

SCHOLARLY ARTICLE

Intrinsic Values and Human Rights: Corporate Duties Depend on Industry Values

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Abstract

Drawing on the work of Donaldson and Walsh, this article explains why for-profit companies in industries denominated by intrinsic values such as health, education and justice, have heavier responsibilities when it comes to honouring the human rights reflected in their industry identity. Optimized collective value, the overarching aim of any system of business, is defined in terms of the satisfaction of intrinsic values, a definition that gives special meaning to firms operating in industries themselves defined in terms of intrinsic values. Nor are such companies' responsibilities to human rights, such as the right to healthcare, conveniently reducible to the 'enlightened' pursuit of profit. For example, a pharmaceutical company such as Pfizer or Moderna may be required to make its COVID-19 vaccine more accessible to COVID-19 victims in developing countries at the expense of optimizing profits over the long run. Such companies have a special and mandatory correlative duty to honour the right to healthcare that derives from their corporate constitutional purpose.

Keywords: business ethics; corporate governance; COVID-19; healthcare; human rights; rights

1. Introduction

The human rights literature adopts a 'one-hat-fits-all-heads' policy, and for good reason. The shining utility of human rights is their no-exceptions reach. People have rights because they are human, that is, because they share an essential generic identity, and not because they happen to be male, well-born, rich, ethnically distinct, or powerful.¹ The same is true of the obligations that accompany rights: no matter who you are, you should respect each and every right of another human.

It is time to rethink this one-for-all truism in the context of corporations. I will explain why for-profit companies in industries denominated by 'intrinsic values' such as health, education and justice, have heavier responsibilities when it comes to honouring the human rights that are directly relevant to their industry identity, such as the right to healthcare.

First, a word about intrinsic values. Intrinsic values are non-instrumental, non-derivative, full-stop justifiers/explainers of action. One of the most important but neglected concepts in business research,² intrinsic values are frequently invoked by philosophers, economists

¹ JW Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (Oakland, CA: University of California Press, 1987).

² T Donaldson, 'How Values Ground Value Creation: The Practical Inference Framework' (2021) 2:4 *Organization Theory* 1–27. <https://doi.org/10.1177/26317877211036712>

and legal scholars.³ These non-derivative values serve as ‘reasons for acting’ where ‘the object of the act is seen as worthy of pursuit’.⁴ They include human dignity, fairness, religious freedom, environmental integrity, physical security, and many others. These hypernorms are full-fledged members of this deepest class of values because no higher norm is needed to proscribe an action that violates a human right. Human rights stand confidently within the circle of intrinsic values.

For-profit firms, as I will show, must shoulder heavier duties when satisfying a human right directly relevant to their industry identity, for example, the duties of healthcare firms *vis-à-vis* the right to healthcare, or the duties of legal-services firms *vis-à-vis* the right to a fair trial. My claim goes beyond the obvious truth that widget makers have special obligations when making widgets. The assertion, rather, is that Moderna or Pfizer have weightier obligations *vis-à-vis* the social right to healthcare because their industry identity is denominated by the intrinsic value of health, which implies special rights-honouring obligations for health in society. In consequence, a pharmaceutical company such as Moderna or Pfizer may be required to make its COVID-19 vaccine more accessible to COVID-19 victims in developing countries at the expense of optimizing its profits in the long run.

The COVID-19 crisis that began in 2020 provides an illuminating example. Journalists and other commentators have asked whether Moderna and other pharmaceutical companies had special corporate social responsibilities to poor countries in the context of the ravages of the COVID-19 pandemic. Clearly, the issue of human rights is salient for COVID-19, and a consensus exists that some form of a right to healthcare exists. Article 25(1) of the *Universal Declaration of Human Rights* states that ‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family...’. As Santoro and Shanklin⁵ show, there is significant agreement among international organizations that at least in some instances pharmaceutical companies have a responsibility to help make essential medicines available to patients. The rights at issue are evidenced in the United Nations Guiding Principles on Business and Human Rights⁶ and in the Human Rights Guidelines for Pharmaceutical Companies in Relation to Access to Medicines.⁷

In the COVID-19 crisis, many healthcare companies adopted eye-catching, compassionate policies. In October of 2020, Moderna committed to ‘not enforce our COVID-19 related patents against those making vaccines intended to combat the pandemic’.⁸ Two years later, as vaccines became available in richer countries, Moderna updated its Patent Pledge with a commitment to never ‘enforce our patents for COVID-19 vaccines against companies manufacturing in or for the 92 low-and middle-income countries in the Gavi COVAX Advance Market Commitment’.⁹ In 2020 a spokeswoman for Pfizer told the *Wall Street Journal* that the company does not expect intellectual property to be a barrier to the availability of

³ D Dorsey, ‘Intrinsic Value and the Supervenience Principle’ (2012) 157:2 *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 267–285; DM Kreps, ‘Intrinsic Motivation and Extrinsic Incentives’ (1997) 87:2 *American Economic Review* 359–364; CR Sunstein, ‘Incommensurability and Valuation in Law’ (1994) 92:4 *Michigan Law Review*, 779–861; MJ Zimmerman, ‘Intrinsic vs. Extrinsic Value’, *The Stanford Encyclopedia of Philosophy* (spring 2015 edition), <https://plato.stanford.edu/archives/spr2015/entries/value-intrinsic-extrinsic/>

⁴ T Donaldson and J Walsh, ‘Toward a Theory of Business’ (2015) 35 *Research in Organizational Behavior* 181–207.

⁵ M Santoro and R Shanklin, ‘Human Rights Obligations of Drug Companies’ (2020) 19:5 *Journal of Human Rights*, 557–567, <https://doi.org/10.1080/14754835.2020.1820315>

⁶ United Nations, *United Nations Guiding Principles on Business and Human Rights* (see Principles 1, 11, 13(b), 25) (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

⁷ United Nations, *Human Rights Guidelines for Pharmaceutical Companies in Relation to Access to Medicines* (2008), <http://www.ohchr.org/Documents/Issues/Health/GuidelinesForPharmaceuticalCompanies.doc>

⁸ Moderna, *Moderna’s Updated Patent Pledge* (2022), <https://investors.modernatx.com/Statements-Perspectives/default.aspx>

⁹ *Ibid.*

its vaccine, and that Pfizer expects third-party licences to be available on reasonable terms.¹⁰ Later in March of 2022 Pfizer issued a statement saying that the company had ‘signed a voluntary license agreement with the Medicines Patent Pool (MPP) for its oral treatment to help expand access, pending country regulatory authorization or approval, in 95 low- and middle-income countries that account for approximately 53% of the world’s population’.¹¹ In 2022, the *Financial Times* reported that a group of top 65 top institutional investors wrote to leading pharmaceutical companies urging them to prioritize equitable global distribution of COVID-19 vaccines.¹²

For our purposes, the salient question is not whether Moderna and Pfizer’s policies went far enough, but whether their reasons for their policies should have included human rights considerations that bound them and other pharmaceutical companies to a special, higher moral standard. The companies’ announcements cited above imply that expanding the availability of a life-saving vaccine, and not merely profit, was a motive in their decision making in the COVID-19 pandemic. Most peoples’ intuition squares with this approach – and, indeed, affirms that the extra-effort approach would have been appropriate even if Moderna and Pfizer acted for self-interested motives. Contrast, however, these heightened expectations around the value of health for Moderna and Pfizer to the ones for a carmaker such as Tesla. Clearly Tesla has social responsibilities, some of them related to health, but contributing to the value of health can easily remain a peripheral, not central, factor in Tesla’s decision making. Arbitrarily cancelling healthcare policies of Tesla employees may violate their right to healthcare and is morally proscribed; but our intuition is that Tesla lacks the same affirmative obligation to encourage health as part of its basic value creation model as Moderna or Pfizer. Our intuition suggests that the obligations that are correlative to the right to healthcare weigh heavier on a pharmaceutical company than a company outside the healthcare industry.

The intuition that Pfizer has heavier health-related social responsibilities prompts two critical questions that will occupy the remainder of this paper: (1) can this intuition find a ground in normative theory?; and (2) if so, does such a grounding imply specific and different correlative human rights obligations for Pfizer? The answer, it turns out, is ‘yes’ to both questions.

II. Despite Controversy, Corporations Have Human Rights-Regarding Obligations

As Schrempf-Stirling and Van Buren¹³ show in their review of the business and human rights literature, interdisciplinary scholarship on human rights to date has largely focused on the justification for why firms have rights responsibilities and on undertaking numerous descriptive research studies at the organizational and macro level. However, even after repeated attempts to clarify the picture of how human rights relate to the *persona ficta* of the for-profit corporation, that picture remains blurry.

The picture is even blurrier for the issue of *which rights corporations possess* than it is for the issue of *whether corporations are obligated to respect human rights*. The question of which rights corporations possess is one that centres on the oddity of treating a fictional corporate

¹⁰ P Loftus, ‘Who Invented COVID-19 Vaccines? Drugmakers Battle Over Patents’ (2021), *The Wall Street Journal*.

¹¹ Pfizer, *Pfizer to Supply UNICEF up to 4 Million Treatment Courses of Novel COVID-19 Oral Treatment for Low- and Middle-Income Countries* (2022), <https://www.pfizer.com/news/press-release/press-release-detail/pfizer-supply-unicef-4-million-treatment-courses-novel>

¹² A Klasa and DP Mancini, ‘COVID-19 Vaccine Makers Face Investor Pressure Over Global Access’ (6 January 2022), *Financial Times*, <https://www.ft.com/content/948196b8-27c7-4dec-996b-c5a1587c6676>

¹³ J Schrempf-Stirling and HJ Van Buren, ‘Business and Human Rights Scholarship in Social Issues in Management: An Analytical Review’ (2020) 5:1 *Business and Human Rights Journal* 28–55. <https://doi.org/10.1017/bhj.2019.23>

person like a real one, and, in turn, granting such a fictional person rights such as religious or political freedom. Any right, Feinberg famously notes, is a form of ‘justified entitlement’.¹⁴ But one wonders: as corporations neither go to church or vote in elections how can they have justified entitlements to freedom of expression and religious association?¹⁵ These arcane puzzles about fictional persons and real organizations raise issues of law, economics and moral psychology. Answers are elusive and hotly contested.¹⁶

But the second issue, namely, of whether *corporations* must respect human rights, is more tractable. Here, a broad convergence of views agrees that corporations must behave in ways that honour legitimate human rights. Brenkert, for example, offers several formidable arguments on behalf of the existence of corporate duties to rights.¹⁷ Few scholars dissent. Nien-he Hsieh’s view that corporations fall outside the category of rights-honouring agents stands as a rare exception. In the end, even Hsieh ends up affirming that corporations should behave largely in line with the demands of human rights, and he proposes an ‘institutional’ view that ‘starts with contemporary human rights practice’ while downplaying the need for corporations to justify behaviour *directly* in terms of human rights. Notably, he accepts the *de facto* obligations implicit in institutional practices such as the United Nation’s ‘protect, respect and remedy’ formula inspired by John Ruggie.¹⁸

Hsieh’s institutional lens puts in relief current practices related to human rights and reminds us that rights are in the real world, not in the heavens of philosophers. For Hsieh, corporate compliance with rights policies is best subsumed not under the banner of ‘rights’, but that of ‘basic moral duties’. ‘There already is a long-standing view’, he writes, ‘that there are moral duties on the part of business enterprises and their managers, and ... we would do well to look to these basic duties as the basis for an account of the responsibilities of business’.¹⁹ Contrast Hsieh’s approach to that of Denis Arnold, who makes a straightforward normative interpretation of corporate rights-honouring obligations. For Arnold, human rights are justified not because of existing practices, but because they are instrumentally necessary ‘for the enjoyment of basic moral rights such as liberty, security and subsistence. This approach echoes Henry Shue’s classic analysis,²⁰ and offers two advantages over Hsieh’s: first, it provides a practice-independent justification for human rights in relation

¹⁴ Joel Feinberg, ‘Duties, Rights and Claims’ (1966) 3 *American Philosophical Quarterly* 137–144.

¹⁵ AJ Sepinwall, ‘Denying Corporate Rights and Punishing Corporate Wrongs’ (2015) 25:4 *Business Ethics Quarterly* 517–534.

¹⁶ MM Blair, *Of Corporations, Courts, Personhood, and Morality*, pp. 415–432 (Cambridge: Cambridge University Press, 2016); PA French, ‘The Corporation as a Moral Person’ (1979) 16:3 *American Philosophical Quarterly* 207–215; PA French, ‘Integrity, Intentions, and Corporations’ (1996) 34:2 *American Business Law Journal* 141–155; JT Mahoney, ‘The Relevance of Chester I. Barnard’s Teachings to Contemporary Management Education – Communicating the Aesthetics of Management’ (2002) 5:1/2 *International Journal of Organization Theory and Behavior* 159–172, <https://doi.org/10.1081/OTB-120004243>; A Sepinwall, ‘Blame, Emotion, and the Corporation’, in EW Orts and NC Smith (eds.), *The Moral Responsibility of Firms*, pp. 143–166 (Oxford: Oxford University Press, 2017); PH Werhane, *Persons, Rights, and Corporations* (Hoboken, NJ: Prentice Hall, 1985).

¹⁷ GG Brenkert, ‘Business Ethics and Human Rights: An Overview’ (2016) 1:2 *Business and Human Rights Journal* 277–306, <https://doi.org/10.1017/bhj.2016.1>

¹⁸ G Kell and JG Ruggie, ‘Global Markets and Social Legitimacy: The Case of the “Global Compact”’, *Governing the Public Domain beyond the Era of the Washington Consensus? Redrawing the Line Between the State and the Market*, York University, Toronto, Canada, 4–6 November, 1999; J Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights* (2008), <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>; JG Ruggie, *Embedding Global Markets: An Enduring Challenge* (2008), <http://www.loc.gov/catdir/toc/ecip0817/2008019108.html>

¹⁹ N-h Hsieh, ‘Business Responsibilities for Human Rights: A Commentary on Arnold’ (2017) 2:2 *Business and Human Rights Journal* 297–309, <https://doi.org/10.1017/bhj.2017.6>

²⁰ H Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, NJ: Princeton University Press, 1980).

to corporations, and, second, it avoids a glaring problem of consistency.²¹ The consistency problem is simple: most would agree that the 'basic duties' of morality referred to by Hsieh include, at a minimum, not infringing on the liberty, security and subsistence of others. Hence, there is no reason why corporations should be excused from honouring at least core duties connected to 'rights', and in turn, no justification for expunging the language and logic of 'rights' from corporate deliberations. All in all, then, it seems wise to adopt the near-consensus view that corporations must honour legitimate human rights, ones that are supported by international documents such as the United Nations' *Universal Declaration* and by rights scholars.²² Indeed, this paper makes that assumption.

Some contemporary controversies can be conveniently ignored for our purposes. To be sure, the confusing debate that infects all discussions of rights, namely, about *which* rights truly count as legitimate, spills over into the corporate question of how corporations should behave in respect to rights. For example, are 'negative' human rights (ones that prohibit others from restricting the right holder), such as freedom of speech, the only legitimate rights? Or are 'positive rights' (ones that require others to act on behalf of the rights holder) such as the right to subsistence *also* legitimate, as most scholars believe? This debate lies beyond the reach of the present discussion. For convenience we shall assume the dominant view that many positive rights such as the right to healthcare, i.e., positive rights of the kind articulated in the *Universal Declaration of Human Rights* and other internationally recognized documents, exist and are proper sources of obligation.

Now that the preliminary issues are out of the way, our focus may turn to identifying the rights-honouring obligations held by corporations. The corporate human rights literature makes one point crystal clear: corporations possess something less than the full panoply of rights-respecting obligations; they hold, instead, a bundle of obligations slimmer than that possessed by human beings or nation states. For-profit corporations may be taller and richer than most of us, but they have exceedingly narrow personalities. They do not cry at funerals or have friends. They live forever (unlimited longevity) and are excused from honouring financial debts that exceed their invested capital (limited liability). They are chartered for financial reasons and for this reason are not expected to clothe the naked or feed the hungry. Such obligations fall on individual humans and nation states, not corporations. Hence, insofar as, say, the right to subsistence usually requires a remedy for the lack of basic shelter and clothing, that remedy must come from governments or private charity, not corporations.

Scholars affirm this view. Drawing on work from Henry Shue,²³ for example, Donaldson²⁴ explains that each human right implies three distinct kinds of correlative obligations to rights: (1) to not deprive the rights-holder directly of the object of the right (for example, taking property from an agent in violation of the right to property); (2) to in some instances protect the right from deprivation (for example, throw a lifeline to a drowning person); and (3) to restore the object of the right (for example, give food to the hungry). Of these three, only the first two are the proper responsibilities of for-profit corporations. Corporations are not obliged because of human rights to play the same role played, for

²¹ DG Arnold, 'Corporations and Human Rights Obligations' (2016) 1:2 *Business and Human Rights Journal* 255–275, <https://doi.org/10.1017/bhj.2016.19>; DG Arnold, 'On the Division of Moral Labour for Human Rights Between States and Corporations: A Reply to Hsieh' (2017) 2:2 *Business and Human Rights Journal* 311–316, <https://doi.org/10.1017/bhj.2017.9>

²² T Donaldson, *The Ethics of International Business* (Oxford: Oxford University Press, 1989); PH Werhane, 'Corporate Moral Agency and the Responsibility to Respect Human Rights in the UN Guiding Principles: Do Corporations Have Moral Rights?' (2016) 1:1 *Business and Human Rights Journal* 5–20, <https://doi.org/10.1017/bhj.2015.1>

²³ Shue, note 20.

²⁴ Donaldson, note 22.

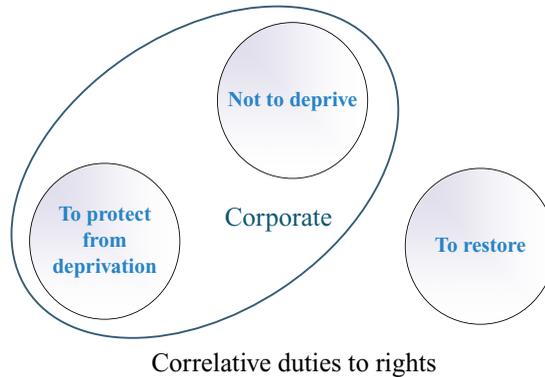


Figure 1. T Donaldson (1989). *The Ethics of International Business*. Oxford University Press.

example, by governments when providing relief after a hurricane.²⁵ Figure 1 shows the distinction.

This same underlying approach is evident in the United Nation's 'protect, respect and remedy' approach,²⁶ which does not burden for-profit corporations with the responsibility to restore the objects of rights to rights-holders. Hence, corporations have slimmer, but significant, correlative obligations to rights, and their financial missions, accompanied by their undemocratic governance structures, make them poor candidates for having positive obligations to contribute to social welfare (other than financial welfare).

This brings us to the nub of this paper's issue. Granted, corporations in general have different and slimmer correlative duties to rights than persons and governments. But might corporations also differ from one another in respect to which rights-respecting obligations they possess? Is it reasonable to assume that the slimmed-down list of obligations described above applies universally and is valid for every corporation in every context? In this vein, some academics assert that at least one exception exists to the 'no duty to restore' proviso.²⁷ The exception is often illustrated with the example of Merck, Inc. and Ivermectin. As Martin Sandbu²⁸ notes, Merck's well-known and heroic decision in the 1970s to develop the drug, Ivermectin, in order to combat river blindness is universally acclaimed to be the right move.²⁹ Merck anticipated losing money on Ivermectin, yet because it alone held the patent for a similar drug in use for animals, the company was uniquely capable of launching a research attempt to develop and test a comparable drug for humans. Merck's attempt eventually generated a miraculous new human drug, Ivermectin, which in turn resulted in the rescue of millions of poor living in river basins around the world who suffered from a disease that, as the name suggests, permanently blinds its victims. Merck heroically paid to have the drug distributed to the hard-to-reach river basins in Africa and elsewhere.

But our strong intuitions around cases like Merck and the identification of a 'rescue exception' do not add up to a theory. Even such strong intuitions are conceptually sterile unless grounded by a theoretical explanation that explains why a company like Merck *should* have taken upon itself a role normally played by governments. We thus need a theoretical

²⁵ Ibid.

²⁶ Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, note 18.

²⁷ T Donaldson, 'Moral Minimums for Multinationals' (1989) 3 *Ethics and International Affairs* 163–182.

²⁸ ME Sandbu, *Just Business: Arguments in Business Ethics* (Hoboken, NJ: Prentice Hall, 2011).

²⁹ Merck & Co., Inc., (A) and (B) [BET 9-991-021 and 9-991-022, 1991] (Boston, MA: H.B.S. Press, 1991).

framework that helps us understand Merck's decision, one that, further, stands as a guide for corporate executives who must decide when, whether, and how to engage in positive rights-satisfying actions beyond the slim moral minimum of 'not depriving' persons of the object of their rights.

Such a framework should be connected to the underlying justification of a corporation's role in society. Because corporations differ in their rights-honouring responsibilities from governments and people, we need a means to specify *how* corporations differ in terms of their broader roles in society. As Donaldson has argued,³⁰ corporations are artifacts and as such their individual governance designs can and should differ widely. Ed Freeman remarks that 'there are few limits on the kinds of purpose that can drive a business'.³¹ As such the form of a corporation's duties must follow its designated corporate governance design, and especially the portion of the corporation's governance design that relates to determining its future actions, namely, corporate purpose.

But as Donaldson and Walsh have elaborated,³² the proper design of an individual corporation's function is parasitic upon the broader purpose of the business system in society. The purpose of business, simply put, is to optimize 'collective value' for society. Different firms with different designs may each contribute to optimized social value in different ways. Hence when seeking to circumscribe the proper rights-respecting duties of the corporation, the question of how each company's value creation contributes to the optimizing collective value equation has emphatic relevance. The next section explains how a particular corporation's value-creating corporate purpose shapes the specific duties it possesses *vis-à-vis* human rights.

III. Why Firms in Industries Denominated by Specific Intrinsic Values Possess Weightier Duties

Donaldson and Walsh's³³ theory of business makes it clear that from the standpoint of 'values' any for-profit corporation may be understood either as a generic 'business' or as a particular business with certain features. A generic business's activities are justified finally through utilizing economic means, i.e., activities of production, distribution and exchange, to contribute to society's 'optimized collective value'.³⁴ Optimized collective value, in turn, is understood in terms of the satisfaction of intrinsic values. This theory of business, which ultimately relies on the concept of an 'intrinsic value', implies two kinds of justified purposes for a given firm: a 'focal' purpose on the one hand, and a 'contextual' purpose on the other. A firm's focal purpose reflects its work *in* society (typically the value added to shareholders and/or customers and employees), while its contextual purpose reflects its work *for* society (its contribution to collective value).³⁵ While contextual purpose often lies outside the sightline of managers and shareholders, it can never be fully removed from a company's deliberations. For example, as Donaldson and Walsh explain, the contextual 'dignity threshold' draws a red line beneath which treatment of a company's stakeholders cannot fall, and for this reason firms can never dismiss values such as gender fairness or religious toleration in their deliberations.

These considerations allow drawing a revealing picture of a corporation's corporate governance design, and in particular its corporate purpose. A corporation, viewed not

³⁰ T Donaldson, 'Androids and Corporations: Why Their Rights Derive from Purpose' (2019) 17 *Georgetown Journal of Law and Public Policy* 864.

³¹ RE Freeman, 'Managing for Stakeholders: Trade-offs or Value Creation' (2010) 96 *Journal of Business Ethics* 7–9, <http://www.jstor.org.proxy.library.upenn.edu/stable/29789749>

³² Donaldson and Walsh, note 4.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

as a generic entity, but as a business with certain features, may be seen as having a ‘constitutional purpose’, that is, a structure of goals that are self-configured by the firm and serve as its focal guide for action. The constitutional purpose may or may not be reflected in a corporation’s formal incorporation documents.³⁶

A firm’s constitutional purpose can be further divided into discretionary versus mandatory purposes. For example, a firm may decide to self-define a noble discretionary focal goal, such as BlueAvocado’s, “to provide thoughtful designs and creative solutions for a greener, simpler life.” Or it may self-define a focal goal that fully engages its core competency, such as PayPal’s “to build the Web’s most convenient, secure, cost-effective payment solution.” Again, the ways in which corporations can vary in their discretionary constitutional purposes are nearly endless.³⁷

However, some aspects of a firm’s constitutional purpose do not fall in the discretionary category, but in the mandatory category. No shareholder firm is free to eliminate shareholder welfare from its list of focal values – unless its shareholders happen to agree – or to evade its duty of compliance with laws. Nor is any firm free to eliminate contextual goals such as adhering to the dignity threshold, or to contributing over time to collective value. (If there is absolutely no way that a cigarette company can conclude that it enhances collective value, then it forfeits its moral right to exist.³⁸)

A simple 2×2 matrix will clarify (see Table 1).

The matrix exemplifies varieties of constitutional purpose from the standpoint of two purpose variants: focal/contextual and discretionary/mandatory.³⁹ The over-arching logic is flexible but subject to the obvious proviso that all purposes must be internally consistent. So, for example, a company has the moral discretion to adopt a straightforward business-relevant focal purpose such as ‘to save people money’ (Walmart), so long as that purpose is consistent with its other mandatory purposes such as satisfying its shareholder welfare commitments and contributing to ‘optimized collective value’. This very consistency is suggested by Walmart’s full version of its mission, ‘to save people money so that they can live better’ [my italics]; and a company has the moral discretion to adopt a laudatory purpose, such as J&J’s matching gift philanthropic initiative, so long as that purpose is consistent with satisfying its other mandatory purposes.

Table 1. Constitutional purpose (hypothetical for-profit firm)

| Purposes | Discretionary | Mandatory |
|-------------------|---|---|
| Focal | <ul style="list-style-type: none"> • ‘To save people money so they can live better.’ (Walmart) • ‘To organize the world’s information and make it universally accessible and useful.’ (example from Google) | <ul style="list-style-type: none"> • Shareholder welfare • Legal compliance *<i>Health (for a firm in the healthcare industry)</i> |
| Contextual | <ul style="list-style-type: none"> • Matching gift philanthropy (example from J&J) | <ul style="list-style-type: none"> • Optimized collective value • Human dignity threshold |

³⁶ Some corporations, called ‘B-Corps’, are certified by an independent non-profit organization, B Lab, for their commitment to creating value for non-shareholding stakeholders, including the local community, employees and the environment.

³⁷ Freeman, note 31.

³⁸ T Donaldson, *Corporations and Morality* (Hoboken, NJ: Prentice Hall, 1982).

³⁹ Particular elements of constitutional purpose may or may not be formally spelled out. In some instances, they may be part of the microsocal contract of the firm in the context of the industry; T Donaldson and TW Dunfee, *Ties That Bind: A Social Contracts Approach to Business Ethics* (Harvard Business School Press, 1999).

The asterisk before ‘health’ in the ‘mandatory’ column of [Table 1](#) highlights the question that lies at the heart of our investigation. Do healthcare firms have enhanced duties regarding human rights related to health by virtue of their participation in a specific industry, i.e., healthcare? Does their industry participation imply that their constitutional purposes must be configured to include health as a *mandatory* purpose?

‘Health’ should be positioned in the ‘mandatory’ column of the corporate constitutional purpose of healthcare firms partly for a reason connected to the accompanying mandatory value of ‘optimized collective value’. The reasoning is straightforward. Because the definition of ‘optimized collective value’ is drawn from the satisfaction of the agglomeration of all intrinsic values that employ business means, i.e., production, distribution and exchange,⁴⁰ it follows that a company whose identity and cannot be understood apart from the industry-relevant intrinsic value that dominates the proper definition of its central productive activity, e.g., ‘health’, is obligated to produce, distribute and exchange while making that intrinsic value a focal goal. The same would *not* be true, for example, of Walmart. Walmart’s industry is not defined around a particular intrinsic value. To be sure, Walmart is obligated to contribute to collective value and to respect the right to healthcare, but a special focus upon health would at best be a discretionary goal that the company chose for itself. Walmart might even have difficulty reconciling a self-chosen focus on health with its contextual goal of contributing to collective value if the inefficiencies of such a focus were extreme and damaged shareholder value. More on this later.

The form of any company’s constitutional purpose must follow its function,⁴¹ and its function is enmeshed in its identity. The identity of a company cannot be separated from the products and services it produces, and these are marked off by its industry identity. By the same logic, other companies in industries designated by intrinsic values, for example, the education industry (where the intrinsic value is knowledge) or the legal industry (where the intrinsic value is justice) are similarly obligated to include those specific intrinsic values that define their industry. The constitutional purpose of healthcare companies should include ‘health’ as a mandatory focal purpose, and, for analogous reasons, the constitutional purpose of law firms should include ‘justice’, and the constitutional purpose of educational firms should include ‘knowledge’ (see [Table 2](#)).

Law firms have special relevance for human rights. Law firms are often retained by corporations in order to provide expert advice in global contexts, and in such contexts human rights issues can be rife. Yet, as Ramasastry⁴² has shown, the advisors from

Table 2. Intrinsic values and firms

| Intrinsic value | Firms |
|-----------------|--|
| Health | <ul style="list-style-type: none"> • Pharmaceutical • Health insurance • Hospital |
| Knowledge | <ul style="list-style-type: none"> • For-profit education • Journalism |
| Justice | <ul style="list-style-type: none"> • Law firms (incorporated) • Legal services |

⁴⁰ Donaldson and Walsh, [note 4](#).

⁴¹ Donaldson, [note 30](#).

⁴² A Ramasastry, ‘Advisors or Enablers? Bringing Professional Service Providers into the Guiding Principles’ Fold’ (2021) 6:2 *Business and Human Rights Journal* 293–311, <https://doi.org/10.1017/bhj.2021.28>

international law firms do not typically appear to apply the UN Guiding Principles on Business and Human Rights and they often fail to frame their advice in a way that features negative human rights impacts. For example, lawyers who have served as ‘arbitrators in major international investment disputes involving alleged human rights abuses, have been called out for conflicts of interest relating to their ties to corporate interests’.⁴³

Table 2 is not meant to be exhaustive and the existence of intrinsic values beyond health, justice and knowledge suggest the possibility that other industries have constitutionally relevant mandatory intrinsic values. Although we will not examine these possibilities here, they point to a broader puzzle that needs solving. Exactly which criteria determine whether an intrinsic value should be labelled ‘mandatory’ and thus fall within the ambit of a particular firm’s constitutional purpose? What criteria mark the threshold for inclusion of a given, industry-related intrinsic value? Roy Vagelos, the legendary CEO of Merck who spearheaded the development of the river blindness drug, Ivermectin (discussed above), once joked that bread companies just as pharmaceutical companies cater to a basic human need: namely, food. ‘Why’, he mused, ‘are pharmaceutical companies and not bread companies lobbied to sacrifice profits?’.⁴⁴ In a similar vein, one might also ask why a car company such as Tesla should *not* be required to designate, say, the value of ‘safety’ as a governance mandate? Surely a car company must make the value of safety a priority in the production of its cars. We might ask, then, what mandates ‘health’ as a focal value for Pfizer, and not ‘safety’ for Tesla or the ‘elimination of hunger’ for the Panera Bread Company?

The answer lies in unpacking the meaning of a ‘mandatory constitutional value’ described above. A mandatory industry-relevant constitutional value reflects two necessary conditions:

- (1) The industry-relevant intrinsic value dominates the proper definition of the firm’s central productive activity in a way such that the value serves as an integral part of the firm’s identity.
- (2) The industry-relevant value serves as a focal goal for each firm decision.

Sandra Waddock remarked that the path to intellectual wisdom is a matter of becoming fully ‘who you are’.⁴⁵ In this sense, the mandatory constitutional purpose of ‘health’ for a pharmaceutical company binds a company such as Pfizer to Waddock’s standard of becoming ‘fully who it is’. How, then, does one discern a firm’s identity? Clues to a firm’s identity lie in the shared norms of firm stakeholders, i.e., the employees, owners and customers of the firm. It can be detected in the set of implicit social understandings comprising the normative interpretation of what the firm does, and what it is. A firm’s identity, thus, is reflected in the shared precepts of the stakeholders who participate directly or indirectly in the firm’s business. In this sense firm identity reflects the ‘microsocial contracts’ among the stakeholders in the firm’s economic milieu.⁴⁶

The second criterion for an industry-relevant intrinsic value qualifying as a mandatory constitutional value is that the value be ‘focal’. A focal value serves as a central, positive goal that is salient in each of the firm’s decisions. In contrast, a non-focal value, intrinsic or otherwise, functions as either a contextual ambition (e.g., optimized collective value) or a side-constraint on the pursuit of a focal goal. Non-focal values establish limiting conditions

⁴³ Ibid.

⁴⁴ Roy Vagelos made this remark in 2001 when serving as a guest speaker in a business ethics class at the Wharton School of the University of Pennsylvania.

⁴⁵ SA Waddock, *Intellectual Shamans: Management Academics Making a Difference* (Cambridge: Cambridge University Press, 2015).

⁴⁶ Donaldson and Dunfee, note 39.

on the pursuit of focal goals. For example, Tesla must pursue its focal goal of transportation without sacrificing safety, and in this way the intrinsic value of safety constitutes a moral minimum for its design and production process. But safety does not function as a focal goal.

The above considerations offer the solution to the puzzle raised earlier, namely, what mandates ‘health’ as a focal value for Pfizer, and not ‘safety’ for Tesla or the ‘elimination of hunger’ for the Panera Bread Company? Health is a mandatory constitutional value for Pfizer because it dominates the proper definition of Pfizer’s central productive activity. It is, thus, an integral part of its identity. Health is, or at least should be, a focal, salient goal in each and every firm decision. In contrast, safety may be an important consideration for Tesla, and may shadow each production decision, but, again, operates as a side-constraint on Tesla’s central activity of producing cars. It is not an integral part of Tesla’s identity. Of course, a carmaker may *decide* to include safety as part of its brand identity as Volvo does, but such branding is not mandatory for all firms in the industry. Nor must the Panera Bread Company elevate the value of eliminating hunger to the status of a focal value in its corporate identity. Eliminating hunger does not dominate the proper definition of the Panera’s central activity, i.e., what it makes. This fact, again, is reflected in the set of implicit stakeholder understandings about the firm’s productive purpose.

With the above in mind, it becomes possible to return to the question of Pfizer and its responsibilities during the COVID-19 pandemic. Pfizer, as shown, lacks the moral discretion to exclude health as a part of its mandatory purpose. Importantly, this requirement is not conveniently reducible, as some might be tempted to do, to a version of the ‘enlightened’ pursuit of profit. It is not reducible, for example, to the ‘shared value’ strategy advanced by Porter and Kramer.⁴⁷ In contrast to what Porter and Kramer would require, Pfizer, or any healthcare company, may be obliged to sacrifice a proposed policy or action that it believes is profit-maximizing in the long-run in order to achieve an especially powerful positive benefit for the health of society. Even if Pfizer believes that protecting its intellectual property would maximize long-term profits, it may well be required to relax its intellectual property protection in order to create vaccine availability in poor countries. Its duty to relax IP protection would follow from its mandatory commitment to the intrinsic value of health.

The implications of these findings for corporate managers are profound. I recall years ago asking about the issue of a right to healthcare when presenting to a group of 200 senior healthcare managers at a large PBM (Pharmacy Benefit Manager). I asked, ‘Do you think people have a right to healthcare?’, and 95% answered ‘yes’. At that very moment the PBM had lobbyists in Washington DC struggling to derail a pending bill that would have expanded the number of citizens with healthcare. I later followed up on this conflict with a small group of senior executives in the firm, asking them about the apparent contradiction between their beliefs and their lobbying activities. The executives explained that they did, in fact, believe that a conflict existed between their beliefs and the company’s lobbying, but were fundamentally confused about how to reconcile them. Their confusion centred on how they should interpret the broader corporate purpose of their PBM. Most executives believed that it should include a special attention to health but acknowledged that what drove their lobbying behaviour was the obvious, undisputed goal of enhancing profit for investors. Executives today stand in desperate need of a clear framework that formally warrants their efforts to insert the intrinsic value of health into the practical reasoning of the firm.

The framework elaborated above promises to successfully harmonize a company’s day-to-day activities of profit-making and risk management with its attention to human rights by drawing on its discretionary and mandatory constitutional purposes. This follows Easterling’s conclusion that any successful rights approach should facilitate an ‘effective

⁴⁷ ME Porter and MR Kramer, ‘Creating Shared Value’ (2011) 89:1/2 *Harvard Business Review* 62–77.

integration of human rights due diligence processes into corporate risk management systems ... [and requires]... an elevation of human rights respect to a corporate goal that determines corporate strategy',⁴⁸ For-profit companies in industries denominated by intrinsic values such as health, education and justice have heavier responsibilities when it comes to honouring the rights that are directly relevant to their industry identity. Because the ultimate test of the entire business system is whether it optimizes social collective value, any particular company must heed its unique capability to contribute to optimized value, whether that contribution is solely through the price and quality of the goods and services it produces and the financial benefit it creates for investors, or through other intrinsic values it satisfies. Optimized collective value is defined in terms of the satisfaction of intrinsic values, a definition that gives special meaning to firms that operate in industries themselves defined in terms of intrinsic values. The identity of a company in the healthcare industry allows it no escape from the special responsibilities its intrinsic-value-laden identity implies. One human rights hat will not fit all corporate heads.

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⁴⁸ B Fasterling, 'Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk' (2017) 2:2 *Business and Human Rights Journal* 225–247, <https://doi.org/10.1017/bhj.2016.26>