

Markets, Games and Lobbying

by
Denys Robinson

A thesis submitted to the Graduate Program in Philosophy in
conformity with the requirements for the Master of Arts degree.

Queen's University,
Kingston, Ontario, Canada
October, 2015

Copyright © Denys Robinson, 2015

Abstract

Contemporary business ethics asks the question: what moral responsibilities do actors in a market economy have? Specifically, what obligations do corporate managers have? In this paper I consider a new method for answering these questions, Joseph Heath's market failure model of business ethics. On this view, the market is a staged competition that is normatively justifiable through its tendency to promote Pareto efficiency. Since the market is justified by Pareto efficiency, competitive behaviour in the market should be constrained by a set of rules that is consistent with the pursuit of Pareto efficiency.

Treating business as a competition is philosophically justified, I argue, both in the sense that it satisfies the conditions of a game, or at least a game-like activity, and in the sense that the deontic weakening that competition brings with it is justified in the market.

I consider one case in more detail, to demonstrate the value of the approach. Within the business competition, I argue, lobbying is an impermissible, though conditionally excusable strategy. This is because lobbying routinely produces market failures, and indeed is often pursued precisely with that goal.

Acknowledgements

I would like to thank my supervisor, Sergio Sismondo, for his careful attention to my project and support throughout.

I would like to thank my examiners Alistair Macleod and Rahul Kumar for their comments.

I would like to thank my parents and friends for their support during my year away as well as some last minute help with copy editing.

Finally, I would like to thank the excellent people in my M.A./PhD cohort. I could not have hoped for a better group of colleagues

Table of Contents

Chapter 1	1
Markets.....	1
1.1. Introduction	1
1.2 Shareholder Theory.....	2
1.2.1 Problems with Shareholder Theory	3
1.3 Stakeholder Theory	6
1.3.1 Problems with Stakeholder Theory.....	9
1.4 The Market Failures Approach	11
1.4.1 Coase and Transaction Cost Theory	18
1.4.2 Applbaum and Deontic Weakening.....	20
1.5 Objections.....	25
1.5.1 Revisiting Stakeholder Theory	30
1.5.2 Why Pareto Efficiency?.....	31
1.6 Conclusion.....	33
Chapter 2	34
Games	34
2.2 Suits on Games	34
2.2.2 Objections to Suits	35
2.2.3 Cheating: Penalties and Costs	38
2.3 Business as a Game or Competition	40
2.3.1 Koehn on Business as a Game.....	41
2.3.2 Hamington and the Domain Confusion.....	45
2.4 Game Variants.....	48
2.4.1 Game Variants and Sean Avery.....	50
2.4.2 Practical Questions	51
2.4.3 An Important Distinction	53
2.4.4 Metagames	54
2.5 Heath and Market Failures.....	55
2.6 Conclusion.....	57
Chapter 3	59
Lobbying.....	59
3.1 Lobbying.....	59
3.2 What is Lobbying?	59
3.2.1 Legal Regulation of Lobbying in Canada.....	62

3.2.2	Lobbyist Code of Conduct	64
	Principles.....	64
	Rules	64
3.3.1	Effectiveness of Lobbying	66
3.2.3	Categorizing Lobbying	68
3.3	How Lobbying Leads to Market Failures	71
3.3.2	Rent Seeking.....	72
3.3.3	Market Failures and Global Trade	74
3.4	Other Views on Lobbying.....	75
3.5	Restricting Lobbying	77
3.5.2	Free Speech and Lobbying	79
3.5.3	Permissible and Excusable Business Practices.....	81
	Conclusion.....	84

Chapter 1

Markets

1.1. Introduction

Contemporary business ethics asks the question: what moral responsibilities do actors in a market economy have? Specifically, what obligations do corporate managers have? In this paper I consider a new method for answering these questions and apply it to the case of business lobbying.

Chapter One is largely exegetical. As a starting point, I briefly consider and reject two traditional theories of business ethics that have been the primary focus of scholarly attention since the 1980s: stakeholder theory and shareholder theory. I then turn to the market failure theory of business ethics as developed by Joseph Heath in his recent book *Morality, Competition, and the Firm*. I unpack Heath's theory and explore how his theory incorporates the work of Arthur Applbaum and Ronald Coase. I consider objections to the theory as well as the implications of its Paretian commitments before turning to examine the implications of treating business as a competition.

In Chapter Two I consider some of the implications of Heath's claim that the competitive aspect of market behaviour is morally relevant. As a starting point, I take up Bernard Suits' definition of a game from his 1978 work *The Grasshopper: Games, Life and Utopia*. After examining Suits' theory and some criticisms, I develop the concept of a game variant. Games are constituted by their rules, but games like hockey and chess sometimes have different rules. In order to make sense of this, I propose

that activities that we call games are actually families of games composed of a series of variants which conform to a general structure. Applying this concept to business I arrive at the conclusion that business competition is a family of games or game-like pursuits composed of many variants. Since the rules constitute the variant, the question: what moral responsibilities do actors in a market economy have? is equivalent to: what variant of the business competition should we establish?

In Chapter Three I apply the theory to business lobbying. On the topic of lobbying, I compare market failure theory to stakeholder and shareholder theory. I subsequently argue that firms lobby in order to generate market failures that increase their profits and that lobbying is thus impermissible in the market failure model.

1.2 Shareholder Theory

Shareholder theorists take the view that managers are the agents of shareholders and must act according to their wishes or in their best interest. Acting in shareholders' interests has been generally interpreted to mean maximizing profit; this coheres with classical economics, which predicts that shareholders with interests other than maximizing profit will be bought out by maximizing shareholders. Thus, shareholder theorists hold that managers are to maximize profits within the law. Managers are agents for shareholders and must act in their best interests or according to their instructions. The only constraint for the manager is the legal regime governing the firm: profit maximization is only to be constrained by legal regulation and ethical custom, not the personal conscience of the manager (Friedman 1970). While Shareholder theory is generally associated with Milton Friedman, it would also be

reasonable to characterize the current state of corporate law as being consistent with the shareholder approach.

There are two reasons one might subscribe to some version of shareholder theory: a commitment to property rights or a commitment to economic efficiency.

On the property rights view, shareholders own the firm and are permitted to dispose of their property as they see fit, within the constraints of the law. Managers are appointed by shareholders to dispose of their property in a certain manner, with the goal of maximizing profits. On this view, the normative force of the manager's responsibility to the shareholders is derived from the shareholder's right to their own property. The political value expressed by this normative commitment is an overriding commitment to freedom, understood as freedom to dispose of oneself and one's property as one sees fit.

On the economic efficiency view, shareholders and their manager representatives ought to be left free to pursue profits on the grounds that permitting them to do so will lead to general social benefit. This view finds its origins in the claim from Adam Smith that the market can translate private vice into public virtue. Recent defenders of the view include David Gauthier, who argues that free markets make morality superfluous in the economic sphere (Gauthier 1986).

1.2.1 Problems with Shareholder Theory

Shareholder theory suffers from four defects. First, it relies on an account of property rights that is philosophically suspect in two ways. Second, it produces unintuitive conclusions about permissible business practices. Third, the view relies on

unjustified moral “laundering,” in a sense I will explain. Fourth, one can accept the efficiency argument and remain skeptical about the principle of maximizing profits within the bounds of the law.

Heath dismisses the property rights version of the view as based on a “broadly Lockean” theory of property rights (Heath 2014:29). Where by “broadly Lockean” Heath means a natural or basic rights based theory of property rights. The Lockean story may apply to individuals, but corporations are artificial constructs (Heath 2014:29). Notably, modern corporations are limited liability entities. Limited liability protection is a privilege granted by laws that does not appear to be directly derived from any natural rights. As opposed to being a basic right, limited liability protections are a privilege. As a quid pro quo, lawmakers, acting on behalf of society, then seem perfectly within their rights to put certain constraints upon the disposal of property that is bound up in this construct (Heath 2014:29).

If shareholder theory is taken at face value, managerial behaviour that maximizes profits but harms others is permissible and probably even required because of the responsibility that managers have to their shareholders. Taking Friedman’s original principle to its logical conclusion demands that managers interfere in regulatory and political processes, insofar as doing so is legal and maximizes profit. Such interference could include things like seeking to prevent carbon taxes or health controls on cigarettes. Furthermore, Friedman's principle seems to demand that managers lie to the public, pollute the environment, and exploit unintended tax loopholes when doing so is legal and will increase profits. Shareholder theory, by permitting or demanding behaviour contrary to the public interest,

generates morally unintuitive conclusions.

Shareholder theory infers from the property rights of shareholders and their employment contract with managers that the managers must always and only act in the shareholders' interests. This may be true, but it does not follow that the managers have an obligation to engage in otherwise impermissible behaviour on the shareholder's behalf. I cannot absolve myself of responsibility for this or that moral wrongdoing simply because I committed the wrongdoing on behalf of someone else who I promised to act for. Suppose Jones and Smith are sitting at the hotel bar after an out of town business meeting. Smith hits it off with a female patron and prepares to take her to his room. Knowing his wife will call their room later, he tells Jones: "promise me that you will tell my wife I went to bed early because I have a migraine and I do not want to be disturbed". Jones promises to do so and follows through. Is it now permissible for Jones to lie to Mrs. Smith because he has promised to do so? Furthermore, how can Smith evade responsibility for lying to his wife by involving an intermediary? Whether or not a behaviour is permissible is an independent question from whether or not one has promised to do it. A promise may make a permissible behaviour required, but it cannot make an impermissible behaviour permissible. Thus shareholder theory seeks to launder impermissible behaviour into permissible behaviour through the fiduciary relationship, but this does not work unless one can provide other reasons as to why the otherwise impermissible behaviour is permissible, given the specific nature of the relationship. Fiduciary duty and promises alone do not do the work.

Heath argues, plausibly, that the rights-based justifications of shareholder theory

are unsuccessful. However, as we will see later, his arguments against shareholder theory leave the door open for an efficiency grounded business ethics and specific attention to shareholder interests on the part of managers.

1.3 Stakeholder Theory

Stakeholder theory was originally developed by R. Edward Freeman and laid out in his 1984 book: *Strategic Management: A Stakeholder Approach* (reissued in 2010). The book was motivated by strategic challenges facing American business in the 1970s and '80s, specifically the competitiveness of Japanese and German manufacturing firms. Freeman's central claim in the book is that business managers ought to attend to the interests of all stakeholder groups in a corporation where a stakeholder is defined as "any group or individual who can affect or is affected by the achievement of the firm's objectives" (Freeman 2010:25). Most of the work involves hashing out the practical implications of adopting such an approach for an executive, while hinting at some of the philosophical commitments underpinning the approach. While Freeman's later work spells those commitments, they seem to be inconsistent with his original articulation of stakeholder theory and inconsistent with how stakeholder theory has come to be understood in the literature (Stieb 2009:403). Consequently, I will look at a more general justification of the approach, not Freeman's own.

Stakeholder theory is a response to the intuitive wrongness of some of the conclusions that shareholder theory generates. For example, if there is no law against a company dumping carcinogenic agents into the local water supply, and if doing so will maximize profits, the shareholder view does not seem to produce what I believe

most people would feel is the right answer in the case. The shareholder theorist seems committed to the view that the company may or even ought to dump the pollutants into the river. Furthermore, if the company can legally intervene in the legislative process in order to prevent regulations being passed to prohibit its dumping practices, the shareholder theorist seems committed to permitting or requiring them to intervene.

A strong intuition that many people have in these cases is that a company dumping in the river wrongs the people downstream by polluting the river. One way of articulating this is to say that those downstream have rights, and that the company is prohibited from infringing on those rights and harming them. To generalize, we might say that persons affected by the behaviour of a company, depending on its form and degree, have a stake in how the company behaves. This points us in the direction of a new normative framework for evaluating managerial decisions.

Instead of simply concerning themselves with maximizing profits, managers ought to take into account how their business strategy affects all stakeholder groups when making business decisions.

Common examples of stakeholder groups include: shareholders, employees, suppliers and distributors, members of the local community, and customers. The basic test in a stakeholder model is whether a firm's behaviour affects a morally relevant group in a morally relevant way. Depending on how one draws the boundaries, the set of stakeholders that managers take into account can vary significantly from a select group including employees, shareholders, and suppliers, to all morally relevant forms of life on the planet.

We can distinguish between normative and instrumental stakeholder theorists (Phillips 2011:131). The normative theorist claims that, for ethical reasons, managers ought to balance the competing interests of stakeholders. The instrumental stakeholder theorist makes the empirical claim that attending to stakeholder concerns is part of (or perhaps the central plank in) any effective profit-maximizing strategy. The two claims are not in tension, largely because one is philosophical and the other empirical. It would be lovely if it were the case that manager-stakeholder relations largely consisted of the potential for win-win interactions. Where it can be demonstrated to all parties that this is the case, presumably things will go better for all involved. However, a realistic assessment of cooperation reveals that it produces both an alignment and a conflict of interest. Rawls lays this out clearly:

[A]lthough society is a cooperative venture for mutual advantage, it is typically marked by a conflict as well as a identity of interests. There is an identity of interests because social cooperation leads to a better life for all than any would have if each were to live solely by his own efforts. There is a conflict of interest since persons are not indifferent as to how the greater benefits produced by their collaboration are distributed.... (Rawls 1999:4)

Suppose we apply this insight to a firm. While it is true that there is considerable space for cooperation between employees and management, between different suppliers in a supply chain, or between rival firms who pool resources to build a large mine, each party is not indifferent to how the additional gains secured by the cooperative behaviour are distributed. A robust stakeholder approach to management then must be justified on ethical grounds, not merely empirical or instrumental grounds.

The stakeholder approach has some intuitive appeal and it seems to get the right answer in cases where shareholder theory produces intuitively unacceptable answers.

However, stakeholder theory suffers from some serious problems of its own.

1.3.1 Problems with Stakeholder Theory

There are four problems with stakeholder theory: scope, institutional role, commensurability, and agency.

Stakeholder theorists have not been able to generate a non-arbitrary way of identifying stakeholder groups. If the standard for assigning stakeholdership is a morally relevant entity affected by a firm's behaviour, then the list of relevant entities is going to be too long to be manageable from the perspective of someone attempting to balance their interests. If the test for stakeholdership produces a shorter list, what is the justification for the narrower test? This leads to the concern that stakeholder lists will tend to be lists of the well-organized groups that are affected by a firm's behaviour (Heath 2014:82).

Stakeholder theorists have not taken into account the role that managers play in firms and that firms play in markets. Just as a defense lawyer has duties qua defense lawyer that are not directly related to the broader project of the legal system in producing just outcomes, managers have duties qua managers that are not directly related to the broader social goals that we attribute to the market institution. The concept of a role-specific duty is useful precisely because the demands placed upon people in a specific role are different from the demands placed upon people in everyday interactions. Since managers are responsible for running firms that compete in markets, their ethical duties have to be assessed in that context. This is another way of saying that business ethics should not be explicitly anti-capitalist (Heath

2014:199-200).

Stakeholder theorists have not provided a commensurable standard for measuring the competing interests of stakeholders leading to the evaluation problem. For example, a popular version of stakeholder theory taught in many undergraduate classes involves the list of duties presented by Robert Audi. Audi's list is derivative of W.D. Ross' attempt to reconcile utilitarian and deontological moral theories (Audi 2009:5). Unfortunately, while it may be wrong to violate one's duty of fidelity by breaking a promise and also wrong to violate one's duty of nonmaleficence by harming someone, this does not tell us anything about how one is to balance duties of nonmaleficence against duties of fidelity. Using the list as a basis for business ethics quickly leads into the commensurability problem: there is no commensurable standard by which to measure the conflicting duties.

The agency problem is not a theoretical one but a practical one. It is a practical consequence of the evaluation problem. Stakeholder theorists hold that managers must balance the conflicting interests of various stakeholder groups. For example, the interests of employees to make a high wage have to be balanced against the interests of shareholders to receive large profits. However, once managers have two or more conflicting interests to balance, it becomes very difficult to hold them accountable for achieving goals or running the firm efficiently. If the shareholders complain about low profits, the managers can point to the importance of keeping aging employees on. If members of the community complain about dumping in a local river, the managers can insist that such behaviour is necessary to remaining profitable (perhaps in light of the practices of other businesses) and thus to protecting the interests of shareholders.

Any complaint one group brings can be pushed aside by appeal to another group's concerns. The tendency for this to lead to managerial misbehaviour within firms is well documented in the post-war era (Heath 2014:197).

Stakeholder theory, in its various incarnations, faces serious problems both generating clear and coherent moral obligations on the parts of managers and pointing to institutional mechanisms for effectively operating firms.

1.4 The Market Failures Approach

Joseph Heath develops his market failures approach to business ethics as part of a larger project in political economy. He first asks the question: how are we to organize the production and distribution of goods within our society? Since Rawls, those working in political philosophy have dealt with this question in relation to two values: efficiency and distribution. Heath's major claim is that justice claims, directly applied to markets, should be made *only* on efficiency grounds. Justice claims with regards to distribution are to be dealt with by other institutions.

Heath argues that if we attempt to enforce standards of distributive justice through market mechanisms, we undermine the mechanism through which the market produces efficiency gains. If efficiency, understood as a component of justice, is the goal of market institutions, then the behaviour of market actors is to be assessed (normatively speaking) on this standard. Just as the professional ethics of doctors are developed in relation to the value of health, the professional standards of managers are to be developed in relation to the value of efficiency. The events or circumstances that lead to inefficient markets are called market failures. Since efficiency is the

standard, the set of moral obligations that managers have is one that aims at preventing or avoiding market failures, hence the market failure approach.

Business ethics deals with the moral obligations of managers in a capitalist economy (Heath 2014:25). If business ethics is to deal with the obligations of managers in a firm, then their obligations must be understood in terms of their obligations as members of administered hierarchies as well as leaders of institutions that participate in markets. Furthermore, managers' role specific obligations can only be understood as role specific in an interesting sense once we ascertain the normative purpose of their role. In order to understand the normative purpose of their role, we must first understand the normative purpose of the institutional arrangements that produce their role. This is the sense in which the market failures approach is a significant departure from both shareholder and stakeholder theory: the obligations of managers are to be understood in the context of a broader project of political economy as opposed to being understood with direct reference to first order moral theories.

Here is Heath again on his theory: "the market is essentially a staged competition, designed to promote Pareto Efficiency, and in cases where the explicit rules governing the competition are insufficient to secure the class of favoured outcomes, economic actors should respect the spirit of these rules and refrain from pursuing strategies that run contrary to the point of the competition" (Heath 2014:5). Heath expands this claim into the following set of claims, which he defends throughout the book:

1. Markets are staged competitions.
2. The only defensible normative justification for markets is that they

- promote Pareto efficiency (efficiency is the implicit morality of the market).
3. From this, we can conclude that the ethical code for market actors qua market actors is derivative of the efficiency goals that justify the market institution.
 4. The manner in which markets achieve efficiency can be mathematically modeled. Furthermore, it has been proven that free markets, in certain ideal conditions, will always achieve Pareto optimal states.
 5. Since real world markets do not and cannot match the ideal model, we cannot directly apply the ideal model to real world markets. Instead, we ought to use the ideal model as a heuristic for identifying the way in which actual markets achieve efficiency gains.
 6. Instances where markets do not achieve Pareto optimal or even Pareto preferable outcomes are instances of market failure.
 7. Analyzing markets should occur with reference to our heuristic and with attention to the details of specific markets.
 8. In addition to following the law, managers are obligated to pursue profits through preferred as opposed to non-preferred strategies. Preferred strategies are those strategies where firms seek to compete in the market in ways that are broadly consistent with the efficiency goals of the market.
 9. This justification is a justification for regulation and ethical constraints. What allows us to distinguish between the two is the practicality and efficiency of imposing regulations in given cases.

What does Heath mean by the claim that markets are essentially staged competitions? The first piece of the claim is a familiar story from introductory economics courses. In a marketplace with multiple buyers and sellers, everyone competes with each other on price. This has the effect of driving goods to their market-clearing price – where the market clearing price is the price at which supply and demand are equal. Pushing goods to their market-clearing price causes the greatest amount of benefit to be gained from the buying and selling of that particular good.

Markets are either justified by pointing to their efficiency or by arguing that they are a necessary condition of the appropriate level of political freedom. The efficiency arguments either point to the market as producing incentives or sharing information. The incentive arguments all end up failing as a justification for markets because

non-market systems can produce the same incentives. As we will see later, part of justifying a competition is showing that the competition is necessary to produce a certain good. Thus, the market is defensible on efficiency grounds using the information transmission account. The freedom arguments either appeal to freedom as a pure value or argue that freedom in the market ends up having good results for society (Heath 2014:197). In the latter case, it is likely just a roundabout way of giving the efficiency argument. In the former case, while it is a coherent position to take, Heath rejects it, given the political failure of the general libertarian viewpoint in American society and elsewhere. Heath attributes the failure to Libertarianism's inability to deal with segregation while remaining philosophically consistent (it is interesting to note here that Ron and Rand Paul, the most prominent contemporary American Libertarian politicians are very reluctant or roundabout when it comes to condemning segregation). In terms of normative justification for markets, Pareto efficiency is "the only game in town" (Heath 2014:197).

It seems hasty to reject a normative claim because it falls out of a set of political commitments that have failed to achieve widespread acceptance in Western societies. However, in the case of segregation, the social situation that had arisen, in some part as a consequence of a strong commitment to a libertarian interpretation of freedom, was not sustainable (i.e., segregation was in part possible because of a robust interpretation of what property rights allowed). In addition to justice concerns, one might reasonably apply certain stability criteria to social institutions. If a particular political commitment leads to instability in political institutions, whatever we might think about the justness of such an institution, its inability to provide stability is a

strike against it. That libertarianism can fail to produce stable social arrangements because of extreme failures on either the equality or efficiency front is a reasonable criticism of libertarian political commitments. Heath's claim here seems to me to be that, given general social views in contemporary western society, a strongly libertarian political program will be unappealing to the public and unable to generate a stable political society. Whether or not this is true might be contested, but Heath does provide us some reasonable prima facie grounds to think that it is.

Why are managers obligated to respect the spirit of the rules as well as the rules themselves? While we can give different accounts of why one must obey laws, a key part of any account is that the laws have some sort of external justification or goal. Laws are not self-justifying, but are justified by some moral aim or by some legitimate process through which they were produced. In the case of business law, the justified business law aims at efficiency. If one thinks that business people ought to follow the law, it suggests some level of commitment to this objective. If business people ought to follow the law in order to maximize efficiency in the market, then they ought to follow rules that are not codified in law that will maximize efficiency in the market.

Roles give context to our understanding of ethical obligations. For example, some of the ethical duties that doctors have are thought to be held qua doctor, not qua human being. But what does this mean? In order to figure out what doctors are supposed to do, qua doctor, are we simply supposed to analyze our doctor concepts and see what sort of duties derive from that analysis? I do not think that this is the most effective way of going about it. Instead, the way to make sense of doctor-specific role obligations is by examining the purpose of the role. The same can be said of

managers in a company. To the extent that managers in a business corporation have duties qua managers, the content of those duties is derived, not from a concept of the role, but from the underlying justification for the role. Determining what sets of duties business managers have, then, is a matter of determining why there are business managers (in the normative sense).

Determining why there are business managers involves determining why there are corporations and why they are managed in the way that they are. Supposing that the reasons corporations exist in the form that they exist involve sufficient justification for their existence, we can then examine that justification. Once the justification for that practice is determined, then we can determine what duties managers have qua managers with reference to the underlying justification. This is part of the philosophical and methodological justification underlying the market failures approach to business ethics – it explains why managers’ ethical duties qua managers are to be assessed in relation to the underlying ethic of the market: efficiency.

Managerial duties are to be assessed in relation to the Pareto efficiency goals that supply the normative justification for our market institutions. However, in the real world, the mathematical model that shows that markets will achieve Pareto optimality is not applicable.

Instead, with the mechanisms through which market competition produces efficiency gains in mind, we must assess specific industries and see if they are achieving socially optimal outcomes.

Business ethics as market failure is only one piece of a broader story about

market institutions and their place in a fully developed theory of the state. Briefly, on this theory, justice is a matter of efficiency and distribution. For practical reasons, there is a division of labour between institutions in our society and the market is an institution that is solely concerned with efficiency. The justice of the overall society is measured against the full set of institutions, some of which will have to deal with distribution. Actors in the market are not directly concerned with efficiency but are obligated to pursue business strategies that are consistent with it. Governments should regulate the market with a mind to its efficiency goals. Governance of market behaviour is thus accomplished through a two-pronged approach: regulation and adherence to ethical norms, both of which are based on the efficiency goal.

Since the real world only approximates ideal mathematical models, our heuristic approach entails the careful study of specific industries. The specific set of regulations and ethical norms appropriate to a particular industry will be a function of the actual conditions, the set of market failures, and the practical limitations in that industry. Furthermore, identifying whether the solution ought to be regulatory or beyond compliance involves a further empirical question of whether or not regulations will be effective. Business ethics is thus concerned not only with empirical questions about how an industry works, but also with empirical questions about how regulatory mechanisms do or would work in that industry. The general form of industry-specific ethical and regulatory codes can be derived from the a priori model of the markets and the efficiency justification of markets, but the codes themselves are, in part, a function of facts on the ground.

Fully unpacking Heath's initial claim, we arrive at this:

The market is a staged competition that is normatively justifiable through its tendency to promote Pareto efficiency. Since the market is justified by Pareto efficiency, competitive behaviour in the market should be constrained by a set of rules that is consistent with the pursuit of Pareto efficiency. For practical reasons, these rules cannot all be articulated in the law. Thus market actors ought to be constrained both by legal norms and moral norms, where both sets of norms have the common objective of securing Pareto efficient outcomes through the market.

1.4.1 Coase and Transaction Cost Theory

Important to Heath's theory is the distinction between competitive and cooperative interactions. In an early attempt to explain why firms exist, Ronald Coase provided a powerful tool for understanding the distinction.

Coase distinguishes between two modes or categories for organizing production (Williamson and Winter 1991:19). One mode is through the price mechanism, while the second is through an administered hierarchy. For example, an entrepreneur who makes widgets might like a report on the reaction of target consumers to widget colouring. To acquire such information he might do one of two things: either he could instruct an employee to produce a report on colour-relative consumer widget demand or he could pay for a report containing the information. In one case, the transaction is organized through the market, which is to say via the price mechanism. In the other case, the transaction is achieved through the hierarchical relations within the firm. One person ordered another to write the report. In the market prices are offered and accepted by individuals, whereas within the hierarchy superiors order subordinates to

produce x or y good or service.

As we have seen, the price mechanism is, on the standard economic theory, the most efficient way of organizing production. However, if this is the case: why do firms exist? As Coase points out: “the distinguishing mark of the firm is the supercession of the price mechanism”(Williamson & Winter 1991:20). Coase's answer is that both markets and administered hierarchies have costs associated with their operation. For some transactions, the costs are higher when organized in a market, for others the costs are higher when organized within a hierarchy.

Coase's argument has two parts. The first is the conceptual distinction between market transactions and administered ones. The second is the empirical claim that firms exist because the transaction cost of arranging certain types of production are lower within firms. There is some disagreement as to whether or not Coase is correct about the empirical claim – though whether or not he is right it has some implications for policy on corporate entities. However, the conceptual distinction is quite clear and does considerable work in the market failures theory.

If Coase is right that firms exist in the cases where administered hierarchies are more efficient than markets, then all is well with firms on the market failure view. However, if Coase is wrong about why firms exist or wrong in some cases, then the market failure theorist may be committed to dismantling firms. For example, firms might exist because of attempts by coalitions of actors to set up powerful entities through which they can extract economic rents from society. Why firms exist in general and why particular firms exist are economic and historical questions beyond the scope of this paper. I will offer no comment on the topic here other than that it

merits further research.

The distinction between market and administered transactions gives us a method for distinguishing between competitive and noncompetitive areas of business. For example, the business manager is competing with the managers of other firms selling the same goods or services. However, the business manager is not in a competitive relationship with their subordinates within the firm. This is because the production relationships between the two firms and between the manager and subordinate are organized on the one hand by a market (entailing a competitive relationship) and, on the other hand, by an administered hierarchy (entailing a non-competitive relationship).

The conceptual distinction between markets and hierarchies provides us with a method for determining the scope of the business game and thus the scope of justifiable competition.

1.4.2 Applbaum and Deontic Weakening

Accepting what Heath calls “deontic weakening” in competitive interactions is a central feature of the market failures approach (Heath 2014:9). In order to accept deontic weakening in market interactions we have to accept two claims. First, that deontic weakening can be, in principle, acceptable in some cases. Second, that deontic weakening is acceptable in the case of market interactions. In this section I will unpack Arthur Applbaum’s account of how deontic weakening can be acceptable in principle.

Although Heath does not define deontic weakening for us, we can roughly

identify what it means. Deontic weakening refers to weakened moral constraints. In this context it refers to weakened moral constraints in competitive environments (e.g. the athlete competes without regard to how beating his opponent will make the opponent feel). According to Heath: “[m]orality arises from the fact that human affairs, when left to their own devices, have a tendency to go very badly” (Heath 2014:95). Meta-ethical debates about the nature of morality aside, we can agree with Heath here that many moral rules and norms which are present in our society or in other societies can be understood as devices for avoiding collective action problems that had arisen historically in the society. Morality on this account is a set of social norms that has been developed to avoid some common pitfalls – often collective action problems – that can plague human affairs. If morality is often about avoiding collective action problems, then our reflective moral intuitions are going to be, *prima facie*, hostile to competitive behaviour. However, there are many instances of competition that, when properly constrained, lead to social benefits. The competition of lawyers at a trial is sometimes thought to lead to the social benefit of a just legal apparatus. Athletes competing on the field can lead to inspiring sporting feats and tremendous entertainment. On Heath's account, firms competing in a properly regulated market produce considerable and not otherwise attainable social benefits. The tension between competition and morality is only apparent – not necessary. In cases where constrained competition actually leads to social benefits, it would seem to be justified.

Deontic weakening is necessary in a competitive environment if the environment is to remain competitive. If athletes on a sports field were to take into account how their opponents might feel if they lose, it would undermine their ability

to compete. In everyday life, we are taught to take into account how our actions impact others. In a competitive environment, competitors deliberately ignore some aspects of how their actions impact others. This is what Heath calls deontic weakening.

This leads Heath to conclude that competitions are often unsolved collective action problems. This is true specifically in the case of markets, since it would be to the benefit of both buyers and sellers to form cartels in order to drive up or down the prices on various goods. In the case of markets, the competition is set up in order to achieve efficiency gains. Since one of the functions of morality is to solve collective action problems, and because participating in a competition involves consistently reinforcing a collective action problem, many competitive behaviours are intuitively unacceptable.

Deontic weakening is justified in a particular case if the competition within which the deontic weakening occurs is justified. Deontic weakening may be justifiable in theory. Applbaum's work gives us some reason to think it is. Deontic weakening is justified in market interactions if the market competition is actually producing efficiency gains for society. The market does, in theory, produce efficiency gains and we have good reason to think that the theory roughly tracks specific cases. However, whether or not it is justified in any particular case is a matter of empirical study.

Whether or not deontic weakening is broadly justifiable in theory is something that Heath simply assumes. He does so with some reason and on grounds that follow Arthur Applbaum's justification of deontic weakening in his book: *Ethics for Adversaries* where his project is to discover what, if anything, justifies or can justify

the apparent rights violations that people in adversarial roles often commit. For example, is there a difference between lying and lawyering such that the lawyer is morally permitted to convince the jury of a falsehood?

Appelbaum considers three unsuccessful and one successful justifications for adversarial behaviour.

Appelbaum denies that a role can justify adversarial behaviour on its own by developing a notion of practice positivism. Practice positivism, like legal positivism, distinguishes between the description of a practice and the moral evaluation of a practice. We can apply a term to this or that practice and call people engaged in the practice practitioners of this or that. The question of whether or not the practice is justified is a separate one. Thus talking about a lawyer's behaviour as lawyering in order to justify it is mistaking a descriptive claim for a normative one.

Appelbaum considers whether or not adversarial relations are justified within a game. Deception is permissible in poker because the players have consented to the rules of the game (Appelbaum 1999:116). However, business, law and other wider social practices involve many people who have not consented or have not consented in the right way (what choice does one have but to buy things in the market in contemporary society – furthermore, one can buy a car knowing that the salesman will try to deceive according to the rules of the market game, but not consent to the deception nor legitimate it). So while the consent justification might work for poker, it does not do the necessary work for lawyers or businesspersons (Appelbaum 1999:117).

Appelbaum considers an argument from fair play. Some adversarial relationships

occur within games that might be thought to bring about social benefits. The legal system and the marketplace are two such cases. Following Rawls, Applbaum points out that it seems unfair to benefit from these systems without contributing to them. In other words, adversarial relations are justified when they are a necessary part of an institution that produces social benefits of which members of society at large, broadly speaking, have voluntarily accepted the benefits. Applbaum accepts the form of the justification, but seriously questions whether it can be applied in practice – are all consumers actually participants in the market game in the right ways to secure the prohibition against free-riding that legitimates the adversarial behaviour (Applbaum 1999:135).

Applbaum considers an argument from legitimate rights violations. While he concludes that there are some complex cases where rights violations might be legitimate, he denies that they are commonplace in business or other social institutions. Delving deeply into his views here is beyond the scope of my project.

Applbaum settles on the argument from equilibrium as the best justification of adversarial behaviour. In short, the argument is that in cases where an institution with built-in adversarial behaviour is necessary for achieving some good and that the good that it achieves outweighs whatever harms are caused by the adversarial behaviour – which is to say that the consequences of all of the adversarial behaviour is good all things considered – gives reasons to those participating in or affected by the institution to accept its legitimacy.

This account gives rise to what Applbaum and, subsequently, Heath refer to as the division of moral labour. Adversarial institutions require rules to limit the

adversarial behaviours to the set of behaviours that will actually achieve the all things considered gains. However, adversaries need to be focused on winning the competition, not on worrying about the broader social consequences of their behaviour. Thus there is a division of labour between the rule-makers and the players in a game or between policy-makers and businesspersons. The fact that some rules are difficult to articulate and enforce gives rise to the distinction between rule-following and sportsmanship or lawful behaviour and beyond-compliance behaviour.

Applbaum is not optimistic about the possibility of setting up adversarial institutions within which some level of adversarial behaviour is actually justified. However, he does give an account of how one might and Heath's system satisfies that account.

1.5 Objections

A number of objections to the Market Failure approach could be or have been put forward. In this section I seek to either deal with conclusively, or set aside with good reason these problems.

One objection to the market failures approach is that it is simply a re-articulation of shareholder theory. On Heath's account, managers are to play the competition to win, constrained only by the law and the spirit of the law. How is this different from Friedman's constraints of the law and ethical custom?

Friedman does not specify how we are to determine what ethical custom is and which ethical customs are to be followed and which ones are not. The market failures approach produces a framework for determining what beyond-compliance obligations

managers have. This is another way of saying that the market failures approach tells us what ethical custom ought to be in business – as opposed to gesturing vaguely at it.

All that said, perhaps then the market failures approach is just a better-developed version of the original Friedman view. If that were right, it would be no objection against the view itself. Furthermore, the main line of objection against Friedman's view tends to be that it is too permissive, but the market failure view gives us the tools to identify impermissible behaviour while maintaining the efficiency promoting tendencies of market institutions. In Chapter Three I will apply the theory directly to better demonstrate this. Thus, whether or not the market failure view is a brand new view or an improvement on an old one – if it lives up to its promises, it is still a good view to have.

There are two ways of interpreting the shareholder theory tradition. The obligation to shareholders can be interpreted as the product of efficiency concerns or as a matter of respect for shareholder rights (or shareholder vulnerability, on some versions of the fiduciary view). While Friedman is clearly in the shareholder rights camp (his view is that, by engaging in corporate social responsibility work, managers impose a tax on shareholders that they have no right to impose), respect for shareholder rights can be derived from the aim for efficiency. We might distinguish then between a natural rights view on the one hand and a efficiency directed rule of protection on the other.

The efficiency interpretation does not fit well with the shareholder theory moniker, because the efficiency interpretation is not really about shareholders, but about efficiency gains for society. Shareholder rights, on the efficiency view, are simply

instrumental or contingent - not really rights at all. The efficiency version of the shareholder view asks managers to maximize profits for shareholders, not because of any concern for the shareholders, but because it is thought that doing so will lead to social gains. Respect for shareholder rights is simply a legal tool that is part of a system designed to produce social gains. This sort of right is distinct from say a right against arbitrary detention. On the other hand, the rights version of the shareholder view is actually about shareholders. Shareholders have property rights that must be taken seriously, and respecting those rights involves maximizing profits for them. Thus the proper interpretation of the shareholder view is the rights interpretation. We might even say that shareholder theorists who base their position on efficiency arguments are market failure theorists in disguise..

Another objection to the market failure approach is that it fails on the same grounds that the stakeholder approach fails. Another way of saying this is that the market failures approach is simply giving a particular account of which stakeholders are relevant and how to accommodate their interests. Stakeholder theorists hold that managers need to balance the interests of stakeholders. The market failure view is, in part, an attempt to develop a normative defense of market institutions that satisfies conditions of liberal neutrality by appealing to Pareto efficiency.

However, on the market failure view we seem to have set up a group of stakeholders (everyone in society) and a way of measuring and balancing their interests (Pareto efficiency). The market failure approach is then just a particular version of stakeholder theory that has solved the commensurability problem and thus, probably, some of the agency problems, that plagued previous versions, but has

not fundamentally deviated from the stakeholder model.

While this objection hits on a similarity between the two views, it fails to identify the fundamental difference in the underlying structure of the two views. The stakeholder view deals with the importance of respecting the rights of stakeholders. Managers have direct obligations to stakeholders that take the form of respecting rights claims. On the market failures view, managers have no obligations to stakeholders, rather they have obligations to obey the law and conform to the spirit of the competition's rules. Fulfilling these obligations, if they have been articulated with proper attention to the facts on the ground, will have the effect of achieving efficiency gains for people who could be considered stakeholders, but this is an indirect consequence of the manager's behaviour.

On the market failure view, stakeholder interests in terms of Pareto efficiency are to be indirectly maximized through conformity with rules and norms. Stakeholder rights are dealt with by different institutional structures. As Heath puts, there is a moral division of labour between market institutions and other institutions in society. The stakeholder theorist thinks that justice claims apply directly to managers, while the market failure theorist thinks that they apply to society more generally. This is sometimes explained as the difference between 1st order, 2nd order, etc., moral theory.

Why is efficiency the standard? Equality is eliminated because directly applying equality standards to markets creates problems for price signalling. Earlier I suggested that part of the reason we demand efficiency over freedom from market institutions is that the libertarian political commitments involved in a freedom based

justification are inconsistent with social values and thus unable to generate a stable society. However, the further question might be asked: supposing efficiency, understood as Pareto efficiency, is the only standard, what are we to say about mechanization of the market? At some point in the future, it might be the case that we are able to develop advanced computers and complex brain scanning technology that are able to perfectly identify individual's preferences and perfectly aggregate those preferences into ideal demand data. It could then match the productive activities of society as a whole to that data. In other words the price signalling work that the market does is, at least conceptually, doable by machines.

What would we want to say about such a world? Would we have a problem with the machines making all of our purchasing and production decisions for us? I have stipulated that the system is efficient, but we might be concerned that the people are not free in some manner.

Heath would presumably be happy with replacing market institutions with the machine preference identifiers. I think we should be too. There are two reasons we might not be. First we might find choosing things for ourselves to be pleasant. Supposing that this is the case, the machines will be able to identify this preference and incorporate it into the productive structure. Those who have a sufficiently strong preference for shopping will still have opportunities to shop provided to them. Second we might think that choosing for ourselves has value in itself. If this is the case, we will have a preference for doing so which, once again, the machines will be able to identify and satisfy. In either case, preferences for making our own decisions can be satisfied within a planned economy. The only preference that cannot be satisfied within a

planned economy is for one to not be living within a planned economy. However, this is a preference that affects others as well as oneself. If the machines were set up properly, they would presumably eliminate the system if enough people held such a preference with sufficient strength. While preference satisfaction might take us to some strange places as technology develops, this is not necessarily a problem with a preference satisfaction based model for evaluating market institutions.

1.5.1 Revisiting Stakeholder Theory

In *The inescapability of a minimal version of normative stakeholder theory* Thomas Donaldson argues that in order to talk about corporations at all, one must commit oneself to a minimal version of stakeholder rights theory. His argument goes like this: talk of corporations involves talk of property rights and justifiable talk of property rights involves equal property rights. In order to have property rights we have to have a right to freedom and, once we have both, we can further derive rights to physical security, non-deceptive communication and a degree of privacy (Philips 2011:130-135). Whatever one might think about arguments for this or that set of natural rights, the basic argument is pretty clear. In order to talk about corporations, we need to talk about property rights, and if shareholders have property rights that need to be respected, then so do stakeholders. In short, the shareholder theorist who wants to respect the property rights of shareholders is committed to respecting the property rights of stakeholders as well. This certainly seems to follow from a natural rights understanding of shareholder theory, which I have argued is the best understanding. Not a whole lot follows from this minimal stakeholder theory. In fact,

respect for property rights is already fairly well established in the Western legal tradition, and shareholder theorists certainly do not deny it. Donaldson admits as much and points the reader in the direction of a broader, social contract based theory of business practices that will give us robust stakeholder rights. What theory this is, I am not quite sure, but a guess can be made.

When doing political philosophy in the contractualist tradition, an important factor is the level at which principles of justice are applied. Rawls famously claims that his two principles of justice only apply to the basic structure, meaning that the difference principle cannot be directly applied to distribution within, for example, the family (Rawls 1999:6). This is, I think, the direction that stakeholder theory is moving in. In order to justify a set of stakeholder rights, without direct appeal to first order ethical theories, some sort of social contract story needs to be told. The version of that story which spits out a principle of justice applicable at the level of stakeholders is the story that stakeholder theorists are looking for. I am not particularly enthusiastic about the likelihood of such a story being any good and thus am looking at Heath's market failures view.

1.5.2 Why Pareto Efficiency?

Using Pareto Efficiency as the standard for evaluating market institutions seems to involve a commitment to a desire or preference satisfaction based theory of the good. If one of the goals of the market failure model is to get away from commitments to controversial first order moral theories, what is the justification for using Pareto Efficiency as the standard?

Heath does not address this issue in his book on the market failures theory. However, a working paper of his on public administration shows, I think, how he would like to address the problem. In the paper *Cost-Benefit Analysis as an Expression of Liberal Neutrality*, Heath argues that Pareto Efficiency as a metric for doing cost benefit assessments of government policy is consistent with liberal neutrality because Pareto efficiency is measured against individual preferences or desires. By extension, I think we can see that, since the state is significantly involved in creating and regulating market institutions, that we might also be concerned with neutrality there. A commitment to Pareto efficiency is, then, not a commitment to a conception of the good, just to a model that gives rulemakers a standard of evaluation while being able to avoid such a commitment.

A further problem is raised by this story. Since, in a market economy, productive resources are distributed and assigned based on price signals and price signals are sent by people's spending choices, spending inequality will lead to a distortion of the price signals being sent. This is clearly illustrated by the fact that we produce things like \$5 lattes inside coffee shops that have homeless people sitting outside. The homeless person cannot direct the market to devote productive resources to the construction of additional housing because they have no money to do so with. On this model then, inequality is not just a distribution concern, it becomes an efficiency concern as well. Since there is decreasing marginal utility of spending and limited productive capacity inequality will also lead to inefficiency.

While calling for complete equality on efficiency grounds (as well as equality grounds) may be a perfectly reasonable thing to do, if the market failure theorist is

committed to doing so, it might be an issue for the theory's practical applicability. I do not think that Heath or the market failure theorist is committed to doing so. The question is not, what is the ideal situation, but what behaviour within current institutions is acceptable. That inequality also produces a drag on efficiency is a good reason to have more public policy devoted towards improving equality.

However, this is beyond the scope of the ethical duties that business people have qua business people. In short, if inequality is a problem, it is not a matter for beyond-compliance norms, which is to say, it is not a matter for business ethics.

1.6 Conclusion

In this chapter I have attempted to outline the market failures approach to business ethics and explored some of its theoretical underpinnings as well as entertaining some objections to the model. A central feature of the market failures approach is that it treats the competitive aspect of markets as normatively significant. In the next chapter I will look at Bernard Suits' definition of a game and try and show how it can be used to develop our understanding of business ethics as competitive ethics.

Chapter 2

Games

2.1 Games, Game Variants and Business

In his 1968 article *Is Business Bluffing Ethical?* Albert Carr claimed that business is a game and thus bluffing in business dealings is justified. Subsequent thinkers (Hamington 2009, Koehn 1997) have argued that business is not a game and that, further, thinking of it like this can easily lead to misbehaviour on the part of business people. Joseph Heath, in his book *Morality, Competition, and the Firm*, uses the business-sports analogy to both help explain his view and as an intuition pump to increase the persuasiveness of his view. While Heath does not commit to a view on whether or not business is a game, the matter is relevant to his theory. In order to determine whether or not business is a game, or like one, we must first establish what a game is. I start with Bernard Suits' account from his 1978 work *The Grasshopper: Games, Life, and Utopia*. I consider several objections to Suits' definition. Without passing final judgement on Suits' definition, I argue that business is game-like and that Suits' account of a game can be used to help understand the market failures approach.

2.2 Suits on Games

Bernard Suits provides the following definition of a game:

To play a game is to attempt to achieve a specific state of affairs (prelusory goal), using only means permitted by rules (lusory means), where the rules prohibit use of more efficient in favour of less efficient means (constitutive rules), and where the rules are accepted just because they make possible such activity

(lusory attitude). I also offer the following simpler and, so to speak, more portable version of the above: playing a game is the voluntary attempt to overcome unnecessary obstacles. (Suits 1978:40).

On Suits' account. chess is a game because:

1. Players are attempting to achieve a specific state of affairs: placing the opponent's king in checkmate
2. The only means permitted are those which are in accordance with the rules of chess (alternating turns, pieces move in certain ways, etc.)
3. The rules constrain efficiency – e.g., Bishops can only move diagonally; one is not permitted to move pieces out of turn
4. The point of moving the pieces according to the rules is to make the game possible – one could not play chess without the constraints and the rules are accepted for this reason

2.2.2 Objections to Suits

The literature on Suits' book is somewhat limited and tends to be focused on his larger claims about game playing and utopia. Consequently, too little attention has been devoted to assessing his definition of a game. Suits' definition may be too broad in that it includes things like morality, education, and publishing. Suits' definition seems to ascribe too great a role to the mental states of the players leading to the worry that his definition does not give us the tools to distinguish between a game and a gamified activity.

Is living morally a game?

1. We seek to have our lives go well (by whichever standard we judge going well). This seems to be the prelusory goal of the game "living morally".
2. The rules of living morally are just the rules of whichever system of morality we adhere to. Any system reasonably called a moral system puts some constraints on how we treat others when pursuing our own ends and following these rules is what living morally amounts to.
3. This means that the rules of living morally prohibit more efficient in favour of less efficient means.
4. Can we accept the rules of morality because they make living morally

possible? I think not. This hinges on what one thinks living morally amounts to. If we think that living morally requires that we follow the rules of morality because of an independent commitment to morality or justice, then we do not accept the rules of morality just because they make living morally possible. Suppose we take a Hobbesian approach and we view morality instrumentality, as a social convention for solving various collective action problems. Then we follow the rules because they make achieving the prelusory goal easier, not because they make the game possible. Either way, living morally fails Suits' fourth condition and thus is not a game on his account.

This does not preclude living morally being treated like a game. One could imagine an eccentric individual who behaved morally for neither of the reasons described above but simply in order to make the game, living morally, possible to play. In that sense, living morally could be a game. However the force of the objection relies on our intuitions that there is something wrong with living morally being a game. If it need not be a game, then we can safely condemn those who treat it as such while maintaining Suits' definition of a game.

Is education a game?

1. Education as a game might have two different prelusory goals: getting a degree and gaining knowledge.
2. Educational institutions are governed by rules. These rules could be the constitutive rules of a game.
3. These rules prohibit more efficient in favour of less efficient means of getting degrees. In this sense, education might be a game. However they do not prohibit more efficient in favour of less efficient means when gaining knowledge, or where they do, it is presumably an accident or for external ethical reasons, not game reasons, and thus education to gain knowledge cannot be a game.
4. One accepts the rules when pursuing a degree because it is necessary to do so in order to get into the institution, not because it makes the activity possible. However, it is reason enough to accept the rules of a university in order to make possible playing the game of education with the prelusory goal of getting a degree. Education in this sense then is a game which students, like professional athletes, play for monetary or career reasons.

We have an intuition that the search for knowledge is not a game. However, education is only a game in the sense that education with the preliminary goal of attaining a degree is a game, a conclusion we should have no problem with.

The concern underlying both of these objections is that, whether or not a certain activity is a game seems to depend on what set of mental states the participants have. To lay out a more mundane version of the objection: is doing the dishes a game? Presumably the answer is no, however one can clearly play the “dishes game” by timing the activity and trying to beat the previous night’s time. Worse, though adding a time element might be said to fundamentally alter the activity, from non-game to game status, this process can be repeated for just about any activity and not just using time constraints.

There is a rough distinction in popular parlance between a game and a gamified activity. Playing chess is a game, timing dishwashing is a gamified activity. The point of gamifying activities is usually to deal with akrasia. The success of this strategy in practical terms seems to suggest that Suits’ maybe on the right track when he links game playing with utopia - just based on the fact that playing a game seems to be a bigger attraction than accomplishing a task which will make our lives go better (playing the dishes game is preferable to cleaning the dishes - that is what makes the motivational trick successful). However, it raises a problem for the Suits’ definition. We can understand the distinction between a game and an activity has been gamified or made game-like, but Suits’ account does not give us a way to track the distinction: something is either a game or it is not. I will not here propose a solution to this problem, although I suspect it may well be solvable. Instead, I will simply point out that

if a non-game activity has been made game-like or has been gamified in such a manner as to fit Suits' definition, there is a sense in which it is not problematic to treat it as a game.

I have suggested that we should remain agnostic about whether or not Suits' definition of a game holds. However, Suits has captured something important about an aspect of human activity. Specifically, his definition of a game neatly captures the distinction between the internal goals and external goals of some activities. In Suits' terminology game players often participate in a game for reasons unrelated to the prelusory goal and for reasons separate from their adoption of the lusory attitude. Furthermore, competitions or games are usually set up by people with goals that are different from the prelusory goal. This is roughly what is going on in the business world where the normative justification for markets is not directly related to the prelusory goals of business actors.

Market actors often participate in the market for pay or out of necessity. This is quite different from most sports or parlour games which are played purely for fun by amateurs. The combination of paid and non-voluntary participants with a prelusory goal that is only indirectly tied to the purpose of the competition makes business ethics the hard case for adversarial ethics since neither the direct product of the competition nor voluntary participation can be appealed to as justifications for the practice.

Despite these problems, thinking about business as a game is a useful conceptual tool for teasing out some of the misconceptions about what a competitive ethic for business entails.

2.2.3 Cheating: Penalties and Costs

Allan Back, in his modestly titled paper *The Paper World of Bernard Suits*, seeks to show that Suits' understandings of play and utopia are flawed. While his whole argument is beyond the scope of this work, he does raise an interesting concern about cheating. Back points out that Suits seems to say contradictory things about cheating, suggesting at one point that cheaters are not playing the game and at another that cheating and accepting the penalties is a valid game strategy (Back 158-159). We can solve this apparent contradiction by distinguishing between punishments and costs.

It is useful here to distinguish between a punishment for a behaviour and an imposed cost for a behaviour. For example, we might think that a fine for littering is a punishment for a wrongful behaviour. Meanwhile, a tax on gasoline could be considered a way ensuring that people pay for the cost of their behaviour. In both cases, the cost imposed looks like a punishment, but the two cases are very different. In the littering case, the behaviour is impermissible and the fine is intended to communicate this and discourage future littering. In the gasoline tax case, burning gasoline is permissible so long as one pays for the costs of the behaviour. In games, there is a distinction between impermissible behaviour which is to say cheating and behaviour which has an in-game cost associated with it. There is a question about whether or not incurring penalties strategically in hockey or basketball is simply a matter of which variant of the game one is playing – more on game variants later.

One cannot play a game and cheat. By cheating one ceases to play the game. However, there is a distinction between breaking the rules and performing an in-game action that incurs a penalty. In the latter case, performing the action and accepting the penalty is a legitimate strategy if the penalty is intended as a cost, not a punishment or

deterrent. Furthermore, some cases that appear to be cheating, may actually be cases of confusion amongst the players over which variant of a game is being played.

One implication of this distinction is that regulators need to be extremely clear with businesspeople in distinguishing impermissible behaviour from taxed behaviour. If a business person thinks that a particular fine is simply a cost of doing business as opposed to a punishment or deterrent, they will be more likely to misbehave. Deploying this distinction also provides a response to advocates of the view that fines for violating regulatory rules should always be viewed as simply the cost of doing business.'

2.3 Business as a Game or Competition

Returning to our definition of a game:

To play a game is to attempt to achieve a specific state of affairs (prelusory goal), using only means permitted by rules (lusory means), where the rules prohibit use of more efficient in favour of less efficient means (constitutive rules), and where the rules are accepted just because they make possible such activity (lusory attitude). I also offer the following simpler and, so to speak, more portable version of the above: playing a game is the voluntary attempt to overcome unnecessary obstacles. (Suits 40).

We can now assess whether or not business fits the definition. What specific state of affairs is aimed at in the business game? Maximizing the amount of profit that their firm makes - specifically maximizing the net present value of all future cash flows.

Are permissible means constrained by rules? Yes, profits are to be pursued only by means of voluntary contracts, with customers, suppliers, employees etc. It is important to distinguish here between the rules of business and contract law. The basic rules of business are roughly (non-exhaustively) that contracts be voluntary,

that parties to the contracts understand the contracts, and that the relevant information related to the contract be known by both parties or at least, knowable. That contracts be voluntary and understood by both parties (or whatever version of these rules is exactly correct) prohibits more efficient in favour of less efficient means.

In what sense are the rules of business accepted just because they make doing business possible? It would seem that business people are not playing games because they conform to the rules as a condition of their employment, not in order to make the business game possible. Here it is useful to turn to Suits' clarificatory remarks on the phrase "just because". Just because, in the definition, means, on Suits' account: "A just because R" means that R is always a reason for doing A and there need be no other reason for doing A (Suits 1978:144). Thus business people can agree to the rules of the game because they are being paid to play the game and this does not change the fact that the rules make the game possible and that the rules make the game possible is always a reason for following the rules.

2.3.1 Koehn on Business as a Game

Daryl Koehn argues that the analogy drawn between business and games is inaccurate. She gives ten reasons for thinking that games and business are not alike, three of which I will address here. I will argue there that the motivation underlying each of her claims is based on a misunderstanding of games that Suits' account can be used to help clear up.

First, in games, losers suffer few consequences. While it is true that in many

games, the losers suffer few consequences because the internal structure of the game is trivial, that does not entail that, because of how the game is being dealt with outside of the game, there will not be serious consequences to losing. Koehn essentially concedes as much with her poker example (Koehn 1448). Why would we think that poker is no longer a game if the stakes and thus the consequences are high enough? Furthermore, professional athletes have whole careers riding on their performance in games. Presumably soccer does not cease to be a game when losing causes one to become unemployed (or shot, in the case of the Colombian defender who scored an own-goal at the world cup). The stakes in business are high too, as Koehn points out, but this does not preclude it from being a game. The key here is that games require a preliminary goal but there is nothing in the concept of game that limits the importance of the preliminary goal or the external ramifications that attaining or not attaining that goal might be.

Second, the rules of the game are accepted by all who play the game. Koehn comes up with this objection because she misunderstands who is playing the game and what the rules are. The rules of the business game are, roughly, just that all transactions be voluntarily agreed to by informed and sufficiently rational parties. Everyone who engages in transactions in the market understands this, even if they do not understand it explicitly. The average market actor is much like the average card game player: they understand, roughly speaking, the rules of the game, even if they do not explicitly understand all of the intricacies. As we saw when discussing Appbaum, this is not sufficient to generate the claim that the rules are accepted in by all who play. Nonetheless, we might still appeal to equilibrium to justify the practice. We can

distinguish between two senses of accept here. One might accept the rules of a game in the sense that one might roughly know the rules and participate in the game. One might also accept the rules in the sense that one might know the rules and participate in the game when there are viable alternatives to doing so. As Applbaum points out, we cannot justifiably claim that the latter form of acceptance applies broadly in society to people participating in some part of the business game. However, this is not a problem for us here. So long as we can admit that the rules of the game are accepted in the weak sense, it seems clear that people playing the business game in society accept the rules. Whether or not the weak version of acceptance is sufficient to eliminate moral concerns we might have about player's acceptance making them justifiable targets is separate from the question of whether or not they are playing a game. For example, if a super-villain were to kidnap two people and compel them to play chess against one another on threat of some diabolical punishment, when they sit down to play chess they are clearly playing a game even though they have only accepted the rules in the weak sense. We can distinguish then between acceptance of game rules and whether or not rules were accepted for good reason or under some form of duress.

Third, Koehn argues that players in a game risk only what is theirs to risk and in a game it is clear to whom any gain belongs. The problem underlying both objections is that managers play the business game while shareholders get the rewards and eat the costs. Now this is not entirely true. Employees and other stakeholders, as well as the managers themselves are affected by a company's performance. However, the force of the objection seems to be that, if managers are playing a game, they should be

advancing their own interests like gamers do and that this is inconsistent with them being good managers and making profits for shareholders or balancing the interests of stakeholders. However, this objection is based on a misunderstanding of what is going on in a game. Game players are advancing their own interests in a specific sense: they are attempting to achieve a specific state of affairs. A game player's interests, qua game player, are measured against how successful they are at achieving the prelusory goal of the game. Managers, understood as game players, are evaluated on their success or failure in relation to the prelusory goal of the game. If the goal of the game in business is to maximize profits, managers who line their own pockets are not successful.

While Koehn's arguments against business being a game are unsuccessful, she makes an important point in her article. Koehn points out that previous advocates of the business is a game view are guilty of, and Carr for one certainly is, claiming that business is a game with rules and that, as in other games, one need only obey the rules without further regard to the standards of morality. Koehn thinks that this analysis is unsuccessful because business is not a game.

However, the stronger reason for thinking that this reasoning is unsuccessful is that, the mere fact that something is a game, does not entail that playing that game is justified. There must be further justification for the practice of playing this or that game in order for the deontic weakening that occurs within the game to be justified. In the case of chess, for example, that both players enjoy the game and agree to it justifies the deception that occurs during the game. As we have seen from our discussion of Applbaum, this move is harder in the area of business, but not, or so I

argue, impossible.

2.3.2 Hamington and the Domain Confusion

Maurice Hamington argues, in his article *Business is not a Game: The Metaphoric Fallacy*, that, while business is like a game, it is not a game, and, further that thinking it is a game can easily lead to unethical conduct. While Hamington quite reasonably criticizes some of the behaviour that he thinks the business as a game understanding seems to justify, I argue that he misunderstands the domain of competition in the marketplace and thus what sort of behaviours can be justified by the deontic weakening that occurs within a justified game.

Furthermore, he misunderstands what the business as a game account actually justifies because he thinks, incorrectly, that the mere fact that something is a game justifies any behaviour within the rules to win and, further, he thinks that the business as a game account treats a game as self-justifying. By understanding business as a game properly we can answer Hamington's four criticisms.

First, Hamington argues that treating business as a game compartmentalizes morality (Hamington 2009:477). Hamington points out that once one interprets one's behaviour, not as human behaviour, but as business person behaviour – which is to say once one understands oneself in the business person role instead of our normal role – it permits one to engage in behaviour that might be inappropriate to our normal role but appropriate to our business role (Hamington 2009:478). Another way of putting this is that it is easier for competitors to forget that the achieving the preliminary goal is not the point of the game. I think we can cede this criticism without

concern. The problem is not that business people are permitted to behave differently in the competitive environment; the problem is that what amounts to behaving differently, if badly described, can lead to harmful behaviour. The solution is not to insist that we apply everyday morality to business decisions, but rather that we apply the right set of role-specific norms to business decisions.

Second, Hamington argues that treating business as a game leads to truncated ethical content in two ways (Hamington 2009:478). First, the strict rule-following nature of game playing fails to capture the nuances of ethical life (Hamington 2009:478). The same problem exists in team sports in the distinction between regulation-following and sportsmanship. While the regulations governing hockey, for example, might not forbid screening the goalie, it seems that Sean Avery exhibited bad sportsmanship when he got in Martin Brodeur's face and waved his hands around instead of actually playing hockey. The distinction is between the set of rules that govern the game and the codified regulations which attempt to articulate these rules. The spirit of the rules is to have a "good" game of hockey, where good is defined by reference to the reasons for playing hockey. Understanding the spirit of the regulations, the underlying rules, and properly applying it to one's conduct provides all of the ethical nuance that Hamington is looking for. Second, Hamington argues that, since games have an end, treating business as a game leads to short-term thinking which can be harmful (Hamington 2009:479). While it is certainly true that executives engage in short-term thinking, this is at least to some degree a basic human failing. Insofar as current corporate governance structures (like stock options and de facto CEO controlled boards) promote short-term thinking they ought to be reformed.

The executive who focuses on quarterly profits instead of thinking of the long-term health of the company is making a bad move just as the chess player who takes a pawn now when it leaves his king vulnerable to checkmate three moves down the road is making a bad move.

Third, Hamington argues that treating business as a game trivializes the stakes (Hamington 2009:479). One of Suits' important insights is that games are about achieving a specific state of affairs and that we can understand something as a game without reference to the importance of that state of affairs. Hamington is confusing the fact that many games we play have trivial stakes with some feature that all games have.

Fourth, Hamington argues that treating business as a game privileges adversarial relationships in business and does not do justice to the importance of cooperation in business (Hamington 2009:480). This criticism is partly based on a conceptual confusion about the domain of competition in business. There is an important difference between inter-firm and intra-firm relationships. While inter-firm relationships are competitive relationships between market actors, intra-firm relationships are cooperative ones (Heath 2014:93).

Intra-firm relationships are cooperative because the corporation, internally, is not a market institution but a command economy. Thus the justification for competitive behaviour that exists for players in the market does not exist for relationships internal to the firm. Once we understand relationships internal to a firm as cooperative – like those between members of the same sports team – we can see how business being a game does not undermine intra-firm cooperation. Anyone who has played a team

sport before knows how important cooperation is to success in competitive endeavours.

Inter-firm and other market relationships are competitive and this does involve deontic weakening. Despite this, there is room for cooperation between competitors in large games. Two companies might cooperate in order to develop a product that neither could develop on their own. Insofar as productive cooperation of this sort is undermined by managers having excessively competitive attitudes, there is a problem. However, I do not see how denying that there is and ought to be competition in the market will help this problem.

There is a sense in which Hamington's criticism hits the mark. It is true that competitions have a tendency to get out of control. However, Hamington's solution, to not treat business as a game, is not a good one. Instead, given that we require a competitive market to achieve certain efficiency gains, we should work on carefully controlling market competition so that it produces the results we want.

2.4 Game Variants

From what I have been saying so far, one might get the impression that I think there is some monolithic entity: the business game, which encompasses all market activity and is governed by a single set of rules. I do not take myself to be arguing for this position (nor is it a tenable one to hold). Instead, I will argue, the business game is actually a family of similar but not identical games, all governed by different rules.

In order to understand the plausibility of a family of games, consider chess. The rules of chess are fairly easily laid out and we tend to talk about chess as a single

entity. However, what about playing chess with a clock versus without a clock? The rules are different and, if the rules are constitutive of the game, then chess is at least two different games. Fischer random chess (where the positioning of pieces on the back row is randomized, within certain constraints) is also chess but not chess. In order to make sense of this, I suggest we consider chess to be a family of games with considerable similarities. When I call speed-clock chess or traditional chess or tournament chess or Fischer random chess, chess, I am not naming a single entity but placing one thing within a category. The same can be said of business. Business works very differently in the oil industry and the publishing industry, in London, England and rural Bolivia. The rules of business games remain similar. The overarching principle of voluntary informed contracts between rational actors remains, but the details start to look different in different industries and different societies. This analysis applies to both parlour games and major social institutions that could be considered games. For example, the rules are different in civil and criminal procedures and poker can be played in a number of ways (5 card draw, texas hold 'em etc). Games then tend to have multiple variants which are referred to as a group with one name, as in the case of chess.

If games have multiple variants this raises the questions: which variant of the business game is being played in our society? In other societies? Which version ought to be played?

Which version is being played is an empirical question. As to which version ought to be played, the short answer, on the market failures view, is whichever is the most efficient. Efficiency justifies the market and the roles necessary to its operation.

Since the actors in the market are playing a game and games can have multiple variants, identifying which variant or variants are justifiable for them to play is a matter of assessing the efficiency of those variants.

If businesspeople are responsible for following the rules, then we must ask which variant of the business game we are playing in order to figure out which rules they are to be following.

2.4.1 Game Variants and Sean Avery

Was Sean Avery playing hockey when he screened Martin Brodeur? One answer might be that no, he was not playing hockey, he was cheating. However, if we are to understand hockey as a family of games, as I think we should, then we can see that Sean Avery and Martin Brodeur were playing two different hockey variants. In Hockey Variant Sean Avery, players are permitted to wave their hands in the goaltender's face while in Hockey Variant Martin Brodeur, they are not. The problem arose because the NHL had not made it clear (largely because it had not previously been necessary to) that NHL hockey was Hockey Variant Martin Brodeur, not Hockey Variant Sean Avery. The answer in this case points us to the broad answer to a potential puzzle with the game variant view.

Are two people playing a game together when they are playing different variants? I think the answer is no. Sean Avery and Martin Brodeur were failing to play hockey together because they were playing different variants. The confusion arose because the two variants were sufficiently similar that it was not immediately apparent that they were playing by different rules. Consider the case of a friendly

chess game. Two players, Smith and Jones, sit down and play a game of chess. Neither having played in some years, they talk through their moves fairly openly with the goal of keeping both players aware of the board state to facilitate a more interesting game of chess. Having spectated the first game, a third player, Miller sits down to play Jones after the conclusion of the first game. Miller also talks through the board state and encourages Jones to continue to do so, but Miller does so with the goal of deceiving Jones and improving his chances of winning the chess game. If Jones discovers what Miller is doing, it seems like he might have a legitimate complaint. However, Miller might easily respond: “Chess is a game of deception, talking about the board state in order to trick you is simply part of the game”. The conflict between Miller and Jones arises because they are playing different variants of chess. In one talking about the board state is meant to be honest and constructive, in the other it is about deception. Both rules are legitimate rules for games, but they cannot be rules for the same game (or the same variant in this case).

In order for deception or other prima facie wrongful behaviour to be justified in a game, it must be the case that the participants are all playing the same game and that the game is justified in some reasonable manner. Ensuring that all participants are playing the same game, through both proper promulgation and enforcement, is then an additional goal for rule makers on both the regulatory and beyond compliance norms front.

2.4.2 Practical Questions

Which variant of the business game should we be playing then? Earlier I suggested it

was the version of the business game that is most efficient. This is in line with the claim from Chapter One that regulations and beyond compliance norms should jointly produce market behaviour that is maximally efficient. How does this work in practice? Giving a full account is beyond the scope of this project, but I can provide a general outline.

Which variant is most efficient is a multidisciplinary empirical question. It involves asking not just what set of rules, when followed, will lead to an efficient market, but also to what degree a set of rules and associated enforcement mechanisms will actually lead to compliance and, further, given expected levels of compliance with this or that set of rules, which set will actually produce the most efficient outcomes. This model is well-understood when it comes to regulation and I will not say more on it here. When it comes to beyond-compliance norms, less work has been done.

One of the original concerns with the stakeholder model was that it did not produce a good system for managers to make decisions by. If the market failure theorist's answer is to ask managers to make business decisions according to a standard of wide scope economic efficiency, not much has been improved. Thus, not just a division of moral labour, but a division of practical reasoning work has to occur in business.

Regulators are responsible for correcting some market failures. However, others are not correctable through regulation, which is where beyond compliance behaviour comes in.

Managers on their own cannot be expected to generate a complete set of beyond

compliance norms. A new role is then called for: rule makers who do the appropriate work to determine a set of beyond compliance norms that satisfy the above standard and which managers can then turn to to guide their actions. This is what I take Heath to be doing when he contrasts preferred and nonpreferred competitive strategies in chapter 4 (Heath 2014:111-113).

Heath's rules are proposed at a very high level of generality. Further work could be done to develop industry-specific norms that are in line with the market failures approach and targeted towards the specific challenges in a particular industry.

2.4.3 An Important Distinction

In order for business to be a game on Suits' account, there must be a distinction between the formal expression of the rules and the rules themselves. This is because, if the formal expression of the rules (in the case of business, contract law) were the constitutive rules, then laws would be necessary (conceptually, not practically) to playing the business game. However, this is not true. The thought that one could have markets and people doing business without contract law is completely coherent (although practically difficult). It is conceptually possible to play hockey for large stakes without a referee or codified rules, it is just practically difficult for it to actually be played this way. Furthermore, people do not accept contract law just because it allows them to do business. One can do business without contract law. Thus, in order for business to be a game, the rules must be something other than contract law. In order to see what they are, we must draw a distinction.

There is a distinction between the rules of a game and the codification of those

rules. Contract law is the codification of the rules of the business game. However, because the rules are extremely complex in practice (although perhaps some fairly simple abstract version of them is possible to articulate) the codification of the rules is incomplete. The rules of the game are thus, not contract law, but the set of rules that contract law seeks to articulate where those rules are centered around voluntary, informed transactions.

2.4.4 Metagames

In the strategy literature there is a distinction drawn between market and nonmarket strategies. Examples of market strategies include advertising, product design, and pricing decisions.

Examples of non-market strategies include engagement with regulatory agencies, legislative bodies, and community groups (Holburn and Vanden Bergh 2014:451). The distinction between market and nonmarket strategies tracks a distinction often used amongst people who play strategy games between the game and the metagame. Without developing a robust definition to support the distinction, the basic idea is this: there is a distinction between what one does while playing the game and what one does to effect the space of choices available during the game.

There is a *prima facie* concern that this difference creates a problem for the competition rules focus of the market failure view. The objection is just this: if nonmarket strategies are like metagame strategies they seem to be occurring outside of the game and thus cannot be regulated by the competition rules. Further, merely because the behaviour has an effect on what is going on inside the competition does

not entail that those responsible for regulating the competition are entitled to regulate the behaviour. For example, presumably a manager's diet and exercise regimen has some effect on their decision-making ability and thus on how good their firm's strategic decisions are. However, this does not entail that utility company regulators are now entitled to tell utility company managers how often they can eat red meat.

I cannot here propose a clear standard for determining what is part of the competition. However, one can observe from the regulation of many organized sports and strategy games that, as a game matures and competitors become more sophisticated, the extent of metagaming increases. This inevitably leads to an expansion in the regulation of competitive behaviour. For example, as financial institutions became more sophisticated, the complexity of financial instruments increased. Particularly since 2008, this has led to an expanded regulatory scope for derivatives.

Lobbying is one example of a non-market or metagame strategy. As managers have become more sophisticated competitors, they have incorporated lobbying into their business strategy. Managers try to influence regulatory agencies in order to get a strategic edge over competing firms. As we will see later, lobbying is now sufficiently widespread that we can reasonably call it part business competition. If lobbying is part of business competition, then it is within the legitimate scope of business ethics.

2.5 Heath and Market Failures

According to Heath, the central claim in his market failures approach is: "the market is essentially a staged competition, designed to promote Pareto-efficiency, and in cases

where the explicit rules governing the competition are insufficient to secure the class of favoured outcomes, economic actors should respect the spirit of these rules and refrain from pursuing strategies that run contrary to the point of the competition” (Heath 2014:5).

Market competition is, at least, game like in the manner outlined by Suits’. The competition is normatively justified by its tendency to promote Pareto efficiency. The reason for setting up the competition and the preliminary goal of the competition are different. The reason for setting up the competition is promoting Pareto-efficiency while the preliminary goal of the competition is to maximize profits.

What justifies the competition is that it indirectly achieves a socially desirable end. What is more, this is only possible through markets. The reason for setting up the competition and the goals of the competitors are different, just like in professional sports where we set up the competition for entertainment but the athletes play to win, not to entertain us.

To summarize Heath’s view with my addendum about game playing: The ideal market is a socially desirable institution. Engaging in the market competition, as outlined by the rules of voluntary and informed contracts, is necessary to the functioning of the market. Contract law and business regulation are to be used to enforce the rules of the competition wherever possible. For practical reasons complete enforcement cannot be achieved through explicit rules and codified laws. Business people then have an obligation, like the obligation to be a good sport, to follow the letter and the spirit of the rules.

Earlier I claimed that Heath's view could be summarized as follows:

The market is a staged competition, which is normatively justifiable through its tendency to promote Pareto-efficiency. Since the market is justified by Pareto efficiency, competitive behaviour in the market should be constrained by a set of rules that is consistent with the pursuit of Pareto efficiency. For practical reasons, these rules cannot all be articulated in the law. Thus market actors ought to be constrained both by legal norms and moral norms, where both sets of norms have the common objective of securing Pareto efficient outcomes through the market.

With my understanding of business as game-like in mind we arrive at the expanded conclusion that:

Markets function through competitive interactions that can be understood as game-like (the business game), some versions of the business game promote Pareto-efficiency and are normatively justifiable by their tendency to do so. Since the market is justified by Pareto efficiency, competitive behaviour in the market should be constrained by a set of rules that is consistent with the pursuit of Pareto efficiency. The version of the business game that is most strongly justified is the version that, when played according to the rules, will produce the most efficient outcomes. For practical reasons, these rules cannot all be legally articulated and enforced. Thus market actors ought to be constrained both by legal norms and moral norms, where both sets of norms have the common objective of securing Pareto efficient outcomes through the market.

2.6 Conclusion

Neither Heath nor any other proponent of the market failures approach is, I think,

committed to the view that business is a game. However, Heath does use business-sports analogy throughout his book, not as an argument for his position but as both an explanatory device and an intuition pump. If business is a game, or at least game-like, the force of the analogy makes sense. Business and sports are similar and thus relevantly analogous because they are both games or game-like. Thus using sport and good sportsmanship as an explanatory device makes sense and the intuition pump strategy is justified. This understanding of business as game-like bolsters Heath's account of business ethics as managerial good sportsmanship.

Chapter 3

Lobbying

3.1 Lobbying

Corporate Political Activity, which I will refer to here as lobbying, has given rise to considerable concern in recent years. In section 2 I will develop a working definition of and categorization scheme for lobbying. In section 3 I will show how lobbying, given certain structural features of our institutions, is overwhelmingly likely to produce market failures. Specifically, lobbying in the area of market regulation is likely to produce government policies which will then lead to market failures. In section 4 I seek to show how shareholder and stakeholder theorists are ill-equipped to explain why lobbying is problematic. In section 5 I explore some of the issues with constraining or abolishing lobbying. I conclude that the market failure theorist supports eliminating lobbying or, as a concession to political realities, further restricting it.

3.2 What is Lobbying?

There is no agreed-on definition of lobbying, and even attempts to clarify the concept are not in evidence. Here I examine a few attempts at defining lobbying from the academic literature as well as the definition provided in the Canadian Federal Lobbying act before providing a working definition of my own.

Keffer and Hill define lobbying as “An attempt to persuade members of city councils, county commissions, state legislatures, or the U.S. Congress to support

legislation favourable to one's goals or desires, or to defeat or repeal legislation unfavourable to one's cause" (Keffer and Hill 1997:1372). In addition to only applying in the United States, this definition misses out on key targets of lobbying, both in terms of actors and processes. For example, neither attempting to influence a regulatory agency to use its discretionary powers in your favour, nor trying to persuade a public health official to start a vaccination campaign using your company's vaccine would count as lobbying on Keffer and Hill's definition. In short, their understanding of lobbying is excessively legislation focused.

Choi et al., distinguish lobbying from constituency building and providing financial support. This is to say they break down non-market business strategies into: providing information to legislators, developing political support amongst voters and other governmental stakeholders, and making campaign contributions (Choi et al 2015:159). While it is reasonable to distinguish between these activities, building grassroots support on an issue and making campaign contributions are both clearly directed towards the end of influencing policy outcomes.

The guide to the Canadian Federal Lobbying Act defines lobbying as follows:

Lobbying is **communication**, with **public office holders**, for payment with **regard to**:

1. the making, developing or amending of federal legislative proposals, bills or resolutions, regulations, policies or programs
2. the awarding of federal grants, contribution or other financial benefits; and
3. in the case of consultant lobbyists, the awarding of a federal government contract and arranging a meeting between their client and a public office holder. (Lobbying Guide:1)

Lobbying legislation has focused on legislative bodies, but passing laws is not the only function of the state. If lobbying is about getting some wing of the state to do

things your way, then lobbying involves not just trying to influence laws but trying to influence the policy process, the application of policy, and specific procurement decisions. Legislative bodies such as parliaments and city councils write and pass laws. These laws are then implemented, applied, and interpreted by civil servants at a variety of levels: anyone from a government economist to a police officer to a judge can be involved in what we might, in the broadest sense, refer to as the policy process. Police officers might use their discretion in giving a speeding ticket or intervening in a family dispute. This exercise of judgement is part of what the law amounts to or how the law affects society. The same can be said of a judge interpreting criminal law when handing down a judgement. Civil servants like government economists and accountants play a role in the policy process when they interpret and apply laws and instructions from their political masters during the budget process. A considerable range of activities, carried about by many different individuals and institutions jointly produce what might be described as policy outcomes.

Independent regulatory bodies, like the Canadian Radio and Television Commission (CRTC) can also affect a firm when they award licences. Firms like Rogers or Bell make submissions to CRTC hearings and attempt to influence the CRTC decisions. Other regulatory bodies, professional bodies, and federal departments like the Ontario Securities Commission, Law Societies, and Health Canada can affect firms depending on how they interpret and enforce regulations.

Governments routinely make large purchases. Military spending on fighter jets, submarines, and jeeps can lead to valuable contracts. Public transportation, highway building, bridge construction, vaccination campaigns, and other public works also

involve large government contracts. Firms can attempt to secure these contracts by putting together high-quality low-cost bids, but they can also attempt to secure government contracts by hiring former generals or cabinet ministers to lobby on their behalf.

When discussing lobbying, specifically business lobbying, what we are concerned about is how and to what degree businesses and business interests affect the policy, purchasing, and regulatory processes as they relate to markets. Lobbying then is any attempt to affect the outcomes of the policy, regulatory, procurement processes and business lobbying is when a firm or other market actor attempts to affect the outcome of these processes as they relate to their market behaviour.

3.2.1 Legal Regulation of Lobbying in Canada

Lobbying activity at the federal level in Canada is governed by the Lobbying Act of 1988. The act's stated aim is to “ensure transparency and accountability in the lobbying of federal public office holders in order to contribute to increasing Canadians' confidence in the integrity of the government decisions making process” (Act Guide:1).

Interestingly, under the act, communicating with a public office holder in order to alter the application or interpretation of a law or regulation does not seem to fall under the definition of lobbying. Furthermore, in-house lobbyists seem to be permitted to “lobby” for their firm to get federal government contracts without fulfilling disclosure requirements that consultant lobbyists are required to.

The act focuses on regulating the professional behaviour of lobbyists, not the

goals or behaviour of their employers. Furthermore, the act is based on four principles:

- Free and open access to government is an important matter of public interest;
- Lobbying of public office holders is a legitimate activity;
- It is desirable that public office holders and the public be able to know who is engaged in lobbying activities;
- A system for the registration of paid lobbyists should not impede free and open access to government. (Lobbying Guide:1)

Simply put, the act seeks to make the behaviour of consultant lobbyists more public and transparent while ensuring that lobbying can still occur. The motivation for this policy is a commitment to “free and open access to government”. Responsibility for ensuring that the government generates good policy is placed solely on public officials. This approach is in line with Jaworski’s position in *An Outrageous Tax on our Fellow Citizens* but, it is not clear that public officials should take sole responsibility for poor policy outcomes. We would have no trouble saying that when a driver flirts with a police officer to avoid a speeding ticket they are doing something wrong as is the officer if they are dissuaded from handing out a speeding ticket. Supposing that the sole responsibility for appropriately functioning state institutions rests with public office holders is an underlying assumption in the Act. Not only is it an unargued point, but it seems inconsistent with the normative commitment implicit in laws against bribing public officials.

Whatever the motivations, in practical terms this legislation amounts to the endorsement of a regulated lobbying competition. Certain behaviours, such as bribery, are still forbidden by criminal law, and lobbyists generally have to register, and follow a code of conduct. There is also a five year ban on public office holders and members of the prime minister’s transition team from taking lobbying positions - but the ban is

fairly weak and exemptions can be given. If lobbyists follow certain rules, then they are free to lobby and public office holders are responsible for ensuring that good policy is still generated and well applied. This act, in conjunction with other laws, sets out the rules for a lobbying competition

3.2.2 Lobbyist Code of Conduct

The lobbyist code of conduct lays three principles and eight rules for lobbyists to follow.

Principles

Integrity and Honesty

Lobbyists should conduct with integrity and honesty all relations with public office holders, clients, employers, the public and other lobbyists.

Openness

Lobbyists should, at all times, be open and frank about their lobbying activities, while respecting confidentiality.

Professionalism

Lobbyists should observe the highest professional and ethical standards. In particular, lobbyists should conform fully with not only the letter but the spirit of the Lobbyists' Code of Conduct as well as all the relevant laws, including the Lobbying Act and its regulations.

Rules

Transparency

1. Identity and purpose

Lobbyists shall, when making a representation to a public office holder, disclose the identity of the person or organization on whose behalf the representation is made, as well as the reasons for the approach.

2. Accurate information

Lobbyists shall provide information that is accurate and factual to public office holders. Moreover, lobbyists shall not knowingly mislead anyone and shall use proper care to avoid doing so inadvertently.

3. Disclosure of obligations

Lobbyists shall indicate to their client, employer or organization their obligations under the Lobbying Act, and their obligation to adhere to the Lobbyists' Code of Conduct.

Confidentiality

4. Confidential information

Lobbyists shall not divulge confidential information unless they have obtained the informed consent of their client, employer or organization, or disclosure is required by law.

5. Insider information

Lobbyists shall not use any confidential or other insider information obtained in the course of their lobbying activities to the disadvantage of their client, employer or organization.

Conflict of interest

6. Competing interests

Lobbyists shall not represent conflicting or competing interests without the informed consent of those whose interests are involved.

7. Disclosure

Consultant lobbyists shall advise public office holders that they have informed their clients of any actual, potential or apparent conflict of interest, and obtained the informed consent of each client concerned before proceeding or continuing with the undertaking.

8. Improper influence

Lobbyists shall not place public office holders in a conflict of interest by proposing or undertaking any action that would constitute an improper influence on a public office holder.

The principles are reasonable ones for governing a competition, but they do not explicitly address the public interest. The closest they come to is referencing integrity. However, I would interpret that reference as integrity qua lobbyist as defined by the act which is simply to say that lobbyists are supposed to be honest with everyone and diligently represent their client's interests. Requiring that lobbyists disclose whom they are representing is reasonable, but does not place a significant constraint on their activity. Furthermore, while it might make explicit the biases that lobbyists might be bringing to their argument, it does not eliminate the potential for unconscious bias on the public official's part.

Rules three through seven simply serve to protect lobbyists' employers, not the

public. Rule four, in particular, seems to limit any whistleblowing that a lobbyist might do depending on one's interpretation of what is required by law.

The rules constrain lobbyists, but do not directly constrain their employers. Placing responsibility on lobbyists to behave themselves but not the firm, is like holding the sales clerk responsible for selling tobacco to minors while ignoring the store owner's role.

Rule eight might provide some substantial constraints, but I am not sure what constitutes improper influence and the act does not elaborate.

The only jail terms in the Act are for registration failures, not failures to meet the code. In short, the Act lacks teeth even if one interprets the code in a manner that requires lobbyists to pay attention to the public interest. Finally, and this is the central problem with the Act, only lobbyists are regulated. There is nothing in the Act that places any direct constraints on firm lobbying.

3.3.1 Effectiveness of Lobbying

Lobbying is an effective non-market strategy through which firms are able to shape government policy.

There is overwhelming empirical evidence that campaign contributions in the United States have a measurable effect on elected officials' voting record. Private meetings with public officials and mobilizing grassroots groups are also effective lobbying strategies (Hillman et. al, 2004:849-850).

In an international study of firms' abilities to direct or influence policy, it was found that firms, particularly in the United States, report that they have the capacity

to influence policy through lobbying. Analysis of this data shows that, if firm self-reporting is accurate, the degree of influence tends to correspond to firm size. Additionally, the point in the election cycle (firms have reduced ability to influence policy near elections), the competitiveness of elections (close fought elections lead to reduced firm capacity to influence policy) and the structure of local government (jurisdictions with multiple layers of government make it harder for firms to influence policy) all affect firms' ability to shape the policy process (Choi et. al, 2015:172-173).

On the international stage American multinationals were able to prevent the United States from committing to binding emissions targets under the Kyoto Protocol (Kolk & Pinkse 2007:208). Lobbyists have also been able to not just influence legislation but write it themselves (Walker 2012:572).

Lobbying legislators and public health officials has become part of the marketing strategy for new pharmaceuticals. In the case of Gardasil, an HPV vaccine developed by Merck, Merck aggressively lobbied states to fund vaccinations and adopt school-entry mandates (Mello et. al, 2012:894-896). Lobbying also likely played a role in Merck's success with Gardasil on the Canadian market. After hiring three well connected lobbyists, including a former senior adviser to the Prime Minister, Merck secured 300 million dollars of funding for a vaccination campaign from federal and provincial governments (Talaga 2007).

One might think that business lobbying is a peculiarly American problem. In Europe citizen groups are relatively effective at countering business lobbying. This is likely due to different political structures in the European Union and its member

states and the combination of strong state and weak business institutions in former Soviet satellite states (Dur et. al, 2015). However, Canada does not fare significantly better than the U.S. in terms of limiting business influence on the political process (Macher & Mayo 2012:74-75).

Given that business lobbying is effective across multiple industries in both Canada and internationally, it is an area of ethical concern.

3.2.3 Categorizing Lobbying

There are two ways of thinking about lobbying that are implicit in the literature. We can think of lobbying as a structured competition between competing interests to influence government policy or we can think of lobbying as a part of the deliberative process in policy making, procurement decisions and regulatory decisions. I will call these two approaches the competitive and the deliberative approach to lobbying respectively. They are not mutually exclusive: legislators could turn to competing lobbyists as part of their deliberations or a government procurement officer could meet with lobbyists from two rival firms to learn more about their bid proposals. However, they are different in kind. A competitive lobbying process involves actors aiming to win: pass a bill, alter a regulation, secure a favourable contract. Persuasion by giving reasons, including reasons on the merits might be part of the competitive strategy, especially when talking to civil servants who are worried about the public interest, but this does not amount to a deliberative process. A deliberative lobbying process on the other hand would be focused on giving reasons on the merits for policy decisions. Deliberations might involve competition, but this does not make the

deliberative process a competitive one. We can distinguish between competition as a deliberative tool and a straightforward competition. As a descriptive account, our current system essentially amounts to a lobbying competition, although with a veneer of deliberative respectability.

As we have seen, lobbying government officials can be an effective way to influence or even design government policy. However, groups and individuals who are affected by government policy are not all equally well positioned to influence it. If lobbying is to be thought of as a competition through which the public interest and legitimate private interests are weighed against one another, then it must be a fair competition. Unfortunately, there are practical barriers to such a competition being fair. Furthermore, these barriers are difficult to fix given current institutional arrangements.

First, there is often a discrepancy in resources between different groups in society. For example, in the United States, after lobbying disclosure laws were passed it was discovered that while 60% of registered lobbyists represented corporate interest groups, those same lobbyists accounted for 90% of total lobbying expenditures (Ostas 2007:38). Thus in areas where competing interests have differing political and financial resources, lobbying can easily lead to one group's interests being favoured at the expense of another, purely as a function of the resources brought to bear on lobbying.

Second, even where the financial and political resources of different interest groups are comparable, it is often the case that some groups are better organized than others. For example, both labour unions and corporations are well-organized groups

that can effectively lobby the government and pool resources to hire lobbyists. Meanwhile, consumers face a considerable challenge in organizing themselves in order to lobby the government or pool resources to hire professionals to do so. Large groups that are affected by government policy face a collective action problem when organizing themselves in order to influence policy. In the case of labour unions and corporations, existing law and institutional structure help the set of interests that such organizations represent to overcome the collective action problem. For example, Canadian law allows for closed-shops and the RAND formula makes union dues mandatory, preventing some union members from free-riding on the financial costs of any political lobbying that the union does to advance their interests. Corporations achieve the same result by placing all of the financial resources under the control of the company management to be directed in an organized fashion. The CEO does not have to convince each shareholder individually to contribute money to hire a lobbyist. Thus, given how our society currently operates, it is unlikely to be the case that diverse interests will be equally represented by lobbyists or will have equal opportunity to lobby the government.

The point of having a lobbying competition would be to secure some benefit that is otherwise unavailable. It does not seem to me that there is any prima facie reason to think that a lobbying competition like the one we have now accomplishes this. Furthermore, there are significant barriers to running a fair lobbying competition as I have just described. While some competitive aspects might be useful within a deliberative lobbying process (as in the legal system), a competitive lobbying system does not seem justified nor likely to be justifiable given how our society is organized.

On the deliberative account, permissible lobbying strategies are ones that involve lobbying through reason giving, specifically giving reasons on the merits or giving relevant reasons. On the competitive account, permissible lobbying behaviour is behaviour that is in accordance with both the letter and spirit of the rules governing the lobbying competition. For example, in most jurisdictions it is against the rules to buy gifts for public officials that one is also lobbying on the grounds that it might sway their decisions in one's favour. Even if the lobbying rules permitted it, it would still be against the spirit of the rules to invite public officials to a prestigious private party when doing so would likely influence them to decide in one's favour on some subsequent policy decision.

On the deliberative account, lobbying is always directed towards the public interest because appeals to the public interest are the only legitimate reasons that are permissible to give. That being said, a lobbyist might work towards some public interest because of the private interests of their employers. On the competitive account, the public interest might be appealed to, but the aim is always towards private interests.

3.3 How Lobbying Leads to Market Failures

Lobbying is not, in itself, a market failure nor does it amount to the exploitation of a market failure. However, there is good reason to think that the aim of most lobbying is to advance the private interests of the group behind the lobbying. In the case of corporate lobbying, this usually amounts to an attempt to create a new or protect an existing market failure that provides the firm with a competitive advantage of some

sort.

How can the three types of lobbying I have outlined: regulatory, legislative, and procurement, produce market failures?

Regulatory bodies often deal with controlling market failures or regulating industries that are set up in areas where normal market competition is not possible (usually because of barriers to entry). For example, the telecommunications industry is heavily regulated in Canada because economies of scale produce huge barriers of entry to the market, leading to practical monopolies or oligopolies in most areas. Utilities like water and electricity also have huge barriers to entry; additionally, inefficiencies caused by the production of rival distribution systems have usually led to them being publicly owned or being privately operated by a government created monopoly. A privately owned utility that is the result of a government monopoly will have its rates set by some sort of government regulatory body. Setting the rates above market clearing prices will lead to deadweight losses.

Lobbying the government to award a contract to one's company or employer can also lead to a market failure. If the lobbying produces a bias in the decision maker, the resultant decision may not be made rationally, leading to an outcome that does not reflect the decision maker's ends or their constituents' ends. A failure in the decision making process due to bias, lack of information, or irrational decision making is a market failure.

3.3.2 Rent Seeking

The thought that firms attempt to secure favourable treatment from governments

through lobbying or other means is not a new one. Ronald Coase recalls being taught as much at the London School of Economics in the early 1930's (Williamson and Winter 1991:37). Economists use the concept of rent seeking to understand this phenomenon. Economic rent is defined as: "return in excess of a resource owner's opportunity cost" (Tollison 1982:575). Rent-seeking is distinguished from profit-seeking by determining whether the attempt to capture an economic rent is the result of market behaviour or market manipulation (Tollison 1982:578). Although this and other definitions rent-seeking suffer from some conceptual problems (for a full discussion see Boatright 2009), the basic idea is clear enough: when someone receives for their goods or services more than is necessary to motivate them to produce the good or service, the market seems to be misfiring. Labeling such an occurrence "rent-seeking" in the manner Tollison does leads to the further claim that to look for such situations is, at least, *prima facie* morally problematic.

I do not here propose a philosophically robust definition of rent seeking (Professor Jaworski has delivered a promissory note on the matter). Rather, I would like to point out that behaviours that economists refer to as rent-seeking are often cases of firms or individuals attempting to exploit or create a market failure. Most of what economists call rent-seeking behaviour involves a firm or group of firms attempting to secure a state-enforced monopoly - in other words trying to generate a market failure (Tollison 1982:579). Attempting to generate the market failure is the morally problematic behaviour and a fully developed concept of rent-seeking is not required.

3.3.3 Market Failures and Global Trade

A common category of market failure is created by the government through trade barriers. For example, in Canada, the domestic milk, cheese, and egg industries are protected by supply quotas and high import tariffs. A supply quota is when a government determines the amount of a good that can be produced. Those producing the good purchase permits from the government which give them the right to produce a certain quantity. The import tariffs make it more expensive for foreign producers to sell in the Canadian market. These two policies, in tandem, have the effect of artificially limiting supply in the domestic market, driving the price above market clearing levels. In short, there are consumers who do not buy these goods because they are too expensive and potential producers, foreign and domestic, who do not sell the goods because they are either not allowed to or because the import tariffs drive their costs and hence their prices above market levels. The problem is not merely conceptual; a comprehensive study has shown that the supply management system leads to large costs for consumers and that the costs are disproportionately borne by lower-income families (Cardwell et. al. 2015)

Let me make some brief comments on this issue. Trade barriers are a collective action problem. If we raise tariffs on eggs, someone else will raise tariffs on our lumber and both sides will end up losing. One solution is free trade agreements (although these bring their own host of problems). However, dealing with the problem can be politically difficult because, while the beneficiaries of a domestic monopoly and the windfall gains it creates are entirely local, many of those who suffer are foreign producers. This is because the trade barriers create a deadweight loss, transactions

that would have occurred but now do not. A deadweight loss is an unrealized gain because in any market transaction, both sides receive some benefit: they both trade something they want less for something they want more. While domestic consumers suffer roughly half the deadweight loss, foreign producers suffer the other half. Furthermore, domestic producers tend to be better organized than consumers (for reasons mentioned above) and thus better able to lobby the government. Finally, deadweight losses are a fairly subtle loss since they take the form of an unrealized gain as opposed to a direct loss.

This issue teases out a practical and perhaps a theoretical problem for business ethics. As markets become increasingly global institutions, the set of norms and regulations governing market institutions ought to reflect this sort of change. However, the bodies that regulate markets are still operating at the national level. This is not only a practical problem in terms of the capacity to respond to global market failures (the globalized externality of carbon emissions and the serious political barriers facing an appropriate response is the best example of this) but also a theoretical one in this sense: given a national government's responsibility to its own citizens, ought government policy to be directed to correcting market failures that, while on the whole inefficient, work out to the benefit of the country's citizens? Perhaps further engagement between theorists of global justice, political philosophers, and business ethicists will yield an answer.

3.4 Other Views on Lobbying

If lobbying is legal and will maximize profits, then go forth and lobby. This is roughly

what a shareholder theorist is committed to saying and, since lobbying (with some constraints) is legal in both Canada and the United States, the shareholder theorist is committed to the view that lobbying is permissible and, depending on the efficacy of lobbying, perhaps even required in these jurisdictions. Furthermore, on the rights account of shareholder theory, lobbying the government in regard to the disposal of one's property could be seen as part of an important package of basic rights.

Lobbying then, as a business strategy, is not only permissible, but probably ought to remain so, and, insofar as lobbying is necessary to maximize profits, managers are morally and legally obligated to do so in order to fulfill their responsibilities to shareholders.

There is some reason to think that lobbying, while an effective method of shaping government policy, is not always best for a firm's bottom line (Dahan et al. 2013). Firms may lobby despite this out of desperation as there is some evidence that firms are not always lobbying as the result of a considered business strategy, but rather as a response to the ineffectiveness of their market strategies (Rudy and Johnson 2013). Firms might also lobby because of a governance failure. There is evidence that firm's lobby in order to produce networking opportunities for senior management (Dahan et al. 2013:377-378). To the extent that lobbying is poor strategy emerging out of desperation or governance failures, shareholder theorists ought to be against it. Nonetheless, in cases where lobbying influences policy in the firm's favour and in a cost-effective manner for the firm, but in a manner contrary to the public interest, the shareholder theorist would support such lobbying.

While stakeholder theorists have not paid much attention to lobbying, the basic

account of stakeholder theory does suggest a view on lobbying. If corporate managers are to represent the interests of stakeholders in a business and stakeholder interests are affected by government policy, then insofar as it is likely to be effective to do so, managers should be lobbying to represent their stakeholders' interests.

Freeman seems to be mildly pro lobbying, or at least thinks some lobbying is a good thing. For example, he treats corporate lobbying as a legitimate form of stakeholder engagement (Freeman 1984:147). Furthermore, he gives some advice to executives on how to incorporate lobbying into their stakeholder outreach (Freeman 1984:158). Kenneth Goodpaster also sees a legitimate role for lobbying by business as a way of arriving at "value congruence" between different groups (Brenkert 2010:146-147). Hamilton and Hoche think that lobbying for both private and public interests is permissible, conditional on certain ethical standards being met (Hamilton & Hoche 1997). A common thread in these authors' positions is the thought that business managers are in a position to either advance the public interest or to advance legitimate private interests through lobbying.

3.5 Restricting Lobbying

We do not have much reason to think that our current system is working. As we have seen, firms are often able to influence the policy process. Furthermore, since I have defined a public interest system as one where all of the actors are aiming at the public interest and any lobbying or lobbying-replacement system will involve actors with relevant private interests (any regulatory system necessarily involves the firms being regulated) it seems unlikely that a fully deliberative, public interest directed system

could be established. I have further argued that setting up a competition does have any otherwise unobtainable advantages. We have competition in markets to decentralize the production of demand information in a way that cannot be reproduced otherwise. It does not seem to be the case that various organizations will be unable to communicate properly with the government without a competitive lobbying process.

What we want from policy, regulatory, and purchasing processes is fairly unsurprising: we want well informed deliberations aimed at the public interest. In order to be well-informed, those deliberating will have to be able to get information from relevant parties, including quite often firms operating in an area of the market that needs regulation or policy changes. John Kennedy gives a fairly reasonable account of the upshot of having lobbyists around:

Lobbyists are, in many cases, expert technicians and capable of explaining complex and difficult subjects in a clear understandable fashion.... They engage in personal discussions with members of Congress in which they can explain in detail the reasons for positions they advocate.... because our congressional representation is based on geographic boundaries, the lobbyists who speak for the various economic and commercial and other functional interests of this country serve a very useful purpose and have assumed an important role in the legislative process. (Ostas 2007:34)

Unfortunately, simply allowing private interests uncontrolled access to government officials does not lead to policy being made in the public interest. In short those deliberating must be insulated from those pursuing private interests but still have a forum for gathering information from relevant stakeholders, including firms.

Developing a system that insulates public office holders, in the broad sense of the term, from private interests is no small task and is beyond the scope of this paper. A place to start might be trying to deal with the fact that politicians tend to do

lobbying work after leaving office because it is the best use of their human capital (Parker et al. 2012).

Returning for a moment to our market failure model summary:

Markets are a series of competitions that are normatively justifiable by the tendency of the set of competitions to produce Pareto improvements. Since the market is justified by Pareto efficiency, competitive behaviour in the market should be constrained by a set of rules that is consistent with the pursuit of Pareto efficiency. The version of the business competition that is most strongly justified is the version that, when played according to the rules will produce the most efficient outcomes. For practical reasons, these rules cannot all be legally articulated and enforced. Thus market actors ought to be constrained both by legal norms and moral norms, where both sets of norms have the common objective of securing Pareto efficient outcomes through the market.

Managers do not need to attend directly to Pareto efficient outcomes in the market. Using such a metric for managerial decision making would not be practical. Instead they ought to conform to a set of rules that on the balance of things will tend to avoid market failures. If lobbying tends to lead to market failures, then we can safely set a rule for managers: do not lobby.

3.5.2 Free Speech and Lobbying

Fairly robust freedom of expression protections are generally considered to be an important, even necessary, feature of a liberal democracy, both as part of a set of liberal rights and as an important tool for ensuring that the deliberative portion of the

democratic political institutions can function. What set of free expression protections can be justified or are socially optimal is beyond the scope of this paper.

Unfortunately, their presence produces a practical problem for someone trying to limit lobbying, both on the legal front and the political front. Lobbying is, at its core, speech. Furthermore, it is speech directed towards public officials, with whom communication is justifiably protected in order to facilitate deliberation and to provide different groups political access. Given this, limiting lobbying and protecting free speech are always going to be in tension.

First of all, any legislation placing limits on lobbying is going to be in danger of falling afoul of legally enshrined freedom of expression protections. Furthermore, in jurisdictions where the protections are constitutional protections, overriding them is either not an option or is a politically fraught one. This is a particular problem in the United States where recent judicial interpretations of the first amendment and its application to corporate entities has made crafting legislation to limit their political engagement nearly impossible. This problem is less severe in Canada where the notwithstanding clause and a less aggressive interpretation of free speech rights on the part of the courts make it easier to limit speech.

Second, freedom of expression protections have considerable public support and carry enormous moral prestige. Insofar as proponents of lobbying defend the practice by appeal to the value of freedom of expression, they are well-positioned to assume the moral high ground.

Furthermore, while defending a corporate lobbyist might be more challenging, defending a “mother against drunk driving” lobbying for more

stringent drunk driving controls is much easier.

It might be objected that free expression protections do not or should not apply to corporate entities nor to paid lobbyists. Corporations are not people after all and lobbyists qua lobbyists can be reasonably placed under constraints that are not placed upon private citizens. However, this misses the point. Insofar as business managers are justified in hiring lobbyists as part of a profit maximization strategy or in the pursuit of stakeholder interests, they are simply acting as representatives of the aggregated interests of the stockholders or stakeholders.

The tension between lobbying and free speech is not troublesome for the market failure theorist. The market competition is justified by efficiency goals, not property rights and thus it is philosophically consistent to place limitations on market behaviour in pursuit of efficiency.

3.5.3 Permissible and Excusable Business Practices

There is generally thought to be a distinction between a permissible and an excusable action. The distinction being that a permissible action is morally acceptable while an excusable action is prima facie not morally acceptable but, given the circumstances under which it was performed, the agent performing the morally unacceptable action had good reason to do so. To illustrate the distinction, suppose that I have made a minor promise to someone - I have promised to meet them for lunch at a certain time - but while on my way to meet them I come upon someone in trouble and stop for to help them. I subsequently miss the lunch. Let us further stipulate that the moral significance of the trouble I stopped to help with was greater than the moral

significance of my promise. It was still wrong to break my promise, but I had a morally relevant reason to do so. In other words, I had an excuse. Suppose instead that I have discovered that the friend whom I promised to meet has been no friend at all to me, because they have been spreading lies behind my back to mutual acquaintances. In this case I made the promise under false pretenses: that my apparent friend was actually my friend. Thus I am justified in breaking my promise and not showing up for lunch.

I have argued thus far that it is impermissible for firms to lobby the government to advance their private interests. However, an impermissible behaviour might still be excusable. Firms may seek different sorts of advantages in the lobbying process. A firm might lobby for tariffs that give it a competitive advantage against foreign firms, it might lobby against environmental regulations that force it to internalize some of its costs, or it might lobby against consumer protections that make its products more costly to produce. Common to all of these and other forms of private interest lobbying is that they seek some advantage for the firm at the expense of some other group - a prima facie impermissible behaviour. What is more, if my earlier arguments are successful, managers have an ethical obligation not to lobby. If impermissible behaviour is sometimes excusable, what would excuse a violation of the do not lobby rule?

The short answer to this question is: when other market actors are lobbying, you cannot prevent them from doing so, and failing to engage in defensive lobbying will cause the firm to become bankrupt. The long answer is beyond the scope of this paper. Identifying what impermissible business practices might be excusable in

certain circumstances is a good area for future research.

3.6 Conclusion

A competitive lobbying process has a demonstrated tendency to produce market failures. Furthermore, there is little reason to think that such a tendency could be fixed, given certain structural features of our society as well as conflict of interest problems and collective action problems amongst stakeholder groups. Given this, government rules around lobbying ought to be altered in such a way that they will produce a deliberative lobbying process. Business managers have an obligation to not lobby in cases where legal regulations are inadequate. In cases where not lobbying will put businesses at a significant disadvantage compared to other firms, lobbying may be impermissible but excusable. In cases where lobbying is not necessary to remain competitive, doing so in the absence of appropriate legal regulations is both impermissible and inexcusable.

Conclusion

I have sought to show that the market failure theory is preferable to traditional stakeholder and shareholder models. I have done this in two ways.

First, I show how treating business as a competition is consistent with Bernard Suits' account of games. Without committing myself to Suits' definition, I sought to show how his distinction between a game's prelusory goal and the purpose of a game tracks the distinction between the profit orientation of firms and the normative justification for the market. I further sought to show how Suits' definition of a game could be used to deal with concerns with treating business as a game or a competition.

Second, I applied the market failure theory to the practice of business lobbying. By treating lobbying as a metagame strategy that had become sufficiently widespread to be considered part of the business competition, I sought to show that the goal of the strategy and its practical consequence was to generate market failures, thus rendering it impermissible under the model. This stands in contrast to the shareholder and stakeholder models which treat lobbying as conditionally permissible and often desirable.

Treating business as a competition is philosophically justified, both in the sense that it satisfies the conditions of a game, or at least a game-like activity, and in the sense that the deontic weakening that competition brings with it is justified in the market. Within the business competition, lobbying is an impermissible, though conditionally excusable strategy.

Bibliography

- Applbaum, Arthur Isak (1999). *Ethics for Adversaries: The Morality of Roles in Public and Professional Life*. Princeton: Princeton University Press.
- Audi, Robert (2009). *Business Ethics and Ethical Business*. Oxford: Oxford University Press.
- Bäck, Allan (2008). The Paper World of Bernard Suits. *Journal of the Philosophy of Sport* 35(2): 156-174.
- Boatright, John R. (2009). Rent Seeking in a Market with Morality: Solving a Puzzle about Corporate Social Responsibility. *Journal of Business Ethics* 88(4): 541 - 552.
- Cardwell, R., Lawley, C., & Xiang, D. (2015). Milked and feathered: The regressive welfare effects of canada's supply management regime. *Canadian Public Policy* 41(1): 1-14.
- Carr, Albert Z (1968). Is Business Bluffing Ethical? *Harvard Business Review* 46(1): 143-153
- Choi, Seong-Jin., Jia, Nan., Lu, Jiangyong., (2015) The Structure of Political Institutions and Effectiveness of Corporate Lobbying. *Organization Science* 26(1): 158-179
- Dahan, Nicolas M., Hadani, Michael., Schuler, Douglas A., (2013) The Governance Challenges of Corporate Political Activity. *Business & Society* 52(3) 365-387
- Dur, Andreas., Bernhagen, Patrick., Marshall, David., (2015) Interest Group Success in the European Union: When (and why) does Business Lose? *Comparative Political Studies* 48(8): 951-983
- Ellis Jonathan (2011) On the Concept of a Game. *Philosophical Investigations* 34:4.
- Freeman, Edward R. (1984) *Strategic Management: A Stakeholder Approach*. Cambridge: Cambridge University Press
- Freeman, Edward R. Harrison, Jeffrey S, Wicks, Andrew C, Parmar, Bidhan, de Colle, Simone. (2010). *Stakeholder theory: The state of the art*. Cambridge: Cambridge University Press.
- Friedman, Milton (1970) The Social Responsibility of Business is to Increase its Profits. *New York Times Magazine* 13: 32-33.
- Gauthier, David P. (1986). *Morals by Agreement*. Oxford: Oxford University Press.

- Hamilton, J. Brooke., Hoch, David., (1997) Ethical Standards for Business Lobbying: Some Practical Suggestions. *Business Ethics Quarterly* 7 (9): 117-129
- Hamington, Maurice (2009). Business is not a Game: The Metaphoric Fallacy. *Journal of Business Ethics* 86: 473-484
- Heath, Joseph (working paper) Cost-Benefit Analysis as an Expression of Liberal Neutrality. Available at: <http://www.academia.edu/9811886/Cost-Benefit-Analysis-as-an-Expression-of-Liberal-Neutrality>
- Heath, Joseph (2014). *Morality, Competition, and the Firm: The Market Failures Approach to Business Ethics*. New York: Oxford University Press..
- Hillman, A. J., Keim, G. D., & Schuler, D. (2004). Corporate political activity: A review and research agenda. *Journal of Management* 30(6): 837-857.
- Holburn, G. L. F., & Vanden Bergh, R. G. (2014). Integrated market and nonmarket strategies: Political campaign contributions around merger and acquisition events in the energy sector. *Strategic Management Journal* 35(3): 450-460.
- Jaworski, Peter Martin (2013). An Absurd Tax on our Fellow Citizens: The Ethics of Rent Seeking in the Market Failures (or Self-Regulation) Approach. *Journal of Business Ethics* 3: 1-10.
- Keffer, Jane M. & Hill, Ronald Paul (1997). An ethical approach to lobbying activities of businesses in the united states. *Journal of Business Ethics* 16(12-13): 1371-1379.
- Koehn, Daryl (1997). Business and game-playing: The false analogy. *Journal of Business Ethics* 16(12-13): 1447-1452.
- Kolk, Ans., Pinske, Jonatan., Multinationals Political Activity on Climate Change. *Business & Society* Volume 46 No 2 201-228
- Macher, Jeffrey T., Mayo, John W. (2012) The World of Regulatory Influence. *Journal of Regulatory Economics* 41(1): 59-79.
- Mello, Michelle M., Abiola, Sara., Colgrove, James., (2012) Pharmaceutical Companies' Role in State Vaccination Policymaking: The Case of Human Papillomavirus Vaccination. *American Journal of Public Health* 102(5): 893-898.
- Office of the Commissioner of Lobbying of Canada. The Lobbyists' Code of Conduct. Retrieved August 22 2015. Available at: https://ocl-cal.gc.ca/eic/site/012.nsf/eng/h_00014.html
- Office of the Commissioner of Lobbying of Canada. Ten Things You Should Know About Lobbying A Practical Guide for Federal Public Office Holders. Retrieved

August 22 2015. Available at:
<http://www.ocl-cal.gc.ca/eic/site/012.nsf/eng/00403.html>

- Ostas, Daniel T. (2007). The Law and Ethics of K Street. *Business Ethics Quarterly* 17(1): 33-63.
- Parker, Glenn R., Parker, Suzanne L., Dabros, Matthew S., The Labor Market for Politicians: Why Ex-Legislators Gravitate to Lobbying. *Business & Society* 52(3): 427-450
- Phillips, Robert A. ed (2011). *Stakeholder Theory: Impact and Prospects*. Cheltenham, UK: Edward Elgar Publishing
- Rawls, John. (1999) *A Theory of Justice* (Revised Edition). Cambridge, MA: Harvard University Press.
- Rudy, Bruce C., Johnson, Andrew F. (2013) Performance, Aspirations, and Market Versus Nonmarket Investment. *Journal of Management*.
doi:10.1177/0149206313503017
- Stieb, James A. (2009). Assessing Freeman's stakeholder theory. *Journal of Business Ethics* 87(3): 401 - 414.
- Suits, Bernard (1978) *The Grasshopper: Games, Life And Utopia*. University of Toronto Press.
- Tollison, Robert, (1982), Rent Seeking: A Survey, *Kyklos* 35(4): 575-602.
- Walker, Edward T., (2012) Putting a Face on the Issue: Corporate Stakeholder Mobilization in Professional Grassroots Lobbying Campaigns. *Business & Society* 51(4): 561-601
- Williamson, Oliver E, Winter, Sidney G, eds. (1991). *The Nature of the Firm: Origins, Evolution, and Development*. Oxford: Oxford University Press.