Good Faith in Corporate Law: Between Cognition and Propriety, or Whose Conscience Is It Anyway?

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Amir N. Licht
Reichman University and ECGI

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Abstract

This Article investigates the dual nature of good faith in legal discourse and its implications for corporate law. Good faith can denote an objective legal standard of conduct, requiring restraint in advancing self-interest and cooperation with others, or a subjective state of mind, defined by the absence of knowledge of adverse legal circumstances. These two facets, debated by scholars since antiquity, intersect with equity and conscience, producing enduring tensions between objectivity and subjectivity in legal institutions. Inspired by Lord Hoffmann's speech in O'Neill v. Phillips, the Article situates good faith within a historical exchange between common law, equity, Roman law, and ecclesiastical traditions. It argues that the meaning of good faith varies with the relational context, where corporations feature several different ones: fiduciary relationships, marked by ascendancy and vulnerability in a "vertical" structure, require a subjective form of good faith to support self-abnegation; corporate bylaws and shareholder agreements, grounded in "horizontal" contractual relations, call for objective good faith that endorse self-enhancement; and hybrid contexts, such as those involving controlling shareholders, demand a combination and balance of both. Rather than offering a unified theory of good faith, the Article proposes a framework that recognizes the coexistence of subjective and objective elements, while highlighting their inseparability and the jurisprudential challenges they present.

Keywords: Good faith, fiduciary law, fiduciary duty, corporate law

JEL Classifications: K22

Amir N. Licht
Professor of Law
Harry Radzyner School of Law, Reichman University
8 University Street
Herzliya 4610101, Israel
phone: +972 995 273 32
e-mail: alicht@idc.ac.il

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This Article investigates the dual nature of good faith in legal discourse and its implications for corporate law. Good faith can denote an objective legal standard of conduct, requiring restraint in advancing self-interest and cooperation with others, or a subjective state of mind, defined by the absence of knowledge of adverse legal circumstances. These two facets, debated by scholars since antiquity, intersect with equity and conscience, producing enduring tensions between objectivity and subjectivity in legal institutions. Inspired by Lord Hoffmann's speech in *O'Neill v. Phillips*, the Article situates good faith within a historical exchange between common law, equity, Roman law, and ecclesiastical traditions. It argues that the meaning of good faith varies with the relational context, where corporations feature several different ones: fiduciary relationships, marked by ascendancy and vulnerability in a "vertical" structure, require a subjective form of good faith to support self-abnegation; corporate bylaws and shareholder agreements, grounded in "horizontal" contractual relations, call for objective good faith that endorse self-enhancement; and hybrid contexts, such as those involving controlling shareholders, demand a combination and balance of both. Rather than offering a unified theory of good faith, the Article proposes a framework that recognizes the coexistence of subjective and objective elements, while highlighting their inseparability and the jurisprudential challenges they present.

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Good Faith in Corporate Law: Between Cognition and Propriety, or Whose Conscience Is It Anyway?

I. Introduction

It is a trite observation that good faith has two very different meanings in legal discourse. The first is a legal norm - a rule (well, a standard) of conduct calling for a proper mode of behavior that implies restraint in advancing one's self-interest (a negative facet) and some consideration of and cooperation with other parties (an affirmative facet). As a legal norm, this type of good faith ideally also reflects a social norm – an accepted and expected mode of behavior – a quality that is often described as "objective". This type of good faith is emblematic of civil law jurisdictions but also exists in certain common law jurisdictions. The second meaning is an individual state of mind – a cognitive condition, in which one's awareness lacks (material) negative indications about one's legal standing – specifically, with regard to one's legal entitlement or to fulfilling an office that involves exercising power. This meaning is often called "subjective". It is subjective in a strong sense in that it not only refers to a particular individual but specifically to her state of mind. Importantly, this usage is central to the content of fiduciary duties.

These distinctions have been discussed by scholars since antiquity. Beyond the intellectual interest they present, they also entail practical implications. Consider the following passages from the House of Lords' seminal decision on unfair prejudice in *O'Neill v. Phillips*.[1] Speaking for a unanimous panel, Lord Hoffmann said:

> … Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman *societas*, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.
>
> … But [this] second [feature] leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith. …
>
> 19th century English law, with its division between law and equity, traditionally took the view that while literal meanings might prevail in a court of law, equity could give effect to what it considered to have been the true intentions of the parties by preventing or restraining the exercise of legal rights. … Or one might, as in

[1] [1999] UKHL 24; [1999] 1 WLR 1092 (UK).

> Continental systems, achieve the same result by introducing a general requirement of good faith into contractual performance. These are all different ways of doing the same thing. … So I agree with Jonathan Parker J. when he said in *In re Astec (B.S.R.) Plc.* [1998] 2 B.C.L.C. 556, 588: "in order to give rise to an equitable constraint based on 'legitimate expectation' what is required is a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former."
>
> This is putting the matter in very traditional language, reflecting in the word "conscience" the ecclesiastical origins of the long-departed Court of Chancery. As I have said, I have no difficulty with this formulation.[2]

With the benefit of having a legal training in South Africa, a mixed jurisdiction, before moving to the United Kingdom,[3] Lord Hoffmann weaves together threads of good faith, conscience, and fairness from common law and equity in the Common Law tradition as well as the Roman law heritage of Continental civil law systems, adding a sprinkle of ecclesiastical law.

But was Lord Hoffmann right? That is, are "these … all different ways of doing the same thing"? For example, at common law, a partnership is a fiduciary relationship.[4] As fiduciaries, partners are accounting parties.[5] In contrast, in English law and in most other common law jurisdictions, majority or controlling shareholders are not fiduciaries of the minority nor of the company (while in Delaware they are, on which more below). The good faith required from a majority shareholder – not to mention bondholders – thus differs from a fiduciary's good faith (in both English law and its sister systems as well as in Delaware),[6] and query whether she is an accounting party. One could also wonder whether the conscience, to which the Court of Chancery would look, is the same for company fiduciaries and for controlling shareholders, or whether it still has anything to do with its ecclesiastical origins.

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[2] *Id.*, at 1100-1101.

[3] *See* James Lee, *Confusio: Reference to Roman Law in the House of Lords and the Development of English Private Law*, 5 ROMAN LEGAL TRADITION 24 (2009).

[4] *See,* e.g., Chan v. Zacharia [1984] HCA 36; 154 CLR 178 (1984) (Aust.).

[5] *Chan*, *id.* This doctrine is codified in ss. 28-29 of the Partnership Act 1890 (UK), which has replicas in several other common law countries, but the substantive doctrine is centuries old. *See* S.J. Stoljar, *The Transformations of Account*, 80 L.Q. REV. 203, 213 (1964); Paul Brand, *The Equity of the Common Law Courts*, in LAW & EQUITY: APPROACHES IN ROMAN LAW AND COMMON LAW 39, 45–53 (Erik Koops & Wouter J. Zwalve eds., Martinus Nijhoff 2014); William S. Holdsworth, *The Early History of Equity*, 13 MICH. L. REV. 293, 295 (1914–1915).

[6] *See*, e.g., Robert Nolan & Matthew Conaglen, *Good Faith: What Does It Mean for Fiduciaries, and What Does It Tell Us About Them?*, in EXPLORING PRIVATE LAW 319, 333 (Elise Bant & Matthew Harding eds. 2010).

This Article argues that the meaning of good faith varies with the relational context, where corporations feature several different ones. Fiduciary relationships, marked by ascendancy and vulnerability in a "vertical" structure, require a subjective form of good faith that mainly focuses on internal individual cognition and motivation to support self-abnegation. Corporate bylaws and shareholder agreements, grounded in "horizontal" contractual relations, call for objective good faith that endorses self-enhancement within socially recognized standards of proper conduct. Hybrid contexts, such as those involving controlling shareholders, demand a combination of both types of good faith.

Legal analysis of good faith is more complex than that, however. In addition to individually- versus socially-oriented types of good faith with regard to the actor, another distinction, between individually- versus socially-oriented types of conscience of the court—namely, the judge—must be acknowledged when implementing good-faith-based legal norms. In social science parlance, the former distinction applies to the individual level of analysis, while the latter applies to the societal level – that of the law as a social institution.

The Article proceeds as follows. Part II presents an analytical framework ("a model" might be ambitious) for distinguishing different types and facets of good faith. Part II traces the development of scholarly thought about good faith and conscience at both the individual and the societal levels of analysis. Prominent thinkers have struggled with these problems for ages. It is submitted that following these intellectual endeavors in some detail bears value beyond antiquitarian historiography. It could help modern-era lawyers appreciate the nuances, complexities, and social challenges that a coherent legal analysis of good faith must be aware of. Part III deploys the insights of the preceding parts to critically analyze the different types of good faith in the corporation.

II. A Simple Analytical Framework

This Part present a simple analytical framework to facilitate the analysis of good faith in the law in general and in corporate law in particular. A structural distinction between "vertical" and "horizontal" relationships helps explain why different legal doctrines emphasize different aspects of good faith.

In vertical relationships—those involving power, ascendancy, and discretion on one side, and vulnerability on the other side—the legally required good faith tends to be subjective – a mental element of the individual actor. Fiduciary relationships provide the clearest example. A fiduciary exercises powers for or on behalf of another person and therefore must genuinely believe that she acts lawfully and for proper purposes. The required good faith in such settings thus focuses primarily on his or her cognition, motivation, and conscience.

Corporate directors and officers exemplify this form of good faith. They are expected not merely to comply formally with legal rules but to exercise their powers with a sincere commitment to the interests of the corporation. Yet subjective good faith is not sufficient in itself. Courts continue to impose objective, socially-informed boundaries of rationality, honesty, and fairness, such that even a genuinely well-intentioned fiduciary may fail to satisfy the law's requirements. In this respect, fiduciary good faith combines an internal mental element with an external normative assessment.

In contrast, in "horizontal" relationships—in which the parties generally stand, or are presumed to stand, on more equal footing—the required good faith tends to be objective, i.e., purely socially-informed and socially-imposed. The paradigmatic setting is contractual performance. Here, the law generally does not inquire deeply into the actor's internal motivations or beliefs. Rather, it evaluates conduct against socially recognized standards of commercially proper behavior. Shareholder agreements and similar corporate arrangements provide typical examples. In such settings, the relevant question is not whether a party sincerely believed herself justified, but whether her conduct would be regarded as commercially unacceptable, opportunistic, or contrary to accepted standards of fair dealing rather than merely (and legitimately) assertive ("sharp").

Between these two modalities, there exist relationships that combine both vertical and horizontal features. Relations involving controlling shareholders are particularly relevant. Such relations are formally contractual, grounded in the corporate constitution and voting arrangements, yet they also involve the exercise of power over vulnerable parties. Consequently, the required good faith in these settings combines subjective and objective elements. Courts therefore may examine both the actual intentions of the controlling shareholder and the external fairness or reasonableness of her conduct. The doctrines of unfair prejudice and oppression exemplify this intermediate setting, in which legal analysis moves continuously between contractual entitlement and equitable restraint. This is the setting of Lord Hoffmann's speech in *O'Neil*.

This framework helps explain why doctrines of equity, conscience, fiduciary loyalty, and contractual good faith overlap yet resist complete conceptual unification. Granted, these distinctions are not always easy to implement. Drawing on Jacques Derrida, Gerald Frug has questioned, if not denied, the coherence of distinguishing subjectivity and objectivity, arguing that the subjective and the objective are simultaneously mutually constructive and mutually destructive (surprised?).[7] But one must not throw one's hands in the air in the face of such post-modernist critiques. Equity, fiduciary obligations, and contractual good faith may at times appear to perform similar functions, but they do so in different relational contexts and therefore with different doctrinal emphases that are reasonably tractable.

III. Equitable Jurisdiction

A discussion of good faith in corporate law must relate to the notion of conscience in Equity and equitable adjudication; any discussion of the latter having to do with good faith and conscience should begin with the origins of equitable adjudication; and a decent discussion of the latter had rather start with Aristotle's conceptions of equity and the equitable person. While a full discussion obviously exceeds the present scope, some introduction is necessary and in fact useful, for understanding the multiple meanings of good faith and the good person.

A functioning legal system, regardless of the purported source of its legitimacy – either thanks to the will of its subjects or to divine grace – should find a balance between universal application of its rules – a key element in the rule of law[8] – and addressing occasional misfits of these rules in certain factual circumstances, where a strict application of a rule would seem unjust, inappropriate or cause undue hardship. Such misfits could be either Type 1 or Type 2 errors – namely,

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[7] Gerald Frug, *The Ideology of Bureaucracy in American Law* 97 HARV. L. R. 1276 (1984). I am indebted to David Kershaw for flagging Frug's contribution. *See*, in a related context, David Kershaw, *Where is the Care in* Caremark*?*, RUTGERS BUS. L. REV. (forthcoming 2025).

[8] Among innumerable references *see*, e.g., James Penner, *Equity, Justice, and Conscience: Suitors Behaving Badly?*, in *Philosophical Foundations of the Law of Equity* 52, 64 (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., Oxford Univ. Press 2020), citing John Gardner, *Law as a Leap of Faith* 210 (Oxford Univ. Press 2012); but *see* also Graham Virgo, *Conscience in Equity: A New Utopia*, 15 OTAGO L. REV. 1, 4 (2017).

overinclusion or under-inclusion, respectively, of a legal rule with regard to a factual setting. The rule could be either substantive or procedural or evidentiary; it could stem from statute or from precedent. The outcome is equally frustrating, as it creates a sense that "the law doesn't work." Such sense could be of concern for the sovereign as the dispenser of justice whose legitimacy is thus adversely affected.[9]

To address this inevitable problem, a functioning legal system must have in place a component that serves as a safety valve – a court, a set of doctrines, or a combination of both – to handle "irregular" cases; those that do not fall neatly into regular legal categories and cannot neatly be resolved by the courts.[10] That much has been acknowledged already by Aristotle as one sense of equity:

> What creates the problem is that the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. … When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission ... And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, namely, that about some things it is impossible to lay down a law, so that a decree is needed.[11]

Legal systems thus have developed approaches to equitable adjudication since antiquity.[12] Civil law systems feature such duality.[13] Yet in common law systems this duality is particularly pronounced because of the structural separation between common law courts and other "discretionary justice courts", the most famous of which has been the Chancery.[14] We focus on equity's substantive, not structural,

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[9] *Cf.* Anthony Musson & W.M. Ormrod, *The Evolution of English Justice: Law, Politics, and Society in the Fourteenth Century* 11 (1998).

[10] For a literature review and a model *see* Sepehr Shahshahani, *When Hard Cases Make Bad Law: A Theory of How Case Facts Affect Judge-Made Law*, 110 CORNELL L. REV. (forthcoming 2025). *See* also Andrew S. Gold, *Equity and the Right to Do Wrong*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY 91 (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., Oxford Univ. Press 2020). Both Shahshahani and Gold advance arguments for considering what the text refers to as "misfits" or "irregular cases" as features rather than bugs in the legal system. In economic terms, both look at the public-good quality of equitable adjudication, which lies beyond the welfare of the litigating parties.

[11] Aristotle, *The Nicomachean Ethics* 98-99 (Lesley Brown ed., David Ross trans., Oxford Univ. Press 2009).

[12] *See* generally Renato Beneduzi, *Equity in the Civil Law Tradition* (Springer, 2021). Beneduzi doubts whether equity was fully developed in ancient Greek social practice, but it certainly was in the Roman.

[13] *See* W.J. Zwalve & E. Koops, *The Equity Phenomenon*, in LAW AND EQUITY: APPROACHES IN ROMAN LAW AND COMMON LAW 3 (E. Koops & W.J. Zwalve eds., Martinus Nijhoff 2014).

[14] *See* Timothy Haskett, *Conscience, Justice and Authority in the Late-Medieval English Court of Chancery*, in EXPECTATIONS OF THE LAW IN THE MIDDLE AGES 159 (Anthony Musson ed., Boydell Press 2001). "Discretionary justice courts" is Laura Flannigan's term. At different points in time these

dimension. That is primarily because fiduciary law is the main substantive branch of private law considered to be equitable – a view that continues to guide its development to this day.[15] As it happens, however, it is very difficult to define the substantive scope of Equity in common law systems. Some 150 years after the Judicature Acts, scholars adhere to Maitland's self-proclaimed hollow definition proposed in 1909:

> [S]uppose that we ask the question — What is Equity? ... Thus we are driven to say that Equity now is that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as Courts of Equity.
>
> This, you may well say, is but a poor thing to call a definition. Equity is a certain portion of our existing substantive law, and yet in order that we may describe this portion and mark it off from other portions we have to make reference to courts that are no longer in existence. Still I fear that nothing better than this is possible.[16]

Fortunately, we do not have to address the role of Equity in private law (and beyond) in general terms – a subject that is gaining new momentum in recent years.[17] Our focus here is narrower in that we deal with corporate law, primarily with fiduciary law within it, and specifically with good faith.[18]

Two points need to be made at this stage. First, a common view holds that corporate law developed from trust law, and because the law of trusts is a unique creation of Equity one might conclude that corporate law is fundamentally equitable.[19] This view is inaccurate, however. The inception of the accountability regime that today governs all fiduciaries took place in Common Law courts during the thirteenth

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courts comprised the Chancery, the Star Chamber, the Court of Requests, and the King's Council court. *See* J.H. Baker, *The Oxford History of the Laws of England: 1483–1553*, vol. 6, at 186–87 (Oxford Univ. Press 2003) (hereinafter Baker, *Oxford History*); Laura Flannigan, *Conscience and the King's Household Clergy in the Early Tudor Court of Requests*, 56 STUD. CHURCH HIST. 210 (2020); Gwilym Dodd, *Reason, Conscience and Equity: Bishops as the King's Judges in Later Medieval England*, 99 HIST. 213 (2014); John A. Guy, *Wolsey, the Council, and the Council Courts*, 91 ENG. HIST. REV. 481 (1976).

[15] For example, *see*, most recently, with regard to the structure of remedies, Rukhadze v. Recovery Partners GP Ltd [2025] UKSC 10 (UK).

[16] F.W. Maitland, EQUITY; ALSO, THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES 1 (Cambridge Univ. Press 1909). *See* Mike Macnair, *Equity and Conscience*, 27 OXFORD J. LEGAL STUD. 659, 664 (2007) and references therein.

[17] *See*, e.g., Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050 (2021); Irit Samet, *Equity: Conscience Goes to Market* (2018); Asaf Raz, *The Original Meaning of Equity*, 102 WASH. U. L. REV. 541 (2024); Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763 (2022).

[18] "Narrower" is relative. *Compare* Andrew S. Gold & Henry E. Smith, *The Equity in Corporate Law*, 100 NOTRE DAME L. REV. 789, 798 (2025).

[19] *See,* e.g., Gold & Smith, *id.*, at 796.

century.[20] Only later did Equity come to dominate accounting,[21] which it could deploy to govern "proto-trustees" called feoffees to uses, and later – trustees as we know them today.[22] Centuries later yet, mostly during the nineteenth century, Equity developed the fiduciary loyalty doctrines of no-conflict etc., while the duty to account remains an independent obligation.[23]

Second, in addition to the constitutive role of equity in a legal system, Aristotle also defined the equitable person. It is this second meaning of equity and the equitable that is of interest here, as it will lead us to the discussion of conscience and good faith – of fiduciaries in general and in corporate law in particular. *The Nicomachean Ethics* say:

> It is evident also from this who the equitable man is; the man who chooses and does such acts, and is no stickler for his rights in a bad sense but tends to take less than his share though he has the law on his side, is equitable, and this state of character is equity, which is a sort of justice and not a different state of character.[24]

The hero of equity according to Aristotle is the person who does not exploit the letter of the law "in a bad sense". This individual-level conception of equity refers to persons; it is separate and different from the societal-level equity as a social institution mentioned above.[25] Translated from the Greek *epieikeia*, equitable as a systemic institutional quality connotes flexibility.[26] As an individual-level quality, however, it means "decency"[27] or "excellence" or "goodness",[28] of the person.

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[20] *See* Stoljar, *supra* note 5; Amir N. Licht, *Lord Eldon Redux: Information Asymmetry, Accountability and Fiduciary Loyalty*, 37 OXFORD J. LEGAL STUD. 770 (2017).

[21] *See* Stoljar, *supra* note 5, at 218-221; Paul Brand, *The Equity of the Common Law Courts*, in LAW & EQUITY: APPROACHES IN ROMAN LAW AND COMMON LAW 39, 45–53 (E. Koops & W.J. Zwalve eds., Martinus Nijhoff 2014); Baker, *Oxford History*, *supra* note 14, at 875–878. *See* also E.O. Belsheim, *The Old Action of Account*, 45 HARV. L. REV. 466 (1932); W.M. Lile, *Bills for Account*, 8 VA. L. REV. 181 (1922).

[22] *See*, e.g., J. H. Baker, *Introduction to English Legal History* 270 (5th edn, 2019) (hereinafter Baker, *Introduction*); Joseph Biancalana, *Medieval Uses*, in ITINERA FIDUCIAE: TRUST AND TREUHAND IN HISTORICAL PERSPECTIVE 111 (R.H. Helmholz & Reinhard Zimmermann eds., Duncker & Humboldt 1998).

[23] *See Rukhadze*, *supra* note 15, at [20].

[24] Aristotle, *supra* note 11, at 99.

[25] *See* Dennis Klimchuk, *Aristotle at the Foundations of the Law of Equity*, in *Philosophical Foundations of the Law of Equity* 13 (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., Oxford Univ. Press 2020); Penner, *supra* note 8; *see* also Gold, *supra* note 10.

[26] *See* Mike Macnair, *Arbitrary Chancellors and the Problem of Predictability*, in LAW & EQUITY: APPROACHES IN ROMAN LAW AND COMMON LAW 79, 79 (E. Koops & W.J. Zwalve eds., Martinus Nijhoff 2014).

[27] *See* Aristotle, *Nicomachean Ethics* 111n43 (Robert C. Bartlett & Susan D. Collins trans., Univ. of Chi. Press 2011).

Our subject of analysis therefore is “the good man”, or “the good man of equity” *a la* Aristotle, or “the Good Man of Equity” in common law systems. The following parts explore the ways in which legal systems conceptualized and implemented this sense of individual-level goodness with the ideas of conscience and good faith. One should keenly bear in mind that both of these ideas have also been used to characterize societal-level phenomena – specifically, the legal branch of equity and the legal doctrine of good faith.

IV. Conscience and the Good Man of Equity

Recall that in *O'Neil*, Lord Hoffmann's identified good faith with conscience as the latter was conceptualized in the Roman and ecclesiastical origins of the Court of Chancery.[29] To assess the place of good faith in the (equitable) jurisprudence of corporate law we therefore need to get at least a grasp of this concept. This is not an easy task, however, since conscience is a complex concept with a protracted history.

To begin, the Oxford English Dictionary lists no less than ten senses of the word “conscience”, including six senses involving consciousness of morality or what is considered right (e.g., “The internal acknowledgement or recognition of the moral quality of one's motives and actions; the sense of right and wrong as regards things for which one is responsible”) and four senses without a moral dimension (e.g., “Inward knowledge or consciousness of something within or relating to oneself; internal conviction, personal awareness.”).[30] For many of these senses, the Dictionary documents etymologies that go back to the Middle Ages, and, moreover, it traces the roots of the English word in Classical Latin (*conscientia*) and ancient Greek (*syneidesis*).

Of course, one could dismiss all this linguistic baggage as superfluous and focus on modern usage(s). Thus, one might be content that when Delaware courts define the contours of directors' duty of oversight and of breaching it as a breach of fiduciary loyalty, they use “conscious” as a direct synonym of “knowing” (following

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[28] *See* Roger A. Shiner, *Aristotle's Theory of Equity*, 27 LOY. L.A. L. REV. 1245, 1247 (1994). Shiner refers to the translation by Ross, *supra* note 11.

[29] *Supra*, text to note 2.

[30] conscience, *Oxford English Dictionary*, (no date; entry revised 2011), https://www.oed.com/search/dictionary/?scope=Entries&q=conscience&tl=true.

the Latin combination *con-* (with) prefix + *scīre* (to know)),[31] without any morality overtones. For example, in *Stone v. Ritter*, the Delaware Supreme Court said that "[w]here directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith."[32] In this context, "conscious" refers to the cognitive aspect of recording or recognizing certain circumstances in directors' awareness. In the analytical framework advanced in this Article, this is good faith that is characteristic of vertical relations.

That would be too quick, however. While during its evolution as an organizing idea in the development of equitable adjudication "conscience" implied knowledge of facts – namely, cognition – it was never shorn of ethical aspects of propriety according to social norms – the sense in which "good faith" is used, for instance, in adjudicating unfair prejudice. In the current analytical framework, that would firstly reflect the hybrid version of good faith. In addition, one could find a normative ethical element in the vertical version – namely, not merely awareness of adverse circumstances but also an air of impropriety that surrounds it.

Conscience played a defining role, literally speaking, in the development of Equity. As Havelock has pointed out, however, "throughout the history of Equity the notion of conscience has lacked clear and universally accepted definition. Instead, conscience is used in a variety of senses and contexts: sometimes it refers to the 'conscience' of the Chancellor himself; sometimes to the 'conscience' of the King; sometimes to the individual 'conscience' of one or both of the parties; and sometimes it is used as an impersonal and external standard of judgment."[33]

The literature largely agrees that at least three historical stages of development in the conceptualization and role of conscience in equitable adjudication can be identified: medieval, reformation, and modern, during which the content meaning of conscience has also evolved.[34] Historically, the Chancery did not begin as a court of

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[31] *Id.*

[32] Stone v. Ritter 911 A.2d 362, 364, 369–70 (Del. 2006); Marchand v. Barnhill, 212 A.3d 805, 821 (Del. 2019).

[33] Rohan Havelock, *The Evolution of Equitable Conscience*, 8 J. EQ. 128, at *6-*7 (2014).

[34] *See* in particular Havelock, *id*; Sinead Agnew, *The Meaning and Significance of Conscience in Private Law*, 77 CAMBRIDGE L.J. 479, 502 (2018); Mike Macnair, *Equity and Conscience*, 27 OXFORD J. LEGAL STUD. 659 (2007); Dennis R. Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate 2010) (hereinafter Klinck 2010); *see* also Dennis R. Klinck, *The Nebulous*

law at all but as an administrative department. To put it colloquially, in the medieval period the chancellor was tasked with "stuff that needs to be done by someone who knows how to do it." Emerging from the royal scriptorium, the chancellor, assisted by the master of the rolls and additional masters, thus was responsible, *inter alia*, for issuing royal grants and writs under the Great Seal and, importantly, for running the Exchequer, in which accounting for feudal revenues was held, known together as the "Latin side".[35] During the fourteenth century, the chancellor began to issue royal and council decrees through the budding Court of Chancery in the "English side", practically functioning as "a clearing house for all kinds of business conducted elsewhere."[36] Appeals to the chancellor were phrased as appeals to the "conscience of the King" and later simply as based on conscience. This jurisdiction of conscience subsequently became equitable adjudication, or Equity.

During the Middle Ages, conscience was first and foremost a religious concept. With few exceptions, those who held the office of Lord Chancellor were high-ranking clerics in the Catholic Church; many served as bishops or archbishops, while others occupied prominent ecclesiastical positions such as canons, deans, deacons, or provosts. Consequently, their understanding of this concept was infused with, if not determined by religious interpretations. This historical fact cannot be dismissed as an archaic anecdote, because as Hedlund argues, "[w]hilst English equity is secular (and always was), the medieval Lord Chancellors drew on what they knew. … [I]t is undeniable that … conscience, as a theological and juridical concept, came from the Catholic Church."[37] Crucially, "[w]hilst its origins as a juridical concept lies in medieval scholastic theology and canon law, equity's conscience became a distinct English juridical concept that withstood the external theological upheavals."[38] In a

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Equitable Duty of Conscience, 31 QUEEN'S L.J. 206 (2005); Timothy S. Haskett, *The Medieval English Court of Chancery*, 14 LAW & HIST. REV. 245 (1996); Patrick A. Keane, *The Conscience of Equity*, 84 AUSTL. L.J. 92 (2010); Alastair Hudson, *Conscience as the Organising Concept of Equity*, 2 CAN. J. COMP. & CONTEMP. L. 261 (2016); Graham Virgo, *Conscience in Equity: A New Utopia*, 15 OTAGO L. REV. 1 (2017); Sir Terence Etherton, Equity and Conscience, Eldon Professor's Lecture, Northumbria Univ. (Oct. 25, 2017), https://www.judiciary.uk/wp-content/uploads/2017/10/sir-terence-etherton-mr-eldon-lecture-20171030.pdf.

[35] *See* generally Baker, *Oxford History*, *supra* note 14, 181-182; Baker, *Introduction*, *supra* note 22, 109. On the Chancellor's responsibility for the Royal Exchequer s*ee* Licht, *supra* note 20.

[36] Ashley James Hannay, *Uses in the Later Fifteenth and Early Sixteenth Centuries* 132 (Ph.D. dissertation, Univ. of Cambridge 2022), https://doi.org/10.17863/CAM.93112.

[37] Richard Hedlund, *Equity and Conscience*, in THE LEGAL LEGACY OF THE REFORMATION: CATHOLIC AND PROTESTANT APPROACHES TO LAW 200, 202 (John Duddington ed., Routledge 2024).

[38] *Id.*, at 201.

way, Lord Hoffmann (notwithstanding his Jewish descent) may be viewed as a modern incarnation of those early chancellors.

In Greek, the term commonly used for conscience is *syneidesis*, which denotes a form of self-knowledge or self-awareness employed in the moral evaluation of one's actions. The Latin equivalent, *conscientia*, conveys a similar meaning. Nevertheless, ecclesiastical theologians have historically distinguished between *synderesis*[39] and *conscientia*, developing a dualistic framework that treats them as separate, though related, concepts, where one reflects cognition and perception and the other - animating motivations in light of such knowledge. At bottom, however, from St Jerome to Bonaventure to St Thomas Aquinas to St John Henry Newman, both concepts are based on self-awareness.[40]

This theological framework was developed for religious purposes – to theorize the assessment of one's conscience and actions by the Church through its agents in a confessional context, which is to say, in a generalized ("objective") manner. Within this framework, emphasis was placed on the community as a relational society composed of individuals interconnected with one another and, fundamentally, with God, rather than on the individual as an autonomous or uniquely distinct entity. Putting theological nuances to one side, as England was a religious society at the time, these ideas have been rehearsed to all church-attending individuals. It is thus plausible that due to such repeated exposure, this approach has taken root and become socially-institutionalized as a general social norm.[41]

In tandem, that the chancellors and masters of the rolls were clerics plausibly entailed that they have deployed the same analytical framework in their non-religious office as well. Thus, an appeal to the chancellor's conscience – the conscience jurisdiction that will become Equity – was an appeal to exercise discretion with regard to the parties' discretion understood in this framework. In other words, the ideal was of assessing a particular person's conscience ("subjectively") using generally expected and possibly accepted norms ("objectively") by a particular officer, the Chancellor (again, "subjectively").

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[39] *Synderesis* is likely a miswriting of *syneidesis*, which nonetheless acquired a separate meaning in medieval times. Peter Eardley, *Medieval Theories of Conscience*, STAN. ENCYC. PHIL. (May 10, 2026), https://plato.stanford.edu/entries/conscience-medieval/.

[40] *Id.*, at 207-209; *see* also Klinck 2010, at 32-34.

[41] *See* Hedlund, *supra* note 37, at 217; *see* also Jennifer Hole, *Economic Ethics in Late Medieval England*, 1300–1500 60 (Palgrave-McMillan, 2016)

Conscious-based adjudication was instrumental – indeed, essential – for the development of uses and later – of trusts by the courts of Equiy. In current parlance we often say that the trust features a "split" between legal and equitable proprietary interest: the trustee is the legal owner, yet the beneficiary has equitable title.[42] This legal/intellectual breakthrough is the hallmark and claim to fame of the English trust. However, in the eyes of early common law, and of an early common law judge, this was impossible: the feoffee to use (and later – trustee) held the legal rights (freehold interest) with regard to the land. The *cestui que* use (later – *cestui que* trust and then simply the beneficiary) was a complete stranger. To effectuate the use/trust structure – say, when a medieval beneficiary faced a medieval trustee who denied the former's interests – the chancellor, bound to maintain the legal reality under the common law, had to look to the conscience of the trustee, as if with a view to saving his soul from sin. In such a situation, "conscience" would refer both to what the trustee was aware of and had to do (namely, to hold the land for the use of the beneficiary) and to what was the prevalent extra-legal norm with regard to uses (namely, that the trustee is not entitled to benefit from the land notwithstanding his legal entitlement).

The Reformation during the sixteenth century brought little change to this framework despite its shift to emphasizing the individual, which in turn led to the Enlightenment and rise of political liberalism and individualism. From a religious perspective, conscience was conceived as an autonomous faculty—superior to both will and reason—that guides the individual, supported by reason and the illumination of the Holy Spirit.[43] The political and religious instability engendered by the English Reformation "led to an idea of conscience and morality as being subjective and allowing individuals to "decide on a course of action in the light of a specific set of circumstances."[44] Nevertheless, while theologically the Protestant conception of conscience differs from the Catholic one, this distinction did not translate into the development of equity.[45]

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[42] On "split ownership" *see* Daniel Clarry, *Fiduciary Ownership and Trusts in a Comparative Perspective*, 63 INT'L & COMP. L.Q. 901 (2014).

[43] *See* Hedlund, *supra* note 37, at 212; Havelock, *supra* note 33, at *58-*63; Klinck 2010, *supra* note 34.

[44] Hedlund, *id.*, at 216.

[45] *Id.*, at 223.

Also in the early sixteenth century, Christopher St. German, a jurist and writer, sought to reconcile common law with principles of conscience and equity. In several treatises – most famously his influential *Doctor and Student* and also writing in pseudonym – St. German advanced a theory to explain the working of courts of equity that weaved together the Aristotelean ideas about *epieikeia* and the religious conceptualization of conscience. According to common interpretations, St German emphasized the objectivity of the standard by which conscience is judged, identifying that standard with "law," including human laws. He argued that conscience functions to relate general precepts to particular situations. For St. German, conscience involved doing equity in the Aristotelian sense of *epieikeia*—applying general rules with flexibility to the specific case. Courts of conscience later became courts of equity, where the Chancellor's role was "to soften and mollify the Extremity of the Law" rather than merely "to correct Mens Consciences for Frauds…".[46]

As if five hundred years have not passed since the writings of St. German, modern scholars continue to debate their interpretation and implications. Macnair thus argues that identifying conscience in equitable adjudication in that formative period with Aristotelean *epieikeia* is misplaced. Rather, he argues that conscience meant knowledge or belief of legally relevant facts which were not appropriately pleaded and proved – namely, a cognitive or mental element.[47]

In contrast, Hudson insists that conscience is an objectively constituted phenomenon.[48] Looking at the Court of Requests, which in the late fifteenth and early sixteenth centuries offered litigants without remedy at the rigid English common law a path the king's extraordinary justice, Flannigan argues that conscience "was occasionally evoked in reference to the conscience of the defendant and the need to save them from dishonesty or sin, a concept found also in Chancery. Far more often, however, conscience in Requests meant the personal conscience of the king himself, and the more universal notions of fairness and reason that he was expected to exemplify and inculcate in his justice system." In other words, both an individual (and often cognitive) analysis and alternatively, a general objective social norm.

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[46] Etherton, *supra* note 34, at 3 (quoting from Earl of Oxford's Case (1615) 1 Ch Rep 1); *see* also Havelock, *supra* note 33, at *63.

[47] Macnair, *supra* note 34, at 661, 674 *et seq*.

[48] Hudson, *supra* note 34; for a similar view, *see* Hedlund, *supra* note 37, at 221.

Separately, Macnair argues that later developments of precedent-based and rules-based systematization in equitable adjudication meant that "modern 'Chancery bar equity' is perhaps the least 'equitable', in the Aristotelian *epieikeia* sense of 'flexible', branch of English law.[49] Williams goes even further to challenge the common association in St. German's work of equity and conscience with the Chancery jurisdiction, which came to be known as Equity. According to Williams, *Doctor and Student* was primarily a religious treatise, and St. German's predominant concern was not with conscience as applied in the Chancery, but with individual conscience, perhaps as affected by confession and even the church courts.[50] Without attempting to reconcile the scholarly debate about those ancient yet influential sources, one can safely infer that during those centuries, leading thinkers continued to struggle with notions of individual-level cognition versus propriety and social-institutional level regulation thereof.

Against this backdrop, a famous exchange took place between Selden, writing in 1689, and Lord Chancellor Eldon, a key figure in the systematization era of Equity, addressing his claim in 1818. Selden quipped:

> Equity is A Roguish thing, for Law wee have a measure, know what to trust too. Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower soe is equity[.] Tis all one as if they should make the Standard for the measure wee call A foot, to be the Chancellors foot; what an uncertain measure would this be; One Chancellor has a long foot another a short foot a third an indifferent foot; tis the same thing in a Chancellors Conscience.[51]

Lord Eldon responded:

> The doctrines of this Court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this Court varies like the Chancellor's foot.[52]

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[49] Macnair, *supra* note 26, at 79.

[50] Ian Williams, *Christopher St. German: Religion, Conscience and Law in Reformation England*, in *Great Christian Jurists in English History* 69, 86 (Mark Hill & R.H. Helmholz eds., Cambridge Univ. Press 2017).

[51] John Selden, *Equity*, in *Table-Talk: Being the Discourses of John Selden, Esq*. 43, 43–44 (London, J.M. Dent & Co. 2d ed. 1689), http://books.google.com/books?id=9QtKAAAAIAAJ&hl=en.

[52] Gee v. Pritchard and Anderson, [1818] EngR 605, (1818) 36 ER 670, 674. On the systematization of equitable jurisdiction *see*, e.g.m Havelock, *supra* note 33, at *70 *et seq.*

Both jurists refer to objective conscience – that which reflects social norms. Both acknowledge that the Chancellor (and today, a judge) would give a personal manifestation to this conscience, although they differ in the leeway the Chancellor enjoys in the legal environment each one perceives. Neither of them refers to the party's cognitive facet of conscience – to awareness to certain information that could taint a party's conscience – conscience as a mental element. However, the latter meaning of conscience certainly has not disappeared.

From the mid-nineteenth century, when fiduciary law began to attain its modern formulas of duties and liability, to this day, references to conscience as a mental condition that determines a fiduciary's liability have become popular. Agnew thus points out several contexts, in which modern era courts state that equitable jurisdiction is founded on "acting on the conscience" of the defendant, which in turn involves her cognitive awareness – in particular, breach of confidence, breach of trust, breach of fiduciary duty, and accessory liability for knowing receipt and dishonest (formerly knowing) assistance.[53] In parallel, conscience-based intervention is not limited to fiduciary or other power relations. It could also take place in cases of unconscionability in contractual relations.[54]

Observing this open-ended, highly general usage of conscience, Grower recently argued that instead, "'constructive fraud' is specific enough to make clear the precise basis upon which the 18th Century courts of Equity would intervene" in (using today's parlance) fiduciary relations and relations of confidence and undue influence. [55] Being more capacious than actual fraud, which is akin to common law deceit, Equity's constructive fraud encompasses cases of one's actual cognitive awareness of adverse circumstances as well as objectively assessed socially unacceptable conduct.

Importantly for the present discussion, Grower advances a compelling account of how together with the emergence of this theory of equitable intervention, Equity has utilized a theory of "the Good Man of Equity" for that purpose. While the constructive fraud framework features a relatively recent, nineteenth-century wrong-

[53] *See* Agnew, *supra* note 34, at 486, citing, *inter alia*, Bristol & West Building Society v. Mothew [1998] Ch 1, 23 (UK, CA).

[54] *See*, e.g., Hart v. O'Connor [1985] UKPC 1 (PC).

[55] Julius Albie Wolf Grower, *From Disability to Duty: From Constructive Fraud to Equitable Wrongs* 88 (2021) (Ph.D. thesis, University College London), https://discovery.ucl.ac.uk/id/eprint/10130976/.

remedy structure, the Good Man framework insists on keeping the relevant actor to his primary obligations, such that straying from them yields legal disability (disqualification). This theory regains traction today owing to Lord Millett's extra-judicial writing and to the UK Supreme Court's decision in *FHR European Ventures LLP v. Cedar Capital Partners LLC*.[56]

Contrasting it to Oliver Wendell Holmes's famous "bad man" theory of law,[57] Lord Millett argued that Equity adopts an entirely different approach that may be described as the "good man" theory of law.[58] Similar to Equity's policy on awarding specific performance for breach of contract,

> Equity treats the fiduciary in the same way. He must not place himself in a position where his interest may conflict with his duty. If he has done so, equity insists on treating him as having acted in accordance with his duty; he will not be allowed to say that he preferred his own interest to that of his principal. He must not obtain a profit for himself out of his fiduciary position. If he has done so, equity insists on treating him as having obtained it for his principal…[59]

This "Good Man of Equity" is not a proxy for a realistic person or an empirical observation by the law, through the courts, about actual members of society.[60] He is an ideal-type of a person that Equity strives to keep away from straying from her putative obligations; in religious parlance one might say – from sin. Getzler advances a structurally similar theory about Equity's approach to errand fiduciaries – namely, treating them "as if" they had discharged their obligations properly,[61] based on a presumption of honesty that developed in eighteenth-century Chancery's jurisdiction of conscience.[62]

As alluded to above, the "goodness" of the Good Man of Equity is highly reminiscent of the "excellence", "goodness", or "decency" of the Aristotelean

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[56] [2015] AC 250, [2014] UKSC 45, [11] (UK).

[57] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

[58] Peter Millett, *Bribes and Secret Commissions*, 1 RESTITUTION L. REV. 7, 19 (1993) (Hereinafter: *Bribes 1993*); *see* also Peter Millett, *Bribes and Secret Commissions Again*, 71 CAMBRIDGE L.J. 583 (2012); David Hayton, *The Development of Equity and the "Good Person" Philosophy in Common Law Systems*, 2012 CONV. 263. But *compare* Rukhadze v. Recovery Partners GP Ltd [2025] UKSC 10, [226] (Lord Leggatt SCJ) (UK); *see* also Annie Mackley, *A Challenge to the Utility and Distinctiveness of the Good Man Theory of Equity*, 27 TR. & TRUSTEES 376 (2021).

[59] Millett, *Bribes 1993*, *id.*, at 20; *see* also Tribe v. Tribe [1995] EWCA Civ 20 (UK) (Millett LJ).

[60] This much is abundantly clear from Lord Millett's description of the corrupt fiduciary. *See* Millet, *Bribes 1993*, *supra* note 58, at 22.

[61] Joshua Getzler, *"As If": Accountability and Counterfactual Trust*, 91 B.U. L. REV. 973 (2011).

[62] Joshua Getzler, *Law, Self-Interest, and the Smithian Conscience*, in *Law in Theory and History: New Essays on a Neglected Dialogue* 250 (Maksymilian Del Mar & Michael Lobban eds. 2016).

epieikeia.[63] It is therefore both an individual-level as well as a societal-level measure of propriety. Straying from the required standard of behavior could be with or without any cognitive awareness of such failure, with little consequence because under this theory the straying actor will be made to meet it one way or another. As Lord Russel said in *Regal (Hastings) Ltd v. Gulliver*, "[t]he liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."[64]

Put differently and somewhat simplistically, Equity might act on the actor's conscience but without looking too much into it, or without conditioning its response to what it finds there. The next part attempts to tie the ribbons of goodness, conscience, the Good Man of Equity, and of good faith by looking at another possible source of content – in Roman Law.

V. *Fides*, *Bona Fides*, and the *Bonus Vir*

Recall again Lord Hoffmann's statement in *O'Neill*, that "company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman *societas*, as a contract of good faith."[65] That nearly all the chancellors in the early generations of Equity were clerics entailed not only that they were familiar with, and likely drew on the theology of conscience; it also meant that as highly educated men they were familiar with civil (Roman) law and with canon law (which served as a conduit for civil Roman law), on which they could also draw.[66] While common law systems are famous in their ambivalence about the civil law principle of good faith,[67] the development of *bona fides* in Roman law from a social idea into a

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[63] *See supra* text to note 28 *et seq*.

[64] Regal (Hastings) Ltd v. Gulliver, [1967] 2 AC 134, [1942] UKHL 1 (UK).

[65] *See supra* text to note 2.

[66] These cleric chancellors held doctoral degrees from Oxford or Cambridge in divinity, civil law or canon law. *See* Dodd, *supra* note 14, at 228; *see* also Paul Tucker, *The Early History of the Court of Chancery: A Comparative Study*, 115 ENG. HIST. REV. 791 (2000); David J. Seipp, *The Reception of Canon Law and Civil Law in the Common Law Courts Before 1600*, 13 OXFORD J. LEGAL STUD. 388 (1993); Charles P. Sherman, *A Brief History of Medieval Roman Canon Law in England*, 68 U. PA. L. REV. & AM. L. REG. 233 (1920).

[67] For example, Canadian law has embraced a general duty of good faith largely similar to the Civil Law duty, whereas English law appears to be inching toward such recognition but is not quite there yet. *Compare* Bhasin v. Hrynew, 2014 SCC 71 (Ca.); C.M. Callow Inc. v. Zollinger, 2020 SCC 45 (Ca.); Braganza v. BP Shipping Ltd [2015] UKSC 17 (UK). *See*, e.g., Yifat Naftali Ben Zion, *Good Faith and*

legal institution holds promise for a better understanding of good faith in company law and in fiduciary law more generally.

Before getting to *bona fides*, a word on *fides*. Fides was a Roman goddess, the deification of the virtue of *fides* – i.e., good faith and honesty.[68] The principal function of Fides was to safeguard honesty and fidelity in the performance of obligations. She presided over agreements formalized by handshakes and served as the protector of those who acted with loyalty and good faith.[69] *Fides*, the virtue, gradually developed from a vague social idea to a social norm to a legal institution of good faith (*bona fides*) that derived its meaning from both the concept of *fides* as a guarantor of promises and as a normative standard of conduct grounded in divine law, social custom, and, in certain contexts, secular legal obligations.[70] The trajectory of this development was long and complex, and much of it remains uncertain, but the key evolutionary stage, of becoming a legal institution, sheds light on the main questions we ask here – namely, whether an obligation of good faith connotes objective propriety or cognitive awareness; whether in the context of equitable jurisdiction good faith and conscience are related; and whether (or how) good faith entails different implications in company law.

Valsan advances a masterful analysis of this development.[71] The central tenet in his theory is the *bonus vir* – the "good man" or "upright man". *Bonus vir* was a Roman male citizen regarded as a model of honesty and righteousness. A key aspect of the *bonus vir*'s role was serving as a respected arbiter in private disputes. His arbitration (*arbitrium boni viri*) was marked and shaped by his *bona fides*, expressed

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Loyalty: Reimagining Contracts from a Fiduciary Law Perspective, 98 TUL. L. REV. 471 (2024); *see*, generally, Daniele D'Alvia, *From Public Law to Private Law: The Remarkable Story of bona fides*, in *The Future of the Commercial Contract in Scholarship and Law Reform* 343 (Marianne Heidemann & Joseph Lee eds., 2018); Martijn W. Hesselink, *The Concept of Good Faith*, in *Towards a European Civil Code* 619 (Arthur S. Hartkamp et al. eds., 4th rev. & expanded ed. 2011); Reinhard Zimmermann & Simon Whittaker, *Good Faith in European Contract Law: Surveying the Legal Landscape*, in *Good Faith in European Contract Law* 7 (Reinhard Zimmermann & Simon Whittaker eds., 2000);

[68] Fides, https://www.britannica.com/topic/Fides. Fides was represented as a matron wearing a wreath of olive or laurel leaves, and carrying in her hand corn ears, or a basket with fruit. Fides, https://pantheon.org/articles/f/fides.html. *See*, generally, Teresa Morgan, Roman Faith and Christian Faith: *Pistis* and *Fides* in the Early Roman Empire and Early Churches (Oxford University Press 2015).

[69] Remus Valsan, *Fides, Bona Fides, and Bonus Vir: Relations of Trust and Confidence in Roman Antiquity*, 5 J.L. RELIGION & ST. 48, 52 (2017).

[70] *See* Martin J. Schermaier, *Bona Fides in Roman Contract Law*, in *Good Faith in European Contract Law* 63 (Reinhard Zimmermann & Simon Whittaker eds., 2000).

[71] Valsan, *supra* note 69.

through an equitable and just decision.[72] The subject matters of his arbitration varied from agricultural disputes (e.g., over husbandry or quality of products) to general commercial disputes (e.g., over the time for payment). His decisions exhibited two facets, which were imposed as the standard of *bonus vir* to all forms of arbitration: first, knowledge and common sense in deciding foreseeable issues; second, trustworthiness that was expected from a person in a position to decide for someone else, like a guardian.[73] One may already see here embryonic requirements for skill and care and for loyalty, although without a clear distinction between regular commercial and fiduciary-type relations. This element emerged in due course:

> In time, the *fides* of the *bonus vir* became an idealized standard of reasoning for those in a position to decide for another. Many persons who had discretion to affect another's interests, such as guardians and fiduciary heirs, were required to exercise judgment as a *bonus vir* would, taking into account relevant considerations and remaining disinterested. The *bonus vir* not only possessed the two virtues that were essential for trustworthiness (*fides*), namely justice (*iustitia*) and prudence (*prudentia* or *sapientia*), but was also endowed with an uncanny ability to resist self-serving impulses and avoid any suspicion of deceit.[74]

The next stage of development saw the transformation of the *fides* of the *bonus vir* from a social norm into a legal standard. The standard was applied in various private relationships, some of which we would today classify as fiduciary.[75] Contractual *bona fides* came to embody a dual meaning: objective *bona fides* that referred to a general expectation for honest and fair conduct in legal transactions; and subjective *bona fides* that denoted the individual's belief that his actions were just, lawful, and did not infringe upon the legitimate interests of others.[76] In certain relationships, however, such as guardianship or mandate—fiduciary relations in modern terminology—breach of *fides* was considered particularly heinous and it led to infamy.[77] It stands to reason that this differential treatment reflected the greater

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[72] *Id.*, at 74.

[73] *Id.*, at 76-77.

[74] *Id.*, at 77.

[75] Thus, the standard was applied to guardianship, fiduciary agreement (*fiducia*), mandate, purchase and sale, lease and hire, administration of another's affairs without authority (*negotiorum gestio*), deposit, partnership (*societas*), and the action for recovery of a dowry. *Id.*, at 80; *see* also Amelie Van Belleghem & Mitja Kovac, Lawmaking in Ancient Rome and the Economic Foundations of the Concepts of Virtue, Honourable Conduct and Good Faith, working paper 6 (2025), https://ssrn.com/abstract=5199516.

[76] Valsan, *supra* note 69, at 78.

[77] *Id.*, at 81.

danger of abuse of power vis-à-vis the vulnerable party that is more despicable in comparison to merely assertive though sharp practices in commercial relations.

It thus seems to be that already in the Roman era, jurists distinguished between a good faith yardstick of propriety of conduct that was **objective** and determined by (minimum yet substantial) qualities and a different, more demanding standard of good faith that was **subjective** and included a cognitive element of belief. The objective standard and was expected in regular –**horizontal**, in this Article framework – relations in private law; the subjective was required from persons in positions of power to decide about other people's interests –**vertical**, in the present framework. Many of these relationships, such as the partnership, agency (mandate), and guardianship would today be classified as fiduciary relationships.

While Valsan is very careful to note that the *bonus vir* institution evolved over time and that much information is missing about its features at various stages of Roman society and law, it is clear that this upright character has found its way into English common law. In a passage in *Cowper v. Cowper* in 1734, that according to Getzler was "quoted incessantly for the next hundred years as epitomising the nature of English equity",[78] the Master of the Rolls said:

> The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue and though proceedings in equity are said to be *secundum discretionem boni viri* [in accord with the judgment of a good man], yet when it is asked, *vir bonus est quis?* ['what man is to be called good?] the answer is, *qui consulta patrum qui leges juraq; servat* [the one who keeps the decrees of the fathers, and who maintains the laws and justice]'[79]

A cursory online BAILII search of "*bonus vir*" or "*boni viri*" in court cases since the eighteenth century yields several decisions that use these terms in the senses mentioned above – namely, as a standard for a reasonable skilled person, as a standard for a person in a fiduciary position, and as a characteristic of equitable jurisdiction.[80] A thorough systematic search (that exceeds the present scope) possibly would yield additional such cases.

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[78] Getzler, *supra* note 62, at 275.

[79] Cowper v. Cowper (1734) 24 ER 930, 941–42 (ChD), quoted and translated [in brackets] by Getzler, *id.*, *id.*; *see* also Grower, *supra* note 55, at 133.

[80] *See*, e.g. respectively, Ker v. Ker [1812] UKHL 5_Paton_609, 619; Crow v. Cathro [1903] ScotLR 40_687, 689; Travelers Insurance Company Ltd v. XYZ [2019] UKSC 48, [92] (UK).

The conceptual similarity of the notional Good Man, to whose conscious Equity looks and in turn, on which Equity acts, and the ideal type Roman *bonus vir* suggests that the former was modelled on the latter. In such case, the good faith of the former could reflect the *bona fides* of the latter. To clarify: it is not submitted that the two legal institutions are identical and differ only in the language of their title. As noted throughout this article, these institutions have evolved over centuries. As is well known and was mentioned here, too, a broad, open-ended duty of good faith as it is known in civil law systems is not uniformly recognized across the common law, and vice versa: modern civil law systems do not feature a full-bodied version of strict accountability-based fiduciary law that exists in common law systems.[81] Still, the conceptual similarity between the "good men" in the two legal traditions and the transmission channels between them cannot be ignored. Moreover, these "good men" appear to address in a broadly similar manner a universal need of every legal system for an ideal type of "goodness" of people at the individual level of analysis, as it was theorized by Aristotle.[82]

VI. Corporate Applications

The business corporation is perhaps the most complex legal institution in terms of the multiplicity and intensity of legal linkages (privities) involved. In light of the preceding parts, this part explores the different roles that good faith plays in corporate law. In particular, it explores where in the corporation good faith exhibits an objective character of a social norm of reasonable proper conduct, where it stands for an individual-level mental condition of cognition free of awareness of adversities, or a middle ground between, or a combination of both.

It is trite law that directors and officers are corporate fiduciaries and as such they must conduct themselves in good faith. There is consensus across common law jurisdictions that this is an individual, subjective mental element requirement for a pure state of mind – namely, a cognitive condition that is not tainted by any (material)

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[81] *See* Martin Gelter & Geneviève Helleringer, *Fiduciary Principles in European Civil Law Systems*, in *The Oxford Handbook of Fiduciary Law* 583 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2018). For a heroic effort to identify similar features in regulating fiduciary(-like) relations in both legal traditions *see* Lionel Smith, *The Law of Loyalty* (Oxford Univ. Press 2023).

[82] *See supra* text to note 28 *et seq*.

adverse belief or motivation.[83] That is, the director must be convinced that she operates lawfully in the best interest of the company, like any other fiduciary vis-à-vis her beneficiary. David Kershaw thus argues that corporate fiduciaries' duty of loyalty is subjective, whereas their duty of care is objective, informed as it is by social practices and norms, while these two institutions constantly interact and the equilibrium point between them shifts.[84] But even within the doctrine of fiduciary loyalty, objective notions of propriety limit directors' subjective good faith to prevent situations of so-called "amiable lunatics"[85] who in pure subjective good faith conduct the company's business objectively irrationally. That much was recognized already in 1883: "*Bona fides* cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly *bonâ fide* yet perfectly irrationally."[86]

In addition to not having irrational beliefs, a director must exercise her powers and discretion at the motivational level only for promoting the best interests of the company and not for any other, ulterior, purpose or motive.[87] Doctrinally, the good faith requirement and the prohibition on ulterior motives are sometimes discussed separately from the no-conflict, no-profit rules that are generally more common as characterizing fiduciaries. The former – namely, the requirement for good faith – is the critical one, however, being part of the mandatory "irreducible core" of fiduciary obligations that cannot be contracted out of.[88] In this context, too, there exists a socially-determined objective boundary that a director must not cross no matter how subjectively pure her motivations are. Thus, in her dealing with the board, a corporate

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[83] *See*, e.g., Regentcrest plc v. Cohen [2001] 2 BCLC 80, [120] (UK) for UK law; *Stone*, *supra* note 32, at 369 for Delaware law.

[84] *See* Kershaw, *supra* note **Error! Bookmark not defined.**.

[85] *See* B.A.K. Rider, *Amiable Lunatics and the Rule in* Foss v. Harbottle, 37 CAMB. L.J. 270 (1978).

[86] Hutton v. West Cork Rly Co (1883) 23 Ch. D. 654, 671 (UK); *see* also ASIC v. Lewski [2018] HCA 63, [71] (Aust.).

[87] *See*, e.g., Hogg v. Cramphorn Ltd [1967] Ch 254 (UK); Howard Smith Ltd v. Ampol Petroleum Ltd [1974] AC 821, 834 (PC); Eclairs Group Ltd v. JKX Oil & Gas plc [2015] UKSC 71 (UK). The definition of "the best interest of the company" varies across jurisdictions depending on their position on a shareholderism-stakeholderism dimension. This subject is vast yet beside the present scope. For a conceptual introduction *see* Amir N. Licht, *Varieties of Shareholderism: Three Views of the Corporate Purpose Cathedral*, in *Research Handbook on Corporate Purpose and Personhood* 386 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

[88] I abstract from the possibility of eliminating the duty of loyalty in certain corporate forms in the US, which should eliminate the applicability of fiduciary law to such arrangements.

fiduciary cannot act objectively dishonestly.[89] In Delaware parlance, such "fraud on the board" is a breach of loyalty.[90]

In addition to directors and officers who are the company's regular fiduciaries, the very same regime of good faith requirement applies to derivative claimants, including the prohibition on ulterior motives.[91] Although she is merely a shareholder, possibly a small one, as a derivative claimant she undertakes to act for and on behalf of the company and thus becomes its fiduciary. Ditto for any shareholder exercising fiduciary powers.[92]

The corporate fiduciary, like other fiduciaries, is thus expected to exhibit "the punctilio of an honor the most sensitive [as] the standard of behavior," in Judge Cardozo's flowery language in *Meinhard v. Salomon*.[93] As he is entrusted with powers to decide for or on behalf of the company, he is expected to be the ultimate "Good Man of Equity", the ultimate *bonus vir*, to exhibit the ultimate personal *epieikeia*, and to harbor the cleanest conscience.

Against this background, an interesting anecdote took place in Delaware around the turn of the century. In *Cede v. Technicolor*, the Supreme Court of Delaware rather surprisingly referred to "any one of the triads of [directors'] fiduciary duty - good faith, loyalty, or due care."[94] This new phrase – the "triads" – which presented good faith as a duty on par with the duties of care and loyalty, caused much confusion. It sent jurists scrambling to find meaningful content to directors' duty of good faith that is distinct from the two others.[95] Whether those efforts were persuasive is debatable, but one need not take a position on this question as this discourse has become moot. In *Stone v. Ritter*, the Supreme Court of Delaware acknowledged that the "triads" *dictum* was misplaced, as it clarified that in connection

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[89] *See* Saxon Woods Investments Ltd v. Costa [2025] EWCA Civ 708 (UK).

[90] *See* In re Oracle Corp. Derivative Litig., No. 139, 2024, 2025 WL 5853693 (Del. Jan. 21, 2025)

[91] *See*, e.g., ClientEarth v. Shell Plc [2023] EWHC 1897 (Ch) (UK).

[92] *See* Lehtimäki v. Cooper (Rev 1) [2020] UKSC 33 (UK).

[93] Meinhard v. Salmon, 164 N.E. 545, 546 (1928).

[94] Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993).

[95] *See* Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456 (2004); Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1 (2006); Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398 (2007); for reviews *see* Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629 (2010); Robert B. Thompson, *The Short, But Interesting Life of Good Faith as an Independent Liability Rule*, 55 N.Y.L. SCH. L. REV. 543 (2010).

with directors' duties, “[t]he failure to act in good faith may result in liability because the requirement to act in good faith is a subsidiary element, i.e., a condition, of the fundamental duty of loyalty.”[96]

In contrast, consider the legal relationship between shareholders. Neighboring the corporation, yet formally outside the corporate nexus of contracts, there lie shareholder agreements. A requirement or duty of good faith in these horizonal relations would depend on the legal system's general stance about it, but where it applies it would be of the objective, socially constructed kind. UK law, which still shudders at the idea of a general duty of good faith in commercial contracts, provides an interesting example. In *Compound Photonics Group Ltd*, which dealt with a shareholder agreement that included a good faith obligation clause for particular circumstances, the Court of Appeals recently refused to apply notions about general good faith in contracts from US law and from New South Wales law, which appears to follow it.[97] Observing that the relations between shareholders are regulated in the company's bylaws and taking note of English case law on relational contracts, the Court was willing to rule, rather circularly: "Depending on the contractual context, a duty of good faith may be breached by conduct taken in bad faith."[98] The Court added, however, that "[t]his could include conduct which would be regarded as commercially unacceptable to reasonable and honest people, albeit that they would not necessarily regard it as dishonest."[99] Certainly, a strictly objective standard.

Read in light of the preceding Parts, what we have here is an implementation of Aristotelean *epieikeia* with regard to "the good man", or of the *bonus vir*, or of "the Good Man of Equity", in a horizontal relationship. While there could always be power differences between the parties, there is no undertaking by one to operate for or on behalf of the other. Consequently, the good faith that is required from the parties will be the objective, social-norm version of this concept. Hence the overlap that Lord Hoffmann finds between the equitable intervention and the Continental duty of good faith.

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[96] *Stone*, *supra* note 32, at 370.

[97] Re Compound Photonics Group Ltd [2022] EWCA Civ 1371, [196] (UK).

[98] *Id.*, at [241].

[99] *Id.*, *id.*

The legal situation changes dramatically when considering relationships within the company, especially between powerful and weaker shareholders. While this relationship is fundamentally contractual,[100] Equity has exercised its jurisdiction over it under different titles – e.g., oppression of the minority and, more recently in UK-influenced jurisdictions, unfair prejudice.[101] This is the setting of *O'Neil*. Recall that according to Lord Hoffmann, "equity could give effect to what it considered to have been the true intentions of the parties by preventing or restraining the exercise of legal rights. … Or one might, as in Continental systems, achieve the same result by introducing a general requirement of good faith into contractual performance. These are all different ways of doing the same thing."[102]

Amending the articles of association presents the quintessential conundrum in shareholder relations. Formally, this is a corporate action usually taken by the general meeting. In reality, it is the outcome of majority voting. The framework is purely contractual on its face, and results are determined by relative power by design and with the minority's prior consent to the mechanism. As amendments usually do not involve directors, fiduciary duties cannot be invoked, such that the exercise of power in this setting could be regulated only by other legal or equitable norms (beyond interpretation maneuvers that could camouflage equitable discretion). In two words: good faith.

In a gradual development over more than a century, UK and other Commonwealth courts have formed a good-faith-based jurisprudence about shareholders' exercise of power in article amendments.[103] Among other things, a power to amend must be exercised in good faith in the interests of the company. It is

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[100] Section 33 of the UK Companies Act 2006 Act gives the force of a contract to the articles of association, not unlike other legal systems.

[101] "Unfair prejudice" is a UK legislative innovation (section 459 of the Companies Act 1985; now section 994 of the Companies Act 2006) that later spread to additional jurisdictions but not to the United States. On the development of oppression jurisprudence in the U.S. *see* Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699 (1993). *Compare* David Gibbs-Kneller & Arad Reisberg, The Thick End of the Wedge: Good Faith in the Corporate Constitution, working paper (2024).

[102] *O'Neil*, *supra* note 1.

[103] The following draws closely on Arbuthnott v. Bonnyman (Re Charterhouse Capital Ltd) [2015] EWCA Civ 536, [90] (UK), which consolidates Allen v. Gold Reefs of West Africa Limited [1900] Ch 656 (UK); Sidebottom v. Kershaw Leese and Co Ltd [1920] 1 Ch 154 (UK); Shuttleworth v. Cox [1927] 2 KB 9 (UK); Peters' American Delicacy Co v. Heath (1939) 61 CLR 457 (Aust.); Greenhalgh v. Arderne Cinemas Ltd [1952] Ch 286 (UK); Citco Banking Corp NV v. Pusser's Ltd [2007] UKPC 13 (PC); Assenagon Asset Management SA v. Irish Bank Resolution Corporation Ltd [2012] EWHC 2090 (Ch) (UK); *see* also Staray Capital Ltd v. Cha (British Virgin Islands) [2017] UKPC 43, [34] (PC).

the shareholder's subjective good faith which matters, and not the court's, but it must be such that a reasonable person would consider it to be such, which means that the court will still examine it through this lens. That minority shareholders may be adversely affected by the amendment does not negate the validity of an amendment adopted in good faith. The same holds even where the amendment is only for the benefit of shareholders, while the company has no interest in it, provided that the amendment does not amount to oppression of the minority or is otherwise unjust.

By leveraging the courts' equitable discretion, this nuanced doctrine presents an ongoing balancing act between two principles: that the majority should be able to act in their own interests when exercising their powers legally; and that the majority cannot exercise their power to oppress or otherwise to be unjust to the minority.[104] This approach conceives of the majority in such "vertical" interactions as Aristotle's "equitable man" – "the man who chooses and does such acts, and is no stickler for his rights in a bad sense."[105] In applying this doctrine to a powerful shareholder as the "good man of Equity" modern courts thus look into his conscience – his subjective mental good faith – but, unlike fiduciaries, not at "the punctilio of an honor the most sensitive [as] the standard of behavior,"[106] and subject to an outer boundary of objective societal reasonableness.

Broadly stated, Delaware law is roughly similar, since "under Delaware law, every corporate act must be twice tested, once at law and again in equity."[107] A closer look reveals substantial differences, however.

Consider a voting in a class of bondholders to change the terms of the bond (and assume that its contractual interpretation allows it). In comparison to shareholder relations, the relations among bondholders and the company are more contractual by nature – "horizontal" – such that one could expect only contractual, objective good faith norms to apply at the most. That was indeed Chancellor Allen's view in *Katz v. Oak Industries Inc*., where he approved a coercive amendment by the majority. Reasoning that the relations "are typically thoroughly negotiated and

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[104] *See* Yanpolsky v. Macmillan [2024] EWHC 3166, [112] (Ch) (UK).

[105] *Supra* text to note 24.

[106] *Supra* text to note 93.

[107] In re Sears Hometown and Outlet Stores, Inc. Stockholder Litigation, 309 A.3d 474, 505 (2024) (Laster VC).

massively documented,"[108] he rejected a claim for breach of an implied obligation of good faith and fair dealing.[109] While being mindful of *Oak Industries*, Briggs J in *Assenagon*, under UK law, nonetheless set aside a similar move by majority bondholders for lack of good faith, as he applied the more elaborate "vertical" approach described above, in a substantial expansion of its scope.[110]

Next, consider controlling shareholders. Delaware law deems controlling shareholders as fiduciaries of the minority and of the corporation when they exercise their rights.[111] Put bluntly, this makes little sense both practically and doctrinally. Practically, because the controller/majority doesn't work for the minority; doctrinally, under the modern theory of undertaking in fiduciary law,[112] there is no undertaking, explicit or implied, by the majority to act for or on behalf the minority. Indeed, without an explicit agency undertaking, there can neither be such an implied undertaking by the majority to act for or on behalf of the corporation. Laster, writing extra-judicially, leverages a devastating critique of this jurisprudence, and calls for imposing a weaker, do-no-harm duty on controlling shareholders.[113] As a corollary, Laster argues that "[u]nlike a director, a stockholder controller need not believe in subjective good faith that it is acting in the best interests of the corporation and its stockholders as a whole."[114] This argument is consistent with the present analysis of good faith inasmuch as it applies to fiduciaries, while there could be a subjective good faith regime that is appropriate for powerful shareholders, as detailed above.

Finally, consider directors. Under Delaware law, directors may be liable for breaching their duty of care only if it was in gross negligence.[115] Delaware courts have defined gross negligence as "'reckless indifference to or a deliberate disregard of

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[108] Katz v. Oak Industries Inc. (1986) 508 A.2d 873, 879 (Del. Ch. 1986) (US); *see* also Simons v. Cogan, 542 A. 2d 785, 787 (Del. Ch. 1987) (US) (Allen C); NACEPF v. Gheewalla, 930 A.2d 92, 99 (Del. 2007).

[109] *Oak Industries*, *id.*, at 881.

[110] *See Assenagon*, *supra* note 103, at [61]-[62].

[111] *See* Kahn v. Lynch Communication Systems, Inc., 638 A.2d 1110, 1113 (Del. 1994). For earlier references and for references to a similar doctrine in other states and federal U.S. law *see* J. Travis Laster, *The Distinctive Fiduciary Duties that Stockholder Controllers Owe*, 20 NYU J. L. & BUS. 461 (2024).

[112] E.g., *Mothew*, *supra* note 53.

[113] Laster, *supra* note 111.

[114] *Id.,* at 462.

[115] Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

the whole body of stockholders or actions which are without the bounds of reason.'"[116] Now, negligence in principle can take place with subjective good faith; the standard is that of a reasonable person – the *bonus vir* in his social standard incarnation. In contrast, reckless indifference and deliberate disregard are cognitive and motivational states of mind that clearly imply individual subjective bad faith. The upshot is that by definition there does not seem to be even a theoretical possibility of breaching the duty of care without also breaching the duty of loyalty. This outcome is hard to justify as a matter of policy; it is also hard to reconcile with the statutory mechanism for exculpating directors from liability for breaching the duty of care,[117] since arguably, there couldn't be any liability to exculpate for a breach in good faith. Finally, this interpretation of gross negligence is inconsistent with its interpretation in English law simply as "ordinary negligence with a vituperative epithet."[118]

VII. Conclusion

Recall the virtual exchange between Selden in 1689 and Lord Eldon in 1818 about the chancellor's conscience and his foot.[119] Now fast forward some two hundred years to find Lord Briggs in 2024 expressing both aspects of societal objective and individual subjective conscience:

> [E]quity has to walk something of a tightrope between, on the one hand, the enforcement of the dictates of conscience and, on the other hand, the achievement of predictability. Although conscience may, viewed from an individual perspective, be that still, small voice which tells you quietly that something you can lawfully do is nonetheless wrong, in the law conscience refers to a corpus of societal and perhaps moral values which all upright and reasonable people are expected to share. But there will always be some uncertainty … [120]

That there is an unavoidable tension between these aspects and that every legal system must find a way to address it has been recognized since antiquity. This Article attempts to provide a cursory review of major developments in the thinking about

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[116] *See*, e.g., *Aronson*, *id.*, at 812; *see* recently *In re McDonald's Corp. Stockholder Derivative Litig.*, 291 A.3d 652, 689 (Del. Ch. 2023).

[117] Delaware General Corporation Law, section 102(b)(7).

[118] Armitage v. Nurse [1997] EWCA Civ 1279 (UK); *see* also Spread Trustee Company Ltd v. Hutcheson (Guernsey) [2011] UKPC 13; for a thorough analysis of the jurisprudence of gross negligence *see* Kershaw, *supra* note **Error! Bookmark not defined.**.

[119] *Supra* text to note 51 *et seq*.

[120] Lord Briggs of Westbourne, *Never Say Never: Equity's Reach in the Modern Age*, HKU–Temple Chambers Law Lecture Series (May 6, 2024), https://supremecourt.uk/uploads/speech_lord_briggs_06052024_94faac9b27.pdf.

equity, conscience, and good faith and to demonstrate how those insights are reflected in contemporary corporate law. I argue that (common law) legal systems tend to demand subjective, mental good faith in "vertical" relationships characterized by power and vulnerability, while restraining it with (the court's) objective rationality, whereas objective, societal good faith would be required in "horizontal", contractual relations. Corporations exhibit both types of relations as well as intermediate versions. One could thus find several doctrines of good faith implemented in corporate law and different approaches to good faith in corporate law across systems.

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