

The Parable of the Talents

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Abstract: On its surface, Jesus' Parable of the Talents is a simple story with four key plot elements: (1) A master is leaving on a long trip and entrusts substantial assets to three servants to manage during his absence. (2) Two of the servants invested the assets profitably, earning substantial returns, but a third servant—frightened of his master's reputation as a hard taskmaster—put the money away for safekeeping and failed even to earn interest on it. (3) The master returns and demands an accounting from the servants. (4) The two servants who invested wisely were rewarded, but the servant who failed to do so is punished.

Neither the master nor any of the servants make any appeal to legal standards, but it seems improbable that there was no background set of rules against which the story played out. To the legal mind, the Parable thus raises some interesting questions: What was the relationship between the master and the servant? What were the servants' duties? How do the likely answers to those questions map to modern relations, such as those of principal and agent? Curiously, however, there are almost no detailed analyses of these questions in Anglo-American legal scholarship.

This project seeks to fill that gap.

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This project seeks to fill that gap for two reasons. First, studying ancient texts—including religious ones—can provide insights into legal history. We do not know much about the fiduciary duties of agents under First Century Jewish law, for example.² Studying Biblical passages, especially the parables of Jesus, can shed light on such questions. The goal of Jesus' parables was to stimulate thought, encourage people to think for themselves, and thus to puzzle out religious mysteries.³ In order to facilitate that process, the parable was told as if it were a true tale—even if sometimes a highly improbable one—that the listeners could accept as a factual basis from which to

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¹ A principal exception is the chapter on the Parable in J. Duncan M. Derrett, *Law in the New Testament* 17-31 (1970). As Lyman Johnson observed of the closely related field of corporate law, it is odd that scholarship in this area is “a secular discourse, both in grammar and focus, notwithstanding that the larger society in which the corporate institution is situated continues to be a very religious society.” Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory*, 56 *Cath. U. L. Rev.* 1, 2 (2006).

² See Derrett, *supra* note 1, at 17 (noting the need to draw on Babylonian, Talmudic, and Islamic sources to infer “what customs will have been familiar to Jesus's contemporaries” who heard the Parable). Of course, there is some question as to whether the relevant source of law would be Roman or Jewish. See, e.g., Email from Fr. Thomas Welbers to author (May 16, 2015, 10:00 PM) (copy on file with author) (noting that First Century Jewish civil law likely “would operate only within the broader framework of Roman Law”).

³ Paul Johnson, *Jesus: A Biography from a Believer* 106 (2010). Johnson usefully defines parable as “a brief allegory with figurative meaning designed for moral instruction.” *Id.*

extrapolate theological lessons.⁴ Put another way, Jesus' parables were effective as teaching tools precisely because his listeners "could readily identify with the roles people filled, work that they did, relations that were broken and restored, losses they sustained and happiness they experienced."⁵ The Parable of the Talents thus likely was premised on a legal backstory about the fiduciary duties of servants that would have been well understood by those who heard the Parable,⁶ which permits us to draw inferences about the contents of that background law.⁷

Second, studying Judeo-Christian texts can help shed light on our modern law. Certainly, fiduciary duty law is in need of as much light as can be brought to bear. Deborah DeMott asserts that it is "one of the most elusive concepts in Anglo-American law."⁸ That studying religious texts has potential as a way of nailing down some of these concepts is suggested by the fact that fiduciary duty law—more so than most bodies of law—is "founded in broad notions of justice and morality."⁹ "It has often been said," for

⁴ *Id.* at 108.

⁵ Simon J. Kistemaker, *Jesus As Story Teller: Literary Perspectives On the Parables*, 16 *Masters Seminary J.* 49, 52 (2005). Interestingly, Edward Rock has argued that corporate law judicial decisions—especially in the Delaware Chancery Court—often resemble parables and sermons. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 *UCLA L. Rev.* 1009, 1015-16, 1106 (1997). This suggests the possibility of a two way street between law and religious texts. As Lyman Johnson observes, however, the "point assuredly is not that fiduciary duty law—or any other dimension of corporate law—is or must be grounded in religious faith. The point, rather, is that senior business leaders can (but are not required to) draw on their faith tradition's rendering of faithfulness to augment their understanding of how to be legally faithful." Johnson, *supra* note 1, at 6. In turn, it thus seems appropriate for lawyers to have some familiarity with that tradition.

⁶ See Robert A. Sirico, *The Entrepreneurial Vocation*, 3 *J. Markets & Morality* 1, 15 (2000) ("The Parable of the Talents ... presupposes a local understanding of the proper stewardship of money.").

⁷ Similarly, Geoffrey Miller has argued that many of the stories in Genesis "served the important social function of embodying and culturally transmitting rules of customary law that responded to the problems of contract and quasi-contract formation and enforcement in a society without an established state." Geoffrey P. Miller, *Contracts of Genesis*, 22 *J. Leg. Stud.* 15, 17 (1993). Studying them helps us understand the customary legal rules of the time and make sense of them in light of the prevailing social and economic conditions.

⁸ Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 5 *Duke L.J.* 879, 879 (1988). See also Leonard I. Rotman, *Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 *B.U. L. Rev.* 921, 922 (2011) (noting that "fiduciary law has been characterized as one of the least understood of all legal constructs").

⁹ Rotman, *supra* note 8, at 950-51 ("Unlike the concepts that underlie contract, tort, and unjust enrichment, fiduciary law's emphasis, founded in broad notions of justice and morality, is on conscience and fairness."). Indeed, some commentators argue that our modern "fiduciary duty norms" have their "origins in the Roman Catholic Church-backed moral norms of the Middle Ages." Dennis J. Callahan, *Medieval Church Norms and Fiduciary Duties in Partnership*, 26 *Cardozo L. Rev.* 215, 218 (2004).

example, that “the fiduciary duty of loyalty is based upon the Biblical precept that no person can serve two masters.”¹⁰

In this sense, my project can be understood as part of the “strand of law and literature” that “uses a literary text”—here a Biblical one—“to explore a legal issue or legal dilemma.”¹¹ To be sure, some caution is necessary here. Many scholars contend that one faces numerous difficulties in seeking to extract “instruction on economic matters from New Testament teaching.”¹² Yet, despite many cultural differences and radically different economic systems, comparing ancient solutions to problems that continue even today may shed light on how we ought to go about solving them. The Parable of the Talents is an especially apt subject for such a project. “Fiduciary law is aimed at allowing people to use the talents of strangers and reduce their cost of verification,”¹³ which is precisely the problem faced by the master in the Parable.

Finally, I note that, in his seminal application of the law and economics methodology to the various accounts in Genesis of contractual arrangements, Geoffrey Miller argued that taking a secular perspective on a religious text need not “denigrate the great spiritual meaning and the astounding literary beauty that they also contain.”¹⁴ To the contrary, “texts as profound as these can contain many meanings, spiritual as well as secular, and that the secular meanings do not detract from their spiritual message.”¹⁵ It is in that spirit that I undertake this study of the Parable of the Talents.¹⁶

¹⁰ Joseph F. Johnston, Jr., *Natural Law and the Fiduciary Duties of Business Managers*, in *Business and Religion: A Clash of Civilizations?* 279, 281 (Nicholas Capaldi ed. 2005). See, e.g., *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 549, 550 n.14 (1961) (“The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, ... a maxim which is especially pertinent if one of the masters happens to be economic self-interest.”); see also Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles And Epistles*, 2009 Mich. St. L. Rev. 847, 853 (2009) (arguing that the Bible’s “admonition against ‘serving two masters’ underlies the fiduciary duty of loyalty in corporate law”).

¹¹ David A. Skeel, Jr., *The Unbearable Lightness of Christian Legal Scholarship*, 57 *Emory L.J.* 1471, 1502 (2008). Citing Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 *Yale L.J.* 455 (1984), Professor Skeel notes that “[t]he classic article in this genre uses the parable of the Prodigal Son to explore the Supreme Court’s cases on desegregation and institutional housing for the mentally handicapped.” *Id.* at 1503. He also notes, however, that the genre is “thin,” *id.*, and criticizes much of it for failing to “seriously engage the passage in theological terms or treat it as having normative force” or not engaging “the secular legal scholarship in any meaningful way.” *Id.* One hopes that this project will not fail on either ground.

¹² Edd S. Noell, *A “Marketless World”? An Examination of Wealth and Exchange in the Gospels and First-Century Palestine*, 10 *J. Markets & Morality* 85, 86 (2007).

¹³ Tamar Frankel, *Fiduciary Law in the Twenty-First Century*, 91 *B.U. L. Rev.* 1289, 1292 (2011).

¹⁴ Miller, *supra* note 7, at 19.

¹⁵ *Id.*

¹⁶ In this project, I make, but in the interest of space shall not defend herein, two potentially controversial assumptions. First, I assume the historicity of Jesus, while not addressing his

The Parable(s)

Parables were one of Jesus' favorite teaching tools.¹⁷ He used them to “alleviate the problem of expressing supernatural things in natural language.”¹⁸ Pertinently for present purposes, Jesus also had a practice of repeating similar material at different times so as to emphasize a lesson by way of repetition.¹⁹

Two of the synoptic Gospels—Matthew and Luke—contain versions of the Parable. The Matthean version states:

“It will be as when a man who was going on a journey called in his servants and entrusted his possessions to them. To one he gave five talents; to another, two; to a third, one—to each according to his ability. Then he went away. Immediately the one who received five talents went and traded with them, and made another five. Likewise, the one who received two made another two. But the man who received one went off and dug a hole in the ground and buried his master's money. After a long time the master of those servants came back and settled accounts with them. The one who had received five talents came forward bringing the additional five. He said, ‘Master, you gave me five talents. See, I have made five more.’ His master said to him, ‘Well done, my good and faithful servant. Since you were faithful in small matters, I will give you great responsibilities. Come, share your master's joy.’ [Then] the one who had received two talents also came forward and said, ‘Master, you gave me two talents. See, I have made two more.’ His master said to him, ‘Well done, my good and faithful servant. Since you were faithful in small matters, I will give you great responsibilities. Come, share your master's joy.’ Then the one who had received the one talent came forward and said, ‘Master, I knew you were a demanding person, harvesting where you did not plant and gathering where you did not scatter; so out of fear I went off and buried your talent in the ground. Here it is back.’ His master said to him in reply, ‘You wicked, lazy servant! So you knew that I harvest where I did not plant and gather where I did not scatter? Should you not then have put my money in the bank so that I could have got it back with interest on my return? Now then! Take the talent from him and give it to the one with ten. For to everyone who has, more will be given and he will grow rich; but from the one who has not, even what he has will be taken

divinity. Second, I accept the Parable as an authentic teaching of Jesus, while recognizing that some scholars argue that that “it remains an open question whether this parable, even in its basic elements, goes back to Jesus.” Richard L. Rohrbaugh, *A Peasant Reading of the Parable of the Talents/Pounds: A Text of Terror?*, 23 *Biblical Theology Bull.* 32, 37 (1993).

¹⁷ Johnson, *supra* note 10, at 858 (noting that parables were “a favorite technique of Christ for teaching”).

¹⁸ Johnson, *supra* note 3, at 106.

¹⁹ Kistemaker, *supra* note 5, at 51.

away. And throw this useless servant into the darkness outside, where there will be wailing and grinding of teeth.”²⁰

Luke’s version is broadly similar but differs in some particulars:

While they were listening to him speak, he proceeded to tell a parable because he was near Jerusalem and they thought that the kingdom of God would appear there immediately. So he said, “A nobleman went off to a distant country to obtain the kingship for himself and then to return. He called ten of his servants and gave them ten gold coins and told them, ‘Engage in trade with these until I return.’ His fellow citizens, however, despised him and sent a delegation after him to announce, ‘We do not want this man to be our king.’ But when he returned after obtaining the kingship, he had the servants called, to whom he had given the money, to learn what they had gained by trading. The first came forward and said, ‘Sir, your gold coin has earned ten additional ones.’ He replied, ‘Well done, good servant! You have been faithful in this very small matter; take charge of ten cities.’ Then the second came and reported, ‘Your gold coin, sir, has earned five more.’ And to this servant too he said, ‘You, take charge of five cities.’ Then the other servant came and said, ‘Sir, here is your gold coin; I kept it stored away in a handkerchief, for I was afraid of you, because you are a demanding person; you take up what you did not lay down and you harvest what you did not plant.’ He said to him, ‘With your own words I shall condemn you, you wicked servant. You knew I was a demanding person, taking up what I did not lay down and harvesting what I did not plant; why did you not put my money in a bank? Then on my return I would have collected it with interest.’ And to those standing by he said, ‘Take the gold coin from him and give it to the servant who has ten.’ But they said to him, ‘Sir, he has ten gold coins.’ ‘I tell you, to everyone who has, more will be given, but from the one who has not, even what he has will be taken away. Now as for those enemies of mine who did not want me as their king, bring them here and slay them before me.’”²¹

The two versions likely were taught at different times. Matthew’s version was part of an eschatological sermon, while Luke’s version was taught as Jesus and his disciples traveled to Jerusalem en route to the Last Supper.²² Yet, both versions share certain

²⁰ Matt 25: 14-30. All Biblical quotations are taken from The New American Bible (rev. ed. 2008).

²¹ Luke 19:11-27.

²² Kistemaker, *supra* note 5, at 51. See also Markus Locker, *Reading and Re-reading Matthew's Parable of the Talents in Context*, 49 *Biblische Zeitschrift* 161, 164 (2005) (noting the “overall eschatological theme” of the Matthean version when taken in context). But see Derrett, *supra* note 1, at 18 (advancing “the view that both Luke and Matthew preserve versions of an original parable, and that the differences reflect different understandings of the function of that original or its successors”). In correspondence, Father Thomas Welbers noted that:

assumptions. Both take “as a fact of life the economics of worldliness, commend[] lending at high interest, and cite[] the wisdom of a lord who reaps ‘where [he] hast not sown’ and gathers ‘where [he] hast not [strewn].”²³

The basic theological lesson Jesus presumably intended his hearers to grasp is the obligation of his followers to earnestly labor in service of the Kingdom of God. His followers were not to hide their light under the proverbial bushel,²⁴ but rather to use their talents (if you will pardon a weak pun) to the fullest extent of their abilities to fulfill the Great Commission.²⁵ This point is particularly driven home by Matthew’s placing of the Parable immediately preceding the parable of the sheep and the goats, which starkly

Both are [located] in Judea, not Galilee, and both are placed right before Jesus' final week. In Matthew, Jesus and his disciples are sitting on the Mount of Olives (the place from which the Messiah was believed to begin his rule - Zechariah 14:4-5), overlooking the Second Temple, rebuilt by Herod the Great, the Roman puppet-king who tried to kill the infant Jesus. The Lucan version puts it being told in connection with Zacchaeus, the Roman-puppet tax farmer, possibly at dinner in his house.

Welbers, *supra* note 2. Accordingly, he argues, it is Roman law and social norms that likely provided the relevant secular framework for Jesus’ listeners:

In both instances, I think there is a stronger identification with the Roman rule (and stories in that context) than anything having to do with Jewish civil law, which at best under Roman rule, would have marginal and incidental significance. ... I think the Roman context is the one that would have been uppermost in the minds of Jesus' hearers, whether the little band of disciples looking at the Temple rebuilt by a Roman puppet and recently defiled by Pontius Pilate's bringing military standards onto its premises, or by the family members and fellow tax-farmers (with the disciples) sharing a meal at Zacchaeus' house.

Id.

²³ Johnson, *supra* note 3, at 117.

²⁴ See Matt. 5:15 (“Nor do they light a lamp and then put it under a bushel basket; it is set on a lampstand, where it gives light to all in the house.”).

²⁵ See Matt. 28:19-20 (“Go, therefore, and make disciples of all nations, baptizing them in the name of the Father, and of the Son, and of the holy Spirit, teaching them to observe all that I have commanded you.”). As Scott Pryor observes:

[The Parable teaches that,] for God’s people in the about-to-be-inaugurated messianic age, the pattern of life would no longer be the pattern of the nation of Israel as a relatively static exemplar of God’s rule in the world. Instead, with the decoupling of God’s people from a single ethnic group and a single piece of land, and with the empowering of the Spirit, God’s people were to adopt an affirmative, outward-directed understanding of their place in the world. To be sure, Jesus wasn’t advocating a crass health-and-wealth gospel, such is to reduce the eschatological to the material, but he was (and is) urging on his followers a mission that will be characterized by world-wide growth and expansion with “profits” measured in terms of increasing numbers of followers from every tribe, tongue, and nation.

Scott Pryor, *The Parable(s) of the Talents and the Law of Fiduciary Duties*, PryorThoughts.com, <http://pryorthoughts.blogspot.com/2016/06/the-parables-of-talents-and-law-of.html> (June 15, 2016).

illustrates the fate of those who fail to care for those for whom Jesus had especial regard.²⁶

The Parable's Legal Context

In contrast to the extensive code of religious law to be found in the Old Testament,²⁷ there is little direct evidence in either Testament for the content of Jewish civil law during the relevant period.²⁸ It seems likely, however, that “the civil law kept on developing according to the life, conditions, usages, and rules of conduct of the age, adapting and modifying usages of other legal systems, most likely the Roman.”²⁹ The question to be addressed herein is whether we can draw inferences from the Parable about one civil issue; namely, the fiduciary duties of agents.

Who Were the Servants?

Some scholars contend that the servants of the Parable were slaves, albeit serving as “as their master's financial agents.”³⁰ Other scholars, however, contend that the servants were “dependents”—i.e., free agents—of the master, rather than slaves.³¹ In either case, it seems safe to assume for our purposes that the servants were regarded as—or, at least, would be regarded today as—fiduciaries of the master.

The master in the parable has given the servants control over substantial assets and thus made himself vulnerable to misconduct by the servants.³² The master, moreover,

²⁶ As Paul Johnson observes:

Jesus immediately passes [from the Parable of the Talents] to the judgment where the unworldly are divided from the worldly: “And he shall set the sheep on his right hand, but the goats on the left” (Mt 25:33). He tells the sheep: “Come, ye blessed of my Father, inherit the kingdom prepared for you” (25:34). Jesus goes on to explain that those in this world who feed the hungry and the thirsty, and who take in homeless strangers, and who clothe the naked, and who visit the sick and the imprisoned shall be rewarded, and he makes the striking point that whoever befriends “the least of these my brethren, ye have done it unto me” (25:40).

Johnson, *supra* note 3, at 117-18.

²⁷ I use the term “Old Testament” solely for convenience without intent to give offense to Jewish readers.

²⁸ Israel Herbert Levinthal, *The Jewish Law of Agency*, 13 *Jewish Q. Rev.* 117, 121 (1922). I note that Levinthal asserts that “among the Jews the distinction between religious and secular law was not known. The division by scholars of the Mosaic and rabbinic legislation into moral, ritual, and legal laws is wholly arbitrary.” *Id.* at 119.

²⁹ *Id.* at 122.

³⁰ Jennifer A. Glancy, *Slaves and Slavery in the Matthean Parables*, 119 *J. Biblical Lit.* 67, 71 (2000). See also Mary Ann Beavis, 111 *J. Biblical Lit.* 37, 37 (1992) (asserting that “the ‘servants’ of the NT are usually slaves”); Locker, *supra* note 22, at 166 (asserting that the Parable utilizes “the historical imagery of managerial slaves”).

³¹ Derrett, *supra* note 1, at 18.

³² Cf. Frankel, *supra* note 13, at 1293 (“No money manager can effectively manage clients’ money unless he has some control over it.”).

manifestly trusts the servants to both preserve but also grow those assets. It is precisely this combination of trust and vulnerability that is characteristic of fiduciary relationships.³³

In addition, a key characteristic of a fiduciary relationship is that the fiduciary “exercises discretion with respect to a critical resource belonging to the beneficiary, whereas most contracting parties exercise discretion only with respect to their own performance under the contract.”³⁴ This criterion also appears to be satisfied in the Parable. The master vested the servants with full control over the assets, whose substantial value doubtless made them “a critical resource,” allowing them essentially unfettered discretion as to how the money was to be invested.³⁵

To be sure, many definitions of fiduciary implicitly assume it to be a consensual relationship, which slavery certainly is not.³⁶ Not all fiduciary relationships are consensual, however.³⁷ Indeed, according to Justice Story, a slave in fact could serve as an agent under Roman civil law.³⁸

³³ As a leading modern U.S. decision explains:

A fiduciary relationship involves discretionary authority and dependency: One person depends on another—the fiduciary—to serve his interests. In relying on a fiduciary to act for his benefit, the beneficiary of the relation may entrust the fiduciary with custody over property of one sort or another. Because the fiduciary obtains access to this property to serve the ends of the fiduciary relationship, he becomes duty-bound not to appropriate the property for his own use.

U.S. v. Chestman, 947 F.2d 551, 569 (2d Cir. 1991).

³⁴ D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 *Vand. L. Rev.* 1399, 1403 (2002).

³⁵ There is an interesting analogy here to *Dodge v. Ford Motor Co.*, which held that “[t]he discretion of directors is to be exercised in the choice of means to attain that end [i.e., shareholder profit], and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.” *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919). Likewise, in the Parable, the servants have discretion as to how the end of enhancing the master’s wealth was to be accomplished, but no discretion to change that duty. The unfaithful servant who did nothing to fulfill the mandate given him effectively ignored and thus de facto changed the assigned end. By thus exceeding the scope of his discretion, the servant disrespects his obligation and by extension his master, which in turn may help explain the severity of the sanction imposed on the unfaithful servant. I am indebted to Paul Miller for that observation. See Email from Paul B. Miller to author (May 17, 2016 4:19 PM) (on file with author).

³⁶ In Austin Scott’s seminal article, for example, he defined the term fiduciary to mean “a person who undertakes to act in the interest of another person.” Austin Scott, *The Fiduciary Principle*, 37 *Cal. L. Rev.* 539, 540 (1949). The verb “undertakes” implies a certain degree of voluntariness.

³⁷ See Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 *Duke L.J.* 879, 910 (1988) (“In what sense, for example, has a constructive trustee “undertaken” to act in the interests of the beneficiaries of the constructive trust?”).

³⁸ Joseph Story, *Commentaries on the Law of Agency* 10 (4th ed. 1851).

In sum, it seems safe to assume that those who heard the Parable would have viewed the servants—whatever their exact status—as agents and thus as fiduciaries.³⁹ In addition, we may assume that both the servants and the master were familiar with the relevant background legal standards.

What Duties Did the Servants Owe the Master?

As Justice Felix Frankfurter famously remarked:

[T]o say that a man is a fiduciary only begins the analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?⁴⁰

In some modern jurisdictions, answering those questions starts by drawing a distinction between proscriptive and prescriptive standards.

Proscriptive standards detail “standards of conduct that require the fiduciary to avoid acting, or to avoid situations where she might be tempted to act, other than in the interests of the beneficiary.”⁴¹ Anglo-Australian law, for example, imposes only proscriptive standards.⁴² In particular, an agent’s sole fiduciary duty under their laws is that of

³⁹ Jewish civil law of the period recognized the principal—agent relationship, as Levinthal explains:

The person who serves a principal in this relation is his agent, known in Jewish law as Shaluah, or Shaliah "one who is sent"; the person who sends or who authorizes the Shalia. to represent him is usually termed the Meshallea. or Sholeah "one who causes to be sent or one who sends"; the relation created between the two is known as Shelihut or "agency".

Levinthal, *supra* note 28, at 125 (footnotes and Hebrew characters omitted).

American law long has recognized a distinction between agents of a principal and the subset of subset of such relationships known as master and servant. See Restatement (Second) of Agency § 2 (1958) (defining the terms master and servant). This terminology, of course, is somewhat archaic and has been abandoned in the Restatement (Third) of Agency. *Hughes v. Metro. Gov't of Nashville & Davidson Cty.*, 340 S.W.3d 352, 365 (Tenn. 2011) (“The Restatement (Third) of Agency ... modernize[d] some of the terminology, replacing, for instance, ‘master’ and ‘servant’ with ‘employer’ and ‘employee.’” Importantly for present purposes, however, the older terminology did not connote a servile relationship, but rather spoke to the degree of discretion exercised by the agent. Non-servant agents had more discretion than did servant agents. See generally Restatement (Second) of Agency § 220 (1958) (describing the differences between servants and independent contractors). In contrast, however, Jewish civil law of the period made “no such distinction.” Levinthal, *supra* note 28, at 127.

⁴⁰ *SEC v. Chenery Corp.*, 318 U.S. 80, 85-86 (1943).

⁴¹ Paul B. Miller, *Multiple Loyalties and the Conflicted Fiduciary*, 40 *Queen’s L.J.* 301, 304 (2014).

⁴² In Australia, for example, the well-known case of *Breen v. Williams*, 186 CLR 71 (Aus. High Court 1996), held that “equity imposes on the fiduciary proscriptive obligations—not to obtain any unauthorized benefit from the relationship and not to be in a position of conflict.... But

undivided loyalty. The agent is not to make an unauthorized profit and not to have a personal interest—or other duty—that is in conflict with the principal. Beyond that minimal obligation, there is no further positive duty “to act in the interests of the person to whom the duty is owed.”⁴³

In contrast, prescriptive standards impose affirmative duties, instructing the fiduciary what he must do. American and Canadian law, to cite two examples, includes both proscriptive and prescriptive standards.⁴⁴ In addition to the proscriptive ban on conflicts of interest, for example, American agency law prescribes an obligation on the agent’s part to affirmatively act in the best interests of the principal.⁴⁵ Similarly, Delaware corporate law requires that “directors of a for-profit corporation must at all times pursue the best interests of the corporation’s stockholders.”⁴⁶

We can infer from the Parable that First Century Jewish civil law was closer to the American-Canadian model than the Anglo-Australian one.⁴⁷ The master clearly believed that his servants had an obligation to affirmatively advance his best interests.⁴⁸ In

the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.” *Id.* at 113. *Breen* involved a doctor-patient relationship, but the principle has been followed in cases involving business organizations. See, e.g., *Pilmer v. Duke Group Ltd.*, 207 CLR 165 (2001) (stating that duties in a partnership are proscriptive, not prescriptive).

⁴³ Richard Batten & Gail Pearson, *Financial Advice in Australia: Principles to Proscription; Managing to Banning*, 87 *St. John's L. Rev.* 511, 520-21 (2013) (footnotes omitted). See also *P & V Industries Pty Ltd v Porto*, [2006] VSC 131 (“The decisions in *Breen* and *Pilmer* clearly confirm that, in Australia, fiduciary duties are limited to proscriptive duties of loyalty This means that the no conflict and no profit rules encompass the whole content of fiduciary obligations and the duty of loyalty imposed on the fiduciary is promoted by prohibiting disloyalty rather than by prescribing some positive duty.”); Gavin R. Skene, *Arranger Fees in Syndicated Loans—A Duty to Account to Participant Banks?*, 24 *Penn St. Int'l L. Rev.* 59, 107 (2005) (under Australian law, fiduciary duty standards tell “the fiduciary what he must not do. It does not tell him what he ought to do.”).

⁴⁴ See *Breen*, 186 CLR at 113 (noting that the Canadian cases “reveal a tendency to view fiduciary obligations as both proscriptive and prescriptive”).

⁴⁵ See Steven N. Bulloch, *Fraud Liability Under Agency Principles: A New Approach*, 27 *Wm. & Mary L. Rev.* 301, 330 n.63 (1986) (“This fiduciary duty exists not because of any control that the principal has over the agent, but because the agent has control over the wealth of the principal and the parties reasonably expect that the agent will act in the best interests of the principal.”).

⁴⁶ Leo E. Strine, Jr., *The Dangers of Denial: The Need for A Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 *Wake Forest L. Rev.* 761, 771 (2015).

⁴⁷ For a general overview of Jewish civil fiduciary duty law, see Tamar Frankel, *Fiduciary Law* 86-88 (2011).

⁴⁸ See Locker, *supra* note 22, at 166 (arguing that the Parable utilizes “the historical imagery of managerial slaves whose main concern, as their duty prescribes, is to advance the interests of their owners”). This understanding of the Parable’s legal background is inferentially supported by Jewish law of the period generally, which frequently imposed affirmative duties. If a Jew of the

particular, the master evidently believed his servants had a duty not only to preserve his funds but also to affirmatively deploy them in trade so as to increase their value.⁴⁹

At this point, however, we encounter an interesting wrinkle. In Matthew's version of the Parable, the unfaithful servant buried the master's talent in the ground to protect it. In contrast, in Luke's version, the unfaithful servant hides his minas in a piece of cloth. According to some scholars, Jewish law of the period would have treated the latter more severely than the former:

[B]urying was regarded as the best security against theft. If a person entrusted with money buried it as soon as he took possession of it, he would be free from liability should anything happen to it. For money merely tied up in a cloth, the opposite was true. In this case, the person was responsible to cover any loss incurred due to the irresponsible nature of the deposit.⁵⁰

Presumably, a treasure carefully buried was regarded as being less susceptible to theft or other loss than one simply wrapped up in a cloth and left who knows where.⁵¹

In the Parable, however, Jesus flips that rule. The servant who wrapped the money in a cloth merely has the money taken away from him and must watch it being given to the first faithful servant. In contrast, the servant who buried the money is thrown “into the darkness outside, where there will be wailing and grinding of teeth.”

Perhaps Jesus introduced this twist to grab his audience's attention and thereby drive home the message that there are severe consequences for those who fail to use their full talents in service of the Kingdom of God. Recall that the Matthean Parable—in which the servant buried the talent—is situated immediately before the parable of the sheep and the goats. The severe punishment of the unfaithful servant in the Matthean Parable thus may have been intended to help the audience grasp the fate awaiting the goats.

Yet, there may be a secular explanation as well. In First Century Judea and Galilee, Roman rule was facilitating a shift from an agrarian economy in which reciprocity was

period saw water flooding his neighbor's field, for example, and was able to stop it from doing so, he was legally obliged to do so. Anne Cucchiara Besser & Kalman J. Kaplan, 10 *J. L. & Religion* 193, 198 (1993). This duty was just one example of a broad obligation to save one's neighbor from suffering a loss. See *id.* at 207 (“The mitzvah of perikah u-te'inah also involves saving one's neighbor from suffering a loss.”).

⁴⁹ See, e.g., Glancy, *supra* note 30, at 84 (“In the parable of the talents, the slave with a single talent incurs his owner's wrath because of an offense related to property: he has failed to increase his owner's wealth.”); Sirico, *supra* note 6, at 17 (arguing that “the master in the Parable of the Talents expected his servants to use the resources at their disposal to increase the value of his holdings”). This is made explicit in Luke's version, in which the master specifically instructed the servants to “engage in trade with these until I return.” Luke 19:13.

⁵⁰ Sirico, *supra* note 6, at 15-16.

⁵¹ See Rohrbaugh, *supra* note 16, at 36 (“Since burying was safer than other means of protection, the rabbis ruled that the person burying an entrusted amount was not responsible for any loss”).

the dominant form of exchange to a more market-oriented economy in which trading was becoming dominant.⁵² The earlier period was dominated by a limited goods economy in which most goods were subject to a fixed level of supply and trade was a zero-sum game, so that making money meant that somebody else lost money.⁵³ In the emerging new economy, however, trading and investing for a return were becoming commonplace.

The older rules made sense in the economic conditions of the period in which they developed, where protecting the value of the goods one already owned might have seemed more important—and socially responsible—than trying to increase their value. In the new increasingly market-based economy, where the supply of goods was no longer fixed and trade was facilitated by the increasing use of money as a unit of exchange rather than barter, however, trade was no longer a zero sum game. Instead, it could produce surplus wealth that came from wealth creation rather than wealth transfers. The Parable presumably reflects the expectations of a master operating in this new environment, while the unfaithful servant’s worldview was still based in the mores of the older period.⁵⁴

Reversing the old expectations about which servant would be punished more severely thus may have been in line with changing norms. If burial had been regarded as the supreme method of preserving assets, punishing it more severely drove home the point that that was no longer good enough. The master “considered burying the talent—and thus breaking even—to be foolish, because he believed capital should earn a reasonable rate of return.”⁵⁵

⁵² Noell, *supra* note 12, at 92-98

⁵³ See Noell, *supra* note 12, at 90 (“The limited good worldview seemed to particularly characterize the economic perceptions of first-century Palestinians.”); Rohrbaugh, *supra* note 16, at 33 (arguing that from the perspective of a First Century Jewish peasant, goods “are both limited and already distributed. There simply is not enough of anything to go around or any way to increase the size of the pie.”).

⁵⁴ In commenting on an earlier draft, Paul Miller made the interesting observation that there “is a parallel narrative in respect of prudent investment rules in trust law—from [a] rigid, risk-averse standard of prudent investment to more relaxed standards that allow trustees to act on the basis of portfolio investment theory. ... The risk-averse standard suited trust law when most trusts were of land and preservation of family property across generations was the primary goal of settlors; commercial trusts have fundamentally altered the landscape.” Miller, *supra* note 35.

⁵⁵ Sirico, *supra* note 6, at 16. Sirico further explains that:

[T]he master in the Parable of the Talents expected his servants to use the resources at their disposal to increase the value of his holdings. Rather than passively preserve what they had been given, the two faithful servants invested the money. But the master was justly angered at the timidity of the servant who had received one talent.

Id. at 17. In commenting on an earlier draft, Robert Miller offered this relevant observation:

It may be worth noting that, in Matt. 25:21 and 25:23, when the master commends the first two servants, he commends them as faithful servants. In a religious context, it’s easy to think this word refers to theological belief, but clearly the word can’t mean any such thing in the context of the parable (its theological interpretation being a different matter). The faithfulness the master commends is not the faithfulness of an individual who does

The disparate treatment of the faithful and unfaithful servants further supports an inference that a changing economy was changing secular expectations. In the earlier economic period, risk taking likely was discouraged because investing and trading were disfavored relative to preserving what one already possessed. In the new economy, however, risk taking would have been valued. Consistent with that hypothesis, in both versions of the Parable, the servant who refused to take risk was punished. In contrast, the faithful servants traded with the master's money, which must have entailed some risk, but the master nevertheless praises them for having done so.⁵⁶

It is likely that Jesus would have been broadly familiar with the commercial civil laws of the day. Contrary to popular misconception, Jesus was not poor.⁵⁷ The income of carpenters and others in the construction trades in the relevant period typically was well above the subsistence level.⁵⁸ It is therefore likely that, prior to the beginning of his ministry, Jesus actively participated in economic life and, accordingly, would have had at least some familiarity with the commercial norms and legal standards of the day. The Parable thus plausibly could have incorporated concurrent changes in those norms and standards.

In passing, I note that this interpretation of the Parable nicely illustrates a core attribute of fiduciary duty law; namely, its ability to “accommodate new situations and changes in social morals and norms, yet maintain its core values and norms, without which no society can survive, let alone flourish.”⁵⁹ It can do so because it emphasizes standard grounded on basic moral principles rather than rigid rules, allowing it to adjust when social mores or economic conditions change.⁶⁰

Why Prescriptive Rules?

If the Parable in fact reflects changing norms adapting to a changing economy, several aspects of the Parable make sense. First, it explains the reliance by the master on servants to conduct financial affairs. “A non-commercial society, while it might have

not see and yet believes (John 20:29) but the faithfulness of a fiduciary who acts to benefit his principal rather than himself—a meaning of “faithful” still in common use to describe proper fiduciary conduct. Commenting on this passage, the medieval Gloss explains that the servant was faithful because he appropriated to himself nothing that was his master's—which is a fiduciary sense of the word “faithful” (i.e., a duty of loyalty sense). Aquinas repeats this point in his commentary on the passage in Super Mattheum, cap. xxv, lect. ii.

Email from Robert T. Miller to author (May 9, 2016 08:31 AM) (on file with author).

⁵⁶ See Noell, *supra* note 12, at 106 (“The two servants who invested their talents and doubled their original funding are lauded by the master and promised even more funds; the one servant who buried the talent in the ground is reproved. Risk-taking and consequent economic gain are endorsed by the master.”).

⁵⁷ *Id.* at 103.

⁵⁸ *Id.*

⁵⁹ Frankel, *supra* note 13, at 1290.

⁶⁰ *Id.*

much use for servants,” after all, “would have little need of agents, empowered to represent the principal in business dealings with third persons.”⁶¹ An emerging commercial society, however, would have needed servant-agents who could conduct trade on the master’s behalf. Second, as we have seen, it helps explain why the master expected his servants not only to preserve his assets but also to use them to earn more money.

What it does not explain, however, is the Jewish law’s decision to adopt prescriptive as well as proscriptive rules. After all, Australia, the UK, and other Commonwealth countries following the proscriptive-only approach are active trading and commercial societies.

Part of the problem may simply be semantics. As Winston Churchill—or Oscar Wilde, as some sources claim—famously quipped, a common language divides the United States and the United Kingdom. According to Michael Conaglen, a leading proponent of the view that fiduciary duties are—and should be—exclusively proscriptive, directors of a corporation have a “fundamental duty” to “act in the best interests of their companies.”⁶² Yet, he argues that this need not be “considered as a fiduciary duty.”⁶³ Instead, it is said to be “analogous to a trustee’s (non-fiduciary) duty to perform the trusts that he has undertaken.”⁶⁴ In contrast, under US law, many fiduciary relationships include a fiduciary duty to act in the principal’s best interests.⁶⁵ So perhaps the distinction is mostly about how we label duties.

Semantics can matter, however, as illustrated by the debate between Tamar Frankel’s “expansive version” of fiduciary duties and Larry Ribstein’s argument “for a smaller role for fiduciary duties.”⁶⁶ Like Conaglen, Ribstein argued that many duties typically referred to in American jurisprudence as “fiduciary,” such as the duties of care

⁶¹ Levinthal, *supra* note 28, at 126.

⁶² Matthew Conaglen, *Fiduciary Loyalty* 56-57 (2011).

⁶³ *Id.* at 57.

⁶⁴ *Id.*

⁶⁵ See, e.g., *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348-49 (1985) (holding that corporate “managers, of course, must exercise the [corporation’s attorney-client] privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals”); *United Equitable Life Ins. Co. v. Trans Glob. Corp.*, 679 F. Supp. 769, 777 (N.D. Ill. 1988) (“Defendants, as agents for United, owed United a fiduciary duty to act in United’s best interest”); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del.1985) (stating that “corporate directors have a fiduciary duty to act in the best interests of the corporation’s stockholders.”).

⁶⁶ Larry E. Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. Rev. 899, 901 (2011).

and fair dealing, in fact are “non-fiduciary duties.”⁶⁷ As Ribstein illustrated, this distinction may have both technical and conceptual consequences in a variety of ways.⁶⁸

One technical aspect of the distinction, for example, goes back to the origins of modern fiduciary duty standards, which came out of equity. Prescription would have been “an unusual approach for equity to adopt because traditionally Chancery was concerned with preventing abuse through the harsh employment of common law rights, rather than intervention to dictate a positive rubric of conduct.”⁶⁹ Yet, this would not explain the different choices made by the U.S. and the U.K.,⁷⁰ let alone First Century Jewish law. It is, moreover, not a terribly persuasive argument for retaining the distinction.

Another consequence of the distinction is that a prescriptive understanding of a fiduciary’s duties could lead one to approve of a fiduciary acting paternalistically even against the beneficiary’s wishes. Miller and Gold argue, for example:

On this view, a fiduciary should act in what she believes are the beneficiary’s best interests, even if the beneficiary might prefer a different course of action. A paternalistic form of fiduciary loyalty is arguably prominent in trust law, where trustees have independent discretion to make choices that beneficiaries may disagree with. It is also arguably evident in corporate law, where directors may act contrary to their shareholders’ known desires when executing their mandate.⁷¹

If we therefore assume that the distinction matters, contemplating the Parable has led me to conclude that a system based solely on proscriptive rules, such as the Australian one, makes two conceptual errors. First, as we have seen, it assumes that an agent’s

⁶⁷ Compare Ribstein, *supra* note 66, at 908 (arguing that the duty of care “is not a fiduciary duty, which as described above is a duty of unselfishness”) with Conaglen, *supra* note 62, at 35 (“The duty of care is not peculiar to fiduciaries and so is not to be equated with or termed a fiduciary duty”; footnotes and internal quotation marks omitted).

⁶⁸ Ribstein, *supra* note 66, at 906-14.

⁶⁹ Donovan M. Waters, *The Development of Fiduciary Obligations*, in Gerald V. La Forest at the Supreme Court of Canada 80, 89-90 (Rebecca Johnson et al. eds. 2000).

⁷⁰ “The system of equity administered in the United States Courts from the very beginning, except where modified by statute, has been that obtaining in the English High Court of Chancery in 1789, when the first Judiciary Act was adopted.” Leon R. Yankwich, “Short Cuts” in Long Cases, 13 F.R.D. 41, 49 (1951). Modern fiduciary duty principles are typically traced back to the 1726 decision of the English Court of Chancery in *Keech v. Sandford*, (1726) 25 Eng. Rep. 223, (Ch.) 223-24 (U.K.), which would have been known to—and presumably incorporated into US jurisprudence—by U.S. courts from the beginning.

⁷¹ Paul B. Miller and Andrew S. Gold, *Fiduciary Governance*, 57 Wm. & Mary L. Rev. 513, 559 (2015). Of course, it may be doubted that the master in the Parable would have had much patience with servants who acted paternalistically or, indeed, that many principals would wish their agents so to do. Cf. *id.* (arguing that “agents are also fiduciaries, and unlike trustees and directors their powers are checked by a legal duty of obedience to their beneficiaries” and that for agents loyalty and obedience are intertwined”).

duties are limited to avoiding conflicts of interest.⁷² Yet, many—most?—principals may wish agents to do more than simply avoid conflicts; they may wish their agents to affirmatively act in specific ways.⁷³ As we have seen, the master in the Parable had a very definite expectation that his servants would do more than just avoid conflicts of interest.

Second, a purely proscriptive approach suggests that an agent “is invariably disloyal whenever he is conflicted.”⁷⁴ As the drafters of the Model Business Corporation Act recognized, however:

Contrary to much popular usage, having a “conflict of interest” is not something one is “guilty of”; it is simply a state of affairs. Indeed, in many situations, the corporation and the shareholders may secure major benefits from a transaction despite the presence of a director's conflicting interest. Further, while the history of mankind is replete with acts of selfishness, we have all also witnessed countless acts taken by persons contrary to their personal self-interest.⁷⁵

The former observation is the one most pertinent for our purposes. Some supporters of the Anglo-Australian view argue that it is not necessary for the law to impose prescriptive fiduciary duties on agents, because when such “duties are appropriate to the relationship they will be identified in the form of non-fiduciary duties.”⁷⁶ In other words, if the parties want to define what the agent ought to do—as opposed to what he may not do—they will do so through contract (or, perhaps, statutes or other sources of prescriptive duties).

It is hardly to be expected that the parties will be able to agree *ex post* on what the agent should have done, so they must do so *ex ante*. As the Parable itself illustrates, however, it often will be impossible to identify *ex ante* what the agent ought to do. To the contrary, the familiar triad of contracting problems—uncertainty, complexity, and opportunism—often precludes principals and agents from entering into complete contracts that fully specify the agent's obligations.⁷⁷ Add in the communication

⁷² Miller, *supra* note 41, at 305 (explaining that giving undue prominence to proscriptive rules suggests that “the content of the correlative duty is defined exclusively or necessarily in terms of avoidance of conflicts”).

⁷³ In commenting on an earlier draft, Paul Miller noted that “all fiduciaries have mandates to perform and beneficiaries are interested in compliance with various legal duties primarily insofar as compliance makes realization of the particular objects of mandates more likely. Contrast Conaglen who believes that fiduciary duties secure the performance of non-fiduciary duties without discussing mandates as such.” Miller, *supra* note 35.

⁷⁴ Miller, *supra* note 41, at 305.

⁷⁵ Michael P. Dooley, *Two Models of Corporate Governance*, 47 *Bus. Law.* 461, 527 (1992) (quoting comments of the MBCA's drafters).

⁷⁶ Conaglen, *supra* note 62, at 203.

⁷⁷ See Oliver E. Williamson, *Markets and Hierarchies* 23 (1975) (arguing that, under conditions of uncertainty and complexity, it becomes “very costly, perhaps impossible, to describe the complete decision tree”).

difficulties inherent in First Century technology, and it seems likely that First Century legal systems would have used *ex post* fiduciary duties rather than *ex ante* contracts.

The Severity of the Sanction

The severity of the sanctions visited upon the unfaithful servants likely shocks many modern readers. Indeed, it so shocks some scholars as to call into question the authenticity of the Parable as a teaching of the historical Jesus:

Given all we have said to this point, it remains an open question whether this parable, even in its basic elements, goes back to Jesus. If anything like the canonical version does, we are left to wonder how Jesus told a story so obviously given from the vantage point of the elite and so sharply out of touch with the peasant perception of the world.⁷⁸

Richly rewarding the risk-taking servants while harshly punishing the frightened one does seem, at least superficially, out of character for Jesus, who was usually so concerned with the plight of the poor and downtrodden.⁷⁹ Assuming we are correct in interpreting the Parable as an allegory intended to prompt total commitment to service of the Kingdom of God, however, the sanctions begin to make more theological sense.⁸⁰

When viewed from informed modern eyes, moreover, the harshness of the sanctions is somewhat less shocking. While it is certainly true that modern principals may not toss their agents into the outer darkness, breaches of fiduciary duty often do elicit quite harsh sanctions.⁸¹ In appropriate cases, for example, the law is increasingly willing to grant punitive damages.⁸²

⁷⁸ Rohrbaugh, *supra* note 16, at 37.

⁷⁹ The unfaithful servant claimed to have been paralyzed by fear of the master's harsh punishment. While we may sympathize with the frightened servant, it remains the case that—by his own admission—he is acting out of concern for his own interests rather than those of the master. Rejecting that excuse as legitimizing the servant's inaction is consistent with Lionel Smith's "leading account" of fiduciary duties that prescriptively require "affirmative devotion toward the fiduciary's beneficiary." Miller & Gold, *supra* note 71, at 557. According to this view, "the motives of the fiduciary are the crucial element in determining whether the fiduciary has acted loyally, and the requirement of motive is quite specific – the fiduciary 'must act (or not act) in what he perceives to be the best interests of the beneficiary.'" *Id.* at 557-58. If selfish fear was in fact the unfaithful servant's motive, that motive—while understandable—was inconsistent with his duty to the master.

⁸⁰ Apropos of which, Robert Miller observed that:

Regarding the proscriptive/prescriptive point, again according to Aquinas in the *Catena Aurea*, Chrysostom says, "Observe that not only he who robs others, or who works evil, is punished with extreme punishment, but he also who does not good works." Aquinas repeats this point in *Super Mattheum*, cap. xxv, lect. ii: "Note that he [i.e., the third servant] is punished not because of some evil he did but because of the good he omitted to do," and Aquinas cites John 7:19 and John 15:2.

Miller, *supra* note 55.

⁸¹ In addition, if we strip the theological imagery of outer darkness from the story, all we really have is a termination of the agency relationship. Termination of the relationship is the most

On one hand, the circumstances of the Parable seem likely to elicit such sanctions. Tamar Frankel identifies a number of situations in which the remedies for breach of fiduciary duties must be “strict.” Typically, in such cases, the amount entrusted to the agent is high, the principal’s ability to supervise and control the agent is low, and the discretion possessed by the agent is high.⁸³

These conditions are satisfied in the Parable. A talent represented 26 kg of silver and was worth about 6,000 denarii. The annual pay of a Roman legionnaire was 225 denarii.⁸⁴ The amounts entrusted by the master were thus quite substantial. In addition, the master was on a long journey in an era of very slow communications and the agents had been left with essentially no instructions.

On the other hand, however, the severity of the sanction should strike informed modern readers as inappropriate given the prescriptive nature of the legal standard in question. The penalties for violating the proscriptive duty of loyalty can be very severe.⁸⁵

common response to misconduct by an agent, far more so than litigation. See Stephen M. Bainbridge, *Agency, Partnerships & LLCs* 3 (2d ed. 2014) (“Of course, in many cases, the principal simply fires a misbehaving agent, rather than suing the agent for a breach of one of these [fiduciary] duties.”). Presumably the same was true in First Century Palestine. See Email from Gordon Smith to author (June 7, 2016 11:52 AM) (copy on file with the author) (“The threat of termination of a fiduciary relationship is, of course, one of the main tools of the beneficiary in controlling the fiduciary. Not all beneficiaries have the power of termination, but it is usually part of the package of control rights allocated to the beneficiary (or other person who is monitoring the fiduciary relationship).”).

⁸² See *LM Ins. Corp. v. Spaulding Enterprises Inc.*, 533 F.3d 542, 551 (7th Cir. 2008) (“Illinois courts have made clear that punitive damages are available for breaches of fiduciary duty.”); *Cowden v. Montgomery Cty. Soc. for Cancer Control*, 591 F. Supp. 740, 753 (S.D. Ohio 1984) (noting that “courts have generally found exemplary damages to be recoverable under appropriate circumstances for breaches of fiduciary duties” under ERISA); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. Rev. 1045, 1069 (1991) (“Punishment for breach of fiduciary duty through the use of punitive damages is increasingly common.”).

⁸³ Frankel, *supra* note 13, at 1297.

⁸⁴ Neil Faulkner, *Rome: Empire of Eagles* xiv (2013).

⁸⁵ See, e.g., *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (1939) (“If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, at its election, while it denies to the betrayer all benefit and profit.”). In commenting on an earlier draft, Tamar Frankel sent the following observation:

... Words may teach a lesson as much as a parable does.

1. For example, the word “identity” may mean I have my identity and you have yours. We are separate and each of us takes care of his or her interests and well-being. Then there is the word “identical.” Here both parties are absolutely the same. ... To some extent each entity loses its uniqueness and become the mirror of others, just as the others mirror of each other entity.

In contrast, modern law is often reticent to punish—no matter how mildly—fiduciaries who violate the prescriptive duty to advance their beneficiaries’ interests. Directors of a corporation who fail to maximize shareholder wealth, for example, typically are protected from liability by the business judgment rule.⁸⁶

This disparity is properly understood as reflecting a key distinction between proscriptive and prescriptive rules. Paul Miller notes that “proscriptive rules are effective as liability rules because they clearly and unambiguously prohibit fiduciaries from being in a position of conflict.”⁸⁷ In contrast, enforcing prescriptive rules can be far more difficult.⁸⁸

And then there is another derivative word of identity. It is a verb: To identify. This word describes a relationship in which each unit retains its uniqueness, but is able to imagine the situation of others: put itself “in the shoes” of others. ...

2. Fiduciary law reflects identification with others. Hence, fiduciaries are prohibited from acting in conflict of interest, and are required to service others who cannot fend for themselves regarding the power that they entrusted to fiduciaries. In addition fiduciaries are required to have identity of interest with the people who trust them and rely on them

However, these requirements are not unlimited. They cover only: (i) The power that was entrusted to us, and (ii) The activities that are involved in connection with that power and the impact of our exercise of the power on those who entrusted us with the power.

...

3. ... Re the story of the servant who did not produce for the master anything. He should be punished because he did not sufficiently identify with the master’s interests. Perhaps there is an assumption that he did not produce for the master but did produce for himself unacceptable rewards. If he just failed to produce, then he did not meet his duty of care. If he produced and collected the benefits for himself, he violated the duty of loyalty. Perhaps the lack of benefits for the master raised suspicion of misappropriation and hence the punishment.

Email from Tamar Frankel to author (May 11, 2-16, 12:08 PM) (on file with author).

⁸⁶ Delaware Chief Justice Leo Strine thus observes that:

Of course, it is true that the business judgment rule provides directors with wide discretion, and thus enables directors to justify--by reference to long-run stockholder interests--a number of decisions that may in fact be motivated more by a concern for a charity the CEO cares about, the community in which the corporate headquarters is located, or once in a while, even the company's ordinary workers, rather than long-run stockholder wealth. But that does not alter the reality of what the law is.

Strine, *supra* note 46, at 776.

⁸⁷ Miller, *supra* note 41, at 323-24.

⁸⁸ Cf. Neil Gunningham & Darren Sinclair, Organizational Trust and the Limits of Management-Based Regulation, 43 *Law & Soc’y Rev.* 865, 871 (2009) (“It is one thing to impose a prescriptive standard requiring, for example, guardrails to be of a specified height, and this can be readily measured and policed irrespective of whether the regulated entity is trustworthy or not. It is quite another to police elements of a safety management system that can legitimately be

A prescriptive duty that an agent maximize the principal's wealth is particularly difficult to enforce. By what metric shall we measure the adequacy of the agent's effort? How do we prevent a decision maker from being affected by the hindsight bias? In addition, as Robert Sitkoff notes:

Judging the agent on the basis of the agent's results is ... an imperfect mechanism for resolving the agency problem because circumstances outside of the agent's control may affect the outcome. Suppose a real estate agent cannot locate a suitable buyer for a home at the homeowner's desired price. The homeowner can seldom ascertain whether the agent's failure reflects the agent's inadequate effort versus the homeowner's overpricing or a slumping market. The homeowner's inability to assess the cause of the agent's failure is a kind of post-contractual information asymmetry known as hidden action or moral hazard.⁸⁹

Reasons such as these are why modern law often makes it difficult for the principal to recover for a breach of this prescriptive duty.⁹⁰

Why didn't Jewish law similarly insulate the unfaithful servant from liability? An answer to that question may be found in an analogy between the conduct of the unfaithful servant and the emergent Delaware law governing the obligation of corporate officers and directors to act in good faith.⁹¹ This body of law gives substantial protection to agents who exercise discretion but does not countenance inaction. "A failure to act in good faith may be shown, for instance, where the fiduciary ... intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."⁹² Such conduct is not protected by the business judgment rule and thus potentially exposes the director or officer to liability.⁹³ Perhaps the First Century Jews who first heard the Parable likewise

subject to multiple interpretations and necessarily involves considerable discretion in its implementation.").

⁸⁹ Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. Rev. 1039, 1041 (2011).

⁹⁰ As explained supra note 86, for example, the business judgment often precludes liability for directors or officers who breach the corporate law fiduciary duty to maximize shareholder wealth.

⁹¹ For background on this body of law, see Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. Rev. 559 (2008).

⁹² *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006).

⁹³ See *In re Tyson Foods, Inc.*, 919 A.2d 563, 593 (Del. Ch. 2007) (explaining that a director who "acted disloyally and in bad faith" "is therefore unable to claim the protection of the business judgment rule").

Robert Miller commented via email that:

In discussing the wrong done by the servant who merely buries the money, you refer to the principle of Delaware corporate law that a director breaches his fiduciary duty if, knowing he has a duty to act, he fails to act. Aquinas, *Super Mattheum*, cap. Xxv, lect. Ii, also says that the parable can be read to mean that the third servant knew he ought to act and failed to do so, and he cites Luke 12:47. It can also be read, however, to mean that the

would have seen the unfaithful servant as having acted in bad faith by intentionally failing to fulfill his duty to increase the master's wealth, although we have no evidence to support that theory.⁹⁴ If so, as would be the case today, perhaps an agent who acted in good faith but unfortunately lost the master's funds through trades that turned out poorly would not face liability.

Fiduciary Duties of Public Officials

Finally, there has been an active debate over whether government officials are fiduciaries of the electorate and, if so, to what duties they are subject.⁹⁵ Perhaps surprisingly, the Parable—specifically Luke's version—speaks to this issue too. In Luke, the Parable immediately follows the story of Zacchaeus, who was a corrupt tax collector, working indirectly—as a tax farmer—for the Roman authorities.⁹⁶ In addition, the master in Luke's version of the Parable is a noble seeking the kingship of the land. When the master returned, moreover, the faithful servants were rewarded by being given charge of ten and five cities, respectively, which again suggests they had at least a quasi-governmental position. The Parable thus suggests that government officials were seen as having fiduciary duties to their masters.

servant simply did nothing at all with the talent entrusted to him, and, if so, there is again a principle of Delaware corporate law that is relevant: under *Stone v. Ritter*, a director who “utterly fails” to act to oversee the business—i.e., a director who does literally nothing—also breaches his fiduciary duty. It might be worthwhile to add a sentence or two about this kind of fiduciary breach too.

Miller, *supra* note 55.

⁹⁴ Although our emphasis herein has been on the unfaithful servant, Robert Miller offered an interesting observation with respect to the two faithful servants:

According to Aquinas in the *Catena Aurea*, Jerome comments that the servant who doubled his five and the servant who doubled his two “are received with equal favor” by the master because the master “looks not to the largeness of their profit, but to the disposition of their will.” Aquinas repeats essentially the same point in *Super Mattheum*, cap. xxv, lect. ii. Note the parallel with fiduciary law: fiduciaries are not generally thought better or worse, as fiduciaries, based on how much money they make for their principals. An investment manager with discretionary authority who gets a better return than his peers is a better investor, but not a better fiduciary, properly speaking; his less able peers may be just as faithful fiduciaries as he, even if the returns they get are much worse. Likewise, a director may have observed his fiduciary duties under *Revlon* impeccably even if, in fact, he didn't get the best price actually available for the company.

Miller, *supra* note 55.

⁹⁵ See generally Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 *Cornell L. Rev.* 845, 870-91 (2013) (discussing this debate).

⁹⁶ Luke 19:1-10.

Conclusion

The Parable of the Talents proves to have a rich legal backstory. Exploring that backstory has shed light both on our understanding of First Century Jewish civil law and provided an opportunity to reflect upon current legal issues. Despite the two millennia that separate us from the Parable's first hearers, we see that agency-type relationships have the same basic structure and same basic flaws, regardless of time and place. We also see that Jesus's teaching was premised on the same sort of legal norms as those provided by modern agency law, suggesting that societies widely separated in time develop similar bodies of law to govern agency-type relationships.