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# Playing in the Sandbox: Moral Development and the Duty of Care in Collaborations between For-Profit and Nonprofit Corporate Persons

Christyne J. Vachon, Esq.\*<sup>1</sup>

Over the history of the corporate entity, U.S. law has evolved to treat the corporate entity as a legal person under the U.S. Constitution. Despite the increased rights granted to the corporation as a legal person, both for-profit and nonprofit corporations have come under considerable scrutiny for misconduct and issues related to corporate governance. When for-profit and nonprofit organizations collaborate together, however, both organizations generally seek to achieve philanthropic good. On the other hand, both organizations and their management are bound by law to fulfill specific duties to their individual constituents. In the 1930s, psychologist Jean

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1. This article pulls together ideas published by three leading researchers in their fields: JAMES E. AUSTIN, *THE COLLABORATION CHALLENGE: HOW NONPROFITS AND BUSINESSES SUCCEED THROUGH STRATEGIC ALLIANCES* 21 (2000); Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477 (1995); and JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (Marjorie Gabain trans., 1997). Sections II through V of this article are substantially based on an article by Christine J. Vachon, *Scratch My Back, and I'll Scratch Yours: Scratching the Surface of the Duty of Care in Cross Sector Collaborations*, 8 HASTINGS BUS. L.J. 1 (2012).

Piaget noted, “[t]he good, in short, is not, like duty, the result of a constraint exercised by society upon the individual. The aspiration to the good is of different stuff from the obedience given to an imperative rule.”<sup>2</sup> Guided by the basis for Piaget’s above assertion related to the natural person, this article begins an analysis of the relationship between legal persons: collaborating for-profit and nonprofit organizations in light of duty, arguing that there is a balance between too much constraint and none that leads to sustainability of the cooperative venture.

## I. Introduction

In the 1930s, psychologist Jean Piaget noted, “[t]he good, in short, is not, like duty, the result of a constraint exercised by society upon the individual. The aspiration to the good is of different stuff from the obedience given to an imperative rule.”<sup>3</sup> Over the history of the corporate entity, U.S. law has evolved to treat the corporate entity as a legal person under the U.S. Constitution.<sup>4</sup> As the corporate entity is assuming additional

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2. PIAGET, *supra* note 1, at 354. See also JEROME KAGAN, *THE NATURE OF THE CHILD* (1984).

3. PIAGET, *supra* note 1, at 354.

4. In 1819, the Court in *Trustees of Dartmouth College v. Woodward* noted the corporation was an artificial person. 17 U.S. 518, 636 (1819). The corporate charter granted it life and could not be altered by the state. *Id.* In his concurring opinion, Justice Story noted that the corporation, “a collection of individuals, united under one collective body, under a special name, and possessing certain immunities, privileges and capacities,” has a life of its own and akin to a natural person. *Id.* at 667 (Story, J., concurring). In 1882, the meaning of “person” in the Fourteenth Amendment was expanded to include an artificial person. *Cnty. of San Mateo v. S. Pac. R.R. Co.*, 13 F. 145, 150 (C.C.D. Cal 1882). In 1886, the Fourteenth Amendment’s application was expanded to include corporations. *Cnty. of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886). In 1889 the Supreme Court ruled that a corporation is a “person” for due process and equal protection. *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889). In 1893, the Court found that corporations have a claim under the Bill of Rights. *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165 (1893). In 1905, the Court invalidated government action against the corporation essentially for violating substantive due process. *Lochner v. New York*, 198 U.S. 45 (1905). In 1906, the Court granted corporations Fourth Amendment “search and seizure” protection. *Hale v. Henkel*, 201 U.S. 43 (1906). In 1908, the Court granted corporations the Sixth Amendment right to a jury trial because a corporate

legal protection as a legal person under the Constitution, the question remains whether moral and ethical standards and thought apply similarly to the artificial person, the corporation. This Article explores the moral development of the corporation from the perspective of Piaget's theory of the moral development of the child. In particular, the Article examines the moral development in the setting of the cross-sector collaboration between a for-profit corporation and a nonprofit corporation along a continuum of increasing engagement.

Cross-sector interactions between nonprofit and for-profit institutions through collaboration on the path to a philanthropic goal ("Collaboration") take on a particularly unique perspective when considering the collaborators are actually legal persons for many situations under law. "[I]t is continually becoming more evident that values-based leadership, synergistic generation of social and economic value, and strategic cross-sector alliances are key ingredients to achieving sustainably successful business."<sup>5</sup> When for-profit and nonprofit organizations engage in collaboration, both organizations generally seek to achieve a philanthropic good. On the other hand, both organizations and their management are bound by law to fulfill specific duties. Although the goal of the Collaboration is to promote the philanthropic mission of the nonprofit, each organization enters the collaboration with its own goals, hoping to gain from opportunities offered by other collaborators. Guided by the basis for Piaget's above assertion, this article begins an analysis of the relationship between collaborating for-profit and nonprofit organizations in light of duty and moral decision making, and discovers that a medium ground of regulation may allow both entities to achieve their

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defendant was considered the "accused." *Armour Packing Co. v. Lacy*, 200 U.S. 226 (1906). In 1922, the Court applied the Fifth Amendment "takings clause" compensation for a corporation subject to a governmental regulation. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922). In 1936, the Court applied the First Amendment right to freedom of speech to a newspaper corporation for tax-free sale of advertising in newspapers. *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936). The law progressed in a similar manner until the Supreme Court's recent decisions in *Citizens United v. FEC*, 558 U.S. 310 (2010), and *FCC v. AT&T, Inc.*, 131 S. Ct. 1177 (2011).

5. James E. Austin & Ezequiel Reficco, *Corporate Social Entrepreneurship*, 11 INT'L J. NOT-FOR-PROFIT L. 86, 90 (2009).

moral potential. The medium ground provides flexibility and reliability similar to the guidance of the U.S. Constitution, of which corporations are increasingly granted protection.

To aid in the analysis I adopt the premise of a continuum of engagement set forth by James Austin (the "Continuum") and applied in the analysis of my article *Scratch My Back*.<sup>6</sup> Under this premise, for-profits and nonprofits engage in collaborations at various levels along a Continuum. For example, on a basic level, a for-profit may simply make a donation to a nonprofit. On the other hand, a nonprofit and a for-profit may achieve more collective action on a regular basis and have integrated aspects of the businesses.

This Article provides an extended analysis of the Collaboration between two unaffiliated entities, the nonprofit and the for-profit, building off of my conclusions in *Scratch My Back*.<sup>7</sup> In Part II, this article briefly sets forth the background for and my argument in *Scratch My Back* that in order for the Collaboration to survive and fulfill the goals of both entities, the more integrated the Collaboration becomes, the more the for-profit needs to consider monitoring and assisting with the management of the nonprofit to fulfill its duty of care in decision making and oversight of the nonprofit. With an aim to better understand the unique relationship between a for-profit and nonprofit in Collaboration, this Article discusses the potential for application to this analysis of psychologist Jean Piaget's theory of the moral development of the child through the influence of constraint and cooperation.<sup>8</sup>

In Part III, this Article provides a general description of Jean Piaget's theory of moral development of the child and applies it to the analysis of the duty of care of the management of the for-profit and the nonprofit in the Collaboration along

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6. Vachon, *supra* note 1.

7. There are other relationships between for-profits and nonprofits, but this paper does not seek to provide an analysis of corporate governance that is equally applicable to those relationships. For instance, in a situation where a for-profit has a subsidiary nonprofit, it is well recognized that the fiduciary duty analysis of a parent-subsidiary relationship applies a modified standard. *See, e.g., Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971).

8. PIAGET, *supra* note 1. "Although, humans do not seem to be specially programmed for a particular profile of moral missions, they are prepared to invent and believe in some ethical mission." KAGAN, *supra* note 2, at 153.

the Continuum. Lawrence E. Mitchell, in his article *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, applied Piaget's moral development theory to corporations as a cooperative enterprise.<sup>9</sup> Recognizing the goal of a Collaboration to promote good and that Piaget's theory offers an ideal model for promoting moral thinking in children, I will extend the application of Piaget's moral development theory to an analysis of the Collaboration, a cooperative venture, between a nonprofit and for-profit.

Piaget determined that children would be challenged to develop into autonomous, moral adults with constraint, attributed to adults and superiors.<sup>10</sup> Instead, if the child participates in cooperative games and other play involving those who are equals to the child, such as games in a sandbox, they are more likely to develop into moral adults respecting others, recognizing good through independent thought than as a duty imposed by adults.<sup>11</sup> At play, as in a sandbox, the child learns to perceive his own moral autonomy and, in turn, to respect and value the autonomy of others.<sup>12</sup>

Along this line, Jean Piaget's theory of a child's moral development sheds light on the need for a relationship of mutual respect and equity between the nonprofit and the for-profit as they play in the Collaboration sandbox. As Mitchell so clearly articulated in his article *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, "[Piaget] saw implications for social structure in his findings on the development of morality-implications that are equally applicable to the corporation."<sup>13</sup> Although the study of Piaget's insights cannot definitively resolve the challenges of corporate governance, they can provide guidance, especially since the underlying activities of the collaborating entities are governed by natural persons.<sup>14</sup> Indeed, from this analysis, no conclusion should be drawn that

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9. Mitchell, *supra* note 1.

10. *See generally*, PIAGET, *supra* note 1.

11. *Id.*

12. *Id.* at 94-95. *See also* Mitchell, *supra* note 1.

13. Mitchell, *supra* note 1, at 493.

14. *Id.* at 493, 499.

either the nonprofit or the for-profit is equated with a child. Instead, this Article applies Piaget's theory to the Collaboration because, as with Piaget's premise, the Collaboration seeks to promote good but offers potential for a situation of inequity or equity, unilateral respect or mutual respect, and constraint or cooperation.

This Article suggests that the duty of care requires finding the right balance between constraint and unilateralism, and cooperation and mutual respect in interactions between the collaborating parties, and, in the future, may be influenced positively or negatively by law makers depending on the approach they take towards constraint or encouraging cooperation. These decisions will have corresponding implications for the development and growth of the Collaboration along the Continuum.

## II. Intertwined Duty of Care

The nonprofit and for-profit are intended to be different types of organizations, and, despite increasing blurring of the distinctions between the two entities, continue, to a certain degree, to maintain some of the corresponding differences.<sup>15</sup> Part of any analysis of the fiduciary duties in the cooperative enterprise of a Collaboration, includes understanding the primary mission for each organization: for-profit businesses are organized and operated primarily for the pursuit of profit and gains to the shareholders, the nonprofits are organized and operated in pursuit of its philanthropic mission.<sup>16</sup>

### A. *The For-Profit*

The for-profit is designed to emphasize one "good" over others. The "good" is profit maximization for the owners of the corporation (the shareholders), referred to as "shareholder

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15. Gail A. Lasprogata & Marya N. Cotten, *Contemplating "Enterprise": The Business and Legal Challenges of Social Entrepreneurship*, 41 AM. BUS. L.J. 67, 73-74 (2003).

16. Vachon, *supra* note 1, at 37.

primacy.”<sup>17</sup> Today, however, shareholder primacy is still the norm in many jurisdictions.<sup>18</sup> The corporation’s governance is the subject of state corporate law, which holds that the board and management owe fiduciary duties only, or primarily, to the shareholders. Therefore, the emphasis of management conduct has been on the profit motive.<sup>19</sup> More recently, however, law and public opinion have recognized socially-accountable for-profits.<sup>20</sup> Translated, profit maximization represents the mission of the for-profit company, and, some argue, to the exclusion of the interests of stakeholders.<sup>21</sup> Concern for social responsibility by management might impair the pursuit of profit maximization,<sup>22</sup> which would arguably be a breach of the fiduciary duties to the shareholders.<sup>23</sup>

For-profits may enter into a Collaboration with a nonprofit hoping that the nonprofit’s image will help to improve, enhance or repair the for-profit’s image.<sup>24</sup> In this way, for-profits may approach the Collaboration as an opportunity to improve the

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17. Jonathan D. Springer, *Corporate Law, Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 87; see also Mitchell, *supra* note 1, at 501.

18. Springer, *supra* note 17, at 97.

19. See Jonathan R. Macey & Geoffrey P. Miller, *Corporate Stakeholders: A Contractual Perspective*, 43 U. TORONTO L.J. 401 (1993). But see Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738 (2005) (stating that “[n]one of the fifty states has a statute that imposes a duty to profit-maximize or that makes profit-maximization the sole purpose of the corporation”).

20. DAVID BORNSTEIN & SUSAN DAVIS, *SOCIAL ENTREPRENEURSHIP: WHAT EVERYONE NEEDS TO KNOW* 4-5 (2010).

21. See Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970; Elizabeth A. Weeks, *Loopholes: Opportunity, Responsibility, or Liability?*, 35 J.L. MED. & ETHICS 320, 320 (2007); HAROLD L. JOHNSON, *DISCLOSURE OF CORPORATE SOCIAL PERFORMANCE: SURVEY, EVALUATION, AND PROSPECTS* 9 (1979).

22. Weeks, *supra* note 21, at 320.

23. But see Chris Cornforth, *Introduction: The Changing Context of Governance—Emerging Issues and Paradoxes*, in *THE GOVERNANCE OF PUBLIC AND NON-PROFIT ORGANIZATIONS: WHAT DO BOARDS DO?* 1, 7-8 (Chris Cornforth ed., 2003) [hereinafter Cornforth]. According to the agency theory of compliance (the most frequently used theory in corporate governance), management acts for the interests of themselves rather than the shareholders or mission. Arguably the duty of loyalty and good faith may be implicated as well. *Id.*

24. Alan R. Andreasen, *Profits For Nonprofits: Find a Corporate Partner*, 74 HARV. BUS. REV. 47, 56 (1996).



company's reputation, and consequently, the company's relationship with its customers.<sup>25</sup>

### B. *The Nonprofit*

The nonprofit is a company also created under state law with a philanthropic mission. Under federal law, the Internal Revenue Code governs tax-exempt nonprofits.<sup>26</sup> In an economy of limited resources, there is abundant competition for limited funds for nonprofits. Consequently, nonprofits explore other avenues of raising funds, including entering into a Collaboration with a for-profit.<sup>27</sup>

The nonprofit's board of directors serves as the "guardians" of the charity's mission."<sup>28</sup> While the governance law applicable to nonprofits is underdeveloped compared to that of for-profits,<sup>29</sup> the IRS has taken a role to try to articulate some standards. In its 2008 Position Paper on Corporate Governance, the IRS encouraged "an active and engaged board believing that it is important to the success of a charity and to its compliance with applicable law."<sup>30</sup> In general, one of the biggest challenges faced by a nonprofit and its management is to keep the business focused on the intended goal(s) of the company.<sup>31</sup> In fact, commercialization may be the strongest

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25. *See id.* (stating that "consumers respond to the halo effect").

26. Austin & Reficco, *supra* note 5, at 90. "Section 501 of the Internal Revenue Code provides several different categories of organization types for which tax-exempt status is an option." Lasprogata & Cotton, *supra* note 15, at 74.

27. Andreasen, *supra* note 24, at 48; Howard P. Tuckman, *Commercialization and For-Profits in Disguise*, in INTERNATIONAL ENCYCLOPEDIA OF CIVIL SOCIETY 504, 504 (2010) (indicating that a reason there is a growth in commercial activities by nonprofits is the serious challenge to raise funds); *see also* Lasprogata & Cotton, *supra* note 15, at 68.

28. Cornforth, *supra* note 23, at 8.

29. Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 500 (1981).

30. INTERNAL REVENUE SERVICE, GOVERNANCE AND RELATED TOPICS – 501(C)(3) ORGANIZATIONS. § 3 (Feb. 4, 2008), [http://www.irs.gov/pub/irs-tege/governance\\_practices.pdf](http://www.irs.gov/pub/irs-tege/governance_practices.pdf) [hereinafter IRS GOVERNANCE].

31. Sean Silverthorne, *Achieving Excellence in Nonprofits Q&A with: Herman B. Leonard*, HARV. BUS. SCH. (Oct. 27, 2008), <http://hbswk.hbs.edu/item/5942.html>.

force shaping nonprofit business these days.<sup>32</sup> Therefore, a nonprofit's involvement in a Collaboration with a for-profit requires careful consideration and monitoring by the nonprofit's board of directors to ensure: "1) pursuit of the philanthropic mission and 2) application of the profit towards the mission."<sup>33</sup>

### C. *Collaboration, Continuum, Care and Cooperation*

#### 1. The Collaboration on a Continuum

With the changing business and economic climate, the dynamics of each type of organization are shifting. In response to increased funding shortages, nonprofits devise and apply various methods of raising funding. Some of these efforts resemble for-profit profit making enterprises. The for-profit organization may look for ways to be more philanthropic, moving from purely donating to a deeper involvement with a nonprofit.<sup>34</sup> In general, many perceive for-profits as entering into Collaborations with nonprofits so they can "bask in the glow of their esteemed partners."<sup>35</sup> The Collaboration has become an integral part of the strategy of these organizations to increase their value.<sup>36</sup> The Collaboration between the for-profit and the nonprofit has been described as occurring on a Continuum, with increasing levels of integration.<sup>37</sup> The Continuum is useful to understanding the varying levels of involvement the collaborating entities may engage in and the corresponding duty of care responsibilities.

The Continuum sets forth various descriptive stages in

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32. Dennis R. Young et al., *Commercialization, Social Ventures, & For-Profit Competition*, in THE STATE OF NONPROFIT AMERICA 521, 522 (2012).

33. Vachon, *supra* note 1, at 22.

34. Lasprogata & Cotten, *supra* note 15, at 96; Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Nonprofit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1066 (2000).

35. Andreasen, *supra* note 24, at 50.

36. See Austin & Reficco, *supra* note 5, at 89.

37. James Austin, *Strategic Collaboration Between Nonprofits and Businesses*, 29 HARV. BUS. SCH. NONPROFIT & VOLUNTARY SECTOR Q. 69, 71 (2000), available at [http://nvs.sagepub.com/content/29/suppl\\_1/69](http://nvs.sagepub.com/content/29/suppl_1/69) [hereinafter Austin Collaboration].

which a nonprofit and for-profit may collaborate at increasing levels of involvement. James Austin in “The Collaboration Challenge” has identified three stages on the Continuum: the philanthropic stage, the transactional stage, and the integrative stage.<sup>38</sup> “The characteristics ascribed to each stage appear in gradations as a multifaceted relationship evolves incrementally from one stage into another.”<sup>39</sup> The deeper the engagement, the more important the Collaboration becomes to the collaborating entities, from “peripheral to strategic” as the resources devoted to the Collaboration by each entity and risk of loss increase.<sup>40</sup> Importantly, the more a collaborating entity has at stake in the Collaboration, the more the management of that entity should be involved to effectuate their fiduciary duties.

## 2. Duty of Care Intertwined

To accomplish effective implementation and continuation of the Collaboration, both entities should be aware of the possible corporate governance issues posed by the Collaboration. As I discussed in *Scratch My Back*, the deeper along the Continuum the Collaboration goes, the more these corporate governance issues can affect each entity’s sustainability, and the viability and productivity of the Collaboration.<sup>41</sup>

In a Collaboration where the for-profit has stronger financial capabilities, more resources (e.g., employees), and more business acumen, its involvement with the nonprofit may have a negative influence on the management of the Nonprofit, causing attention and efforts to move away from the philanthropic mission. Negative impacts such as these can cause the nonprofit to experience mission drift. Mission drift

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38. As James E. Austin described in *The Collaboration Challenge* the cross sector interaction continuum tends to follow a specific collaboration continuum wherein each stage of the continuum has specific identifying characteristics. AUSTIN, *supra* note 1, at 20, 34. The three stages in the continuum are philanthropic stage, transactional stage, and integrative stage. *Id.*

39. *Id.* at 35.

40. *Id.* at 34.

41. *See id.*; Vachon, *supra* note 1, at 28-30.

occurs when the original philanthropic mission of the nonprofit is no longer the focus of management's efforts.<sup>42</sup> Instead, the philanthropic goal has been partially or wholly replaced by something much more akin to for-profit interest.<sup>43</sup>

The Continuum does not require that one stage happen before another, nor does the Collaboration have to proceed further along the Continuum. It can stay in one stage or even regress. The board of director's involvement increases the deeper into the Continuum. At the first stage in the Continuum, the philanthropic stage, the board of directors and other management of both entities are usually not very involved, if at all.<sup>44</sup> The deeper into the Collaboration along the Continuum, the harder it may be for the nonprofit management to thwart mission drift. In *Scratch My Back*, I argue that due to the threat of mission drift in the Collaboration, the nonprofit's activities in the Collaboration and the effect of the Collaboration on the nonprofit need to be carefully monitored and evaluated by the management of both collaborating entities depending on where the Collaboration is on the Continuum. In *Scratch My Back*, I urge that the management of a collaborating for-profit has an obligation to ensure the care and sustainability of the nonprofit because their duty of care to the for-profit requires it. I urged that this premise depends on two factors: (1) how far the Collaboration is situated along the Continuum, and (2) a recognition that the further along the Continuum, if failure happens, increasingly negative taint will attach to both parties. First, by being informed, they will understand that the deeper into the Continuum the more both entities have invested in the success

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42. See Cornforth, *supra* note 23, at 7-8 (Traditionally, the board is viewed as protecting the nonprofit's mission.); Tuckman, *supra* note 27, at 506.

43. See Tuckman, *supra* note 27, at 506; Young et al., *supra* note 32, at 542-43 (provides various examples of mission drift—nonprofits compromised by for-profit considerations). See also Estelle James, *Commercialism and the Mission of Nonprofits*, 40 SOC. J. 29, 29 (2003) ("So long as the charitable goal of the nonprofit remains the driving force, such commercialization has a positive impact on the finances and long-term stability of the organization and the sector."); Tuckman, *supra* note 27, at 506; Lasprogata & Cotten, *supra* note 15, at 86.

44. AUSTIN, *supra* note 1, at 20.

of the Collaboration. Second, the success of the Collaboration is contingent upon the sustainability of both collaborating organizations.<sup>45</sup>

Mission drift may result in failure of the nonprofit. If the nonprofit fails, so too does the Collaboration. Consequently, the nonprofit's sustainability determines the success of the for-profit's engagement in the Collaboration. The success of the Collaboration determines the success of the business decision by the for-profit to enter into the Collaboration to achieve its articulated goals, such as goodwill. Knowing that the sustainability of the nonprofit determines the sustainability of the Collaboration, and therefore the success of the for-profit's decision, the for-profit management, I argue, must determine the level of care owed by both entities to ensure the success of the investment in the Collaboration which may include ensuring the sustainability of the nonprofit.<sup>46</sup>

As I argued in *Scratch My Back*, as the Collaboration continues to develop, and depending on the form of Collaboration, the management of both entities will need to become more involved,<sup>47</sup> and especially, to evaluate the impact the Collaboration will have on each of their companies and the overall impact on the mission of the nonprofit.<sup>48</sup> In this way, the collaborators need to be vigilant to ensure that the commercialization pressures of the Collaboration, and the time and activities allocated to the Collaboration at any point along the Continuum do not erode and/or erase the nonprofit's mission and values.<sup>49</sup> For example, over the years The Timberland Company ("Timberland") and City Year, Inc. ("City

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45. Vachon, *supra* note 1, at 28-29.

46. Austin & Reficco, *supra* note 5, at 90 (explaining that at the integrative stage, there is at least one example where the for-profit held a seat on the nonprofit partner's board of directors and had become engaged in the governance of that partner); Vachon, *supra* note 1, at 11-12.

47. Vachon, *supra* note 1, at 12 (citing AUSTIN, *supra* note 1, at 60, 77, 85).

48. AUSTIN, *supra* note 1, at 60, 77, 85. See Vachon, *supra* note 1, at 29.

49. Tuckman, *supra* note 27, at 506; Young et al., *supra* note 32, at 542-43. See James, *supra* note 43, at 29 ("So long as the charitable goal of the Nonprofit remains the driving force, such commercialization has a positive impact on the finances and long term stability of the organization and the sector."). But see Lasprogata & Cotten, *supra* note 15, at 86.

Year”) have evolved their collaboration into a more and more integrated cooperative enterprise; however, the contact started with a cold call from City Year to Timberland asking for a donation of fifty pairs of boots to be part of a uniform for City’s Year’s youth corps.<sup>50</sup> Over time, the two entities became more integrated in the Collaboration. In 1994, the chief operating officer of Timberland was named chairman of the board of directors of City Year; and in 1995, Timberland created a new line of apparel called City Year Gear.<sup>51</sup> Timberland’s Vice President of Human Resources provides guidance to City Year on structuring staff pay plans and labor policies.<sup>52</sup> In 2000, City Year started its first non-urban corps out of the same building where Timberland has its headquarters in New Hampshire.<sup>53</sup>

The Collaborators will need to be able to recognize the pull of Collaboration commercialization that benefits the nonprofit’s mission and Collaboration commercialization that distorts it.<sup>54</sup> Distortion would result in mission drift.<sup>55</sup> Some claim that one of the biggest challenges confronting the nonprofit is mission drift.<sup>56</sup> This is particularly relevant with regards to a nonprofit that engages in a Collaboration with a for-profit particularly as they move along the Continuum towards the integrative stage. If the Collaboration has reached the integrative stage and fails, both parties will likely carry the taint of a failed to Collaboration to a greater or lesser extent, especially if one party to the venture failed ethically, or in the case of the nonprofit, mission drift occurred.<sup>57</sup>

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50. AUSTIN, *supra* note 1, at 21. *See also* Susan Nickbarg, *Anatomy of a Partnership: City Year & Timberland Branding/Rebranding*, P.R. NEWS 72-74 (Dec. 12, 2012), *available at* <http://www.prnewsonline.com/Assets/File/PRNTop100sample.pdf>.

51. AUSTIN, *supra* note 1, at 27.

52. *Id.* at 28.

53. Nickbarg, *supra* note 50, at 72.

54. Vachon, *supra* note 1, at 24. *See* James, *supra* note 43, at 29.

55. Cornforth, *supra* note 23, at 7-8; Vachon, *supra* note 1, at 24.

56. Silverthorne, *supra* note 31.

57. Vachon, *supra* note 1, at 29-31.

### 3. A Cooperative Enterprise

Before a discussion of how Piaget's theory of moral development and emphasis on cooperation and mutual respect shed light on the corporate governance issues of a Collaboration, it is important to note that the Collaboration is, in varying degrees along the Continuum, a cooperative enterprise. It has been argued that the corporation is a cooperative association based on the cooperative enterprise model centered "around the achievement of certain goals."<sup>58</sup> In the current example of a Collaboration, this type of cooperation evidences itself with members from each organization working to achieve the goals of the Collaboration, including promoting the philanthropic mission. A Collaboration is a cooperative enterprise, but it is even more so when the duty of care is intertwined such that the for-profit too should ensure that the nonprofit management is fulfilling its duty of care.

As Mitchell articulated, the common goal that determines a common enterprise may be a goal that is narrow and specific, such as a nonprofit and for-profit collaborating to host a road race, to something more general and sweeping, such as a nonprofit and for-profit working together to achieve improved global literacy.<sup>59</sup> The concept that should be considered is what underlying principles hold the Collaboration together. Mitchell cites to the two models set forth by Lon Fuller in *Two Principles of Human Association*.<sup>60</sup> The two models are based on two different principles: the legal principle and the shared commitment principle.<sup>61</sup> An association marked by the legal principle tends to have greater formality and structure. Fuller described the association as premised on "rules of duty and entitlement."<sup>62</sup> An association of the type known as the shared

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58. Mitchell, *supra* note 1, at 481-83 (recognizing that a second model of cooperative enterprise may also apply, that of emphasis on shared interest in the process or activity).

59. *Id.* at 484 (identifying characteristics of a common goal).

60. Lon L. Fuller, *Two Principles of Human Association*, in VOLUNTARY ASSOCIATIONS 6 (J. Roland Pennock & John W. Chapman eds., 1969). See Mitchell, *supra* note 1, at 484-85.

61. Fuller, *supra* note 60, at 6.

62. *Id.* at 8.

commitment principle characteristically provides a way for voluntary association based on common value(s) or goal(s).<sup>63</sup> A church or charitable organization is a good example of an association convened under the shared commitment principle. Fuller finds that the majority of human associations have elements of both principles, shared commitment and legal; however, once the legal principle asserts itself, it tends to dominate over the shared commitment principle, tainting the shared commitment characteristic with a set structure of responsibilities and powers.<sup>64</sup>

While a for-profit, and even a nonprofit may arguably be considered more an association based on the legal principle than a shared commitment principle, a Collaboration between the two at the start may be founded very strongly on the shared commitment principle.<sup>65</sup> The entities come together to achieve the goals of the Collaboration, a shared project to further the philanthropic mission of the nonprofit, while recognizing that each entity has its own individual interests in engaging in the cooperative enterprise. This is similar to a group of individuals working on a cooperative enterprise, such as building a bridge. Each person has the common goal of building the bridge, but each individual has their own interests, such as getting paid, health care, or other benefits.

### III. The Psychology of the Collaboration

A successful Collaboration requires cooperation, mutual respect, and equality in order to ensure sustainability, attain the good sought, and benefit both organizations. Psychologist Jean Piaget's theory of the moral development of the child, by indirect analogy, helps to shed light on the unique characteristics of the Collaboration. The dominant theme from Piaget's moral development research was that children would not develop into autonomous and morally responsible adults

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63. Mitchell, *supra* note 1, at 485.

64. Fuller, *supra* note 60, at 11-14. See Mitchell, *supra* note 1, at 485.

65. Mitchell notes that although pursuit of profit alone by individuals at a corporation is a goal, it was not necessarily the goal as a basis for the shared commitment principle that Fuller had in mind. Mitchell, *supra* note 1, at 485-86.



without having had the experience of cooperative play and other child games with his equals.<sup>66</sup> The competing characteristics identified by Piaget, which determine the ingredients for the ideal method of moral development (constraint versus cooperation, unilateral respect versus mutual respect, and equality versus inequality), also contribute to understanding the development of the two organizations and their Management in the Collaboration.

A. *Piaget's Moral Development Theory*

As a sub-category of practical reasoning, moral reasoning essentially asks the questions about what to do in a particular situation.<sup>67</sup> The unique characteristic of moral reasoning, as opposed to other types of practical reasoning, is that the motivation behind the reasoning is some moral principle or ideal.<sup>68</sup>

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66. Mitchell, *supra* note 1, at 499. However,

It is meaningless, therefore, to wonder whether it is the cognitive cooperation (or cooperations) which engender the individual operations or the other way around. It is at the stage of concrete operations that new interpersonal relations of a cooperative nature are established, and there is no reason why these should be limited to cognitive exchanges.

JEAN PIAGET & BARBEL INHELDER, *THE PSYCHOLOGY OF THE CHILD* 118 (1969).

67. See Jerrold R. Coombs, *Attainments of the Morally Educated Person*, in *DEVELOPMENT OF MORAL REASONING* 17 (1980). "Practical reasoning involves two distinct kinds of reasons: (1) motivational reasons such as wants, purposes, or rules of conduct and (2) beliefs about what actions will fulfill the wants, purposes, or rules of conduct." *Id.*

68. See Coombs, *supra* note 67, at 17. For a moral principle to be defensible it must meet these standards, at a minimum:

1. It must be the case that the person making the moral judgment can accept the moral decisions that follow from the principle in all cases to which it logically applies . . . .
2. It must be the case that if everyone acted on the principle, the consequences would not be disastrous . . . .
3. It must be the case that the principle can be publicly advocated without defeating the point of adopting the principle.

Jean Piaget was a child psychologist who, in the 1930s, researched the moral development of children by observing them playing simple social games, such as marbles, and published his results in *The Moral Development of the Child*.<sup>69</sup> Piaget found that the normal progression of a child's moral development moved through stages and not necessarily characterized by specific years.<sup>70</sup> He identified three stages of the child's development of the consciousness of rules, and four stages of the child's development of the practical observance of the rules.<sup>71</sup> Piaget explained the three stages of the child's development of the consciousness of the rules. The first stage, which includes the beginning of the egocentric stage, is where the superior adult or older child sets the rules to a child's game.<sup>72</sup> These rules are not yet perceived as coercive by the child because they are adopted as purely motor skills by the child or, as the child enters the egocentric stage, perceived unconsciously and as "interesting examples" of what to do rather than "obligatory realities."<sup>73</sup> During the second stage, which includes the bulk of the egocentric stage and the beginning half of the cooperating stage, the child views the rules as "sacred and untouchable, emanating from adults and lasting forever."<sup>74</sup> This reverence by the child to the rules of the

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*Id.* at 19.

69. PIAGET, *supra* note 1, at 14. In part of his work, Piaget drew from his contemporaries, in particular, Baldwin, Bovet, Durkheim, and Fauconnet. WILLIAM KAY, MORAL DEVELOPMENT: A PSYCHOLOGICAL STUDY OF MORAL GROWTH FROM CHILDHOOD TO ADOLESCENCE 39 (1970).

70. PIAGET, *supra* note 1, at 14, 26-28. See KAGAN, *supra* note 2, at 117; MARY ANN SPENCER PULASKI, UNDERSTANDING PIAGET: AN INTRODUCTION TO CHILDREN'S COGNITIVE DEVELOPMENT 15 (1971). "[A] 'stage' is held to be a way of looking at the world that is not implanted in the child by social agents but actively constructed by the child as he interacts with and tries to make sense of his world." Thomas Lickona, *Beyond Justice: A Curriculum For Cooperation*, in DEVELOPMENT OF MORAL REASONING 139-40 (Donald B. Cochrane & Michael E. Manley-Casimir eds., 1980).

71. See ALBERT BANDURA & RICHARD H. WALTERS, SOCIAL LEARNING AND PERSONALITY DEVELOPMENT 206-10 (1963), for a discussion of an opposing approach indicating, among other things, that "the developmental sequence proposed by Piaget is by no means predetermined or invariant."

72. PIAGET, *supra* note 1, at 28.

73. *Id.* at 28.

74. *Id.* at 28, 72 (as "imposed by his elders as a sort of Decalogue

superior has been referred to as unilateral respect, as opposed to mutual respect found later in the cooperation context.<sup>75</sup> If someone suggests a modification to the rules, the child views that modification as a transgression.<sup>76</sup> In the third and final stage, which ultimately results in the child's recognition of his and other's moral autonomy, the child views a rule as a law resulting from mutual consent, democracy.<sup>77</sup> The child perceives that the rule may be altered if one is able to garner general opinion in favor of the alteration.<sup>78</sup>

Piaget's four stages of the child's development of the practical observance of rules describe the child's application of the rules.<sup>79</sup> Research shows that transformation in cognitive abilities parallels changes in legal and political perspectives.<sup>80</sup> In the first stage, the child's application is purely motor and individual-the child functions pursuant to his own desires and motor habits. At this point in the child's perception, the concept of a true set of "collective rules" (rules perceived as applicable to other children too) does not apply since the rules the child

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revealed by divine beings (*i.e.*, adults, including God . . . ”)).

75. PIAGET & INHELDER, *supra* note 66, at 127.

The sentiment described by Bovet constitutes only one of two possible forms of respect. We shall call it 'unilateral,' since it binds an inferior to a superior who is regarded as such, and shall distinguish it from 'mutual respect,' which is based on reciprocity of esteem. Unilateral respect, if it is indeed the source of the sense of duty, begets in the young child a morality of obedience which is characterized primarily by a *heteronomy* that declines later to make way, at least partially, for the *autonomy* characteristic of mutual respect.

*Id.* at 124.

76. PIAGET, *supra* note 1, at 28.

77. *Id.* See Mitchell, *supra* note 1, at 478.

78. PIAGET, *supra* note 1, at 28.

79. *Id.* at 26-27. Piaget indicates that the four stage continuum can be variable and "is not linear in character, and its general direction can only be observed by schematizing the material and ignoring the minor oscillations which render it infinitely complicated in detail." *Id.* at 27.

80. See Peter Scharf, *The Moral Education of the Juvenile Offender: A Social Dilemma*, in DEVELOPMENT OF MORAL REASONING 218 (1980).

practices are purely motor.<sup>81</sup> The second stage, known as the egocentric stage, begins when the child actually receives the collective rules from the outside world. The child tends to imitate the application of the rules but does not play with others or try to win the game. In this sense, the child still plays alone, imitating others' application of the rules with a "purely individual use of the examples received."<sup>82</sup>

Piaget referred to the third stage as "incipient cooperation."<sup>83</sup> Each child that plays the game endeavors to win the game. From this perspective, each child is concerned with "mutual control" and "unification of the rules."<sup>84</sup> It is only after this point that the game becomes social, and cooperation may begin.<sup>85</sup> However, ideas about the rules continue to be rather ill-defined and inconsistent between children playing the same game with each other.<sup>86</sup> The aim to win begins in the third stage. "In the third stage, [t]he thing now is not only to fight the other boys but also and primarily to regulate the game with a whole set of systematic rules which will ensure the most complete reciprocity in the methods used."<sup>87</sup>

The fourth and final stage Piaget referred to as the

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81. PIAGET, *supra* note 1, at 26

82. *Id.* at 27.

The studies one of us conducted on the functions of language in exchanges among children led to similar results. These, although they gave rise to the other studies mentioned, have, however, been far more controversial. The fact is that the speech of subjects between four and six (observed in situations in which children work, play and speak freely) is not intended to provide information, ask questions, etc. (that is, it is not socialized language), but consists rather of monologues or 'collective monologues' in the course of which everyone talks to himself without listening to the others (that is, egocentric language).

PIAGET & INHELDER, *supra* note 66, at 120-21.

83. PIAGET, *supra* note 1, at 27.

84. *Id.*

85. *Id.* at 46.

86. *Id.* at 27.

87. *Id.* at 45-46.

“codification of rules.”<sup>88</sup> “Not only is every detail of procedure in the game fixed, but the actual code of rules to be observed is known to the whole society.”<sup>89</sup> In the fourth stage, the child is able to clearly and uniformly articulate the rules of the game. A child in the third stage “plays as he reasons.”<sup>90</sup> In the fourth stage, the child engages in “juridico-moral discussions,” discussions to learn the legislation of the game and give complete mastery of the rules of the game, which Piaget compares to “formal reasoning in general.”<sup>91</sup> In the realm of moral development, the child would ultimately reach a point where he recognizes his own moral autonomy and that of others, creating a notion of reciprocal respect for individual autonomy.<sup>92</sup> In the fourth stage, the child perceives the rule as a pronouncement of free will by mutual respecting individuals. This reciprocity developed through cooperative play is key to moral development.<sup>93</sup> As a result, the child does not perceive the rule as coercive any longer and, instead, sees the rule as evidence of democratically-established moral law.<sup>94</sup> Based on the democratic nature, when the child accepts a moral principle at this stage, the child also views the principle as an acceptable guide for anyone.<sup>95</sup> The child will not achieve this autonomous and moral thinking if the child is not exposed to cooperative play with equals.<sup>96</sup>

For the child to reach this realization and develop autonomy, the atmosphere around the child must encourage cooperation and not constrain. When rules imposed by superiors constrain the child, the child will experience limited

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88. *Id.* at 27.

89. *Id.*

90. *Id.* at 46.

91. *Id.* at 47.

92. Mitchell, *supra* note 1, at 478. See also PIAGET & INHELDER, *supra* note 66, at 127 (“With advances in social cooperation and the corresponding operatory progress, the child arrives at new moral relationships based on *mutual respect* which lead to a certain *autonomy*.”).

93. PIAGET, *supra* note 1, at 70. See also Lickona, *supra* note 70, at 140 (“Cooperative living and learning give students this opportunity to ‘construct morality’ for themselves. Through class or community meetings, for example, they are able to create rules and solutions to problems.”).

94. PIAGET, *supra* note 1, at 70.

95. See Coombs, *supra* note 67, at 19.

96. See *supra* note 66.

moral development because the rules are unilaterally applied and, consequently call for little autonomous thinking by the child. A child will be unable to develop the mutual respect from interacting with equals and engaging in independent thought necessary to follow a rule, instead, for morality sake and not just because it is a rule, moving beyond egocentrism.<sup>97</sup> Piaget stated: “External constraint does not destroy egocentrism. It covers and conceals when it does not actually strengthen it.”<sup>98</sup> To a child in a cooperative play environment, such as in the sandbox, the rules are no longer sacred tradition set forth by superiors, the rules are now perceived as developing from autonomous people in cooperation with each other.<sup>99</sup> Through a steady diet of cooperation, the pressure from cooperation will cause the child’s egocentrism to wither.<sup>100</sup> When the child accepts the rule at free will, the rule becomes incorporated into the mind of the child based on the moral background to the rule, and compliance with the rule becomes spontaneous because it is developed from and incorporated into the child’s moral code.<sup>101</sup>

It is the act of engaging in cooperation that guides the child to mutual respect, reciprocity and generosity.<sup>102</sup> The key to this stage is cooperation among equals: “For it is of the essence of cooperation as opposed to social constraint that, side by side with the body of provisional opinion which exists in fact, it also allows for an ideal of what is right functionally

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97. PIAGET, *supra* note 1, at 71. Put simply:

[C]onstraint prevented the child from coming to grips with his own moral agency and relieved him from having to acknowledge moral responsibility. Cooperation, on the other hand, produced a recognition of moral autonomy in which the child was able to develop a form of Kantian reciprocal respect for his fellows and to acknowledge and accept his own moral responsibility.

Mitchell, *supra* note 1, at 478.

98. PIAGET, *supra* note 1, at 71.

99. *Id.*

100. Lickona, *supra* note 70, at 140.

101. PIAGET, *supra* note 1, at 71-72.

102. *Id.* at 72.

implied in the very mechanism of discussion and reciprocity.”<sup>103</sup>

*B. Piaget's Theory Applied to the Corporation and the Collaboration*

Society in general seems to be ideally modeled from Piaget's equilibrium concepts of autonomy, cooperation and reciprocity.<sup>104</sup> He appears to have seen application for his theory to the broader society at large.<sup>105</sup> Characteristics of this model include “relatively equal and free autonomous beings seeking their own ends and respecting the ends of others with agreement on the general principle that each should have the opportunity to do just that and that governmental restraint is justified only to sustain that possibility.”<sup>106</sup> In 1969, Richard Merelman was among the first to apply Piaget's theory to understand the process of legal socialization. He argued that without the ability to apply moral reasoning, complex political and legal thinking is impossible.<sup>107</sup>

The characteristics of Piaget's model have been applied to corporations to offer guidance to “achieve sensible solutions.”<sup>108</sup> In today's society, the corporation is taking on more and more characteristics of the natural person under law and is also comprised of natural persons that exercise the corporation's decision-making functions and general oversight. Piaget's theory about childhood development has been applied to corporations and management, finding, in general, that a corporation will function better and more ethically if less dominated and constrained by rules and laws.<sup>109</sup> The same

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103. *Id.* at 72-73. *See also* Mitchell, *supra* note 1, at 494-95.

104. Mitchell, *supra* note 1, at 500.

105. *Id.* at 493; PIAGET, *supra* note 1, at 107 (referring to M. Bovet and stating “it is necessary, in order to grasp the situation, to take account of two groups of social and moral facts – constraint and unilateral respect on the one hand, cooperation and mutual respect on the other”).

106. Mitchell, *supra* note 1, at 500. *See also* PIAGET, *supra* note 1, at 251-57.

107. *See* Scharf, *supra* note 80, at 216.

108. Mitchell, *supra* note 1, at 493.

109. *Id.* at 480. “[T]he relationship between managers and other corporate constituent groups is characterized by exactly the kind of dominance that Piaget found not only stifles the moral development of the

concept applies to management, and to a lesser extent the owners of the corporation, who exercise the powers, rights, and duties of the corporation.<sup>110</sup>

While democratic principles have a base in corporate law, overall the rules of corporate law constrain the corporation. For a for-profit corporation, corporate law has narrowly drawn the legal purpose of the corporation and the individuals in the corporation. This constrains the actions of the corporation itself and those individuals (the management) who govern the entity.<sup>111</sup> The current legal model of the corporation and laws of corporate governance, for either for-profit or nonprofit, recognize roles for individuals (management and shareholders) instead of recognizing the individual persons. This constraint by law-bound-roles tends to remove the “person” from the “corporate personhood.”<sup>112</sup> Further, the underlying constraint on the for-profit is that law restricts its goal as a cooperative enterprise to, as discussed above, profit maximization for the benefit of the corporation and its owners.<sup>113</sup> This emphasis on profit maximization tends to limit the management’s ability to choose the purposes for the corporation and, therefore, tends to restrain the Management, and therefore the corporation, to fully exercise of their moral autonomy in corporate governance.<sup>114</sup> Of course considering corporate governance, the role of stockholders should not be overlooked. Rules of corporate law also constrain the powers of shareholders, assigning to them a very limited role in governance and, therefore, in the shareholders’ ability to influence the moral actions of the corporation.<sup>115</sup>

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weaker parties, but also leads the strong party to be inattentive to rationality and justice.” *Id.* at 498.

110. *Id.* at 501.

111. *Id.* at 497.

112. *Id.* at 488. While this will lead to the obvious conclusion that Piaget’s model of moral development may not be directly applicable, there is also a less obvious conclusion that maybe efforts to dehumanize less, allowing more clear application of Piaget’s model and the increased opportunity for moral expression and autonomy.

113. *Id.* at 489-90.

114. *Id.* See also PULASKI, *supra* note 70, at 85 (discussing the difference between constraint based on expiatory versus equality and mutual cooperation).

115. Mitchell, *supra* note 1, at 490.



It is well recognized that the moral responsibility of for-profits and its management has been under considerable scrutiny. Based on Piaget's theory, the limitation on the development of the moral autonomy of the corporation precludes management and, therefore, the corporation, from perceiving full moral responsibility for their acts.<sup>116</sup> It has been argued that the required goal of profit maximization leads to immoral behavior by management, which is be detrimental to society and the long-term success of the corporation.<sup>117</sup> Therefore, applying Piaget's theory that constraint negatively affects moral development of the for-profit, the lack of moral responsibility of the corporation and management should be attributed to the constraints we have placed upon it.<sup>118</sup> By defining the goal of the for-profit so narrowly, laws and rules have constrained the corporation from behaving as an autonomous moral entity.<sup>119</sup>

Legal constraints have arguably caused the corporation to be forever consigned to the egocentric and pre-cooperative stage.<sup>120</sup> A child loses his or her physical egocentrism long

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116. *Id.* at 480.

117. *Id.* at 501.

118. *Id.*

119. *Id.* at 480.

Our concern with managerial loyalty is so central, and our distrust of management's motives so great, that we have straitjacketed managers' behavior in a way that essentially relieves them of moral responsibility for their actions and thus effectively denies their moral agency. As a consequence, they often do not behave as morally responsible actors, except in defiance of the law that imposes the stockholder-centric profit motive, and thus at their peril.

*Id.* at 502.

120. PIAGET & INHELDER, *supra* note 66, at 118 ("It is highly probable, then, that the social exchanges characteristic of the preoperatory level are pre-cooperative; that is, at once social from the point of view of the subject and centered upon the child and his own activity from the point of view of the observer. This is precisely what one of us meant by 'infantile egocentrism.'"). However,

the axiom that freedom to act in the service of one's self-

before the child loses his or her mental egocentrism.<sup>121</sup> With egocentrism, cooperation, the essential element for moral development, does not exist.<sup>122</sup> The child, or the corporation in this case, receives the rules as “ready-made and external to subjective feelings,” and thus ends up reflecting the values of the superior by imitation and not by actually developing and applying its own moral thinking.<sup>123</sup>

At birth, says Piaget, the infant is ‘locked in egocentrism.’ By this he means not that the baby is self-centered but that he is unaware of anything beyond himself. He knows nothing of the world apart from his immediate consciousness and therefore cannot at first distinguish himself from it or make any sense out of the variety of stimuli he receives from it.<sup>124</sup>

We have so restricted the corporation as to essentially assign it the role of perpetually acting in its self-interest and to not consider the interests of others.<sup>125</sup> Similar to the child, the constraints on the corporation and management lead the actors to follow the rules because they are rules, not out of sense of responsibility for the impact of the corporation’s conduct on others.<sup>126</sup>

Mitchell suggested that the answer is to liberalize the constraints on the corporation so as to provide more flexibility

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interest is an absolute, primary good follows from neither logic nor observation. It is not transparently true that such freedom is friendlier to human nature or more conducive to social harmony than the ambivalent acceptance of either of an obligation to care for a sick relative or of an invitation to participate in the cooperative creation of an object of beauty.

KAGAN, *supra* note 2, at 115-16.

121. PULASKI, *supra* note 70, at 39.

122. PIAGET & INHELDER, *supra* note 66, at 119 (“True cooperation does not exist yet, even on the level of play.”).

123. PULASKI, *supra* note 70, at 81.

124. *Id.* at 17.

125. Mitchell, *supra* note 1, at 502.

126. *Id.* at 479-80.

for the corporate purpose.<sup>127</sup> If the rules were liberalized to allow the corporation and its interests to be defined to include those significantly affected by its actions, the corporation may develop an appreciation for its effects on the world around it.<sup>128</sup> Some states have enacted legislation, other constituency statutes, or case law which allows corporations to a greater or lesser extent to consider interests other than profit maximization for the owners and includes engaging in some level of Collaboration with a nonprofit.<sup>129</sup>

Taking it one step further, Piaget's moral development theory is similarly applicable to the cooperative enterprise of a Collaboration between a nonprofit and a for-profit. Research has shown that in collaborative business ventures the pattern of interaction affects each party's ability to meet its goals in the collaborative venture.<sup>130</sup> There are multiple considerations of the Collaboration in light of Piaget's model of moral development. First, the moral development theory offers insight into the for-profit's perspective. Arguably, a for-profit corporation seeking to enter into a Collaboration to pursue a philanthropic cause may be already working beyond the constraint on moral development argued by Mitchell.<sup>131</sup> By

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127. *Id.*

128. *Id.* at 503.

129. *Id.* at 490-91.

The first issue traditionally has been dealt with under the rubric of corporate social responsibility and has engendered debates that seem to flare up regularly. Nonetheless, this issue quite consistently has been resolved in favor of the private side of the equation, deeming even the largest and most widely flung corporate empire to be private, with the assertion that public concerns ought to be dealt with by public regulation external to the structure of the corporation itself.

*Id.*

130. Africa Arino & Jose de la Torre, *Learning from Failure: Towards an Evolutionary Model of Collaborative Ventures*, 9 ORG. SCI. 306, 308 (1998).

131. PIAGET, *supra* note 1, at 61. "We are now definitely in the presence of a social reality that has rational and moral organization and is yet peculiar to childhood. Also we can actually put our finger upon the conjunction of cooperation and autonomy, which follows upon the conjunction of egocentrism and constraint." *Id.*

further engaging in the cooperative business enterprise of the Collaboration, the for-profit may be engaging in less constrained play in the sandbox, outside of the constraint of the rule of profit maximization. In this way, the cooperative play in the Collaboration may, in turn, encourage broader moral development of the for-profit and its Management.

Second, the moral development theory offers insight for the nonprofit's perspective. As a cooperative enterprise, the Collaboration many times involves the nonprofit seeking funds from the for-profit, and maybe in need of business expertise. In turn, the for-profit hopes to gain the goodwill by association with the nonprofit. Many risks of the Collaboration failing due to failure of the nonprofit center on the premise that the nonprofit should be treated not as charity but as a true equal in the Collaboration.<sup>132</sup> It has been argued that the for-profit has greater potential for treating the nonprofit as an inferior or a subordinate and thereby creating an environment of constraint. This commentary is not just directed at for-profit management. In fact, it is equally important that the nonprofit's management views the nonprofit as an equal to the for-profit. Partners in a collaborative business enterprise tend to monitor the enterprise for efficiency, adaptability, and equity.<sup>133</sup> In a collaborative business enterprise, equity means fair dealing for both parties.<sup>134</sup> The potential dominance of the for-profit over the subordinate nonprofit would create an environment of constraint that would stunt the moral development of the nonprofit organization. Stunted moral development could, in turn, lead to activities that cause mission drift, illegal conduct, and other questionable practices affecting the sustainability of the nonprofit.

Furthermore, if the for-profit management fulfills its duty of care by taking steps, as suggested above, to ensure that the nonprofit management is fulfilling its duty of care, a similar environment of constraint could be created given the potential for paternalistic conduct by the for-profit management in

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132. Andreasen, *supra* note 24, at 48. Clearly, the interest in the wellbeing of the nonprofit should not rise to the level as to implicate a conflict of interest or breach of the corresponding duty of loyalty. *Id.*

133. Arino & de la Torre, *supra* note 130, at 307.

134. *Id.*

monitoring the nonprofit's management. In this way, under Piaget's theory, if a for-profit were to conduct itself in the Collaboration in this potentially dominant and oppressive manner, commanding unilateral respect, the nonprofit's development in the Collaboration may suffer. This could affect its moral autonomy, thereby implicating mission drift. Mission drift would lead to varying problems for the nonprofit, the worst of which includes failure of the entity, fraud, illegal conduct by the management, and violations of IRS regulations. Mitchell made a similar argument in the context of the state constraining the corporation. This approach is directly contrary to the ideal approach of Piaget's moral development model and would negatively affect a corporation's development of moral autonomy.<sup>135</sup> Power imbalances may also have an impact on the innovative goals the partners in Collaboration seek to attain.<sup>136</sup>

Similarly, as nonprofits engage in more commercialization through Collaboration and for-profits seek goals other than profit maximization through Collaboration, the law may seek to offer some regulation over the Collaborative activities and, perhaps, commercial activity of the nonprofit. This law making activity would involve consideration of the fiduciary duties in the unique relationship of the Collaboration. While there is a benefit to allow management flexibility and power to ensure the interest of the corporation are fulfilled, it is also important that these powers are limited. The fiduciary duties serve this function.<sup>137</sup> In the scope of the Collaboration, the lawmakers may seek to offer guidance and constraints on the powers of management of both entity types as they seek to engage in more collaborative efforts. Efforts should be made to avoid heavy constraint in favor of methods to enhance cooperation and urging equilibrium between the two entities.<sup>138</sup> As Mitchell

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135. Mitchell, *supra* note 1, at 500-01.

136. See Sara Holmes & Lance Moir, *Developing a Conceptual Framework to Identify Corporate Innovations Through Engagement with Non-Profit Stakeholders*, 7 CORP. GOV. 414, 417 (2007) (indicating that innovation can decrease if one partner perceives itself as inferior).

137. Mitchell, *supra* note 1, at 493.

138. *Id.* at 495. Kagan explains:

argued in the context of the corporation's moral development: "Constraint is the enemy of moral development."<sup>139</sup> However, mechanisms with a certain degree of control will help to reduce risk and uncertainty in the Collaboration which, in turn, increases trust between the parties.<sup>140</sup>

Finally, Piaget's theory, emphasizing that all important aspects of human beings' moral development takes place in the early years of life of the child, can be discouraging.<sup>141</sup> While Piaget's moral development theory should be considered as insightful and offering guidance to consider the corporate governance issues of the entities in a Collaboration, other psychologists offer guidance on the continued moral

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[T]he moral primacy of this view of individual freedom has a ring of validity to almost all citizens in our society because, despite ideological pluralism on many issues, there is a consensus that there should be minimal restraint on one's willed efforts to improve one's talents and to attain wealth and status.

KAGAN, *supra* note 2, at 115

139. Mitchell, *supra* note 1, at 497 (1995). Pulaski says:

Adult authority is not sufficient to create in children a true sense of justice. As Piaget points out, this is a situation which is not in equilibrium and therefore cannot be stable. The adult is strong and demanding; the child feels weak and inferior. Unilateral respect leads only to moral constraint. The factor essential to moral development is mutual respect and cooperation – "cooperation between children to begin with, and the between child and adult as the child approaches adolescence, and comes, secretly at least, to consider himself as the adult's equal.

PULASKI, *supra* note 70, at 40.

140. See Lauren C. Johnson, Understanding the Role of Cross-Sector Strategic Alliances in the Age of Corporate Social Responsibility (Apr. 12, 2005) (unpublished M.A. thesis, Fletcher School, Tufts University) (on file with Tufts Digital Library, Tufts University), *available at* <http://hdl.handle.net/10427/35290> (indicating that it is important to align government policies with cross-sector codes of conduct to improve corporate social performance through learning).

141. Carl Goldberg, *Swords into Plowshares: The Recovery Ethics of Destructive Adult Development*, in HANDBOOK OF ADULT DEVELOPMENT 494 (Jack Demick & Carrie Andreoletti eds., 2003).

development of an individual and, therefore, would similarly offer insight into the evolution in the Collaboration. In fact, the human brain continues to develop through a child's adolescence and into his or her early twenties.<sup>142</sup> Research has shown that the brain matures until about the age of twenty-five.<sup>143</sup> The corporation, however, is always changing. While the adults in the organization may have mature brains, the mix of adults continues to flow, providing different perspectives on morals, if allowed.

Studies have shown overwhelmingly that during the second decade of life, adolescents view adults as the legitimate regulators of moral issues through rules.<sup>144</sup> Programs in schools have observed that the moral development of the adolescents is continuing and, therefore, have underscored the importance of educating adolescents for citizenship and participation in democracy.<sup>145</sup> For instance, schools may integrate service programs into the adolescent's experience. This allows them to experience the service, reflect on it, and engage in discussion. The idea behind this aspect of education comes from the belief that it can lead to increased moral commitment overall.<sup>146</sup> Some research has shown that a human being forms the actual understanding of the moral underpinnings of society in adolescence and starts to make "principled moral judgments" in late adolescence.<sup>147</sup> Some of the theories of adolescent moral development rest, at least in part, on the understanding that changes in adolescent moral thought are tied to the

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142. See THE TEEN BRAIN: STILL UNDER CONSTRUCTION, NATIONAL INSTITUTE OF MENTAL HEALTH 2, 3 (2011).

143. Claudia Wallis et al., *What Makes Teens Tick*, TIME, May 10, 2004, at 56. See also Terrance Sandalow, *The Moral Responsibilities of Universities*, in MORAL VALUES AND HIGHER EDUCATION: A NOTION AT RISK 149, 168-69 (Dennis L. Thompson ed., 1991) (discussing the importance of universities in the moral development of the students).

144. Judith G. Smetana & Elliot Turiel, *Moral Development during Adolescence*, in BLACKWELL HANDBOOK OF ADOLESCENCE 247, 257 (Gerald R. Adams & Michael D. Berzonsky eds., 2003) (indicating that adolescence recognition of adult authority is contextually bound: parents are the authorities outside of school, teachers and administrators are the authorities in school).

145. *Id.* at 260.

146. *Id.* at 262.

147. *Id.* at 248 (citing to research conducted by Lawrence Kohlberg).

development of other competencies during that period of maturation.<sup>148</sup> Building from Piaget's foundation on the development of moral reasoning, Lawrence Kohlberg added that with continued moral maturation, the person progressively reconsiders what is morally right.<sup>149</sup> Lawrence Kohlberg researched the moral development of the human being from childhood to adulthood.<sup>150</sup>

For example, Lawrence Kohlberg, in *The Philosophy of Moral Development*, offers insight into the development of an individual from childhood to adulthood.<sup>151</sup> In his moral judgment development theory,<sup>152</sup> Kohlberg identified six frameworks (also referred to as stages) in which human beings address moral issues.<sup>153</sup> Kohlberg discovered that moral

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148. *Id.* at 249 (indicating that “development of formal operational thought and the development of more advanced perspective-taking abilities” are two of these other developing competencies).

149. See Scharf, *supra* note 80, at 214-15.

150. Smetana & Turiel, *supra* note 144, at 248.

Eisenberg and her colleagues have examined an aspect of moral reasoning – prosocial judgments – that they believed was omitted in the previous research focusing on reasoning about rules and prohibitions. Gilligan and her colleagues also have focused on aspects of morality they believed were ignored in previous work – caring (as opposed to justice) in interpersonal relationships.

*Id.*

151. See 1 LAWRENCE KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT: THE PHILOSOPHY OF MORAL DEVELOPMENT* 16-22 (1981) [hereinafter *ESSAYS ON MORAL DEVELOPMENT*]. See also Mitchell, *supra* note 1, at 499. Granted, Kohlberg also recognized that autonomous moral reasoning does not necessarily lead to good behavior but determined that it most frequently did. WILLIAM K. KILPATRICK, *WHY JOHNNY CAN'T TELL RIGHT FROM WRONG* 102 (1992). Kohlberg's case for moral development beyond childhood has been referred to as the leading work. David Moshman, *Developmental Change in Adulthood*, in *HANDBOOK OF ADULT DEVELOPMENT*, *supra* note 141, at 51 (2003).

152. See TIANLONG YU, *IN THE NAME OF MORALITY* 50-51 (2004) (discussing developmentalists, particularly Kohlberg's, emphasis on moral judgment).

153. Kohlberg identifies these frameworks in his 1984 work *THE PSYCHOLOGY OF MORAL DEVELOPMENT*. See Moshman, *supra* note 151, at 51-52 (brief discussion of these frameworks and their application). Kohlberg's six stages are as follows:



reasoning increases in intellectual complexity and moral principle the further along the stages an individual moves.<sup>154</sup> The sixth stage is the most morally principled, while the first stage is the least. He identified another level of development beyond Piaget's theory of moral development of the child, labeled "post-conventional."<sup>155</sup> At this level, the human being engages in the principled moral judgments.<sup>156</sup> Kohlberg's research and theory have been used as evidence that human beings can progress in moral development into adolescence and adulthood.<sup>157</sup> "Significantly, Kohlberg's data suggest that Stage 5 moral reasoning is used by less than 20 percent of adult Americans and by few adolescents, although it can be understood intuitively by a larger proportion of people."<sup>158</sup>

Kohlberg recognized the role of moral education in the development of moral individuals and institutions.<sup>159</sup> He viewed moral development as the product of "increasing ability

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[a]t Stage 1, law is conceived as the force of the powerful, to which the weaker must submit. At Stage 2, right action becomes that which satisfies one's own needs: law is thought of in terms of the rules of expedience or a naive [sic] rational hedonism.... Stage 3 offers what is called the good boy/girl orientation: law becomes associated with collection opinion; one obeys the law because that is what others expect. At Stage 4, there is a shift toward fixed definitions of law and society: the law is justified by its order-maintaining function... Stage 5 is a legalistic-contract orientation: law becomes the agreed-upon contract among social equals with duties of state and individual clearly defined and regulated. At Stage 6, Kohlberg argues that there is a universal basis for ethical decision-making: the law is the repository for broader social principles and is subordinate where law and justice conflict.

Scharf, *supra* note 80, at 215.

154. See Ralph L. Mosher, *Funny Things Happen on the Way to School Democracy*, in DEVELOPMENT OF MORAL REASONING, *supra* note 67, at 84 (1980).

155. ESSAYS ON MORAL DEVELOPMENT, *supra* note 151, at 18.

156. Smetana & Turiel, *supra* note 144, at 249.

157. See Moshman, *supra* note 151, at 51.

158. See Mosher, *supra* note 154, at 84.

159. See *id.* at 85.

to perceive social reality or to organize and integrate social experience.”<sup>160</sup> His theory underscores the importance of the social environment to stimulate progress in moral reasoning.<sup>161</sup> He held that the problem responsible for the latent capacity for full moral reasoning is that human thought must be provoked by experiences, particularly through interactions in a democratic and equitable community.<sup>162</sup> The child’s and adolescent’s educational experience is a large part of his or her social experience. “As it comes into contact with education, ethics as a discourse about principles is transformed into an applied morality.”<sup>163</sup> Unfortunately, as Kohlberg pointed out, many teachers are not aware of the role they have in moral education and do not have training or clear views on the concept.<sup>164</sup> Kohlberg also recognizes the value of a system of “checks and balances” to support rights and protect against behavior by individuals who have not fully moved through the six stages of moral development.<sup>165</sup> Kohlberg explains that the role of the educating environment “depend[s] upon the value-perspective of functional sociology, the perspective that the invisible hand of societal survival guides the shaping of human institutions and gives them a value or wisdom not apparent at first glance.”<sup>166</sup>

This urges that, like a natural person, the corporate person is in continual moral development and underscores the importance of the influence by the partner with which the collaborating entity chooses to engage in the Collaboration.

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160. ROBERT COLES, *THE MORAL LIFE OF CHILDREN* 26-27 (1986) (internal quotations omitted).

161. See Scharf, *supra* notes 80, at 215.

162. See Mosher, *supra* note 154, at 84-85.

163. SHARON TODD, *LEARNING FROM THE OTHER* 5 (2003) (indicating that “education frequently becomes a practice through which ethical principles and ideals are made into concrete moral obligations, duties, and the like, and responsibility itself is based on the degree to which such obligations are fulfilled”).

164. See Lawrence Kohlberg, *Stages of Moral Development as a Basis for Moral Education*, in *MORAL DEVELOPMENT, MORAL EDUCATION, AND KOHLBERG* 18 (Brenda Munsey ed., 1980) [hereinafter *MORAL EDUCATION*].

165. See Lawrence Kohlberg, *Educating for a Society*, *MORAL EDUCATION*, *supra* note 164, at 457-61 (analyzing Nixon’s conduct in Watergate and recognizing the value of a system of “checks and balances”).

166. *MORAL EDUCATION*, *supra* note 164, at 15, 19.

Research has shown that, through learning in Collaborations, for-profits' social performance can be enhanced.<sup>167</sup> The for-profit and nonprofit in the Collaboration can be seen as educators to each other and should, therefore, respect their corresponding roles. "If we think of moral education as something carried on at the adult level, we recognize that the effective moral educator is something of a revolutionary rather as an instiller of virtues."<sup>168</sup> From this perspective, the collaborator in the Collaboration, the public and law makers may be viewed as part of the revolutionary model, continuing the guidance of the corporation in its moral development by offering democratic guidance with adequate flexibility.<sup>169</sup>

#### IV. Conclusion

Increased need has led to increased numbers of nonprofits, straining their already limited resources. Increased need, on the other hand, combined with the changing perspective on corporate value has created new opportunities for for-profit organizations to add value through cross-sector Collaboration with nonprofits. The Collaboration offers both the nonprofit and for-profit an opportunity to work together towards an identified philanthropic good. At play in the Collaboration sandbox, there are various stages on the Continuum at which the collaborators may engage. As the level of engagement becomes higher, so too does the need for the management to be involved so as to properly exercise their duty of care, decision-making, and oversight. Since the cross-sector Collaboration offers a new opportunity for both types of entities to advocate for the good and to develop as entrepreneurs, the law in this area continues to experience parallel changes and

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167. See Bindu Arya & Jane E. Salk, *Cross-Sector Alliance Learning and Effectiveness of Voluntary Codes of Corporate Social Responsibility*, 16 BUS. ETHICS Q. 211, 228 (2006) (indicating that it is important to align government policies with cross-sector codes of conduct to improve corporate social performance through learning).

168. MORAL EDUCATION, *supra* 164, at 65. *But see* ALBERT BANDURA, SOCIAL LEARNING THEORY (1977) (providing a differing view to Kohlberg's model of development).

169. See, e.g., *supra* note 168.

enhancements. Given the unique characteristics of a for-profit and nonprofit collaborating together and the evolving nature of the sandbox of Collaborations, the management of both entities must pay particular attention to their effective rendering of the duty of care. Depending on the level of integration of the Collaboration along the Continuum, the for-profit, given its knowledge of profit generating business and access to more resources, may consider whether the nonprofit's management is fulfilling their oversight and decision making function in an informed and responsible manner. This is particularly true if the Collaboration is successful in promoting its goals of fundraising for the philanthropic mission. If proper care is not directed towards the nonprofit, the sustainability of the nonprofit itself may be called into question due to mission drift, possible improper conduct by management, and problems with the IRS. The risks for negative consequences to the nonprofit increase the further along the Continuum if steps are not taken to counter the effects of the Collaboration on the culture and mission of the nonprofit.<sup>170</sup>

With Piaget's moral development theory as a guide, his Article establishes that a for-profit should view the sustainability of the collaborating nonprofit as a responsibility under its own duty of care further along the Continuum. This responsibility focuses on the unique influences of the Collaboration on the nonprofit and ensures that the nonprofit does not abuse the tax-exempt status, commit fraud or other illegal conduct, and maintains adequate measures in place to continue pursuit of the mission. Jean Piaget's theory provides considerable insight into how to manage the relationship between the for-profit and nonprofit in the Collaboration. The deeper into the Continuum and the more cross-efforts by management of the entities, the greater the need for guidance from the for-profit to the nonprofit as improved results are achieved and, on the other hand, the greater the potential for paternalistic conduct by the for-profit and regulation by law makers to the point of constraint on the moral development of both entities in the Collaboration. This would be contrary to the intended results of the Collaboration and to the greater

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170. Austin & Reficco, *supra* note 5, at 90.

good of society.

Both a nonprofit and for-profit corporation entering into a Collaboration seek promotion of a philanthropic good and some degree of development of their organization. In particular, the for-profit seeks improvement of good will from associating with the nonprofit, and the nonprofit seeks access to more funds and capabilities. The Piaget moral development theory prescribes an approach to the Collaboration which emphasizes one of cooperation, equity, and mutual respect. While a child usually outgrows the constraint by the rules and establishes his or her own autonomy, a corporation is always bound by constraint, including the rules applicable to corporate governance.<sup>171</sup> This would advocate in favor of a middle ground for regulation, where there is guidance but not overly constrictive rules.

Piaget's theory of moral development applies to the behavior of children and, as such, does not necessarily directly parallel the moral development of corporate entities in the Collaboration.<sup>172</sup> However, the core tenants of Piaget's moral development theory—cooperation and mutual respect or constraint and unilateralism—shed light on and offer guidance related to implementation of corporate governance standards and the corresponding duty of care. We see the concepts play out in the Collaboration's interactions. Further, corporate governance itself generally relates to a tug-of-war between constraint and freedom: constraint from management's opportunism and freedom for management to make business decisions.

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171. See Mitchell, *supra* note 1, at 480.

172. See *Id.* at 499.

It would be silly to argue that direct parallels exist between corporate behavior and children's behavior, and I do not attempt to do so. Instead, I have tried to draw one of the central insights from Piaget's work to show how it illuminates important problems in corporate law. This central insight concerns the effects of constraint and cooperation on moral development and growth.

*Id.*