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## Reclaiming an Ethic of Corporate Responsibility

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# Reclaiming an Ethic of Corporate Responsibility

Lyman Johnson\*

No matter how much irresponsibility America exports, we still have a surplus at home. The collapse of Enron, spectacular and riveting as it may be, is largely a story of domestic failure and, disturbingly, one that may not be unique. The broad fallout of Enron's demise has led pragmatic Americans to search for answers—fast answers. Congressional committees have geared up to investigate and, inevitably, the resulting momentum will lead lawmakers to do what lawmakers always do—make laws to “do something about this.”<sup>1</sup>

Some of these laws will probably be good. Campaign finance reform was long overdue, but not solely because of Enron. Changes to defined contribution plans for employees—401(k)s—may encourage diversification in portfolios, heighten employee knowledge of and vigilance over their retirement funds and thereby reduce pension risk, especially that associated with overinvestment in employer stock. Perhaps Congress will revisit its own misguided efforts in the mid-1990s to “reform” securities laws, efforts that made it harder to unearth and prove financial wrongdoing of a sort many naively thought had been cured (rather than masked) by a rising stock market. Yet other beneficial legislation, such as stricter rules on financial accounting, may also be passed. And then the lawmakers will recess. They will think, and many Americans will hope, that “the problem”—as if it were a technical defect, like a leaky faucet—has been “fixed.”

If Larry Mitchell's analysis of corporate society and corporate law is accurate, the belief that applying a few tire patches—even very good ones—will cure a basic design defect is not only wrong, it is sadly symptomatic of how little is known about our corporate system, even among educated elites.<sup>2</sup> Mitchell's book should be must-reading for those wringing their hands over Enron and what it portends. He does not patronize, offer glib advice, prescribe a regulatory pill and promise results in 30 days. He tells the patient—us—that the problem is deep-seated and longstanding, reflects faulty attitudes, and requires change at a fundamental level.

Mitchell links corporate irresponsibility, both at home and abroad, to an age-old dilemma: how to reconcile the interests of the individual with those of the group. There are two vantage points on this quandary, the perspective of the group (whether a family, club, team, church, school or company) and that of the individual. In a free society, the group may make relatively few demands, perhaps only restraining the individual's desire for unfettered, harm-producing liberty. This can be done both through positive law prohibi-

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<sup>1</sup> See Greg Ip, *Mood Swings in Favor of Regulation*, WALL ST. J., Mar. 29, 2002, at A14.

<sup>2</sup> See LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT* (2001).

tions and various non-legally-enforceable social conventions and sanctions (such as, for example, shunning, shaming or not promoting). Alternatively, the group may seek to induce positively desired behavior by offering various incentives and rewards. The point is simply that all groupings of humans have collective/corporate interests and goals that transcend those of an individual member. By way of example, Michael Jordan may justifiably want, once again, to be named Most Valuable Player in the NBA, but his basketball team (the Washington Wizards) wants to win games and advance in the play-offs. The individual in the group, consequently, has his own "internal" vantage point on the interaction—a vantage point that, ideally, recognizes the strong and valid pull of both self and other: "How do I rightly accommodate my desires/needs/interests with responsible membership in the [family, club, team, church, school, company]?"

Transported into the setting of the public corporation, this dilemma should have been cast at the very outset in terms of how to reconcile the interests of capital providers (shareholders) with those of other constituents of the business enterprise. Corporate law in the twentieth century, however, framed the issue differently: How to reconcile the interests of dispersed shareholders with the fact of centralized, potentially autonomous and unaccountable management? Make no mistake. This "agency" issue, as law and economics scholars describe it, is important, especially as business organizations grow from "close" firms where capital providers directly participate in management to "public" firms where the capital-providing and management functions are separated. In providing money to a company while being legally and practically foreclosed from meaningful say over its management, shareholders rightly expected—and the law rhetorically obliged them on this point—that directors should act as fiduciaries and not serve their own personal interests.

Ensuring that managers do not wrongly advance their own interests over shareholder welfare is one thing. It is another thing, however, to focus so single-mindedly on the second-level, "agency" problem that the deeper institutional dilemma of harmonizing the interests of numerous physically absent shareholders with the interests of a host of other corporate participants is ignored. Viewed this way, as a subset of the universal and longstanding individual/group dilemma, the real challenge for corporate directors—and corporate governance—should have been cast from the outset as the task of figuring out how to constrain or induce directors to act in a way that advances the interests of shareholders consistent with fulfilling the overarching interests/purposes of the corporate group.

Contributing to the neglect of this root institutional dilemma—in favor of corporate law's fascination with the intermediate, "agency" dilemma—was the personification of the corporation. As with *individual* members of society, those directing the affairs of this new "person" faced the usual predicament of reconciling *its* interests with those of the group (here, society). From the vantage point of the group (society), the new member's interests/purposes were hoped to be compatible with group concerns. In a *laissez-faire* era of relatively little law—the late nineteenth and early twentieth centuries—when states were competing for incorporation business by relaxing cor-

porate regulations,<sup>3</sup> there was not much authoritative legal material, beyond antitrust law and common law, to express societal concerns and views on this matter. From the vantage point of those persons directing the affairs of the new member (the corporation), the proper question should have been: "How are the desires/needs/interests of this institution harmonized with membership in the larger group (society)?" This question—a question of responsibility to others—is problematic enough for an individual. For a complex organization, the question is greatly complicated by two factors.

First, there is the critical issue of voice. Who within an organization is given a voice on such a fundamental matter? The customary answer in corporate law is the directors and senior officers. As they address the basic matter of group (corporate) purpose, they know as right-thinking people and as fiduciaries that the group's purpose is not the promotion of their own personal interests.<sup>4</sup> But beyond that minimal obligation, how do they affirmatively articulate their conception of corporate goals and what sources of legal and non-legal authority should guide them? For various reasons, the rhetoric of corporate law rather early on encouraged the alignment of corporate-group interests with the interests of one set of participants—the shareholders.<sup>5</sup> That this remained the chief orthodox assumption throughout the twentieth century—with occasional episodes of doubt—may be because corporate law struggled, with understandable fascination, to address the important, but second-level "representational" dilemma noted earlier. It may also be because directors and officers themselves truly believed that to be the group's proper purpose. It might also be because early twentieth century conceptions of personhood—recall the then newly emergent notion of the corporation as a "person"—were insufficiently developed, or at least sufficiently ambivalent, to permit the simplifying utilitarian assumption that persons (both individuals and groups) acted with a certain singularity of purpose and that purpose was the rational pursuit of self-gain.<sup>6</sup>

Self-gain for a business corporation during the first three-quarters of the twentieth century meant maximizing enterprise profits. This goal, however, in the 1970s and 1980s, was widely modified in a seemingly subtle but actually very profound manner, to the goal of maximizing the common stock share price. In the economic sphere of social life, then, both individuals and companies were thought, descriptively, to act to maximize "personal" economic welfare, however measured. Since the mid-1970s, the simplifying proxy for company welfare, however, permutated from *enterprise* profitability to *shareholder* wealth, a change that was directly contrary to the conception of the corporation as a "distinct" person. Beginning from such a *descriptive* account

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<sup>3</sup> See *Liggett Co. v. Lee*, 288 U.S. 517, 557-67 (1933) (Brandeis, J., dissenting).

<sup>4</sup> I express this as what right-thinking persons should know; of course, that many do not act in this manner is what creates problems in corporate law.

<sup>5</sup> The most famous instance of this is the Michigan Supreme Court's assertion, made in 1919 without recitation of authority, that a "business corporation is organized and carried on primarily for the benefit of the stockholders." *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

<sup>6</sup> See Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215, 2231-32 (1992) (describing both nineteenth and twentieth century scholars who believed people predominantly engage in rational, self-interested behavior).

of individual and corporate economic and psychological motivation, it may have been a short move to simultaneous development of a strong social norm of promoting self-interest (first understood as enterprise profitability, then maximizing the share price), as a *prescriptive* matter.<sup>7</sup>

However narrow and one-dimensional such a view is of what does and should motivate an individual's behavior—after all, widely shared religious, philosophical and literary perspectives have expressed misgivings about it for a long time, and the perspectives of psychology and behavioral economics more recently have added their challenge to the correctness of such a simplistic account—it is completely misguided for explaining organizational behavior. This brings me to the second reason why it is difficult for a complex organization to meld its interests responsibly with those of society. It is difficult to clearly orient corporate activities in a way that is congruent with the demands of society because, of course, the corporation is not a “person,” but a sub-society with its own internal constellation of individual/group dilemmas. Both the law and common discourse may usefully posit the corporation as a “person,” with an assumed coherence of “personality” (or image) and purpose, at least when considering the corporation in relation to other persons and groups in society at large. Thus, for example, it frequently makes sense to speak of Microsoft or other corporations as though they are singular in aspect—as in, “Have you tried Microsoft's latest program” or “Do you think Microsoft violated antitrust laws?”—even though this phrasing does not fully capture the immense complexity of Microsoft, the organization. In many situations, then, the oversimplification may work tolerably well, and the word “person” may be as good a conceptual and verbal shortcut for capturing the group's separateness and responsibility as any other.

But the rise of that useful legal and linguistic convention at a time when the corporation acted with growing influence on society at large should not distract us from seeing that individuals “within” the supposedly singular corporate person always act in a decidedly dual capacity. Each person acts vis-à-vis other participants *in* the corporate sub-group,<sup>8</sup> be they low or mid-level employees, officers or shareholders. Then, as a composite of these coordinated efforts, the company (by and through certain of these same individual constituents) acts in and alters the social world at large. These relationships are complicated even more when, as is the case with institutional shareholders, some participants in the corporate sub-group are themselves sub-groups with their own inner/outer duality of organizational focus.

Corporate “law and econ” scholars deftly sidestep this Janus-like, dual orientation of corporate participants by simply dissolving the corporation as a sub-society. This is done in two moves. First, only the economic, as opposed to the psychological, sociological, or moral, dimension of commercial interaction is emphasized. Second, all interaction—including that “within” the firm (itself, recall, conceived of as simply a “nexus” of contracts)—takes

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<sup>7</sup> See Dale T. Miller, *The Norm of Self-Interest*, 54 AM. PSYCHOLOGIST, Dec. 1999, at 1053.

<sup>8</sup> Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968, 970 (2002).

place by and among *individual* economic actors pursuing only self gain.<sup>9</sup> In other words, sub-groups do not have distinctive *institutional* purpose/identity or culture; they are, rather, places of individual, replicable market interactions. Neo-classical economics, uninformed by sociological, psychological or other insights, then becomes—as it has in corporate law scholarship over the last twenty-five years—the dominant disciplinary prism for viewing corporate interactions. Concededly, the contractarian, market model of corporate/group relations has explanatory power—to a point. For example, Shaquille O'Neal and Kobe Bryant of the Los Angeles Lakers basketball team interact with the Lakers' organization through their respective employment contracts, powerfully influenced by the labor market for professional basketball players. But when those two players have a clash of personality and playing style, two facts are conspicuous. First, the conflict will not be worked out in any "market," at least in the short term. Rather, it is a coaching/management personnel problem requiring a range of sophisticated inter-personal and "social" insights to resolve. Second, the clash "within" the Lakers affects the Lakers as a game-winning basketball team. The clash was not simply a flare up between two independent market participants. It affected the sub-group (Lakers) and its attempts to carry out its *group* goals in the larger arena of the NBA. In short, the individuals' "internal" squabble affects the sub-group's "external" performance as a team playing other teams. Likewise in corporations, the individual pursuit of goals/interests can jeopardize or enhance the company's performance as a company competing in the marketplace.

In acting in the vast array of groups and sub-groups that form America's complex society—including action in the corporate setting—the individual, Mitchell observes, has both a self-serving orientation and a caring impulse.<sup>10</sup> The "others" in an individual's life understandably seek more of the other-regarding and caring impulse, and groups develop various strategies for coercing or inducing more of such "altruistic" conduct. This is not news, for example, to the parent introducing a young child to family obligations, to a coach in the NBA seeking to harness individual talent for team success, or to an officer in a public corporation. For the individual, on the other hand, the joint demands of self and other, and their proper balancing, present recurrent moral choices. Many times the interests of self and group are (or seem to be) congruent, but at other times they are not, and the individual must starkly choose which interests to advance and which to deny.

All of this goes on within every corporation in our corporate society—which is not to say with the urgency found in a family—though it may be veiled by the vast and unprecedented *scale* of groups in the twentieth century and by the greater physical and emotional *detachment* experienced by participants in such large groups. Scale and detachment present challenges for altruistic conduct. It simply is harder, from an emotional and psychological

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<sup>9</sup> See Johnson, *supra* note 6, at 2215-16 (describing this conception and contrasting it with a noncontractarian account of corporateness).

<sup>10</sup> Although Mitchell does not make this entirely clear in his treatment of the subject, caring can have both an affective, emotional aspect, as well as a duty-bound and quite non-affective aspect. See MITCHELL, *supra* note 2, at 13-14.

standpoint, *to care for*, and, from a duty standpoint, *to take care of*, persons with whom you have little ongoing interaction. An example is the relationship of most employees and most shareholders in a public company. They have remarkably little to do with one another, given that both groups have significant financial interests in the same business. One salient difference is that only natural persons can be employees—while groups can be shareholders—and another is that natural persons can only work one job at a time while a shareholder can hold stocks in many companies at a time. The resulting difference in both financial dependence on, and emotional and moral attachment to, a particular company is obvious. To cite one example, when a worker retires or leaves, frequently other workers arrange a party honoring the co-worker. This does not happen when a shareholder sells stock—usually neither shareholders nor workers even know about the departure, much less care. Correspondingly, a person has a greater likelihood of solidarity where these are close, sustained dealings. This is why many bosses really like their workers and vice versa—they know each other as humans and not simply in work roles. Appreciation, respect, empathy, and even legitimate fondness, often result.

Corporate law and culture, however, in various ways Mitchell elaborates, seek blithely to ignore the social/moral complexity of corporate (group) dealings and, instead, insist on a pallid singularity of joint action: maximize shareholder wealth.<sup>11</sup> That is said to be the normative purpose of the group qua group as well as the standard by which individual actors within the group are to resolve the numerous choices over which they have influence or control. When the choice is, for example, between working and loafing for an hour, the economically and morally correct choice for a division manager is obvious and uncontroversial. But what about when that same manager is under orders to “reduce costs.” How should he do so, if he has some latitude? Should he lay off a secretary who is five months pregnant? Is shareholder wealth maximization so unequivocal a moral imperative that it demands her termination? The manager may well care more about the secretary than the shareholders. He may also believe he should take care of her interests. That is not at all to say he is not obligated to attend to shareholder interests. It is simply to refuse to ignore the fact that managers make moral choices that frequently are elided by glib reference to “market” transactions and “shareholder welfare.” It is the timeworn executioner’s excuse, the customary appeal to role as a moral defense—“I had no choice; my hands were tied.” Quite apart from the proper resolution of this issue—and I join Mitchell in believing that a manager in this position should have more freedom—my point (and Mitchell’s) is more basic: Where is the language and opportunity in corporate law discourse to even *acknowledge* the moral dilemma faced by the manager, much less where is the discourse rich enough to *accommodate* multiple demands, rather than, a priori, insisting on a wholesale maximizing of one participant’s claim?

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<sup>11</sup> As expressed by a young corporate lawyer in Louis Auchincloss’s novel, *SKINNY ISLAND*, “To question the validity of a life dedicated to the apotheosis of money-making was to be guilty of heresy.” LOUIS AUCHINCLOSS, *The Senior Partner’s Ethics*, in *SKINNY ISLAND* 194, 195 (1987).

Mitchell advocates certain structural reforms to loosen the grip of shareholders on directors and senior officers. At the same time, he acknowledges that shareholders are entitled to have their interests served. In corporate law, like it or not, in the early twenty-first century we are still trying to figure out exactly *what* that means. Does it mean maximization of current share price or is some other, less short-term oriented measure of corporate health, such as enterprise profitability, to be preferred? Shareholders are unquestionably somewhat detached from the everyday center of corporate life, and while their interests must be served, they may not especially care about—or even be situated to care about—employees, or fully appreciate their importance.<sup>12</sup> Workers are, too often, the “invisible man,” to use Ralph Ellison’s phrase,<sup>13</sup> in corporate law. This institutional myopia is not because of some moral deficiency on the part of shareholders. It results both from a widely shared norm that advancing economic self-interest *is* proper—a norm easily subscribed to and reinforced in the market setting where shareholders operate—and from a structural governance arrangement that, for shareholders, largely *precludes* moral choice.

Directors and managers, as representatives of shareholders, vicariously confront moral choices all the time and they should address them in just that way—as moral choices. Those decisions should not automatically be resolved (thereby making a nonreflective moral choice) by uncritically advancing only what are thought to be short-term shareholder interests. As members of the group, shareholders, through their representatives, must morally do what all members of a group do—seek responsibly to reconcile and harmonize their interests with those of others. They are not, in effect, to seek MVP honors only, but must contribute to the team’s winning of games, to borrow a sports metaphor. Where they are foreclosed from doing that directly, directors can and should do it on their behalf. Mitchell forcefully argues that those legal principles and institutional practices that short-circuit director and manager freedom to act responsibly are socially pernicious and must be reformed. In this respect, the book stands in a long tradition of “redemption” literature—it calls corporate law back to first principles, urging us to implement reforms where we have strayed off course.

Mitchell seeks within the laws and norms governing the corporate institution the necessary philosophical pre-condition for morally responsible behavior—freedom from the restraint of shareholder wealth maximization. He does a good job of arguing for that freedom, nicely recounting how corporate law’s intrepid pursuit of management accountability to shareholders is itself the very cause for concern on the social responsibility front. (As a matter of intellectual history, this is a compelling story of how framing an inquiry by selection of a paradigm and then assigning it exclusively to a group of corporate law specialists can shape culture-wide practices; you get answers only to the questions you ask.) But the necessary pre-condition—freedom—is not a sufficient condition for successful reform. Also essential is a *willingness* to

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<sup>12</sup> I use “care” here both in the emotional sense and, more importantly, in the sense of moral duty.

<sup>13</sup> See RALPH ELLISON, *INVISIBLE MAN* (1952).

act and the *knowledge* of how to act. Moreover, the corporate actor must be able to discern from prevailing social norms and law what morally responsible managerial and corporate conduct, directly and on behalf of shareholders, really looks like. Let me briefly address what, besides Mitchell's plea for freedom, is needed to begin to institutionally revive the caring impulse in corporate life and corporate law. Put another way, how can we begin to reclaim an ethic of corporate responsibility? A non-exhaustive sketch follows.

First, the breakdown of corporate responsibility both reflects and contributes to the breakdown of the caring impulse and loyalty in larger society. This is what sociologist Alan Wolfe discovered in his survey of modern American attitudes toward such qualities as loyalty. As noted by Wolfe:

We like to believe that the loyalty taught in families will carry over everywhere else. More likely, the emphasis on putting one's own interest first taught in the economy will carry over into the family. When business firms treat workers as disposable commodities, the last thing on their minds is that their actions could have an effect on the divorce rate. Americans started divorcing one another long before the current wave of corporate downsizing, but there is nonetheless a relationship between workplace disloyalty and marital disloyalty that runs throughout the comments of our respondents. The moral maxim learned in the world of business comes down to the proposition that if you can no longer trust your company, you have no choice but to trust yourself. Because America is a business civilization, one in which every institution finds itself conforming to the logic of profit even when it has another ostensible purpose, it is an easy temptation for people to apply the same moral maxim to the family.<sup>14</sup>

In this disturbing assessment, not only has loyalty understood as affirmative devotion to another person's well being lost significance, even loyalty understood as mere non-betrayal of another appears to be eroding in importance. What anthropologist Ernest Becker called a culture's "hero-system" has,<sup>15</sup> in modern America, regrettably come to celebrate the high-achieving, self-promoting individual who does not responsibly deploy his or her freedom and talents to care for the interests of others in the group (whether a family, club, team, church, school, or company). Consequently, the social norm of self-interest must be combated on many social fronts, not simply in the business corporation.<sup>16</sup>

Second, corporate leaders—directors and senior officers—must genuinely believe that they have responsibilities to corporate constituents *and* that

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<sup>14</sup> ALAN WOLFE, *MORAL FREEDOM* 48-49 (2001).

<sup>15</sup> See ERNEST BECKER, *THE DENIAL OF DEATH* 4-5 (1973).

<sup>16</sup> Recently, the Dean of the Yale School of Management, Jeffrey Garten, spoke ruefully of the link between behavior in business and social values:

I don't blame it all on the CEOs or Wall Street. It's the broader society that has brought on this focus on money-in-the-pocket-now and forget the long term. The nature of capitalism has been transformed and the whole society is now complicit.

Frankly, I'm not sure how you change that.

Steven Pearlstein, *Executive Privilege?*, WASH. POST, Mar. 24, 2002 at H5.

their legal duties do not preclude this impulse. Mitchell believes they do subscribe to this belief,<sup>17</sup> but that they abandon the impulse when they enter corporate boardrooms.<sup>18</sup> Legally, directors have discretion because the policy of the business judgment rule is to recognize the propriety of directors making substantive business decisions free of second-guessing by reviewing courts. Directors should see that this reflects a social policy of entrusting them to use their discretion to act responsibly, not narrowly or automatically. This means reflecting on what, based on prevailing social values as well as market realities, the responsible course of conduct might be. This requires moral deliberation, not simple adherence to the maxim of shareholder welfare.

Third, the constituency statutes enacted in the 1980s and 1990s reflect an underlying social belief, congruent with directors' own beliefs as noted above, that directors can and should factor into their decisions factors in addition to shareholder wealth. This should reinforce directors in believing that their impulse to act responsibly has social support.

Fourth, one wonders whether shareholders themselves really reject calls for more socially responsible conduct. Do we wrongly caricature them in portraying them as intolerant of socially/morally responsible conduct? Are they *so* intolerant that they would actually sue socially responsible directors for breach of fiduciary duty or support shareholders proposals against such conduct or launch/join proxy campaigns to oust such directors? Professor Dale Miller's findings—that people may subscribe to the norm of self-interest as *justification* and explanation for action that actually might be *motivated* to be socially responsible—may apply to investors as well.<sup>19</sup> Maybe they *speak* the language of self-interest while genuinely *accepting* at least some socially responsible conduct.

Fifth, how much will various markets (product, labor, capital) constrain socially responsible action? Does every new expenditure or decision not to cut costs for good reason raise costs/prices sufficiently that the company cannot effectively compete? Do we have compelling data on this question? The existence of market limits on price increases does not mean there is no freedom whatsoever in cost/pricing decisions. Moreover, consumers are rationally frugal and prudent, but perhaps they value other factors as well. Consumers too will have to decide whether they are truly willing to "pay" for corporate responsibility by frequenting companies that practice it, at a cost.

Sixth, moral discourse must be rejuvenated; especially the ready-made vocabulary in corporate law of "care" and "loyalty," two powerful, other-regarding norms/duties.<sup>20</sup> This requires a willingness to engage in moral dialogue and moral encounter. The reason directors enter the boardroom, and

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<sup>17</sup> MITCHELL, *supra* note 2, at 118.

<sup>18</sup> *Id.*, at 97-98.

<sup>19</sup> See Miller, *supra* note 7, at 1057.

<sup>20</sup> Mitchell is correct when he states that loyalty obligates directors "to act in the best interest of the corporation," but he is wrong when he goes on to observe that the "duty of loyalty, simply put, is a series of conflict of interest rules." MITCHELL, *supra* note 2, at 101. There is a more affirmative, demanding thrust to the duty of loyalty that corporate law professors as well as corporate lawyers and directors must recall. See Lyman Johnson, *After Enron:*

abandon their pre-existing moral vision,<sup>21</sup> is that no one in the room encounters or engages them morally! They too readily subscribe to the countervailing corporate norm of shareholder welfare which, once again by acquiescence, thereby gets *prescriptively* reinforced. This restarting of moral dialogue should take place in institutions throughout society, but within corporate law it requires at least three conversations. One hopes that the Enron debacle and Mitchell's timely book will prompt these much-needed conversations. The first conversation should take place among directors and senior officers about their duties/responsibilities to take care of their companies and to be loyal to them and those dependent on them. At every company, someone must make the first move, break the silence about the tension between the norm of shareholder welfare and a broader moral vision, and propose pragmatic ways to harmonize a range of legitimate interests.

The second conversation should take place between lawyers and directors, wherein lawyers speak openly about director duties/norms to take care of, and care for, and be truly loyal (as in devoted) to, the well being of the companies they oversee. These duties and norms should be stated robustly as affirmative responsibilities. The frail, non-moral business judgment rule rubric should not be used to shape conduct in the boardroom but should be reserved for its proper province—defense of business judgments in the courtroom.

The third conversation should be initiated by professors at professional schools. Teachers of lawyers-to-be (law professors) and teachers of directors-to-be (MBA professors) should likewise talk about the duties/norms of care and loyalty in more robust terms. Plenty of literary, philosophical, religious, and other non-legal source material exists to place these core values/responsibilities in a broader, more uplifting and inspiring framework.<sup>22</sup> Teachers in professional schools can do a great deal to shrink or expand the thinking of these future counselors and corporate decisionmakers. We, too, set a moral "tone" for future actors in the corporate milieu by what we emphasize and what we neglect.

Seventh, directors need to be honest and realistic about directorships. How many companies can a person truly direct in a way that responsible, caring, loyal stewardship demands? In answering this question, one can usefully ask to how many other persons can any of us caringly, loyally and responsibly relate. Directors may vary on this, but three seems to me to be the maximum number of directorships that should even be tried, if extreme conscientiousness is, as it ought to be, the proper standard.

Finally, all of these inquiries and these conversations—in corporate law and in society at large—are a dynamic process. Corporate governance is a decisionmaking arrangement wherein actors, acting to pursue multiple goals, must reconcile individual/group claims in complex organizations while being pulled by competing impulses. The rightful demands of self and other com-

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*Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. (forthcoming 2003) (manuscript at 7-8, on file with author).

<sup>21</sup> *Supra* note 18 and accompanying text.

<sup>22</sup> See Lyman Johnson, *The Social Responsibility of Corporate Law Professors*, 76 TUL. L. REV. 1483, 1489-90 (2002).

pete within social institutions as they do within the individual. Even healthy persons and organizations, though they may tend toward some balancing of interests, will not completely attain some steady-state, once and for all equilibrium. Rather, constant flux is more likely, as people act constantly to mediate, imperfectly, varying self-centered and selfless interests and tendencies. It is simply the case that *at this moment* in our culture we need a reviving of the other-regarding, caring impulse and some subduing of the egoistic, self-serving impulse. We need this both in our personal lives and in our institutional lives, of which the business corporation is just one instance.