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Relating Fiduciary Duties to Corporate Personhood and Corporate Purpose

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1. INTRODUCTION

The subjects of corporate personhood, corporate purpose, and fiduciary duties are all central to corporate law discourse. But what is the relationship of each of these to the others? Delaware courts routinely deal with fiduciary duties, but only rarely take up corporate personhood and corporate purpose. Conversely, in a sharply split 2014 opinion the United States Supreme Court addressed corporate objectives for the first time, as well as corporate personhood, but not fiduciary duties.¹ In the larger scholarly and social arenas, the notion of corporate personhood is unendingly controversial (Johnson and Millon 2015),² and corporate purpose remains an unsettled topic evoking fierce debate,³ while the area of fiduciary duties is undeniably important but does not spark serious dissent. These three subjects of personhood, purpose, and duties should not be treated separately, as standalone topics, but each should be situated in relationship to the others.

This chapter describes how corporate personhood, corporate purpose, and fiduciary duties are vitally and coherently connected. Part 2 argues that positive law, reflecting institutional

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¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

² This is seen in hotly contested views about the wisdom of the Supreme Court's decision permitting corporations to spend money on political campaigns. *See Citizens United v. FEC*, 558 U.S. 310 (2010).

³ Compare Leo E. Strine, *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761 (2015) with LYNN STOUT, *THE SHAREHOLDER VALUE MYTH* (2012).

reality, makes it beyond dispute that corporations are persons in the eyes of the law. While longstanding debates about the theoretical nature of corporateness likely will continue,⁴ corporations are meaningful socio-legal entities separate and distinct from those persons associated with them. With respect to corporate purpose, the objective or “mission” of a business company is to provide goods or services in a particular manner, goals that may in part be non-monetary in nature and not necessarily the ultimate aims or motives of all individuals choosing to associate with a corporation. Moreover, Delaware law is agnostic and broadly permissive as to a company’s goals.⁵ Outside the narrow *Revlon* context,⁶ Delaware does not mandate shareholder wealth maximization – nor does the law of most other states – and even in the *Revlon* setting, remedial relief due to director failure is extremely unlikely.⁷ Shareholder well-being, moreover, is better understood as an outcome of corporate success, not necessarily the very point of business enterprise. Taking these considerations together, corporations as distinct *entities* can and do have *purposes* separate and apart from those of its shareholders and other constituencies who choose, so to speak, to submit voluntarily to the jurisdiction of the corporation. This is an important characteristic of a burgeoning institutional pluralism not just in the business sector, but in modern society more generally, as different organizations pursue, to varying degrees, different entity-specific objectives.

Part 3 introduces fiduciary duties into this picture, arguing that corporate boards of directors collectively have the statutory governance responsibility, and corporate directors

⁴ See generally David K. Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201 (1990). As Professor Orts observes about economic theories of the firm: “[They] do not provide an adequate understanding of business firms.” ERIC W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* ix (2013).

⁵ Lyman Johnson & David K. Millon, *Corporate Law after Hobby Lobby*, 70 BUS. LAW. 1 (2015); Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385 (2008).

⁶ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

⁷ Lyman Johnson & Robert Ricca, *Reality Check on Officer Liability*, 67 BUS. LAW. 75 (2011).

individually have the fiduciary duty, to act in the best interests of the corporate entity, which is to say, to act to advance the purposes of the corporation, whatever they might be. The purpose may be – but need not be – zealous shareholder wealth maximization, or it might be the pursuit of pecuniary objectives along with one or more other non-pecuniary goals.

Thus, stated most strongly, the directorial fiduciary duty of loyalty is to act in the best interests of the corporation (a distinct person) by affirmatively advancing the articulated corporate purpose(s). This is the “maximum condition” of devoted loyalty, to use Professor George Fletcher’s apt phrase,⁸ and it comports with Delaware’s, and particularly Vice-Chancellor Laster’s, “standard of conduct” doctrinal notion. It also bears out Professor Paul Miller’s and Professor Andrew Gold’s recent theoretical account of “fiduciary governance,” and Professor Arthur Laby’s “adoption of ends” theory of duties.⁹ But to fully explain the policy of strong judicial deference to director prerogative in charting corporate direction, and the empirical reality that remedial relief is rare even in the face of director failure to fulfill duty – that is, failure to devotedly advance corporate purpose – Fletcher’s weaker “minimum condition” of loyalty and Delaware’s more forgiving “standard of liability” also are needed. Here, only a less substantial version of loyalty is judicially demanded – nonbetrayal of the corporation’s institutional interests and purpose, not their fully faithful attainment. In this way, corporate law discourse can express a strong coherent demand that directors loyally serve the private corporation’s distinctive purposes even as public courts, institutionally, can only enforce a weaker demand that directors not betray those interests. Part 3 also explains how the recent wave of benefit corporation statutes moves the conceptual needle in the right direction on the

⁸ GEORGE B. FLETCHER, *LOYALTY – AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 9 (1993).

⁹ Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513 (2015); Arthur B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFFALO L. REV. 100, 130-37 (2008).

three inter-connected areas of personhood, purpose, and duty, but ultimately fails to achieve a full and desirable congruence.

2. CORPORATE PERSONHOOD; CORPORATE PURPOSE

Corporate personhood and corporate purpose are closely related concepts, with the former facilitating the latter and the latter lending moral weight to the recognition of corporate personality. Personhood reflects the corporation's socio-legal *identity* as separate from that of persons associated with it and provides the legal *capacity* to pursue distinct institutional objectives. Corporate personhood brings with it certain rights and benefits in aid of that pursuit, but it brings as well a distinct legal, social, and moral responsibility.¹⁰ Corporate purpose is simply the particular institutional objective(s) sought to be achieved by cooperative human endeavor through the corporate entity. As the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.* put it, a corporation is a form of organization "used by human beings to achieve desired ends."¹¹ Corporations, like other social groups, thus can have commitments at the collective level that are not necessarily equivalent to those of associated persons, and corporations take actions that, both philosophically and legally, "cannot be directly ascribed to the individual members."¹² These distinctive *corporate* commitments support recognition of the corporation as a distinctive person.

¹⁰ This is the subject of a vast legal, business ethics, and philosophical literature. An excellent recent treatment, collecting substantial literature, is Orts' *Business Persons: A Legal Theory of the Firm*, *supra* note 4. On the importance to society of morally distinct social groups in light of the relational nature of conscience, see ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE (2009).

¹¹ *Hobby Lobby*, 134 S. Ct. at 2768.

¹² Kendy M. Hess, *The Free Will of Corporations (and Other Collectives)*, 168 PHIL. STUD. 241, 243 (2014).

A. Personhood

1. Positive Law

As a matter of positive law, corporations are unquestionably regarded as persons. A recent example is seen in the 2014 Supreme Court *Hobby Lobby* decision. In holding that a corporation is a “person” under the Religious Freedom Restoration Act,¹³ the Supreme Court turned in part to the federal Dictionary Act,¹⁴ which like countless statutes and regulations, includes corporations within its definition of “person.” As a widely-used form of business entity, and as one of many types of socio-legal groups, corporations are separate and distinct from – and are not mere avatars or proxies of – the human beings associated with them in the disparate roles of shareholders, employees, directors, creditors, officers, customers, and so on. This is true even though corporations are brought into existence and continue to function only by the actions of human persons who see advantage in proceeding collectively rather than individually. Distinctive personhood also recognizes the obvious empirical reality that society is populated with numerous social groups and, conversely, that participants in these groups also participate in many groups seeking to fulfill diverse goals and in which they play yet different roles, while still preserving their own individual identities and personhood.

Personhood permits these diverse groupings to possess discrete, sharply demarcated identities while serving many pragmatic purposes as well. These include, for example, the facilitating of property ownership and transfer, ease of contracting, initiation of and amenability to lawsuits, and, importantly, the advancement of unique institutional goals. Given the risks and liabilities of business activity, personhood also achieves a salutary two-way partitioning of assets in which, on the one hand, shareholders, directors, officers, and agents are not responsible for

¹³ Religious Freedom Restoration, 42 U.S.C. §§ 2000bb–4 (2012).

¹⁴ *Hobby Lobby*, 134 S. Ct. at 2768.

corporate liabilities, and on the other hand, the corporation likewise is not responsible for the individual liabilities of those associated persons. Relatedly, corporations as persons can be held liable under civil and criminal laws, and they pay taxes and are subject to civil fines and penalties for wrongdoing, quite apart from whether associated persons also are sanctioned.

Positive law not only facilitates group activity through its recognition of corporate personhood, it also broadly grants legal rights, privileges, entitlements, and legal protection to corporate persons. These rights and protections are not simply those of certain identified associated persons. If they were purely derivative,¹⁵ then if even one associated person already was endowed with a right or protection, the corporation automatically would be as well. But, as a basic matter of corporate governance, persons choosing to associate with a corporation lose certain aspects of personal autonomy in submitting to the sovereignty of the corporation's decision-making structure, even as they gain a new role and believe they will achieve overall advantage through association. An individualistic and disaggregated account of corporate personality, moreover, does not contend with the myriad ways in which collective groups differ ontologically from their associated persons, or pursue goals distinct from them, goals made possible only by collective endeavor of a sort an individual is not capable of by herself. This is most dramatically seen in the case of sprawling public corporations but it pertains as well to many closely held enterprises.

The Supreme Court has held that corporations enjoy many – but not all¹⁶ – of the constitutional rights afforded to human beings. In 2010, for example, the Supreme Court ruled

¹⁵ See, e.g., Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015).

¹⁶ Corporations, for example, are not protected by the Fifth Amendment's privilege against self-incrimination. *Hale v. Henkel*, 201 U.S. 43 (1906).

that corporations can spend corporate funds on political campaigns,¹⁷ and in 2014 the Court held that a corporation can exercise religion in its own right.¹⁸ In short, the status of corporations as persons under positive law is well established, and is socially, economically, and legally useful – even as the full contours of personhood continue to be worked out in accommodative relation to public regulations endowing human participants with various benefits, and even if many find corporate personhood to be conceptually problematic and politically disturbing.

2. Theory

In legal theory and moral philosophy, the ontology of the corporation (Orts 2013) – and its moral agency (Walt and Schwartzman) – is more complex, and is one aspect of understanding more generally the status of, and duties and rightful claims by, various groups of humans in a complex society. Historically, the chief legal theories of the corporation have been the aggregation theory, the artificial entity (also, concession) theory, and the real entity theory (Millon 1990). Each has enjoyed periods of hegemony, but today we live with certain fragments of all of them. In particular, since the early 1980s the aggregation theory, which views the corporation as a mere “aggregation” of other persons, has enjoyed a stunning resurgence through the nexus of contracts theory of corporate relationships. Originally a financial economics theory of the firm, its simplistic contractarian construct was systematically imported into corporate law theory in the 1980s (Millon 2013). Long attractive to many conservative libertarian scholars, this theory seeks more to disaggregate and disregard the corporation than understand it and account for its prominent place in law and society (Johnson 1992; Bratton 1989). Recently, individualistic accounts of corporateness (and of group sovereignty claims more generally) come from

¹⁷ *Citizens United*, 558 U.S. 310 (2010).

¹⁸ *Hobby Lobby*, 134 S. Ct. 2751 (2014).

progressives unhappy with the recent endorsement of strong corporate rights, such as the free exercise of religion. At the same time, Professor Klausner now argues that the theoretical assumptions of the contractarian theory are invalid and its empirical predictions have not been established.¹⁹ In the face of the corporation’s considerable political, economic, and social influence – not to mention its unquestioned recognition in positive law – an aggregation theory, whatever the ideological underpinning, lacks explanatory power of the corporation as a unique rights-bearing, socio-legal actor.

To be sure, Justice Alito’s majority opinion in the 2014 *Hobby Lobby* decision contains phrases that might be construed as reflecting shades of an aggregation conception of corporateness. For example, he described the business corporation as “simply a form of organization used by human beings to achieve desired ends.”²⁰ And in extending rights to corporations, Justice Alito stated that “the purpose is to protect the rights of these people.”²¹ Of course humans organize corporations, just as they organize churches, schools, clubs, teams, unions, and a host of other voluntary associations. But that tells us nothing about the nature of those collective endeavors once formed or about the overarching and distinctive ends to which they are employed, and it surely does not equate corporations legally or philosophically to the individual humans associated with them. Were that not so, the Court would not have held, as it did, that the corporations *themselves* in *Hobby Lobby* were “persons” that could “exercise religion,” not simply the humans associated with them. Justice Alito’s phrase “these people,” moreover, referred expressly to humans acting in *corporate* capacity. Roles, organizational

¹⁹ Michael Klausner, *The “Corporate Contract” Today*, in OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Wolf-Georg Ringe ed., 2016).

²⁰ *Hobby Lobby*, 134 S. Ct. at 2768.

²¹ *Id.*

structure, and influence in the decisionmaking process are quite different for humans interacting in the corporate setting, as in any group setting, than outside it. The ability of humans to play diverse roles in myriad social groups expands the range of opportunity open to them for the creative expression of identity, the experience of camaraderie in mutual effort toward shared ends, and service to others. When humans act corporately, that is, collectively, moreover, their actions are sensibly ascribed to the corporation, not solely (if at all) to them, simply because all humans act in many social roles, and actions taken in one collective sphere do not travel with legal import as humans move into other spheres of their lives.

The Supreme Court also recently has drawn on the artificial entity theory and, in part, on the real entity theory of corporateness. In 1987, Justice Powell’s majority opinion in a significant corporate law decision quoted from and relied on Chief Justice Marshall’s memorable 1819 language from *Trustees of Dartmouth College v. Woodward*, to the effect that a corporation “is an artificial being..., existing only in contemplation of law.”²² In 2010 the Court also suggested entity theory in *Citizens United*. Justice Kennedy wrote that “corporations and other associations, like individuals, contribute to the [discussion and debate] that the First Amendment seeks to foster.”²³ Here Justice Kennedy analogizes corporations to individuals but does not equate them or make them coextensive, even as he recognizes their undeniable social presence. He further referred to “corporations ... presenting both facts and opinions to the public” and “voices” of corporations.²⁴ Here again – in another fractured vote, to be sure – the Court acknowledged distinctive corporate personality and a role for private collaborative political action. In ruling as they did, the majority opinions in both of these cases were not instrumentally

²² CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 90 (1987).

²³ *Citizens United*, 558 U. S. at 343.

²⁴ *Id.* at 355, 339, 354.

vindicating the derived rights of shareholders – whose role within a modern corporation is quite limited – but were protecting the distinctive legal integrity, and rights and attributes, of the corporation itself, as in *Hobby Lobby*.

Into this inconclusive theoretical debate two points must be interjected. First, the undoubted, and growing, positive law recognition of the corporation as a distinct legal person is itself a fact, or datum, that must inform legal theory. Endowed by law with legal rights and protections, the corporation continues to grow in socio-economic and political significance, as a matter of the very underlying socio-legal reality that theory struggles to explain. This bodes well for the real entity theory – real as in being empirically observable – with its teaching that corporate identity is not a simple summing up (“aggregation”) of individual preferences, rights, or wills, but is distinctive in its own right because social groupings are an indelible feature of human community.

Second, as sketched in the next subpart, distinctive legal personhood facilitates the formulation and pursuit of distinctive corporate goals. These institutional objectives are commitments at the corporate level, but they may not perfectly reflect or coincide with the individual beliefs, preferences, or desires of associated persons who submit, so to speak, to the corporation’s jurisdiction and its dominion over them. This too strengthens an entity conception of the corporation.

B. Purpose

There continues to be a split of scholarly opinion on the basic question of whether the law mandates the pursuit of a particular corporate purpose.²⁵ This is not simply a normative debate

²⁵ Compare Strine and Stout, *supra* note 3.

as to what the purpose(s) of the corporation should be; this is a dispute as to what, descriptively, the law really is on this foundational subject. Almost invariably, the debate narrows to whether the law requires the maximization of shareholder wealth as the sole or predominant corporate purpose, or at least specifies a default rule to that effect.

Outside of Delaware, a majority of states have enacted so-called constituency statutes.²⁶ These laws permit but do not require directors to consider the interests of nonshareholders as well as those of shareholders in directing corporate activity. In conferring broad discretion to sacrifice shareholder welfare in order to pursue other objectives, these statutes reject shareholder wealth maximization as a mandatory corporate purpose, as even strong proponents of shareholder wealth maximization acknowledge.²⁷

As to Delaware, this author,²⁸ along with others,²⁹ has argued that the law does not mandate shareholder wealth maximization, but is agnostic and broadly permissive on corporate purpose. Others, including Chief Justice Strine (Strine 2015) and Vice-Chancellor Laster,³⁰ along with various scholars,³¹ argue to the contrary. For example, writing in 2015, the Chief

²⁶ See JAMES COX & THOMAS HAZEN, TREATISE OF THE LAW OF CORPORATIONS § 4.10, at 245 (2010).

²⁷ See, e.g., Leo E. Strine & Nicholas Walker, *Conservative Collision Course? The Tension between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335 (2015).

²⁸ See Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEXAS L. REV. 865, 865 (1990); Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135 (2012); and Johnson & Millon, *supra* note 5.

²⁹ See, e.g., Stout, *supra* note 3; Bruner, *supra* note 5; and Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005).

³⁰ J. Travis Laster & John Mark Zeberkiewicz, *The Rights and Duties of Blockholder Directors*, 70 BUS. LAW. 33 (2014).

³¹ See, e.g., STEPHEN BAINBRIDGE, CORPORATION LAW AND ECONOMICS 422 (2010) (describing the “shareholder wealth maximization norm”); David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181 (2013); and Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439 (2001).

Justice insists that directors must maximize value for stockholders over the long term. Shareholder wealth maximization is a default rule, and perhaps a mandatory rule, in all settings, he argues, and directors must focus exclusively on investor interests, not on those of non-investors, except as a means to the end of stockholder well-being. For this strong proposition, Chief Justice Strine cites *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,³² arguing that, far from being only a special takeover-related case, *Revlon* articulated Delaware law on corporate purpose more generally as well. He points to the court’s language that directors may consider non-investor constituencies only if “rationally related benefits accru[e] to the stockholders.”³³

Revlon does not support this heavy reliance. The quoted language mentions “benefits” for shareholders and says nothing about “maximizing,”³⁴ leaving that objective to the sale setting only. And *Revlon* pointedly emphasized that directors are defenders of the “corporate” bastion outside the sale context, and are “stockholder” value-maximizers only once in that narrow context.³⁵ The Delaware Supreme Court in *Paramount Communications, Inc. v. Time, Inc.*³⁶ also spoke of “enhancing” not “maximizing” profits, and stressed “corporate” profitability, not a share price metric. Today, then, there is no Delaware Supreme Court case law clearly mandating that, outside the *Revlon* setting, a corporation’s purpose is or must be solely to maximize wealth for shareholders. Frequently, however, business leaders, business school academics, economists,

³² *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

³³ *Id.* at 173.

³⁴ This is true as well of a 2007 decision. *N. American Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007) (explaining that directors “manage the business of a corporation for the benefit of its shareholder . . . owners.”).

³⁵ *Revlon*, 506 A.2d at 182.

³⁶ *Paramount Comm., Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1990).

and the business press take for granted that corporate directors must, and therefore should, maximize shareholder wealth.³⁷ This makes for a simplistic two-party narrative of shareholders versus managers within corporations, along with an intriguing if more troubling story of money-maximizing corporations versus society in the larger social sphere, but both narratives are founded on a faulty understanding of positive law.

Vice-Chancellor Laster also has written extensively on corporate purpose. In a recent article (Laster & Zeberkiewicz), he and his co-author wrote that directors are required to “maximize the value of the corporation over the long term for the benefit of long-term, (presumably permanent) capital.” This comes closer to an entity focus than does Chief Justice Strine’s formulation, because it emphasizes that shareholders benefit as an *outcome* of the rightful (and successful) corporate entity focus. In an earlier opinion, Vice-Chancellor Laster somewhat differently explained that “by increasing the value of the corporation, the directors increase the share of value available for the residual claimants.”³⁸ Whether Laster means in this judicial passage to emphasize shareholder wealth as the very purpose of corporate endeavor, or, once again, as simply an effect or consequence of corporate success, is not clear. Moreover, his repeated “maximizing” emphasis, like Chief Justice Strine’s, is at odds with the language of *Time* quoted above, although Laster uses “maximizing” in reference to the corporation and he uses the milder “benefit” term for stockholders. The Supreme Court, unlike Vice-Chancellor

³⁷ For example, a 2011 Brookings Institute study noted that the top twenty law schools and top twenty business schools in the United States routinely teach that maximizing shareholder wealth is (and should be) the primary purpose of the corporation. Darrell M. West, *The Purpose of the Corporation in Business and Law School Curricula*, BROOKINGS INS. 17–18 (2011), http://www.brookings.edu/~media/research/files/papers/2011/7/19-corporation-west/0719_corporation_west.pdf.

At the same time, many, likely most, business ethicists sternly resist shareholder primacy as a normative matter. *See also* Hasko Von Kriegstein, *Shareholder Primacy and Deontology*, 120 BUS. & SOC’Y REV. 465 (2015).

³⁸ In re Trados S’holder Litigation, 73 A.3d 17, 48 (2013).

Laster, however, spoke only of “enhancing,” not “maximizing,” even as it emphasized the “corporation,” not stockholders as such. Thus, long term value maximization is certainly an optional rule, but it may not be a default rule or a mandatory rule, if directors elect otherwise, as *Time* suggests they can. In other words, directors are free simply to “enhance” value and profitability over the long term, not “maximize” it, or, alternatively, possibly they could choose to emphasize short term value in all contexts, not just in *Revlon*.

The United States Supreme Court addressed corporate purpose for the first time in its 2014 *Hobby Lobby* opinion upholding the free exercise of religion right of the three corporations in that case. To do so, the Court pointedly rejected the government’s position that “the purpose of such corporations is simply to make money.”³⁹ The Court began by stating that the government’s contention “flies in the face of modern corporate law.”⁴⁰ Observing that “a” central objective of business corporations is to “make” money,⁴¹ the Court did not regard that as the only legally permissible goal. Instead, the Court noted that “modern corporate law does not require business corporations to pursue profit at the expense of everything else, and many do not do so.”⁴² The Court observed that many business corporations support charitable causes, and pursue humanitarian and altruistic objectives.⁴³ Notably, the Court did not say that corporations may advance those objectives only as an instrumentalist means to maximize profits; nor did the Court say that doing so was in some way consistent with the overarching aim of making profits.

³⁹ *Hobby Lobby*, 134 S. Ct. at 2771.

⁴⁰ *Id.* at 2770–71.

⁴¹ *Id.*

⁴² *Hobby Lobby*, 134 S. Ct. at 2770–71.

⁴³ *Id.*

Rather, when the pursuit of profits comes “at the expense of everything else,”⁴⁴ the corporation may forgo profits. In addition, the Court recognized that many business corporations are not organized “in order to maximize profit.”⁴⁵ Many companies regard that form of organization as beneficial for other reasons, the Court pointed out, such as the freedom to lobby or campaign for political candidates.⁴⁶ The Court was not altogether clear, regrettably, as to whether it was rejecting the claim that the default rule was profit maximization or simply holding that profit maximization, *if* a default rule, can and frequently is modified.

The Court, however, clearly rejected as overly simplistic the supposed stark and binary nature of corporations, to the effect that one type – non-profits – cannot and do not distribute any profits they may generate, while the other type – so-called “for-profit” business corporations – must singularly seek to maximize profits for the exclusive benefit of their shareholders. Instead, the Court recognized that companies fall along a spectrum, with some maximizing profits, others coupling the pursuit of profits with other non-monetary objectives, and yet others (non-profits) not distributing profits to owners/members at all. In this way, the Court recognized that business corporations reflect, not a mono-culture, but a growing institutional pluralism wherein private associative organizations of the same type can and do pursue a variety of goals. Positive law, then, readily accommodates a multitude of distinctive institutional missions that humans can collectively and efficiently seek to achieve through use of the corporate entity. This is seen in *Hobby Lobby’s* pointed observation that a corporation is a form of organization used “to achieve desired ends.”⁴⁷ It would be exceedingly helpful, of course, if, as a matter of positive law, a

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Hobby Lobby*, 134 S. Ct. at 2768.

clear default rule as to purpose was specified or if business corporations were required to explicitly state *what* their purpose is, so as to provide all associated persons with clarity as to the overarching goal of their combined contributions and give them a shared understanding of institutional identity.

Shareholders, like other persons, typically will do well if and as the corporate entity itself succeeds in achieving its objectives, which success of course must include profitability as a precondition for sustainable enterprise success, but this will be as a result of – not the very *raison d'être* of – the corporation's existence (Orts, p. ix). On this point stakeholder-oriented theories of the corporation (Goodpaster 1991) err as surely as do pure stockholder primacy theories. Both theories, in opposite directions, focus on the corporation existing to serve one or more constituencies, and ignore the overarching organizational mission, to which those constituencies contribute and from which they benefit, but which is distinct from their individual goals and interests. Professor Dodd noted this long ago in arguing that if the “corporate body is real ... managers of the unit are fiduciaries for it and not merely for its individual members”⁴⁸ Moreover, although various associated persons stand, in different ways, in a contractual relationship *to* the corporation as they provide critical resources,⁴⁹ the corporation itself is not simply some ephemeral “nexus” *of* those contracts. Instead, it is a business entity and socio-legal person separate and distinct from its associated persons that seeks to advance a collective purpose that may differ from and transcend the individual goals of its participants, even as its success depends on the joint effort of all those persons.⁵⁰ Appreciating this can serve to combat

⁴⁸ Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

⁴⁹ D. Gordon Smith, *A Critical Resource Theory of Fiduciary Duty*, 55 VANDERBILT L. REV. 1399 (2002).

⁵⁰ Peter Drucker captured the social institution aspect of the corporation in his view of corporate purpose as lying outside the company itself: “If we want to know what a business is we have to start with its

both the simplifying and misleading orthodoxy of shareholder primacy theories of corporateness and unhelpful rival stakeholder theories.

Summary

In this Part 2, it is shown that, as a matter of positive law, the business corporation – a vitally important socio-economic institution in modern society – is unquestionably a person separate and distinct from its various associated persons. Far less consensus exists on the best theoretical understanding of the corporation. Given positive law, which acknowledges and facilitates the significant social reality of the corporation, and the fact that corporations can and do have overarching institutional goals distinct from the individual goals of associated persons, an entity conception has considerable explanatory power.

It also has been shown that, as to corporate purpose, the scholarly debate continues at both the normative and descriptive levels, and positive law on the subject remains remarkably sparse – even in Delaware – but the Supreme Court’s *Hobby Lobby* decision and widespread constituency statutes support the view that shareholder wealth maximization is not a mandatory purpose in most states, even apart from any stockholder agreement to that effect. Delaware itself lacks Supreme Court precedent mandating shareholder wealth maximization and its law is agnostic and broadly permissive. A shareholder wealth maximization goal, to be sure, is a permissible objective, and likely it is the predominant one given prevailing business and professional education norms. But the pursuit of other corporate purposes is both possible and common, and results in a more humane and pluralistic business culture.

purpose. And its purpose must lie outside the business itself. In fact, it must lie in society since a business enterprise is an organ of society.” PETER F. DRUCKER, *THE PRACTICE OF MANAGEMENT* 37 (HarperCollins 2006) (1954). Chief Justice Strine also recognizes the corporation as a social institution. See Leo Strine Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 4 (2007).

An important question remains. How do fiduciary duties relate to corporate personhood and corporate purpose, both in law and theory? Part 3 addresses this subject.

3. FIDUCIARY DUTIES IN RELATION TO CORPORATE PERSONHOOD AND CORPORATE PURPOSE

A. **Duty to the Corporation**

As a matter of organizational function and structure, the role of shareholders is to contribute capital to a company – which then becomes committed property of the corporation and is not accessible by, or controlled by, the shareholders acting alone⁵¹ – and in return they receive shares of stock. Obviously, being a distinctive legal person, but not human, the corporation does not govern itself. Corporate statutes, reflecting this fact while acknowledging the functional separation of capital provision and corporate management, specify a governance framework that places responsibility for the corporation’s business and affairs in a board of directors. Shareholders qua shareholders play no management role. The board also exercises the corporation’s broad, human-like statutory powers.⁵² Given that this governing body must oversee the business and affairs of the corporation,⁵³ not those of the shareholders themselves, it is typically stated that the “best interests of the corporation” should be the directors' focus in discharging their governance responsibilities. The widely adopted Model Business Corporation Act states this explicitly.⁵⁴

⁵¹ An exception to this general rule applies to investors in “open end” investment companies – i.e., mutual funds. Investment Company Act of 1940, § 22(e), 15 U.S.C. §§ 80a-1–64 (2012 (funds withdrawable within seven days of demand)).

⁵² *See, e.g.*, MODEL BUS. CORP. ACT § 3.02 (2014) (corporations have “the same powers as an individual.”).

⁵³ *See, e.g.*, DEL. CODE ANN. tit. 8 § 141(a) (2011).

⁵⁴ *See, e.g.*, MODEL BUS. CORP. ACT § 8.30(a) (2014).

The plenary power and control of the board as a decisionmaking body results in the individual members of the board standing in a fiduciary relationship to the company. These persons, acting collectively, act for and on behalf of another person – the corporate entity; they are its legal representatives. This is true as well of executive officers, who are agents of the company, not agents of the shareholders (Johnson and Millon 2005), and shareholders can neither direct officer action nor remove officers from their positions. The rationale for this fiduciary relationship might be – and has been – explained by various theoretical accounts, but it is uncontroverted that, as a matter of positive law, directors stand in a fiduciary relationship to the company.

Historically, however, corporate law doctrine has demanded that directors not only act in the best interests of the corporation itself, but also in the best interests of shareholders. For example, in *Cede & Co. v. Technicolor, Inc.*, the Delaware Supreme Court stated as follows: “Essentially, the duty of loyalty mandates that the best interest of the corporation and its shareholders take precedence over any interest possessed by a director, officer, or controlling shareholder and not shared by the stockholders generally.”⁵⁵ Thus, there are two recipients of the fiduciary duty: the corporation and its shareholders.

If there is congruence between corporate interests and shareholder interests, as there frequently is given strong profit-seeking business norms, this duality is not, as a theoretical or practical matter, problematic. As noted above, shareholders (and society itself where citizens hold equity) will typically benefit as an outcome of corporate success, and suffer as a consequence of corporate adversity. This dual thrust of duty can be problematic, however, and can obscure conceptual analysis, where directors believe, in good faith, that there is a clash

⁵⁵ *Cede & Co. v. Technicolor*, 634 A.2d 345, 361 (Del. 1993), *modified in irrelevant part*, 636 A.2d 956 (Del. 1994).

between a corporate enterprise's interests and shareholder interests. After all, if a corporation has separate legal personhood not simply as a rhetorical convenience, but because it has a distinctive institutional identity and pervasive socio-economic presence, and has formulated and seeks to advance uniquely corporate objectives, then the company as an entity, not shareholders directly, should be the focus of the director duties. Canada, for example, so provides.⁵⁶ Under this approach, in discharging their statutory governance responsibilities to act in the best interests of the corporation, directors must act to advance the purpose(s) of the corporation, whatever they may be.

Whether the institutional purpose of a particular business corporation is to maximize shareholder wealth or is to pursue (but not maximize) shareholder wealth along with advancing one or more non-pecuniary goals, the responsibility, and so the fiduciary duty, of the directors in both cases is to act in the best interests of the company by serving its particular purposes. Doing so would align business corporation director duties with the duties of non-profit corporation directors – i.e., to advance the articulated mission of the corporation.⁵⁷ To always include “shareholders” within a formulation of director duties can somewhat undermine distinctive corporate mission and negate the fundamental agnosticism of corporate law on the very question of corporate purpose. In essence, the expression of director fiduciary duties as running to shareholders as well as to the corporation, at least as a matter of overall board focus in directing corporate activity, misleadingly presupposes the answer to an important and prior question: what is the purpose of this corporation? To be sure, strong business and social norms dominate on this issue, and commentators make various normative arguments (consequentialist and deontological)

⁵⁶ Canada Business Corporations Act, R.S.C. 1985, c C-44, § 122(1)(a); *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, paras. 81–84 (Can.).

⁵⁷ See Harvey Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers*, 23 J. CORP. L. 631, 649 (1998).

as to why duties should or should not favor shareholders (Strine 2015; Marcoux 2003), but law itself is agnostic and permissive, and proper formulations of director fiduciary duties should align both with clear statutory responsibilities running to the corporation and actual (not supposed) corporate objectives.

This is not to say, it must be emphasized, that directors do not also owe fiduciary duties to shareholders – only that, as a specific matter of corporate purpose, director duties run to serve the best interests of the corporation, understood as meaning the advancement of its purpose(s). Occupying powerful positions in corporate governance, directors may not, however, act to directly harm shareholders qua shareholders, or treat particular groups of common shareholders differently. Doing so would not only expose wrongly acting directors to a direct action in the name of the aggrieved shareholder(s), as opposed to a derivative action on behalf of the injured corporation itself,⁵⁸ it harms the social interest in ensuring fair treatment of citizen-investors. Directors may not, for example, interfere with the shareholder franchise, mislead shareholders when seeking their approval, fail to achieve a reasonable price for shareholders' stock once the board has made a decision to sell control of the company, or take other action damaging the shareholder in his or her capacity as a shareholder. But these fiduciary duty obligations, owed to shareholders in their position as shareholders, are not the same as a fiduciary duty to make shareholder interests superior to or equivalent to the corporation's separate interest in advancing its distinct purpose(s), to which investor capital has been committed. The duty of loyalty in the corporate context is not unitary as between the duty owed to the corporation and that owed to shareholders and, thus, the contours of director loyalty can vary as between the two.

⁵⁸ See *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004) (explaining the distinction between direct and derivative actions).

Recently, a majority of states have enacted statutes permitting the formation of “benefit corporations,” a hybrid form of business corporation that explicitly permits the pursuit of profits along with the advancement of a general and/or specific public benefit.⁵⁹ These statutes usefully illuminate, but only partially meliorate, the confusion within traditional corporate law over the relationship of fiduciary duties to corporate purpose and corporate personhood. As to corporate purpose, the statutes require the pursuit of a public benefit that has an “external” focus rather than a particular stakeholder/stockholder focus.⁶⁰ This usefully highlights the separate personhood of the corporation as well as its distinctive institutional mission.

The statutes then typically link advancing the corporate purpose to the “best interests of the corporation” focus in a coherent and ingenious way. These statutes provide that the creation of a general public benefit or a specific public benefit *is* deemed to be in the best interests of the corporation.⁶¹ This equating of corporate purpose with corporate best interests thus rejects the unsound category shift from a directorial obligation to serve the corporation’s best interests to the pursuit of shareholder wealth maximization as being the corporation’s purpose. In addition, having rejected shareholder wealth maximization as a required corporate purpose in favor of companies advancing general/specific public benefits, these statutes posit a legal congruence between the corporation’s best interests and its public benefit corporate purpose.⁶² Consistently,

⁵⁹ More than one-half of all states now authorize the formation of benefit corporations. *See State by State Legislative Status*, BENEFIT CORP. INFO. CTR., <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited May 30, 2016).

⁶⁰ DRUCKER, *supra* note 50.

⁶¹ *See, e.g.*, MD. CODE ANN., CORPS. & ASS’N § 5-6C-06(c) (West Supp. 2012); VA. CODE ANN. §13.1-787(B) (2011).

⁶² Equating the corporation’s best interest with the corporation’s public benefit purpose(s) means that additional permitted corporate purposes, such as pursuing profits or shareholder wealth, are not likewise equated with the corporation’s best interests in the statute. Thus, to create financial benefits of whatever magnitude for investors without creating a public benefit would not fall within the statutory definition of the corporation’s best interests. In this way, although a benefit corporation can pursue financial purposes along with public benefit

and keeping the focus on the corporation rather than on one stakeholder (e.g., shareholders) within the corporation, the statutes thus synchronize the *corporation's* best interests with the ongoing pursuit of the purpose(s) for which the *corporation* was formed.⁶³

So far, this statutory linkage avoids the odd turn from a corporate focus with respect to director governance responsibility to a shareholder-only focus seen in many commentators' conception of traditional corporate purpose.⁶⁴ As to director fiduciary duties, then, one might think they also would be aligned accordingly in benefit corporation statutes. That is, the fiduciary duties of directors should be to carefully and loyally advance the best interests of the corporation, and, since the best interests of the corporation are to advance its public benefit, the duties would be to pursue the avowed public benefits – i.e., to advance the corporation's purpose(s). This would deftly meld fiduciary duties, corporate purpose, and the best interests of the corporation as a separate person.

Instead, with respect to director duties, most benefit corporation statutes – with Minnesota as a striking exception – take an incoherent turn. The statutes typically require directors, in considering the best interests of the corporation, to consider the effects of any action (or any decision not to act) on a variety of stakeholders.⁶⁵ Thus, in contrast to the constituency statutes embedded in many traditional corporate statutes, which simply permit director

purposes, only the latter are equated with the corporation's best interests. This is a design flaw because the corporation's best interests should align with corporate purpose, whatever the latter may be.

⁶³ See, e.g., MD. CODE ANN., CORPS. & ASS'NS § 5-6C-06(c) (West Supp. 2012); VA. CODE ANN. § 13.1-787(B) (2011).

⁶⁴ See *supra* Part 2B.

⁶⁵ See, e.g., MD. CODE ANN., CORPS. & ASS'NS § 5-6 C-07 (a)(1) (West Supp. 2012); VA. CODE ANN. § 13.1-788(A)(1) (2011). For an extended critique, see Lyman P.Q. Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corporations*, 25 REGENT U. L. REV. 269 (2013).

consideration or balancing of stakeholder interests,⁶⁶ benefit corporation statutes mandate it.⁶⁷ In doing so, however, these laws regrettably formulate director fiduciary duties in diffuse stakeholder terms, not in terms of the *corporation's* best interests or furthering *corporate* purposes. The upshot in most statutes is an odd amalgam of stakeholderism and stockholderism, and a missed opportunity for harmonizing fiduciary duties with a truly *corporate*-centered corporate purpose. Minnesota, by contrast, sensibly provides in its director standard of conduct statute that directors must consider the effect of proposed conduct on the company's ability to achieve its specified general or specific public benefit, though directors may also consider assorted stake-holders.⁶⁸

B. Loyalty to the Corporation's Purposes

Three further observations are in order before discussing Delaware's important but prolix doctrinal standards in the fiduciary duty area. First, prominent Delaware jurists have somewhat compounded the confusion over the corporate purpose/director duty connection. Chief Justice Leo Strine has written as follows about the relationship of loyalty to corporate purpose: “[C]orporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders.”⁶⁹ In this account of fiduciary duty, the

⁶⁶ See COX & HAZEN, *supra* note 24 and accompanying text.

⁶⁷ See statutes cited *supra* note 65. This faulty move is only heightened in 2012 amendments to the Model Benefit Corporation legislation. There, a business judgment rule is codified for directors and officers. MODEL BENEFIT CORP. LEGISLATION § 301(a), 303(a)(2012). Each group is to act in the “best interests of the benefit corporation.” *Id.* Yet, in comments to those sections, it is stated that a determination of the corporation's best interests requires consideration of stakeholder interests. *Id.* § 301 cmt., 303 cmt. This undermines the correlation between corporate purpose and corporate best interests noted earlier.

⁶⁸ MINN. STAT. § 304 A.201, Subd. 1, 2.

⁶⁹ Leo E. Strine Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 155 (2012).

corporation as a distinct legal person and meaningful socio-economic institution having purposes that may not include shareholder wealth maximization is ignored.

Vice-Chancellor Laster also has written several opinions that link director duties to an assumed shareholder wealth goal, albeit with at least an acknowledgement of the corporation itself. For example: “[The fiduciary duties of loyalty and care] require that the directors exercise their managerial authority on an informed basis in the good faith pursuit of maximizing the value of the corporation for the benefit of its residual claimants, viz., the stockholders.”⁷⁰ Although the corporation itself is recognized, missing still is the possibility that the corporation may have purposes other than value maximizing or might seek to benefit stockholders only as an outcome of corporate success, rather than as the avowed corporate goal. Thus, the corporate institution as an important pluralistic body with an array of possible purposes distinct from the interests of shareholders is diminished, corporate personhood is essentially disregarded and – in the face of sparse law – corporate purpose is conflated with stockholder benefit. These juridical accounts of director fiduciary duties then do not take seriously the distinctive legal and institutional personhood of the corporation or the breadth of possible objectives to which directors are to be loyal.

Second, by way of contrast, the recent efforts of Professors Paul Miller and Andrew Gold to develop their theory of “fiduciary governance” takes seriously the possibility of a distinctive corporate purpose (Miller and Gold 2015), as does Professor Laby's "adoption of ends" theory of fiduciary obligation.⁷¹ Under their view, a fiduciary (here, directors) may be charged with the duty to pursue what Miller and Gold call “abstract purposes” rather than the interests of specified

⁷⁰ Feeley v. NHAOCG, LLC, 62 A.3d 649, 668 (Del. Ch. 2012). *See also*, In re Trados, Inc. S'holder Litig., 73 A.3d 17, 37, 40–41, 62 (Del. Ch. 2013).

⁷¹ *See* Laby, *supra* note 9.

persons. In the corporate setting, this means the directors are to pursue the corporation's particular purposes, although they may be quite concrete and not "abstract" in the usual sense. The notion of loyalty to a purpose, rather than to just one or more persons, was likewise captured by philosopher Josiah Royce in 1924 when he described loyalty as "[t]he willing and practical and thoroughgoing devotion of a person to a cause." (Royce 1924).

Thus, under a traditional analysis specifying a particular person as beneficiary that also takes the corporation seriously, directors are to act in the best interests of the corporation itself, because the corporate entity is the legal person whose interests directors are to serve and to which their fiduciary duty thus runs. Alternatively, because the analysis here equates the best interests of the corporation with the pursuit of its identified purposes, the director duty can also be described in the terms used by Miller and Gold, i.e., as a duty to advance the corporation's particular purpose(s).

Third, when directors act in their capacity as directors to advance the corporation's purposes, they are acting in their *corporate* role and are exercising *corporate* powers; they are not acting on their own behalf. Thus, collective director action, via board action, like the contributions of other associated persons, is essential to corporate action, and the highly stylized taking of director action in accordance with proper legal protocol results in the production of corporate action that, as philosopher Kendy Hess puts it, "give evidence of...a corporate desire." (Hess 2014). But, importantly, the resulting corporate action is the corporation's alone, and as Hess also underscores, "it does not entail any commitments about what the members [or directors] themselves believe or desire, [or] what their individual preferences are,..." Thus, the taking of corporate action coincides with and depends on collective director activity, but it does so regardless of a director's individual preference. Konstantin Tretyakov expresses the same

dependent, yet distinctive, relationship of director conduct to corporate action in stating that “when individuals come together the will of their collective [the corporation] can be distinct from a will of any of its separate members and [from] a mere ‘sum’ of their wills.” (Tretyakov 21).

Critically, the duty of loyalty is the very reason for this. It demands that those persons whose governance responsibilities are essential to the taking of corporate action (so as to attain corporate goals) place corporate interests first, whatever their own individual interests, preferences, beliefs, or desires may be. It is precisely the distinction between the corporate entity with its own purposes and the directors whose activity begets corporate action that requires the concept of loyalty. Without it, those humans who act in corporate role and corporate capacity can mistake their individual desires and preferences for the best interests of the corporation. Thus, loyalty plays an important and pervasive ex ante guiding role in corporate governance as well as an occasional ex post remedial role. This invites deeper scrutiny into the nature of loyalty as a fiduciary duty in light of corporate personhood and corporate purpose.

C. Delaware’s Standards Reflect Two Dimensions of Director Loyalty

To identify the proper object or thrust of a fiduciary’s duties – here, the duties of directors running to the corporation as an entity to advance its purposes – tells us nothing about the nature or content of the duties themselves. Nor does it tell us about the judicial administration of fiduciary duties and the availability of remedial relief upon breach of duty. Focusing on the duty of loyalty, it will be argued that, in the corporate personhood and purpose context, there are two dimensions of loyalty, a “minimum condition” and a “maximum condition.” Appreciating the

distinction between the two aspects of loyalty provides great explanatory power both at the theory level and in legal doctrine.

In his insightful essay on loyalty, Professor George Fletcher differentiates between what he calls the “minimal condition” and the “maximum condition” for loyalty.⁷² The “minimum condition” requires the loyal actor to “reject temptation”⁷³ and consists of “not betraying the object of one’s loyalty.”⁷⁴ Examples of minimal loyalty, drawn from outside the law, include “not committing adultery, not fighting for the enemy, [and] not worshipping foreign gods.”⁷⁵ This view of loyalty, as demanding “the minimum commitment of nonbetrayal,”⁷⁶ parallels philosopher John Ladd’s view that “*at the very least*, loyalty requires the complete subordination of one’s own private interest.”⁷⁷ Moreover, it comports with author David Brook’s recent elaboration of self-renunciation as a core element of character,⁷⁸ and with sociologist James Hunter’s argument that the “most basic element of character is *moral discipline*,”⁷⁹ the “most essential feature [of which] is the inner capacity for *restraint* – an ability to *inhibit* oneself in one’s passions, desires, and habits within the boundaries of a moral order.”⁸⁰

⁷² GEORGE P. FLETCHER, *LOYALTY – AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 9 (1993).

⁷³ *Id.*

⁷⁴ *Id.* at 40.

⁷⁵ *Id.*

⁷⁶ *Id.* at 24.

⁷⁷ John Ladd, *Loyalty*, in 5 *ENCYCLOPEDIA OF PHIL.* 97 (Paul Edwards ed., 1967).

⁷⁸ *See generally* DAVID BROOKS, *THE ROAD TO CHARACTER* (2015).

⁷⁹ JAMES DAVISON HUNTER, *THE DEATH OF CHARACTER* 16 (2000).

⁸⁰ *Id.* (emphasis added).

By way of contrast, Fletcher describes the “maximum condition” of loyalty as involving “an element of devotion”⁸¹ and “affirmative duties of devotion”⁸² as well. In this more positive facet of loyalty, he adopts the view of Josiah Royce that loyalty is “[t]he willing and practical and thoroughgoing devotion of a person to a cause.”⁸³ This robust account of loyalty is not simply a restraint or inhibition of *self*-interest.⁸⁴ Instead, it runs in favor of *another*, such as a “spouse, nation, and a jealous God.”⁸⁵ Moreover, this dimension of loyalty is never general or abstract, but rather is “always specific; a man is loyal to *his* lord, *his* father, or *his* comrades.”⁸⁶

At the theory level, to say that loyalty demands that the fiduciary (director) act in the best interests of the beneficiary (corporation), or to maximize its value, is to invoke the maximum condition of loyalty. Two of many possible examples are Section 8.30 of the Model Business Corporation Act’s “best interests” standard,⁸⁷ and Chief Justice Leo Strine’s assertion that “[C]orporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders.”⁸⁸ The clear thrust of these statements is in the affirmative and toward a devotion for the “best” and to “maximize” on behalf of another.

But, on the other hand, to say that a fiduciary must refrain from conflicts of interest or other unsavory or unacceptably low level of conduct is to deploy the minimum condition of

⁸¹ FLETCHER, *supra* note 72 at 9, 24.

⁸² *Id.* at 24.

⁸³ JOSIAH ROYCE, THE PHILOSOPHY OF LOYALTY 16–17 (Hafner Pub. Co., 1924) (1908).

⁸⁴ FLETCHER, *supra* note 72, at 40.

⁸⁵ *Id.*

⁸⁶ Ladd, *supra* note 77, at 97. *See also* ALAN WOLFE, MORAL FREEDOM 23 (2001).

⁸⁷ MODEL BUS. CORP ACT § 8.30(a)(2014).

⁸⁸ Strine, *supra* note 69, at 155.

loyalty. As Professor Melvin Eisenberg has written, “[t]he duty of loyalty concerns the standards that apply to the conduct of corporate actors that are not free of self-interest.”⁸⁹ And, from Delaware: “Directors also have a duty of loyalty, and accordingly, can not [sic] place their interests above the interests of the stockholders.”⁹⁰ Here, the thrust is more modest; directors are warned against betrayal and are called to self-renunciation – but no more. Moreover, the abnegation of self interest dimension of loyalty is more amenable to a multi-stakeholder model than is the affirmative, devotion-type of loyalty that demands partiality.⁹¹ This is because the director can deny self interest in relationship to many constituencies, whereas he or she cannot easily be partial to multiple interests.

To be clear, Delaware case law expressly demands both maximum, devotion-type loyalty and minimal, nonbetrayal-type loyalty. The seminal case of *Guth v. Loft, Inc.*⁹² succinctly captures the dual mandate of loyalty, as do later cases. The Delaware Supreme Court, addressing loyalty in *Guth*’s usurpation of corporate opportunity context, described the double thrust of director duty as “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.”⁹³

It is desirable to preserve the high calling of a devotion-type loyalty because, as an ex ante decisionmaking matter, it demands that a fiduciary adhere to what he or she will rightly see as a fairly strict standard: act in the beneficiary’s “best interests.” The expectation is that,

⁸⁹ Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1265 (1999).

⁹⁰ *Krim v. ProNet, Inc.*, 744 A.2d 523, 527 (Del. Ch. 1999).

⁹¹ This is not to say the author favors a multi-stakeholder focus of director duty, only that the minimal type of loyalty is more conducive to such a focus.

⁹² *Guth*, 5 A.2d at 510 (emphasis added).

⁹³ *Id.*

prospectively, the fiduciary will commendably self-regulate because of an internal appreciation that loyalty is a valued and demanding social norm as well as a legal stricture. Presumably – and this is a key aspect of this role for loyalty ex ante – the fiduciary both has been informed of her legal duty of loyalty and has some understanding of its demands, perhaps drawn from extra-legal sources such as literature, religion, the arts, and personal experience. At the same time, reviewed ex post, it is, of course, utterly unknowable whether a chosen course of action – among a menu of options – was the “best” or “maximized” some desideratum. This is so because, by definition, no other possibility was actually chosen and so none can be compared to that course which was selected. Moreover, overly strict judicial review ex post will lead to the host of problems well known to lawyers and judges – avoidance of service by prospective director candidates, risk averse behavior, hindsight bias, and inappropriate judicial interference into the directors’ province of making business judgments.

The challenge, then, is how to reconcile the quite different demands of the maximum and minimum conditions of loyalty – clear enough in theory – in positive law itself and in the judicial administration of fiduciary duties. One way is to continue to recite both facets of loyalty – as seen in *Guth v. Loft* and when lawyers counsel fiduciary decisionmakers ex ante – but in fact take only the minimum condition seriously as an ex post remedial matter. This has been the longstanding approach. But a more nuanced and candid approach has been consistently deployed by Vice-Chancellor Laster.

Building on earlier work by Professor Melvin Eisenberg,⁹⁴ and in an effort to bring coherence to Delaware decisional law, Laster uses three concepts in his fiduciary analysis:

⁹⁴ Melvin Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 *FORDHAM L. REV.* 437 (1993).

standard of conduct, standard of review, and standard of liability. For Vice-Chancellor Laster, the standard of conduct resembles what here is called the maximum condition of loyalty. Thus, in Laster’s words: “To reiterate, the standard of conduct for directors requires that they strive in good faith and on an informed basis to maximize the value of the corporation for the benefit of its residual claimants,…”⁹⁵

The standard of conduct always applies, Laster emphasizes. However, it is the proper standard only for director conduct *ex ante*, not for judges reviewing that conduct *ex post*. Judges apply more forgiving standards, a standard of review and a standard of liability. The usual standard of review is the deferential business judgment rule. Under this standard, although directors may not have been affirmatively loyal, that is, they may have violated the standard of conduct, the court never gets that far because, at the outset, compliance with that standard is simply presumed. More is needed to gain closer judicial scrutiny of supposedly faulty director conduct. One way, of course, is to allege that directors failed to comply with the minimum condition of loyalty by, for example, engaging in a conflict of interest transaction. That leads to the stricter entire fairness standard of review with the burden of proof being placed on directors to prove, in effect, that, because the corporation was treated fairly, they did not betray the corporation. That standard, however, does not demand that they did their best for the company or that they maximized value. In short, full-fledged devotion is not required in this inquiry, although fairness may be regarded as an adequate stand-in.

In certain *Revlon*-type sale settings, however, the standard of judicial review does ask whether directors acted reasonably in maximizing value for shareholders in the final period setting. Thus, the standard of review in this context comes close to demanding what the standard of conduct demands: the maximum condition of loyalty. But the standard of “reasonableness”

⁹⁵ *In re Trados*, 73 A.3d at 40–41.

still affords directors considerable room to depart from obtaining the “best” or the “maximum” value, as seen in the stunning dearth of remedial relief under the *Revlon* standard (Johnson and Ricca 2014). And *Revlon* itself is, in a number of ways, being steadily worked back into the larger, deferential body of Delaware fiduciary law. (Johnson 2015).

Moreover, even if directors fail under *Revlon*'s enhanced scrutiny standard of review, a third standard – the standard of liability – will almost invariably lead to directors avoiding monetary sanctions for loyalty breaches. A recent opinion by Vice-Chancellor Laster is instructive. In *Chen v. Howard-Anderson*, Vice-Chancellor Laster ruled that defendant directors may well have departed from the standard of conduct and acted unreasonably under the enhanced scrutiny review standard of *Revlon*.⁹⁶ That is, they were not affirmatively and devotedly loyal because they may have failed to maximize value. Yet Laster granted the outside directors summary judgment because the plaintiffs failed to cite evidence sufficient to support an inference of director bad faith,⁹⁷ a necessary element for director liability. Speculation as to director motive was not enough, he ruled. And like the more objective bad faith claims asserted in *Lyondell Chem. Co. v. Ryan*⁹⁸ – i.e., conscious disregard of duty – subjective bad faith claims require an *intent* to do harm,⁹⁹ a high hurdle that plaintiffs, not directors, must clear in seeking damages against independent directors. Here, Vice-Chancellor Laster plainly emphasizes that *Revlon* is only a standard of judicial review, not a director liability standard, because to violate the latter requires a showing of intentional wrongdoing, not just “unreasonable” conduct. The

⁹⁶ *Chen v. Howard-Anderson*, 87 A.3d 672–76 (Del. Ch. 2014).

⁹⁷ *Id.* at 685.

⁹⁸ *Lyondell Chem Co. v. Ryan*, 970 A.2d 235 (Del. 2009).

⁹⁹ *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 64–66 (Del. 2006).

directors may not have been devotedly loyal, Laster effectively ruled, but there was no evidence that they *deliberately* breached that standard.

Moreover, in an important 2015 decision, the Delaware Supreme Court held that, in damages actions, plaintiffs must plead a non-exculpated claim against disinterested, independent directors in order even to survive a motion to dismiss.¹⁰⁰ The court emphasized the breadth of its ruling, stating that it applied “regardless of the underlying standard of review for the board’s conduct – be it *Revlon*, *Unocal*, the entire fairness standard or the business judgment rule.”¹⁰¹ In other words, plaintiffs must effectively plead director betrayal (intentional wrongdoing) for the case to advance; not being affirmatively or devotedly loyal, or behaving unreasonably, will not suffice.

It remains now to connect this theoretical and doctrinal exploration of fiduciary duties to Part 2’s discussion of corporate personhood and corporate purpose. To begin, fiduciary duties have drawn much useful theoretical attention in recent years,¹⁰² yet in both theory and positive law they are rather dependable, if dynamic, mainstays and are not especially controversial, at least in corporate law. Corporate personhood and corporate purpose, in contrast, remain very controversial in scholarly and wider socio-political circles, but are rarely considered in articulating positive corporate law. Nonetheless, corporate personhood is a fixture in corporate law doctrine, however inconclusive are debates about the best theory of corporateness. Corporate purpose is much debated in theory, but rarely is addressed in doctrine, although Chief

¹⁰⁰ In re Cornerstone Therapeutics Inc. S’holder Litig., 2015 WL 2394045 (Del.).

¹⁰¹ *Id.* at *1.

¹⁰² PAUL B. MILLER & ANDREW S. GOLD, PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (2014).

Justice Strine recently has written extensively on it, suggesting he may speak to it in a prominent way when the right case presents itself.

Corporate personhood and corporate purpose should be taken seriously in theory and doctrine by taking the corporate entity as a socio-legal institution seriously; that is, as a person distinct from associated persons both in juridical status and in its organizational purpose(s). This should extend into the realm of fiduciary duties as well. Coherence demands that the director duties of care and loyalty run to the corporation, at least with respect to the purpose of the corporation. Delaware's corporation statute, after all, charges the board of directors to direct the business and affairs of the corporation itself, not those of stockholders. And its formulation of the business judgment rule presumes, likewise, that directors are acting in the best interests of the corporation.¹⁰³ Delaware's ex ante standard of conduct, then – a salutary maximum condition of devoted loyalty – should demand that directors act to serve the best interests of the corporation by affirmatively advancing its identified institutional purposes. Pragmatically, however, the ex post liability standards created by Delaware courts will hold directors liable only for betrayal behavior – the minimum condition of loyalty. In this way, corporate personhood, corporate purpose, and fiduciary duties are theoretically and doctrinally aligned while the role of courts in expressing high standards for directors ex ante, but only rarely sanctioning them ex post, is made clear.

¹⁰³ Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled in part*, Brehm v. Eisner, 746 A.2d 244, 253 (Del. 2000).

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