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ARTICLES

THE RESTRICTED NATURE OF THE PROFIT MOTIVE: PERSPECTIVES FROM LAW, BUSINESS, AND ECONOMICS

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INTRODUCTION

This essay investigates the permissible limits of the profit motive in business contexts by examining theory and cases from law, business, and economics. This essay aims to remind the reader that the theoretical principles upon which the profit motive is founded require abidance to law, ethics, and customary societal rules. Accordingly, the application of the profit motive as a purported justification for illegal or immoral business decisions does not withstand scrutiny. Part I distinguishes between restricted and unrestricted profit motives, and illustrates this distinction by the use of three business cases that improperly appeal to the unrestricted profit motive. Part II utilizes economic theory to reveal the restricted nature of the profit motive. Part III utilizes legal cases to display the restrictions placed on the profit motive by law. Finally, Part IV suggests that the unrestricted profit motive often results from intra- and inter-organizational power imbalances and contends that curbing such imbalances will aid in the proper application of the restricted profit motive.

I. RESTRICTED VERSUS UNRESTRICTED PROFIT MOTIVES

During precarious economic times, businesses are frequently overwhelmed by pressures to produce, to be innovative, and to outdo the competition. These pressures regularly give rise to motivations to increase business profits, that is, intents to monetarily gain from business transactions.[1] The profit motive perseveres even in times of economic growth, but the improper application of the profit motive, without accounting for its inherent restrictions, often results in cata-

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1. *Profit Motive*, INVESTOPEDIA, http://www.investopedia.com/terms/p/profit-motive.asp (last visited Jan. 31, 2016).

strophic events that affect not only the internal workings of the business but also the broader economic environment.

The profit motive is oftentimes portrayed in the guise of "shareholder wealth maximization" ("SWM") within corporate settings, but profit motivations are not limited to corporations with shareholders. Instead, the profit motive manifests in a variety of business settings, ranging from sole proprietorships and partnerships to multinational organizations. The principle of shareholder wealth maximization recurrently stems into a perceived obligation that businesses must act solely for profit-making purposes. Corporate and non-corporate businesses adamantly promote increased profits as the hallmark of success regardless of whether shareholder interests are involved or not.

The profit motive may be dissected into two broad categories: the restricted and the unrestricted kinds. The unrestricted profit motive is the imperative that monetary gain be maximized without concern for law, ethics, or customary societal rules. Within corporate settings, the unrestricted profit motive may be referred to as unrestricted SWM, which is the imperative that shareholder wealth be maximized without concern for law, ethics, or other customary societal rules. There is little theoretical grounding for the unrestricted profit motive, but it has nonetheless disseminated across the populace becoming something of a mantra invoked by savvy businessmen who attempt to skirt law or ethics.[2] As Alfred Rappaport commented in *Harvard Business Review*, "When executives destroy the value they are supposed to be creating, they almost always claim that stock market pressure made them do it."[3] The pressures on corporate executives to increase shareholder wealth recurrently give rise to scandals and broader ethical failures via the improper utilization of unrestricted SWM. On the other hand, the restricted profit motive is the imperative that monetary gains be maximized but only when doing so is in accordance with law, ethics, or other customary societal rules. Within corporate settings, restricted SWM is similarly the imperative that shareholder wealth only be maximized when doing so is in accordance with law, ethics, or other customary societal rules. Both economic theory and legal doctrine support only a restricted profit motive. Nevertheless, proliferating rationalizations by use of unrestricted profit motives in contemporary business environments appear, in part, due to pressures and societal power imbalances.

Despite the sparse theoretical foundation for unrestricted profit motives, many authors devise arguments against its recurring manifestation in contemporary business practice. Although not all cases of unrestricted profit motives are publicized, unrestricted profit motives manifest regularly in business practice. The following are three cases that display unrestricted profit motives over time: the IBM-Nazi case, the Chevy Malibu case, and the Chainsaw Al case.

2. Alfred Rappaport, *Ten Ways to Create Shareholder Value*, HARV. BUS. REV., Sept. 1, 2006, at 66.

3. *Id.*

In the 1940s, during World War II and the accompanying Holocaust, a deal was struck between multinational manufacturer, International Business Machines ("IBM"), and the Nazi party. Pursuant to this deal, IBM sold Hollerith tabulation machines, predecessors to modern computers, to the Nazi party which utilized them to perform calculations with punch cards.[4] IBM also provided training, sold replacement punch cards, and employed technicians to service and repair machines for the Nazi party.[5] The focus of IBM was profits despite its executives knowing that the Nazi party was using these machines in concentration camps to track the extermination of Jews.[6] For IBM, profits superseded any questions of the morality of providing the machines to the Nazis. They pursued profits without regard to ethical concerns. During the Holocaust, IBM embraced unrestricted profit motives.

In 1979, General Motors ("GM") similarly embraced unrestricted profit motives when GM knowingly allowed a faulty product to be placed on and remain on the market. The 1979 Chevrolet Malibu had a fuel tank that exploded during rear end collisions. The fuel tank was placed only eleven inches from the rear bumper, whereas in earlier models it was to be placed twenty inches from the rear bumper.[7] The cost of making a safer fuel tank was $8.59 per vehicle, but, according to a memorandum from an Oldsmobile engineer, fuel tank fires were costing GM only $2.40 per vehicle.[8] GM ran a cost-benefit analysis to determine that defending lawsuits was cheaper than fixing the exploding fuel tanks.[9]

The faulty fuel tanks led to a 1999 California jury award that was then the largest liability award in United States' history of approximately $4.8 billion dollars (later reduced).[10] In this case, several people were badly burned when a 1979 Chevrolet Malibu's fuel tank exploded during a rear-end collision.[11] A memo from a GM engineer was uncovered that "analyzed the cost of making safer fuel tanks ($2.40 per car) against the possible losses from damages GM would have to pay in the event of accidents and resulting fires."[12] The evidence showed that GM placed profits above human life, and, according to the plaintiff's attorney, "The jurors wanted to send a message to General Motors that human life is more important than profits."[13] After the jury award

4. JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 88 (2004).

5. *Id.*

6. *Id. See also* EDWIN BLACK, IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION (2001).

7. Andrew Pollack, *$4.9 Billion Jury Verdict in G.M. Fuel Tank Case*, N.Y. TIMES (July 10, 1999), http://www.nytimes.com/1999/07/10/us/4.9-billion-jury-verdict-in-gm-fuel-tank-case.html.

8. *Id.*

9. LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 25 (2001).

10. *Id.*

11. *Id.*

12. *Id.*

13. Pollack, *supra* note 7.

against GM, "The plaintiffs offered to reduce the punitive damages by $4 billion if GM recalled the cars and all those built on the same frame, but the company refused."[14] Despite all efforts, GM continued to place profits before ethics—regularly embracing the unrestricted profit motive.

In the 1990s, several scandals arose pertaining to the incredulous actions of Albert J. Dunlap ("Chainsaw Al"). Dunlap was notorious for his cost-cutting techniques at multiple businesses—most famously at Scott Paper and Sunbeam. His questionable business practices led to his record as one of the world's "Worst CEOs Ever,"[15] as one of the "Top 10 Worst Bosses,"[16] as a "psychopath,"[17] and as a "bad guy."[18] Eventually, ethics case studies were written about Dunlap at both the Harvard Business School[19] and the University of New Mexico.[20] Dunlap set the standard in "Mean Business"—both the title of his book and his approach to business strategy.[21] He repeatedly fired workers in order to temporarily increase profits, engaged in deceitful accounting techniques to temporarily increase profits, and placed profits before ethics and humanity.[22] Although ultimately ousted from Sunbeam, Dunlap left his mark on the families, employees, and companies he harmed. By placing profits before ethics, Dunlap too embraced the unrestricted profit motive.[23]

Despite its lack of legitimate theoretical basis, unrestricted profit motives play a recurring role in business over time. Many authors, such as Mitchell, Martin, and Stout, respond to the recurrent manifestation of unrestricted profit motives in contemporary business with argumentation aimed at undermining the notion. Mitchell, for example, discusses the tendency for corporate personnel to erroneously conflate profit motivations with the "pursuit of the good."[24] Profit, however, is not a good, but rather, a good that should be considered when making economic decisions. In framing the unrestricted nature of profit

14. MITCHELL, *supra* note 9, at 25.

15. Kamelia Angelova, *Worst CEOs Ever: Al Dunlap*, BUS. INSIDER (June 8, 2009, 12:17 PM), http://www.businessinsider.com/worstceosever/al-dunlap.

16. Dan Fastenberg, *Top 10 Worst Bosses: Al Dunlap*, TIME (Oct. 18, 2010), http://content.time.com/time/specials/packages/article/0,28804,2025898_2025900_2026107,00.html.

17. Jeff Bercovici, *Why (Some) Psychopaths Make Great CEOs*, FORBES (June 14, 2011, 8:46 AM), http://www.forbes.com/sites/jeffbercovici/2011/06/14/why-some-psychopaths-make-great-ceos/.

18. *Al Dunlap: Exit Bad Guy*, ECONOMIST (June 18, 1998), http://www.economist.com/node/136843.

19. *See* Brian J. Hall, Rakesh Khurana & Carleen Madigan, *Al Dunlap at Sunbeam*, HARV. BUS. SCH. CASE NO. 899–218 (1999) (rev. 2003).

20. *See* MELANIE DREVER ET AL., U. OF N.M., SUNBEAM CORPORATION: "CHAINSAW AL," GREED, AND RECOVERY (2011), https://danielsethics.mgt.unm.edu/pdf/sunbeam-case-study.pdf.

21. *See* ALBERT J. DUNLAP, MEAN BUSINESS: HOW I SAVE BAD COMPANIES AND MAKE GOOD COMPANIES GREAT (1996).

22. John A. Byrne, *How Al Dunlap Self-Destructed*, BUS. WK. (July 6, 1998), http://www.businessweek.com/1998/27/b3585090.htm.

23. *Id.*

24. MITCHELL, *supra* note 9, at 43.

motives as the problem, Mitchell contends that "the moral freedom of the board extends only so far as it is consistent with the end goal of the corporation, the end of maximizing stockholder profit. When moral, or, if you prefer, responsible, behavior conflicts with this end, responsibility must take a back seat to profitability."[25] Placing responsibility behind profitability, instead of as a restriction on profitability, is at the heart of Mitchell's critique. He contends that unrestricted profit motivations and the corporate legal structure, including limited corporate liability, lead to the externalization of costs and irresponsible corporate behavior.

Martin and Stout also identify the problem of unrestricted profit motives; they argue that shifting the way people think in business settings is the solution to avoiding its manifestation. Martin advocates for a shift from business focus on expectations markets to business focus on real markets.[26] He explains that:

> Our theories of shareholder value maximization and stock-based compensation have the ability to destroy our economy and rot out the core of American capitalism. . . . New theories that recognize the important distinction between the real market and the expectations market, and that return our focus to the real market, are needed.[27]

According to Martin, the National Football League ("NFL") is a properly functioning organization that focuses on real markets and customer satisfaction, as opposed to expectations markets; the NFL is more concerned about ensuring the integrity of the game that is played on the field, the real game, than in valuing the point spread, or other expectations that could lead to increased profit.[28] Businesses could learn much from the NFL, according to Martin, because it is the focus by organizations on expectations markets and the constant thinking about influencing the value of stock and stockholder wealth that leads to inefficiencies. Martin argues that businesses should shift their thinking away from expectations markets and focus instead on customer satisfaction.[29]

Stout similarly argues that there must be a shift in human mentality away from unrestricted profit motives and towards an alternative paradigm.[30] Stout explains why unrestricted SWM is actually bad for most shareholders, or why the shareholder who cares only about short-term share price increase of only one corporation is an "impossible abstraction."[31] A variety of individuals own stock for different reasons, for different lengths of time, and often within diversified portfolios. This quasi-mythical, single-minded shareholder who only desires immediate,

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25. *Id.* at 69.

26. *See* ROGER L. MARTIN, FIXING THE GAME: BUBBLES, CRASHES, AND WHAT CAPITALISM CAN LEARN FROM THE NFL 31 (2011).

27. *Id.*

28. *Id.* at 80.

29. *Id.* at 80–81.

30. LYNN STOUT, THE SHAREHOLDER VALUE MYTH 109 (2012).

31. *Id.* at 107.

short-term gain may benefit when unrestricted SWM is utilized, but the long-term shareholder will suffer dramatically. After a short-term rise in shares due to unrestricted SWM, it is not uncommon that a scandal will thereafter be uncovered, leading to a significant share-value drop, and sometimes fines, settlements, and other associated legal fees. Stout argues against unrestricted SWM, explaining how it has no basis in law and how it has detrimental economic and empirical effects.[32] Stout, Martin, and Mitchell all identify the problem of unrestricted profit motives, and propose alternative arguments against it.

Solomon similarly identifies how profit motivations impact business thinking.[33] Solomon contends that profit motivations give entrepreneurs "a convenient way not only to describe but also to justify their myopia. Behavior that was merely greedy and selfish could now be defined and defended in terms of an abstract and honorable motive."[34] Acceptance of the profit motive as a viably honorable mental state without restrictions may lead to a putative basis for defending an organization's actions. In this way, unrestricted SWM provides businesses a means of defending their organizations even in light of pernicious actions and immoral decisions. Despite the recurrent utilization of unrestricted profit motives in business settings, neither economic nor legal theory condones the unrestricted profit motive as a legitimate justification for business actions or initiatives.

II. Economic Perspectives on the Profit Motive

In the field of economics, there is a long history of shareholder wealth maximization in the writings of normative stockholder theorists (often referred to as "shareholder theorists"). However, normative stockholder theorists impose only restricted, not unrestricted, SWM imperatives. Normative stockholder theory's roots are in Adam Smith's 1776 publication, *The Wealth of Nations*.[35] Formal development of stockholder theory began during the early twentieth century with the Chicago and Austrian Schools of Economics.[36] Representative authors from the Chicago School include Milton Friedman, Gary Becker, Ronald Coase, and Frank Knight.[37] These authors often mix with authors from the Austrian School, such as F. A. Hayek, Ludwig von Mises, Joseph Schumpeter, and Israel Kirzner.[38] Within the Chicago and Austrian Schools, the views of the authors differ significantly as to ethics and social responsibility. There are also distinct differences across schools.

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32. *Id.* at 108–10.

33. *See* Robert C. Solomon, Ethics and Excellence: Cooperation and Integrity in Business (1992).

34. *Id.* at 43.

35. *See* Adam Smith, The Wealth of Nations (1776); *see also* Michael D. Pfarrer, *What Is the Purpose of the Firm?: Shareholder and Stakeholder Theories*, *in* Good Business: Exercising Effective and Ethical Leadership 86 (James O'Toole & Don Mayer eds., 2010).

36. Pfarrer, *supra* note 35, at 87.

37. Javier Aranzadi, Liberalism Against Liberalism 2 (2006).

38. *Id.* *See also* Pfarrer, *supra* note 35, at 87.

Each individual author from the Austrian and Chicago Schools has variations upon which restrictions should be placed on SWM.[39] Gary Becker of the Chicago School, for example, asserted in a 2005 blog post,[40] which was later published in his book co-authored by Judge Richard Posner, *Uncommon Sense: Economic Insights, from Marriage to Terrorism*,[41] that SWM is only restricted by laws and contracts. According to Becker, other principles, such as social and ethical concerns, are best implemented by abidance to laws and contracts.[42] Even the most conservative normative stockholder theories require that corporations abide by the law when maximizing shareholder wealth. Frank Knight, also of the Chicago School, discusses the inseparable nature of ethics and economics in his 1952 essay, *Economic Freedom and Social Responsibility*.[43] Knight explicitly considers that the "basic fact-of-life underlying all problems is that men have individual minds and wills" in his analysis of the link between ethics and economics.[44] John Hasnas asserts that,

> the stockholder theory does not instruct managers to do anything at all to increase the profitability of the business. It does not assert that managers have a moral blank check that allows them to ignore all ethical constraints in the pursuit of profits. Rather, it states that managers are obligated to pursue profit *by all legal, nondeceptive means*. . . . A significant amount of the criticism that is directed against the stockholder theory results from overlooking these ethical limitations.[45]

Hasnas's description is in accord with Nobel Laureate F. A. Hayek, who contends that "the only specific purpose which corporations ought to serve is to secure the highest long-term return on their capital," but in making this assertion, Hayek explicitly clarifies that "this does not mean that in the pursuit of this end they ought not to be restrained by gen-

39. Some radical economists or finance gurus may claim that when the cost of implementation of a legally required item is cheaper than the risk imposed by avoiding the cost, that one should avoid the cost. For example, if a statute required the implementation of a widget by Z Corporation, and the widget costs $1,000.00, but the fine for not having a widget is only $100.00, certain financial positions may claim that Z Corporation should maximize profits by not implementing the widget (by saving $900.00 even if it Z Corporation is fined). I suggest that empirical stockholder theory may reveal such instances, but no normative stockholder theory could reasonably claim this is how organizations should conduct their business.

40. Gary S. Becker, *Do Corporations Have a Responsibility Beyond Stockholder Value?*, THE BECKER-POSNER BLOG (July 24, 2005), http://www.becker-posner-blog.com/2005/07/index.html.

41. GARY S. BECKER & RICHARD A. POSNER, UNCOMMON SENSE: ECONOMIC INSIGHTS, FROM MARRIAGE TO TERRORISM 191 (2009).

42. *Id.*

43. Frank H. Knight, *Economic Freedom and Social Responsibility: An Essay in Economics and Ethics*, 7 STUD. BUS. & ECON. 1, 3 (1952).

44. *Id.* at 20.

45. John Hasnas, *The Normative Theories of Business Ethics: A Guide for the Perplexed*, 8 BUS. ETHICS Q. 19, 22 (1998); *see also* Daniel Palmer, *Upping the Stakes: A Response to Hasnas on the Normative Viability of Stockholder and Stakeholder Theories*, 8 BUS. ETHICS Q. 699 (1999); John Hasnas, *Two Normative Theories of Business Ethics: A Critique*, *in* ETHICAL THEORY & BUSINESS 65 (Tom L. Beauchamp & Norman E. Bowie eds., 7th ed. 2004).

eral legal *and* moral rules."[46] Unrestricted SWM simply has no basis in normative stockholder theory.

From the Chicago School, Milton Friedman's famous 1970 *New York Times Magazine* article, *The Social Responsibility of Business Is to Increase Its Profits*, is a widely known statement of normative stockholder theory.[47] Friedman's formulation, however, is frequently read in isolation of his other works; critics do not always give due care to the underpinning macroeconomic context within which his theory is posited. The Austrian School's stockholder theory presents a stronger representative model that is rarely considered by critics. F. A. Hayek, in *The Corporation in a Democratic Society: In Whose Interest Ought It to and Will It Be Run*, provides a detailed account of the Austrian School's normative stockholder theory.[48] The Austrian and Chicago Schools, although overlapping in key issues, such as free markets, often diverge when it comes to the relationship between humans and economics,[49] and as to certain aspects of the responsibilities of organizational actors. Although the Austrian and Chicago Schools maintain key differences as to social responsibilities, they generally share the common view that corporations ought to be run in the interest of stockholders. This view, according to both the Austrian and Chicago Schools, is one of restricted SWM; restricted by, at a minimum, law, and often further restricted by ethical principles and other societal rules.

The most frequently considered normative stockholder theory is found in Milton Friedman's 1970s polemic.[50] In oft-quoted passages from his work, Friedman restricts the SWM imperative by "the rules of the game," by avoiding "deception" and "fraud," and by abiding by "the basic rules of the society, both those embodied in law and those embodied in ethical custom."[51] In light of these restrictions, Friedman's stockholder theory does not condone many of the actions taken by organizations in the name of SWM. Friedman's restrictions, however, leave considerable room for interpretation as to what constitutes the basic rules of society, the rules of the game, and ethical custom. Although legal doctrine is instructive in defining the bounds of law and fraud within a given society, Friedman makes little effort to define when organizational actors may be justified in not abiding by the SWM principle, that is, when these restrictions should trump SWM.

Friedman's stockholder theory applies only to "corporate executives," who are charged with managing the money of others (i.e., stockholders).[52] According to Friedman, corporate executives are unique

46. Friedrich A. Hayek, *The Corporation in a Democratic Society: In Whose Interest Ought It to and Will It Be Run?*, *in* STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS 300, 301 (Friedrich A. Hayek ed., 1967).

47. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 33.

48. Hayek, *supra* note 46, at 300.

49. ARANZADI, *supra* note 37, at 1–9.

50. Friedman, *supra* note 47.

51. *Id.* at 33, 124.

52. *Id.* at 33.

because of their responsibilities to stockholders and so are demarcated from other organizational actors who do not have the same responsibilities to stockholders.[53] For Friedman, restricted SWM is necessary to protect the stockholders (owners) whose money is invested in the corporation and trusted in the care of corporate executives. This underpinning need for protecting stockholders is at the heart of Friedman's stockholder theory—abiding by the (legal and ethical) desires of the stockholders is the paramount restriction on Friedman's SWM imperative.[54]

Hayek's normative stockholder theory also imposes multiple restrictions on the SWM imperative. Despite some similarities, there are important differences between Friedman and Hayek's restrictions on SWM. Hayek advocates for SWM restricted by law, ethics, and "generally accepted rules of decency."[55] He explicitly considers that charitableness may be included in the rules of decency of a corporation.[56] Permissible corporate charity is anathema to Friedman who spent considerable efforts in *Capitalism and Freedom* arguing against charitable contributions by corporations.[57] Hayek explicitly rejects contentions that the corporation ought to be run for the benefit of management, labor (employees), and the public at large.[58] Any attempt to pigeonhole Hayek into stakeholder theory would, thus, prove a challenging task.[59] Finally, Hayek expressly appeals to "long-term," as opposed to "short-term" profits in his model.[60] Focusing on "long-term" profit may also be perceived as a restriction on SWM, which may, under other formulations, be construed as a means to "short-term" gain (although Friedman, at times, also emphasized long-term profits).[61] There is no basis in Hayek's formulation of normative stockholder theory for unrestricted SWM, but only restricted SWM.

Central to both Hayek and Friedman's normative stockholder theories is the restricted SWM imperative. A paramount restriction on SWM is that the corporation be run in accordance with the desires of its stockholders. While there is much concurrence between the two authors, they have different primary justifications underpinning their imperative that corporations ought to be run in the interests of stockholders. Although both authors provide a variety of reasons in support of the restricted imperative, the central justification for managing stockholder interests for Friedman is deontological, whereas the central justification for Hayek is negative utilitarian.

53. *Id.* at 123.

54. *Id.* at 122.

55. Hayek, *supra* note 46, at 301.

56. *Id.*

57. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 135–36 (1962).

58. Hayek, *supra* note 46, at 302–06.

59. R. EDWARD FREEMAN ET AL., STAKEHOLDER THEORY: THE STATE OF THE ART 11 (2010).

60. Hayek, *supra* note 46, at 301.

61. *Id.*

Friedman paid particular attention to the need to protect stockholders from being stolen from, deceived, or otherwise defrauded by corporate executives in possession of their money.[62] Friedman's desire to protect stockholders, whose money is entrusted to others, because of concerns that no one cares for someone else's money with as much care as their own, is a recurrent theme throughout Friedman's *Capitalism and Freedom,* his famous *New York Times Magazine* article, and his subsequent *Free to Choose.*[63] Little space in *Capitalism and Freedom,* and even less space in *Free to Choose,* is devoted to the social responsibility of business, but this underpinning concern for handling the money of others recurs in both texts. In these writings, Friedman's primary concern is more about the "rest of us" creating macroeconomic conditions within which free market capitalism can function in accordance with Adam Smith's "invisible hand" of the marketplace.[64]

The underpinning justification of Friedman's normative stockholder theory, the deontological justification,[65] aims to protect stockholders from theft and fraud. Friedman offers a variety of other justifications and other theorists attempt to ground normative stockholder theory in fiduciary obligations,[66] public policy,[67] or utilitarianism,[68] but many contest the adequacy of these justifications.[69] Friedman's central deontological justification, however, does lie in the protection of stockholders.

Friedman's writings face many criticisms including critiques that his work is not analytically sound and that his assumptions of free market economics are flawed. McAleer proffers, on the basis of logical deduction, that Friedman's normative stockholder theory is contradictory and logically unsound.[70] McAleer contends, among other things, that Friedman's two imperatives of restricted SWM and abiding by the stockholders' desires are "at odds with each other."[71] Specifically, McAleer contends that one formulation of Friedman's imperative allows the executives to take into account the interests of non-stockholders so long as the stockholders desire this, but the second formulation rules this out.[72] However, from a legal perspective, courts often

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62. Friedman, *supra* note 47.

63. FRIEDMAN, *supra* note 57; *see also* MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT (1980).

64. FRIEDMAN, *supra* note 57, at 133.

65. Hasnas, *supra* note 45, at 25; *see also* Palmer, *supra* note 45.

66. *See generally* Kenneth E. Goodpaster, *Business Ethics and Stakeholder Analysis,* 1 BUS. ETHICS Q. 53 (1991).

67. John R. Boatright, *Fiduciary Duties and the Shareholder-Management Relation: Or, What's So Special About Shareholders?,* 4 BUS. ETHICS Q. 393 (1994); *see also* John R. Boatright, *What's So Special About Shareholders?, in* ETHICAL THEORY & BUSINESS, *supra* note 45, at 75.

68. Hasnas, *supra* note 45.

69. Palmer, *supra* note 45; *see also* Frederick R. Post, *A Response to "The Social Responsibility of Corporate Management: A Classic Critique",* 18 MID-AM. J. BUS. 25, 25 (2003).

70. Sean McAleer, *Friedman's Stockholder Theory of Corporate Moral Responsibility,* 7 TEACHING BUS. ETHICS 437 (2003).

71. *Id.* at 438.

72. *Id.*

address issues of potentially conflicting phrases in or among statutes and, in order to resolve such conflicts, courts resort to traditional canons of judicial interpretation.[73] These canons require that language be read consistently, when there is a reasonable, consistent interpretation.[74] In Friedman's case, there is a reasonable, consistent interpretation of his two imperatives, viz., that profit should be maximized so long as doing so is in accordance with law, ethics, the rules of the game, the rules of society, and the desires of the stockholders (i.e., restricted SWM).

Others argue that Friedman's vision of free market capitalism is inherently flawed. Some members of this camp argue against Friedman's macroeconomics because his theory assumes that people are self-interested. Coelho, McClure, and Spry counter this criticism by setting forth an argument explaining how self-interested businessmen pursuing profit promote a better society, in support of a Friedman paradigm of social responsibility.[75] Coelho, McClure, and Spry argue that there are at least three ways by which such profit seeking promotes a better society: (1) customers benefit from the production of better, less expensive, or alternative products; (2) suppliers, shareholders, and employees benefit from increased income; and (3) other members of society benefit from having products on the market which may provide generalized benefits to humanity.[76] In light of the self-interested, profit seeking businessmen, society benefits in all of these ways so long as businessmen pursue the aim of self-interest within the bounds of restricted SWM. Others object to this idealized vision of free market capitalism, claiming "the correct answer to the economic question (Is it profitable?) does not always produce the correct answer to the ethics question (Is this the right decision?)."[77] Yet these authors also overlook the restricted nature of Friedman's SWM imperative, which requires that stockholder desires be deemed permissible only so long as they accord with, among other things, ethics. There is an inherent restriction placed upon the self-interested nature of businessmen.

Friedman's central deontological justification persists despite these criticisms. Hayek, on the other hand, faces much less criticism for his negative utilitarian justification of stockholder primacy. Hayek desires that corporations be run in the stockholders' interests in order to reduce, control, and put a check upon the growing powers of corporations.[78] Hayek argues that corporate abidance to stockholder desires minimizes the potentially harmful effects of corporations on society. In

73. ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 51 (2012).

74. Bd. of Adjustment v. Wende, 92 S.W.3d 424, 432 (Tex. 2002); Barr v. Bernhard, 562 S.W.2d 844, 849 (Tex. 1978); Clint Indep. Sch. Dist. v. Cash Inv., Inc., 970 S.W.2d 535, 539 (Tex. 1998); Standard v. Sadler, 383 S.W.2d 391, 395 (Tex. 1964) (quoting Wintermann v. McDonald, 102 S.W.2d 167, 171 (Tex. 1937)).

75. Philip R.P. Coelho, James E. McClure & John A. Spry, *The Social Responsibility of Corporate Management: A Classic Critique*, 18 MID-AM. J. BUS. 15, 17 (2003).

76. *Id.* at 17.

77. Post, *supra* note 69, at 27.

78. *See generally* Hayek, *supra* note 46.

terms of desiring a classically liberal free market economy, Hayek is largely in accord with Friedman. These two Nobel Laureate economists concur that governments should rarely intervene with private economic activities of individuals.[79] When it comes to the social responsibilities of business, however, there are key differences between the work of Hayek and the work of Friedman. Hayek, for example, was not as concerned about protecting the stockholders, but instead, was more concerned about limiting the power that corporations were gaining, even in his time.[80] Hayek's power concerns expanded well beyond the deceptive uses of social responsibility expressed by Friedman.[81] For Hayek, treating corporations as trustees of stockholders, whose desires management must abide by, instrumentally places a check on the permissible powers of corporations.[82]

Hayek contends that corporations should attain the highest return over the "long-term" for its stockholders, subject to law, morality, and the "rules of decency," because this focus limits the power of corporations to influence values outside of this specifically allocated imperative.[83] As Hayek explains,

> Power, in the objectionable sense of the word, is the capacity to direct the energy and resources of others to the service of values which those others do not share. The corporation that has the sole task of putting assets to the most profitable use has no power to choose between values: it administers resources in the service of the values of others.[84]

For Hayek, permitting management, as opposed to the stockholder, to pursue what values management sees fit gives rise to the danger that "real and uncontrollable power" that is "arbitrary and politically dangerous" will arise from the corporation.[85] This power must be kept limited by allowing the stockholders to control the corporation lest society lose its ability to maintain control over the corporation. As Hayek explains,

> Even the largest aggregation of potential power, the largest accumulation of resources under a single control, is comparatively innocuous so long as those who exercise such power are entitled to use it only for one specific purpose and have no right to use it for other aims, however desirable in themselves.[86]

On this principle of power, Hayek contends that the best way to keep corporations in check is to require that corporations abide by the desires of the stockholders. Hayek's argument is rooted in negative

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79. *See generally* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (Bruce Caldwell ed., 2007); FRIEDMAN, *supra* note 57, at 133.

80. *See generally* Hayek, *supra* note 46.

81. Friedman, *supra* note 47.

82. Hayek, *supra* note 46, at 301.

83. *Id.* at 301–02.

84. *Id.* at 301.

85. *Id.*

86. *Id.*

utilitarianism—that is, he argues that curbing the power of the corporation will minimize the harm to society.

Hayek and Friedman, along with other authors from the Chicago and Austrian Schools of Economics, embrace only a restricted, not an unrestricted, profit motive. Although these theorists recognize the need for businesses to make profit, they justify the profit motive by moral argument, and recurrently emphasize the restricted scope of the SWM imperative. There is no basis in this theory for unrestricted profit motives. The next section examines the restrictions placed on the profit motive by law.

III. Legal Perspectives on the Profit Motive

Neither legal doctrine nor normative stockholder theory entail unrestricted SWM imperatives, but conversely, both entail restricted SWM imperatives that are frequently limited to specific scenarios. The 1919 Michigan Supreme Court case of *Dodge v. Ford* is often cited as the basis for a legal obligation to maximize shareholder wealth.[87] In *Dodge*, the Michigan Supreme Court stated that "[a] business corporation is organized and carried on primarily for the profit of the stockholders."[88] Despite this assertion, there are at least four reasons to contest that this simple statement does not give rise to a duty of unrestricted SWM. First, the court makes this comment in dicta, which is a non-binding and non-precedent setting part of a legal decision. Second, the court recognizes that directors of corporations have "duties . . . to the general public . . . ," and discusses a variety of other social expenditures that may be permissible for directors to pursue.[89] Third, when this case was decided, Ford Motor Company was a close corporation, making the case's holding not immediately extendable to publicly-held corporations.[90] Finally, this Michigan Supreme Court decision is only binding within the state courts of Michigan and not anywhere else in the United States (unless adopted by other courts). For these reasons, it is questionable whether there is a legal duty to maximize shareholder wealth, and if so, if it is generally applicable as opposed to unique to circumstances mirroring *Dodge* that occur in Michigan. At a minimum, it is apparent that if an obligation exists to maximize wealth under *Dodge*, it is an obligation restricted by law and social responsibilities.

Others point to the corporate purpose debate of the 1930s as a basis for wealth maximization, but neither side of the debate advocates for unrestricted SWM. Pursuant to this debate, a dialogue took place between Columbia professor Adolf Berle and Harvard professor Merrick Dodd.[91] Berle initially contended that corporate powers were primarily for the benefit of stockholders. Dodd, on the other hand, contended that corporate powers were for the benefit of the commu-

87. *See* Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).
88. *Id.* at 684.
89. *Id.*
90. Stout, *supra* note 30, at 24-32.
91. *Id.* at 17.

nity (and not just stockholders). It is typically Berle's view that is conflated into SWM, because of its stockholder-centered imperatives. However, Berle does not advocate for SWM, but rather that "all powers granted to a corporation or to the management of a corporation . . . are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears."[92] These shareholder interests could at times be the maximization of wealth, but could at other times range any number of interests, both simple and complex. Berle did not advocate solely for SWM, neither restricted nor unrestricted. Moreover, ultimately, Berle conceded that the debate was settled in favor of Dodd, who argued that corporate powers were to be asserted for the entire community, and not merely for the benefit of shareholders.[93]

Other cases, such as the 1986 case of *Revlon, Inc. v. MacAndrews & Forbes Holdings*,[94] are sometimes cited to support the putative legal obligation to maximize shareholder wealth.[95] However, *Revlon* "is the exception that proves the rule."[96] In *Revlon*, the Delaware Supreme Court was faced with determining whether directors could shield themselves by considering obligations to non-shareholder constituents during a takeover of Revlon. The court determined that, generally, directors can consider non-shareholder constituents, but not in circumstances such as those of *Revlon*; when the company is going from public to private ownership, the business judgment rule does not apply and the directors have a duty to get the best price of shares for the shareholders. In other words, the general rule is that directors do not have to maximize shareholder wealth, but when a public corporation is going private, then directors in *Revlon*-like circumstances do have a limited duty to maximize shareholder wealth.[97] *Revlon* provides no basis for either restricted or unrestricted SWM outside of these very limited circumstances.

Delaware courts repeatedly hold that there is no per se duty to maximize shareholder wealth outside of the limited circumstances of *Revlon*. As the Delaware Supreme Court stated, "absent a limited set of circumstances as defined under *Revlon*, a board of directors, while always required to act in an informed manner, is not under any *per se* duty to maximize shareholder value in the short term, even in the context of a takeover."[98] This principle was reiterated in the *Air Products* case when a board refused to go private despite the fact that many of the company's shareholders wanted the board to accept a takeover bid so that the shareholders could profit from the tender.[99] In *Air Products*,

92. A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931).
93. STOUT, *supra* note 30, at 17-18.
94. Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. 1986).
95. STOUT, *supra* note 30, at 30.
96. *Id.* at 30.
97. *Id.* at 30-31.
98. Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1989).
99. *See* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011); STOUT, *supra* note 30, at 30. *See also* Steven M. Davidoff, *A Case Study: Air Products v. Airgas and the Value of Strategic Judicial Decision-Making*, 2012 COLUM. BUS. L. REV. 502 (2012).

because a board wanted the company to remain public and reasonably believed that the take-over offer was inadequately low, the board did not have a legal obligation to maximize shareholder wealth by accepting the takeover bid.[100] There is simply no basis in contemporary corporate law for a generalized legal obligation to maximize shareholder wealth, but instead there is only a restricted imperative, limited to extremely unique circumstances, to maximize shareholder wealth.[101] In fact, legislatures across the fifty states have responded to pro-shareholder sentiments by promulgating corporate constituency statutes.[102] By the early 1990s, over half of the states had created statutes that explicitly allow, and, in at least one state require,[103] that boards of directors consider the interests of non-shareholder constituencies.[104] These cases and statutes reveal that any legal imperative to seek profits is of a restricted kind: restricted to limited unique factual circumstances, restricted by obligations to society and other constituents, and restricted by overarching ethical concerns.

IV. Power Imbalances and the Profit Motive

Law and economics restrict the operation of the profit motive to those circumstances when profit making accords with law, ethical principles, and other customary societal rules. Despite these inherent theoretical restrictions upon the profit motive, contemporary business practice regularly reflects unrestricted profit motives. This section proposes that the unrestricted profit motive is often embraced due to greed, fear, pressures, and societal power imbalances. Curbing these influences will contribute to decreasing manifestations of unrestricted profit motives in contemporary business.

Power imbalances arise in a variety of societal settings, including the relationships between employees and organizations, employees and managers, and between small business owners and the general society. Among those that write on power imbalances between employees and organizations, it is almost universally accepted that employees have disproportionately less power than the organizations they work for. Among the authors that examine the disproportionate power relationship between employees and their managers, it is generally contended that employees have disproportionately less power than their managers. Similarly, small businesses often maintain disproportionately less power than do larger businesses and the general society.

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100. *Air Prods.*, 16 A.3d at 58.

101. *Id.* at 129.

102. Anant K. Sundaram & Andrew C. Inkpen, *The Corporate Objective Revisited*, 15 Org. Sci. 350, 352 (2004).

103. Margaret M. Blair, Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century 218 (1995).

104. *Id.*; Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 Notre Dame L. Rev. 173 (1997); Timothy L. Fort, *Corporate Constituency Statutes: A Dialectical Interpretation*, 15 J.L. & Com. 257 (1995).

Concerns about power imbalances between organizations, such as corporations, and their employees became paramount in the 1960s when Dow Votaw and F. A. Hayek, among others, critiqued the growing powers of corporations in society. Votaw described these powers in the following passage:

> The large corporations are the possessors of substantial amounts of this power, and properly so. Without it they could not perform the tasks society demands of them. In a free society, however, we cannot leave the subject there. Power, in either private or public hands, raises difficult questions: How much power? In whose hands? Power for what purposes? To whom are the wielders of power responsible? What assurances are there that the power will be used fairly and justly? and, Is there machinery by which the power and the method of its exercise can be made responsive to the needs of society?[105]

Votaw's inquiry into the scale and scope of corporate powers is particularly concerning when employees are treated arbitrarily by corporations. Nobel Laureate F. A. Hayek similarly expressed concerns about the growing powers of corporations and the growing dependence on the corporations by their employees. Hayek explained that "the increasing dependence on the particular corporation by which a person is employed . . . gives the corporations increasing power over the employees, a power against which there can be no other safeguard than the facility the individual has of changing his employment."[106] The power concerns of Hayek and Votaw persist in contemporary times as authors and popular press continue analyzing power concerns and imbalances.

Lawrence Mitchell discusses how employees of organizations often feel powerless to evoke positive change.[107] Mitchell recognizes that the power imbalances between employees and organizations often lead to employees maintaining silence even when potentially unethical deeds are performed by the organization.[108] For example, if there are faulty products being put into the market, employees may not speak up to counter the issue because they "do not have bargaining power equal to that of the corporations on which they rely."[109] The disproportionate power relationship may thus have negative social results that are larger than the employer-employee relationship. If, as Mitchell surmises, individuals are afraid to speak up against injustices, such as against placing faulty products on the market, then the power imbalance may result in significant harms to the consumer population and the general public.[110] Irresponsibility by organizations is, according to Mitchell, often

105. DOW VOTAW, MODERN CORPORATIONS 87 (1965). *Accord* BLAIR, *supra* note 103, at 202-34; Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1151 (1932).

106. Hayek, *supra* note 46, at 302.

107. *See generally* MITCHELL, *supra* note 9.

108. *Id.*

109. *Id.* at 60; *see also* Dodd, *supra* note 105, at 1151.

110. *See generally* MITCHELL, *supra* note 9.

reinforced by the legal infrastructure of the United States, which incentivizes corporate irresponsibility.[111]

Contemporary popular press reveals that power imbalances between organizations and their employees grow more disproportionate during times of economic recession. The *New York Times* speculates, based on Department of Labor reports, that employees are less likely to voluntarily leave their jobs during times of economic recession.[112] Similarly, *Business Week* reports that job tenure rates increased during the economic recession beginning around 2008, noting that "the median time on the job for American wage and salary workers aged twenty-five and older was 5.4 years as of the beginning of 2012. That was up from 4.7 years in 2000."[113] *Business Week* concluded that "when hiring was strong, the jobless rate was low, and it was easy for quitters to get new jobs."[114] Both the *New York Times* and *Business Week* cite fear (i.e., emotion) as the major motivator of employees not voluntarily leaving their positions.[115] Similarly, National Public Radio cites fear and greed on the parts of the bank personnel engaged in rate manipulation, as the underlying cause of the LIBOR scandal.[116] The preceding suggests that not only are there power imbalances, but such imbalances give rise to emotive bonding by employees, which in turn, lead employees to embrace unrestricted profit motives (because of the correlative fear and greed).

Although generally there are power imbalances between employees and their organizations, there are occasionally exceptions to this observation. First, some organizations are so molded around and dependent on the representation of certain high level officials that without those high level officials, the organization will suffer dramatically. The passing of Steve Jobs, Apple Inc.'s co-founder and former CEO, for example, led to a media frenzy that questioned Apple's viability for continued success without its visionary leader.[117] Cases of orga-

111. *Id.*

112. Catherine Rampell, *Afraid to Quit Work, Even If You Hate the Job*, N.Y. TIMES (Sept. 7, 2011, 4:18 PM), http://economix.blogs.nytimes.com/2011/09/07/afraid-to-quit/.

113. Peter Coy, *Afraid of Unemployment, Americans Cling to Their Jobs*, BUS. WK. (Dec. 20, 2012), http://www.businessweek.com/articles/2012-12-20/afraid-of-unemployment-americans-cling-to-their-jobs.

114. *Id.*

115. *Id. See also* Rampell, *supra* note 112.

116. Robert Smith, *Identifying the Real Victims of the LIBOR Scandal*, NAT'L PUB. RADIO (July 9, 2013), http://www.npr.org/blogs/money/2012/07/09/156484153/identifying-the-real-victims-in-the-libor-scandal.

117. Tim Wu, *Does a Company Like Apple Need a Genius Like Steve Jobs?*, NEW YORKER (Feb. 19, 2013), http://www.newyorker.com/news/news-desk/does-a-company-like-apple-need-a-genius-like-steve-jobs; Hayley Tsukayama, *Apple, a Year After Steve Jobs*, WASH. POST (Oct. 5, 2012), http://www.washingtonpost.com/business/technology/apple-a-year-after-steve-jobs/2012/10/05/60908f8c-0ee7-11e2-bb5e-492c0d30bff6_story.html; Jon Swartz, *Year After Jobs' Death, How High Can Apple Fly?*, USA TODAY (Oct. 4, 2012), http://www.usatoday.com/story/tech/2012/10/04/steve-jobs-apple-year-later/1577271/; Suzanne Choney, *A Year After His Passing, Steve Jobs Remains Larger Than Life*, NBC NEWS (Oct. 5, 2012), http://scitech.nbcnews.com/_news/2012/10/05/14242676-a-year-after-his-passing-steve-jobs-remains-larger-than-life?chromedomain=technolog-discuss.

nizational actors maintaining significant power over organizations, such as Jobs, are the outliers; in most cases, low level managers and employees along with higher level executives maintain disproportionately small amounts of power in relation to the organizations they serve. Second, the imbalance of power between each individual actor (e.g., employee) and the organization is displaced when many organizational actors act in coordination. If many organizational actors of a specific organization were to simultaneously leave the organization, it would cause disruptions, at least temporarily, to the normal flow of the organization's business. Recruitment, training efforts, and the new organizational structure would undoubtedly hamper, at least temporarily, organizational success. This circumstance does manifest through collective bargaining initiatives, such as strikes or pickets, or similar circumstances, such as the simultaneously announced defection of seventeen partners from the multi-national law firm, Patton Boggs LLP, in 2013.[118] Aside from these relatively rare circumstances, organizational actors, such as employees, generally maintain significantly less power relative to the organizations they serve.

Thomas Donaldson and Patricia Werhane discuss the unequal power relationships in contemporary business. Donaldson examines the view of the "modern radical theorists" who impose power in the "emerging class of professional corporate managers, or 'technocrats.'"[119] As Donaldson explains, "the point of the radical criticism is . . . power is used to authorize the ultimate exploitation of the powerless."[120] According to the modern radical theorist, such power imbalances are utilized in business to benefit the powerful at the expense of the weak. Patricia Werhane similarly discusses the power imbalances between employees and their supervisors. Werhane comments that "freedoms of the employer or senior manager to fire when they please lead to an inequality of relationships, because the person in the position to fire has power over the fired person and may exercise this power 'at will' over the employee."[121] Werhane is describing the power imbalance that arises between managers and employees due to employment at will. Relatedly, Werhane and Radin argue that the employment at will system should be abandoned in favor of a system that permits due process in employment.[122] Both Werhane and Donaldson identify instances of superiors, such as managers, exerting disruptive power over subordinates.

118. Paul M. Barrett, *More Trouble in Big Law: Weil Gotshal and Patton Boggs*, BUS. WK. (June 24, 2013), http://www.businessweek.com/articles/2013-06-24/more-trouble-in-big-law-weil-gotshal-and-patton-boggs; Catherine Ho, *17 Partners to Leave Patton Boggs*, WASH. POST (June 24, 2013), http://www.washingtonpost.com/business/capitalbusiness/17-partners-to-leave-patton-boggs/2013/06/24/c1f5fef0-da9e-11e2-a9f2-42ee3912ae0e_story.html.

119. THOMAS DONALDSON, CORPORATIONS & MORALITY 86 (1982).

120. *Id.*

121. PATRICIA H. WERHANE, PERSONS, RIGHTS, & CORPORATIONS 151 (1985).

122. Patricia H, Werhane & Tara Radin, *Employment at Will and Due Process*, *in* ETHICAL THEORY & BUSINESS, *supra* note 45, at 268.

Mitchell argues that the laws surrounding boards of directors should be modified so as to free them from stockholder pressures, and, if such freedom were permitted, directors would not be as likely to engage in unrestricted SWM.[123] For example, the primary powers of stockholders currently include the election and removal of directors; if this power were eliminated and directors were given longer terms to serve (creating a perpetuating board), according to Mitchell, these changes would allow directors to be more impartial.[124] Mitchell's solution of shifting more power to the board, however, may give rise to the potential for greater corruption and the unfettered utilization of unrestricted SWM by directors.

At times, directors engage in unrestricted SWM to benefit select stockholders, such as CEOs and high level executives. Displaying such bias is generally not due to stockholder pressures, but rather is due to a desire to reward executives for their work, or, at times, to line their own pockets. Consider, for example, the options backdating scandal. This scandal was uncovered by the work of Professor Erik Lie, who conducted a study of option awards to CEOs from 1992 through 2002.[125] His study concludes that, "Unless executives possess an extraordinary ability to forecast the future marketwide movements that drive these predicted returns, the results suggest that at least some of the awards are timed retroactively."[126] According to Martin, unscheduled options (options not awarded on a regular schedule), which are usually meant to award a CEO for some accomplishment, are typically awarded as follows:

> [unscheduled options] are typically granted at market price on the day of the award. That's because if options were awarded below the market price, they would be deemed to contain a capital gain and the CEO would face an immediate tax bill. If, alternatively, they were granted above market price, the stock price would have to rise just to make them worth anything at all. So the norm was, and remains, to issue stock options at the market price on the day the award is made.[127]

In order to avoid the immediate capital gains, boards were backdating options to the most recent point in time when the stock prices were lowest, and entering into the corporate records that the options were granted on an earlier day, when stocks were at a low. Lie's study uncovered that boards were backdating options which, although not technically illegal, resulted in fraudulent reporting and the uncovering of "384 acts of securities and accounting fraud."[128] It was subsequently reported that approximately "29 percent of American businesses that made stock option grants to executives from 1995 to 2006 had manipu-

123. MITCHELL, *supra* note 9, at 118–19.

124. *Id.*

125. Erik Lie, *On the Timing of CEO Stock Option Awards*, 51 MGMT. SCI. 802, 802–12 (2005).

126. *Id.* at 802; *see also* MARTIN, *supra* note 26, at 88–94.

127. MARTIN, *supra* note 26, at 88–89.

128. *Id.* at 92.

lated them. That's two thousand companies engaging in suspect behavior."[129] It may be due to such behaviors that Hayek rejects the notion that corporations should be run in the interest of management and directors, claiming[130] that it is "a danger to be guarded against."[131] Scandals not motivated by stockholder pressures, such as this options backdating saga, provide a valid reason to reject the notion of creating self-perpetuating boards.[132]

Small businesses are also placed in a disproportionate power relationship to larger businesses in the general societal context. Small businesses are born and die at exponential rates. According to the U.S. Small Business Administration ("SBA"), in 2010 there were 27.9 million small businesses (independent businesses with less than 500 employees or no employees) and 18,500 businesses with 500 or more employees.[133] According to the SBA, "About 10–12 percent of firms with employees open each year and about 10–12 percent close."[134] For example, from March 2008 through March 2009, there were 518,500 births of employee firms and 680,716 deaths.[135] In this time period, an approximate average of 1,421 employee firms were born per day and an approximate average of 1,865 employee firms died per day.[136] The vast majority of the businesses that are born and die each day and year are small businesses. Small businesses are particularly susceptible to broader scale economic changes because they frequently lack the resources to maintain profitability during times of economic crisis. The fear of lost income, not making enough money to sustain operations, or even the fear of going out of business leads some small businesses to engage in unrestricted profit motives to maintain profitability, even though doing so may harm others and ultimately themselves. Curbing power imbalances within organizations and societies more generally may reduce the likelihood that individuals and companies will embrace in unrestricted profit motives by partially relieving the pressures that regularly motivate these illegal and unethical acts.

Conclusion

The profit motive is frequently misused in an unrestricted manner, resulting in scandals and far reaching economic repercussions that have deleterious effects upon business and society. The unrestricted profit motive is neither substantiated in economic thought nor legal

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129. *Id.*

130. Hayek, *supra* note 46, at 302–03.

131. *Id.* at 302.

132. Mitchell, *supra* note 9, at 119 (noting that director self-dealing is a likely criticism of self-perpetuating boards, but not considering these types of questionable transactions with upper management).

133. U.S. Small Bus. Admin., Office of Advocacy, Frequently Asked Questions About Small Business, September 2012, at 1 (2012), http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf.

134. *Id.* at 3 (providing the birth and death statistics for select years between 1999 and 2009).

135. *Id.*

136. *Id.*

theory, both of which place fundamental restrictions on profit-seeking imperatives. The proliferation of unrestricted profit motives in contemporary business settings may be due, in part, to the power imbalances persisting throughout society and business, along with the correlative fear and greed spurring from these imbalanced contexts. This essay aims to remind the reader that there are limits to the permissible seeking and maximizing of profits. Although restricted profit motivations are fundamental underpinning facets of business and capitalism, unrestricted profit motives undermine the central legal and economic precepts of business and society.