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BUSINESS ETHICS: CONCEPTUALIZE GOVERNING  
WITH THE ETHIC OF CARE AND JUSTICE

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*The most basic questions about human living—how to live and what to do—are fundamentally questions about human relations, because people's lives are deeply connected, psychologically, economically, and politically.<sup>1</sup>*

*Throughout corporate America's history, we experience periods of positive ethical behavior when negative activity momentarily may dissipate or be hidden. However, a positive ethical behavior flash in business often is brief. As seen in economic challenges from the Great Depression to the savings and loan crisis to the financial collapse of the 2000s to the more recent mortgage financial crisis, public and governmental respect of the business sector is*

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1. CAROL GILLIGAN, *IN A DIFFERENT VOICE* xiv (1982).

decreasing. Individual actor behavior around ethical choices and its connection to organizational culture have much input into the crisis of the business community and its subsequent ramification. Despite much work around positive business ethics, consistent and sustained individual behavior and positive ethical choices are moving at snail-like speed. Thus, this article proposes a dual system for individual decision analysis for organizational responsibility. I label this dual system, “dual ethical analysis.” The dual ethical analysis, which is conceptual, posits using both the ethic of care and ethic of justice as the organizational model for individual decision analysis. Ethic of care would be the foundation for individual decision analysis, while the ethic of justice is for surface analysis.

The dual ethical analysis attempts to establish positive, consistent, and sustainable ethical behavior by decision makers. I further argue its importance for corporate governance in that it can support an officer or director decision maker in meeting her fiduciary duties, specifically the duty of care. By drawing upon business ethics literature and practical examples, I desire to initiate a conversation about using the ethic of care as a foundation for business decision making.

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#### INTRODUCTION

This Article proposes a dual system for individual decision analysis for organizational responsibility. I label this dual system, “dual ethical analysis.” The dual ethical analysis, which is

conceptual, posits using both the ethic of care and ethic of justice as the organizational model for individual decision analysis. Ethic of care would be the foundation for decision analysis. Generally, under the ethic of care, decision making focuses on relations among people based on care and compassion. On the other hand, ethic of justice decision making is based on justice, rules, and individual rights. The dual ethical analysis attempts to establish positive, consistent, and sustainable ethical behavior by individual decision makers. Additionally, with the complexity, debates about, and fading of corporate governance, I argue for the importance of the dual ethical analysis. The dual ethical analysis can support an officer or director decision maker in meeting the duty of care. By drawing upon the business ethics literature and practical examples, I desire to initiate a conversation about using the ethic of care as a foundation for business decision analysis, and to neutrally influence policy around organizational ethics.

This article focuses on business ethics rather than general ethics. I do not argue which literature definition is correct or propose my own definition of business ethics. Some business ethics research defines as right or wrong behavior,<sup>2</sup> other researchers explain business ethics as professional standards and codes that provide guidance on morally acceptable behavior in situations.<sup>3</sup> Such definitions however can be problematic in theory and practice for many reasons, including the subjectivity of right and wrong moral behavior.<sup>4</sup>

The goal of business ethics is to study why business actors act or fail to act a certain way when engaged in conflict or a dilemma.<sup>5</sup> Business ethics' dilemmas typically result in an actor making an organization decision when a conflict exists between an actor's personal choice and the policies and culture guiding decision analysis and making.<sup>6</sup> For example, a middle

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2. James S. Bowman, *Managerial Ethics in Business and Government*, 79 BUS. HORIZONS 48, 48 (1976); Phillip V. Lewis, *Defining 'Business Ethics': Like Nailing Jello to a Wall*, 4 J. BUS. ETHICS 377, 377, 383 (1985).

3. See Bowman, *supra* note 2, at 48; Danielle S. Beu et al., *Ethical Decision-Making: A Multidimensional Construct*, 12 BUS. ETHICS: EUR. REV. 88, 89 (2003).

4. See Lewis, *supra* note 2, at 378–79.

5. See Beu et al., *supra* note 3, at 90.

6. Robert C. Solomon, *Corporate Roles, Personal Virtues: An Aristotelean Approach to Business Ethics*, 2 BUS. ETHICS Q. 317, 321–23 (1992).

manager may experience the conflict of whether to select the most competitive offer of a supplier or the one from the organization with which the manager's supervisor has a personal affiliation. If no policy or law prohibits accepting the affiliate offer, a dilemma exists. While weighing the competing offers, the manager likely is balancing the profit-maximizing and superior pleasing environment at the organization against making an ethical choice. From both a shareholder and stakeholder perspective, the ethical choice is for the manager to look out for the organization's interest despite the pressure from the manager's supervisor to select his or her affiliate organization.

Ethics generally evolves from religious, cultural, and philosophical beliefs of those establishing the ethical frameworks.<sup>7</sup> Arguably, unlike business ethics, general ethics is rooted in tradition.<sup>8</sup> Business ethics is a modern documented phenomenon which changes with time. The interest of business executives, government officials and regulators, stakeholders, (including activist shareholders) and academics in business ethics changes as corporate governance challenges evolve. Ethics generally does not specifically involve organizational dynamics that may lead actors to behave in certain ways. An in-depth analysis of the existence of, difference between, and severability of general ethics and business ethics, is outside the scope of this article, however, for completeness, I note there are arguments for such difference.

After introducing the definition and problems with the definition of business ethics and its relation to general ethics, Parts I and II discuss the importance of business ethics and its current state, respectively. In Part III, I layout and describe the proposed dual ethical analysis, including a detailed explanation of the ethic of care as the foundation of the dual ethical analysis. Part IV is another conceptual aspect of this article in which I theorize how the actors can meet their duty of care with the ethic of care framework. Parts V and VI, respectively, include information on the implementation of the dual ethi-

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7. Lewis, *supra* note 2, at 377.

8. *Id.* Some persons with whom I spoke in conducting this research argue against the claim that business ethics has no traditional basis. One person referenced that people can look to the Jewish community in how it conducts business to see the business ethics as tradition.

cal analysis and its theoretical and practical relevance. Finally, I mention some future research possibilities in the area and conclude this article.

## I.

### IMPORTANCE OF BUSINESS ETHICS

Ethical analysis, behavior, and decisions are critical, timely, and controversial topics in business today. In the rush to make decisions, turn a profit, and meet other goals, the connection of ethics and business often gets lost in the noise of daily functioning. The populist has a waning, negative view of business, which historically and currently, slips with each series of corporate scandals.<sup>9</sup> In the forward to their book *Women's Studies and Business Ethics*, Darden School of Business Professors Andrea Larson and R. Edward Freeman issued a challenge to stop and understand how business and ethics are and should be related.<sup>10</sup> They ask if and how business and ethics are related and more specifically what is or should be the role of ethics in business. This challenge addressed by Larson and Freeman is relevant to this article because, as it acknowledges, critical to business and society is decision makers' proper ethical analysis for positive ethical decision making. This article also demonstrates the importance of ethics in business in explaining the importance of consistent and sustainable actor behavior while proposing a theoretical decision analysis framework. Finally, understanding, exploring, and looking at solutions to the Larson and Freeman challenge is important to society given the scandals that have plagued the business community and related harm including people's reduced confidence in the capital markets and its actors.

Some researchers question the importance of promoting positive business ethics,<sup>11</sup> but positive business ethics is important. It prepares organizational actors for the inevitable di-

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9. Michael Betz et al., *Gender Differences in Proclivity for Unethical Behavior*, 8 J. BUS. ETHICS 321, 321 (1989); Bowman, *supra* note 2, at 48; Andrew Sikula, Sr. & Adelmiro D. Costa, *Are Women More Ethical Than Men?*, 13 J. BUS. ETHICS 859, 859 (1994); William A. Weeks et al., *The Effects of Gender and Career Stage on Ethical Judgment*, 20 J. BUS. ETHICS 301, 301-02 (1999).

10. ANDREA L. LARSON & R. EDWARD FREEMAN, *WOMEN'S STUDIES AND BUSINESS ETHICS: TOWARD A NEW CONVERSATION* (1997).

11. See James Weber, *Institutionalizing Ethics into Business Organizations: A Model and Research Agenda*, 3 BUS. ETHICS Q. 419, 421 (1993).

lemma faced in an organizational structure. This preparation hopefully will lead the actor to explore the deeper implications of a decision and possibilities to make a choice best for the organization and its stakeholders. Thus, I discuss some reasons business ethics is important, especially how it connects with corporate governance.

First, business ethics is important because the law is not all encompassing and often is reactive instead of proactive.<sup>12</sup> To legislate all possible situations and close all loopholes, legislative and regulatory bodies collectively would have to work with one hundred percent cooperation to brainstorm and then capture (including in language) all possible operation issues that could occur on a matter. Realistically, we know this is an impossible task. We only have to look at the development and passage of the Sarbanes-Oxley Act of 2002 (SOX) to know that this is an impossible task. U.S. Senators Paul Sarbanes and Michael G. Oxley sponsored this bi-partisan bill in response to corporate scandals of the early 2000s.<sup>13</sup> SOX was reactionary and Congress's attempt to restore investor confidence in the U.S. securities market.<sup>14</sup> SOX enhanced regulation on accounting firms and provided mandates to SEC reporting companies addressing internal controls and accounting issues in the 2001 and 2002 corporate failures.<sup>15</sup> Such regulation created the Public Company Accounting Oversight Board (PCAOB) to regulate the accounting profession and governance mandates for SEC reporting companies. These mandates include the CEO and CFO now having to attest to internal controls and financial statement accuracy and audit committee composition and function placing responsibility on these executives to understand the contents.<sup>16</sup> SOX however did not

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12. See GILLIGAN, *supra* note 1, at 37–38, 65–68.

13. Seletha R. Butler, “Financial Expert”: A Subtle Blow to the Pool and Current Pipeline of Women on Corporate Boards, 14 GEO. J. GENDER & L. 1, 3, 11 (2013); Robert A. Prentice, *Enron: A Brief Behavioral Autopsy*, 40 AM. BUS. LAW J. 417, 440–42 (2003).

14. Butler, *supra* note 13, at 3.

15. Roberta Romano, *Does the Sarbanes-Oxley Act Have a Future?*, 26 YALE J. ON REG. 229, 232–33 (2009). Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. §§ 7201–7266 (2012)).

16. Romano, *supra* note 15. Sarbanes-Oxley Act § 906(a), 15 U.S.C. § 1350 (2012) (criminal liability for knowingly violation certifications), § 302, 15 U.S.C. § 7241 (2012)) (certification of financials), § 201, 15 U.S.C. § 78j-1(g) (2012)) (non-audit services); § 301, 15 U.S.C. § 78j-1(m) (2012)

specifically address the regulatory regime of financial institutions.<sup>17</sup> Therefore, Congress returned eight years later with the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) in response to the Great Recession to address financial reforms not captured in prior legislation including SOX. Dodd-Frank, although controversial, is thought to be a response to the 2008 financial crisis, systematic results from the meltdown of the subprime mortgage market, and the subsequent governmental bailouts of some financial institutions.<sup>18</sup> Some argue that the cause of the 2008 financial crisis is financial institutions' increased risk with leverage generated by short-term economic target pressure and executive compensation incentive structure.<sup>19</sup> Dodd-Frank's regulatory regime is preventive and supervisory.<sup>20</sup> It created the Financial Stability Oversight Council (FSOC) which oversees systemic risk, and it authorizes the Federal Reserve to establish standards for "contingent capital"<sup>21</sup> and specifies minimum capital requirements for "covered financial institutions."<sup>22</sup> Dodd-Frank also authorizes the Federal Reserve to limit excessive compensation at "covered financial institutions."<sup>23</sup> Despite the efforts of Dodd-Frank in trying to address potential harm in the capital markets, there are shortcomings. There is no sustainable strategy within the financial market for consistently addressing systemic risks; it is difficult to predict financial risk happening, its repercussions, and the exposure, especially by human regulators; and planning is often based on past mistakes.<sup>24</sup> Because

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(audit committee independence and functions). Other provisions include § 402(a), 15 U.S.C. § 78m(k) (2012) (executive loan prohibition), § 404, 15 U.S.C. § 7262 (2012) (internal controls), § 304, 15 U.S.C. § 7243 (2012) (forfeiture of incentive compensation on restatement).

17. Romano, *supra* note 15.

18. John C. Coffee, Jr., *Systematic Risk After Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies Beyond Oversight*, 111 COLUM. L. REV. 795, 797 (2011).

19. *Id.* at 795.

20. *Id.*; Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended at 12 U.S.C. § 5301).

21. *Id.*; 12 U.S.C. §§ 5321–5325.

22. 12 U.S.C. § 5365; Coffee, *supra* note 18, at 797–98. "Covered financial institution" includes most financial institutions with assets in excess of \$1 billion.

23. 12 U.S.C. § 5641; Coffee, *supra* note 18, at 798.

24. Coffee, *supra* note 18, at 798–808.

of the inherent shortcomings of any regulatory scheme, the promotion of business ethics remains an important part of the corporate governance calculus.<sup>25</sup>

Secondly, Robert Solomon provides a powerful example of the importance of “caring” companies in his 1997 book, *It’s Good Business: Ethics and Free Enterprise for the New Millennium*. Solomon argues that a caring company is the best regulator and sanction of bad activity, better than laws, regulation, and free market competition given their deficiencies.<sup>26</sup> In this acclamation of the importance of business ethics, he uses Johnson and Johnson’s 1980s Tylenol matter as an example of a caring company protecting the populist without outside enforcement.<sup>27</sup> In October of 1982, during James Burke’s tenure as CEO of Johnson & Johnson, the company faced a crisis when seven people in metropolitan Chicago died from taking Extra-Strength Tylenol capsules.<sup>28</sup> At the time Extra-Strength Tylenol was the leading pain-killer in the United States.<sup>29</sup> Reports indicate that the suspect put 65 milligrams of cyanide into extra-strength Tylenol capsules by removing the product from the shelf and reshelving the product, which occurred in metropolitan Chicago.<sup>30</sup> At the time of the crisis, Johnson & Johnson’s Tylenol controlled thirty-seven percent of the pain-killer product market with \$1.2 billion in revenue.<sup>31</sup> Based on established connections on when and how the tampering occurred, Johnson & Johnson knew it was not responsible for the actions.<sup>32</sup> However, it removed all extra-strength Tylenol capsules from shelves nationwide—about 31 million bottles with a

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25. Cf. GILLIGAN, *supra* note 1, at 37–38, 65–68. New York University and former Harvard Professor Carol Gilligan cites a student in a study as saying, “Laws are pragmatic instruments, but they are not absolutes.”

26. ROBERT C. SOLOMON, *IT’S GOOD BUSINESS: ETHICS AND FREE ENTERPRISE FOR THE NEW MILLENNIUM* 16–22 (1997).

27. *Id.* at 54–55.

28. Howard Markel, *How the Tylenol Murders of 1982 Changed the Way We Consume Medication*, PBS NEWSHOUR, (Sept. 29, 2014, 11:39 AM), <http://www.pbs.org/newshour/updates/tylenol-murders-1982/> (last visited Oct. 15, 2015).

29. *Id.*

30. Markel, *supra* note 28.

31. See Mark L. Mitchell, *The Impact of External Parties on Brand Name Capital: The 1982 Tylenol Poisoning and Subsequent Cases*, 27 *ECON INQ.* 601, 603 (1989).

32. Markel, *supra* note 28.

loss of more than \$100 million dollars-and halted all advertising of the product.<sup>33</sup> Johnson & Johnson did not limit the recall to metropolitan Chicago, the determined scope of the tampering.

Following the recall, Johnson & Johnson reintroduced the capsules back to the market with a triple-seal tamper resistant packaging the first in the U.S. to use this packaging and made presentations to restore confidence in the product then following the 1986 recall because of a New York cyanide tampering incident promoted caplets which is more tamper resistant than capsules.<sup>34</sup>

Finally, business ethics is important because conceptually the organization benefits from having ethical practices and engaging with ethically positive actors.<sup>35</sup>

Some academics argue that positive ethics are costly without substantial economic benefit.<sup>36</sup> Certainly, there can be major financial gains from unethical behavior.<sup>37</sup> While positive ethical behavior in organizations has been shown to reduce corporate fraud and increase financial misconduct reporting in some circumstances, the research also indicates that positive ethical behavior is costly and lacks substantive monetary benefits.<sup>38</sup> But as Lynn Sharp Paine eloquently points out in *Value Shift: Why Companies Must Merge Social and Financial Imperatives to Achieve Superior Performance*, “[w]hatever the path . . . more and more companies are rejecting traditional ideas of management as a ‘value free’ science and business as an ‘ethics-free zone’ . . . Many now believe that adhering to the core principles found in virtually all the world’s ethical traditions is neither naïve nor a sign of weakness, but rather smart and a

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33. *Cf. id.*

34. Mitchell, *supra* note 31, at 603.

35. See Jeanne M. Liedtka, *Feminist Morality and Competitive Reality: A Role for an Ethic of Care?*, 6 *BUS. ETHICS Q.* 179, 185–89 (1996); Phillip M. Linsley & Richard E. Slack, *Crisis Management and an Ethic of Care: The Case of Northern Rock Bank*, 113 *J. BUS. ETHICS* 285, 286 (2013).

36. See LaRue Tone Hosmer, *The Future of Business Ethics: An Optimistic View*, 14 *BUS. ETHICS Q.* 781, 783–85 (2004).

37. LYNN SHARP PAINE, *VALUE SHIFT: WHY COMPANIES MUST MERGE SOCIAL AND FINANCIAL IMPERATIVES TO ACHIEVE SUPERIOR PERFORMANCE* 78 (2003).

38. See David Hess, *A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines*, 105 *MICH. L. REV.* 1781, 1788–89, 1804 (2007); Linda Klebe Treviño & Michael E. Brown, *Managing to Be Ethical: Debunking Five Business Ethics Myths*, 18 *ACAD. MGMT. EXEC.* 69, 69–81 (2004).

source of organizational strength. And some . . . view moral judgment as a help rather than a hindrance in doing business.”<sup>39</sup> Although not universally popular, employees have preferences for ethically responsible organizations.<sup>40</sup> Employees often prefer ethically responsible organizations. Limited empirical research supports a positive relationship between an organization’s ethical behavior and employee job satisfaction.<sup>41</sup> For example, one study found that employees have greater job satisfaction where there is similarity between the employee’s morality and a caring ethical work environment.<sup>42</sup> Additional research on salespeople found that an organization’s positive ethical environment creates greater job satisfaction and organizational commitment and lower turnover.<sup>43</sup> These findings are in light of Goodell’s research showing that of the business employees surveyed twenty-five percent felt their employers ignored ethical conduct to fulfill business objectives and seventeen percent believe their employers overtly encourages misconduct to obtain business goals.<sup>44</sup>

## II.

### CURRENT STATE OF BUSINESS ETHICS

Reacting to the various waves of business scandals involving unethical business actions, the corporate community, the government, and academia (particularly business and law schools) act to fix or curtail such unethical current or future behavior. Despite many such actions by these institutions, the public revealing of the next wave of ethical breaches soon comes.

Numerous factors affect the business ethics of organizations. From an individual perspective, individual qualities such as demographics, personality, culture, and moral principles af-

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39. PAINE, *supra* note 37, at 27.

40. Kenneth E. Goodpaster, *Business Ethics and Stakeholder Analysis*, 1 BUS. ETHICS Q. 65 (1991).

41. Charles H. Schwepker, Jr., *Ethical Climate’s Relationship to Job Satisfaction, Organizational Commitment, and Turnover Intention in the Salesforce*, 54 J. BUS. RES. 39, 48 (2001).

42. Maureen L. Ambrose et al., *Individual Moral Development and Ethical Climate: The Influence of Person-Organization Fit on Job Attitudes*, 77 J. BUS. ETHICS 323, 329 (2008).

43. Schwepker, *supra* note 41, at 48.

44. *Id.* at 39.

fect the ethics of individuals within the organization.<sup>45</sup> External forces also impact ethical activity of individual actors, including management and peers, role models, mentors, and sponsors, corporate culture and codes of ethics and responsibility, and local culture and environment.<sup>46</sup> Company factors affecting the organization's business ethics include perceived values and ethical culture, code of conduct, ethics training programs, and leadership.<sup>47</sup> Also, myths about business ethics and dissociation with the importance of business ethics drive its play in organizations.<sup>48</sup>

#### A. Individual

Regarding the personal ethical influencers, substantial research focuses on the role of gender in ethical judgment<sup>49</sup> and behavioral intentions.<sup>50</sup> Specially, these studies address whether men and women within the corporation made ethical decisions differently than one another<sup>51</sup> or if women are more ethical in decision making than men.<sup>52</sup> Although some re-

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45. Sean R. Valentine & Terri L. Rittenburg, *The Ethical Decision Making of Men and Women Executives in International Business Situations*, 71 J. BUS. ETHICS 125, 125 (2007); Robert C. Ford & Woodrow D. Richardson, *Ethical Decision Making: A Review of the Empirical Literature*, 13 J. BUS. ETHICS 205, 206–11 (1994); Terry W. Loe et al., *A Review of Empirical Studies Assessing Ethical Decision Making in Business*, 25 J. BUS. ETHICS 185, 186–94 (2000).

46. Dane Peterson et al., *Ethical Beliefs of Business Professionals: A Study of Gender, Age and External Factors*, 31 J. BUS. ETHICS 225, 227 (2001).

47. See Valentine & Rittenburg, *supra* note 45, at 125; Loe et al., *supra* note 45, at 194–99; Linda Klebe Treviño et al., *The Ethical Context in Organizations: Influences on Employee Attitudes and Behaviors*, 8 BUS. ETHICS Q. 447, 447–48 (1998); Sean Valentine & Tim Barnett, *Ethics Codes and Sales Professionals' Perceptions of Their Organizations' Ethical Values*, 40 J. BUS. ETHICS 191, 191–93 (2002); Sean Valentine & Gary Fleischman, *Ethics Training and Businesspersons' Perceptions of Organizational Ethics*, 52 J. BUS. ETHICS 381, 381–82 (2004). See generally Ford & Richardson, *supra* note 45, at 211–18.

48. Treviño et al., *supra* note 47.

49. Weeks et al., *supra* note 9, at 302.

50. See *id.*

51. Daulatram B. Lund, *Gender Differences in Ethics Judgment of Marketing Professionals in the United States*, 77 J. BUS. ETHICS 501, 501–03 (2008); George R. Franke et al., *Gender Differences in Ethical Perceptions of Business Practices: A Social Role Theory Perspective*, 82 J. APPL. PSYCHOL. 920, 920–22 & 927–30 (1997).

52. Ford & Richardson, *supra* note 45, at 206; Loe et al., *supra* note 45, at 187; Maria L. Roxas & Jane Y. Stoneback, *The Importance of Gender Across Cultures in Ethical Decision-Making*, 50 J. BUS. ETHICS 149, 149–65 (2004).

search studies conclude that there are differences in male and female ethics-related decision making,<sup>53</sup> the findings are not consistent and conclusive. Some studies indicate that no gender differences exist in decision making.<sup>54</sup>

Gilligan is noted for her work on the importance of hearing the different voices, including women and men, in the business environment.<sup>55</sup> Her work often appears to be misinterpreted as identifying that women are more ethical than men or that ethic of care attributes are female attributes.<sup>56</sup>

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53. *E.g.*, Gerald Albaum & Robert A. Peterson, *Ethical Attitudes of Future Business Leaders: Do They Vary by Gender and Religiosity*, 45 *BUS. & SOCIETY* 300, 300, 305 & 318 (2006); Durwood Ruegger & Ernest W. King, *A Study of the Effect of Age and Gender Upon Student Business Ethics*, 11 *J. BUS. ETHICS* 179, 184–85 (1992); Weeks, *supra* note 9, at 302–03; Betz, *supra* note 9, at 321–22.

54. *See* John Tsalikis & Marta Oritz-Buonafina, *Ethical Beliefs' Differences of Males and Females*, 9 *J. BUS. ETHICS* 509, 509 (1990).

55. *See, e.g.*, Carol Gilligan, *In a Different Voice: Women's Conceptions of Self and Morality*, 47 *HARV. EDUC. REV.* 481 (1977) [hereinafter Gilligan, *Women's Conceptions*]; GILLIGAN, *supra* note 1; Carol Gilligan, *Hearing the Difference: Theorizing Connection*, 10 *HYPATIA* 120 (1995) [hereinafter Gilligan, *Hearing the Difference*].

56. *See* Gilligan *Hearing the Difference*, *supra* note 54. So the reader can have vivid insight into some Gilligan text around this point, I included the following language from Gilligan's work.

Listening to women's voices clarified the ethic of care, not because care is essentially associated with women or part of women's nature, but because women for a combination of psychological and political reasons voiced relational realities that were otherwise unspoken or dismissed as inconsequential. A patriarchal social order depends for its regeneration on a disconnection from women, which in women takes the form of a psychological dissociation: a process of inner division that makes it possible for a woman not to know what she knows, not to think what she thinks, not to feel what she feels. Dissociation cuts through experience and memory, and when these cuts become part of cultural history, women lose the grounds of their experience and with it, their sense of reality.

*Id.* at 123–24.

Gilligan goes on to caution about the lack of placing ethic of care in a framework as the ethic of justice is placed in a framework. Any discussion of a care ethic, then, has to begin with the issue of framing. What is the framework within which we will compare and contrast justice and care? When I hear care discussed as a matter of special obligations or as an ethic of interpersonal relationships, I hear the vestiges of patriarchy. When I listen to care versus justice debated as if there was no framework, I hear the implicit patriarchal framework silently slipping back into place.

*Id.* at 125.

Gilligan posits that listening to the different organizational voices impacts organizational relationships and storytelling transforms the culture from a patriarchal business environment.<sup>57</sup> Hearing Gilligan's different voices arguably impacts the psychological assessment of decision making. It is because of Gilligan's work that I focus on the ethic of care as important for ethical analysis. Thus, I use the work of Gilligan and other ethics researchers, including feminist scholars, to build the dual ethical analysis conceptualization.

Further, Harvard Business School Professor Rosabeth Moss Kanter argues in *Men and Women of the Corporation* gender differences do not dictate male or female organization behavior.<sup>58</sup> Rather women's problems in organizations result from structural asymmetry with women being in either dead-end jobs or the token in upper level positions.<sup>59</sup> Generally, Kanter shows that gender differences in organizational behavior results from the organizational structure and its impact on the genders and not male versus female characteristics.<sup>60</sup>

#### B. *Company Through Business Ethics Myths and Dissociation*

In an article following the signing of SOX, Treviño and Brown, wrote a theoretical piece on the myths of business ethics and how to dispel those myths. They acknowledge that a number of the notations about business ethics likely stems from the varied opinions and reactions to the various corpo-

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57. See Gilligan *Women's Conception*, *supra* note 54; GILLIGAN, *supra* note 1, at xii.

58. ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* (2d ed. 1993).

59. Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 *GENDER & SOC.* 139, 143 (1990); KANTER, *supra* note 57, at 290-94.

60. Acker, *supra* note 58, at 140, 143; KANTER, *supra* note 57, at 290-94. Kanter's article does not explore the ethic of care and ethic of justice as a gender matter. It provides a general overview of the ethic of care and ethic of justice as background understanding. Although some research focuses on the ethic of care as being associated with feminism and the ethic of justice being more male centric such discussion, analysis and debate are outside the scope of this article. GILLIGAN, *supra* note 1, at 173-74; Leslie M. Dawson, *Women and Men, Morality and Ethics*, *BUS. HORIZONS* 61, 68 (1995). I, however, note that Robert Solomon did argue that the ethic of care, which is focused on care and compassion, are not exclusively feminist concepts. LARSON & FREEMAN, *supra* note 10, at 153-54. He exemplifies such argument referencing that both David Hume and Adam Smith address care and compassion in their work on the history of capitalism.

rate scandals throughout history. The myths Treviño and Brown discuss are: (1) the ease in being an ethical actor; (2) unethical behavior is directly associated with a bad person; (3) company ethics codes and programs are how organizations manage ethics; (4) ethical leadership is mainly directly associated with the leader's integrity; and (5) unethical behavior is new. I use this business ethics myth discussion to explain company factors affecting the organization's business ethics.

First, ethical decision making is tougher than most imagine and involves critical analysis with numerous approaches being advocated over the years.<sup>61</sup> Such frameworks range from the normative philosophical approaches, to the religious position of treat one as you want to be treated, to the Chicago-style law and economics cost-benefit analysis, to the law's social justice, individual rights, and protectionism platforms. The multiple approaches proposed for ethical decision may cause conflict in decision making and outcomes and thus exemplifies the ease myth. The quandary of college athletics and National Collegiate Athletic Association (NCAA) is a modern example of this conflict and the resulting lack of ease in evaluating and making ethical decisions. Questions and concern exist regarding the ethical treatment of college athletes by the NCAA and related athletic programs. The issue is whether or not these groups are ethical in the fair-treatment of student-athletes regarding health care protection and benefit for play. Because both groups make substantial money from major sports and thus the play of those athletes, should the athletes receive some form of compensation for play or is a scholarship subject to annual renewal sufficient. Other ethical dilemmas exist around the subject, including Taylor Branch's arguments about anti-trust violations against student-athletes. However, others see that some players because of family background would never have a college or professional opportunity without college sports. Thus, the decision regarding the future of college sports is very complex and requires more than analyzing solely based on various theoretical ethical frameworks including the above-mentioned.

Another ethical situation recognition also demonstrates the Treviño and Brown's ease myth.<sup>62</sup> There is no checklist for

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61. Treviño & Brown, *supra* note 38, at 69–72.

62. *Id.* at 70.

guaranteed identification of a business ethics issue, therefore, no clear formula exists to signal to actors the presence of an ethical dilemma.

Second, to understand business ethics in today's challenging and changing business environment, the Treviño and Brown discussion positions that persons taking unethical actions are not all bad.<sup>63</sup> In many instances, actors' unethical moves are caused by encouraging or accepting environments or unintentional consequences of positive actions.<sup>64</sup> For example, in the 1990s management executives at Sears, Roebuck & Company established sales goals for its automotive mechanics.<sup>65</sup> The intent of the goals was to increase repair speeds and thus customer service.<sup>66</sup> However, the unintended consequence of the goals was that the mechanics overcharged customers for services and suggested unneeded repairs.<sup>67</sup> The new goals did not result in the anticipated increased productivity by the mechanics.<sup>68</sup>

Third, formal internal and external regulation and policy do not always completely eliminate unethical behavior. Many companies have a formal ethics program, ethics related code of conduct, ethics compliance officers, an ethics hotline or other formal structures for handling ethical issues. SOX mandates that many companies have to have an anonymous employee system for reporting fraud and ethics violations. The Ethics Resource Center's National Business Ethics 2013 Survey indicates that organizations with a strong ethics program experience greater ethical performance,<sup>69</sup> but formal structures do not ensure the absence of unethical behavior. For example,

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63. *Id.* at 72–73.

64. *Id.* at 72.

65. Max H. Bazerman & Ann E. Tenbrunsel, *Ethical Breakdowns: Good People Often Let Bad Things Happen. Why?*, HARV. BUS. REV., Apr. 2011, at 1, 4 (2011).

66. *Id.*

67. *Id.*

68. *Id.*

69. NATIONAL BUSINESS ETHICS SURVEY® OF THE U.S. WORKFORCE FOR 2013, ETHICS RES. CTR. (2014), <https://www.ibe.org.uk/userassets/surveys/nbes2013.pdf>.

before its collapse, Enron, had a code of conduct—and on occasion, the board suspended the code.<sup>70</sup>

Next, a leader has to openly demonstrate his or her positive ethics and communicate clearly the positive ethical behavior of the workers. This positive reinforcement requires leadership to directly address unethical behavior to demonstrate its lack of tolerance and acceptance of such behavior. Otherwise, inaction can be viewed as a culture of unethical behavior acceptance. For example, leadership at a higher education institution ignored addressing when an employee openly and in writing disrespected and disparaged a minority group. Because leadership failed to concretely say such unethical behavior is not permissible, some people in the organization lost respect for the leadership and organization after realizing the acceptability of such unethical behavior.

Finally, unethical behavior is both historical and modern. Almost daily it appears that the media reports on some ethical issue involving business. It ranges from accounts of alleged cheating scandals in public education institutions<sup>71</sup> to failure to recall defective or faulty design products<sup>72</sup> to Layne Christensen Co's decision to self-report alleged foreign-bribery allegations.<sup>73</sup> The government tries to address ethical lapses or those resulting in illegal activity with laws and regulations. They are reactionary in most cases. However, some companies internally try to correct unethical behavior or self-report it as Layne Christensen did.

The Treviño and Brown myths impact actor behavior regarding business ethics. Unethical behavior is not a new phenomenon. It historically and unfortunately will continue to exist. Thus, organizations and their actors should recognize the

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70. Reed Abelson, *Enron's Collapse: The Directors*, N.Y. TIMES, Jan. 19, 2002, <http://www.nytimes.com/2002/01/19/business/enron-s-collapse-directors-one-enron-inquiry-suggests-board-played-important.html>.

71. Elizabeth Flock, *APS (Atlanta Public Schools) Embroiled in Cheating Scandal*, WASH. POST, July 11, 2011, [http://www.washingtonpost.com/blogs/worldviews/post/aps-atlanta-public-schools-embroiled-in-cheating-scandal/2011/07/11/gIQAj19m8H\\_blog.html](http://www.washingtonpost.com/blogs/worldviews/post/aps-atlanta-public-schools-embroiled-in-cheating-scandal/2011/07/11/gIQAj19m8H_blog.html).

72. Peter J. Henning, *Justice Dept. Takes Hard Look at G.M.'s Handling of Issues*, N.Y. TIMES, June 16, 2014, [http://dealbook.nytimes.com/2014/06/16/justice-dept-sizes-up-possible-criminal-charges-against-g-m/?\\_r=0](http://dealbook.nytimes.com/2014/06/16/justice-dept-sizes-up-possible-criminal-charges-against-g-m/?_r=0).

73. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Texas-Based Layne Christensen Company With FCPA Violations (Oct. 27, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543291857>.

myths exist and acknowledge how they impact their business ethics. Understanding these myths and how they motivate activity, we can work to try to curtail and contain unethical behavior to a minimum attempting to make society safer for current and future generations.

### III.

#### THE DUAL ETHICAL ANALYSIS

Prior to addressing components of the proposed dual ethical analysis, I mention that for centuries, the ethic of justice, explained later in this article, dominated business decisions. However, I posit that this limits organizational decisions and that understanding and incorporating the ethic of care in the business decision environment is needed. The ethics literature, specifically the focused research on ethic of care and gender ethics, bodes well with moving away from a solely justice ethics to care and relationship ethics.<sup>74</sup> For example, Machold et al. in some of their research addressed corporate governance models being based on the ethic of care.<sup>75</sup> Such ethic of care based corporate governance model (which encompasses business ethics) is referenced in Machold's work as the Feminist Governance Model, which is a suggested substitution to existing corporate governance models.<sup>76</sup> They say that "Caring does not take place at the cost of replacing justice considerations, rather the obligation to care is in tandem with the duty not to harm individual stakeholders and not to exploit or take advantage of unequal relationships."<sup>77</sup>

#### A. *Ethic of Care: Relationship Foundation*

*Meaning.* The ethic of care emphasizes relations between and among people.<sup>78</sup> The focus is being people centric instead of individual centered.<sup>79</sup> Labeled by some as the female decision making methodology, the ethic of care concentrates on

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74. See Silke Machold et al., *Corporate Governance and Ethics: A Feminist Perspective*, 81 J. BUS. ETHICS 665, 665 (2008).

75. *Id.*

76. *Id.* at 673–74.

77. *Id.* at 674.

78. VIRGINIA HELD, *FEMINIST MORALITY: TRANSFORMING CULTURE, SOCIETY, AND POLITICS* 66, 93 (1993).

79. *Id.* at 66, 78.

relationships and compassion in moral decision making.<sup>80</sup> Gilligan in *In a Different Voice* vividly describes the voice of ethic of care stating that “It was concern about relationship that made women’s voices sound ‘different’ within a world that was preoccupied with separation and obsessed with creating and maintaining boundaries between people.”<sup>81</sup> She further states that the psychology of relationships underlies the ethic of care versus fairness which inspires the ethic of justice.<sup>82</sup> This care relationship is a reciprocal relationship meaning that both relationship parties are rewarded.<sup>83</sup> These parties are treated as ends rather than means to an end.<sup>84</sup>

Because of the relationship aspect, other researchers categorize the ethic of care as the socialization approach to ethics.<sup>85</sup> With its implementation, business is seen in more human terms.<sup>86</sup> In examining business and society, Freeman and Gilbert rejected business based on the economics view, pushing the view that business is a web of stakeholder associations developed from caring, compassion, cooperation, and relationships.<sup>87</sup>

Also, the ethic of care involves communication, involving discussion and listening.<sup>88</sup> Listening to the different voices within the organization or impacted by the decision arguably assists in informed decision analysis and making.<sup>89</sup> In listening

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80. GILLIGAN (1982), *supra* note 1, at 28–9; John Dobson, *The Feminine Firm: A Comment*, 6 BUS. ETHICS Q. 227, 227–28 (1996); E. Sharon Mason & Peter E. Mudrack, *Gender and Ethical Orientation: A Test of Gender and Occupational Socialization Theories*, 15 J. BUS. ETHICS Q. 599, 599 (1996); Dawson, *supra* note 59, at 68.

81. GILLIGAN, *supra* note 1, at xiv.

82. *Id.* at 30, 73, 173–74.

83. Linsley & Slack, *supra* note 35, at 287.

84. Liedtka, *supra* note 35, at 185.

85. Roxas & Stoneback, *supra* note 51, at 150.

86. LARSON & FREEMAN, *supra* note 10.

87. R. Edward Freeman & Daniel R. Gilbert, Jr., *Business, Ethics and Society: A Critical Agenda*, 31 BUS. & SOCIETY 9, 14 (1992); Brian K. Burton & Craig P. Dunn, *Feminist Ethics as Moral Grounding for Stakeholder Theory*, 6 BUS. ETHICS Q. 133, 133 (1996); Dawson, *supra* note 59, at 68. Stakeholder is defined as any person who is or can be affected by the organization and its activities. Goodpaster, *supra* note 40, at 54.

88. Liedtka, *supra* note 35, at 180.

89. Robbin Deery, *Toward a Feminist Firm: Comments on John Dobson and Judith White*, 6 BUS. ETHICS Q. 101, 101 (1996). Considerable research supports that diversity results in companies that are better governed and better

to the thoughts and positions of others, the decision maker no longer needs to imagine the thinking of others.<sup>90</sup> He can actually hear this thinking directly. Furthermore, the ethic of care through listening shines light on the silent or silenced group

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managed with better prospects for long-term growth. See JOANNA BARSH & LAREINA YEE, MCKINSEY & CO., UNLOCKING THE FULL POTENTIAL OF WOMEN IN THE U.S. ECONOMY 5 (2011), [http://www.mckinsey.com/Client\\_Service/Organization/Latest\\_thinking/Unlocking\\_the\\_full\\_potential.aspx](http://www.mckinsey.com/Client_Service/Organization/Latest_thinking/Unlocking_the_full_potential.aspx); AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 58–64 (2015); Renée B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 291–303 (2009); Lissa L. Broome et al., *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 763–64 (2011); Seletha R. Butler, *All on Board! Strategies for Constructing Diverse Boards of Directors*, 7 VA. L. & BUS. REV. 61, 73–80 (2012); Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 795–796 & 831 (2005); Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583, 1587 (2004); Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 382–401 (2014). There is even support from a top corporate regulator favoring diversity within corporate leadership. See Public Statement of Luis A. Aguilar, Comm'r, U.S. Sec. & Exch. Comm'n, Dissenting Statement on the Final Interagency Policy Statement: Failing to Advance Diversity and Inclusion (June 9, 2015), <http://www.sec.gov/news/statement/dissent-inter-agency-policy-statement-diversity.html>; Luis A. Aguilar, Comm'r, U.S. Sec. & Exch. Comm'n, Statement by SEC Commissioner: The Abysmal Lack of Diversity in Corporate Boardrooms is Growing Worse (May 2, 2011), <https://www.sec.gov/news/speech/2011/spch050211laa.html> [hereinafter Aguilar, *Abysmal Lack of Diversity*]. Commissioner Aguilar on several occasions stated his support of diversity within corporate America, including his disdain for the lack of diversity in corporations and within the SEC. Luis A. Aguilar, Comm'r, U.S. Sec. & Exch. Comm'n, Address to Women's Executive Circle of New York, Merely Cracking the Glass Ceiling is Not Enough: Corporate America Needs More than Just a Few Women in Leadership (May 22, 2013), <http://www.sec.gov/News/Speech/Detail/Speech/1365171515760>; Luis A. Aguilar, Comm'r, U.S. Sec. & Exch. Comm'n, Setting Forth Goals for 2015: Address to Practicing Law Institute's SEC Speaks in 2015 Program (February 20, 2015), <http://www.sec.gov/news/speech/022015-spchclaa.html> [hereinafter Aguilar, *Setting Forth Goals for 2015*]. He stated that "Even though there are more qualified diverse candidates for corporate board seats than ever before, fewer of these candidates are being chosen for corporate board seats. Even though our nation has grown more diverse, the corporate boardroom is proving resistant to change." Aguilar, *Abysmal Lack of Diversity*.

90. Derry, *supra* note 88.

bringing forth experiences of the group.<sup>91</sup> The decision maker's inclusiveness is important to the decision making process because his values often set the physical and psychological organizational environment.<sup>92</sup>

Finally, although one may easily envision individual organization actors caring, scholars debate whether or not organizations themselves can care.<sup>93</sup> Some research suggests that individuals within an organization can care and the organization's involvement, by incorporating caring actions into the corporate strategies and policies,<sup>94</sup> is encouraging such caring.<sup>95</sup> Johnson & Johnson's bedding its credo into the organization and taking in line action in the 1982 and 1986 cyanide tampering crises exemplifies this point. In 1943, Robert Wood Johnson, a member of Johnson & Johnson's founding family and former chairman from 1932 to 1963, crafted the company's credo. Generally, the credo challenges Johnson & Johnson and its employees to put the needs and well-being of the people they serve first.<sup>96</sup>

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91. LARSON & FREEMAN, *supra* note 10, at 129–35.

92. Derry, *supra* note 88, at 106.

93. NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION 186 (1984); Liedtka, *supra* note 35, at 187; William A. Kahn, *Caring for the Caregivers: Patterns of Organizational Caregiving*, 38 ADMIN. SCI. Q. 539, 561 (1993); EDWARD R. SHAPIRO & A. WESLEY CARR, LOST IN FAMILIAR PLACES: CREATING NEW CONNECTIONS BETWEEN THE INDIVIDUAL AND SOCIETY (1991).

94. See Liedtka, *supra* note 35, at 186–87.

95. See Liedtka, *supra* note 35, at 183–88.

96. JOHNSON & JOHNSON, *Our Credo Values*, <http://www.jnj.com/about-jnj/jnj-credo/> (last updated Oct. 16, 2015). Johnson & Johnson's Credo Values:

We believe our first responsibility is to the doctors, nurses and patients, to mothers and fathers and all others who use our products and services. In meeting their needs everything we do must be of high quality. We must constantly strive to reduce our costs in order to maintain reasonable prices. Customers' orders must be serviced promptly and accurately. Our suppliers and distributors must have an opportunity to make a fair profit.

We are responsible to our employees, the men and women who work with us throughout the world. Everyone must be considered as an individual. We must respect their dignity and recognize their merit. They must have a sense of security in their jobs. Compensation must be fair and adequate, and working conditions clean, orderly and safe. We must be mindful of ways to help our employees fulfill their family responsibilities. Employees must feel free to

As in building a house or technology program, in training the individual for the dual ethical analysis, the trainer must lay a solid foundation. In the dual ethical analysis, I conceptualize caring about the impacted parties as the bedrock for decision analysis. By analogy, with the ethic of care representing a bedrock rather than sand foundation, the ethic of care would be a strong foundation for decision analysis. As sometimes occurs, a situation, such as a storm, may knock the structure from the foundation. The home is destroyed. However, with the bedrock, the homeowner can rebuild the structure. Similarly, with the ethic of care in the dual ethical analysis being the strong foundation, if, and most likely, when an individual decision maker experiences the challenges of the wind or storm, his ethical foundation remains strong. Going back to the ethic of care foundation, he can regroup and rely on the ethic of care to make a positive business ethics choice. Even if he completely stumbles, the strong ethic of care foundation remains when the individual has to make a total rebuild following a poor ethical choice.

Next, I look at the cared for in the ethic of care relationship. In a given situation, the cared for may be multi-dimensional, and could include suppliers, customers, and the community.

Further, I discuss the organizational actor or care provider. Foundationally, under the ethic of care, the decision maker must see the impacts of his actions. Thereby, he must

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make suggestions and complaints. There must be equal opportunity for employment, development and advancement for those qualified. We must provide competent management, and their actions must be just and ethical.

We are responsible to the communities in which we live and work and to the world community as well. We must be good citizens - support good works and charities and bear our fair share of taxes. We must encourage civic improvements and better health and education. We must maintain in good order the property we are privileged to use, protecting the environment and natural resources.

Our final responsibility is to our stockholders. Business must make a sound profit. We must experiment with new ideas. Research must be carried on, innovative programs developed and mistakes paid for. New equipment must be purchased, new facilities provided and new products launched. Reserves must be created to provide for adverse times. When we operate according to these principles, the stockholders should realize a fair return.

understand that he makes a choice in ethical analysis and decision making which comes with ramifications. "The essence of moral decision is the exercise of choice and the willingness to accept responsibility for that choice."<sup>97</sup>

Finally, in advocating for ethic of care as the foundation for the dual ethical analysis, I do not propose that ethic of care involve individual selflessness or the individual loss of psychological vitality and courage. But, I caution that the decision maker must be self-aware. He must understand the potential overpowering nature of these traits to the detriment of making ethical choices.<sup>98</sup>

*Ethic of Care Criticisms.* First, a criticism of the ethic of care is that it has no objective evaluation methodology which leads to arbitrary analysis and capricious results.<sup>99</sup> Critics of this subjective analysis process may argue that it is rooted in philosophy with a religious slant. Thus, ethic of care critics advocate for analysis, judgment and decision making by objective principles of obligations and rights.<sup>100</sup> The objective principle would be some uniform theoretical foundation that all can agree guides right and wrong ethical behavior.<sup>101</sup> Because I can envision the impossibility of such universal construct, this objective over subjective criticism also can be an advantage of the ethic of care as a foundation for ethical decisions. The below defense section sets forth this argument.

Secondly, critics question if the ethic of care will work for an entity. They argue that organizations cannot care; only individuals have the capacity to care.<sup>102</sup> This criticism however is refutable by acknowledging the partial truth to such belief. Yes, individuals are the actor for caring; however, the underlying organization should actively support the organization actors in engaging in and implementing ethic of care activity.<sup>103</sup> It provides that business ethics commences with individual integrity and good policy and governance follows from organiza-

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97. GILLIGAN, *supra* note 1, at 67.

98. See Gilligan, *Women's Conceptions*, *supra* note 54, at 512-513. Gilligan cautions that selfishness, lacking psychological vitality, courage and self-awareness is a slippery slope to missing the ethic of care. *Id.*

99. Burton & Dunn, *supra* note 86, at 138-40; HELD, *supra* note 77, at 75.

100. HELD, *supra* note 77, at 75.

101. Lewis, *supra* note 2, at 378.

102. Machold et al., *supra* note 73, at 673.

103. *Id.* at 673.

tional leadership, encouragement, and cultivation of such personal virtue.<sup>104</sup>

A third criticism is about the impersonal nature of organizations as their size and geographic scope expand. With the increase in size and culture complexity of multinational organizations, these relationships between and among individuals of the organization become more impersonal or non-existent.<sup>105</sup> Thus, arguably, the ethic of care is difficult if not impossible as a moral monitor of organization actor behavior.<sup>106</sup> As the earlier Johnson & Johnson example on the use of its credo values to guide the organization and its employees demonstrates, size does not restrain an organization from successfully implementing a caring and moral culture.

A fourth criticism is that organization actors often wear blinders in that they act on the instruction of or out of fear and displaced loyalty to the supervisor.<sup>107</sup> They “internalize a pre-existing social order they find in business corporation.”<sup>108</sup> Thus, even if the actor desires to act with care—compassion and empathy for the applicable stakeholders—he does so out of conformity to authority and organizational culture. As I discuss elsewhere in this article, organization leadership and culture can address the second, third and fourth criticism.

The next criticism related to the group think phenomenon. Most people, so the theory goes, fail to analyze and make principled independent decisions.<sup>109</sup> Some research indicates the incapacity of individuals to possess beliefs on which they can think autonomously without relying on outside guidance for thinking and decisions.<sup>110</sup> Such literature supports the notation of group think and uniform and non-independent thinking within organizations. Because arguably the ethic of care is a principled concept, ordinary persons may be unable to engage in ethic of care analysis. I do not refute the concept

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104. Solomon, *supra* note 6, at 321–23.

105. John Dobson, *The Role of Ethics in Global Corporate Culture*, 9 J. BUS. ETHICS 481, 485 (1990).

106. *Id.* at 486.

107. Art Wolfe, *Reflections on Business Ethics: What Is It? What Causes It: And, What Should a Course in Business Ethics Include?*, 1 BUS. ETHICS Q. 409, 409–410 (1991).

108. *Id.* at 425.

109. Treviño & Brown, *supra* note 38, at 72.

110. *Id.*

that persons may make analysis and decisions to avoid punishment or based on the expectations of others. However, I would not discount persons from having the aptitude, courage, and desire to engage in ethic of care analysis. Theoretically, we all may not be leaders, but we all have the ability to learn about, assess and implement qualities of ethic of care. Leaders would then guide those transformed individuals to ethical behavior with ethic of care as the bedrock.

A final mentioned criticism of the ethic of care is what I label the feminist scar. Some view the ethic of care as a feminist concept. Because of historical linking of the ethic of care to women's studies and the lack of connecting women's studies to corporate governance and ethics, many in business dismiss the ethic of care as business irrelevant. Continued progress around diversity in business and progressive thinking and actions hopefully will eliminate this antiquated mindset.

*Ethic of Care Defenses.* A defense of the ethic of care is that the firm is a nexus of relationships between and among firm stakeholders.<sup>111</sup> The noted corporate governance frameworks of principal-agent relationship, multilateral relationship, and contractarian stakeholder theory, among others, demonstrate the firm relationship platform.<sup>112</sup> Given the rising interest of stakeholder theory in business, the ethic of care may result in increasing support of stakeholder theory importance.

Secondly, it is arguably impossible to develop a universal foundation for determining morally right and wrong behavior. Because there is no standard model to say "X" is always morally right, and "Y" is always morally wrong, focusing on retained, positive relationships is important. Thus, by training, encouraging, and uplifting the ethic of care as the foundation of the dual ethical analysis, persons can use their existing and learned understanding of caring for others (such as stakeholders) as the foundation for decision analysis. With the ethic of care as the foundation, decision making can move from the need for a bright line measure where in all matters "X" is right and "Y" is wrong.

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111. Machold et al., *supra* note 73, at 673.

112. *Id.* Machold in his Feminist Governance Model discussed the firm as a network of relationships. *Id.*

Third, research supports that the ethic of care enhances the effectiveness and moral quality of organizations.<sup>113</sup> One reason is that the ethic of care centers upon relationship development and enhancement that results in stronger networks, which are important for effective organizational management.<sup>114</sup> These relationships require action from the actors in order to flourish; they cannot be left to inaction to grow and continue.<sup>115</sup>

Next, the ethic of care gets to the root cause of the problem. Looking at the cause helps correct and guide better ethical behavior. This is in contrast to arguments that justice based platforms such as codes of conduct and other ethics programs and the law fail to understand or address the underlying cause of misconduct. The ethic of care addresses the cause by acknowledging, taking responsibility, and acting.<sup>116</sup> The ethic of care is successful in attacking the root cause of issues because the actor or organization acknowledges, apologizes, and acts which can be seen in the Johnson & Johnson example discussed earlier.

When a supervisor trusts employees to make less self-serving and more long-term decisions, the organization theoretically spends less money on monitoring employee action and coordinating employee behavior. A second area of cost savings could be found in the area of compliance with broad, far-reaching, (and punitive,) laws and regulations. If organizations use ethic of care to help make positive ethical decisions which result in less governance failures, political and social advocates may reduce command and control campaigns and actions to get organizations to behave in a way benefiting stakeholders.<sup>117</sup> Further, better-behaved organizations will not have to spend on rebuilding their reputations following liability,

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113. See Linsley & Slack, *supra* note 35, at 287; Liedtka, *supra* note 35, at 179–180.

114. Linsley & Slack, *supra* note 35, at 286; see also David C. Bauman, *Evaluating Ethical Approaches to Crisis Leadership: Insights from Unintentional Harm Research*, 98 J. BUS. ETHICS 281 (2011); Per Sandin, *Approaches to Ethics for Corporate Crisis Management*, 87 J. BUS. ETHICS 109 (2009); Sheldene Simola, *Ethics of Justice and Care in Corporate Crisis Management*, 46 J. BUS. ETHICS 351 (2003).

115. Linsley & Slack, *supra* note 35, at 286.

116. *Id.* at 287.

117. Lynn Sharp Paine, *Does Ethics Pay?*, 10 BUS. ETHICS Q. 319, 321 (2000).

scandal, or public outcry of corporate activity or quality.<sup>118</sup> Ideally, if the organization and its actors are truly operating with ethic of care and the public knows, understands, and believes in the authenticity of this behavior, these actions may prevent negative images and potential reputation rebuilding resulting if there is a product quality or service problem.

Finally, there is an embracing of human relationships when looking at ethical analysis through the eyes of the ethic of care. In many respects, moral problems may be seen as problems of human relations, which require different ways of addressing conflict resolution.<sup>119</sup> For example, one can look simply at the history of civil and human rights and public education integration and the solutions found to address such segregation and inequality challenges. It was Robert Woodruff's care for the City of Atlanta's advancement from an economic and social perspective that caused him to ensure that the dinner honoring Reverend Dr. Martin Luther King, Jr.'s 1964 Nobel Peace Prize was well attended and peaceful.<sup>120</sup> By signaling his support for the King dinner and using his business influence to effect positive ethical behavior, Woodruff was influential in making the King dinner successful.<sup>121</sup>

#### B. *Ethic of Justice: Rationale Component*

The ethic of justice is referred to as a market based or structural approach to ethics.<sup>122</sup> It emphasizes universal positions or abstract rules on ethics, rather than individuals, and the relationships between them.<sup>123</sup> More specifically, ethic of justice is about addressing ethical dilemmas in terms of justice, rights, and rules.<sup>124</sup> Under the ethic of justice, persons solve moral issues through rules and individual rights.<sup>125</sup> The com-

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118. *Id.* at 320–21.

119. GILLIGAN, *supra* note 1, at xix.

120. See Jim Burrell, *The Time Coca-Cola Got White Elites in Atlanta to Honor Martin Luther King, Jr.*, NPR (Apr. 4, 2015, 9:12 AM), <http://www.npr.org/sections/codeswitch/2015/04/04/397391510/when-corporations-take-the-lead-on-social-change>.

121. *Id.*

122. See Roxas & Stoneback, *supra* note 51, at 150.

123. See HELD, *supra* note 77, at 190; Burton & Dunn, *supra* note 86, at 137–38.

124. See Dawson, *supra* note 59, at 68.

125. See GILLIGAN, *supra* note 1, at 73; Dobson, *supra* note 79, at 227; Mason & Mudrack, *supra* note 79, at 599; Dawson, *supra* note 59, at 68.

mand and control method associated with the ethic of justice is respecting individual rights and abiding by provided and policed responsibilities.

Since the ethic of justice often is more widely supported in business,<sup>126</sup> I limit my discussion of the criticism and defense of the ethic of justice in ethical analysis.

One ethic of justice criticism is the law's inability to completely guide corporate behavior. The law helps when people are too immoral, or when they refuse to engage in ethical behavior voluntarily and such inaction causes harm.<sup>127</sup> However, as noted, the law is often reactive in addressing the inaction and harm. Also, the limitation of the law is visible in economics' free market philosophy. This philosophy argues for less law and regulation as the market can guide proper actor behavior; the free market (or invisible hand) however fails to direct all corporate activity to positive ethical decisions.<sup>128</sup> Thus, to completely rely on the justice concept and its contractual or even free market foundations to guide all behavior is fiction.

A second criticism is that this theory of ethics views all actors equally and impartially.<sup>129</sup> However, we know from a practical perspective such unfettered equality does not exist in business or the world generally. Conceptually all persons may have equal natural rights, but inequality among persons does exist in actuality. Examples of inequality among persons and the shortcomings of only looking at universal and abstract rules to address the issue is visible in modern society. One can look at economic and gender pay inequality and alleged racial civil rights violations being discussed and explored. Take gender pay inequality to exemplify the point. There are federal laws making it illegal to overtly discriminate against women in the workplace.<sup>130</sup> However, gender pay gap exists. Generally,

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126. See Machold et al., *supra* note 73, at 665.

127. See HELD, *supra* note 77, at 114.

128. Kenneth E. Goodpaster & John B. Mathews, Jr., *Can a Corporation Have a Conscience?*, HARV. BUS. REV., Jan. 1982, at 1, 5–6.

129. Burton & Dunn, *supra* note 86, at 142.

130. *E.g.*, Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e (2012)) (prohibiting employment discrimination based on race, color, religion, sex, or national origin); Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2012)) (protecting men and women who perform substantially equal work in the same establishment from sex-based wage discrimination); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2,

full-time working women earn seventy-seven percent less than their male counterparts<sup>131</sup> despite laws prohibiting pay discrimination between the sexes. Thus, the concept is the ethic of justice may not always address inequalities and the ethic of care may be a better foundational solution.

In light of the criticisms, there is a major defense of the ethic of justice. The ethic of justice has objectivity which is an important aspect to decision analysis. Businesses and their actors often find comfort in having objective guidance and measures of proper behavior. Thus, the rule and rights based framework for ethic of justice is a benefit.

#### IV. DUTY OF CARE

Today's corporate environment, particularly for publicly-traded companies, is increasingly litigious, subject to shareholder and government pressure and intervention. I postulate that the dual ethical analysis can assist officers and directors in meeting their fiduciary duty of care in this increasingly active arena.

As established by case law, the directors and officers of a corporation owe the fiduciary duties of care and loyalty to the shareholders of the organization in a shareholder-held organization.<sup>132</sup> Practically, being found liable by a court for breaching the fiduciary duties is a minimal risk because of the business judgment rule.<sup>133</sup> The business judgment rule presumes that officers and directors make informed and good faith business decisions that are in the best interest of the organization

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123 Stat. 5 (codified at 29 U.S.C. §§ 621, 626, 633a, 791, 794 and 794a, 42 U.S.C. §§ 12111, 12117, 12203, 1981a, 2000d, 2000e, 2000e-16 and 2000e-5) (stating that the 180-day statute of limitations for filing an equal-pay lawsuit regarding pay discrimination resets with each new paycheck affected by that discriminatory action).

131. Eileen Patten, *On Equal Pay Day, Key Facts About the Gender Pay Gap*, PEW RESEARCH CTR. ONLINE (Apr. 14, 2015), <http://www.pewresearch.org/fact-tank/2015/04/14/on-equal-pay-day-everything-you-need-to-know-about-the-gender-pay-gap/>.

132. Butler, *supra* note 88, at 67–68.

133. *Id.* at 68.

unless that plaintiff otherwise can prove the agent committed fraud, acted with gross negligence or if or self-dealing exists.<sup>134</sup>

Corporate law generally demonstrates that directors and officers thus shield themselves behind the business judgment rule in much decision making. However, officers and directors must meet their fiduciary duties for such shielding. This means that directors with respect to its reporting officers and officers with respect to its employee reports, must monitor the activities of those subordinates including illegal and unethical conduct.<sup>135</sup> As Prentice in his behavioral ethics work discusses, these fiduciaries must recognize actor vulnerabilities and keep eyes and ears open for indiscretions and unethical lapses by the organization's actors.<sup>136</sup>

The obligation to listen could be seen as part of the scope of an officer or director of an organization meeting his/her fiduciary duty. In order for a fiduciary duty holder to make an informed and reasonable decision, arguably he must perform some level of due diligence before making such decision. I thus argue that such due diligence obligation includes obtaining and listening to input of relevant stakeholders. This is why operating under the ethic of care can assist with one's duty of care obligation.

Undesirable or unexpected turnover in a corporation can have negative consequences on the organization. Such consequences could be the loss of productive employees that are difficult or impossible to replace and institutional knowledge that cannot be recorded or retained. Other turnover consequence may be the expense of recruiting and training and negative impact on customer and supplier relationship because of the turnover. In using the ethic of care as the foundation of the dual ethical analysis, the organization may be able to reduce undesired turnover because employees may feel more committed to the organization given the stakeholder focused ethical position. Thus, increased employee retention, eliminating the costs and negative consequences from em-

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134. Yaniv Grinstein & Stefano Rossi, *Good Monitoring, Bad Monitoring* 1 (European Corp. Governance Inst., Working Paper No. 418, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1906326](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1906326).

135. Robert A. Prentice, *Good Directors and Bad Behavior*, 55 *BUS. HORIZONS* 535, 539–40 (2012).

136. *Id.* at 540.

ployee turnover arguably, assists applicable agents in meeting their duty of care fiduciary duty to the organization.

## V.

### DUAL ETHICAL ANALYSIS IMPLEMENTATION

Some proponents for implementing cultural change advocate to shame, guilt or involuntarily force persons into acting ethically.<sup>137</sup> To integrate the dual ethical analysis throughout an organization, my conceptual framework moves from the shame game to a system of “consciousness-raising” as the better approach.<sup>138</sup> This means changing the way organization actors think about and engage in organizational activities.<sup>139</sup>

The dual ethical analysis implementation proposals for raising the conscience of organizational actors about dual ethical analysis are training, transparency, communication and engagement, management accounting and accountability, and proactive leadership involvement.

#### A. *Training*

First, successful organizational change requires actual and visible support from top management including their acknowledged support of such change.<sup>140</sup> Thus, organizational leadership should invest time and funds for the conceptual and practical training program to get all or the applicable employees understanding the concept and use of dual ethical analysis in decision making. Funds need to be allocated and applied. However, leadership also must be an active force and participate in promoting the program and the related training.

Next, ethical awareness and identification are critical because the actor must recognize the existence of an ethical dilemma in order to successfully address one.<sup>141</sup> Literature indicates that ethical awareness and identification can improve the actor’s ability to engage in processes of ethical decision mak-

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137. See HELD, *supra* note 77, at 178–82.

138. In seeking gender equality in business, feminist democracy action platforms used this consciousness-raising tactic. See *id.*

139. *Id.*

140. Seletha R. Butler & Valerie Njiiri, *Higher Education Governance: Proposals for Model Child Protection Governance Policy*, 2015 BYU EDUC. & L.J. (forthcoming 2015) (manuscript at 26).

141. Treviño et al., *Behavioral Ethics in Organizations: A Review*, 32 J. MGMT. 951, 953 (2006).

ing.<sup>142</sup> Parties may not recognize ethical dilemmas.<sup>143</sup> Thus, part of the training must be teaching ethical dilemma recognition. Training should also provide dialogue with a diverse group of persons from inside and outside the organization, (such as internal organization representatives from all levels, outside agents such as attorneys, current or former regulatory authority members, and other parties relevant to the scenario training) and include scenarios. Scenarios could include some of the following training questions:

- Does an ethical issue exist in this scenario?
- How would you handle this ethical dilemma?
- Where should you report the matter internally, and if externally, how would you do such?<sup>144</sup>

### B. *Transparency*

In many instances public-policy regimes advocate for greater transparency versus cost-benefit concerned platforms that point out the negative consequences of transparency.<sup>145</sup> Transparency advocating scholars<sup>146</sup> indicate that disclosure increases markets, public discourse and citizen empowerment. Countering scholars argue that transparency policies are ineffective and counter-productive. Such scholars, in their work on the cost and benefit of information disclosure, report that being transparent results in both negatives and positives for the organization.<sup>147</sup>

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142. *Id.* at 959.

143. Treviño & Brown, *supra* note 38, at 70.

144. Dawn-Marie Driscoll, *Ethics and Corporate Governance: Lessons Learned From a Financial Services Model*, 11 BUS. ETHICS Q. 145, 155 (2001).

145. Benjamin E. Hermalin & Michael S. Weisbach, *Information Disclosure and Corporate Governance*, 67 J. FINANC. 195, 196 (2012).

146. The transparency argument that disclosure is good dates back to the early 1900s with positions by corporate governance notables, Berle and Means in 1932. *Id.* at 195–96.

147. *Id.* Positives of transparency include: (a) reducing information asymmetry between insiders and outsiders of the firm can facilitate a firm's ability to issue securities, lowering the firm's cost of capital because fear of trading against those with inside information could reduce trading; (b) reduction of blatant fraud and insider theft; and (c) better manager monitoring. Negatives of transparency include: (a) increase in costs to the firm to disclose; (b) harm to the firm's competitive advance; and (c) greater manager monitoring can result in value-reducing activities. *Id.*

Positively, the Johnson & Johnson 1982 Tylenol tampering case is an example of how a company benefits from being transparent in a social responsibility issue. Upon Johnson & Johnson discovering the Chicago area deaths from Tylenol Extra-Strength capsules laced with cyanide, the company focused on protecting the public. It communicated nationally to consumers about the problem, instructing them to halt consumption of any Tylenol product until further notified. Johnson & Johnson took broad action even though the contamination was thought to be limited to Tylenol Extra-Strength. Johnson & Johnson also communicated its strategy to the public, which included removing all Tylenol capsules from all shelves nationwide. With its actions, the Tylenol tampering matter has been described by some scholars as the model for crisis management because the company timely communicated to the public and took accountability for the company's product even though it may not have been the direct reason for the tampering.<sup>148</sup>

Even with case studies of companies taking ethical actions, organizations and persons however often desire to forgo disclosing breaches. Reasons may include the risk and reactions resulting from such disclosure. For example, in Walmart's alleged bribery campaign in Mexico, by leading the public disclosure of the matter, Walmart and its officers may have fared better from a potential civil and criminal liability and publicity perspective. As of the third quarter of 2014, Walmart's spending on investigations into alleged Foreign Corrupt Practices Act violations in Mexico, China, India and Brazil is \$381 million.<sup>149</sup> Walmart could have decided against disclosure given its belief of negative consequences with such transparency. However, its actions are costing the shareholders millions.

### C. *Communication and Engagement*

As with any organizational change, whether policy implementation or general cultural shift, proper dissemination of information and flow of communication are essential for the

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148. Markel, *supra* note 28; Mitchell, *supra* note 31.

149. WAL-MART STORES, INC., NOTICE OF 2014 ANNUAL SHAREHOLDERS' MEETING AND PROXY STATEMENT 80 (2014).

successful implementation of the change.<sup>150</sup> Thus, the dual ethical analysis to have a chance of success must be effectively communicated within the organization. Corporate communications should be a part of the strategy implementation as soon as possible. Depending on the change's complexity, the organization may handle communications internally, externally or both.

Despite the source and flow of the communication conveyance, the communications scope and detail must be specifically tailored to the information being disseminated and to its intended audience. Significant information requires more detail with guidance on its importance and how to apply and utilize it.<sup>151</sup> Communications need to explain how the dual ethical analysis applies to the employees daily functioning and why it is important for all stakeholders for its proper compliance. The communication also should be bottom-line communication, meaning that it needs to be short, direct, and with action verbs, and to the extent possible, foreclose any ambiguity in interpretation.<sup>152</sup> The message should not be hidden and passive.

#### D. *Management Accounting and Accountability*

A corporation, through its management, must engage in and ensure employee compliance with laws and policies, including employee engagement in ethical behavior. One way to accomplish this is by building a culture of integrity within the organization and demonstrating non-tolerance with violating it.<sup>153</sup> While this is easier said than done, as Currell and Bradley point out, “[i]ntegrity capital’ is embedded in the culture . . . and it helps shape employee behavior . . . . It is driven by five key factors: Management takes action when it becomes aware of misconduct. Employees are comfortable speaking up about misconduct and don’t fear retaliation. Senior leaders and managers treat employees with respect. Managers hold employees accountable. High levels of trust exist among col-

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150. Butler & Njiiri, *supra* note 139, at 33.

151. MICHAEL B. GOODMAN & PETER B. HIRSCH, *Chapter 5: Tools and Techniques for Internal Corporate Communication*, in CORPORATE COMMUNICATION: STRATEGIC ADAPTATION FOR GLOBAL PRACTICE 53, 70 (2012).

152. *Id.* at 67.

153. Butler & Njiiri, *supra* note 139, at 26.

leagues.”<sup>154</sup> They go on to explain that management must be swift and specific in acknowledging and reprimanding wrongdoing to garner respect and stability of this integrity centered culture.<sup>155</sup>

#### E. *Proactive Leadership Involvement*

For dual ethical analysis to work and a positive ethical organizational culture to exist, leadership must be sincerely and directly committed to fostering the environment and implementing the program. Leadership must have a real and realistic desire to implement and enforce the culture of dual ethical analysis. Directors and management at all levels must be present, visible, and set a positive example regarding ethical behavior in the organization. They should avoid the fray and excuse that ethics is only personal to the individual actor and no one can teach, encourage, or demand ethical behavior from organizational performers. As Paine states in writing about managing organizational integrity, “Managers must acknowledge their role in shaping organization ethics and seize this opportunity to create a climate that can strengthen the relationships and reputations on which their companies’ success depends.”<sup>156</sup>

Research and practical evidence demonstrate that organizational culture, including incentives and custom can contribute to unethical behavior. In the face of K–12 education reform and increasing pressure for student enrollment and school performance in a shrinking student market and public funding environment, certain education professionals in the Atlanta Public School System were charged with cheating on state-administered Criterion-Reference Competency Tests (CRCT) by changing student test answers to increase performance rates (the APS Scandal).<sup>157</sup> The education professionals convicted in the APS Scandal are appealing the convictions. The APS Scandal unfolded when the *Atlanta Journal-Constitution* revealed the CRCT results which allegedly are sta-

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154. Dan Currell & Tracy Davis Bradley, *Greased Palms, Giant Headaches*, HARV. BUS. REV., Sept. 2012, at 21, 22.

155. *Id.* at 23.

156. Lynn Sharp Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.–Apr. 1994, at 106, 106.

157. Flock, *supra* note 70.

tistically unlikely test scores for the involved time periods.<sup>158</sup> Some of the wrongdoers admitted that the pressurized climate to meet the performance targets on which bonuses and possible negative evaluation or termination hinged led to the misconduct.<sup>159</sup> With top leadership possibly involved in the APS Scandal or at least actively engaged with fostering unethical testing practices, employees were left to make decision analysis and actions in light of critical performance pressures.

## VI.

### THEORETICAL AND PRACTICAL CONTRIBUTIONS

This conceptual discussion adds a number of both theoretical and practical contributions to the ethics and corporate governance literature.

#### A. *Theoretical*

First, theoretically, this discussion adds value because it seeks to establish, retain, and reestablish, if lost, trust in businesses by its stakeholders. Trust is key to morality.<sup>160</sup> Thus, for continued stakeholder support of the organization, it needs to establish, retain, and reestablish individual trust.

Secondly, ethical choices drive the survival of the organization, so managing ethics and ethics programs is essential.<sup>161</sup> Thus, the organization's longevity may depend on getting the best possible ethics culture in place. This survival outlook is especially relevant as stakeholders' expectations of positive ethical activity by an organization and its actors mature and increase. This is especially true as companies seek to use ethics as a competitive advantage. Integrity is an important component of business productivity and performance<sup>162</sup> despite the

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158. John Perry & Heather Vogell, *Are Drastic Swings in CRCT Scores Valid?*, ATLANTIC J. CONST. (July 15, 2011, 12:00 PM), <http://www.ajc.com/news/news/local/are-drastic-swings-in-crct-scores-valid/nQYQm/>.

159. Flock, *supra* note 70.

160. HELD, *supra* note 77, at 37, 52.

161. Max B. E. Clarkson, *A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance*, 20 ACAD. MGMT. REV. 92, 112–13 (1995).

162. See Werner Erhard et al., *Integrity: A Positive Model That Incorporates the Normative Phenomena of Morality, Ethics, and Legality* 1–2, 77, 89 (Harvard Bus. Sch. NOM, Working Paper No. 06-11, 2014).

fact that economists ignore or fail to recognize the monetary value of integrity.<sup>163</sup>

### B. *Practical*

First, the difficulty of allocating and enforcing personal liability against corporate actors committing misconduct is practically why the dual ethical analysis is important. As recently reported by a global news outlet regarding the General Motors' ignition switch alleged defect matter, it is challenging if not impossible to pin-point and lay personal responsibility for corporate action on the parties committing malfeasance, misfeasance or nonfeasance as applicable.<sup>164</sup> One reason for such difficulty is because responsibility for corporate decision making falls throughout the organization.<sup>165</sup> Particularly, in many publicly revealed corporate misconduct matters, senior officers and directors often fail to take responsibility or are not held responsible for the corporate misdeed.<sup>166</sup> Although in some instances, lower level employees serve as the scapegoat

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163. *Id.* at 2. For simplicity purposes in this article, I equate integrity to this business ethics discussion without getting into Erhard and his co-author's discussion of the differences. Erhard and his co-authors distinguish between integrity, morality, ethics, and legality. Below is an excerpt from their work describing the differences.

The philosophical discourse, and common usage as reflected in dictionary definitions, leave an overlap and confusion among the four phenomena of integrity, morality, ethics, and legality. This overlap and confusion confound the four phenomena so that the efficacy and potential power of each is seriously diminished. In this new model, we distinguish all four phenomena—integrity, morality, ethics, and legality—as existing within two separate realms. Integrity exists in a *positive* realm devoid of normative content. Integrity is thus not about good or bad, or right or wrong, or what should or should not be. Morality, ethics and legality exist in a *normative* realm of virtues (that is, they *are* about good and bad, right and wrong, or what should or should not be). Furthermore, within their respective realms, each of the four phenomena is distinguished as belonging to a distinct and separate domain, and the definition of each as a term is made clear, unambiguous, and non-overlapping. *Id.*

164. *See* Henning, *supra* note 71.

165. *See id.*

166. *See id.*

with employment termination or resignation.<sup>167</sup> Thus, as discussed in the implementation section of this article, organizations must bake dual ethical analysis throughout the organization with a high authority such as the company's board of directors having ultimate oversight and determination of the success of the program. This board responsibility may be indirect with its direct report, possibly chief ethics officer, being directly in charge of dual ethical analysis implementation and evaluation.

Secondly, a practical implication of this article's framework is the public policy implications of the dual ethical analysis. Paraphrasing Lily Safra of the Edmond J. Safra Foundation, in valuing humanity and justice, ethics must be included in all policy discussions and fields of study.<sup>168</sup> Although developed for an organization structure, dual ethical analysis may be used as a model for institutional policies or evaluated by commissions or standards organizations in setting benchmarks and blue ribbon commission recommendations. The overarching point is that getting businesses involved in and accountable for positively guiding morals and values, including the public policy around ethics, is important for advancing a more just and relationship-centric society.

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167. Although this article does not address these, the difficulty in establishing the criminal elements for corporate actor liability and the limitation of the corporate officer doctrine are two other reasons for the inability to hold corporate actors personally liable for corporate misdeeds. The early 2000s HealthSouth accounting scandal is one example. HealthSouth employee scandal participants admitting or suspected to be involved in the scandal either resigned or were fired (including CEO Richard Scrushy) from HealthSouth, and some were convicted. Associated Press, *Scrushy Participated in Scheme, Ex-CFO Says*, L.A. TIMES, Feb. 2, 2005, <http://articles.latimes.com/2005/feb/02/business/fi-scrushy2>. For profiles of the five HealthSouth CFOs and ten "family members" who pled guilty to federal charges in connection with fraud, see <http://www.al.com/specialreport/birminghamnews/healthsouth/guilty.jpg>. Scrushy continuously denied involvement in the scandal, and was charged but acquitted of fraud charges related to participating in the scandal. See Kadesha Thomas, *From Wall Street to Prison: The HealthSouth Story*, CHI. BOOTH NEWS, May 31, 2011, <http://www.chicago-booth.edu/news/2011-05-31-healthsouth.aspx>.

168. Thomas Kaplan, *With Gift, Harvard to Study Institutional Corruption*, N.Y. TIMES: DEALBOOK (Oct. 19, 2010, 12:01 AM), <http://dealbook.nytimes.com/2010/10/19/with-gift-harvard-studies-institutional-corruption/>.

## VII. FUTURE RESEARCH

As expressed in this article, it is increasingly important to look at corporate governance from more than a legal perspective. Business ethics is important for corporate governance. Therefore, I incorporate and advocate for incorporating business ethics into the corporate governance discussion.

Several follow-up corporate governance research projects can come from this article. First, explore whether a difference exists between “ethics of caring” compared to “ethic of care,” the foundation of our dual ethical analysis. If such difference can be articulated and conceptualized, how will such difference impact the foundation of the dual ethical analysis for which I posit? Secondly, conduct a survey to determine how different organizational decision makers, such as directors, senior management, or non-management employees in a single company or industry, view or understand the ethic of care and ethic of justice in decision making analysis. Third, examine the traits, virtues, actions, and outcomes associated with organizational leaders perceived by the public through a determined benchmark to be “ethical” leaders. If these leaders have written an autobiography or other work describing their take on leadership or what motivated their decision making analysis, see if the leader articulates her or his traits, virtues, or actions under the concepts of ethic of care or ethic of justice. The final further research suggestion is to conduct a manager survey that evaluates managerial recognition of the economic and social benefit of organizational ethical behavior.<sup>169</sup> In direct connection with this article, the survey would focus specifically on the surveyed managers’ recognition of the economic and social organizational benefit of the dual ethical analysis with ethic of care as the foundation.

## CONCLUSION

I argue that the ethic of care is the foundation for consistent and sustainable positive business ethics within an organi-

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169. This final research option is in line with Hosmer’s review of Paine’s work, *Value Shift: Why Companies Must Merge Social and Financial Imperatives to Achieve Superior Performance*. He suggested that Paine should have expanded the anecdotal evidence, supplementing it with managerial insight if such is supportive of Paine’s positions. Hosmer, *supra* note 36, at 786.

zation. In corporate governance, including the business ethics component of governing organizations, sometimes there is no legal violation turning the analysis and decision. There may not be a wrong thing to do legally. But, there may be a best thing to do. In the dual ethical analysis, I posit that relying solely on the ethic of justice will not generate consistent and sustained positive ethics. Focusing solely on the ethic of justice, and thus the battle among individual rights, should be a component of ethical analysis. But, individuals and agents for the organization need an ethical foundation, and organizational leadership needs to strongly embed this foundation throughout the organization.

Also, formal and structured unethical deterrence mechanisms, such as ethics programs, codes of conduct, laws and regulations even those with enforcement structures with teeth, are not full-proof at netting positive ethical organizational and individual actor behavior. As we have seen from prior scandals such as Enron, additional sources of curtailing bad behavior are critical to moving business forward and restoring some of the consumer and public confidence in corporate America. Thus, the ethic of care in decision making is critical for the decision maker.