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ESSAYS

THE MORAL UNDERPINNINGS OF DELAWARE'S MODERN CORPORATE FIDUCIARY DUTIES

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I. INTRODUCTION

Fiduciary duties serve dual purposes in modern corporate law. First, they support economic prosperity by establishing a liability framework to incentivize corporate directors and managers to engage in value-maximizing behavior. By deterring negligent or self-interested action by those in corporate positions of trust, fiduciary duties play a distinct role in fueling investment and innovation, and they support good corporate governance. A different, though no less important, purpose of fiduciary duties is to serve as the moral pulse of our society as we define and set expectations for business relationships among ourselves. This moral component of fiduciary duties is no more obvious than in the "rich, moral vocabulary"[1] that characterizes these duties and their long history and evolution, which traces all the way back to biblical principles.[2]

It is upon this long history and evolution of the morality of modern corporate fiduciary duties that I will focus this Essay. Before outlining the specific direction of this Essay, however, I must clarify the subject matter. Throughout this Essay, I refer to

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* Chief Justice of the Delaware Supreme Court. I thank my law clerk Ryan Scofield and judicial intern Jonathan Urick for their research and drafting contributions to this Essay. The views I espouse in this Essay are my own and are neither attributable to any of my colleagues on the Supreme Court nor any other judges in Delaware or elsewhere. I also reserve the right to participate in future cases that may implicate issues related to those I discuss here on the basis of their unique factual records.

1. Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 28 (2003).

2. *See* Mary Szto, *Limited Liability Company Morality: Fiduciary Duties in Historical Context*, 23 QUINNIPIAC L. REV. 61, 61 (2004) ("Fiduciary duties are the offspring of ecclesiastical property views and Roman legal forms. They would then mature into agency and trust law; partnership and corporate law would later wed them to the business association. They are Christological in origin.").

"modern corporate fiduciary duties," by which I intend the modern construction of corporate fiduciary duties as Delaware courts commonly impose them upon directors and managers of Delaware corporations. That is, specifically, I refer to the dual fiduciary duties of care and loyalty, along with the overarching requirement—but not independent fiduciary duty—of good faith conduct.[3] These duties are products of the common law and have evolved by judicial definition; no Delaware statute names, numbers, or defines any fiduciary duty.[4] I do not intend to use this Essay to argue the propriety of this conception of fiduciary duties vis á vis competing conceptions,[5] but I explain the modern approach here to define specifically what I mean by "modern corporate fiduciary duties" throughout this Essay.

I do not intend this Essay to provide a comprehensively thorough examination of each stage in the evolution of modern corporate fiduciary duties from biblical times to modern day. Rather, I plan to trace this evolution in moderate detail from its beginning through its various legal manifestations to modern corporate law. This morality, borne of biblical Creationism,[6] became a force affecting Roman inheritance law and played a significant role in canon law, the English common law of property, trust law, and the development of agency, partnership, and modern corporate law.[7] One reason that courts through the ages have continued to adapt this morality to fit emerging legal

3. *See* Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006) ("[A]lthough good faith may be described colloquially as part of a 'triad' of fiduciary duties that includes the duties of care and loyalty, the obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty.").

4. Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1, 5 (2007).

5. Indeed, though I support the modern approach including the duties of care and loyalty and the requirement of good faith conduct as a "subsidiary element" of the duty of loyalty, see *Stone*, 911 A.2d at 370, the Delaware Supreme Court has construed "fiduciary duties" in Delaware somewhat inconsistently over time. *Compare Stone*, 911 A.2d at 370 (explaining that corporate directors and officers have fiduciary duties of care and loyalty and an obligation to act in good faith) *and* Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009) (affirming that the only fiduciary duties Delaware officers and directors owe are the duties of care and loyalty), *with* Emerald Partners v. Berlin, 787 A.2d 85, 90 (Del. 2001) (describing due care, loyalty, and good faith as the three "primary fiduciary duties" in Delaware corporation law) *and* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) (describing the "*triads* of [directors'] fiduciary duty—good faith, loyalty, or due care").

6. By "Creationism," I refer to the general idea that God created the world, not the more particular idea that the account in the Book of Genesis describes seven 24-hour periods.

7. Szto, *supra* note 2, at 86.

constructs and new circumstances is because of consistent "judicial sensitivity to the imbalance of power between fiduciary and beneficiary."[8] This imbalance stems from the inherent passivity of the relevant beneficiaries and the control exercisable by the relevant fiduciaries, whether in corporate law, trust law, or the various other iterations across history.[9]

After tracing this genealogy, I will illustrate that this morality continues to influence modern corporate fiduciary duties in Delaware. It has not changed much despite the modern rise in popularity of the so-called "law and economics" academy. In conclusion, I will explain why I—a self-described "contractarian" and regular supporter of the law and economics paradigm—believe there is a positive continuing role for morality in fiduciary duty law.

II. THE GENEALOGY OF FIDUCIARY DUTIES

A. *Theological Genesis*

The morality underlying modern corporate fiduciary duties began with the biblical account of the Creation in the Book of Genesis.[10] According to the Bible, God created the Earth and then created man and woman as stewards of his will.[11] In a grand sense, then, according to biblical Creationism, God is the world's owner and humans are his agents, whom he appointed to exercise dominion over, use, and take care of His property.[12] Thus, though the account is theological, not legal in nature, humanity is, in a sense, a fiduciary with duties to God in its exercise of dominion over the Earth.

Also, Jesus Christ plays the role in Christian theology of the "perfect fiduciary."[13] According to Christian doctrine, Jesus Christ was an utterly selfless steward sent to Earth to provide humanity the promise of eternal inheritance.[14] He taught lessons in morality, including notions of loyalty and care toward others. Through His life and death, according to Christian doctrine, He embodied these morals about which He taught, and therefore served as an example for mankind in the continued exercise of its fiduciary mandate to steward the Earth in God's likeness.

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8. Johnson, *supra* note 1, at 47–48.
9. *Id.* at 48.
10. Szto, *supra* note 2, at 87.
11. *Id.*
12. *Id.*
13. *Id.* at 88.
14. *Id.*

These early theological examples were not legal precepts during biblical times, but they nevertheless provide the starting point for the moral foundation of modern corporate fiduciary duties. Roman law first tied these moral concepts to actual legal frameworks, which canon lawyers later adopted in structures that eventually evolved into early trusts. With the emergence of modern business associations, practitioners evolved trust law to address new circumstances, and modern corporate fiduciary duties followed.

B. *The Romans Wed Theological Morality to Law*

The Romans began to adapt this early theological morality into a legal construct by applying it to emerging circumstances in property and inheritance law.[15] The Romans developed several devices, including the *fideicommissum* and *fiducia*, which involved the holding of property by a fiduciary in the interest of a beneficiary.[16] The Church later seized upon these devices and adopted them to fit its own ends, serving as a link to more modern devices like uses and trusts.[17]

The Roman *fideicommissum* was a three party arrangement reminiscent of a modern trust. The owner of an item entrusted it to a friend who was under a legal obligation to pass the item on to an identified beneficiary.[18] Specifically, the testator named the legal beneficiary—known as a *haeres fiduciarius*—as his legal heir, and the *haeres fiduciarius* then had an obligation to hold the inheritance in the interest of the true beneficiary—the *fideicommissarius*.[19] The Romans developed the *fideicommissum* to address several different circumstances. First, it provided a means of allowing testators to devise their estates to legally incapacitated beneficiaries.[20] This category of incapacitation under Roman law included, for example, unmarried adults, foreigners, criminals, and others.[21] Also, the *fideicommissum* permitted indebted testators to shield their children or other legal heirs from inheriting a debt-riddled estate.[22] Because heirs inherited both assets and liabilities, by disinheriting his children and using

15. *Id.* at 89.
16. *Id.*
17. *See id.* at 90–92.
18. Shael Herman, Utilitas Ecclesiae*: The Canonical Conception of the Trust*, 70 TUL. L. REV. 2239, 2252 (1996).
19. *See* Szto, *supra* note 2, at 89; *see also* Avisheh Avini, *The Origins of the Modern English Trust Revisited*, 70 TUL. L. REV. 1139, 1147–48 (1996).
20. Szto, *supra* note 2, at 89.
21. *Id.*
22. *Id.*

a *fideicommissum* to name a different legal heir, an indebted testator could divert his debts from burdening his children after his death.[23]

Under Roman law, a *fideicommissum* was only valid upon the death of the testator;[24] it was not a valid legal mechanism for an *inter vivos* transfer of property. It also did not become a valid legal construct until the 500s A.D.

Another device the Romans created was the *fiducia.* The *fiducia* was often used in a manner more akin to collateral than a trust, but the fiduciary concept was similar. Generally, a *fiducia* was a type of security involving the transfer of ownership of property from a debtor to a creditor until the debtor repaid the debt in full.[25] The creditor, in a sense, held the property both as collateral for the debt and in trust for the debtor. While the creditor in fact owned the property until it received complete repayment from the debtor, the creditor could exercise all of the rights of ownership over the property except the right to sell it.[26] In that sense, the creditor was legally required to hold the property in the interest of the debtor, and because the creditor legally owned the property for the relevant period, the creditor had every incentive to manage, preserve, and profit from the property.

A *fiducia* was not limited to the context of security interests, however. For example, it was also available to a property owner who wanted to secure his own property against threats by transferring ownership to another person who could hold it in trust for him until he was prepared to reclaim ownership.[27] Under this contractual arrangement, the fiduciary had a legal obligation to return the property to the true owner when the purpose of the transfer was fulfilled.[28]

Under these Roman legal constructs, we observe the seeds of modern fiduciary duty law. In both cases, the legal structure involved one person holding property on behalf of another to whom the holder had a legal obligation to transfer ownership. The Church used and evolved these Roman constructs, providing the link to the development of the use, which begat the trust, and ultimately led to modern corporate fiduciary duty law.

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23. *Id.* at 89–90.

24. *Id.* at 89.

25. *Id.* at 90.

26. *Id.*

27. DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 536 (William Smith, ed., 1870).

28. *Id.*

C. *The Church Adapted Roman Law*

Early canon law was very similar to Roman law, as the Church was, for a long time, the "custodian" of the Roman legal tradition in Europe.[29] In fact, the Church considered Roman law to be "divinely reasonable," and it therefore adopted many Roman legal forms—including the *fideicommissum*—to address emergent theological issues.[30] It is important to note at this juncture that the Church operated—indeed, operates—much like a corporation; the Church was an invisible entity that acted exclusively through the clerical hierarchy that served as its agents.[31] The clerical hierarchy, similar to the role of corporate directors and managers, had the duty to administer the Church's patrimony and manage its property for the welfare of Christianity.[32]

The clerics of the era faced other circumstances that affected the manner in which they had to discharge this duty of serving as a fiduciary of Church property for the benefit of Christendom. First, Christian teaching forbids clerics from owning property.[33] Second, many lay property owners sought assurance that their ownership would not diminish their spiritual standing.[34] Also, St. Augustine, a pillar of the early Church, taught that material goods must be put to spiritual use.[35] Consider, then, the prevailing environment: lay property owners, taught that material goods must be put to spiritual use, worried that their ownership would harm their place in the theological order, but property transfers to the Church were complicated by the fact that the clerics, through which the Church "acted" and without which the Church was powerless, could not own property. This complicated landscape which had been created was ripe for the development of legal accommodations.

In the beginning, clerics adapted *fideicommissa* directly from the Roman tradition in order to become the administrators of Church property which they could then manage and utilize to serve the Church's ends.[36] Adopting the principles of *fideicommissa* directly into the canon law served several important pur-

29. Szto, *supra* note 2, at 90.

30. *Id.* at 91; *see also* Dennis J. Callahan, *Medieval Church Norms and Fiduciary Duties in Partnership*, 26 CARDOZO L. REV. 215, 222 (2004) ("Ecclesiastical judges readily incorporated the robust body of Roman law—the sixth century Justinian Code—into canon law.").

31. Herman, *supra* note 18, at 2251.

32. *Id.*

33. Szto, *supra* note 2, at 91.

34. *Id.*

35. *Id.* at 92.

36. *Id.*

poses. First, it insulated the Church against adverse claims on its property. For example, relatives of a cleric might have claimed ownership of Church assets under the control of a cleric upon his death, or a cleric's creditors may have sought to recover from Church assets subject to his care.[37] It also created a liability scheme for clerics who, contrary to the interests of the Church, wasted or abused Church assets which they controlled but did not own.[38]

Over time, the *fideicommissum* transformed into the *utilitas ecclesiae*.[39] The *utilitas ecclesiae* was more a semantic than a functional deviation from the *fideicommissum*. That is, individual clerics were still granted stewardship and control—but not ownership—over Church assets for personal maintenance and to serve the Church's spiritual mission.[40] The movement from *fideicommissum* to *utilitas ecclesiae* is indicative of the powerful moral framework underlying emerging canon law.[41] The *utilitas ecclesiae* included the same insulation against adverse claims on Church property, continued to prevent clerics from passing Church assets to relatives upon their death, and imposed legal liability on clerics who wrongfully abused or wasted Church property.

While clerics took poverty vows, however, and were forbidden from owning property, their administrative power over Church assets, which included using the assets for personal maintenance, allowed the clergymen to live lives of significant collective wealth.[42] Thus, canon lawyers began speaking in terms of clerics holding Church wealth "*ad utilitatem ecclesiae*"[43]—roughly, "for the utility of the Church." The evolution of this Latin phraseology was "[r]ich in both implications and connotations," and it suggested that while the clergy exercised control over Church property, Christ was the ultimate owner and beneficiary of the property.[44] In the words of one academic, "[a]s Christ's perfect pilgrims, clerics were to husband material goods in their custody for His greater glory."[45] Thus, early clerics inherited fiduciary duties similar to those of trustees well before medieval Church

37. Herman, *supra* note 18, at 2252.
38. *Id.*
39. Szto, *supra* note 2, at 92.
40. *Id.*; *see also* Herman, *supra* note 18, at 2244.
41. *See* Callahan, *supra* note 30, at 224 ("[T]he emerging law had a powerful normative basis, a moral framework that in many situations impeded the growth of commerce.").
42. Herman, *supra* note 18, at 2244.
43. *Id.*
44. *Id.*
45. *Id.* at 2241.

courts and English common law courts refined the concept and vocabulary of uses and trusts.[46] And, notably, those duties were couched in moral terminology.

D. *The English "Use" Evolved at Common Law*

By the 1100s A.D., English common law courts enforced "uses," which evolved from *utilitas ecclesiae* and were the forebear to trusts.[47] The legal structure of uses was far from revolutionary—a property owner transferred legal title in property to a person who would hold the property, in a fiduciary capacity, for a beneficiary.[48] In the legal terminology of the era, a *feoffor* would transfer title—an act known as *enfeoffment*—to the *feoffee to uses* in order to benefit the *cestui que use*.[49] The clergy were the first class to utilize the use.[50]

The Mortmain Acts in England prohibited the clergy from receiving donations of real property by prohibiting the giving of land to charitable organizations, including the Church.[51] The clergy, consequently, began to take advantage of the use in order to circumvent the limitations of the Mortmain Acts and allow landowners to convey land to clergymen who were duty-bound to manage and maintain it for the benefit of the Church.[52] Around the same time, religious orders—most notably the Franciscan Friars—popularized the use significantly.[53] The individual friars had taken vows of poverty and were therefore precluded from owning any worldly possessions, but they widely employed the use in order to take control of and manage land and other property donated for the benefit of their religious order.[54] Clearly, this construct is reminiscent of the canonic *utilitas ecclesiae*.

With time, the use became popular among laymen, as well, because it provided a series of advantages over restrictive common law property principles. For example, under the English common law of property, holding legal title to property was a costly endeavor. Specifically, in the feudal system, vassals held

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46. *Id.*

47. Szto, *supra* note 2, at 94. *But see* Avini, *supra* note 19, at 1140–41 (suggesting that while scholars long accepted the *fideicommissum*, and therefore the *utilitas ecclesiae*, as the direct ancestor of the use, modern theories contend that, in fact, the Salic *Salmannus*, the Islamic *waqf*, or a combination of all three served as the basis for the development of the use).

48. Avini, *supra* note 19, at 1143.

49. *Id.*

50. *Id.*

51. *Id.* at 1143–44.

52. *See id.* at 1144.

53. *Id.*; *see also* Szto, *supra* note 2, at 94–95.

54. Avini, *supra* note 19, at 1144.

legal title and owed "reliefs," or money payments, to their lords upon the occurrence of certain events.[55] Vassals could avoid paying reliefs by *enfeoffing* title to the land in a *feoffee to uses* and naming themselves as the *cestui que use*, entitling them to use—but not own—the property at issue.

Additionally, the use provided lay landowners other significant advantages. For example, the use permitted land owners to prevent the forfeiture of their property in the event that they broke certain laws, the punishment for which would otherwise have included divestiture of property.[56] The use also allowed debtors to avoid repaying creditors by *enfeoffing* a *feoffee of uses* and naming themselves the *cestui que use* because the common law provided no remedy to creditors against the interest of a use beneficiary.[57] Also, it permitted landowners to avoid marital estates—by *enfeoffing* a *feoffee of uses*, a landowner could prevent the attachment of a dower interest in his daughter upon her marriage.[58] Regardless of the motivation underlying the creation of a given use, the *feoffee* held the property as a fiduciary, managing it and maintaining it for the interest of the beneficiary.

During this early common law period, property owners could only transfer legal estates during their lifetime.[59] Meanwhile, property owners who *enfeoffed* property to a *feoffee* and retained only its use held an equitable—not legal—estate, which they could transfer either in secret during their lives or even upon their death.[60] Legal estates were not transferrable *post mortem*,[61] so the increased flexibility of uses portended their broad adoption and employment. On the other hand, courts of law had jurisdiction over legal estates, but had no jurisdiction over the enforcement of uses.[62] Consequently, for some time, while uses were flexible constructs, they were also mere honorary obligations because beneficiaries had no remedy at law and courts of equity were only beginning to emerge.[63]

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55. *Id.* These events included, for example, when the land descended to an heir, or when the lord's daughter married, or when the son achieved knighthood. *Id.* (citing GEORGE G. BOGERT & GEORGE T. BOGERT, HANDBOOK OF THE LAW OF TRUSTS, 8 (5th ed. 1973)).

56. *Id.*

57. *Id.* at 1144–45.

58. *Id.* at 1145.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

There is evidence that ecclesiastical courts were the first to enforce uses.[64] The primary reason for this is twofold: (1) before the Court of Chancery came into existence, ecclesiastical courts had jurisdiction over probate, and (2) canon law empowered church courts to act in equity when necessary to ensure justice.[65] This enforcement by church courts began to decline in the late fifteenth century in conjunction with the Court of Chancery's emergence and assumption of jurisdiction over probate.[66] The Court of Chancery's equity power to enforce uses by subpoena gave teeth to uses and made them even more popular.

By the sixteenth century, all classes of people widely utilized the use for all of the fraudulent purposes discussed above—avoiding "reliefs," evading creditors, avoiding dower, and bypassing the limitations of the Mortmain Acts.[67] In response, Parliament passed the Statute of Uses in 1535.[68] Parliament's purpose in passing the statute was to convert all uses from equitable estates to legal estates.[69] Functionally, Parliament attempted to do this by eliminating the middleman; the statute provided that the creation of a use vested legal title to the property immediately in the *cestui que use*, thereby bypassing the *feoffee of uses* altogether.[70] Because of the plain language of the statute and its interpretation by the Court of Chancery, however, certain equitable interests remained protected.[71] For example, the Court of Chancery widely interpreted the statute as converting only *enfeoffments* of real property—not personalty.[72] Even then, it interpreted the statute as voiding only "general" trusts—traditional uses where *feoffors* would *enfeoff feoffees* for the benefit of *cestui que use*.[73] On the other hand, the Court of Chancery interpreted the statute as not applying at all to "special," or "active" trusts—the transfer of property from an owner to a trustee for some temporary purpose.[74] As a result, the popularity of traditional uses diminished somewhat, but trusts survived the Statute of Uses largely intact, paving the way for modern trust law and the continued development of fiduciary principles.

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64. Szto, *supra* note 2, at 95.
65. *Id.* at 95–96.
66. *Id.*
67. Avini, *supra* note 19, at 1145–46.
68. *Id.* at 1146.
69. *Id.*
70. *Id.* at 1146–1147.
71. *Id.* at 1147.
72. *Id.*
73. *Id.*
74. *Id.*

E. *Trusts Reinvigorated and Prompted a Renewed Focus on Fiduciary Principles*

After Parliament passed the Statute of Uses, the Court of Chancery began to broadly enforce trusts as separate entities from uses.[75] As with uses, the structure of trusts was consistent with structures, like *fideicommissa*, that had existed in previous legal regimes.[76] A major development of trusts, however, was that the terminology of "trust" reinvigorated the moral foundation underlying the legal framework, and trust law provided a mechanism through which fiduciary principles could continue to mature.

Technically, trusts were—in fact, are—very similar to uses. The beneficiary has "the jural right to use and enjoy the trust property, [though] still there is vested in the trustee a certain ownership."[77] Classically, trusts involve a property owner—a settlor—transferring legal title to the subject property—the corpus—to a trustee.[78] The trustee, in turn, administers the trust and collects and spends revenues for a beneficiary whom the settlor designates.[79] The beneficiary, though he never owns the corpus, acquires equitable rights in it.[80] Curiously, the trustee can, under certain specific circumstances, transfer the corpus to an outside party, yet he cannot waste, abuse, or siphon off the proceeds from the transfer, which ultimately belong to the beneficiary.[81] Meanwhile, the beneficiary, though ultimately entitled to the funds produced by a transfer of the corpus to an outside party, cannot transfer the corpus because the trustee—not the beneficiary—holds legal title.[82] If a trustee dies, just like the death of a clergyman in the case of a *fideicommissum*, his heirs cannot claim against the corpus, even though the trustee technically owns legal title to it, because the trustee held legal title solely for the benefit of the beneficiary.[83] Similarly, the trustee's creditors cannot claim against the corpus.[84] The beneficiary's

75. Szto, *supra* note 2, at 97.

76. *Id.*

77. *Id.* (quoting Brendan F. Brown, *The Ecclesiastical Origin of the Use*, 10 NOTRE DAME L. REV. 353, 359 (1935) (citation omitted)).

78. Herman, *supra* note 18, at 2242.

79. *Id.* at 2243.

80. *See id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

creditors, however, may claim against the corpus despite the fact that the beneficiary does not own legal title to it.[85]

This arrangement embodies the specific contemporary legal meaning of a trust, and the progression from uses to this specific formulation took several centuries.[86] Equity also developed notions of "quasi-trust," which applied to situations that implicate principles of confidence or trust, but which do not fit this specific technical framework.[87] The technical structure of a trust certainly implicates paradoxical consequences—i.e., the beneficiary cannot dispose of the corpus even though he is entitled to proceeds from any transfer, while the trustee can dispose of the corpus even though he is not entitled to any portion of the proceeds. This paradoxical arrangement is a consequence of the development of the English Court of Chancery as a stand-alone court of equity.[88]

The English separation of law from equity set the stage for the distinctly English development of the modern trust. Beneficiaries of trusts—like beneficiaries of uses before the Statute of Uses—had no cause of action against unscrupulous trustees at law.[89] A trustee, then, had the curious job of managing a trust corpus for certain specific purposes to the preclusion of others, while the Court of Chancery had to exercise its equity jurisdiction to weed through and dispose of the equitable interests involved.[90] Equity jurists had to define just what trustees could do and the standards against which to measure their conduct. From this ongoing consideration arose modern articulations of fiduciary duties, which soon became staples of various business law contexts.

F. *Agency, Partnership, and Corporate Law Provide New Settings for the Continued Moral Development of Fiduciary Principles*

Agency law originated from uses and trusts, and it serves as an integral component of modern business law.[91] It was the first modern setting in which fiduciary duties were clearly defined. In the thirteenth century, modern agency concepts were born when *ad opus* evolved as a term signaling that one person, an agent,

85. *Id.*

86. Szto, *supra* note 2, at 97.

87. *Id.*

88. Herman, *supra* note 18, at 2243 (citing FREDERICK W. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW 23 (A.H. Chaytor & W.J. Whittaker, eds., 1909)).

89. *Id.* at 2243–44.

90. *Id.* at 2244.

91. Szto, *supra* note 2, at 98.

received money for the use of a second person, the principal.[92] Centuries later, jurists and commentators in the nineteenth century regularly began to impose "trust-like" fiduciary duties upon agents.[93]

The Restatement of Agency first authoritatively articulated the fiduciary principles of agency law that had developed during the nineteenth and early twentieth centuries.[94] In fact, the Restatement (Third) of Agency states explicitly:

> The relationship between a principal and an agent is a fiduciary relationship. . . . Although an agent's interests are often concurrent with those of the principal, the general fiduciary principle requires that the agent subordinate the agent's interests to those of the principal and place the principal's interest first as to matters connected with the agency relationship.[95]

The Restatement then explains specific fiduciary duties that agents owe to principals, including a general duty of loyalty,[96] subject to modification by the principal's consent,[97] and duties of performance,[98] which include a duty of care.[99] Many agency cases have refined the specific fiduciary duties that agents owe principals, but it suffices for present purposes to state that agents owe their principals duties to avoid conflicts of interest and to act skillfully, diligently, and zealously on behalf of those principals.[100]

While agency law really began to define the modern conceptualization of fiduciary duties, partnership law first married them to business associations.[101] To be sure, partnerships date to the Babylonian Code of the twenty-fourth century B.C.[102] The Roman *societas* was an early form of partnership marked by a "sense of fraternity" that determined the reach of partners' fiduciary duties towards each other.[103] The canon law and Church courts infused early partnership law with the Church's own moral

92. *Id.* at 98–99.
93. *Id.* at 99.
94. *See generally* RESTATEMENT (FIRST) OF AGENCY (1933).
95. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (2006).
96. *Id.* §§ 8.02–8.05.
97. *Id.* § 8.06.
98. *Id.* §§ 8.07–8.12.
99. *Id.* § 8.08.
100. Szto, *supra* note 2, at 101.
101. *Id.*
102. Callahan, *supra* note 30, at 229.
103. *Id.* at 231–32.

values.[104] These moral values, embedded in the Church's partnership law, became central propositions underlying much of the English common law's treatment of partnerships.[105]

The moral framework for modern fiduciary duties within partnerships, then, has a long history,[106] but rich articulations of the scope and meaning of fiduciary duties in modern partnerships accompanied the American development of the uniform partnership acts in the late nineteenth and twentieth centuries.[107] Unsurprisingly, these accounts described the duties of care and loyalty in moral terminology of honor, good faith, fidelity, and trust that paralleled evolving agency law principles.[108] For example, Sir Nathaniel Lindley, an English common law judge, described the partnership fiduciary relationship as follows:

> The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arise between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has law on his side, but that his conduct will bear to be tried by the highest standard of honor.[109]

Lindley also described copartners as owing each other an "obligation [of] perfect fairness and good faith."[110] And, of course, Justice Cardozo articulated perhaps the clearest—and doubtless the most famous—example of the continuing moral influence on fiduciary duties in partnership law in his opinion in *Meinhard v. Salmon.*[111] There, Cardozo explained:

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104. *Id.* at 240 ("The Church's view that good faith promises between believers formed the core of valid contracts imbued the duties partners owed each other with Christian values. . . . Once the partnership—or marriage—was formed, the good faith owed to adversarial parties in contract negotiations transformed into the fiduciary obligations owed to those with whom one shared a relationship of trust and confidence.").

105. *Id.* at 248.

106. *Id.* at 259 ("The non-economic values which originated in the moral norms of the medieval Catholic Church have inhered in Western legal systems . . . .").

107. The Uniform Partnership Act, completed in 1914, used broad language prohibiting self-dealing and detailing a duty of loyalty, but did not explicitly mention a duty of care. *Id.* at 262. The language was broad enough, however, that courts often adopted common law rules on partnership fiduciary duties. *Id.* The Revised Uniform Partnership Act, completed in 1992, explicitly stated that partners owe duties of loyalty and care to each other. *Id.* at 266.

108. *See* Szto, *supra* note 2, at 102–05; Callahan, *supra* note 30, at 279.

109. NATHANIEL LINDLEY, A TREATISE ON THE LAW OF PARTNERSHIP 700 (Marshall D. Ewell ed., Chicago, Callaghan & Co. 2nd Amer. ed. 1888) (1860).

110. *Id.* at 702.

111. 164 N.E. 545 (N.Y. 1928).

> Joint adventurers, like copartners, owe to one another, while the enterprise continues, the *duty of the finest loyalty.* Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but *the punctilio of an honor the most sensitive,* is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the *rule of undivided loyalty* . . . .[112]

These passages make clear that modern partnership law successfully tied the morality that had long supported partnership entities to developing agency law principles. In the process, it explicitly embedded the concept of modern fiduciary duties with a distinctly moral dimension.

For centuries, partnerships were favored forms of business, and people generally organized corporations only for public or charitable purposes.[113] Nevertheless, the modern corporation is traceable to Roman municipal communities and canon law's precursor to the "legal person," the *persona ficta.*[114] This changed dramatically as a result of the Industrial Revolution in the mid-nineteenth century, however, and business corporations became very popular.[115] The proliferation of general incorporation statutes precipitated this shift, which coincided with the ongoing moral development of fiduciary principles in trust, agency, and partnership law.[116] Courts and commentators readily applied these fiduciary principles to corporations, as well.[117]

Sir Nathaniel Lindley, for example, writing about the corporate form, described corporate directors as trustees and explained that they, by virtue of accepting a directorship, inherit fiduciary duties of care and loyalty and an increased obligation to observe good faith.[118] While his conception of directors as trust-

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112. *Id.* at 546 (emphasis added).

113. Szto, *supra* note 2, at 109.

114. *Id.* at 108–09 (quoting JAVIER MARTÍNEZ-TORRÓN, ANGLO-AMERICAN LAW AND CANON LAW: CANONICAL ROOTS OF THE COMMON LAW TRADITION 180 (1998)).

115. *Id.*

116. *Id.* at 110.

117. *Id.*

118. NATHANIEL LINDLEY, A TREATISE ON THE LAW OF COMPANIES, CONSIDERED AS A BRANCH OF THE LAW OF PARTNERSHIP 509–10 (Walter B. Lindley ed., Sweet & Maxwell 6th ed. 1902) (1860) ("[The corporate form] increases the obligation of the directors to observe good faith towards the great body of shareholders, to attend diligently to their interests, and to act within the limits

ees faded during the twentieth century, the moral influence on director fiduciary duties, obvious from the rhetoric he used, remained. In fact, the Delaware Supreme Court provided evidence of this ongoing moral foundation in an opinion, *Guth v. Loft, Inc.*, from 1939:

> Corporate officers and directors are not permitted to use their position of *trust and confidence* to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and *derived from a profound knowledge of human characteristics and motives*, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the *most scrupulous observance* of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an *undivided and unselfish loyalty* to the corporation demands that there shall be no conflict between duty and self-interest. The occasions for the determination of *honesty, good faith and loyal conduct* are many and varied, and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale.
>
> If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, at its election, while it denies to the *betrayer* all benefit and profit. *The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.* Given the relation between the parties, a certain result follows; and a con-

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of the authority conferred by them. Directors are not only agents, but to a certain extent trustees for the company and its shareholders . . . . The duty of directors to shareholders is so to conduct the business of the company, as to obtain for the benefit of the shareholders the greatest advantages that can be obtained consistently with the trust reposed in them by the shareholders and with honesty to other people.")

> structive trust is the remedial device through which *precedence of self is compelled to give way to the stern demands of loyalty.*[119]

The strong moral vocabulary with which the Delaware Supreme Court articulated the fiduciary duties of corporate directors in *Guth* is perhaps the clearest indication of all that the transcendent moral basis for fiduciary duties—borne of biblical Creationism and shepherded through Roman, canonical, and English common law manifestations—had finally made its way to the heart of corporate discourse.[120]

III. MORALITY IS NOT DEAD, NOR SHOULD IT BE

There is little doubt that we live in a more secular world today than at any point in history. During the twentieth century and into the twenty-first, the law and economics academy has grown in both popularity and influence. I admit that, as a general proposition, I tend to agree with the economic approach that this movement promulgates. Scholars tend to characterize law and economics disciples as "contractarians"[121]—a badge that I proudly claim, as well—because of their fundamental belief in the fairness of and economic advantages to private ordering.

Often, the law and economics academy's support for contractual freedom creates tension with prevailing moral approaches to various legal disciplines. This is true in the realm of fiduciary duties. For example, contractarians have argued that modern corporate fiduciary duties should not be based in morality,[122] and have explicitly explained that "[f]iduciary duties are not special duties; they have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings."[123] For all that I agree with the law and economics crowd, I disagree with both their objective and normative arguments; I cannot agree with their proposition

119. Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) (emphasis added). The emphasis is mine, and I intend it to highlight the strikingly moralistic tenor with which the Court described the fiduciary duties of corporate directors.

120. The Model Business Corporations Act has even codified the fiduciary principles of good faith, due care, and loyalty. Because of my specific focus on corporate fiduciary principles as they exist in Delaware today, and because Delaware has never adopted the MBCA, I do not address this issue further.

121. *See, e.g.*, Callahan, *supra* note 30, at 270.

122. Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J. L. & ECON. 425, 427 (1993) ("Acting on the moral belief that agents *ought* to be selfless will not make principals better off; it will instead lead to fewer agents, or higher costs of hiring agents.") (emphasis in original).

123. *Id.*

that modern corporate fiduciary duties are not imbued with a transcendent morality, nor can I agree that those duties should not be informed by moral principles.

In the summer of 2011, the Delaware Supreme Court decided a case, *Kahn v. Kolberg Kravis Roberts & Co.*,[124] in which the derivative plaintiffs alleged that several corporate directors violated their fiduciary duties to the corporation by purchasing stock in the corporation on the basis of material, non-public information about the corporation. The Vice Chancellor granted the defendant's motion to dismiss because, according to him, Delaware law required a derivative plaintiff to show that the corporation had suffered actual harm from a director's conduct before the court could make the director disgorge his wrongful profits from the wrongful transaction.[125]

The Supreme Court reversed the Vice Chancellor's judgment, making very clear that "actual harm to the corporation is not required for a plaintiff to state a claim [for disgorgement]."[126] As the Court explained, if a director of a Delaware corporation has profited from dealing on material insider information, "[e]ven if the corporation did not suffer actual harm, equity requires disgorgement of that profit."[127] This, in the words of the Court, is because the enforcement of modern corporate fiduciary duties is not all about dollars and cents; fiduciary duty claims like the one in *Kahn* are focused not on repaying a party for economic loss, but on the broader public policy of preventing unjust enrichment and the prevention of profiting from "a breach of the confidence imposed by the fiduciary relation."[128]

Kahn stands for the proposition that, at least in Delaware, there continues to be a clear moral element to modern corporate fiduciary duties.[129] To be sure, *Kahn* is hardly an outlier case. Indeed, mere months before deciding *Kahn*, the Delaware

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124. 23 A.3d 831 (Del. 2011).

125. *Id.* at 837.

126. *Id.*

127. *Id.* at 838.

128. *Id.* at 840 (quoting Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939)).

129. *See also* Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1989) ("Not only do these [fiduciary] principles demand that corporate fiduciaries absolutely refrain from any act which breaches the trust reposed in them, but also to affirmatively protect and defend those interests entrusted to them. . . . [D]irectors are required to demonstrate both their utmost good faith and the most scrupulous inherent fairness of transactions in which they possess [an interest].").

Supreme Court decided a different case, *William Penn Partnership v. Saliba*,[130] implicating fiduciary morality.

William Penn dealt specifically with a limited liability corporation ("LLC"), but at issue were the "traditional fiduciary duties of loyalty and care."[131] The plaintiffs in that case, members of a Delaware LLC, argued that the LLC's managers had breached their fiduciary duties through self-dealing, and the Chancellor agreed that the managers had breached their duties.[132] The Chancellor found, however, that the transaction had not harmed the LLC or the interested member plaintiffs.[133] The Chancellor did not leave the plaintiffs without any remedy, however, because he "essentially" awarded the plaintiffs their attorneys' fees, experts' fees, and costs.[134]

Applying an abuse of discretion standard of review, the Supreme Court affirmed the Chancellor's award of fees and costs even though the award contravened the general American Rule whereby parties bear their own litigation expenses.[135] The Court highlighted the fact that "where there has been a breach of the duty of loyalty, as here, potentially harsher rules come into play and the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly."[136] The Court noted that without awarding fees and costs, the plaintiffs would have been penalized for filing a successful claim for breach of fiduciary duty.[137] An alternative result would have effectively encouraged disloyalty by removing the incentive for beneficiaries to keep fiduciaries honest by filing suit. This case, like *Kahn*, makes clear that fiduciary duties in Delaware continue to be informed by moral principles.

Beyond the objective reality that Delaware corporate law today involves fiduciary duties informed by transcendent moral principles, that objective reality is as it should be. "Pure" contractarians might view a corporation as nothing more than a bundle of contracts, but that view ignores the reality that human beings are the social actors behind those contracts. There is nothing wrong with—indeed, arguably, there is significant value added by—a system of liability that holds corporate actors to a higher standard, discourages distasteful or unsavory conduct in

130. 13 A.3d 749 (Del. 2011).
131. *Id.* at 756.
132. *Id.* at 755–56.
133. *Id.* at 756.
134. *Id.*
135. *Id.* at 758–59.
136. *Id.* at 758 (quoting Cantor Fitzgerald, L.P. v. Cantor, No. 16297, 2001 WL 536911, at *3 (Del. Ch. May 11, 2001)).
137. *Id.* at 759.

blind pursuit of individual interests, and reflects the manner in which those same actors might interact in other, similar, but non-business contexts.[138] After all, the corporate context in which the law permits this morality to affect liability is one characterized by an imbalance of power between fiduciaries and beneficiaries.[139] We, as a society, encourage corporate investment, which is "socially desirable, but vulnerable," by designing a liability framework that (1) incentivizes fiduciary conduct on terms with which investors can relate and (2) proves itself an effective protector of investor interests.[140]

My position in this Essay is that Delaware's modern corporate fiduciary duties are and should be informed by a history of rich moral principles. Lest my audience somehow misconstrue this position as inconsistent with my previously published position that courts should not automatically read traditional fiduciary duties into the founding documents of alternative business entities like LLCs,[141] I should explain myself. These positions are easily reconcilable because corporations and alternative business entities are different. By law, at least in Delaware, members of alternative business entities have significantly more contractual power to define their relationships with their managers than shareholders of Delaware corporations have with their officers or directors. Consequently, in my view, members of alternative business entities can negotiate for precisely those protections that they want and ignore those that they do not want.

On the other hand, the corporate form is more of a one-size-fits-all proposition. Without the ability to create their own remedies or protective devices, shareholders must depend on courts to enforce fiduciary duties to make directors and officers, entrusted with shareholder property, walk the proverbial "straight and narrow." In this corporate context, people (directors, officers) have a responsibility to safeguard the interests of other people (shareholders). It makes sense, then, in the absence of the shareholders' ability to contractually protect their own interests, to impose limitations on the fiduciaries by holding

138. In other words, there is a certain morality that pervades our general everyday social interactions. I see no reason why morality should not play a role in affecting business relationships, which are, at the end of the day, just that—relationships.

139. Johnson, *supra* note 1, at 47–48.

140. *Cf. id.* at 48 ("Fiduciary strictures induce resource providers to assume socially desirable, but vulnerable, positions only by a proven track record of having dependably watched over the interests of those who make themselves susceptible.").

141. *See, e.g.*, Steele, *supra* note 4, at 5.

them to a standard of conduct informed by prevailing social mores and moral norms.

Not only does this alignment encourage corporate investment, which is a social good, but it also promotes value in other ways. A business landscape involving various business entities that treat fiduciary duties differently promotes maximum business entity diversity—itself a value-promoting proposition. It enables investors to have the luxury of choice; investors have a broader ability to decide which scheme best fits their risk tolerance and desired return.

IV. CONCLUSION

A rich moral foundation supports the modern conception of corporate fiduciary duties in Delaware. Transcendent moral principles, decidedly Christian in nature, evolved from biblical Creationism and influenced various legal regimes over time including Roman law, canon law, and English common law. Various commentary and cases illustrate clearly, through both rhetoric and the application of legal principles to various fact scenarios, that these moral principles still influence the manner in which jurists, practitioners, and academics consider and apply modern corporate fiduciary duties. This is true notwithstanding the expanding influence of the law and economics school.

Moreover, not only *do* moral principles still underlie fiduciary duties, but they *should.* In a business landscape marked by various business entities, a moral approach to corporate fiduciary duties adequately protects the interests of shareholders who, because of the costliness of collective action and the lack of contractual rights to protect themselves, are vulnerable to mismanagement of their investments. It also enhances business entity diversity and social value by giving investors a broader spate of choices while investing.