otherwise might be disregard by corporations.[132] This was likely one reason that Chancellor Allen referred to this matter as one of the most difficult doctrines in corporate law as it is hard to reconcile the oversight duties located at the heart of corporate law with the stakeholders' traditional zero-sum shareholder supremacy model.[133] Violations of non-corporate, issue-specific legislation that include sanctioning definitive corporate behavior (e.g., environmental protection, antitrust issues, consumer protection), and which have only multiplied in number,[134] have economic consequences that can give rise to shareholders' derivative litigation claims. These laws and regulations were promulgated to protect a variety of stakeholder interests that are affected by corporate activity and have infiltrated corporate law through **proactive** oversight duties that have been imposed on directors.[135] Cases such

[130] In the third case, Caremark was accused violating the Anti-Referral Payments Law, transferring funds to physicians who referred patients to its products, and in so doing the company acted against the core of its business which was meant to assist patients in need of medical care.

[131] *Compare* Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship*, 49 CARDOZO L. REV. 623 (2007).

[132] For the notion that corporations facilitate moral disengagements, *see* Roy Shapira, *supra* note 11, at 249.

[133] Caremark, *supra* note 109.

[134] "As *Marchand* makes clear, when a company operates in an environment where externally imposed regulations govern its 'mission critical' operations, the board's oversight function must be more rigorously exercised" - *In re Clovis Oncology, Inc.* Deriv. Litig., 2019 WL 4850188, at *13 (Del. Ch. Oct. 1, 2019).

[135] "If Caremark means anything, it is that a corporate board must make a good faith effort to exercise its duty of care. A failure to make that effort constitutes a breach of the duty of loyalty", *Marchand v. Barnhill*, 824.

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as *Caremark* (medical patients), *Marchand* (consumers), and *Boeing* (airline passengers and crew members) transform the defense of stakeholder interests into an inherent component of the business, social, and legal fields.

In conclusion, the doctrine argues for a strategic change and demands that directors and officers proactively map prosocial and stakeholder corporate interests. To achieve this, corporate law uses a "stick and carrot" approach. In effect, this encourages directors and officers to act to mitigate ESG risks, implement measures to prevent stakeholder risks, including, first and foremost, by defining purpose-based stakeholderism.[136]

4.3 Stakeholder Litigation Outside Corporate Law – "Social Impact Indirect Application"

4.3.1 Corporate Liability Towards Stakeholders through Specific Legal Statutes

My discussion of the organ theory is incomplete without a discussion of the mechanisms that address the personal legal liability—as opposed to liability of the corporate entity—of corporate directors. Substantially, director and officer liability reframes and redirects the discretion of key corporate actors to stakeholder matters. This, in effect, is how case law justifies and frames corporate leaders' personal liability that is external to corporate law.[137]For instance, criminal law imposes individual liability on those acting on behalf of the corporation because "*the fact that someone is acting as an organ of a corporation does not relieve that individual from criminal liability that would be imposed upon him were he not acting on behalf of the corporation*."[138]

In essence, this broader policy approach indicates that personal liability is part of the public and integrative purpose of corporate leaders. It influences decision-makers through an

[136] As well as ongoing reporting mechanisms from management to directors, the formation of specialized director committees to supervise ESG risks, appropriate documentation of discussions on these topics and so forth.

[137] For a similar approach, *see* Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 L. & CONTEMP. PROBS. 104 (2004).

[138] Modiim Construction& Development Ltd. v. State of Israel, *supra* note 111.

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increasing number of procedures, such as derivative lawsuits and a relatively new rhetoric calling to increase enforcement of provisions outside of the Companies Law.[139]

In Israel, these crimes are addressed in a unique framework, according to which a corporate criminal liability creates personal liability. If the corporation is not liable, then neither is the officer.[140] Similar to a "reverse organ theory", they aim to serve similar objectives of the organ theory. For example, anti-competition and securities laws impose personal obligations, mostly criminal, on directors, officers, and at times controlling shareholders,[141] who did not use reasonable means to prevent their violation. These "stakeholders" laws prevent directors and officers from only focusing on shareholder interests and profit maximization at the detriment of other stakeholders (labor rights,[142] consumer protection[143] and environmental protection[144]).

Rich stakeholder-oriented regulation and personal liability on corporate officers' frame and push for a deeper change within the integrative approach of corporate purpose and the subsequent direction of managerial strategy.

On this matter, Justice Matza's words in **Cohen v. State of Israel** echoes the new declarations made by the Business Roundtable.[145] Using anti-trust law, the court imposed criminal liability on a senior corporate executive for a crime committed by the corporation noting that "[p]erforming a management role in a corporation is burdened with heavy

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[139] *See* HCJ 4395/12 Cohen v. Central District Attorney's Office, p. 20 (published in Nevo, 15.11.2012) (Isr.)... "I believe that the State Attorney should closely examine, in future cases, the extent to which prosecution of a corporation alone [for the deaths in a train accident], without prosecution of its office-holders, serves the objectives of criminal law and subsequently the public interest."

[140] Modiim Construction and Development Ltd. v. State of Israel, *supra* note 111, at 387.

[141] *See* Moran Ofir, *Controlling Non-controlling Shareholders: The Case of Effective Control*, LAW SOCIETY ECONOMY WORKING PAPERS NO. 17/2023 (2023)., Forthcoming (elaborating on duties imposed on shareholders).

[142] For example, the Work and Rest Hours Law, 5711-–1951 (Isr.), The Wage Protection Law, 5768–1958 (IIsr.), The Dismissal Compensation Law, 5733–1963 (IIsr.), The Occupational Safety Ordinance (new version), 5735–1970) (IIsr.).

[143] For example, the Consumer Protection Law, 5741–1981 (IIsr.), the Uniform Contracts Law, 5733–1982 (Isr.), the Economic Competition Law, 5748–1988 (IIsr.).

[144] Such as the Law for the Prevention of Environmental Hazards (Civil Lawsuits), 5752–1992(IIsr.), The Law for the Prevention of Hazards, 5761–1961 (Isr.), Regulations for the Prevention of Hazards (Preventing Unreasonable Air and Odor Pollution from Waste Disposal Sites), 5752–1901 (Isr.), the Law of Maintaining Cleanliness ,5744–1984 (Isr.), Cleanliness Regulations (Cleanliness Maintenance Levy),5747–1987 (Isr.), Clean Air Law, 5768–2008 (Isr.).

[145] CivA 4148/03 Cohen v. State of Israel, 58 (2) 629 (2004) (ISR.).

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responsibility, which is not only meant to safeguard the corporation and its shareholders and creditors, but also ensures the protection of the public interest."[146]

4.3.2 The Good Faith Principle in Contract Law and the Concept of Corporate Fairness and Trust

The good faith principle[147] is one of the central legal principles in civil law in general,[148] and especially in Israeli contract law. As such, the influence of the good faith principle on business discourse cannot be ignored, especially regarding the expansion of corporate purpose and personal liability of corporate actors to stakeholders. For example, through the duty to act in good faith during contractual negotiations, which is a general and ambiguous principle, Israeli courts attempt to find grounds for mutual trust between parties through means such as the duty of disclosure, fairness, consideration for reasonable expectations of the other party, as well as the creation of profitable cooperation for the given transaction and for society as a whole.[149] The infusion of mandatory behavioral norms into an interaction that did not necessarily mature into a consensual agreement reflects the legislator's understanding that the public expects appropriate behavior in order to "*guarantee that such self-fulfillment will be executed in a* ***fair*** *manner which benefits a cultural society*."[150]

This value-based approach is even more important when a corporation is the opposing party. In **Castro,** the court held that a company officer was personally liable for nondisclosure during negotiations. The officer was found liable even though he was not a formal party to the agreement and even despite the fact that liability is a *de-facto* exception to the principle of limited liability under corporate law. This judgment, which was granted in a rare additional review of the Supreme Court's decision, was based on the principle of contractual good faith, in favor of fostering a culture based on inter-personal trust and fairness in corporate transactions. At the foundation of the court's decision was the understanding that trust established during contractual negotiations instills personal liability on both sides and

[146] Cohen v. State of Israel, at 632.
[147] In Israel this principle is set out in §12 and §39 Contract Law (General Part), 5733–1973 (Isr.).
[148] Ibid. §61(b) of the Contracts Law, 5733–-1973 (ISR.), sets out: "These provisions shall apply, so long as it is suitable and with the appropriate modifications, to legal actions which are not in the nature of contract and to legal obligations which do not arise from contract."
[149] Eli Bukspan, *Neither Angels Nor Wolves: Evolving Principles of Social Responsibility in Israeli Law*, 27 ISRAEL STUDIES REV.86 (2012).
[150] Further Hearing 22/82 Beit Yules v. Raviv, 43 (1) 441, 558 (1989).

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mandates appropriate behavior. This judgment included expansive discourse on corporate managers' responsibility to those communities affected by the company's activities.

President Shamgar's approach in this case, according to which "the corporation and the managers acting on its behalf must take into consideration not only the good of shareholders…but also the good of the corporation's employees, consumers and the general public,"[151] was ahead of its time and still prevails today, 40 years after the judgment in documents such as the 2019 Business Roundtable Statement. The good faith principle ongoingly influences corporate activity and by its virtue extensive legal responsibility has been imposed on the business sector over recent decades, including the heavy disclosure burdens imposed on banking and insurance corporations.[152]

4.3.3 The Public Policy Principle in Contract Law and the Implementation of the Concept of Business and Human Rights

Imposition of social responsibility on the business sector also occurs in Israel through another general contractual principle "public policy,"[153] which traditionally outlines the boundaries of the freedom of contract and is used as a "reflection of world views and life perspectives that are unique to a given social or national context."[154]

Accordingly, human rights obligations, as set out in the Israeli Basic Law: Human Dignity and Freedom have been applied to corporate actors through the contract law principle of public policy. This phenomenon reflects an ongoing attempt to facilitate desirable interpersonal human behavior and consideration of a reasonable expectation of the other,

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[151] DN 7/81 Penider Open and Construction Investment Company Ltd. et al. V. Castro, 17 (4) 695, 673 (1983) (ISR.) (hereinafter: The "**Castro**" case): "The corporation and the managers acting on its behalf must take into account not only the good of the shareholders […] but also the good of the corporation's employees, consumers and the public at large."

[152] This is not to detract from the general business framework of working to enhancing profits that underlies business activity, so long as such profit enhancement is executed fairly - CivA 8566/06 Americar Management and Consulting Services (1987) Ltd. v. Malibu – Israel Ltd., para. 32 to the judgment of Justice Joubran (published in Nevo,Nov 8,.2009) (Isr.): "The duty of good faith is consistent with the purpose of the business contract and requires all parties to the contract to act fairly, taking into account the reasonable expectations and proper reliance of the other party [….] Concern for economic interests, which is part of the contract, does not violate the duty to act in good faith."

[153] §30, Contract Law (General Part), 5733–1973 (Isr.). For the contractual principle and its meaning, *see* Eli Bukspan, *Freedom of Contracts, Good Faith and Public Policy: A Renewed Look at the Triangular Confines of Contract Law*, 10 DIN U-DVARIM 267 (2018) [in Hebrew].

[154] CivA 614/76 Anonymous v. Anonymous, 31 (3) 85, 94 (1977) (Isr.).

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enhancing the trend of subjecting the private sector to public legal norms. It even invites the adoption of a "direct application" model for human rights, according to which constitutional human rights directly apply in the realm of private law, especially the business sector.[155] To a certain extent, it seems that this legal approach aligns with the spirit of the protection of human rights within the business sector as expressed in the 2011 U.N. Guiding Principles.[156]

Accordingly, and even though the principle of public policy alongside the principle of good faith are technically elements of contract law, these provisions should also be included in the provision of the Companies Law as they are applied widely in the corporate context and have legal consequences, both practical and rhetorical, on the public and social status of corporate discretion.

4.3.4 Class Action Litigation as Stakeholder Litigation

Class action is a collective procedural tool to enforce rights and suggests the law's approach to the modern purpose of business corporations.[157] Nowhere is this as evident as in Israel, which is considered a "superpower" of class actions.[158] Class action claims are usually submitted against business entities, rather than governmental bodies.[159] Moreover, class action claims are primarily made in the fields of consumer protection, insurance, banking, antitrust, environmental protection, anti-discrimination, including work place discrimination against people with disabilities, and labor law. All subjects that are related to stakeholders, rather than shareholders, and as such provide legal protection for interests that coincide with the social, and not only financial, responsibilities of corporations. In this respect, class action law can be considered, *de facto*, an effective part of corporate law in its broader context. Class actions provide an additional perspective, albeit indirect, on treating ESG externalities

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[155] Bukspan & Kasher, *Human Rights in the Private Sphere: Corporations First*. *supra* note 68, at 63–64.
[156] *Guiding Principles on Business and Human Rights*, *supra* note 70.
[157] Owen M. Fiss*, The Supreme Court 1978 Term Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979); LEORA BILSKY, THE HOLOCAUST, CORPORATIONS, AND THE LAW: UNFINISHED BUSINESS, 51–54 (UNIVERSITY OF MICHIGAN PRESS, 2017). Bilsky draws a connection between the class action lawsuits, the phenomenon of increasing corporate social responsibility and the UN guidelines, Guiding Principles on Business and Human Rights, *supra* note 70.
[158] Moshe Gorali, *Israel is the Champion of Class Actions,* CALCALIST, (Nov. 20, 2017) [In Hebrew], www.calcalist.co.il/local/articles/0,7340,L-3725398,00.html; For an updated statistical data *see The report of the inter-ministerial team for examining the arrangements stipulated in the Class Actions Law, 2006* (Israel Ministry of Justice, March 2023) .
[159] Keren Winshel–Margel & Alon Klement, *The Application of the Class Actions Law in Israel – an Empirical Perspective*, 45 MISHPATIM 707 (2016).

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and legal risks of corporate activity vis-à-vis stakeholders. After all, class actions indeed belong to the world of procedural law, but its central designation is to act to improve the protection of substantial rights and to fulfill the requirements of essential social and legal norms.[160] As a mechanism primarily directed at business corporations, class actions go hand-in-hand with more substantive changes that integrate legal and public responsibilities into business sector activities. They are inherent to enforcement and effective implementation of desirable behavioral norms in the corporate world.[161] This view of class actions and their implications on corporate social responsibility aligns with the "Public Action Model" mechanism of class action lawsuits.[162] According to this approach, the central justification for class actions is embedded in its ability to efficiently enforce legislative provisions aimed at promoting values and general social goals.[163] Furthermore, collective action aids to protect legal rights, enforce the law, and deter its violation, similar to the regulation and enforcement by governmental agencies and regulators. Class action litigation, therefore, allows the representative claimant a semi-regulatory role.[164]

5. Conclusion

Changes in the business and legal worlds have triggered a search for a new theoretical framework that better fits ESG, corporate social impact purpose and Corporate Law in general. This article concludes that certain principle of behavioral economics, mainly the

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[160] A strong and clear example of this can be seen in the judgment *Brown v. Board of Education*, 347 U.S.C. 483 (1954), which commenced with a class action; Barak Atiram, *From Brown to Rule 23: The Rise and Fall of the Social Reform Class Action*" 37 Rev. LITIGATION 48 (2018).

[161] For further discussion, *see* Eli Bukspan, *The Israeli Public Class Action Fund: New Approach for Integrating Business and Social Responsibility,* in THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS, 528 (BRIAN FITZPATRICK & RANDALL THOMAS eds., 2021).

[162] Martin H. Redish & Clifford W. Berlow, *The Class Action As Political Theory*, 85 WASH. U. L. REV. 753, 797 (2007); John Bronsteen & Owen Fiss*, The Class Action Rule*, 78 NOTRE DAME L. REV. 1419 (2003); Owen Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21 (1996).

[163] Abram Chayes, *The Role of the Judge in Public Law Litigation*,89 HARV. L. REV. 1281, 1291 (1976). "The class suit is a reflection of our growing awareness that a host of important public and private interactions – perhaps the most important in defining the conditions and opportunities of life for most people – are conducted on a routine or bureaucratized basis and can no longer be visualized as bilateral transactions between private individuals."

[164] J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*,53 WILLIAM. & MARY LAW REVIEW 1137, 1180 (2012).

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concept of fairness,[165] identified by Kahneman, Knetsch and Thaler almost forty years ago[166]—helps to explain business trends in the current corporate discourse.[167] .

Furthermore, the concept of fairness, as a main attribute of the evolving DNA of modern corporations, also stands behind new trends in various corporate legal doctrines and liabilities. As demonstrated in Section 4, the legal world has already started responding to the evolving question of corporate social impact purpose and stakeholders' fairness in novel ways.[168] Some of these relate to fundamental doctrines originally intended to protect shareholder interests (e.g., separate legal personality, piercing the corporate veil, directors' oversight duties) and others originate outside of corporate law, especially regarding specific legislative acts, the contract law principles of good faith and public policy, and the class action procedure.

Traditional theory of corporate law, based on neoclassical economics, no longer explains these observations. It is time to change, or at least enrich, corporate law theory as was well framed in Easterbrook and Fischel seminal book *"The Economic Structure of Corporate Law"*,[169] with behavioral economics realistic observations about the role fairness and prosocial preference play in the real world.

Respectively, and in accordance with the framing effect, these issues deserve a legal framework by codifying a general and comprehensive clause in companies' laws that lay out that the corporation's purpose is to enhance long-term profits, while considering its impact on relevant stakeholders, including creditors, employees, the environment, and the public.[170]

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[165] *Compare*: Robert D. Cooter & Melvin A. Eisenberg, *Fairness, Character, and Efficiency in Firms*, 149 U. PA. L. REV. 1717 (2001); Eli Bukspan, *The Notion of Trust as a Comprehensive Theory of Contract and Corporate Law: A New Approach to the Conception that the Corporation Is a Nexus of Contracts*, 2 HASTINGS BUS. L.J. 229 (2006).

[166] Daniel A. Kahneman, Jack L. Knetsch, and Richard H. Thaler, *supra* note 9, at S285.

[167] This claim is applicable also in support of "Stakeholderism" (R. Edward Freeman, *Strategic Management: A Stakeholder Approach* (PITMAN PUBLISHING INC., MARSHFIELD, MA, 1984) as well as the objective of "Creating Shared Value" (Porter & Kramer, *supra* note 99 and the "Team Production theory" (Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 275 (1999).

[168] *supra* note 3.

[169] Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* 35–39 (BOSTON: HARVARD UNIVERSITY PRESS, 1996); Lucian A. Bebchuk, *Competing Views on the Economic Structure of Corporate Law,* 1 UNIVERSITY OF CHICAGO BUSINESS LAW REVIEW 29 (2022).

[170] *Compare*: Marcel Kahan & Edward Rock, *supra* note 3.

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In this expressive manner,[171] together with the various legal risks associated with enhancing corporate stakeholders' interests, the business-oriented structure of corporate activity remains the same, while recognizing the fundamental role of the fairness concept in the various human interactions that underpin the activities of modern corporations.[172] Most importantly, the suggested legal objective will bridge the business and legal discourses while leading and motivating corporations and their shareholders, directors and office holders to credibly implement corporate impact and stakeholders' fairness. By moving in this direction, corporate law provides the best foundation to implement fairness and social considerations into corporate activities—one of the most crucial economic (and social) institutions of our time.

[171] For findings supporting the relevance of the expressive function of law in changing corporate prosociality and stakeholder expectations *see* Hajin Kim, *Expecting Corporate Prosociality* University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 978 (2022), available at SSRN: https://ssrn.com/abstract=4282358 or http://dx.doi.org/10.2139/ssrn.4282358

[172] *Compare:* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, Cardozo L. REV. 261 (1992).

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