

Shifting Contours of Directors’ Fiduciary Duties and Norms in Comparative Corporate Governance

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Jennifer G. Hill
Monash University and ECGI

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Abstract

Corporate law and corporate governance are often called upon to address problems in international and transnational contexts. Financial markets are global and the problems in those markets are often similar, if not identical, even though the capital market structure across jurisdictions differs significantly. The beginning of the 21st century was marked by a spate of international corporate scandals, and the 2007-2009 global financial crisis reflected the global “interconnectedness” of contemporary international capital markets.

These events highlighted the issue of accountability for wrongful conduct by company directors and officers. Modern corporate governance is highly fragmented, encompassing an array of techniques to control the improper exercise of discretion and conflicts of interest. According to Professor Gilson, it is “a braided framework” that encompasses, not only autonomous legal rules, but also non-binding norms.

This Article analyzes, from a comparative perspective, two core aspects of this “braided framework”. First, the Article considers fiduciary duties. It argues that, although there are broad similarities in the scope and operation of fiduciary duties in common law jurisdictions, such as the United States, United Kingdom and Australia, at a more granular level, there are important differences, which may affect the accountability of directors and officers.

Secondly, the Article examines corporate codes. Although generally non-binding, corporate codes can create powerful norms concerning the role of directors and officers and the exercise of their powers. These codes may also interact with fiduciary duties in complex and interesting ways, either complementing, or creating tensions with, those duties. Yet, such codes are by no means homogeneous, and substantive differences can often be traced to the identity of the actors responsible for writing them.

Keywords: director and officer fiduciary duties, comparative law, Delaware corporate law, UK company law, Australian company law, duty of care, corporate governance codes, stewardship codes, norms, shareholders, stakeholders

JEL Classifications: G30, G34, G38, K10, K19, K22, N4, N20, M14

Jennifer G. Hill

Bob Baxt AO Chair in Corporate and Commercial Law
Monash University, Faculty of Law
Building 15, Clayton Campus
Melbourne, NSW 3800, Australia
phone: +61 3 99053838
e-mail: jennifer.hill@monash.edu

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Jennifer G. Hill*

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1. Introduction

Corporate law and corporate governance are often called upon to address problems in international and transnational contexts. Financial markets are global and the problems in those markets are often similar, if not identical, even though the capital market structure across jurisdictions differs significantly. The beginning of the 21st century was marked by a spate of international corporate scandals,¹ including Enron and WorldCom in the United States.² These scandals were similar, but isolated, events. The same cannot be said of the 2007-2009 global financial crisis, which exemplified the global “interconnectedness” of contemporary international capital markets.³

* Bob Baxt AO Chair in Corporate and Commercial Law, Monash University Faculty of Law, Melbourne, Australia; Research Member, European Corporate Governance Institute (ECGI). I would like to thank participants at the Transnational Fiduciary Law Conference, convened by UCI Law and Bucerius Law School in 2019, and to Mitheran Selvendran for research and editing assistance.

¹ These scandals included, for example, Royal Ahold in the Netherlands, Parmalat in Italy, Elan in Ireland, Kirch in Germany, and One.Tel and HIH in Australia. *See, e.g.*, Guido Ferrarini & Paolo Giudici, *Financial Scandals and the Role of Private Enforcement: The Parmalat Case*, in *AFTER ENRON: IMPROVING CORPORATE LAW AND MODERNISING SECURITIES REGULATION IN EUROPE AND THE US* 159 (John Armour & Joseph A. McCahery eds., 2006); Jennifer G. Hill, *Regulatory Responses to Global Corporate Scandals*, 23 *WISC. INT'L. L. J.* 367 (2005).

² *See, e.g.*, Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 *U. CHI. L. REV.* 1233 (2002); John C. Coffee, *What Caused Enron?: A Capsule Social and Economic History of the 1990s*, 89 *CORNELL L. REV.* 269 (2004). *See also* Geoffrey P. Miller, *Catastrophic Financial Failures: Enron and More*, 89 *CORNELL L. REV.* 423 (2004).

³ *See Tony D'Aloisio*, Chairman, Australian Securities and Investments Commission, *Presentation at the Asia Securities Forum in Sydney: Regulatory Response to the Financial Crisis*, 13 (October 12, 2009) .

These corporate crises prompted significant financial market reforms.⁴ Discerning the causes of the crises was no easy feat, yet framing of the underlying problems was critical to the regulatory responses. For example, there were multiple possible explanations for the collapse of Enron, from board failure, to conflicts of interest of auditors and other reputational intermediaries, to defective remuneration structures.⁵ In relation to the global financial crisis, opinion was divided as to whether shareholders were part of the problem, or a potential solution, to excessive risk-taking in corporate law.⁶

These crises highlighted the issue of accountability for improper conduct by company directors and officers. Modern corporate regulation today “occurs in many rooms”.⁷ It is highly fragmented, encompassing an array of techniques to control improper exercise of discretion and conflicts of interest, to ensure accountability. According to Professor Gilson, corporate governance is “a braided framework encompassing legal and non-legal elements”⁸ - not only autonomous legal rules, but also non-binding principles, processes and institutions.⁹

This Article discusses two core aspects of this “braided framework”, which provide constraints on how directors and officers exercise their powers and discretion. The first of these is fiduciary duties, which occupies a central role in common law jurisdictions. The Article examines the fiduciary duties of directors and officers from a comparative law perspective in three common law jurisdictions, the United States, the United Kingdom and Australia. It shows that although,

⁴ Luca Enriques, *Regulators' Response to the Current Crisis and the Upcoming Reregulation of Financial Markets: One Reluctant Regulator's View*, 30 U. PENN. J. INT'L. L. 1147 (2009). Professor Enriques describes the response to the global financial crisis in these terms, however, the same can also be said for the earlier set of scandals, including Enron. See Jennifer G. Hill, *Regulatory Responses to Global Corporate Scandals*, 23 WISC. INT'L. L. J. 367 (2005).

⁵ See generally, John C. Coffee, *What Caused Enron?: A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269 (2004). See also Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233 (2002).

⁶ See e.g., Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497 (2018).

⁷ Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981).

⁸ Ronald J. Gilson, *From Corporate Law to Corporate Governance*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 3, 6 (Jeffrey N. Gordon & Wolf-Georg Ringe, 2018).

⁹ *Ibid.*

at a general level, there are broad similarities across these countries, at a more granular level, there are important differences, which may affect the accountability of directors and officers.

Fiduciary duties were once the primary constraint on the powers and discretion of company directors and officers. Today, however, they are only part of the “braided framework”¹⁰ - one of a number of relevant sources of regulation.¹¹ Corporate codes have become a particularly important aspect of contemporary corporate governance. These codes, although generally non-binding, create powerful norms concerning the role of directors and officers, and expectations regarding their use of power. Fiduciary duties and corporate codes operate holistically, and interact in complex and interesting ways. Corporate codes, for example, provide a matrix in which fiduciary duties operate, and can complement, or create tensions with, those duties. Yet, as this Article shows, corporate codes are by no means homogeneous, and substantive differences can often be traced to the identity of actors behind the relevant codes.

The Article is structured as follows. Part 2 provides a snapshot of the historical basis for classifying company directors and officers as fiduciaries, and the transmission of broadly similar fiduciary law principles applying to company directors and officers across common law jurisdictions. Part 3 discusses the influential “law matters” hypothesis, and critiques its assumption that there are major differences between common law and civil law approaches to corporate regulation, but a unified Anglo-American common law. As Part 3 demonstrates, there are many significant differences relating to fiduciary duties in the corporate law context in the United States, the United Kingdom and Australia. Part 4 shifts focus, to examine soft law, specifically the rise of corporate codes and their function as “norm creators”. It considers the complex ways in which these codes can interact with directors’ and officers’ duties. Part 5 concludes, noting that there can be tensions between the law of fiduciary duties and corporate codes in, for example, the area of shareholder versus stakeholder interests and rights. The Article concludes by suggesting that corporate governance codes are likely to increase, rather than decrease, jurisdictional differences relating to directors’ and officers’ duties.

¹⁰ *Ibid.*

¹¹ John Armour et al., *Agency Problems and Legal Strategies*, in *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 29 (Reinier Kraakman et al., 3d ed. 2017).

2. The Common Heritage of Common Law Directors' Duties in Corporate Law

The law relating to fiduciary duties of company directors was, historically, a national affair.¹² The classification of company directors as “fiduciaries” was a central pillar of early British law, developing by analogy to agents¹³ and trustees,¹⁴ who were considered archetypical fiduciaries.¹⁵ The famous 1742 UK decision, *Charitable Corp v. Sutton* (“Sutton’s case”),¹⁶ laid the groundwork for modern directors’ duties. In that case, Lord Hardwicke LC stated that “by accepting a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence”.¹⁷ Throughout the 19th century, British company law was notoriously *laissez-faire*,¹⁸ and fiduciary duties served as the primary constraint on directors’ discretion and conduct.¹⁹

Numerous rationales and justifications have been given for the imposition of fiduciary duties on particular social actors. Some scholars have stressed the role of trust, dependence, and vulnerability of the beneficiary in the relationship.²⁰ From a historical perspective, the imposition of fiduciary duties on company directors and officers was justifiable under this

¹² See Jennifer G. Hill & Matthew Conaglen, *Directors’ Duties and Legal Safe Harbours: A Comparative Analysis*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 305 (D. Gordon Smith & Andrew S. Gold eds., 2018).

¹³ See Deborah A. DeMott, *Fiduciary Principles in Agency Law*, in FIDUCIARY PRINCIPLES IN AGENCY LAW (Evan J. Criddle et al., eds., 2018) (stating that, under the common law, “agency relationships are categorically treated as fiduciary” and noting that the fiduciary character of the agency relationship is directly linked to the potentially “grave impact” for the principal of the agent’s actions).

¹⁴ See Matthew Conaglen, *Interaction Between Statutory and General Law Duties Concerning Company Director Conflicts*, 31 COMPANY & SECURITIES L.J. 403, 404-05 (2013).

¹⁵ *Hospital Products Ltd v. United States Surgical Corp.*, 156 C.L.R. 41, 68 (1984).

¹⁶ *Charitable Corporation v. Sutton*, 2 Atk. 400 (1742).

¹⁷ *Id.*, 406. See also Joseph Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1096-7 (1968); *ASIC v. Cassimatis* (No 8) [2016] FCA 1023, [417]ff. According to *Sutton*’s case, the touchstone for assessing whether directors had acted with reasonable diligence was the standard of “gross neglect”. See *Charitable Corporation v Sutton*, 2 Atk. 400 (1742).

¹⁸ See Brian R. Cheffins, CORPORATE OWNERSHIP AND CONTROL: BRITISH BUSINESS TRANSFORMED, 35, 194, 273 (2008); L.C.B. Gower, *The English Private Company*, 18 LAW & CONTEMP. PROBS. 535, 536-37 (1953)

¹⁹ See generally Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, U. ILL. L. REV. 507, 553-56 (2019).

²⁰ See e.g., Leonard I. Rotman, *Fiduciary Law’s “Holy Grail”: Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 B.U. L. REV. 921, 933 (2011).

rationale. At the time of Berle and Means' seminal 1932 text, *The Modern Corporation and Private Property*,²¹ for example, shareholders were viewed as a dispersed and vulnerable group, in need of legal protection, due to their inability to act collectively.²² Today, however, the dominant shareholders in some jurisdictions, including the United States and United Kingdom, are powerful institutional investors.²³ Although these shareholders are hardly vulnerable, the imposition of fiduciary duties on directors and officers can still be justified on other rationales, such as the breadth of their discretionary powers,²⁴ and their control of "critical resources belonging to the beneficiary".²⁵

There are strong similarities in the approach to modern fiduciary duties of company directors and officers across common law jurisdictions, such as the United Kingdom, the United States and Australia. Each has equitable and common law ("general law") duties applying to directors, that are designed to address Adam Smith's classic problems of "negligence and profusion",²⁶ or, in modern economic parlance, "agency costs".²⁷

These broad jurisdictional similarities regarding the duties of company directors and officers are hardly surprising. They are clear historical examples of legal transplantation,²⁸ whereby the

²¹ ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

²² Although *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) concerned a two-man joint venture, its language encapsulates a "shareholder vulnerability" rationale for the imposition of fiduciary duties on company directors and officers. *Meinhard v. Salmon* is, however, rarely cited in the public corporation context by the Delaware courts.

²³ See e.g. Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence and Policy* (forthcoming, COLUM. L. REV.).

²⁴ PAUL B. MILLER, THE IDENTIFICATION OF FIDUCIARY RELATIONSHIPS, in *THE OXFORD HANDBOOK OF FIDUCIARY LAW* 367, 379 (Evan J. Criddle et al. eds., 2019).

²⁵ D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399 (2002). In the corporate law context, technically those resources "belong" to the corporation, which is also the beneficiary of fiduciary duties.

²⁶ ADAM SMITH, *THE WEALTH OF NATIONS: ON JOINT STOCK COMPANIES* (1776).

²⁷ See, e.g., Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

²⁸ See generally David Cabrelli & Matthias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109 (2015). For discussion of some of the difficulties in transplanting law, See, e.g., Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); Amir N. Licht, *Legal Plug-ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform*, 22 BERKELEY J. INT'L. L. 195 (2004);

UK model of directors' duties was transmitted to common law countries around the world.²⁹ In the United States, for instance, the Delaware Court of Chancery acknowledged directors as fiduciaries in the 1926 decision in *Bodell v. General Gas and Electric Corp.*,³⁰ providing the basis for Delaware law's equitable duties of loyalty and care.³¹ Australia also took its lead from the United Kingdom with regard to corporate law, including directors' duties. The 1925 UK decision, *In re City Equitable Fire Insurance Co.*,³² for example, represented the leading decision in Australia in the area of directors' duty of care for over 70 years. Directors' "no conflict" and "no profit" duties in Australia were also firmly based on UK case law.³³

3. The "Law Matters" Hypothesis and Uncommon Common Law Approaches to Directors' Fiduciary Duties

The broad jurisdictional similarities between the UK, US and Australia accord with the influential "law matters" hypothesis, promulgated by La Porta et al. approximately 20 years ago.³⁴ This hypothesis claimed that the structure of capital markets around the world is directly linked to a country's corporate governance regime. According to the hypothesis, "legal investor

Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

²⁹ See Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285, 286 (2008) (arguing that historically legal traditions were spread around the globe primarily by conquest and colonization. Transmission of British common law principles exemplifies the latter method of transmission).

³⁰ 132 A. 442 (Del. Ch. 1926) (aff'd, 140 A.2d. 264 (Del. 1927)). See generally, Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PENN. J. BUS. L. 675, 680-81 (2009).

³¹ Under modern Delaware law, there was some uncertainty as to whether there existed a third duty, namely the duty of good faith. It is now accepted, however, that the so-called "duty of good faith" is not a stand-alone duty, but is rather a component of the broader duty of loyalty. See generally *id.*, 679. For a detailed analysis of the historical development of directors' fiduciary duties in the United States, see M.M. McMurray, *An Historical Perspective on the Duty of Care, the Duty of Loyalty and the Business Judgment Rule*, 40 VAND. L. REV. 605 (1987).

³² [1925] Ch 407; See generally Rosemary Teele-Langford et al., *The Origins of Company Directors' Statutory Duty of Care*, 37 SYD. L. REV. 489, 507-8 (2015).

³³ Pivotal UK cases in this area included, for example, *Aberdeen Railway Co v. Blaikie Bros*, 1 Macq 461 (1854); *Transvaal Land Co v. New Belgium (Transvaal) Land and Development Co* [1914] Ch 488; *Cook v. Deeks* [1916] 1 AC 554; *Regal (Hastings) Ltd v. Gulliver* [1967] 2 AC 134; *Industrial Development Consultant Ltd v. Cooley* [1972] 1 WLR 443.

³⁴ See Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999).

protection is a strong predictor of financial development”,³⁵ and it forecast that jurisdictions with a high level of minority shareholder protection would develop deep dispersed ownership structures.³⁶ “Legal origins” played a central role, because the study concluded that common law jurisdictions, within the British “legal family”,³⁷ provided stronger minority shareholder protection than civil law jurisdictions.³⁸ One feature of the common law that the study viewed as particularly advantageous - and which is central to the development of the law of fiduciary duties - was the important role of independent judges, who relied on legal reasoning to decide cases.³⁹

The “law matters” hypothesis provided support for convergence theory,⁴⁰ via a process of horizontal imitation. One of the implications of the hypothesis was that jurisdictions with substandard legal rules would follow the siren song of economic efficiency, by voluntarily adopting superior rules.⁴¹ The study proved to be extraordinarily influential in defining a set of problems and solutions,⁴² and had real world consequences. On the premise that good corporate governance can improve national economic performance, major international organizations, such as the OECD, developed model corporate governance codes for ready international

³⁵ Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285, 286 (2008).

³⁶ See OECD, *OECD Corporate Governance Factbook 2019*, 17 (which classifies only four countries, namely the United States, the United Kingdom, Australia and Canada) as having a dispersed ownership structure for listed companies).

³⁷ La Porta et al. included 18 common law jurisdictions in their original sample, including United States, Canada, Australia, India. See Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113, 1119 (1998).

³⁸ See David A. Skeel Jr., *Corporate Anatomy Lessons*, 113 YALE L.J. 1519, 1544-45 (2004).

³⁹ See generally David Cabrelli & Matthias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109, 118-20 (2015).

⁴⁰ For an overview of the convergence theory, and the convergence-divergence debate, see Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28 (Jeffrey N. Gordon & Wolf-Georg Ringe, 2018); *Convergence and Persistence in Corporate Governance* (Jeffrey N. Gordon & Mark J. Roe eds., 2004); Jennifer G. Hill, *The Persistent Debate About Convergence in Comparative Corporate Governance*, 27 SYD. L. REV. 743 (2005).

⁴¹ Hill, *id.*, 744.

⁴² See, e.g., Stijn Claessens & Burcin Yurtoglu, *Corporate Governance and Development – An Update*, GLOBAL CORPORATE GOVERNANCE FORUM FOCUS 10, International Finance Corporation, World Bank Group, 11 (2012); Steve Kaplan & Luigi Zingales, *How “Law and Finance” Transformed Scholarship, Debate*, CHICAGO BOOTH REVIEW, Mar. 5, 2014.

transplantation.⁴³ The World Bank also adopted the methodology of the “law matters” study, applying it to a number of working papers, including the bank’s *Doing Business* reports.⁴⁴

In spite of its influence, the law matters hypothesis attracted widespread academic criticism,⁴⁵ including criticism of its methodology.⁴⁶ Commentators also disputed the study’s stark divide between common law and civil law legal systems,⁴⁷ and between supposedly flexible judge-made law under a common law system and rigid codification in civil law jurisdictions.⁴⁸ Consistent with these critiques, the idea that directors’ fiduciary duties constitute a unique

⁴³ See, e.g., G20/OECD, *Principles of Corporate Governance* (OECD Publishing, Paris, 2015), 3 (stating that the Principles “help policy makers evaluate and improve the legal, regulatory, and institutional framework for corporate governance, with a view to supporting economic efficiency, sustainable growth and financial stability”). Cf, however, Amir N. Licht, *Legal Plug-Ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform*, 22 BERKELEY J. INT’L. L. 195, 196 (2004) (arguing that, in the “long and checkered” history of legal transplantation, “direct transplantation efforts were largely futile in generating Western-like economic growth”).

⁴⁴ See David Cabrelli & Matthias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109, 120 (2015). The World Bank and the International Monetary Fund (IMF) were already interested in the connection between corporate governance and economic outcomes. During the 1997 East Asian Financial Crisis, the World Bank and the IMF included corporate governance reform as a condition to financial assistance. See Ronald J. Gilson, *From Corporate Law to Corporate Governance*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 3 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018); Timothy Lane, et al., *IMF-Supported Programs in Indonesia, Korea, and Thailand*, 72-73 (Int’l Monetary Fund Occasional Paper No. 178, 1999); John M. Broder, *Asia Pacific Talks Vow Tough Action on Economic Crisis*, N.Y. TIMES, Nov. 26, 1997, p.A1.

⁴⁵ See Stijn Claessens & Burcin Yurtoglu, *Corporate Governance and Development – An Update*, GLOBAL CORPORATE GOVERNANCE FORUM FOCUS 10, International Finance Corporation, World Bank Group, 12 (2012).

⁴⁶ See, e.g., Holger Spamann, *The ‘Anti-Director Rights Index’ Revisited*, 23 REV. FIN. STUD. 467 (2010). La Porta et al. responded to methodological criticism of their original study in several later papers. See David Cabrelli & Matthias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109, 123 (2015).

⁴⁷ See David A. Skeel Jnr, *Corporate Anatomy Lessons*, 113 YALE L.J. 1519, 1546; Katharina Pistor et al., *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT’L. ECON. L. 791, 799 fn. 27 (2002).

⁴⁸ See David Cabrelli & Matthias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109, 117-118 (2015). Cabrelli and Siems note that common law and civil law are regarded as diverging with respect to “their relevant sources of law and legal methods” (*id.* 117). They also state that whereas common law judges are considered to solve individual disputes by deductive reasoning, civil law judges are regarded as “law-appliers”, who are expected to follow codified rules (*id.* 118). See, e.g., Cally Jordan, *The Conundrum of Corporate Governance*, 30 BROOK. J. INT’L. L. 983, 1005, 1005-68 (2005) (arguing that the distinction between common law and civil law under the “law matters” hypothesis is over-generalized, and that the jurisdictional line between these two forms of regulation is far more blurred in practice).

features of the common law may be misleading, given that functional equivalents to fiduciary duties exist in civil law jurisdictions.⁴⁹

In addition to exaggerating the differences between common law and civil law legal families, the “law matters” hypothesis also arguably overstated the similarities within the common law world itself.⁵⁰ Although it is often assumed that there is a unified Anglo-American approach (and a unified Anglo-Australian approach), significant differences appear across these jurisdictions when one shifts from a general, to a more granular, level.⁵¹

First, US and UK corporate law had different organizational starting points, which led to different corporate law trajectories, including in the area of directors’ duties.⁵² Whereas the organizational origins of US corporate law were British royal chartered corporations, which had strong quasi-public roots,⁵³ British company law derived from unincorporated joint stock (or “deed of settlement”) companies, which were quintessentially private bodies.⁵⁴ These

⁴⁹ See, e.g., Martin Gelter & Geneviève Helleringer, *Fiduciary Principles in European Civil Law Jurisdictions*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 583 (Evan J. Criddle et al. eds., 2019). In the Asian civil law context, see Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions*, 25 DEL. J. CORP. L. 189 (2000).

⁵⁰ See, e.g., Ruth V. Aguilera et al., *Corporate Governance and Social Responsibility: A Comparative Analysis of the UK and US*, 14 CORP. GOV: INT’L REV. 147, 147-48 (2006); Steven Toms & Mike Wright, *Divergence and Convergence within Anglo-American Corporate Governance Systems: Evidence from the US and UK 1950–2000*, 47 BUS. HIST. 267, 267-68 (2005).

⁵¹ Jennifer G. Hill, *Subverting Shareholder Rights: Lessons from News Corp.’s Migration to Delaware*, 63 VAND. L. REV. 1, 8-9 (2010).

⁵² See generally Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, U. ILL. L. REV. 507, 541-47 (2019).

⁵³ See *id.*, 541-44; L.C.B. Gower, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. 1369, 1370-72 (1956); Lawrence M. Friedman, A HISTORY OF AMERICAN LAW 159ff (4th ed. 2019). As a result, most early US chartered businesses were regarded as “public agencies”. See Oscar Handlin and Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 22 (1945); Samuel Williston, *History of the Law of Business Corporations Before 1800: Part I*, 2 HARV. L. REV. 105, 110-11 (1888). In Britain, royal chartered companies reflected the theory that the corporate form was a body, approved by the state to act in “the national interest”. See C.A. Cooke, CORPORATION, TRUST AND COMPANY: AN ESSAY IN LEGAL HISTORY 78 (1950).

⁵⁴ Unincorporated deed of settlement companies were effectively large partnerships with strong contractual elements, which also made creative use of trust law to artificially replicate the benefits of incorporation. See John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2157-66 (2016). See generally Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, U. ILL. L. REV. 507, 544-47 (2019).

different organizational origins affected the scope of directors' discretion and the role of fiduciary duties.⁵⁵

Second, whereas under Delaware law, all duties owed by directors, including the duty of care, tend to be classified as "fiduciary",⁵⁶ UK and Australian judicial decisions have adopted a narrower view of fiduciary duties,⁵⁷ emphasizing that only proscriptive duties (or duties requiring "self-denial")⁵⁸ are fiduciary in nature.⁵⁹ On this more restrictive interpretation, only the "no conflict" and "no profit" duties qualify as fiduciary. Other duties, including the duty of care⁶⁰ and the duty to act in good faith in the best interests of the company, are non-fiduciary in nature.⁶¹ This difference in classification can affect the remedies available for breach of duty.

Third, in relation to the duty of loyalty, there is no equivalent under UK or Australian case law to the US concept of "entire fairness".⁶² UK and Australian courts are simply not permitted to evaluate directors' conduct from the perspective of fairness.⁶³ Also, whereas independent directors in the United States have played a significant role as a sanitizing device for approving conflicts of interest,⁶⁴ UK and Australian company law primarily reserve this role for

⁵⁵ See generally Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, U. ILL. L. REV. 507, 541ff (2019).

⁵⁶ See Matthew Conaglen, FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES 13 (2010).

⁵⁷ See Matthew Conaglen, *Interaction Between Statutory and General Law Duties Concerning Company Director Conflicts*, 31 COMPANY & SECURITIES L.J. 403, 405ff (2013).

⁵⁸ Martin Gelter & Geneviève Helleringer, *Fiduciary Principles in European Civil Law Jurisdictions*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 583 (Evan J. Criddle et al. eds., 2019).

⁵⁹ See also The Honourable T.F. Bathurst, Chief Justice, Supreme Court of New South Wales, *Director's, Trustee and Fiduciary Duties in the Context of Domestic Corporate Arrangements*, Annual Family Law Conference, Tasmania, 13 Oct. 2012, [29] (citing *Breen v. Williams*, 186 CLR 71, 93, 137 (1996); *Pilmer v Duke Group Ltd (in liq)*, 207 CLR 165, 270-271 (2001)).

⁶⁰ Cf, however, William M. Heath, *The Director's 'Fiduciary' Duty of Care and Skill: A Misnomer*, 25 COMPANY & SECURITIES L.J. 370 (2007); J.D. Heydon, "Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?", in *Equity in Commercial Law* 185 (Simone Degeling and James Edelman eds., 2005).

⁶¹ See, e.g., *Aequitas Ltd v. AEFC Leasing Pty Ltd*. [2001] NSWSC 14 at [284] (per Austin J.).

⁶² See generally Deborah A. DeMott, *The Figure in the Landscape: A Comparative Sketch of Directors' Self-Interested Transactions*, 62 LAW & CONTEMP. PROBS. 243 (1999).

⁶³ *Aberdeen Railway Co v. Blaikie Bros.*, 1 Macq 461 (1854).

⁶⁴ See James D. Cox, "Corporate Governance in the United States: The Evolving Role of the Independent Board", in C.K. Low (ed.), *Corporate Governance: An Asia-Pacific Critique* 379, 388 (2002), stating

shareholders.⁶⁵

Fourth, the sources of directors' duty vary in contemporary corporate law across common law jurisdictions. In Delaware, directors' fiduciary duties, in accordance with their ancestry, are purely equitable.⁶⁶ Modern UK and Australian law, on the other hand, encompasses statutory directors' duties, which interact differently with general law fiduciary duties.⁶⁷ Under the UK model, directors' statutory duties, which were introduced in 2006,⁶⁸ eradicate and replace the general law principles,⁶⁹ but are not necessarily co-extensive with those general law principles. Section 172(1) of 2006 UK Companies Act,⁷⁰ for example, creates a statutory directors' duty that appears to lack any prior general law counterpart. The provision requires directors to act in the way they consider "in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole".⁷¹ Adopting an "enlightened shareholder value" approach to corporate governance,⁷² the section states that, in fulfilling this duty, directors must consider the interests of a non-exhaustive list of stakeholders and the impact of corporate actions on the community and the environment.⁷³ Australia's statutory directors'

that "[t]he most noticeable aspect of American corporate governance is the law's repeated resort to the independent director as a cleansing agent".

⁶⁵ See *Regal (Hastings) Ltd v. Gulliver* [1967] 2 AC 134; *Furs Ltd v. Tomkies*, 54 CLR 583 (1936); *Winthrop Investments Ltd v. Winns Ltd* [1975] 2 NSWLR 666. See also *Corporations Act 2001* (Aust), Chapter 2E (regarding authorization of related party transactions).

⁶⁶ See generally, Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PENN. J. BUS. L. 675, 677-78 (2009).

⁶⁷ See generally Jennifer G. Hill & Matthew Conaglen, *Directors' Duties and Legal Safe Harbours: A Comparative Analysis*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 305 (D. Gordon Smith & Andrew S. Gold eds., 2018).

⁶⁸ See *Companies Act 2006*, c. 46 (UK), Pt 10, Ch. 2.

⁶⁹ Yet, in an interesting example of statutory interpretation, the UK legislation states that the statutory directors' duties should be interpreted in accordance with these now-defunct general law principles. See *Companies Act 2006*, s. 170(4) (UK).

⁷⁰ See *Companies Act 2006*, c. 46 (UK), s. 172(1).

⁷¹ *Ibid.* See generally Paul L. Davies & Sarah Worthington, *GOWER & DAVIES PRINCIPLES OF MODERN COMPANY LAW* [16-37] - [16-39] (10th ed., 2016).

⁷² See *id.*, [16-38]; Andrew Keay, *The Duty to Promote the Success of the Company: Is it Fit for Purpose in a Post-Financial Crisis World?*, in *DIRECTORS' DUTIES AND SHAREHOLDER LITIGATION IN THE WAKE OF THE FINANCIAL CRISIS* 50, 60 (Joan Loughrey ed., 2013); Andrew Keay, *Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's "Enlightened Shareholder Value Approach"*, 29 SYD. L. REV. 577 (2007).

⁷³ See generally Paul L. Davies & Sarah Worthington, *Gower & Davies Principles of Modern Company Law* [16-37] - [16-39] (10th ed., 2016). In spite of this apparently "public" focus in s. 172(1), however,

duty scheme is quite different from the UK model, in that its statutory duties⁷⁴ are “additive to the general law rather than substitutionary”.⁷⁵ Also, Australian lawmakers considered, but rejected the need to introduce any statutory duty involving stakeholder interests, akin to s. 172(1) of the UK Act.⁷⁶

Fifth, the scope of the safe harbors providing protection for breach of duty by directors differs across these jurisdictions.⁷⁷ This disparity is particularly evident in the context of the duty of care.⁷⁸ In Delaware, directors receive a high level of protection against monetary liability for breach of the duty of care as a result of the capacious US business judgment rule,⁷⁹ combined with legislative approval, under Del GCL § 102(b)(7), of charter exculpation provisions that

the duty remains firmly shareholder-oriented in practice, because the UK statutory directors’ duties are owed to the company, and enforceable only by the company, or its shareholders in derivative suit. *See* Companies Act 2006, c. 46 (UK), s 170(1); Virginia E. Harper Ho, *Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder- Stakeholder Divide*, 36 J. CORP. L. 59, 79 (2010).

⁷⁴ *See* Corporations Act 2001 (Aust.), ss. 180-184.

⁷⁵ *See* G.F.K. Santow, *Codification of Directors’ Duties*, 73 AUST. L.J. 336 (1999) (also noting that, historically, Australia has placed more emphasis on corporate legislation than the United Kingdom). Australian corporate legislation explicitly preserves the operation of directors’ general law duties alongside the statutory duties. *See* Corporations Act 2001 (Aust), s. 185. Also, the duties in these parallel regimes are not necessarily coterminous. *See* Jason Harris et al., *Shareholder Primacy Revisited: Does the Public Interest Have Any Role in Statutory Duties?*, 26 COMPANY & SECURITIES L.J. 355, 361ff (2008).

⁷⁶ Two Australian government reports rejected calls to introduce a statutory provision like s 172(1) of the UK Companies Act 2006, on the basis that the UK provision was overly prescriptive, unnecessary, and would result in confusion in the Australian context. *See* Parliament of Australia, Parliamentary Joint Committee on Corporations and Financial Services (‘PJC’), *Corporate Responsibility: Managing Risk and Creating Value* (2006); Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations: Report* (2006).

⁷⁷ *See generally* Jennifer G. Hill & Matthew Conaglen, *Directors’ Duties and Legal Safe Harbours: A Comparative Analysis*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 305 (D. Gordon Smith & Andrew S. Gold eds., 2018).

⁷⁸ *See, e.g.*, Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 WM. & MARY L. REV. 519 (2012).

⁷⁹ The US business judgment rule assumes that the directors, in making a business decision, have 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”. *See* *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). *See also* *Gagliardi v. Trifoods International, Inc.*, 683 A. 2d 1049, 1052–3 (Del. Ch. 1996), stating that the US business judgment rule will protect directors, provided they “act in good faith and meet minimal proceduralist standards of attention”. There has been academic debate in the United States as to whether the duty of care is shaped by the business judgment rule, or is doctrinally separate from, and merely protected by, the business judgment rule. For the latter approach, see Lyman Johnson, *The Modest Business Judgment Rule*, 55 BUS. LAW. 625 (2000); D. Gordon Smith, *The Modern Business Judgment Rule*, in, *Research Handbook on Mergers and Acquisitions* 83 (Claire A. Hill and Steven Davidoff Solomon eds., 2016).

exclude liability for negligence, including gross negligence.⁸⁰ The breadth of this protection has attracted criticism in recent times.⁸¹ Indeed, even aspects of the duty of loyalty, long treated as a the immutable core of fiduciary obligation in Delaware,⁸² can now be waived under Delaware law.⁸³

In the United Kingdom and Australia, the protection offered to directors for breach of fiduciary duty, including the duty of care, is far less generous. The United Kingdom has no business judgment rule,⁸⁴ and Australia's statutory business judgment rule,⁸⁵ although ostensibly modeled on the US version,⁸⁶ operates in an extremely narrow way as a result of judicial interpretation.⁸⁷ Whereas US statutory provisions, such as § 102(b)(7) of the Delaware code,

⁸⁰ See, e.g., *Malpiede v. Townson*, 780 A.2d 1075 (Del. 2001). Some US states, however, go further than Del GCL § 102(b)(7) regarding the scope of permissible exculpation. For example, Del GCL § 102(b)(7) only authorizes exoneration of directors, while other states, such as Nevada, Louisiana and New Jersey, also authorize protection of company officers. See, e.g., Nev. Rev. Stat. § 78.037(2) (2013); LA Rev. Stat. § 12:24(C)(4) (2011); NJ Rev. Stat. § 14A:2-7(3) (2013).

⁸¹ See, e.g., John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 *J. Legal Analysis* 35, 61 (2014) (arguing that that where systemic risk exists, the US business judgment rule can promote excessive risk-taking by directors and officers of financial institutions, justifying the imposition of liability rules); Holger Spamann, *Monetary Liability for Breach of the Duty of Care?*, 8 *J. LEGAL ANALYSIS* 337, 339 (2016) (arguing that the complete exclusion of liability for breach of the duty of care in the United States is not necessarily justified by standard policy rationales and should be reassessed).

⁸² See Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 *U. PENN. J. BUS. L.* 675, 687 (2009).

⁸³ Del GCL § 122(17) was amended in 2000 to permit waiver of the corporate opportunity doctrine. See generally Gabriel V. Rauterberg & Eric L. Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 *COLUM. L. REV.* 1075 (2017). See also Leo E. Strine & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, in *RESEARCH HANDBOOK ON PARTNERSHIPS, LCS AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS* 11, 12 (Robert W. Hillman & Mark J. Loewenstein eds., 2015) (discussing the growing trend toward waiver of the corporate opportunity doctrine in the context of limited liability companies (LLCs) and limited partnerships (LPs)).

⁸⁴ Although the concept of a business judgment rule is alien to UK company law, UK judges are, however, reluctant to hold directors liable for honest mistakes of judgment. See, e.g., *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, at 835; *Turquand v. Marshall*, LR 4 Ch App 376, 386 (1869); *Lagunas Nitrate Co v. Lagunas Syndicate* [1899] 2 Ch. 392. See also M.J. Trebilcock, *The Liability of Company Directors for Negligence*, 32 *MOD. L. REV.* 499, 500 (1969); André Tunc, *The Judge and the Businessman*, 102 *L.Q.R.* 549 (1986).

⁸⁵ Corporations Act 2001 (Aust), s. 180(2).

⁸⁶ Australia's statutory business judgment rule, which was introduced in 2000, is found in s 180(2) of the Corporations Act 2001. For background regarding the introduction of the statutory business judgment rule in Australia, see Mark Byrne, *Directors to Hide from a Sea of Liabilities in a New Safe Harbour*, 22 *AUST. J. CORP. L.* 255 (2008).

⁸⁷ In contrast to its US counterpart, the courts have interpreted the Australian statutory business judgment rule in such a way as to place the onus of proof on the defendant directors, rather than on the plaintiff. See, e.g., *ASIC v. Rich* [2009] NSWSC 1229; (2009) 75 *ACSR* 1, [7269]; *ASIC v Fortescue Metals*

expressly authorize companies to exculpate directors from liability for negligence, UK and Australian legislation expressly prohibits such exoneration.⁸⁸

Finally, enforcement mechanisms for breach of directors' duties differ across these three common law jurisdictions. Delaware and the United Kingdom both rely primarily on private enforcement of directors' duties.⁸⁹ Although a high percentage of civil actions filed in the Delaware Court of Chancery involve questions of fiduciary duty,⁹⁰ only those involving breach of the duty of loyalty tend to succeed, given the legal safe harbors available for negligence. In the United Kingdom, on the other hand, very little private litigation for breach of directors' duties is ever commenced, due to procedural obstacles.⁹¹

Australia diverges radically from both Delaware and the United Kingdom in the area of enforcement of directors' duties, because it adopts a primarily public enforcement model for breach of the statutory duties of directors and officers.⁹² This regime enables the business regulator, the Australian Securities and Investments Commission (ASIC), to bring legal actions for contravention of the statutory duties. It appears that this mode of enforcement has affected the substance of directors' duties in Australia, shifting them away from the private to the public

Group Ltd, 190 FCR 364; 274 ALR 731; [2011] FCAFC 19, [197] (2011); ASIC v. Mariner Corp. Ltd (ACN 002 989 782), 327 ALR 95, [485] (2015).

⁸⁸ See Companies Act 2006 (UK), s. 232(1); Corporations Act 2001 (Aust), ss. 199A–199C).

⁸⁹ In Delaware, for example, actions for breach of fiduciary duty can be brought by the company, or by shareholders in direct suits, derivative litigation or, most commonly, by means of class actions. See Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 167-69 (2004). In the UK context, there are, however, some aspects of public enforcement. See John Armour et al., *Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States*, 6 J EMP. LEGAL STUD. 687, 716-17 (2009).

⁹⁰ Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 165ff (2004).

⁹¹ A number of procedural differences make the United Kingdom a less hospitable jurisdiction for corporate litigation than Delaware. For example, class actions and contingency fees are available in Delaware, but not the United Kingdom, which moreover operates on a “loser pays” basis. See John Armour et al., *Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States*, 6 J EMP. LEGAL STUD. 687, 692-93 (2009).

⁹² Although historically, Australia had a UK-style private enforcement model, this changed in 1993, when it introduced the statutory “civil penalty regime”. This is a distinctive public enforcement regime for certain contraventions of the Corporations Act 2001, including the statutory directors' duties. For the full list of civil penalty provisions, including the statutory directors' duties, see Corporations Act 2001 (Aust), s. 1317E.

realm.⁹³ ASIC and the courts have, for example, stated that these statutory duties are closely interlinked with the “public interest”,⁹⁴ and that breach of the duties constitutes, not only a private, but also a public wrong.⁹⁵ In the wake of a recent high profile Banking Royal Commission⁹⁶ in Australia, ASIC has indicated that it intends to use its enforcement powers in this area more aggressively in the future.⁹⁷

4. Codes, Norms and Fiduciary Duties

The behavior of corporate actors is not only shaped by enforceable laws. It is also shaped by social norms and governance practices, which may indeed be more important in this respect than formal legal rules.⁹⁸ Norms can interact in complex ways with fiduciary law,⁹⁹ to drive greater convergence or divergence across jurisdictions. Furthermore, the lines between formal legal rules and norms can sometimes be blurred and hard to define,¹⁰⁰ and there can be

⁹³ See Michelle Welsh, *Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia*, 42 FED. L. REV. 217, 223-28 (2014); Jason Harris et al., *Shareholder Primacy Revisited: Does the Public Interest Have Any Role in Statutory Duties?*, 26 COMPANY & SECURITIES L.J. 355 (2008).

⁹⁴ See Australian Securities and Investments Commission, *ASIC’s Approach to Enforcement*, Information Sheet 151 (September 2013), 6.

⁹⁵ See, e.g., ASIC v. Cassimatis (No 8) [2016] FCA 1023, [455], [461], [496] ff, [503].

⁹⁶ Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, Final Report, Vol. 1 (2019).

⁹⁷ In the Financial Services Royal Commission’s Final Report, Commissioner Hayne stated that the regulator’s first question, upon becoming aware of any entity’s breach of the law, should be “Why not litigate?”. *Ibid*, 427. It is anticipated that this will result in a far greater volume of litigation, including for breach of statutory directors’ duties, in the future. See, e.g., Michael Pelly, *ASIC Set for Hayne Court Blitz*, AUST. FIN. REV., Aug. 19, 2019. See also Australian Securities and Investments Commission, *ASIC Enforcement Update: January to June 2019*, Report 625, Aug. 2019, 3.

⁹⁸ Another criticism sometimes made of La Porta et al.’s “law matters” hypothesis is that it focused solely on legal rules and failed to recognise the important role played by social norms and governance practices. See generally John C. Coffee, *Do Norms Matter? A Cross-Country Evaluation*, 149 U. PA. L. REV. 2151, 2154ff (2001).

⁹⁹ See generally Matthew Harding, *Fiduciary Law and Social Norms*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 797, 797-99 (Evan J. Criddle et al. eds., 2019).

¹⁰⁰ See John C. Coffee, *Do Norms Matter? A Cross-Country Evaluation*, 149 U. PA. L. REV. 2151 (2001). Cf, however, a recent UK corporate governance dispute, which relied on a clear distinction between legal rules and norms. In 2019, Daejan Holdings (“Daejan”) constituted the only listed UK company without any women on its board of directors. It was reported that, Sir Philip Hampton, leader of a government review to increase the number of women in UK listed company boardrooms, wrote to Daejan calling on it to alter its all-male board policy, in accordance with prevailing corporate governance norms. According to the report, Daejan’s response stated, “Whilst we appreciate the views of your review body they are

movement in either direction between so-called “hard law”, comprising enforceable legal rules, and “soft law”, encompassing norms.¹⁰¹

Corporate governance codes have proliferated around the world in recent decades.¹⁰² They have focused greater attention on norms and governance practices, many of which intersect with the dictates of fiduciary duties. These codes operate in a parallel universe to corporate law. They can, nonetheless, affect the scope of directors’ discretion, the nature of their fiduciary obligations and enforcement practices. Codes epitomize the shift from corporate law to corporate governance, a shift from “from legal rules standing alone to legal rules interacting with non-legal processes and institutions”.¹⁰³

Corporate governance codes are by no means uniform across jurisdictions and, in some countries, have been subject to almost continuous amendment.¹⁰⁴ The provisions of these codes sometimes complement and bolster key directors’ duties.¹⁰⁵ For example, corporate governance codes typically stress the need for independent directors,¹⁰⁶ as a means of providing procedural protection against managerial conflicts of interest. However, in other instances, code provisions may create tension with established principles of fiduciary law.

not enshrined in law or any formal regulation and we are not obliged to comply with them”. See Helen Cahill, *Inside the VERY Secret Boardroom that's Firmly CLOSED to Women*, DAILY MAIL, Jun. 3, 2019.

¹⁰¹ E.g., although the appointment of independent directors listed public company boards was a prevalent practice in the United States, there was no specific rule requiring this practice prior to the introduction of the New York Exchange Stock Exchange corporate governance rules following the Enron and WorldCom scandals. See § 303A of the Stock Exchange's Listed Company Manual. NYSE, Inc., Listed Company Manual (2003).

¹⁰² See Alice Klettner, *Corporate Governance Codes and Gender Diversity: Management-Based Regulation in Action*, 39 U.N.S.W. L.J. 715 (2016) (noting that in 1999, 24 countries were reported to have a code of corporate governance in place, compared to 64 countries in 2008, and 93 countries in 2015). The full list of current international codes is available on the European Corporate Governance Institute (ECGI) website at <https://ecgi.global/content/codes>.

¹⁰³ Ronald J. Gilson, *From Corporate Law to Corporate Governance*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 3 (Jeffrey N. Gordon & Wolf-Georg Ringe, 2018).

¹⁰⁴ See, e.g., Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMP. L. 1, 10 (2011) (criticizing the “fast-paced, code changes” in Germany).

¹⁰⁵ See, e.g., ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations*, Commentary to Recommendation 2.6, fn 39 (Feb. 2019) (explicitly referencing a leading Australian case on the duty of care, *ASIC v. Healey* [2011] FCA 717, in its discussion of induction of new directors).

¹⁰⁶ *Ibid*, Recommendations 2.3 and 2.4 (Feb. 2019). Note, however, that there are many differences in the interpretation of “independence” across jurisdictions. See generally INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (Dan W. Puchniak et al. eds., 2017).

Nowhere is this more apparent than in the context of shareholder versus stakeholder rights and interests.

The blueprint for the international corporate governance codes is the UK Corporate Governance Code, which can be traced back to the 1992 Cadbury Committee.¹⁰⁷ These codes are typically non-binding, yet they can create powerful norms. They emanate from a variety of sources, including government agencies, stock exchanges and business organizations,¹⁰⁸ and this can itself affect the norms they create. The content of these codes differs considerably, as does their enforcement and administration.¹⁰⁹

The corporate governance codes of the United States, the United Kingdom and Australia reflect interesting differences in their approach to several key issues related to fiduciary duties, including the thorny question, which has underpinned corporate law since the time of the famous Berle-Dodd debate, as to whom directors owe their duties.¹¹⁰ This debate has been described as a "clash between the different visions of corporatism",¹¹¹ exemplifying the tension between a public and private image of the corporation.¹¹²

¹⁰⁷ Sir Adrian Cadbury, *Report of the Committee on the Financial Aspects of Corporate Governance*, London, Dec. 1992.

¹⁰⁸ See generally Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMP. L. 1, 12 (2011).

¹⁰⁹ *Id.*, 13-15.

¹¹⁰ Professors Berle and Dodd both considered that directors were "trustees", however, they strongly disagreed on two other matters closely tied to directors' duties – (i) the theoretical nature of the corporation; and (ii) the identity of the beneficiaries of directors' fiduciary duties. Berle adopted a private aggregate theory of the corporation, which supported his claim that directors held their powers in trust for shareholders. Dodd, on the other hand, regarded the corporation as a public institution, arguing that directors owed their duties to a diverse group of stakeholders, including employees, creditors, and consumers. See A.A. Berle Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); A.A. Berle, *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932). See generally Jennifer G. Hill, *Then and Now: Professor Berle and the Unpredictable Shareholder*, 33 SEATTLE U. L. REV. 1005, 1009-10 (2010).

¹¹¹ William W. Bratton and Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 124 (2008).

¹¹² See generally William T. Allen, *Our Schizophrenic Concept of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992). The Berle-Dodd debate laid the groundwork for the persistent debate concerning shareholder primacy versus stakeholder theory. See, e.g., Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PENN. L. REV. 2003 (2013).

This public-private tension continues in corporate law and corporate governance today. Under traditional Anglo-Australian case law, directors have owed their duties to “the company as a whole”, which has generally been interpreted to mean the shareholders as a general body, rather than the corporation as a commercial entity.¹¹³

Corporate governance codes, on the other hand, often display greater variation and emphasis concerning their “visions of corporatism”.¹¹⁴ There are several different categories of code, which can affect content. Codes are sometimes: (i) purely voluntary and self-regulatory; (ii) linked to public authorities; or (iii) promulgated by stock exchanges to provide listed companies with a blueprint for “good corporate governance”.¹¹⁵

These diverse origins can result in major differences concerning the stringency and enforceability of these corporate governance codes.¹¹⁶ They can also affect the emphasis given to shareholder or stakeholder interests. Variations can often be traced to the identity of the actors behind the relevant code. For example, the US Corporate Governance Principles,¹¹⁷ which were issued in January 2017, are an example of the first category of code. The US Corporate Governance principles are a set of six voluntary principles adopted by the Investor Stewardship Group (“ISG”).¹¹⁸ The ISG is a collective of some of the largest US-based and international asset owners and managers. Signatories to the principles include, not only “the

¹¹³ See, e.g., *Ngurli Ltd v. McCann*, 90 CLR 425, 438 (1953) (citing the decision of Evershed MR in *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286, 291). See generally J.D. Heydon, *Directors' Duties and the Company's Interests*, in EQUITY AND COMMERCIAL RELATIONSHIPS 120 (P.D. Finn ed., 1987). However, the courts have at times stated that there will be exceptions to this basic principle. For example, in *The Bell Group Ltd (in liq.) v. Westpac Banking Corp* (No 9), 39 WAR 1; [2008] WASC 239 (2008), Owen J. stated: “This does not mean that the general body of shareholders is always and for all purposes the embodiment of ‘the company as a whole’. It will depend on the context, including the type of company and the nature of the impugned activity or decision...In my view the interests of shareholders and the interests of the company may be seen as correlative not because the shareholders are the company but, rather, because the interests of the company and the interests of the shareholders intersect”. *Id.*, [4393].

¹¹⁴ William W. Bratton and Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 124 (2008).

¹¹⁵ See Eddy Wymeersch, *Corporate Governance Codes and Their Implementation*, Financial Law Institute Working Paper 2006-10, Sept. 2006, 2-3.

¹¹⁶ See Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMP. L. 1, 13-15.

¹¹⁷ ISG, *Corporate Governance Principles for U.S. Listed Companies* (“ISG Corporate Governance Principles”) (Jan. 2017), <https://www.isgframework.org/corporate-governance-principles/>.

¹¹⁸ See ISG, *About the Investor Stewardship Group and the Framework for US Stewardship and Corporate Governance* (<https://isgframework.org/>).

Big Three” fund managers (BlackRock, Vanguard, and State Street Global Advisers),¹¹⁹ but also some activist hedge funds (ValueAct Capital and Trian Partners).¹²⁰ Not surprisingly, given the origins and identity of the actors behind the code, the US Corporate Governance Principles assert that directors are directly accountable to shareholders.¹²¹ Furthermore, they state that shareholders should have participatory rights in corporate governance, and boards should be responsive to shareholders’ viewpoints.¹²² These principles reflect a strongly private law, shareholder-focused conception of directors’ duties.¹²³

The origins of the UK and Australian corporate governance codes differ from the US Corporate Governance Principles. The UK Corporate Governance Code falls within the second category of corporate governance code described above. It is administered by the UK Financial Reporting Council (FRC), an independent regulator, which, with the backing of the British government,¹²⁴ seeks to “promote transparency and integrity in business”.¹²⁵ Australia’s corporate governance principles represent the third category of code. They are drafted and promulgated by the Australian Securities Exchange (ASX) Corporate Governance Council, which comprises a group of industry stakeholders.¹²⁶

Recent amendments to the UK and Australian corporate governance codes represent a far more

¹¹⁹ See Jan Fichtner et al., *Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, 19 BUSINESS AND POLITICS 298 (2017); Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence and Policy* (forthcoming, COLUM. L. REV.).

¹²⁰ For the full list of signatories to the ISG Corporate Governance Principles and Stewardship Principles, see <https://isgframework.org/signatories-and-endorsers/>.

¹²¹ See ISG, *Corporate Governance Principles for U.S. Listed Companies* (“ISG Corporate Governance Principles”) (Jan. 2017), “Principle 1: Boards are accountable to shareholders.”

¹²² See *id.*, “Principle 2: Shareholders should be entitled to voting rights in proportion to their economic interest. Principle 3: Boards should be responsive to shareholders and be proactive in order to understand their perspectives”. See also ISG, *The Principles: Stewardship Framework for Institutional Investors* (Jan. 2017).

¹²³ See Adolf A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); Adolf A. Berle, *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

¹²⁴ See “About the FRC” (<https://www.frc.org.uk/about-the-frc>).

¹²⁵ The FRC’s board of directors is appointed by the UK Secretary of State for Business, Energy and Industrial Strategy.

¹²⁶ See ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations*, 4th ed. (Feb. 2019), *About the Council*, 1.

public conception of the corporation, and correspondingly, directors' responsibilities than the US Corporate Governance Principles.¹²⁷ The UK and Australian corporate governance codes also clearly recognize that financial under-performance is not the only problem in modern corporate law, and that issues relating to organizational integrity are also critical. The 2018 UK Corporate Governance Code notes, for example, that the role of a successful company is not only to create value for shareholders, but also to contribute to "wider society".¹²⁸ It states that that directors must lead by example to establish a culture of integrity,¹²⁹ that is aligned with the organization's "purpose, values and strategy".¹³⁰

The 2018 UK Corporate Governance Code also pays heightened attention to stakeholder interests, particularly those of employees. The code bolsters the statutory directors' duty in s 172(1) of the UK Companies Act 2006, but also goes further than legislation in the norms it creates. First, the code states that the board should describe in the company's annual report how the interests of stakeholders have been considered in board decisionmaking,¹³¹ and should "understand the views" of non-shareholder stakeholders.¹³² Secondly, whereas s 172(1) involves protection of stakeholder interests,¹³³ the 2018 amendments to the code promote use of structural features to ensure actual participation in corporate governance by employees.¹³⁴ The UK code now outlines three alternative methods for ensuring workforce engagement in corporate governance: the appointment of an employee director; establishment of a formal workforce advisory panel; or designation of a non-executive director with responsibility for

¹²⁷ William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 124 (2008).

¹²⁸ FRC, *The UK Corporate Governance Code*, 4, Principle A (Jul. 2018).

¹²⁹ *Id.*, 1, 4, Principle B (Jul. 2018).

¹³⁰ *Id.*, 4, Principle B. The British Academy's influential research project on 'The Future of the Corporation' also focuses on the importance of corporate culture and "societal purpose". See The British Academy, *Future of the Corporation: Research Summaries*, 26-7, 32-3, 48-9 (2018).

¹³¹ FRC, *The UK Corporate Governance Code* (2018), 1, 5.

¹³² *Ibid.*

¹³³ It is also noteworthy that this protection is limited under s 172(1), in the sense that the directors are only required to consider the interests of stakeholders to the extent that such consideration is likely to promote the success of the company for the benefit of its members as a whole. See Paul L. Davies & Sarah Worthington, *GOWER & DAVIES PRINCIPLES OF MODERN COMPANY LAW* [16-3] (10th ed., 2016),

¹³⁴ See FRC, *The UK Corporate Governance Code* (2018), 1, 5.

workforce related issues.¹³⁵

Australia's 2019 Corporate Governance Principles and Recommendations ("ASX corporate governance code"),¹³⁶ replicates this UK trend towards more emphasis on organizational integrity and corporate responsibilities to the public. A 2018 Consultation Draft¹³⁷ of proposed changes to the code included a specific reference to a listed entity's "social licence to operate".¹³⁸ The Consultation Draft also stated that directors and managers were expected to consider the views and interests, and engage with, a wide variety of stakeholders.¹³⁹ These proposed revisions were the subject of widespread backlash in the business community. Critics argued that these changes would directly conflict with existing Australian law regarding directors' and officers' duties,¹⁴⁰ emphasizing that Australia lacks any statutory directors' duty, relating to stakeholder interests analogous to s 172(1) of the UK *Companies Act*.¹⁴¹

The final version of the 2019 ASX corporate governance code, which was released in February 2019, wound back several of the more controversial features of the draft code. In particular, it jettisoned the references to a listed company's "social licence to operate". Nonetheless, in launching the new code, the Chair of the ASX Corporate Governance Council noted that the

¹³⁵ The UK Corporate Governance Code states that, "[i]f the board has not chosen one or more of these methods, it should explain what alternative arrangements are in place and why it considers that they are effective". *Id.*, 5.

¹³⁶ ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations*, 4th ed. (Feb. 2019).

¹³⁷ ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations*, 4th ed., Consultation Draft (2018).

¹³⁸ *Ibid.* See also Bryan Horrigan, *Does Corporate Performance Now Include a Social Licence to Operate?*, AUSTRALIAN INSTITUTE OF COMPANY DIRECTORS, Dec. 2018.

¹³⁹ See ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations*, 4th ed., Consultation Draft (2018), 25.

¹⁴⁰ In addition to the argument that the expression "social licence to operate" was contrary to Australian law concerning directors' duties, critics stated that the phrase was vague, uncertain, subjective, a product of political correctness, and potentially unfair to companies in certain industries, such as gaming, alcohol, tobacco and mining. See, e.g., Patrick Durkin, *Board Outrage Over Push to Have a Social Licence*, AUST. FIN. REV., Aug. 1, 2018; Australian Institute of Company Directors, *Submission to the Review of the ASX Corporate Governance Principles and Recommendations*, Jul. 27, 2018; Janet Albrechtsen, *There's a Corporate Rebellion Brewing Over Fanatical Social Justice Movements*, THE AUSTRALIAN, Aug. 4, 2018; Anne Davies, *Corporate Australia is Locked in a Culture War, But It's Not About Left and Right*, THE GUARDIAN, Aug. 9, 2018.

¹⁴¹ See Will Heath and Lauren Beasley, *Proposed Fourth Edition of ASX Corporate Governance Principles*, KING & WOOD MALLESONS, Jun. 6, 2018. Cf Australian Institute of Company Directors, *Forward Governance Agenda: Lifting Standards and Practice* (Apr. 2019), 17.

controversial expression had been replaced by “essentially synonymous”¹⁴² terms, such as “reputation” and “standing in the community”.¹⁴³ She also noted that, in the wake of the Australian Banking Royal Commission Final Report, the ASX Corporate Governance Council considered it “imperative that listed entities align their culture and values with community expectations to help arrest the loss of trust in business”.¹⁴⁴

Shareholder stewardship codes (“stewardship codes”) are another more recent variety of corporate governance code. Stewardship codes originated in the United Kingdom in the aftermath of the global financial crisis.¹⁴⁵ They exemplify the important link between problem framing and regulatory outcomes.¹⁴⁶ For example, a common view in the United States was that shareholders contributed to the global financial crisis, by placing pressure on corporate managers to engage in excessive risk-taking to increase profitability.¹⁴⁷ But, the reverse view prevailed in the United Kingdom, where the real problem during the crisis was perceived to be the failure of institutional investors to provide a counterweight to managerial risk-taking, by

¹⁴² Elizabeth Johnstone, Chair, ASX Corporate Governance Council, Address at the ASX Corporate Governance Council: Launch of the 4th Edition of the Corporate Governance Principles & Recommendations, Feb. 27, 2019, 4.

¹⁴³ *Ibid.*

¹⁴⁴ *Id.*, 5.

¹⁴⁵ The first stewardship code was adopted in the United Kingdom in 2010 in response to the global financial crisis. See FIN. REPORTING COUNCIL, THE UK STEWARDSHIP CODE, Jul. 2010. A revised version of the Code, which operates on a voluntary basis, was released in 2012. See FIN. REPORTING COUNCIL, THE UK STEWARDSHIP CODE, Sept. 2012. In January 2019, the Financial Reporting Council published a draft of proposed revisions to the Stewardship Code, designed to strengthen the code. See FIN. REPORTING COUNCIL, PROPOSED REVISION TO THE UK STEWARDSHIP CODE, Jan. 2019. In October 2019, the Financial Reporting Council published the 2020 Stewardship Code, taking effect from January 1, 2020. See Baker McKenzie, *The Stewardship Code 2020: Is This an Opportunity for Listed Companies to Increase Meaningful Stakeholder Engagement?*, Nov. 11, 2019.

¹⁴⁶ See generally Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497 (2018); Tim Bowley & Jennifer G. Hill, *Collective Activism and Shareholder Stewardship: The Australian Experience* (2019, conference paper presented at *Global Shareholder Stewardship Conference*, King’s College London, Sept. 23-24, 2019).

¹⁴⁷ See, e.g., John C. Coffee, *Systemic Risk After Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies Beyond Oversight*, 111 COLUM. L. REV. 795, 799 (2011).

participating in corporate governance.¹⁴⁸ The UK Stewardship Code,¹⁴⁹ which operates on a voluntary basis, was designed to address this problem, on the basis that “[e]ffective stewardship benefits companies, investors and the economy as a whole”.¹⁵⁰

Since the time of the global financial crisis, more than twenty countries have followed the United Kingdom’s lead by adopting stewardship codes, and that number is growing.¹⁵¹ Asian jurisdictions, in particular, have been eager to embrace the shareholder stewardship concept.¹⁵² This is in spite of the fact that the capital market structure in many Asian countries is fundamentally different from UK capital market structure. Whereas in the United Kingdom the vast majority of shares in public listed companies are held by institutional investors,¹⁵³ in Asia, the opposite is true. Asian listed companies typically have concentrated ownership structures, with family members or the state as controlling blockholders.¹⁵⁴

¹⁴⁸ According to the Walker Review, a lack of institutional investor engagement with UK banks was a key governance problem in relation to the global financial crisis. The review stated that “[w]ith hindsight it seems clear that the board and director shortcomings...would have been tackled more effectively had there been more vigorous scrutiny and engagement by major investors acting as owners”: WALKER REVIEW, A REVIEW OF CORPORATE GOVERNANCE IN UK BANKS AND OTHER FINANCIAL INDUSTRY ENTITIES: FINAL RECOMMENDATIONS, Nov. 26, 2009, [5.11].

¹⁴⁹ See FIN. REPORTING COUNCIL, THE UK STEWARDSHIP CODE (2012); FIN. REPORTING COUNCIL, THE UK STEWARDSHIP CODE 2020.

¹⁵⁰ FIN. REPORTING COUNCIL, THE UK STEWARDSHIP CODE (Sept. 2012), 1. Cf the 2020 version of the code, stating that stewardship leads to “sustainable benefits for the economy, the environment and society”. FIN. REPORTING COUNCIL, THE U.K. STEWARDSHIP CODE 2020, 4.

¹⁵¹ More than twenty countries have now adopted shareholder stewardship codes. For a list of jurisdictions that have to date adopted stewardship code or analogous initiatives, see Alice Klettner, *Stewardship Codes and Shareholder Participation in Governance*, 70 GOVERNANCE DIRECTIONS 227, 228-29, Table 1 (2018).

¹⁵² Jurisdictions in Asia which have adopted a form of stewardship code to date include: - Japan, Malaysia, Hong Kong, Taiwan, Singapore, South Korea and Thailand. *Ibid.* A stewardship code has also been proposed for India. See Securities and Exchange Board of India (SEBI), *Report of the Committee on Corporate Governance* (“Kotak Committee Report”), Oct. 5, 2017, 93-94. See also comments of Amarjeet Singh, Executive Director of SEBI in NSE-IGIDR Conference on Corporate Governance, *Edited Transcript of Keynote Speech and Panel Discussion*, Jun. 21, 2018, 21-24. In December 2019, SEBI adopted a stewardship code for mutual funds and alternative investment funds (AIFs), which is due to come into effect on April 1, 2020. See *SEBI Puts in Place Stewardship Code for Mutual Funds, AIFs*, THE ECONOMIC TIMES (India), Dec. 24, 2019.

¹⁵³ In the United Kingdom, around 90% of shares are held by financial institutions and approximately half of these are non-UK-based. See, e.g., Paul L. Davies, *Shareholders in the United Kingdom*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER 355, 356 (Jennifer G. Hill & Randall S. Thomas eds., 2015); HOUSE OF COMMONS BUSINESS, ENERGY AND INDUSTRIAL STRATEGY COMMITTEE, CORPORATE GOVERNANCE: THIRD REPORT OF SESSION 2016-17, Mar. 30, 2017 at §§ 13-16.

¹⁵⁴ In a controlling blockholder context, which is the main paradigm for Asian listed companies, increasing shareholder rights or responsibilities may be irrelevant as an accountability device. See Luh Luh Lan & Umakanth Varotttil, *Shareholder Empowerment in Controlled Companies: The Case of Singapore*, in *in*

Like corporate governance codes, stewardship codes emanate from different issuing bodies.¹⁵⁵ In some jurisdictions, such as the United Kingdom and Japan, stewardship codes are issued by regulators or quasi-regulators.¹⁵⁶ In others, such as South Korea and South Africa, stewardship codes are promulgated by industry players.¹⁵⁷ Finally, some countries, including Australia, Canada and the United States, have stewardship codes initiated by investors themselves.¹⁵⁸ These differences in origin can influence the effectiveness of a particular code.¹⁵⁹ It can also affect the extent to which a stewardship code tolerates or encourages, shareholder activism, including collective activism.¹⁶⁰ Also, the regulatory goals for introducing stewardship codes vary across jurisdictions. Whereas the UK stewardship code was designed to address the need for effective risk control following the global financial crisis, Japan's stewardship code was designed to reverse declining profitability and increase investor returns, by creating a "warmer climate" for foreign investors and shareholder activists.¹⁶¹ The Japanese example also shows how political friction can affect the content of stewardship codes. It appears that the Japanese code adopted a "relatively gentle stance"¹⁶² on shareholder engagement and activism as way to appease critics of the more shareholder-oriented focus of the Japanese reforms.¹⁶³

Some scholars have viewed the idea of granting stronger rights to shareholders, or encouraging them to become more engaged in corporate governance, as akin to letting the fox guard the

RESEARCH HANDBOOK ON SHAREHOLDER POWER 355, 356 (Jennifer G. Hill & Randall S. Thomas eds., 2015); Kon Sik Kim, *Dynamics of Shareholder Power in Korea*, *id*, 535.

¹⁵⁵ See generally Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497, 507-13 (2018).

¹⁵⁶ *Id*, 507-8.

¹⁵⁷ *Id*, 508-9.

¹⁵⁸ *Id*, 509-13.

¹⁵⁹ Ernest Lim & Luh Luh Lan, *The Role of Institutional Investors in Singapore and Hong Kong: Stewardship Codes and Ownership Engagement* (unpublished manuscript) (presented at the Corporate Governance and Regulation: East Meets West Conference at the Univ. of Sydney (Aug. 17-18, 2017).

¹⁶⁰ See Tim Bowley & Jennifer G. Hill, *Collective Activism and Shareholder Stewardship: The Australian Experience* (2019, conference paper presented at *Global Shareholder Stewardship Conference*, King's College London, Sept. 23-24, 2019).

¹⁶¹ See Ben McLannahan, *Japanese Reformists Face Challenge Over Shake-Up of Corporate Governance Laws*, FIN. TIMES, May 25, 2014.

¹⁶² See Gen Goto, "The Logic and Limits of Stewardship Codes: The Case of Japan" (forthcoming, *Berkeley Bus. L. J.*), 40, fn 152 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3311279).

¹⁶³ *Ibid*.

henhouse.¹⁶⁴ However, Larry Fink, CEO of BlackRock, one of the world's largest institutional investors, has declared that companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate".¹⁶⁵

There is an increasing number of examples of this trend, whereby institutional investors have pursued broad social or stakeholder-related goals. In 2017, for instance, BlackRock, which is estimated to be one of the top three shareholders in every company listed on the FTSE index, wrote to the chairs of over 300 UK companies, announcing that it would vote against executive pay increases, unless they were linked to strong and sustainable long-term corporate performance and were also matched by pay increases to rank-and-file employees.¹⁶⁶ Also, a list of the top ten corporate governance issues in the U.S., released by Institutional Shareholder Services (ISS) in 2019, goes well beyond financial performance of corporations, and includes topics such as board and C-suite diversity, climate change, executive misconduct, sexual harassment, and gun violence.¹⁶⁷ Environmental and social issues now account for the majority of all shareholder proposals filed in the United States, and companies are showing greater willingness to reach agreements with proponents of such resolutions as a result of the increasing interest in these issues demonstrated by the largest institutional investors.¹⁶⁸

5. Conclusion

It is often assumed that there is a unified and cohesive approach to the law of fiduciary duties across common law jurisdictions. This examines three common law jurisdictions, the United States, the United Kingdom and Australia, and shows that, in spite of their common legal

¹⁶⁴ Christopher M. Bruner, *Corporate Governance Reform in a Time of Crisis*, 36 J. CORP. L. 309, 311 (2011). *See also* Alan Dignam, *The Future of Shareholder Democracy in the Shadow of the Financial Crisis*, 36 SEATTLE U. L. REV. 639 (2013).

¹⁶⁵ *See* BlackRock, Larry Fink's Annual Letter to CEOs, *A Sense of Purpose*, Jan. 12, 2018; Peter Horst, *BlackRock CEO Tells Companies to Contribute to Society. Here's Where to Start*, FORBES, Jan. 16, 2018.

¹⁶⁶ *See* Angela Monaghan, *World's Largest Fund Manager Demands Cuts to Executive Pay and Bonuses*, GUARDIAN, Jan. 16, 2017.

¹⁶⁷ *See* Kosmas Papadopoulos, *ISS Lists Top 10 Corporate Governance Topics To Watch in 2019*, THE CLS BLUE SKY BLOG, JAN. 11, 2019.

¹⁶⁸ *See* ALLIANCE ADVISERS, 2019 PROXY SEASON PREVIEW, 1, 4ff (2019), <https://allianceadvisors.com/wp-content/uploads/2019/04/Alliance-Advisors-Newsletter-Apr.-2019-2019-Proxy-Season-Preview.pdf>.

heritage, there are nonetheless sufficiently significant differences to challenge any notion of homogeneity of directors' and officers' duties in these jurisdictions.¹⁶⁹

The Article also discusses a new and important transnational regulatory development: the rise of corporate governance codes in both common law and civil law jurisdictions. These codes, which are usually non-binding, represent an interesting overlay to the law of directors' and officers' duties. Examples of these tensions include Although corporate governance codes often complement and bolster these duties, there can also create tensions with them. The tension between shareholder versus stakeholder rights and interests is a clear example of this situation. Also, the focus on corporate culture, purpose, values and trust in some modern corporate governance codes shows that there are multiple problems in corporate law. Corporate underperformance is one important issue, but organizational integrity is equally critical.

While corporate governance codes could potentially increase convergence regarding directors' and officers' duties across jurisdictions, in fact, these codes are issued by different bodies, with different purposes and goals. They also vary in their content and are constantly evolving. Corporate governance codes are therefore likely to increase, rather than reduce, jurisdictional differences relating to directors' and officers' duties.

¹⁶⁹ See generally Jennifer G. Hill & Matthew Conaglen, *Directors' Duties and Legal Safe Harbours: A Comparative Analysis*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 305 (D. Gordon Smith & Andrew S. Gold eds., 2018).

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