

Reframing the DEI Case

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ABSTRACT

Corporate firms have long expressed their support for the idea that their organizations should become more demographically diverse while creating a culture that is inclusive of all members of the firm. These firms have traditionally, however, not been successful at improving demographic diversity and true inclusion within the upper echelons of their organizations. The status quo seemed unlikely to move, but expectations for corporate firms were upended after the #MeToo Movement of 2017 and 2018, which was followed by corporate support of the #BlackLivesMatter Movement in 2020. These two social movements, while distinct in many ways, forced firms to rethink how to approach the status of women and people of color within their organizations. It forced them to ask, yet again, but with renewed energy: “What is the best way to improve diversity and inclusion within firms?”

This Article seeks to contribute to scholarly conversations aimed at addressing that, admittedly elusive, question head-on. It argues that in addition to pursuing the business and legal cases for diversity when crafting diversity, equity, and inclusion (“DEI”) programs, firms should also employ insights from behavioral ethics literature. By utilizing insights from behavioral ethics literature, firms can better prompt decisionmakers to recognize that DEI questions—whether under the business or legal case for diversity—are questions that should be evaluated from an ethical perspective. Scholars and firm leaders have long debated the accuracy of the business case rationale in support of DEI efforts. More recent scholarship has focused on the legal case in support of DEI efforts. This Article recognizes that firms committed to crafting meaningful DEI reforms must focus on both the business and legal cases, but they must reinforce the ethical ramifications of DEI concerns under both frameworks. In short, firms committed to creating a successful DEI

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program must find ways to evoke ethical framing when engaged in the creation of diverse, equitable, and inclusive organizational cultures.

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INTRODUCTION

In 2000, the Coca-Cola Company (“Coke”)¹ entered into a landmark settlement to resolve a lawsuit brought by black employees alleging that the company had discriminated against them. The settlement terms required Coke to pay \$192.5 million.² At the time, it was the largest settlement arising out of a U.S. race-discrimination lawsuit.³ The settlement was unusual, in part, because Coke agreed to allow “an outside panel, appointed by Coke and the plaintiffs’ lawyers, limited authority to revise company personnel policy.”⁴ The “panel [was] charged with ensuring that Coke’s record of paying and promoting all minority workers and women improve[d]. Unless granted an exception by a judge, the company [was required to] adopt the suggestions.”⁵ For many, this settlement, particularly when paired with another significant employment

1. During the summers of 2003 and 2004, I was a brand marketing intern at the Coca-Cola Company in Atlanta, GA.

2. Sarah Schafer, *Coke to Pay \$193 Million in Bias Suit*, WASH. POST (Nov. 17, 2000), <https://www.washingtonpost.com/archive/politics/2000/11/17/coke-to-pay-193-million-in-bias-suit/6a43c0c7-dcde-4d8c-a95f-3fe57c508c85/> [https://perma.cc/F76K-S3VY].

3. *Id.*

4. Greg Winter, *Coca-Cola Settles Racial Bias Case*, N.Y. TIMES (Nov. 17, 2000), <https://www.nytimes.com/2000/11/17/business/coca-cola-settles-racial-bias-case.html> [https://perma.cc/X6YY-H79D].

5. *Id.*

discrimination settlement involving Texaco⁶ a few years prior, seemed like a watershed moment. It was finally time for corporate firms to take concerns surrounding discrimination seriously, but it was also seen by some as an opportunity for firms to establish effective diversity and inclusion programs.

Whether it was Coke, Texaco, or a number of other organizations, corporate firms have long embraced the need to dedicate time and resources to diversity and inclusion efforts within their ranks. Coke, for example, hired Deval Patrick to serve as its General Counsel shortly after its 2000 discrimination settlement.⁷ Patrick had previously “spearheaded efforts to improve diversity at Texaco” and was expected to use his experience in employment law and civil rights to assist the company in “improv[ing] its record on diversity.”⁸ It was understood by many that his appointment was meant to spur a moment of transformational change not only at the firm, but also throughout corporate America more generally.

The circumstances that unfolded at Coke are a wonderful example of the two challenges firms have often focused upon—the legal case for diversity and the business case. Those making the legal case for firms to adopt diversity and inclusion programs often focus on the importance of (i) complying with regulatory and legal mandates and (ii) minimizing legal liability. By settling the lawsuit with its employees and by allowing the outside panel to assist it in revamping its policies and procedures, Coke was addressing two concerns that are commonly associated with the legal case for diversity. Coke, however, also appeared to understand the business case for diversity. The business case for diversity “offers a connection between increased diversity and inclusion and positive performance outcomes.”⁹ When Coke decided to settle the discrimination case, a move that surprised many, it appeared to consider, at least in part, the ways the discrimination suit was impacting its reputation, which could have an impact on its overall business. Then Chief Executive Officer Douglas N. Daft “ordered officials to settle the matter swiftly,” while Coke simultaneously “stepped up efforts to heal rifts with minority groups, particularly in Atlanta, where it [had] donated money to schools and churches attended by some of the plaintiffs.”¹⁰ Additionally, the hiring of Patrick was understood by many to be an intentional signal to the business

6. Schafer, *supra* note 2.

7. Wall Street Journal Staff Reporter, *Coke Names Deval Patrick as New General Counsel*, WALL ST. J. (Jan. 25, 2001), <https://www.wsj.com/articles/SB980379695158676997> [<https://perma.cc/SH9C-JGS4>] [hereinafter Reporter].

8. *Id.*

9. Jamillah Bowman Williams, *Breaking Down Bias: Legal Mandates vs. Corporate Interests*, 92 WASH. L. REV. 1473, 1489 (2017).

10. Winter, *supra* note 4.

community that Coke was committed to improving diversity and inclusion efforts throughout its business.

On the academic front, scholars have written about diversity efforts within corporate firms for many years. Legal scholars have written in favor of both the business and legal case for implementing diversity and inclusion efforts.¹¹ There is disagreement in the literature as to whether the business or legal case should be the predominant view by which firms structure their diversity programs.¹² This Article, however, suggests that firms and scholars cease disputing whether the business or legal case is the better way forward for those committed to improving diversity, equity, and inclusion within firms.

Instead, this Article argues that in addition to pursuing the business and legal cases for diversity when crafting diversity, equity, and inclusion (“DEI”) programs, firms should also focus on employing insights from behavioral ethics literature. In particular, this piece focuses on insights from behavioral ethics that discuss the concept of moral awareness in decision making. The behavioral ethics literature argues that how you frame a question can prompt an individual to identify the topic as one that does or does not impact morality or ethics. Importantly, utilizing a business or legal frame, often does not trigger moral awareness. By utilizing insights from behavioral ethics literature, firms can better prompt decisionmakers to recognize that DEI questions—whether under the business or legal case for diversity—are questions that should be evaluated from an ethical perspective.¹³ Part I of this Article outlines the importance of the business and legal cases for diversity, demonstrating that both are necessary to focus upon for those charged with creating and implementing effective DEI programs. Part II outlines why reframing discussions of the business and legal cases for DEI efforts through a behavioral ethics lens could be beneficial. Part III explains how reframing the business and legal cases for DEI efforts to include ethical considerations could change the way decisionmakers implement DEI initiatives. Part IV then addresses

11. Williams, *supra* note 9, at 1487 nn.59–61 (collecting citations).

12. *Id.* at 1487–92.

13. This Article is not going to engage with arguments about whether DEI initiatives are important to firms or appropriate for public firms to pursue. There is a robust literature on these topics. See generally Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1 (2022); Jesse M. Fried, *Will Nasdaq’s Diversity Rules Harm Investors?* (Eur. Corp. Governance Inst., Working Paper No. 579, 2021), <https://ssrn.com/abstract=3812642> [<https://perma.cc/8AVS-R73J>]; Richard W. Painter, *Board Diversity: A Response to Professor Fried*, 27 STAN. J. L. BUS. & FIN. 173 (2022); Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795. Instead, given the nature and scope of this Symposium, this Article takes as a given that DEI initiatives within organizations are generally accepted as important.

questions raised by this Article, to help clarify the parameters, reach, and boundaries of the argument.

I. THE TRADITIONAL ARGUMENTS.

Scholars and leaders within corporate firms have long debated the best way to present DEI initiatives in a way that will obtain broad based buy-in from those within firms. The two primary justifications within legal scholarship have been (i) the business case and (ii) the legal case for diversity. This Part begins by outlining the business case, and it then turns to the legal case. It then highlights that these two justifications are often then used to pivot toward a moral case for diversity.

A. The Business Case

The argument in favor of the business case for diversity has been articulated for over twenty-five years. For example, in 1997, Robinson and Dechant argued that “[t]he presentation of a solid business case increases the likelihood of obtaining the leadership commitment and resources needed to successfully implement diversity initiatives.”¹⁴ They argued that firms were having difficulty meeting their diversity priorities and goals, in part, because “there [were often] more tangible and compelling business priorities” that seemed more pressing for firms to invest their resources.¹⁵ They urged those at firms responsible for DEI programs to “develop a case for diversity integration based on the competitive edge gained by optimizing the people resources of a firm.”¹⁶

One of the challenges, however, in the space has been demonstrating how diversity contributes to improving the profitability and performance of the firm. A key component to business case arguments has been that investing in diversity will have long-term value for the firm. There are a number of studies supporting the argument that diversity does in fact assist in improving firm profitability,¹⁷ but these studies have often been

14. Gail Robinson & Kathleen Dechant, *Building a Business Case for Diversity*, 11 ACAD. MGMT. EXEC. 21, 21 (1997).

15. *Id.*

16. *Id.*

17. See, e.g., NANCY M. CARTER, LOIS JOY, SRIRAM NARAYANAN & HARVEY M. WAGNER, CATALYST, THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN’S REPRESENTATION ON BOARDS 1 (2007), https://www.catalyst.org/wp-content/uploads/2019/01/The_Bottom_Line_Corporate_Performance_and_Womens_Representation_on_Boards.pdf [<https://perma.cc/5QF6-U7NA>]; SUNDIATU DIXON-FYLE, VIVIAN HUNT, KEVIN DOLAN & SARA PRINCE, MCKINSEY & CO., DIVERSITY WINS: HOW INCLUSION MATTERS 13 (2020), <https://www.mckinsey.com/~media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf> [<https://perma.cc/6Q8G-GRZY>] [hereinafter MCKINSEY REPORT]; *Corporate Board Gender Diversity Associated with Higher Credit Ratings*, MOODY’S INV. SERV. (Sept. 11, 2019), <https://www.moody.com/research/MoodysCorporate-board->

criticized as not having sufficiently rigorous methodological components.¹⁸

Despite the split on the empirical justifications¹⁹ and the long-standing articulation of the business case for diversity, many agree that the majority of firms have failed to make meaningful progress on the DEI initiatives. For example, Robin J. Ely and David A. Thomas argued in 2020 that:

[O]rganizations have largely failed to adopt a learning orientation toward diversity and are no closer to reaping its benefits. Instead, business leaders and diversity advocates alike are advancing a simplistic and empirically unsubstantiated version of the business case. They misconstrue or ignore what abundant research has now made clear: Increasing the numbers of traditionally underrepresented people in your workforce does not *automatically* produce benefits. Taking an “add diversity and stir” approach, while business continues as usual, will not spur leaps in your firm’s effectiveness or financial performance.²⁰

Ely and Thomas make an important and powerful point: the business case for diversity, when translated into action within firms, often results in DEI programs that are overwhelmingly focused on recruitment of individuals who will improve the demographic diversity of the firm. That’s not to suggest that an increase in demographic diversity is not of great importance for firms that are committed to implementing strong DEI programs to dedicate their time and focus. Indeed, Gina-Gail S. Fletcher and I recently argued:

[I]nstitutional investors should incentivize firms to (i) measure the state of (in)equality in their organizations and supply chains; (ii) identify a list of specific, assessable equality goals; (iii) implement policies and procedures aimed at achieving those goals that can be tested and measured; (iv) disclose their progress toward meeting

gender-diversity-associated-with-higher-credit-ratings--PBC_1193768 [https://perma.cc/KEJ3-NC35].

18. See Fried, *supra* note 13, at 4. Additionally, there are studies with inconclusive results. See generally Jan Luca Pletzer, Romania Nikolova, Karina Karolina Kedzior, Sven Constantin Voelpel, *Does Gender Matter? Female Representation on Corporate Boards and Firm Financial Performance—A Meta-Analysis*, 10 PLOS ONE 1 (2015); Alice H. Eagly, *When Passionate Advocates Meet Research on Diversity, Does the Honest Broker Stand a Chance?*, 72 J. SOC. ISSUES 199 (2016).

19. Nasdaq laid out the existing literature well in a recent proposed rule change. See generally Nasdaq Stock Mkt. LLC, Form 19b-4 Proposed Rule Change to Required Diversity Disclosures (Dec. 1, 2020), <https://listingcenter.nasdaq.com/assets/RuleBook/Nasdaq/filings/SR-NASDAQ-2020-081.pdf> [https://perma.cc/MPR2-BG4K].

20. Robin J. Ely & David A. Thomas, *Getting Serious About Diversity: Enough Already with the Business Case*, HARV. BUS. REV., Nov.–Dec. 2020, at 115, 117.

these goals at regular intervals; and (v) use their own and others' measured performances on these metrics to direct future efforts at creating a more equitable organization.²¹

These reforms were specifically targeted at increasing demographic diversity throughout the ranks of public firms.

But as Fletcher and I recognize in our piece, and as Ely and Thomas persuasively suggest, a focus on demographic diversity, while a necessary component for a firm to implement a successful DEI program, is not sufficient. The business case for diversity, wherever one falls on the empirical arguments, is necessary for a firm to craft a complete DEI strategy. As Robinson and Dechant recognized in 1997, if businesses are going to invest time and resources in diversity initiatives, they must understand why that's going to make their businesses better. The business case helps leaders and members of corporate firms better understand the power of diversity for their business interests, even if the academics remain split on the empirical underpinnings.

B. The Legal Case.

The legal case for DEI programs is often rooted in concerns surrounding compliance with certain legal and regulatory mandates, and that makes sense when one reminds oneself of the legal origins of the diversity rationale.

The discussion of diversity within legal spaces and caselaw finds its roots in the push for affirmative action. The term "affirmative action" was first penned in a 1961 Executive Order issued by President Kennedy.²² Executive Order 10925 created the Committee on Equal Employment Opportunity and mandated that projects financed with federal funds "take affirmative action" to ensure that employers receiving federal funds implement employment practices and hiring procedures free of racial bias. The Executive Order was followed by the implementation of the Civil Rights Act (CRA), which was signed by President Johnson in 1964.²³ Title VII of the CRA prohibits virtually all private employers from discriminating on the basis of a person's race, color, religion, or national origin. But President Johnson explained in 1965 that civil rights laws were not enough to remedy discrimination on their own. Instead, a concerted effort had to be made by society to give those systemically oppressed members a fair shake.

21. Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.J.F. 869 (2021).

22. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961).

23. 42 U.S.C. Ch. 21.

You do not wipe away the scars of centuries by saying: now, you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a man who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe you have been completely fair. . . . This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.²⁴

President Johnson’s description reflects the belief that the extensive and deep-seeded limitations on opportunity for persons of color in this country would not be remedied quickly or easily. Importantly, Title VII recognized the role that corporate firms needed to play to help combat discrimination within their workplaces and beyond.

And yet, less than fifteen years later, the Supreme Court expressed severe skepticism of any sort of racial preferences in *Regents of University of California v. Bakke*.²⁵ The Court held that a university’s admissions criteria which used race as a primary basis for admissions decisions violated the Fourteenth Amendment, as well as Title VI of the Civil Right.²⁶ The *Bakke* decision, however, embraced the diversity rationale for permitting affirmative action. That case, while not applicable to private employers, impacted the way private employers crafted their own antidiscrimination efforts. They shied away from setting specific goals and targets with regards to their workforces, and instead used the less easily defined and more amorphous term “diversity” as the umbrella for their antidiscrimination strategies.²⁷

But as Cheryl Wade has argued, as corporate firms have moved away from discussions of antidiscrimination efforts in favor of less concrete conversations about diversity, some of the punch of these efforts has been lost. Indeed, she explains that “[i]mplicit in [corporate firms] silence about discrimination and racism was the conclusion that these problems had been resolved within their companies, if they had ever existed at all.”²⁸ When firms attempted to create DEI programs that would not run afoul of

24. President Lyndon B. Johnson, Howard University Commencement Address (June 4, 1965).

25. See 438 U.S. 265, 324 (1978).

26. *Id.* at 287.

27. Lisa Fairfax has suggested that Supreme Court decisions like *Bakke* “evidenced a growing dissatisfaction with moral and social justifications for diversity, but also signaled a burgeoning receptiveness to more market-oriented arguments for diversity.” Lisa Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 858 (2011).

28. Cheryl L. Wade, “*We Are an Equal Opportunity Employer*”: *Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541, 1543 (2004).

the rationale set out in *Bakke*,²⁹ the unintended consequence is that they stopped using explicit language related to antidiscrimination efforts.

This change matters for a whole host of reasons, but one in particular is that there is empirical evidence that suggests that the legal case for diversity is actually more effective than the business case. Jamillah Bowman Williams, a legal scholar, conducted a study comparing the business case and the legal case.³⁰ She found that the legal case, which focuses on the legal rationales emphasizing antidiscrimination laws, is more effective than the business case at reducing bias within firms.³¹ This is, of course, just one study, but it does help cement the importance of relying on the legal case for diversity when creating firms' DEI programs.

But again, the legal case on its own is likely not enough to ensure a DEI program will meet all the goals and aspirations that firms say they want to achieve. The legal case may, as Williams's study suggests, be helpful to eliminate bias within firms. In contrast, the business case may be important for getting buy-in from a large subset of an organization to participate in DEI efforts. In short, despite the competing rationales presented in an effort to support DEI initiatives, both the business and legal cases serve important purposes.

C. A Caveat: The Moral Case.

While the business and legal cases have been a predominant source of concern for scholars studying DEI initiatives, there are also scholars who have discussed the business or legal cases within the context of other "moral" or "social" cases for diversity.³²

Williams, for example, notes that a study that involved "interviewing twenty-four CEOs from inclusive companies around the world" found that they "expressed that diversity is both a business and a moral imperative."³³ Williams goes on to posit that "[a]ntidiscrimination law may also lessen bias through a normative component in which civil rights law conveys a shared consensus on which behaviors are right and which are wrong."³⁴

Lisa Fairfax, a legal scholar, who has written extensively on diversity at the board of directors level, has explained that "advocates of board diversity—like advocates of diversity in other sectors—relied on moral or

29. Additionally, firms are attempting to not run afoul of the rationale set out in other cases. See *Ricci v. DeStefano*, 557 U.S. 557, 562 (2009).

30. Williams, *supra* note 9, at 1473.

31. *Id.*

32. See, e.g., *id.* at 1482; Fairfax, *supra* note 27, at 856–57.

33. Williams, *supra* note 9, at 1477 n.9 (citing Boris Groysberg & Katherine Connolly, *Great Leaders Who Make the Mix Work*, HARV. BUS. REV. (Sept. 2013), <https://hbr.org/2013/09/great-leaders-who-make-the-mix-work> [<https://perma.cc/QU26-Q7LM>]).

34. Williams, *supra* note 9, at 1481.

social justifications to convinced people of the desirability of such diversity.”³⁵ This was, as she notes, an outgrowth of the “notion that increasing diversity was the ‘right thing to do,’ particularly because efforts to increase diversity were aimed at rectifying existing inequalities stemming from the lingering effects of slavery, segregation, and other forms of discrimination.”³⁶ Fairfax’s work directly refers to the moral components of the corporate diversity and inclusion conversation, even while many of these debates remain framed as the business or legal cases for diversity.

An attempt to precisely parse the moral case as distinct from the business or legal case for diversity would be, at best, messy. That said, the moral case is often rooted in arguments that look quite similar to the legal case. Indeed, the moral case often appears to be an attempt to respond to societal inequality rooted in legal frameworks that either (i) permitted discrimination against certain segments of the population or (ii) aimed to stop discrimination against those individuals. I note the moral case within this Part to acknowledge that the argument exists, but the predominant framing in the literature today does appear to be between the business and legal cases for diversity.

* * * *

Scholars and firm leaders have made strong arguments in favor of both the business and legal cases for DEI efforts. Most of these arguments have strongly favored one rationale in support of DEI initiatives. This Article, however, takes the position that firms must incorporate both the business case and the legal case when creating and implementing their DEI initiatives. Both rationales are necessary to create DEI programs that will lead to more demographic diversity, create greater equity amongst individuals within the firm, and establish an inclusive workplace environment. But firms should incorporate these two cases in support for DEI efforts, while also encouraging decisionmakers as firms to view DEI initiatives from an ethical frame or perspective.

II. INCORPORATING BEHAVIORAL ETHICS INSIGHTS.

For over twenty-five years, scholars and industry leaders have drawn on both the business and legal cases for diversity when crafting and implementing DEI programs. And despite the time and resources dedicated to these efforts,³⁷ corporate firms continue to struggle to create

35. Fairfax, *supra* note 27, at 856.

36. *Id.* at 857.

37. See, e.g., Williams, *supra* note 9, at 1479 (citing Kristen P. Jones, Eden B. King, Johnathan Nelson, David S. Geller, Lynn Bowes-Sperry, *Beyond the Business Case: An Ethical Perspective of Diversity Training*, 52 HUM. RES. MGMT. 55, 55 (2013)) (“finding that 67% of all U.S. organizations

equitable and inclusive organizations. This Part puts forth the thesis of this Article, which is that in addition to pursuing the business and legal cases for diversity when crafting DEI programs, firms should also employ insights from behavioral ethics literature. By utilizing insights from behavioral ethics literature, firms can better prompt decisionmakers to recognize that DEI questions—whether under the business or legal case for diversity—are questions that should be evaluated from an ethical perspective. That reframing of the conversation can help to change the tenor of decision making from questions related to what is legally required or might create better profitability for the firm to questions about what the right decision is to make in the DEI space. This Part begins by explaining how the business and legal cases, in support of diversity efforts, have proven to not be up to the task of achieving the implementation of effective DEI programs. This Part then outlines how insights from behavioral ethics literature can begin to help firms reframe the DEI Case to be one that has ethical ramifications.

A. Necessary, But Not Sufficient

The business and legal cases have been articulated in various arguments from business and legal scholars, industry leaders, and others for over twenty-five years. And yet, many are of the view that firms have failed to transfer their stated intentions and commitments into robust, tangible actions on the diversity front. More specifically, the failure to create organizations that were (i) more demographically diverse across the spectrum of the organization, (ii) truly equitable for all members, and (iii) inclusive of a range of viewpoints and voices was known, but it was not necessarily the topic of protracted public debate. That all changed, however, in 2020, with the death of George Floyd.³⁸

Floyd's death was an unlikely tipping point within the corporate world on issues of racial justice and equity, and it prompted a renewed sense of urgency that led many firms to look critically at their own DEI failures.³⁹ The diversity status quo in firms from 2020 to present-day suggests that regardless of whether one supports the business case or legal case as the best rationale for framing one's diversity efforts, one must recognize that DEI programs rooted in these justifications largely failed at creating the diverse, equitable, and inclusive workplaces that were contemplated at the outset of these initiatives. That said, Floyd's death

and 74% of Fortune 500 companies utilize diversity training programs and on average, the costs of diversity training for a single large organization exceed one-million dollars per year").

38. Martinez & Fletcher, *supra* note 21, at 870.

39. See, e.g., *id.* at 871; Veronica Root Martinez, *The Diversity Risk Paradox*, 75 VAND. L. REV. 115, 155 (2022).

prompted firms to rethink their DEI programs, and a renewed momentum was found for firms to rethink how they structured their diversity efforts.⁴⁰

Additionally, the new corporate support for the #BlackLivesMatter Movement was followed by regulatory⁴¹ and quasi-regulatory⁴² moves to incentivize firms to provide more information about their workforces. One such regulatory intervention, human capital disclosures, prompted many firms to provide information about the state of diversity within their ranks.⁴³ While the human capital disclosures were not targeted at diversity disclosures, those reviewing the disclosures have concluded “that the vast majority of firms responding to the disclosures in 2021 included ‘a qualitative discussion regarding the company’s commitment to diversity, equity, and inclusion.’”⁴⁴

This change is a welcome one; but it demonstrates the continued reluctance by many firms to provide concrete, specific, and targeted data about the demographic make-up of their workforces. The results of these, and other disclosures over the past two-and-a-half years, makes it abundantly clear that the business and legal cases for diversity have not resulted in the types of diverse, equitable, and inclusive organizations that firms strived to create over twenty-five years ago. Moreover, while the past few years have seen modest increases in the numbers of women and people of color on boards of directors,⁴⁵ the current demographics within corporate firms more generally, which have traditionally lagged in the recruitment and retention of women and people of color in senior-level management roles, is largely unreported and unpublished at this time.

The upshot is that while the business and legal cases for diversity have prompted change within firms, corporate firms still have quite a long

40. See, e.g., Lisa M. Fairfax, *Racial Rhetoric or Reality? Cautious Optimism on the Link Between Corporate #BLM Speech and Behavior*, 2022 COLUM. BUS. L. REV. 118, 124 (arguing, based on empirical surveys, that corporate firms that issued statements in support of the #BlackLivesMatter movement after the death of George Floyd did in fact follow through on their promises to promote greater racial justice and diversity).

41. See, e.g., Benjamin Colton, Holly Fetter & Aneta McCoy, *Human Capital Management and Diversity Disclosures and Practices*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 14, 2022), <https://corpgov.law.harvard.edu/2022/02/14/human-capital-management-and-diversity-disclosures-and-practices/> [https://perma.cc/2PVD-8R2U].

42. See, e.g., *SEC Approves New Nasdaq Board Diversity Rules*, GIBSON DUNN (Aug. 12, 2021), <https://www.gibsondunn.com/sec-approves-new-nasdaq-board-diversity-rules/> [https://perma.cc/7LFV-33VY].

43. Martinez, *supra* note 39, at 122.

44. *Id.*; see also Kavya Vaghul, Aleksandra Radeva & Kim Ira, *Workforce Diversity Data Disclosure*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 9, 2022), <https://corpgov.law.harvard.edu/2022/03/09/workforce-diversity-data-disclosure/> [https://perma.cc/4569-FZPK].

45. Peter Eavis, *Board Diversity Increased in 2021. Some Ask What Took So Long.*, N.Y. TIMES (Jan. 3, 2022), <https://www.nytimes.com/2022/01/03/business/corporate-board-diversity.html> [https://perma.cc/JFW4-CGGE].

way to go toward creating truly diverse, equitable, and inclusive workplaces.⁴⁶ These rationales for firms to invest in and promote DEI efforts, while necessary, have shown themselves to be insufficient. More is needed.

B. Behavioral Ethics as Applied to DEI Efforts

If one agrees that both the business and legal cases for DEI efforts serve important purposes, but also believe that they have not been sufficient in advancing firms to their stated aspirations, the natural question is, “What more is needed?” This Part demonstrates that some of the limitations of the business and legal cases for DEI efforts can be explained, at least in part, by the very framing that these cases invoke when individuals move to make decisions based upon those rationales.

Behavioral ethics, a field mostly developed within business literature, is “a field that seeks to understand how people actually behave when confronted with ethical dilemmas.”⁴⁷ One of the primary insights of behavioral ethics research is that traditional ethics fails to recognize that many individuals make decisions without activating their (i) moral awareness, (ii) moral judgment, or (iii) moral intention.⁴⁸ In other words, people make decisions without realizing there is a moral component to that decision-making. Additionally, behavioral ethics research demonstrates that when questions or problems are presented in a way that prompts a particular “frame” of decision-making, it can be less likely for the individual to view the question or problem as one that is an ethical decision—or one that should activate their moral awareness.⁴⁹ The combination of these insights presents a compelling argument for why, in addition to pursuing the legal and business cases for diversity, industry leaders should work to reframe these conversations as ones that also invoke ethical concerns.

For example, Ann E. Tenbrunsel and Kristin Smith-Crowe, two business scholars, have demonstrated that when one presents a problem as a business problem, a legal problem, or an ethical problem, one elicits a different set of reactions from business leaders. In particular, they explain:

If a decision is coded as an ethical one, ethical considerations will be part of the decision process; conversely if the decision is coded as a business decision or a legal decision, other considerations such as

46. See, e.g., Ely & Thomas, *supra* note 20, at 117.

47. MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* 1, 4 (2011).

48. *Id.*

49. Ann E. Tenbrunsel & Kristin Smith-Crowe, *Ethical Decision Making: Where We've Been and Where We're Going*, 2 *ACAD. MGMT. ANNALS* 545, 552–53 (2008).

profit or compliance might be more central to the decision process. By highlighting a multi-dimensional construct, decision frames, to represent the construal of the decision, we expand the traditionally dichotomous categorization induced by moral awareness (i.e., “Is the decision maker morally aware or not?”).⁵⁰

The insights of behavioral ethics research have ramifications for a host of decisions that business leaders face every day, but they have particular importance for diversity conversations that have been rooted in the dichotomy of the business versus the legal case for DEI efforts. Whether one is concerned with the profit-motive that animates much of the business case discourse, or with the legal case, which is often focused on technical compliance with legal and regulatory mandates, ethical concerns remain on the backburner. In doing so, those espousing both the business and legal cases for DEI have divorced those conversations from moral and ethical concerns.

Of course, one might immediately revert back to Section I.C. of this Article to support the notion that discussions about the business and legal case have sometimes led scholars and industry leaders to invoke moral awareness. The problem, however, is that the ad hoc recognition of the ways in which business and legal decisions might impact moral decision-making is not enough to ensure that business leaders are confronting their decisions regarding DEI efforts from an ethical perspective. It is not the argument of this Article that business leaders are never considering the moral ramifications of their DEI efforts—indeed, to the contrary, the response from business leaders after the death of George Floyd on topics like racial justice suggests that they were strongly motivated to consider the moral ramifications of their business decisions.⁵¹

That temporary or ad hoc recognition of the manner in which DEI efforts might intersect with moral considerations, however, is not sufficient over the long-term. Behavioral ethics research explains that how someone approaches a problem or question has a strong impact on how they construct the resolution to that problem or question.⁵² Currently, the predominant rationales for DEI efforts are rooted in business and legal frameworks.⁵³ This Article argues that ethics should also be explicitly and purposefully brought into these existing and ongoing conversations. Instead of constructing DEI efforts with business or legal concerns in

50. *Id.* at 561.

51. *See, e.g.*, Tracy Jan, Jena McGregor & Meghan Hoyer, *Corporate America’s \$50 Billion Promise*, WASH. POST (Aug. 23, 2021), <https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/> [https://perma.cc/4J2F-ETXZ].

52. BAZERMAN & TENBRUNSEL, *supra* note 47, at 4; *see, e.g., id.* at 15–18, 143.

53. *See supra* Part I.

mind, leaders should attempt to reframe their efforts grounded in the business and legal cases to also invoke decisionmakers' moral awareness. In short, firms should engage in activities that explicitly prompt those charged with creating and implementing DEI programs to consider the ethical ramifications of their decisions. Moreover, DEI leaders should attempt to present DEI efforts to their workforces and members in a way that prompts those individuals to frame diversity initiatives from an ethical frame. The upshot is that those working in the DEI space need to spend more time reframing the business and legal cases for DEI as having strong connections to ethical decision-making.⁵⁴

III. THE EFFECT OF REFRAMING

DEI leaders focused on the legal case know that there are a number of potential legal liabilities that can arise as a result of failing to have a demographically diverse workforce, including a range of employment discrimination claims.⁵⁵ DEI leaders focused on the business case, particularly since 2020, know that a failure to hire and retain a demographically diverse workforce is an active concern of shareholders and consumers today.⁵⁶ The question, of course, is how could the reframing proposed by this Article actually impact DEI efforts? This Part begins to address this question.

A. Reframing the Business Case

As noted earlier, Ely and Thomas have explained, “[i]ncreasing the numbers of traditionally underrepresented people in your workforce does not *automatically* produce benefits.”⁵⁷ Instead, one must create an equitable and inclusive environment to achieve these benefits. Ely and Thomas argue that to make substantive changes within a firm, traditionally

54. This Article is not the first to suggest that those interested in diversity within corporate firms should embrace an ethics framework in an effort to achieve their DEI goals. Scholars, particularly those from the fields of business and organizational psychology, have argued in favor of an ethical approach to diversity efforts. For example, in 2012, van Dijk, van Engen, and Paauwe argued in favor of a virtue ethics approach to DEI efforts. Hans van Dijk, Marloes van Engen & Jaap Paauwe, *Reframing the Business Case for Diversity: A Values and Virtues Perspective*, 111 J. BUS. ETHICS 73, 73 (2012). They framed the two predominate arguments in the diversity space as being between equality scholars and those concerned with the business case. Their framing of equality appears to track well with the legal case outlined in this Article. Specifically, they “point[ed] out how the arguments of equality scholars correspond with moral reasoning grounded in deontology, whereas the foundations of the business case perspective are crafted by utilitarian arguments.” *Id.*

55. See Martinez & Fletcher, *supra* note 21, at 888; see also Edward Chang & Bonnie Levine, *To Drive Diversity Efforts, Don't Tiptoe Around Your Legal Risk*, HARV. BUS. REV., July–Aug. 2022, at 74, 76.

56. See sources cited *supra* note 55.

57. Ely & Thomas, *supra* note 20, at 117.

unrepresented groups need to have “the power to help set the agenda, influence what—and how—work is done, have one’s needs and interests taken into account, and have one’s contributions recognized and rewarded with further opportunities to contribute and advance.”⁵⁸ The business case, they argue, has failed to create these sorts of environments.⁵⁹ I concur with their arguments. The business case is often focused on metrics like profitability, but there are few strong accounts within the business case rationale that would provide strong incentives for leaders within firms to ensure they have created truly equitable and inclusive organizational cultures. The one caveat, perhaps, is narratives that argue that more demographically diverse teams lead to better decision making, but these studies are part of the empirical works that are often criticized by academics as having questionable empirical support.⁶⁰

That said, it may be helpful to think through how reframing the business case rationale for DEI efforts to incorporate ethical concerns may change how certain DEI initiatives are approached by decisionmakers within firms. Assume, for example, that the fictional Acme Corp., in recent years, has embraced the research that suggests that diverse teams craft better decisions that bring greater profitability and value to the firm.⁶¹ Decisionmakers at the firm begin to look at strategies that will allow it to create more demographically diverse firms, and it begins to audit its most important internal committees and teams to ensure there is gender and racial diversity throughout. As a result of these audits, the company realizes that there are several teams within its sales departments that lack women and people of color. The company brings up this lack of demographic diversity to the relevant managers and encourages them to add more women and people of color to these teams.

This sort of intervention makes complete sense for a firm that has embraced the business case for diversity. They need to increase demographic diversity of their teams to ensure the best value and profitability of the firm. There is a business problem and a business answer—assign more women and people of color to the teams that are lacking in demographic diversity. But if this issue were reframed to also invoke ethical concerns, decisionmakers at the firm who are encouraging managers to restructure their teams may go a bit further to think through what the managers would need to actually accomplish these goals. For example, would the managers need to assign current women and people of

58. *Id.* at 118.

59. Please note, Ely and Thomas critique traditional inclusion efforts because they do not “fundamentally reconfigure power relations.” *Id.*

60. *Id.* at 117.

61. See generally MCKINSEY REPORT, *supra* note 17.

color to more than one team? Would those women and people of color end up with more demands on their time than their white counterparts? If so, would that increase in team or committee work have a negative impact on their ability to complete other expectations and requirements? In other words, an ethical frame might encourage decisionmakers to think through how their mandate might impact the people who would be expected to perform this additional work. Moreover, it might lead them to consider whether it would be helpful or harmful to them personally, instead of just focusing on bottom-line concerns for the firm.

B. Reframing the Legal Case

When creating DEI programs, firms started off by attempting to (i) create strong antidiscrimination norms and (ii) alter the demographic composition of their workforces by attempting to hire more women and people of color.⁶² However, the legal case was not rooted, at least not initially, in creating fully equitable and inclusive organizations. This is, perhaps, not all that surprising, because it is likely quite difficult to mandate goals like the creation of an inclusive environment for all employees. And yet, a reframing of the legal case to include moral and ethical concerns could help a firm approach their legal obligations in a more expansive way.

Take the Coca-Cola settlement discussed in this Article's introduction. Part of the remediation effort at the firm involved reviewing the ways in which Black employees were treated differently than their white counterparts and addressing any disparities.⁶³ Let us assume, for example, that after the claims were settled that the firm engaged in a review of its employees' salaries in an attempt to identify and rectify any disparities across racial or gender lines.

If one is conducting a review of this nature from the frame of the legal case, one is concerned with addressing the legal liability that has arisen within the context of the antidiscrimination lawsuit that was settled. One would identify any employees whose salaries looked as if someone was underpaid due to their race or gender and increase it to a level more on par with those employees' white male counterparts. One might even attempt to put in salary tables that tied compensation to certain objective metrics in an attempt to prevent similar disparities, and legal liabilities, in the future. These would all be activities that might result from looking at the problem of pay disparities from the legal case perspective.

62. *See supra* Section I.B.

63. *See, e.g.,* Winter, *supra* note 4.

If one, however, reframed the issue of pay disparities as not just a legal issue, but also a moral and ethical concern, one might take additional actions. For example, one might hire a consultant or establish a committee to see if the table meant to create objective metrics for setting pay might inadvertently entrench or be impacted by structural racism. For example, do people doing the same basic work for the firm, but with different educational backgrounds, qualify for different levels of pay? Or do employees working in traditionally Black geographic areas get paid differently than employees working in traditionally white geographic areas? Or do certain divisions of the firm tend to be racially homogenous, with Black employees working as janitorial staff, while white employees work as mailroom staff? Additionally, are there pay disparities along the different divisions despite the workers having similarly situated educational levels and employment backgrounds?

These examples are fictional, but they demonstrate different ways structural racism could infect a seemingly objective metric for setting pay. If one is only concerned with the legal case, one might not even think to question how the proposed remedy to the legal problem might in itself create new pay disparities that would be difficult to challenge as part of an antidiscrimination suit.

* * * *

The upshot is that by tweaking how people perceive the scope of the business and legal cases for diversity to include ethical questions, one can encourage decisionmakers to take a more holistic view of their DEI interventions.

IV. CLARIFYING QUESTIONS

This Part will include clarifying questions that readers familiar with the DEI literature may have in response to this Article's argument. This Part details two such concerns, but there could be additional questions that require more attention, research, and thinking.

A. Should the Business Case Be Abandoned Wholesale?

Some of the empirical literature attempting to measure the effectiveness of DEI efforts on increasing the demographic diversity within firms suggests that the legal case is superior to the business case.⁶⁴ But even more than that, some sociological studies suggest that DEI efforts grounded in the business case are actually harmful and decrease

64. Jamillah Bowman Williams, *The Social Psychology of Inclusion: How Diversity Framing Shapes Outcomes for Racial-Ethnic Minorities* 17 (Geo. L. Fac. Publ'ns & Other Works, Working Paper No. 2427, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4024504 [<https://perma.cc/4YXU-T8A5>] (under submission in peer-reviewed journal).

demographic diversity efforts within firms.⁶⁵ These findings may prompt some to argue in favor of abandoning the business case wholesale. I am reluctant to support an abandonment of the business case for, at least, the following two reasons.

First, while the empirical evidence does demonstrate that certain business case rationales and initiatives are harmful to demographic diversity, it does not tell us whether business case initiatives are helpful to other aspects of the firm. The measurement in these studies is tied to findings related to demographic diversity. That makes sense. The percentage of people of color within a firm creates a clear metric by which to assess the efficacy of DEI strategies. It is much harder, however, to measure other benefits the business case may have. For example, widespread and public adoption of the business case rationale, which was after the death of George Floyd in 2020, could be having societal impacts on what is and is not a legitimate area of focus for firms. Measuring that impact could be quite tricky, but it may also be too soon to engage in that sort of work. In other words, scholars may know that existing business case efforts have decreased demographic diversity at firms, but we do not know whether those same business case DEI efforts are having positive impacts in other areas of the firm and society.⁶⁶

Second, and at least partially related to the above discussion, when firms adopt the business case for DEI efforts, it may be serving an expressive function. Scholars have long-discussed the ways in which legal and regulatory requirements have an expressive function, which Professor Cass Sunstein describes as “‘making statements’ as opposed to controlling behavior directly.”⁶⁷ He notes how the expressive function of law can have an impact on social norms and society expectations about how the world should function.⁶⁸ When firms adopt DEI policies based on the business case, there could be a valuable expressive function across a variety of dimensions. For example, it might be important for members of their workforce to believe they are working for a firm that cares about DEI issues. Additionally, it may be important to consumers to purchase goods and services from firms that have embraced the rationale. Indeed, some firms and firm leaders have been sanctioned when failing to embrace certain DEI initiatives.⁶⁹ The upshot is that the business case’s expressive

65. *See id.* at 14; Williams, *supra* note 9, at 1503.

66. *See, e.g.*, Williams, *supra* note 9, at 1491–92.

67. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996).

68. *Id.* at 2024–25.

69. *See, e.g.*, Brenda Salinas, *CrossFit CEO Steps Down After His Racial Remarks Led Reebok, Others to Cut Ties*, NPR (June 9, 2020), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/09/873150038/crossfit-company-is-ostracized-after-its-ceos-racial-remarks> [<https://perma.cc/4WMT-MBPF>].

function is not limited to items related to improving the demographic diversity within a firm and knowing this makes me reluctant to encourage firms to abandon it wholesale.

B. Does the Moral Case Obfuscate the Need for Reframing?

Section I.C. notes that within the discussions of the business and legal cases for diversity (particularly the legal case), there has been a focus on morals. For example, the legal case for diversity is rooted in the idea that discrimination against a set of persons is immoral, so efforts aimed at addressing discriminatory conduct have a moral imperative.⁷⁰ One might argue that the reframing suggested in this Article is duplicitous of the moral case one finds discussed in the literature to date, thus making the suggestions here unnecessary. I have two primary responses to this concern.

First, the references to the moral case articulated in the DEI within corporate firms' literature has not been presented in an even way. The discussions of the moral case are primarily, although not only, in tandem with discussions of the legal case, but it has not received consistent attention when discussing the legal rationale for DEI efforts within firms. In other words, sometimes scholars reference the moral justifications of the legal case and sometimes they do not. The suggestion in this Article is that decisionmakers within firms should engage in purposeful, consistent, and explicit efforts to reframe discussions surrounding the business and legal cases for diversity as ethical concerns. This specific intervention is novel.

Second, the moral case articulated in the DEI literature to-date is often rooted in backward-looking rationales. Many anti-discrimination efforts are rooted in the past exclusion and subordination of people of color and women within and throughout the history of the United States.⁷¹ The reframing I suggest—an increased focus on the ethical ramifications of the business and legal cases for DEI efforts—are meant to be more forward looking. When crafting new policies and procedures meant to create more diverse, equitable, and inclusive organizations, decisionmakers should consider the ethical ramifications of those decisions in helping them craft strong initiatives. The focus of the ethical frame proposed is meant to

70. *See, e.g., Williams, supra* note 9, at 1482 (discussing how the legal case is rooted in moral concerns).

71. *See, e.g., Justice Kentaji Brown Jackson, Remarks During Merrill v. Milligan Oral Argument* (Oct. 4, 2022), <https://www.c-span.org/video/?c5034217/justice-jackson-argues-14th-amendment-intended-race-neutral-race-blind#> [<https://perma.cc/QJC8-57HW>].

create strong DEI programs for tomorrow, not to remedy the discrimination of yesterday.⁷²

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I am not suggesting that reframing the business and legal cases for diversity will magically make them more effective at improving DEI efforts within firms. I am, however, suggesting that insights from behavioral ethics research focused on how one frames an issue or problem could be beneficial to those in the DEI space. Legal problems get legal answers. Business problems get business answers. And ethical problems prime people to craft ethical responses. The reality is that DEI issues do not fit neatly in any of these buckets. They have legal, business, and ethical components. My proposal aims to help decisionmakers think about how ethical concerns might impact their decision-making when crafting business and legal case strategies toward DEI initiatives, thereby encouraging them to create more complete and thoughtful strategies.

CONCLUSION

Corporate firms have recognized the importance of pursuing DEI strategies for decades, yet much more progress is needed to create demographically diverse organizations with equitable and inclusive organizational cultures. This Article contributes to scholarly conversations about how best to implement and structure DEI initiatives. In particular, it argues that in addition to pursuing the business and legal cases for diversity when crafting DEI programs, firms should also employ insights from behavioral ethics literature so that firms can better prompt decisionmakers to recognize that DEI questions are questions that should be evaluated from an ethical perspective. When the business and legal cases for DEI are reframed to encourage ethical concerns as well, it may help change the tenor of decision making from questions related to what is legally required or what might create better profitability for the firm, to questions about what is the right decision to make in the DEI space.

72. While that is not the argument of this Article, I do think that a valid basis of support in favor of affirmative action policies is an attempt to remedy the historical discrimination certain demographic groups within the United States have faced.