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I. INTRODUCTION

The benefits of transparency in business organizations are regularly touted, and mechanisms to encourage and mandate truthful disclosure are pervasive throughout the legal system.[1] For example, federal securities law in the United States is founded upon a disclosure-based system of regulation.[2] As Justice Arthur Goldberg described federal securities law while writing for the Supreme Court of the United States in *SEC v. Capital Gains Research Bureau, Inc.*, "A fundamental purpose . . . was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry."[3] Such transparency decreases a variety of reprehensible behavior—including fraud, money laundering, and a range of other shady business practices—which may flourish in its absence.[4]

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1 *See* Merritt B. Fox, *Civil Liability and Mandatory Disclosure*, 109 COLUM. L. REV. 237, 250 (2009) ("Vibrant, deep equity markets and dispersed ownership structures in turn appear to be possible only with a high level of corporate transparency. Transparency has also been heralded as necessary for good corporate governance more generally.").

2 *See* Urska Velikonja, *Waiving Disqualification: When Do Securities Violators Receive a Reprieve?*, 103 CALIF. L. REV. 1081, 1101 (2015) ("[F]ederal securities laws are often described as a disclosure-based regime, where the regulator's primary goal is not to evaluate the fairness of an offering but to ensure accurate and complete disclosure to let investors make fully informed purchasing decisions.").

3 375 U.S. 180, 186 (1963).

4 *See* Diane Ring, *The 2021 Corporate Transparency Act: The Next Frontier of U.S. Tax Transparency and Data Debates*, 18 PITT. TAX REV. 249, 261 (2021) ("Some actors rely on . . . ownership transparency [in business entities] to advance illicit activities ranging from money laundering and terrorism financing to securities fraud and serious tax fraud.").

Such transparency, however, does not come without costs. Individuals with socially stigmatized identities often struggle to survive and thrive in the business world. For example, minorities and women face substantial challenges in raising capital for business activities.[5]

Scholars have described the process of hiding socially stigmatized identities in the business world as "identity shielding"[6] and have described disguising socially stigmatized identities in the business world as "venture bearding."[7] Although identity shielding and venture bearding are far less than ideal and evidence deep social problems,[8] these practices are at times useful in achieving greater diversity, equity, and inclusion in the business world.[9] To take advantage of identity shielding, one option is to make use of the anonymous companies that can be formed in Delaware, Nevada, Wyoming, and other jurisdictions without listing the owners and managers of such entities.[10] The problem is that for better or worse and whether true or not, these entities are becoming associated with shady and inappropriate behavior.[11]

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5 *See* Alma Pekmezovic & Gordon Walker, *The Global Significance of Crowdfunding: Solving the SME Funding Problem and Democratizing Access to Capital*, 7 WM. & MARY BUS. L. REV. 347, 444 (2016) ("[S]everal studies point to women entrepreneurs being able to raise less capital than men, regardless of the source of capital. As a result, women launch firms with significantly smaller amounts of capital than men."); W. Sherman Rogers, *The Black Quest for Economic Liberty: Legal, Historical, and Related Considerations*, 48 HOW. L.J. 1, 110 (2004) ("African Americans have always found it more difficult to obtain capital to start, maintain, and grow their business enterprises largely due to discrimination and social realities. This history of discrimination has forced African American entrepreneurs to rely on bootstrapping, the art of learning to do more with less, as a routine matter.").

6 *See* William J. Moon, *Anonymous Companies*, 71 DUKE L.J. 1425, 1430-31 (2022) ("[T]he ability of individuals to invest in and operate business enterprises without forced public disclosure . . . [is] *identity shielding*.").

7 *See* Benjamin P. Edwards & Ann C. McGinley, *Venture Bearding*, 52 U.C. DAVIS L. REV. 1873, 1873 (2019) ("Venture bearding, as we use the term, describes behaviors that persons with contextually stigmatized identities adopt to access social status and capital.").

8 *See id.* at 1924 ("Widespread bias and stigmatization in the venture capital, startup, and technology sectors now cause many founders to adopt ingenious *venture bearding* strategies. Although these strategies now facilitate access to capital, their use both testifies to widespread bias and risks reinforcing discriminatory norms.").

9 *See* Moon, *supra* note 6, at 1488 ("Anonymous companies have become a staple feature of modern economic life by enabling individuals to operate business enterprises without coerced public disclosure. . . . [A]nonymity enables entrepreneurs to compete on more equal footing in the commercial marketplace, countering the prejudice and discrimination experienced by socially marginalized groups.").

10 *See id.* at 1441 ("Within this broader market for business entities, a handful of states—most notably, Delaware, Nevada, and Wyoming—are actively competing to attract anonymous companies in part to boost their state government revenues.").

11 *See id.* at 1428 ("[S]ecrecy is accomplished by operating a business in the name of the corporate entity formed in a jurisdiction, like Wyoming, that does not require the

This Essay explores the role of a well-established and generally accepted business organization, the business trust, in providing identity shielding and privacy that can be used to promote greater diversity, equity, and inclusion in the business world. The remainder of this Essay will be structured as follows. Part II provides a brief history of business trusts. Part III explains that common law business trusts offer the same benefits as corporations while offering some important differences, such as identity shielding. Part IV discusses the benefits and harms of identity shielding in promoting diversity, equity, and inclusion. Part V provides brief concluding remarks.

II. THE REBELLIOUS HISTORY OF THE BUSINESS TRUST

Business trusts have been, currently are, and will continue to be a cornerstone of the United States economy. Historically, some of the most important businesses in the United States were organized as business trusts. For example, during the nineteenth century, Standard Oil and United States Steel operated as business trusts and dominated their respective industries.[12] Consequently, because of the concentration of wealth and power within business trusts during the late nineteenth century, the United States has antitrust law—rather than competition law, which is the title used for the similar body of law in most foreign jurisdictions.[13] The Sherman Antitrust Act of 1890 is a manifestation of the "trust busting" efforts of that period.[14] Although seldom the subject of legal scholarship,[15] business trusts remain an important business form.[16]

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actual owners of business entities to be disclosed. Nefarious activities facilitated by these anonymous 'shell' companies—including drug trafficking, money laundering, terrorism financing, and tax evasion—by now are familiar to avid readers of *The New York Times* and *The Washington Post*.").

12 *See* John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2164 (2016) ("The most prominent examples of the trust's enduring popularity, of course, were the huge monopoly trusts that inspired the 'anti-*trust*' movement of the 1880s, such as United States Steel and Standard Oil.").

13 *See* Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2254 (2013) ("U.S. competition laws are known as 'antitrust' because they were designed as measures against the nineteenth-century trusts.").

14 Tom C. Hodge, *Compatible or Conflicting: The Promotion of a High Level of Employment and the Consumer Welfare Standard Under Article 101*, 3 WM. & MARY BUS. L. REV. 59, 66 (2012) ("In the United States, competition law is known as 'antitrust,' the reason for this being that the Sherman Act had been passed specifically to combat business 'trusts' (or cartels).").

15 *See* Robert H. Sitkoff, *Trust as "Uncorporation": A Research Agenda*, 2005 U. ILL. L. REV. 31, 33-34 (2005) (discussing the limited amount of scholarship regarding business trusts and the numerous holes in the existing literature).

16 *See* Peter B. Oh, *Business Trusts*, *in* RESEARCH HANDBOOK ON PARTNERSHIPS, LLCS AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 268, 268 (Robert W.

These entities are regularly used for mutual funds, pension funds, real estate investment trusts ("REITs"), and asset securitization.[17] Notably, index funds, which command a vast amount of power, are commonly organized as business trusts.[18] Many other businesses organize using this form as well, and the amount of wealth residing in the corpuses of business trusts collectively equals trillions of dollars.[19]

Trusts have often been employed when regulation has become onerous, as a means of circumventing that regulation. For example, in Anglo-American law, one place that the origins of trusts can be traced is to the "use," which developed in the twelfth and thirteenth centuries as a predecessor to the modern trust.[20] This device came into being as a means of circumventing restriction on land ownership by the Roman-Catholic Church to give members of their religious orders access to real property on which to live and worship.[21] During the Medieval Ages, trusts were also used for avoiding taxes, creditors, and restrictions on the transfer of land upon death.[22]

In regard to business trusts, this entity has regularly been used when corporate law has been too restrictive. Historically, a corporation

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Hillman & Mark J. Loewenstein eds., 2015) ("Virtually ignored by academics, the business trust arguably is the most prominent organizational form used today.").

17 *See* Wendy S. Goffe, *Oddball Trusts and the Lawyers Who Love Them or Trusts for Politicians and Other Animals*, 46 REAL PROP. TR. & EST. L.J. 543, 561 (2012) ("[B]usiness trusts have become the preferred entity form for asset securitization and certain financial transactions related to mortgages, credit cards, and other debt, and many mutual funds, pension funds, real estate management investment companies, regulated investment companies, and real estate investment trusts, any of which could also be structured as a corporation, LLC, or partnership.").

18 *See* Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2049 (2019) ("[I]ndex funds are generally structured as corporations or statutory trusts, with their own directors or trustees.").

19 *See* David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 75 (2012) ("[T]oday, trusts hold trillions of dollars in employee pensions, mutual funds, and securitized assets.").

20 *See* Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 805 (1983) ("The 'use' emerged during the twelfth and thirteenth centuries in England, and the trust developed over the fourteenth through seventeenth centuries.").

21 *See* Megan J. Ballard, *The Shortsightedness of Blind Trusts*, 56 U. KAN. L. REV. 43, 57 n.65 (2007) ("Trusts were created in medieval England when grantors conveyed land to someone else to manage for the benefit of members of religious orders who had taken vows of poverty and were forbidden from owning property.").

22 *See* Ignacio Arroyo Martinez, *Trust and the Civil Law*, 42 LA. L. REV. 1709, 1713-14 (1982) ("As a legal institution, the trust enjoys a secular history dating back to the thirteenth century, and, according to historical investigations, it can be proved today, without any risk of error, that the trust was born in the pursuit of an illegal purpose: the transfer of lands to bogus intermediaries, avoiding in that way the payment of taxes and the enforcement of the laws governing *mortmain*.").

could only be formed by a specific act of the government.[23] Rather than going through the arduous process of petitioning the government for the granting of a corporate charter, many businesses operated as business trusts and avoided use of the corporate form entirely.[24] Even as general incorporation statutes were passed in the United States, business trusts remained an alternative to corporations because of restrictions placed on use of the corporate form under state law.[25] For example, although Massachusetts enacted a general incorporation statute in 1809, the restrictions contained within in it on the use of corporations were so onerous that business trusts became so common in that jurisdiction that the term "Massachusetts trust" became and currently is synonymous with the term "business trust" generally in the United States.[26]

III. A Common Law Corporation and More

Although business trusts vary substantially because they are creatures of state law, these entities in general share many characteristics with corporations.[27] Consequently, this has led one leading commentator to refer to business trusts as "common law corporations."[28] The shared characteristics include limited liability, entity shielding, capital lock-in, tradable shares, legal personhood, and governance through fiduciary duties.[29]

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23 *See* Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. Cin. L. Rev. 353, 357-61 (2017) (providing the historical origins of the corporate form).

24 *See* Sheldon A. Jones, Laura M. Moret & James M. Storey, *The Massachusetts Business Trust and Registered Investment Companies*, 13 Del. J. Corp. L. 421, 424-25 (1988) ("Due to the difficulty of obtaining Parliamentary authority or a Crown charter, many associations were voluntarily formed for the purpose of offering shares to the public without that proper authorization.").

25 *See* Giacomo Rojas Elgueta, *Divergences and Convergences of Common Law and Civil Law Traditions on Asset Partitioning: A Functional Analysis*, 12 U. Pa. J. Bus. L. 517, 531 (2010) ("In the first half of the nineteenth century in the U.S., incorporation was still restricted to a fixed range of business purposes. In order to achieve affirmative asset partitioning, business people used . . . trust law.").

26 *See* Robert H. Sitkoff & Jesse Dukeminier, Wills, Trusts & Estates 399 (10th ed. 2017) ("In the late 1800s and early 1900s, entrepreneurs used the business trust to escape the heavy regulation of the corporate form. The business trust was so common in Massachusetts, where corporate ownership of real estate was prohibited, that the term *Massachusetts trust* became synonymous with business trust.").

27 *See* Lee-ford Tritt & Ryan Scott Teschner, *The Rise of Business Trusts in Sustainable Neo-Innovative Economies*, 88 U. Cin. L. Rev. 735, 742 (2020) ("[B]usiness trusts are governed by the state laws of the trust's situs. These laws . . . vary[ ] significantly across states . . . .").

28 *See* Morley, *supra* note 12, at 2146 (explaining how business trusts may be considered a close competitor to corporations due to the number of shared advantages).

29 *Id.* (detailing how each of these features exists both within corporations and business trusts).

The entities do differ in various ways. For example, the default fiduciary duties within business trusts are more robust than within corporations.[30] In addition, business trusts require a focus on wealth maximization that is much stronger than what is mandated by the corporate form.[31] Perhaps most important for this piece, however, common law business trusts afford business organizers, owners, and managers a level of privacy and identity shielding that is beyond corporations because these entities can be formed without filing with the state.[32]

To provide some context, the general trend is to provide more disclosure relating to the corporate form. For example, Congress enacted the Corporate Transparency Act as part of the National Defense Authorization Act for Fiscal Year 2021.[33] The Corporate Transparency Act, which will take full effect in 2023, requires reporting companies, unless exempted, to file reports with the Financial Crimes Enforcement Network of the Department of the Treasury (FinCEN) identifying and providing information regarding applicants and beneficial owners of certain business entities.[34] Under the Corporate Transparency Act, with some exceptions, a "reporting company" is defined as:

> a corporation, limited liability company, or other similar entity that is —
>
> (i) created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe; or
>
> (ii) formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe . . . .[35]

"Applicant" is defined as:

> any individual who —

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30 *See* Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593, 634 (1999) ("While fiduciary duties exist under both trust and corporate law, corporate standards are less strict.").

31 *See* Eric C. Chaffee, *A Theory of the Business Trust*, 88 U. CIN. L. REV. 797, 835 (2020) (explaining that based on the essential nature of the business trust form, such entities should engage in relentless profit maximization).

32 *See* David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company?*, 51 OKLA. L. REV. 427, 485 (1998) ("The business trust is a creature of contract; state filing is not necessary for its existence.").

33 William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, §§ 6401-03, 134 Stat. 4604-05.

34 31 U.S.C. § 5336(b) (2018 & Supp. II 2022).

35 *Id.* § 5336(a)(11)(A)(i)-(ii).

> (A) files an application to form a corporation, limited liability company, or other similar entity under the laws of a State or Indian Tribe; or
> (B) registers or files an application to register a corporation, limited liability company, or other similar entity formed under the laws of a foreign country to do business in the United States by filing a document with the secretary of state or similar office under the laws of a State or Indian Tribe.[36]

In addition, with certain exceptions, "beneficial owner" is defined as:

> an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—
> (i) exercises substantial control over the entity; or
> (ii) owns or controls not less than 25 percent of the ownership interests of the entity . . . .[37]

The permissible disclosure of information by FinCEN under the Corporate Transparency Act is limited.[38] However, the Act still provides broad and unprecedented disclosure regarding various business forms and reflects a general mentality that corporate transparency should be the norm.

While the Corporate Transparency Act would likely apply to statutory business trusts,[39] common law business trusts can, and do, continue to exist in many jurisdictions and will continue to afford privacy to their owners and operators.[40] Because these entities almost certainly fall outside of the definition of reporting companies because of the lack of state filing, the organizers and owners of these entities are likely to retain the ability to operate without disclosure of their identities or other information.[41] FinCEN has acknowledged this in its "Fact Sheet: Beneficial Ownership Information Reporting Notice of Proposed Rulemaking (NPRM)," which is related to the Transparency Act.[42] Consequently, in

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36 *Id.* § 5336(a)(2)(A)-(B).

37 *Id.* § 5336(a)(3)(A)(i)-(ii).

38 *See id.* § 5336(c).

39 *See id.* § 5336(a)(11)(a)(i) (providing that that the Transparency Act applies to companies that require filing with "a State or Indian Tribe.").

40 *See* S.I. Strong, *Arbitration of Trust Disputes: Two Bodies of Law Collide*, 45 VAND. J. TRANSNAT'L L. 1157, 1173 (2012) ("[T]here are a wide variety of statutory and common law business trusts currently in use . . . .").

41 *See* § 5336(a)(11)(A)(i)-(ii) (providing the definition of a "reporting company" under the Transparency Act).

42 *See Fact Sheet: Beneficial Ownership Information Reporting Notice of Proposed Rulemaking* (NPRM), FINCEN (Dec. 7, 2021), https://www.fincen.gov/news/news-releases/fact-sheet-beneficial-ownership-information-reporting-notice-proposed-rulemaking [https://perma.cc/G64M-LQT7] ("Other types of legal entities, including certain

a case of history repeating itself, trusts once again offer a means of avoiding onerous regulation.[43]

IV. The Benefits and Harms of Identity Shielding

The question that lingers is whether the identity shielding that common law business trusts afford is a good or a bad thing. As with many aspects of the law, the answer is that it depends. With that said, however, for those with socially stigmatized identities the benefits do outweigh the costs. The identity shielding associated with business trusts allows individuals with socially stigmatized identities to raise capital and conduct business more easily and reduces concerns about discrimination and harassment.[44] Business trusts offer all of the benefits of anonymous companies and should be recognized as such.[45] In addition, as transparency is pushed regarding corporations and other business forms that require filing with the state,[46] common law business trusts offer a path to anonymity that has not been and should not be blocked by regulation because these entities can be formed without state action.[47]

Using the identity shielding afforded by common law business trusts to address diversity, equity, and inclusion issues, however, does present a number of concerns. First, legitimizing venture bearding and identity shielding can entrench stigmatization of certain identities.[48] Venture bearding is likely of greater concern because venture bearding involves misrepresenting a socially stigmatized identity as a socially accepted one, rather than identity shielding, which simply involves nondis-

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trusts, would appear to be excluded from the definitions [of reporting companies] to the extent that they are not created by the filing of a document with a secretary of state or similar office. FinCEN recognizes that the creation of many trusts does not involve the filing of such a formation document.").

43 *See supra* Part II (discussing the historical use of trusts to circumvent onerous regulation).

44 *See* Moon, *supra* note 6, at 1451, 1484-85, 1488 (explaining how identity shielding can promote opportunity for those individuals who are discriminated against).

45 *See supra* Part III (explaining that business trusts offer the same defining features as the corporate form and privacy).

46 *See supra* notes 33-38 and accompanying text (discussing the Corporate Transparency Act).

47 S.I. Strong, *Congress and Commercial Trusts: Dealing with Diversity Jurisdiction Post-Americold*, 69 Fla. L. Rev. 1021, 1036 (2017) ("[M]any commercial trusts, including the well-known Massachusetts business trust, are created by private agreements in the form of trust deeds or declarations of trust rather than by compliance with statutory or regulatory formalities.").

48 *See* Edwards & McGinley, *supra* note 7, at 1924 ("Widespread bias and stigmatization in the venture capital, startup, and technology sectors now cause many founders to adopt ingenious *venture bearding* strategies. Although these strategies now facilitate access to capital, their use both testifies to widespread bias and risks reinforcing discriminatory norms.").

closure.[49] However, both still involve nonconfrontation of important social issues. With that said, the benefit of identity shielding outweighs the concerns because it allows for the transition of wealth to certain communities that likely will lead to such secrecy being no longer necessary.

Second, identity shielding is associated with a range of different reprehensible conduct, including fraud, money laundering, and terrorism financing.[50] Even if this is true, the virtues of identity shielding relating to diversity, equity, and inclusion outweigh these concerns. Criminals have a remarkable aptitude for figuring out ways to commit crime and will do it regardless of what sort of disclosure is mandated. Allowing individuals with socially stigmatized identities to more fairly engage in business is more important than disclosure in the business context.

Third, identity shielding may be of limited use in some instances because transacting parties may demand the disclosure of the identities of the individuals involved with the business trust. For example, a company attempting to raise or borrow capital is likely to have to disclose the identities of the individuals involved as part of the process. Regardless, identity shielding affords individuals with socially stigmatized identities the power to determine if, when, how, and to whom to disclose who they are, as well as other personal information. Even if this is a limited advantage, it is still an advantage.

Fourth, the law could be changed to require additional disclosure relating to common law business trusts. The Corporate Transparency Act provides an obvious example about how the law is already evolving to mandate greater disclosure from business entities that are brought into existence through filing with the state.[51] Currently, however, common law business trusts provide a means of allowing valuable identity shielding and should be recognized and valued for that feature.

V. CONCLUSION

Privacy, especially identity shielding, is being recognized for its importance in creating a more egalitarian society. Although concerns do exist regarding the use of identity shielding within businesses, the benefits of such shielding in uplifting individuals with socially stigmatized identities through the use of common law business trusts is substantial. This Essay is designed to recognize and laud the role that common law

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49 *See supra* note 7 and accompanying text (defining venture bearding).

50 *See supra* note 4 and accompanying text (explaining that identity shielding within business entities has become associated with a range of disreputable activities).

51 *See supra* notes 33-38 and accompanying text (providing an overview of the Corporate Transparency Act).

business trusts can play in affording privacy that can lead to greater diversity, equity, and inclusion in the United States.