WHAT WE TALK ABOUT WHEN WE TALK ABOUT SHAREHOLDER WEALTH MAXIMIZATION

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Professor Stefan Padfield's *The Role of Corporate Personality Theory in Opting Out of Shareholder Wealth Maximization* proposes a novel approach to the ongoing shareholder wealth maximization debate.[1] Specifically, Padfield posits that an exploration of corporate personality theory might provide some clarity on the ability of for-profit corporations to privately order around the shareholder wealth maximization norm.[2] Ultimately, Padfield argues that certain corporate personality theories support private ordering around the shareholder wealth maximization norm while others do not.[3] Because of the varying levels of support, Padfield argues that a participant in the shareholder wealth maximization debate would be wise to incorporate corporate personality theory into their arguments, as it provides ammunition for supporters of both sides of the argument.[4]

I agree with Padfield's thesis that an analysis of corporate personality theory can prove helpful for anyone engaging in a debate regarding the ability of for-profit corporations to privately opt out of any shareholder wealth maximization norm. However, I disagree with Padfield's implication that such an investigation will provide any clarity on the debate. Thus, my criticism is not about Padfield's thesis. Rather, I take issue with an assumption implied in his piece—that we have defined

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[1] Stefan J. Padfield, *The Role of Corporate Personality Theory in Opting Out of Shareholder Wealth Maximization*, 19 TENN. J. BUS. L. 415 (2017).

[2] *Id.*

[3] *Id.* at 450–53.

[4] *Id.* at 419–20 ("Advocates on either side of the debate risk ceding precious ground to their opponents if they ignore these theories in the course of making their arguments.").

the metes and bounds of the shareholder wealth maximization norm in a manner sufficient to have a meaningful debate. This assumption is not peculiar to Padfield, as many scholars debate the existence of the norm without properly defining what the norm requires. Thus, my primary complaint concerning Padfield's piece is that before we can properly weigh the value of corporate personality theory in debating the ability of for-profit corporations to privately opt out of the shareholder wealth maximization norm, we need to have a working definition of precisely what the norm requires.

A. The Limits of the Shareholder Wealth Maximization Debate

The shareholder wealth maximization norm has captured the attention of business law scholars for years. Given this attention, it's reasonable to wonder how we still find ourselves lacking consensus. Scholars as prominent as Professor Lynn Stout[5] and Professor Stephen Bainbridge[6] have wrestled with the issue and come out on opposite sides. Professor Joan MacLeod Heminway nicely encapsulates the state of the debate when she notes that "[c]ommentators from the academy (law and business) and practice (lawyers and judges) have taken various views on [the shareholder wealth maximization] norm—ranging from characterizing the norm as nonexistent or oversimplified to maintaining it as simple fact."[7]

Inspired by this failure to reach consensus, Heminway reframes the debate in *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, a piece on which Padfield relies heavily.[8] In Heminway's article, as the title suggests, she examines the shareholder

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[5] Lynn Stout, *Corporations Don't Have to Maximize Profits*, N.Y. TIMES (Apr. 16, 2015), https://www.nytimes.com/roomfordebate/2015/04/16/what-are-corporations-obligations-to-shareholders/corporations-dont-have-to-maximize-profits.

[6] Stephen Bainbridge, *A Duty to Shareholder Value*, N.Y. TIMES (Apr. 16, 2015), https://www.nytimes.com/roomfordebate/2015/04/16/what-are-corporations-obligations-to-shareholders/a-duty-to-shareholder-value.

[7] Joan MacLeod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 WASH. & LEE L. REV. 939, 940 (2017).

[8] *Id.*

wealth maximization norm from the perspective of state corporate statutes, relevant judicial decisions, and corporate governing documents. Implied in the thesis of the piece is a critique of the shareholder wealth maximization debate.[9] Because "much of the debate over a shareholder wealth maximization norm focuses on theory and policy," Delaware law, or from the perspective of a "broad-based, state-oriented doctrinal viewpoint," Heminway proffers that the conversation would benefit from a focus on "firm-level corporate governance—the point at which applicable corporate governance law theory, policy, and doctrine intersect with a firm's organic documents."[10] With this focus, Heminway engages in an exhaustive investigation, ultimately concluding that neither decisional nor statutory law definitively supports the existence of the shareholder wealth maximization norm.[11] However, she is quick to point out that the lack of statutory or decisional law does not mean that corporations may ignore the norm.[12]

Inspired by Heminway's call to clarify and examine the statutory and decisional sources of the shareholder wealth maximization norm, I would like to ask an even more fundamental question: what, precisely, do we mean when we say shareholder wealth maximization? Rather than asking whether directors are restricted by the shareholder wealth maximization norm, I question if we even know what such a norm would require. Ultimately, I argue that the answer is less definite than one would hope. And this indeterminacy suggests that the argument over the existence of a shareholder wealth maximization norm is a bit beside the point if we cannot define what it requires. And more to the point, Padfield's call to examine corporate personality theory to determine the ability to

[9] *See id.* at 939–44.

[10] *Id.* at 939–40, 942.

[11] *Id.* at 955 ("[I]t would be over-claiming to assert that U.S. state decisional law—any more than U.S. state statutory law—articulates a clear, legally enforceable shareholder wealth maximization norm as a matter of substantive corporate doctrine.").

[12] To support this, Heminway cites Professor Haskell Murray, who stated "the persistent common perception seems to be that directorial duties require placing shareholder wealth at the forefront." J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 17–18 (2012).

privately opt out of the norm is similarly premature until we can settle on a definition.

B. By the Way, None of This Matters

Before examining the lack of definitional certainty concerning the shareholder wealth maximization norm, I'll briefly note why it does not really matter if it exists or what it might require. This is because the business judgment rule renders the existence and content of the shareholder wealth maximization norm virtually meaningless. Although the precise contours of the business judgment rule may be up to debate,[13] one might confidently say that it "protects the [business] decisions of corporate leaders from subsequent challenge by shareholders or stakeholders who may ultimately disagree."[14] The justification is that "courts are ill equipped to engage in *post hoc* substantive review of business decisions."[15] Absent evidence of "fraud, bad faith, or self-dealing," a "presumption [exists that the Board] exercised sound business judgment 'in the honest belief that the action taken was in the best interest of the company.'"[16] Thus, if a board member of a for-profit corporation is haunted by the specter of the shareholder wealth maximization norm, the director need only to reframe the action in question with a view toward the bottom line.[17] In such a case, the business judgment rule will insulate the director from any shareholder challenge.[18]

For example, imagine that a board member is considering dedicating some corporate profits to help the homeless population in the corporate headquarters' hometown. Spending corporate profits in such a manner might run afoul of the shareholder wealth maximization norm. After all, that money could hire more employees, purchase advertise-

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13 *See* Padfield, *supra* note 1, at 424–25.

14 TODD J. CLARK AND ANDRÉ DOUGLAS POND CUMMINGS, CORPORATE JUSTICE 13 (Carolina Academic Press 2016).

15 *Id.* at 60.

16 Grobow v. Perot, 539 A.2d 180, 187 (Del. 1988).

17 *See id.*

18 *See id.*

ments, or more apropos, fund a shareholder dividend. But the director can cleanse this decision of any impropriety if the director can simply provide a colorable business purpose. If the director were to, for example, justify the decision by highlighting the positive press the corporation would receive, the decision would not offend the shareholder wealth maximization norm. After all, the director made the decision to improve the public opinion of the corporation, which might result in a concomitant rise in shareholder value. The justification does not change the result: a for-profit corporation spends money on the homeless and the expenditure does not offend the shareholder wealth maximization norm.

The ease with which a board can avoid the shareholder wealth maximization norm (however defined), robs the debate of much urgency.[19] However, the next section will argue that even if the business judgment rule allows a board to easily avoid the constraints of the shareholder wealth maximization norm, the norm itself remains ill-defined to such a degree that it provides little, if any, guidance for either directors or courts.

C. Defining Shareholder, Wealth, and Maximization

This section will argue that each of the words in the phrase "shareholder wealth maximization" lacks sufficient definition to provide any reasonable guidance for those debating the existence of a norm, much less to the directors expected to limit their activities in accordance with the norm.

Although it might appear to be little more than definitional gamesmanship, "shareholder" does not have a definite meaning in the context of the shareholder wealth maximization norm. Unless one refers to a single shareholder, there is little hope in identifying a solitary interest of a group as disparate as any given collection of shareholders. To make

[19] Padfield, *supra* note 1, at 424, 437. The business judgment rule is why Padfield can confidently state the following two seemingly opposing statements: (i) no reasonable attorney "would risk money that mattered to them retrying the *Dodge* case on behalf of Ford" and (ii) it is "relatively easy for boards to avoid accountability for ignoring any duty to maximize shareholder value by simply appending a colorable pro-shareholder-value story to any action taken."

the point painfully clear, one shareholder's interests may not be in line with another shareholder's. Shareholders are nothing more than "human beings who happen to own shares, and human beings have different interests and different values."[20] For example, one shareholder may place a higher value on the corporation's community standing than another, while another shareholder might place a higher value on the well-being of the corporation's employees. Although upon first blush it may seem facile, it bears stating that people are different from one another. Or to put it in more economic terms, "shareholders are heterogeneous and do not have a unitary maximizing incentive."[21] It is therefore a bit disingenuous to speak of "shareholders" as having a singular set of desired ends. Or in the words of Professor Stout, "[s]hareholder primacy looks at the world from the perspective of the Platonic shareholder who only cares about one company's share price, at one moment in time. Yet no such Platonic entity exists."[22]

Similar to "shareholder," the word "wealth" is deceptive in that it suggests a clear and finite meaning. But in this context, wealth can have a number of meanings. While financial or pecuniary wealth is the most obvious, a shareholder might find great personal satisfaction in a corporation's provision of high-paying jobs to a particular community. On the other hand, a shareholder might think that a corporation's practice of sourcing products locally as a measure of wealth. As Heminway notes, "shareholder wealth maximization theory focuses almost exclusively on financial wealth (i.e., pecuniary gain or profit), as opposed to other measures of satisfaction or benefit derived by shareholders from their equity ownership."[23]

Some might find it strange that "wealth" would refer to anything other than financial or pecuniary gain. But consider the early sharehold-

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[20] Lynn Stout, *The Shareholder Value Myth*, EUROPEAN FINANCIAL REVIEW, Apr.-May 2013.

[21] William W. Bratton & Simone M. Sepe, *Shareholder Power and Incomplete Markets*, 40 (Sept. 28, 2017) (unpublished manuscript) (on file with author, used by permission).

[22] Stout, *supra* note 20.

[23] Heminway, *supra* note 7, at 943.

ers of Ben & Jerry's before the company was sold to multinational giant Unilever.[24] In its early years, rather than turning to more traditional venture capital financing to raise funds, the company instead sold shares to Vermont residents to emphasize and ensure local ownership.[25] These shareholders were part owners of "a social enterprise icon" that was "fair to its employees, easy on the environment, and kind to its cows."[26] It is reasonable to assume such shareholders valued the company's ethical practices highly, perhaps even more highly than financial wealth. This would represent an alternate measure of shareholder value–something other than the "pecuniary gain or profit" that Heminway references.[27] If the shareholders of such a company were faced with a lucrative acquisition offer, they might vote against the transaction if the buyer were not dedicated to the company's responsible business practices.[28] This proves that the shareholder heterogeneity discussed above extends to what a particular shareholder might or might not consider "wealth."

Finally, the word "maximization" shares the lack of definitional certainty that plagues both "shareholder" and "wealth." As noted above, the heterogeneity of shareholders makes it very difficult to pin down a

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[24]Anthony Page & Robert A. Katz, *The Truth About Ben & Jerry's*, STANFORD SOC. INNOVATION REVIEW (Fall 2012), ssir.org/articles/entry/the_truth_about_ben_and_jerrys (stating that at the time, Unilever was "the world's third-largest consumer goods company, described by one commentator as 'a giant multinational clearly focused on the financial bottom line.'").

[25] Amy Cortese, *Seeking Capital, Some Companies Turn to 'Do-It-Yourself I.P.O.'s'*, N.Y. TIMES (July 31, 2013) ("[I]n 1984, two young entrepreneurs raised a first round of capital for their fledgling ice cream company in an intrastate offering. With the slogan 'Get a scoop of the action,' Ben & Jerry's raised $750,000 from 1,800 ice-cream-loving Vermonters, allowing them to build a new plant and expand.").

[26] Page & Katz, *supra* note 24.

[27] Heminway, *supra* note 7, at 943.

[28] Page & Katz, *supra* note 24 (noting that the Ben & Jerry's shareholders were under no legal compulsion to accept a lucrative offer to purchase their shares and that "[a]s shareholders, they were entitled to enjoy the benefits of selfish ownership, which ironically in this context could have been exercised altruistically to maintain the company's social mission.").

singular goal.[29] Does maximization refer to quarterly earnings, or does maximization require a more long-term view? When you have shareholders that hold stock for as little as a few hours, is it possible to maximize their interests while simultaneously maximizing the interests of shareholders planning to hold the stock for a longer period of time? As Professor Bratton points out, "[t]he shareholder disaggregates among short-term types, long-term types, information traders, and liquidity traders. There is accordingly no basis for presuming that shareholder incentives are aligned with maximization of fundamental value."[30]

Given this lack of definition, it is little wonder that corporate scholars have failed to find consensus. And this is precisely the reason why I am not convinced that Padfield's suggestion will provide any clarity in the debate. If a particular corporate personality theory supports the private ordering out of the shareholder wealth maximization norm, we have not accomplished anything if we do not have a shared understanding of what "shareholder wealth maximization" requires.

I do, however, agree with Padfield's ultimate thesis. A clear understanding of the corporate personality theories will provide a toehold from which to launch arguments for or against the ability to opt out of the shareholder wealth maximization norm. But because we have not yet agreed upon a shared definition of the term "shareholder wealth maximization," I do not think an exploration of corporate personality theory will bring us closer to determining the ultimate issue (i.e., whether a statement in a charter or the bylaws might permit opting out of the norm). It certainly provides arguments for why or why not the private ordering should affect the applicability of the norm, but without settling on a definition of what, precisely, the norm requires, I fear that the endeavor will not prove very illuminating.

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29 *See* Bratton & Sepe, *supra* note 21.

30 *Id.*