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Lyman P.Q. Johnson
Washington and Lee University School of Law, johnsonlp@wlu.edu

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Is the Moral Dimension of Fiduciary Duty Law Relevant to Teaching and Law Practice?

The Social Responsibility of Corporate Law Professors

Lyman P.Q. Johnson*

Most treatments of corporate social responsibility focus on the responsibilities of corporate decision makers or their advisors. Professor Johnson argues that corporate law professors—the persons who educate the students who will become lawyers counseling corporate decision makers—also have a social responsibility. He believes that professors should find various ways to raise the subject of corporate social responsibility in the basic corporations course, and he advocates rejecting a classroom approach that addresses only shareholder-manager relations. After describing several possible ways to do this, Professor Johnson spotlights fiduciary law as a fruitful area to enrich student understandings of director duties in a way that encompasses socially shared norms of loyalty and care. With broader understandings of those key notions, lawyers may counsel corporate decision makers—and decision makers may act—in a way that results in more socially acceptable and responsible corporate conduct. In this way, corporate law professors can fulfill, not abdicate, their own responsibilities.

Everyone thinks of changing the world, but no one thinks of changing himself.

—Leo Tolstoy

As I think about law professors and corporate social responsibility, my thoughts turn to sports and to civil rights lawyers. I ask myself whether I want to study corporate social responsibility detachedly or whether I want to (and can) play a role in shaping corporate social responsibility. I will not undertake to do the latter unless there is some realistic likelihood of genuinely making a difference. After all, I might want to play baseball for the Yankees, but why bother thinking about it, except in a Walter Mitty-like way, because it will never happen. At the same time, that does not mean that I can only watch or study others; I can still play baseball in my backyard, golf, exercise regularly, and otherwise directly participate in sports on a more local scale. Can law professors likewise directly

* Robert O. Bentley Professor of Law, Washington and Lee University School of Law. Financial support was provided by the Frances Lewis Law Center, Washington and Lee University.
participate in the attainment of more socially responsible corporate conduct? What is our "arena" for involvement?

Civil rights lawyers in the 1950s and 1960s engaged in, and public interest lawyers still engage in, the struggle to advance civil rights and other causes thought to be in the general public interest. Sure, they studied the relevant legal issues and drew on the work of those who had studied the issues in even greater depth. But then they acted to effectuate change. They were "activists." Can corporate law professors who care about corporate social responsibility effectuate change? Can we, should we, be "activists?"

My answer is "yes." Law professors can shape corporate social responsibility and can do so without necessarily leaving law schools. In fact, we are fashioning corporate social responsibility already, by doing so little. How much corporate law scholarship in the last few years has addressed issues of corporate social responsibility? How much of that scholarship acknowledges, draws on, or engages the social responsibility scholarship originating in business schools or elsewhere? More importantly, how much classroom time do we law professors devote to engaging our students to reflect on issues of corporate social responsibility? If the answer to these questions is "not much," then we are influencing corporate responsibility in just that way. We are stating, in effect, either that things are as they ought to be, or, if they are not, that it is none of our business. Who, me?

I think it is the social responsibility of corporate law professors to challenge law students, in varied and sustained ways, to reflect on basic issues of corporate social responsibility. As future lawyers counseling corporate decision makers, they will draw from us a good measure of what they believe to be the proper role, professional responsibility, and ambit of concern of corporate lawyers. I think, therefore, in a post-Enron world we cannot escape being more "activist." Not, I hasten to add, for the purpose of advocating particular views on corporate responsibility in the hopes that students

1. See generally Robert B. Thompson, The Basic Business Associations Course: An Empirical Study of Methods and Content, 48 J. LEGAL EDUC. 438 (1998) (discussing the basic law school business associations course). Professor Thompson's article gathers useful information on topics commonly taught in the basic course, but does not indicate what content is covered. Id. at 439-40. It appears that the topic of corporate social responsibility is not commonly covered, but perhaps it is treated as an aspect of other topics. See id. Treatment of corporate "stakeholders" may be an example. Id. at 445; see, e.g., Hillary A. Sale, Of Corporate Suffrage, Social Responsibility, and Layered Law: Teaching Basic Business Law Through Federal Securities Law, 34 GA. L. REV. 809, 820-21 (2000) (discussing the use of federal proxy rules as a topical vehicle for classroom discussion of social responsibilities).
will go on as lawyers to implement our views. Here the civil rights lawyer parallel breaks down. They were activists *advocating* particular views. I suggest that law professors be activists in *raising* various views of corporations and their role in society in a more systematic way.

Within the corporate law academy, proponents of the contractarian theory of corporate relationships have declared victory through Professor Stephen Bainbridge:

Over the last few decades, law and economics scholars have mounted a largely successful hostile takeover of the corporate legal academy.

... The law and economics movement remains the most successful example of intellectual arbitrage in the history of corporate jurisprudence.

... Most law and economics scholars embrace a model of business organizations known as the "nexus-of-contracts theory of the firm."\(^2\)

In a subsequent letter Professor Bainbridge adds a new, stronger claim and one pertinent to this Essay: "[L]aw and economics is also *taking over the law schools*. My sense is that it is getting very hard to get a job as a corporate law teacher without having a law and economics background. At least this seems to be true among the ‘top’ schools."\(^3\) Although Bainbridge explicitly addresses only the growing prevalence of "law and econ" professors, the phrase "taking over the law schools" suggests a *curricular* predominance as well.\(^4\)

Once a corporation is theoretically conceived of as a nexus of contracts, corporate governance goes on to concern itself with one central relationship in particular, the shareholder-manager strand. The subject of corporate governance being so defined and, I guess, the law school course of corporate law being correspondingly organized, with casebooks and the customary selection of topics reflecting this, the topic of corporate social responsibility, if addressed at all, lacks a

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2. Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 857-59 (1997) (book review). The current period in corporate law theory may be an example of what Grant Gilmore calls a classical period when law is (or seeks to be) "neat, tidy and logical." GRANT GILMORE, THE DEATH OF CONTRACT 102 (1974). This is in contrast to those romantic periods, which is the classical alternate, when detailed rules are disfavored. *See id.*


4. *See id.*
theoretical niche. Consequently, it appears as sort of an “add on” component that is not easily integrated into the basic course as a whole. This also may be why mainstream corporate law scholars have been relatively silent about recent corporate scandals, as outrage pours in from many quarters.

One wonders whether even that determined group of scholars who persistently object to the bargain model of corporate relationships in our scholarship has succumbed to that very model in how we teach our corporate law courses. I believe that we who profess concern about corporate social responsibility should ask whether we practice what we preach in the classroom. I also think that the arena where corporate law teachers can play the greatest role in spotlighting and enhancing corporate social responsibility is, quite simply, the devotion of greater classroom attention to the subject. In the years ahead, I think the untapped potential of the basic corporations course to serve as a vehicle for exploring social responsibility will attract the sort of attention that will make for exciting pedagogy. In this Essay, I briefly say why I think corporate law teachers should tend to this and how, in my own limited, halting way, I am starting to rethink what I do in the classroom.

No one, before or after September 11th, or the collapse of Enron and WorldCom, could seriously dispute that the activities of corporations are central to our society’s well being. Teachers must ask themselves, and find creative ways to probe with their students, the question of whether the bonds between and among corporate participants, and those whose lives are significantly molded by corporate activity, are fully captured in the “nexus-of-contracts” (or bargain) model of corporate relationships. Corporate law scholarship

5. Professor Kent Greenfield has pointed out how little material on social responsibility there is in the most popular corporate casebooks. Kent Greenfield, There’s a Forest in Those Trees: Teaching About the Role of Corporations in Society, 34 GA. L. REV. 1011, 1011 n.1 (2000). This neglect might flow naturally from the “nexus-of-contracts” conception of corporateness because, as a marketplace rather than a moral/legal actor, the corporation is thought to have no social responsibility. See Lynne L. Dallas, Two Models of Corporate Governance: Beyond Berle and Means, 22 U. MICH. J.L. REFORM. 19, 30 (1988) (noting authority).

6. Notable examples of professors who have written about how they teach corporate social responsibility are Professors Kent Greenfield, supra note 5, and Kellye Y. Testy, Adding Value(s) to Corporate Law: An Agenda for Reform, 34 GA. L. REV. 1025, 1031-44 (2000). Professor Lynne Dallas’s forthcoming book on teaching socio-economics, which includes a chapter on corporate social responsibility, will give teaching in this area a huge boost. LYNN DALLAS, LAW & SOCIO-ECONOMICS (forthcoming 2002).
may be one of the few places in America where that model is thought to be both accurate and morally unobjectionable.

Sociologist Alan Wolfe, in recently asking whether we now live in a "postloyalty world" wherein we suffer a chronic "loyalty deficit," neatly captured the contrast between the views of ordinary citizens and a purely economic model of business.7 Wolfe stated:

This emphasis that so many Americans place on the personal side of business practice runs up against the way most economists and defenders of business treat the issue of corporate loyalty. Institutions are not, in the view of the latter, like people, subject to emotions, possessing a potential for empathy, and capable of dialogue. Rather, corporations, to be efficient, must act rationally, dedicated to doing whatever is best for stockholders, irrespective of the impact of those decisions on those, like employees, who have a personal stake in the company's future. ... As free market economists see the world, a company forced to let employees go, no matter how loyal those employees may have been in the past, is just responding to the impersonal logic of the market. Market discipline leaves companies no choice but to act efficiently, whatever the spill-over effects may be with respect to loyalty.

This way of thinking rubs many Americans the wrong way.8

A theoretical perspective on corporate relationships that advocates a focus on short-term shareholder welfare is, according to sociologist Richard Sennett, "a principle which corrodes trust, loyalty, and mutual commitment."9 Just such a prescriptive focus, however, is often assumed to be proper in the orthodoxy of corporate governance. Thus, theoretical conceptions of corporate relations are not purely descriptive; they can also alter, in normatively controversial ways, the very social landscape they purport to observe.

Possibly, however, it is not just contractarian scholars but also corporate decision makers themselves who think they are not supposed to, or cannot, overtly act in socially responsible ways. Perhaps this is because the bargain model of corporate relations accurately captures a segment of a more general bargain model of social relations and, consequently, contractarian scholars simply have located the corporate institution in an even larger theoretical understanding of social bonds. In other words, perhaps familial, educational, athletic, and a host of

8. Id. at 30-31.
other social interactions, along with business relations, are increasingly being conceptualized as “bargained for” in nature. Alternatively, the causal direction runs the other way. Possibly the very breakdown of loyalty in the business sphere and the accompanying rise of the bargain model in framing business relations may mean the “emphasis on putting one’s own interest first ... in the economy” carries over from the business arena into the realm of family and other social relations. The altered social-moral environment may, in turn, reinforce corporate decision makers’ belief that they act consistently with larger social norms by conceiving corporate conduct as purely contractual and self-interested in nature; in fact, their conduct may corrode those norms.

Only recently as a professor have I begun to wonder whether I sufficiently explore in classroom sessions, and in more informal out-of-class discussions, what students really think about this conception of business and social interaction. If life is a series of bargains, perhaps I should ask students, then aren’t we humans always (rightly) seeking to advance our own individual interests? And our personal well-being depends on our success at bargaining, does it not? And that, in turn, depends on the endowments with which we have to bargain and on our capacity to identify and satisfy needs and desires of those from whom we, in turn, seek things, does it not? And so on. The upshot of this outlook, in short, is that reciprocity and cooperation in fully-bargained-for social relations will endure only so long as each actor believes that what is received equals or exceeds what is given in “exchange.” Given short shrift in this account, however, are the series of “involuntary” relationships in which we all stand. We do not select our family of origin, the particulars of our children (as of 2002), those persons at work who are hired after us, the neighbors who move in later, etc. Nor do we terminate all relationships where we believe we “give” more than we “get.” In some interactions—think here of a rescue worker in New York or Washington, D.C. on September 11th—there may be little expectation of “getting” anything. Not all relationships, in other words, business or otherwise, are wholly self-created or voluntary or fragile, except in the very limited sense that the “exit” option may not always be exercised.

I think many law students, like many people in society at large, believe human actors are both more complex and more irrational than the contractarian metaphor allows. Insights from psychology and sociology support this view. Recent work in behavioral law and

10. WOLFE, supra note 7, at 48.
economics also validates this impression.\textsuperscript{11} Certainly, instances of disinterested generosity and outright self-sacrifice have occurred with sufficient frequency, before and after September 11th, to challenge the simple bargain metaphor. Moreover, possibly many law students (perhaps even those who believe the bargain model is descriptively accurate) are, consistent with Alan Wolfe's observations about the citizenry at large, nonetheless disenchanted with such a view and may even yearn for a model of social bonds that transcends the calculated pursuit of self-interest.\textsuperscript{12} But how will we know, and how will they know, if we professors do not challenge them to grapple with this issue? How can we expect them to have, or reflect on whether they might desire, an alternative conception of corporate relations if we do not provide any?

In short, corporate relations are socio-economic relations, and our conceptions of human interaction in the one sphere will both shape and be shaped by our notions of interaction in the other. Thinking about social relations as a nexus of contracts is relatively new, at least on such a widespread basis. Contractarians in corporate law may be claiming victory in the law journals.\textsuperscript{13} Unless the bargain conception of business relationships is simply different than the nature of all other social relations, however, one tack for corporate law teachers and students seeking to raise questions about the descriptive accuracy and prescriptive appeal of that model of corporate relations is to be creative in identifying other models of human association, including instances of reluctance to embrace the bargain model, both in law and in other social endeavors.

Activating classroom consideration of corporate social responsibility may and should, of course, proceed on a number of fronts, including a fresh reexamination of the very scope, methodology, and appropriate topics for inclusion in what customarily has been called corporate social responsibility. My point is that to overcome its perennial status on the periphery of the corporate law course, its treatment, initially at least, may best be linked to an embracing or rejecting of a larger theoretical model of corporate relations, or at least otherwise fitted into the existing edifice of

\begin{footnotes}
\item[12] See Wolfe, supra note 7, at 54.
\item[13] See Bainbridge, supra note 2.
\end{footnotes}
corporate governance concepts. One such concept is that of fiduciary duty.

The relatively new theoretical "bargain" paradigm coexists, uneasily, with the continuing legacy in corporate law of a moral-sounding vocabulary in doctrinal fiduciary discourse; a vocabulary formed in an era when corporate relations were not coined in contract terms. The central notions of "care," "loyalty," and "good faith" carry significant social, literary, and moral meaning outside corporate law discourse. Corporate law contractarians earnestly deny the moral footing of this received professional discourse, seeking either to render it innocuous or to recast it into the discourse of finance and economics, with talk of "bargain" and "agency costs," etc. To be sure, the economic perspective on "corporateness" is important and necessary; the issue is whether in teaching corporate law one or another mode of discourse will supplant all others, including those more hospitable to the idea of corporate social responsibility.

The historic deployment within corporate law doctrine of a moral-sounding vocabulary suggests a widespread belief, at least at one time, that a moral subject matter was involved. One can hardly imagine richer, more evocative, social-moral notions than "care," "loyalty," and "good faith." In spite of recent contractarian efforts to "translate" these deep-rooted terms into a finance/economic dialect, the project must acknowledge a fundamental tension: unlike the theoretical underpinnings of the contractarian model, these core doctrinal notions are inescapably "other regarding," not self-interested, in orientation. As a matter of cultural-linguistic practice, these terms were not designed to describe the conduct of persons, including corporate decision makers, instrumentally conceived of as calculating, economic functionaries rationally advancing self-interest, either in freely contracting over the very rules of corporate governance or in acting within the governance regime supposedly "bargained" for. They aim, rather, to prescribe unselfish behavior. Moreover, in spite of current scholarly efforts in this direction, these notions should not be blithely dismissed as simply masking, in high-sounding altruistic rhetoric, behavior that in fact is forward-looking and instrumentally calculated to "signal" trustworthiness for the self-interested (and self-deceiving) purpose of inducing others to transact future business with

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The tenacious normative commitment to an exclusively self-serving account of human behavior dismisses the morally and socially responsible dimension of economic activity (and the tenor of fiduciary discourse) by insisting that action supposedly taken out of a normative commitment to others' welfare inevitably is rooted in self-interest. We simply as yet, we are told, have "no psychological account" to explain how or why such self-serving conduct gets translated into moral-sounding rhetoric about "responsible" conduct. In short, according to this account, our other-regarding terms of discourse hinder understanding of social interaction more than they help.

Criticism about the moral flavor of fiduciary discourse can also come from an altogether different quarter. Here the claim is not that, historically or linguistically speaking, the discourse does not have a prescriptive social-moral aspect. Nor is the claim that such discourse should not have a social-moral bent. Rather, the concern is whether today, with a weakened belief in traditional sources of moral authority, cultural norms are sufficiently widely and strongly shared that it is even possible to attain consensus on whether and how corporate decision makers should responsibly consider the legitimate interests of others. In short, can concepts originating in a time when biblical, literary, and philosophical virtues were more widely shared remain important without continuing broad assent to those same foundations?

Alan Wolfe's interviews with numerous Americans reveal that indeed many citizens have lost touch with the traditional religious language of morality. People now look to many sources for guidance, including religion, but also to other serious books and artistic works. Wolfe found that many people feel let down by those very institutions, such as churches, businesses, and schools, supposedly established on traditional moral virtues. The result in contemporary society is a sense of disappointment and disenchantment, on the one hand, and a newfound sense of "moral freedom," on the other. The new emphasis

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16. See id.
17. See id. at 1832.
19. See id. In the aftermath of September 11th, there is strong evidence that people are (re)turning to religion for comfort and to help them make sense of that tragedy. Sales of Bibles and attendance at church services have risen sharply.
20. Id.
21. Id.
on "moral freedom," in which people determine for themselves what it means to lead a good and virtuous life, is to be distinguished, notes Wolfe, from "moral anarchy," in which people do whatever they want.22

This sociological assessment of the state of moral authority in contemporary society has relevance for corporate social responsibility, as viewed through the lens of fiduciary discourse.23 In a modern culture of "moral freedom," such freedom will find expression in the business sphere, both in the larger social arena of corporate global influence and in the corporation's own internal, moral climate. Although many individuals will exercise that moral freedom in an array of corporate activities, none will do so with more power or with greater influence on the ethical tone of the business than directors and senior officers. What terms do they use as they think and talk about how they make decisions?

These key corporate actors live in the same culture, grappling with the vertigo of moral freedom as we all do. They too find moral guidance in religion, philosophy, literature, lore, and general cultural understandings. Today, as a hundred years ago, they still read, hear about, see, and otherwise directly experience instances of loyalty, care, and good faith, and their opposites. They carry with them, in differing ways to be sure, some experience and understanding of what those social norms (virtues) mean. Thirty years from now, directors and senior officers likewise will have an understanding of these social-moral norms, unless, as is unlikely, they vanish altogether from our social-moral landscape. Both today and, one hopes, in thirty years, corporate directors also will read about and hear from their corporate legal counsel that they have a legal duty to act with good faith, loyalty, and care. One would think a director's understanding of those notions as social norms would influence how he or she understands them as legal duties. That is, directors, upon hearing counsel's advice to be

22. Id.
23. By "corporate social responsibility," I mean both the corporation's influence on "externals," such as the environment, the impact of its products and services on consumers and others, and its large-scale shaping of other "social" and cultural interests, as well as a corporation's own "internal" ethical culture. In nonlegal settings, apparently only the former is considered "corporate social responsibility," while the latter falls under the rubric of "business ethics." W. Michael Hoffman, Remarks to the Canadian Business Ethics Summit in Toronto, Canada, on Sept. 15, 1999, available at http://ecampus.bentley.edu/dept/cbe/20year/cbe20toc.htm (last visited June 27, 2002). Recently it was observed that "these approaches have not yet found appropriate ways to interrelate, or even to interact, with each other." Id. This mirrors a dichotomy similar to that noted earlier about how corporate social responsibility, if addressed at all, is treated separately from corporate governance in the basic law school corporations course.
loyal and to fulfill their duty of good faith and care, undoubtedly bring to these words their own individual and diverse recollection of teaching, stories, drama, poetry, preaching, personal experience, and other sources wherein the larger, exemplary norms of care, loyalty, and good faith were modeled and transmitted. Such "legal" advice, being couched in terms that, by the psychological process of association, serve to remind the hearer of a richer, moral-social meaning, can result in director action going beyond the legal minimum toward behavior genuinely seeking to care for and be loyal to the corporate enterprise.

This may be a reason to preserve the moral flavor of corporate law discourse; by infusing the concepts of care and loyalty with social-moral-experiential meaning, lay people may endow those concepts with more significance than the legal minimum (i.e., duty) transmitted by lawyers. The result might be an upgrading of conduct beyond the minimum needed to avoid legal sanction, possibly approaching a standard closer to prevailing social expectations of responsible conduct. Alternatively, if the legal duties of loyalty, care, and good faith are conveyed by lawyers as being "smaller" than those norms prevailing generally in the social milieu, then a downgrading of conduct may result. In other words, how an individual director and the board of directors (as a body) understand good faith, care, and loyalty as legal duties (i.e., as robust or shrunken) will presumably shape action that, through the corporate institution, over time will lead to more or less socially responsible conduct. That conduct, in turn, will help influence the public's perception of the state of overall institutional morality. Indeed, Alan Wolfe found just such a connection between corporate conduct and public disillusionment when he observed that "[n]o other institution in American life provokes such bittersweet reflections of loyalty lost as the business corporation."

Both now and in the future, consequently, those who counsel directors can be seen to play a key social role in mediating the realms of legal duty and social norms through their explanation of notions like care, loyalty, and good faith that form part of the basic vocabulary of both realms. These people are corporate lawyers. The people who introduce them to the language of corporate law are law professors.

There are many ways for corporate law professors to promote broader-ranging, in-class exploration of corporate social responsibility. Lynne Dallas's recent pedagogical work in socio-economics, presented at the 2002 annual American Association of Law Schools (AALS)

conference, is one excellent example.\textsuperscript{25} Kent Greenfield has suggested another good approach—teach the case of \textit{Local 1330 v. United States Steel Corp.}\textsuperscript{26} For many years, on the second day of class, I have expressly raised four questions that I ask students to ponder throughout the semester, questions to which on several later occasions I explicitly link class material. They are:

\begin{enumerate}
    \item What is the proper purpose(s) of corporate endeavor?
    \item Why do you answer the above question as you do?
    \item How can that purpose better be attained?
    \item Who should participate in deciding the answers to the above questions?
\end{enumerate}

I still regularly pose, discuss, and refer back to these questions. More recently, however, I also have chosen fiduciary duty discourse as an avenue to ask students about the responsibilities of corporate decision makers who, as students learn in corporate law, have legal duties of care, loyalty, and good faith.

I believe, as stated earlier, that the core fiduciary notions of care, loyalty, and good faith have a richness as social-moral norms that is not captured in the expression of those notions as legal duties. Unless the richer meaning somehow conflicts with or impedes discharge of a legal duty, a decision maker fulfilling her legal duty is free to do so in a way that also advances shared social norms. If so, then law professors, who introduce future lawyers to the professional lexicon, should be careful not to truncate the vocabulary, thereby leading future lawyers to internalize and transmit a professional norm "smaller" than the norm prevailing outside legal discourse.\textsuperscript{27}

Communicating to law students a shrunken interpretation of core notions inevitably will influence how, as lawyers, those students go on to convey those same notions to corporate decision makers. The result will be that decision makers may feel inhibited in bringing their broader cultural understandings of these concepts to the performance of their responsibilities. Instead, they will, through the way legal counsel expresses legal duties, struggle to "translate" their broader understandings into law talk. The opportunity, or "moral freedom," not only to comply with legal duties, but also to promote social-moral

\textsuperscript{25} See \textit{Dallas}, supra note 6.
\textsuperscript{26} See Greenfield, supra note 5, at 1020-24.
\textsuperscript{27} In a wholly different context discussing tenure, Professor Robert Ashford has suggested that law teachers themselves might be "fiduciaries." Robert Ashford, \textit{Law Teachers as Fiduciaries: A Socio-Economic Take on Tenure}, Remarks at Symposium on the Socio-Economics of Professional Responsibility, 10th International Conference on Socio-Economics, Vienna, Austria (July 16, 1998).
norms responsibly may be lost. This opportunity will be missed because something was lost in the “translation,” both the translation in the boardroom and the earlier one in the classroom, where professors launch into legal discourse about care, loyalty, and good faith without linking corporate law’s rendering of those concepts to richer understandings brought into the classroom from other sources.

I will not repeat an argument I have made elsewhere as to precisely how “care” and “loyalty” are fuller-bodied than we in corporate law often remember.\(^2\) Briefly, however, with respect to care, philosopher Martin Heidigger described care as so primordial that “[b]eing must be defined as care.”\(^2^9\) And, as seen in the well-known story of the Good Samaritan, we are told that the Samaritan changed his travel plans and “took care of” a wounded stranger. Indeed, the World Book Dictionary lists nine different meanings of the word “care.”\(^3^0\) It is, in short, a concept that pervades our everyday social discourse and one that is thought to be unqualifiably good.

With respect to loyalty, one key inquiry, both within corporate law discourse and in other realms, is to ask whether that notion means only nonbetrayal or whether it includes, and indeed demands, affirmative devotion to the well-being of another. By way of example, when we say of a man that he is a “loyal husband” do we mean only that he does not betray his wife in that he does not commit adultery, or do we mean, in addition, that he is affirmatively devoted to advancing the well-being of his wife?

Drawing on understandings of care and loyalty as derived from other discourses and from our own everyday cultural understandings can usefully enrich a student’s understanding of corporate law’s effort to construe and use those terms. Doing so may lead to the following points. First, loyalty, both as a social norm outside of corporate law and as a mandatory corporate law duty, includes the minimum condition of nonbetrayal and some context-sensitive degree of affirmative devotion. Second, although care has several meanings as a social norm outside of corporate law, within corporate law the duty of care has come to mean only that a director must act in a certain procedurally “careful” manner. This did not need to happen—there

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are two other dimensions of care that are relevant to corporate law. For example, title 8, section 141(a) of the Delaware Code places the business and affairs of a corporation under the “direction” of a board of directors.31 "Direction" means “the guidance or supervision of action [or] conduct,” which is also one meaning of “care,” as in the phrase “under a doctor’s care.”32 In corporate law then, by statute, the business and affairs of a corporation are “under the board of directors’ care.”33 Director neglect of corporate affairs, or a director’s abdication of his or her duties, is a violation of care in this most fundamental, statutory sense. It is a failure to direct, or “take care of,” the corporation.

In addition to taking “care of” a corporation’s business and affairs, a board is expected to “care for” the interests of the corporate enterprise and its shareholders. That is, the affirmative object of director attention and energy must be the enterprise and its shareholders, not the directors’ interests or those of any disinterested third party. Unconsidered director neglect violates this obligation of care because it is a failure to “care for” the enterprise and its shareholders. Equally important, a director acting out of self-interest (disloyalty) or out of a motive other than the interest of the corporate enterprise and shareholders (bad faith), also is failing to “care for” the proper interests.

Third, it can be seen from this that care and loyalty are not, in fact, wholly distinct concepts but are instead interrelated, both as social norms and legal duties. This means there is only a fuzzy dividing line between them, primarily because the devotion dimension of loyalty encompasses that critical aspect of care seen, for example, in the Good Samaritan (director) “taking care of” and “caring for” the appropriate object of his concern. Therefore, the legal duty of loyalty potentially includes dimensions of the robust social norm of care not encompassed in the more anemic legal duty of care (i.e., to act procedurally “with care”).

A starting point for probing the meanings of care and loyalty can be simply to ask students what they think those ideas mean.34 The last couple of years I did this in class before we read anything in the

33. See DEL. CODE ANN. tit. 8, § 141(a).
34. As Kellye Testy put it: “[W]hat do ‘care’ and ‘loyalty’ really mean?” Testy, supra note 6, at 1039.
casebook about the "duties" of care and loyalty. In this way, students are not yet thinking like lawyers (fortunately!) and, so, are free to range a bit in their thinking. A few questions can draw them out. For example, on loyalty: "What are the qualities of a loyal spouse or friend?" "Does loyalty mean only nonbetrayal, or does it include devotion of some sort—always, sometimes, when?" "Can you provide an example to help us see your thinking?" "Can devotion to one person conflict with devotion to another?" "Then what?"

A few questions on care might, for example, be the following:

"What does the notion of 'care' mean to you?" "Does that notion have different meanings?" "When we say, for example, that someone is under a doctor's care, does that mean the same thing as when we say a boss takes good care of his workers?"

"And, when we say that a woman deeply cares for her son, do we mean the same thing as when we say a manager handled a particular matter with care, or the same thing as when we say a boss takes good care of his workers?"

Another approach for exploring the concepts of care and loyalty is to expose students to nonlegal treatments of them. Obvious sources are literature and dramatic works. William J. Bennett's work, The Book of Virtues, collects numerous short, classic works on loyalty.36 Recently, French philosopher André Comte-Sponville's book, A Small Treatise on the Great Virtues, was translated into English.37 This book is his effort to show that, although traditional foundations of morality have weakened, people still think in moral categories. The thirteen-page essay on "Fidelity" (loyalty), for example, is a bit philosophical but gives good return for the effort.38 In one passage he elaborates on how

35. A recent instance where "care" was used in two related but distinctive ways is the description by Ms. China Gorman, Chief Operating Officer of Lee Hecht Harrison, a global outplacement firm, of how employees of a Fortune 500 company responded to large layoffs sensitively handled by transition coaches hired for all division presidents:

The general feeling among the people being laid off was that they were being well cared for... The care that the company took in planning and communicating the downsizing seemed to communicate to the folks leaving that the company wanted to do this very difficult thing in the very best way they could.


38. See id. at 16-29.
fidelity allows us to adhere... to the historicity of a value, to an always particular presence within us of the past, whether it be the collective past of humanity (culture and civilization, the things that separate us from barbarism) or a more individual past.... The point is not to betray what humanity has made of itself and, in the process, of us. 39

That puts a broader, less bargain-hungry slant on loyalty!

Comte-Sponville also includes essays on “Compassion” and “Mercy” that can broaden a student’s understanding of “care.” 40 Personally, however, I think it is hard to beat the short biblical story of the Good Samaritan to convey a richer perspective on what it means for someone to inconvenience himself and “take care of” another person when those who should have done so did not. Finally, I think Comte-Sponville’s short essay on “Good Faith” is the only treatment of that central legal concept to meaningfully inform me as to what, substantively, it actually means:

[S]omeone of good faith says what he believes, though he may be wrong, and believes what he says. That is why good faith is a faith, in both senses of the term-belief and fidelity.... [S]incerity means not lying to others; good faith means lying neither to others nor to oneself....

... Good faith means loving truth more than oneself....

... [At the same time], flinging the truth at someone who never asked to hear it, who cannot bear to live with it, who is pained and crushed by it is not an act of good faith but an act of brutality, of insensitivity, of violence.

This is rich, thought-provoking material for persons who countless times in their professional lives will be called on to counsel someone that he or she must act in “good faith.”

Even if we do not ask students to read or observe treatments of care, loyalty, and good faith outside the law, our handling of these subjects with our students will be enriched if we draw ideas from nontraditional (for law school) sources. Recounting our own experiences of care and loyalty, or a lack thereof, may place those ideas in a broader light. Another method is to draw from the artistic or literary realms to broaden our own thinking. One brief example: as a relatively new opera fan, I recently saw in Verdi’s II Trovatore an

39. Id. at 25-26.
40. See id. at 103-31.
41. Id. at 195-97, 206-07.
example of loyalty as affirmative devotion. Leonora offers herself to Count di Luna in exchange for the Count sparing the life of his rival, her beloved Manrico. Manrico initially curses Leonora for “selling” her love, but when the poison she secretly swallowed takes hold and Manrico sees the distress caused by his response to Leonora’s sacrificial act, he understands the extent of her deep devotion to him. Moral language suits Leonora’s actions—we can rightly speak of her loyalty. She is loyal in more than the nonbetrayal sense—she is fully loyal in her commitment to Manrico’s well-being.

My point is simple. Corporate law casebooks rather abruptly introduce and portray care, loyalty, and good faith in a highly specialized way. These are, however, not simply legal qualities; they are moral qualities, and resilient ones at that. Students are never really asked to contrast corporate law’s use of these notions with their own pre-law understandings or with existent cultural depictions of these notions. Will a more multidisciplinary approach to fiduciary discourse in the law school classroom necessarily make lawyers better at counseling directors in a way that will lead directors to make more socially responsible decisions? Of course, there is no guarantee. Nor will it automatically settle tough issues in corporate law, such as who are the proper recipients of director care and loyalty, broadly understood. But how we phrase and frame subjects in language matters immensely. As James Hunter puts it: “Language itself provides horizons for our moral imaginations.”

Some of the social responsibility issues that plague us as teacher/scholars may have new light shed on them if we invite the next generation, our students, to think broadly and novelly about topics that are, in some ways, quite conventional.

In corporate law teaching, in short, we can introduce students to corporate law discourse through words that are technical, professional, and lacking any connection to the larger social milieu; in other words, we can have a small horizon. Similarly, we can convert the customary doctrinal terms into the vocabulary of the new bargain model of social

43. Business schools also must address how they frame these issues for their students—future influential corporate decision makers. Recently, The Wall Street Journal reported the views of certain business leaders and public interest groups that graduate business schools must emphasize corporate responsibility and stewardship as well as profits. See Ronald Alsop, CORPORATIONS STILL PUT PROFITS FIRST, BUT SOCIAL CONCERNS GAIN GROUND, WALL ST. J., Oct. 30, 2001, at B12. The Aspen Institute, for example, advocates integrating corporate responsibility into the core curriculum, not just electives, to reach all students. See id. Without such efforts in business schools, “enlightened” legal advice will fall on deaf ears.
relations. Alternatively, we can appreciate, as Alan Wolfe did, that loyalty (and care and good faith) have “not disappeared in America. Instead, Americans are called upon to determine for themselves what loyalty means—and to do so precisely at the time when some of their major institutions act as if loyalty means nothing much at all.” We in teaching are also free to decide what corporate law’s core terms mean. Indeed, corporate law doctrine provides a ready-made, substantive entry point for infusing enriched, culturally renegotiated, social understandings of care, loyalty, and good faith into corporate decisions. This largely remains the work of directors and their lawyers, but horizons can be extended or diminished in the classroom. Moreover, courts, notably the courts of Delaware, still use and place enormous significance on these words in resolving corporate clashes. They remain central to the grammar of corporate law. I think student command of that language can only be improved by helping them see what the core terms do and do not mean, what they could and could not mean, and maybe even what they should and should not mean. I think it is our social responsibility as teachers to find new ways to hold open our students’ field of vision on corporate responsibility.

44. Wolfe, supra note 7, at 61.