

# CORPORATE LAW AS AN EXISTENTIAL PROJECT

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[P]roblems of welfare economics must ultimately dissolve into a study of aesthetics and morals.

—Ronald Coase, “The Problem of Social Cost”<sup>1</sup>

True enough, thought I . . . old black-letter, thou reasonest well.

—Herman Melville, *Moby-Dick*<sup>2</sup>

## INTRODUCTION

We yearn for meaning but its material is hard to source. Once trusted suppliers are now examples of suspect ones. Religion is not believable. Art is sublime but not operational. Politics is patronizing. The culture is a mess. Baseball is gone to analytics. Material progress advances, formal ethical analysis advances, but the human spirit lags behind. This is a problem of the greatest importance. To concern ourselves with meaning is no luxury endeavor. It is a core need. Without it, human beings suffer terribly and die miserably.<sup>3</sup>

Law is no panacea, but it is undervalued as a source of value. This Essay proposes that corporate law in particular can be a potent resource for the formation of meaning in our minds and in our lives. Here, I am not after *the* meaning of life, in the sense of coming to a certain substantive conclusion; e.g., “the meaning of life is 42.”<sup>4</sup> Our modern conception is that the meaning

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1. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 43 (1960).
2. HERMAN MELVILLE, *MOBY-DICK; OR THE WHALE* 22 (Hershel Parker ed., W. W. Norton & Co. 2018) (1851) (footnote omitted).
3. See VIKTOR E. FRANKL, *MAN’S SEARCH FOR MEANING: AN INTRODUCTION TO LOGOTHERAPY* (Ilse Lasch trans., 4th ed. 1992); see also BREE BUCHANAN & JAMES C. COYLE, *THE PATH TO LAWYER WELL-BEING: PRACTICE RECOMMENDATIONS FOR POSITIVE CHANGE* 9–10 (2017), <https://lawyerwellbeing.net/wp-content/uploads/2017/11/Lawyer-Wellbeing-Report.pdf> [<https://perma.cc/SEN8-V8UP>] (drawing on social psychology to emphasize meaning and purpose as core components of human well-being).
4. See DOUGLAS ADAMS, *LIFE, THE UNIVERSE, AND EVERYTHING* (1982) (concluding that the meaning of life is 42 in an absurdist novel).

of life is not to be found in the form of a singular answer. Our search for significance is not the pursuit of a destination but is instead a journey, a process, that continually makes meaning as we undertake it. Here, I pursue a practical search for “meaning” as a sense of life that gives us a working favor over nihilism and despair, boredom and nothingness. I am concerned with trying-out an approach to thinking about and feeling life which can generate engagement, interest, energy, enthusiasm, and happiness: in a word, meaning.<sup>5</sup>

### I. WHY CORPORATE LAW?

Our institutions constrain us. That is one of the primary functions, for example, of law as social contract. But our institutions also enable us to transcend personal limitations that we could not get past on our own. Law, for example again, can enliven people in noncoercive, personally liberating ways. In the jargon of contemporary legal theory, law can be morally “enabling” by providing a “menu” of ethical possibilities which become salient and encouraging through the majesty of law’s presence and credibility.<sup>6</sup> An older vocabulary would say that the law is enmeshed with *paideic* qualities.<sup>7</sup> Aristotle said that tragedy shows humanity as better than it is, and comedy as worse.<sup>8</sup> When we see ourselves in the latter and shudder, the former gives us a path to turn to after the laughter gives out. This I think is true of the fiduciary law I explore here. Its dictates describe a way of life that is more impressive than the lives lived by those who come to it, but, having come to it, we may get better than we were.

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5. My description of this as an “existential project” follows Roberto Unger’s usage: “[b]y an existential project I mean an individual’s view of how he can live in a way that gives a measure of sense, unity, and value to the course of his life.” ROBERTO MANGABEIRA UNGER, *PASSION: AN ESSAY ON PERSONALITY* 47 (1984). This Essay is the first piece of a larger project exploring the existential significance of corporate law. Here, I will introduce the nature of the project and set out some of its foundational themes. Complexities, contradictions, retreats, and further advances will be rendered in subsequent installments, presently in progress.

6. See generally Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3 (2006) (analyzing the use of menus in legal regimes); Yair Listokin, *What Do Corporate Default Rules and Menus Do?: An Empirical Analysis*, 6 J. EMPIRICAL LEGAL STUD. 279 (2009) (showing that explicitly offering takeover defenses as menu options in corporate law statutes causes more firms to adopt them, even though such defenses are also lawful when not specified as options in the statutes).

7. See Faith Stevelman Kahn, *Transparency and Accountability: Rethinking Corporate Fiduciary Law’s Relevance to Disclosure*, 34 GA. L. REV. 505, 513–14 (2000) (“[I]n applying corporate fiduciary law to individual cases, courts have not shied away from constructing such standards in terms of expressly personal and moral commitments on the directors’ parts. In undertaking this work of *paideia*, corporate fiduciary law (and fiduciary law generally) has assumed some of the ‘valence’ of the criminal law. . . . [I]t has been the special role, the unique nature and function of corporate fiduciary law to speak expressly to the importance of supporting norms of managerial trustworthiness.”). See generally LYNN A. STOUT, *CULTIVATING CONSCIENCE: HOW GOOD LAW MAKES GOOD PEOPLE* (2011) (using behavioral research to propose ways that the law can help cultivate ethical decision-making in various contexts).

8. See ARISTOTLE, *Poetics*, in *A NEW ARISTOTLE READER* 540, 541 (J. L. Ackrill ed., 1987).

Much of what I have to say here relates to the agency law dimensions of corporate law. A comprehensive exploration of these themes would need to canvass the full expanse of the fiduciary realm. But I regard it as especially important, and potent, to conceive of this existential project as being about *corporate* law. First, corporations are fundamental, powerful institutions in our civilization today. They therefore are, or ought to be, at the core of our concerns about how society is operating, what is wrong with it, and what we want to be better. Any existential project that does not address the corporation near to its heart threatens to be nostalgic, or escapist. A long tradition of secular humanists have drawn on religious canon to formulate and express secular, even anti-religious, insights.<sup>9</sup> I draw here on the liturgy of corporate law to make personal, even anti-corporate, ethical contributions to our postmodern existential predicament. We live in a corporate world so we will use it.<sup>10</sup>

Because corporate law is controversial, it has the attention of both its supporters and detractors. This attention can be nudged to adjacent concerns. If you love corporate law already, this project will let that love run deeper and make it more personally actionable than is suggested by canonical corporate law discourses. If you hate corporate law, I will show some depths of its power that may change your way of thinking about it. I will also suggest how that power can be redirected to change corporate law for the better.

Finally, it is the mysterious nature of the corporation which makes it an especially attractive site for existential inquiry. We who have thought hard about it cannot even say once and for all what a corporation is, or in what sense it should be said to exist.<sup>11</sup> Yet we know that it is powerful. Like all human creations, the corporation must reflect something of ourselves. We look to the corporation because it has been so successful. There must be something in its design that is useful. We look to the corporation because it

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9. See generally THE ENDURING LEGACY: BIBLICAL DIMENSIONS IN MODERN LITERATURE (Douglas C. Brown ed., 1975) (collecting and analyzing celebrated examples of this).

10. Many studies have shown that lawyers in general suffer unhappiness at rates surpassing the general population and surpassing rates seen in other professions. See BUCHANAN & COYLE, *supra* note 3, at 47 (describing the report of the National Task Force on Lawyer Well-Being). It is often thought that corporate lawyers are especially vulnerable to a void of meaning in their lives. See Lance McMillian, *Tortured Souls: Unhappy Lawyers Viewed Through the Medium of Film*, 19 SETON HALL J. SPORTS & ENT. L. 31, 38–41 (2009) (canvassing depictions of “soullessness” in corporate lawyering). This Essay is trying for an antidote and shows that, to the contrary, corporate lawyers are poised to serve as an existential vanguard through their proximity to corporate law.

11. See Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1095 (2002) (“[A]t other times, the corporation-thing falls away and we experience a kind of ontological crash—we have lost the identity of the thing we were supposedly talking about.”). See generally John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 65 (1926). Compare the ineffability of the corporation to the strong intuitive conceptions that we have of contract or real property. See generally Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277 (1988) (describing and critiquing the intuitive idea of real property).

is so destructive. There must be some warning within it that we must tell ourselves.

It is not my intention here to assess corporate law as it operates “in the trenches” (or the tranches). Instead, I want to encourage an *interpretation* of corporate law, a way of *being moved* by corporate law, that can help us to a better life. A better sentiment of life. In *Moby-Dick*, the narrator Ishmael says that it is the French painters who best capture the spirit of the whale hunt in action, even though the French have far less presence in the whale fishery than do the Americans or the British.<sup>12</sup> American painters miss the essence of whaling, he implies, not despite but *because* of their immersion in the industry. American paintings are too technically and mechanically precise to raise the deeper truths of what whaling is all about.<sup>13</sup> So too may legal theory say what corporate law is like without detailing the particulars of the darted irons and the bloody spray. Ethics must address the practical world through perspectives and categories that are outside of it, otherwise it risks patronizing the world it really wants to engage. There is more in corporate law than bread alone, we must consecrate its spiritual use.

This is not to say that corporate law has an exclusive claim to excellence as an existential device. It is only to say that it is a promising one. There is not just one way of making things good or making things awful, and so there is a moral landscape, with many peaks and valleys.<sup>14</sup> I mean this as an experiment that might be undertaken in other areas of law, and other areas of professional and social life. This project is an existential reconnoiter of the mountain of corporate law, a high mountaintop, which, once climbed will reveal its top as a false peak: we can go still higher.

This Essay explores corporate law as a source for generating meaning in the course of a good individual life. But the personal is political. The resource that I aim to unleash has broad normative potential. If tapped, it could yield the vision and energy required to achieve a reform of law, and corporate law in particular, that might render it more socially and existentially desirable. Wanting to know what corporate law can do for me or you is wrapped up in the question of what we can do, and might better know how to do, for society.

## II. IT IS ABOUT CONNECTION

We cannot say what it is like to be, for example, a bat.<sup>15</sup> For humans, we can say. Or dare say. With Roberto Unger, I “gamble[] on the idea that we can develop an account of our basic human identity that is neither trivial nor

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12. MELVILLE, *supra* note 2, at 209–11.

13. *Id.*

14. *See generally* SAM HARRIS, THE MORAL LANDSCAPE: HOW SCIENCE CAN DETERMINE HUMAN VALUES (2010) (defending this view).

15. *See generally* Thomas Nagel, *What Is It Like to Be a Bat?*, 83 PHIL. REV. 435 (1974) (concluding that we cannot know).

fatally beholden to the preconceptions of a particular culture.”<sup>16</sup> We can start by understanding that for us the most important meaning emerges in the course of our relationships with other people. No person is an island entire of itself.<sup>17</sup> Poets, anthropologists, psychologists, sociologists, theologians, artists—the full ecumenical “priesthood of the imagination”<sup>18</sup>—agree that the answer (an answer) to existential dread lies in the creation of meaning through the ways we connect with others.<sup>19</sup> This is why Sartre said, “Hell is other people.”<sup>20</sup> Terrible as everyone is, there is really no escaping them, except into something worse. Worse is the dehumanization of isolation. What we are primarily concerned with is other people. If we are to have meaning, and improved meaning, in our lives, we must be “involved in mankind.”<sup>21</sup> Corporate law can show us how.

In an important article, Peter Gabel argued that while we have a core desire for union and intimacy with others, we are *afraid* of this desire. We avoid, evade, and undermine it, and, he claimed, we do so especially through law.<sup>22</sup> Gabel’s idea is that law and legal relationships function as a framework, a thing in consciousness, around which we execute our intention to divert from our core desire for intimacy and instead present ourselves to each other in less vulnerable ways.<sup>23</sup> We insert legal institutions into our imaginations in order to conceive of our alienation as dictated and “official.” Making our alienation “official” both explains it and gives us a masochistic confidence that it will always be there. According to Gabel, this “conspiracy of withdrawn selves” can be seen in (for lawyers) “their glassy eyes and rigid posture,” or in the slight delays in speech by which other people assure us

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16. UNGER, *supra* note 5, at 21. The critical legal studies movement did not, as is sometimes rumored, take the view that “everything” is “socially constructed.” To the contrary, this literature often worked with a very definite, even essentialist conception of what people are like, psychologically and spiritually. That conception is to me usually more resonant and workable than the abstract, sterile characterizations of human beings found either in conventional law and economics, or in the law and social psychology counterrevolution. My method is to deploy what it is useful from each of these traditions, and ignore what is not.

17. See generally JOHN DONNE, *Devotions upon Emergent Occasions*, in DEVOTIONS UPON EMERGENT OCCASIONS AND DEATH’S DUEL 1, 17 (Izaak Walton ed., Vintage Books 1999) (1624).

18. LIONEL TRILLING, SINCERITY AND AUTHENTICITY 91 (1972) (citing but apparently not quoting William Wordsworth).

19. See generally Doug McAdam, *On the Existential Function of the Social and the Limits of Rationalist Accounts of Human Behavior*, 39 SEATTLE U. L. REV. 225, 232 (2016) (“[W]e function as existential co-conspirators, relentlessly—if generally unconsciously—exchanging affirmations that sustain our sense of our own significance and our lives inherent meaningfulness.”).

20. JEAN-PAUL SARTRE, NO EXIT AND THREE OTHER PLAYS 45 (S. Gilbert trans., Vintage Books 1989).

21. See generally DONNE, *supra* note 17, at 17.

22. Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1569 (1984).

23. Gabel calls this a “descriptive assertion” that is evident “for an historical reason that remains somewhat obscure.” *Id.* at 1566–67. He drops a footnote which points to a Marxist explanation: that scarcity makes everyone look like a threat or an instrument. *Id.* at 1567 n.9. Gabel himself rejects this explanation because scarcity has always been with humanity but alienation, in his view, has not. *Id.* at 1566–67, 1567 n.9.

“that they are in some sense not here with us.”<sup>24</sup> Gabel rues this widespread conspiracy because it causes so much of our lives to “lack any sense of the immediacy and contingency of truly lived encounters.”<sup>25</sup>

My view is really the reverse of Gabel’s. Our desire for meaning is too massive, and unbound, and our creativity too unstructured, and our minds too cluttered, to concretize our yearning for connection and relation on our own. So we do it through existential “mediating hierarchs,” to borrow a phrase, among which is legal imagination. Gabel claims we deny our desire for connection by hiding in roles that the law makes official. My point is the opposite—we are clumsy and shy and unartful, but through our legal imagination we can conceive of roles and feed on lines that facilitate connection. We need this mechanism of encounter, and we have it.

I promise that this is not to say that we must have, in our workspaces or elsewhere, open floor plans, or face time, or meetings, or coffees or lunches, or chitchat. Anyone can have those things if they want them, but you do not need them for this existential project. Corporate existentialism is not against being alone, it is only against loneliness. This is not really about professional arrangements. It is about how we think and feel about our lives. I am talking about an ethics, an approach to consciousness, imagination, and a sentiment of being. This is happening only in your mind, and you may also find it happening in your life.

### III. GETTING AFTER IT

While corporate theorists ponder about what the corporation is, the corporate *law* gets right into the *process of becoming*, by specifying in section 141(a) of the Delaware General Corporation Law that “the corporation *shall* be managed by a board of directors.”<sup>26</sup> If meaning is found through engagement, through iteration, then the injunction to move, to do it, is a first ethical principle of a good existential project. And this first principle is well elaborated in corporate law.<sup>27</sup> The fact that corporate boards have a duty to act is one of the reasons corporations are so often more effective than natural people. Corporations *have* to be managed, while people often abide a vacancy in the central offices. This simple principle describes a core ethic of a good life. You cannot just sit there like a lump on a log. Do not regard this as merely enabling, or as clarifying that you *may* be managed. There is more

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24. *Id.* at 1575.

25. *Id.* at 1575–76.

26. It goes without saying (although I now say it) that by corporate law I mean the Delaware General Corporation Law, the most widely used and thought about corporate law in the United States. See John Armour et al., *Delaware’s Balancing Act*, 87 IND. L.J. 1345 (2012) (describing and explaining Delaware’s dominance in corporate law).

27. This exhortation is also core to the lawyer’s fiduciary obligations. A lawyer should “*pursue* a matter on behalf of a client despite opposition.” MODEL RULES OF PROF’L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS’N 2018) (emphasis added). It will not suffice for the lawyer to abide by the technical rules and advance a cause mechanically or reactively. Rather, the lawyer must “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” *Id.* The lawyer must show some *oomph*.

in it than that. Private ordering will come, there will be plenty of chances to choose your own way. But you will not have occasion to forge your own path until you are moving. Yet neither is this quite command. “Shall be managed” is prophecy. The duty of care is the self-fulfilling prophecy of corporate existentialism.

This injunction to act must be regarded as opportunity, rather than burdensome responsibility. It gives escape from slothfulness, a condition we call sinful because it is corrupting to what is beautiful and tending toward the divine in humanity. Like all sinners, the sloth is ultimately a pitiable figure. Whatever private, professional, or social responsibilities she neglects, the worst of it she suffers herself in “the pain of idleness.”<sup>28</sup> Melville’s Bartleby, the scrivener who “prefers not to” undertake the duties of the magistrate’s office in which he is employed, and does not undertake them, is not happy.<sup>29</sup> His eyes are glazed.<sup>30</sup> He is miserable, neurotic, and finally dies of his nothingness. A human being managing their life does not lose energy but rather gains it. Emerson knew: “Power . . . resides in the moment of transition from a past to a new state, in the shooting of the gulf, in the darting to an aim.”<sup>31</sup> With just a mustard seed of “shall be managed,” you can move mountains. Or at least begin a climb, and give your dinner the seasoning of appetite. More than potent, trying is joyful. The face of oomph is a smile, or better.<sup>32</sup> “Energy is Eternal Delight,” wrote Mr. Blake.<sup>33</sup> This is the secret profit of agency that cannot be disgorged.

In this existential project, we see coming and then duck the hard questions concerning freedom of will, as against deterministic forces. Are we free to move ourselves, or was it all dictated in the register of the Big Bang? Corporate law gives a practical ethics, for practical men and women. We are after meaning, not truth. We can be big in life even if we are little in understanding. So we move at Delaware’s command to act and “write on the lintels of the door-post, Whim. I hope it is somewhat better than whim at last, but we cannot spend the day in explanation.”<sup>34</sup>

This is audacious but it is not glib. The inequitably distributed privileges of social status, wealth, birth endowments, and luck make it easier for some

28. BOB DYLAN, *Every Grain of Sand*, on SHOT OF LOVE (Columbia Records 1981).

29. HERMAN MELVILLE, *BARTLEBY, THE SCRIVENER: A STORY OF WALL-STREET* (Mockingbird Classics Publ’g 2017) (1853).

30. See *supra* notes 23–24 and accompanying text in which Gabel says that our (purportedly) legally compelled “withdrawn selves” are evidenced by glassy eyes. To my point, it is Bartleby’s *refusal* to scaffold his intimacy through the strictures of fiduciary duty that leaves his eyes glassy.

31. RALPH WALDO EMERSON, *SELF-RELIANCE 23* (Logos Books 2019) (1841).

32. Early usage of “oomph” in the United States, in the first decades of the twentieth century, had an affirming sexual connotation. See *Oomph*, OXFORD ENG. DICTIONARY, [https://www.oed.com/view/Entry/131620?redirectedFrom=oomph& \[https://perma.cc/2UQN-TTG6\]](https://www.oed.com/view/Entry/131620?redirectedFrom=oomph&[https://perma.cc/2UQN-TTG6]) (last visited Mar. 17, 2020); see also *In re an Application by La Marquise Footwear, Inc.* [1947] 64 RPCTMC 27 at 29 (Eng.) (describing “oomph” as an informal term in the United States meaning sex appeal).

33. WILLIAM BLAKE, *THE MARRIAGE OF HEAVEN AND HELL 5* (John W. Luce & Co. 1906) (1793).

34. EMERSON, *supra* note 31, at 12.

people, and harder for some people, to “go.” This existential project is not a programmatic response to—and certainly not a reconciliation with—established distributions of power and capability. This is a personal ethics for the creation of meaning in the shadow of prevailing arrangements, which meaning might enable a reformative impulse to emerge out of the shadow and strike for social justice.

Neither is this a substitute for health care. I am addressing a sentiment of being, in whatever idiom ethics properly operates distinctly from the realm of medical diagnosis and treatment. Readers suffering from depression or other mental illnesses are urged to seek medical attention. Humbly it is my hope that they may find in this Essay some resource of persistence that may aid them to keep seeking it, despite finding, as may be likely under current arrangements, that it is hard to get.

#### *A. (Non)Judgment*

Among the hallowed precepts of corporate law is the business judgment rule. Under this rule, corporate directors who make deliberate, unconflicted business decisions are insulated from personal liability though the decision turns out badly, or even disastrously, for the firm. Directors are not held to a standard of ordinary prudence. If they meet the standards of the business judgment rule, they can make unusual, offbeat, or weird choices that differ from industry norms without exposing themselves to a stickable charge of wrongdoing. The idea of the business judgment rule is existentially promising. We will not say that you should do what most people are doing or what is usually done. We do not say how or where exactly to move. We only say: go. Do what you think is best, the best you can, and, if you act in good faith, we do not judge you and you will not judge yourself.

A crucial modern component to the business judgment rule is that we only grant its protections if a decision was informed.<sup>35</sup> It is not enough to be properly motivated. You must also make an effort to know and think things through the relevant facts. The world is a certain way, it works in a certain way. We cannot perfectly know it, nor know how our behavior will affect it, or the people in it. But we have to make an effort to find out, to understand what is likely to happen, and to base our decisions about our own behavior on our evaluation of the available evidence. We do not have to keep our nose in the social statistics all day. But the responsibility to look and think before we act is a principle of realism, of modernity, that must be satisfied, if you are to escape judgmental scrutiny. This responsibility redounds as existential opportunity. To be informed and deliberate you must be continually engaged with others, making your mind and opinion vulnerable to influence by them, trusting them, as you must, if you are going to be open to changing your mind, as you must be open, before you can receive business judgment rule protection. The corporate life in this sense is the life of intimacy and vulnerability. And in that kind of life is found the stuff of meaning.

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35. *See* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

### B. Purpose

But what should you be managing yourself for, or towards? What I say here might be controversial intellectually, but not practically. The Delaware corporate code says “get after it.” What corporate directors are supposed to get after is profits for the shareholders.<sup>36</sup> Directors do not have to think about what their purpose is. Instead, they are to spend their time and energy coming up with the *means* of advancing their purpose. This framework is commendable to the kind of existential project I am developing here. Of course, I do not mean that you should maximize your own wealth, nor is it especially inspiring to think in terms of “maximizing” utility or well-being.<sup>37</sup> Instead what I want to emphasize is that the existential project proposed here does not require you, or even really invite you, to struggle with purpose. You do not need to think too much about the purpose of your life. The purpose is given, more or less. The purpose is as described in the default expectations of our culture: work hard and honest, be a good friend, spouse, mother, sister, father, brother, son, daughter, citizen, community member, consumer, relax and be happy, exercise, be socially responsible, worship, keep your vices in check but not so much that they manifest as neurosis. That sort of thing. An existential project, or this existential project, should be concerned with surfacing the means to pursue these default purposes. The point is that people should not really see their existential task as figuring out the purpose of their life. Rather, they should regard the path to meaning as running through the course of discovering the best means—their best means—towards accomplishing the purpose that is implicit in what they are as humans in this society.

Now as to this there must be freedom of escape. As in corporate law, people can widely deviate even from the core default rules and establish whatever heterodox purpose they desire.<sup>38</sup> But they must do so explicitly. Otherwise they will be held by others, and will hold themselves, to the ordinary standard and will suffer confusion, despondency, and misery within the conventional idiom. There are forms of life that allow for maximal private ordering. However, there is greater risk in them, they are less tried,

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36. See DAVID YOSIFON, *CORPORATE FRICTION: HOW CORPORATE LAW IMPEDES AMERICAN PROGRESS AND WHAT TO DO ABOUT IT* 60–96 (2018) (specifying “the actual law of corporate purpose”).

37. In other work I have repudiated the shareholder primacy norm as socially destructive, and urged that it be replaced with a more socially responsible corporate governance command. *See id.* Nothing in this Essay should be read to contradict that position or vindicate shareholder primacy. Instead, this should be read as an effort to see what is valuable in corporate law despite the odious shareholder primacy principle that currently occupies it, and as an effort to show how that value can be exploited even before shareholder primacy is overcome.

38. See generally Bernard Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 543–45 (1990) (discussing mutability in corporate law generally, but not addressing mutability of purpose); Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-contractarians*, 65 WASH. L. REV. 1, 2–6 (1990) (responding to Black and others); David G. Yosifon, *Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?*, 41 DEL. J. CORP. L. 461 (2017) (discussing the mutability of corporate purpose under Delaware law).

and many people will be reluctant to invest in or deal easily with you unless you share the default ideas concerning what life is all about.

### C. Loyalty

A principal must risk being used or manipulated if it would chance to gain the benefits that a faithful agent can deliver. The duty of loyalty is the generative salve we put on this gash of vulnerability in fiduciary relationships. Corporate law prescribes a duty of loyalty that compels directors to put the interests of the corporation and its shareholders first and to not allow their own self-interest to get in the way of serving the corporate purpose.<sup>39</sup> This kind of giving and receiving of loyalty may ready us for the deeper responsibilities, and opportunities, that more intimate vulnerability can present.

The law's most hallowed exposition of the duty of loyalty comes from the case of *Meinhard v. Salmon*,<sup>40</sup> in which Judge Benjamin Cardozo wrote that a fiduciary owes to their charge "[n]ot honesty alone, but the punctilio of an honor the most sensitive,"<sup>41</sup> and that fiduciary loyalty requires "thought of self . . . to be renounced, however hard the abnegation."<sup>42</sup> *Meinhard* and *Salmon* were partners in a real estate venture. Near the end of the lease on their property, *Salmon*, the managing partner, arranged a new deal, in his own name, on his own account, to develop the property and adjacent land under a new lease.<sup>43</sup> *Meinhard* sued, alleging a fiduciary violation, and Cardozo held that *Salmon* breached his duty of loyalty in taking the new deal for himself.<sup>44</sup> It was turned over to their partnership.<sup>45</sup>

In an essay asking "Must *Salmon* Love *Meinhard*?"<sup>46</sup> Professor Stephen Bainbridge answers in the negative, finding decisive limits to loyalty obligations in agency law doctrine that do not require *agapic*, self-sacrificing love from the agent to the principal. "So much for renouncing thought of self," writes Bainbridge.<sup>47</sup> If *agape* is not actually the standard, then what is the *agapic* language doing in this touchstone opinion? Bainbridge concludes that it sets out an aspirational ideal, as Delaware opinions often do today, praising or condemning corporate directors' conduct even where formal liability is not implicated.<sup>48</sup> For our existential purpose, I want us to regard this kind of fiduciary dicta as an invitation to, and an incantation of, the deep

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39. While purpose is mutable, *see supra* note 39 and accompanying text, loyalty is mandatory for corporate directors; it cannot be waived by private ordering within a corporate charter. But the law can be broken. *See infra* text accompanying notes 60–70 (discussing the power of the fiduciary breach).

40. 164 N.E. 545 (N.Y. 1928).

41. *Id.* at 546.

42. *Id.* at 548.

43. *Id.* at 546.

44. *Id.*

45. *Id.*

46. Stephen M. Bainbridge, *Must Salmon Love Meinhard?*, 17 GREEN BAG 2D 257 (2014).

47. *Id.* at 265.

48. *See* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997).

power that is available if we give ourselves over to the loyalty relationship. “[C]ast your dancing spell my way/ I promise to go under it.”<sup>49</sup>

This is to say that among the good pleasures is the big meaningful feeling of loyalty. Not the receipt of it, but the giving of it. Such is the strange alchemy of loyalty that it pays back to the soul more than it costs the ego. The great educator Booker T. Washington understood this effect. In *Up from Slavery*, he wrote: “Few things help an individual more than to place responsibility upon him, and to let him know that you trust him.”<sup>50</sup> There is personal power to be gained, not in the slack of the agency relationship but in the torque of loyalty given hard and true. This is the truth of the human condition: “Every individual responds to confidence.”<sup>51</sup> The commitment to putting something before ourselves does not diminish us: it elevates us. Loyalty does not just forbid us from our own narrow self-interest, it liberates us from it. We look in the mirror and see what we were meant to be. Washington, born into slavery, generated his insight in the conditions of extreme deprivation that attended emancipation. He found a key to human nature that can generate meaning even within desolation.<sup>52</sup>

By requiring us to restrain ourselves, the duty of loyalty gives us a better idea of what we really are, and what is worthwhile about us. This reaches at the deeper philosophical questions, and corporate law helps us grasp the answers. Just as our moral wisdom says there is no single meaning of life, but instead that meaning emerges through processes, so too does our best wisdom say there really is no single, constant *you*, no singular self, to be discovered and vindicated once and for all. This is what the Buddhists, the postmodernists, and the social psychologists all say: the sense of a core and abiding dispositional self is an illusion, an ephemeral subjectivity generated by the unmoored discourses that “thought dreams” pass through our minds. There is no inveterate, unchanging ground of authentic selfhood to stand firmly on, and the trying to do so is bound to give you vertigo. As the Nobel laureate Bob Dylan has repeatedly emphasized: “the point of life is not to discover who you are, the point of life is to create who you are.”<sup>53</sup>

Polonius *is* the fool when he says “to thine own self be true.”<sup>54</sup> What washes up in the heart or mind is not you, and is not necessarily a truth worth having. When we say “be true to yourself” what we really mean is hew to what the black letter says you are, not what you find yourself being in the

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49. BOB DYLAN, *Mr. Tambourine Man*, on BRINGING IT ALL BACK HOME (Columbia Records 1965).

50. BOOKER T. WASHINGTON, *UP FROM SLAVERY: AN AUTOBIOGRAPHY* 172 (1901).

51. *Id.*

52. *See generally* FRANKL, *supra* note 3 (describing how he survived the Nazi death camps and the qualities he witnessed in others who survived).

53. *See* ROLLING THUNDER REVUE: A BOB DYLAN STORY BY MARTIN SCORSESE (Grey Water Park Productions 2019). Dylan has been making this point for more than fifty years: “I’m ready for to fade / Into my own parade.” DYLAN, *supra* note 49.

54. WILLIAM SHAKESPEARE, *HAMLET*, act 1, sc. 3, l. 78 (David Bevington et al. eds., Bantam Books 1988).

trenches. By our “true self” we really mean our “best self,” and our “best self” is *archetypal*: restatement visions we may ensoul.<sup>55</sup>

Loyalty is a way of getting past yourself as you are and getting instead to something better. It is not just alright but imperative to escape from yourself in the pursuit of a meaningful life. This is why Oscar Wilde is not just clever but profound when he writes: “The first duty in life is to be as artificial as possible. What the second duty is no one has yet discovered.”<sup>56</sup> The mask of agency is valuable not because it frees you *to* say what you really think, the mask is valuable because it frees you *from* saying what you really think. The importance of being earnest, it turns out, is nil. And, as Lionel Trilling concludes, “if ‘existence’ is responded to as if it were less than totally in earnest, Spirit is the less bound by it. It can then without sadness accept existence, and without resentment transact such business with it as is necessary.”<sup>57</sup>

You cannot be free of your authorial self-conception simply by making a philosophically or scientifically grounded decision to ignore it. Getting past yourself is a process. Before you can be free of that fiction, you must first be attentive to it and see as clearly as you can the truth of its falsity. In meditation this is done through quiet, still, focused observation of the “thought dreams” and disidentifying with them.<sup>58</sup> It can also be accomplished with the use of psychedelics.<sup>59</sup> But meditation is hard for householders, and psychedelics are even harder. The duty of loyalty provides a direct and practicable way out of the illusions of solipsistic self-narration. The introspection required by the law of loyalty helps us to see our narrative selves more clearly and then to understand the fleeting nature of what we see. The fiduciary obligation to confess personal conflicts at first may lend greater reality to those truths, which might otherwise have laid only half-alive in our minds.<sup>60</sup> But then the obligation to strike out or constrain these conflicting elements of personality vindicates the truth that they are not really us, we are separate from them, and can wear them or put them aside. “The truths of metaphysics are the truths of masks,” said Oscar Wilde.<sup>61</sup>

But what should we find meaning in loyalty *to*? To say that you are loyal implies that you are an agent to some principal. I am not exactly reaching here to fortify the particular relationships of your life, although of course they can be nourishing when well cultivated. I am trying to show how the loyalty

55. See TRILLING, *supra* note 18, at 5.

56. OSCAR WILDE, *Phrases and Philosophies for the Use of the Young*, in THE WRITINGS OF OSCAR WILDE 140, 141 (1907).

57. TRILLING, *supra* note 18, at 121.

58. See *generally* SWAMI JANAKANANDA SARASWATI (THE SOURCE OF BLISS), *YOGA, TANTRA AND MEDITATION IN DAILY LIFE* (1991) (a practical guide).

59. See MICHAEL POLLAN, *HOW TO CHANGE YOUR MIND: WHAT THE NEW SCIENCE OF PSYCHEDELICS TEACHES US ABOUT CONSCIOUSNESS, DYING, ADDICTION, DEPRESSION, AND TRANSCENDENCE* (2018) (a practical guide).

60. Just as Foucault saw that the injunction to confess forbidden sexual desires helped flesh out and give bigger life to those desires. See *generally* 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans., 1978).

61. OSCAR WILDE, *Oscariana*, in THE WRITINGS OF OSCAR WILDE, *supra* note 56, at 1, 23.

conception can help generate a meaningful sentiment of being, in your own head, irrespective of whether you serve on a board, have clients, are married, or coach youth soccer. We are going to do what we do. Work, take care of our children, eat, play, sleep, whatever. What is subject to alteration is how we think about it. The liturgy of loyalty, I am urging, can be tapped in the imagination of a way of life. You are vulnerable, you need somebody to trust, and you can trust yourself. Be loyal to your endeavor.

#### IV. TRANSFORMATION: SOCIAL RESPONSIBILITY AS PERSONAL OPPORTUNITY

This existential project is not complacent, it is not an ideology of the status quo. A big human life must involve openness not just to tinkering but to transformation. Meaning understood in terms of process necessarily involves dynamism and possibility. I want to illustrate this with reference to an idea of social responsibility and how it informs and may be served by corporate existentialism.

Start with the idea that society is a construct, in the deepest sense. What else would it be? Its terms are not discovered under any microscope nor revealed on top of any mountain. The institutions, structures, and types of relationships we have now are not *necessary*, they are only ever provisional. The truth of this “anti-necessitarianism” is hard to deny, but harder to believe. We understand it as a formal principle but are easily lulled into necessitarian thinking by our psychological status quo bias, polemicists, and the “the idolatry of the actual.”<sup>62</sup> *Social responsibility* must therefore involve the responsibility to continually remind ourselves and each other about what society is: “[t]he idea of society includes the assumption that a given society can be changed if the judgment passed upon it is adverse.”<sup>63</sup> Second, social responsibility must involve the actual passing of judgment on society. Third, social responsibility must involve some effort to imagine alternatives against which the actual might be evaluated, or moved on from. An existential project must be socially responsible in this sense, otherwise it cannot produce meaning in our modern terms of process and becoming.

Corporate existentialism is socially responsible. Having compelled you to be diligent and loyal, it has made you sober, healthy, and potent. Having thrown off the shackles of self-interest, and empowered by the mysterious energy of loyalty, you are freed to transform from what you were. If we are to be socially responsible, in the sense I have defined it here, our fiduciary commitments must have limits. We must be poised to be disloyal to the meanings in which we are involved. We must encourage in ourselves not the “heroism of dumb service”<sup>64</sup> but agency as a mask, a loose mask, which can be taken off in favor of another mask, a new mask, that is more meaningful to us.

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62. ROBERTO MANGABEIRA UNGER, *POLITICS: THE CENTRAL TEXTS: THEORY AGAINST FATE* 371 (Zhiyuan Cui ed., 1997).

63. TRILLING, *supra* note 18, at 26.

64. *Id.* at 35 (discussing Hegel).

Here is where the core corporate law principle of volunteerism plays its crucial role.<sup>65</sup> Notice I did not emphasize it at the beginning. There the focus was on the injunction: “shall act.”<sup>66</sup> But corporate law also requires that you be voluntarily engaged in the meaning you are generating. The elements of corporate life are always provisional, are only a mask, because of the rule that agency relationships must be voluntary. This volunteerism is prior to and supersedes the duty of loyalty. This is to say: you can always breach. And maybe you should. The future “cannot be colonized in advance.”<sup>67</sup> The power and vulnerability dictated by the fiduciary opportunities of care and loyalty may generate any kind of new, unexpected meaning, and if it is heretical to fiduciary scriptures, so be it. Something very different, very bold may come out. Law is not the destination. Law is the path. What should corporate law become? Who are you becoming?

Beyond authorizing transformation, the approach adopted here can also help to enliven and quicken the transformative impulse. Earlier I discussed Gabel’s idea that the law works in our imagination to make our alienation seem “official,” and therefore unalterable, to our shallow satisfaction but deeper dismay.<sup>68</sup> If that does happen, then it is a badly educated legal imagination that allows it to happen. An existential project committed to exploiting meaning available in corporate law can show the *falsity* of the conception that Gabel laments as so widespread. From a corporate law perspective, legal relationships are clearly *not* permanent and unalterable. You do not choose your family and you barely choose your friends, but your fiduciary affections are voluntary. Corporate existentialism can tutor dynamism and counsel means (and meanings) of escape in other areas of life. Gabel says that we use the law to represent “our false selves as legally compelled.”<sup>69</sup> But I am emphasizing the core element of voluntariness in agency law, the opportunity for exit. With this knowledge in your head you cannot lapse into reveries of compulsory alienation. Unger says that “[o]ur ideals and interests are nailed to the cross of the institutions and practices that represent them in fact. The law is the site of this crucifixion.”<sup>70</sup> But Golgotha is a holy place, not an evil place. It is the place where redemption and renewal are initiated, not despite but *through* the crucifixion.

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65. See 1 RESTATEMENT (THIRD) OF AGENCY § 1.01 (2005) (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests *assent* to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise *consents* so to act.” (emphasis added)).

66. See *supra* text accompanying notes 27–36.

67. Gabel, *supra* note 22, at 1581.

68. See *supra* text accompanying notes 23–26.

69. Gabel, *supra* note 22, at 1569.

70. UNGER, *supra* note 62, at 231.