REIMAGINING THE TRUSTEESHIP PRINCIPLE: STAKEHOLDERS AND CORPORATE SOCIAL RESPONSIBILITY IN THE UNITED KINGDOM AND THE UNITED STATES

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International Commercial Law LLM
Submitted to the School of Law, Politics and Sociology
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Abstract

Andrew Crane and Dirk Matten of University of Bath and York University recently raised a number of issues the COVID-19 pandemic has uncovered on the topic of corporate social responsibility (CSR). They particularly identify four notable fields of CSR research that have been challenged by the Pandemic: 'stakeholders, societal risk, supply chain responsibility, and the political economy'. This dissertation considers the position of stakeholders in transnational corporate law and their relationship to the long-standing trusteeship principle that regards directors of companies as fiduciaries to its stockholders. Crane and Matten particularly highlight the need to 'reconsider how value is assessed and allocated in models of value creation if those deemed most essential [as stakeholders] are receiving such a small slice of the economic pie'. They specifically reference frontline workers in healthcare, food service, delivery, and public transportation. Methodologically, they believe that 'power, legitimacy and urgency' characterise the salience of which stakeholders ought to be promoted. How can new models be developed to identify the salience of a stakeholder? In the context of the traditional director-stockholder relationship, the answer to this question necessitates an appreciation of the trusteeship principle and its bearing on different corporate law jurisdictions throughout the international community. It argues that the degree to which stakeholder interests can be codified as an extension of the trusteeship principle can be appreciated through a comparative analysis of company law in the United Kingdom, and corporate law in the United States.

Keywords: *COVID-19, Trusteeship Principle, Corporate Social Responsibility, Stakeholder Interests, Fiduciary Duties*

Acknowledgements

The quality of education that has been delivered by University of Sussex is commendable. I would particularly like to extend my deepest appreciation to Dr Olufemi Amao for broadening our minds across national legal systems and encouraging us to consider the implications of corporate behaviour at the multi- national level. Dr Olufemi Amao's sage advice, both as a supervisor to this dissertation and as a learned professor of International and Comparative Company Law has been an inspiring and intriguing experience. I am also extremely grateful to Dr Maria Federica Moscati for encouraging me to pursue an LLM, and for her support and guidance throughout the completion of my LLB and LLM at University of Sussex. Dr Moscati's endless passion and knowledge for Family Law and Alternative Dispute Resolution is admirable. Furthermore, my interest in International Commercial Law would not have stimulated without the intellect and enthusiasm delivered by Dr Edward Guntrip, Dr Sirko Harder, and Paul Eden in the study of Transnational Commercial Law and the Law of International Business Transactions. A special thank you to Frankie Roake as well for all the help in co-ordinating this LLM in International Commercial Law. Finally, I would like to thank Dr Steven Maynard and Dr Jeffrey Brison of Queen's University at Kingston in Ontario, Canada for their endless belief in me and for developing my foundation in critical thought.

On a more personal note, I would like to acknowledge my partner, Jane, for her endless encouragement to pursue my greatest passions, especially as I endeavour the completion of this LLM. Thank you to my parents, John and Michelle, and my brothers, James, Chris, Danny, and David, without whom I would not have had the privilage to embark on this journey in the first place.

List of Cases and Statutes

Statutes:

Aktiengesetz
Companies Act 2006
New York Business Corporation Law

Cases:

Bank of the United States v Deveaux 9 US (5 Cranch) 61 90 (1809)
Dodge v Ford Motor Co (1919) 204 Mich 459
eBay Domestic Holdings Inc v Newmark 16 A3d 1 (Del Ch 2010) 33
Hutton v West Cork Railway Co (1883) 23 Ch D 654
Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald (No.2) [1995] B.C.C. 1000
Paramount Communications, Inc v Time Inc 571 A2d 1140 (Del 1989) 1150
Percival v Wright [1902] 2 Ch 421
Regentcrest plc v Cohen [2001] BCC 494
Salomon v Salomon Co Ltd [1897] AC 22

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A. Introduction

In an April 2021 shareholder proposal presented by members of the United States' Interfaith Center on Corporate Responsibility, up to 32 per-cent of Pfizer and Johnson & Johnson shareholders cast their vote to approve corporate measures that would 'prioritise lower consumer prices' and the equitable distribution of COVID-19 vaccines. The proposal generally aimed to address accusations of price gouging above market value whilst less developed countries enter into contracts for the international sale of the vaccines. Although the proposal failed to pass to each company's respective board of directors, shareholder support for these measures, at the very least, indicates a curious fact about the business corporation: company members can and will consider 'socially responsible' stakeholder interests in *ex ante* strategy, despite the potential for these interests to impede on the long-held practice of shareholder-value maximisation. In the context of the COVID-19 Pandemic's economic and social environment, corporate social responsibility (CSR) has markedly become a salient variable of consideration for company members vis-à-vis shareholder interests.[1] Accordingly, Andrew Crane and Dirk Matten of University of Bath and York University highlight the need for academics to 'reconsider how value is assessed and allocated in models of value creation [for stakeholders] if those deemed most essential are receiving such a small slice of the economic pie'.[2] In particular, they reference frontline workers in healthcare, food service, delivery, and public transportation. But to what extent can models of value creation be developed and incorporated into *ex ante* corporate strategies when those strategies have traditionally been dominated by shareholder interests?

This dissertation considers the position of stakeholders in transnational company law and their relationship to the long-standing 'trusteeship principle' that regards company directors as fiduciaries to company shareholders. In the seminal Supreme Court of Michigan case *Dodge v Ford Motor Co*, Ostrander CJ held that the business corporation 'is organised and carried on primarily for the profit of the stockholders' and that 'the discretion of directors is to be exercised in the choice of means to attain that end […]'.[3] Although some discretion remains for directors to 'carry on with humanitarian motives', these factors are 'incidental to the main business of the corporation'.[4] In particular, the principle-agent relationship established between shareholders and directors by the trusteeship principle 'has dramatic implications for the incentives of corporate managers to maximise the firm's profits'.[5] Conversely, CSR emphasises stakeholder value-creation rather than shareholder value-maximisation. It addresses the behaviours of the company in the context of its relationship with society and specifically asks *at what level* the company ought to owe a responsibility, not just to its shareholders, but to its stakeholders as well. Although it has been difficult to develop a universally accepted definition of CSR across multiple disciplines, Olufemi Amao contends that a general focus on 'how companies should respond to externalities of their operations' is a sufficient baseline for the purposes of legal inquiry.[6]

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[1] Andreas Koutoupis and others, 'Corporate governance and COVID-19: a literature review' (2021) Emerald Publishing Limited <10.1108/CG-10-2020-0447> accessed 20 July 2020.

[2] Andrew Crane and Dirk Matten, 'COVID-19 and the Future of CSR Research' (2021) 58 JMS 280.

[3] (1919) 204 Mich 459, 170 NW 668.

[4] ibid.

[5] Daniel R Fischel, 'The Corporate Governance Movement' (1982) 35 VLR 1259 1263.

[6] Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (TFG 2011) 68.

Moreover, this dissertation contends that the extent a company can respond to 'externalities' of their operations is limited by the trusteeship principle.[7] The degree models of 'socially responsible' stakeholder value creation can be developed and incorporated into *ex ante* strategy necessarily depends on the extent a company director's fiduciary duties permit them to consider and act upon stakeholder interests in the first place. In common law jurisdictions, this confound often manifests in common law fiduciary principles and constituency statutes that widen the scope of stakeholders company directors are permitted to 'take into consideration' whilst assessing the primary interests of the company.[8] Subsequently, key common law principles and constituency statutes within the United States and United Kingdom will be comparatively analysed with reference to aspects of Germany's *Gesellschaftsrecht*, or 'company law', as a baseline to differentiate the expression of fiduciary principles in civil (compared to common) law jurisdictions. In particular, the equivalent *duty to promote the success of the company* in the United Kingdom's Companies Act 2006 and New York Business Corporation Law will be comparatively analysed for two purposes: first, to critically assess the prevalence of the trusteeship principle in each given statute, and second, to address the extent CSR can be mandated in each statute. In light of the COVID-19 Pandemic and recent stakeholder pressure on domestic and multinational corporations (MNCs) to develop more 'socially responsible' corporate cultures, it is argued that directors in common law jurisdictions should, at the very least, be required to consider some stakeholder interests in addition to shareholder interests when carrying out the equivalent *duty to promote the success of the company*.[9] Importantly, the requirement to at least *consider* some of these interests as a *de minimus* standard is recommended only to operationalise CSR as a mandatory component of corporate governance without derailing the capitalist, market-oriented integrity of the corporate form.

B. Manifestations of the Corporate Form, Trusteeship Principle, and CSR

With respect to transnational commercial law, contracts for the international sale of goods are often subject to well defined and harmonised legal principles.[10] The preponderant factor that warrants its success at the international level is the convergence of the domestic laws and principles that a 'significant number of legal systems' subscribe to, 'whether by international convention […] judicial parallelism, uniform rules for specified types of contract, and international restatements of […] contract law'.[11] Whilst there have been numerous attempts to harmonise MNC corporate governance regulations under the auspices of transnational company law, Amao contends that they have so far been 'unsuccessful' due to their voluntariness.[12] If corporate governance regulations are not developed as substantive law, whether that be in the form of international conventions or national statutory laws, they will not carry the *de jure* authority necessary to ensure the proliferation

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[7] Carsten Gerner-Beuerle and Michael Schillig, *Comparative Company Law* (OUP 2019) 258.

[8] Constituency statutes widen the scope of stakeholders company directors are permitted to 'take into consideration' whilst assessing the primary interests of the company. For further information, see Olufemi Amao, Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries (TFG 2011) 60.

[9] Whilst it is out of the scope of this dissertation to prescribe a descriptive theory that assists in the development of stakeholder value-creation models, it at the very least establishes the extent these models can be mandated in current corporate governance laws.

[10] Roy Goode and others, *Transnational Commercial Law: Texts, Cases and Materials* (OUP 2015) 5; Gerner-Beuerle (n7) 3.

[11] Loukas Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law' in Fletcher and others (eds), Foundations and Perspectives of International Trade Law (Sweet & Maxwell 2001) 10.

[12] Amao (n 6) 36.

of compliance across national legal systems. This dissertation's focus on domestic substantive laws that regulate corporate governance models—and more specifically, fiduciary principles—may serve as a more pragmatic methodology to foster compliance and corporate cultures that value their impact on society.[13] Although the further development of domestic fiduciary laws do not directly address the issue of corporate governance regulation at the international level, a *de minimus* standard that mandates consideration for stakeholder interests may, at the very least, establish new normative corporate behaviours otherwise not transient across national legal systems.

Notwithstanding the commonalities that exist between Western notions of the corporate form, 'major differences in typology, historical development, regulatory framework, and legal characteristics remain'.[14] Therefore, to provide a sufficient analysis of the trusteeship principle and CSR's prevalence in the equivalent *duty to promote the success of the company* in the United Kingdom's Companies Act 2006 and New York Business Corporation Law, an assessment of the normative and legal contexts underpinning each jurisdiction is 'essential for [the] evaluation of their comparative merits and demerits'.[15] The codification of a *de minimus* standard for CSR's prevalence in common law constituency statutes ultimately relies on each legal system's independent development of such a standard for it to carry any transnational legal thrust. In essence, to ensure the objective identification of the trusteeship principle and CSR in each of the former constituency statutes, both criterion must be defined—not just at their conceptual level—but within the legal context from which they arose. Comparative *nomo-genetics*, defined by John Henry Wigmore as the study of the development of legal systems of law 'in relation to one another', will be employed to establish a 'broad historical grounding in the socio-cultural contexts' from which the trusteeship principle and CSR uniquely developed in the United Kingdom and the United States.[16]

The Corporate Form

The trusteeship principle and CSR are, in many ways, symbiotic to the corporate form itself. Without the existence of the corporate form as a legal abstract, the trusteeship principle and CSR would have no medium through which they could be operationalised. In England, companies were historically incorporated by an Act of Parliament or Royal Charter that functioned to extend state powers to the company to 'make peace or war' on behalf of the Crown.[17] In as early as the fifteenth century, companies such as the East India Company operated with the exclusive power to conduct and prohibit trade in territories occupied or defined by the Crown whilst the Crown itself reaped the economic benefits of its monopoly and national influence over those territories.[18] England's corporate form ultimately legitimised its power through the Crown's sovereign and positivist right, *act jure imperii*, to operate with 'internal order and external independence' and accord legal authority from the state to the corporate form.[19] Although the Joint Stock Companies Registration and Regulation Act 1844 later supplemented the former techniques with registration for incorporation, the corporate form's normative foundations in England were less so a product of the

[13] ibid 45.

[14] Gerner-Beuerle (n7) 4.

[15] Ishwara Bhat, *Idea and Methods of Legal Research* (OUP 2020) 272.

[16] ibid 271-2.

[17] Gerner-Beuerle (n7) 8.

[18] Amao (n 6) 15.

[19] Jaakko Heiskanen, 'Spectra of Sovereignty: Nationalism and International Relations' (2019) 13 IPS 315 325.

free-market and more so a product of an administrative bureaucracy,[20] to which the sovereign powers of the Crown were dispersed.

England's sphere of national influence particularly dominated the development of corporate jurisprudence in the Thirteen American Colonies during the seventeenth and eighteenth centuries. At the time, transnational companies that acted as *de facto* agents of the Crown, 'to rule its colonial subjects' vis-à-vis the corporate form proved to be an 'effective structure through which [the Crown could assert] and organise political power […]'.[21] Even in the Thirteen Colonies, companies were organised 'as a device to encourage investment in enterprises requiring large amounts of capital that government was unable or ill equipped to provide'.[22] The insidious development of the Thirteen Colonies by chartered Crown corporations operated in tangent with the much smaller local partnerships, trusts, and unchartered companies that initially carried out public works in these Colonies.[23] To suggest the company is, therefore, solely a product of the free-market is ahistorical when considering the preponderant and *prima facie* purposes it functionally served by way of the state's *de jure* transfer of legal authority to it. Ultimately, the corporate form in England and the Thirteen American Colonies during the seventeenth and eighteenth centuries maintained a 'semi-judicial structure'[24] through which the state operationalised its power to develop the Colonies themselves.

Even after the Declaration of Independence from the British Crown in 1776, common law principles from England continued to pervade legal discourse in the United States. In the Marshall Court (now known as the Supreme Court of the United States), corporate jurisprudence drew heavily from English precedent, of which the Chief Justice at the time 'appealed [to] in deciding cases relating to the legal personality of corporations'.[25] Tara Helfman notes that much of Chief Justice Marshall's jurisprudence on corporate personality relied heavily on legal precedents in England, including the 1701 case *City of London v Wood*, wherein the Court of the King's Bench in England first 'acknowledged that the corporation had legal rights of its own'.[26] In the 1809 case *Bank of the United States v Deveaux*, the all-important principle that the corporate form is an 'invisible, intangible, and artificial being' drew directly from company law in England, which conceptualised the corporate form as a 'creature of the law'.[27] Although the concept of the corporate form at law maintained a relatively similar characterisation in both the United States and the United Kingdom up until the late nineteenth century, the House of Lord's *Salomon v Salomon and Co Ltd*

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[20] In discussion of the 'endemic struggles of feudal power agencies', Michel Foucault surmises that 'The king's head still hasn't been cut off, yet already people are trying to replace it by discipline, that vast system instituted in the seventeenth century, comprising the functions of surveillance, normalisation and control, and, a little later, those of punishment, correction, education, and so on'. Much the same, the corporate form as utilised by the Crown in as early as the fifteenth century can be understood as this 'administrative bureaucracy', to which the powers of the Crown were slowly defused to over a number of decades. For further information, see Michele Foucault, 'Truth and Power' in Paul Rainbow (ed), The Foucault Reader (Pantheon Books, New York 1984) 63.

[21] Tara Helfman, 'Transatlantic Influences on American Corporate Jurisprudence: Theorizing the Corporation in the United States' (2016) 23 IJ of GLS 383 388.

[22] ibid 390.

[23] ibid.

[24] Much an extension of the 'administrative bureaucracy' developed by Michel Foucault, a 'semi-judicial structure' is characterisable by its '[…] quasi-absolute sovereignty, jurisdiction without appeal, a writ of execution against which nothing can prevail […]'. For further information, see Michele Foucault, 'Truth and Power' in Paul Rainbow (ed), The Foucault Reader (Pantheon Books, New York 1984) 125.

[25] Helfman (n 21) 394.

[26] *Bank of the United States v Deveaux* 9 US (5 Cranch) 61 90 (1809).

[27] ibid at 85.

and the Michigan Supreme Court's *Dodge v Ford Motor Co* instigated a significant juncture in the way the corporate form was both normatively and legally conceptualised in each respective jurisdiction.

In the 1897 case *Salomon v Salomon*, United Kingdom's House of Lords held that the company is a separate and distinct legal person from its subscribers.[28] The advent of the corporate form maintaining a distinct legal personality at law had major implications on the responsibility that company subscribers faced in respect of their corporate obligations.[29] Although not demonstrably causal, Simon P. Ville notes that credit fraud drastically escalated through the 1890s into the early twentieth century as the potential to avoid personal liability for actions taken on behalf of the company became palpable.[30] Small private firms began to dominate business in England whilst the United States began to '[…] more commonly embrace large corporations'.[31] As investment banks expanded throughout the United States, larger public corporations became the preferred method of capital acquisition.[32] Thus, the preponderant factor that distinguished the United States from the United Kingdom from this point on to the early twentieth century were the 'active capital markets on investment banking' that allowed for larger volumes of capital to be secured.[33]

Following the Supreme Court of Michigan's ruling in the subsequent 1919 case *Dodge v Ford*, the normative focus on the corporate form shifted from that of *Salmon's* corporate personality to shareholder property rights in the United States. At the forefront of this normative shift, Berle and Means famously argued that the premise of the corporate form developed not at law, but rather, by means of property owned by the corporation's shareholders.[34] Managerial capitalism soon became a pervasive theory that characterised the operant of the corporate form in the United States:

> [S]hareholders and owners […] played virtually no part in running a firm, but instead preferred to secure a reasonable or satisfactory level of dividend income, leaving managers to actually control discretionary decision making […] [since] management discretion is more likely to further the interests of senior managers subject to a dividend constraint'.[35]

Theoretical postulations of the relationship between corporate management and shareholders and the behaviour of management in relation to financial contingencies engendered the corporate form in the United States more so than the United Kingdom during the mid-twentieth century. Daniel R. Fischel attests that in respect of the principle-agent relationship established by the trusteeship principle developed in *Dodge v Ford*, the behaviour of directors were in fact motivated by contingencies that minimised agency costs and maximise the firm's profits.[36] As a component of

[28] [1897] AC 22.

[29] David Milton, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory LJ 1305 1309.

[30] Simon P Ville, 'Judging Salomon: Corporate Personailty and the Growth of British Capitalism in a Comparative Perspective' (1999) 27 Fed L Rev 203 210.

[31] ibid 203.

[32] Gerner-Beuerle (n7) 295.

[33] Ville (n 30) 213.

[34] For further information on the nature of this argument, see Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (New York, Commerce Clearing House, 1932).

[35] Ian Clark, 'Owners and managers: disconnecting managerial capitalism? understanding the private equity business model' (2009) 23 4 WES 775 780.

[36] Fischel (n 5).

agency cost theory, this market-oriented approach to corporate management conceived a corporate form predicated on shareholder value-maximisation.

The Trusteeship Principle

This predication of shareholder value-maximisation is at the foundation of the trusteeship principle. In *Dodge v Ford Motor Co*, the plaintiffs charged that since 31 July 1916, the defendant, Henry Ford, had not declared any special dividends for shareholders and that as minority shareholders of Ford Motor Company, the policy of the board of directors had been 'dominated and controlled absolutely by Henry Ford, the President of the company'.[37] The defendant evidenced that the dividends had instead been reinvested into the business for the 'benefit' of employee wages and consumer prices. Whilst counsel for the defendant argued that the directors of any business corporation were not prevented from practicing the latter 'humanitarian motives', Ostrander CJ held that the primary purpose of the stockholder corporation was shareholder wealth-maximisation and supported continuation of the special dividend. At the time of the plaintiffs' charge in 1916, Ford Motor Company had completed the most 'prosperous' year it had endured yet: 'it had had been the policy of the corporation for a considerable time to annually reduce the selling price of cars, while keeping up, or improving, their quality'.[38] The defendant presented evidence that implied the Ford Motor Company 'had made too much money' and that by 'reducing the price output of the company', a share of those profits could be provided indirectly to consumers.[39]

However altruistic the defendant's intentions may have appeared, the plaintiffs argued that by reducing the price output of the company in substitution of special dividends, particularly for the minority shareholders, the competition fostered by other automotive corporations would have effectively been displaced by a monopoly controlled solely by Henry Ford, who owned 58 percent of the stock capital for Ford Motor Company.[40] Although not directly addressed by Ostrander CJ, the issue of Henry Ford's apparent anti-competitive behaviour devolved into a stakeholder-oriented debate between each party, focused on the question of an outcome that would best suit the corporation's consumer base and the automotive industry in general. Regardless of Henry Ford's motives, his unilateral attempt to reinvest the company's earnings back into the company itself consequenced the development of a stakeholder value-creation model based on the Ford Motor Company's consumer base—but this is an aside. Ostrander CJ's primary focus on shareholder value-maximisation signalled to the preponderant issue at stake: the role directors undertake as 'trustees' or 'fiduciaries' to shareholders of the corporation.

Prior to *Dodge v Ford,* the Court of Chancery in the United Kingdom's *Percival v Wright* had already addressed the former issue: 'Assuming that directors are, in a sense, trustees for the company, are they trustees for individual shareholders?'.[41] Citing *Watson v Spratley*, the Court held that at law, directors are trustees only for the company and that a share in a company is 'a definite proposition of the joint estate […]'.[42] The Court of Chancery continued; in the event the facts were in an alternative form—such that a special factual relationship existed between the directors and

[37] *Ford* (n 3).

[38] ibid.

[39] ibid.

[40] ibid.

[41] [1902] 2 Ch 421.

[42] ibid 423-4.

shareholders—the directors would be trustees of the shareholders in equity.[43] Although English trust law greatly influenced the development of fiduciary principles in American corporate law, the trusteeship principle, as established in the Supreme Court of Michigan's *Dodge v Ford*, does not necessarily reflect the position maintained by the Court of Chancery in *Percival v Wright*. On the one hand, in *Percival v Wright*, the question of a director's duties to the stockholder corporation arose in respect of their role as trustees to the beneficiaries. But on the other hand, *Dodge v Ford* 'regarded corporate managers as fiduciaries who had the duty to maintain an equitable balance between shareholders and various other potential claimants on the corporation'.[44] Despite the clear focus on shareholder value-maximisation, *Dodge v Ford* blurred the lines between whether a director owed a fiduciary duty solely to the corporate form or to the corporate form's shareholders as well, and whether other constituencies external to the company ought to be included in this calculus. The subsequent debates that consumed corporate law's legal jurisprudence in the United States thereafter are reflective of this quagmire.[45]

Berle and Dodd' famous debate on the relationship between shareholders and directors changed the nature of the way the trusteeship principle was normatively understood in corporate and company law after *Dodge v Ford.* In Berle's *Corporate Powers as Powers in Trust* thesis, he argued:

> [A]ll powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appear.[46]

Premised on the idea that shareholders are the means through which capital is acquired to establish the corporate form, Berle's focus on shareholder protection helped shift jurisprudential focus from the corporate form's separate legal personality, to corporate ownership and shareholder property rights. Since shareholders first risk the investment of capital into the company, shareholders stand to face the greatest investment liabilities. Berle surmised that the corporate structure is thus 'analogous' to a *cestui que trust*, such that the powers granted to the trustees in the corporate instrument makes those trustees fiduciaries to the beneficiaries.[47] As clarified by Amao, Berle 'advocated the trust model under which directors and managers would be construed as trustees of the stockholders and subject to oversight by the Court of Equity'.[48] This trust model underpinned the premise of Berle's thesis and further developed Ostrander CJ's conceptualisation of the trusteeship principle with stronger jurisprudential justifications. This trust model notably developed in tangent with the 'emergence of large corporations owned by stockholders […]' in the United States, which were accompanied by 'the erosion of legal safeguards that once put strict limits on managers and the ability of managers to transfer power and wealth to themselves'.[49] If directors were given discretion without clear limitations, what prevented them from considering and acting upon their own interests? The evolution of the corporate form as a *prima facie* tool for capital acquisition in the United States directly impacted the legal jurisprudence that developed as a

[43] ibid.

[44] Amao (n 6) 56.

[45] ibid.

[46] AA Berle Jr, 'Corporate Powers as Powers in Trust' (1931) 44 7 HLR 1049.

[47] ibid.

[48] Amao (n 6) 57.

[49] ibid.

consequence of the *Dodge v Ford* case. By construing the corporate form as a *cestui que trust*, the discretion of directors would more likely reflect the interests of the principle investment.

In response to Berle, Dodd felt that he had missed the mark in his analysis of shareholder ownership under the rules of equity. Whilst recognising that the corporate form developed from a legal system based on 'private ownership and freedom of contract',[50] he argued that managers and directors ought to at least have some degree of freedom to consider and act upon the interests of 'employees, consumers, and the general public, as well as that of stockholders […]'.[51] Berle had only considered shareholder value-maximisation in every instance directors took action on behalf of the company—but does this necessarily prevent directors from considering other interests whilst in pursuit of company shareholder interests? This question derives from Dodd's postulation that the corporate form cannot be regarded as a *cestui que trust* in every instance, since it is 'the association of which they [directors] are members and not an individual acting as trustee for them [shareholders] that comes into contract relations with customers and creditors'.[52] All the same, the actions of directors are not always in relation to the expectations of shareholders.

Rather than conceptualising the property rights of shareholders through the fiduciary duties directors owe to shareholders, Dodd surmised that the directors instead owed their fiduciary duties to the company, premised on the corporate form's distinct and separate legal personality from its subscribers.[53] Although he advised that the shareholders are the 'ultimate beneficiaries of the business',[54] it is argued that through this perspective, shareholders are only the 'ultimate beneficiaries of the business' first through any *bona fide* consideration of the company's best interests. This viewpoint is more so a reflection of the Court of Chancery's position in the United Kingdom's 1902 case *Percival v Wright*, which regarded directors as fiduciaries to the company at law, but shareholders as the 'real beneficiaries'.[55] Even from less a doctrinal perspective, Dodd correctly referenced the fact that in the instance the corporate form is indeed premised on the concept of shareholder property rights, the premise itself is only reflective of a normative shift that had occurred in American corporate law regarding the private or public function of property. After all, in the early days of the Thirteen American Colonies, 'property employed in a business' was established for the Crown and public's benefit, rather than for private investors themselves.[56]

Corporate Social Responsibility

The corporate form and trusteeship principle are not as objective a legal abstract as one would likely suppose. The same unfortunately stands for CSR. The relationship between directors and shareholders, already relatively complex in respect of their fiduciary relationship in abstract, becomes all the more convoluted upon the consideration of external constituencies and stakeholders. Despite these convolutions, this dissertation does not offer justifications for or against stakeholder value-creation. Rather, it offers the legal basis to Andrew Crane and Dirk Matten's plead for academics to assess how value ought to be allocated in models of stakeholder value-creation for those externalised constituents that have been most affected by the COVID-19

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[50] E Merrick Dodd Jr, 'For Whom Are Corporate Managers Trustees?' (1932) 45 7 HLR 1145.

[51] ibid 1156.

[52] ibid 1146.

[53] Amao (n 6) 58.

[54] Dodd (n 50) 1146.

[55] [1902] 2 Ch 421 423.

[56] Dodd (n 50) 1151.

pandemic. Whilst it does respect the issues inherent to the agency costs directors undertake whilst in pursuit of such a corporate culture, the primary focus of this dissertation is to merely assess the relationship of CSR to the trusteeship principle and to rationalise the extent CSR can be operationalised at law as an aspect of already-existing fiduciary principles.

Moreover, the main difficulty with CSR is that it is a fairly 'fluid' concept in respect of its relationship with the corporate form, since 'individuals and institutions change their definition of the concept all the time'.[57] In addition, it often receives negative connotations as a result of the use of the word 'social' in its descriptive definitions, even though the concept itself is rooted in pragmatic considerations of the corporate form's *prima facie* relationship to its constituencies.[58] For the purposes of legal jurisprudence, it can at least be defined as the behaviours and corporate cultures of the company in the context of its relationship with society, with particular focus on the extent the corporate form ought to owe a responsibility, not just to its shareholders, but to its stakeholders as well.[59] These stakeholders can include anyone from employees, consumers, competition, and society in general. With respect to multinational corporations, this list becomes all the more expansive as the consequences of managerial discretion become apparent in legal jurisdictions external from within which the company or its subsidiaries operate. But if the trusteeship principle is premised on the advent of shareholder value-maximisation, the extent a director can consider and act upon these 'externalities' requires that any action taken by directors on behalf of the shareholders necessarily be in primary pursuit of those shareholders' interests.

This postulation, of course, follows from the premise that the trusteeship principle is reflective of Berle's conceptualisation of the corporate form as a *cestui que trust*. Conversely, whilst this dissertation is inclined to follow Dodd's argument—that through the advent of separate legal personality, a fiduciary relationship arises between directors and the company itself—corporate case law subsequent to *Dodge v Ford* in the United States suggests that shareholders are the beneficiaries of the corporate form, despite various State statutory laws in the United States today primarily identifying directors as fiduciaries to the corporation. Thus, it is argued that Berle's rationalisation of the trusteeship principle has carried more normative thrust in the development of common law fiduciary principles than Dodd's rationalisation of the same. In the 1989 case *Paramount Communications, Inc v Time Inc*, the Delaware Supreme Court held that:

> […] [D]irectors, generally, are obliged to chart a course for a corporation which is in its best interests without regard to a fixed investment horizon. […] [A]bsent a limited set of circumstances . . . a board of directors, while always required to act in an informed manner, is not under any per se duty to maximise shareholder value in the short term […].[60]

Although the Delaware Supreme Court effectively confirmed Berle's postulation of the trusteeship principle as a trust model for shareholder value-maximisation, it held that interests outside the scope of shareholder value-maximisation could be permissible if short-term decisions that incorporated externalities and constituencies maximised shareholder value in the long-term.[61] This was effectively confirmed in 2010, when the Delaware Court of Chancery held that '[p]romoting,

[57] Amao (n 6) 68.

[58] Jenny Fairbrass, 'Exploring Corporate Social Responsibility Policy in the European Union: A Discursive Institutionalist Analysis' (2011) 49 5 JCMS 949 952.

[59] ibid 953.

[60] 571 A2d 1140 (Del 1989) 1150.

[61] ibid.

protecting, or pursuing nonstockholder considerations must lead at some point to value for stockholders'.[62] Although consideration of CSR stakeholder interests is permitted in United States corporate law, theses interests are still relatively restricted by Berle's conceptualisation of the trusteeship principle.

Thus, the question remains: in respect of the trusteeship principle as understood by Berle, to what extent can CSR be operationalised if stakeholder interests are restricted by the fiduciary duties directors owe to the corporate form's shareholders? At a conceptual level, the relationship between CSR and Berle's trusteeship principle is paradoxical. In one respect, the trusteeship principle predicates the relationship between company directors and shareholders as one that is *de jure* fiduciary in nature, therefore demanding that directors act in the best interests of the company's shareholders. In another respect, CSR is expansive and considers the *de facto* relationship the company has with constituencies 'external' to its operations, therefore necessitating the value-creation of stakeholders in some aspects of *ex ante* corporate strategy. In essence, neither the trusteeship principle nor CSR can be reconciled in their conceptually purest forms at law. However, the law does not deal in absolutes. CSR can be operationalised at law under the guise of the trusteeship principle if the premise of the trusteeship principle follows from the preponderant notion that the company is a separate and distinct legal personality from its subscribers.

In fact, the United Kingdom constructs the trusteeship principle in respect of the corporate form's separate legal personality, since directors are understood as maintaining a fiduciary relationship to the company, rather than to the company's shareholders.[63] This director-company fiduciary relationship is likely prevalent in the United Kingdom for two primary reasons: first, that the normative conceptualisation of the trusteeship principle in the United Kingdom is more so premised on the principle of the company's separate and distinct legal personality, as advocated by Dodd; and second, that the United Kingdom was, for some time, a member of the European Union, which heavily influenced the use of companies to achieve social objectives.[64] On the first, the advent of the company's separate legal personality enables the company to position itself as the beneficiary of the principle investment. This is in stark contrast to the trusteeship principle as applied in the United States, which focuses on the property rights shareholders acquire as the principle investors of the corporation. On the second, the codification of EU treaties into the United Kingdom's domestic legal system has had a 'significant impact on the concept of the corporation', as the development of company law since the 1970s has been under the auspices of an EU framework.[65]

As the law currently stands, sections 172 and 414C(a) of the United Kingdom's Companies Act 2006 and section 717 of New York Business Corporation Law do permit certain stakeholders to be considered whilst director carry out their equivalent *duty to promote the best interests of the company.* This dissertation's argument that this equivalent duty in both the United States and United Kingdom ought to mandate the consideration of stakeholder interests as a *de minimus* standard of corporate governance builds off the former codified statutory fiduciary laws in each respective jurisdiction. As previously discussed, the voluntariness of corporate governance regulations do not ensure their compliance. If a *de minimus* standard can be operationalised as substantive law in both the United Kingdom and New York without the need for an international convention, it may carry

[62] *eBay Domestic Holdings Inc v Newmark* 16 A3d 1 (Del Ch 2010) 33.

[63] Although, this is a contested point, as discussed in further detail below.

[64] Amao (n 6) 61.

[65] ibid.

the *de jure* authority necessary to ensure the proliferation of compliance across national boundaries whilst fostering corporate cultures that are transnational in nature. Although only a minor step in the pursuit of such a model of transnational corporate governance, this does not exhaust the possibility of such a standard being applied to other common law jurisdictions as well. As this standard is developed in subsequent paragraphs, it does so without derailing the normative thrust the trusteeship principle still maintains today in corporate and company law.

C. Consolidating the Trusteeship Principle and CSR as a *de minimus* Standard in the United Kingdom and United States

The advent of multinational corporations has increasingly made the use of comparative methods for the analysis of domestic law all the more salient. To effectively establish a *de minimus* standard that directors in common law jurisdictions should, at the very least, be required to follow whilst carrying out the equivalent *duty to promote the success of the company,* sections 172 and 414C(a) of the United Kingdom's Companies Act 2006 and Section 717 of New York Business Corporation Law are comparatively considered. Although the historical underpinnings of the United States and United Kingdom have already been discussed, the function of the company director in relation to shareholder rights and duties underscoring the Companies Act 2006 and New York Business Corporation Law will be further assessed to develop a common *de minimus* standard for the codification of CSR in each respective jurisdiction. The development of this standard is particularly reinforced through the *reflexive law theory approach*[66] to encourage 'socially responsible' corporate cultures whilst maintaining the market-oriented integrity of the trusteeship principle. The operationalisation of a *de minimus* standard that requires directors to at least *consider* external constituencies whilst performing their equivalent *duty to promote the success of the company* is considered below. This standard is built upon already existing principles inherent to section 172(1) of the Companies Act 2006.

With respect to a director's fiduciary duties owed to the company, section 172(1) of the Companies Act 2006 stipulates that: 'A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard […]' to a variety of key constituencies external to the relationship.[67] These constituencies include:

> [T]he interests of the company's employees, […] the need to foster the company's business relationships with suppliers, customers and others, […] the impact of the company's operations on the community and the environment, […] [and] the need to act fairly as between members of the company.[68]

Four notable observations can be unpacked from this section of the Companies Act 2006. First, the fiduciary relationship that is established between the director and the company, such that the success of the company must be promoted 'for the benefit of its members as a whole'. Second, the subjective intentions of the director, which inform his or her actions on behalf of the company.

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[66] The reflexive law theory approach aims to foster self-regulation under the guise of 'socially responsible' corporate cultures. Its focus is predominantly on procedural norms rather than substantive law that attempts to govern the behaviour of directors. For further information, see Olufemi Amao, Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries (TFG 2011) 75-7.

[67] Companies Act 2006, s 172(1).

[68] ibid s 172(1) (a) to (f).

Third, the mandatory nature of the constituencies directors must take into consideration in their performance of this duty. And fourth, the listed constituencies that the director must take into consideration whilst carrying out their duty. In sum, the *de minimus* standard as recommended by this dissertation is prevalent in section 172(1) of the Companies Act 2006, and can serve as a comparative guide for similar developments in additional common law jurisdictions, since the prevalence of such a duty is inherently rooted in common law principles. However, 414C(a) offers the potential for the additional operationalisation of CSR in section 172(1), following the *enlightened shareholder value approach*, which is discussed further below.[69]

Regarding the first, the notion that a company director under section 172(1) of the Companies Act 2006 owes a fiduciary duty to the company itself is contested. Carsten Gerner-Beuerle and Michael Anderson Schillig argue that 'the relevant point of reference of the duty to promote the success of the company is exclusively the benefit of the shareholders'.[70] This argument stems from the concept of 'shareholder primacy' as established in the 1883 case *Hutton v West Cork Railway Co*: 'The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company'.[71] In further agreement to the latter case, David Milman suggests that the established duty to act in the best interests of the company, is 'prominently embedded' in section 172(1) of the Companies Act 2006. However, in pursuit of their critical analysis, Gerner-Beuerle, Anderson, and Milman alike implicitly favour Berle's conceptualisation of the trusteeship principle, which directly links directors and shareholders in a *prima facie* fiduciary relationship. Rather than acknowledging the conceptual conundrum that the trusteeship principle bears in its normative underpinnings—that being whether the corporate form is predominantly premised on shareholder property rights or whether the corporate form is predominantly premised on the advent of its separate and distinct legal personality—the best interests of the *company* are assumed as analogous to the best interests of the *shareholders*. Had Dodd's appreciation of the trusteeship principle—representing the fiduciary relationship between company directors and the company itself—been employed, the conclusions reached by each of the former academics would have likely been different. This distinction between: (A) shareholders as beneficiaries to the directors, and (B) directors as fiduciaries to the company, is an important one to be made. As previously argued, it is the company itself that serves as the nexus between directors as trustees and shareholders as ultimate beneficiaries, since directors principally maintain a fiduciary relationship with the company at law.

Regarding the second, the stipulation that the director must 'act in the way he considers, in good faith' is a subjective element to section 172(1). If a director truly believed he or she has made a decision that was in the best interests of the company and its members, they cannot be held liable for breach of their section 172(1) duty. Prior to the enactment of the Companies Act 2006, *Regentcrest plc v Cohen* addressed the defendant director's honest belief that they had acted in the best interests of the company in their decision to waive a clawback claim 'for good commercial reasons'.[72] Justice Jonathan Parker held that:

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[69] The *enlightened shareholder value approach* was applied by the Company Law Review Steering Group in their development of the Companies Act 2006. The approach follows from the premise that directors are not the ethical arbitrators of the corporate form, but that they ought to be encouraged to consider the externalities and wider interests of the company in the performance of their section 172(1) duties. For more information, see Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework* (2000).

[70] Gerner-Beuerle (n7) 263.

[71] (1883) 23 Ch D 654 673.

[72] [2001] BCC 494 513.

> The duty imposed on directors to act *bona fide* in the interests of the company is a subjective one. […] The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company[.] […] The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest[.][73]

Although this does not represent a direct interpretation of a director's section 172(1) *duty to promote the success of the company*, it at the very least highlights the Court of Chancery's examination of a director's 'honest belief' in respect of their *bona fide* actions in the interests of the company. However, as noted by Gerner-Beuerle and Schillig, this subjective test contains objective elements that arise as a result of circumstantial evidence that can attest to the subjective mind of the director at the time they held their 'honest belief'.[74] In this respect, section 414C(a) of the Companies Act 2006 may serve as a potential operative for considerations of CSR that may assist in the determination of a director's honest belief when liabilities arise.

Section 414A of the companies Act mandates that directors of a company 'must prepare a strategic report for each fiscal year of the company'.[75] The contents of this report include key financial performance indicators as well as the same 'relating to environmental matters and employee matters'.[76] Key performance indicators involve referenced contingencies that indicate the development, performance, or position of the company's business—which informs the extent directors have performed their section 172 duty.[77] In essence, the advent of an annual strategic report that contains issues regarding information about 'environmental matters', 'the companies employees', and 'social, community, and human rights issues' may serve as an effective piece of disclosure to assist in evidencing the 'honest belief' of directors at the time they may or may not have breached their section 172 *duty to promote the success of the company*. Although outside the scope of this dissertation, this strategic report may additionally serve as the locus through which models of stakeholder-value creation can be mandated in respect of the inclusion of 'front line workers', without derailing the role of the trusteeship principle in section 172. However, this is ancillary to the current discussion.

On both the third and fourth observation, the mandatory nature of the regard directors must have to the listed constituents in section 172(1) (a) to (f) speak to why a *de minimus* standard ought to only mandate the *consideration* of stakeholder interests rather than mandate a director's *bona fide* duties to them:

> Granting all interested constituencies standing to sue the directors on the ground that they did not balance the interests of shareholders and other affected parties correctly would open the door to frequent litigation and pose substantial liability risks, since courts could easily disagree with the directors about an inherently ill-defined notion such as the 'right' balance of shareholder and stakeholder interests.[78]

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[73] ibid 513-14.

[74] Gerner-Beuerle (n7) 264.

[75] Companies Act 2006, s 414A.

[76] ibid s 414C(4).

[77] ibid ss 414C(5) 414C(1).

[78] Gerner-Beuerle (n7) 261.

The codification of this duty is based on a previous common law principle apparent in the *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald (No.2)*, which discourages the selfish behaviour and self-dealing of directors amongst themselves.[79] In respect of *agency cost theory*, since a director's relationship to shareholders and the company itself is predicated on financial contingencies that, in theory, influence the extent that they act in the best interests of the company, the advent of the potential for unlimited liabilities in respect of stakeholder claims made against them would derail the very nature of the trusteeship principle. The general duty of trust that encompasses section 172(1) 'demands that a director act with honesty, integrity and fairness for the benefit of all shareholders of the company', much in the way the trusteeship principle demands the same.[80] At the same time, this does not exclude the potential for additional stakeholders to be included in section 172(1) (a) to (f), including those deemed most essential in the fight against COVID-19. Section 172 may serve as a tool of the Companies Act 2006 that would allow for pragmatic policy considerations to be codified, so long as the duties that arise in respect of section 172 are not extended to the company's stakeholders. Since the trusteeship principle effectively restricts the extent CSR can be operationalised at law, it would effectively take an entire upheaval of jurisprudence predicated on the trusteeship principle to make any immediate and substantial changes based in CSR theory.

New York Business Corporation Law similarly enables directors to consider additional stakeholder interests other than the company and its shareholders. The key aspect that distinguishes section 717 of New York Business Corporation Law from section 172 of the United Kingdom's Companies Act 2006, however, is the voluntariness of these considerations. In the Companies Act, stakeholders as defined in section 172(1) (a) to (f) must be considered in their pursuit of actions that would be most likely to promote the success of the company. In New York Business Corporation Law, a director is merely 'entitled to consider […] the effects that the corporation's actions may have in the short-term or in the long-term upon' the corporation's employees, customers, creditors, as well as 'the ability of the corporation to provide […] employment opportunities and employment benefits and otherwise to contribute to the communities in which it does business'.[81] Perhaps it is the dominance of Berle's trusteeship principle in the United States that has pervaded the development of corporate law in New York Business Corporation Law. Nonetheless, the discretion directors maintain as a result is much greater in the latter corporation law than in section 172 of the Companies Act 2006. Furthermore, it is premised on the goal that by permitting directors to have regard to non-shareholder interests, broader societal interests can be considered in pursuit of long-term goals that maximise shareholder interests.[82]

The failure, therefore, of some American vaccine companies to consider key stakeholder interests, such as 'frontline workers' or less developed countries in pursuit of vaccination programs, may indeed be reflective of the voluntary nature of statutory State laws (much the same as that of section 717 of New York Business Corporation Law). If the pursuit of non-shareholder interests is not a mandatory aspect of corporate governance, there is no guarantee that these interests will be considered in *ex ante* corporate strategy at all. Following the argument presented by Olufemi Amao, for CSR to be effective, it must engage with the law.[83] If the engagement of CSR is only limited by

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79 [1995] BCC 1000.

80 Wendy Steel, 'Director's general statutory duties' University of Chester Review.

81 New York Business Corporation Law, s 717(b).

82 Gerner-Beuerle (n7) 265.

83 Amao (n 6).

the prevalence of the trusteeship principle (whether that be in statutory or common law), there should be no conceptual difficulty inherent to the mandatory *consideration* of stakeholder interests whilst performing the equivalent *duty to promote the success of the company*.

Moreover, in respect of Germany's position on fiduciary duties, its relationship with the European Union has directly impacted the development of its *Gesellschaftsrecht*. Section 76(1) of its *Aktiengesetz* (*AktG*), or Stocks Corporation Act, establishes that '[t]he management board shall manage the company under its own responsibility'.[84] In essence, the actions of company directors are not in pursuit of any particular stakeholder's interest. If CSR is established on the advent of stakeholder value-creation rather than shareholder value-maximisation, Germany reflects the most conceptually appropriate application of its theoretical underpinnings at law. Much in the way the corporate form was used to attain social and political objectives on behalf of the Crown in the early days of the United States, the company has been 'regarded as one of the main vehicles of achieving EU social objectives'.[85] The use of the corporate form to achieve the European Union's social objectives is not unlike the corporate form's similar function in the process of colonialism and in the development of the Thirteen American Colonies. However, the use of the corporate form to achieve social objectives in the European Union contains a distinct objective that is not prevalent in the Crown nor the Thirteen Colonies' histories: the advent of a more 'competitive and dynamic knowledge-based economy […] capable of sustainable economic growth with more and better jobs and greater social cohesion'.[86] Much like in Germany's *Aktiengesetz* (German Stock Corporation Act), the United Kingdom's Companies Act 2006 maintains scrupulous rules regarding the maintenance of capital, 'given that they both derive from EU directives'.[87]

In the end, the level of 'social responsibility' prevalent in corporate governance models in the European Union and Germany is ultimately greater than that of the United States and United Kingdom. German co-determination significantly represents employee interests on the board of directors and is championed as a pragmatic way to protect labour interests, 'by inserting persons with contacts and duties to the employees on the administrative organ of a company'.[88] However, Germany is a civil law system, and so the apparent duties that manifest in similarity to the common law's equivalent *duty to promote the success of the company* are difficult compare. In sum, whilst reference to considerations of CSR in civil law jurisdictions construct an 'ideal' image of CSR's application at law, the comparative merits that enable the transplantation of legal principles is difficult—especially in respect of the trusteeship principle, which is unequivocally a product of common law jurisprudence.

D. Conclusions

The normative underpinnings of the corporate form in both the United States and United Kingdom are relatively similar in many respects. As a global colonial power, England dominated the development of jurisprudence and society in the early days of the Republic vis-à-vis Crown

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[84] *Aktiengesetz* s 76(1).

[85] Amao (n 6) 61.

[86] European Commission, *Promoting A European Framework for Corporate Social Responsibility: Green Paper* (COM) 2001 366 final.

[87] David C Donald, 'Approaching Comparative Company Law' in Andreas Cahn and David C Donald (ed) Comparative Company Law (2nd edn, CUP 2008) 21.

[88] Andreas Cahn, 'An Introduction to the Board and its Governance' in Andreas Cahn and David C Donald (ed) Comparative Company Law (2nd edn, CUP 2008) 359.

corporations that had been granted sovereign authority by way of Royal Charter. By demonstration of the corporate form's normative underpinnings as an administrative bureaucracy to the Crown in the sixteenth and seventeenth centuries, three inferences are raised: first, that the genesis of the modern corporate form is not necessarily a product of the free-market, but rather a *prima facie* product of the Crown exercising its sovereign right, *act jure imperii*, to accord *de jure* authority to the chartered company; second, that the role of the corporate form in the colonisation of the Thirteen American Colonies is demonstrative of the influence England's jurisprudence had on the development of common law in the United States; and third, that whilst English company law continued to heavily influence corporate law in the United States throughout the nineteenth century, the seminal case *Dodge v Ford Motor Co* created a significant juncture in how the corporate form was conceptualised thereon in the United States. The subsequent development of the trusteeship principle as an amalgamation of both Ango-American and Anglo-Saxon case law and legal jurisprudence is reflective of the shared histories the corporate form maintains in each jurisdiction today.

The trusteeship principle itself is a conceptually elusive concept in legal jurisprudence. Whilst this dissertation has argued that the extent companies subject to the fiduciary principles of common law jurisdictions can respond to 'externalities' of their operations is limited by the trusteeship principle, it has also attempted to offer the pragmatic development of a *de minimus* standard common law jurisdictions ought to employ, with particular reference to section 172 of the United Kingdom's Companies Act 2006 as a template. The degree models of 'socially responsible' stakeholder value creation can be developed and incorporated into *ex ante* strategy necessarily depends on the extent a company director's fiduciary duties permit them to consider and act upon stakeholder interests in the first place. Much in the way the impacts of the state began to have far reaching consequences on the advent of increased globalisation during the mid-twentieth century, the impact of multinational corporations on constituencies external to their *ex ante* operations is all the more apparent. As academics such as Andrew Crane and Dirk Matten of University of Bath and York University seek to reconsider how value is assessed and allocated in models of value creation for stakeholders most affected by the COVID-19 pandemic, questions surrounding the ineffective nature of voluntary corporate governance models will become all the more apparent.

Word Count: 9,021

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