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## Pernicious Loyalty

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## PERNICIOUS LOYALTY

ANDREW S. GOLD\*

### ABSTRACT

*Fiduciary loyalty is generally considered valuable, and in the usual case it is. Yet some of the very features of loyalty that make it valuable also encourage behaviors harmful to beneficiaries, third parties, or society as a whole. Examples include the corporate director whose concern with shareholder wealth maximization leads to considerable environmental harm and the skillful attorney whose zealous representation undermines justice between the parties. In short, actions that are motivated by good-faith fiduciary loyalty may be undesirable in individual cases. I will describe such cases as cases of pernicious loyalty. Outside the law, pernicious loyalty is often limited by features of extralegal loyalty itself. For example, the “alarm bells” that Philip Pettit describes as a trigger for moral reasoning may help constrain otherwise harmful loyalty between friends. Unfortunately, such responses do not always translate well to legal settings. This Article will consider the nature of pernicious loyalty together with potential legal responses to its excesses.*

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\* Professor, Brooklyn Law School. I am grateful for helpful comments from Miriam Baer, Anita Bernstein, Evan Criddle, Deborah DeMott, Cynthia Godsoe, Ethan Leib, Ted Janger, Paul Miller, and Julian Velasco. I am also grateful to participants at a Brooklyn Law School summer faculty workshop and at the *William & Mary Law Review* symposium on the future of fiduciary law. Any errors are my own.

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## INTRODUCTION

Loyalty's obligations can diverge from morality's obligations. The loyal member of the mob is often quite loyal indeed, but there is little about the mobster's loyalty to emulate.<sup>1</sup> Scholars even disagree over whether loyalty is a virtue.<sup>2</sup> Perhaps an ideal form of loyalty is virtuous, even if some forms are not. Whatever our views, the leading examples of problematic loyalty are usually egregious cases (like the loyal Nazi) and not the more benign examples. What if instead our concern is with desirable forms of loyalty that play out in an undesirable way? This Article will consider that question, with fiduciary loyalty as a central focus.

There should be little question that fiduciary loyalty is a valuable thing. Yet some types of loyalty are widely regarded as valuable while still proving harmful in specific applications. These harmful expressions of loyalty will be described here as "pernicious loyalty." While undesirable forms of loyalty represent a much broader category (as indicated by the loyal mobster), the interesting case for our purposes will be loyalty that is worth having in the general run of cases but harmful in specific circumstances. Fiduciary loyalty is a prominent example of loyalty that can be harmful in this way.

So defined, pernicious loyalty can also be subdivided to emphasize specific concerns. Expressions of loyalty are sometimes troubling because they induce partiality when morality is thought to require neutrality.<sup>3</sup> Loyalty may also be problematic where it causes

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1. Cf. Irit Samet, *Fiduciary Loyalty as Kantian Virtue*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 125, 128 (Andrew S. Gold & Paul B. Miller eds., 2014) ("The 'loyal Nazi' makes perfect sense, and the 'disloyal Nazi' (say the party member who betrays the party's principles for a bribe) lacks exactly that kind of admirable trait that we try to capture with the notion of loyalty.").

2. See SIMON KELLER, *THE LIMITS OF LOYALTY* 156-58 (2007) (suggesting loyalty is not a virtue); J.E. Penner, *Is Loyalty a Virtue, and Even if It Is, Does It Really Help Explain Fiduciary Liability?*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW*, *supra* note 1, at 159, 163 (suggesting loyalty is a "minor vice, like indiscriminateness").

3. On the moral challenges posed by partiality, see generally SIMON KELLER, *PARTIALITY* (2013); *PARTIALITY AND IMPARTIALITY: MORALITY, SPECIAL RELATIONSHIPS, AND THE WIDER WORLD* (Brian Feltham & John Cottingham eds., 2010). While special relationships often produce partiality, note also that a duty of impartiality may itself be the result of a special relationship. See JOHN GARDNER, *FROM PERSONAL LIFE TO PRIVATE LAW* 40 (2018).

blindness to the faults of its beneficiary or biases our judgment.<sup>4</sup> And, more generally, loyalty can prove harmful because of its breadth of application; loyalty is robust, and it retains its hold across a broad range of differing circumstances.<sup>5</sup> Although these challenges can overlap, this Article will discuss the final type of problem. Loyalty's tenacity across differing fact patterns is part of what makes loyalty valuable, but this tenacity also means that even desirable forms of loyalty can be harmful.

Consider some examples of fiduciary loyalty that cause harm to third parties or to society. Lawyers may seek to help their clients at the expense of justice between the parties, or else at the expense of the rule of law. Directors may seek to maximize shareholder wealth even where this causes brutal consequences for corporate employees, the local community, or the environment. Guardians may bring suit on behalf of wards even when those wards, if they were mentally competent, would have shown mercy to the defendant. And judges may show loyalty to the cause of justice though the heavens fall. Each of these difficulties stems from a type of loyalty that is valuable in the typical case but harmful in specific settings.

My hypothesis is that fiduciary loyalty's tenacity across different fact patterns is more challenging in legal settings than it is in most nonlegal contexts. Outside the law, loyalty is delimited in various ways, but it is difficult to modulate fiduciary loyalty adequately while still maintaining its benefits. If that is right, what can we do in response? This Article will review several possibilities. The first option is to adopt a form of self-policing. An example is what Philip

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4. For an example involving Joey and Chandler from the television show *Friends*, see KELLER, *supra* note 2, at 24. I will not belabor the point here, but Chandler was apparently expected to believe Joey would get an acting job, in light of Chandler's loyalty to Joey. *See id.* ("If he were really a good friend, Chandler would have more optimistic beliefs about Joey's prospects."). This example of loyalty may not be pernicious, but others are.

5. For analysis of a virtue's robustness in light of counterfactual cases, see PHILIP PETTIT, *THE ROBUST DEMANDS OF THE GOOD: ETHICS WITH ATTACHMENT, VIRTUE, AND RESPECT* 43-72 (2015); *see also* Stephen R. Galoob & Ethan J. Leib, *Intentions, Compliance, and Fiduciary Obligations*, 20 *LEGAL THEORY* 106 (2014) (suggesting fiduciary loyalty must be robust, in that fiduciaries must comply with its requirements not only for existing fact patterns but also in counterfactual cases). Note that while the kind of robustness that Pettit and Galoob and Leib discuss may not inevitably produce pernicious loyalty, this is a likely outcome given a significant degree of robustness. In order to avoid confusion with the technical sense of "robustness" they describe, I refer to loyalty's "tenacity" to indicate that it applies across a wide range of fact patterns.

Pettit has called a “standby strategy.”<sup>6</sup> Loyal fiduciaries might police themselves, cutting back on loyalty’s role in those cases in which appropriate cues indicate that strict compliance with a loyalty obligation will be unjust, injurious, or socially harmful.

Alternatively, the law might adopt legal constraints on fiduciary loyalty that preclude certain categories of pernicious loyalty. Such constraints might be external to the law’s understanding of fiduciary loyalty, as when behavior is simply declared to be illegal without reference to fiduciary law. Yet constraints on pursuit of a loyalty mandate can also be internal to that loyalty mandate itself.<sup>7</sup> When constraints are internal, a proper understanding of the loyalty at issue dictates that it should not be pursued in certain ways or beyond a certain point. For example, an agent who paternalistically seeks the best interests of her principal would be violating an internal constraint on her fiduciary loyalty to the extent she disregards her principal’s known preferences. Such internal constraints could preclude pernicious loyalty when it would otherwise advance a beneficiary’s best interests.

A third approach would be to look the other way when fiduciaries disregard the pull of pernicious loyalty. Fiduciaries often possess a form of “agency slack” which enables them to avoid a complete devotion to their beneficiary when such devotion is socially undesirable.<sup>8</sup> In doing so, the fiduciary can escape liability because the legal system ignores the breach or refuses to enforce the obligations at issue.<sup>9</sup> This slack could be the product of an *ex ante* rule (such as the business judgment rule) or the product of *ad hoc* judicial decision-making. In either event, the underlying loyalty obligation is left untouched; it is loyalty’s enforcement that changes.<sup>10</sup>

Each of these strategies works to some degree, but we ought not to disregard the drawbacks of success. I will discuss three of the more prominent difficulties here. While these challenges tend to

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6. PETTIT, *supra* note 5, at 221.

7. See generally Andrew S. Gold, *The Internal Limits on Fiduciary Loyalty*, 65 AM. J. JURISPRUDENCE 65 (2020).

8. See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005).

9. See *id.* at 738.

10. *Cf. id.* at 738-41 (discussing the lack of an *enforceable* corporate profit-maximization duty).

overlap, some are more likely to occur for particular fiduciary relationships or specific fact patterns.

The first basis for caution is the need to accommodate extralegal expressions of loyalty.<sup>11</sup> Fiduciaries who are governed by legal loyalty obligations will often simultaneously develop an extralegal loyalty toward their beneficiaries. When the legal conception of loyalty diverges from the extralegal conception, this can place a substantial burden on the fiduciary who takes his loyalties seriously.<sup>12</sup> The problem is particularly acute with close personal relationships (for example, guardian-ward or parent-child relationships), but it can arise across a wide range of fiduciary fact patterns.<sup>13</sup>

The second consideration is that efforts to cut back on pernicious loyalty will alter a special relationship that exists between fiduciary and beneficiary. Parent-child relationships are clearly special relationships with substantial value, but various professional relationships can also be valuable even if they are less close. If an alteration in such relationships decreases their value, or even deters their formation, this could be a significant loss. One reason is instrumental; for example, it may be that certain relationships encourage trust in a way that advances markets, or that they help the justice system function effectively. But it may also be that some of the special relationships constituted by fiduciary law are relationships with intrinsic value. A loss of certain intrinsically valuable relationships, or a decrease in their intrinsic value, is not a small concern.

The third difficulty is opportunism. Fiduciary loyalty and the associated burdens of proof and remedies for breach are often understood to respond to opportunism risks.<sup>14</sup> The difficulty of monitoring a fiduciary's (often broad) discretionary authority invites various forms of advantage taking. To the extent courts facilitate a fiduciary's discretion as to when she will act in the best interests of

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11. See, e.g., Andrew S. Gold, *Accommodating Loyalty*, in CONTRACT, STATUS, AND FIDUCIARY LAW 185 (Paul B. Miller & Andrew S. Gold eds., 2016).

12. See *id.* at 185-86.

13. See *id.* at 197-98.

14. See Henry E. Smith, *Why Fiduciary Law Is Equitable*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 261, 277-78 [hereinafter Smith, *Why Fiduciary Law Is Equitable*]; D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1402 (2002).

her beneficiary—even if that discretion is aimed at avoiding pernicious loyalty—there is a real risk that the fiduciary will take advantage of that discretion to self-deal or otherwise act to advance the fiduciary’s idiosyncratic preferences.

Where does this leave us? The costs and benefits of limiting pernicious loyalty are subject to great empirical uncertainty, and incommensurable values may run rampant. With those caveats, I tentatively suggest that pernicious loyalty is not something to be eliminated altogether but rather something to be managed. Targeted intrusions on fiduciary loyalty are less likely to destroy the value in fiduciary loyalty and its associated special relationships. On the other hand, a targeted approach will inevitably allow some pernicious loyalty to survive. Moreover, it is hard to eliminate all cases of pernicious loyalty (through whatever mechanism) given the bounded rationality of judges, legislators, and fiduciaries themselves. Accordingly, acting in a piecemeal fashion may not only be our best option, it may be the most we can hope for. So long as fiduciary law adopts a strong form of loyalty as its centerpiece—a reasonable choice—pernicious loyalty may be a necessary evil.

Part I of this Article will begin with an analysis of pernicious loyalty, illustrated by several leading examples. Part II will discuss ways to limit the existence of pernicious loyalty. These might take the form of self-imposed limits on loyalty, as with a standby strategy, or they might take the form of *ex ante* constraints on loyalty imposed by courts or legislatures. Alternatively, pernicious loyalty could be alleviated by doctrines like the business judgment rule, which leave room for some deviations from loyal behavior without threat of liability. Part III will discuss drawbacks to these measures, on the assumption that they can be successfully implemented. Among other concerns, it may be important to accommodate extralegal conceptions of loyalty or to preserve the value of special relationships between fiduciary and beneficiary. In addition, efforts to limit pernicious loyalty may invite opportunism by savvy fiduciaries. Part IV will consider whether targeted carve outs from fiduciary loyalty are a viable answer. I will tentatively suggest that it makes sense to manage pernicious loyalty, but that eliminating it altogether would not be worth the attempt.

## I. VALUABLE LOYALTIES THAT ARE PERNICIOUS IN PRACTICE

In all likelihood, pernicious loyalty is a feature of any type of fiduciary loyalty that involves affirmative devotion toward a beneficiary.<sup>15</sup> Whether this means small-scale agency relationships or large-scale director-shareholder or state-citizen relationships, the risk is significant. Likewise, whether the fiduciary relationship is relatively intimate, as with parent-child or guardian-ward relations, or instead is quite detached, as with some money-manager settings, the potential for pernicious loyalty is always present. Each type of fiduciary relationship encourages its own characteristic forms of pernicious loyalty, but the broad category is a constant across types. In order to better understand what is at stake, this Part will review some leading examples.

### A. *Lawyer and Client*

Consider first the lawyer-client relationship. This is a classically fiduciary relation, and one of its hallmarks is the duty of loyalty a lawyer owes her client.<sup>16</sup> Lawyers also owe obligations to the legal system, and they may be understood to owe fidelity to the rule of law—indeed, on some accounts lawyers participate in a dual mandate, with private-law obligations and public-law obligations borne by the same party.<sup>17</sup> But even with these caveats, it is hard to avoid the conclusion that lawyers sometimes will seek to advance their clients' interests in a way that makes justice between a client

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15. Not all conceptions of fiduciary loyalty have this feature. For an analysis of fiduciary loyalty that is purely proscriptive, see MATTHEW CONAGLEN, *FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES* (2010). On the potential for variations across jurisdictions and relationships, see Andrew S. Gold, *The Loyalties of Fiduciary Law*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW*, *supra* note 1, at 176.

16. See Evan J. Criddle & Evan Fox-Decent, *Guardians of Legal Order: The Dual Commissions of Public Fiduciaries*, in *FIDUCIARY GOVERNMENT* 67, 71 (Evan J. Criddle et al. eds., 2018) (“Generally, a lawyer cannot represent someone if the lawyer already represents a party whose interests conflict with that person. And, under no circumstances can the lawyer represent adverse parties to the same suit.” (footnote omitted)).

17. For several different ways of thinking about this question, see *id.* at 71-76; W. Bradley Wendel, *Should Lawyers Be Loyal to Clients, the Law, or Both?*, 65 *AM. J. JURISPRUDENCE* 19 (2020); Gold, *supra* note 7.

and another litigant less likely. In some cases, lawyers will also seek to advance their clients' interests in a way that is harmful for society more broadly.

To see how this can happen, compare the extreme account of a lawyer's obligations elaborated by Lord Henry Brougham:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.<sup>18</sup>

David Luban has recently argued that a version of this view is still recognizable in present-day codes of legal ethics. Contemporary language does not sound like Lord Brougham's phrasing. But, as Luban suggests:

Perhaps implicit in the change of wording is Tim Dare's distinction between mere zeal and "hyperzeal," in order to make it clear that reasonably diligent (i.e., merely-zealous) lawyers will not face discipline for not doing everything under the sun on their clients' behalf. The fact remains that lawyers also will not face discipline for hyperzeal, that is, for *doing* everything under the sun on their clients' behalf, no matter how ruthless, so long as the law permits it.<sup>19</sup>

If Luban's interpretation is correct, that is an invitation for pernicious loyalty. The hyperzeal involved, moreover, can be understood in fiduciary terms.

We can also borrow one of Luban's examples to see how a particular version of fiduciary legal ethics raises concerns:

The ... example comes courtesy of a friend and colleague who is a distinguished mergers-and-acquisitions partner at a New York law firm. He was closing a deal, and the lawyer on the other side

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18. 2 CAUSES CÉLÈBRES: TRIAL OF QUEEN CAROLINE 3 (New York, James Cockcroft & Co. 1874).

19. See David Luban, *Fiduciary Legal Ethics, Zeal, and Moral Activism*, 33 GEO. J. LEGAL ETHICS 275, 278-79 (2020) (footnote omitted).

prepared the draft of the agreement. That lawyer goofed: the draft he prepared bore no resemblance to the deal the parties had agreed to verbally, and it was hugely advantageous to my friend's client and disadvantageous to the drafting lawyer's client. It was, in other words, a deadly scrivener's error in favor of my friend's client. Furthermore, the very real advantage it gave to my friend's client would not be readily detected until much later, if ever.<sup>20</sup>

Suppose that the lawyer tells his client about the scrivener's error and counsels the client to disclose the error, yet the client says no. Luban contends that, under a fiduciary ethics view, the lawyer would then be required to quit or to leave the scrivener's error in place without mentioning it.<sup>21</sup>

This is an example of fiduciary loyalty's potential local effects (dependent on the interpretation of loyalty at issue), and it is specific to the parties involved in a mergers-and-acquisitions deal. In other cases, a lawyer's zealous efforts to advance her client's interests could lead to broader social harms.<sup>22</sup> The relevant point is that in either event a fiduciary understanding can result in pernicious loyalty. Indeed, even if ethics codes do not directly encourage pernicious loyalty, the possibility that a Brougham-like perspective will emerge among individual lawyers could be a substantial risk.<sup>23</sup>

### *B. Director and Shareholder*

The director-shareholder relationship is also a well-known fiduciary relationship, and it too is characterized by strong obligations

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20. *Id.* at 292.

21. *Id.* at 293.

22. For more extended discussion of the puzzles raised by a lawyer's loyalty obligations, see Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060 (1976); W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 38 (2010); DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 69 (2007); DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* (2008); Alice Woolley, *The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations*, 65 *U. TORONTO L.J.* 285 (2015).

23. Note also that market forces could play a role, as could psychological phenomena like ethical "fading." On ethical fading in the legal representation context, see Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 *WIS. L. REV.* 495, 512-13. I thank Miriam Baer for noting these issues.

of loyalty. In a common formulation, directors have an obligation to maximize shareholder wealth.<sup>24</sup> On some views, this is also justified in light of social benefits, but the obligation itself is directed at shareholders, with shareholder concerns in mind.<sup>25</sup> Because that loyalty obligation is generally unremitting (and also undivided), there is a potential for loyalties that misfire in some circumstances.

Here is a useful hypothetical from Einer Elhauge that helps illustrate the concern:

Suppose clear-cutting is profitable and legal, but is nonetheless regarded as environmentally irresponsible under prevailing social norms. Can management of a timber corporation decline to clear-cut its timberland even though that sacrifices profits? One might be tempted to evade the question by claiming that being environmentally responsible is profitable in the long run, either because it preserves the forest for future harvesting or because it maintains a public goodwill that aids future sales. But suppose, in an incautious moment, management admits that the present value of those future profits from not clear-cutting cannot hope to match the large current profits that clear-cutting would produce.<sup>26</sup>

Elhauge asks if management can avoid liability when it declines to engage in clear-cutting. The answer is yes; the business judgment rule will likely protect the directors.<sup>27</sup> But notice the flip side of this hypothetical: management could also choose to engage in clear-cutting, and it could do so out of a sense of loyalty to the corporation's shareholders. This, too, would be protected by the business judgment rule. To the extent a corporation's board did choose the clear-cutting option, its choice might be environmentally irresponsible despite being loyal. Moreover, the loyalty at issue—the loyalty involved in a shareholder wealth maximizing norm—could be

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24. See Elhauge, *supra* note 8, at 736 & n.1 (listing authorities).

25. See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001) (arguing that the “broad normative consensus” that directors owe loyalty solely to shareholders has been justified by the view that “the best means to [the] end [of] ... aggregate social welfare ... is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests”).

26. See Elhauge, *supra* note 8, at 735-36.

27. See *id.* at 738.

desirable overall even though it is undesirable in this specific case. In short, this board could readily engage in pernicious loyalty.

A more contestable example is the case of directors who choose to have their corporation violate the law on the understanding that this will maximize shareholder wealth. Not everyone agrees that this behavior merits fiduciary liability, or at least not in all cases. For instance, some may think that a package delivery corporation that intentionally engages in illegal parking of its vehicles can act efficiently, and (in certain views) this may not deserve treatment as a fiduciary breach.<sup>28</sup> Alternatively, certain forms of entrepreneurship may involve intentional violations of law with the aim of moving the law in an allegedly desirable direction.<sup>29</sup> Under the right circumstances, the resulting shift in the law could also be a valuable shift. For some, perhaps, this could be justification for limiting fiduciary liability in these contexts.

Whatever our views of such cases—and many would say the lawbreaking in these more disputed cases is still wrong—at least some instances of intentional lawbreaking *are* beyond the pale. In these cases, lawbreaking could still maximize shareholder wealth. This, in turn, is enough to show a potential for pernicious loyalty. Lawbreaking can advance shareholder interests, yet also be wrongful (legally and morally). Directors who break the law are then engaged in pernicious loyalty if their loyalty is the cause.

### C. *Guardian and Ward*

Suppose that we move further away from the lawyer-client and director-shareholder cases toward a more intimate fiduciary relationship. The above two examples have long raised doubts about the potentially dangerous effects of fiduciary loyalty. A guardian-ward case may seem less prone to pernicious forms of loyalty, particularly given the close family relationships that are often involved and the vulnerability of many wards. Even here, however,

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28. See Stephen M. Bainbridge, Star Lopez & Benjamin Oklan, *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 592-94 (2008).

29. For discussion of a strategy like this one, see Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 712-13 (2019) (discussing Uber's strategy to challenge and change the law, including launching operations in violation of existing law).

there are instances of loyalty that may fall into the pernicious category.

Consider a case like *In re Will of Gleeson*.<sup>30</sup> In that case, Mary Gleeson had owned farmland, which she leased on a yearly basis to a partnership in which Con Colbrook was a partner.<sup>31</sup> Colbrook was also a trustee for Gleeson's estate, which included the farmland.<sup>32</sup> Gleeson passed away fifteen days before the farming year began.<sup>33</sup> Acting as trustee, Colbrook allowed his partnership to continue leasing the property for that year.<sup>34</sup> Colbrook claimed that he wished to advance the best interests of the estate, and apparently it would have been difficult to find another tenant.<sup>35</sup> The trust allegedly suffered no financial loss as a result of the transaction.<sup>36</sup> Even so, the court found the trustee's good faith and honesty irrelevant.<sup>37</sup> Colbrook had to turn over the profits he earned from farming the Gleeson land under the new lease.<sup>38</sup>

The outcome in *Gleeson* is often considered to be a harsh result. Let us bracket any debates about fiduciary law's remedial strictness. Granting that the plaintiffs' claims were legitimate, and granting that the law's remedial regime is justifiable, should the suit have been brought? This is a potentially harder question; not every suit that is legally meritorious is a suit that should be pursued. Mercy and forgiveness have their place in litigation. Notice, however, that one of the plaintiffs in *Gleeson* was represented by a conservator.<sup>39</sup> Consider then a guardian's role in litigation. Not all wards are mentally competent and able to express their litigation preferences. A guardian may reasonably feel that she needs to bring suit in order to properly represent her ward's interests, even if the guardian would never have brought suit on her own behalf. If so,

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30. Colbrook v. Black (*In re Will of Gleeson*), 124 N.E.2d 624 (Ill. App. Ct. 1955).

31. *Id.* at 625.

32. *Id.*

33. *Id.* at 626.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 627.

38. *Id.* at 628. Note that some of the cases in this genre implicate unsophisticated and poorly counseled trustees. For suggestions on how the law should address such cases, see Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 WM. & MARY L. REV. 541, 582-86 (2005).

39. 124 N.E.2d at 625 (incompetent party represented by a conservator).

this would not be an ordinary case of someone being a stickler for her rights.<sup>40</sup> Rather, the choice to sue may result from a particular conception of fiduciary loyalty.

A claimant who sues when it would be “selfish, heartless, or unjust” is described by John Goldberg and Benjamin Zipursky as an “overreaching plaintiff.”<sup>41</sup> Identifying such a plaintiff is a difficult challenge in guardian-ward settings like this one. Even if a non-fiduciary plaintiff should not have brought suit under the circumstances, perhaps it is different when a vulnerable ward is involved. Should not the guardian act to benefit her ward, even in cases when, if the ward had full mental competence, the ward might have preferred to sue? More to the point, could the loyal guardian have an obligation to do so? If so, maybe the guardian in such cases is not a true overreaching plaintiff. Yet the loyalty at issue may still be a pernicious loyalty; for, even if we recognize that the guardian should sue given her fiduciary mandate, this could be something tragic.

In *The Right of Redress*, I have recently argued that equity can be a solution to the overreaching plaintiff problem.<sup>42</sup> Often, courts can avoid assisting an overreaching plaintiff by means of estoppel, laches, or the doctrine of unclean hands.<sup>43</sup> But equity is a limited solution in the case of a loyal guardian like the one posited in the *Gleeson* case. Fiduciary law remedies apply with a rigidity that is uncommon for cognate fields, like contract law.<sup>44</sup> Judges may occasionally find ways to soften the effects of the doctrine (often sub silentio),<sup>45</sup> but for the most part, fiduciary law remedies are unsparingly forceful.<sup>46</sup> The remedial consequences for defendants in these circumstances may then be harsh and regrettable in a way that should discourage some suits. In these cases, the lawsuit may

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40. On the problem of sticklers, see Dennis Klimchuk, *Equity and the Rule of Law*, in PRIVATE LAW AND THE RULE OF LAW 247, 254 (Lisa M. Austin & Dennis Klimchuk eds., 2014); Andrew S. Gold, *Equity and the Right To Do Wrong*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY 72 (Dennis Klimchuk et al. eds., 2020).

41. JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 356 (2020).

42. ANDREW S. GOLD, THE RIGHT OF REDRESS 182-202 (2020).

43. See *id.* at 16-17.

44. See Emily L. Sherwin, *Formal Elements of Contract and Fiduciary Law*, in CONTRACT, STATUS, AND FIDUCIARY LAW, *supra* note 11, at 167, 167-68.

45. See *id.* at 180.

46. *Id.* at 176 (explaining that courts usually do not evaluate a trustee’s good faith or reasonableness in conducting a prohibited transaction).

be the product of a pernicious loyalty if loyalty forced the guardian's hand.

#### *D. Judge and Justice*

The fiduciary judge poses a different variant on the problem, and here we may think the existence of pernicious loyalty is even less likely. That is not the case. The judge acting as a fiduciary is very capable of engaging in pernicious loyalty, and the dangers posed by judicial loyalty are, if anything, more severe than in other settings. Judges may be tempted to pursue justice at all costs, and depending on the legal system at issue, that can be a troubling thing. When loyalty is the reason for a judicial choice to pursue justice come what may, we are confronted again with the risk of pernicious loyalty.

Before proceeding, it may be helpful to unpack the idea of a judge's fiduciary loyalty. For some, a judge's loyalty is owed to the general public as a whole. That is the view of Ethan Leib and his coauthors.<sup>47</sup> They are hesitant to recognize loyalty to the litigating parties alone, and they find a loyalty to the common law to be overly abstract.<sup>48</sup> One certainly can think of judges as fiduciaries who owe their loyalty to the public as a whole (however the "public" is defined), and this approach offers insights for some purposes.

Yet this approach is by no means required. As Paul Miller and I have argued, judges may instead have fiduciary governance mandates: a judge's fiduciary loyalty may then involve pursuit of an abstract purpose, such as the advancement of justice.<sup>49</sup> Many fiduciary relationships are similar to charitable purpose trusts; such relationships do not involve loyalty to any determinate beneficiary.<sup>50</sup> These relationships are nonetheless fundamentally concerned with

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47. See Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 719-23 (2013).

48. See *id.* at 720-22. For a suggestion that judges may be trustees of the common law, see Sarah M.R. Cravens, *Judges as Trustees: A Duty to Account and an Opportunity for Virtue*, 62 WASH. & LEE L. REV. 1637, 1645 (2005).

49. Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513 (2015). In other settings, loyalty and justice may pull in different directions. See JOHN GARDNER, *The Virtue of Justice and the Character of Law*, in *LAW AS A LEAP OF FAITH* 238, 253 (2012). Here, however, the two converge; loyalty is taken as the reason for pursuing justice.

50. See Miller & Gold, *supra* note 49, at 528-30 (discussing these features of charitable purpose trusts).

loyalty, and they exist comfortably within the fiduciary fold. Judges could likewise fall into this category.

Let us assume that the loyalty judges owe is a loyalty to the abstract cause of justice. To be clear, the loyalty that Leib and his coauthors espouse could also be capable of producing pernicious loyalty (loyalty to a given “public” as a whole may leave out the interests of various individuals, and it can be excessive in its own way), but a loyalty that is owed to the cause of justice provides an especially instructive case. It also avoids some of the oddities involved in judges owing loyalty to the public as a whole, given that what advances the interests of the public may differ from what brings about justice between the litigants.<sup>51</sup>

If we assume judges owe loyalty to the cause of justice, we might wonder what it could mean to have too much justice. Surely, maximizing justice is not problematic in the way that maximizing shareholder wealth can be. We might even believe that the ideal amount of justice is simply the greatest amount of justice feasible. Even so, there are contexts in which an excessive interest in justice is both recognizable and problematic. Judges, at times, take their responsibility to bring about justice—or more precisely, a certain kind of justice—as a responsibility that defeats all other considerations.

This type of thinking is by no means isolated to judges. Philip Pettit notes a model of the moral agent as someone who follows moral rules in strict fashion, like a code: “In this characterization of the moral agent, it is often assumed that the duties imposed are more or less absolute. Thus it goes naturally with dicta such as: *Fiat justitia, ruat coelum*; let justice be done, though the sky should fall.”<sup>52</sup>

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51. The force of this argument may depend on how one conceptualizes the justice with which courts are concerned. For example, there is some dispute as to how closely private law reasoning is linked to a concern with justice between the parties. For an account that emphasizes a system-level type of justice in private law, see Benjamin C. Zipursky, *Civil Recourse Theory*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 53, 68 (Andrew S. Gold et al. eds., 2021). *But cf.* Henry E. Smith, *Systems Theory: Emergent Private Law*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW, *supra*, at 143, 150 (suggesting internal accounts of private law “are based on local rather than (directly) societal justice”). For the view that private law is concerned in particular with justice between the parties, see GOLD, *supra* note 42. For the view that justice is a judicial priority, see GARDNER, *supra* note 49, at 267-69.

52. PETTIT, *supra* note 5, at 223.

Granted, this *fiat justitia* approach does not always match our moral psychology.<sup>53</sup> But people often do think this way when they engage in moral reasoning, and, more importantly, they sometimes do so when holding a public office. *Fiat justitia, ruat coelum* does match a common mode of thought. If a judge's loyalty to justice reflects this approach, we have the necessary ingredients for a fiduciary loyalty that can cause great harm. The result is similar to Lord Brougham's thoughts about a lawyer's obligations, transposed to the judicial role.<sup>54</sup>

Some cases are admittedly extreme and unlikely. The judge who pursues justice for the litigating parties at the expense of her society's survival is presumably not common. But the judge who is willing to pursue justice when it will cause great hardship (for litigants or for third parties) is more abundant. Moreover, in cases in which the positive law is morally dubious, the judge who mechanically applies that positive law in the name of justice may cause substantial suffering.<sup>55</sup> Not every case will be uncontestable—sometimes a harsh result is what the judge must provide if she does her job well, and sometimes justice should prevail over other weighty concerns—and hard cases are not difficult to imagine. But judges, like other fiduciaries, may show a loyalty that has pernicious effects.

## II. SELF-POLICING, LEGAL CONSTRAINTS, AND AGENCY SLACK

### A. *Self-Policing and the Standby Strategy*

One of the main reasons why loyalty outside the law can be less problematic than its legal counterparts is that nonlegal loyalty has powerful safety valves and other limits on its scope. Courts could use various means to impose limits that circumscribe fiduciary loyalty,<sup>56</sup> but loyalty can also be bounded by fiduciaries themselves. In the latter case, self-policing fiduciaries might adopt an *ex ante*

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53. *See id.* at 223-24.

54. *See supra* text accompanying note 18.

55. Judges are sometimes quite candid that they feel compelled to enforce immoral or unjust legal rules, even from their own point of view. *See* JOHN GARDNER, *How Law Claims, What Law Claims*, in *LAW AS A LEAP OF FAITH*, *supra* note 49, at 125, 141-42.

56. *See infra* Part II.B.

rule against certain behaviors. The tendency of the plaintiff's bar in some settings to avoid seeking "blood money"—money in excess of insurance policies—fits into this category.<sup>57</sup> It is not written into the law that lawyers should do this, but if they adopt a rule against seeking blood money, this is a self-imposed constraint on the exercise of fiduciary loyalty when that loyalty might impose serious hardships. Other cases of self-policing may involve a fact-specific moral safety valve, as discussed below.

Pettit's recent philosophical work on virtues shows how such a safety valve works in practice, and it will be helpful to consider one of his examples. Pettit argues that sometimes individuals ought to adopt a disposition and act on it, yet still be open to overcoming that disposition in appropriate cases.<sup>58</sup> Loyalty is one setting where such a disposition is required. The difficulty is in figuring out how to adopt a disposition that is subject to moral limits without overwhelming the disposition itself.<sup>59</sup> As Pettit's leading illustration involves friendship—a loyalty-centered relationship—it is particularly illuminating for our purposes.

On Pettit's view, it is problematic for someone to help a friend based on abstract reasons to assist anyone who happens to occupy the role of friend.<sup>60</sup> Doing so would make it "a matter of luck" whether she helps this particular friend, rather than another person.<sup>61</sup> When we act as friends, we act for a specific person. And this premise, Pettit contends, "casts serious doubt on whether I can fully enjoy the goods you give me as a friend, or as someone attached to me in any distinctive way, if you allow yourself to be guided in your deliberation and decision-making by the overall balance of reasons."<sup>62</sup> As a friend, one must adopt a disposition to

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57. See Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275 (2001) (discussing the moral code on not pursuing blood money).

58. See PETTIT, *supra* note 5, at 209-14.

59. See *id.* at 214-16.

60. See *id.* at 211 ("You have to see me as a friend, of course, in offering me a friend's favour. But it is essential that I be someone known to you in my individuality and, more important, that I command the favour in my individuality, albeit qua friend.").

61. *Id.*

62. *Id.*

think in a certain way,<sup>63</sup> and some deliberations are inconsistent with that disposition.

Friendship and morality are not necessarily at odds, but particularized moral reasoning can swallow up what is valuable in friendships. As Pettit indicates:

If you are guided by the theory of the right in dealing with me, ... I cannot enjoy the special good involved in my demands being given a default status in your thinking. I do not make a demand on you that carries presumptive weight, independently of your confirming that it is right in general terms to satisfy that demand.<sup>64</sup>

Moral reasoning can defeat the demands of loyalty when there is a conflict between the two, and moral reasoning can overwhelm the features that make friendships what they are.

Nonetheless, people do need to engage in moral reasoning even when they are bound by loyalty, and this raises a hard question. How are they to take friendship, attachment, and loyalty seriously if moral norms are still to hold significance in their lives? Pettit's suggestion is that individuals may adopt what he calls a "standby strategy."<sup>65</sup> A disposition of attachment, virtue, or respect may be a starting point for a dutiful friend, but contextual cues can trigger exceptions.<sup>66</sup>

Here is Pettit's intuitive example of the standby strategy in action:

Think of the joke remark that a good friend will help me move an apartment but only a very good friend would help me move a body. Disposed to treat me as a friend you will readily agree to my request to help me move apartment; the only question will be about when and how to organize it. You will be suitably spontaneous in your response and will not have one thought too many to count as a friend. But however disposed you are to treat

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63. The concern here is similar to the concern that one should not have "one thought too many." *See id.* at 216; cf. BERNARD WILLIAMS, *Conflicts of Values*, in *MORAL LUCK* 71, 81 (1981).

64. *See* PETTIT, *supra* note 5, at 213.

65. *See id.* at 221.

66. *See id.*

me as a friend under such regular cues, you will not—certainly you should not—readily agree to help me move a body.<sup>67</sup>

The response is automatic: “The request will put on the red lights, under any plausible moral theory.”<sup>68</sup> As Pettit adds, “Let the alarm bells ring, and agents are required to put their dispositions offline and to deliberate about whether this is a case where they should resist the spontaneous promptings of their dispositions and consider what the overall balance of reasons requires of them.”<sup>69</sup>

Notice that a standby strategy is a potential solution to the pernicious loyalty challenge if judges owe a strong loyalty to the cause of justice. For public fiduciaries, the approach is appealing because it can be difficult for legal institutions to enforce fiduciary norms against such parties (for example, it is difficult to enforce fiduciary norms against judges acting in their adjudicatory capacity). A standby approach could bring pernicious loyalty under control if a fiduciary is capable of voluntarily recognizing those cases in which her fiduciary loyalty should cease or take a more qualified form.

The challenge is in adopting this strategy for ordinary, private law fiduciaries (a context where enforcement is presumptively part of the law’s approach). A welter of questions then arises. Outside of the truly extreme cases, can the law require people to curtail their loyalty in cases when alarm bells are appropriate? What if the court’s alarm bells are more finely tuned than the fiduciary’s? How do we avoid hindsight bias? Suppose the loyal fiduciary is too quick to disregard her loyalty obligations in light of her individual sense of what is pernicious? And, given that cases are often highly individualized, how are fiduciaries to have adequate notice as to when an alarm should go off?

It should be apparent that enforcing loyalty in the borderline cases based on a standby strategy is problematic. The triggers for an alarm bell are not so commonly shared that hard cases will be rare.<sup>70</sup> To the contrary, some of the cases that look like pernicious

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67. *See id.* (citation omitted).

68. *See id.* Interestingly, Samet’s account of equity draws on similar language concerning moral alarms. *See Irit Samet, What Conscience Can Do for Equity*, 3 JURISPRUDENCE 13, 31-33 (2012).

69. *See* PETTIT, *supra* note 5, at 220.

70. *See id.* at 222 (“The sensitivity to cues required for implementing the standby strategy is not something that can be taken for granted.”).

loyalty to some (such as the lawyer who detects a scrivener's error and does not disclose it) will seem acceptable to others. Even contexts involving directors who engage in intentional violations of positive law are not subject to scholarly consensus.<sup>71</sup> When hindsight bias is added to the picture, there is a genuine risk that parties who seek in good faith to be loyal fiduciaries will run afoul of a court's interpretation of what the standby approach should have produced.<sup>72</sup>

Judging may then be the rare instance in which a standby model is sensible for legal fiduciaries; a judge's fiduciary obligations are rarely enforced outside of impeachment (which is itself a rare event). Perhaps a standby strategy is also appropriate for legislators or public officials. A fiduciary's personal alarm bells could be helpful in public fiduciary settings, in which external enforcement is limited in scope and the usefulness of fiduciary obligations often hinges on a fiduciary's self-imposed behavioral constraints. Yet public fiduciaries are a special case in many contexts, and this is one of them. For public fiduciaries, both fiduciary loyalty itself and the exceptions to that loyalty are especially hard for third parties to police.<sup>73</sup>

If a standby strategy is difficult to implement for most other fiduciary settings, this leaves us with an important question: What other responses are available? The next Sections will consider several possibilities. I will begin with the idea that loyalty can be circumscribed *ex ante* by legal rules that prohibit certain expressions of loyalty. I will then turn to another possibility: courts may permit limits on loyalty by looking the other way when fiduciaries violate the requirements of the loyalty they owe.

### *B. Loyalty Constraints: Internal and External*

Pernicious loyalty can also be circumscribed by external rules that render it improper to fully pursue a loyalty mandate. In

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71. See Elhauge, *supra* note 8, at 756-57.

72. On the import of hindsight bias in adjudicative settings, see Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).

73. On the enforceability of judges' fiduciary duties, see Leib et al., *supra* note 47, at 729. *But cf.* Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1174 (2014) (offering a more skeptical account of the significance of impeachment for a fiduciary theory of public office holders).

addition, such rules may be imposed *ex ante* to avoid hindsight bias concerns. For example, if a certain course of conduct is illegal pursuant to a statute—perhaps for reasons that have nothing to do with fiduciary law—a loyal director may not require her corporation to pursue that illegal path even if it would maximize shareholder wealth. These external rules are commonplace, and they limit specific instances of pernicious loyalty by prohibiting the relevant behavior (for example, if an environmental statute makes certain forms of pollution illegal, a corporate board cannot legally cause the corporation to break that rule even if doing so would otherwise show loyalty).

It is just as possible, however, that loyalty may incorporate *internal* constraints on the pursuit of its mandates. Indeed, corporate law offers a leading example. Consider again the case of a director who wishes to pursue shareholder wealth by having her corporation break the law. The Delaware courts have made it clear that this is not merely unacceptable; the intentional pursuit of an illegal corporate objective is a kind of disloyalty to the corporation.<sup>74</sup>

The outcome may seem unusual, but this conception of loyalty is nonetheless coherent. We need to recognize that fiduciary loyalty sometimes involves something more than pursuit of a beneficiary's best interests; it may also involve "being true."<sup>75</sup> A party who is loyal in this sense will keep his word, follow his commitments, and generally show that he can be relied upon.<sup>76</sup> Corporate law is replete with cases when fiduciary loyalty calls for this, even in cases when being true will not necessarily be in the best interests of the corporation or its shareholders.<sup>77</sup> Directors who lie to their shareholders or break an agreement with their shareholders are considered

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74. See *Desimone v. Barrows*, 924 A.2d 908, 934 (Del. Ch. 2007) (Strine, V.C.).

75. For discussion of this idea, see Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457 (2009); Matthew Harding, *Disgorgement of Profit and Fiduciary Loyalty*, in *EQUITABLE COMPENSATION AND DISGORGEMENT OF PROFIT* 19, 21 (Simone Degeling & Jason NE Varuhas eds., 2017). For discussion of "being true" in the philosophical literature, see KELLER, *supra* note 2, at 154; JOSEPH RAZ, *THE MORALITY OF FREEDOM* 353-57 (1986).

76. See KELLER, *supra* note 2, at 154 ("In telling you that somebody is loyal in this sense, I am telling you that you can trust him; he is not scheming or deceitful or manipulative; he will not sell you out; he takes his promises and commitments seriously; he knows his job and he gets it done.")

77. See Gold, *supra* note 75, at 472-84 (discussing recent Delaware holdings related to the fiduciary duty of directors to act in good faith).

disloyal, whether or not the lies or betrayals helped the shareholders in some sense.<sup>78</sup> Causing the corporation to violate positive law is simply another way of being disloyal under this approach, because a violation of the corporate charter is a violation of a commitment made to the corporation.<sup>79</sup>

One might think this approach has limited applicability in the absence of a charter or similar governing document. There is, however, another way to look at these cases. Human beings do not have charters to govern them, but they nonetheless experience internal constraints on loyalty, including internal constraints that track moral principles.<sup>80</sup> To see how, it will be helpful again to compare nonlegal examples of loyalty.

Friendship is once again a useful point of comparison, albeit for different reasons. Here, Tim Scanlon's work offers valuable insights. In *What We Owe to Each Other*, Scanlon expresses concern about the "amoralist" individual who "could be immune to the claims of strangers while still enjoying friendship and the goods of other relations with specific individuals."<sup>81</sup> He contends, however, that the obligations of friendship may include a need for moral justification to other parties.<sup>82</sup> As the obligations of friendship are significantly comprised of loyalty obligations, the argument is suggestive.

As Scanlon indicates:

Friendship ... involves recognizing the friend as a separate person with moral standing—as someone to whom justification is owed in his or her own right, not merely in virtue of being a friend. A person who saw only friends as having this status would therefore not have friends in the sense I am describing: their moral standing would be too dependent on the contingent fact of this affection. There would, for example, be something unnerving about a "friend" who would steal a kidney for you if you needed one.<sup>83</sup>

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78. For a discussion of dishonesty towards shareholders as a violation of the duty of good faith, see *id.* at 477-79.

79. See *id.* at 476-77.

80. See Gold, *supra* note 7.

81. T. M. SCANLON, *WHAT WE OWE TO EACH OTHER* 164 (1998).

82. See *id.* at 164-65.

83. See *id.* at 164.

A friend's loyalty duties may thus incorporate constraints that reflect that friend's moral obligations.<sup>84</sup> Friends are not fiduciaries, thankfully, but friends and fiduciaries share this much in common.<sup>85</sup> As with friends, a fiduciary's loyalty can be subject to internal constraints, in light of the loyalty that is expected within that relationship.

If moral constraints can be incorporated into loyalty in this way, legal constraints can as well. The key step is to recognize that particular relationships may presuppose a certain kind of loyalty, and such relationships may do so without any dependence on a governing document. If the loyalty in a friendship were built around a governing document, this would suggest a misunderstanding of how the norms of friendship work. Loyalties can also prove dynamic, incorporating various requirements based on the evolution of a given relationship even in those cases in which a loyalty obligation started with a text-based agreement.<sup>86</sup> Internal constraints could thus prohibit some instances of pernicious loyalty whether or not a charter is involved.

### *C. Agency Slack and Limits on Liability*

Rather than impose constraints on the proper pursuit of loyalty obligations, courts might cut back on liability when fiduciaries fail to pursue their loyalty obligations to the fullest extent. In other words, they might provide a kind of "agency slack," granting fiduciaries a degree of freedom to diverge from their loyalty obligations without the risk of paying damages. The obligations themselves are left unchanged, but the consequences of their breach are diminished or removed altogether.

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84. *See id.* at 165.

85. For a different view on the status of friends, see Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 (2009). Then again, some would say that fiduciary loyalty is not even loyalty. *See* Stephen A. Smith, *The Deed, Not the Motive: Fiduciary Law Without Loyalty*, in CONTRACT, STATUS, AND FIDUCIARY LAW, *supra* note 11, at 213.

86. *See* Daniel Markovits, *Sharing Ex Ante and Sharing Ex Post: The Non-Contractual Basis of Fiduciary Relations*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 209, 222 (discussing marriages as an example); *cf.* GARDNER, *supra* note 3, at 37 (comparing contracts with "frameworks, such as friendship, that tend to ebb and flow and adjust, in their detailed normative content, to what Olds, thinking of the trajectory of an ill-fated marriage, calls 'the slow-revealed comedy/of ideal and error'" (quoting SHARON OLDS, *Crazy*, in STAG'S LEAP 65 (2012))).

One leading example is the business judgment rule.<sup>87</sup> As Einer Elhauge notes, this doctrine provides corporate directors with a kind of agency slack.<sup>88</sup> Directors may act to advance the public interest without any effective judicial review, even if doing so turns out to be inconsistent with shareholder wealth maximization.<sup>89</sup> As a consequence, directors may choose to pursue the public interest without worrying that they will be liable for breaches of their fiduciary obligations to shareholders.<sup>90</sup> The effect of the courts' nonreview of such boundedly loyal director conduct is that this conduct is more likely to occur.

This structure could apply more broadly to address cases of pernicious loyalty. Fiduciaries of various types—including directors—could feel safer in curtailing the excesses of fiduciary loyalty because they may rest assured they will not be liable in damages. Indeed, the fiduciaries' beneficiaries may prefer some deviation from strict loyalty when that loyalty proves to be pernicious (at least some of the time). Some beneficiaries will wish for their fiduciaries to act loyally though the heavens fall, but that is not likely to be the preference of all, especially in the more egregious cases. An agency slack approach might also work in tandem with a standby model of deliberation, such that fiduciaries are able to recognize pernicious loyalties and feel free to avoid them.

A major difficulty with an agency slack approach is that it could signal the acceptability of disregarding fiduciary duties. The business judgment rule is justified on many grounds, and so its existence need not give this signal; but if this approach were adopted

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87. To be clear, I do not mean that this is the primary explanation for that rule. The bases for recognizing the business judgment rule are many. *See, e.g.*, William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and Its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 455 (2002); Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398 (2007); Rachlinski, *supra* note 72, at 621; Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004).

88. *See* Elhauge, *supra* note 8, at 740.

89. *See id.* at 770-71.

90. Indeed, this may actually bring director conduct closer to what shareholders would view as desirable. *See id.* at 739 ("If managers are acting as loyal agents for most shareholders, then even patent exercises of the power to sacrifice profits in the public interest will enhance shareholder welfare by furthering what most shareholders view as the public interest.").

more widely, the expressive effects might be substantial. If courts are transparent in their reasoning, the agency slack approach may communicate that courts do not always want legal compliance. While that could limit pernicious loyalty, it might also cut back on more benign loyalty (dependent, of course, on what motivates loyal fiduciaries).

Another difficulty is that the very same agency slack that permits fiduciaries to avoid acting in a perniciously loyal way may also permit them to engage in harmful behavior. This is not simply a matter of spite or self-dealing. Directors may know that pernicious loyalty is not required in order to avoid liability, yet still experience emotional attachments and role-based obligations that encourage pernicious loyalty. For example, the business judgment rule will permit directors to avoid paying damages when they quietly cut back on profit-maximizing behavior that harms the environment, but it will also permit directors to profit-maximize no matter what the environmental cost.<sup>91</sup> If directors feel that their loyalty requires profit-maximizing at any cost, the business judgment rule will not be a substantial limit on perniciously loyal behavior.

### III. THE DOWNSIDES TO LIMITING PERNICIOUS LOYALTY

I have already noted some difficulties in implementation. For example, it is not clear how readily a court could implement a standby model in most fiduciary loyalty settings.<sup>92</sup> As noted, an agency-slack approach may facilitate pernicious loyalty as readily as it allows for its avoidance.<sup>93</sup> And, to the extent agency slack involves a lack of judicial transparency, it is questionable how well that approach will function. Suppose, however, that we bracket questions of effectiveness. There are also downsides if the law's limitations on pernicious loyalty are effective. I will turn to these now.

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91. *See supra* text accompanying note 27.

92. *See supra* Part II.A. The success of a standby strategy may also hinge on the existence of concurrent legal strategies, either of the internal-constraints variety or the agency-slack variety. Strictly speaking, however, it is possible for the standby strategy to operate without the presence of the other two legal strategies; this simply requires fiduciaries to respond to the appropriate moral alarm bells irrespective of what the law says concerning limits on loyalty or limits on liability.

93. *See supra* Part II.C.

The concerns I have in mind reflect broader understandings of what makes partiality valuable. Moral philosophers have sought to justify an individual's partiality toward friends and loved ones based on three perspectives.<sup>94</sup> Some focus on the value of that partiality to the person who is being partial; for example, being partial may advance the meaningful pursuits of a loving or loyal individual.<sup>95</sup> Others focus on the value of the special relationships that encourage this partiality.<sup>96</sup> And yet others focus on the value of partiality for its beneficiary.<sup>97</sup> The discussion below roughly tracks these three perspectives.

### A. *Accommodating Loyalty*

An initial concern is that even pernicious loyalty may involve conduct that is meaningful to loyal fiduciaries. This loyalty may be sufficiently meaningful, in fact, that it could merit accommodation by the legal system. Fiduciary law is usually designed with the vulnerabilities of beneficiaries in mind, but this does not mean we should overlook the perspective of fiduciaries themselves.<sup>98</sup> Courts may have good reason to make room for the pull of loyalty on parties

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94. As Simon Keller notes about partiality in general, "When you have reason to give special treatment to someone with whom you share a special relationship, the ground of your reason could be in you, or in the relationship, or in the other person." KELLER, *supra* note 3, at 31.

95. *See id.* at 11-12 (citing BERNARD WILLIAMS, *Persons, Character and Morality*, in MORAL LUCK 1, 12-18 (1981)).

96. *See id.* at 13 (first citing Joseph Raz, *Liberating Duties*, 8 LAW & PHIL. 3, 18-21 (1989); then citing SAMUEL SCHEFFLER, BOUNDARIES AND ALLEGIANCES 100-01, 121-22 (2001); then citing Samuel Scheffler, *Projects, Relationships, and Reasons*, in REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ 247, 247-52 (R. Jay Wallace et al. eds., 2004); and then quoting Niko Kolodny, *Love as Valuing a Relationship*, 112 PHIL. REV. 135, 150-51 (2003)).

97. *See id.* at 14 (quoting IRIS MURDOCH, THE SOVEREIGNTY OF GOOD (1970)). Note that this last approach is also Keller's own. *See id.* at 113-56. Note also it is possible to adopt a theory that draws on multiple bases for partiality. *Cf.* Samuel Scheffler, *Morality and Reasonable Partiality*, in PARTIALITY AND IMPARTIALITY, *supra* note 3, at 98, 128 ("Even if morality is not generally relational, I believe that it incorporates project-dependent, relationship-dependent, and membership-dependent reasons, and in doing so accommodates reasonable partiality.").

98. For a different context in which this holds true, see generally Andrew S. Gold, *Trust and Advice*, in FIDUCIARIES AND TRUST: ETHICS, POLITICS, ECONOMICS AND LAW 35 (Paul B. Miller & Matthew Harding eds., 2020) (discussing the import for fiduciaries to notice that they are in a fiduciary relationship).

who take their loyalty obligations seriously, especially in fiduciary relationships that involve close or even intimate connections between participants. In such cases, courts may have reason to accommodate extralegal loyalty obligations even to the point of permitting pernicious loyalty.<sup>99</sup>

An accommodationist approach is a recent addition to the fiduciary theory literature, but it builds on a more developed literature in other private law spheres. In order to better understand the argument, a brief digression into the world of contract theory may be helpful. The classic example of an accommodationist perspective is found in Seana Shiffrin's work on the relation between contracts and promissory morality.<sup>100</sup> When contractual duties and promissory duties diverge—and they do so regularly—Shiffrin indicates that the law should look out for the concerns of moral agents.<sup>101</sup>

On Shiffrin's view, contracts and promises overlap, applying simultaneously to contracting parties.<sup>102</sup> Moreover, the content of contract law diverges in important ways from the content of the promissory obligations that a contract brings into existence.<sup>103</sup> This would be problematic if we thought contract law should simply reflect the requirements of promissory morality, but Shiffrin does not adopt that tack. She is reluctant to say that the law's duties should always match moral duties. Instead, she suggests that under the right circumstances, the law should give moral agents space to act consistently with their moral obligations.<sup>104</sup>

As Shiffrin notes, “[E]ven if enforcing interpersonal morality is not the proper direct aim of law, the requirements of interpersonal morality may appropriately influence legal content and legal justifications to make adequate room for the development and expression of moral agency.”<sup>105</sup> The law, in other words, should *accommodate* interpersonal morality. As she adds, “[W]hat legal rules directly

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99. Cf. Gold, *supra* note 11, at 194-98.

100. See Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

101. See *id.* at 710.

102. See *id.* at 721 (indicating that contracts are represented by the law to be enforceable promises).

103. See *id.* at 722-27.

104. See *id.* at 713-15.

105. *Id.* at 715.

require agents to do or to refrain from doing should not, as a general matter, be inconsistent with leading a life of at least minimal moral virtue.”<sup>106</sup>

In prior work, I have suggested that fiduciary law presents an interesting variation on this problem.<sup>107</sup> Much like contract law and its interaction with promissory morality, fiduciary law engages fiduciaries in simultaneous legal and extralegal obligations.<sup>108</sup> But unlike the contract law example, the extralegal obligations that fiduciary law implicates are not necessarily moral. Loyalty duties have a contingent relationship to morality.<sup>109</sup> Accordingly, if the law makes accommodations for the extralegal loyalties of fiduciaries, it need not “make adequate room for the development and expression of moral agency.”<sup>110</sup>

There are, however, strong arguments that still support accommodation. The most powerful justification for accommodating extralegal loyalty applies to fiduciary relationships that involve close family ties or other instances in which loyalty is linked to thick forms of trust.<sup>111</sup> For many of us, loyalty occupies a central place in our self-understanding.<sup>112</sup> More intimate fiduciary relationships, which are likely to implicate that kind of loyalty, are appropriate settings for accommodating expressions of loyalty that are not always in the best interests of society or of individual third parties.

As Irit Samet recognizes, “Loyalty tends to attach to relationships which form part of our identity. In close relationship[s] of that type, the distinction between actions that serve ‘me,’ actions that serve ‘you,’ and those that serve ‘us’ is not always well defined.”<sup>113</sup> Indeed, loyalty-inflected relationships may be central to our ground projects in life, central to those projects that give our life its meaning.<sup>114</sup> For

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106. *Id.* at 718.

107. Gold, *supra* note 11.

108. *See id.* at 186-87.

109. *See id.*

110. Shiffrin, *supra* note 100, at 715; *cf.* Gold, *supra* note 11, at 195 (noting the distinct question whether the law should make room for loyal agency).

111. On the role of thick forms of trust in fiduciary law, see Matthew Harding, *Trust and Fiduciary Law*, 33 OXFORD J. LEGAL STUD. 81, 83-84 (2013).

112. *See* Gold, *supra* note 11, at 196-97.

113. Samet, *supra* note 1, at 127 n.9.

114. On ground projects and their importance in our lives, see BERNARD WILLIAMS, *Persons, Character and Morality*, in MORAL LUCK, *supra* note 63, at 1, 13. As developed in the present Article, this approach emphasizes what is deeply meaningful to the *fiduciary*. Note, however,

some, loyal relationships themselves may constitute these ground projects.<sup>115</sup> It is not a large step from valuing relationships in this way to valuing our loyalties as a major component of our self-understanding. As Josiah Royce argues, loyalty “tends to unify life, to give it centre, fixity, stability.”<sup>116</sup>

The argument should not be pressed too hard. People who describe loyalty as a component of our identities sometimes leave the impression that, but for such loyalty, we would be different people. Not all of our loyalties mean that much to us, and those loyalties that are truly significant may still not be integral to our very identity. As Simon Keller puts it, “People cannot lose their deep and passionate loyalties without changing, but they can do so without changing into other people.”<sup>117</sup>

On the other hand, even loyalties that are less significant may matter enough to merit accommodation. Legal systems have reasons to accommodate the more quotidian features of our lives. As Shiffrin notes, “Accommodation permits people some aspects of their lives in which they do not have to police themselves and others so hard or so comprehensively.”<sup>118</sup> This is valuable even when many of the aspects at issue are relatively ordinary features of our daily existence. Such cases are perhaps not a close match for the fiduciary loyalties under consideration, but they are a healthy reminder that not everything that merits accommodation will be a central part of our identity. Those things that merit accommodation exist along a continuum of importance, with ground projects on one end and more mundane aspects of our lives on the other end. Fiduciary loyalties

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that a beneficiary’s ground projects may be significant concerns as well. See Gold, *supra* note 11, at 196 n.60; Andrew S. Gold, *Purposive Loyalty*, 74 WASH. & LEE L. REV. 881, 902 (2017) (“A loyal friend or family member may take advancement of purposes—as reflected in a person’s ground projects—as a means to be loyal to that person, even where they fear that pursuit of these purposes will not advance (or might impair) her objectively-construed best interests.”).

115. For the idea that relationships may be our true concern when we discuss ground projects, see SUSAN WOLF, *The Meanings of Lives*, in THE VARIETY OF VALUES 89, 94 (2015). For an extension of this idea to fiduciary relationships, see Andrew S. Gold, *The State as a Wrongful Fiduciary*, in FIDUCIARY GOVERNMENT, *supra* note 16, at 183, 200-01.

116. JOSIAH ROYCE, THE PHILOSOPHY OF LOYALTY (1908), *reprinted in* 2 THE BASIC WRITINGS OF JOSIAH ROYCE 855, 863 (John J. McDermott ed., 2005).

117. KELLER, *supra* note 2, at 14.

118. Seana Valentine Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation*, in REASON AND VALUE, *supra* note 96, at 270, 293.

can be important enough to help justify accommodation even if they exist somewhere in the middle of this continuum.

Consider also some of the key contexts for accommodation that Shiffrin has developed in her work:

At least in the American context, I suspect ... that the areas of decision around which there should be some accommodation should include decisions relating to personal relationships and their place within one's life; ... decisions relating to the development and exercise of significant, individuating virtues ... and decisions relating to one's body and one's physical experiences.<sup>119</sup>

These examples cover more than what is central to our identity or our ground projects. Concerns over our physical experiences, for example, can mean a lot, but they are not always so integral to our sense of self as concerns over major personal relationships or significant virtues. The same is true for decisions relating to our more distant personal relationships, especially for relationships that are not deeply meaningful in themselves. Decisions relating to how we behave within such personal relationships may still matter a great deal. For example, we often care a lot about how we should behave within a friendship, even in the case of friendships that are not especially close.

One might object that these arguments have force when society is indifferent to a set of harmless yet nonmoral loyalties, but that there is still no reason to accommodate pernicious loyalty. That conclusion, however, is not so clear. In some cases, we have reason to be tolerant and accommodating of foibles that we consider harmful or even wrongful to a degree. As Shiffrin indicates, “[A]ccommodating such flaws through forbearance from legal rebuke is a way publicly to manifest compassion and understanding for one another’s shortcomings.”<sup>120</sup> While an accommodationist approach may have added strength when extralegal loyalty will not harm third parties, we should not presume that accommodationist reasoning runs out when the behavior at issue crosses into harmful territory.

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119. *Id.* at 296.

120. SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 163 (2014).

Note also that there may be broader, more systemic reasons for accommodating loyalty. For example, if a legal conception of loyalty diverges too much from extralegal understandings, this could potentially corrode the trust that is so integral to the success of fiduciary relationships.<sup>121</sup> Perhaps, if the divergence is sufficiently uncertain in its contours, this will unduly increase the information costs that fiduciary law imposes on fiduciaries.<sup>122</sup> Or, when there is a divergence between the views of courts and individuals, compliance rates may drop.<sup>123</sup> When systemic reasons come into play, there may thus be further cause to accommodate extralegal conceptions of loyalty despite their potentially pernicious effects.

Whether our reasons for accommodation are based on tolerance and respect for the centrality of loyalty in an individual's life or instead based on systemic concerns regarding trust, compliance, and information costs, there are grounds for an accommodation of extralegal loyalties. This includes accommodation with respect to pernicious loyalty. Such reasons may of course be outweighed, and in particular contexts that is likely.<sup>124</sup> Nevertheless, if we are balancing the reasons for and against a legal system's allowance for pernicious loyalty, the value in accommodating extralegal loyalties should be included.

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121. In the corporate law setting, trust is often thought to play a crucial role in achieving the legal system's goals. For discussions of trust's role in that context, see JONATHAN R. MACEY, *CORPORATE GOVERNANCE* 40-42 (2008); Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001). On the import of trust for reasons other than efficiency, see Harding, *supra* note 111, at 96. For further discussion, see Gold, *supra* note 11, at 199.

122. On information costs and their significance for the contours of fiduciary duties, see Robert H. Sitkoff, *An Economic Theory of Fiduciary Law*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW*, *supra* note 1, at 197, 204-06. We might also be concerned that addressing pernicious loyalty in an open-ended way would undercut the modular structure of fiduciary loyalty concepts. On the modularity of private law concepts, see Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 J. TORT L. 1, 17 (2011); Andrew S. Gold & Henry E. Smith, *Sizing Up Private Law*, 70 U. TORONTO L.J. 489 (2020). Notice, however, that beneficiaries may also prefer understandings of loyalty that do not require them to ascertain whether a fiduciary has differing views on the social good. This, too, raises an information cost concern. I thank Brian Lee for noting the latter concern.

123. *Cf.* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997); Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399 (2005).

124. *See* Gold, *supra* note 11, at 198 (discussing the possibility that reasons to accommodate will be outweighed).

*B. Damaging Fiduciary Relationships*

Another angle on pernicious loyalty is to begin with a focus on relationships. Fiduciary law is filled with relationships that emphasize and encourage trust, and often these are relationships that have great value to society. Doctor-patient, lawyer-client, guardian-ward, and even parent-child relationships are often understood to be fiduciary. Such relationships are not only of great instrumental value, they may also have great intrinsic value.<sup>125</sup> At least some of the time, it is reasonable to think that attempts to limit pernicious loyalty will erode the closeness of such relationships, limit the degree of trust between the participants, or perhaps decrease the attractiveness of entering into these relationships in the first place.

Such worries are prominent in attorney-client settings, among others. What will become of client trust if attorneys are known to balance zealous representation against perceived social benefits? How much information will clients share when their fear of such balancing is genuine? How much of an attorney's counsel will they take at face value? Turning to psychiatrists and patients, how much information will a patient share if they think their doctor might tell third parties? Will the patient forgo talking to a psychiatrist altogether? To ask these questions is not to resolve the issue of how pernicious loyalty should be addressed, but these questions do underscore how certain fiduciary relationships might change in response to prohibitions against such loyalty.

Suppose, for example, that a lawyer's loyalty obligation to her client is subordinated to a loyalty obligation owed to the law.<sup>126</sup> This need not undercut a client's trust in her lawyer—she might even trust such a lawyer more—but it is not hard to imagine some clients would trust this lawyer to a lesser degree. They might want to be represented by someone who will loyally serve as their “mouthpiece” above all.<sup>127</sup> A lawyer who serves as a mouthpiece could easily act in a manner that will produce pernicious consequences. It may be

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125. See, e.g., Markovits, *supra* note 86, at 223 (indicating that marriage, guardian-ward, and lawyer-client relationships may have intrinsic value).

126. See Criddle & Fox-Decent, *supra* note 16, at 80-81 (suggesting lawyers have second-order fiduciary duties to the public as a whole and to the justice system).

127. See MARKOVITS, *supra* note 22, at 93.

inevitable, however, that attempts to limit those pernicious consequences will alter the trusting relationship between lawyer and client in a way that makes this relationship less valuable along several dimensions.<sup>128</sup>

Goldberg and Zipursky have considered a related set of problems, in what they call a “triangular tort” setting.<sup>129</sup> Triangular tort cases involve special relationships that may cut off duties of care that are ordinarily owed to third parties.<sup>130</sup> Doctor-patient relationships, therapist-patient relationships, and lawyer-client relationships all implicate this concern.<sup>131</sup> A leading example involves therapists and their patients. Suppose a therapist causes great harm to a patient’s father by using hypnosis in a negligent way, resulting in false recovered memories of abuse by the patient’s father.<sup>132</sup> Although the cases are split, courts have shown a general reluctance to find a breach of care owed to the father.<sup>133</sup>

Goldberg and Zipursky suggest that a judicial refusal to recognize the tort law duty of care in cases like this is justified by the loyalty duty that the professional owes to her patient.<sup>134</sup> But they also emphasize something more. In their view, the reasons for not recognizing a duty of care owed to third parties reflect society’s views on the professional role at issue. As they argue in the lawyer-client context: “The basic idea is that the lawyer’s role carries special treatment only because society values the creation and performance of such roles; if a lawyer is not authentically occupying that role, she is not entitled to that special treatment.”<sup>135</sup>

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128. Cf. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 345-48 (Cal. 1976), *super-seded by statute*, Act of Sept. 17, 1985, ch. 737, § 1, 1985 Cal. Stat. 2394 (codified as amended at CAL. CIV. CODE § 43.92 (West 2013)).

129. See John C.P. Goldberg & Benjamin C. Zipursky, *Triangular Torts and Fiduciary Duties*, in CONTRACT, STATUS, AND FIDUCIARY LAW, *supra* note 11, at 239, 240.

130. See *id.*

131. See *id.*

132. See *id.* at 242.

133. See *id.* at 244 (noting the split and also the general tendency to find there is no duty of care owed to a third party).

134. See *id.* at 247 (“There is a qualitatively different kind of legal duty on one side of this imagined ledger, and it is the sort of duty that, given the present state of the law, requires courts to decline to recognize a duty on the other side.”). In other words, taking seriously the professional’s loyalty duty does not leave space for recognizing a duty of care to third parties.

135. *Id.* at 256.

They offer a similar argument in the therapist setting.<sup>136</sup> As they note, “[I]f putative healthcare professionals are actually inauthentic as professionals ... their putative fiduciary relationships are not entitled to occlude the duties to third parties.”<sup>137</sup> Significantly, this analysis may also underscore the importance of the relationship that incorporates such roles. Goldberg and Zipursky are considering whether certain legal relationships should be privileged by the legal system.<sup>138</sup>

Liability to parties outside the fiduciary relationship is certainly an option in triangular tort cases. The famous *Tarasoff* case illustrates how a triangular tort case can result in such liability.<sup>139</sup> There, a therapist faced liability for failing to alert the family of a murder victim who was killed by the therapist’s patient.<sup>140</sup> The therapist had reason to believe that his patient intended to murder the victim but did not inform the victim or her family about the risk.<sup>141</sup> In that case, the duty of care owed to the murder victim effectively superseded the fiduciary duty of loyalty that the psychologist owed to the patient.<sup>142</sup> *Tarasoff* is thus a good example of how a pernicious loyalty problem can be addressed so as to avoid harm to third parties. But it is also, indirectly, a good example of how limits on pernicious loyalty are bounded. *Tarasoff* has not expanded through the full range of fiduciary relationships but is instead limited to a relatively narrow subset.<sup>143</sup>

One way of understanding the judicial tendency to cut off duties of care that would ordinarily be owed to third parties is to see it as

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136. *See id.* (“We recognize therapists’ relationships with their patients as special (and fiduciary in nature) in part because of a set of values and expectations associated with being a therapist as a profession.”).

137. *Id.* at 257.

138. *See id.* (noting a context where “the system need not shield and privilege that relationship and that trust in the same way”).

139. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 346-48 (Cal. 1976), *superseded by statute*, Act of Sept. 17, 1983, ch. 737, § 1, 1985 Cal. Stat. 2394 (codified as amended at CAL. CIV. CODE § 43.92 (West 2013)).

140. *Id.* at 339-40.

141. *See id.* at 340.

142. *See id.* at 345-47.

143. *See* JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 113 (2004). Note that lawyer-client relations offer some exceptions to the triangular tort rule, as some third-party claims do succeed. *See* Goldberg & Zipursky, *supra* note 129, at 261.

privileging valuable fiduciary relationships—typically, in professional settings where the relationships at issue serve broader social goals. And these contexts are suggestive of a more general understanding. Obligations to third parties that impede or significantly alter the effect of a fiduciary's duty of loyalty to a beneficiary may decrease the value or the attractiveness of some special relationships. Courts may recognize this risk in a range of triangular tort cases, even when pernicious loyalty is a concern.

### C. *Opportunism Risk*

Opportunism is a different challenge. A concern with opportunism is fundamental to fiduciary law, and it helps make sense of rules regarding conflicting interests, burdens of proof, and the strict remedies for breach. As Henry Smith suggests, the risk of opportunism is a reason why fiduciary law is an equitable field.<sup>144</sup> Opportunism is also a particular risk when fiduciaries are enabled to pursue something other than the best interests of their beneficiaries. For example, if a director is given leeway to look out for the public good rather than just shareholder wealth maximization, this may give that director more space for self-dealing.<sup>145</sup> Some of the strategies for addressing pernicious loyalty raise such concerns.

As Judge Frank Easterbrook and Daniel Fischel trenchantly note, “[A] manager told to serve two masters ... has been freed of both and is answerable to neither.”<sup>146</sup> A variation applies if a manager is given discretion to serve one master to a lesser degree when, in the manager's view, this would serve the public interest or avoid unduly harsh results for third parties. That type of discretion allows for sophisticated fiduciaries to pick and choose when to be loyal to the fullest extent, with little means for ex post judicial review.<sup>147</sup>

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144. See Smith, *Why Fiduciary Law Is Equitable*, *supra* note 14.

145. There may also be an informational burden. See Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 581 (2003) (“Because stakeholder decisionmaking models necessarily create a two masters problem, such models inevitably lead to indeterminate results.... The alternative to following the shareholder wealth maximization norm would ... force directors to struggle with indeterminate balancing standards.” (footnote omitted)).

146. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 38 (1991).

147. Note that cases involving partiality toward third parties do not necessarily involve

The concern extends beyond pure cases of the “two masters” problem. For example, doubts about the pursuit of conflicting missions are part of why public benefit corporations and other social enterprises are controversial.<sup>148</sup> Strictly speaking, directors of these businesses do not have to serve two masters; they may instead have to balance a fiduciary obligation owed to their shareholders against a fiduciary obligation to advance the public interest.<sup>149</sup> Even so, this balancing leaves substantial room for behavior that is more about the fiduciary’s personal desires or pet projects than it is about shareholders or the public interest.

Much like the social enterprise setting, the problem with permitting fiduciaries to avoid pernicious expressions of loyalty when those fiduciaries perceive a problem with full-fledged loyalty is not a true two-masters problem. But the concern is quite similar. A fiduciary is given a choice between: (a) full-fledged loyalty to a beneficiary and (b) loyalty that is cabined due to a fiduciary’s concerns that it will prove socially harmful or unduly harsh to third parties. While this is not the result of balancing loyalties between multiple beneficiaries, fiduciaries are nonetheless permitted to choose how loyal they are going to be toward their beneficiary. That is an invitation for opportunism in making the choice.

A large part of fiduciary law is understandable as a response to opportunism.<sup>150</sup> Adjustments to loyalty obligations with the aim of avoiding pernicious loyalty, however, may open the door to greater opportunism by sophisticated fiduciaries who find ways to use discretion to their advantage (or to the advantage of their friends and family). In such cases, the concern rightly shifts to the vulnerable beneficiary.

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biased judgment. See GARDNER, *supra* note 3, at 40-41 (distinguishing partiality from bias).

148. See, e.g., Dana Brakman Reiser, *Blended Enterprise and the Dual Mission Dilemma*, 35 VT. L. REV. 105, 105 (2010) (noting the difficulty of pursuing profit and the social good due to an imperfect alignment between these goals).

149. See Andrew S. Gold & Paul B. Miller, *Fiduciary Duties in Social Enterprise*, in THE CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE LAW 321, 324-25 (Benjamin Means & Joseph W. Yockey eds., 2018) (distinguishing the “two masters” argument).

150. See Smith, *Why Fiduciary Law Is Equitable*, *supra* note 14, at 261.

## IV. THE TENTATIVE CASE FOR A TARGETED APPROACH

What then are we to do about pernicious loyalty? This Article does not offer an argument against efforts to prohibit or mitigate pernicious loyalty. Rather, it suggests a cautious approach to addressing the pernicious loyalty concern. Some responses to pernicious loyalty are more likely to produce opportunism than others; some may undercut special relationships in dramatic fashion, while others will not. Certain interventions unduly burden the loyal fiduciary who takes her loyalties seriously, but not all interventions will. Perhaps if pernicious loyalty cases are curtailed in the right way there is less cause to worry.

One possibility is to adopt a comprehensive prohibition on pernicious loyalty by building broad limits into the fiduciary duty of loyalty itself. How could this be done? Consider the form of loyalty obligation that John Gardner imagines in his recent work. Gardner notes that fiduciary loyalty could, in theory, offer a variant on the “reasonable person.”<sup>151</sup> Fiduciaries might be required to act like a “reasonably loyal” person, just as some individuals must act like a “reasonably prudent” person.<sup>152</sup> In that case, proper fiduciary behavior would be that of a reasonable person who demonstrates a particular character trait: loyalty.<sup>153</sup>

The law might choose this path, but it would do so at a substantial price. Gardner notes some potential concerns (for example, the loyalty duties of a trustee may not have an extralegal counterpart),<sup>154</sup> and I would add to the list. While a reasonably loyal person standard is flexible enough to limit any accommodationist concerns, the risks to valuable special relationships and dangers of opportunism would be widespread. Information costs could also skyrocket. How, then, should the law respond to pernicious loyalty while minimizing such costs?

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151. See JOHN GARDNER, *TORTS AND OTHER WRONGS* 298 (2019).

152. See *id.* (noting that a fiduciary “is not described as a ‘reasonably loyal trustee’ or the like”).

153. For the idea of a reasonable person with particular character traits, see *id.* at 296-97.

154. See *id.* at 299 (“A second explanation is that the role of trustee (unlike that of parent, businessperson, observer, physician, etc.) has no law-independent existence. There is no measure of a ‘reasonably loyal trustee’ until the law says just how much loyalty is expected of a trustee.”).

A tentative suggestion is that fiduciary law may respond to the above concerns through targeted measures rather than adopting a comprehensive approach.<sup>155</sup> Ex ante efforts to prohibit a specific category of pernicious loyalty are less likely to undermine the meaning of extralegal loyalty, corrode the significance of special relationships, or harm vulnerable beneficiaries. As Goldberg and Zipursky note, some incursions on a loyalty obligation are “manageable.”<sup>156</sup> Such incursions will not alter the loyal party’s deliberations across the board but only in particular, bounded scenarios. This, in turn, may obviate worries about the drawbacks of interfering with a loyal fiduciary’s obligations.

For example, if it is treated as disloyal for a corporate director to have their corporation intentionally violate positive law, that is a narrow carve out from a loyalty that focuses on the corporation’s and shareholders’ best interests.<sup>157</sup> Quite possibly it would have a limited effect on the burdens fiduciaries face, on the value of the relationship between directors and the corporation, and on the vulnerability of the corporate entity and its shareholders. If so, a certain kind of pernicious loyalty could be prohibited without incurring excessive costs. Targeted responses may then be a valuable way to manage loyalty’s excesses.

My suggestion is tentative for a reason. While each context may differ, even targeted interventions could undercut the significance of special relationships for their participants, and such interventions may produce substantial conflicts between the ways legal and extralegal loyalty are experienced by the loyal fiduciary. And, if the scope of a targeted intervention is unclear, opportunism may again find a foothold where fiduciaries can locate ways to exploit their discretion. Nor should we overlook party sophistication when considering opportunism risks. As Henry Smith’s work suggests,

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155. It is an interesting question whether contractual modifications to fiduciary loyalty could offer another viable approach. I leave that question for another day.

156. See Goldberg & Zipursky, *supra* note 129, at 250 (“[A] therapist’s ... duty not to defame nonpatients is *manageable* in a way that the conflict between her duty of loyalty and a duty of care to nonpatients is not.”). As Goldberg and Zipursky further explain, “To recognize a duty of care running to nonpatients invites the physician/therapist to consider adjusting her treatment of the patient in light of the possible consequences for non-patients.” *Id.* In addition, defamation law is more manageable because it does not implicate an equivalent “grey area.” See *id.*

157. See *supra* notes 28-29 and accompanying text.

opportunistic parties are quite creative in their efforts to manipulate ex ante legal rules.<sup>158</sup>

In considering these possibilities, we should also be aware of limits to the judicial imagination. Pernicious loyalty is context-specific in a way that makes it hard to pin down through ex ante rules.<sup>159</sup> Cases where loyalty duties properly apply are highly particularized, and by extension, this is true for the pernicious cases. The targeted nature of a response thus has the following additional downside: such responses leave substantial space for pernicious loyalty in the fact patterns that are not covered (and these cases may be unforeseeable). The fact patterns that invite pernicious loyalty will often be hard to predict, such that it is hard to adequately pick out the problem cases before they arise.

If each of these concerns has merit, pernicious loyalty is not something to be fully eliminated but rather something to be cabined within an acceptable range (and even then with caution). At the least, this will be true if we want fiduciary law to mandate loyalty in a wide-ranging and forceful way. Efforts to completely eliminate pernicious loyalty are not likely to succeed, given the particularized nature of fiduciary fact patterns. But whether or not such efforts succeed, each effort to do so may enable opportunism, place substantial burdens on fiduciaries who take their loyalty seriously, or undercut certain special relationships.<sup>160</sup> These are risks that could be worth taking in narrow areas—for example, where illegality is involved or in *Tarasoff*-type situations—but a more comprehensive

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158. See Henry E. Smith, *Equity as Meta-Law*, YALE L.J. (forthcoming), <https://papers.ssrn.com/abstract=3734662> [<https://perma.cc/4W8N-HVZW>]. For discussion of creativity in opportunistic behavior, see *id.* (manuscript at 21-22, 68-69).

159. On the Aristotelian view, such problems may be appropriate settings for equity. See ARISTOTLE, NICOMACHEAN ETHICS bk. V (c. 384 B.C.E.), reprinted in 2 THE COMPLETE WORKS OF ARISTOTLE 1729, 1795 (Jonathan Barnes ed., W. D. Ross trans., Princeton Univ. Press rev. ed. 1984) (“What creates the problem is that the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which will be correct.”). Unfortunately, a legal approach that seeks to address pernicious loyalties on an ad hoc basis might resolve individual disputes but not scale up well from the micro level to the macro level. On scaling challenges, see Gold & Smith, *supra* note 122; Andrew S. Gold & Henry E. Smith, *Scaling Up Legal Relations*, in THE LEGACY OF WESLEY HOHFELD: EDITED MAJOR WORKS, SELECT PERSONAL PAPERS, AND ORIGINAL COMMENTARIES (Shyam Balganeshe et al. eds.) (forthcoming 2021).

160. See *supra* Part III.

approach invites a range of costs, many of them hard to anticipate *ex ante*.

There remain empirical uncertainties in multiple areas.<sup>161</sup> It is not always easy to determine when opportunism will arise or where extralegal loyalties will prove significant enough to merit accommodation. Interactions between loyalty, trust, and special relationships are also deeply complex. Yet, while it is difficult to know when the costs exceed the benefits in responding to pernicious loyalty, the optimal approach may fall well short of a complete prohibition on such loyalty (assuming that a prohibition would be effective). Regrettable though it may be, pernicious loyalty may be the price we pay for requiring fiduciaries to be loyal with affirmative devotion.<sup>162</sup> I consider that price worth paying, but it is not trivial.

#### CONCLUSION

Fiduciary law is well known for the duties of loyalty it imposes on fiduciaries, together with the strict remedies associated with enforcement.<sup>163</sup> For some, these loyalty duties may seem like powerful selling points in favor of employing fiduciary law in response to various private wrongs and social ills. Recent proposals for an expansion of fiduciary principles into new realms could reflect this view.<sup>164</sup> And indeed, fiduciary law's apologists may be onto something important.

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161. One of the most significant uncertainties is the effect that a change in legal loyalty will have on various aspects of extralegal loyalty. This problem shows signs of being a polycentric problem in Lon Fuller's sense; an adjustment in one area will produce unexpected changes in other areas. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-95 (1978) (introducing the concept of polycentric tasks).

162. Note that this is not necessarily an argument for the thinner types of loyalty adopted in some jurisdictions. With appropriate adjustments, the pernicious loyalty problem may then reappear through a fiduciary's efforts to adhere to the fiduciary duty of care, and powerful extralegal loyalties may emerge irrespective of a thin legal understanding of fiduciary loyalty.

163. See *supra* note 44 and accompanying text.

164. One notable recent suggestion is the information fiduciary. Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016); Richard R. W. Brooks, *Knowledge in Fiduciary Relations*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 225, 237-41. For a critical perspective, see Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497 (2019).

Yet fiduciary loyalty can be truly harmful—both at the micro level and at the macro level<sup>165</sup>—when loyalty attaches to the wrong parties, expresses itself in the wrong ways, or applies under the wrong circumstances. These harms can be a valid concern even if the fiduciary loyalty at issue is desirable overall. Such cases involve pernicious loyalty notwithstanding the value of fiduciary loyalty as a category. This Article has sought to show that pernicious loyalty is a real problem for fiduciary law, and also that it is a problem that is difficult to solve. Targeted interventions could be an answer, but in all likelihood, pernicious loyalty is something to be managed and not eliminated. The reason is this: what makes fiduciary loyalty costly is closely linked to what makes that loyalty valuable.

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165. The interaction between these two levels is also a significant concern. *See generally* Gold & Smith, *supra* note 122.