

Contract, Trust, and Corporation: From Contrast to Convergence

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ABSTRACT: This Essay contributes to the theory of fiduciary relationships. Using legal analysis, legal theory, and the results of a new global survey of professional fiduciaries, it shows that fiduciary relationships are not now fundamentally different from contractual relationships. I then show how different types of fiduciary relationships are converging. Scholars commonly claim that the fiduciary obligations imposed on trustees are more severe—and more severely enforced—than those imposed on corporate directors and officers. Large parts of current law and practice do not bear out this view. That fiduciary relationships generally, and their traditionally distinct types, are in practice more alike to other social and economic relationships than it is often assumed expresses the current reformulation of fiduciary relationships as short term, arm’s length, commodified transactions. Because this reformulation is part of an overall socio-economic transformation, tending to anonymity and commodification, reforms returning fiduciary law to its protective roots are unlikely to reverse the commodification of fiduciary relationships.

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I. INTRODUCTION

According to the way they have classically been understood, fiduciary relationships are not contractual. Instead, they form a separate category of relationships that are essentially different from contracts. Complete *ex ante* specification of the parties' duties characterizes contractual relationships, while pre-existing relationship-governance frameworks characterize fiduciary relationships—leaving the fiduciary to fill in most of the details unilaterally *ex post*, prioritizing the beneficiary's interests. While the law imposes fiduciary duties on corporate directors and officers as much as on trustees, those it imposes on trustees are more severe—and more severely enforced—than those it imposes on corporate directors and officers.

This Essay presents and justifies a new, empirically grounded theory of modern fiduciary relationships. Using legal analysis, legal theory, and the results of a new global survey of professional fiduciaries I have recently conducted, Part II shows that fiduciary relationships are not now fundamentally different from contractual relationships. The survey results demonstrate that trust drafters are highly likely to replace features of the default law governing trusts with alternative arrangements, specifying many of the parties' rights and duties *ex ante* in great detail—the very conduct that has traditionally been said to characterize contractual relationships. Trust drafters are equally likely to replace features of the default law governing trusts with alternative arrangements, whether they created the trust by contract or by such non-contractual means as unilateral trust deeds and declarations of trust. Part III shows how current law and practice do not bear out the common view that the fiduciary obligations the law imposes on trustees are more severe—and more severely enforced—than those it imposes on corporate directors and officers. Trusts are converging with corporations by way of the exculpatory and duty-abridging terms trust instruments increasingly contain, as well as by statutory reform. The commodification of fiduciary services, transforming them from intimate, often long-term relationships into anonymous, arm's-length transactions, has caused fiduciary relationships generally and their traditionally distinct types to become increasingly similar to other social and economic relationships. Because this reorientation of fiduciary relationships follows and expresses the social alienation and relationship commodification characteristic of current society, reversing it will likely be difficult. Only harsh reform measures, such as statutory reform holding fiduciary-duty-abridging and exculpatory terms to be void, have some chance of success—and current consumer preferences are likely to stymie even such drastic

measures. If jurisdictions return fiduciary law to its protective roots, fiduciaries are likely to demand premium prices, and potential clients to prefer cheaper, commodified, less protective options.

II. FIDUCIARY RELATIONSHIPS AND CONTRACT

This Part examines the classical view that fiduciary relationships are different from contractual relationships. According to that understanding, contractual parties fully specify their rights and duties at the drafting stage, while parties to fiduciary relationships merely opt into a general relationship-governance framework, expecting the fiduciary to fill in the details unilaterally in the course of performance. Employing legal theory, legal analysis, and newly collected empirical data, I argue in this Part that this classical understanding accounts for neither the nature of modern contracting, nor that of current fiduciary relationships. While the common law has traditionally addressed contracts and fiduciary relationships separately, fiduciary relationships are no longer fundamentally different from contractual relationships.

A. FIDUCIARY CONTRACTARIANISM

John Langbein argues that while contract law and trust law have long evolved as separate doctrinal fields, “the deal between settlor and trustee is functionally indistinguishable from the modern third-party-beneficiary contract. Trusts are contracts.”¹ The fact that “the existence of specifically identified property (the trust res) is necessary for trust formation”² merely adds that trusts are contracts having to do with property; it does not prove the identification of trusts as a genre of contracts wrong.³ Henry Hansmann and Ugo Mattei “agree with Langbein that, so far as the relationships between the settlor, the trustee, and the beneficiary are concerned, trust law adds very little to contract law.”⁴

1. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995).

2. Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 629 (2004).

3. Ming-Wai Lau comments that “[t]here really is nothing special about trusts as contracts precisely because trusts do not exist primarily to enforce economic exchanges; this is why the ‘contractual elements’ of trusts appear so ordinary.” M.W. LAU, *THE ECONOMIC STRUCTURE OF TRUSTS* 144 (2011). The view that many trusts use contractual scaffolding to fulfill purposes unlike those that typically animate contracts is based on too narrow and stereotypical a view of both trusts and contracts. Many contracts do not “exist primarily to enforce economic exchanges,” a prime example being “the modern third-party-beneficiary contract” to which Langbein referred. Langbein, *supra* note 1, at 627. Trusts, on the other hand, often exist “primarily to enforce economic exchanges,” as with commercial trusts, security trusts, and pension trusts. LAU, *supra*, at 144.

4. Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 470 (1998). Trust contractarianism is one branch of a broader academic effort, deeply influenced by the economic analysis of law, to state the law of contracts as a unifying theory of private law (and perhaps of law as a whole, taking into account

Illustrating the ongoing convergence trend, Langbein fleshes out his idea by observing how modern developments in contract law bring it ever closer to trust law, making clear the common elements.⁵ Courts have neutralized the rule that specific relief is only available in contract where a plaintiff shows that damages are an inadequate remedy “by defining adequacy in such a way that damages are never an adequate substitute for plaintiff’s loss.”⁶ This means that “the remedial tradition of the trust with its ready facility for specific relief no longer distinguishes the trust importantly from contract law.”⁷ Contract-focused decisions and scholarship have adapted to recognize the particular characteristics of the long-term relational contract, in which specifying the contents of each party’s undertaking *ex ante* is more difficult than in short-term deals. Standard donative trusts are similarly long-lived, which means that settlors cannot furnish trustees upon the creation of the trust with complete guidance about how to exercise their discretion throughout its life. Langbein recalls how “Goetz and Scott identify various ‘fiduciary’ relations—including those involving attorneys, executors, and partners—that ‘are properly analyzed as relational contracts because they tend to be characterized by uncertainty about factual conditions during performance and an extraordinary degree of difficulty in describing specifically the desired adaptations to contingencies.’”⁸ He adds that “[t]he good faith standard in contract law

contractarian theories of criminal law, constitutional law, public international law, and so on). See Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303, 305 (1999); David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1677–79 (2009); Langbein, *supra* note 1, at 630.

5. See generally Langbein, *supra* note 1. Developments in trust law also contribute to closing the remaining differences between the two bodies of law. The Uniform Trust Code (“U.T.C.”), promulgated in 2000 and since enacted in 31 states, gave settlors of irrevocable trusts, contrary to the common law position, standing to request the court to remove a trustee, UNIF. TRUST CODE § 706(a) (UNIF. LAW COMM’N 2010). See references to different states’ enacted versions of the U.T.C., until 2012, in the recent RESTATEMENT (THIRD) OF TRUSTS § 105 reporter’s notes to cmt. c (AM. LAW INST. 2012). The controversial character of settlor standing is clear in the Restatement’s failure to adopt it. *Id.* § 94 cmt. d(2). While under contract law one contracting party cannot ask the court to remove or replace the other, all parties have standing in court, whereas under the common law of trusts settlors had no standing once the trust was launched. The U.T.C. having granted standing to settlors, even if in a specific context only, brings trust law closer to contract law. Unsurprisingly, Lau, being loyal to the traditional common law understanding of trusts as non-contractual, criticizes Langbein’s support for settlor standing. LAU, *supra* note 3, at 33–34.

6. Langbein, *supra* note 1, at 653 n.144 (quoting Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 688, 691 (1990)). See, however, later case law emphasizing that in order to obtain injunctive relief in contract a plaintiff must, according to the four-factor test established in equity, supply the court with some sort of positive evidence indicating that damages would not constitute adequate relief. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 388 (2006).

7. Langbein, *supra* note 1, at 653.

8. *Id.* at 654 n.151 (quoting Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1127 (1981)).

echoes the norms of trust fiduciary law, which regulate the trustee's embedded discretion in performing the trust deal.⁹ While beneficiaries who did not also create the trust often do not voluntarily choose to enter into a relationship with their trustees, they are similarly situated to third-party contract beneficiaries. Some trust beneficiaries inject a volitional dimension into the trust relationship by modifying it. They may do so, for example, by consenting to trustee behavior that would otherwise breach the trustee's default duties under the law of trusts, such as the duties of loyalty and prudence.¹⁰

B. THE CHALLENGE TO FIDUCIARY CONTRACTARIANISM

Daniel Markovits and others have recently challenged Langbein's fiduciary contractarianism by re-emphasizing the classical distinction between contractual and fiduciary relationships.¹¹ Markovits argues that fiduciary relationships are deeply different from contracts, because contracts specify the parties' complete duties *ex ante*, while parties to fiduciary relationships choose a pre-existing framework of relationship governance that leaves the fiduciary to fill in the details unilaterally *ex post* with the beneficiary's interests in mind.¹² He notes that contract law permits efficient breaches by making expectation damages the preferred remedy for breach of contract.¹³ Fiduciaries, on the other hand, are not permitted to efficiently

9. *Id.* at 655. But note the view of John Kidwell and Lisa Bernstein that courts should interpret relational contracts according to a strict, formalist approach, realizing parties' sharing plan formulated *ex ante*. See Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L.J. 59, 76–81 (1993). See generally John Kidwell, *A Caveat*, 1985 WIS. L. REV. 615.

10. Langbein, *supra* note 1, at 660–61.

11. Lau, another opponent of fiduciary contractarianism, emphasizes doctrinal differences between English trust law and contract law, eschewing Markovits' theoretical concerns. LAU, *supra* note 3, at 20–35. Lau explains away many of the trust law reforms of the past half-century that emphasized the contractual dimension of trusts, such as statutory legitimation of trustee duty waivers, settlor-reserved powers, and the decline of beneficiaries' rights and powers, regarding them as instances of trust law having strayed from the true path. *Id.* at 30–34. He distinguishes contract from consensual agreement, noting that “[fiduciary] contractarians would garner more support if they characterized companies or trusts as consensual agreements, rather than insisting on contract law and the narrow and technical doctrines and terminologies it carries.” *Id.* at 30. Fiduciary exceptionalism is, of course, not a new phenomenon. For an earlier exponent, see FitzGibbon, *supra* note 4; even earlier, see Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879 (1988).

12. See Daniel Markovits, *Sharing Ex Ante and Sharing Ex Post: The Non-Contractual Basis of Fiduciary Relations*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 209 (Andrew S. Gold & Paul B. Miller eds., 2014). Compare with the contractarian view of Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993), noting that “a ‘fiduciary’ relation is a contractual one characterized by unusually high costs of specification and monitoring. The duty of loyalty replaces detailed contractual terms . . .”

13. Markovits, *supra* note 12, at 209. On efficient breach theory in contract law, see RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note (AM. LAW INST. 1979); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 55–61 (1972); Robert L. Birmingham, *Breach of Contract*,

breach their obligations; disgorgement of their gains is a common remedy for breach of fiduciary duty.¹⁴ Markovits points out that, while contracts contain bespoke terms of sharing, fiduciary law's frameworks of relationship governance are creatures of the law.¹⁵ While the law merely subjects contractual parties to a duty of acting in good faith, it subjects fiduciaries to the more demanding duties of loyalty and care.¹⁶ Although parties to a fiduciary relationship "may select among substantive specifications of fiduciary loyalty and care and indeed (often) waive certain elements of these duties,"¹⁷ neither such waivers nor the amenability of fiduciary law's default relationship-governance frameworks to modification "entail any general abandonment of fiduciary sharing ex post in favor of contract sharing ex ante. The terms of fiduciary sharing may be varied in substance, but not in form. Liberalization . . . is not contractualization."¹⁸ He adds that "both the individual parties to fiduciary engagements and the broader legal order also possess interests in fiduciary relations for their own sakes,"¹⁹ while contractual relations are only as valuable as their outcomes.

C. THE CHALLENGE REBUFFED

Holding that fiduciary relationships are irreducibly different from contractual relationships offers comfort of several kinds. Not least, it fits the doctrinal tradition separating the law governing fiduciary relationships from that governing contractual relationships. I find, however, that the arguments raised in support of classical fiduciary exceptionalism, outlined above, are fairly easily answered, concluding that fiduciary relationships are not now fundamentally different from contractual relationships.

Markovits's characterization of the two relationship types—contractual and fiduciary—is incomplete. To take the fiduciary case first, many fiduciary relationships are expressed in contracts concluded between a fiduciary and its client or other counterparty. Instruments establishing fiduciary relationships often include clauses replacing features of the applicable pre-existing relationship-governance framework with alternative provisions.²⁰

Damage Measures, and Economic Efficiency, 24 RUTGERS L. REV. 273, 284 (1970). For moralistic-deontological criticism of the theory, see, e.g., Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 730–32 (2007). For criticism of the economic analysis involved, see generally Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1 (1989).

14. Markovits, *supra* note 12, at 209.

15. *Id.* at 218.

16. *Id.* at 209–10.

17. *Id.* at 219.

18. *Id.* at 222 (emphasis omitted).

19. *Id.* at 223.

20. Professionals have been drafting trust instruments so as to waive some of the duties imposed by the default law of trusts since at least the mid-18th century. See Adam S. Hofri-Winogradov, *The Stripping of the Trust: A Study in Legal Evolution*, 65 U. TORONTO L.J. 1, 4

The extreme detail and prolixity characteristic of many trust instruments bely the alleged ex post character of fiduciary–relationship governance; drafters of these instruments often make a considerable effort to specify the parties’ complete rights and duties ex ante.

I conducted a survey of professional fiduciaries worldwide to find out whether professionals who create fiduciary relationships by contract tend to oust more of the applicable pre-existing relationship-governance framework by specifying the parties’ rights and duties ex ante than drafters of non-contractual fiduciary instruments.²¹ Such surveys are rare, likely due to the confidential character of much of the trust industry and the relative dearth of regulatory supervision over trustees of donative trusts. While some such trustees, such as the institutional fiduciaries Robert Sitkoff and Max Schanzenbach studied,²² are subject to registration and/or reporting requirements, they make an unrepresentative sample of the overall fiduciary population: Other fiduciaries tend to be smaller in size and have a differently composed clientele. Further, even where reporting requirements exist, the reported data can be quite limited. For example, the institutional fiduciaries Sitkoff and Schanzenbach studied report “their trust holdings, including total assets and number of accounts”²³ as well as income earned, expenses incurred, and losses suffered on their fiduciary holdings to federal banking regulators, but do not report the administrative or dispositive characteristics of trusts the assets of which they hold.²⁴ While trustees file tax

(2015); *see also* RESTATEMENT (THIRD) OF TRUSTS § 4 cmt. a(1) (AM. LAW INST. 2003) (“[M]any (but not all) of trust law consists of ‘default rules,’ as opposed to mandatory or restrictive rules, and is therefore subordinate to the terms (or ‘law’) of the trust.”); Langbein, *supra* note 1, at 650 (“[V]irtually all trust law is default law—rules that the parties can reject. The rules of trust law apply only when the trust instrument does not supply contrary terms.” (citing RESTATEMENT (SECOND) OF TRUSTS § 164(a) (AM. LAW INST. 1959))).

21. I conducted the survey by emailing the membership of the three leading organizations of the estate planning profession: the American Bar Association (“ABA”) Section of Real Property, Trust and Estate Law; the American College of Trusts and Estates Counsel (“ACTEC”); and the Society of Trusts and Estates Practitioners (“STEP”). I invited all targets to respond to an online survey. The survey, conducted between November 16, 2014 and April 20, 2015, is available here: Adam Hofri-Winogradow, *Trust Practice Survey*, <http://tinyurl.com/ozuqekz> (last visited Mar. 20, 2017). The full survey results, as well as a complete set of descriptive statistics, are available from the author.

22. *See generally* Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?*, 50 J.L. & ECON. 681 (2007); Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465 (2006); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005) [hereinafter Sitkoff & Schanzenbach, *Jurisdictional Competition for Trust Funds*].

23. Sitkoff & Schanzenbach, *Jurisdictional Competition for Trust Funds*, *supra* note 22, at 388.

24. For data the Federal Deposit Insurance Corporation currently requires from reporting institutions regarding fiduciary services they provide, see FED. DEPOSIT INS. CORP., UNIFORM BANK PERFORMANCE REPORT USER’S GUIDE: FIDUCIARY & RELATED SERVICES (2017), https://cdr.ffiec.gov/CDR/public/download/UserGuide/v66/FFIEC%20UBPR%20User%20Guide%20Fiduciary%20%20Related%20Services—Page%201_2017-01-25.PDF.

returns for the trusts they administer, those returns only include such data as is useful for tax collection. The Internal Revenue Service (“IRS”) collects and makes publicly available detailed data on the income reporting trusts earned, deductions they took, and federal tax they paid, but not data about the administrative or dispositive characteristics of reporting trusts.²⁵ There is no trust equivalent to the large cache of corporate contracts deposited with the Securities and Exchange Commission (“SEC”) that many scholars have used to great profit.²⁶ My respondent pool of 409 fiduciaries, spread across the globe, is larger, as well as far more diverse, than those accessed in the few previous survey-based research projects focused on fiduciary practice.²⁷

I found that trust drafters are equally likely to replace features of the default law governing their trust with alternative arrangements, whether they

25. *SOI Tax Stats—Income from Estates and Trusts Statistics*, IRS, (last updated Dec. 30, 2014) <http://www.irs.gov/uac/SOITaxStatsIncomefromEstatesandTrustsStatistics>. The self-classification of reporting trusts into simple, complex, grantor, split-interest, qualified disability and qualified funeral trusts for income-tax purposes does provide some rough data about the distribution of reporting trusts across these trust types, which each have their own administrative and/or dispositive characteristics. See INTERNAL REVENUE SERV., STATISTICS OF INCOME: ESTATES AND TRUSTS, 2001 TO 2013, <https://www.irs.gov/pub/irssoi/13EstatesAndTrustsOneSheetpdf> (listing categorizations) (last visited Mar. 30, 2017).

26. See generally, e.g., Matthew D. Cain & Steven M. Davidoff, *Delaware’s Competitive Reach*, 9 J. EMPIRICAL LEGAL STUD. 92 (2012) (concluding, based on a study, that Delaware has become more valuable to corporate actors who influence incorporation choices and that Delaware competes strongly for legal products); John C. Coates IV, *Managing Disputes Through Contract: Evidence from M&A*, 2 HARV. BUS. L. REV. 295 (2012) (examining dispute management clauses in mergers and acquisitions contracts); Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975 (2006) (investigating the determinants underlying choice of law in incorporation); Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts*, 30 CARDOZO L. REV. 1475 (2009) (examining choice of law provisions in corporate contracts); Sarath Sanga, *Choice of Law: An Empirical Analysis*, 11 J. EMPIRICAL LEGAL STUD. 894 (2014) (proposing a new measure for studying choice of law).

27. Exactly four such research projects have reached publication. See BEVIS LONGSTRETH, MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE 232 (1986) (surveying the 50 largest of each of U.S. bank trust departments, corporate pension funds, foundations, and private universities, 200 respondents in all, about their investment practices); THE LAW COMM’N, TRUSTEE EXEMPTION CLAUSES: A CONSULTATION PAPER 31–32 (2002), <https://www.treasurers.org/ACTmedia/cp171.pdf> (surveying 276 U.K. trustees and 69 U.K. legal advisors to trustees and settlors about the prevalence of trustee exemption/exculpation terms, settlor attitudes towards such terms, and potential techniques for their regulation); Martin D. Begleiter, *Does the Prudent Investor Need the Uniform Prudent Investor Act—An Empirical Study of Trust Investment Practices*, 51 ME. L. REV. 27, 72–73 (1999) (surveying 61 corporate trustees in Iowa about their investment practices, to examine the impact on those practices of Iowa legislation of 1991 reforming the traditional prudent man rule); Francis J. Collin Jr. et al., *A Report on the Results of a Survey About Everyday Ethical Concerns in the Trust and Estate Practice*, 20 ACTEC NOTES 201, 220–21 (1994) (surveying 111 members of the American College of Trusts and Estates Counsel (“ACTEC”) regarding their techniques for coping with the everyday ethical concerns raised by trust and estate practice).

created the trust by contract or otherwise. Survey respondents estimated, on average, that 44.6% of the donative trusts they service were created by contract.²⁸ They further estimated, on average, that 60.57% of the donative trusts they service which were created by contract include clauses replacing features of the default law governing the trust with alternative arrangements,²⁹ while of the donative trusts they service which were created other than contractually, 61.02% include such clauses.³⁰ The frequency with which trust drafters rejected features of the default law governing the trust did not significantly differ between trusts created by contract and trusts created otherwise, $p > .1$. Moreover, respondents' estimates of the frequency of default rejection in trusts created by contract were highly correlated with their estimates of the frequency of default rejection in trusts created otherwise, $r_s = .67$, $p < .001$. This result suggests that certain trust drafters tend to replace features of the default law governing the trust more often than others, and that their preferences regarding default rejection remain consistent whether the trust instruments they are drafting are created by contract or otherwise.

Where trust instruments compromise both fiduciaries' duty of loyalty—including the duty to refrain from conflicts of duty and interest—and their duty of prudence, as the recent Restatement (Third) of Trusts states that they may,³¹ they fundamentally transform the relevant pre-existing

28. For this statistic, $n = 409$; median = 30%; mode = 0%; standard deviation = 39.72%. In total 25.7% of respondents said that none (0%) of the donative trusts they service were created by contract, while 15.2% of respondents said that all (100%) of the donative trusts they service were created that way. I obtained this data in response to the following question: "Of the trusts you service, how many are created in a contract (rather than by an instrument other than a contract, such as a unilateral declaration)? Estimate using percentages." In order to gather responses that reflected the entire breadth of each respondent's experience with donative trusts, rather than merely those trusts under which he or she functioned as trustee, I defined "trust services" broadly as "any of the following: trust drafting; functioning as trustee; functioning as protector; functioning as trust enforcer; functioning as custodian of trust assets; functioning as another type of trust officer; functioning as trustee delegate, such as an investment manager; advising settlors, trustees, protectors, trustee delegates or beneficiaries on trust affairs."

29. For this statistic, $n = 299$; median = 70%; mode = 100%; standard deviation = 36.88%. I obtained this data in response to the following question: "Of the trusts you service which have been created in a contract, how many include clauses replacing default features of the trust regime (or law) governing the relationship with alternative arrangements? Estimate using percentages."

30. For this statistic, $n = 342$; median = 75%; mode = 100%; standard deviation = 36.9%. I obtained this data in response to the following question: "Of the trusts you service *which have NOT been created in a contract*, how many include clauses replacing default features of the trust regime (or law) governing the relationship with alternative arrangements? Estimate using percentages." The comparison results are significant at the 0.0105 level.

31. RESTATEMENT (THIRD) OF TRUSTS § 78(1) (AM. LAW INST. 2007) ("Except as otherwise provided in the terms of the trust, a trustee has a duty to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose."); *see also* Langbein, *supra* note 1, at 659 ("[T]he duty of loyalty is default law that yields to contrary terms

relationship-governance framework—the default law of trusts. The common relaxation of those duties disposes of another supposed distinction between contractual and fiduciary relationships: that the law merely subjects contractual parties to a duty of acting in good faith, but subjects fiduciaries to more demanding duties of loyalty and care.³² Further, as Andrew Gold noted, “[a] contract can expressly create a duty of loyalty outside the fiduciary relation.”³³ The duty classically considered most emblematic of fiduciary law is thus often waived by parties to fiduciary relationships, and can be adopted by parties to relationships not seen as fiduciary.

Despite Markovits’ claim that parties may vary fiduciary law’s frameworks of relationship governance in substance but not in form,³⁴ it is hard to deny that where a settlor and trustee contract to bypass some of trust law’s default rules—for example, releasing the trustee from its duty to compensate beneficiaries for losses they suffer as a result of its negligence³⁵—they engage in contractual sharing *ex ante*. The more detailed the trust instrument, the clearer the trust relationship’s *ex ante* character becomes. While the instrument may still be entitled “trust deed” or “agreement for the provision of fiduciary services” rather than “contract,” and while, despite its modification of some of the default law of trusts, the instrument may still rely on other parts of that law, conserving some of the substance and form of the applicable relationship-governance framework cannot negate the contractual character of replacing parts of that framework *ex ante* by specifying the parties’ rights and duties. Because no one can reasonably identify a specific proportion of *ex ante* waivers, alterations, or qualifications that would constitute a general abandonment of *ex post* fiduciary sharing, it is unreasonable to claim that the popular practice of waiving or varying parts of the default trust framework does not undermine the traditional characterization of fiduciary practice as sharing *ex post*.

The characterization of contractual practice as specifying the parties’ complete duties *ex ante* is equally inaccurate. Contracts concluded in non-

of the trust deal.”). For the duty of prudence, see RESTATEMENT (THIRD) OF TRUSTS § 77 cmt. d (“Because the normal duty of prudence in matters of administration is default law, the terms of the trust may modify or relax its requirements.”).

32. As D. Gordon Smith noted, “[f]iduciary duty and the duty of good faith and fair dealing are variations on a theme. Both are judicially imposed loyalty obligations designed to attack the potential for opportunism in relationships.” D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1487–88 (2002) (footnotes omitted).

33. Andrew S. Gold, *The Loyalties of Fiduciary Law*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 176 (Andrew S. Gold & Paul B. Miller eds., 2014).

34. Markovits, *supra* note 12, at 222.

35. A common trust precedent provides that “[t]he trustee shall not be personally liable for acts or omissions done in good faith,” which releases the trustee from liability for negligent acts and omissions, and possibly grossly negligent acts and omissions too. NORTHERN TRUST, FORM 201 REVOCABLE TRUST AGREEMENT, ONE SETTLOR, FRACTIONAL SHARE MARITAL 23 (2014), https://www.northerntrust.com/documents/wealth-advisor/forms/pdf/Form_201.pdf.

fiduciary situations are based on pre-existing archetypes no less often than contracts concluded in fiduciary situations. Non-fiduciary contracts can also express choices of pre-existing relationship-governance frameworks—for example, of the default frameworks governing a hire-purchase relationship, a lease, a sale, a mortgage, a credit swap, and so on. The terms of many contracts are far from bespoke: consider the vast universe of standardized boilerplate language that drafting parties dictate to thousands or millions of counterparties. Markovits writes that “even boilerplate terms derive their meaning from the parties’ expectations”;³⁶ yet this statement seems, with respect, questionable, given that boilerplate recipients are frequently unaware of the boilerplate’s existence, or if aware, ignorant of its contents; yet boilerplate terms are enforced, regardless of whether recipients’ expectations of their relationship with the boilerplate provider fit, or do not fit, those terms.³⁷ Further, many non-fiduciary contracts are far from complete, belying the image of such contracts as specifying the parties’ *complete* duties *ex ante*; relational contracts—long-term contractual relationships which may, and often do, evolve in unexpected directions during their protracted existence—are a key example, as they render specifying the parties’ complete duties *ex ante* impossible.³⁸

Markovits further distinguishes contractual from fiduciary relationships by arguing that “both the individual parties to fiduciary engagements and the broader legal order also possess interests in fiduciary relations for their own sakes.”³⁹ Insofar as Markovits implies that parties to fiduciary relationships and the “broader legal order” see some value in the type of continuing relationship where one party supplies much of the governing detail *ex post*, which Markovits labels “fiduciary,” he offers no proof of this. Instead, Markovits cites two concrete examples of fiduciary engagements that people consider to be valuable “for their own sakes”: marriage and “the lawyer–client relation.”⁴⁰ He writes that “[p]artners value a marriage not simply as a means to ends . . . but rather as an end in itself.”⁴¹ He adds that “[i]t would . . . be quite incredible to think that the positive law governing lawyers might be adequately explained without any reference to the intrinsic

36. Markovits, *supra* note 12, at 218.

37. For a discussion of boilerplate language see generally BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS (Omri Ben-Shahar, ed. 2007); MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013); and Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883 (2014). For a discussion of U.S. courts’ enforcement of boilerplate see RADIN, *supra* at 246–48.

38. On relational contracts see generally Goetz & Scott, *supra* note 8; Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775 (2000); and Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974).

39. Markovits, *supra* note 12, at 223.

40. *Id.* at 222–23.

41. *Id.* at 223.

value of the rule of law . . .”.⁴² Even, however, if people value marriage as an end in itself, and the law governing lawyers embodies the intrinsic value attributed to the rule of law generally, these points do not demonstrate the innate value of fiduciary relationships. Marriage is a unique relationship which derives its value, as Markovits states, from the spouses’ “obligations to make new sacrifices in the face of unforeseen developments.”⁴³ The lawyer–client relationship is uniquely close to the core functioning of the legal order. The same cannot be said, however, of other fiduciary relationships. Consider the trustee–settlor and trustee–beneficiary relationships. Settlers and beneficiaries do not generally see trustees’ control of the administration of trust property and trustee discretion regarding its distribution as valuable “for their own sakes.” Granting trustees great power over the trust property and the beneficiaries may be appropriate because of the characteristics of many trust relationships, such as great duration. Settlers create many trusts when their beneficiaries are minors or even unborn. Because settlers cannot forecast the beneficiaries’ capacities for wealth management, and settlers may not survive until such time as distributing the trust capital becomes appropriate, it is necessary to appoint an extensively empowered third party—a trustee—as manager. Necessary power, however, is valuable due to its necessity, not for its own sake. Trustee power actually raises great apprehension in both settlers and beneficiaries. That apprehension has recently led trust drafters to devise mechanisms for restraining trustee power. Trusts now frequently reserve powers to veto trustee decisions or replace the trustee to the settlor, assign such powers to a trust protector, or both.⁴⁴

Finally, Markovits’ strongest argument for distinguishing contractual from fiduciary relationships is that contract law permits efficient breaches, expectation damages being the preferred remedy for breach of contract,⁴⁵ while fiduciaries are not permitted to efficiently breach their obligations, disgorgement of their gains being a common remedy for breach of fiduciary

42. *Id.*

43. *Id.* at 222.

44. See discussion of settlers of irrevocable trusts reserving powers to control the trustee in UNIF. TRUST CODE § 808(b) (UNIF. LAW COMM’N 2010); RESTATEMENT (THIRD) OF TRUSTS § 75 cmt. c(2) (AM. LAW INST. 2007); AMY MORRIS HESS ET AL., THE LAW OF TRUSTS AND TRUSTEES § 42 (3d ed. 2007); LAU, *supra* note 3, at 175–78; and 1 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 8.2 (5th ed. 2006). On protectors, see, e.g., RESTATEMENT (THIRD) OF TRUSTS § 94 cmt. d(1) & reporter’s notes (AM. LAW INST. 2012); RESTATEMENT (THIRD) OF TRUSTS § 75 (AM. LAW INST. 2007); RESTATEMENT (THIRD) OF TRUSTS § 64(2) cmt. d & reporter’s notes to cmts. b–d (AM. LAW INST. 2003); and PAOLO PANICO, INTERNATIONAL TRUST LAWS 405–45 (2010). See generally ANDREW HOLDEN, TRUST PROTECTORS (2011); Robert Ham et al., *Protectors, in* THE INTERNATIONAL TRUST 193 (John Glasson & Geraint Thomas eds., 2d ed. 2006); Donovan W. M. Waters, *The Protector: New Wine in Old Bottles?*, in TRENDS IN CONTEMPORARY TRUST LAW 63 (A.J. Oakley ed., 1996).

45. U.C.C. § 1-305 (AM. LAW INST. & UNIF. LAW COMM’N 2014); RESTATEMENT (SECOND) OF CONTRACTS §§ 344, 347 (AM. LAW INST. 1981); 24 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 64:2 (4th ed. 2002).

duty.⁴⁶ While as a matter of doctrine, this distinction stands,⁴⁷ statutory amendments to the law of trust administration have rendered the distinction less significant than it was by permitting conduct that used to constitute a breach of trustees' fiduciary duties. Cases in point are the statutes enacted in "[n]early all of the [s]tates" that allow trustees to invest trust monies "in securities of an investment company or investment trust to which the trustee . . . provides services," for which services it is "compensated . . . out of fees charged to the trust," thus entitling it to two income streams drawn from the same trust fund.⁴⁸

The distinction between contract law's condonation and fiduciary law's prohibition of efficient breaches cannot alone justify the traditional paradigm holding fiduciary relationships to be non-contractual. This Part showed that while fiduciary relationships have a distinct history and a separate doctrinal tradition, they do not now constitute a class of relationships fundamentally different from contractual relationships. Fiduciary relationships can easily be accommodated as a relatively paternalistic part of the contractual universe. Even this distinction may be questionable, given that the law permits parties to trust relationships to waive fiduciaries' key protective duties of prudence and loyalty.⁴⁹

46. See RESTATEMENT (THIRD) OF TRUSTS §§ 99 cmt. c, 100 cmt. c & reporter's note; RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 43 (AM. LAW INST. 2011); RESTATEMENT (SECOND) OF TRUSTS § 205 (AM. LAW INST. 1959); RESTATEMENT (FIRST) OF RESTITUTION § 138 (AM. LAW INST. 1937); HESS ET AL., *supra* note 44, § 862; 4 SCOTT ET AL., *supra* note 44, § 24.9. See generally Irit Samet, *Guarding the Fiduciary's Conscience—A Justification of a Stringent Profit-Stripping Rule*, 28 OXFORD J. LEGAL STUD. 763 (2008) (arguing in support of the traditional rule requiring individuals found to be in violation of fiduciary duties to return all their gains).

47. See *supra* notes 45–46. Gregory S. Alexander hypothesized that courts' harsh treatment of many fiduciaries is a result of their demanding "preconceived notions" of the fiduciary role, while "in cases of alleged contractual breaches, [courts] employ a bottom-up cognitive method . . . [which is] data-driven and therefore remain[s] free from the influence of a preconceived theory of the situation." Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 768 (2000) (footnotes omitted). By entrenching the distinction between fiduciary and contractual relationships, fiduciary exceptionalists such as Markovits may contribute to the entrenchment of courts' cognitive bias against fiduciaries.

48. See UNIF. TRUST CODE § 802(f) & cmt. The subsection provides that such an investment "is not presumed to be affected by a conflict between personal and fiduciary interests if [it otherwise is a prudent investment]." *Id.* § 802(f); see also RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. c(8); NORTHERN TRUST, *supra* note 35, at 31 (permitting trustees "to invest . . . trust property in . . . shares of investment companies, real estate investment trusts and other investment funds (including ones that receive services from, and pay compensation to, a corporate trustee hereunder . . .)"); *infra* Part III.B (discussing the watering-down of trustees' duty of loyalty, including UNIF. TRUST CODE § 802(f) and the equivalent Restatement text).

49. See *supra* notes 30–34 and accompanying text; see also *infra* Part III.B.

III. TYPES OF FIDUCIARY RELATIONSHIPS: TRUSTS AND CORPORATIONS

Scholars commonly claim that trusts are very different from corporations and that the fiduciary obligations the law imposes on trustees are more severe—and more severely enforced—than those it imposes on corporate directors and officers.⁵⁰ This Part shows how recent developments in both law and practice have led to an increasing convergence between trusts and corporations. Because this convergence expresses a general social transformation—the evolution of most social and economic relationships into short-term, commodified transactions—it is unlikely to be reversible. Even radical law reform measures, returning trust law to its protective roots, are unlikely to produce a trustee population subject to a heavier burden of obligation than that corporate fiduciaries currently bear: fiduciaries' demands for higher prices and consumers' preferences for short-term, commodified relationships will likely thwart them.

A. THE SUPPOSED CONTRAST

Leading scholars have long believed that trusts and corporations are very different.⁵¹ Edward Rock, Michael Wachter, and Melanie Leslie, among others, believe that trust law is characterized by a rigorous application and enforcement of trustees' strict duties, while corporate law imposes weaker standards on directors and officers and does not seriously enforce them.⁵² Even Robert Sitkoff, doyen of trusts at Harvard, believes that under “canonical law,” corporate law and trust law are very different in that trust law protects beneficiaries against trustee defalcations far better than corporate law protects shareholders against directors' and officers' duty infringements.⁵³ He argues that “trust fiduciary law, especially the duty of loyalty, is stricter and more prophylactic than the fiduciary law of other

50. See *infra* notes 51–55.

51. There have been a few exceptions: Frederic Maitland, an exceptional English jurist and legal historian, understood around the turn of the 20th century that trusts and corporations were often functionally similar and that the differences between them were only technical. Frederic William Maitland, *Trust and Corporation*, reprinted in 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 321, 397–98 (H.A.L. Fisher ed., 1911). See generally RESTATEMENT (SECOND) OF TRUSTS, ch. 1, intro. note; A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); F.J. Stimson, “Trusts,” 1 HARV. L. REV. 132 (1887).

52. Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 93 (2005) (“Fiduciary duties draw brighter lines [in trust law] as compared to corporate or partnership law . . .”); Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 NW. U. L. REV. 651, 661–63 (2002); see also, e.g., RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. a (“The duty of loyalty is, for trustees, particularly strict even by comparison to the standards of other fiduciary relationships.”); HESS ET AL., *supra* note 44, § 16; 1 SCOTT ET AL., *supra* note 44, § 2.3.12; Easterbrook & Fischel, *supra* note 12, at 437; John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 958–62 (2005).

53. Email from Robert H. Sitkoff, John L. Gray Professor of Law, Harvard Law School, to author (Oct. 24, 2014, 10:47 PM) (on file with author).

organizational forms.”⁵⁴ Sitkoff sees this difference as the law’s response to the absence of a market in beneficial interests under donative trusts on the one hand, and the ubiquity of the share market on the other: Holders of public company shares who are unhappy with management can sell their shares, while trust beneficiaries can merely disclaim their interests. Since trust beneficiaries may, where they cannot remove their trustees, be stuck with unsatisfactory trustees, the law imposes a strict, prophylactic disciplinary regime to counter trustees’ resulting power.⁵⁵

But are corporate law and trust law, or corporations and trusts, still that different? Sitkoff himself pointed to some points of law and practice where trusts and corporations have been growing closer. As I will now show, transformations in trust law and practice have multiplied these points, joining them into an ongoing process of convergence.

B. CONVERGENCE

Much like corporate law has evolved from imposing limits on corporate powers to relying on fiduciary obligations to police officer and director conduct, trust law has similarly evolved from imposing limits on trustee powers to relying on fiduciary obligations to police trustee conduct.⁵⁶ Even if the argument that trustees are bound by stronger and more rigorously enforced fiduciary duties than corporate directors and officers was once true, it is true no longer. Take the duty of care (or prudence) that the default law of trusts imposes on trustees—a duty long considered to be especially rigorous.⁵⁷ Trust instruments now routinely compromise this duty with provisions exculpating trustees from liability for any loss they cause to beneficiaries, so long as their injurious conduct does not amount to fraud or dishonesty.⁵⁸ Occasionally, trust instruments raise the liability threshold slightly, so that trustees’ grossly negligent behavior would lead to liability

54. Sitkoff, *supra* note 2, at 680. For other scholars holding equivalent positions regarding trustees’ duty of *care*, compared to that owed by other fiduciaries, see Leslie, *supra* note 52, at 76–94; A. Joseph Warburton, *Trusts Versus Corporations: An Empirical Analysis of Competing Organizational Forms*, 36 J. CORP. L. 183, 185–88 (2010). On trust law as a branch of organizational law, see generally Robert H. Sitkoff, *Trust Law as Fiduciary Governance Plus Asset Partitioning*, in THE WORLDS OF THE TRUST 428 (Lionel Smith ed., 2013).

55. Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. CORP. L. 565, 571, 579 (2003); see also Sitkoff, *supra* note 2, at 645–47 (discussing incentives for the trustee to manage the trust for the beneficiaries).

56. Sitkoff, *supra* note 2, at 677; see also Langbein, *supra* note 1, at 641 n.75.

57. See UNIF. TRUST CODE § 804 & cmt. (UNIF. LAW COMM’N 2010); RESTATEMENT (THIRD) OF TRUSTS § 77 & cmts.; HESS ET AL., *supra* note 44, § 541; 3 SCOTT ET AL., *supra* note 44, § 17.6.

58. Sitkoff, *supra* note 2, at 678 (noting that “the fiduciary duties imposed by the law of trusts are simply majoritarian default rules”). On trust parties’ limited power to waive or alter trustees’ duty of care, see generally *Donato v. BankBoston, N.A.*, 110 F. Supp. 2d 42 (D.R.I. 2000); *First Ala. Bank of Huntsville, N.A. v. Spragins*, 475 So. 2d 512 (Ala. 1985); *N.Y. State Med. Care Facilities Fin. Agency v. Bank of Tokyo Tr. Co.*, 621 N.Y.S.2d 466 (N.Y. Sup. Ct. 1994).

being imposed. Respondents to my recent survey of professional fiduciaries worldwide believe, on average, that 71.1% of donative trusts include a term exculpating the trustee, while 33% of respondents believe all trusts include trustee exculpatory terms.⁵⁹ Respondents also believe, on average, that only 10.4% of settlors of trusts that include trustee exculpatory terms demand and receive some quid pro quo for including these clauses, such as a fee reduction.⁶⁰

The Uniform Trust Code of 2000, now enacted into law in 31 states and the District of Columbia,⁶¹ states that these exculpatory clauses are enforceable unless they excuse trustees from “liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.”⁶² The law of the remaining states is likely to be influenced by the Restatement (Third) of Trusts, which provides that trustee exculpatory clauses are enforceable

except to the extent that [they] purport[] to relieve the trustee (a) of liability for a breach of trust committed in bad faith or with indifference to the fiduciary duties of the trustee, the terms or purposes of the trust, or the interests of the beneficiaries, or (b) of accountability for profits derived from a breach of trust.⁶³

The resulting liability threshold, both under the Uniform Code and under the slightly more protective Restatement (Third), is often more permissive than that which the “business judgment rule” applies to corporate directors and officers, which “requires deference to the ordinary business decisions of management unless they . . . are so unreasonable as to amount to gross negligence.”⁶⁴ The Uniform Trust Code and Restatement (Third) liability thresholds are also lower than those that the Revised Uniform Partnership Act applies to partners, under which “[a] partner’s duty of care to the partnership and the other partners . . . is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.”⁶⁵ The treatment of

59. For this statistic, $n = 391$; median = 90%; mode = 100%; standard deviation = 32.77%. Data were obtained in response to the following question: “What share of trusts include a trustee exemption/exculpation clause of any kind?”

60. For this statistic, $n = 382$; median = 0%; mode = 0%; standard deviation = 20.34%. Data were obtained in response to the following question: “[w]hat share of settlors of trusts including trustee exemption/exculpation clauses demand and receive some quid-pro-quo for the inclusion of such clauses, such as a fee reduction?”

61. *Legislative Fact Sheet—Trust Code*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code> (last visited Mar. 20, 2017).

62. UNIF. TRUST CODE § 1008(a)(1).

63. RESTATEMENT (THIRD) OF TRUSTS § 96(1) (AM. LAW INST. 2012).

64. Sitkoff, *supra* note 2, at 656.

65. REVISED UNIF. P’SHIP ACT § 404(c) (UNIF. LAW COMM’N 1997); *see also* Frederick R. Franke, Jr., *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract*, 36 ACTECL.J. 517, 539 (2010).

trustee exculpatory provisions under the Uniform Trust Code and Restatement (Third) echoes most states' authorization of "articles of incorporation . . . protect[ing] directors from liability for damages for grossly negligent acts."⁶⁶ Trust law and practice have joined the rush towards fiduciary exculpation which now characterizes the structures of business organization. The traditional distinction between active businesses, where the risk-taking necessary for success traditionally justified scaling back liability out of respect for business judgment, and donative trusts, where beneficiaries' vulnerabilities traditionally justified imposing a particularly heavy liability burden on trustees, has disappeared.

Trustees' other duty seen as fiduciary is their duty of loyalty. Like others, Sitkoff believes that "trust fiduciary law, especially the duty of loyalty, is stricter and more prophylactic than the fiduciary law of other organizational forms."⁶⁷ Trust law's formerly strong duty of loyalty is, however, being watered down. Classically, trust beneficiaries could void transactions the trustee personally conducted with trust property if a conflict between the trustee's fiduciary and personal interests affected them, such as where a trustee purchased a trust asset for his personal account. Beneficiaries could void these transactions even where the trustee could show that they benefitted them, such as where he or she purchased a trust asset at a fair or even favorable price. Sitkoff noted that under this so-called "no further inquiry" rule, even if the self-dealing transaction is objectively fair, the beneficiaries need only show the existence of the trustee's self-interest in order to prevail.⁶⁸ The Restatement (Third) preserves the classical severity of this rule, stating that "[e]xcept in discrete circumstances, the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests,"⁶⁹ and adding that "[t]ransactions in violation of [this duty] are not void but may be affirmed or set aside by the beneficiaries, except as the rights of bona fide purchasers intervene."⁷⁰ While the Uniform Trust Code has retained this rule in the context of "transaction[s] involving the investment or management of trust property entered into by the trustee for the trustee's own personal account,"⁷¹ its drafters transformed the rule into a rebuttable presumption regarding transactions with trust property the trustee entered into with his or her spouse, relatives, agent, attorney, or "a corporation or other person or enterprise in which the trustee, or a person that owns a significant

66. JAMES D. COX & THOMAS L. HAZEN, BUSINESS ORGANIZATIONS LAW § 25.6 (3d ed. 2011).

67. Sitkoff, *supra* note 2, at 680.

68. Sitkoff, *supra* note 55, at 573.

69. RESTATEMENT (THIRD) OF TRUSTS § 78(2) (AM. LAW INST. 2007).

70. *Id.* § 78 cmt. a.

71. UNIF. TRUST CODE § 802(b) (UNIF. LAW COMM'N 2010).

interest in the trustee, has an interest that might affect the trustee's best judgment."⁷² With respect to these latter transactions, the Code's drafters transformed trust law's application of the duty of loyalty to self-interested transactions into a form traditionally associated with corporate law: "a liability rule under which a self-dealing manager must show that the transaction was fair. If so, then it will be upheld, sometimes even if the manager failed properly to disclose his or her conflict in advance."⁷³

Another Code provision weakens the strict "no further inquiry rule" by allowing trustees to invest trust monies "in securities of an investment company or investment trust to which the trustee . . . provides services" for which it is "compensated . . . out of fees charged to the trust."⁷⁴ The Restatement (Third) provides a comparable "statutory exception for corporate trustees' participation in what are generally called 'proprietary mutual funds,'" warning that "the use of proprietary mutual funds for a trust's investment program must not result in the trustee receiving more than the reasonable overall compensation . . . appropriate to its services to the trust, taking account of the trustee's mutual-fund duties and compensation."⁷⁵ In its newly compromised form, trustees' duty of loyalty is less strict than at least some formulations of the corporate business-judgment rule, which "requires deference to the ordinary business decisions of management unless they are tainted by a conflict of interest."⁷⁶ Further,

72. *Id.* § 802(c). Even more radically, Langbein believes that the "no further inquiry rule" should be abolished, and "transaction[s] in which there has been conflict or overlap of interest should be sustained if the trustee can prove that the transaction was prudently undertaken in the best interest of the beneficiaries." Langbein, *supra* note 52, at 932. Langbein's suggestion extends the U.T.C. reform of the "no further inquiry rule," turning its classical prophylactic rigidity into a presumption, to cases where the trustee deals directly with his or her trust. Pennsylvania has in fact extended its transformation of the "no further inquiry rule" into a presumption to transactions involving trust property entered into by the trustee with "the trustee personally." *See* 20 PA. CONS. STAT. § 7772(c)(6) (West 2016).

73. Sitkoff, *supra* note 55, at 573. As Gregory Alexander noted in email correspondence, courts may blunt the edge of the transformation by treating the presumption of conflicted action as very strong. E-mail from Gregory S. Alexander, A. Robert Noll Professor of Law, Cornell Law School, to author (May 5, 2015, 1:56 AM) (on file with author). Whether courts will do so is yet to be seen.

74. UNIF. TRUST CODE § 802(f). A minority of enacting states modified this provision to protect beneficiaries from trustees drawing two simultaneous income streams from the trust account. New Hampshire, Virginia, Ohio, West Virginia, Maryland, and Minnesota omitted, in enacting this section of the U.T.C., the reference to the trustee's compensation for services it gave to the investment company or investment trust being "charged to the trust." *See* MD. CODE ANN., EST. & TRUSTS § 15-106 (West 2016); MINN. STAT. ANN. § 501C.0901 (2015); N.H. REV. STAT. ANN. § 564-B:8-802(f) (2016); OHIO REV. CODE ANN. § 5808.02(E) (West 2016); VA. CODE ANN. § 64.2-764(F) (West 2016); W. VA. CODE ANN. § 44D-8-802(F) (West 2016). The equivalent section of the Pennsylvania Statutes, not based on the U.T.C., also does not refer to the trustee's compensation being charged to the trust. 20 PA. CONS. STAT. § 7209 (West 2016).

75. RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. c(8) (AM. LAW INST. 2007).

76. Sitkoff, *supra* note 2, at 656 (citing *Brehm v. Eisner*, 746 A.2d 244, 264 & n.66 (Del. 2000)). In an email to the author, Sitkoff noted that "it is indeed canonical law that the

even the relatively strict Restatement (Third) notes that the “fiduciary duty of loyalty is a *default rule* that may be modified by the terms of the trust.”⁷⁷ This decline of trustees’ fiduciary obligations belies claims positing the law of trusts as the legal discipline most “asymmetrically biased against one particular party.”⁷⁸

The canonical position holding trustees’ fiduciary duties to be stricter than those imposed on corporate directors and officers explained this purported state of affairs by noting that reliance on fiduciary standards can be less complete in the corporate case than in the trust case, because the share market and the market for corporate control provide an additional check on director and officer conduct that does not exist for trustees.⁷⁹ Sitkoff emphasizes that the share market provides shareholders with an exit from their agency relationship with the corporation’s directors and officers, while there is no equivalent market for beneficial interests under private donative trusts.⁸⁰ He notices, however, that this description of beneficiaries’ position is true for some trusts, but not for others.⁸¹ As regards many types of trusts, including investment trusts and business trusts, there is a market in beneficiaries’ interests. Sitkoff notes that “the governance of numerous commercial manifestations of the common law private trust, at least when the residual claims are sold to outsiders . . . more closely resembles the governance of the public corporation than it does the governance of the donative trust.”⁸²

That terms restricting fiduciaries’ duties and liabilities are hidden, in classic boilerplate fashion, deep inside protracted documents, away from trust users’ (settlor’s and beneficiaries’) view, may explain their prevalence. This prevalence may make even users who are aware of these terms’ existence slow to realize that they are not an inevitable part of every fiduciary relationship. Even those clients who are aware of their existence, understand their consequences, and realize they are at least potentially subject to modification may be prone to accept them, because fiduciary

fiduciary duty of loyalty is stricter in trust law, and the duty of prudence (care) is not insulated by a business judgment rule. But that is not the same as saying that the canonical default law is in fact what applies in most cases in practice, owing to opt outs or otherwise.” Email from Robert H. Sitkoff, *supra* note 53. As I show in these pages, the convergence of the fiduciary standards applied to trustees with those applied to corporate officers and directors is evident not only as a matter of practice, but also in many states’ statutory trust regimes, as well as in the Uniform Trust Code and Restatement (Third) of Trusts.

77. RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. c(2).

78. LAU, *supra* note 3, at 153.

79. See Melanie B. Leslie, *Helping Nonprofits Police Themselves: What Trust Law Can Teach Us About Conflicts of Interest*, 85 CHIL-KENT L. REV. 551, 557 (2010); John Morley, *The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation*, 123 YALE L.J. 1228, 1271–72 (2014).

80. Sitkoff, *supra* note 55, at 566.

81. *Id.*

82. Sitkoff, *supra* note 2, at 681 & n.310.

exculpatory terms have become a common baseline from which it may be expensive to deviate. Cognitive limitations, such as the tendency “to equate ‘low probability’ risks with ‘zero probability’ risks,”⁸³ may further prevent even informed clients from concluding that these terms’ potential consequences in case of fiduciary-created loss may justify active negotiation to curtail or remove them, or receive some quid pro quo for allowing them to remain.⁸⁴ The ubiquity of fiduciary exculpatory terms may also arise from clients’ desire to stay out of court: Clients may trust their fiduciaries not to conduct the relationship negligently more than they trust courts to adjudicate their fiduciaries’ behavior correctly.

My survey findings that fiduciary exculpatory terms, without clients demanding and receiving any quid-pro-quo for their inclusion, are a conventional, nearly universal standard in donative trusts that professionals service⁸⁵ show that legislative reforms making the validity of such terms, if “drafted or caused to be drafted by the trustee,” conditional on their disclosure to the settlor⁸⁶ have not checked their popularity. Recent scholarship on the ineffectiveness of disclosure as a means for driving individuals to make informed, competent decisions⁸⁷ rules out, as remedies for value erosion by way of exculpatory terms, both simple disclosure requirements and Leslie’s stronger recommendation that for an exculpatory term to be enforced, trustees would have “to prove that [the] settlor expressly agreed to the [term].”⁸⁸ Given human cognitive abilities, many clients are likely, having heard or read an explanation of the exculpatory term along with a statement that the term was part of the fiduciary’s standard conditions, to expressly agree to the term without having properly cognitively processed its potential implications. Successfully countering exculpatory terms that transfer value from clients to their trust service providers will require heavier normative machinery, such as a legislative provision holding terms that curtail fiduciaries’ duties to beneficiaries and/or the liability consequent on their infringement to be void, combined with choice-of-law rules sufficiently restrictive to prevent service providers from

83. Robert A. Hillman, *Online Boilerplate: Would Mandatory Web Site Disclosure of e-Standard Terms Backfire?*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 83, 85 (Omri Ben-Shahar, ed. 2007).

84. For these limitations, see, e.g., OREN BAR-GILL, *SEDUCTION BY CONTRACT* 7–23 (2012); OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* 59–78 (2014); and Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1291–92 (2003).

85. See *supra* notes 59–60 and accompanying text.

86. UNIF. TRUST CODE § 1008(b) (UNIF. LAW COMM’N 2010).

87. See generally BEN-SHAHAR & SCHNEIDER, *supra* note 84.

88. Leslie, *supra* note 52, at 109.

successfully subjecting the trust relationship to the law of a jurisdiction which has not prohibited duty-abridging and exculpatory terms.⁸⁹

A less drastic approach would be legislatively to grant clients credible powers to sanction fiduciaries for negligent conduct, such as by removing and replacing them or by withholding their fees for a predetermined period of time. Once clients have such powers, are aware of them, and understand them, fiduciaries may invest more effort in refraining from negligent conduct. Clients' awareness and understanding of their sanctioning powers may depend, however, on fiduciaries introducing and explaining them. While the legislature could condition the enforcement of duty-abridging and exculpatory terms on such an explanation being provided, cognitive limitations may again undercut the effectiveness of the conditional mechanism proposed. The drastic solution of legislatively voiding fiduciary-duty-abridging and exculpatory terms is not subject to such cognitive limitations, but even it may not successfully return the trust to its protective roots, because the commodification of the fiduciary-client relationship simply conforms it to an overall social and economic cultural transformation that is turning most relationships into short-term transactions. Should legislatures remodel trusts on their traditionally protective paradigm, consumers used to a transactional socio-economic landscape may react by eschewing them.

Beyond the reform of trustees' fiduciary duties, other recent changes to the law of trusts also bring about a convergence of its default relationship-governance framework with that of corporate law. One of the key differences between the two frameworks is that while a corporation is a legal person, a trust is not. However, several recent changes to trust doctrine have eroded this classical difference, expressing an "entification" of the trust that treats it as if it were a legal person. New York law allows a trust to acquire property in its own name, "as [that] name is designated in the trust instrument. It is not necessary that there be a conveyance to, or registration in the name of, the trustee. Legal title as a matter of law, however, would still pass to the trustee."⁹⁰ Many U.S. states have limited trustees' personal contractual liability to trust creditors (persons or bodies to whom trustees have become indebted as part of trust administration) to cases where they did not disclose their fiduciary capacity and limited their personal liability for torts committed in the course of administering a trust and obligations arising from ownership or control of trust property to cases where trustees

89. For the current law regarding the choice of law to govern trusts, see generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 267–282 (AM. LAW INST. 1971); HESS ET AL., *supra* note 44, §§ 291–301; and 7 SCOTT ET AL., *supra* note 44, §§ 44–46.

90. CHARLES E. ROUNDS, JR. & CHARLES E. ROUNDS, III, LORING AND ROUNDS: A TRUSTEE'S HANDBOOK § 2.1.1, at 53 (2012) (citing N.Y. EST. POWERS & TRUSTS LAW § 7-2.1).

were personally at fault.⁹¹ In other cases, trust creditors' sole recourse is against the trust fund, much like corporate creditors' sole recourse is against the corporation.⁹² Another modification to trust doctrine which tends to transform the trust into an entity-like legal construct is many jurisdictions' abolition of the rule against perpetuities or prolongation of the permitted perpetuity period to several hundred or a thousand years. The decline of this rule, so far affecting the trust regimes of 29 states and 14 non-U.S. jurisdictions, has created opportunities for trusts to endure forever, joining corporations and limited liability companies ("LLCs") as another form of permitted perpetuity.⁹³

The entification of the trust, stripping it from rules which characterized the older trust-as-relationship, reaches its zenith in the commercial (or business) trust. With trusts formed under general trust law having declined as a business-organization structure in the 20th century,⁹⁴ most business trusts are now formed according to bespoke statutory business trust regimes. While the Delaware Statutory Trust Act ("Delaware Act") contains the most popular such regime,⁹⁵ the Uniform Law Commission has recently adopted

91. See UNIF. TRUST CODE § 1010(a)–(b). The Uniform Probate Code, which 19 states have substantially adopted, provides similarly in section 7-306, adding a requirement that for trustees to be "personally liable on contracts properly entered into in [their] fiduciary capacity," they must fail to identify the liable trust estate in the contract. UNIF. PROBATE CODE § 7-306(a) (UNIF. LAW COMM'N 2010); see also 4 SCOTT ET AL., *supra* note 44, § 26; Hansmann & Mattei, *supra* note 4, at 459–61. The British Virgin Islands have since 2003 provided a similar regime as an option. Trustee Ordinance, 1961, § 97(3), c. 303 (Virgin Is.).

92. See UNIF. TRUST CODE § 1010(c); UNIF. PROBATE CODE § 7-306(c); RESTATEMENT (THIRD) OF TRUSTS §§ 105–106 (AM. LAW INST. 2012). For the traditional law, limiting trust creditors' recourse to the trust fund to an indirect approach by way of subrogation into the trustee's right to indemnity from that fund, see Kalev J. Crossland, *Unsecured Creditors and the 'Uncorporation': Issues with Trading Trusts Post Global Financial Crisis*, 17 TR. & TRUSTEES 185, 194–98 (2011); and Paul Heath, *Bringing Trading Trusts into the Company Line*, 16 TR. & TRUSTEES 690, 692–99 (2010). Under that law, in order to limit their liability to the trust fund, trustees must expressly "contract[] 'as trustee and not otherwise.'" Crossland, *supra*, at 190.

93. For references to U.S. perpetuity-friendly trust regimes, see *5th Annual Dynasty Trust State Rankings Chart*, LAW OFFICE OF OSHINS & ASSOCIATES, LLC (2016), https://media.wix.com/ugd/b211fb_15c05b51f611475b83e6aaa778c69191.pdf. For rules allowing perpetual trusts outside the U.S., see, for example, Perpetuities and Accumulations Act, C.C.S.M. 1983, c P33, § 3 (Can. Man.) ("The rules of law against perpetuities . . . are no longer the law of Manitoba."); Trustee Act, 2009, S.S. 2009, c T-23.01, § 58 (Can. Sask.) ("The rules against perpetuities are no longer the law of Saskatchewan."); Perpetuities Act 2011, S.N.S. 2011, c 42, § 3 (Can. N.S.) ("The rules of law against perpetuities are abolished."); and Land and Conveyancing Law Reform Act 2009 (Act No. 27/2009) § 16(d) (Ir.), <http://www.irishstatutebook.ie/eli/2009/act/27/enacted/en/index.html> ("[T]he following rules are abolished . . . (d) the rule against perpetuities . . .").

94. UNIF. STATUTORY TRUST ENTITY ACT (USTEA) prefatory note, at 1 (UNIF. LAW COMM'N 2012). Robert Flannigan wrote that business trusts, having enjoyed popularity only sporadically during the 20th century, became very popular with Canadian investors in the early years of the present century. Robert Flannigan, *The Political Path to Limited Liability in Business Trusts*, 31 ADVOC. Q. 257, 280–81 (2006).

95. See Flannigan, *supra* note 94, at 271 (noting that many other states have emulated Delaware's legislation); see also generally DEL. CODE ANN. tit. 12, §§ 3801–3824 (West 2016). *But*

a Uniform Statutory Trust Entity Act (“USTEA”).⁹⁶ The two regimes replicate all the features of the “entified” trust by giving it formal entity status.⁹⁷ The Delaware Act reverses two further traditional trust law rules: The “no further inquiry rule,” which enabled beneficiaries to void transactions between the trustee personally and the trustee as trustee, and the rule providing that persons empowered to direct the trustees in the exercise of their functions owe, as a matter of default law, fiduciary duties to the beneficiaries.⁹⁸ The USTEA also reverses both of those rules and additionally reverses the doctrine requiring a trust whose sole trustee is also its sole beneficiary to terminate by merging the legal and equitable interests.⁹⁹

Trust law’s convergence with corporate law is expressed at additional doctrinal foci, including issues where a significant difference remains between the two fields of law. One such issue is trust modification and termination. Nineteenth century U.S. law has made them difficult: Absent the settlor’s consent, beneficiaries could not modify or terminate the trust so as to offend a material purpose the settlor set for it.¹⁰⁰ The last few decades, however, have seen a liberalization of trust modification and termination at the behest of beneficiaries.¹⁰¹ While the Restatement (Second) of 1959 provided that “[t]he court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not

see Tamar Frankel, *The Delaware Business Trust Act Failure as the New Corporate Law*, 23 CARDOZO L. REV. 325, 337–39 (2001) (finding that, as of 2001, the Delaware regime has not acquired a significant following among business owners). For an example of the influence of the Delaware regime, see USTEA prefatory note at 2.

96. See generally USTEA. The USTEA has, to date, been adopted by only the State of Kentucky and the District of Columbia. See Uniform Statutory Trust Entity Act of 2010, D.C. CODE ANN. §§ 29-1201 to 29-1209 (West 2001); Kentucky Uniform Statutory Trust Act, KY. REV. STAT. ANN. § 386A (West Supp. 2016).

97. For entity status, see DEL. CODE ANN. tit. 12, § 3801(g) (West 2016); and USTEA § 302. For the positing of trust assets as the exclusive fund from which trust creditors’ debts are to be satisfied, see DEL. CODE ANN. tit. 12, §§ 3803(a)–(c), 3804(a) (West 2016); and USTEA § 304. For restriction of trustee liability to beneficiaries to a good faith standard, see DEL. CODE ANN. tit. 12, § 3806(c) (West 2016); and USTEA § 505(a). For perpetual duration, see DEL. CODE ANN. tit. 12, § 3808(a) (West 2016); and USTEA § 306(a).

98. For conflicted transactions, see DEL. CODE ANN. tit. 12, § 3806(h) (West 2016). For trustee “directors,” see *id.* § 3806(a).

99. For conflicted transactions, see USTEA § 507. For trustee “directors,” see *id.* § 510. For abolition of the merger doctrine, see *id.* § 306(d). For criticism of the “entification” trend in trust law and practice, see Lionel Smith, *Mistaking the Trust*, 40 HONG KONG L.J. 787, 793–802 (2010). For a discussion of the merger doctrine, see ROUNDS & ROUNDS, *supra* note 90, § 8.7.

100. See *Clafin v. Clafin*, 20 N.E. 454, 456 (Mass. 1889); see also Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1207–08, 1242 (1985); Gregory S. Alexander, *The Transformation of Trusts as a Legal Category, 1800–1914*, 5 L. & HIST. REV. 303, 325–26 (1987); Joshua Getzler, *Transplantation and Mutation in Anglo-American Trust Law*, 10 THEORETICAL INQUIRIES L. 355, 360, 374–81 (2009).

101. Sitkoff, *supra* note 2, at 658–63.

anticipated by him compliance [with the terms of the trust] would *defeat* or *substantially impair the accomplishment of* the purposes of the trust,”¹⁰² making this remedy available only as regards the administrative provisions of trusts.¹⁰³ The Restatement (Third) of 2003 provides that “[t]he court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will *further* the purposes of the trust.”¹⁰⁴ The Uniform Trust Code contains similar wording.¹⁰⁵ While the Restatement (Second) provided that a “court will not . . . direct the trustee to deviate from the terms of the trust merely because [the] deviation would be more advantageous to the beneficiaries,”¹⁰⁶ under the Restatement (Third), courts are likely to direct trustees to deviate from the terms of their trusts precisely for that reason. While the law governing the amendment of articles of incorporation and voluntary corporate dissolution is more liberal still—the board of directors and a majority of the shareholders entitled to vote can, together, take both steps absent any court involvement¹⁰⁷—the liberalization of the law governing trust modification and termination has reduced the difference between the trust rules and those applicable to corporations.

Legislatures have similarly liberalized the rules governing trustee removal. Recent amendments in Uniform Trust Code states have made court-ordered removal easier, no longer requiring a serious breach of trust. Litigants can now convince courts to remove trustees by showing that there has been “a substantial change of circumstances” or that “removal is requested by all of the qualified beneficiaries,” so long as the court also finds “that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.”¹⁰⁸ While corporate law allows for

102. RESTATEMENT (SECOND) OF TRUSTS § 167(1) (AM. LAW INST. 1959) (emphasis added).

103. See *id.* § 167(1) cmts. a–c.

104. RESTATEMENT (THIRD) OF TRUSTS § 66(1) (AM. LAW INST. 2003) (emphasis added).

105. See UNIF. TRUST CODE § 412(a) (UNIF. LAW COMM’N 2010); see also *In re Moeder*, No. 49A02–1205–TR–377, 2012 WL 5328124, at *4 (Ind. Ct. App. Oct. 30, 2012); *In re Stephen L. Chapman Irrevocable Tr. Agreement*, 953 N.E.2d 573, 580–81 (Ind. App. 2011); *In re Nobbe*, 831 N.E.2d 835, 842 (Ind. App. 2005); *In re Fee Tr.*, No. 92,928, 2005 Kan. Unpub. LEXIS 72, at *3–4 (Kan. Apr. 22, 2005).

106. RESTATEMENT (SECOND) OF TRUSTS § 167(1) cmt. b.

107. See COX & HAZEN, *supra* note 66, §§ 25.1, 25.4, 26.2.

108. UNIF. TRUST CODE § 706(b)(4); see *In re McKinney*, 67 A.3d 824, 826 (Pa. 2013) (holding that “a family’s movement over time from northwestern Pennsylvania to the Tidewater region of Virginia, coupled with the fact that the original trustee institution has gone through approximately six corporate mergers leading to entirely different bank officers involved in administering the trusts, represents a change of circumstances substantial enough to come within the no-fault statutory provisions” (footnote omitted)). See generally *In re Fleet Nat. Bank’s Appeal from Prob.*, 837 A.2d 785 (Conn. 2004); *Fleet Bank v. Foote*, No. CV020087512S, 2003

even easier removal—a board of directors can remove officers and shareholders can remove directors with or without cause¹⁰⁹—the recent reform of the trust rules has again reduced the distance separating them from their corporate parallels.

Finally, much as trust doctrine has increasingly come to approximate corporate law, the practice of trust drafters has come to approximate corporate drafting practices. One example is trust drafters' having developed an analogue to the corporate poison pill. Poison pills are rights distributed to existing shareholders to receive additional shares once events such as a tender offer trigger them. Pills serve to dilute the offeror's holdings, making a takeover more difficult and thus entrenching the current management.¹¹⁰ The trust equivalent is the "event-of-duress" mechanism: a trust instrument clause providing that specified events will automatically trigger changes in the trust's structure. Events such as an injunction against a trustee ordering him or her to pay over the trust assets other than in accordance with the trust instrument could automatically operate to remove and replace him or her. Once replaced, the former trustee would be unable to obey the injunction. "Event-of-duress" provisions have become popular in so-called "asset-protection trusts" (or self-settled spendthrift trusts) as they effectively insulate the trust assets against court orders obtained by the settlor's creditors.¹¹¹

Many aspects of the convergence of trusts and corporations are regrettable. Beneficiaries are now less protected from fiduciary duty breaches than they were before the reforms, while trustees have become better protected against trust creditors: they no longer effectively insure beneficiaries against trust debts. More positively, court removal of trustees has become easier, enabling beneficiaries to exit an unsatisfactory relationship with their fiduciaries. This reformulation of the legal

WL 22962488 (Conn. Dec. 2, 2003); *Davis v. U.S. Bank Nat. Ass'n*, 243 S.W.3d 425 (Mo. Ct. App. 2007); *Rapela v. Green*, 289 P.3d 428 (Utah 2012).

109. COX & HAZEN, *supra* note 66, §§ 8.4, 9.13.

110. On poison pills and their development, see generally COX & HAZEN, *supra* note 66, § 23.6–7; and Michael J. Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 LAW & SOC. INQUIRY 423 (1993).

111. See the court's discussion of "event of duress" provisions in *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 n.9 (9th Cir. 1999) ("Under the trust agreement, an event of duress includes '[t]he issuance of any order, decree or judgment of any court or tribunal in any part of the world which in the opinion of the protector will or may directly or indirectly, expropriate, sequester, levy, lien or in any way control, restrict or prevent the free disposal by a trustee of any monies, investments or property which may from time to time be included in or form part of this trust and any distributions therefrom.' Upon the happening of an event of duress, the trust agreement provides that the [settlers-cum-beneficiaries] would be terminated as co-trustees, so that control over the trust assets would appear to be exclusively in the hands of a foreign trustee, beyond the jurisdiction of a United States court. . . ." (citation omitted)); see generally *Lawrence v. Goldberg*, 279 F.3d 1294 (11th Cir. 2002); *SEC. v. Brennan*, 230 F.3d 65 (2d Cir. 2000); *In re Lawrence*, 251 B.R. 630 (S.D. Fla. 2000).

background to the fiduciary–client relationship conforms to the transformation of that relationship in practice from a long-term, fairly intimate one between family members of different generations and a friend or service provider who provided the family with decades of fiduciary services to a shallower, transaction-based relationship focused on the sale of well-defined services by one party to the other. Like other service providers, many professional fiduciaries are socially, and now geographically, distant from their clients. Institutional service providers' sales of their fiduciary activities, mergers and other transformations on the provider side of the fiduciary relationship have reduced the typical duration of such relationships. The fiduciary situation has morphed from a relationship to a transaction, with fiduciaries only prepared to bear well-defined and clearly priced risks, rather than the open-ended protective commitment characteristic of the classical fiduciary. Clients' relationships with their fiduciaries have come to approximate shareholders' unsentimental, fully commodified relationships with corporate directors and officers. The transformation of fiduciary practice resembles that of other social institutions, such as marriage, which were classically characterized by a long-term, open-ended commitment of each party to the other, as well as by exit difficulties. It expresses the social alienation and relationship commodification characteristic of current society.

Whereas the long-term trust-as-relationship of yesteryear could optimally provide clients with some economic and interpersonal stability, the new trust-as-transaction is merely one more economic exchange for clients to scrutinize carefully. It joins the long and mounting list of economic transactions each individual must choose, formulate, or avoid. Given the limitations of human information-processing abilities, the mounting pile of transacting opportunities increases the likelihood of consumer errors.

Theoretically, a return to classical fiduciary law's more protective conception of the fiduciary–client relationship could provide a desirable shelter from the commodification of social and economic life. Again theoretically, fiduciaries could compensate themselves for the additional risk consequent on offering a service on classical, protective terms by charging a premium fee, which clients would gladly pay given the stability and peace of mind resulting from those terms. Realistically, however, modern consumers have grown used to their lives being composed of a great number of short-term purchase transactions, concluded with an anonymous, constantly changing crew of vendors and service providers and financed by credit extended by an equally fluctuating collection of providers. Most consumers have adjusted to social and economic anonymization and commodification. Most consumers are also economically over-extended, and so put a premium on low costs. A high-cost, classically protective trust service is thus unlikely to meet with high demand.

IV. CONCLUSION

This Essay has demonstrated that the traditional distinctiveness of fiduciary relationships has been eroded, so that fiduciary relationships are no longer fundamentally different from contractual relationships. Fiduciary-client relationships are one type of contractual relationship among many. This Essay has also shown how different types of fiduciary relationships are converging: While the traditional claim that trustees' fiduciary duties are more severe—and more severely enforced—than those of corporate directors and officers may have been true at one time, it is no longer true under many states' statutory trust regimes. Trust law and practice, including those of trustees' fiduciary duties, are converging on the law and practice of corporations.¹¹² This convergence, carried out in both statutory reforms and trust instruments, expresses the commodification of fiduciary services and their transformation from an intimate, often long-term relationship to an arm's-length transaction. Because this reorientation of fiduciary relationships follows and expresses the social alienation and relationship commodification characteristic of current society, reversing it will likely be difficult, if not impossible. Only radical reform measures, such as holding fiduciary duty-abridging and exculpatory terms to be void, have some chance of success, and consumer preferences are likely to stymie even such measures. If jurisdictions return fiduciary law to its protective roots, fiduciaries are likely to demand premium prices for their services, causing consumers to balk and search for cheaper, commodified options.

112. I do not claim that trusts and corporations have become identical. Lau patiently teased out the remaining differences, LAU, *supra* note 3, at 66–70, while admitting that “trusts and corporations sometimes appear to be the same thing and the difference is just a matter of degree.” *Id.* at 97.