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The Case Against Officer Fiduciary Duties

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Paul D. Weitzel*

The Case Against Officer Fiduciary Duties

ABSTRACT

This article argues that fiduciary duties owed by officer to shareholders are counterproductive, theoretically unsound and unnecessary in practice. Using experimental data from behavioral ethics research, the article shows that fiduciary duties expand the range of morally justifiable behavior, which increases self-serving transactions. This harm is not offset by the constraints created by fiduciary duties because officer fiduciary duties are rarely enforced and almost never result in actual damages paid by the officers themselves.

The article further shows that fiduciary duties owed by officers to shareholders are theoretically unsound. Fiduciary theory is premised on opportunism, vulnerability, entrusted assets and costly monitoring. None of these rationales apply well to officer fiduciary duties because officers are directly monitored by the board and because the shareholders are not the owners of the corporation's assets. The article draws on recent econometric analysis to show that public company boards closely monitor officers, contrary to the chummy relationships that existed in past decades.

Finally, the article argues that officer fiduciary duties can be eliminated without creating practical harms to the shareholders. It offers better solutions, like more detailed employment contracts, and it offers alternative paths to litigation in last stage games with deceptive officers.

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I. INTRODUCTION

Officer fiduciary duties are central to the two largest debates in corporate law: (1) should corporations prioritize profits over other interests? And (2) how do we prevent misbehavior by corporate managers? But the duties owed by officers (rather than directors) remain undertheorized, even as they gain more attention from the courts. This article examines the history, policies and unintended consequences of officer fiduciary duties and suggests these duties should be subject to private ordering.

The first question, whether corporations should care only about profits, has been a significant debate in corporate law for over ninety years.[1] Many authors focus on policy considerations—efficiency, externalities, and agency theories. Fewer focus on the legal mechanism that drives profit maximization—fiduciary duties owed by officers and directors to shareholders. Some opposing profit maximization interpret these duties broadly,[2] while others argue fiduciary duties to shareholders don't exist.[3] This article fills the gap in this ninety-year-old debate, providing a stronger theoretical footing to oppose profit maximization.

To the second question: how to prevent misbehavior, eliminating officer fiduciary duties is a counterintuitive solution. Fiduciary duties are intended to stop the types of scandals that regularly shake public confidence in corporations,[4] so eliminating them would seem to invite

1. *See* A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1074 (1931); David Millon, *Looking Back, Looking Forward: Personal Reflections on a Scholarly Career*, 74 WASH. & LEE L. REV. 699, 699–724 (2017).
2. Paul Weitzel & Zachariah J. Rodgers, *Broad Shareholder Value and the Inevitable Role of Conscience*, 12 N.Y.U. J.L. & BUS. 35, 37–38 (2015).
3. *See, e.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 293–96 (1999) (arguing that "directors owe their fiduciary duties to the firm, rather than its shareholders").
4. *See Confidence in Institutions*, GALLUP, https://news.gallup.com/poll/1597/confidence-institutions.aspx (last visited Oct. 13, 2023) [https://perma.cc/6TDJ-YYJ4] (finding that in 2022 only 31% of U.S. respondents had a "great deal" (14%) or "quite a lot" (17%) of confidence in big business; the lowest ever on record for this poll); *see also* IPSOS MORI, *It's a Fact! Scientists Are the Most Trusted People in World*, https://www.ipsos.com/ipsos-mori/en-uk/its-fact-scientists-are-most-trusted-people-world (last visited Oct. 13, 2023) (finding that only 22% of global

more scandals. But as discussed in Part II, new research in behavioral ethics shows that fiduciary duties—which are intended to prevent misbehavior—may instead encourage it by weakening executives' internal moral constraints.

This is because human decision-making seems to proceed in two parts.[5] First, we map the field of what actions can be justified. Second, within that field, we tend to select the outcome that most benefits us, loosely weighing the tangible and intangible costs and benefits. Fiduciary duties affect both calculations.

Fiduciary duties change the calculation of what is morally justifiable. Fiduciary duties are regularly treated as moral duties:[6] an action that might otherwise be immoral can be justified as complying with the moral duty of a fiduciary.[7] Stated differently, an immoral act becomes justifiable in the context of duty. Any action that creates profits is an act of loyalty, giving it cover to pass the moral sifter.

Though not yet applied to corporate law, this is not a novel concept in other fields. When Shakespeare's King Henry V passed in disguise among his troops at Agincourt, he declared that the king's cause was just: a soldier in the field, not recognizing his liege, responded apathetically to the moral righteousness of the cause, "we know enough, if we know we are the king's subjects. If his cause be wrong our obedience to the king wipes the crime of it out of us."[8]

Like these soldiers' loyalty to the king, fiduciary duties allow corporate officers to outsource the moral consequences of their decisions to shareholders rather than internalize the moral costs of their actions.[9] Meanwhile, shareholders often remain unaware that any moral decision was made, so the moral costs are not internalized by anyone. This concept of loyalty and obedience wallpapers morality over otherwise immoral acts.

One might argue that the soft concerns of internal guilt and self-image matter less than the officer's fear of punishment in a fiduciary

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respondents reported that business leaders were trustworthy, while 32% said they were untrustworthy, placing business leaders between pollsters and journalists).

5. *See infra* section II.B.
6. *See infra* section I.E.
7. A complete definition of morality is beyond the scope of this work. Rather than define morality, this article defers to the moral system of the officers and merely urges them to stick to it. This functional approach is sufficient for our purposes because, as noted in section IV.A, corporate officers typically value honesty, helping others, and other behaviors that are typically classified as prosocial. For a broader discussion of prosocial behavior and the marketplace, see JONATHAN SACKS, MORALITY chs. 5, 6, 19, 20, 22, 23 (2020).
8. WILLIAM SHAKESPEARE, HENRY V, act 4, sc. 1. This concept carries through to modern day with BOB DYLAN, *Who Killed Davey Moore?*, *in* THE BOOTLEG SERIES, VOL. 6: BOB DYLAN LIVE AT 1964 PHILHARMONIC HALL (Legacy Records 2004).
9. Behavioral ethics models suggest that when people act in a way that violates their moral code, they face internal psychological costs, as discussed further in subsection II.B.1. In simple terms, guilt feels bad.

enforcement action. That is, even if self-serving managers are cognitively capable of providing some moral justification for an action, they may still behave prosocially if the potential jail term is long enough. This is the goal of fiduciary duties—to prevent bad deeds by threatening and punishing them.

Two obstacles keep officer fiduciary duties from meeting that goal. First, fiduciary duties do not tie executives to any concept of universal morality, but only to shareholder interests.[10] If shareholders want to profit by immoral means,[11] an officer's fiduciary duties will encourage that. Second, fiduciary duty claims against officers are rarely brought and even more rarely enforced. In practice, plaintiffs have only recently begun to sue officers in their capacity as officers, a phenomenon that is detailed in section IV.C.[12] When shareholders do sue, the business judgment rule prevents enforcement for all but the most egregious violations.[13] Officer fiduciary duties make it easier to justify behavior that harms society, and they do not provide sufficient deterrence or punishment to stop behavior that harms shareholders.

This shows why stakeholder proposals designed to promote prosocial corporate behavior are counterproductive. Stakeholder models would impose a fiduciary duty to other stakeholders, such as employees or suppliers, on officers.[14] As discussed briefly above and more fully in section II.B, each new fiduciary duty expands the field of actions that can be morally justified as "doing one's duty." The morality sifter allows more and more actions to slip through. So an officer evaluating justifiable courses of action now has more opportunity to select one that is self-serving. This is likely to lead to more self-interested behavior, not less. Those concerned about management's excessive loyalty to

10. *See infra* section II.A; *see also* Andrew S. Gold, *Dynamic Fiduciary Duties*, 34 CARDOZO L. REV. 491, 493 (2012) (pointing out that courts have at times made "the corporation" the beneficiary of corporate fiduciary duties, rather than the shareholders).
11. It is crucial to distinguish "immoral" from "illegal" here. Some actions are legal (or unenforced) in the jurisdiction where they take place, but morally repugnant. Slavery was not illegal globally until the 1980s and is still underenforced in some jurisdictions. *See* OFF. OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFF. OF THE PRESIDENT, PRESIDENT TRUMP TERMINATES TRADE PREFERENCE PROGRAM ELIGIBILITY FOR MAURITANIA (2018), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/november/president-trump-terminates-trade [https://perma.cc/TW4Y-ZK2V] (noting Mauritania's lack of progress in removing hereditary slavery); James Gray Pope, *A Free Labor Approach to Human Trafficking*, 158 U. PA. L. REV. 1849, 1857 (2010); *see also Confidence in Institutions*, *supra* note 4 (providing a functional definition for moral acts).
12. This is not to say fiduciary duties offer no enforcement benefits, only that the necessarily deferential standards of review limit enforcement to the most extreme cases. Section I.C outlines a variety of cases where fiduciary duties are enforced.
13. *See infra* section I.B (detailing the business judgment rule).
14. *See, e.g.*, Blair & Stout, *supra* note 3, at 293–96 (arguing that fiduciary duties are owed to the corporation, which comprises all the stakeholders).

shareholders and share price maximization may do better by removing that loyalty, rather than by expanding it.

Officer fiduciary duties also do not fit into the legal theories of fiduciary duties. Part III provides the history and evolution of officer fiduciary duties, showing that they are an anomaly. They were created without explanation, existed for seventy years without definition, and another ten years without much use. Once they were used, the legislature amended the governing statutes to effectively defang them. Officer fiduciary duties don't fit the theories explaining when those duties apply; removing them would make the law of fiduciary duty more cohesive.

All this can be accomplished without leaving shareholders defenseless or giving executives free rein to ignore profits or "rob the till." Part IV shows that boards will continue to use power relationships to keep officers focused on profitability. Employment contracts can supplement these power relationships to customize enforcement to the level that is right for the company. As long as shareholders control boards and boards control bonuses, CEOs will focus on shareholder needs.

It may seem naïve to argue that morality can constrain corporate misconduct, but empirical studies in behavioral ethics suggest that morality has a strong role to play. And even if internalizing moral costs will not move mountains, it can shift the culture. While would-be officers are trained to operate with "an undivided and unselfish loyalty" to shareholders,[15] share price maximization theories will dominate, and otherwise immoral actions that promote profit will remain morally justifiable. Eliminating officer fiduciary duties is essential to advance corporate theories that consider something more than the share price. Eliminating officer fiduciary duties can revitalize the internal incentives for moral corporate behavior and shift corporate culture away from a moral obligation to maximize profits.

II. FIDUCIARY DUTIES OWED BY OFFICERS

Before eliminating officer fiduciary duties, it is important to define them. Corporations house a web of fiduciary duties.[16] Officers and directors owe fiduciary duties to shareholders.[17] Officers, directors and employees owe fiduciary duties to the reified corporation.[18] Parts I through IV focus on the duties *officers* owe to shareholders and the

15. Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).
16. Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009) (holding that directors and officers have fiduciary duties to shareholders). This is not an exhaustive list of the fiduciary duty relationships within a corporation. *See, e.g.*, Singer v. Magnavox Co., 380 A.2d 969, 977 (Del. 1977) (holding that controlling shareholders owe a fiduciary duty to minority shareholders).
17. *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 745 (Del. Ch. 2005).
18. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006); *see also* DEL. CODE ANN. tit. 8, § 102(b)(7)(v) (2022) (for officers specifically).

corporation. Part V discusses whether the same arguments apply to director fiduciary duties to shareholders.

Officers owe the corporation and its shareholders a duty of care and a duty of loyalty.[19] Other "duties" are subsets of these two.[20]

A. Who is an "Officer"?

"Officer" typically includes the positions of president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer, and chief accounting officer.[21] Officers often have access to the board either through solid or dotted reporting lines, and the board typically approves or reviews officers' salaries, bonuses, hiring and removal.[22]

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19. *In re Walt Disney Co.*, 907 A.2d at 745.
20. *Id.* n.400. For a fun and insightful counterpoint, see Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?*, 83 S. CAL. L. REV. 1231, 1290–91 (2010) (showing many ways to divide up fiduciary duties).
21. The definition of "officer" is making progress toward clarity but would benefit from further research. Whether the title contains the word "officer" is a good start but that is both over- and under-inclusive. Megan Wischmeier Shaner notes officer titles that include "CE-Yo," "iCEO," "President of Revenue," and "Chief Ninja." *The Corporate Chameleon*, 54 U. RICH. L. REV. 527, 539–40 (2020). Other titles include the word officer without actually being an officer, such as a local bank's "loan officer."

    Two statutes offer guidance in determining who is an officer. First, DEL. CODE ANN. tit. 8, § 142(a) (1998) requires that an officer's "titles and duties" be listed in the bylaws or a resolution of the board. So, an officer is a person so designated by the board or bylaws. While clear in theory, this becomes unclear in practice as corporations are loose with board resolutions or titles. For example, one appellate court disagreed with a trial court over whether a bank's vice president was an officer, given that a third of the bank's employees had the title "vice president." *See* Aleynikov v. Goldman Sachs Grp., Inc., 765 F. 3d 350, 354, 365 (3d Cir. 2014) (reversing the trial court's ruling on summary judgment that a "vice president" at an investment bank was an officer).

    The Delaware legislature's 2022 amendments provide another unsteady guidepost. While DEL. CODE ANN. tit. 8, § 102(b)(7) (2022) previously allowed a corporation to exculpate directors for violations of the duty of care, the 2022 amendments allow the corporation to exculpate officers as well. In doing so, the amendments defined "officer," but only for the purposes of that paragraph. In other words, the definition is local and does not apply to everyone that might have officer fiduciary duties—only to those that can be exculpated from them. This leads to the bizarre, and hopefully unlikely, result that someone could be an officer as described under the caselaw (and therefore subject to fiduciary duties) while not being described under the exculpatory provisions. Localizing the definition creates a wasteland in which there is liability without exculpation. One might hope a court encountering this wasteland will rely on legislative intent to annex all officers into exculpatory territory, but it is an area that could use clarification.
22. DEL. CODE ANN. tit. 8, § 142(b) (1998).

B. The Duty of Care

Officer fiduciary duties include the duty of care. The duty of care requires directors and officers to "exercise an informed business judgment" when dealing with shareholders' interests.[23] The classic breach of duty of care case is a board approving a sale of the company after only a brief meeting and with incomplete information.[24] Essentially, the duty of care requires directors and officers to pay attention. But the exact contours of the duty of care are rarely defined for two reasons.

First, Delaware allows corporations to exculpate directors and officers from the duty of care through a charter provision.[25] Most companies have adopted these exculpatory provisions, which essentially waive the duty of care for most suits and allow courts to dismiss complaints without defining the contours of the duty of care.[26]

Second, the business judgment rule sets up a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[27] This

23. McMullin v. Beran, 765 A.2d 910, 921 (Del. 2000); *see also* DEL. CODE ANN. tit. 8, § 251(b) (2020) (imposing procedural requirements to protect shareholder interests during mergers).

24. *See* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985); *see also In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 94–103 (Del. Ch. 2014) (holding an advisor had aided and abetted the board in its breach of the duty of care where the board was unaware of an advisor's conflict, received valuation data only three hours before the approval meeting, and did not know of the advisor's manipulation of the valuation metrics).

25. DEL. CODE ANN. tit. 8, § 102(b)(7) (2022). Prior to the 2022 legislative amendments, corporations could exculpate only directors—not officers. These charter provisions cannot exculpate for a breach involving bad faith, intentional misconduct or knowing violation of law. *Id.* Other provisions allow corporations to waive corporate opportunities, which effectively limits the scope of the duty of loyalty. *See, e.g.*, DEL. CODE ANN. tit. 8, § 122(17) (2000); *see also* Gabriel Rauterberg & Eric Talley, *Contracting out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075 (2017) (explaining that Delaware and the majority of states allow parties to contract around the duty of care).

26. I say "most suits" because prior to 2022 only director duties—not officer duties—could be exculpated. There was a narrow window when a few suits were brought against officers under the duty of care before the Delaware legislature amended the statutes to allow officers similar protection. During the 2023 proxy season, 203 public companies, including 26 companies on the S&P 500, held a vote on whether to exculpate officers from the duty of care. These exculpation measures proved largely successful, as 92% of the measures passed with an average of 73% shareholder support. Thomas W. Christopher et al., *Amending Bylaws and Charters to Address Universal Proxy, Shareholder Activism and Officer Exculpation*, WHITE & CASE (June 8, 2023), https://www.whitecase.com/insight-alert/amending-bylaws-and-charters-address-universal-proxy-shareholder-activism-and-officer [https://perma.cc/JGT9-6N7D].

27. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985). The business judgment rule is based on the board's responsibility to manage the corporation. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 367 (Del. 1993); *see also* Melvin Aron

presumption applies unless the plaintiff can show self-dealing, entirely uninformed decision making or gross negligence.[28] Because the business judgment rule is analyzed at the outset, a court will typically not consider what the duty of care requires unless it has already found that the fiduciary was clearly self-dealing, entirely uninformed, or grossly negligent. This leaves the space between gross negligence and the duty of care standard unexamined and the boundaries of the duty of care largely unmapped.

C. The Duty of Loyalty

The duty of loyalty is closer to what one might expect in a fiduciary relationship. It prohibits directors and officers from acting against the interests of the corporation's shareholders.[29] Because so many corporations exculpate their directors for breaching the duty of care, the duty of loyalty is where most plaintiffs focus, and as a result these claims come in a great variety.

The most intuitive duty of loyalty claim is where a director or officer acts directly to harm the corporation or the shareholders. For example, in *Dweck v. Nasser*, the CEO set up a competitor within the company's office space, using the company's employees, customer relationships and goodwill.[30] Stealing a company's resources to destroy it from the inside unsurprisingly breaches the duty of loyalty.[31]

Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 437–38 (1993) (explaining that the standard of review for corporate action often diverges from the standard of conduct expected from directors).

28. Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 64 (Del. 1989); Chen v. Howard-Anderson, 87 A.3d 648, 666 (Del. 2014) (first quoting *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 35–36 (Del. Ch. 2013); then quoting Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 457 (Del. Ch. 2011) (internal quotation marks omitted)) (explaining that "[t]he standard of conduct describes what directors are expected to do and is defined by the content of the duties of loyalty and care," whereas "[t]he standard of review is the test that a court applies when evaluating whether directors have met the standard of conduct," and that "Delaware has three tiers of review for evaluating director decision-making: the business judgment rule, enhanced scrutiny, and entire fairness").
29. There is some debate as to whether the duty of loyalty requires a fiduciary to place the beneficiary's interests before his own or whether it merely requires the fiduciary to not harm the beneficiary's interests. *See* Broz v. Cellular Info. Sys., Inc., 673 A.2d 148, 154 (Del. 1996) ("A corporate fiduciary agrees to place the interests of the corporation before his or her own in appropriate circumstances."). *But see* D. Gordon Smith & Jordan C. Lee, *Fiduciary Discretion*, 75 OHIO ST. L.J. 609, 613 n.12 (2014). Resolving that debate is not necessary for this article's thesis.
30. Dweck v. Nasser, No. 1353-VCL, 2012 Del. Ch. LEXIS 7, at *2 (Del. Ch. Jan. 18, 2012).
31. A plaintiff in this situation may also have a claim for waste, though the plaintiff faces a high bar. "[W]aste is a subset of good faith under the umbrella of the duty of loyalty." Se. Penn. Trans. Auth. v. AbbVie Inc., No. 10374-VCG, 2015 Del. Ch. LEXIS 110, at *48 n.114 (Del. Ch. Apr. 15, 2015) *overruled on other grounds by*

Relatedly, stealing opportunities for future business from the corporation can also violate the duty of loyalty. There are multi-factor tests for when a corporate opportunity belongs to the corporation,[32] but at a high level, a director or officer cannot take a business opportunity that the corporation would have been expected to take.

For example, in *Personal Touch Holding Corp. v. Glaubach*, the founder and president of the company bought a building that he knew his company was interested in and then tried to lease the building to the company.[33] An officer intentionally frontrunning the company breaches the duty of loyalty.

Beyond these intuitive breaches of loyalty, the duty of loyalty also prohibits a director or officer from hiding vital information from the board.[34] These "duty of candor" claims are a subset of the duty of loyalty because a truly loyal fiduciary would not lie or hide relevant information.

For example, in *City of Fort Myers General Employees' Pension Fund v. Haley*, the CEO of a merging corporation did not disclose to his board that along with negotiating the merger, he had negotiated a hefty compensation package with the combined entity.[35] Because the board might have found that this compensation package biased the CEO while negotiating the merger, the CEO's failure to disclose this

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AmerisourceBergen Corp. v. Lebanon City Emps.' Ret. Fund, 243 A.3d 417 (Del. 2020). *But see* Harwell Wells, *The Life (and Death?) of Corporate Waste*, 74 WASH. & LEE L. REV. 1239, 1241 (2017) (arguing that waste is not an outgrowth of fiduciary duties); Joseph K. Leahy, *Are Corporate Super PAC Contributions Waste or Self-Dealing? A Closer Look*, 79 MO. L. REV. 283, 303–05 (2014) (presenting several treatments of waste as independent of fiduciary duties); Jamie L. Kastler, Note, *The Problem with Waste: Delaware's Lenient Treatment of Waste Claims at the Demand Stage of Derivative Litigation*, 95 MINN. L. REV. 1899, 1911 (2011).

32. A director or officer cannot take a business opportunity which (1) the corporation is able to exploit; (2) is within the corporation's line of business; (3) the corporation has an interest or expectancy in; and (4) would place the corporate fiduciary in a position inimical to corporate duties if taken for the fiduciary's own self. *Broz*, 673 A.2d at 154–55. There is some debate as to whether the last two elements are conjunctive or disjunctive. Francis Pileggi, *Chancery Finds Usurpation of Corporate Opportunity*, DEL. CORP. & COMMERCIAL LITIG. BLOG (Mar. 11, 2019), https://www.delawarelitigation.com/2019/03/articles/chancery-court-updates/chancery-finds-usurpation-of-corporate-opportunity. As a corollary, corporate directors or officers may themselves take a corporate opportunity if: (1) the director or officer is presented the opportunity in an individual, not a corporate, capacity; "(2) the opportunity is not essential to the corporation; (3) the corporation holds no interest or expectancy in the opportunity; and (4) the director or officer has not wrongfully employed the resources of the corporation in pursuing or exploiting the opportunity." *Broz*, 673 A.2d at 155.

33. Pers. Touch Holding Corp. v. Glaubach, No. 11199-CB, 2019 Del. Ch. LEXIS 66, at *49–50 (Del. Ch. Feb. 25, 2019).

34. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 708–12 (Del. 1983).

35. City of Fort Myers Gen. Emps.' Pension Fund v. Haley, 235 A.3d 702, 704–05 (Del. 2020).

potential conflict breached his duty of candor and therefore his duty of loyalty.[36]

Moving still further away from an intuitive understanding of the duty of loyalty are *Caremark* or duty of oversight claims.[37] Courts have reasoned that a truly loyal fiduciary would give proper oversight, and a bad faith refusal to do so would be disloyal.[38] If the lack of oversight is such that it constitutes bad faith, then this breach of the duty of oversight is a breach of the duty of loyalty, giving rise to a *Caremark* claim.[39]

Caremark claims arise when the directors or officers fail to implement or monitor a robust compliance program.[40] For example, an ice cream maker ignored years of food safety issues that eventually caused a listeria outbreak that led to the deaths of three customers.[41] The court found that the board may have breached its duty of oversight, and therefore its duty of loyalty, by failing to "make a good faith effort to oversee the company's operations."[42]

Caremark claims do not fit comfortably into the duty of loyalty because a failure to act would typically fall under the duty of care, which covers negligence and gross negligence. But when the omission is so significant that it constitutes bad faith, it breaches the duty of loyalty under *Caremark*.[43] A *Caremark* claim looks like a duty of care

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36. *Id.*
37. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).
38. *Id.* at 971.
39. Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006) ("[B]ecause a showing of bad faith conduct, in the sense described in *Disney* and *Caremark*, is essential to establish director oversight liability, the fiduciary duty violated by that conduct is the duty of loyalty.").
40. Implementation and monitoring are broken into two separate fiduciary duty claims. Implementation claims are referred to as prong one *Caremark* claims or information-system claims. Monitoring claims are known as prong two *Caremark* claims or red-flags claims. Lebanon Cnty. Emps.' Ret. Fund v. Collis, 287 A.3d 1160, 1175–76 (Del. Ch. 2022); *In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 359–60 (Del. Ch. 2023).
41. Marchand v. Barnhill, 212 A.3d 805, 813–14 (Del. 2019).
42. *Id.* at 820–24.
43. *Caremark* claims require a showing that the lack of oversight is so bad it constitutes bad faith, while (because of the business judgment rule) a duty of care claim requires as a practical matter a showing of gross negligence. "If *Caremark* means anything, it is that a corporate board must make a good faith effort to exercise its duty of care. A failure to make that effort constitutes a breach of the duty of loyalty." *Id.* at 824. Bad faith typically denotes knowledge or willful action, while negligence typically denotes a lack of knowledge or a reckless disregard without knowledge. *See Bad Faith*, BLACK'S LAW DICTIONARY (6th ed. 1991) ("[I]mpl[ying] the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will."). It would seem more logical to include unintentional acts as breaches of the duty of care and intentional acts as breaches of the duty of loyalty, rather than say that some unintentional acts are so severe they amount to an intentional act. The courts have struggled

claim in a light scienter sauce. But in application, this scienter requirement is stringent: until recently these claims typically failed,[44] with courts often noting that a *Caremark* claim is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[45]

This high standard seems to be eroding.[46] The 2019 ice cream case noted above involved a company with a single product line and a listeria outbreak that killed three customers, which shut down all operations for several weeks. In 2020 the Boeing board was denied a motion to dismiss because its aircraft, the Boeing 737 Max, had sensors which caused it to nose dive, killing all passengers.[47] In 2023, an officer defendant of McDonald's was denied a motion to dismiss for failing to respond to red flags about sexual harassment; specifically the officer ignored reports of a drunken executive pulling a woman onto his lap and related incidents,[48] which created a "toxic culture."[49] Sexual harassment is intolerable at any level but is more prevalent than airplanes falling from the sky or repeatedly poisoning customers with a company's only product. Although the claim against McDonald's was later dismissed,[50] the case shows that *Caremark* claims are moving

with this for some time, including by briefly recognizing a separate duty of good faith, but that theory has since collapsed. *See also* DEL. CODE ANN. tit. 8, § 102(b)(7) (2022) (expressly distinguishing between breaches of the duty of loyalty and "acts or omissions not in good faith"). *See generally* Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Balotti & Jeffrey M. Gorris, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629 *passim* (2010).

44. *See* Meghan Roll, *The Delaware Supreme Court Does Not Scream for Ice Cream: Director Oversight Liability Following* Marchand v. Barnhill, 57 SAN DIEGO L. REV. 809, 816–17 (2020) (noting that this is the first *Caremark* claim to proceed beyond the pleading stage at the Delaware Supreme Court). *But see, e.g.*, *In re* Clovis Oncology Inc. Derivative Litig., No. 2017-0222-JRS, 2019 Del. Ch. LEXIS 1293 (Oct. 1, 2019) (ruling for plaintiffs); Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857 (2021) (pointing to other recent successful *Caremark* claims and arguing these claims will succeed more frequently).

45. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996). As of February 2021, this language has been cited by courts 170 times.

46. Stephen Bainbridge, *After Boeing, Caremark Is No Longer "The Most Difficult Theory in Corporation Law Upon Which a Plaintiff Might Hope to Win a Judgment,"* PROFESSORBAINBRIDGE.COM (Sept. 8, 2021), https://www.professorbainbridge.com/professorbainbridgecom/2021/09/after-boeing-caremark-is-no-longer-the-most-difficult-theory-in-corporation-law-upon-which-a-plainti.html [https://perma.cc/JJ3D-P5A3].

47. *In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934, at *8–12 (Del. Ch. Sept. 7, 2021).

48. *In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 353 (Del. Ch. 2023).

49. *Id.* at 377; *see also* Jennifer Kay, *McDonald's Toxic Culture Ruling Sheds Light on Officer Liability*, BLOOMBERG LAW (Feb. 1, 2023, 4:15 AM), https://news.bloomberglaw.com/us-law-week/mcdonalds-toxic-culture-ruling-sheds-light-on-officer-liability [https://perma.cc/2YBN-UN2J] (providing further details of the litigation).

50. *In re* McDonald's Corp. S'holder Derivative Litig., 291 A.3d 652 (Del. Ch. 2023).

beyond being "the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[51] *McDonald's* expanded *Caremark* duties to officers for the first time.[52] If shareholders are deemed victims when executives create a toxic work environment, these suits may become common.[53]

D. The Grand Dicta

The cases establishing fiduciary duties often spend as much text on weighty sermons of morality as they do on legal rules.[54] With grand dicta, courts equate fiduciary duties with moral obligations. Because humans will act on a perceived duty even if that duty is unenforceable,[55] this moral equivalence supports the intense shareholder focus often criticized in the literature.[56]

For example, courts have counseled fiduciaries that they must not only avoid conflicts, but must also show "an undivided and unselfish loyalty,"[57] and be "unremittingly faithful to [their] charge."[58]

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51. *Caremark*, 698 A.2d at 967. Stephen Bainbridge has repeatedly warned of the worrisome expansion of *Caremark* liability. *See In re McDonald's Corp. Stockholder Litig.: Caremark is the Chicken Heart*, PROFESSORBAINBRIDGE.COM (Jan. 25, 2023), https://www.professorbainbridge.com/professorbainbridge-com/2023/01/in-re-mcdonalds-corp-stockholder-litig-caremark-is-the-chicken-heart.html [https://perma.cc/B4QG-3TYS].
52. *McDonald's*, 289 A.3d at 358.
53. The opinion notes that these are derivative claims so they will not create "[a] flood of new employment-style claims." *Id.* at 381. But if plaintiffs redraft the claim to accuse the board and the C-suite of taking part in this toxic culture directly, shareholders may be able to avoid the demand requirements that often stop derivative suits. *See* Del. Ch. Ct. R. 23.1; United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1048 (Del. 2021).
54. *See, e.g.*, Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (explaining that "[j]oint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty," such that "[m]any forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties," and declaring that 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"); *see also* Guth v. Loft, Inc., 5 A.2d 503, 510, 515 (Del. 1939) (quoting *Meinhard* proclamation); Estate of Eller v. Bartron, 31 A.3d 895, 898 (Del. 2011) (same). *But see* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 ("Fiduciary duties are not special duties; they have no moral footing . . . .").
55. Nina Mazar, On Amir & Dan Ariely, *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, 45 J. MKTG. RSCH. 633, 636–38 (2008) (finding that reminding people of a moral obligation encourages conformity with that moral obligation even when a violation would be undetectable).
56. *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH *passim* (2012).
57. *Guth*, 5 A.2d at 510.
58. *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 698 (Del. Ch. 2005). Arthur Laby cites this case and others in an interesting paper arguing that the fiduciary must adopt the principal's "objectives, goals or ends as the fiduciary's own." Arthur

Fiduciaries must not only serve diligently; they must also offer "peremptorily and inexorably, the most scrupulous observance of . . . duty."[59] They have an "unremitting duty"[60] not only to communicate clearly, but "fully and accurately."[61] They must act with "the highest and truest principles of morality."[62]

The fiduciary duty is "unyielding,"[63] "inveterate and uncompromising in its rigidity,"[64] and "does not tolerate faithlessness or self-dealing."[65] A failure to meet these high ideals is not just a breach, but a "betrayal."[66] These broad moral condemnations reach far beyond what the courts would enforce.

III. HOW FIDUCIARY DUTIES ENCOURAGE BAD BEHAVIOR

Given the examples above of bad CEO behavior, why does it make sense to remove officer fiduciary duties? Fiduciary duties seem to offer some constraint, and in light of corporate misconduct it is reasonable to think any constraint is a good one.

There are two primary reasons to reject officer fiduciary duties. First, the fiduciary duty runs not to some objective, universal morality, but to the interests of shareholders. Shareholders are not saints, and an overactive desire to please shareholders leads to bad decisions.[67] Managers don't fudge earnings to please suppliers.

B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFFALO L. REV. 99, 129–130 (2008); *see also* City of Fort Myers Gen. Emps.' Pension Fund v. Haley, 235 A.3d 702, 718 (Del. 2020) (quoting *Guth*, 5 A.2d at 510) ("'[C]orporate officers and directors are not permitted to use their position of trust and confidence to further their private interests.'"). For another interesting perspective, see Mary Szto's excellent article, *Limited Liability Company Morality: Fiduciary Duties in Historical Context*, 23 QLR 61, 88 (2004) (providing a historical account of the development of fiduciary duties with comparisons of a fiduciary's duty to the martyrdom of Jesus).

59. *Guth*, 5 A.2d at 510.
60. *City of Fort Myers*, 235 A.3d at 718; *see also* Bäcker v. Palisades Growth Capital II, L.P., 246 A.3d 81, 107 (2021) (quoting *City of Fort Myers*, 235 A.3d at 718).
61. Hoeller v. Tempur Sealy Int'l, Inc., No. 2018-0336-JRS, 2019 Del. Ch. LEXIS 50, at *32 (Del. Ch. Feb. 12, 2019).
62. Sokoloff v. Harriman Ests. Dev. Corp., 754 N.E.2d 184, 189 (N.Y. 2001). *See generally* Tamar Frankel, *Toward Universal Fiduciary Principles*, 39 QUEEN'S L.J. 391, 401, 416–17 (2014).
63. Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).
64. *Guth*, 5 A.2d at 510.
65. *Smith*, 488 A.2d at 872.
66. *Guth*, 5 A.2d at 510; *cf.* Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 917–18 (1993).
67. Wendy W. Achilles, Jennifer Blaskovich, & Terence J. Pitre, *The Relationship Between Compensation, Motivation, and Earnings Management*, 29 J. APPLIED BUS. RSCH. 579, 580 (2013) ("We find that participants with high extrinsic motivation were more likely to manage earnings upwards . . . while those with high intrinsic motivation did not manage earnings."); Marcus L. Caylor & Thomas J. Lopez, *Cost*

Second, fiduciary duties allow officers to justify unethical acts based on duty. Fulfilling a duty is an ethical obligation. When that duty conflicts with another ethical obligation, executives may decide to do their duty and let the ethical costs of their actions fall to shareholders.[68] Meanwhile, the shareholders are often unaware of this moral outsourcing and the associated trade-offs, so no one internalizes the moral costs, and no moral reckoning ever occurs.

A. Shareholder Interests Are Not Always Societal Interests

Fiduciary duties are designed to align an officer's interests with those of the shareholders. If this alignment is superficial, it encourages excessive focus on short-term performance and can invite fraud. If the alignment is deep, it encourages executives to follow shareholder interests across ethical threshholds in pursuit of profit.

The alignment in Enron was superficial.[69] In the 1990s, Enron was the leading natural gas company in the United States.[70] But as competitors entered new markets that Enron created, profit margins declined.[71] Rather than give up its high stock valuation, which peaked at a price-to-earnings ratio of fifty-five to one,[72] Enron continually expanded into new markets, spending billions to compete in water, power, metals, coal, crude and broadband, and across India, the United Kingdom, Brazil and Canada.[73] When its expertise in gas failed to translate into success elsewhere, Enron was seriously overextended.

Fearing the wrath of investors, Enron's executives began cooking the books to inflate its revenue and deflate its expenses. The CFO's

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Behavior and Executive Bonus Compensation, 29 ADV. IN ACCT. 232, 233–34 (2013) (finding that poor performance reduces CEO earnings and that compensation "committees do not blindly protect executives for earnings underperformance").

68. Shaul Shalvi, Francesca Gino, Rachel Barkan & Shahr Ayal, *Self-Serving Justifications: Doing Wrong and Feeling Moral*, 24 CURRENT DIRECTIONS IN PSYCH. SCI. 125, 126 (2015) ("People behave immorally only to a certain extent so that they can profit from their misconduct but still feel moral.").
69. For an excellent review and critique, see William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1283 (2002) ("That pursuit of immediate shareholder value caused them to become risk-prone, engaging in levered speculation, earnings manipulation, and concealment of critical information."). Former Enron counsel has confirmed to me the awareness of, and focus on, the share price by line employees.
70. John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective*, 76 U. COLO. L. REV. 57, 64 (2005).
71. *Id.*; *see also* Douglas G. Baird & Robert K. Rasmussen, *Four (or Five) Easy Lessons from Enron*, 55 VAND. L. REV. 1787, 1790 (2002) ("Creating a market for the first time offers the promise of a big one-time profit—the proverbial home run. . . . Over the long term, however, market-makers must be satisfied with making a small profit on each trade.").
72. Kroger, *supra* note 70, at 59. This was *four times* higher than comparable energy trading firms. *Id.*
73. *Id.* at 65.

subsequent guilty plea allocution clearly stated this investor focus: "Our purpose was to mislead investors and others about the true financial position of Enron and, consequently, to inflate artificially the price of Enron's stock and maintain fraudulently Enron's credit rating."[74] Though this is perhaps a self-serving admission, it is believable precisely because of the well-known pressure quarterly earnings create and the parallel incentives for bad acts. Accountability to shareholders added fuel to the largest corporate scandal in recent memory.[75]

Enron's management was only superficially aligned with Enron's shareholders. The shareholders did not want scandal and bankruptcy, just as the chairman did not want to go to prison. But the intense focus on pleasing shareholders in the short term led to both.[76]

These types of problems aren't alleviated by officers having deeper alignment with shareholders. Cambridge Analytica, for example, was a political consulting firm with expertise in data analysis. The company's algorithms were designed to predict and influence the behavior of voters based on their social media activity. This went beyond the ad customization systems that send the typical reader advertisements for vacations. The algorithms predicted and tracked users' gender, sexual orientation, race, religion, political views, relationship status, substance use, and personality.[77] With as few as 300 Facebook likes the algorithms could outperform a spouse in assessing their partner's personality.[78] The company then used this personality profile, according to their co-founder, to "exploit what we knew about [users] and target their inner demons. That was the basis the entire company was built on."[79]

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74. Plea Agreement Ex. A, United States v. Fastow, Cr. No. H-02-0665 (S.D. Tex. Jan. 14, 2004) (statement of defendant, dated January 4, 2004). Increasing the share price certainly also created a financial benefit to the executives. Seventy-five percent of Enron's executive compensation was variable, based on metrics like market performance and total shareholder return. Enron Corp., Definitive Proxy Statement (Form 14A) (Mar. 30, 1999). This compensation is received in their role as shareholders, not as officers, though this distinction is not essential. If Enron cheated to improve its stock price and raise its executive compensation, its actions only strengthen the point that aligning shareholder incentives to management incentives does not prevent fraud.
75. The Enron collapse led to over 4,500 job losses, $1.3 billion loses to its employee 401(k) accounts and a stock price decline of $61 billion. Kroger, *supra* note 70, at 58–59.
76. It is also worth noting that a short-term view can, at times, be helpful to the long-term outlook. *See generally* Robert J. Rhee, *Corporate Short-Termism and Intertemporal Choice*, 96 WASH. U. L. REV. 495, 495 (2018).
77. Cambridge Analytica's model was based on two research papers. *See* Patrick Day, *Cambridge Analytica and Voter Privacy*, 4 GEO. L. TECH. REV. 583, 597–98 (2020).
78. *Id.* at 598.
79. Daniel Susser, Beate Roessler, & Helen Nissenbaum, *Online Manipulation: Hidden Influences in a Digital World*, 4 GEO. L. TECH. REV. 1, 10–11 (2019); *see* Ido Kilovaty, *Legally Cognizable Manipulation*, 34 BERKELEY TECH. L.J. 449, 466–68 (2019).

Cambridge Analytica built personality profiles for 87 million Facebook users, using the profiles to create ads that, instead of relying on reason, would leverage the cognitive biases of each personality type. For example, it might serve ads appealing to a user's predisposition to anxiety.[80] Cambridge Analytica leveraged this anxiety and these predispositions to amplify social discord for profit.

And it is not alone. A leaked strategy document from Facebook bragged to advertisers that it could identify when children as young as fourteen feel vulnerable in order to target them with ads.[81] Opioid manufacturers pushed their advertisements to remarkable effect, leading to record profits and a national opioid crisis.[82]

To the extent that these activities are legal and profitable, executives who are fully loyal to their shareholders may feel an "unremitting[]" duty[83] to do them.[84] Shareholders want profits. Profits are amoral. We cannot expect an amoral objective to create only moral outcomes.

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80. These data were obtained by Aleksandr Kogan, a lecturer at Cambridge University, through his Facebook app "This is Your Digital Life," which provided Facebook users a personality test in exchange for their data and their friend lists. *See* Waseem Ahmad Qureshi, *The Militarization of Social Media*, 42 U. HAW. L. REV. 169, 181–82 (2019). The scandal surrounding Cambridge Analytica spread to accusations of illegal activity unrelated to these advertising efforts. *See* Mark Bridge, Henry Zeffman, & Alice Thomson, *Cambridge Analytica Sends "Girls" to Entrap Politicians*, THE TIMES (Mar. 20, 2018), https://www.thetimes.co.uk/article/british-firm-sends-girls-to-entrap-politicians-wpthxqhwv [https://perma.cc/EZS7-TN4H]. There are also accusations that the company's access to the data violated Facebook's terms of service. *See* Qureshi, *supra*, at 183–84 (arguing that accessing the data was not illegal or a violation of Facebook's terms, but distributing that data to Cambridge Analytica was a violation of Facebook's terms). These accusations make the Cambridge Analytica example more unsavory, but also highlight that what many would feel is a manipulative invasion of their privacy is prohibited only by Facebook's grace.
81. Darren Davidson, *Facebook Targets 'Insecure' Young People*, THE AUSTRALIAN (May 1, 2017), https://www.theaustralian.com.au/business/media/facebook-targets-insecure-young-people-to-sell-ads/news-story/a89949ad016eee7d7a61c3c30c909fa6?amp&nk=e8948141c56a77795314407fe3af734f-1685307556 [https://archive.ph/mhNkh]. Facebook has denied that it used insecurity to help advertisers, arguing that it only meant to help "marketers understand how people express themselves on Facebook." *Comments on Research and Ad Targeting*, FACEBOOK NEWSROOM (Apr. 30, 2017), https://about.fb.com/news/h/comments-on-research-and-ad-targeting [https://perma.cc/9YQW-J5EF].
82. Jan Hoffman, *Purdue Pharma Is Dissolved and Sacklers Pay $4.5 Billion to Settle Opioid Claims*, N.Y. TIMES (Sept. 17, 2021), https://www.nytimes.com/2021/09/01/health/purdue-sacklers-opioids-settlement.html [https://perma.cc/7XS7-JF7F] (noting that after legal settlements shareholders in an opioid company "will remain among the richest families in the country").
83. *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 698 (Del. Ch. 2005); *see supra* note 58 (discussing various commentators' conceptions of the extent of fiduciary duty).
84. For further examples, consider David M. Carr, *Pfizer's Epidemic: A Need for International Regulation of Human Experimentation in Developing Countries*, 35 CASE

B. Moral Outsourcing: Fiduciary Duties Provide Justifications for Profit Maximizing Bad Acts

How is it that CEOs get into these messes? Are they psychopaths, as some scholars have alleged,[85] or is there something in our systems that pushes them toward fraud or preying on emotionally vulnerable teens? What allows them to bypass the normal ethical self-regulation processes that might prevent this type of behavior? Recent research in behavioral ethics provides strong evidence that fiduciary duties play a part.

1. Behavioral Ethics Shows that Plausible Justifications Increase Unethical Behavior

When humans act in a way that violates our ethical code, it inflicts psychological costs.[86] We try to avoid these costs with various strategies, including creating justifications to show our actions were ethical.[87] Our ability to create these justifications expands or contracts the range of actions we can take without paying these psychological costs.[88]

For example, in one study researchers asked a group of heterosexual men which of two magazines they would prefer.[89] One option provided more articles but fewer feature articles. The other option was the reverse; it provided fewer articles but had more feature articles. Both options came with a bonus issue. For one, the bonus issue featured the top ten athletes of the year. For the other, the bonus issue featured women in swimsuits. The researchers posited that selecting this bonus issue would be an ethically questionable choice for the participants. For half of the participants, the swimsuit issue was included with the

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W. RSRV. J. INT'L L. 15 (2003) (discussing a pharmaceutical company's experimentation in Nigeria), and Weitzel & Rodgers, *supra* note 2, at 49–50.

85. See the wonderful Lynn Stout at her absolute best in *How Investing Turns Nice People Into Psychopaths*, THE ATLANTIC (Apr. 4, 2012), https://www.theatlantic.com/business/archive/2012/04/how-investing-turns-nice-people-into-psychopaths/255426 [https://perma.cc/GV2X-ARHP]. *See generally* Joel Bakan, THE CORPORATION (2005).
86. Mazar, Amir & Ariely, *supra* note 55 (collecting studies, including brain imaging showing neural reward center activation consistent with compliance with social norms); Rachel Barkan, Shahar Ayal, Francesca Gino & Dan Ariely, *The Pot Calling the Kettle Black: Distancing Response to Ethical Dissonance*, 141 J. EXPERIMENTAL PSYCH.: GEN. 757, 763 (2012).
87. *See* Shalvi, Gino, Barkan & Ayal, *supra* note 68, at 125 (summarizing recent studies).
88. Francesca Gino & Dan Ariely, *The Dark Side of Creativity: Original Thinkers Can Be More Dishonest*, 102 J. PERSONALITY & SOC. PSYCH. 445 (2012).
89. ZOË CHANCE & MICHAEL I. NORTON, "I READ PLAYBOY FOR THE ARTICLES": JUSTIFYING AND RATIONALIZING QUESTIONABLE PREFERENCES 6 (Harv. Bus. School, Working Paper No. 10-018, 2009). One drawback to this study is the small sample size (23); but the results are replicated in the studies cited in the subsequent footnotes.

magazine with more articles, for the other half the swimsuit issue was included with the option providing more feature articles.

The experimenters found that the majority of men selected the option with the swimsuit edition, regardless of which magazine it was paired with, and, interestingly, when rating what was most important in their selection they claimed it was either the "number of feature[s]" or "number of articles," whichever matched their selection.[90] The experimenters theorized that the swimsuit issue was an ethically questionable choice, but the ambiguity created by each magazine having some superior attribute over the other allowed the participants to justify their base preferences.

Studies have shown similar results in hiring when the candidates vary by sex.[91] Where a candidate of the preferred sex has greater experience but less education, interviewers will rank experience as the most important attribute.[92] Where the preferred candidate has more education but less experience, evaluators rank education as the most important attribute. These results have been repeated with race in college admissions and jury selection, in each case finding that people will pick the result they want within the range of justifiable options.[93]

These studies show that the existence of a plausible ethical justification facilitates otherwise unethical behavior. As a corollary, when these justifications are removed, unethical behavior decreases.

90. *Id.* at 6–7.

91. Michael I. Norton, Joseph A. Vandello & John M. Darley, *Casuistry and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCH. 817, 820–21 (2004).

92. *Id.* (finding 75% of participants selected the better educated candidate if that candidate is male, but only 43% selected the better educated candidate if that candidate is female, with a $p < 0.02$); Michael I. Norton, Samuel R. Sommers & Sara Brauner, *Bias in Jury Selection: Justifying Prohibited Peremptory Challenges*, 20 J. BEHAVIORAL DECISION MAKING 467, 471 (2007) (finding that undergraduate students pretending to be prosecutors would strike a juror for being a parent 67% of the time if the juror were female but only 24% of the time when the juror was male, with a $p < 0.001$).

93. Norton, Vandello, & Darley, *supra* note 91, at 823–24 (Princeton undergrads showed a bias toward black candidates in college admission, rating the value of a GPA higher when it favors black candidates, $p < 0.01$); Michael I. Norton, Samuel R. Sommers, Joseph A. Vandello & John M. Darley, *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCH. PUB. POL'Y & L. 36, 42–43 (2006) (finding that Princeton undergrads had no preference between higher GPA or more AP classes unless the candidate's race was introduced, at which point they prioritized the category that benefited the black candidate, accepting the candidate with the higher GPA 78% of the time if the candidate was black and only 22% of the time if the candidate was white; $p < 0.001$); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 L. & HUM. BEHAV. 261, 266–67 (2006) (finding that undergraduates posing as prosecutors are more likely to strike a juror who is a journalist reporting on police misconduct if that juror is black (77% vs. 53%), though the results were significant only to $p < 0.3$).

For example, one study asked participants to answer twenty math questions on a software program they were told was glitchy.[94] The program, they were told, would display the answer unless the participant pressed the spacebar. This "glitch" was intentional and formed the core of the experiment. It allowed a reasonable explanation for someone to cheat: "I accidentally forgot to hit the spacebar before the answer appeared." The math test consisted of two sections; in one the participants needed to press the spacebar in one second, in the other they had ten leisurely seconds to do so.[95] Failure to press the spacebar was covertly noted by the experimenters as cheating.

The researchers found that participants were 20% more likely to cheat when the time to press the spacebar was short and a failure to hit the spacebar could be justified as inadvertent.[96] The researchers also found that if the participants were allowed to establish themselves as good people in other ways prior to the test (credentialing), the cheating disparity increased further, a correlation that shows participants were perfectly capable of hitting the spacebar under both the fast and slow scenarios.[97] A plausible justification increased unethical behavior and when the justification was removed, unethical behavior decreased.[98]

2. *Fiduciary Duties Create Plausible Justifications for Unethical Behavior*

So how do officer fiduciary duties affect an officer's ethical analysis?

Fulfilling a duty is a moral obligation. When the duty to serve shareholders conflicts with another moral obligation, officers may choose to

94. Ryan P. Brown et al., *Moral Credentialing and the Rationalization of Misconduct*, 21 ETHICS & BEHAV. 1, 1–5 (2011).

95. The order of the sections was reversed for half of the participants. *Id.* at 4.

96. Participants cheated an average of 2.09 times per long pause set and 4.27 times per short pause set, $p < 0.001$, with ten questions in each set for each of the 187 undergrads. *Id.* at 5–6. Interestingly, the participants were also asked how many times they failed to press the spacebar in time. The difference between the self-reported misses and the actual misses also increased when the time limit was shorter, $p < 0.001$. *Id.* at 6–7.

97. The credentialing task involved rating how likely they would be to behave ethically in four situations. Credentialing did not have a statistically significant effect on overall cheating, but it did have a statistically significant effect on cheating when rationalizable ($p = 0.05$). It also shows that the cheating was not the result of being unable to press the spacebar quickly enough. *Id.* at 6–8

98. This result has been found in many other experiments. For example, researchers asked heterosexual male participants to watch a film in one of two rooms. One screening room was empty; in the other sat a female. When the participants were told that the two movies were different, the participants overwhelmingly watched the movie with the female. When they were told the movies were the same, the men sat alone; they no longer had a justification follow their preference. William M. Bernstein, Blair O. Stephenson, Melvin L. Snyder & Robert A. Wicklund, *Causal Ambiguity and Heterosexual Affiliation*, 19 J. EXPERIMENTAL SOC. PSYCH. 78, 78–82 (1983); *see also* CHANCE & NORTON, *supra* note 89, at 10–11.

follow their duty to shareholders, rationalizing that the shareholders are the beneficiaries of the officers' actions so the shareholders are morally responsible for any resulting harms.[99] With the benefits go the costs. This moral outsourcing was shown in one of the most famous social science experiments of the last century.

In Stanley Milgram's classic experiment, participants were told they had been randomly selected to be either a "teacher" or a "learner."[100] In reality, all participants were teachers, and the learner was an actor assisting with the experiment. The learner and teacher met, and then the teacher watched as the learner was strapped to a chair with electrodes attached on his arm.[101] The teacher went to another room where he could hear but not see the learner. From there, an experimenter would ask the learner questions and, when the responses were wrong, the experimenter would direct the teacher to give an electric shock to the learner.[102]

The teacher gave the shock by flipping one of several switches labeled with increasing voltage. The labels ranged from "slight shock" to "Danger: Severe Shock" and eventually "XXX." Unknown to the teacher, the device was a prop that did not provide any shocks at all. The teacher was instructed to increase the voltage throughout the experiment, and though no shock was actually given, the learner would shout out in pain, ask to be released, mention troubles with his heart, then, as the voltage increased, go completely silent as though dead. If the teacher resisted giving the shock, the experimenter would instruct in an even tone that "the experiment must go on."

Milgram found that, when ordered by the expert, 65% of subjects would administer shocks up to the highest level, labeled XXX.[103] This is despite the shouts of pain and heart conditions and the learner going silent as though dead.

There are multiple theories to explain why these otherwise normal people would be willing to administer what appeared to be a fatal shock. Milgram theorized that the subjects entered an "agentic state," in which people "come[] to view [themselves] as the instrument for carrying out another person's wishes, and [they] therefore no longer

99. Shalvi, Gino, Barkan & Ayal, *supra* note 68, at 126 ("People behave immorally only to a certain extent so that they can profit from their misconduct but still feel moral.").
100. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY 19–21 (1974).
101. The participants were all male. *Id.* at 62.
102. *Id.* at 13–22.
103. *Id.* at 32–33.

regard[themselves] as responsible for [their] actions."[104] This explanation for psychopathic behavior is a restatement of the ideal fiduciary.[105]

Milgram's study shows that a perceived duty can shift our moral constraints, and that when the duty conflicts with our moral code, we can justify the immoral action on the basis of duty. If, as the grand dicta suggest, fiduciary duties create a moral obligation to prioritize another's interests, then loyalty can override our moral constraints, and a fiduciary officer may outsource the moral costs to the shareholders.

This is troubling because, unlike the authority figure in Milgram's experiment who was present to hear the screams, the shareholders are typically unaware of the morally questionable acts done on their behalf.[106] In other words, no moral reckoning ever occurs because the moral weight of the decision is outsourced to the shareholders, but the shareholders are unaware that any decision was made.[107] The moral costs are never internalized. Like any cost, moral costs that are never internalized will be overproduced.

One might argue that corporate officers are not obedient stooges; they are more likely to stand up to authoritative pressures and reject demands for higher shocks. As noted in section IV.A below, there are reasons to believe the opposite may be true. A CEO's paycheck and career are typically linked to profitability, so the sense of duty is reinforced by a self-serving bias. Research has shown that people are more likely

104. *Id.* at xii; Albert Bandura et al., *Mechanisms of Moral Disengagement in the Exercise of Moral Agency*, 71 J. PERSONALITY & SOC. PSYCH. 364, 365 ("Under *displacement of responsibility*, people view their actions as springing from the social pressures or dictates of others rather than as something for which they are personally responsible. . . . Because they are not the actual agents of their actions, they are spared self-censuring reactions.").

105. RESTATEMENT (THIRD) OF AGENCY § 8.01(b) (AM. L. INST. 2006) ("[T]he general fiduciary principle requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship.").

106. If the action is immaterial, it is unlikely to be disclosed. *Cf.* 17 C.F.R. § 240.10b-5(b) (1951) (unlawful to "make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements . . . not misleading"). If the action is material, unless it is egregious enough to catch a journalist's attention, it will likely be known only to particularly attentive investors and to fund managers who may outsource the ethical consequences to their unaware yet benefitting share owners. This may explain the interesting work by Colin Mayer finding that when there is a scandal the market "only inflicts penalties on corporations which, by their actions, have damaged the corporation itself. Where the corporation has damaged other people or other corporations, then far from penalizing it, the stock market might even reward it for enhancing its profits." COLIN MAYER, FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT (2013); *see* John Armour, Colin Mayer, and Andrea Polo, *Regulatory Sanctions and Reputational Damage in Financial Markets*, 52 J. FIN. & QUANTITATIVE ANALYSIS 1429 (2017) (note that the third-party data were not statistically significant at the 10% level for indirect issues).

107. *See* DYLAN, *supra* note 8.

to act unethically if their personal biases align with a plausible moral justification.[108] In addition, the c-suite is full of people that climbed by pleasing their bosses; corporate hierarchy selects for obedience.[109]

Others may argue that the fiduciary sword cuts both ways—while it may permit justifications for some behaviors, it cuts off justifications for other undesirable behavior.[110] While this is undoubtedly true, Part IV shows that these constraints are available through other means that do not leave uninternalized moral costs.

3. *The Danger of Extending Fiduciary Duties to Stakeholders*

These behavioral ethics experiments show why stakeholder models extending fiduciary duties may be counterproductive in fighting executive self-interest. Stakeholder models argue that executives should have fiduciary or fiduciary-like duties to employees, suppliers, the local community, or others.[111] This stakeholder approach is likely to be counterproductive because, as shown above, (1) people tend to act in their self-interest to the extent the action has a plausible ethical justification, and (2) a duty to another party provides that ethical justification.

If corporate officers owe an ethical duty to multiple stakeholders,[112] the field of plausible justifications grows exponentially. For example, managers might "serve employees" by building out a fancier headquarters (including their own office). They might "serve the local community" with local donations, focused on their own children's schools. Nearly every action can be justified as helping someone, so a broader range of actions becomes morally justifiable.[113] Extending fiduciary duties to stakeholders is a recipe for more self-interested behavior, not

108. Rachel Barkan, Shahar Ayal & Dan Ariely, *Ethical Dissonance, Justifications, and Moral Behavior*, 6 CURRENT OP. IN PSYCH. 157, 158 (2015) ("Unlike a lie that benefits only the liar, if a lie benefits another person as well, it can be justified, and redefined as altruistic. . . . Altruistic cheating increases as the lie benefits more people.").

109. *See supra* section IV.A.

110. Frankel, *supra* note 62, at 417 ("Morality becomes an adjunct to law in that a sense of moral obligation may present a disguised threat to the fiduciary as well as a positive inducement."); Larry E. Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899, 905 (2011) ("Fiduciary duties can be helpful in establishing behavioral norms that supplement the law.").

111. *See, e.g.*, Blair & Stout, *supra* note 3, at 293–96.

112. For a survey of these theories, see STOUT, *supra* note 56 *passim*.

113. *See* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1427 & n.13 (1993) (quoting *Matthew* 6:24) ("No one can serve two masters. Either he will hate the one and love the other, or he will be devoted to the one and despise the other."); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 581 (2003) ("Because stakeholder decision making models necessarily create a two masters problem, such models inevitably lead to indeterminate results." (footnote omitted)).

less. Those concerned about management's "unyielding"[114] loyalty to shareholders (and by extension profit maximization) may do better by removing that loyalty rather than expanding it.

C. Delaware Should Eliminate the Fiduciary Duties

The solution to these challenges is to eliminate officer fiduciary duties. Doing so would eliminate uninternalized moral costs. If executives choose to engage in immoral, legal, profitable behavior, they will no longer be able to justify it as altruism to shareholders.

As explained more fully below, this solution would also bring fiduciary duties more in line with current theories. And shareholders would still find protection through the corporate power structure and through private ordering.

IV. OFFICER FIDUCIARY DUTIES LACK THEORETICAL SUPPORT

It would be reckless to eliminate fiduciary duties from officers without first understanding their intended purpose.[115] This Part explores the justifications provided by Delaware's highest court for imposing fiduciary duties on officers and shows that no coherent theory is given. It then considers theories of fiduciary duty developed by scholars, which incorporate a broader range of fiduciary duty applications. Part IV concludes that theories and explanations for fiduciary duties cannot justify officer fiduciary duties.

A. Legal Basis of Officer Fiduciary Duties

The Delaware Supreme Court has never provided a comprehensive theory explaining why some persons associated with a corporation owe fiduciary duties to shareholders (directors, officers, major shareholders), while others typically do not (other critical employees, minority shareholders, suppliers, debtholders).

The Delaware Supreme Court first held that officers owe shareholders a fiduciary duty in 1939, when Loft, Inc. sued its president, Charles

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114. Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).

115. Consider G.K. Chesterton's parable of the reformer:

> There exists in such a case a certain institution or law; let us say, for the sake of simplicity, a fence or gate erected across a road. The more modern type of reformer goes gaily up to it and says, "I don't see the use of this; let us clear it away." To which the more intelligent type of reformer will do well to answer: "If you don't see the use of it, I certainly won't let you clear it away. Go away and think. Then, when you can come back and tell me that you do see the use of it, I may allow you to destroy it."

G.K. CHESTERTON, THE THING 35 (1929).

Guth. Guth was an officer and the dominant director of Loft, Inc.[116] The company operated a chain of soda shops along the Atlantic coast. Guth used the company's financial support to purchase the secret recipe for Pepsi for himself; he then produced Pepsi syrup to sell to the company's soda shops at a profit.

Holding that the double-dealing president had appropriated an opportunity from the company, the court said:

> While technically not trustees, [directors and officers] 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.[117]

The basis of assigning fiduciary duties to officers was the court's "profound knowledge of human characteristics and motives."[118] This provides no guide as to which situations or relationships should give rise to fiduciary duties among other relationships with "human characteristics and motives."[119]

Scholars spent the next seventy years debating which fiduciary duties of officers are included in this charge, whether the same duties are owed by directors, how they are enforced, whether they are exculpable, and whether they even exist.[120]

In 2009, the Delaware Supreme Court clarified that officers have the same fiduciary duties to shareholders as directors, but again without stating the theoretical or policy reason.

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116. The Supreme Court opinion refers to him as "control[ling]" the board of directors. Guth v. Loft, Inc., 5 A.2d 503, 506, 515 (Del. 1939). "He was its master. . . . Guth manifested some of the qualities of a dictator." *Id.* at 512. The Chancery opinion clarifies further that Guth selected every board member and in one instance held a director's letter of resignation, which he could accept at will. Loft, Inc. v. Guth, 2 A.2d 225, 237 (Del. Ch. 1938).

117. *Guth*, 5 A.2d at 510.

118. *Id.*

119. *Id.*

120. *See* Deborah A. DeMott, *Corporate Officers as Agents*, 74 WASH. & LEE L. REV. 847, 849 (2017) (arguing that "officers should be subject to the same liability standard applicable to third-party agents," namely that the duty of care is breached by simple, rather than gross, negligence); Stephen P. Lamb & Joseph Christensen, *Duty Follows Function: Two Approaches to Curing the Mismatch Between the Fiduciary Duties and Potential Personal Liability of Corporate Officers*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 45, 46 (discussing extending exculpation under § 102(b)(7) to officers and discussing differentiated fiduciary duties for various functions); Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1601 (2005).

> The Court of Chancery has held, and the parties do not dispute, that corporate officers owe fiduciary duties that are identical to those owed by corporate directors. That issue—whether or not officers owe fiduciary duties identical to those of directors—has been characterized as a matter of first impression for this Court. In the past, we have implied that officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors. We now explicitly so hold.[121]

Without further explanation, the court turned to the facts of the case once again, leaving lower courts and scholars to wonder why and when this holding applies.[122]

B. The Elusiveness of Fiduciary Law Theory

While the courts have not explained why officers have fiduciary duties, fiduciary duties arise in several contexts, and those more general applications are instructive.

History has made providing a theory of fiduciary duty difficult, both by design and by accident.[123] First, by design fiduciary duties, like all equitable doctrines, were established to avoid the formulaic application of strict rules that would allow a fiduciary to outwit and cheat a beneficiary through technical compliance.[124] While fiduciary duties can

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121. Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009). The court said that this holding had previously been "implied." *Id.* It further noted in a footnote that the principle "has long been an articulated principle of Delaware law," *Id.* at 709 n.36. However, any such implication was not obvious outside Dover. *See* Johnson & Millon, *supra* note 118, at 1601 (explaining that as of 2005, four years before *Gantler*, "no Delaware decision has ever clearly articulated the subject of *officer* duties and judicial standards for reviewing their discharge"); Lyman P.Q. Johnson & Robert V. Ricca, *(Not) Advising Corporate Officers About Fiduciary Duties*, 42 WAKE FOREST L. REV. 663, 666 (2007); *but see* DeMott, *supra* note 118, at 854 n.25 (arguing that Delaware law "was not silent about officers' duties, just reliant on the common-law backdrop of agency, which rarely occupied the foreground").

122. *See, e.g.*, Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405 (2013); DeMott, *supra* note 118; Amitai Aviram, *Officers' Fiduciary Duties and the Nature of Corporate Organs*, 2013 U. ILL. L. REV. 763 (2013) (proposing private ordering to address the officer's duties, liabilities); Michael Follett, Gantler v. Stephens*: Big Epiphany or Big Failure? A Look at the Current State of Officers' Fiduciary Duties and Advice for Potential Protection*, 35 DEL. J. CORP. L. 563 (2010).

123. D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1400 (2002) (calling fiduciary law "messy"); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879, 915 (1988) (explaining that fiduciary duties, "[a]pplicable in a variety of contexts, and apparently developed through a jurisprudence of analogy rather than principle . . . resist[] tidy categorization," and calling fiduciary law "atomistic" and "elusive"); Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 15 (2001) (calling fiduciary law "elusive").

124. *See* Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1043–44 (2011) (arguing that an expansive understanding of fiduciary duty is necessary due to incomplete contracting).

be traced back to Roman courts, canon law, and Islamic *waqfs*,[125] the most direct lineage is through the first English court of chancery, which existed so the king's conscience could intervene to prevent an unjust application of bright line rules.[126] Replacing clear rules with vague boundaries was by design.

However, this design explanation is insufficient because many other areas of equity arose through this same process and have clarified over time. If time can provide clear rules for laches, why not for the concept of fiduciary duties?

Fiduciary duties are hard to define because they embody the doctrine of residual morality. Consider the scope of their potential application. If one delays too long, that may or may not be laches, but it is not subrogation. If a contract term is cruel, look to unconscionability, but it certainly is not estoppel. Each equitable doctrine has a field of potential application. For fiduciary duties, the field of potential application is any relationship where someone expected more loyalty than they got.[127] That's most relationships.[128] And particularly those that end up in court. When bright line rules suggest results that feel unjust, courts

125. Other lineages include feudal barons, ecclesiastical courts, crusading knights, and even Mary Stzo's insightful analogy to the creation. *See* Szto, *supra* note 58, at 86–87; Ronald J. Scalise Jr., *Some Fundamentals of Trusts: Ownership or Equity in Louisiana?*, 92 TUL. L. REV. 53, 57–60 (2017) (providing an overview of the theories); Justice Arthur Emmett, *Roman Law and Equity: Some Parallels*, 2014 ABR LEXIS 57, at *18–30 (2014) (tracing the development of equity in Roman law as compared to modern equity and Edward III's chancery); Shael Herman, Utilitas Ecclesiae*: The Canonical Conception of the Trust*, 70 TUL. L. REV. 2239, 2243–48 (1996); Myron T. Steele, *The Moral Underpinnings of Delaware's Modern Corporate Fiduciary Duties*, 26 NOTRE DAME J. L. ETHICS & PUB. POL'Y 3, 5–13 (2012); Monica M. Gaudiosi, *The Influence of the Islamic Law of* Waqf *on the Development of the Trust in England: The Case of Merton College*, 136 U. PA. L. REV. 1231, 1232 (1988).

126. DeMott, *supra* note 121, at 880; Celia R. Taylor, *The Inadequacy of Fiduciary Duty Doctrine: Why Corporate Managers Have Little to Fear and What Might Be Done About It*, 85 OR. L. REV. 993, 1006–07 (2006) (quoting Cecil J. Hunt, II, *The Price of Trust: An Examination of Fiduciary Duty and the Lender-Borrower Relationship*, 29 WAKE FOREST L. REV. 719, 728 (1994)).

127. To be clear, this section does not claim that an expectation of loyalty establishes a duty; expectations of trust and loyalty are common in most commercial relationships. *See, e.g.*, Smith, *supra* note 121, at 1417–18 ("In light of recent scholarship, the concept of 'trust' simply seems inapt."); Scallen, *supra* note 66, at 917–18.

This section makes the more modest claim that when an expectation of loyalty is unjustly unmet and law does not seem capable of addressing it, the applicable equitable doctrine a court may turn to is fiduciary duties. Where a legal remedy is available, equity is less likely to be found pacing the grounds. *See* DeMott, *supra* note 121, at 915 ("Described instrumentally, the fiduciary obligation . . . enables the law to respond to a range of situations in which . . . one person's discretion ought to be controlled because of characteristics of that person's relationship with another. This instrumental description is the only general assertion about fiduciary obligation that can be sustained.").

128. *See generally* my high school love life.

may consider whether there is a fiduciary duty. In this way, to quote a former Delaware Supreme Court justice, fiduciary duties "serve as the moral pulse of our society."[129]

This broad application makes it difficult to create a unified theory of fiduciary duties. Theories struggle to cover the variety of relationships that often have little in common with prior situations.[130] Dicta about business partners is used to analyze the relationship between a doctor and a patient[131] or a two-timing real estate agent.[132] So while most equitable principles accrue over time through experience, the theories governing fiduciary duty set more slowly because courts keep stretching the mold to encompass new relationships.[133]

As fiduciary duties are transferred from field to field, they begin to clarify within their respective fields. But clarifying how fiduciary duties apply within a field does not clarify when fiduciary duties should apply to a new field. That is, understanding *how* directors must act does not provide insight on *why* officers must act.

C. Proposed Theories of Fiduciary Duties

Undaunted scholars have offered up a body of clever and insightful work to establish a universal theory of when fiduciary duties arise. These typically involve multifactor tests with various elements.[134] Because there is considerable overlap between the theories, this section will address the most common elements, which taken together

129. Steele, *supra* note 123, at 3.

130. DeMott, *supra* note 121, at 879 ("Because of the wide range of situations in which the obligation may arise, the law of fiduciary obligation has developed through analogy to contexts in which the obligation conventionally applies.").

131. Fiduciary duties run through relationships created by corporations, trusts, contracts, partnerships and hospital visits. *See, e.g.*, Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160, 163–64 (Del. 2002) (holding that a "limited partnership agreement may provide for contractually created fiduciary duties substantially mirroring traditional fiduciary duties that apply in the corporation law").

132. Estate of Eller v. Bartron, 31 A.3d 895, 898 (Del. 2011) (citing Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928)).

133. C.A. v. Critchley, 166 D.L.R. 4th 475, 496 (Can. B.C.C.A.) ("All Canada is divided in three parts: those who owe fiduciary duties, those to whom fiduciary duties are owed, and judges who keep creating new fiduciary duties!"); DeMott, *supra* note 121, at 909 (noting recent expansions of fiduciary duty into commercial franchises, distributor relationships, banks and borrowers, and other relationships).

134. As an alternative to these tests, some of my favorite writers have looked instead to analogies to agency law. Johnson & Millon, *supra* note 118, at 1601; Aaron D. Jones, *Corporate Officer Wrongdoing and the Fiduciary Duties of Corporate Officers under Delaware Law*, 44 AM. BUS. L.J. 475, 478 (2007) (suggesting that if officers are agents, then the duties owed should be adjustable by contract); DeMott, *supra* note 118. Delaware courts reject this analogy, *see, e.g.*, *Firefighters' Pension Sys. v. Presidio, Inc.*, 251 A.3d 212, 286 & n.28 (Del. Ch. 2021) (collecting cases), but until they provide an alternative theory agency analogies seem fair game.

encompass the principal theories. These elements include: the voluntary assumption of duties by the fiduciary,[135] possession of a resource[136] over which the fiduciary has discretion,[137] the vulnerability of the beneficiary to opportunism[138] and the difficulty of monitoring,[139] and the expectation that the fiduciary will act "on behalf of" the beneficiary's interests.[140]

While section III.B argues that fiduciary duties embody the doctrine of residual morality and so cannot be limited to a unified test, this section will show that officer fiduciary duties do not fit into the other existing theories of fiduciary duties.

135. Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539, 540 (1949).

136. L.S. Sealy, *Fiduciary Relationships*, 20 CAMBRIDGE L.J. 69, 74–79 (1962); Ribstein, *supra* note 110, at 901 (arguing that fiduciary duties arise only from a contractual relationship in which a property owner "delegat[es] to a manager . . . open-ended management power over property without corresponding economic rights"); Frankel, *supra* note 62, at 397–98 (finding fiduciary duties arise when (1) the relationship involves "the kind of trust and reliance that society is interested in nurturing," (2) there is an "entrusting of property or power" and (3) "controlling fiduciaries in the performance of their services and in the use of entrusted assts may undermine the very usefulness of those services"); Smith, *supra* note 121, at 1441; Lauren R. Roth, *The Collective Fiduciary*, 94 NEB. L. REV. 511, 517 (2016).

137. Sealy, *supra* note 134, at 74–79; Ribstein, *supra* note 110, at 901; Frankel, *supra* note 62, at 397–98; Smith, *supra* note 121, at 1441; Roth, *supra* note 134, at 517.

138. Lisa M. Fairfax, *"With Friends Like These . . .": Toward a More Efficacious Response to Affinity-Based Securities and Investment Fraud*, 36 GA. L. REV. 63, 104 (2001); Leonard I. Rotman, *Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 B.U. L. REV. 921, 934 (2011) ("The fiduciary character of a relationship, then, is determined by looking at both the degree of dependence and vulnerability that exists within it, and the value of the interaction to society at large."); Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 809 (1983); Smith, *supra* note 121, at 1402, 1424, 1434–35 (calling this "opportunism"); Sealy, *supra* note 134, at 78–79 (calling this "undue influence"); Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1249 (1991) (finding that fiduciary duties arise in "long-term commercial relationships in which the weaker party accepts a risk that may lead to opportunism by the more powerful party"); *see also* DeMott, *supra* note 121, at 902 ("[One] party's vulnerability to the fiduciary's abuse of power or influence conventionally justifies the imposition of fiduciary obligation."); Frame v. Smith, [1987] 2 SCR 99 (Can.) (discussing fiduciary duties owed to children); Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 255 (2011) ("It is most commonly said that fiduciary duties are founded upon the beneficiary's vulnerability to the fiduciary," i.e., the beneficiary's "dependence, weakness or incapacity").

139. Frankel, *supra* note 136, at 814; Easterbrook & Fischel, *supra* note 54, at 426.

140. Frankel, *supra* note 136, at 805, 808 (referring to this as substitution); Smith, *supra* note 121, at 1402–03 (referring to this as acting "on behalf of"); Sealy, *supra* note 134, at 74–79.

1. Voluntary Assumption

An early, straightforward theory stated that a "fiduciary is a person who undertakes to act in the interest of another person."[141] This voluntary assumption theory struggled to explain many modern cases where fiduciaries are often surprised by their designation.[142] Still, voluntary assumption arises repeatedly through the literature, occasionally as an element of larger tests and most notably in the contractarian approach, which states that fiduciary duties exist to fill contractual gaps.[143]

One may argue that officers are fiduciaries because they voluntarily agreed to become officers, who have long been held to be fiduciaries. This is a fair point, but also tautological. New officers are fiduciaries because they knew prior officers were fiduciaries. This supplies no reasoned principle. If courts applied fiduciary duties to any profession, then in ten years the reasoning would be just as strong. "Should" cannot merely follow "is."

The voluntary assumption case is even weaker because none of the affected parties seem particularly attached to the law in its current form. As explained in subsection IV.C.1, shareholders rarely rely on an officer's fiduciary duties. As explained in section IV.A, officers aren't in love with shareholder primacy. And as explained in Part II, removing officer fiduciary duties is likely to encourage prosocial behavior.

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141. Scott, *supra* note 133, at 540.

142. *See* Smith, *supra* note 121, at 1415–17; DeMott, *supra* note 121, at 910–11.

143. J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 L.Q. REV. 51, 75 (1981) ("A fiduciary relationship exists whenever any person receives a power of any type on condition that he also receive with it a duty to utilise that power in the best interests of another, and the recipient of the power uses that power."); Easterbrook & Fischel, *supra* note 54, at 426 (arguing that the fiduciary duties arise to fill gaps caused by incomplete contracting and would be accepted in a hypothetical bargain); Scallen, *supra* note 66, at 922 (included along with dependence or vulnerability, power conferred, inability to monitor/protect, and acceptance); Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1684 (1990) ("A fiduciary relationship is a relationship of power and dependency in which the dependent party relies upon the power holder to conduct some aspect of a dependent's life over which the power holder has been given and accepted responsibility."); Estate of Eller v. Bartron, 31 A.3d 895, 897–98 (Del. 2011) (internal citations and quotation marks omitted) (explaining that "[a]gency is the fiduciary relationship that arises when a person (a 'principal') manifests assent to another person that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act" and that "[w]hen accompanied by trust that the agent will use the principal's confidential information to pursue the principal's ends, that relationship also imposes fiduciary duties on the principal").

2. *An Entrusted Resource*

Most theories link fiduciary duties to entrusting a resource to a fiduciary.[144] This idea seems to have motivated the early theories in corporate governance.[145]

Entrustment theories do not fit well with officer fiduciary duties because shareholders own stock, not corporate assets, so officers do not control any property owned by the shareholders. Stock is a bundle of rights that includes the right to appoint the directors, to vote on some major items, and to receive dividends when the directors declare them.[146] These rights establish a power dynamic that is designed to protect the shareholders' interests. But they do not establish legal ownership of any property the corporation manages. Shareholders have contributed capital, but they have no legal claim to that capital—they traded that claim for stock.[147]

True, the shareholders are likely to prosper if that capital is managed well, but the same prosperity would also benefit employees and others that rely on the company to whom no fiduciary duties are owed.

In addition to the lack of assets, there is no entrustment relationship because the shareholders have no relationship with the officers. Shareholders do not select the officers, command them, set their terms or remove them.[148] Even if stock were an entrustment, the entrustment would be to the board, not the officers.

Because the officers are not entrusted with any asset owned by the shareholders and because there is no entrusting relationship between the officers and shareholders, the most common element in a theory of fiduciary duties is not present.

3. *Discretion*

Another ubiquitous component of fiduciary duty theories is the fiduciary's discretion.[149] That is, a person becomes a fiduciary by having discretion over the affairs of another. This element presents a stronger case, but still misses the mark.

144. *See, e.g.*, *Estate of Eller*, 31 A.3d at 898; Smith, *supra* note 121, at 1402.
145. Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) (stating that directors and officers are "technically not trustees"); Lofland v. Cahall, 118 A. 1, 3 (Del. 1922) ("Directors of a corporation are trustees for the stockholders, and their acts are governed by the rules applicable to such a relation . . . ."); Berle, *supra* note 1, at 1074.
146. DEL. CODE ANN. tit. 8, § 170(a) (2010).
147. Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1191 (2002).
148. DEL. CODE ANN. tit. 8, § 142(b) (1998) (officers are selected according to the direction of the board or the bylaws). While it is possible for the bylaws to directly appoint an officer, this is almost always done through a resolution of the board.
149. *See, e.g.*, Miller, *supra* note 136, at 262–63 (finding fiduciary duties arise from "[d] iscretionary power to affect the legal or vital practical interests of . . . [an]other").

Delaware statutes and cases place discretion for managing the company in the hands of the directors, not the officers. "The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . . ."[150] This power is not jointly held with officers—"the board of directors acting as a board must be recognized as the only group authorized to speak for 'management' in the sense that under the statute they are responsible for the management of the corporation."[151] Boards have discretion; officers implement that discretion.

Of course, within their sphere of influence, officers still have discretion. Every employee has discretion in their sphere of influence,[152] but not every employee has fiduciary duties back to shareholders. If limited discretion were sufficient, there would be no limit on fiduciary duties to shareholders. One may argue that officers' discretion is unique because it covers the entire operations of the company, but this is true only of one officer: the president. The chief technology officer lacks discretion over the treasury.

Because the board, not officers, retain the managerial discretion over the corporation, discretion does not support officer fiduciary duties.

4. *Vulnerability, Abuse of Power, Opportunism*

A major economic justification for fiduciary relationships is that society is more productive if people can rely on experts. It is costly to monitor an expert because identifying opportunism may itself require expertise. Even where expertise is not necessary for monitoring, monitoring defeats the purpose of appointing a fiduciary to free up the beneficiary.

Fiduciary duties solve this problem by supplementing *ex ante* monitoring with *ex post* remedies. This builds consumer trust in experts, which in turn results in less time spent on monitoring while limiting consumers' vulnerability to the experts' opportunism.

While lower monitoring costs are certainly welcome, they are not necessary here because officers are already monitored by the board to prevent opportunism or abuse of power. The board directly supervises the officers. Board members of public companies often bring industry expertise to monitor operations and financial expertise to monitor fraud. Even where these skills are absent, that absence was at the shareholders' election. Each director has a right to all of the company's

150. DEL. CODE ANN. TIT. 8, § 141(a) (2020).
151. Campbell v. Loew's, Inc., 134 A.2d 852, 862 (Del. Ch. 1957).
152. Discretion cannot include merely access. Professor Smith gives as an example an electrician working on a home, who has access but not discretion. Smith, *supra* note 121, at 1403, 1425.

information.[153] A director's job is primarily to set strategy and monitor the officers who implement it.

One might object on the basis that while boards have the legal right to monitor, in practice they don't—a board composed of the CEO's golf buddies offers no protections.[154] This objection lacks both factual and theoretical support. As discussed in section IV.B, there is ample evidence that modern boards monitor and terminate poorly performing officers.

The argument also misunderstands the theory. The *reasonable opportunity* to monitor is a factor for fiduciary duties because without the reasonable opportunity to monitor, the beneficiary becomes vulnerable to opportunism. Here, the board has the chance to monitor; if they don't, the shareholders should replace them. If the shareholders decline to do so, it is hard to see why that should earn them additional protections. One cannot create fiduciary duties through sloth.

5. *Acting "On Behalf Of"*

Another common element in fiduciary duty theories is whether the person is acting "on behalf of" or "for the benefit of" another.[155]

Technically, officers act on behalf of the directors, not shareholders, to implement the directors' strategy—though such a fine distinction is not necessary. This element is never sufficient on its own to establish a fiduciary relationship because acting "on behalf of" or "for the benefit of another" is central to most commercial agreements, and to all gratuitous acts of kindness, that without substantiation do not create fiduciary duties.[156] "Acting on behalf of" is only relevant to distinguish

153. *See In re* WeWork Litig., 250 A.3d 901, 908, 911 (Del. Ch. 2020); Kalisman v. Friedman, No. 8477-VCL, 2013 Del. Ch. LEXIS 100, at *9 (Del. Ch. Apr. 17, 2013) ("A director's right to information is 'essentially unfettered in nature.'" (citation omitted)). There are a few minor limitations on individual directors such as limits fixed by preexisting agreements, privileged information provided to a special Board committee, and privileged information with a director that is adversarial to the company. *Kalisman,* 2013 Del. Ch. LEXIS 100, at *10–12. None of these limit the full board's access, only access by an individual director.

154. *See Report of the Task Force of the ABA Section of Business Law Corporate Governance Committee on Delineation of Governance Roles and Responsibilities*, 65 BUS. LAW. 107, 128 (2009) [hereinafter *ABA Task Force Report*] ("A legitimate criticism of corporate governance for much of the last century was that boards were unduly passive and deferential to the professional managers to whom they had delegated authority for the daily operations of the company.").

155. Estate of Eller v. Bartron, 31 A.3d 895, 898 (Del. 2011); Smith, *supra* note 121, at 1402.

156. Smith, *supra* note 121, at 1402–03 ("Because the prospect of mutual benefit motivates almost all contractual relationships, however, this requirement cannot easily distinguish fiduciary relationships. It is most useful in circumstances where the other two requirements are satisfied.").

fiduciary relations from other areas like tenancy, where the person holding the asset is also the beneficiary.

6. *Duties to the Reified Corporation*

While for clarity this analysis has focused on the duties officers owe to shareholders, similar arguments apply for the officers' duties owed to the reified corporation. The voluntary assumption factor still depends on circular reasoning. And the monitoring argument is unchanged.

The entrusted resources and discretion factors have stronger arguments here, but board delegations of resources and discretion vary so much from company to company that private ordering is likely to create a productive, reasonable fit.[157]

D. Agency Theory of Officer Fiduciary Duty

Another theory that arises occasionally[158] suggests that officers are agents, and that therefore they owe the fiduciary duties applicable under agency law.[159]

While discussions of corporate fiduciary duties share terminology with agency, these are distinct fields of law.[160] Agency arises when a principal "manifests assent . . . that the agent shall act on the principal's behalf and *subject to the principal's control*, and the agent manifests assent or otherwise consents so to act."[161] Shareholders cannot, collectively or individually, direct any officer. Only the board can do that. There is simply no agency relationship with shareholders.[162]

157. D. Gordon Smith, Matthew Wright & Marcus Kai Hintze, *Private Ordering with Shareholder Bylaws*, 80 FORDHAM L. REV. 125, 181 (2011) (calling for private ordering to leverage the "laboratories of corporate governance").

158. *Compare In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 364–65 (Del. Ch. 2023) (putting forth an agency theory), *with* Goldman v. Shahmoon, 208 A.2d 492, 494 (Del. Ch. 1965) ("Officers as such are the corporation. An agent is an employee . . . ."); *see also* Hasenfratz v. Berger Apartments, 61 N.Y.S.2d 12, 15 (Sup. Ct. 1946) ("While an executive officer of a corporation is in a sense an agent, he is more than that; he is the alter ego of the corporation.").

159. Lebanon Cnty. Emps.' Ret. Fund. v. AmerisourceBergen Corp., No. 2019-0527-JTL, 2020 WL 132752, at *21 (Del. Ch. Jan. 13, 2020); *McDonald's*, 289 A.3d at 364–65.

160. *See generally* 2 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 266 (Supp. 2023).

161. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) (emphasis added).

162. An additional challenge with claiming an agency relationship between officers and shareholders is that shareholders have conflicting interests—some want profits maximized this quarter, others want long-term growth, still others want environmental considerations and fair wages. An officer facing such conflicting interests among coprincipals would likely need to withdraw, though there may be an argument that the shareholders waived any conflict by purchasing the shares. *Cf.* RESTATEMENT (THIRD) OF AGENCY § 8.06 (AM. L. INST. 2006). A stronger argument is that the board is the principal. This argument requires accepting that a half-dozen meetings per year is enough to constitute "control." *See McDonald's*, 289

Neither does the agency relationship run from the shareholders through the board to the officers as subagents. Subagency requires a middleman, in this case the board, to be an agent.[163] And Delaware law is clear: the board is not an agent of the shareholders.[164] Because the board is not an agent of the shareholders, the officers cannot be subagents to the shareholders through the board. There is no agency connection between officers and shareholders.

As noted above, the argument for agency to the reified corporation is stronger, but it still fails. Corporate fiduciary duties share terminology with agency, but these fields of law are distinct.[165] For example, a typical agent does not benefit from the business judgment rule. Nor will a typical agent be subjected to *Unocal* standards, *Revlon* duties or other innovations unique to corporate relationships.[166] One becomes an officer not by "manifest[ing] assent,"[167] as other agents, but by having your title included in the bylaws or a board resolution.[168] Some states have even allowed officers to sue for reinstatement,[169] which would be anathema to agency law.[170] Corporate fiduciary duties are not a subset of agency law; they are a different field of law—just as natural science was once a branch of philosophy, though few would recommend studying quantum mechanics through Aristotle's treatises. As corporate law has developed in theory and in doctrinal refinement, its similarities to the law of agency have winnowed to the point of curiosities.

As noted in section III.C, fiduciary duties can arise in ways other than an agency relationship. For example, directors owe fiduciary duties to shareholders and to the corporation, but are agents of neither.[171] The

A.3d at 364–65 (putting forward an agency theory while also noting that it is the officers who run the corporation).

163. RESTATEMENT (THIRD) OF AGENCY § 3.15 (AM. L. INST. 2006).

164. Arnold v. Soc'y for Sav. Bancorp, Inc., 678 A.2d 533, 539 (Del. 1996) ("Directors, in the ordinary course of their service as directors, do not act as agents of the corporation, however."); *see* RESTATEMENT (SECOND) OF AGENCY § 14C (AM. L. INST. 1958) ("Neither the board of directors nor an individual director of a business is, as such, an agent of the corporation or its members."); *see also* Johnson & Millon, *supra* note 118, at 1605 n.25 (collecting authorities).

165. *See generally* 2 FLETCHER CYCLOPEDIA, *supra* note 158, § 266.

166. While these duties have not been tied to officers, the Delaware Supreme Court has held that the same standards apply to directors and officers. Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009); *see also In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 358 (Del. Ch. 2023) (expanding *Caremark* claims to corporate officers).

167. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

168. DEL. CODE ANN. tit. 8, § 142(a) (1998).

169. *See, e.g.*, State *ex rel.* Blackwood v. Brast, 127 S.E. 507, 510 (W. Va. 1925) ("It is undoubted that, where the title is undisputed or clear, mandamus will lie to deliver or restore an office in a corporation to a person entitled thereto.").

170. RESTATEMENT (THIRD) OF AGENCY § 3.10(1) (AM. L. INST. 2006) ("[A]n agent's actual authority terminates if . . . the principal revokes the agent's actual authority by a manifestation to the agent.").

171. *See supra* note 162 (discussing agency in comparison to fiduciary duty).

Delaware Supreme Court has held that officer fiduciary duties "are the same as those of directors."[172] If agency is not the basis of director fiduciary duties, it is not the source of officer fiduciary duties.

E. Summary of Fiduciary Duty Theories

In summary, the courts have not provided a theory justifying officers' fiduciary duties. Similarly, theories by scholars find only weak support for officer fiduciary duties because the board is equipped to monitor and limit opportunism. Other factors, like resource entrustment and discretion, vary widely among corporations and so are better served by private ordering. Agency law may have inspired early corporate theories, but a century of development has separated the two fields.

Theories and explanations for other types of fiduciary duties cannot justify corporate officer fiduciary duties. This weak theoretical footing creates unpredictable law, which makes compliance and litigation more unpredictable, inefficient, and costly.

V. OFFICER FIDUCIARY DUTIES ARE UNNECESSARY TO PROTECT SHAREHOLDERS

It would be easy to imagine that removing officer fiduciary duties would lead to corporate chaos, but the effect would likely be limited to corporate culture. Boards can control officers with power dynamics and through employment contracts customized to suit the company's risks and priorities. Fiduciary duties are not essential for controlling most corporate interactions, and there are several practical reasons to believe they are not necessary here.

This section will review the practical implications of removing officer fiduciary duties. First, it will show that CEOs are not psychopaths. Nonetheless, forcing them to internalize ethical costs is likely to increase prosocial behavior. Second, shareholders will still control the power dynamic, which will keep officers from drifting too far from profitability. Third, shareholders can still create legal boundaries against most misbehavior. Private ordering through employment contracts would allow boards to customize fiduciary duties to the company, executive and market.

A. CEOs Are Not Psychopaths

CEOs are not psychopaths. Research shows that on average they are more agreeable, conscientious, extraverted, emotionally stable and

172. Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009).

open.[173] This makes sense—getting things done without making enemies is both clichéd and proven advice for climbing the corporate ranks.

This executive predisposition to cooperate shows in their public statements. The Business Roundtable, comprising 181 CEOs of the largest corporations in the United States, affirms "companies should serve not only their shareholders, but also deliver value to their customers, invest in employees, deal fairly with suppliers and support the communities in which they operate."[174] Individual CEOs regularly call for more compassionate treatment of others and the environment.[175]

There are, of course limits to this argument. Average CEOs should cause less worry than CEOs with below-average integrity. That is, even if most people are honest, theft shouldn't be legal. Still, the research showing that CEOs *want* to be good limits our scope from countless corporations to the truly bad eggs. The next two sections will show how power relations and private ordering will contain that potential rot.

B. Power Dynamics Will Preserve Shareholder Control

The primary control for any CEO is not legal constraint, but the CEO's power relation with the board. [176] If officer fiduciary duties are

173. Ian D. Gow, Steven N. Kaplan, David F. Larcker & Anastasia A. Zakolyukina, Nat'l Bureau Econ. Rsch., CEO Personality and Firm Policies (Working Paper No. 22435, 2016). These data come from two sources. One source comprised personality surveys from employees evaluating their CEO for 28 CEOs. The other comprised 91 personality assessments conducted directly with officer candidates that later went on to become corporate officers. Both found similar results. *Id.* at 48 tbl.II. For an interesting comparison, see Rüveyda Kelleci, Frank Lambrechts, Wim Voordeckers & Jolien Huybrechts, *CEO Personality: A Different Perspective on the Nonfamily Versus Family CEO Debate*, 32 Fam. Bus. Rev. 31 (2019), which found that non-family CEOs were very balanced individuals, while family CEOs were less openminded, less data rational, and less trusting of others. The sample size was only 44 CEOs, so the authors were unable to find strong statistical significance in a broader range of attributes, but the data trended favorably to nonfamily CEOs. The study reported that most family CEOs were also major shareholders. If these CEOs that are the most troublesome are also majority owners, arguments for officer fiduciary duties to protect shareholders become less persuasive.

174. *One Year Later: Purpose of a Corporation*, Business Roundtable, https://purpose.businessroundtable.org (last visited Oct. 13, 2023) [https://perma.cc/AZ35-YVK2]; *see also* Steven Pearlstein, Can American Capitalism Survive? 16, 201 (2018) ("The dirty little secret is that nobody dislikes the move to shareholder capitalism more than corporate executives and directors," because it forced them "to abandon their role as proud stewards of the American system").

175. *See* Weitzel & Rodgers, *supra* note 2, at 88–91 (collecting prosocial statements by business leaders).

176. While this section explores only the protections that would already remain in place, there are several options available to a party seeking to add contractual protections in the absence of a fiduciary duty. *See, e.g.*, Kenneth B. Davis, Jr., *Judicial Review of Fiduciary Decisionmaking — Some Theoretical Perspectives*, 80 Nw. U. L. Rev. 1, 4–19 (1985).

eliminated, shareholders will still pressure officers indirectly through the board.

For example, if my boss asks me to get coffee, I do so. There is no fiduciary duty or corporate policy in place saying that I must get the coffee, and my boss will not have a tort or contract claim against me if I refuse. I do it because my boss controls my salary, bonus, scope of freedom, and whether I get fired. Power, not policy, is the primary motivator for most intra-corporate interactions. Changing the legal lines of fiduciary duties will not change the power dynamic between a CEO and the board; the CEO will remain accountable to directors, who remain accountable to shareholders. CEOs will not lose sight of profits.

One might object that boards do not adequately supervise the company's officers. The criticism of overly chummy boards had more truth forty years ago than it does today.[177] The data shows that modern boards hold officers accountable for poor performance. Missing earnings estimates reduces the officer's cash bonus on average by 3–20%.[178] Beyond compensation, poor performance is a factor in 38–55% of CEO departures.[179] Missing just one quarterly earnings estimate increases the probability that the CEO will be terminated by 18–36%.[180] C-suite turnover averages 14.7% annually,[181] which is particularly surprising

177. *See ABA Task Force Report*, *supra* note 152, at 111 ("A legitimate criticism of corporate governance for much of the last century was that boards were unduly passive and deferential to the professional managers to whom they delegated authority for the daily operations of the company.").

178. Steven R. Matsunaga & Chul W. Park, *The Effect of Missing a Quarterly Earnings Benchmark on the CEO's Annual Bonus*, 76 ACCT. REV. 313, 328 (2001) (finding a compensation loss of 3.5% for missing one quarter and 20% for missing three or more quarters).

179. The question of CEO termination is notoriously difficult because most departures are announced as voluntary. A CEO likely places high value on avoiding a personal reputation hit, while the board's focus is on removing the underperformer. This leads to negotiating space where an underperforming CEO can offer to depart more quickly and quietly in exchange for it being announced as a move "to spend more time with family." Earlier studies found lower figures of performance-related departures, but these did not measure actual performance when determining whether a departure was voluntary or forced. *See* Dirk Jenter & Katharina Lewellen, *Performance-Induced CEO Turnover*, 34 REV. FIN. STUD. 569 (2020). Jenter and Lewellen establish a baseline of "[non-]performance-based departures" by looking at departures of top performing CEOs. *Id.* at 577–81. They then compare that to departures by lower performing CEOs. *Id.*; *see also* Kathleen A. Farrell & David A. Whidbee, *Impact of Firm Performance Expectations on CEO Turnover and Replacement Decisions*, 36 J. ACCT. & ECON. 165, 166 (2003) (finding an "inverse relation between the likelihood of CEO turnover and industry-adjusted 1-year analyst forecast errors").

180. Shane S. Dikolli, Milliam J. Mayew & Dhananjay Nanda, *CEO Tenure and the Performance-Turnover Relation*, 19 REV. ACCT. STUD. 281, 298–300 tbl.3 (2014) (noting that CEO turnover increases 18% for a negative earnings surprise, 20% for earnings decreases, and 36% for negative returns).

181. CRIST KOLDER, VOLATILITY REPORT 16 (2019), http://www.cristkolder.com/media/2503/volatility-report-2019-americas-leading-companies.pdf.

because this turnover is not among workers of average abilities—C-suite officers are typically proven employees with years of top performance. Most surveyed directors feel that every member of their board is willing to challenge management.[182] The data show that boards exercise their power to defend shareholders' interests without resorting to legal claims.[183]

C. Legal Constraints Beyond Fiduciary Duties

Power dynamics cannot be the only control over a corporate officer because, as Professors Rock and Wachter note, "if one can get seriously rich, one can move to Aspen and ski for the rest of one's days . . . [and soft norms and power relationships] cannot constrain such behavior."[184] This can be done effectively through private ordering in employment agreements. But even where private ordering fails, shareholders will be no worse off in most situations.

1. Private Ordering Through Employment Contracts

Corporations that want the full suite of protections can negotiate for them by private ordering through employment agreements. Most officers already negotiate an employment agreement, so corporations could merely add a provision stating what duties the corporation and shareholders are owed. Companies that are happy with fiduciary duties that would match a director's can contract for those if the employment

182. PricewaterhouseCoopers, PWC'S 2022 ANNUAL CORPORATE DIRECTORS SURVEY 29 (2022), https://www.pwc.com/us/en/services/governance-insights-center/assets/pwc-2022-annual-corporate-directors-survey.pdf (finding that only 19% of directors believe one or more members of the board is reluctant to challenge management, and that 56% find that no member of the board faces that or other surveyed issues).

183. Jeff Schwartz's interesting work explores how activist hedge funds have pushed shareholder primacy. *De Facto Shareholder Primacy*, 79 MD. L. REV. 652, 656 (2020). Schwartz's article is reminiscent of David Millon's work decades earlier. *Looking Back, Looking Forward: Personal Reflections on a Scholarly Career*, 74 WASH. & LEE L. REV. 699 (2017) (discussing how an initial driver of stakeholder theories was concern about investors pushing corporate reorganizations).

184. Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1662 (2001); *see also* Deborah A. DeMott, *The Domains of Loyalty: Relationships Between Fiduciary Obligation and Intrinsic Motivation*, 62 WM. & MARY L. REV. 1137, 1156 (2021) ("[T]he distinct legal vocabulary tied to fiduciary obligation, by expressing moral disapproval of an actor's conduct, furnishes formal reinforcement for intrinsic motivation both to disapprove of a disloyal actor and to avoid engaging in the conduct."); *In re* Lear Corp. S'holder Litig., 926 A.2d 94, 117 (Del. Ch. 2007) (recognizing "the reality that American business history is littered with examples of managers who exploited the opportunity to work both sides of a deal"). The last stages in games requiring cooperation are notorious for antisocial behavior. *See also Luke* 16:13 (NIV) ("No one can serve two masters. Either you will hate the one and love the other, or you will be devoted to the one and despise the other.").

market allows. This private ordering is preferable to a blanket rule because it can be customized to the company and to market conditions.

a. Customizable to Each Company and Executive

Management of the firm is delegated to the board.[185] Each board chooses what authority to delegate to officers, making each officer's responsibilities unique. That creates unique risks, and one-size-fits-all fiduciary duties cannot properly weigh the costs at individualized firms. Fiduciary duties are designed to balance the costs of enforcement and monitoring for the average firm, but no firm is the average firm.[186]

Similarly, no executive is the average executive. Some may hold board seats on other companies, making broader waivers more valuable to the executive. Some boards are more hands-on, making the fiduciary backstop less relevant. Where the corporation and the executive place different values on fiduciary duties, private ordering allows gains from trade during employment negotiations.

b. Responsive to the Market and Legal Developments

Private ordering also keeps fiduciary duties in line with the market for executives. At an individual level, it may be a red flag for an executive to start the negotiations focused on fiduciary duties—a board should think twice about an executive willing to trade salary for a wider ability to steal. But occasionally the market shifts in a way that private ordering is uniquely able to address. *Smith v. Van Gorkom* famously collapsed the market for director & officer insurance, which led to a shortage of qualified candidates.[187] Time will tell if *In re McDonald's Corp.*, which extends oversight duties to officers for company culture, will have a similar effect.[188] Private ordering would allow companies to fix an officer's duties at a particular place in time, to adjust annually to new developments or to opt into a simpler system altogether. This creates stability, which lowers risk and may reduce insurance premiums.[189]

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185. DEL. CODE ANN. tit. 8, § 141(a) (2020).

186. Paul Weitzel, *The End of Shareholder Litigation? Allowing Shareholders to Customize Enforcement Through Arbitration Provisions in Charters and Bylaws*, 2013 BYU L. REV. 65, 89 (2013).

187. Robert T. Miller, Smith v. Van Gorkom *and the* Kobayashi Maru*: The Place of the Trans Union Case in the Development of Delaware Corporate Law*, 9 WM. & MARY BUS. L. REV. 65, 80–81 (2017).

188. *In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 359–60 (Del. Ch. 2023).

189. It is also possible that risk-weighting individualized fiduciary obligations will be too difficult, and the insurance market will push companies toward standard fiduciary duties. If so, the result is still preferable because it takes into account (and responds to changes in) market data.

On a broader level, private ordering allows private parties to balance the market when the market is distressed by shocks from supply or law. These negotiations will also signal to the legislature and the Chancery when rules no longer reflect the participants' default preferences.

One drawback of private ordering would be that chancery decisions become less relevant. Having all officers guided by the same language creates an externality of increased clarity every time an opinion is released. If every company adopts different fiduciary language, the information externality of litigation is lost. This concern is minimized because, as noted below, officer fiduciary suits are uncommon to begin with.

c. *Covenant of Good Faith and Fair Dealing*

Removing management's fiduciary duties is not novel; Delaware allows limited liability companies to "restrict[] or eliminate[]" management's fiduciary duties,[190] which has not led to market chaos or a wave of manager scandals. This may be in part because a limited liability company that eliminates manager fiduciary duties still retains the implied contractual covenant of good faith and fair dealing, which prohibits "arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain."[191] A corporate officer who steals resources, as in *Dweck*,[192] or misappropriates company information to frontrun a lease, as in *Glaubach*,[193] could be liable for breaching the covenant of good faith and fair dealing.[194] This covenant provides a legal hook for truly atrocious behavior without converting shareholder profit into a moral obligation.

2. *A Reversion to the Norm*

Eliminating officer fiduciary duties would be less of a revolution and more of a reversion to the norm. While the existence of officer fiduciary duties was noted in 1939,[195] it was not until 2009 that the

190. DEL. CODE ANN. tit. 6, § 18-1101(c) (2013).
191. Kuroda v. SPJS Holdings, L.L.C., 971 A.2d 872, 888 (Del. Ch. 2009) (internal quotation marks and citations omitted).
192. Dweck v. Nasser, No. 1353-VCL, 2012 Del. Ch. LEXIS 7, at *2 (Del. Ch. Jan. 18, 2012).
193. Pers. Touch Holding Corp. v. Glaubach, No. 11199-CB, 2019 Del. Ch. LEXIS 66, at *49–50 (Del. Ch. Feb. 25, 2019).
194. This assumes there is an employment contract in place. Otherwise, there may be claims under tort law, for example, misappropriation of trade secrets. *See* RESTATEMENT OF TORTS § 757 (AM. L. INST. 1939).
195. Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

Delaware Supreme Court addressed what duties are owed.[196] Even after this clarification, shareholders generally sued only directors—not officers—for corporate misbehavior.

Megan Wischmeier Shaner, who laid the foundation for work in this area, refers to this phenomenon as the "director preference," and notes that it arises in two ways.

> First, where there are allegations of misconduct by both directors and officers, only the directors are being sued for violating their fiduciary duty. Second, where an individual accused of misconduct serves as both an officer and a director of a corporation, he or she is sued only in a directorial capacity.[197]

There are several explanations for why shareholder litigation against officers is rare. One reason is the difficulty of obtaining personal jurisdiction against officers prior to the civil procedure amendments in 2003.[198] But this difficulty doesn't explain the decade and a half that followed the amendments, during which almost no officer litigation occurred. Another explanation is that because shareholder litigation nearly always settles with a view to insurance limits,[199] adding defendants beyond the directors requires more work without more payout.[200]

Officer litigation didn't gain attention until 2019, when the Delaware Chancery Court denied a motion to dismiss a duty of care claim against the general counsel of a corporation for preparing a merger filing with misstatements.[201] The court held that although the allegations were not sufficient to establish a claim for a breach of the duty of loyalty, they "adequately allege gross negligence with regard to the disclosures"[202] because "crafting such a narrative to stockholders, while

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196. Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009); *see also* Megan Wischmeier Shaner, *The "Director Preference" in Stockholder Litigation*, 39 HAW. L. REV. 75, 80 (2016) ("Officer fiduciary duty doctrine is conspicuously underdeveloped which can be attributed, in large part, to a lack of officer-focused fiduciary duty litigation in state court."). For some of this period the lack of officer-focused suits may be attributable to lack of personal jurisdiction. The Delaware legislature did not make all officers of Delaware corporations subject to personal jurisdiction in the state until 2004. *See* Del. S.B. 126, 142nd Gen. Assemb., 74 Del. Laws ch. 83 (2003).

197. Shaner, *supra* note 194, at 88; *see also* Megan Wischmeier Shaner, *Officer Accountability*, 32 GA. ST. U. L. REV. 357, 377–78 (2016) (finding that officers are rarely the targets of fiduciary duty claims); Megan Wischmeier Shaner, *The (Un)Enforcement of Corporate Officers' Duties*, 48 U.C. DAVIS L. REV. 271, 303–19 (2014) (discussing how power and procedural dynamics reduce the litigation against corporate officers).

198. *See* Del. S.B. 126, 142nd Gen. Assemb., 74 Del. Laws ch. 83 (2003) (making all officers of Delaware corporations subject to personal jurisdiction in the state).

199. Weitzel, *supra* note 184, at 75.

200. *See* Shaner, *supra* note 194, at 105–07 (detailing how the often-rushed process of filing shareholder litigation precludes in-depth research of the relevant facts).

201. Morrison v. Berry, No. 12808-VCG, 2019 Del. Ch. LEXIS 1412, at *62–64 (Del. Ch. Dec. 31, 2019).

202. *Id.* at 56.

possessed of the information evincing its inadequacy, represents gross negligence."[203]

This case highlighted the asymmetry between officer and director fiduciary duties. While both owed a duty of care and a duty of loyalty, directors could be exculpated from the duty of care through charter amendments that have become ubiquitous. Practically, this means that to state a claim against a director, shareholders must show bad faith (duty of loyalty) while a claim against an officer need show only gross negligence (duty of care).[204]

This led to an increase in fiduciary duty claims against officers.[205] In a merger case, the chancery court denied a motion to dismiss a duty of care claim against a chief financial officer because he was "at least recklessly indifferent to the steps [the CEO and chairman] took to tilt the sale process."[206] Within two months, two other cases denied motions to dismiss duty of care claims against officers for faulty proxy statements.[207]

These suits indicated the asymmetry of allowing exculpation of directors but not officers to the Delaware legislature. The legislature responded by allowing officer exculpation, but not to the full extent allowed directors.[208] During the 2023 proxy season (the first since the amendments authorized officer exculpation), 203 companies in the Russell 3000, including 26 in the S&P 500, proposed officer exculpation amendments. As of June 1, 2023, shareholders approved these amendments 92% of the time with an average support of 73%.[209] This shows that shareholders are keen on limiting officer fiduciary duties.

203. *Id.* at 64.

204. Typically, gross negligence will be required to overcome the business judgment rule. *See supra* section I.B.

205. For an insightful review of these and other cases, see Edward B. Micheletti, Bonnie W. David & Andrew D. Kinsey, *Recent Trends in Officer Liability*, INSIGHTS: THE DELAWARE EDITION (Dec. 18, 2020) https://www.skadden.com/-/media/files/publications/2020/12/insights-the-delaware-edition/recent_trends_in_officer_liability.pdf [https://perma.cc/N5VQ-L4PV].

206. *In re* Mindbody, Inc. S'holders Litig., No. 2019-0442-KSJM, 2020 Del. Ch. LEXIS 307, at *73 (Del. Ch. Oct. 2, 2020).

207. *In re* Baker Hughes Inc. Merger Litig., No. 2019-0638-AGB, 2020 Del. Ch. LEXIS 321 (Del. Ch. Oct. 27, 2020); City of Warren Gen. Emps.' Ret. Sys. v. Roche, No. 2019-0740-PAF, 2020 Del. Ch. LEXIS 352 (Del. Ch. Nov. 30, 2020).

208. There are slight differences between the exculpation regimes. As discussed in *supra* note 21, there may be some common law officers that do not qualify for statutory exculpation. And officers cannot be indemnified for duty of care violations brought as derivative claims.

209. Christopher et al., *supra* note 26. As noted, shareholders have widely decided to waive the duty of care, and Gabriel Rauterberg and Eric Talley identify "a significant appetite for contracting out of the fiduciary duty of loyalty." Gabriel Rauterberg & Eric Talley, *Contracting out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075, 1123 (2017). Their research found that corporations widely limit liability for appropriating

VI. DIRECTOR FIDUCIARY DUTIES SHOULD REMAIN

If *officer* fiduciary duties cause more harm than good, one might ask whether *director* fiduciary duties should also be replaced with private ordering. Director fiduciary duties should remain because they have stronger theoretical support, are less likely to encourage bad behavior, and protect shareholders from bias in the negotiation of employment contracts on behalf of the shareholders.

First, the theoretical support is stronger for director fiduciary duties. Fiduciary duties allow remediation when prevention is impractical. Effectively, they substitute enforcement for monitoring. Monitoring officers is the board's primary job, so officer fiduciary duties are less necessary. In contrast, directors are monitored only by shareholders, who are rationally inattentive, which leaves them more vulnerable to an abuse of power and opportunism.

Fiduciary duties for directors are also a closer fit to theory because directors have broader discretion and because they declare the dividends, a power more analogous to having control over a trusted resource.[210]

The behavioral ethics studies above also offer less concern that director fiduciary duties will incentivize bad behavior because there are fewer moral dilemmas and decisions are made as a group. Directors' primary role is overseeing officers and providing strategy, not achieving implementation. Oversight presents fewer moral dilemmas. Similarly, strategic decisions such as choosing a product line or financing strategies certainly affect other stakeholders, but these present fewer opportunities for moral failings than implementing strategies. The devil is in the details, and less so in the strategy.

Board decision making is done in a group, where any moral deviation is on full display.[211] The behavioral ethics studies cited above showed that individuals were more likely to cheat when they believed others wouldn't find out.[212] This group dynamic is likely to constrain director misbehavior. Directors may also be less inclined to accept moral costs for financial gain. Directors are often approaching the end of their careers when financial incentives carry less value.[213]

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corporate opportunities, which would otherwise breach the duty of loyalty. *Id.* at 1123–28.

210. DEL. CODE ANN. tit. 8, § 170(a) (2010).

211. The types of decisions boards make are also less likely to create ethical issues. Boards focus on strategy; corners are more typically cut during implementation, which falls to the officers. However, because this article defines morality only by deference to each individual's own moral compass, it is difficult argue whether the devil is in the strategy or in the details. Factory layoffs, for example, are likely to come to the board and carry ethical weight.

212. *See supra* subsection II.B.1.

213. Felix Cheung & Richard E. Lucas, *When Does Money Matter Most? Examining the Association between Income and Life Satisfaction over the Life Course*, 30 PSYCH. &

Finally, private ordering is unlikely to be properly implemented for director fiduciary duties. Shareholders set policy only through voting, and an up-or-down vote does not reflect true negotiation. Because directors would control what proposals are offered, it is unlikely that privately ordered director duties would reflect market forces.

VII. CONCLUSION

Officer fiduciary duties create counterproductive moral incentives that allow officers to justify otherwise immoral decisions. These duties have never been fully reasoned through, and they do not fit into the current theories of fiduciary duty law. Protection against rogue executives is better maintained through power dynamics and better enforced through private employment contracts. Eliminating officer fiduciary duties would reduce uninternalized moral costs, strengthen the theoretical framework around fiduciary duties, and still leave shareholders the dominant hand in corporate governance.

AGING 120, 121 (2015) (finding that life satisfaction for survey participants over 50 was less affected by income than younger groups).