

21 Health Matrix 189, *

n15 In his recent monograph on director primacy, Stephen Bainbridge invites us to imagine corporate law coming out of a meeting between the parties to the corporate contract around a hypothetical "conference table." BAINBRIDGE, *supra* note 11, at 31. But urging us to think of corporate law as coming out of a conference room invites us to forget one of the most important elements of the nexus of contracts conception, and that is that these are not negotiated terms. The "poetic" nature of the "conference table" abstraction should be highlighted rather than obscured when we talk about corporate law in theory and practice.

n16 Social psychologists refer to the sticky default phenomena as the "endowment effect." See Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 *GEO. L.J.* 1, 41-42 (2004) [hereinafter *The Situational Character*] (reviewing endowment effect); see also KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 16-18 (2006) (recognizing the stickiness of defaults in corporate law).

n17 Donald Langevoort describes part of what I have in mind when I refer to "discourse norms," when he speaks of the "regulat[ion] of human and organization discourse: who determines what meaning can properly be drawn from what someone says or does not say, and with what sort of guidance for making hard judgments about what was meant." Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 *STAN. L. REV.* 87, 124 (1999).

n18 See generally ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (analyzing the power of norms in the extra-legal regulation of conduct); see also Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 *U. PA. L. REV.* 1697 (1995) (critiquing norm-based regulation).

n19 This example is drawn from Stephen Gillers' discussion of the lawyer's ethical obligation of candor to the tribunal in his excellent casebook. STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 401-06 (8th ed., 2009). Neither Gillers nor I intend to be characterizing Clinton's actual statements to his wife in that most personal of conversations. Indeed, the statement "there is no sexual relationship" was really made not by Clinton, but in an affidavit by former Office of the President intern Monica Lewinsky, and later by Clinton's lawyer, William Bennett, when characterizing Lewinsky's affidavit. When Clinton said that "it depends on what the meaning of the word 'is' is" he was responding to a question asking whether Bennett was lying when he said it. *Id.* at 404. Arguably, Clinton was trying to protect his lawyer as much as himself. In her memoir Hillary Clinton states that when reports of Bill's affair broke in January of 1998, "I questioned Bill over and over . . . he continued to deny any improper behavior. . . ." HILLARY RODHAM CLINTON, *LIVING HISTORY* 441 (2003). Later that year, she writes,

he told me for the first time that the situation was much more serious than he had previously acknowledged. He now realized that he would testify that there had been inappropriate intimacy. He told me that what had happened between them had been brief and sporadic. He couldn't tell me seven months ago, he said, because he was too ashamed to admit it and he knew how angry and hurt I would be.

Id. at 466. In his memoir, Clinton writes that when he acknowledged the affair to his wife, "I still didn't understand why I had done something so wrong and stupid; that understanding would come slowly, in the months of working on our relationship that lay ahead." BILL CLINTON, *MY LIFE* 800 (2004).

n20 *Bronston v. United States*, 409 U.S. 352, 358-59 (1973) ("If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.").

n21 See *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967-68 (Del. Ch. 1996) (quoted in *In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d. 106, 122 (Del. Ch. 2009)). The court states:

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