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# Justice Failure: Efficiency and Equality in Business Ethics

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**Abstract** This paper offers the concept of "justice failure," as a counterpart to the familiar idea of market failure, in order to better understand managers' ethical obligations. This paper takes the "market failures approach" (MFA) to business ethics as its point of departure. The success of the MFA, I argue, lies in its close proximity with economic theory, particularly in the idea that, within a larger scheme of social cooperation, markets ought to pursue efficiency and leave the pursuit of equality to the welfare state. As a result, the core ethical responsibility of business actors is to avoid profiting off of market failure. After reviewing this approach I challenge its emphasis on efficiency. I argue that just as we note the suboptimal efficiency of actual markets (market failure), we should also take seriously the suboptimal equality of actual welfare states (what I call "justice failure"). Taking this idea seriously results in a whole other set of ethical responsibilities for businesses to take into account; in addition to market imperfections and regulatory lacunae, managers should also avoid profiting from, and exacerbating, structural inequalities and injustices. I offer an outline of the kinds of injustices and inequalities that would have bearing on business ethics, and the kinds of ethical responsibilities that this approach suggests that business actors should take into account.

**Keywords** Market failures · Social justice · Efficiency and Equality · Corporate social responsibility · Affirmative action · Corporate political activities

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Much has been made about the non-economic roles that business corporations play. This has resulted in a number of texts dedicated to reconceiving the ethical dimensions of business in political terms, and the development of concepts like "political corporate social responsibility" (Scherer and Palazzo 2007; Neron 2010; Whelan 2012; Neron 2013), "a political theory of the corporation" (Ciepley 2013), "the political authority of corporate executives" (McMahon 2013), and so on. While this is a generally positive trend, there is an extent to which the pendulum has swung too far back. Theorizing about the political nature and obligations of corporate actors has been marked by relative inattention to the economic context in which businesses operate, and the important economic function that the business corporation serves. While the economic nature of the corporation was once assumed and foregrounded, leaving the ethical and moral responsibilities to be shoehorned in, the new trend in business ethics appears to highlight the corporation's explicitly social function, marginalizing the important effects that economic and market forces still play on the firm.

This trend is troubling because it undermines the more robust ethical standards that we require, and which the political conception of the corporation is meant to articulate. In order for a normative conception of the corporation to have any theoretical coherence or practical uptake, it must take seriously context in which corporate actors operate. Without taking this into account, it is likely that the analysis will be specious and wrongheaded on its face. To use a hackneyed analogy, one can note the socializing and educational role that organized sports like football perform in society. Yet if one were to suggest a course of action for a team or coach that only emphasized this socializing function, while underplaying the competitive or physical nature of the sport, one would be in error. Let us say one suggests we ought to avoid actions that might cause pain to others, because it is clearly a form of anti-social behavior; therefore, one concludes, one should not tackle opponents. Not only would such a suggestion have no chance of being pursued or taken seriously, but it also misses the most important and interesting fact about something like football: its socializing effects are not in contradiction with its competitiveness or physicality, but are consequences of it.

Similarly, if we want to understand the ethical and political nature of the corporation, we must think of these themes in the context of, not in contrast to, the corporation's economic function and framework. If we want answers to a questions like "what ought a manager do in a given situation?" we need to have at least plausible answers for questions like "what is the ethical basis of the market?" "what is the ethical basis of the managerial role?" and "how do markets and managers cohere and conflict with our wider normative commitments?" Without such a more general grounding, questions regarding the morality of business decisions and actors will be naïve, untenable, and/or undesirable.

In this paper, I offer an approach for doing this. Building off the "market failures approach" to business ethics (MFA), I argue that understanding the ethical and political nature of the corporation and corporate managers requires considering the ways in which we expect larger statutory and market institutions to perform, and the ways in which they fail to do so. To this end, I offer the concept of "justice failure." As we will see in more detail below, "market failure" implicitly relies on an idealized conception of the market; the "failure" of the market refers to the to the normative standards by which we would understand the market to be functioning ideally, and uses them as a way of noting when markets are performing imperfectly. To go back to our football analogy: we can note that the aim of football is to showcase athletic excellence, instill discipline among players, encourage strategic elegance, or some combination thereof. When the rules of the game create competition that goes against these values (by encouraging steroid use, employment of boring strategies, or excessive long-term head health problems among players) we can say the game is not living up to the standards that justify it. In the case of markets, that standard is efficiency; a "market failure" is when the market fails to achieve possible efficiencies.

Yet the concept of market failure assumes that other background institutions are capable of effectively dealing with other social values like justice or equality. "Justice failure," therefore, refers to instances when the state fails to achieve possible steps toward more egalitarian and just outcomes. Together, the ideas of market failure and justice failure point toward a particular view of managerial ethical responsibility: to avoid profiting off the imperfections of market and state institutions that create inefficiencies and injustices, and, more idealistically, to help redress these problems.[1] I contend that if one adopts the MFA, one cannot do so without taking on some notion of justice failures as well.

In the first section of this paper, I offer overviews for some economic concepts that are crucial for understanding the MFA and the economic justification for institutional intervention into the market. In section two, I explain the MFA in more detail. The MFA was born out of the impulse to explain why pursuing profit for a corporation was distinct from naked self-interest, and why pursuing profit through competition has an ethical basis. The novely of the MFA approach is using its close proximity to economic theory in order to derive a set of normative prescriptions that are sensitive practically to our non-ideal world, yet are still capable of producing an aspiration vision of how the business world could and should be organized. I argue, however, that the MFA's project of deriving business ethics solely from the value of efficiency is not consistent with the economic theories it relies upon; some value that stands in for a notion of equality is required. I therefore supplement this approach with the concept of justice failure. "Justice Failure," I argue, is a concept that fits with the corporation's economic context, but capable of taking seriously those political and ethical dimensions of the business corporation that are distinct from efficiency promotion.

## Ethical Bases and Limits of Markets: Four Key Concepts

In this section, I give some background for four economic concepts that are necessary for understanding the MFA: (1) market failure; (2) the first and second fundamental theorems of welfare economics; (3) transaction costs; and (4) the theory of second best.

### Market Failure

The modern formulation of "market failure" was given by Pigou. For Pigou (Pigou 1932, I.III.1), the beauty of the market was that it could provide incentives for individuals that match the social effect of their action. Often this idea gets captured in the idea that markets internalize externalities. Pigou argued that there are two ways of

[1] In this way, the approach to business ethics I am offering is similar to Neron's (2015a, b) idea that businesses are best understood as subjects of non-ideal theorizing, although I use a different language and come to slightly different conclusions.

understanding the way in which an action does or does not contribute to the national dividend: in terms of its marginal social net product and its marginal private net product. The former is the increase in physical things brought about by the marginal increase of resources that accrues to no person or group in particular; the latter is the increase in such goods brought about by a marginal increase in resources that accrues specifically to the actor that brought about the marginal increase in resources. When the market is working well, these are equal: an individual gets the same return or pays the same cost in proportion to the increase or decrease in the total stock of goods she has caused. When this happens, individual actors get rewarded personally in proportion to their contribution to social welfare. This fits in with Smith's idea of the invisible hand: when these marginal contributions are equal, then the individual pursuit of self-interest leads people to unintentionally contribute to the collective good.

However, Pigou dedicates the second part of his *Economics of Welfare* to detailing and analyzing the various reasons why market do not equalizing these two concepts. These all suggest good reasons for public policy to interfere with the market: "when there is a divergence between these two sorts of marginal net products, self-interest will not, therefore, tend to make the national dividend a maximum; and, consequently, certain specific acts of interference with normal economic processes may be expected, not to diminish, but to increase the dividend" (Pigou 1932, II.IX.1). What we call "market failure" is the result when these two concepts do not align: when the marginal social net product exceeds the private (in which case there is underproduction of goods and frustration of demand) or when the marginal private net products exceeds the social (in which case there is overproduction). The former is often defined in terms of underinvestment or missing markets, when there is no incentive for an actor to do something that would add to the social store of goods (public goods like roads and other infrastructure are a classic examples). The latter is defined in terms of negative externalities: people are incentivized to engage in actions that are to the detriment of society (pollution is the most intuitive example). These asymmetries create what Pigou (1932, II.XX.4) referred to as a "prima facie" case for government intervention: subsidies to incentivize actions that would otherwise cause a relative decrease in private net product, and issue taxes on action that would otherwise cause a relative decrease in social net product.

The result is that the "prima facie" case for governmental intervention is made on precisely the same grounds that the case for the market is made—efficiency. Taxing the production of goods that create externalities, and publicly subsidizing or producing goods that will be under-produced by markets, is justified in terms of the efficiency such actions produce, precisely the grounds upon which the market's "internalizing externalities" function is defended. Referring to something as a market failure is to claim that the incentives offered in some particular market are producing incentives that undermine (or fail to maximize) market efficiency.

## The First and Second Fundamental Theorems of Welfare Economics

This is not to say that this approach restricts state action to efficiency promotion. Welfare economics was later developed in the 20th century to show how a commitment to efficiency need not, in principle, mean an apathetic stance toward equality. The first and second fundamental theorems of welfare economics showed, respectively, that given certain assumptions (1) a competitive pricing system of private exchange would produce optimal allocation across all markets—or, more technically put, that all markets would reach an optimal equilibrium (Arrow and Debreu 1954, p. 273) and (2) given that there are multiple possible optimal allocations, "every Pareto-optimal allocation of resources is an equilibrium for a perfectly competitive economy, provided a redistribution of initial endowments and property rights is permitted" (Blaug 2007, p. 185)—any particularly preferred optimal allocation could be reached by altering initial endowments through tax-and-transfer schemes.

What all of this means is that a market can produce an efficient allocation of goods based on some particular initial holdings of market participants, and that an efficient *and egalitarian* outcome can be produced in the market by altering the initial holdings of market participants through governmental taxation. Combined with the account given above regarding the governmental role in efficiency promotion, the theory of welfare economics should be seen as promoting three main roles of the government: (1) subsidizing the production of goods that would otherwise be under-produced, (2) taxing the production of goods that would otherwise be overproduced (controlling externalities), and (3) achieving the egalitarian and/or justice-oriented values of a society by engaging in pre-market tax-and-transfer programs.

## Transaction Costs

Coase is often thought of as Pigou's most vociferous critic. This is because of his famous article "The Problem of Social Cost" (1960), which has been interpreted (Stigler 1966) to imply a disbelief in the existence of externalities at all. While I believe this view is not entirely accurate (for views similar to my own see Medema 1994; McCloskey 1998; Van Horn and Klaes 2011), this is not important for our purposes here. What is important is Coase's other main contribution to economic theory, his argument in "The Nature of the Firm" (1937). The question Coase posed in this article was why, given the efficiency-enhancing qualities of the market's competitive pricing mechanisms, the firm exists at all. The answer that Coase offered was that using the price mechanism entails various costs, costs that can be prohibitively high for particular classes of transactions. This insight was developed into a full-blown theory of transaction costs by Oliver Williamson. The competitive pricing mechanism of markets, Williamson (1985) argued, can be used opportunistically by its participants. This, in turn, reduces the possibility of long-term knowledge development and learning, leading to the underdevelopment of goods that require such investments. For these transactions, the best bet is not to double down on the market, but to suspend market competition and instead institute a more straightforward and cooperative approach to economic coordination. Firms and corporations are precisely such a cooperative approach. Therefore, firms exist to overcome transaction costs; by implementing hierarchical structures and superseding the price mechanisms, firms allow transactions to occur that otherwise would not otherwise be realized because of market failure.

What we have from the foregoing is an account of how markets produce efficient results, how markets come with their own costs that necessitate the creation of firms and corporations to better coordinate particular activities, and how states step into re-orient the incentives of firms to increase or reduce production of goods they would otherwise under or overproduce, as well as promote justice and equality. Yet what we also have is a strong suspicion of theoretical constructs resting on unrealistic assumptions. By focusing on the problem of transaction costs, Coase was taking welfare economics to task for being overly abstract in its theoretical constructs; the fact of transaction costs was assumed away in these models, making the existence of firms and externalities difficult to understand. By explaining the firm in terms of transaction costs, Coase gestured toward a more general insight; what might work or make sense given certain abstract theoretical assumptions, will have to be altered once we turn our sights toward the real world, where such assumptions do not hold.

### The Theory of Second Best

All of this can be seen as fitting in with what has come to be known as the theory of second best. It is widely recognized that while markets in theory can produce all the great results we might expect from them, in practice the assumptions upon which those theoretical models rely are absent. The general response to this by defenders of free markets is to say that while the assumptions do not hold, what we ought to do is approximate those assumptions to the greatest degree possible. What the theory of second best shows, however, is that "if one of the Paretian optimum conditions cannot be fulfilled a second best optimum situation is achieved only by departing from all other optimum conditions" (Lipsey and Lancaster 1956, p. 12); in the real world where competitive markets do not produce all of the hypothetical efficiency results because the assumed conditions do not exist then he next best alternative will *not* be to most closely approximate the rest of those conditions. If the completely open and competitive market of economics textbooks does not exist, the best bet is not to make the market as competitive as possible; instead, we ought to introduce other institutions that address the absence of those assumptions. Despite being armed with elegant models of market efficiency, the correct response to market failure is not an unabashed "more markets," but an experimental approach to addressing these practical problems with a variety of institutional solutions: sometimes markets, sometimes legally constituted firms, sometimes strong market regulation and taxation, and sometimes the straightforward public production of goods.

## Market Failures and Business Ethics

The market failures approach (MFA) to business ethics attempts to articulate both the ethical underpinnings of markets and business, as well as a prescriptive program for business practice and economic institutions, with a firm grounding in the economic theories reviewed above. Given these, the MFA contends that such understandings actually lead to a view of business ethics that advocates significant constraint and restraint in the strategies through which business actors can pursue profit.

To begin, the MFA puts business ethics in its rightful context: "one cannot do business ethics without some appreciation of what justifies the system of private enterprise….we need to understand why corporations should be entitled to pursue profits, in order to understand the responsibilities of managers" (Heath 2004, p. 73).[2] Just as one cannot understand why it is not a moral problem for a football player to tackle an opposing player on the field (a behavior we generally frown upon in polite society) without understanding the game of football, to understand the role of profit and self-interest in business ethics, one must first understand the business manager's context, the imperatives this context creates, and whether or not there is a justification for this environment. For the business-ethical

[2] The articles I cite for Heath's articulation of the "Market Failures Approach" have now been collected and updated in a book (Heath 2014).

subject, this involves understanding three institutional features of the economy—the imperatives of the market, the nature of the business firm, and how such things are structured by the legal and political system—and leads to four prescriptive orientations for business decision-makers: (1) a competitive orientation in the market, (2) a cooperative orientation within the firm, (3) a willingness to respect legal constraint, and (4) a willingness to restrain oneself from unethical behavior. One might think that (4) in the above list is the main domain of business ethics. What the MFA does, however, is insist that (4) is not exhaustive of business ethics, and that in fact the content of ethical restraint can only be made sense of once the first three classes of behavior are understood.

### Competitiveness in the Market

What reasons might be given to endorse a competitive market? While there are perhaps a number of normative arguments in defense of competitive markets, the MFA follows the tradition of welfare economics and favors the Paretian argument over a Lockean[3] one or, if one prefers, the welfarist argument over the libertarian one. The Paretian defense of the market endorsed by the MFA is based on the efficiency-maximizing nature of competition. When suppliers compete with suppliers to sell to purchasers, and when purchasers compete with other purchasers to buy from suppliers, the prices at which goods trade will adjust to reflect relative supply and demand for a particular good. As prices change to reflect supply and demand, the result is a more efficient allocation of resources: "society has succeeded in minimizing the overall amount of waste in the economy….fewer resources will have been spent producing goods that no one wants, at the expense of goods that people do want" (Heath 2004, p. 75). Thus, the market is preferred because of its welfare-enhancing properties. By discouraging waste and encouraging the direction of resources toward their most preferred social use, the efficiencies brought about by the market allow for a greater degree of preference-satisfaction and human welfare.

Profit-maximization, it follows, is to be seen as an advantageous thing because it encourages earnest competition among suppliers and consumers. In order to maximize profits, firms will attempt to sell to the highest number of potential customers by lowering their prices, or by altering the goods they are producing to better meet demand. Either way, the result is a more efficient use of resources, and the customers are the beneficiaries. Much like Adam Smith's invisible hand, the price mechanism allows the drive to maximize profit to contribute to the public good. Profit-maximizing firms are therefore a good thing given the context of a competitive market economy, not because they are extensions of natural liberty, but because they encourage the use of scarce resources toward the benefit of the most people:

> Thus, if we ask what the obligations of managers are, the answer can be provided quite directly. The function of the market economy is to produce the most efficient use of our productive resources possible. This can be done, roughly speaking, by achieving the price level at which all markets clear. The role of the firm in that economy is to compete with other suppliers and purchasers for profits in order to drive prices to that level. Thus managers are obliged to do what is necessary in order for the firm to maximize profits in this way. Profits show that the balance of "needs satisfied" to "resources consumed" is positive, while losses show that the resources would have been put to better use elsewhere. (Heath 2004, p. 77)

This is a straightforward application of the first fundament theorem of welfare economics reviewed above. Competitive markets help lead to efficient allocations of goods; therefore, market competition, in and of itself, is not a bad thing and can lead to positive results for all, given the correct institutional context. This last qualification, however, is what leads to the other three features of the MFA since, as we know, perfectly functioning markets are creatures of abstract theories and not the real world. Thus, while the first fundamental theorem helps us understand why competition and profit-maximization might be ethical activities, it cannot be the whole of ethical activity; different normative orientation and activities are required because of second best considerations.

### Cooperativeness in the Firm

The market in which firms operate is one of the competitions that encourage markets to clear, and thus generally serves to promote welfare. But as we know, markets may fail to optimally promote welfare in a number of ways. As we have seen in the discussion of Coase and Williamson above, the dominance of firms and corporations in market economies (relative to private contractors) suggests just how many transactions require the supersession of the price mechanism in favor of more overt forms of cooperation. As we have seen, the MFA suggests that in order to understand the nature of business ethics, we must first understand the normative basis of the market and its emphasis on profit. Similarly, we must also understand what the role of the

[3] I use the term advisedly. The libertarian argument is Lockean only in the sense that Nozick and others have interpreted Locke as a libertarian. There is much in Locke's *Second Treatise* that does not square with a libertarian approach to political economy.

firm is in the market, and how actors within the corporation fit within this story.

What the MFA takes from the Coase-Williamson story about transaction costs is that firms, and their managers, contribute to efficiency in two related but distinct ways. In the first instance they do so indirectly, by participating in organizations whose profit-maximizing behavior in a competitive market contributes to the efficient use of resources. However, the second way they contribute to efficiency is by complementing the market with cooperatively organized production, superseding the price mechanism within the corporation, in order to create goods that would not otherwise be created, or not be created as efficiently. Again, both of these functions are justified normatively by a Paretian emphasis on welfare and are therefore not in tension with each other ethically, despite the distinct institutional mechanisms used to achieve this goal.

The obligations of the manager coming from the welfarist stance of the MFA are therefore Janus-faced in orientation: generally cooperative within his firm and generally competitive with other firms. From this we can see that the profit-maximization ethic, whether or not it is substantial enough on its own, cannot simply be understood as a dressed up defense of naked self-interest. The norm of profit-maximization requires the manager of a firm to act on behalf of the firm (or the shareholders of the firm), and therefore to act in good faith and a trustworthy fashion, while not requiring the same trustworthiness or good faith when interacting with her competitors (Heath 2007, pp. 367–368). To see that this has teeth, one need only to consider that such a norm condemns many of the various corporate scandals that have occurred over the past twenty years.

## Legal Constraint

Without going too far afield, the MFA roughly follows the Pigouvian story about market failure and therefore approaches the law (in the economy) in similarly welfarist terms: the law is ideally used to constrain transactions in ways that protect society against market failure. However, whereas corporations address market failure by supplementing the market with cooperative mechanisms to create greater sets of goods, the law tries to address market failure by constraining market transactions that have a deleterious effect on social welfare. That is, because markets are imperfect, and things like externalities, missing insurance markets, and incomplete information exist, there are actually a whole range of activities that firms can engage in that would not contribute to efficiency. The law, in this view, is meant to step into prevent or, at the least, de-incentivize, these behaviors. This comes from following the logic of the theory of second best; absent the achievement of all necessary optimizing conditions that would allow for markets to work their Paretian magic, there is good reason to think that we must deviate from other optimizing conditions as well. In this instance, this calls for using non-market institutions to achieve second best levels of efficiency:

> The basic rules for marketplace competition laid down by the state—including the system of property rights—are designed to limit these possibilities, in order to bring real-world competition closer to the ideal (or to bring *outcomes* closer to those that would be achieved under the ideal, in cases where a functional competition cannot be organized). This is the motivation that underlies not only direct state provision of public goods, such as roads, but also state regulation of negative externalities, such as pollution. (Heath 2006, p. 550)

Although a firm can maximize profits by selling faulty merchandise or by dumping its costs onto society as a whole (as is the case in pollution), doing so does not augment social welfare in a Paretian sense. Firms, therefore, contribute to efficiency not only by competing in a market for consumers or by producing goods and services that competitive markets would under-produce; they also, in following the law, refrain from doing those things that would create profit to the detriment of consumers or third parties. In this sense, it is not just market competition, but market competition *in which the ground rules are followed*, that generates the ethical results that business managers ought to pursue. As a consequence, following the law is not merely a civic duty for business leaders but an ethical one as well.[4] This has all been under the assumption, of course, that the laws are as they ought to be; that is, that law is created in order to create the more efficient ground rules and is not subject to capture or poor enforcement. Taking these real-world concerns into account informs the MFA's account of ethical restraint.

## The Content of Ethical Restraint

As was stated earlier, the MFA endorses a Janus-faced orientation for business ethics, where managers face their own firms in a cooperative and trustworthy manner, and address their competitors in an adversarial manner. Stated in this way, it does not seem like the MFA differs much from approaches that claim that all businesses need worry about is profit, and following the law. To see how the MFA proposes more than this, we must recall that all the foregoing has been derived from the Pareto principle, which

[4] This is, of course, assuming that the law is legitimate and does not require extraordinary behavior like civil disobedience.

asserts that a state of affairs is preferable if one person is better off and no other person is made worse off. Firms are encouraged to pursue profit not for any intrinsic reason, but because doing so when others do so tends to create Pareto improvements. In this sense, profit-maximization is endorsed, but endorsed instrumentally. Similarly, managers are meant to pursue firm profit, as opposed to self-interest, because the organization of economic activity within a firm is done to obtain Pareto improvements left unrealized by a price-mediated market. Again, the reason is instrumental and not principled: the shareholder does not have some moral primacy that makes their interest trump the manager's (as a theory built on the celebration of the entrepreneur might). The manager represents others as opposed to himself because doing so allows for the cooperative organization needed to increase welfare.

In contrast, respect for the law is not to be done on the basis of some cost-benefit calculation. The law, in this view, restrains firms from engaging in activities that the price mechanism does not effectively de-incentivize. Thus, even if there is profit in breaking the laws in order to engage in these activities, doing so is to pursue profit in a non-preferred and socially harmful manner. Therefore, unlike profit and corporate cooperation, respect for the law has an ethical content in itself, because the activities prohibited therein are harmful on their face. Despite this difference, all of these are grounded in the same basic idea of efficiency. Respect for legal intervention and regulation as ethically substantive restraint, and pursuit of profit and shareholder primacy as instrumentally valuable, are both drawn out of the Pareto principle and the view of social welfare it advances.

It is with this move that we can better understand the thicker conception of business ethics that the MFA generates. Because of administrative costs, enforcement costs, and the difficulty of effectively detecting all forms of malfeasance, "the deadweight losses imposed through use of the legal mechanism can easily outweigh whatever efficiency gains might have been achieved through the intervention." As a result, even after the law is used, many activities would still be legal and harmful for firms to engage in. This is where ethical leadership and decision-making kick in: "ethical conduct in an extra-firm business context consists in refraining from using non-preferred strategies to maximize profit, even when doing so would be legally permissible. Put more simply, the ethical firm does not seek to profit from market failure" (Heath 2006, p. 550). This has been articulated by Norman as understanding business ethics in terms of "self-regulation," in which ethical business leaders recognize the normative content of a regulatory scheme and act both in compliance with the regulatory scheme as it is enacted, and beyond compliance as it ought to be enacted: "you shouldn't do X because there are clearly identifiable reasons why X should be illegal, even though it is not in fact (or yet) illegal; profiting from X is a perversion of the market system itself" (Norman 2011, p. 48). The result is an ethics in which competition, regulation, and normative self-regulation are all endorsed and, more to the point, endorsed on the same welfarist grounds.

One way to put this is to say that the MFA extends the theory of second best beyond institutional configuration of markets, and to the behavioral orientation of those acting within those markets. If the optimizing conditions obtain, then allocation can be done solely through a competitive market, and all market actors need to consider is maximizing their utility. When these conditions do not obtain, not only might we require different institutions, but we might also require a different approach to the behavior of economic actors; we not only move away from unfettered markets, but we also move away from profit-maximization and conformity to law as the only types of behavior likely to contribute to allocative efficiency. Those actors who have leadership positions within the firm have a particular duty to recognize this since the firm, and their positions within it, is created precisely to overcome market failure. To exacerbate market failure, or profit from it, is to go against the basis of their institutional role. In order to contribute to the efficiency of a second best economy, market actors like corporate executives must avoid doing various things that would otherwise fetch them (or their firms) a profit, and must engage in strategies that would otherwise harm their profits. This includes (1) minimizing negative externalities, (2) competing only through price and quality, (3) reducing information asymmetries between firm and customers, (4) not exploiting the diffusion of ownership, (5) avoiding the creation of barriers to entry, (6) not using cross-subsidization to eliminate competitors, (7) not opposing regulation aimed at correcting market imperfection, (8) not seeking tariffs or other protectionist measures, (9) treating price levels as exogenously determined, and (10) not engaging in opportunistic behavior toward customers or other firms (Heath 2004, p. 84).

This list helps to illustrate the critical nature of the MFA. The MFA is decidedly not an apologia for the status quo. Were one to follow this list fully, business would not only have to refrain from legal forms of pollution and collusion, but also advertising strategies that are not purely informational (as an outcome of 2, 3, and 10), or using economies of scale resulting from the size and scope of one's enterprise to prevent other businesses from entering competition (as a result of 5 and 6). Thus, even though it affirms profit as a legitimate aim of business and an adversarial ethic in competition that might at first seem ethically compromised, the MFA's model of competition is an aspirational one; where the MFA adopted by all businesses, the nature of the markets and profits would look extremely different from that which we find ourselves in now. In fact, much of what is required by managers under the MFA still winds up being overly demanding in the context of the actual conditions of the market economy. Given this, managers have a first-order ethical requirement to not stymie efforts to bring a system into place that would allow the MFA to be followed.

The MFA engages with the norms inherent in the actual practice of business so as to criticize those practices as we find them here and now, and show how such practices could be transcended in favor of a more just and better world. In this way, the MFA approaches business ethics as a type of immanent critique (Cooke 2006, p. 189). By beginning with the apparently amoral terrain of economic theory, the MFA takes these groundings and shows how they not only produce decidedly moral imperatives for those in business, but also moral imperatives that provide the bases for a robust critique of contemporary business practice. Table 1 summarizes the different types of behavior the MFA prescribes, how they connect to the institutions of political economy, and the economic theories to which they are connected.

## Taking Values Other than Efficiency into Account

Much more can be said on the merits of the MFA, but I will mention here quickly how it is distinguished from other prominent approaches to business ethics. On the one hand, as has been mentioned in passing, the MFA differs in significant ways from the shareholder value maximization camp (e.g., Friedman 1970), challenging their emphasis on profit-maximization by highlighting the instrumental nature of the profit motive and, in turn, how profit-maximization can lead to market failure. Similarly, the MFA challenges stakeholder theories (e.g., Donaldson and Preston 1995), which argue that corporations have moral obligations to all of their stakeholders, including customers, employees, suppliers, local communities, and so on. Here, the MFA's critique is the opposite of its challenge to shareholder maximization; it holds that stakeholder theory imports ethical standards and criteria foreign and antithetical to the corporation's efficiency mandate. To follow the stakeholder program is to wrongheadedly give up on the welfare-promoting potential of the corporation in favor of something unworkable in the business environment.

Put differently, while the MFA offers a strong criticism of what we might think of as the hard-hearted approach of the profit-maximization camp, it does so without rejecting our underlying institutional order and the imperatives it imposes. While capitalist markets and institutions are not immune from philosophical critique, such critiques are not the domain of business ethics, since the problems that business ethics are meant to address are more-or-less particular to capitalism. Stakeholder theory, by supposing that corporate managers can ignore the competitive market in favor of concerning oneself with all stakeholders, essentially assumes away the problem of business ethics. The aim of the MFA is to articulate a substantive theory of business ethics without the denying the existence of capitalism and what it demands of actors.

And yet one wonders whether, in this position vis-à-vis stakeholder theory, the MFA has not given up something important from an ethical perspective. There is an important intuition shared by many that the unethical nature of much business practice is created by precisely the adversarial and "norm-free" nature of the market with which the MFA begins. If business ethics is to mean anything, it ought to be the supplementing of this market—instrumental and useful as it may be—with a more robust sense of morality so as to blunt the sharp edge of capitalism or, if one wishes, to trim the sharp nails of the invisible hand. From this view, the MFA fails in its project even before it starts. By looking to the logic of the market to derive the morality upon which market actors ought to act, one might say we have essentially capitulated to the economists and financiers; instead of attempting to challenge the hegemony of economic reasoning, it seems that the ethicists are ceding the ground to the economists themselves. The MFA, in this view, is pragmatic in the pejorative sense of being without principle, strategically aligning itself in such a manner so as to gain favor and resonance with the relevant economic discourse of the day.

**Table 1** The market failures approach to business ethics

| | Guiding idea | Corresponding institution | Animating economic concept |
|---|---|---|---|
| Ethical orientation of behavior | Competition | Market | 1st fundamental theorem |
| | Cooperation | Firm | Transaction costs |
| Ethical limitation of behavior | Constraint | Law | 1st fundamental theorem and theory of second best[a] |
| | Restraint | Business ethics | |

[a] Though for our purposes here the law largely plays a second best role, there still exists law in the first best world of the fundamental theorems of welfare economics in the form of property law, contract law, and the like

As should be clear, I believe this is overstating the case against the MFA. While proponents of the MFA do build their system of business ethics up from what McMahon (1981) referred to as the "implicit morality of the market," *this is not the same as endorsing market morality as a standalone system of morals*. As Norman (2014, p. 27) notes, the morality of the market is but one of many competing values society must concern itself with:

> A Paretian approach to business ethics cannot pretend to explicate all the relevant issues in the field—even though it is hugely significant that most legitimate ethical concerns about business activities do stem from the creation or exploitation of classic market failures…we can *argue in favor* of the design of any given market regulation or beyond-compliance standard by appealing to other socially desirable values it promotes. And we can surely *criticize* particular markets, or the activities of particular market actors (firms, employees, owners, customers, etc.), because they fail *not necessarily* or *merely* on efficiency grounds, but by the standards of other values and principles we care about. Of course, many such arguments will be flawed. But at least some justifications of this sort deserve to carry the day.

The MFA, then, merely takes efficiency as one societal value, and attempts to show just how robust a system of morality can be drawn out from it. Yet, this does not imply that efficiency trumps all concerns. Other relevant considerations—like equality or justice—can be brought in from outside this system of morality, and markets can be regulated from without on their behalf.

The MFA's claim is not that efficiency is the most important value, but that asking business ethics to concern itself with those other values is to be too demanding of the field. Concerns other than efficiency are the domain of, for example, political philosophy, which can demand that the state make certain structural changes to markets so as to make them fairer or more just. Thus, what proponents of the MFA demand is a less expansive notion of business ethics, and a greater understanding of how business ethics might fit within a larger scheme of morality and justice, or a "unified theory" of firms, markets, and states (Heath et al. 2010). Put differently, the MFA asks for a project of complementarity between business ethics and other fields of normative theory, not one of all encompassing expansion. This is not merely a semantic distinction. Growing from Rawls's idea (1971) that principles of justice apply only to the "basic structure" of society (the constitution and key institutions), the MFA appears to assume that the macro-level ideals of political philosophy are at best indeterminate, if not silent, on questions at less general levels, like business (Singer 2015). Therefore, when addressing a meso-level institution like the business firm, the goal is not to bring justice to bear through an expansive scheme of business ethics, one that extends overarching principles of justice to the more local level. Instead the idea is to articulate a notion of business ethics consonant with a larger scheme of justice, implying attention not just to these overarching principles, but also to the more local social role that business itself is meant to perform. For the MFA, this local concern is efficiency.

Though not stated explicitly, this normative schema is underwritten for the MFA by the second fundamental theorem of welfare economics described above. Markets, and market actors, can be geared entirely toward efficient allocation without downplaying other moral values because it is presumed that equality can be achieved through the tax-and-transfer redistributions of the welfare state, leaving the market to work as it will. Efficiency and equality can be achieved jointly through a division of labor between market and welfare state without the one impairing the other. Similarly, the MFA endorses a division of labor between business ethics and political philosophy, where the former works out the practical implications of the "implicit morality of the market," and the latter concerns itself with justice in a wider sense. One need not demand that business ethics concern itself with justice in order to achieve a just society, according to the MFA; a just society is better sought by letting business deal with the efficient allocation of resources, and leaving justice to those institutions better calibrated for achieving it, namely the state. This division of intellectual labor is depicted in Fig. 1.

The problem, of course, is that institutions like the state do not live up their theoretical potential any better than markets do. Indeed, as political CSR theorists have pointed out (e.g., Scherer and Palazzo 2008) quite often the geographical or market domain in which businesses are operating lack anything that could be called a statutory or legal regime. In these conditions, no such justice-seeking institutions can be said to exist. Therefore, even if we grant that business ought to be in the business of maximizing efficiency—and therefore refraining from profiting off of

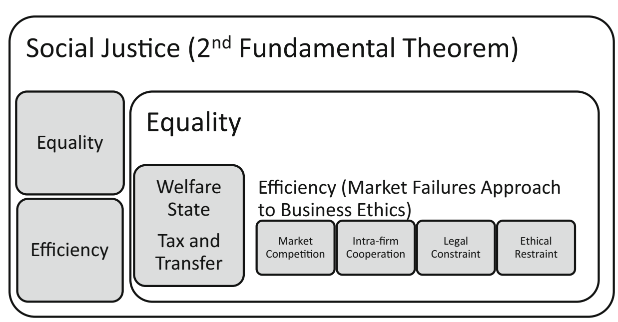


**Fig. 1** Business ethics' place within a scheme of social justice

market failure—we still want to know what businesses ought to do when background conditions of justice do not exist. While the MFA admirably looks at how markets fail to achieve efficiency and then suggests what this demands of the business corporation, I want to pose this critical-but-friendly question: *how does the failure of justice-procuring institutions to function as we would wish them to function change the ethical demands of efficiency-procuring institutions like the corporation?* Does it suggest a change in focus?

Let us return to the sports metaphor. We ask athletes to compete, and compete singularly, and to follow the moral codes derived from the ideal of competition itself, like ideas of sportsmanship and fair play. Other moral concerns enter the sphere of competition not through the contestants but through non-competitive actors: the rule-making bodies of the league, ringside physicians, and referees. As Oates (2006, p. 47) describes in her celebrated *On Boxing*: "the referee is our intermediary in the fight. He is our moral conscience extracted from us as spectators so that, for the duration of the fight, 'conscience' need not…be a factor in the boxers' behavior." This allows us to have values like safety and fairness established, while also allowing for the fight to be as competitive, athletic, and entertaining as possible. Similarly, the second fundamental theorem allows for us to offload other moral concerns to the state and law when it comes to market competition, enabling the achievement of social equality *and* efficiency.

But what if the ringside doctor is paid off by one corner? What if the match is purposely moved to a particular state because its licensing policies are far too lax? Is it still ethical to participate in the fight, or to do so in the same manner as one would were the background conditions more optimal? Similarly, if the welfare state does not function well or does not exist at all, or if historical inequalities and injustices continue to persist despite the efforts of the welfare state, does this change the ethical content of business ethics? I answer, "yes." In the remainder of this paper I sketch out the concept of justice failure, which explains this intuition in terms of the MFA and the economic theories from which it is derived. I contend that the institutional division of labor between efficiency and equality upon which the MFA rests is not tenable. Because of this, I argue that businesses must concern themselves with values like equality or fairness (and that business ethics ought to try to spell out how) in the absence or failure of other institutions to do so effectively. This concept allows us to understand how concerns other than efficiency enter into what the MFA demands of business actors. It also provides us with some basic ideas of how such values ought to influence the way relationships are structured *within* the corporation.

## The Concept of Justice Failure

In the previous section, I have highlighted how the first and second fundamental theorems are key to the MFA and its presumed division of intellectual labor in normative political economy. Yet, we have also seen that the MFA requires the theory of second best in order to explain how efficiency and regulation are not at odds. Because the assumptions of the fundamental theorems do not actually hold, efficiency requires moving away from pure market mechanisms in our second best world. In other words, the second best theory shows how markets and efficiency are closely related but, because markets and the world do not operate the way in which economists assume, other institutions are required. For this reason, the MFA can assert both its adversarial side and its cooperative rule following side on the basis of efficiency.

However, while the MFA takes the theory of second best seriously when it comes to the first fundamental theorem, it does not seem to apply it to its own reliance on the second fundamental theorem. Just as we depart from free markets so as to achieve the second best possible efficient allocation, there is good reason to think that we should depart from purely statist approaches to distribution in our pursuit of justice or fairness. We demand institutions like the state act in particular ways so as to achieve second best efficiency, and we ask corporate executives to constrain and restrain themselves according to the spirit of those actions; perhaps, there is good reason to think that market actors ought to be asked to shoulder some of the burden of justice in order to achieve second best social justice.

Another way of putting this is that the MFA's scope of critique is too narrow. The project is built on the norm of efficiency because efficiency is the implicit morality of the market. However, there is a more substantive implied morality when it is not simply the market being considered, but *the market and its place within a larger scheme of social cooperation*. Unless the MFA wishes to assert efficiency as the most important aspect of justice (as opposed to one component part of it), the morality of pursuing efficiency must rest on the background of a larger scheme of social equality; the first fundamental theorem presents a compelling moral case for the market because the second fundamental theorem shows how it can be pursued without sacrificing equality. When this latter assumption falters—when we can no longer assume that the welfare state is actually handling equality—the rationale for basing a moral code solely on efficiency seems less obvious. Again, here one can respond by asserting that efficiency is in fact the most important value either in principle or in our second or third best world. If we are unwilling to assert this—or if wish to understand what our aspirational moral duties in business ought to be even if, here and now, efficiency as the main value must suffice—then we must introduce other values into business ethics.

To this end, I suggest justice failure as a complement to market failure. I use the term "justice failure" to distinguish the concept from "government failure." Government failure, like market failure, refers to suboptimal efficiency resulting from government action (Le Grand 1991); justice failure, although also concerned with state action, is not about the failure to achieve efficiency, but the failure to achieve some morally desirable form of equality (whatever that notion of equality is). While market failure suggests failures of the market to achieve all possible Pareto improvements, justice failure suggests failures of the welfare state to achieve all possible movements toward equality consistent with efficiency.[5] Similarly, just as the MFA argues that business must refrain from intentionally profiting from market failure in order to avoid contradicting the implied morality of the market, businesses must also refrain from intentionally profiting off of justice failure in order to avoid contradicting the implied morality of the larger social scheme that justifies the implied morality of the market.

For now, I articulate this in intentionally vague terms. While the concept of market failure comes replete with a particular understanding of efficiency (the Pareto standard, in contrast to utilitarianism or cost-benefit analysis) and is therefore more conclusive in its prescriptions, I present the concept of justice failure here without a corresponding metric of equality. Without some specific content or definition of justice or equality, this will be a fairly broad and generic suggestion. With some more particular notion of equality, one gets a more determinate understanding of what would constitute justice failure. In the next section, I offer such a determinate understanding of justice failure and its consequences for business ethics.

The main claim here is that some idea of justice or equality should enter into our conception of business ethics, and that we can do this while still being committed to an "immanent critique" of political economy. While the MFA intimates that to base business ethics on something other than efficiency would be to violate certain facts about capitalism, this is based on an overly narrow understanding of capitalism. Capitalist markets do not exist in a vacuum but rather within a complex of institutions that attempt to secure cooperation, a scheme of cooperation that is justified according to a number of values of which efficiency is merely one. Noting that background institutions are failing to achieve equality, that markets exacerbate those failures, and that therefore market actors ought to take those failures into account, is therefore not anti-capitalist. Instead, we note the multiplicity of values and institutions that are inherent to an actual capitalist order and try to figure out how best to approximate such an order in practice. The justice failure approach allows us to do precisely this.

This conceptual move may not seem obvious for at least two reasons. First, since the theory of second best is only explicitly about efficiency and not equality, it is not clear how relevant or applicable this theory is for the second fundamental theorem. Yet, the second fundamental theorem is parasitic on the first: the claim that a fair and efficient allocation can be reached through initial redistributions is based on the first theorem's conclusion that markets will always reach Pareto optima in the first place (Stiglitz 1994, p. 46). If we have disabused ourselves of this latter belief because of second best considerations, then it seems we must also disabuse ourselves of the former: that somehow the best possible egalitarian distribution is attainable purely through the tax-and-transfer systems implied by the second fundamental theorem.

The second trouble for this conceptual move is motivating the assignment of duties to the corporation in particular. Even if we grant that justice failures exist and that such failures ought to affect the way in which market actors act, it is not obvious why I have singled out corporations as needing to take on such onerous responsibility. For market failures, such an assignment makes sense: because firms and corporations exist to help deal with the problem of market failure, it makes sense to contend that they ought not to exacerbate that which they are meant to mitigate. Because corporations exist primarily for reasons of efficiency specifically, and not social justice generally, such an argument cannot be used to justify a corporate duty with regards to justice failure. There are two additional reasons, however, why the duty to consider justice failures ought to attach to corporations. The first is pragmatic: although actors generally ought to consider justice failure, corporations wield far more power, influence, and volume with regards to things like hiring, investment, governmental lobbying, and so forth. For pragmatic reasons then, corporations have duties that individuals do not—though it would be no bad thing were individuals to take justice failures into account as well.[6]

The other related reason why we should think that corporations ought to have such a duty is that in many aspects of social life, corporations have taken on roles formerly occupied by the state. This insight informs the basis of political CSR scholars who argue that given our post-Westphalian world, the division of labor that used to exist between corporation and state is no longer wholly tenable. As a result, corporations have taken on roles in fashioning

[5] This does not include failures to "level down" toward equality, which is why I add the qualification "equality consistent with efficiency."

[6] It is an open and interesting question whether other institutional market actors—like labor unions—might have such duties as well. My intuition is to think that they do, though I do not explore that here.

regulation, governance, and enforcement in policy realms abdicated by the nation-state (Scherer and Palazzo 2011, pp. 909–911). I generally think this paradigm overstates its case a bit and exaggerates the extent to which the state has been displaced. Still, there is more than a little merit in the empirical claim that corporations have a regulatory and governance function that extends beyond the more traditional purview of efficiency and profit. Because they are performing functions in lieu of states, it is sensible to ask that they take on the ethical duties that result from the state's incapacity or inability to secure the egalitarian basis for the just pursuit of profit. The problem of justice failures therefore falls onto the corporation to consider.

## Justice Failures and Business Ethics: An Outline

As I noted in the last section, the concept of justice failure is at a slight disadvantage in comparison to the concept of market failure when it comes to prescription. While market failure has a specific notion of efficiency in tow, the concept of justice failure forces us to consider what notion of equality or justice we are working with. As Amartya Sen has argued, equality is a generic feature of virtually every normative social theory or theory of justice. The question is not whether or not a theory is egalitarian or not, but what social goods the theory demands to be equalized and for what goods the theory will tolerate distributive inequality (Sen 1996, p. 395). On the one hand, this means that we can expect the concept of justice failure to be useful regardless of how one conceives of justice, since all such conceptions will entail an idea of equality that might be frustrated by malfunctioning institutions. On the other hand, it means that simply saying the failure to affect equality implies justice failure is, on its own, a vague claim: we need to know what relevant goods we require to be equalized in order to see a scheme of justice working as it ought. In order to understand how equality affects the ethical obligations of businesses, then, we must ask the question: equality of what?

Instead of taking a comprehensive understanding of what idea of equality we *should* endorse, I start with the kind of equality we already seem to endorse in our liberal capitalist societies, and look at what follows from this (for a similar approach see Carens 2013).[7] In articulating his own particular understanding of justice, John Rawls (1999, p. 14) contended that his was only one of a family of liberal conceptions of justice, all of which share three key commitments: (1) a commitment to individual rights and liberties; (2) a priority given to these rights, liberties, and opportunities; and (3) the assurance that all citizens have the basic goods necessary to use these freedoms. From these principles, we can derive a generic list of institutional desiderata that all liberal societies are committed to attempt to realize in some shape or form: (1) the familiar set of constitutionally guaranteed rights and liberties that are (2) protected and enforced equally among all citizens; (3) fair equality of opportunity; (4) a decent distribution of wealth and means in order to allow all citizens to be able to make use of their rights and freedoms; and (5) the institutions necessary to "ensure that representatives and other officials are sufficiently independent of particular social and economic interest and to provide the knowledge and information upon which policies can be formed and intelligently assessed by citizens" (Rawls 1999, p. 50).

This list is not exhaustive or fully determinate; liberal societies will disagree on what specific institutional configuration will best fulfill these principles to the requisite degree, and many liberals (like Rawls) will find them insufficient for realizing a just society. However, we can take as a minimum that egregious failures to affect these basic institutional prerequisites constitute a justice failure (for a more thoroughgoing treatment, see Blanc and Al-Amoudi 2013). In particular, we can note three more specific classes of justice failure that most will recognize as existing in all or most contemporary liberal societies: (1) political justice failures, referring to the failure to secure a government sufficiently democratic or independent of economic and social interests; (2) social justice failures, referring to an insufficiently equal enforcement of rights and opportunities; and (3) distributive justice failures, referring to the failure to secure a decent distribution of wealth. In order to further describe the concept of justice failure, as well as to show the kind of normative commitments that follow from it, I offer an outline of these justice failures and how businesses ought to respond to them. I hasten to emphasize that this is only an *outline* of the kind of considerations that are suggested by this approach. To be fully satisfactory, each one of these claims requires further defense and nuanced elaboration.

### Political Justice Failure

If we think of an ideal social arrangements as one where statutory institutions establish the egalitarian bases for an efficient and productive economy, then a crucial form of justice failure are political institutions that frustrate the establishment and/or efficacy of such statutory arrangements. We can think of this class of justice failure as

[7] This is not to deny that our current social practices might be based on norms that are insufficiently egalitarian or just. It is indeed a worthy philosophical project to explore such a possibility and it would have ramifications for how we understand business ethics. Yet, for our purposes, starting with the normative commitments that are already immanent to our own societies is a more productive enterprise, since it enables us to offer a program of business ethics that is not alien to our socio-economic institutions.

"political justice failure" because it reflects a shortcoming of the political system that leads to the malfunctioning of equality-seeking institutions. Understanding this helps us make sense of the ethical responsibilities that businesses have with regard to their engagement in politics. There are of course many critics of corporate political activity. However, most of these criticisms are made from the perspective of what democratic legitimacy demands. While these critics are likely right that regulation ought to alter or mitigate the effect that moneyed interests have on elections, these criticisms do not necessarily translate into principles for business ethics. To understand the ethical implications for businesses in a principled and thoroughgoing manner, we would need to make an argument as to why democratic legitimacy should be a concern of business actors in the first place. That is: why should an institution like the corporation, which we permit to act adversarially and instrumentally for particular reasons, forego strategically good, but democratically bad, strategies of political engagement?

The MFA, as we have seen, can get us part of the way there, in that it suggests that businesses ought not to oppose regulations aimed at correcting the market. Neron (2015a, b) has argued this should lead us toward a critical view of corporate political activity. On his account, corporate political activity violates the corporate license to operate because such activity has the effect of legally entrenching market failure; instead of competing within the rules of the game, corporate political activity aims to compete by changing the rules of the game, which has adverse effects according to a metric of efficiency. This helps us understand why Stoll's claim (2015, p. 561) that corporate political speech ought "to target specific policy initiatives of direct import to the business in question" is still too weak of a moral limitation, since it still can create regulatory capture that would entrench market failure. However, if we understand the political system not only in terms of its role in correcting market failure, but also in its equality-seeking charge, then there are a whole range of instances in which business's political engagement will not egregiously affect the efficiency of the market, but it will exacerbate justice failures significantly. Taking this into account helps us understand common intuitions about business engagement with politics, and understand them in terms of professional ethics.

To give one example of this, we can consider the potential role that business corporations can and do have on elections in many democratic countries, and in the United States in particular. Here, it is helpful to consider that the political system in a democracy is not meant merely to *effect* just outcomes, but is meant to *reflect* a certain type of democratic equality in the form of equal citizenship (Silver 2012). Therefore, a democratic system that is not structured so as to insulate it from the pervasive effects of strong particular interests, or in which certain people's ability to affect electoral outcomes is arbitrarily greater than others, ought to be understood as a political system that is not living up to the ideal of justice that underlies it; it is an example of justice failure. This is captured well by Silver (2015, p. 389) who argues that such corporate political activity seeks to "bypass a political system that equitably represents the interests of all citizens for one that represents only those that are willing and able to pay for access." The ability to engage in such a bypass should be understood as defect in our democratic system. Despite being institutions and roles that are designed primarily for economic efficiency and profit, corporations and their executives ought to refrain from exploiting this defect, since doing so would be subverting the just foundations of their pursuit of profit.

This would entail, at its most basic, a general principle to refrain from contributing to electoral campaigns or attempting to undo laws and regulations curtailing corporate campaign contributions, even if doing so is legal and would be advantageous for one's business. Engaging in this type of activity would be profiting off of justice failure, namely the failure to institutionalize the basic of procedure of equal citizenship rights. Yet this general principle can yield a more complex application. Given that the malfunctioning of an electoral system is the result of certain policy and legislation, it follows that fixing such issues will also require policy and legislation –say, policies restricting the kinds and amount of donations allowable during electoral campaigns, or the legal length of electoral campaigning. Furthermore, because the current electoral system will tend to produce policy results based on the kinds of campaign contributions procured by the policy's partisan advocates, it stands to reason that rectifying the underlying electoral justice failure will require the sorts of activity that we should be seeking to avoid. Put differently, the general principle to abstain from political engagement may *reconcile* ethically minded businesses to extant justice failures, but it will generally not *resolve* those justice failures in an institutionally sustainable way. If business should not merely refrain from exacerbating justice failure, but perhaps attempt to redress such things, then might there be an ethical angle to corporate political engagement?

The general principle of abstaining from corporate political activity, then, can be lifted when corporations are participating in such a manner so as to eliminate the underlying political justice failure. That is, it is not unethical for businesses to work toward curtailing their own outsized effect on politics, even if doing so requires using that outsized effect. While businesses have an ethical obligation not to exacerbate, profit off of, or further entrench the political justice failure embodied in a broken electoral system, it is an ethical act for businesses to use their resources to address this justice failure at the expense of their own influence. This is similar to Baumol's (1974) claim that corporations have an ethical responsibility to engage in "meta-voluntarism," to try and create the regulations and laws necessary for them to pursue the ethical strategy (for instance, lobbying for environmental restrictions, so that they can avoid polluting while being assured that their competitors will avoid doing so as well).

One must note the narrowness of this claim. It is not simply that corporate influence in politics is justified if the corporate actor sees such involvement as addressing any instance of justice failure. To do this would be to attempt to address one injustice, while making another injustice worse. The claim here is narrowly applied to instances where the justice failure lies precisely in the ability of businesses to affect politics at the expense of democratic equality. In such instances, there is an ethical responsibility for businesses to address that institutional state of affairs.

The case of electoral contributions is just an illustration. One can make similar claims that businesses have an ethical obligation to forbear from lobbying legislators, or attempting to capture regulators, even if such activity would tend to benefit them strategically. Similarly, the exception to this is when such activity can lead to an institutional remedy to the underlying justice failure; in those instances, such activity is ethical. There is much more that could be said and specified about the ethics of business engagement in politics. What is more useful for our purposes is what this discussion helps us understand about what the concept of justice failure more generally implies for business ethics. There are three general responsibilities that businesses have with relation to justice failure, which the case of political justice failure points toward:

1. do not create justice failure (in the case of political justice failure, this means not attempting to undermine or undo policies preventing outsized corporate influence);
2. abstain from exacerbating or profiting off of justice failure (for political justice failure, this means abstaining from wielding outsized corporate influence in the political system); and
3. attempt to remedy the institutional bases of the justice failure (for political justice failure, this may include using corporate influence to lobby for laws that proscribe outsized corporate influence).

We might say that the program of business ethics that is suggested by the concept of justice failure is primarily about specifying what these three key responsibilities demand of businesses in the face of particular classes of justice failure.

## Social Justice Failure

Another feature of "justice failure" is that helps us understand existing institutions and practices as they relate to the ethical underpinnings of business and markets. To this end, it is worth noting that there is a large extent to which we already apply the logic of second best to questions of justice or equality, as can be seen in affirmative action policy. A way of understanding affirmative action is as a second best response to the existence of *social justice failure*. That is, given the existence of historically grounded social injustices that stand in the way of equal opportunity and equal social standing, we require different practices and institutions than we would otherwise desire. To understand this, note that there are few advocates of affirmative action who do not also hold that Harlan's vision of a "color-blind constitution," as expressed in his dissent in *Plessy v. Ferguson*, is the ideal to which we ought to strive. This, as Michelman (1999, p. 75) notes, seems to be the case of Justice William Brennan, who thought Plessy's prophetic dissent was one of the best in judicial history, despite joining the historic *Bakke* decision (among others) that laid the jurisprudential basis for affirmative action.

What accounts for this? The answer, of course, is that both goals—a color-blind constitution and affirmative action policy—are justified by the same value, something like equality or social justice. Color-blindness in the law is the ideal, but its achievement depends upon a number of conditions. Regardless of its success in achieving its aims, the intent of affirmative action is to achieve second best racial equality or justice. Given the failure of governments, markets, universities, militaries, and so on to achieve the background conditions necessary for the color-blind constitution—that is, given the existence of justice failure—affirmative action advocates argue that we must move away from the color-blind approach and toward an approach that actively combats the problems of racial exclusion. I say that this is the same logic as the second best approach to political economy applied to legal equality because the overall goal remains constant; just as we move from a laissez-faire market to a complex of markets, firms, and statutory intervention in the service of efficiency, what changes in the move from color-blindness to affirmative action is the recognition of empirical contingencies that would make the former unhelpful or counterproductive in the pursuit of racial social equality.

Unger (1983, p. 607) captures this logic well in his discussion of how a supposedly neutral political process might very well lead to further entrenchment of social inequality:

> [The goal] is to create a political process that can serve as an impartial device for summing up the wills

> of individuals about the proper role of the state…it is carefully designed to prevent manipulation by transitory and inflamed majorities who, misguided by the demagogues or fools, might wreck the underlying pure structure of power and coordination. But precisely because government cannot easily disrupt the social order, it becomes the victim and protector of this order. It turns into a pervasively biased method of collective choice. The search for the neutral method for summing up the opinions of the citizenry diverts us from the more realistic attempt to create a polity that would in fact be more open to self-revision and more capable of dismantling any established or emergent structure of social division and hierarchy.

The liberal idea of law, from this perspective, attempts to establish a neutral and objective system of politics and law that applies to all equally, and thus ensures that this system establishes equality among the citizenry as they go about their lives freely. Yet, when the assumptions of the model do not obtain—when legal and material resources are distributed unequally throughout society on class and racial lines, for example (see Seron and Munger 1996, p. 190)—the application of an objective and formally equal legal system will further exacerbate extant inequality. This was best and most famously articulated by King (2000, p. 73) in his chastisement of white moderates for their resistance to his method of civil disobedience: "law and order exist for the purpose of establishing justice ... when they fail in this purpose they become the dangerously structured dams that block the flow of social progress." Sticking to the liberal idea of formal justice in the face of structural injustice can often have the effect of amplifying the latter. To avoid exacerbating injustices, the best bet is not to approximate the ideal, neutral procedure as closely as possible. Instead, we should recognize that the non-realization of certain assumptions might require letting go of other commitments in order to most closely attain the substantive ideal of equality (at the expense of the procedural ideal of objective formalism).

So, when we are confronted with a market system that is meant to allocate goods and services most efficiently, but which is set against a background in which social institutions have failed to offer opportunities of training and access equally, what are we to do? To say that the market must stay the course of efficiency is to resign oneself to the possibility that one might further perpetuate the initial inequality in the process. It also does not seem plausible to try to fold these concerns into the more substantive duties that the MFA derives from efficiency: while a duty to refrain from profiting off of externalities or information asymmetries is quite a demanding and admirable proposition for business ethics, it is quite different from, say, dedicating resources to overcome systematically unequal educational opportunities. The former is proposed because it gets us as close to the Pareto frontier as possible, absent the complete markets and complete information necessary for the market mechanism to do so; the latter, on the other hand, is fundamentally about win–loss transfers, and thus involves comparisons of distributive states that are Pareto non-comparable.

The idea of justice failure helps us both reconstruct the existence of particular practices and policies, while also explaining what business ethics demands within this context. To continue with the example of anti-discrimination law and affirmative action, justice failure better explains why such policies ought to exist in the economic realm. It is not obvious that they can be explained on the efficiency terms the MFA uses to explain the ethical basis of following the spirit of regulatory law—even though there are surely efficiency gains to be had from ensuring equal access, justifying such policy in terms of efficiency misses the point. Furthermore, affirmative action and anti-discrimination law deviate from the MFA in how they bring justice to bear. While the MFA asks justice to be brought into the equation through background redistribution and welfare programs, affirmative action policy explicitly affects, and intervenes in, the way in which businesses act. They are not simply legally constrained from profiting off of market failure, but morally compelled to bring values (equality, diversity, etc.) into their business decision-making.

The idea of justice failure helps us make sense of this. Due to the historical failure of the United States to effectively integrate descendants of slaves into its most important political, economic, and cultural institutions, we have a case of justice failure that demands that business practice take on this historical burden as well. Absent the redistributive (and, perhaps, reparative) institutions that could establish something like an equality in initial positions upon which an efficient market could work its magic, we demand that businesses follow particular rules of action that reflect this historical fact and institutional deficit.[8] Of course, legal and statutory interventions here will be blunt instruments; as I have been arguing, the necessity to intervene legally into the decision-making processes of businesses comes about because the state has failed to achieve background conditions that would promote equality. In a sense then we are asking for statutory action to make up for the inefficacy of statutory action. This is not necessarily as absurd as it sounds: requiring businesses to engage in affirmative action is an order of magnitude more manageable than using large-

[8] Despite the variety in ethical descriptions of affirmative action, all seem to agree that fundamentally it is about the failure of society to integrate a particular "protected class," either affirmatively working toward their equal treatment, or demanding special treatment in order to achieve equal results. (See Adams 1997, p. 245).

scale transfers of wealth and government programs to solve the structural factors that perpetuate racial inequality and injustice. However, it should make us aware of just how limited state action might be.

For this reason "social justice failure" would also imply something further with regards to business ethics: *businesses should not merely follow the laws intended to promote social equality, but the spirit of the laws, and actively combat the inequality that business leaders find in front of them.* In order to avoid exacerbating justice failure businesses must avoid strategies that take advantages of the non-enactment or non-enforcement of policies necessary to combat social inequality. Wade (2003, p. 907), for instance, suggests something akin to self-regulation in her call for stricter self-monitoring of employees' compliance with anti-discrimination law. Other more substantive proposals would suggest procedures and practices for ensuring greater representation of people of color in positions of power, among the client base, interpretations of fiduciary duty that emphasize a duty to care and empathy, and dedicating resources to training those who might otherwise not have the types of educational opportunities to succeed in the market (see Dhir 2009; Woo 2005).

Attempting to remedy the problem of social injustice would seem to suggest that members of such groups should be paid higher wages. I am not against this in principle, and the justice failure approach might very well support such practices. However, there also seem to be all sorts of prudential concerns (e.g., fostering tokenism, creating envy and hostility in the workplace toward precisely those groups) that would complicate pursuing such a measure. With regards to the competency and capability of businesses, following the spirit of affirmative action policies seems a desirable first step. Of course, one might think of even more drastic measures to demand of businesses when it comes to issues of racial injustice, in addition to issues of gender, or a host of other social inequalities that bring the very non-ideal functioning of our social institutions into stark relief. The point, however, is that such proposals make sense to include in a program of business ethics, and that they are best made sense of through the concept of justice failure, through businesses' moral duty to refrain from exacerbating those inequalities that contradict the social basis of the just pursuit of profit.

## Distributive Justice Failure

The third class of justice failures I call "distributive" in that it refers to the institutional maldistribution of resources and income. In a certain sense, all instances of justice failure can be understood as distributive, since they all entail the maldistribution of particular goods. Still, it is worth separating the distribution of income and resources from the failure of the electoral system, or the failure to overcome historical injustices resulting from racism or sexism, for at least two reasons. First, often the maldistribution of income results from a different set of factors and institutions than other justice failures. Political justice failure may result from the inadequate dedication of resources or policies to insulate elections and legislation from special influences, and social justice failures generally result from inadequate reparative measures necessary to overcome prior and continuing exclusions; distributive justice failure is generally the result of a number of other factors: market architecture that produces undue material inequality, legislation that gives undue advantages to certain parties over others, an ineffective/inadequate/non-existent tax regime incapable to appropriating such excesses, and an ineffective/inadequate/non-existent welfare state incapable of redistributing appropriated resources. For purely pragmatic purposes, it is worth distinguishing distributive justice failures from other justice failures, even if they will often not operate in isolation from them.

The second reason to distinguish this from other classes of justice failure is because it rests on a more controversial understanding of justice than the others. Although not uncontroversial, political justice failure refers to a widely shared idea that the political process ought to be insulated from special influences in a democracy; social justice failure, though again not without heated controversy, rests on fairly well-held view that society ought to furnish equality of opportunity to its citizens, and that historical factors have conspired against achieving this. There is far less agreement, however, on what kinds of material inequalities that can be tolerated in a liberal society. One might disagree about the nature and extent of distributive justice failure—and what ought to be done about it—and still agree about other classes and kinds of justice failure.

The fact that such conceptions of distributive justice will be controversial does not preclude their bearing on business ethics, though it does temper the kinds of actions that businesses ought to take with regard to material inequality. That is, because businesses also have a duty to avoid exacerbating political justice failures, they should generally refrain from using their political power to pursue policies that will favor their particular understanding of distributive justice. Instead, businesses have an ethical responsibility to submit to extant redistributive mechanisms, to conduct their own businesses with the understanding that such mechanisms are likely insufficient, and to address such insufficiency through their own hiring and remuneration practices.

First and foremost then, businesses should not avoid paying taxes. This is a fairly obvious and platitudinous claim, which follows from the basic idea that businesses should follow the law for ethical reasons. However, given that the imperfection of the tax system can contribute to distributive justice failure, businesses have an ethical duty not merely to follow the letter of tax law, but the spirit of the law. This means not looking for tax loopholes, using tax shelters, or otherwise gaming the system to avoid paying their share of taxes.

Another way that businesses should avoid creating or exacerbating justice failures is by respecting collective bargaining processes and adhering to the spirit of those rules. While labor unions are hardly a panacea, their legal recognition and institutionalization creates the possibility for a greater share of wealth to go toward labor (Hacker and Pierson 2011, pp. 56–61, pp. 139–144). As a result, businesses have an ethical responsibility to engage with organized labor in good faith during bargaining processes. It also means not discouraging union formation—"union busting"—if workers are attempting to organize, even if the means that are used may be formally legal. Union organizing constitutes a second best institutional practice used to achieve the kinds of equality that a perfectly functioning redistributive state might otherwise be able to achieve; actively subverting attempts to unionize are a way of exacerbating justice failure, by preventing the second best institutional remedy.

More fundamentally, businesses actually profit off of justice failure by being able to pay workers unjustifiable wages. As even Hayek (1976, p. 64) noted, the market's price mechanism produces morally arbitrary income disparities; the income generated by particular employments is not due to moral desert but to purely contingent facts about relative scarcity and productivity. There is nothing just about paying certain people certain wages; rather, it is merely a consequence of a price mechanism that serves the primary purpose of directing labor into its most productive use (Heath 2014, p. 187). Put differently, wages that are determined by the market are not just in and of themselves. Instead, they are made compatible with justice by virtue of background institutions that secure certain fair terms of cooperation, insulating people from the morally arbitrary distributive consequences of the price mechanism. Given the failure of these background institutions to do precisely this—that is, given the existence of distributive justice failure—businesses end up reaping the benefits of being able to pay wages that are unjustified.

While someone like Gauthier (1982) wants to maintain that in ideal circumstances, there is no morality or immorality involved in responding to prices, I argue that paying the market wage in the context of justice failure must require moral justification, a moral justification that may not be forthcoming. More to the point, employers have an ethical responsibility to pay more than the market wage in cases where the market wage would be intolerable in a just liberal society. In this sense, this approach runs close to Snyder's (2008) claim that employers have a limited responsibility to pay employees a "living wage," a wage sufficient to allow its earner to cover the cost of a basic basket of necessary goods (see also Pollin 1998). There are a number of ways one might calculate a "living wage," and indeed the "living wage" standard might be too weak a standard altogether, since it only addresses basic needs and not what we might consider to be a "fair wage."[9] I am agnostic with regards to which way of determining wages would be most appropriate for addressing the concerns of justice failure without sacrificing too much by way of efficiency. The bigger point is that some way of addressing unjustifiable wages caused by justice failure is necessary for the possibility of ethical business, and that such a claim cannot be made if one only seeks to ground business ethics in efficiency.

## Conclusion

In this paper, I have aimed to show how an emphasis on economic welfare can lead to an aspirational approach to business ethics, one that takes seriously the normative underpinnings of markets and firms, and shows how, on those terms, ethical managerial behavior could be in the service of social justice. However, in the process, I have also shown the limits of this approach. In particular, I have argued that a scheme that takes welfare as its underlying principle must have some principled reason to do so. The fundamental theorems of welfare economics are generally taken to provide the justification for how a market approach to efficiency does not preclude a more general social commitment to equality or justice. Yet, I have argued that, just as efficiency-minded business ethics must take into account the non-ideal nature of markets and regulatory law, a concern for social justice requires corporate actors to take into account the non-idea nature of welfare states and distributive policy.

I have contended that this alters the adversarial ethics of market competition and, at the least, suggests that managers ought to restrain themselves from profiting off and exacerbating justice failure. As I noted, this is a fairly generic prescription; absent a more substantive theory of justice or equality the normative implications of this are unavoidably vague and indeterminate. However, given certain values that seem implicit to our social order, I offered a sketch of how and when values other than efficiency should enter into the business ethics equation while still being cognisant of the economic realities in which businesses find themselves. Some will find those

[9] I thank Michael Kates for helping me understand the distinction between a "living wage" and a "fair wage."

conclusions compelling, while I am sure that many will not. This is fine. The main point was to illustrate the kinds of issues the justice failures approach draws our attention toward, and the kinds of claims it helps us make. Put differently: even if one disagrees with my specific diagnoses of justice failures and prescriptions for business ethics, I feel it still helpfully illustrates "justice failure" as a generic concept, and clarifies its use for understanding business ethics.

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