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ARTICLES

SEEKING AN ANGLE OF REPOSE IN U.S. BUSINESS ORGANIZATION LAW: FIDUCIARY DUTY THEMES AND OBSERVATIONS

J. William Callison *

What do you mean, ‘Angle of Repose?’ she asked me[,] . . . and I said it was the angle at which a man or woman finally lies down.¹

People associate. They join together in clubs, political parties, and bowling leagues. They form households.² They also associate by pooling their capital, labor, and ideas to accomplish business objectives in general partnerships, limited partnerships, limited liability companies, and close corporations. “Partnership” is defined as an *association* of two or more persons to carry on business as co-owners for profit, and the partners’ relationship is established by a partnership *agreement*. A limited partnership is a partnership, and therefore it also is a method by which people associate to transact business under a limited partnership agreement. The limited liability company (“LLC”), in many ways an offshoot of the partnership form, is another method by which people associate, typically for business purposes. LLC operations are governed by the members’ operating agreement. Close corporations are formed by people who have decided to act in concert to undertake a trade or business and are sometimes treated in a fashion similar to partnerships, even when

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¹ WALLACE STEGNER, ANGLE OF REPOSE (1971).

² See generally Robert C. Ellickson, *Unpacking the Household: Informed Property Rights Around the Hearth*, 116 YALE L.J. 226 (2006).

special statutory close corporation rules are not applied to them. Shareholder relationships in close corporations are often set forth in shareholder agreements.

These voluntary business associations are an important part of our economy, and they are an also important part of a society in which work and economic relationships matter. I am a person; I am a lawyer; and I have chosen to associate with others as a partner in a large law partnership that I entered by agreement and that I can leave at will. For many of us, our business associations form part of who we are and how we identify and ground ourselves in the world.

Fundamental aspects of American business organization law have changed in the last quarter century. In 1990, business organizations generally took the form of corporations, general partnerships, and limited partnerships. Corporations, being legal entities separate from their owners, offered the benefits of limited liability protection, centralized management, free transferability of interests, and continuity of life at the cost of potentially less favorable tax treatment and rigid legal rules. On the other hand, general partnership law embodied an aggregate theory, in which the firm is a collective of persons doing business together and is not a separate entity. Thus, general partnerships offered more efficient pass-through income tax treatment, but at the cost of unlimited personal liability for general partners, a decentralized management structure, lack of free transferability of partnership interests, and dissolution upon the dissociation of existing partners or the admission of new partners. Limited partnerships offered similar partnership income tax treatment while providing liability protection to the limited partners, but not the general partners, and offered some centralization of management authority in the general partners, some transferability of interests, and some continuity of life.³ For all intents and purposes, LLCs did not yet exist, nor did their offshoots—limited liability partnerships (“LLPs”) and limited liability limited partnerships (“LLLLPs”). The implementation of statutory default rule concepts, in which rules are amendable by agreement among the owners, was in its infancy.

In 1990, general partnerships were governed by the venerable Uniform Partnership Act (“UPA”), promulgated by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in 1914.⁴ Many significant partnership law issues, such as the nature and extent of partner fiduciary duties, were

³ Many limited partnerships had corporations, which often were thinly capitalized, as general partners, and personal liability therefore stopped at the corporate level. Robert W. Hamilton, *Corporate General Partners of Limited Partnerships*, 1 J. SM. & EMERG. BUS. L. 73, 74 (1997).

⁴ UNIF. P'SHIP ACT (1914) [hereinafter UPA].

not elaborated in the UPA and were left to common law development.⁵ Most states had replaced the archaic 1916 Uniform Limited Partnership Act (“ULPA”) with the 1976 Revised Uniform Limited Partnership Act (“RULPA”), along with the 1985 amendments to that Act. Only Wyoming and Florida had LLC statutes (with Florida treating LLCs as though they were corporations for tax purposes), and virtually no entities were organized as LLCs.

Beginning in the 1990s, much of this changed. First, spurred on by a report by the Committee on Partnerships and Unincorporated Business Organizations of the American Bar Association’s Business Law Section, NCCUSL began a complete overhaul of the general partnership statute.⁶ This process concluded with the promulgation of the Revised Uniform Partnership Act (“RUPA”) in 1997.⁷ At this time, RUPA has been adopted in approximately thirty-six states. Among other things, RUPA provides that partnerships are entities (rather than aggregates of their partners), provides relatively detailed rules concerning partnership fiduciary duties and obligations, provides a mechanism through which partners can contract for governance and other rules that differ from the statutory default rules, and provides rules regarding partnership continuation despite partner dissociation. RUPA’s adoption caused some to question the appropriate linkages between the new general partnership rules set forth in RUPA and the limited partnership rules then still contained in RULPA.⁸ For example, although RUPA set forth fiduciary duty rules applicable to general partnerships, RULPA’s silence concerning fiduciary duties meant that RUPA’s rules applied to limited partnerships as well as to general partnerships. The result was NCCUSL’s promulgation of a new, stand-alone Uniform Limited Partnership Act in 2001 (“ULPA 2001”).⁹

Even more importantly, in a game-changing determination, the Internal Revenue Service (“IRS”) ruled that a Wyoming LLC could provide favorable partnership taxation while affording limited liability protection to all members and managers, irrespective of their participation in entity governance.¹⁰ Previously,

⁵ See *id.* § 21.

⁶ *Id.*; UPA Revision Subcomm. of the Comm. on P’ships & Unincorporated Bus. Orgs., *Should the Uniform Partnership Act Be Revised?*, 43 BUS. LAW. 121 (1987).

⁷ UNIF. P’SHP ACT (1997) [hereinafter RUPA].

⁸ See Allan W. Vestal, *A Comprehensive Uniform Limited Partnership Act? The Time Has Come*, 28 U.C. DAVIS L. REV. 1195 (1995).

⁹ UNIF. LTD. P’SHP ACT (2001) [hereinafter ULPA 2001].

¹⁰ Rev. Rul. 88-76, 1988-2 C.B. 360.

Wyoming's adoption of the nation's first LLC legislation in 1977 had garnered little attention, since the IRS had stated its skepticism as to whether an entity offering full liability protection could be taxed as a partnership and had refused to issue taxpayer guidance while it studied the question. As a result of Revenue Ruling 88-76, Colorado and Kansas adopted LLC legislation in 1990, and the rest of the states followed within several years. Further, the IRS effectively blessed the universal tax treatment of multi-member LLCs as tax partnerships by issuing so-called "check-the-box" regulations in 1997.¹¹ At the same time, the IRS accepted single member LLCs, which had then been implemented in several states, and ruled that they would be disregarded for federal income tax purposes unless they affirmatively elected to be taxed as corporations. LLCs have become a well-established and dominant form of business organization in the United States.¹² They can be thought of as a hybrid of a contract, a corporate-like entity, a partnership-like association, and a fiduciary relationship, and the balance between these sometimes conflicting aspects has made LLC law fertile, interesting, and frequently unresolved.

During the early years, there were frequent legislative changes to state LLC statutes as states accepted changes spawned in other states and as state statutes were revised to keep pace with changing IRS tax classification positions. Much of this statutory ferment died down after state legislatures adapted to the IRS's check-the-box regime, which afforded LLCs considerable structural leeway without sacrificing or risking favorable tax treatment. State LLC statutes then began to allow increasing flexibility for the members to agree upon the operations and governance structure that fit their business needs and individual goals. In addition, the Partnerships and Unincorporated Business Organizations Committee of the American Bar Association's ("ABA's") Business Law Section drafted a prototype LLC statute in 1992.¹³ Not to be left out of the action, NCCUSL promulgated a Uniform LLC Act ("ULLCA") in 1996 and a Revised Uniform LLC Act ("Re-ULLCA") in 2006.¹⁴ These Uniform LLC Acts have been adopted in several states.

With the advent of LLCs and the notion that partnership taxation does not require partner liability, numerous states amended their general partnership laws to

¹¹ Treas. Reg. § 301.7701-1-3 (2011).

¹² For a brief history of limited liability companies, see J. William Callison, *Federalism, Regulatory Competition, and the Limited Liability Movement: The Coyote Howled and the Herd Stampeded*, 26 J. CORP. L. 951, 954-64 (2001).

¹³ See Revised Prototype Ltd. Liab. Co. Act Editorial Bd., LLCs, P'ships & Unincorporated Entities Comm., *Revised Prototype Limited Liability Company Act*, 67 BUS. LAW. 117 (2011).

¹⁴ UNIF. LTD. LIAB. CO. ACT (1996) [hereinafter ULLCA]; REV. UNIF. LTD. LIAB. CO. ACT (2006) [hereinafter RE-ULLCA].

provide for LLPs and their limited partnership laws to provide for LLLPs. These “partnerships with an attitude” reversed the long-standing rule that general partners have personal liability for partnership debts and obligations unless the partnership’s creditors contracted for non-recourse debt. RUPA and ULPA 2001 also adopted the LLP and LLLP concepts.

Although business organization law has remained relatively static when compared with “unincorporation” law, some of the unincorporation *zeitgeist* made its way into corporate law. For example, in recent years, there has been increasing focus on corporate purpose and whether shareholders can agree to corporate purposes that go beyond profit and wealth maximization. Recent U.S. Supreme Court decisions held that corporations are persons entitled to political speech under the First Amendment and to religious protection under the Religious Freedom Restoration Act (“RFRA”).¹⁵ While this Article focuses on LLC and partnership law, some related corporate law issues are also discussed.

Furthermore, even though much academic scholarship continued to focus on corporations, an increasing amount of scholarship went into understanding and explicating non-corporate forms. Major conferences were held at the University of Colorado School of Law in 1995, Lewis & Clark Law School in 1996, Washington & Lee Law School in 1996 and 1998, the University of Maryland School of Law in 2002, and Wake Forest University Law School in 2005. In addition, an international conference on close corporation and partnership law reform in the United States and Europe was held at Tilburg University Law School in 2001.

This Article explores several related themes. First, it recognizes that business organization law is malleable and changes over time. Although some scholars have come close to stating what they believe to be existential principles for business organizations, I work from an assumption that there is no “natural law” of business organizations and that they are what we make them.

The second theme treats business organization law as embedded in society and reflective of societal norms, which themselves change over time. In order to determine whether business entity laws are effective and just, we must first attempt to understand the normative values expressed by the laws. Law embodies political theory, and by understanding political theory, we can hope to understand the law.

The third theme is an attempt to approach business organization law and its reform from a pragmatist’s perspective. Polarities are avoided and a middle ground is embraced when possible. Law reform is a series of tacks between shorelines. Law

¹⁵ *Citizens United v. FEC*, 558 U.S. 310, 372 (2010) (regarding campaign finance); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (regarding the RFRA).

should adopt tools that work, regardless of ideological foundation. Individualism and community association complement one another, as both are necessary components of human existence and human freedom. Substance generally should govern over form.

I. CONTRACTARIANS AND COMMUNITARIANS

Many scholars and lawyers adopt a “contractarian” starting point in creating, understanding, and analyzing business organizational rules. This position assumes that individual autonomy is the dominant value, focuses on market efficiency, is essentially anti-regulatory, and limits the operation of the common law through the judiciary. From the contractarian perspective, which both describes much of current law in the LLC and partnership arena and is a normative vision on the role of law, participants in a business enterprise should be free to specify their own rights and obligations through contract and should also be free from obligations not expressed through their contract. In fact, the unincorporated business association is the poster child for contract and the market because it is voluntary, decentralized, and seeks a positive end sum for individual participants. In my view, an excessive dominance of contractarian principles results in a constipated discussion of law, and its reform, that principally considers the ability of the market to achieve efficient outcomes despite transaction costs and the question of whether the externalities caused by individual behaviors should be mitigated in some fashion.¹⁶

However regnant contractarian analysis may be in current legal discussions, there remains another, more “communitarian” approach that increases the richness, or at least the potential for richness, of business organization law. In contrast to contractarians, but without rejecting the moral value of individual autonomy, communitarians would open the aperture of business law by focusing on the social arena and considering the broader social effects of individual business activities. In the communitarian view, people have obligations to each other that exist independently of contract and should not be entirely capable of delimitation by contract. To the communitarian, the individual is embedded in his or her communities and obtains benefit from life in those communities. As a result, the quality of the social environment matters, and part of the law’s role is to respect the obligations that derive from the social aspects of individual existence. This focus on community goes beyond an analysis of market externalities and transaction cost limitations on bargaining. Instead, communitarians reject arguments that the market

¹⁶ See, e.g., J. William Callison, “*The Law Does Not Perfectly Comprehend*”: *The Inadequacy of the Gross Negligence Duty of Care Standard in Unincorporated Business Organizations*, 94 KY. L.J. 451 (2006).

provides sufficient solutions to all problems, expand the interests that business organization law should consider, and ultimately protect those interests through the rule of law. Although there have been attempts to develop a communitarian, sometimes termed “progressive,” approach to business organization law, at this time, such an approach has not been fully developed. We can hope for the further development of a robust communitarian approach to, and a robust communitarian-contractarian dialogue regarding, business organization law. Without an adequate counterweight, the scale always tips toward the weight placed on it.

A. *Liberty, Equality, Fraternity—Liberal, Neoliberal, Critical, Feminist, and Communitarian Conceptions of Justice*

Justice is a set of principles that we apply to determine whether our social structures and actions are appropriately ordered.¹⁷ Justice is also a philosophical concept—a human artifact. It can be delineated in numerous ways, with different views of justice dominating among different people at different times and in different spheres.¹⁸ Although concepts of justice may sometimes seem inevitable and unchanging because they are embedded in our social norms and our collective perspective, the reality is that our models of justice are contingent and ever-changing. “Justice” is created by us, and we have the power to change it. This change often occurs slowly and by processes of accretion or elimination.¹⁹ By changing the meaning of justice, we also change our views of whether existing structures and actions are just and can thereby change these structures and institutions.²⁰

¹⁷ Thus, distributive justice is concerned with questions of proper distributions among individuals. Distributions are just when they are appropriate and unjust when they are not. Theories of justice attempt to specify the conditions under which distributions are appropriate. If the conditions are met, and that may indeed be a utopian state, then the distribution is just.

¹⁸ See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 4–6 (1983).

¹⁹ Sometimes, it can occur quickly. See generally BRUCE ACKERMAN, 3 WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014) (outlining the “Civil Rights Revolution”).

²⁰ An example, on a constitutional law level, can be seen in shifts from the so-called *Lochner* era, when the U.S. Supreme Court constitutionalized classical *laissez-faire* liberalism in economic matters, to a post-*Lochner* era, in which the Court rejected dominant freedom of contract conceptions in favor of greater state activism in economic matters, to the present, in which the Court appears to insist on the autonomy of individuals and corporations to form their own identities and relationships that cannot be dictated by the state. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring) (“Under our Constitution, the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.”); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *Lochner v. New York*, 198 U.S. 45, 64 (1908); see also *Citizens United*, 558 U.S. 310 (holding that corporate political speech has same constitutional protections as individual speech). Justice Roberts’ commerce clause-based dictum in

In *A Theory of Justice*,²¹ and again in *Justice as Fairness: A Restatement*,²² John Rawls engaged in a thought experiment to develop a set of ordering principles for a just society. Rawls wrote that “justice as fairness” takes the basic structure of society as the primary subject of political and social justice.²³ The “basic structure of society” is the way in which society’s main political and social institutions fit together into one system of social cooperation and the way these institutions assign basic rights and duties and regulate the division of advantages that arises from social cooperation.²⁴

Rawls also recognized the existence and role of intra-society relationships, including partnerships and other voluntary associations.²⁵ However, he noted that “justice as fairness” principles do not necessarily apply to or regulate associations within society and that we should not assume that principles that are reasonable and just for society’s basic structure are also reasonable and just for associations operating within society. Instead, in Rawls’ view, the associational sphere might be governed by different principles in light of peoples’ special aims and purposes in voluntarily associating together and the peculiar nature and requirements of voluntary associations.²⁶ Thus, Rawls maintained that there are separate and distinct spheres in which justice principles can be defined and applied. First, there is local justice, or justice principles applying directly to institutions and associations; second, there is social justice, or justice principles applying to the basic structure of society;

National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2599–609 (2012), can be seen as an extension of concepts of individual freedom of contract rights. Ultimately, the question addressed by the courts, taking *Lochner* as the paradigm, is whether the threat to freedom created by minimum wage laws is a greater danger to individual freedom than the threat to individual survival posed by below-minimum wages. At present, it appears that the dominant constitutional view is hypersensitive to the threat to freedom posed by an overextending state.

²¹ JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

²² JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (2001).

²³ *Id.* at 42–43.

²⁴ *Id.* at 39–40. Rawls’ statement of the essential principles of his “justice as fairness” theorem is well known: (a) each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which is compatible with the same scheme of liberties for all; and (b) social and economic inequalities must satisfy two conditions: first, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit to the least-advantaged members of society (the so-called “difference principle”). *Id.* at 42.

²⁵ *Id.* at 10–12.

²⁶ *Id.*

and, third, there is global justice, or justice principles applying to international relationships and international law.²⁷ Although Rawls argued that local justice has its own principles, he made no attempt to systematically develop those principles.²⁸

Many of the values inhering in business organization law resemble values advanced in familiar political and social theories that express social ideals and examine political, economic, legal, and other institutions against the background of these ideals.²⁹ Although there can be gaps between a society's abstract ideals, which themselves change over time, and the behavior evidenced by its members, including by members of voluntary associations, we might expect, and, indeed, we find, some correspondence between the values proclaimed by society and the laws governing persons acting within that society. Former Delaware Chancellor William Allen observed that "the choices that are reflected in even the most technical legal subjects come, in the end, to reflect contestable visions of what constitutes the good life. Beneath the surface of the most fundamental corporation law problems lie normative questions masquerading as technical corporation law questions."³⁰ As will be seen, developments in business organization law over recent decades illustrate this correspondence and demonstrate that law is neither value-free nor viewpoint neutral, but is instead created and advanced by normative values and arguments.³¹

²⁷ JOHN RAWLS, *THE LAW OF PEOPLES* (2001).

²⁸ However, Rawls does note that rules governing individual transactions should allow individuals to be free to pursue their own ends without excessive constraints. See John Rawls, *The Basic Structure as Subject*, in *VALUES AND MORALS* 47, 55 (A.I. Goldman & Jaegwon Kim eds., 1978).

²⁹ Political thinking precedes legal thinking, which builds on the former. Thus, liberalism, which flows throughout legal thought, arguably began with Hobbes. See THOMAS HOBBS, *LEVIATHAN* (Rod Hay ed., McMaster Univ. Archive of Econ. Thought 1999) (1651), available at <http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/hobbes/Leviathan.pdf>; Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 205, 216–17 (1979).

³⁰ Stephen J. Massey, *Chancellor Allen's Jurisprudence and the Theory of Corporate Law*, 17 *DEL. J. CORP. L.* 683, 694 n.36 (1992) (quoting William T. Allen, *Competing Conceptions of the Corporation in American Law* Address at Lehigh University (Oct. 29, 1990)).

³¹ See Alicia E. Plerhoples, *Representing Social Enterprise*, 20 *CLINICAL L. REV.* 215 (2013) (discussing, from the perspective of a clinical law professor, the relationship of contractarian and communitarian legal theories to views of corporate purpose and various business models and organizational activities that contribute to or detract from sustainability). These discussions have also occurred in more theoretical discussions of corporate purpose. See, e.g., Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 *DEL. J. CORP. L.* 405 (2013). Cass Sunstein has noted that law has an expressive function in which "debates over the appropriate content of law are really debates over the statement that law makes," and that "the expressive function of law has a great deal to do with the effects of law on social norms. Often law's 'statement' is designed to move norms in fresh directions."

It is possible to consider associational justice by focusing the inquiry through the lenses provided by two large theoretical constructs that have been used to analyze issues of social justice—liberalism and communitarianism—although my use of these constructs embrace numerous sub-categories within them.³² Even though theorists operating as liberals or communitarians advance different, and frequently incompatible, versions of each theory, there are common threads that distinguish them. In this Article, I offer an outline of the following: liberal and communitarian theories of justice; criticisms of those theories, such as those of liberal theory by critical legal scholars; and developments of those theories, such as through neoliberal and feminist thought. I illustrate how these underlying theories might be applied to partnerships and LLCs by considering fiduciary duty law. While it is relatively easy to link liberal conceptions of justice to fiduciary duty analysis, there is not as much academic development of applications of communitarian and feminist theories, and I attempt to make some of these linkages.

1. Classical Liberalism—Positive and Negative Liberties

Liberalism's common theme is the paramount value of individual autonomy and freedom.³³ Liberals agree that a central goal of political society is to establish conditions for individuals, each of whom has a free and independent will that should

Cass R. Sunstein, *Law, Economics & Norms: On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2052–53 (1996).

³² I do not directly address utilitarian arguments in this Article. Utilitarianism, which purports to make evaluations based on the total amount of “good” established, only takes personal autonomy into account indirectly as a component of measuring aggregate good. See J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR & AGAINST* (1973).

³³ In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992), Justice Kennedy wrote that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” Eric Foner notes that “freedom” is not a fixed category or predetermined concept, but rather, it is an “essentially contested concept” that, by its very nature, is the subject of disagreement. ERIC FONER, *THE STORY OF AMERICAN FREEDOM* xiv (1998). Foner shows how, at different periods of American history, different ideas of freedom have been conceived and implemented and how the clash between dominant and dissenting views of freedom has constantly reshaped the idea’s meaning. *Id.* at xv; see EDMUND FAWCETT, *LIBERALISM: THE LIFE OF AN IDEA* (2014).

In a different context, Owen Fiss has referred to a “Tradition,” in which the First Amendment free speech guaranty amounts to a protection of individual autonomy within a structure where there is a sharp distinction between state and citizen, and in which autonomy is defined as the absence of governmental interference. See Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986) (referring to K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960)). “Tradition,” to Fiss, refers to an “all-embracing perspective.” See *id.* At times, the law of unincorporated business organizations can appear to embrace a similar autonomy “Tradition.”

not be dominated by others, to flourish. Therefore, liberal thought, which grew from a historical repudiation of regal, ecclesiastical, feudal and other authority in favor of individual autonomy, focuses on individual rights and individual choice.³⁴

A survey of liberal conceptions of justice begins with a mainstay of political theory—the distinction between positive and negative liberty. The distinction is ancient,³⁵ recurring,³⁶ and can be said to constitute the essential problem of freedom. In a famous 1958 essay, Isaiah Berlin renewed discussion of the dichotomy between positive and negative liberty.³⁷ Berlin stated that positive liberty “derives from the wish on the part of the individual to be his [or her] own master,” to exercise one’s capacities to achieve one’s own ends.³⁸ Positive liberty is essentially “freedom to.” On the other hand, negative liberty is measured by “the area within which the subject . . . is or should be left to do or be what he [or she] is able to do or be without interference by other persons.”³⁹ Negative liberty is essentially “freedom from.” Liberalism, in both its positive and negative aspects, is dominated by concepts of

³⁴ See HOBBS, *supra* note 29, at 129 (“Liberty, or freedom [is] . . . the absence of opposition (by opposition, I mean external impediments of motion).”). Hobbes recognized both the existence of individual autonomy and the fact that equally autonomous individuals are vulnerable to interference by others in pursuit of their own ends. His solution to the “war of all against all” was based on individual autonomy: individuals choose to surrender some of their autonomy to the state in order to maintain their ability to establish and pursue individual goals while restricting others from interfering with those pursuits; in exchange, individuals obtain the state’s obligation to protect them from violence. *Id.* at 103–227. John Locke followed the Hobbesian concepts of individual surrender, state power, and individual rights. JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT § 128.31 (1690). For Locke, the individual gives up certain powers, including punishment and adjudication, to the state and obtains not only protection from violence, but also the right to governance in accordance with certain rules and the right to impartial adjudication of disputes. *Id.* For a more discussion of Hobbes and Locke, see C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE (1962).

³⁵ Aristotle wrote that there are two kinds of freedom that track the negative and positive ideals: (1) the freedom to live as one wishes; and (2) the freedom to take part in self-government. See ARISTOTLE, POLITICS, reprinted in THE BASIC WORKS OF ARISTOTLE 1113, 1265–66 (Richard McKeon ed., 1941).

³⁶ See BENJAMIN CONSTANT, THE LIBERTY OF ANCIENTS COMPARED WITH THAT OF MODERNS (1816), reprinted in LEADING AND LEADERSHIP 110 (Timothy Fuller ed., 2000).

³⁷ Isaiah Berlin, *Two Concepts of Liberty* (1958), in FOUR ESSAYS ON LIBERTY 118 (1969).

³⁸ *Id.* at 131 (“[T]he ‘positive’ sense of the word ‘liberty’ derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men’s, acts of will.”).

³⁹ *Id.* at 121–22 (“Political liberty in this sense is simply the area within which a man can act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree . . .”).

individual autonomy. The individual comes first and possesses a chronological and moral priority over society.⁴⁰ Individuals then associate in groups to achieve preexisting ends such that the association is an instrument of its members. Individual interests, as natural, pre-legal, and sovereign, are generally preferred over societally-imposed constraints. However, the freedom to/from dichotomy persists and is reflected in a fundamental and continuing debate between progressive liberals and libertarian liberals.

In liberalism's "positive" aspect, people exercise their free wills to advance their individual ends (e.g., purposes, values, interests, and desires) without regard to their impact on others. Positive liberty is the affirmative freedom to be or do anything the actor might wish to be or do.⁴¹ In a liberal state, the law's role is to facilitate individual choices and to ensure that each person has as much freedom as possible to pursue goals of his or her own choosing, rather than to dictate how people exercise choice or whether they succeed or fail upon exercising choice.⁴² However, there remains a question of the extent to which society, generally acting through the state, has as its purpose and obligation to advance the well-being of its people and to assist individuals in realizing their own goals, for example, by providing assets, minimal income, housing, jobs, healthcare, and other similar things.⁴³

⁴⁰ See CHARLES FRIED, MODERN LIBERTY AND THE LIMITS OF GOVERNMENT 19 (2006) ("Individuals come first . . . —societies, families, teams, traditions, religions, languages, and cultures—are the products of individual persons.").

⁴¹ Berlin also notes the risks of positive liberty, including that

the real self may be conceived of as something wider than the individual (as the term is normally understood), as a social 'whole' of which the individual is an element or aspect [An] entity [that] is then defined as being the 'true' self which, by imposing its collective, or 'organic' single will upon its recalcitrant members, achieves its own, and therefore their, 'higher' freedom.

Berlin, *supra* note 37, at 131–32.

⁴² See BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1981).

⁴³ Some liberal theorists, such as Martha Nussbaum and Amartya Sen, argue that a just liberal state must ensure that people attain certain fundamental capabilities that permit their freedom—capabilities that the preconditions of a good education, decent healthcare, adequate food, and decent shelter allow. See generally MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT (2000); AMARTYA SEN, THE IDEA OF JUSTICE (2009). Equal development of these capabilities likely requires some level of asset redistribution and governmental regulation to assure some level of individual and general well-being. See generally Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901 (2001); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 (1979).

This positive liberty can be limited by others' freedom to pursue their own goals, and civil society, liberal government, and the state are designed to protect individual boundaries through a system of rights so that each person's or group's enjoyment of freedom does not unduly limit others' abilities to exercise their freedom.⁴⁴ In this sense, liberalism has a "negative" aspect in that it involves restrictions, often termed as individual legal rights, protecting people from external coercion or restraint by other persons, acting individually, in association, or through the state.⁴⁵ This negative, *laissez-faire* aspect considers freedom as the absence of governmental or other societal regulation. At the same time, there are rules defining the spheres of the individual's arbitrary discretion (e.g., criminal law) and rules governing the cooperative activities of individuals in society (e.g., contract). These negative rights disempower the otherwise powerful, and potentially overreaching, state from intervening in the private affairs of individual citizens. By doing so, they also disempower the state from intervening in the private sphere for the democratic purpose of redistributing resources and power, and securing, on behalf of those lacking resources or power, the material goods necessary for them to positively exercise the good life as they define it.

There are several strands to liberal theories based on where the theory is located on a continuum defining the permissible scope of societal power to intervene and enforce its collective vision of positive liberty against the conflicting negative liberty approach of individuals pursuing their self-interest.⁴⁶ In liberal thought, these often relate to the political decisions that define and allocate economic rights such as property. In our society these political decisions depend upon popular legitimacy and they affect "market" operations, the particular kind of state to which we are subject, and the political, democratic, and economic interests that are protected. First, at the

⁴⁴ A rights-based system addresses both how the state limits powers of the strong in order to protect the weak and what the state may not do to anyone.

⁴⁵ The state, which began with a monopoly on the legitimate use of force, is considered a threat to individuals that need to be constrained. At its extreme, negative liberty implies that the content of contractual obligation is a matter for the contracting parties, not the law. The law should enforce the parties and otherwise get out of the way. Essentially, there has been a tendency to lower the goals of social life to create a minimalist set of arrangements to keep people out of one another's way. This is frustrating to those who want the state to assist individuals and benefit its people.

⁴⁶ See Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 *YALE L.J.* 472, 483–84 n.29 (1980) (arguing that "individual liberty is an 'essentially contested concept' . . . [that] has such diverse criteria of applicability that analysis of ordinary usage yields no single, preferred definition"); Walter Gallie, *Essentially Contested Concepts*, 56 *PROCEEDINGS ARISTOTELIAN SOC'Y* 167, 169 (1956) ("[T]he proper use of [essentially contested concepts] inevitably involves endless disputes about their proper uses on the part of their users.").

libertarian extreme of the freedom-equality scale, there are those who believe that government's sole role is to protect personal and property rights.⁴⁷ Second, there are those who argue that government should not only protect personal and property rights, but that it should also remedy collective action problems left unresolved by the free market, but nothing more.⁴⁸ Third, there are those who argue that the government should be restrained from limiting individual actions that do not harm others, but that governmental action is appropriate when individual actions cause harm to others.⁴⁹ Finally, there are those who allow a broader conception of the police power, including the power to enact legislation relating to the general public welfare.⁵⁰

Liberal theorists disagree about the social, political, and economic conditions (e.g., volition and cognition) that must exist before individuals actually possess the freedom of will that allows their personal choices to be legitimate. They further disagree about the state's role in establishing and interfering with these conditions. To characterize the arguments, on one side are those, frequently referred to as "conservatives," who emphasize negative liberty and who see property rights and market capitalism, loosely regulated, as a mode of approaching perfection. In this view, unencumbered markets lead to efficiency, choice, and progress. Others deviate to some extent from a market dominant approach and argue that free markets cannot be left unchecked and must be protected from a natural tendency toward excesses

⁴⁷ See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26 (1974) (describing the appropriate role of the state as "limited to the functions of protecting all its citizens against violence, theft, and fraud, and to the enforcement of contracts"). Nozick later abandoned this position as "seriously inadequate." ROBERT NOZICK, THE EXAMINED LIFE 286 (1989). In the libertarian view, individuals have a moral right to voluntarily enter agreements of their choosing for the exchange of their property, so long as third-party rights are not violated as a result. This requires a moral theory of property—one generally addressed by libertarians on the basis of possession. The question of the moral value attached to possession distinguishes libertarian theory from other liberal theories, such as that of John Rawls.

⁴⁸ See RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 367–86 (4th ed. 1992). See also MILTON FRIEDMAN, CAPITALISM AND FREEDOM 25 (1962).

⁴⁹ JOHN STUART MILL, ON LIBERTY 13 (1859) ("[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civiliz[ed] community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.").

⁵⁰ See generally, e.g., Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Frank I. Michelman, *The Supreme Court 1968 Term-Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

that can lead to monopolization and unfairness.⁵¹ In this view, government's job is to protect people from market power through its regulation and taxation powers. On the other side are those, frequently referred to as "progressives," who place emphasis on positive liberty and view economic, material, educational, genetic, and other limitations as artificial and unjust barriers to the individual's freedom to shape his or her life as he or she chooses. From this perspective, the proper role of government in a liberal society is to redistribute wealth and other resources, at least to some extent, in order to remove as many of these limitations as possible.⁵² These dueling positions concerning the balance between positive and negative liberty constitute the essential dilemma of liberalism—should there be restricted government for the sake of individual freedom, or should there be expanded government for the sake of individual freedom?

2. Neoliberalism and the Dominance of Negative Liberty

One contemporary strain of liberal thought can be termed "neoliberalism" and refers to a set of recurring claims by some scholars and policy-makers in the contest between market and non-market values. Indeed, neoliberalism, and not classical liberalism, is the dominant paradigm of current legal thought.⁵³ A neoliberal advances the negative liberty side of the contest and insulates the market and

⁵¹ For these non-libertarian liberals, there is a social theory that assures there is some attribute in which individuals deserve a share of resources and attempts to describe a pattern of holdings that would result if this were a basis for resource distribution. This ideal distribution pattern is then treated as a method for evaluating the actual fairness of distributions in a society, and the state is assigned the task of bringing actual resource distributions into conformity with the ideal. This is frequently accomplished through taxation. *See generally* BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999). Other contract-based methods for redistribution, such as minimum wage requirements, exist. *See generally, e.g.*, Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 *YALE L.J.* 1093 (1971). There can be substantial disagreement among liberal theorists about principles of what resource shares are deserved by members of society and, therefore, the extent to which a society is fair and the role of the state.

⁵² *See, e.g.*, ACKERMAN & ALSTOTT, *supra* note 51; NUSSBAUM, *supra* note 43, at 74–90.

⁵³ Neoliberalism has been described as hegemonic. Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 *LAW. & CONTEMP. PROBS.* 71, 88–90 (2014) ("Hegemony is most concisely defined as constituting the 'common sense' of an age. . . . No longer merely a theory or even an ideology, its ideas become inseparable from a set of actions, institutions, and a mode of governance. Hegemony's power . . . [entails] an assumption of the impossibility of an alternative."). It can be argued that it is essential to respond to neoliberalism's hegemony by offering alternative concepts of justice, and that challenging the neoliberal hegemony is a critical role for legal scholarship, even if the result is societal selection of the neoliberal agenda. "[T]he unexamined life is not worth living . . ." PLATO, *APOLOGY* § 38a, *reprinted in* 1 *PLATO IN TWELVE VOLUMES* (Harold North Fowler trans., Harvard Univ. Press 1966); *see generally* Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 *IND. L.J.* 783 (2003).

individuals, who plan their actions according to market logic, from collective vision of society and democratic governance.⁵⁴ As famously declared by Margaret Thatcher, to the neoliberal “[t]here is no such thing as society.”⁵⁵ In this fashion, economics comes first, and ethics and politics are driven by economics.

David Grewal and Jedediah Purdy argue that there are four overlapping premises of neoliberalism. First, there is an efficiency-based “market fundamentalism,” in which property rights and private contract are the best means to increase overall welfare.⁵⁶ Second, there is a belief that property rights best protect the equal freedom and dignity of individuals, such that a social order governed by the market is the most decent society we can hope to achieve.⁵⁷ Third, there is a denial that democratic politics and public institutions can successfully shape economic affairs.⁵⁸ Finally, there is a position that defines some policy options as unacceptable perspectives in respectable and influential conversations, thereby limiting the scope of political possibility.⁵⁹ Grewal and Purdy state:

A neoliberal, then, is a person who, in arguments over law and politics, is likely to appeal to, be convinced by, or presuppose a set of things: (1) technical arguments about economic efficiency that are implicitly braided with the thought that it provides the primary or sole measure of governance; (2) a moral vision of the person and of social life that emphasizes consumer-style choices, contract-modelled collaboration, and an ideal of personal autonomy connected with property ownership; (3) a pessimism that there is any meaningful alternative to

⁵⁴ David S. Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 J. L. & CONTEMP. PROBS. 1, 1 (2014). The three core values of neoliberal law are negative liberty, *laissez-faire* market distributions of resources, and a minimal state.

⁵⁵ Interview by Douglas Keay with Margaret Thatcher, Former British Prime Minister, in London, Eng. (Sept. 23, 1987), available at <http://www.margarethatcher.org/document/106689>.

⁵⁶ Grewal & Purdy, *supra* note 54, at 6.

⁵⁷ *Id.* Indeed, some argue that any attempts to intervene in natural market processes risk authoritarian political outcomes. See generally F.A. HAYEK, *THE ROAD TO SERFDOM* (2001). In this view, even if planning might work economically, it bears a high political and social risk. In a sense, neoliberalism is the flip side of Marxist thought, with the “withering away of the state” accomplished through the market rather than through a community of freely associated individuals. In neoliberal thought, there is a disappearance of society as a setting for discussing the public good.

⁵⁸ Grewal & Purdy, *supra* note 54, at 6.

⁵⁹ *Id.* Thus, in current political discourse, “capitalism” is not an economic system that can be challenged or changed.

policies that protect and support markets; and (4) the obvious inappropriateness, even unthinkability, of ‘off-the-wall’ changes to existing market relations.⁶⁰

Neoliberalism focuses the legal system on a few formal defined tasks, such as the enforcement of private contracts, and does not subordinate law to substantive social purposes.⁶¹ With respect to contract, in the neoliberal construct, the individual, and only the individual, decides the terms of his or her voluntary relationships.⁶²

Neoliberal values can be contrasted with, and have arguably led to the diminution of, what David Marquand calls “the public domain”—namely, “the domain of citizenship, equity[,] and service whose integrity is essential to democratic self-governance and social well-being.”⁶³ Marquand states that the public domain

is best understood as a dimension of social life, with its own norms and decision rules, cutting across sectoral boundaries: as a set of activities which can (and historically have been) carried out by private individuals, private charities[,] and even private firms as well as public agencies. It is symbiotically linked to the notion of a public interest; central to it are the value of citizenship, equity[,] and service.⁶⁴

Further, Marquand notes that the recent decline of the public domain was an intentional one, pushed by those holding an alternative vision of social reality defined

⁶⁰ David Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism* 6 (Yale Law Sch. Pub. Law Research Paper No. 313, 2014), available at <http://ssrn.com/abstract=2341068>.

⁶¹ See HAYEK, *supra* note 57, at 75–76 (“Stripped of all technicalities, [the Rule of Law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.”).

⁶² Various civil rights laws, such as the Civil Rights Act of 1964, regarding nondiscrimination in employment, and the Fair Housing Act of 1968, regarding nondiscrimination in housing, conflict with individual free contract rights. 42 U.S.C. § 2000(a) (2012); 42 U.S.C. § 3601 (2012).

⁶³ DAVID MARQUAND, *THE DECLINE OF THE PUBLIC: THE HOLLOWING OUT OF CITIZENSHIP* 1 (2004); Alfred S. Konefsky & Barry Sullivan, *In This, the Winter of Our Discontent: Legal Practice, Legal Education, and the Culture of Distrust*, 62 BUFF. L. REV. 659 (2014).

⁶⁴ MARQUAND, *supra* note 63, at 27.

by self-interest, competition, unrestricted market forces, and efficiency. To be more specific, neoliberal thinking has caused an “incessant marketization.”⁶⁵

3. Critical Legal Responses to Liberal Theory

Critical legal studies scholars (“Crits”) respond to the dominant liberal theory by focusing attention on the downsides, or the pathologies of autonomous individualism and the self-reliant forms of conduct most closely associated with it.⁶⁶ Fundamentally, Crits introduce the definitional and normative question of what things constitute social goods, thereby introducing the questions of how these goods should be delivered and how they can be attained. Crits recognize that man is a social being in the deep sense that human identity and emotions are social and interdependent. Further, in this view, society does not exist only as a social contract among autonomous individuals; society comes first and is part of what creates the individuals within it.

Where liberals see freedom, including the freedom to contract, as a positive value, Crits see the subjective and existential risk of alienation and isolation as a negative counterpart to individual freedom. Where liberals see domination by ends that are not chosen by the individual as the principal threat to freedom, Crits see the danger that the individual will be denied the benefits of association, connection, and community with others. To Crits, concepts of individual autonomy can prevent people from achieving their subjective desire of connection with other people. Further, if liberal individualism conceives of social constraints as shackles to be

⁶⁵ *Id.* at 3–4; see also ROBERT KUTTNER, EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS 230–31 (1996) (“[A]cceptance of an overly mechanical view of economic man, in which narrow conclusions necessarily follow from narrow premises, realities of political and market power are excluded, and entire debates about the nature of the good society are foreclosed by tacit definition.”)

⁶⁶ See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976) (“[T]here are two opposed rhetorical modes of dealing with substantive issues[:] . . . individualism and altruism.”). To Kennedy, self-reliance

means an insistence of defining and achieving objectives without help from others It means accepting that they will neither share their gains nor one’s own losses. And it means a firm conviction that I am entitled to enjoy the benefits of my efforts without obligation to share or sacrifice them to the interest of others.

Id. at 1713. This individualism justifies the fundamental legal institution of property and contract. *Id.* at 1715; see Ralph Waldo Emerson, *Self-Reliance*, in ESSAYS, FIRST SERIES 37 (1850). Although it can be argued that critical legal scholarship has “lost its way,” perhaps due to the rise of neoliberalism, the Crit project remains important as it points the way to alternative modes of thought about law and society. See Blalock, *supra* note 53, at 83.

eliminated, freedom becomes license, and individuals become selfish. Unbalanced and unrestrained liberal individualism becomes a cultural pathology in which people lack the meaning that comes from life in society, and, although they have the power of choice, they lack the ability to choose well. For example, Duncan Kennedy writes of “altruistic justice”:

The “freedom” of individualism is negative, alienated[,] and arbitrary. It consists in the absence of restraint on the individual’s choice of ends, and has no moral content whatsoever. When the group creates an order consisting of spheres of autonomy separated by (property) and linked by (contract), each member declares her indifference to her neighbor’s salvation—washes her hands of him the better to “deal” with him. . . . We can achieve real freedom only collectively, through group self-determination. We are simply too weak to realize ourselves in isolation. . . . True, collective self-determination, short of utopia, implies the use of force against the individual. But we experience and accept the use of physical and psychic coercion every day. . . . A definition of freedom that ignores this problem is no more than a rationalization of indifference, or the velvet glove of domination through rules.⁶⁷

Kennedy sets forth a “thick description” of human experiences,⁶⁸ which recognizes that the individualism/self-reliance perspective dominates legal discourse, but claims that it is still possible to find a competing counter-ethic of altruism.⁶⁹ Just as individualism is a “pole, or tendency or vector or bias,” so is altruism.⁷⁰ Individualist views tend to dominate, but a conflict occurs around questions of community versus autonomy, regulation versus facilitation, and paternalism versus self-determination, in which the individualistic and altruistic views obtain some synthesis and balance.⁷¹ Kennedy sees part of the struggle as being between an individualistic preference for rules and rule enforcement and an

⁶⁷ Kennedy, *supra* note 66, at 1774; *see also* Duncan Kennedy, *The Stakes of Law, or Hale and Foucault*, 15 J. LEGAL STUD. 327 (1991).

⁶⁸ *See* CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973) (noting that a “thick description” of behavior explains not just the behavior, but also the behavior’s context, such that the behavior becomes meaningful to an observer).

⁶⁹ Kennedy, *supra* note 66, at 1717 (“The essence of altruism is the belief that one ought not to indulge a sharp preference for one’s own interest over those of others. Altruism enjoins us to make sacrifices, to share, and to be merciful.”).

⁷⁰ *Id.* at 1732.

⁷¹ *Id.* at 1733. Personal autonomy becomes one good among others, and it lacks special preference.

altruistic preference for converting rigid rules into standards that will avoid over- and under-inclusion to force advantages that are the result of others' positions, or "follies."⁷² As will be seen, the antitheses of individualism and altruism play dominant roles in the definition of what it means to be a "fiduciary," as do questions of rules versus standards. In my view, a synthesis has yet to be reached.

According to Kennedy, the contrast and contradiction between the autonomy value of liberal theory and the subjective risk posed by Crits both constitute radical contradictions and are part of the human condition. He writes:

Here is a statement of the fundamental contradiction: Most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. Others . . . are necessary if we are to become persons at all Even when we seem to ourselves to be most alone, others are with us, incorporated in us through processes of language, cognition[,] and feeling that are . . . collective aspects of our individuality. Moreover, we are not always alone. We sometimes experience fusion with others, in groups of two or even two million, and it is a good rather than a bad experience.

But at the same time that it forms and protects us, the universe of others . . . threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. . . . Numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society. And the price is a high one. Through our existence as members of collectives we impose on others and have imposed on us hierarchical structures of power, welfare[,] and access to enlightenment that are illegitimate, whether based on birth into a particular social class or on the accident of genetic endowment. The fundamental contradiction—that relations with others are both necessary to and

⁷² *Id.* at 1740. A classic contract case, *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921), demonstrates the duality. There, a construction company contracted to build a mansion (for a lawyer) using a specified brand of wrought-iron pipe. *Id.* at 890. Instead of installing that pipe brand, a different brand was used. *Id.* The substitute brand was of equivalent quality and value, but the lawyer sued on the basis that the contract expressly specified both the brand and the remedies for breach of contract. *Id.* at 890–92. The case came to the New York Court of Appeals, and Judge Cardozo, not surprisingly taking an altruist standard-based perspective, stated that justice would not sanction a forfeiture of payment over a trivial breach. *Id.* at 892. In dissent, Judge McLaughlin took an individualist, rule-oriented perspective, concluding that it was for the parties to decide whether the terms were fair and that justice required the court to enforce the contract as written. *Id.* at 892 (McCloughlin, J., dissenting) ("He wanted that [pipe] and was entitled to it."); see CHARLES FRIED, *CONTRACT AS PROMISE* (1981) (taking an individualist approach to contracts); P.S. Atiyah, *The Liberal Theory of Contract*, in *ESSAYS ON CONTRACT* 121 (1986) (taking a collectivist approach to contracts); see also Kronman, *supra* note 46, at 483–84.

incompatible with our freedom—is not only intense. It is also pervasive. . . . [W]ithin law as law is commonly defined; it is not only an aspect, but the very *essence* of every problem. There simply are no legal issues that do not involve directly the problem of the legitimate content of collective coercion, since there is by definition no legal problem until someone has at least imagined that he might invoke the force of the state.⁷³

Notwithstanding the Crits' negative critique of liberal theory, Crit scholarship largely fails to address the positive questions of what should replace liberalism and individual autonomy, or what balance should be struck between the individual and the social. Nihilism does not spawn solutions. Disregarding what we might see as the practical failure of Crits, Crits provide insights into existing legal structures and a place from which we can analyze alternatives. The key question for those who accept at least part of Crit analysis is whether, in the face of neoliberal dominance in legal discourse, viable alternative structures can be conceived of and ultimately embodied in law.⁷⁴

4. Feminist Responses to Liberal Theory

Feminist theory contains many strands, and all share a common biological basis and a common focus on the position of women in a patriarchal society and on methods of eliminating, or of moderating, patriarchy.⁷⁵ One strand, relational feminism, identifies an alternative set of values based on the shared experiences of women and argues that incorporation of these values into jurisprudential analysis is beneficial, both to women and to society generally. Another related strand, developed as “vulnerability theory,” proposes that vulnerability is inherent to the human condition and that society and government have a responsibility to respond affirmatively to that vulnerability. Both strands are communitarian in nature. Although there has been little attention given to corporate law by feminist theorists,

⁷³ Kennedy, *supra* note 29, at 211–13.

⁷⁴ See Richard Fischl, *The Question That Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779, 780 (1992).

⁷⁵ See Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1416–24 (1992) (outlining liberal feminism, socialist feminism, radical feminism, relational feminism, and analytical feminism). Gabaldon notes that there has been “remarkably few applications of feminist theories and methods in areas related to corporate law.” *Id.* at 1413–14.

feminist jurisprudence provides some analytical tools that can be applied to corporate law.⁷⁶

a. Relational Feminism

Twenty-five years ago, Robin West set forth the guiding principles of relational feminism in an article entitled *Jurisprudence and Gender*.⁷⁷ West's project is to articulate certain values manifest in women's experiences and then to assess legal structures for their fit with these values.⁷⁸ First, she sets forth a "separation thesis," in which most modern liberal political theory is committed to the proposition that, in Michael Sandel's words, "[w]hat separates us is in some important sense prior to what connects us—epistemologically prior as well as morally prior. We are distinct individuals first, and *then* we form relationships and engage in co-operative arrangements with others; hence the priority of plurality over unity."⁷⁹ West states that the separation thesis is "essentially and irretrievably masculine"⁸⁰ and contrasts it with a biologically-derived starting point, in which "[w]omen are *not* essentially, necessarily, inevitably, invariably, always and forever separate from other human beings," but are instead connected to other human lives.⁸¹ West calls this the "connection thesis"—"women are actually or potentially materially connected to other human life," and this connection is prior, both epistemologically and morally, to the individual.⁸² Thus, West argues that women view the morality of actions

⁷⁶ Gabaldon notes that,

[b]ecause relational feminism manifests a willingness both to claim a special set of values and to employ special methods to evaluate how well existing legal structures reflect those values, this approach emerges as the most likely to justify and sustain a detailed scrutiny of the role of limited liability in corporate law.

Id. at 1428; see Theresa A. Gabaldon, *Feminism, Fairness & Fiduciary Duty in Corporate and Securities Law*, 5 TEX. J. WOMEN & L. 1 (1996) [hereinafter Gabaldon, *Feminism, Fairness & Fiduciary Duty*].

⁷⁷ Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

⁷⁸ West does not state that men cannot or do not share these values, but instead states that women generally do have these values. Although this essentializing characteristic of West's analysis can be argued as too abstract and conformist, it does allow the establishment of a valid viewpoint on law.

⁷⁹ *Id.* at 2.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 14–15.

against a standard of responsibility to others, rather than against a standard of rights and autonomy from others.⁸³

West then moves toward the development of a feminist jurisprudence that involves an image-changing narrative “unmasking and critiquing of the patriarchy behind purportedly ungendered law and theory.”⁸⁴ First, such a feminist narrative demonstrates how the masculine separation thesis is incommensurable with the feminine connection thesis, thereby demonstrating that the separation thesis standing alone does not represent the human condition.⁸⁵ Second, a feminist narrative shows how intimacy is valuable to women *and to the community* and the damage done to women *and the community* by law’s refusal to reflect that value.⁸⁶ In West’s view, the next step in developing a feminist jurisprudence is to “render feminist reform rational.”⁸⁷ In essence, such a rendering creates power, and without rationality, “women’s issues are crazy issues.”⁸⁸ Thus, feminist theorists need to provide rational descriptions of humans that are true to the conditions of women’s lives.

Finally, and especially importantly, West seeks balance. Just as the separation thesis is not entirely true of men, the connection thesis is not entirely true of women. By shifting the narrative and the power balance, the relational feminist’s goal is to eliminate ignorance, increase freedom, and allow us to “become the authors of our fate.”⁸⁹ At its heart, *Jurisprudence and Gender* espouses a balanced jurisprudence of human association in which the legal system “will recognize life affirming values generated by all forms of being.”⁹⁰ By transforming images and power, West hopes that jurisprudence will become a humanist jurisprudence, unmodified by particular views of the human condition. West moves from Kennedy’s statement of the contradictions to a perspective that the “Rule of Law” itself reflects the fundamental contradiction:

⁸³ *Id.* at 18.

⁸⁴ *Id.* at 60.

⁸⁵ *Id.* at 60–61.

⁸⁶ *Id.* at 65.

⁸⁷ *Id.* at 68–70.

⁸⁸ *Id.* at 69.

⁸⁹ *Id.* at 71.

⁹⁰ *Id.* at 72.

The Rule of Law itself values and protects our autonomy and minimizes the dangers that are consequent to our vulnerability. That's its official role. But it also has an unofficial, underground, subterranean potentiality, only occasionally recognized, but nevertheless always there. The Rule of Law is a product of our dread of alienation from the other and our longing for connection with him, no less than it is a product of love of autonomy and fear of annihilation by him. As a consequence, it can be used and occasionally is used to ameliorate the sorrow we feel as a consequence of our alienation, as well as to protect the autonomy we value against the very real threat of annihilation.⁹¹

b. Vulnerability Theory

Martha Fineman's "vulnerability paradigm" proposes that vulnerability—specifically the fact that humans are universally and constantly susceptible to harm—is inherent to the human condition, and that all people are prone to dependency on others.⁹² She writes that vulnerability has a social or relational component, and that purpose of the state and society is to respond to this vulnerability: Our vulnerability and the need for connection and care it generates are what makes us reach out and form society. It is the recognition and experience of human vulnerability that brings individuals into families, families into communities, and communities into societies, nation states, and international organizations.⁹³

To the vulnerability theorist, it is this vulnerability that causes the formation of voluntary associations. The invulnerable and fully competent individual has no need to associate since he or she would have the capital, skills, duration, ability to take risk, and other necessary characteristics to do everything himself or herself. Voluntary associations are to be viewed against this backdrop. The legal rules of association operate to limit individual vulnerability, and to do so with a recognition that associational relationships are inherently vulnerable to change, including decline, corruption, and capture. By doing so, greater equality of opportunity and

⁹¹ *Id.* at 52.

⁹² See Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 9–15 (2008). See Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 YALE J.L. & FEMINISM 1 (2014).

⁹³ Martha A. Fineman, *Equality, Autonomy and the Vulnerable Subject*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 13, 22 (Martha A. Fineman & Anna Grear eds., 2013); see also IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 33–34 (2011) (“[J]ustice is primarily the virtue of citizenship, of persons deliberating about problems and issues that confront them collectively in their institutions and actions, under conditions without domination or oppression, with reciprocity and mutual toleration for difference.”).

meaningful access to society's institutions can be enhanced for all people—not just those relatively powerful individuals who are sufficiently invulnerable to take risks.

Vulnerability theory views equality and autonomy as conflicting, and restrictions on autonomy to minimize the effects of vulnerability are desirable. Although vulnerability theory encourages comprehensive governmental approaches to addressing vulnerability, it also encourages balance, since those in power might be less likely to adopt unreasonably paternalistic laws if those laws apply to them as well as to others.⁹⁴ Importantly, in addition to questions of resource allocation, vulnerability theory may provide a framework for thinking about human associations and other social structures, including how to allocate responsibility within them. Although Fineman's vulnerability theory begins with a concern about unrestricted autonomy, it does not necessarily lead to an abandonment of autonomy values. Instead, vulnerability theory can be a basis for targeted restrictions on the ability of autonomous individuals to behave in ways that create negative externalities, including creating unacceptable risk for persons who are vulnerable to particular threats or problems.⁹⁵ The intervention could then focus on the particular vulnerability at issue.

5. Communitarianism

The “communitarian” critique of liberalism begins with the notion of voluntarism and focuses on the philosophical difficulty inherent in the liberal conception of people as freely choosing, independent selves, unencumbered by moral or civic ties existing prior to, and having priority over, their choice.⁹⁶ Michael

⁹⁴ See Kohn, *supra* note 92, at 10.

⁹⁵ *Id.* at 22. The focus on externalities means that individual behavior might be limited only to the extent it has impact on persons and things beyond the individual.

⁹⁶ Michael Sandel notes that the principal idea of

the political philosophy by which we live is that government should be neutral toward the moral and religious views that its citizens espouse. . . . [I]t should provide a framework of rights that respects persons as free and independent selves, capable of choosing their own values and ends. . . . So familiar is this vision of freedom that it seems a permanent feature of the American political and constitutional tradition.

MICHAEL SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF PUBLIC PHILOSOPHY* 4–5 (1996); see MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 5 (1983) (expressing skepticism of a philosophy of justice based in what “ideally rational men and women would choose if they were forced to choose impartially, knowing nothing of their own situation, barred from making particularist claims, confronting an abstract set of goods,” noting the “particularism of history, culture, and membership,” and stating that, “[e]ven if they are committed to impartiality, the question

Sandel has critically referred to modern liberalism's "voluntarist conception of freedom" as having three elements:⁹⁷ first, that state power to coerce individuals should be limited to those situations where collective action to implement collective norms can be specially justified—otherwise, individuals should be free to pursue their private objectives; second, that the scope of market and other contract-based institutions should be correspondingly maximized; third, that the state should maintain neutrality as among different conceptions of the good out of respect for individuals' freedom and autonomy to choose their own ends.⁹⁸ Sandel argues that this individualistic perspective contrasts with another tradition that sees liberty as "deliberating with fellow citizens about the common good and helping to shape the destiny of the political community," and that this requires "a sense of belonging, a concern for the whole, a moral bond with the community whose fate is at stake."⁹⁹

Sandel argues that when individuals are existentially described as autonomous, rather than social, beings, they become, at least in the eyes of law, atomized persons who are isolated from each other and are unable to achieve moral connections with one another.¹⁰⁰ This atomistic approach to individuals, and to individual rights, is behind an insistence on state neutrality toward competing conceptions of the good life. Thus, the community and the state is incapacitated from any task of bringing a good society into fruition and thereby benefiting the individuals who comprise it.¹⁰¹

Collectivism and brotherhood lie at communitarianism's extreme (and utopian) edge where justice relates to shared ends. In the communitarian view, the liberal focus on individual rights and the market does not account for a wide range of

most likely to arise in the minds of the members of a political community is . . . What would individuals like us choose, who are situated as we are, who share a culture and are determined to go on sharing it? . . . What choices have we already made in the course of our common life? What understandings do we (really) share?").

⁹⁷ SANDEL, *supra* note 96, at 278.

⁹⁸ See PETER SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 61 (2003) (outlining Michael Sandel's theory).

⁹⁹ SANDEL, *supra* note 96, at 5. John Winthrop's "City Upon a Hill" declaration encouraged that "[w]e must delight in each other; make others' conditions our own; rejoice together, mourn together, labor and suffer together, always having before our eyes our commission and community in the work, as members of the same body." JOHN WINTHROP, A MODEL OF CHRISTIAN CHARITY (Hanover Historical Texts Project eds., 1996) (1603), available at <https://history.hanover.edu/texts/winthmod.html> (last visited Mar. 9, 2016).

¹⁰⁰ SANDEL, *supra* note 96, at 25–54.

¹⁰¹ *Id.*

commonly recognized moral and political obligations.¹⁰² Liberalism's failure rests with its inability to recognize that people can be claimed by, and responsible for, ends they have not chosen, such as those given by our identities as members of families, cultures, traditions, and society.¹⁰³ Communitarian theorists note that when the political world brackets morality too completely, it generates disenchantment. The resulting yearning for a public life of larger meaning ultimately finds expression in some form, much of it negative and undesirable. Thus, communitarians seek a politics that recognizes collective purposes and contrast it with the isolation and lack of moral formation that stems from pursuit of solely autonomous purposes.¹⁰⁴

From a communitarian perspective, people enter valuable associations, not just for personal benefits, but also for the social gains that come from participating in a collective enterprise. In this view, people value interpersonal relationships as an end in themselves, and not just a means to some other autonomously-specified end.¹⁰⁵ The question becomes one of establishing boundaries and balancing competing ethics.

¹⁰² See David Millon, *New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1383 (1993) ("The market alone cannot adequately fulfill basic human needs for everyone because many people lack the resources to participate effectively in the market."). Millon also goes beyond "market equality" arguments to note that the communitarians' normative view is that "individuals owe obligations to each other that exist independently of contract." *Id.* at 1382.

¹⁰³ See ROBERT SKIDELSKY & EDWARD SKIDELSKY, *HOW MUCH IS ENOUGH: MONEY AND THE GOOD LIFE* (2013) (unpaginated) ("What was lost [in liberal thought] was the idea of the social good as a collective achievement. It became a result of individuals pursuing their self-interests in markets. The logic of contract was sundered from the logic of reciprocity, which in most human cultures and societies has been an integral part of the economy.").

¹⁰⁴ See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 144 (1985) (arguing that Americans have "the fear that society may overwhelm the individual and destroy any chance of autonomy unless he stands against it, but also recognition that it is only in relation to society that the individual can fulfill himself"); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

¹⁰⁵ See KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 27 (2006) ("Instead of using corporate law . . . to accentuate the antagonisms in society, perhaps we would want to craft a method of corporate governance that promotes harmony and partnership."); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1419–21 (2004).

B. A Pragmatic Approach

Pragmatists recognize that any attempt to impose uniform principles on human activity is perilous.¹⁰⁶ Essentially, such an attempt brutally recreates the Procrustean myth, in which all things must be cut, shaped, and stretched to fit a particular ideological bed.¹⁰⁷ This is particularly the case with the progressive and libertarian strands of liberalism, in which there does not appear to be a rational way to decide whether a positive liberty framework or a negative liberty framework has priority.¹⁰⁸ There is nothing inherent to the concept of individual rights that mandates that they be understood as constraints on state action, as opposed to obligations entitling individuals to state intervention to provide goods. Rights could theoretically include both individual entitlements that follow from the liberal state's moral obligations and from the liberal state's moral prohibitions.

To the pragmatist, this means that a choice between frameworks is arbitrary.¹⁰⁹ Too much individualism kills fundamental social foundations for the individual; too much society deadens. All is balance, and all is capable of shifting over time. Indeed, all has shifted over time, and, at different times, rights have been conceived of as essentially positive or essentially negative, depending on political contingencies.¹¹⁰ Justice becomes tense and is the fulcrum of the balance between freedom and

¹⁰⁶ American pragmatic philosophy is based on a belief that ideas are tools devised by people "to cope with the world in which they find themselves," that ideas are produced by groups of individuals, that ideas are social constructs and are dependent on their human carriers and their environment, and that the survival of ideas depends on their adaptability. See LOUIS MENAND, *THE METAPHYSICAL CLUB* xi–xii (2001). Menand also notes that, regardless of the pragmatic philosophers' view of ideas' provisionality, pragmatic philosophy was designed to support a democratic political system in which everyone is equally in the game and that ideas should constitute an ever-changing means to this democratic end. *Id.* at 439–42. Using the Cold War as a metaphor, it can be argued that we have outdated capitalism/socialism ways of framing our debates and that the fall of the Berlin Wall does not mean that *laissez-faire* marked capitalism should be triumphant in all things. It may be time to identify other principles that should govern.

¹⁰⁷ See *Procrustes*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/477822/Procrustes> (last visited Jan. 26, 2016).

¹⁰⁸ See ALASDAIR MACINTYRE, *AFTER VIRTUE* 7, 8 (1984) (noting that the choice between frameworks is an expression of "attitude or feeling" and is not grounded in rational analysis).

¹⁰⁹ *Id.* at 8.

¹¹⁰ See FONER, *supra* note 33, at xiv, xv. Isaiah Berlin, who generally criticized positive liberty, did not eliminate the individual's right to receive, and the state's rights to provide, a threshold level of goods. BERLIN, *supra* note 37, at 123–24, 164–65. It may be that the entrenchment of negative liberty conceptions began with the libertarian concepts of Robert Nozick, and they may be as contingent as they are relatively short-lived.

authority—between the individual and society.¹¹¹ Law ceases to be a method for the application of universal truths and instead becomes an institution of moderation—one that reflects societal and individual circumstances and attempts to arrange things to maximize individual freedom while simultaneously maximizing social values. In this view, freedom is not an abstraction, but rather, it involves the freedom to live individual lives well in association with others. Rights, which are frequently conceived of as negative in nature, can also be balanced and comprised of both the actions that states are required to undertake on behalf of individuals and the actions that states are prohibited from taking to the detriment of individuals. A pragmatic view might assist in reconstructing rights from negative to positive, in a liberal sense, and from atomistic and autonomous to relational and connected.

C. *Academic Applications of Theory to Fiduciary Duties in Incorporations*

1. Contractarian Principles Applied to Fiduciary Duties

a. Overview

A contractarian model of fiduciary law, which emphasizes the origin of the business association as an agreement of its owners and conceives of fiduciary duties as a form of the parties' contract, has become American law's conventional wisdom over the last several decades. This contractarian approach to fiduciary law is related to an economic perspective describing business firms as a "nexus of contracts" among the firm's constituencies, including owners, employees, creditors, suppliers, managers, and the public.¹¹² The guiding principle of this theory is "efficiency," and it is assumed that rational actors freely acting in their own self-interest promote this efficiency. Individual constituents are free to enter what are presumably efficiency-maximizing contracts with one another, and statutes act as a set of default rules that parties would have entered were there no transaction costs or other structural impediments to deliberate contracting. Thus, default rules are assumed to be those

¹¹¹ See E.J. DIONNE, *OUR DIVIDED POLITICAL HEART: THE BATTLE FOR THE AMERICAN IDEA IN AN AGE OF DISCONTENT* 4 (2012) ("American history is defined by an irrepressible and ongoing tension between two core values: our love of individualism and our ongoing reverence for community. These values do not simply face off against each other. . . . Rather, both of these values animate the consciousness and the consciences of nearly all Americans."). Dionne writes that "one of [America's] particular achievements has been to nurture communitarian individualists—and individualistic communitarians." *Id.* at 69. Dionne's concerns are that Americans are losing this balance by seeking to choose between these values and that radical individualism is dominating the political discourse. *Id.* at 5, 133.

¹¹² See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Managerial Structure*, 3 J. FIN. ECON. 305, 311 (1976).

that reduce agency costs and are efficient, and efficiency becomes the dominant criterion for evaluating legal doctrines.¹¹³

In a seminal law-and-economics article, Frank Easterbrook and Daniel Fischel claim that “[f]iduciary duties are not special duties; they have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings,” and that “[g]ood faith in contract merges into fiduciary duties, with a blur and not a line.”¹¹⁴ Further, they argue that fiduciary law does not constitute a distinct doctrine: “Searching for the right definition of a fiduciary duty is not a special puzzle. In short, there is no subject here, and efforts to unify it on a ground that presumes its distinctiveness are doomed.”¹¹⁵

The economic analysis conceives of private law as a set of incentives to maximize social welfare based on individual preference satisfaction, and Easterbrook and Fischel conclude, “because this process is contractual—because both principal and agent enter this [relationship] for gain—the details should be those that maximize that gain, which the contracting parties can divide.”¹¹⁶ In this view, judges and other decisionmakers should fill any duties that are not contractually specified with a content that maximizes the parties’ economic welfare and should not impose standards based on moral or other considerations.

Although we can argue, as I do later in this Article, that the contractarian view rests on presumptions that omit critical aspects about fiduciary law’s character, it does contain certain truths and, thereby, makes important contributions to understanding fiduciary duties. First, the contractarian approach recognizes that people generally choose (i.e., contract) to establish a relationship that is fiduciary in nature. Second, the contractarian approach importantly recognizes that people who occupy fiduciary relationships should be able, at least in some ways, to express their own intentions and elaborate on their duties through contract by eliminating certain

¹¹³ The “efficient breach” theory of contract law, under which a breach of contract is permissible, and, perhaps, even desirable, if a promisor can get a higher price for a good than that contracted for and the promisee can buy or sell the good in the market for the contract price, demonstrates that it is the short-term efficiency of the contract in the marketplace, not the long-term morality of enforcing promises, that is dominant in contract law.

¹¹⁴ Frank Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J. L. & ECON. 425, 427, 438 (1993).

¹¹⁵ *Id.* at 438. Thus, from Easterbrook and Fischel’s monistic perspective, those who seek noneconomic bases for fiduciary duties “have trouble coming up with a unifying concept.” *Id.* Of course, this assumes that it is essential, or even beneficial, to come up with a unifying concept rather than acknowledging pluralism in law.

¹¹⁶ *Id.* at 426.

obligations, enhancing others, and defining others. Thus, while contractarian principles fail to illuminate the full nature of fiduciary relationships and duties, by opening up avenues for individual choice, they have a vital, autonomy-fulfilling role to play in the fiduciary discussion.

- b. Following the *Zeitgeist* and Applying Contractarian Principles to Unincorporated Business Organization Law—The Writings of Larry Ribstein
- i. Battling the Procrustean Bed—Focusing on Corporate Fiduciary Duties

Twenty-five years ago, Henry Butler and Larry Ribstein considered the question of whether “the fiduciary duties of corporate managers should be subject to private ordering through contract or should be to some extent law-imposed and non-waivable.”¹¹⁷ They concluded that private ordering should be the norm.¹¹⁸ First, they attempted to establish the “basic contractual nature of the corporation,” primarily by attacking the historical concession theory of corporations,¹¹⁹ Brudney’s volition and information arguments,¹²⁰ Eisenberg’s “implicit contract” arguments,¹²¹ and Easterbrook and Fischel’s no-modification, “hypothetical-bargain” arguments.¹²² They then noted that there are market-based contractual constraints on management conduct and concluded that these “should at least establish a presumption in favor of private ordering in the corporation in general and opt-out provisions in particular.”¹²³ They argued that markets themselves efficiently constrain contract terms by affecting stock price and that mandatory fiduciary terms are inefficient, in part because of institutional defects in judicial interpretation of fiduciary rules. Summing up, Butler and Ribstein stated:

¹¹⁷ Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 4 (1990).

¹¹⁸ *Id.* at 12.

¹¹⁹ *Id.* at 8–10.

¹²⁰ *Id.* at 12–16.

¹²¹ *Id.* at 16.

¹²² *Id.* 16–17.

¹²³ *Id.* at 32.

This [a]rticle has demonstrated that corporate rules ultimately are and, from an efficiency perspective, should be the product of private ordering, not government regulation. Even where liability rules are appropriate, they should be regarded as standard form contractual provisions that can be drafted around. . . .

In general, it is time that legal commentators of corporations fully recognize the contractual nature of the corporation, leave behind early nineteenth century conceptions of business organization, and stop discussing corporate law issues in terms that reflect political compromise rather than respect for private ordering.¹²⁴

In this view, using the language of American economic analysis (e.g., “from an efficiency perspective”), which is then rather uncritically applied to American law, the law should erect fiduciary duties only as a default rule in cases where it is too difficult to specify a particular contractual relationship due, for example, to the continuous nature of the parties’ dealings. Not only does contractual consent provide a basis for modifying the extent of fiduciary duties, it becomes the origin of fiduciary relationships.¹²⁵

ii. Ribstein’s View of Fiduciary Duties in the Incorporation

Beginning with his criticism of RUPA¹²⁶ and RULPA,¹²⁷ and continuing with his focus on the LLC,¹²⁸ Larry Ribstein applied his strong contractarian bias to

¹²⁴ *Id.* at 71–72; see also John Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 629 (1995) (arguing that fiduciary duty rules are essentially default contractual provisions that the parties can override at will).

¹²⁵ Tamar Frankel notes that “one way to water down fiduciary duties is to find and use the criteria of other disciplines when these criteria are least influenced by trustworthiness and self-limitations and are not close to morality and ethics.” Tamar Frankel, *How to Water Down Fiduciary Duties*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 257 (Andrew S. Gold & Paul B. Miller eds., Oxford Univ. Press 2014). Rather than asking about whether actions are right or wrong, there is a discursive shift to ask whether efficiency is served and whether economic resources have been created.

¹²⁶ See generally Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 BUS. LAW. 45 (1993).

¹²⁷ See generally Larry E. Ribstein, *Fiduciary Duties and Limited Partnership Agreements*, 37 SUFFOLK U. L. REV. 927 (2004).

¹²⁸ See, e.g., Larry E. Ribstein, *A Critique of the Uniform Limited Liability Company Act*, 25 STETSON L. REV. 311 (1995); Larry E. Ribstein, *An Analysis of the Revised Uniform Liability Company Act*, 3 VA. L. & BUS. REV. 35 (2008); Larry E. Ribstein, *The Emergence of the Limited Liability Company*, 51 BUS. LAW. 1 (1995).

fiduciary duty issues in incorporations. Ribstein argued that fiduciary duties are contractual “gap-fillers” only and that they cannot be specified independently of the express and implied terms of the relevant contract among the individual partners or members.¹²⁹ Unlike the Fischel and Easterbrook majoritarian view, in which default rules reflect the terms most parties would select, Ribstein argued that the terms of the fiduciary relationship are those that the specific parties to the specific contract choose.¹³⁰ In this view, content remains unspecified, but a contract-based method for determining content is supreme. At its extreme, if the nature of the parties and the conditions of their arrangement indicate that they would have agreed that neither party owes any duty of loyalty to the organization or to each other and, therefore, that each could compete, self-deal, and usurp, then no duty exists, even if a majoritarian approach might have established some default duty.

Ribstein’s views on fiduciary duties in incorporations were best encapsulated in his 2005 article, *Are Partners Fiduciaries?*, in which he attempted to “reduce the confusion” by addressing the foundational question of whether fiduciary duties should apply to manager-owners as well as to managers in firms with passive owners.¹³¹ Ribstein argued that default/hypothetical-bargain fiduciary duties should be narrowly confined to relationships that involve the contractual delegation to a manager of broad and open-ended power over another person’s property, but that they do not fit relationships among parties who expect to be active.¹³² Further, Ribstein argued that the existence of default fiduciary duties depends solely on the structure of the parties’ contractual relationship, specifically, the terms of their express or implied contract, and not on any vulnerability arising other than from their contract.

Ribstein argued that there are three justifications for narrowly defining fiduciary duties. First, in many situations where one party’s vulnerabilities seem to

¹²⁹ See Ribstein, *supra* note 126, at 59–60 (arguing that the RUPA “seriously unsettles existing law by providing in detail for a revised duty of loyalty, a duty of care, and an obligation of good faith and fair dealing”).

¹³⁰ *Id.*; see generally David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815 (1991).

¹³¹ Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209 (2005). Ribstein set forth similar views in a prior article, Larry E. Ribstein, *Fiduciary Contracts in Unincorporated Firms*, 54 WASH. & LEE L. REV. 537 (1997) and in a subsequent article, Larry E. Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899 (2011) (arguing against the expansive view advocated by Professor Tamar Frankel in TAMAR FRANKEL, *FIDUCIARY LAW* (2001)).

¹³² Ribstein, *Are Partners Fiduciaries?*, *supra* note 131, at 215.

create benefits from using broad fiduciary duties, the costs of fiduciary duties outweigh the benefits.¹³³ Second, there are benefits to a clear delineation of the situations where duties apply, including minimizing litigation and contracting costs and effectuating extralegal conduct norms (e.g., reputational value).¹³⁴ Third, fiduciary duties are described as “a type of contract term.”¹³⁵ Ribstein’s logic in reaching this conclusion is based on the fact that, at least in the business organization arena, people decide whether to form a fiduciary relation. A narrow approach is inherent to the contractual nature of fiduciary duties, since contract requires that duties arise from the parties’ deal, not from their personal characteristics. Broad duties impose obligations that parties neither want nor expect. Ribstein contrasted his fiduciary duty theory with other theories that view fiduciary duties as protecting parties in supposedly unequal bargaining positions or as arising out of the parties’ vulnerable status or relationship, and he stated that these are consistent with mandatory rules protecting people from consequences of their bargains.¹³⁶ In Ribstein’s view, there should not be mandatory rules protecting people from the consequences of their bargains—contract *über alles*.

Larry Ribstein, like other law-and-economics scholars, attempted to demonstrate that long-lived legal constructs, such as fiduciary duties, can be explained by their tendency to create economic efficiency.¹³⁷ In his view, efficiency is a positive value, and it exists if the benefits to some exceed the detriments to others. Benefit is assessed by willingness to pay, and the hypothetical-bargain structure, which recognizes that actual transaction costs may be high, is the device by which the assessment is made. Thus, to Ribstein, the limited role of fiduciary duties in incorporations replicates, at reduced transaction costs, the contract that the particular entity’s particular members would enter if they had bargained beforehand, acting rationally in their self-interest, with full knowledge of costs and benefits. Since a beneficiary must pay a fiduciary to be unselfish, we can assume a bargaining setting where the beneficiary prefers to keep the amount that would otherwise be paid and

¹³³ *Id.* at 212–13. These costs include the effect of a duty on the fiduciary’s incentives and the reduction of trust or reciprocity from substituting legal obligations for extralegal constraints.

¹³⁴ *Id.* at 213.

¹³⁵ *Id.* at 215.

¹³⁶ *Id.* at 223–32.

¹³⁷ Ribstein attempted to spin Judge Cardozo’s moralistic statements in *Meinhard v. Salmon*, 64 N.E. 545, 546 (N.Y. 1928), into a contract-based duty that “fits the bargain that many fiduciaries and beneficiaries would likely make in the absence of contract costs.” Ribstein, *Are Partners Fiduciaries?*, *supra* note 131, at 210–14, 241–43; Ribstein, *Fiduciary Duty Contracts in Unincorporated Firms*, *supra* note 131, at 542.

to allow the fiduciary to be selfish or to have the fiduciary's selfish inclinations limited by non-fiduciary values, such as reputation. All things flow into one, efficiency runs through it, and other non-economic values drop out of the legal picture.¹³⁸

Ribstein's argument concludes that (1) partners in general partnerships do not have fiduciary duties when they act solely as owners, but they do have duties when they act as managers or agents; (2) that general partners in limited partnerships have fiduciary duties with respect to limited partners; and (3) that fiduciary duties in LLCs should depend on the allocation of management power.¹³⁹ However, Ribstein's analysis does not seem to appropriately address the question of why hypothetical-bargain analysis should be used to establish that managers in manager-managed LLCs and general partners in limited partnerships, specifically, persons who are delegated broad and open-ended power over another's property, should have default fiduciary duties of any kind. Law-and-economics theory purports to explain, on a positive basis, what the law actually is and the limits of law. Law, in its most general sense, is the agreement the parties would reach in a hypothetical bargain with no transaction costs. The limits are implicit—if the parties can reach an actual agreement without great difficulty, then they must bargain, and the law does not replicate some hypothetical bargain. Missing from Ribstein's analysis, perhaps because he did not wish to push his theory to the extreme, is some analysis of why a hypothetical-bargain structure is necessary at all in the negotiated setting of most LLCs and limited partnerships. As discussed below, this left a hole that was recently contested in Delaware courts. Ribstein's embrace of the ability of contracting parties to define and eliminate the content of their fiduciary duties takes pressure off the existence problem, but the problem remains. Presumably, some answers might be found in the normative justifications implicit in the hypothetical-bargain principles—namely, that law is trying to eliminate the resource waste arising from a complete inability to bargain or from rent-seeking transaction costs of requiring actual bargaining where one party has power and information advantages to extract a price that exceeds the efficiency gain. The question is whether forcing fiduciary duties on managers is necessary to avoid strategic behavior by managers at the real bargaining table.

In some senses, Ribstein's analysis fits a neoliberal, Nozickian perspective. It begins with a belief that current holdings are presumptively just and that freedom

¹³⁸ For criticism of the elimination of other values from the efficiency equation, see generally Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980).

¹³⁹ Ribstein, *Are Partners Fiduciaries?*, *supra* note 131, at 238–51.

lies in individuals' ability to order their actions and dispose of their possessions as they see fit through contract. The law-and-economics hypothetical-bargain analysis takes this into account by attempting to consider whether one party to a contract would in fact transfer some portion of its holdings to the other in exchange for the other's agreement to act or to forbear from acting. Imposition of other values amounts to a redistribution of holdings and implies that some other person or group of people can force a transfer, thereby asserting partial ownership of a person's property by others. Ribstein's libertarian views of fiduciary duty are hallmarked by their emphases on negative liberty—the right to be left alone.

Notwithstanding these strong similarities, Ribstein does not go to the neoliberal extreme. By forcing the existence of fiduciary duties on managers in manager-managed LLCs and general partners in limited partnerships, it can be argued that members and limited partners are compelled, at least as a default rule, to use their resource holdings to buy insurance against managerial acts. This deprives them of the freedom to retain their holdings, rather than to redistribute them, and might deprive them of their freedom to associate when they decide that the forced costs of association are too high. The libertarian reduces as much as possible to actual contract, thereby giving autonomous individuals their freedom. The libertarian requires that a strong case be made before creating any exception to the rule that human activity should be organized through voluntary market exchanges, and Ribstein does not fully make that case. Thus, it may be that Ribstein's unstated, and, perhaps unacknowledged, purpose is to further interpersonal responsibility more than it is to protect negative, individual rights, and thereby to maximize some gains from living in a society. Thus, there is some balance, but balance on a scale whose fulcrum is pushed heavily toward concepts of individual autonomy.

2. Communitarian Principles Applied to Fiduciary Duties

Because partnerships and other voluntary business associations involve consent, it seems reasonable to classify them as contracts, thereby bringing concepts such as "freedom of contract" into play. However, communitarians argue that such associations, while entered voluntarily, are not circumscribed by contract law and attempts at such circumscription inappropriately omit other values. Similarly, although in a business association the fiduciary relationship requires the consent of the involved parties,¹⁴⁰ communitarians argue that the fiduciary relationship is more than a contract, and that other values are at play when people associate.

A communitarian perspective begins by recognizing that business associations are embedded in, and have profound importance on, society and therefore should

¹⁴⁰ In other settings, the fiduciary relationship may only require the consent of the fiduciary.

reflect broader social realities and not just the members' interests as set forth in their contract. Further, a communitarian perspective recognizes that values beyond economic efficiency, such as fairness, are to be considered when adopting legal rules. Notwithstanding the simplicity of this normative starting point, it becomes much trickier to find a coherent communitarian approach to legal and statutory reform, much less any empirical studies of the effects of such reforms on social good, capital markets, or anything else. However, it can be argued that a communitarian approach to fiduciary duties is the traditional approach, embedded in centuries of common law and some statutes, and that the adoption of a contractarian approach constitutes the "reform" that must be theoretically and empirically justified.

A communitarian approach to fiduciary law, and to fiduciary duties in partnerships and LLCs, recognizes that a group of individuals can prosper only if its members can rely on one another and embraces the equitable, open-ended view that fiduciary duties prevent opportunistic behavior by persons occupying positions of power and trust in a specific community, however organized.¹⁴¹ The open-endedness of fiduciary law allows the community, sometimes operating through the courts, to deal with new ways that people can be opportunistic in violation of formal legal structures. Essentially, the communitarian perspective is this: people associate to obtain benefits that are not temporally limited; by associating, they make connections with one another, entering a community of interest and establishing a terrain of shared responsibilities in which power, vulnerability, and trust have important roles; the rules and doctrines of the association (e.g., agency powers) are capable of misuse; over time, and while in association, people, being people, can act in opportunistic fashion and thereby violate the community's norms and customs; and fiduciary law is the mode by which society avoids, condemns, and stigmatizes such opportunistic behavior and therefore operates as a safety net to support community. In this way, fiduciary law allows and supports connectivity and trust between people and can thereby benefit both the individual and society.¹⁴² The functional core of the

¹⁴¹ Professor Henry Smith has defined "opportunism":

[B]ehavior that is undesirable but that cannot be cost-effectively captured—defined, detected, and deterred—by explicit *ex ante* rulemaking. . . . It often consists of behavior that is technically legal but is done with a view to securing unintended benefits from the system, and these benefits are usually smaller than the costs they impose on others.

Henry E. Smith, *An Economic Analysis of Law Versus Equity* 10–11 (Mar. 27, 2012) (Working Paper) (emphasis added), available at <http://www.law.uchicago.edu/files/files/Smith%20paper.pdf>.

¹⁴² See, e.g., Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209 (1995).

fiduciary obligation is deterrence,¹⁴³ and the communitarian argues that the end of such deterrence is not solely economic efficiency, but alleviation of vulnerability and enhancement of trust and responsibility that are the bases of community. In this view, fiduciary law has a moral content, and stripping fiduciary duties of this content dilutes the stigma of opportunistic behavior.¹⁴⁴ This dilution might in turn affect the economic value of association in part by stabilizing business relationships through a commitment to honor the interests of the participants.¹⁴⁵ As stated by Tamar Frankel:

Viewing this [fiduciary] area of the law as a whole, one discovers a structure. Its variable rules are linked to, and can be explained by, a few distinct conditions. In fact, this area of law has existed for centuries because it is open ended. It has not shriveled and died because it is anchored in a few important conditions. Fiduciary law can accommodate new situations and changes in social morals and norms, yet maintain its core values and norms, without which no society can survive, let alone flourish. Its definitions of duties may adjust to the magnitude of the problems fiduciary relationships pose when social mores change. It highlights “the difficulties that face a legal ethic of service to others . . . in a culture that celebrates personal wealth, achievement and consumption.” Yet the imposition of fiduciary duties continues.¹⁴⁶

Stated somewhat differently, unlike contractual relationships, which are *ex ante* in nature, community relationships are continuing and *ex post* in nature. As stated by Daniel Markovits:

[C]ontract-partners share *ex ante*; fiduciaries share *ex post*. These different styles of sharing, in turn, entail that fiduciary relations and the obligations they involve cannot inhabit a contract form. . . . [T]he contract model sows only confusion concerning the nature of fiduciary relations and the formal juridical structure of fiduciary law. Contract sharing and fiduciary sharing proceed qualitatively

¹⁴³ See Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1043 (2011).

¹⁴⁴ See Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 90 (2005).

¹⁴⁵ Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 WM. & MARY L. REV. 541, 555–63 (2005); see Frankel, *supra* note 142, at 1269–70.

¹⁴⁶ Tamar Frankel, *Fiduciary Law in the Twenty-First Century*, 91 B.U. L. REV. 1289, 1290 (2011).

differently; and contract and fiduciary relations display distinct structures. Fiduciary law thus cannot be *understood* on the contractarian model.¹⁴⁷

Partnership and LLC law scholars have been making communitarian, anti-contractarian arguments for many years.¹⁴⁸ Recently, Sandra R. Miller challenged the view that the LLC is a “singularly private contract.”¹⁴⁹ Miller argues that the LLC should be regarded as a social entity that operates with a purpose to make profits under a privilege to do business within public policy constraints and recommends that LLC legislation retain a mandatory core of fiduciary duties that cannot be eliminated by the parties’ contract.¹⁵⁰ After surveying several theories of the firm that look beyond self-interest,¹⁵¹ Miller adopts what she calls a “Concession/Sovereign Involvement-[O]riented” view of the LLC that recognizes broad public interest in internal governance matters by virtue of the state’s grant of authority to conduct business with limited liability protections.¹⁵² Although she does not fundamentally dispute the notion that the LLC is operated primarily for the benefit of its members, Miller expands the LLC’s focus beyond the individual

¹⁴⁷ Daniel Markovits, *Sharing Ex Ante and Sharing Ex Post: The Non-Contractual Basis of Fiduciary Relations*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 125, at 209, 210 (first and second italicization added).

¹⁴⁸ See, e.g., Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. REV. 523 (1993) (arguing that then-existing partnership law adopted the view that a partnership is fiduciary in nature, in which partners establish a relationship to advance their individual self-interest through a collective enterprise, rather than contractarian in nature). The fiduciarian/contractarian dispute is discussed in J. William Callison, *Blind Men and Elephants: Fiduciary Duties Under the Revised Uniform Partnership Act, Uniform Limited Liability Company Act, and Beyond*, 1 J. SMALL & EMERGING BUS. L. 109 (1997).

¹⁴⁹ Sandra K. Miller, *Fiduciary Duties in the LLC: Mandatory Core Duties to Protect the Interests of Others Beyond the Contracting Parties*, 46 AM. BUS. L.J. 243 (2009); see also Sandra K. Miller, *Legal Realism, The LLC and a Balanced Approach to the Implied Covenant of Good Faith and Fair Dealing*, 45 WAKE FOREST L. REV. 729 (2010); Sandra K. Miller, *The Best of Both Worlds: Default Fiduciary Duties and Contractual Freedom in Alternative Business Entities*, 39 J. CORP. L. 295 (2014); Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom with the Need for Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV. 1609 (2004); Sandra K. Miller, *What Fiduciary Duties Should Apply to the LLC Manager after More than a Decade of Experimentation?*, 32 J. CORP. L. 565 (2007).

¹⁵⁰ Miller, *Fiduciary Duties in the LLC*, *supra* note 149, at 243.

¹⁵¹ *Id.* at 250–54.

¹⁵² See *id.* at 243.

members to other social concerns, including fairness, protection of more vulnerable members of the community, and trust.¹⁵³

The quintessential communitarian fiduciary duty case is an old and famous one. In *Meinhard v. Salmon*, Judge Cardozo wrote:

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept of a higher level than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.¹⁵⁴

Despite its age and quaint language, *Meinhard v. Salmon* continues to be cited by courts in the LLC fiduciary context.¹⁵⁵ This demonstrates that the view of unincorporated business entities as incorporating standards "stricter than the morals of the market place" and that business relationships can include "punctilio[s] of honor" have survived the contractarian onslaught.¹⁵⁶ From a communitarian perspective, and importantly from the perspective of law reform and statutory drafting, cases like *Meinhard* demonstrate the need to avoid "both the language and the mindset of narrow definition and exception" found in much contemporary business organization law in favor of broad standards like "punctilios of honor."¹⁵⁷

¹⁵³ *Id.* at 271–78.

¹⁵⁴ *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (internal citation omitted).

¹⁵⁵ See *Feresi v. Livery, LLC*, 182 Cal. Rptr. 3d 169, 174 (Cal. Ct. App. 2015); *Auriga Capital Corp. v. Gatz Props., LLC*, 40 A.3d 839, 855 n.64 (Del. Ch. 2012) (citing *Boxer v. Husley Oil Co.*, 429 A.2d 995, 997 (Del. Ch. 1981)); *McCoy v. Durden*, 155 So. 3d 399, 403 (Fla. Dist. Ct. App. 2014).

¹⁵⁶ *Meinhard*, 164 N.E. at 546.

¹⁵⁷ Gabaldon, *Feminism, Fairness and Fiduciary Duty*, *supra* note 76, at 3; see Kennedy, *supra* note 66, at 1687–1713 (discussing rules and standards).

3. Finding a Resting Place Between Strict Contractarianism and Strict Communitarianism—The Case for Strong and Amendable Fiduciary Rules

The strong communitarian position is essentially that certain fiduciary duties are relationship-based and society-enhancing, exist independently of the parties' agreement, and are unamendable. The strong contractarian position is that all fiduciary duties are contract-based and autonomy-enhancing and exist only to the extent the parties' contract brings them into existence. If we accept the merits of both positions, a balance that recognizes individual autonomy, human interdependence, and vulnerability, which may be deemed theoretically impure by those occupying extreme positions, becomes clearer.¹⁵⁸ The elements of a balanced approach are set forth below.

a. *There should be broad default fiduciary duties.* Beginning in the communitarian mode, the starting place for fiduciary analysis in partnerships, limited partnerships, and LLCs should be that there are default duties springing from the relationship that, at least initially, exist independently of the parties' contract. These duties should be broad, common law based, fact-specific, and judicially-determined. They should apply, at a minimum, to partners, members, and managers who have the power to make and execute decisions for the entity. When otherwise passive partners and members exercise power, they also should have fiduciary duties commensurate with that power.

Again, as a starting place, these fiduciary duties include a duty of loyalty, a duty of care, and a duty of good faith and fair dealing. In this regard, several state LLC and limited partnership statutes declare that the duties include a duty of loyalty, a duty of care, and a *contract-based* duty of good faith and fair dealing, but they leave room for other equitable duties in the appropriate cases.¹⁵⁹ These additional duties likely include a *fiduciary* duty of good faith and fair dealing and a fiduciary duty of disclosure. Other statutes declare that the duties of loyalty and care are the exclusive duties and foreclose equitable conclusions that other duties exist. In my view, these exclusive pronouncements do not give sufficient room for courts to exercise equitable powers to rule that actions are beyond the members' "community" norms, and they should be amended so that they are not so constricted.

b. *Assuming that certain conditions are met, the parties should be free to contract around the default rules.* Shifting to the contractarian mode, if certain pre-

¹⁵⁸ Other scholars have taken similar positions. *See, e.g.*, Frankel, *supra* note 142.

¹⁵⁹ *See, e.g.*, COLO. REV. STAT. § 7-64-404 (2015) (regarding general partnerships); *id.* § 7-80-404 (regarding LLCs).

conditions are met, the parties should be free to govern their own relationship by agreement without the imposition of mandatory fiduciary rules. The conditions for elimination or modification of fiduciary duties relate to the agreement of the parties to bargain around the default rules. They are as follows: (1) there must be sufficient notice identifying the proposed elimination or modification; (2) there must be disclosure of all facts material to a decision to allow elimination or modification in order for the contracting parties to make informed decisions; (3) the terms of the agreement to eliminate or modify should be specific, rather than speculative; and (4) since fiduciary duties are being eliminated or modified, the parties' agreement should be reasonable and fair. This last requirement can be viewed as encompassing a belief that unreasonable and unfair agreements are not informed (i.e., cognitive) and independent (i.e., volitional) agreements.

c. *More courts, less statutes.* Fiduciary duties, which are inherently fact specific, implicate standards of conduct and are not reducible to well defined rules. Thus, statutes should be relatively silent as to fiduciary rules and courts should be relatively noisy as to fiduciary standards.

D. *Delaware Law and the Uniform Unincorporated Organization Laws—What Is Happening on the Ground*

1. What Happens in Delaware . . .

Delaware unincorporation law has frequently proceeded down a contractarian path, with several side alleys being explored. First, the Delaware LLC Act and other limited partnership statutes contain language proclaiming that “[i]t is the policy of [the Delaware LLC Act] to give the maximum effect to the principle of freedom of contract and to the enforceability of agreements.”¹⁶⁰ Although it may be uncertain what “maximum effect to the principle of freedom of contract” means, the apparent legislative intent is to keep the courts from interfering with what are believed to be the parties' private contractual affairs. Second, Delaware LLC Act and other partnership statutes do not contain positive statements concerning fiduciary duties, but they do contain language that “duties may be expanded or restricted or eliminated by provisions in an agreement.”¹⁶¹ Third, although the Delaware LLC Act does not declare a role for good faith and fair dealing, it does indicate that there is an “implied contractual covenant of good faith and fair dealing” that cannot be eliminated by the parties' agreement.¹⁶² The Delaware LLC Act and other partnership statutes also do

¹⁶⁰ DEL. CODE ANN. tit. 6 § 18-1101(b) (2013).

¹⁶¹ *See id.* § 18-1101(c).

¹⁶² *Id.*

not specify the persons who owe fiduciary obligations. All of these issues, specifically the questions of who owes duties, what duties are owed, the role of contract in establishing duties, and the nature of good faith, are discussed below.

a. Does Anyone Owe Default Duties?

In a law review article, then-Delaware Chief Justice Myron Steele wrote that Delaware courts should interpret the Delaware LLC Act and its limited partnership statute as not including *any* default fiduciary duties.¹⁶³ Therefore, he argued that the only fiduciary duties in Delaware LLCs and limited partnerships arise from the parties' contract—not as a result of their relationship.¹⁶⁴ To reach this conclusion, Steele argued that the Delaware legislature announced a clear public policy to enforce the parties' freedom of contract, that Delaware courts have determined the duties that apply in a contract context, namely, the implied contractual covenant of good faith and fair dealing, and that the courts should apply those same default duties to LLCs and partnerships, and no more.¹⁶⁵

Steele applied an economic analysis whereby “courts seeking to adopt economically sensible default rules might begin by considering whether the parties to a LLC would provide for fiduciary duties if they had bargained over all the risks—that is, the hypothetical bargain.”¹⁶⁶ He noted that a hypothetical-bargain analysis requires the court to use an economic cost-benefit approach, and here, Steele turns to Larry Ribstein's economic rationale, discussed above, for narrowly defining fiduciary duties.¹⁶⁷ In Steele's view, the mere existence of default fiduciary duties

¹⁶³ Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 AM. BUS. L.J. 221, 221–25 (2009).

¹⁶⁴ Steele had previously urged that we

come to grips with the reality that the contractual relationship between parties to limited partnership and limited liability company agreements should be the analytical focus for resolving governance disputes—not the status relationship of the parties. When the parties specify duties and liabilities in their agreement, the courts should resist the temptation to superimpose upon those contractual duties common law fiduciary principles

Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1, 25 (2007). Steele also stated that a contractual analysis of fiduciary duties “fulfills any rational view about appropriate public policy.” *Id.* at 5–6.

¹⁶⁵ Steele, *supra* note 163, at 235.

¹⁶⁶ *Id.* at 237.

¹⁶⁷ *Id.* at 238–42.

add unnecessary contracting costs and resource expenditures, since their nebulous nature makes it difficult for the parties to eliminate some, but not all, duties.¹⁶⁸ He viewed a contract creating duties as a simpler drafting project than a contract eliminating some, but not all, duties.¹⁶⁹ Steele also viewed default fiduciary duties as creating unexpected litigation expenses, since default duties “create the opportunity to enter into litigation based upon rights not provided by the LLC agreement,” and, if the problem was a failure of expression, the parties might be forced to litigate claims they never intended in their agreement.¹⁷⁰ Finally, Steele relied on Delaware’s judicial sophistication and stated that, in a hypothetical-bargain setting, the parties would likely prefer that Delaware courts determine their rights and duties in accordance with contractual terms—not an unbargained-for fiduciary duty.¹⁷¹ In fact, Steele went several steps beyond Ribstein, who concluded that hypothetical-bargain principles would create at least *some* level of default duties on managers of manager-managed LLCs and general partners of limited partnerships; to Steele, everything about fiduciary duties is contractual.¹⁷²

But academic musings are not judicial holdings, and the question of default fiduciary duties was litigated in Delaware. In *Auriga Capital Corporation v. Gatz Properties, LLC*, Chancellor (and now-Delaware Chief Justice) Leo Strine held that equitable principles overlay the Delaware LLC Act, particularly since the Act contains a legislative mandate that, “[i]n any case not provided for in this chapter,

¹⁶⁸ *Id.* at 240.

¹⁶⁹ *Id.* As a lawyer who drafts these contracts, my observation differs from Steele’s conclusion. At a minimum, it would be useful to see some empirical evidence one way or the other.

¹⁷⁰ *Id.* at 241. Again, objective evidence would be helpful.

¹⁷¹ *Id.* at 241–42.

¹⁷² See Lyman Johnson, *Delaware’s Non-Waivable Duties*, 91 B.U. L. REV. 701 (2011) (arguing that Delaware’s Constitution vests the Chancery Court with general equity powers equivalent to those held by Great Britain’s High Court of Chancery when the Constitution was adopted in 1792, and that private contracts cannot oust Chancery’s traditional plenary powers even when the legislative branch desires that they should do so; concluding that fiduciary duties cannot be eliminated by contract in Delaware unincorporations, that Delaware’s Chancery judges should reassert their constitutional authority, and that Delaware unincorporation law is both more indeterminate than people may believe and than the laws of other states and more closely resembles Delaware corporation law in this regard); see also *CML V, LLC v. Bax*, 28 A.3d 1037, 1040–41 (Del. 2011) (holding, in a decision authored by Chief Justice Steele, that the statutory limitation of LLC derivative suits to members does not unconstitutionally strip the Delaware Chancery Court of its equitable jurisdiction since LLCs, unlike corporations, did not exist at common law in 1792). *Bax* was seriously weakened in *In re Carlisle Etcetera LLC*, 2015 WL 1947027 (Del. Ch. Apr. 30, 2015), discussed *infra* note 186.

the rules of law and equity . . . shall govern.”¹⁷³ Strine then ruled that, “under traditional principles of equity, an LLC manager would qualify as a fiduciary of the LLC and its members[,] since the manager is vested with discretionary power to manage the LLC’s business.”¹⁷⁴ He concluded that, “because the LLC Act provides for principles of equity to apply, because LLC managers are clearly fiduciaries, and because fiduciaries owe the duties of loyalty and care, the LLC Act starts with the default rule that managers of LLCs owe enforceable fiduciary duties.”¹⁷⁵ Then and only then, in Strine’s view, do the statutory provisions allowing contractual modification or elimination step in, and “where the core default fiduciary duties have not been supplanted by contract, they exist as the LLC statute itself contemplates.” To Strine, the existence and content of fiduciary duties start with equitable, relationship-based principles. Then and only then does the parties’ particular contract begin to operate.

Although the Delaware Supreme Court affirmed Chancellor Strine’s *Gatz* decision, it did so only on narrow, contract-based grounds.¹⁷⁶ The court held that the “pivotal legal issue” presented on appeal was whether Gatz owed contractually-agreed-upon fiduciary duties to his LLC and its members.¹⁷⁷ It agreed with Chancellor Strine that the LLC agreement at issue imposed fiduciary duties in transactions between the LLC and affiliated persons, including its manager, even though “magic words” such as “fiduciary duties” were not used.¹⁷⁸ The Delaware Supreme Court then considered the question of whether an equitable default rule exists, establishing that managers have extra-contractual fiduciary duties, which are then capable of contractual delimitation, and ruled that Chancellor Strine’s “statutory pronouncements must be regarded as dictum without any precedential value.”¹⁷⁹ Although we might quibble with the court’s statement that Chancellor Strine’s

¹⁷³ *Auriga Capital Corp. v. Gatz Props., LLC*, 40 A.3d 839, 849 (Del. Ch. 2012).

¹⁷⁴ *Id.* at 850.

¹⁷⁵ *Id.* at 581.

¹⁷⁶ *Gatz Prop., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1218 (Del. 2012). Although the Supreme Court’s *Gatz* ruling was a *per curiam* decision, it bears hallmarks of then-Chief Justice Steele’s thinking.

¹⁷⁷ *Id.* at 1212.

¹⁷⁸ *Id.* at 1213.

¹⁷⁹ *Id.* at 1218.

equity-based ruling was dictum, to the Delaware Supreme Court at that time, “the question remains open.”¹⁸⁰

The door may have closed in *Feeley v. NHAOCG, LLC*, in which Vice Chancellor Laster, relying on a “long line of Chancery precedents,” agreed with Chancellor Strine’s *Auriga* decision and held that default fiduciary duties apply to Delaware LLCs.¹⁸¹ The door ultimately was closed by the Delaware legislature, which amended the Delaware LLC Act to provide: “In any case not provided for in this chapter, the rules of law and equity, including the rules of law and equity relating to fiduciary duties . . . , shall govern.”¹⁸² Thus, it appears that now-Chief Justice Strine ultimately had the better position and that, in Delaware, fiduciary duties can arise from the relationship of the parties and can then be revised by contract.

b. What Default Duties Are Owed and How Are They Modified?

Once it is established as a general rule that managers of Delaware LLCs and general partners of Delaware limited partnerships have fiduciary duties under equitable principles, the next question is one of content: what are those duties,

¹⁸⁰ We may wonder whether the Delaware Supreme Court’s ruling would have been the same if Chancellor Strine had cloaked his holding in hypothetical-bargain language instead of, or in addition to, references to equitable principles.

¹⁸¹ *Feeley v. NHAOCG, LLC*, 62 A.3d 649 (Del. Ch. 2012). Vice Chancellor Laster stated:

As the Delaware Supreme Court recognized in *Gatz*, the long line of Chancery precedents holding that default fiduciary duties apply to the managers of an LLC are not binding on the Supreme Court, but are appropriately viewed as *stare decisis* by this Court. . . . Although the Delaware Supreme Court determined that the Chancellor should not have reached the question of default fiduciary duties, his explanation of the rationale for imposing default fiduciary duties remains persuasive, at least to me. In citing the Chancellor’s discussion I do not treat it as precedential, but rather afford his views the same weight as a law review article, a form of authority the Delaware Supreme Court often cites. . . .

The Delaware Supreme Court is of course the final arbiter on matters of Delaware law. The high court indisputably has the power to determine that there are no default fiduciary duties in the LLC context. To date, the Delaware Supreme Court has not made that pronouncement, and *Gatz* expressly reserved the issue. Until the Delaware Supreme Court speaks, the long line of Court of Chancery precedents and the Chancellor’s dictum provide persuasive reasons to apply fiduciary duties by default to the manager of a Delaware LLC.

Id. at 660–61, 663 (citations omitted).

¹⁸² DEL. CODE ANN. tit. 6, § 18-1104 (2013).

assuming that the parties' agreement fails to establish, eliminate, or modify them? Again, the Delaware LLC Act is silent other than a provision that "the rules of law and equity [relating to fiduciary duties] . . . shall govern."¹⁸³ This allows courts to make important policy decisions and determine the default levels of fiduciary duties.¹⁸⁴ The Delaware Court of Chancery has generally held that, as a default rule, LLC managers owe "traditional" fiduciary duties of loyalty and care.¹⁸⁵ This position is buttressed by the statutory statement that the rules of law and equity relating to fiduciary duties shall govern.¹⁸⁶

Although the Delaware default rules concerning the extent of fiduciary duties appear to be based on the existence of the parties' relationship, and not on their contract, contract principles still can prevail in Delaware. As noted, the Delaware LLC Act states succinctly that duties may be "expanded or restricted or eliminated by provisions in the agreement" and that "it is the policy of [the Delaware LLC Act] to give maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements."¹⁸⁷ This has recently led to further judicial musings in a book chapter by now-Delaware Chief Justice Strine and Vice Chancellor Laster, the authors of the Chancery Court's decisions in *Auriga* and

¹⁸³ *Id.*

¹⁸⁴ Kelly v. Blum, No. 4516-VCP, 2010 WL 629850, at *10 (Del. Ch. Feb. 24, 2010).

¹⁸⁵ *Id.*; see also William Penn P'ship v. Saliba, 13 A.3d 749, 756 (Del. 2011) (discussing that the parties agreed that managers of Delaware LLCs owe traditional fiduciary duties unless modified or eliminated by agreement); Grove v. Brown, No. 6793-VCG, 2013 WL 4041495, at *9 (Del. Ch. Aug. 8, 2013) (discussing usurpation of opportunity); Metro Commc'n Corp. BVI v. Advanced Mobilcomm Techs., Inc., 854 A.2d 121, 131–32 (Del. Ch. 2004) (discussing the duty to disclose).

¹⁸⁶ *In re Carlisle Etcetera LLC*, 114 A.3d 592 (Del. Ch. 2015) demonstrates the power of equitable principles as wielded by the Delaware Court of Chancery. There, Vice-Chancellor Laster held that Section 18-802 of the Delaware LLC Act does not provide the exclusive means for LLC dissolution and that the court retains equitable jurisdiction under the Delaware Constitution to dissolve LLCs in the appropriate circumstances. *Id.* at 601–03. The court specifically ruled that it did not accept the contention, previously indicated in the Delaware Supreme Court's decision in *Bax*, that, "because the nascent practice of entity law as it existed at the time of the colonies' separation had not yet envisioned LLCs, they fall outside the domain of equity." *Id.* at 603 (citations omitted). Further, the Chancery Court indicated that the parties' ability to waive statutory dissolution rights does not extend to their ability to seek dissolution in equity. *Id.* at 605. In light of academic discussions by Delaware Chief Justice Strine and Vice-Chancellor Laster, as discussed in note 188, we may now wonder how far this approach will extend into Delaware fiduciary law. Cf. Weinstein v. Colborne Foodbiotics, LLC, 302 P.3d 263, 266 (Colo. 2013) (stating that "corporation common law" does not extend to LLCs in the absence of an express statutory mandate).

¹⁸⁷ DEL. CODE ANN. tit. 6, § 18-1101(b); see Elf Atochem N. Am. v. Jaffari, 727 A.2d 286, 291 (Del. 1998).

Feeley, respectively.¹⁸⁸ Strine and Laster begin by noting that the concept of contractual freedom “conjure[s] up images of bargaining similar to what occurs between sophisticated parties bargaining over a commercial relationship . . . , with the parties tailoring a contract to the unique features of their relationship.”¹⁸⁹ However, they question whether the image diverges from reality, and they state that, at least in their experience, in many situations there is not significant bargaining of LLC agreements, but that “these governing instruments seem to be drafted unilaterally by the sponsors and proposed on a take it or leave it basis.”¹⁹⁰ They also note the lack of clarity or poor drafting of many LLC agreements, which themselves lead to increased litigation costs and inefficiencies.¹⁹¹

Strine and Laster state that the drafters of the Delaware LLC and limited partnership statutes sought to limit the risks posed by the corporate opportunity doctrine by permitting LLC agreements to restrict or eliminate managerial fiduciary duties.¹⁹² However, they argue that, “as a policy basis for using alternative entities, this does not seem to us to be all that substantial,” since, at least in Delaware, the corporation statute specifically provides a safe harbor against corporate opportunity claims through a statement in the certificate of incorporation.¹⁹³ In their view, the same safe harbor could presumably be transplanted to LLCs, and broader elimination language could itself be eliminated.¹⁹⁴

Importantly, Strine and Laster also note that an argument in favor of LLCs and other noncorporate entities is that they “allow for . . . the establishment of a purely contractual relationship,” but they state that they do not grasp why this would be viewed as a compelling advantage.¹⁹⁵ In their view, fiduciary duties emerged as a non-waivable, common law overlay because people recognized the difficulty of developing contractual provisions that would provide a fair and efficient path in all

¹⁸⁸ Leo E. Strine & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, in RESEARCH HANDBOOK ON PARTNERSHIPS, LLCs AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 11 (Robert W. Hillman & Mark J. Loewenstein eds., 2015).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 11–12.

¹⁹¹ *Id.* at 12.

¹⁹² *Id.* at 15.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 15–16.

the diverse circumstances that businesses confront.¹⁹⁶ Thus, American business organization law developed with relatively few statutory rules and broad reliance on judicial enforcement of common law principles.¹⁹⁷ Strine and Laster doubt whether this initial foundation has shifted.¹⁹⁸

Strine and Laster then discuss issues arising from typical contract language stating that, “[e]xcept as expressly set forth in this [a]greement, . . . the [g]eneral [p]artner . . . shall [not] have any duties or liabilities, including fiduciary duties, to the [p]artnership or any [l]imited [p]artner”¹⁹⁹ Among these issues are: (1) most agreements then retain only portions of the traditional duty of loyalty and expose managers to liability only if they act in subjective bad faith (e.g., they eliminate any requirement of substantive fairness in self-dealing transactions); (2) most agreements fail to define exactly who owes contractual duties, to whom they are owed, and to distinguish between direct and derivative actions; (3) simultaneously, most agreements contain indemnification and exculpation provisions suggesting that non-contractual duties continue (e.g., the inclusion of gross negligence as a basis for indemnification suggests that common law duties of care persist); and (4) in most agreements, there is a failure to address the obligations of persons who control the manager, and the application of the *USACafes* line of cases is left uncertain.²⁰⁰

Finally, Strine and Laster argue that the move to contract superiority creates a “profound danger” for contract law itself.²⁰¹ Historically, when managers of unincorporated entities have appeared to act inappropriately, but in compliance with the express contract, plaintiffs have made “good faith” *fiduciary-based* claims.²⁰² However, in traditional contract law, the implied good faith covenant is only a gap filler that applies “when the express terms of the contract indicate that the parties would have agreed to the obligation had they negotiated the issue.”²⁰³ Thus, when

¹⁹⁶ *Id.* at 16.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 16–17.

¹⁹⁹ *Id.* at 19.

²⁰⁰ *Id.* at 19–21, 22 (citing *In re USACafes, L.P. Litig.*, 600 A.2d 43 (Del. Ch. 1991)).

²⁰¹ *Id.* at 25.

²⁰² *Id.* at 25–26.

²⁰³ *Id.* at 26 (citation omitted); see generally *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878 (Del. 2015) (discussing the implied contractual covenant of good faith and fair dealing).

the contract covers a topic, the implied contractual good faith covenant is inapplicable. This traditional, implied contractual good faith covenant is far different from the fiduciary duty of good faith, which is the state of mind of a loyal fiduciary bound to advance the owners' best interests.²⁰⁴ To Strine and Laster, courts that consider only the parties' agreement to eliminate fiduciary duties are likely to use the implied contractual covenant of good faith as a substitute for the fiduciary duty of good faith eliminated by the parties' agreement.²⁰⁵ They contend that this renders traditional fiduciary principles less dependable for persons who form business relationships, but also that possible expansion of the implied contractual covenant's role to accommodate the traditional fiduciary role could render contract-based expectations less predictable, thereby raising the cost of contracting and deterring the formation of relationships.²⁰⁶ Thus, they implicitly encourage returning the good faith duty to its fiduciary origins.

In conclusion, Strine and Laster argue that traditional fiduciary principles of loyalty should not be subject to elimination, but instead, the unincorporated entity statutes should be amended to, among other things, alleviate corporate opportunity doctrine problems through organizational document provisions.²⁰⁷

c. Summary

Delaware jurists appear to be wrestling with the contractarian question and, after early movement to a contractarian approach to unincorporation law, the tide seems to be moving in the other direction at present. It will be interesting and important to see where the eventual balance is reached.

2. The Uniform Business Organizations Code Experience

Over the ten-year period beginning with RUPA in 1997, moving through the most recent iteration of Re-ULLCA in 2006, as well as the recent amendments to the Uniform Business Organizations Code in 2013 ("2013 Amendments"), there have been changes in approach to fiduciary duties that demonstrate a softening in contractarian attitudes. However, most of the recent uniform business organization

²⁰⁴ See *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005) ("To act in good faith, a director must act at all times with an honesty of purpose and in the best interests and welfare of the corporation."), *aff'd*, 906 A.2d 27 (Del. 2006).

²⁰⁵ Strine & Laster, *supra* note 188, at 26.

²⁰⁶ *Id.* at 26–27.

²⁰⁷ *Id.* at 27.

laws, and the recent changes to prior laws, have not been adopted in many states. Thus, the effect of the changed uniform laws approach remains to be determined.

- a. What are the Fiduciary Duties?
 - i. General Partnerships

The 1997 version of RUPA originally provided that the *only* fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care.²⁰⁸ RUPA then stated that a partner's duty of loyalty *is limited to* the following: (1) accounting for profit or benefit derived by the partner in the conduct of the partnership business or from the partner's use of partnership property, including a usurpation of opportunity; (2) refraining from dealing adversely with the partnership; and (3) refraining from competing with the partnership.²⁰⁹ Conspicuously absent are duties of good faith and fair dealing and disclosure.²¹⁰ Finally, RUPA Section 404(d) sets forth a contractual (not fiduciary) obligation of good faith and fair dealing in discharging a partner's duties under the statute or the partnership agreement and in exercising rights.²¹¹

These RUPA provisions were significantly modified as part of the Uniform Business Organizations Code, which was adopted by NCCUSL in 2013.²¹² First, RUPA's Section 404(a) was amended to eliminate the word "only."²¹³ Second, RUPA Section 404(b)(1) was amended to make the loyalty duty "include," rather than be limited to, the enumerated duties.²¹⁴ The comment to RUPA Section 409 states that "the . . . [h]armonization amendments made one substantive change; they 'un-cabined' fiduciary duties."²¹⁵ Specifically, the comment notes that the original RUPA's exhaustive list of duties left no room for the fiduciary duty owed by partners

²⁰⁸ RUPA, *supra* note 7, § 404(a).

²⁰⁹ *Id.* § 404(b)(1)–(3).

²¹⁰ *See id.*

²¹¹ *Id.* § 404(d).

²¹² UNIF. BUS. ORGS. CODE (2011) (amended 2013).

²¹³ *Id.* § 409(a). Note that Section 409 of the Uniform Business Organizations Code "originated as" RUPA Section 404. *Id.* § 409 cmt.

²¹⁴ *Id.* § 409(b)(1).

²¹⁵ *Id.* § 409 cmt.

to one another in the punctilio of an honor the most sensitive.²¹⁶ Thus, the revisions to RUPA broaden the potential duties of general partners.

ii. Limited Partnerships

The original version of ULPA 2001 repeated the original RUPA provisions, thereby “cabin-ing” fiduciary duties in limited partnerships.²¹⁷ However, the 2013 Uniform Business Organizations Code changed ULPA 2001 to “un-cabin” fiduciary duties in the same fashion as they were in RUPA.²¹⁸

iii. LLCs

The 1996 version of ULLCA continued the original RUPA-based regime of limited fiduciary duties and a contract-based good faith and fair dealing obligation.²¹⁹ However, the 2006 version of ULLCA, know as Re-ULLCA, contains a major shift in approach, which formed the basis for 2013 amendments to RUPA and ULPA 2001. Re-ULLCA Section 409(a) omits the word “only” when describing a member or manager’s fiduciary duties as the duties of loyalty and care, and thereby allows for the existence of additional fiduciary duties in appropriate cases.²²⁰ Further, Re-ULLCA Section 409(b) states that the duty of loyalty *includes* (and is not limited to) duties to account for benefits derived from the use of LLC property or the appropriation of an LLC opportunity, to refrain from dealing adversely with the LLC, and to refrain from competing with the LLC.²²¹ The comment to Re-ULLCA Section 409 demonstrates that the drafters of the original RUPA made “an effort to respect freedom of contract, bolster predictability, and protect partnership agreements from second-guessing when it decided to ‘cabin’ all fiduciary duties within a statutory formulation.”²²² The comment then notes that Re-ULLCA takes a different approach, since Re-ULLCA’s drafters decided the original RUPA “corral” does not fit the complex and variegated world of LLCs and that it is impracticable to “cabin” all fiduciary duties within a statutory formulation.²²³ Fundamentally, the Re-ULLCA

²¹⁶ *Id.*

²¹⁷ ULPA 2001, *supra* note 9, § 408.

²¹⁸ *See generally* UNIF. BUS. ORGS. CODE.

²¹⁹ ULLCA, *supra* note 14, § 409(a)–(b), (d).

²²⁰ RE-ULLCA, *supra* note 14, § 409(a).

²²¹ *Id.* § 409(b).

²²² *Id.* § 409 cmt.

²²³ *Id.*

drafters decided that the RUPA experiment had failed, and they abandoned contractarian rules for more communitarian standards, in which courts can continue to use fiduciary duties to police the parties' relationships.²²⁴ Although Re-ULLCA continues to use good faith as a contract-based obligation, the "un-cabining" of fiduciary duties also means that there can be a broader fiduciary duty of good faith and fair dealing in appropriate settings as determined by the courts. Further, courts can apply a fiduciary duty of disclosure in the appropriate settings.

b. Who Owes and Is Owed Fiduciary Duties?

i. General Partnerships

RUPA provides that "[a] partner owes the partnership and the other partners" duties of loyalty and care.²²⁵ This is a communitarian statement derived from the historical concept of partnership as an aggregate of people doing business together—not an entity separate in any real sense from its owners.²²⁶

ii. Limited Partnerships

ULPA 2001 follows RUPA to some extent and provides that general partners owe to the partnership and the other partners duties that include loyalty and care.²²⁷ Thus, general partner duties are broadly communitarian. Limited partners, on the other hand, have no duties to the partnership or other partners, except that "they shall discharge any duties to the partnership and the other partners *under the partnership agreement* and exercise any rights under this [Act] or the partnership agreement consistently with the contractual obligation of good faith and fair dealing."²²⁸ Thus, with respect to limited partners, duties are contractarian in nature since the existence of duties is left to the partnership agreement. In my view, this is an inappropriate distinction between general partners, which are included in the partnership community as default rule, and limited partners, which are not. To the extent that limited partners participate in the partnership (e.g., when they exercise contractual

²²⁴ *See id.*

²²⁵ RUPA, *supra* note 7, § 404(a).

²²⁶ Although RUPA states that duties are owed among co-partners, the exclusive listing of duties of loyalty (e.g., no usurpation, no adverse dealing, and no competition), the 1997 version of RUPA leaves no room for the duties partners owe to each other, since they all relate to duties owed to a partnership. *See id.* § 404. The problem was remedied when the RUPA fiduciary duties were "un-cabined" in 2011 and 2013. *See* UNIF. BUS. ORGS. CODE § 409 (2011) (amended 2013).

²²⁷ ULPA 2001, *supra* note 9, § 408.

²²⁸ *Id.* § 305(a)–(b) (emphasis added).

powers to remove general partners and vote or consent to partnership actions, when they receive information about the partnership's business and financial affairs, and when they transact business with their co-partners, such as by buying and selling partnership interests), limited partners should, as a default rule, owe duties of loyalty and care.²²⁹ A contractual obligation of good faith and fair dealing is insufficient, in part because the meaning of "good faith" is undefined and elastic.²³⁰

iii. LLCs

Turning to LLCs, the 1996 version of ULLCA provided that members of member-managed LLCs have duties of loyalty and care as well as a good faith obligation.²³¹ In the case of manager-managed LLCs, ULLCA states: (1) that managers are held to the same standards of conduct as members of member-managed LLCs; (2) that members who are not also managers owe no duties solely by reason of being a member; and (3) that members who exercise some or all of the rights of a manager in the management and conduct of the LLC's business have the same standards of conduct as a manager to the extent they exercise managerial authority.²³² The 1996 version of ULLCA thus favorably differs from ULPA 2001 by specifically providing default duties of non-manager members (who are roughly equivalent to limited partners) in manager-managed LLCs. All participants are appropriately included in the LLC community.

Re-ULLCA then takes a step backwards. Although it states that members of member-managed LLCs and managers of manager-managed LLCs owe fiduciary duties, it completely eliminates any member fiduciary duties in manager-managed LLCs, irrespective of whether members exercise managerial authority.²³³ Presumably, this change tracked the elimination of limited partner fiduciary duties in ULPA 2001, and it is problematic for the same reasons as discussed above.

²²⁹ See J. William Callison & Allan W. Vestal, *The Want of a Theory, Again*, 37 SUFFOLK L. REV. 719, 722 (2003).

²³⁰ See Callison, *supra* note 148, at 158.

²³¹ ULLCA, *supra* note 14, § 409(a).

²³² *Id.* § 409(h).

²³³ RE-ULLCA, *supra* note 14, § 409(g)(5).

c. Modifying Duties by Agreement
i. General Partnerships

RUPA states generally that relations among the partners and between the partners and the partnership are governed by the partnership agreement.²³⁴ However, the original version of RUPA also provided that the partnership agreement may not eliminate the duty of loyalty or unreasonably reduce the duty of care,²³⁵ but that it may identify *specific* types or categories of activities that do not violate the duty of loyalty, *if not* “manifestly unreasonable,” and that partners may authorize or ratify *after full disclosure* of all material facts, a specific act, or transaction that otherwise would violate the duty of loyalty.²³⁶ With the exception of the “manifestly” qualification to “unreasonable,” RUPA meets the pragmatic test for contractual modification of fiduciary duties set forth above.²³⁷ That is, the modification must meet contractual standards for an agreement, be specific, meet a reasonableness threshold, and, as part of the transaction, include full disclosure with respect to authorization or ratification.

The Uniform Business Organizations Code amended RUPA to allow the partnership agreement to alter or eliminate the aspects of the duty of loyalty (e.g., to eliminate the noncompetition aspect) if not “manifestly unreasonable.”²³⁸ The 2013 Amendments also set forth a methodology for judicial determination of manifest unreasonableness.²³⁹ RUPA now follows the lead of Re-ULLCA, discussed below.

²³⁴ RUPA, *supra* note 7, § 103(a).

²³⁵ *Id.* § 103(b)(3)(i).

²³⁶ *Id.* (emphasis added).

²³⁷ *Id.*; *see* Callison, *supra* note 148, at 158–60.

²³⁸ UNIF. BUS. ORGS. CODE § 105(d) (2011) (amended 2013).

²³⁹ *Id.* § 105(e).

ii. Limited Partnerships

ULPA 2001 closely follows the RUPA provisions concerning contractual modification of default fiduciary duties.²⁴⁰ In 2013, ULPA 2001 was amended so that it continues to track RUPA, as amended.²⁴¹

iii. LLCs

The 1996 version of ULLCA also follows RUPA's lead and provides for an irreducible, non-eliminable core of fiduciary duties that can be modified by the members' operating agreement if the modification itself is specific and not manifestly unreasonable.²⁴² Members can also authorize or ratify acts that otherwise might violate the duty of loyalty if the authorization or ratification is specific and there has been full disclosure of all material facts.²⁴³

Re-ULLCA makes significant changes to the fiduciary duty modification process. First, it states that unless otherwise allowed by Re-ULLCA, the operating agreement cannot entirely eliminate the duties of loyalty, care, or any other fiduciary duty.²⁴⁴ Next, Re-ULLCA allows complete elimination or any restriction on the enumerated duties of loyalty (e.g., self-dealing, adverse dealing, and competition) if not manifestly unreasonable.²⁴⁵ The agreement may also identify specific types or categories of activities that do not violate the loyalty duty and may alter any other fiduciary duty, including the elimination of particular aspects of that duty.²⁴⁶ Re-ULLCA also contains authorization or ratification procedures, including full disclosure of all material facts.²⁴⁷ Finally, Re-ULLCA, for the first time, sets forth the rules by which a court may determine that an operating agreement term is "manifestly unreasonable," including that the court must look to the time the agreement was entered and may invalidate the term only if it is "readily apparent"

²⁴⁰ ULPA 2001, *supra* note 9, § 110.

²⁴¹ *Limited Partnership Act (2001) (Last Amended 2013)*, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/Act.aspx?title=Limited%20Partnership%20Act%20\(2001\)%20\(Last%20Amended%202013\)](http://www.uniformlaws.org/Act.aspx?title=Limited%20Partnership%20Act%20(2001)%20(Last%20Amended%202013)) (last visited Jan. 16, 2016).

²⁴² ULLCA, *supra* note 14, § 103(b).

²⁴³ *Id.*

²⁴⁴ RE-ULLCA, *supra* note 14, § 110(c)(4).

²⁴⁵ *Id.* § 110(d).

²⁴⁶ *Id.*

²⁴⁷ *Id.* § 110(e).

that the objective of the term is unreasonable or the term is an unreasonable means to achieve the objective.²⁴⁸ Thus, although much of Re-ULLCA is an elaboration on previous concepts, it makes a move toward contractarian objectives by allowing complete elimination of loyalty duties if the not-manifestly-unreasonable standard is met. As stated above, broad amenability under defined rules is an appropriate and pragmatic goal.

d. Summary

The unincorporated business organization statutes have generally moved from a contractarian view of fiduciary duties toward a more pragmatic approach. First, there is a recognition of broad-based fiduciary duties that exist independently of the parties' contract. Second, the parties are allowed to contract around the default rules, including by eliminating aspects of the duty of loyalty. Third, the uniform laws are more in the nature of standards than rules and permit broad-judicial intervention and interpretation. The remaining pragmatic quibble is that they do not sufficiently include limited partners and members of manager-managed LLCs within the community of persons owing duties. This could be rectified by provisions recognizing that these persons, while generally not having fiduciary obligations, will have duties to the extent they participate and can thereby harm the other participants.

CONCLUSION

Contractarian theories run strong in contemporary American law. However, there continues to be a major tension between contractual freedom and public policies that limit contractual liberty. Fiduciary duties are such a constraint. For example, to the extent that partnership or LLC law were to provide that people can agree to associate and can set forth the terms of their association in their particularized agreement, but that in all such associations the participants have un-waivable duties of care and loyalty, there would be a policy-based limitation on contractual freedom and personal autonomy. The questions become whether the law does (or should) delimit the participants' ability to freely contract and, if so, why.

A communitarian argument in support of non-contractual fiduciary duties is that, although markets are good at allowing people to obtain goods that have personal value, there are other goods that depend on shared values or on social interactions that lead to shared justifications, understandings, and principles for living well together.²⁴⁹ Thus, contract can be limited by other non-personal understandings of

²⁴⁸ *Id.* § 110(h).

²⁴⁹ See Elizabeth Anderson, *The Ethical Limitations of the Market*, 6 *ECON. & PHIL.* 179, 185–92 (1990); see generally Melvin A. Eisenberg, *The World of Gift and the World of Contract*, 85 *CALIF. L. REV.* 821 (1997).

good developed by communities through deliberations and decisions about the appropriate scope of contract and the market. In addition, contract can be limited to the extent market forces undermine individual capacities to achieve these goods. Fiduciary duties can be seen as one of those areas in which the community, through legislative and judicial processes, insists on the importance of extra-contractual values. Although the neoliberal argues that such determinations are inappropriate, the communitarian embraces them.

This Article has its own intellectual history. I began writing what became this Article approximately ten years ago, on the back of an airline napkin while traveling to moderate a Widener University School of Law program on the convergence of fiduciary duties in incorporated and unincorporated entities. At that time, I believed that the currents of contractarianism were at flood stage and that insufficient attention was being given in the legislative, judicial, and academic arenas to other values, which I have broadly termed as “communitarian.” Perhaps we were still closer to the fall of the Berlin Wall than we are today. My goal was to remind people that there are choices to be made, that neoliberal attitudes are not the only attitudes, that change happens, that value choices influence change, that there are historical and theoretical bases for non-contractarian choices, and, in Wendell Berry’s words, that “we do not have to live as though we are alone.”²⁵⁰ I was essentially pessimistic, and, in a sense, I was responding to the sentiment contained in the comment of a good friend, that “we are all contractarians now.”

As I write this Article a decade later, I am more optimistic. After a period of deepening contractarianism in Delaware, in NCCUSL, and elsewhere, a rebalancing is beginning. It is manifest in some recent Delaware judicial decisions and in the recent work of NCCUSL. Although contractarian thought still dominates, other ideas are starting to percolate and shine through. Perhaps we are now closer to the economic decimations of 2008–2010 and to the “Occupy” movement than we are to the fall of the Berlin Wall. Every idea has its day, and I hope that more progressive thinking, including positive conceptions of liberty and communitarian ideas, will continue to add their weight so that American business organization law can find its angle of repose and an acceptable place to lie down for a while.

²⁵⁰ WENDELL BERRY, *It All Turns on Affection*, in *IT ALL TURNS ON AFFECTION: THE JEFFERSON LECTURE AND OTHER ESSAYS* 9, 38 (2012).