

## THE MORALITY OF FIDUCIARY LAW

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### ABSTRACT

*Recent work of fiduciary theory has provided conceptual synthesis requisite to understanding core fiduciary principles and the structure of fiduciary liability. However, normative questions have received only sporadic attention. What values animate fiduciary law? How does, or should, fiduciary law prove responsive to them?*

*While in other areas of private law theory—notably, tort theory—pioneering scholars went directly at normative questions like these, fiduciary theory has been exceptional in the reticence shown toward them. The reticence is sensible. Fiduciary principles are the product of equity’s most extended and convoluted program of supplementing surrounding law. They span several distinct forms of relationship arising in markedly different settings.*

*In this Article, I develop a framework for analyzing the morality of fiduciary law. The framework accomplishes four things. First, it situates questions about the morality of fiduciary law within the context of the general jurisprudential literature on the nature of law and its normativity. Second, it explains the sense in which fiduciary law is normatively complex by virtue of being structurally biplanar, with general equitable principles (duty-imposing rules) overlain upon legal and equitable principles (including, notably, power-conferring rules) that define and enable legal forms of relationship characterized as fiduciary in equity. Third, it distinguishes the general morality of fiduciary duties from the special morality of fiduciary*

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*relationship types. Fourth, and finally, it provides an overview of loci of value in fiduciary relationships, canvassing considerations of general and special morality that give salience to the interests of parties, third parties, and the public in rules that enable and constrain the performance of fiduciary mandates.*

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## INTRODUCTION

Fiduciary law traverses wide and irregular terrain. With time, equity has come to extend fiduciary duties to a highly diverse set of relationships.<sup>1</sup> Fiduciary law's reach varies by jurisdiction but has come to encompass relationships between parents and children, guardians and wards, agents and principals, trustees and beneficiaries, executors and trustees of estates and the beneficiaries of same, directors and corporations, and trustees and charities, to name just a few.<sup>2</sup> Furthermore, courts have shown increased willingness to extend fiduciary duties ad hoc to relationships outside categories of relationship of recognized fiduciary status.<sup>3</sup>

Equity has responded to this variegation partly by tailoring the content of fiduciary duties by relationship type. Consider the duty of loyalty.<sup>4</sup> Some fiduciaries are subject to a sole-interest standard of conduct, according to which they must avoid all unauthorized conflicts of duty or interest.<sup>5</sup> Others are subject to a best-interest standard, under which their loyalty is assessed in terms of the material impact of mandate performance on the pertinent interests of beneficiaries.<sup>6</sup> Yet others act under a solidarity standard, whereby loyalty is a function of maintaining solidarity in the performance of a mandate in which the fiduciary has an authorized beneficial

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1. See Paul B. Miller, *The Fiduciary Relationship*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 63, 76-89 (Andrew S. Gold & Paul B. Miller eds., 2014) [hereinafter Miller, *Fiduciary Relationship*]. See generally Paul B. Miller, *The Identification of Fiduciary Relationships*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 367 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019) [hereinafter Miller, *Identification*].

2. See TAMAR FRANKEL, FIDUCIARY LAW 42-62 (2011).

3. See Daniel B. Kelly, *Fiduciary Principles in Fact-Based Fiduciary Relationships*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 1, at 3, 12-13.

4. See generally Andrew S. Gold, *The Loyalties of Fiduciary Law*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 176, 176 (analyzing various conceptions of loyalty in fiduciary law); Andrew S. Gold, *The Fiduciary Duty of Loyalty*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 1, at 385, 385-86 [hereinafter Gold, *Fiduciary Duty*] (discussing features of fiduciary loyalty, including breach of the duty of loyalty, remedies, and modifications of the duty of loyalty).

5. See Gold, *Fiduciary Duty*, *supra* note 4, at 388.

6. See Lionel Smith, *Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another*, 130 LAW Q. REV. 608, 611-12 (2014).

stake.<sup>7</sup> Similar tailoring is evident in the specification of standards of conduct associated with other fiduciary duties.<sup>8</sup>

It is only relatively recently that fiduciary law has attracted the kind of synthetic analysis that allows one to view it as a field unto itself. Consistent with the need of synthesis, it should be unsurprising that fiduciary scholars have thus far focused mostly on providing high-level analyses of core concepts and principles. For example, in other work, I have examined the conceptualization of fiduciary relationships as well as the content and function of fiduciary duties.<sup>9</sup> Others have addressed similar questions, again aiming to provide synthesis.<sup>10</sup>

To this point, normative questions have received less attention. In my work, I have limited myself to the relatively modest claim that fiduciary duties and remedies are justified juridically on the basis of formal properties of fiduciary relationships.<sup>11</sup> I have not staked claims about the value(s) implicated by fiduciary relationships or how fiduciary duties and remedies do, or should, prove responsive to them.<sup>12</sup> But a few other theorists have. For example, Hanoch Dagan and Sharon Hannes have argued that financial fiduciary relationships are autonomy-enhancing inasmuch as the delegation of power to fiduciaries enables beneficiaries to engage in

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7. See Evan J. Criddle, *Stakeholder Fiduciaries*, in FIDUCIARIES AND TRUST: ETHICS, POLITICS, ECONOMICS AND LAW 105, 106 (Paul B. Miller & Matthew Harding eds., 2020) [hereinafter FIDUCIARIES AND TRUST].

8. See Robert H. Sitkoff, *Other Fiduciary Duties: Implementing Loyalty and Care*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 1, at 419, 426-29.

9. See generally Miller, *Fiduciary Relationship*, *supra* note 1; Miller, *Identification*, *supra* note 1; Paul B. Miller, *Dimensions of Fiduciary Loyalty*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 180 (D. Gordon Smith & Andrew S. Gold eds., 2018) [hereinafter Miller, *Dimensions*].

10. See, e.g., THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 1.

11. See, e.g., Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 973 (2013) [hereinafter Miller, *Duties*]; Paul B. Miller, *Justifying Fiduciary Remedies*, 63 U. TORONTO L.J. 570, 601-02 (2013) [hereinafter Miller, *Remedies*].

12. As will be evident in what follows, I shall not distinguish here between the positive and critical morality of fiduciary law (that is, between the values to which it *is* responsive, analyzed interpretively, and *is properly to be* responsive, analyzed critically). Juridical justification belongs within, but does not exhaust, interpretive analysis of the posited morality of law. See generally Paul B. Miller, *Juridical Justification of Private Rights*, in JUSTIFYING PRIVATE RIGHTS (Michael Crawford et al. eds., forthcoming Feb. 2021) (manuscript at 12-13), <https://ssrn.com/abstract=3534423> [<https://perma.cc/Y22J-B9B3>].

pursuits that they value more highly.<sup>13</sup> Tamar Frankel has argued that the morality of fiduciary law is centrally concerned with the value of trust.<sup>14</sup> And Evan Criddle has argued that fiduciary law is responsive to the republican value of non-domination.<sup>15</sup>

Each of these accounts has some plausibility. Setting aside relationships that structure administration of the affairs of incapable persons, it seems reasonable to think that fiduciary law often enhances autonomy insofar as it enables us to shift burdens of judgment and action to representatives.<sup>16</sup> The formation of fiduciary relationships usually features an “entrustment” of power, and the formation or performance of a fiduciary relationship might implicate trust in some richer sense.<sup>17</sup> Further, to the extent that all fiduciary relationships implicate representation,<sup>18</sup> it seems reasonable to suppose that fiduciary law is responsive to the value of non-domination.<sup>19</sup>

And this is not all. As I shall explain, fiduciary relationships implicate other important values. For example, those of protecting and promoting personal and social welfare, enabling care for dependents and those in need, and facilitating cooperation in joint pursuits.<sup>20</sup> Most fiduciary relationships call for the exercise of power in advancement of welfare interests of beneficiaries.<sup>21</sup> Virtually all of the arrangements in which we provide for dependents are structured by way of fiduciary mandate.<sup>22</sup> And all forms of organization

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13. Hanoch Dagan & Sharon Hanes, *Managing Our Money: The Law of Financial Fiduciaries as a Private Law Institution*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 91, 105.

14. FRANKEL, *supra* note 2, at 271-78.

15. Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993, 995 (2017).

16. *See* Dagan & Hanes, *supra* note 13, at 105.

17. For more qualified perspectives on the value of trust and its significance for fiduciary law, see Joshua Getzler, “As If.” *Accountability and Counterfactual Trust*, 91 B.U. L. REV. 973, 974, 980 (2011); Matthew Harding, *Trust and Fiduciary Law*, 33 OXFORD J. LEGAL STUD. 81, 84-88 (2013); Matthew Harding, *Contracts, Fiduciary Relationships and Trust*, in FIDUCIARIES AND TRUST, *supra* note 7, at 55, 67-69.

18. *See* Paul B. Miller, *Fiduciary Representation*, in FIDUCIARY GOVERNMENT 21, 38-40 (Evan J. Criddle et al. eds., 2018).

19. *See* Criddle, *supra* note 15, at 995.

20. *See infra* Part III.C.

21. Miller, *supra* note 18, at 24-25.

22. *See, e.g.*, Elizabeth S. Scott & Ben Chen, *Fiduciary Principles in Family Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 1, at 227, 227-28.

supplied in law and at equity enable cooperation through fiduciary governance.<sup>23</sup>

What might all of this indicate about the morality of fiduciary law? In what follows I will argue that, in critical terms, it counsels avoidance of two mistakes: the first being *normatively* reductive analysis of the morality of fiduciary law (that is, in terms of a single value or limited set of values), and the second being *structurally* reductive treatment of the morality of fiduciary law in terms of fiduciary duties to the exclusion of power-conferring rules implicated in the constitution of fiduciary mandates. As for constructive indications, I shall argue two correlative points: first, the morality of fiduciary law is pluralistic as to its values and loci; and second, fiduciary law is structurally biplanar and thus inevitably normatively complex. Biplanarity and complexity are a function of the origin, function, and morality of the power-conferring rules upon which equity has engrafted fiduciary duties.<sup>24</sup>

The argument will unfold as follows. Part I provides a general framework for analysis of the morality of law that I assume in what follows. Part II explains the structural biplanarity of fiduciary law and shows how it generates normative complexity. Part III outlines loci of value in fiduciary relationships and shows how these values imply that the morality of fiduciary law is pluralistic. Then, I conclude with reflections on what the account of the morality of fiduciary law provided here might mean for understanding the wider normative relationship of equity to law.

## I. GENERAL ANALYTICAL FRAMEWORK

The morality of fiduciary law is messy; here, much as ever, clarity might be achieved by settling a framework of analysis. That which is outlined below assumes *arguendo* the truth of moral realism and the relative advantages of interest theories of rights in analyzing

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23. See, e.g., Julian Velasco, *Fiduciary Principles in Corporate Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 1, at 61; Mohsen Manesh, *Fiduciary Principles in Unincorporated Entity Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 1, at 79; Lloyd Hitoshi Mayer, *Fiduciary Principles in Charities and Other Nonprofits*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 1, at 103.

24. See *infra* Part II.

the morality of private law.<sup>25</sup> It supposes that law, to the extent that it does or should prove responsive to objective moral value(s), manifests responsiveness in its recognition of, and apt responses to, the moral salience of the interests of persons.

### A. *Persons*

I take it that law is invariably addressed to legal persons<sup>26</sup> and that it addresses persons in their capacity to engage, directly or indirectly (for example, via agents or representatives), in practical reasoning. Practical reason is defined as “the general human capacity for resolving, through reflection, the question of what one is to do”<sup>27</sup> and involves the identification of, differentiation between, deliberation with, planning in light of, and conforming of one’s actions to, various kinds of practical reason, including those given by, and for, law.

Additionally, I take it that legal persons are, directly or indirectly, the focal objects of law and associated practices of lawmaking and enforcement.<sup>28</sup> To say that persons are the objects of law is simply to say that the law’s aims and functions are to advance or secure certain interests that persons do or can have and goods that are or can be in issue for them. Allow me to briefly elaborate.

First, in saying that the law is addressed to legal persons, I mean to emphasize that it supplies normative guidance to individual legal persons. I do not mean that the content of the law addresses persons individually, for that would be incompatible with its generality.<sup>29</sup>

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25. It is thus broadly consistent with the philosophy of Joseph Raz. See generally JOSEPH RAZ, PRACTICAL REASON AND NORMS (1975) [hereinafter RAZ, PRACTICAL REASON]; JOSEPH RAZ, THE MORALITY OF FREEDOM (1986) [hereinafter RAZ, MORALITY]; Joseph Raz, *On the Nature of Rights*, 93 MIND 194, 199 (1984). I say “broadly consistent” in that I depart from Raz on the ontological basis of values and dissent from his service conception of legal authority and associated views on the relationship between law and practical reason.

26. By “legal persons,” I mean those natural or artificial persons identified as “persons” by, and for the sake of, law. It would be cumbersome to add the adjectival “legal” to every apt reference to “person” in what follows. Thus, unless otherwise indicated, subsequent mention of “person” or “persons” reference legal persons.

27. *Practical Reason*, STAN. ENCYC. OF PHIL. (Jan. 14, 2020), <https://plato.stanford.edu/entries/practical-reason/> [<https://perma.cc/29Y8-R6YM>].

28. That is to say, primary or principal. For discussion, see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 9-11 (1980).

29. However, enforcement actions, including judgments and courts orders, are typically



Rather, I mean that, insofar as a core moral aim and social function of law is one of supplying normative guidance,<sup>30</sup> that guidance is of necessity addressed to persons individually, insofar as legal personality entails individuated capacities for rational deliberation and action.<sup>31</sup> This holds irrespective of the fact that the law's objects include relationships and associations because, to be effective, the law must (and does) guide persons who deliberate and act individually with respect to their interactions (relationships and associations) with others.

Second, in saying that legal persons are the focal objects of the law, I mean, again, to emphasize that the law is a means by which to secure or advance the interests of legal persons, and so to realize the value(s) that give these interests their moral salience. Sometimes, the law protects or advances the interests that legal persons have personally, each in their own right (that is, as individuals).<sup>32</sup> But the law also protects and advances shared interests, including those that we can enjoy only relationally.<sup>33</sup> Differentiating the ways in which the law takes the interests of legal persons as its objects will become important when we consider the sense in which the normativity of law is oriented by the moral salience of these interests.

### *B. Interests*

I have said that legal persons are the focal objects of law.<sup>34</sup> But to say this is to say nothing, yet, as to how the law shows concern for persons. In my view, the law generally cannot effectively protect,

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addressed to individuals and specific circumstances in which a matter of law or equity was put in issue with respect to them. See Stephen A. Smith, *Why Courts Make Orders (and What This Tells Us About Damages)*, 64 *CURRENT LEGAL PROBS.* 51, 51-52 (2011); STEPHEN A. SMITH, *RIGHTS, WRONGS, AND INJUSTICES* 48 (2019).

30. See H.L.A. HART, *THE CONCEPT OF LAW* 2-3, 6-9 (1961).

31. See Christine M. Korsgaard, *Creating the Kingdom of Ends: Reciprocity and Responsibility in Personal Relations*, 6 *PHIL. PERSPS.* 305, 312-15 (1992).

32. See, e.g., Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 *CARDOZO L. REV.* 1, 243 (2008) ("Tort law is our primary fall-back method of empowering ordinary people to remedy injustices to themselves through their courts.")

33. For discussion in the context of criminal law, see R.A. Duff, *Relational Reasons and the Criminal Law*, in 2 *OXFORD STUDIES IN PHILOSOPHY OF LAW* 175, 179-80 (Leslie Green & Brian Leiter eds., 2013).

34. See *supra* note 28 and accompanying text.

empower, or guide persons other than by addressing the moral salience of a specific aspect of their personality and its social or other practical extension(s).<sup>35</sup> Put simply, the law must disaggregate the elements and extensions of personality that have moral salience.

Consistent with this, in what follows I shall suppose that the law recognizes and treats as morally salient *specific interests* of persons.<sup>36</sup> And, as I shall explain below, the law delineates interests primarily by developing (and, as necessary, calibrating) the content, juxtaposition, and enforcement of legal rules so as to prove aptly responsive to them.<sup>37</sup>

By focusing on specific interests rather than taking the moral measure of persons more widely, the law manifests a kind of moral economy of attention; one that, among other things, might increase the likelihood that each will be treated according to their moral desert. Rules tailored to specific interests can be expected to produce better—clearer and more manageable—normative guidance than those that are more amorphous in singling out matters of moral concern and the ontological foundation of same.<sup>38</sup>

I have suggested that the interests singled out by law may be enjoyed by legal persons on a personal or relational (shared) basis.<sup>39</sup> *Personal interests* pertain to a characteristic, potential, good or bad outcome, or aim that legal persons can be understood to have, enjoy, or suffer individually. Many personal interests—for example, in physical and psychological integrity, in being treated with dignity, in freedom of conscience and movement—are protected by stand-alone rules in tort and criminal law.<sup>40</sup> By contrast, *relational interests* are those that arise within the context of, or are premised

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35. An exception might be made for broad ascriptions of status borne by persons, which attribute a complex set of rights, powers, capacities, and the like to an individual.

36. Here I follow RAZ, *MORALITY*, *supra* note 25, at 165-66, in structure but not substance, in that I do not restrict the kinds of “interests” that can ground rights to welfare interests. On the insufficiency of welfarist accounts of the kinds of interests that can ground rights, see Leif Wenar, *The Nature of Rights*, 33 PHIL. & PUB. AFFS. 223, 240-43 (2005).

37. *See infra* Part I.D.

38. *See* Paul G. Mahoney & Chris William Sanchirico, *General and Specific Legal Rules*, 161 J. INST. & THEORETICAL ECON. 329, 329-30, 345 (2005).

39. *See supra* Part I.A.

40. *See, e.g.*, Arthur Ripstein, *Philosophy of Tort Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 656, 656-57 (Jules L. Coleman et al. eds., 2002); Duff, *supra* note 33, at 179-80.

on an ability to form, a relationship or association with others.<sup>41</sup> Many relational interests—for example, in solidarity, care, and cooperation—are served by rules that facilitate and regulate various legal forms of relationship and association.<sup>42</sup>

### C. Values

If interests focus the law's concern for legal persons, moral values ground their normativity. In taking this position, again, I align myself with moral realism<sup>43</sup> and do so here *arguendo*.

In law, as in other contexts, the attribution of moral salience to an interest on the basis of a proposition about moral value is a function of the practical judgment of person(s) acting on their own behalf (engaging personal moral judgment) or on behalf of others (engaging in representative moral judgment).<sup>44</sup> For law, to the extent that a given legal rule encapsulates a judgment as to the moral salience of an interest, the posited morality of the law is that identified by the officials who lay it down or otherwise give authoritative recognition to it; thus, the posited morality of law is the product of representative moral judgment.<sup>45</sup> The *critical* morality of law, by contrast, consists in well-founded judgments—personal or representative—that a given legal rule ought to prove responsive (or more perfectly responsive) to an interest and its value, or (in the absence of a rule) that there ought to be a legal rule to protect or advance an interest and so to respond aptly to its value.<sup>46</sup>

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41. Leon Green, *Relational Interests*, 29 ILL. L. REV. 460, 462 (1934). For general philosophical discussion, see CHARLES TAYLOR, *SOURCES OF THE SELF* (1989).

42. Cf. Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 741, 744 (2016) (arguing for laws that advance children's interests by supporting children's relational interests); Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 18 (1983) (“[T]he law of defamation ... remedies a wrongful disruption in the ‘relational interest’ that an individual has in maintaining personal esteem in the eyes of others.”).

43. Understood as involving a commitment to there being moral facts and values and to the truth value of claims about moral facts and values. See DAVID O. BRINK, *MORAL REALISM AND THE FOUNDATIONS OF ETHICS* 14 (1989); DAVID ENOCH, *TAKING MORALITY SERIOUSLY* 1-8 (2011); T.M. SCANLON, *BEING REALISTIC ABOUT REASONS* 41 & n.41 (2014).

44. See BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* 77-78, 83-87 (1993).

45. See Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. REV. 335, 354 (2009).

46. See Peter Cane, *Morality, Law and Conflicting Reasons for Action*, 71 CAMBRIDGE L.J. 59, 63-66 (2012).

To the extent that one's interest lies with the posited morality of law, the task of the interpretive theorist is to identify claims of value expressly made in the law or that are implied given the content and material context of a legal rule.<sup>47</sup> To the extent that one is concerned with the law's moral shortcomings or unfulfilled moral promises, one's task is that of the critical theorist: cataloging the ways in which the law fails—entirely or adequately—to protect the interests and values that it ought to protect (that is, those in relation to which there are decisive moral reasons for lawmaking or reform).<sup>48</sup>

#### *D. Reasons*

Law proves responsive to interests and underlying values in part through stipulation of the content of legal rules, the articulation of juridical reasons for legal rules, and through enforcement and reasons for judgment (that is, reasons responsive to applicable rules and the material facts of a grievance on which judgment is sought).<sup>49</sup> Legal rules give reasons, and reasons are given for legal rules.<sup>50</sup> Both instances of reason-giving implicate practical reasons (that is, reasons that figure in our private and public deliberation about how we ought to act).<sup>51</sup>

A given value can be understood to contribute to the justification of a rule in light of the rule's intended and actual impact on the interest(s) the rule is meant to protect or advance.<sup>52</sup> Values contribute to the justification of rules by means of the practical reasons that can be derived therefrom for the rule and for compliance with or enforcement of it (or for compliance with and enforcement of legal rules in general).<sup>53</sup> All of this is consistent with my earlier stipulation that a core function of law is the provision of normative

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47. See Miller, *supra* note 12 (manuscript at 21).

48. See *id.* (manuscript at 9).

49. See, e.g., *id.* (manuscript at 19) (proffering tort law as an example).

50. *Id.* (manuscript at 11-12); see David Enoch, *Reason-Giving and the Law*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 1, 26-28 (Leslie Green & Brian Leiter eds., 2011).

51. See RAZ, PRACTICAL REASON, *supra* note 25, at 28-33; FINNIS, *supra* note 28, at 12, 14-16; NEIL MACCORMICK, PRACTICAL REASON IN LAW AND MORALITY 209 (2008).

52. See Miller, *supra* note 12 (manuscript at 20).

53. See *id.*

guidance; its mode of address of legal persons is a matter of providing the latter with practically reasonable guidance.<sup>54</sup>

The interpretive theorist interested in excavating the posited morality of law will aim at identifying interests advanced or protected by a given legal rule and the values thereby incorporated in law, and at determining whether and how those interests and values resolve in specific juridical reasons given by and for the rule(s).<sup>55</sup> Sometimes propositions as to the posited morality of law (assertions or arguments about the interests protected or values advanced by a given rule) will be given explicitly as juridical reasons by lawmakers.<sup>56</sup> Otherwise, they may be inferred from the content of the rule or from public statements made by lawmakers in connection with it.<sup>57</sup> Doubtless, the interpretive theorist's task will often be difficult, not least because in some cases none of these methods will enable her to draw confident conclusions about the posited morality of law.<sup>58</sup>

The fact that the law supplies normative guidance by giving practical reasons obviously does not imply that it is successful in the guidance it gives. Sometimes the guidance is inscrutable or unsound.<sup>59</sup> The critical theorist performs an essential service in pointing out gaps and infirmities in the moral quality of guidance that the law provides.<sup>60</sup> That said, most political communities aspire to the provision of sound, practically reasonable guidance through law.<sup>61</sup> Whether that aspiration is met turns on the quality of the practical reasons given by and for a legal rule or framework of legal rules.<sup>62</sup> When lawmakers provide practically reasonable justification for laws, they will have established a robust normative nexus

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54. See *supra* Part I.A.

55. See Miller, *supra* note 12 (manuscript at 8-9).

56. See *id.* (manuscript at 20).

57. See *id.*

58. See *id.* (manuscript at 17).

59. As Raz, for example, repeatedly emphasizes. See RAZ, MORALITY, *supra* note 25, at 41-42, 62; Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003, 1022-23 (2006).

60. See Miller, *supra* note 12 (manuscript at 9).

61. Cf. Mark C. Murphy, *Natural Law Jurisprudence*, 9 LEGAL THEORY 241, 244, 256, 267 (2003) (“[O]ne can abstract from the details of natural law moral and political theory.”); see also SCOTT J. SHAPIRO, LEGALITY 338 (2011) (“[T]he law must solve moral problems without creating new ones in the process.”).

62. See Murphy, *supra* note 61, at 244.

between the law, the interests it advances or protects, the reasons given publicly for the law, and the value propositions that the latter invoke or upon which they rely. In such cases, *ceteris paribus*, we can be confident that the law succeeds morally in the normative guidance that it supplies.

### *E. Rules*

I have thus far referred only elliptically to legal rules, noting their significance in guiding persons and protecting or advancing morally valuable interests. I shall now comment directly on legal rules generally and the rules germane to fiduciary law and its morality.

Following Hart, I take it that legal rules guide the practical reasoning and behavior of legal persons acting in private (unofficial) and public (official) capacities.<sup>63</sup> As directed to persons acting in a private or unofficial capacity, *primary* legal rules and certain *secondary* rules specify how we may or must act and interact.<sup>64</sup> As directed to persons acting in a public or official capacity (including, notably, within legal institutions), secondary rules also specify how a legal system is to operate.<sup>65</sup> For present purposes, it will suffice to note the distinction between *duty-imposing* primary rules and *power-conferring* secondary rules insofar as they govern and structure the actions and interactions of legal persons acting in a private capacity.

Duty-imposing rules are familiar and straightforward: they specify mandatory standards of conduct for their addressees.<sup>66</sup> Much attention is lavished on these rules in private law theory.<sup>67</sup> But, as Hart recognized, private law includes power-conferring rules, too.<sup>68</sup> These rules are at least as significant to private law as are duty-

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63. See HART, *supra* note 30, at 96.

64. See *id.* at 78-79; William C. Starr, *Law and Morality in H.L.A. Hart's Legal Philosophy*, 67 MARQ. L. REV. 673, 676 (1984).

65. See HART, *supra* note 30, at 91-92, 94-95.

66. *Id.* at 78-85; see also Starr, *supra* note 64, at 676.

67. See, e.g., Curtis Bridgeman & John C.P. Goldberg, *Do Promises Distinguish Contract from Tort?*, 45 SUFFOLK U. L. REV. 873, 876 (2012); Hanoch Dagan, *The Utopian Promise of Private Law*, 66 U. TORONTO L.J. 392, 410 (2016); Curtis Bridgeman, *Civil Recourse or Civil Powers?*, 39 FLA. STATE U. L. REV. 1, 3 (2011).

68. HART, *supra* note 30, at 27-28.

imposing rules.<sup>69</sup> Power-conferring rules enable legal persons to effectively transact, to form relationships and enter into or establish associations with others, and to incur voluntarily undertaken duties on these bases.<sup>70</sup> It is primarily by making use of power-conferring rules that natural and artificial persons invoke the law to change the normative landscape within which they act and interact.<sup>71</sup>

As is true of much of the rest of private law, fiduciary law implicates an array of duty-imposing and power-conferring rules.<sup>72</sup> Fiduciary law both enables and constrains parties to fiduciary relationships, as well as third parties in their interactions with grantors, fiduciaries, and beneficiaries.<sup>73</sup> The province of fiduciary law has grown incrementally as equity has extended duty-imposing rules (fiduciary duties) to an ever-widening set of relationships.<sup>74</sup> Those relationships bear common formal properties.<sup>75</sup> But the constitution (formation and indicia of legal form) of fiduciary relationships, and so the occasion for the imposition of fiduciary duties, is not governed by fiduciary law.<sup>76</sup> It is instead enabled and regulated by various sets of power-conferring rules developed for particular types of relationships and associations characterized as fiduciary in equity. These sets of power-conferring rules may originate in law or in other fields within equity. For example, both the formation of a valid express trust and the mechanisms for the

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69. See Dagan, *supra* note 67, at 410; see also Bridgeman & Goldberg, *supra* note 67, at 876.

70. See HART, *supra* note 30, at 27-28.

71. See the discussion of powers in DAVID OWENS, *SHAPING THE NORMATIVE LANDSCAPE* 123-85 (2012) (exploring how people use ownership and consent to shape their normative landscape).

72. For a similar perspective on the legal rules that enable contracting, see generally Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726 (2008).

73. Criddle, *supra* note 15, at 1016-17, 1026.

74. See Tamar Frankel, *The Rise of Fiduciary Law*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 10, 2018), <https://corpgov.law.harvard.edu/2018/09/10/the-rise-of-fiduciary-law/> [<https://perma.cc/ARM7-G94P>].

75. See Miller, *Fiduciary Relationship*, *supra* note 1, at 73.

76. See Paul B. Miller, *Principles of Public Fiduciary Administration*, in *BOUNDARIES OF STATE, BOUNDARIES OF RIGHTS* 251, 253 (Tsvi Kahana & Anat Scolnicov eds., 2016); cf. Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303, 319 (1999) (“Fiduciary duties are often not set forth—sometimes not even referred to—in agreements between parties.”); Miller, *Identification*, *supra* note 1, at 368. See generally *Fiduciary Duties*, *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* (Peter Newman ed., 1998).

devolution of fiduciary powers on trustees are enabled and constrained by power-conferring rules found in the law of trusts.<sup>77</sup> Likewise, the incorporation, devolution, and definition of the fiduciary mandates of corporate directors are matters for power-conferring rules established by corporate law.<sup>78</sup> The same may be said of each and every other kind of status-based fiduciary relationship.<sup>79</sup>

## II. STRUCTURAL BIPLANARITY AND THE MORALITY OF FIDUCIARY LAW

The morality of fiduciary law is pluralistic owing to variety in the salience held by the interests of persons in the legal rules that enable and regulate fiduciary relationships. As I will explain below, there is reason to think that fiduciary duties are amenable to general moral evaluation and justification in terms of values put in issue by all fiduciary relationships.<sup>80</sup> But there is little reason to think that the *general morality* of fiduciary law is normatively monistic. And, in any case, variety in the moral salience of the interests of persons in the formation and performance of different kinds of fiduciary mandate implies that fiduciary law is normatively pluralistic when analyzed in terms of the *special morality* of different fiduciary relationship types.<sup>81</sup>

To appreciate that the morality of fiduciary law is pluralistic, it helps to understand the way in which it is (also) normatively complex in its amalgamation of considerations of general and

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77. See generally Robert H. Sitkoff, *Fiduciary Principles in Trust Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 1, at 41.

78. See generally Velasco, *supra* note 23; Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?*, 83 S. CAL. L. REV. 1231 (2010).

79. For present purposes I shall restrict my attention to status-based fiduciary relationships. It is unclear what role power-conferring rules have in the constitution of fact-based fiduciary relationships, partly because the latter are irregular. See Kelly, *supra* note 3, at 3-4; Andrew S. Gold, *Trust and Advice*, in FIDUCIARIES AND TRUST, *supra* note 7, at 35, 47. See generally Paul B. Miller, *The Idea of Status in Fiduciary Law*, in CONTRACT, STATUS, AND FIDUCIARY LAW 25 (Paul B. Miller & Andrew S. Gold eds., 2016) (discussing status-based fiduciary relationships).

80. See *infra* Part II.B.

81. On special morality more widely, see generally Michael O. Hardimon, *Role Obligations*, 91 J. PHILOSOPHY 333 (1994); Samuel Scheffler, *Relationships and Responsibilities*, 26 PHIL. & PUB. AFFS. 189 (1997); SIMON KELLER, *PARTIALITY* (2013).



special morality. The normative complexity of fiduciary law is a product of its structural biplanarity. In what follows, I explain the sense in which fiduciary law is structurally biplanar insofar as it is premised on the extension by equity of duty-imposing rules (fiduciary duties) to legal forms of relationship and association that are constituted through variable sets of power-conferring rules. I then explain how structural biplanarity generates normative complexity insofar as it (a) implies the possibility of a general morality of fiduciary duties but (b) requires recognition of the special morality of the power-conferring rules that enable and undergird fiduciary mandates.

#### *A. Structural Biplanarity in Fiduciary Law*

The morality of fiduciary law is a matter of the moral salience of the interests of various differently situated persons in fiduciary relationships and, by extension, in the undertaking, performance, and termination of fiduciary mandates. To appreciate this, one must understand a basic feature of fiduciary liability: it is relationally structured.<sup>82</sup> Fiduciary duties are triggered by the formation of fiduciary relationships.<sup>83</sup> Fiduciary duties are thus secondary to fiduciary relationships: they assume the existence of a fiduciary relationship and, absent that relational underpinning, have no juridical or factual basis.<sup>84</sup> That is, as a matter of law, they have nothing to which to attach, given that they are not free-standing conduct rules.<sup>85</sup> And as a practical matter, they have no conduct to shape, given that, absent an underlying fiduciary mandate, there is nothing that a would-be fiduciary can be understood to have undertaken to do, representatively, for another.<sup>86</sup>

The fact that fiduciary duties are integrally linked to fiduciary relationships has important implications for our understanding of fiduciary law taken in whole. For present purposes, the most important is to notice that the duty-imposing rules through which

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82. See generally Miller, *Fiduciary Relationship*, *supra* note 1.

83. See *id.* at 67.

84. See *id.*

85. See *id.*

86. See *id.*

equity attaches fiduciary principles to various particular fiduciary relationships are contingent upon the existence and operation of power-conferring rules that enable and regulate the formation, performance, and termination of fiduciary relationships.<sup>87</sup>

When I say that fiduciary law is *structurally biplanar*, I mean to capture this interaction of rules across two levels: fiduciary duty-imposing rules on the one hand, and nonfiduciary power-conferring rules on the other. Fiduciary duties are imposed on the basis of relationship characterizations conducted in equity.<sup>88</sup> But relationships so characterized (that is, treated as fiduciary in equity) are constituted through the engagement of power-conferring rules stipulated other than by fiduciary law.<sup>89</sup> Put otherwise, the extension of fiduciary duties is premised on a secondary rendering, in equity, of a primary legal form of relationship or association.<sup>90</sup>

Allow me to explain. As I have detailed elsewhere, equity has extended fiduciary status to categories of relationship on the basis that one of the parties (the fiduciary) has been granted a fiduciary mandate (a mandate and set of powers through which she is to act representatively).<sup>91</sup> This is a characterization that picks out formal properties of all fiduciary relationships.<sup>92</sup> But it is secondary, insofar as the properties are legal or juridical and not merely factual incidents of relationships.<sup>93</sup> Equity seizes upon legal incidents of legal forms of relationship and association that are common across the forms taken collectively.<sup>94</sup> Notably, it seizes upon incidents that suggest that one party or group within the relationship or association have been authorized to act representatively for others.<sup>95</sup>

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87. For contrasting views on the place of fiduciary principles in equity, compare Henry E. Smith, *Why Fiduciary Law Is Equitable*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW*, *supra* note 1, at 261, 281-82, with Paul B. Miller, *Equity as Supplemental Law*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY* 92, 98-100, 101-03 (Dennis Klimchuk et al. eds., 2020).

88. See PAUL FINN, *FIDUCIARY OBLIGATIONS* 1-3 (1977).

89. See *supra* notes 76-79 and accompanying text; see also FINN, *supra* note 88, at 1-3; *Fiduciary Duties*, *supra* note 76.

90. See *supra* notes 76-79 and accompanying text; see also FINN, *supra* note 88, at 1-3; *Fiduciary Duties*, *supra* note 76.

91. See Miller, *supra* note 18, at 39-40.

92. See *id.*

93. See *id.*

94. See *Fiduciary Duties*, *supra* note 76.

95. *Id.*; FINN, *supra* note 88, at 2; Miller, *supra* note 18, at 38-40.

But note that equity, despite providing for the extension of fiduciary duties, does not supply rules that provide for the formation of fiduciary relationships. It does not, in other words, presume to define and develop terms that enable and govern mandates of personal representation.<sup>96</sup> Indeed, there are no general rules establishing such terms in fiduciary law or elsewhere. Fiduciary law regulates the exercise of authority by a fiduciary but is not a source of such authority.<sup>97</sup> Instead, fiduciary law regulates mandates founded under discrete sets of power-conferring rules developed for various legal forms of relationship and association.<sup>98</sup> One might say that the fiduciary mandates enjoyed, respectively, by directors, trustees, and agents, originate in, and are regulated by, sets of power-conferring rules established by trust law, corporate law, and the law of agency.<sup>99</sup> But even this is insufficiently specific. In tracing the mandate enjoyed by a director of a corporation, say, to the power-conferring rules that enable it, one must first determine the type and jurisdiction of incorporation. The rules governing the incorporation of a nonprofit corporation in Nebraska cannot be assimilated with those governing the incorporation of a business in Delaware.<sup>100</sup> The same point holds for the power-conferring rules enabling fiduciary mandates associated with other categories of fiduciary relationship.

To recognize the structural biplanarity of fiduciary law is, then, to recognize that fiduciary law is oriented toward, and is responsive to, relationship types defined by power-conferring rules apt to the type in a given jurisdiction. Again, fiduciary duties have nothing on which to operate absent these rules.<sup>101</sup> But this is not to diminish the significance of equity's contribution in the extension of duty-imposing rules to fiduciary relationships. Its contribution is crucial,

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96. See *supra* note 76 and accompanying text.

97. Miller, *supra* note 76, at 253.

98. See *supra* notes 77-79 and accompanying text.

99. This is exemplified in leading doctrinal surveys of fiduciary principles in these fields. See generally Deborah A. DeMott, *Fiduciary Principles in Agency Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 1, at 23; Sitkoff, *Fiduciary Principles*, *supra* note 77; Velasco, *supra* note 23.

100. See Alyssa Gregory, *Best States to Incorporate a Business*, BALANCE SMALL BUS. (Mar. 29, 2019), <https://www.thebalancesmb.com/best-states-to-incorporate-a-business-4178799> [<https://perma.cc/SR3Q-9285>].

101. See *supra* notes 84-86 and accompanying text.

even if secondary. It consists in (a) the articulation of properties common to mandates of personal representation and (b) the articulation and extension of fiduciary duties and other principles to same.<sup>102</sup> It is by virtue of the latter that equity makes its intervention felt, taking the law as found, but adjusting it so as to make it more likely that a fiduciary will respect the representative nature of his charge.<sup>103</sup>

### *B. The General Morality of (Fiduciary) Duty-Imposing Rules*

Equity imposes fiduciary duties on relationships it deems fiduciary.<sup>104</sup> Again, fiduciary liability is relationally structured insofar as (equitable) obligations are ascribed on the basis of relationship construction conducted in equity.<sup>105</sup> But I have emphasized this construction, though guided by form,<sup>106</sup> is secondary insofar as it is one made of the legal or juridical incidents of primary legal forms of relationship or association that implicate fiduciary mandates.

I have underscored variety in the nature of fiduciary mandates and associated practices of representation across status-based fiduciary relationships.<sup>107</sup> I have noted that the different primary legal forms of relationship and association that equity deems fiduciary are constituted by different sets of power-conferring rules.<sup>108</sup> And, with others, I have observed that equity responds to variegation in the nature of fiduciary mandates in part by modulating the content of fiduciary duties.<sup>109</sup> However, none of this should be taken as denying that fiduciary law is a field defined by common concepts, principles, and structural features—points emphasized by

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102. See *Fiduciary Duties*, *supra* note 76; Miller, *supra* note 18, at 38-40.

103. On this feature of equitable intervention more generally—encapsulated in the maxim that equity follows the law—see Michael T. Morley, *The Federal Equity Power*, 59 B.C.L. REV. 217, 275-79 (2018); Samuel L. Bray, *Equity: Notes on the American Reception*, in EQUITY AND LAW 31 (John C.P. Goldberg et al. eds., 2019); Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. (forthcoming) (manuscript at 47) (on file with author).

104. See *supra* Part II.A.

105. See generally Miller, *Fiduciary Relationship*, *supra* note 1.

106. That is, guided by a conception of the formal properties shared by fiduciary relationships.

107. See *supra* Part II.A.

108. See *supra* Part II.A.

109. See Criddle, *supra* note 7, at 109; Gold, *Fiduciary Duty*, *supra* note 4, at 385-86.

myself and others in prior work.<sup>110</sup> Rather, fiduciary law is defined by the common set of equitable obligations that equity extends to relationships that it treats as having formal properties in common.<sup>111</sup> These features, in turn, indicate the possibility of a general morality of fiduciary law.

If a general morality of fiduciary law is to be elucidated successfully, it will involve (a) the articulation of general moral interests in fiduciary relationships; (b) explication of these interests in terms of the formal properties of fiduciary relationships; (c) specification of the values that give identified interests their moral salience; and (d) an analysis showing how fiduciary duties are responsive to the salience of identified interests and underlying values. The result would be an account of the general morality not of fiduciary law in its entirety but rather of duty-imposing rules (fiduciary duties) understood in light of values reasonably believed to be at issue in all fiduciary relationships.

As noted in my introductory remarks, fiduciary theorists who have developed accounts of the morality of fiduciary law have focused on fiduciary duties (duty-imposing rules) and, sometimes, the properties of fiduciary relationships.<sup>112</sup> Some of these accounts might be questioned over doubts about the generality of the morality identified with fiduciary law. Thus, for example, trust-based theories have not shown that robust personal trust is implicated in all fiduciary relationships, that trust has inherent moral value, or that enforceable fiduciary duties are trust-reinforcing.<sup>113</sup> Much the same is true of arguments that the fiduciary duty of loyalty is justified by the moral value of loyalty, framed as a virtue.<sup>114</sup> They fail to establish that juridical conceptions of loyalty

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110. See, e.g., Miller, *Fiduciary Relationship*, *supra* note 1; Miller, *Identification*, *supra* note 1; Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1 (1975); FINN, *supra* note 88; Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795 (1983); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399 (2002); Lionel Smith, *Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another*, 130 LAW Q. REV. 608 (2014).

111. See FINN, *supra* note 88, at 1-5.

112. See *supra* notes 9-15 and accompanying text.

113. See Miller, *Duties*, *supra* note 11, at 995-99.

114. See generally Irit Samet, *Guarding the Fiduciary's Conscience—A Justification of a Stringent Profit-Stripping Rule*, 28 OXFORD J. LEGAL STUD. 763 (2008); Irit Samet, *Fiduciary Loyalty as Kantian Virtue*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1,

track moral ones, that loyalty is a virtue or is otherwise inherently morally valuable, or that fiduciary relationships are uniformly premised on valid moral expectations of loyalty.<sup>115</sup>

Doubtless, it will be difficult to satisfactorily distill the general morality of fiduciary duties. However, my main point has been to emphasize that the common concepts, principles, and structural features of fiduciary law invite the effort. Without pretending thoroughness, I offer two hypotheses: first, a normatively monistic account is unlikely to prove satisfactory; and second, a normatively pluralistic account is most likely to be successful if it encompasses the values of negative liberty (non-domination), personal and social welfare, and positive liberty or autonomy (self-authorship).<sup>116</sup> These three axes of value reflect the abiding moral concern that *all* fiduciaries (a) refrain from self-interested appropriation of fiduciary powers;<sup>117</sup> (b) devote themselves to the advancement of their beneficiaries' interests;<sup>118</sup> and (c) remain faithful to grantors' intentions in the performance of fiduciary mandates.<sup>119</sup>

### *C. The Special Morality of (Nonfiduciary) Power-Conferring Rules*

Fiduciary duties are occasioned by the formation of relationships that equity characterizes as fiduciary.<sup>120</sup> And fiduciary duties constrain the performance of fiduciary mandates within the context of these relationships.<sup>121</sup> As noted above, because fiduciary law works

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at 125.

115. See, e.g., 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; Stephen A. Smith, *The Deed, Not the Motive: Fiduciary Law Without Loyalty*, in CONTRACT, STATUS, AND FIDUCIARY LAW, *supra* note 79, at 213; Miller, *Dimensions*, *supra* note 9, at 180-82.

116. See generally W.D. ROSS, THE RIGHT AND THE GOOD (1930); FINNIS, *supra* note 28. My argument for pluralism is largely interpretive and foundationalist; that is, it is driven by recognition that fiduciary law is most plausibly interpreted as responsive to more than one foundational value. For a different, legal realist argument for pluralism, see generally HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY (2013).

117. See *Fiduciary Duties*, *supra* note 76.

118. See *id.*

119. See Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 563 (2015).

120. See *supra* Part II.A.

121. See FINN, *supra* note 88, at 1; Smith, *supra* note 110, at 1483-84.

with common constructs—of relationship and duty—it seems amenable to general moral analysis.<sup>122</sup> However, it should be remembered that equity employs these constructs in relation to independently stipulated sets of legal rules.<sup>123</sup> More specifically, it treats as “fiduciary” legal forms of relationship and association constituted juridically by nonfiduciary power-conferring rules. These are the rules that define the contours of a given type of relationship or association; permit courts to differentiate between (and thus to police the boundaries of) legal forms; and enable persons to make use of forms in structuring their own affairs, interactions with others, and cooperative undertakings.

The power-conferring rules that enable the formation, alteration, and termination of fiduciary mandates do not follow a fixed pattern. They might include rules specifying the qualifications or presumed capacities of parties; informal or formal mechanisms by which the parties may signify their intentions to confer, alter, or resign from a mandate; minimum content of a mandate (for example, going to fiduciary powers, mandate purposes, or beneficiaries); and criteria governing judicial construction of an instrument purporting to establish a mandate.<sup>124</sup> But the range and content of the power-conferring rules varies considerably.<sup>125</sup> And it bears emphasis that, though patterns in these rules enable us to speak abstractly about legal forms of relationship or association,<sup>126</sup> the rules themselves are specified and operative at a more granular level. They are specified variably by jurisdiction for specific subtypes (subsidiary forms) of relationships or associations. Thus, the power-conferring rules that enable the formation, alteration, and dissolution of a nonprofit corporation will differ from those specified for benefit corporations, business corporations, and governmental corporations.<sup>127</sup> Similarly, the power-conferring rules that enable the formation, alteration,

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122. *See supra* Part II.B.

123. *See supra* Part II.A.

124. *See* FINN, *supra* note 88, at 1-4 (noting that the term fiduciary “provid[es] a veil behind which individual rules and principles have been developed”); Miller & Gold, *supra* note 119, at 516 (describing mandates).

125. *See* Frankel, *supra* note 110, at 795.

126. *See* FINN, *supra* note 88, at 5.

127. *See* Frankel, *supra* note 110, at 795; ROBERT R. KEATINGE & ANN E. CONAWAY, KEATINGE AND CONAWAY ON CHOICE OF BUSINESS ENTITY § 1:1 (2020).

and windup of a charitable trust will differ from those specified for conventional donative trusts, real estate investment trusts, and business trusts.<sup>128</sup>

If my suggestion as to the possibility of a general morality of fiduciary law holds,<sup>129</sup> the engagement of power-conferring rules results in the formation of relationships which, by virtue of characteristics held in common with other fiduciary relationships, justify the imposition of fiduciary duties. But we should not think that this exhausts the morality of the power-conferring rules that enable fiduciary administration. Rather, the morality of these rules likely varies by type or subtype of relationship. That is, each type of relationship that equity deems fiduciary will have its own special morality, the latter being a matter, in part, of the particular values implicated by the provision the law makes for (a) formation of relationships of that type and (b) tailoring of mandates within the type.

The notion that the power-conferring rules that enable fiduciary administration implicate considerations of special morality should be uncontroversial. The moral reasons for providing for the formation of guardianship relationships—for example, via the subtype of adoptive parenthood—reflect the special moral interests prospective guardians have in formally assuming care and custodial responsibility for wards, and the special moral interests the latter have in ensuring that their basic needs are provided for by someone with legally recognized responsibility and authority over their care, to say nothing of the public interest in regularizing adoptive care of dependents.<sup>130</sup> The moral reasons for enabling the formation of nonprofit corporations and charitable trusts reflect the special moral interests that philanthropists, donors, and volunteers have in a fixed structure for the fiduciary administration of charitable investments and activities, as well as the public interest in the promotion of charitable giving.<sup>131</sup> And one could similarly catalogue distinct

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128. See Frankel, *supra* note 110, at 795. See generally RESTATEMENT (THIRD) OF TRUSTS (AM. L. INST. 2003).

129. See *supra* Part II.B.

130. See *Adoption Law: United States*, LIBR. OF CONG. (June 9, 2015), <https://www.loc.gov/law/help/adoption-law/unitedstates.php> [<https://perma.cc/YL7W-RPTE>].

131. See JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAWS OF CORPORATIONS § 1:18 (2020); RESTATEMENT (FIRST) OF TRUSTS §§ 348-49, 368 (AM. L. INST. 1935); *cf.*



sets of moral reasons reflecting a wide range of values served by power-conferring rules that enable other forms of fiduciary administration. To fail to notice the special morality of these rules is, in many cases, to miss their most immediate and pressing moral point or purpose.

#### *D. Why Structural Biplanarity Cannot Be Ignored*

Most theorists have a decided preference for parsimony.<sup>132</sup> So, too, do fiduciary theorists. Even if they might be persuaded that the general morality of fiduciary duties is pluralistic, fiduciary theorists could be reluctant to accept the complexity introduced by recognition of fiduciary law's structural biplanarity and the special morality of power-conferring rules.<sup>133</sup> After all, to do so is to recognize that the morality of fiduciary law is, to a considerable extent, eclectic, allowing for a stable undercurrent of considerations of general morality that apply to all fiduciary relationships while the wider morality of the field varies by relationship type and subtype.<sup>134</sup> This makes theory construction arduous and the resulting wide-angle view rather messy.

With this in mind, one can anticipate the following skeptical question: Why does fiduciary theory need to account for the special morality of power-conferring rules? After all, we have established that fiduciary law operates in relation to these rules, but the rules are not in themselves fiduciary.<sup>135</sup>

The answer lies in the close connection between fiduciary duty-imposing rules and nonfiduciary power-conferring rules. As noted earlier, the relationship characterization through which equity extends fiduciary duties is secondary: equity provides its own gloss on relationships, the primary legal form and character of which is defined otherwise at law or in equity.<sup>136</sup> So, too, the functions of fiduciary duties are secondary. Fiduciary duties secure the formal

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*Fiduciary Duties*, *supra* note 76 ("Fiduciary duties are imposed when public policy encourages specialization in particular services.").

132. See generally Sam Cowling, *Ideological Parsimony*, 190 SYNTHESE 3889 (2013).

133. See *supra* Part II.C.

134. See *supra* Part II.B.

135. See *supra* Part II.A.

136. See *supra* Part II.A.

and practical integrity of the various forms of relationship and association to which they attach.<sup>137</sup> They thus help to ensure that the power-conferring rules through which these forms are constituted are used as intended relative to salient interests that support the content of those rules and conditions placed on their exercise.

It turns out, then, that the general morality of fiduciary duties and the special morality of nonfiduciary power-conferring rules are not severable. Considerations of general morality—of non-domination, welfare, and autonomy<sup>138</sup>—are put in issue by all fiduciary relationships insofar as they implicate personal representation.<sup>139</sup> But personal representation is not a construct subsisting on air; it arises relative to, and plays out with respect to, specific mandates under which a fiduciary is authorized to do something in particular for and on behalf of another.<sup>140</sup> One cannot understand personal representation in practice, or fiduciary law's role in safeguarding it, without attending to the power-conferring rules that enable the various mandates under which fiduciaries act and without taking notice of the special morality of these rules.

This point can also be made by analogy. The connection between general and special morality in fiduciary law is akin to that between the general morality of tort law<sup>141</sup> and the special morality of the legal forms it sometimes protects. Consider the tort of inducing breach of contract. As a matter of general morality, one can say that this tort, like others, is responsive to the value of autonomy.<sup>142</sup> But as a matter of moral theory this is incomplete and unsatisfying. That is because an account of the morality of this tort must also incorporate the morality of contract. For one can always ask: Why is contract (or why is autonomous action, when realized through contracting behavior) worthy of tort law's protection? An answer will require that one attend not just to general characteristics of tort

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137. Cf. *Fiduciary Duties*, *supra* note 76 (noting how regulatory regimes are designed around specific fiduciaries, ensuring against misappropriation and inadequate performance).

138. See *supra* note 116 and accompanying text.

139. Miller, *supra* note 18, at 38-40.

140. See *Fiduciary Duties*, *supra* note 76 ("Fiduciaries must be entrusted with power over the entrustors or their property ... to enable fiduciaries to serve their entrustors.")

141. See generally John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010).

142. See Hanoch Dagan & Michael Heller, *Freedom, Choice, and Contracts*, 20 THEORETICAL INQUIRIES L. 595, 632 (2019).

liability and its structure but to the morality of the interests that tort law protects, and in this case the latter is, in part, a matter of the morality of contract.

### III. LOCI OF VALUE IN FIDUCIARY RELATIONSHIPS

Having established a framework for analysis of the morality of fiduciary law, it remains for us to identify loci of value that contour that morality. One common approach to analysis of the morality of legal rules—especially duty-imposing rules—is to focus on their content and triggering conditions as well as the sanctions for (or consequences otherwise of) rule violation. So, for example, when tort theorists debate the morality of tort law, they often do so by examining the moral content of the duty of care, conditions governing the incidence and scope of the duty, and the remedial default of damages for breach.<sup>143</sup>

There is something to this strategy, at least with respect to free-standing, duty-imposing rules of the sort that dominate tort and criminal law. But it proves problematic in relation to duty-imposing rules that establish terms of interaction for legal forms of relationship and association. Here, specification of the form shapes the incidence, scope, and effect of the duty-imposing rules that are partly constitutive of it.<sup>144</sup> This, in turn, makes it difficult, if not impossible, to analyze the morality of a duty-imposing rule independently of that of the form in which it is embedded. I shall therefore assume for present purposes that the morality of duty-imposing rules embedded within legal forms must be understood in light of the morality of the forms themselves.<sup>145</sup>

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143. See Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37, 37-38 (1983); Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 349-50 (1992); Ripstein, *supra* note 40, at 656-57; Goldberg & Zipursky, *supra* note 141, at 918; John Gardner, *What Is Tort Law For? Part 1. The Place of Corrective Justice*, 30 LAW & PHIL. 1, 50 (2011); Mark A. Geistfeld, *Hidden in Plain Sight: The Normative Source of Modern Tort Law*, 91 N.Y.U. L. REV. 1517, 1519-21 (2016).

144. See *supra* Part II.A; see also Miller, *Identification*, *supra* note 1, at 368; Frankel, *supra* note 110.

145. I allow, without commenting further here, for the possibility that the morality of a duty-imposing rule embedded within a form may not simply receive or reflect the morality of the form but may contribute to it *sui generis* through an ancillary moral impact on the intentions, motivations, or behavior of the parties. See Mark Greenberg, *The Moral Impact*

Fiduciary duties are not stand-alone duties. They are occasioned by fiduciary relationships, binding fiduciaries in the performance of their mandates.<sup>146</sup> Elsewhere, I have argued that fiduciary duties serve, in part, to secure the expectation that fiduciaries prove to be reasonably good representatives of those for whom they act under a mandate.<sup>147</sup> Given that fiduciary duties are attached by equity to various legal forms of relationship (for example, trust, corporation, partnership, guardianship, and agency),<sup>148</sup> I shall assume that their morality is primarily a function of that of the general and special morality of fiduciary relationships.

To the extent that fiduciary law regulates relationships of representation,<sup>149</sup> it facilitates and governs the practice of representation in decision-making, much of which concerns the care and custody of persons and the administration, investment, and disposition of property.<sup>150</sup> One might therefore speculate that the general morality of fiduciary law is a matter of the values—including, again, those of non-domination, welfare, and autonomy<sup>151</sup>—put at issue by interpersonal and group representation. But it should be remembered that an implication of structural biplanarity is that one must attend to the special morality of particular fiduciary relationship types—and associated power-conferring rules—in analyzing the wider morality of the field.<sup>152</sup>

Bearing all of this in mind, in what follows I will argue that identifying loci of value in fiduciary relationships is a matter of identifying morally salient interests in the formation, performance, and termination of a fiduciary mandate. More specifically, I suggest the need to attend to, and to differentiate between, the interests of parties, third parties, and the general public as a matter of general and special morality as they shift across the lifespan of a relationship. To the extent that the law proves responsive to these interests,

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*Theory of Law*, 123 YALE L.J. 1288, 1290 (2014).

146. See *supra* Part II.A.

147. See Miller, *supra* note 18, at 38-40.

148. See *supra* Part II.A; see also Frankel, *supra* note 110, at 795; *Fiduciary Duties*, *supra* note 76.

149. See Miller, *supra* note 18, at 38-40.

150. See FINN, *supra* note 88, at 1-3; *Fiduciary Duties*, *supra* note 76.

151. See *supra* note 116 and accompanying text.

152. See *supra* Part II.D.

it does so through rules that define and adapt entry into, execution of, and exit from fiduciary relationships.

### A. *Interests of Parties*

In analyzing the morality of fiduciary law, it seems natural to begin with the interests of parties to fiduciary relationships.<sup>153</sup> By “parties,” I mean to include fiduciaries and beneficiaries, as well as grantors and enforcers.<sup>154</sup> And it should be noted that artificial as well as natural persons may be parties<sup>155</sup> to the extent that the nature of a mandate and its objects permit it.<sup>156</sup>

I have suggested that it is best to analyze the morality of fiduciary law by examining considerations of general and special morality separately across different stages in the lifespan of a fiduciary relationship.<sup>157</sup> Different sets of rules shape and govern the conduct of parties and nonparties at various stages of a relationship, and salient interests shift, too.<sup>158</sup> I shall therefore adopt this approach in what follows.

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153. It makes sense to begin with the parties in that duty-imposing rules apply correlatively between fiduciary and beneficiary (or third-party mandate enforcer) and in that power-conferring rules enable the formation of a relationship treated by law and equity as personal to the parties.

154. Enforcers are persons granted legal standing to enforce a fiduciary mandate despite being neither grantors nor beneficiaries. See Miller & Gold, *supra* note 119, at 543 n.95. Trust protectors are an example. See Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2763 (2006). Recognizing that recourse to enforcers is relatively rare, I will set consideration of their interests to one side here. However, it may be noted that enforcers generally protect the interests of grantors, beneficiaries, or the public (in the case of mandates for public benefit); they therefore fulfill a second-order fiduciary function (that of a concerned “watcher,” at remove from first-order mandate performance). See *id.* at 2762-63; Paul B. Miller, *Regularizing the Trust Protector*, 103 IOWA L. REV. 2097, 2098 (2018).

155. See Paul B. Miller & Andrew S. Gold, *The Corporation as a Category in Private Law*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY 429 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020).

156. Cf. Miller & Gold, *supra* note 119 (discussing governance mandates).

157. See *supra* Part II.C.

158. Compare Miller, *Identification*, *supra* note 1, at 381 (listing ways fiduciary relationships may be formed), with RAFAEL CHODOS, *THE LAW OF FIDUCIARY DUTIES* ch. 4 (2d ed. 2000) (ebook) (describing termination of fiduciary duties).

### 1. *In Mandate Formation*

At formation, grantors can have different intentions, the facilitation of which engages a variety of values. As a matter of general morality, we might say that the freedom to confer a mandate on a fiduciary enables grantors more effectively to provide for their own welfare or that of someone for whom they wish to make provision.<sup>159</sup> But generalization is difficult because grantors' interests at formation are served by power-conferring rules that are specific to different types of fiduciary relationships, and the intentions enabled by these rules will depend in part on how the law defines the legal form in which the rules are embedded.<sup>160</sup> Thus, the special morality of fiduciary relationships, insofar as it reflects grantors' interests, will be pluralistic across, and often within, different areas of fiduciary administration.

This being allowed, it is perhaps worth noting that grantors will often have, with respect to a specific mandate, one or more of several kinds of intention.<sup>161</sup> First, when a grantor establishes a mandate for the benefit of others, her intention will often be either to provide in some way for the welfare of specific beneficiaries or to provide for advancement of causes of general public interest.<sup>162</sup> In either case, the grantor confers a mandate on a fiduciary in order to provide for people or causes that matter to her, and so underlying power-conferring rules enable her to meet a moral obligation of care effectively or to actualize her moral identification with certain persons or causes.<sup>163</sup> Second, when a grantor establishes a mandate for her own benefit, her intentions again might vary. She might

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159. See Dagan & Hanes, *supra* note 13, at 92-93; Robert H. Sitkoff, *An Economic Theory of Fiduciary Law*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 197, 198.

160. See *supra* Part II.C; see also Miller, *Identification*, *supra* note 1, at 382-83 (“[C]omplexities make generalizations difficult.”); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 909 (“[F]iduciary obligation is inevitably tied to the particular context in which it arises.”); Frankel, *supra* note 110, at 797 (“The differences among fiduciaries may be so great that treating them as a group would require a very high level of generality.”).

161. See Miller & Gold, *supra* note 119, at 543 (listing different configurations of fiduciaries and mandates).

162. See *id.* at 519-22, 525.

163. See, e.g., *id.* at 551.

believe or trust that the fiduciary will more effectively or efficiently decide for her benefit in relation to the subject matter of the mandate.<sup>164</sup> She might also, or alternatively, engage a fiduciary so that she may devote her time, attention, and energies to pursuits that she values more.<sup>165</sup> Or she might have planned for fiduciary administration of her person or property in the event of her own incapacity.<sup>166</sup> Finally, when a grantor joins with others in engaging a fiduciary under a new or ongoing mandate focused on objects of common interest, she may do so because fiduciary administration is entailed by the legal form of association under which the group is organized or in recognition that it enables effective organization.<sup>167</sup> In sum, the special morality of fiduciary relationships will depend in part on which—or which combination—of grantor intentions and interests a set of power-conferring rules enables.

The interests of fiduciaries at formation are rather more straightforward. As a matter of general morality, it may be noted that fiduciaries must freely undertake their mandates in order to be held to them, and they usually do so as a form of remunerated employment or on a voluntary basis as a matter of moral obligation to, or identification with, grantors or beneficiaries.<sup>168</sup> Their interests might reasonably be thought to include the generic ones we all have in employment or in identifying with others through acts of service. However, generalization is difficult here, too. More particularly, specific rules governing the undertaking of fiduciary mandates, and those constraining the nature and scope of powers that may be conferred on a fiduciary, will impact the terms under which fiduciaries do or may serve, depending on the kind of mandate.<sup>169</sup>

As a matter of special morality, the intentions and motivations that a fiduciary might have for undertaking a mandate will vary

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164. See Dagan & Hannes, *supra* note 13, at 98-99.

165. See *id.* at 104-05; see also Hanoch Dagan, *Fiduciary Law and Pluralism*, in *THE OXFORD HANDBOOK OF FIDUCIARY LAW*, *supra* note 1, at 833, 844-47.

166. See Nina A. Kohn, *Fiduciary Principles in Surrogate Decision-Making*, in *THE OXFORD HANDBOOK OF FIDUCIARY LAW*, *supra* note 1, at 249, 249-54.

167. See *supra* Part II.C; see also Miller & Gold, *supra* note 119, at 527.

168. See Miller, *Dimensions*, *supra* note 9, at 184-85; Miller, *Identification*, *supra* note 1, at 352. See generally Matthew Harding, *Fiduciary Undertakings*, in *CONTRACT, STATUS, AND FIDUCIARY LAW*, *supra* note 79, at 71; James Edelman, *When Do Fiduciary Duties Arise?*, 126 *LAW Q. REV.* 302 (2010).

169. See Harding, *supra* note 168, at 76-77.

depending on its nature and his relationship to other parties. For example, it is still relatively common for those with filial ties to a grantor or beneficiary to serve as executor or trustee for the purposes of estate or trust administration of family property.<sup>170</sup> Filiation is also a factor in the appointment and undertaking of guardianships.<sup>171</sup> Finally, it might be noted that some serve as fiduciaries in part because of their identification with fiduciary social roles<sup>172</sup>—for example, the physician’s identification with the social role of healer,<sup>173</sup> or the lawyer’s identification with the roles of intermediary and advocate.<sup>174</sup> However, more commonly, fiduciaries act mostly or in significant part for reason of their being promised remuneration or other employment perquisites that are acceptable to them.<sup>175</sup> In either case, power-conferring rules leave it for the fiduciary to determine whether to serve and to negotiate—when feasible—over terms of their service.<sup>176</sup> Thus, in sum, the special morality of fiduciary relationships will also depend on which—or which combination of—intentions and motivations foreseeably factor in a fiduciary undertaking a mandate.

As for beneficiaries, their interests at formation are rather more nebulous than one might expect given their recognized significance in law after formation. And that is because, prior to formation, some beneficiaries might have moral expectancies—for example, grounded in need, a moral right, or other basis of desert—of fiduciary administration, but these expectancies are not treated in law as

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170. *Will Executor Duties FAQ*, FINDLAW (Dec. 6, 2019), <https://estate.findlaw.com/estate-administration/will-executor-duties-faq.html> [<https://perma.cc/44SZ-BLAA>]; Karen Hube, *Picking a Trustee, Family or Banker?*, BARRON’S (Nov. 30, 2009), <https://www.barrons.com/articles/SB125936551043767209> [<https://perma.cc/FP98-FQJQ>]. For a discussion, see generally Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001).

171. See Kohn, *supra* note 166, at 257.

172. See generally Matthew Harding, *Fiduciary Law and Social Norms*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 1, at 797; Hardimon, *supra* note 81, at 362.

173. See Clarissa Hsu, William R. Phillips, Karen J. Sherman, Rene Hawkes & Daniel C. Cherkin, *Healing in Primary Care: A Vision Shared by Patients, Physicians, Nurses, and Clinical Staff*, 6 ANNALS FAM. MED. 307 (2008); Stephen C. Schimpff, *The Physician as Healer*, IN-TRAINING (Aug. 1, 2014), <https://in-training.org/doctors-orders-physician-healer-stephen-c-schimpff-md-7525> [<https://perma.cc/L2ZP-84JC>].

174. See, e.g., Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1071-73 (1976).

175. See Miller, *Dimensions*, *supra* note 9, at 184-85.

176. See Frankel, *supra* note 110, at 801.



material to the founding of a fiduciary mandate.<sup>177</sup> When a beneficiary has a powerful moral expectancy, and so a recognizable moral stake in the formation of a mandate that is responsive to their (usually welfare-related) interests, the expectancy normally operates on the grantor or fiduciary as a matter of moral obligation.<sup>178</sup> It gives a grantor a moral reason to establish a fiduciary mandate for the benefit of the beneficiary and, additionally or alternatively, gives the fiduciary a moral reason to undertake it.<sup>179</sup>

## 2. *In Mandate Performance*

All fiduciary relationships center on mandates that call for performance.<sup>180</sup> Fiduciaries are not people who just happen to be in a position of influence over others. Rather, they are people with mandates to perform, being called to use judgment in the exercise of legal powers in pursuit of purposes established at law or by grantors.<sup>181</sup>

The performance of fiduciary mandates is shaped by power-conferring and duty-imposing rules.<sup>182</sup> Power-conferring rules make provision for variation of the terms on which a mandate will be performed.<sup>183</sup> They include rules governing the variation of contracts, charters, and other documents, as well as rules that stipulate the circumstances under which courts or a party (usually the beneficiary or grantor) can give binding directions to a fiduciary.<sup>184</sup>

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177. With the possible exception of children, whose need of parental care has been said to ground the law's default ascription of parental authority and responsibility to birth parents. See generally Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA.L. REV. 2401 (1995); Lionel Smith, *Parenthood Is a Fiduciary Relationship*, 70 U. TORONTO L.J. 395 (2020).

178. Cf. Peter Birks, *The Content of Fiduciary Obligation*, 34 ISR. L. REV. 3, 17-23 (2000) (defining levels of legal obligatory altruism).

179. Cf. *id.*

180. See Miller, *Identification*, *supra* note 1, at 382-83; Miller, *supra* note 18, at 38-40; Miller & Gold, *supra* note 119, at 516.

181. See Miller, *Identification*, *supra* note 1, at 382-83; Miller, *supra* note 18, at 38-40; Miller & Gold, *supra* note 119, at 516.

182. See *supra* Part I.E.

183. See Daniel Clarry, *Mandatory and Default Rules in Fiduciary Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 1, at 435, 435-41.

184. The latter are sometimes misleadingly characterized as a "fiduciary" duty rather than an example of a retained power relating to amendment or enforcement of mandate purposes. See, e.g., Alan R. Palmiter, *Duty of Obedience: The Forgotten Duty*, 55 N.Y.L. SCH. L. REV. 457 (2010-2011); Jeremy Benjamin, Note, *Reinvigorating Nonprofit Directors' Duty of Obedience*,

The duty-imposing rules with which we are concerned are those establishing fiduciary duties.

Turning now to the task of identifying the moral interests of various parties in mandate performance, we may begin again with grantors. The interests of grantors that are germane to the general and special morality of power-conferring rules remain salient for the duty-imposing rules (fiduciary duties) that constrain mandate performance. Duties of loyalty and care, in particular, make it more likely that a fiduciary will abide by the purposes that a grantor has stipulated for a mandate, and thus that a fiduciary will give effect to the grantor's intentions.<sup>185</sup> Duties that require respect for the intentions of grantors engage values that I identified with the general morality of fiduciary law, including those of freedom from domination (or negative liberty) and autonomy.<sup>186</sup> Relatedly, but not incidentally, these duties also serve to protect the values advanced by grantor choice as a matter of special morality (that is, the various specific commitments and pursuits of value that may be provided for by a grantor by way of conferral of a fiduciary mandate).<sup>187</sup> Whether objects valued by a grantor are realized will turn on mandate performance, and fiduciary duties are focusing devices, reminding fiduciaries that they are beholden to the grantor's choices in performing a mandate save and unless they resign from it.<sup>188</sup>

As for beneficiaries, the points made earlier about fiduciary duties responding, as a matter of general morality, to the value of freedom from domination holds for beneficiaries, too.<sup>189</sup> However, whereas in respect of grantors, the value of non-domination is primarily implicated in terms of respect for their intentions, in the case of beneficiaries it is chiefly a matter of the fiduciary's respect for the beneficiary's person and recognition that certain of the beneficiary's welfare interests have been entrusted to him.<sup>190</sup> Second,

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30 CARDOZO L. REV. 1677 (2009).

185. See Miller, *supra* note 18, at 41-42.

186. See *supra* note 116 and accompanying text; see also KELLER, *supra* note 81 (discussing the ethics of special responsibilities).

187. On autonomy and (moral) self-constitution, see generally RAZ, MORALITY, *supra* note 25; CHRISTINE M. KORSGAARD, SELF-CONSTITUTION (2009).

188. See Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty*, 34 J. CORP. L. 43, 45-49 (2008).

189. See *supra* note 116 and accompanying text.

190. See, e.g., Scott & Scott, *supra* note 177, at 2430-32.

beneficiaries have an interest in the realization of moral expectancies that arise or ripen on the establishment of a fiduciary mandate for their benefit.<sup>191</sup> Beneficiaries have different welfare interests at stake in different kinds of mandates, and the extent of their interests and claims to solicitude vary by mandate as well.<sup>192</sup> But all beneficiaries have an interest in well-founded expectancies being realized through due performance of mandates by fiduciaries.<sup>193</sup>

As a matter of special morality, the welfare interests of beneficiaries, for which provision may be made under a fiduciary mandate, and values, which give these interests their moral salience, will vary by mandate type (that is, the kinds of powers that may be conferred and objects specified for a mandate), as well as choices made by lawmakers or grantors in specifying mandate terms.<sup>194</sup> But whatever the beneficiary's interests, their position will be materially advanced or set back through mandate performance by a fiduciary, and so, in turn, the beneficiary will be protected by fiduciary duties to the extent that the latter require that the fiduciary focus on achieving mandate objects or purposes.<sup>195</sup>

Turning, finally, to fiduciaries, their interests in mandate performance correlate closely with those in formation. Fiduciaries who undertake a mandate for reason of their moral identification with the grantor or beneficiary may find moral fulfillment in sound performance.<sup>196</sup> Those who serve for the sake of fixed remuneration have an interest in continuing receipt of same and, in some cases, in performance-based compensation.<sup>197</sup> This being noted, one should not simply suppose that the relevant moral interests of fiduciaries will be advanced in proportion to their success in performance, much less that fiduciaries who look for it will always find moral fulfillment in their work when it is objectively successful. Indeed, a

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191. See Paul Faulkner, *Fiduciary Grounds and Reasons*, in FIDUCIARIES AND TRUST, *supra* note 7, at 17, 22-23.

192. See *id.* at 17.

193. See *Fiduciary Duties*, *supra* note 76, at 127 (noting that fiduciaries would not be entrusted with powers if the probable loss would exceed the value gained from the relationship).

194. See Miller & Gold, *supra* note 119, at 551-53; Miller, *Identification*, *supra* note 1, at 382.

195. See Miller & Gold, *supra* note 119, at 516.

196. See, e.g., Scott & Scott, *supra* note 177, at 2433.

197. See Frankel, *supra* note 110, at 811-12.

fiduciary may well find performance presents unexpected moral burdens—ones that threaten other, higher moral commitments.<sup>198</sup>

### 3. *In Mandate Termination*

With this in mind, we may now consider the interests of grantors, beneficiaries, and fiduciaries, respectively, in rules that enable and govern the termination of fiduciary relationships. A couple of preliminary observations: first, the power to terminate varies by type of mandate; and second, the exercise of such a power by a fiduciary is governed by their fiduciary duties.<sup>199</sup> In some fiduciary mandates (for example, those conferred upon agents), the grantor retains a power to unilaterally terminate the mandate.<sup>200</sup> In others (for example, those conferred on trustees), the grantor may lack this power, but a power of termination will lie with courts as a part of their equitable supervisory jurisdiction to regulate mandate performance.<sup>201</sup> Again, under some fiduciary mandates, beneficiaries will have the power to terminate a fiduciary or demand the windup of a mandate, or beneficiaries will have the right to petition a court for termination and replacement of a fiduciary or for windup of the mandate.<sup>202</sup> But, in other cases, beneficiaries will lack the power or right to petition for termination or windup.<sup>203</sup> Finally, ordinarily a fiduciary enjoys a liberal power to resign from, but not to terminate, a mandate, subject to compliance with duties of care and loyalty.<sup>204</sup> For example, a colorable resignation motivated by self-interest may

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198. See Andrew S. Gold, *Accommodating Loyalty*, in CONTRACT, STATUS, AND FIDUCIARY LAW, *supra* note 79, at 185, 187-92; Andrew S. Gold, *The Internal Limits on Fiduciary Loyalty*, 65 AM. J. JURISPRUDENCE 65, 72-74 (2020).

199. See generally Pearlie Koh, *Once a Director, Always a Fiduciary?*, 62 CAMBRIDGE L.J. 403 (2003).

200. See RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. c (AM. L. INST. 2006).

201. RESTATEMENT (THIRD) OF TRUSTS § 66 (AM. L. INST. 2003). See generally DANIEL CLARRY, THE SUPERVISORY JURISDICTION OVER TRUST ADMINISTRATION (2018).

202. See generally CLARRY, *supra* note 201.

203. For example, a single shareholder cannot unilaterally bring about the windup of a corporation with multiple shareholders, though equity provides for the right to petition for windup on equitable grounds. See Steven C. Bahls, *Resolving Shareholder Dissension: Selection of the Appropriate Equitable Remedy*, 15 J. CORP. L. 285, 295-98 (1990).

204. See Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209, 1224 n.39 (1995).

result in fiduciary liability for acts after resignation.<sup>205</sup> Similarly, a fiduciary who resigns from a mandate without taking due steps to ensure succession might face liability for damages suffered by a beneficiary.<sup>206</sup>

The power-conferring rules that enable termination and resignation from fiduciary mandates are, like those that enable formation, responsive to a variety of interests, some of which are salient as a matter of general morality, others as a matter of special morality. For example, when a grantor or beneficiary has a power to unilaterally terminate a mandate or the fiduciary's authorization under it, the power-conferring rule supports their respective autonomy interests (for example, the grantor's interest in effectuation of her intentions), but it also serves their interests in non-domination (a liberal power of exit here being a bulwark against an inherent risk of domination).<sup>207</sup> When courts have jurisdiction to remove and replace a fiduciary or to wind up a mandate, it is usually exercised to protect the interests of beneficiaries or grantors when self-protection is not viable.<sup>208</sup> Finally, the autonomy interests of fiduciaries support a wide power of unilateral resignation.

Each of the parties will also have interests in rules enabling liberal termination and resignation as a matter of special morality varying by mandate type. For example, a patient's power to withdraw consent to a treatment relationship has value not just as a function of an abstract autonomy interest but also in virtue of her specific moral interest in bodily integrity.<sup>209</sup> Similarly, in many contexts, the nature of a specific mandate, or what is required by way of performance, will mean that a fiduciary's power to resign serves specific freedoms, including freedom of religion and conscience.<sup>210</sup>

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205. See *Can. Aero Serv. v. O'Malley*, [1974] S.C.R. 592, 607, 613-16 (Can.).

206. See Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367, 417-19 (1992).

207. On the importance of liberal powers of exit for members of organizations, see generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

208. See generally Nigel Furey, *The Statutory Protection of Minority Shareholders in the United Kingdom*, 22 WAKE FOREST L. REV. 81 (1987) (discussing the history of the windup remedy and shareholder protection in English law); Alvin E. Evans, *The Termination of Trusts*, 37 YALE L.J. 1070 (1927-1928) (discussing reasons for terminating trusts).

209. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990).

210. For discussion in the context of lawyers, see generally DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* (2007).

Finally, turning to the duty-imposing rules (fiduciary duties) that condition resignation by limiting its effects on liability, here it may simply be observed that equity's refusal to countenance opportunistic resignation protects the interests of grantors and beneficiaries in faithful fiduciary representation.<sup>211</sup> Equity will recognize as effective the exercise of a power of resignation in that the fiduciary will be deemed to have forfeited authority enjoyed under the mandate, but will insist that the fiduciary remains answerable for liabilities sought to be circumvented through the expedient of resignation.<sup>212</sup>

### *B. Interests of Third Parties*

The formation, performance, and termination of fiduciary mandates can implicate the interests of third parties in a variety of ways. By third parties, I mean individual persons or definite subcategories of persons other than parties to a fiduciary relationship. The subcategories of persons are those who come to be in contemplation of law by virtue of the frequency of their interaction with parties and are presumed to have some commonality of interest. Examples include involuntary creditors<sup>213</sup> and bona fide purchasers for value.<sup>214</sup>

#### *1. In Mandate Formation and Termination*

Generally speaking, the interests of third parties are implicated in two ways by the power-conferring rules that enable the formation and termination of fiduciary mandates and by the duties that constrain performance by fiduciaries. The interests of third parties are implicated in these rules with respect to agency and accountability.

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211. See Koh, *supra* note 199, at 424-26.

212. See *id.* at 426-27, 431.

213. See generally Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887 (1994); Hanoeh Dagan, *Restitution in Bankruptcy: Why All Involuntary Creditors Should Be Preferred*, 78 AM. BANKR. L.J. 247 (2004).

214. See generally *Pilcher v. Rawlins* [1872] 7 Ch. App. 259 (Eng.); Peter Jaffey, *The Nature of Knowing Receipt*, 15 TRUST L. INT'L 151 (2001); Aruna Nair & Irit Samet, *What Can 'Equity's Darling' Tell Us About Equity?*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY, *supra* note 87, at 264.

Briefly, if a third party is to interact—and so, to exercise personal agency—with a party to a fiduciary relationship with full awareness of the legal consequences of his actions, he will need to know with whom he is dealing and on what basis.<sup>215</sup> Because fiduciary relationships entail representation, they present inherent risks to the autonomy interests of third parties; a third party, unaware that he is dealing with a person acting in a fiduciary capacity, may falsely assume otherwise (that is, that the dealings are direct ones) or fail to make inquiries before acting so as to irrevocably change his normative position.<sup>216</sup>

Furthermore, the establishment of a fiduciary mandate will sometimes—due to the combined effect of rules providing for artificial personality, agency, and limited liability—significantly impact accountability. In some circumstances, a third party might be barred from seeking redress from a person who wronged them (for example, a fiduciary) and be required to seek redress from another person of whom they had no knowledge and with whom they had no direct interaction (for example, a grantor or beneficiary).<sup>217</sup> In other cases, a third party might be without an avenue of recourse for a wrong, as when the asset partitioning effect of a rule is such as to place beyond reach resources that would otherwise be available to satisfy a claim.<sup>218</sup> In either case, the third party will be disabled from holding accountable a person who would otherwise be answerable at law and who might be morally answerable for a wrong.

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215. As exemplified in treatment of liability under pre-incorporation contracts. See Nathan Issacs, *The Promoter: A Legislative Problem*, 38 HARV. L. REV. 887, 891-93 (1925); Eddie R. Flores, Note, *The Case for Eliminating Promoter Liability on Preincorporation Agreements*, 32 ARIZ. L. REV. 405, 405-08 (1990); Wilfred M. Estey, *Pre-incorporation Contracts: The Fog Is Finally Lifting*, 33 CAN. BUS. L.J. 3 (2000). See generally Michael J. Whincop, *Of Dragons and Horses: Filling Gaps in Pre-incorporation Contracts*, 12 J. CONT. L. 223 (1998).

216. Cf. Miller & Gold, *supra* note 119, at 540.

217. For example, the corporate doctrine of limited liability may shield tortfeasor directors from individual suit. See Alan Schwartz, *Product Liability, Corporate Structure, and Bankruptcy: Toxic Substances and the Remote Risk Relationship*, 14 J. LEGAL STUD. 689, 714-15 (1985) (discussing how the concept of limited liability may cause firm owners to “externalize tort risks to victims”); Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1880 (1991) (arguing that limited liability is not defensible in relation to corporate torts).

218. See, e.g., Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 438, 466 (1998); Robert H. Sitkoff, *Trust Law as Fiduciary Governance Plus Asset Partitioning*, in *THE WORLDS OF THE TRUST* 428, 436 (Lionel Smith ed., 2013).

Distinguishing impact on agency from that on accountability is helpful in disentangling third-party interests.<sup>219</sup> Given that fiduciary relationships impact third parties largely through the alteration of default rules pertaining to personal agency and accountability, it should be unsurprising that, as a matter of general morality, third-party interests at formation and termination coalesce around notice<sup>220</sup> and self-help.<sup>221</sup> By default, individuals are assumed to act in legally consequential ways on the footing of their own personality and to be personally accountable for their acts on this basis (that is, on the basis that their acts and associated liabilities are borne personally).<sup>222</sup> Many fiduciary relationships are supported by rules that alter these defaults, in different ways, in order to enable personal representation (that is, the execution of a mandate under which the fiduciary acts for and on behalf of others).<sup>223</sup>

As a matter of general morality, voluntary creditors and others who interact willingly with a party to a fiduciary relationship have interests—sounding in agency and accountability—in knowing whether default rules that govern interpersonal interactions are applicable or instead have been superseded or modified by rules enabling fiduciary representation.<sup>224</sup> These interests are generally well served by rules promoting notice (for example, those requiring the use of signifiers or other tokens).<sup>225</sup> But notice is an imperfect salve in a world in which much legally consequential conduct is not, and cannot reasonably be expected to be, foregrounded by careful deliberation and negotiation. In many, if not most, of our

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219. For general analysis of equity's treatment of third parties, see Ben McFarlane & Andreas Televantos, *Third Party Effects in Private Law: Form and Function*, in 1 OXFORD STUDIES IN PRIVATE LAW THEORY 107 (Paul B. Miller & John Oberdiek eds., 2020).

220. See Joseph R. Long, *Notice in Equity*, 34 HARV. L. REV. 137, 138 (1920).

221. See Janet O'Sullivan, *Rescission as a Self-Help Remedy: A Critical Analysis*, 59 CAMBRIDGE L.J. 509, 511-12, 531-32, 542 (2000).

222. See Miller & Gold, *supra* note 155.

223. See generally *id.*; Paul B. Miller, *Corporations*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW (Andrew S. Gold et al. eds., 2020). Note, however, that fiduciaries are not invariably granted the authority to bind those for whom they act (for example, physicians and other professional fiduciaries usually have a more limited form of authority to act relative to the person of the beneficiary or her affairs). See Elaine B. Krasik, Comment, *The Role of the Family in Medical Decisionmaking for Incompetent Adult Patients: A Historical Perspective and Case Analysis*, 48 U. PITT. L. REV. 539, 561-62 (1987).

224. See Frankel, *supra* note 204, at 1246 n.106.

225. See *id.*; see also Long, *supra* note 220, at 140.



interactions with others, we trust in appearances and assume the continuing applicability of default rules. The same holds true for third parties interacting with persons who might be parties to a fiduciary relationship.<sup>226</sup> Thus, third parties without actual or constructive notice have moral interests in being protected in their reliance on default rules governing interpersonal interactions that would apply absent the existence of a fiduciary relationship.

The moral calculus is different when the interactions affecting a third party are nonvoluntary. Victims of torts and crimes receive little to no protection from rules requiring notice. Instead, their moral interests, such as protection from and recompense for harm, are primarily served by restoration of default rules governing interpersonal accountability for tortious and criminal wrongs.<sup>227</sup>

## 2. *In Mandate Performance*

Whether or not third parties interact with a party to a subsisting fiduciary relationship on a voluntary basis, they will have a general moral interest in fiduciaries taking due notice of their rights and reasonable expectations in the performance of a fiduciary mandate. Relatedly, they have reason to be concerned about harm and other setbacks to their interests by a fiduciary's overestimation of what is required by way of compliance with fiduciary duties (for example, mandate performance involving morally blind or blinkered loyalty to a grantor or beneficiary).<sup>228</sup> These considerations support side constraints that make fiduciaries liable for avoidable harms suffered by third parties not justified or excused by fiduciary duties. Alternatively, they may support fiduciary standards of conduct that give fiduciaries discretion to act in cognizance of the moral interests of third parties.<sup>229</sup>

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226. See Frankel, *supra* note 204, at 1246 n.106.

227. See Criddle, *supra* note 15, at 1019.

228. This is exemplified in the debate over zealous advocacy of client interests that involves immoral or inequitable conduct by lawyers. See generally Tim Dare, *Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers*, 7 LEGAL ETHICS 24 (2004); David Luban, *Fiduciary Legal Ethics, Zeal, and Moral Activism*, 33 GEO. J. LEGAL ETHICS 275 (2020).

229. For analysis of the discretion afforded to corporate directors under Delaware corporate fiduciary law, see generally Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005).

### 3. *As a Matter of Special Morality*

The nature and moral salience of third-party interests varies to some extent by type of fiduciary mandate. For example, the division of legal and equitable title, or the presence of uniform equitable constraints on legal title,<sup>230</sup> that characterizes fiduciary administration of trust property has a peculiar set of implications for conveyancing that can, and routinely does, impact third parties in ways not captured by the considerations of general morality noted above.<sup>231</sup> The same holds true for third parties in their interactions with fiduciaries in other contexts, whether employees of corporations<sup>232</sup> or family members affected by substitute decision-making in healthcare.<sup>233</sup> In each case, to fully appreciate the morality of the position of the third party, one must understand how their interests are implicated by a mandate of a given type.

### C. *Interests of the General Public*

The moral stakes held by the general public in fiduciary relationships are disparate but relate primarily to the aggregate moral impact<sup>234</sup> of mandate formation and performance.

In thinking about the moral impact of legal rules, care must be taken to distinguish two ways in which legal rules are morally consequential on a society-wide basis.<sup>235</sup> One is a function of the

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230. On the debate over how best to characterize the basis on which trustees hold title to trust property, and the equitable interest of beneficiaries in the latter, see generally Ben McFarlane & Robert Stevens, *The Nature of Equitable Property*, 4 J. EQUITY 32 (2010) and J.E. Penner, *The (True) Nature of a Beneficiary's Equitable Proprietary Interest Under a Trust*, 27 CAN. J.L. & JURIS. 473 (2014).

231. See generally McFarlane & Televantos, *supra* note 219; Percy Bordwell, *Equity and the Law of Property*, 20 IOWA L. REV. 1 (1934).

232. See Aditi Bagchi, *Exit, Choice, and Employee Loyalty*, in CONTRACT, STATUS, AND FIDUCIARY LAW, *supra* note 79, at 271, 279, 284 (arguing that mandatory terms imposed in employment contracts for the benefit of third parties advance public policy interests).

233. See generally Krasik, *supra* note 223; HILDE LINDEMANN NELSON & JAMES LINDEMANN NELSON, *THE PATIENT IN THE FAMILY* (1995).

234. By aggregate moral impact, I mean the society-wide moral upshots (moral goods and harms) of power-conferring and duty-imposing rules implicated in fiduciary law. These include, but are not limited to, effects on social utility. See, e.g., *The History of Utilitarianism*, STAN. ENCYC. OF PHIL. (Sept. 22, 2014), <https://plato.stanford.edu/entries/utilitarianism-history/> [<https://perma.cc/J9GU-FGLM>].

235. Cf. Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L.

aggregate impact of a rule on those whose personal interests are affected, for better and for worse, by reliance on and use of the rule, including via formal and informal enforcement. The public interest here is indirect, being a function of whether, on the whole, fiduciary relationships succeed in advancing or protecting the interests of individuals.<sup>236</sup> The second is a matter of the impact of a rule on the fate of public and quasi-public goods.<sup>237</sup> Here, the public interest is direct, being a function of whether certain types of fiduciary relationships—those featuring mandates in which stipulated purposes are matters of public rather than private advantage<sup>238</sup>—succeed by virtue of the rules that enable and constrain them.<sup>239</sup> In these relationships, mandate performance is a matter of securing, producing, or distributing public and quasi-public goods.

### 1. *In Mandate Formation and Termination*

With respect to the indirect public interest in power-conferring rules that enable the formation of mandates established for private advantage, the fate of the public interest is a matter of the aggregate moral good and harm that these rules bring about for parties and third parties.<sup>240</sup> Moral good encompasses protection and

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REV. 1717, 1718 (1982) (“[T]he intellectual and institutional constraints on common law adjudication require one to be very cautious in attributing major social and economic consequences to common law rules.”); Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1605-06 (2000) (discussing approaches “capable of accounting for the influences of legal rules on social norms and individual values”).

236. For example, whether the various legal forms that enable fiduciary administration of the affairs and property of incapable persons succeed in enabling satisfaction of moral obligations of care for the vulnerable, or whether those that enable fiduciary administration of property of persons of full capacity succeed in enhancing the autonomy of persons relieved of the burden of judgment passed on to a fiduciary, and whether they result in a net enhancement of beneficiaries’ personal welfare.

237. See generally BRIAN BARRY, *POLITICAL ARGUMENT* (1965); ELINOR OSTROM, *GOVERNING THE COMMONS* (1990); Philip Pettit, *The Common Good*, in *JUSTICE AND DEMOCRACY*, at 150 (Keith Dowding et al. eds., 2004).

238. For example, charitable trusts as well as governmental and nonprofit corporations.

239. See Miller & Gold, *supra* note 119, at 533-35.

240. It will be recalled that moral advantage and disadvantage are a function of the advancement of, or setback to, the morally salient interests of parties and third parties. See *supra* Part I. It should also be noted that the moral calculus will differ by relationship type to the extent that parties and third parties have different moral interests in different kinds of fiduciary mandate, these being a matter of the special morality of same. See *supra* Part II.C.

realization of moral values that lend the interests of persons in mandate formation their salience, including the welfare effects of relationship formation for the parties, enhancement or protection of their autonomy, enablement of effective cooperation, and nourishment of filial bonds. Moral harm encompasses the setback of moral values that lend interests their salience, including those just noted (which typically relate to the parties) as well as those which underlie the agency- and accountability-related moral interests of third parties.

By contrast, the direct public interest in power-conferring rules that enable the formation of mandates established for public advantage is a function of the aggregate impact of enabling (a) private provision for matters of public advantage (for example, through settlement of charitable trusts and organizations);<sup>241</sup> or (b) limited delegation of governmental functions to private fiduciaries.<sup>242</sup> Assuming, for the sake of argument, that fiduciary administration is an effective way in which to safeguard, produce, and distribute public and quasi-public goods, and that it does not crowd out or inhibit other mechanisms of administration, the public will have an interest in rules that enable both kinds of mandate.

## *2. In Mandate Performance*

The indirect public interest in performance of a given kind of fiduciary mandate, and in the duty-imposing rules that safeguard it, will depend on whether anticipated personal moral advantages of mandate performance for the parties are realized, and if so, to what extent and at what rate, factored in light of moral setbacks suffered by parties and third parties.

Whether the direct public interest is served will depend almost entirely on whether a mandate for fiduciary administration of public or quasi-public goods has been successful with respect to the protection, production, and distribution of same. And this will, in part, be a matter of the effectiveness of fiduciary duties in promoting due

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241. See generally MATTHEW HARDING, CHARITY LAW AND THE LIBERAL STATE (2014); KATHRYN CHAN, THE PUBLIC-PRIVATE NATURE OF CHARITY LAW (2016).

242. See Miller & Gold, *supra* note 119, at 531-35. See generally John Barratt, *Public Trusts*, 69 MOD. L. REV. 514 (2006).

performance of these mandates.<sup>243</sup> If apt standards of conduct have been specified, compliance with these standards is robust, and enforcement is reasonably effective, fiduciary administration is likely to be morally beneficial to the public. But if standards are poorly formulated, enforcement is weak, or the culture of compliance is poor, fiduciary administration is likely to be morally disadvantageous or harmful.

### CONCLUSION

In other work, I have noted the need for attention to normative questions about fiduciary law.<sup>244</sup> In this Article, I have provided a framework within which these questions might be identified and pursued. My aim has been to develop a schema that supplies clarity but is equal to the conceptual complexity and doctrinal variegation that distinguishes fiduciary law from other heads of legal and equitable obligation.

The framework distinguishes two kinds of legal rules—duty-imposing and power-conferring, respectively—that are prevalent in fiduciary law, and urges analysis that draws on currents in the general jurisprudential literature on law and practical reason.

The framework clarifies that the legal rules through which fiduciary law operates are characterized by structural biplanarity—that is, the interaction of rules operating at two different levels.<sup>245</sup> Fiduciary duty-imposing rules supplied by equity reveal a consistent conceptual structure but arise and function relative to differing sets of nonfiduciary power-conferring rules.<sup>246</sup> The latter are, in turn, constitutive of primary legal forms of relationship and association. I have suggested that structural biplanarity is material to the morality of fiduciary law in two ways. First, it implies that the morality of the field taken in whole encompasses considerations of general morality (that is, those germane to all fiduciary

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243. For general discussion and analysis of principles common to private and public fiduciary administration, see generally Miller, *supra* note 76.

244. See generally Paul B. Miller, *New Frontiers in Private Fiduciary Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 1, at 891.

245. See *supra* Part II.

246. See *supra* Part II.

relationships)<sup>247</sup> as well as considerations of special morality (that is, those germane to the power-conferring rules enabling of particular types of fiduciary relationships).<sup>248</sup> Second, it implies that the morality of fiduciary law is normatively complex (varying in accordance with the special morality of different relationship types) and suggests that it is normatively pluralistic (characterized by its responsiveness to more than one, and often several, values).<sup>249</sup>

The framework also explains that the morality of fiduciary law is understood in relational terms, insofar as fiduciary duties are premised on fiduciary relationships and aim to secure integrity in the performance of fiduciary mandates.<sup>250</sup> It is for this reason that I outline loci of value in fiduciary relationships—namely, the morally salient interests that persons might have in the formation, performance, and termination of fiduciary relationships.<sup>251</sup>

My ambition has been to provide a structure for analysis of the morality of fiduciary law. But I want to be explicit about the limits of this ambition, particularly because acknowledgement of them suggests avenues for future scholarship. There are three points, in particular, that I would like to emphasize.

The first is that I have not here attempted to exhaustively identify or argue for the values that animate the morality of fiduciary law. As to general morality, I have simply argued that it is plausible to think—as others have suggested—that non-domination, welfare, and autonomy are core values, and I have noted further that there is reason to doubt whether any one of these values alone suffices to explain or justify our law. As to special morality, it would be impossible to delineate in so short a piece the morality of even a small subset of fiduciary relationship types. And, so, I have been contented here simply to point out that (a) each type or subtype of fiduciary relationship implicates its own special morality and (b) that a theorist cannot defensibly ignore considerations of special morality given that fiduciary duties secure the integrity of

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247. *See supra* Part II.B.

248. *See supra* Part II.C.

249. *See supra* Part II.D.

250. *See supra* Part I.A.

251. *See supra* Part III.

representation in the relationship types to which they have been attached by equity.

The second point is that I have not differentiated interpretive from critical analyses of core normative issues in the field. And, so, I have not claimed to have uncovered the posited morality of fiduciary law (the values to which fiduciary law *is* responsive). Nor have I undertaken criticism of fiduciary law and its posited morality (the values to which fiduciary law ought to be responsive). Rather, I intend the framework to be used to identify what matters (morally) to fiduciary law, whether to our appreciation of the justification of the rules we have or to our understanding of the ways in which extant rules require reform.

The third and last point is that I have focused on the nature and morality of legal rules in fiduciary law without saying much about how they may be understood relative to functions performed by, and values served in, equity more generally. In other work, I have commented on how one might understand fiduciary law relative to the general functions of equity (that is, its correction and supplementation of law).<sup>252</sup> But I do not there, or here, consider whether, and if so, how the general morality of fiduciary law squares with leading analyses of the morality of equity, whether in terms of conscience,<sup>253</sup> opportunism,<sup>254</sup> equality,<sup>255</sup> or the rule of law.<sup>256</sup> These questions beckon though, like others,<sup>257</sup> I would caution that equity—understood as a complex ancillary system of law—is just as unlikely to reward reductive normative analysis as are its products, fiduciary law being just one example.

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252. See generally Miller, *supra* note 87.

253. See generally IRIT SAMET, EQUITY (2018).

254. See generally Smith, *supra* note 103.

255. See generally Dennis Klimchuk, *Aristotle at the Foundations of the Law of Equity*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY, *supra* note 87, at 32.

256. See generally Lawrence B. Solum, *Equity and the Rule of Law*, 36 NOMOS 120 (1994); Matthew Harding, *Equity and the Rule of Law*, 132 LAW Q. REV. 278 (2016).

257. See generally Lionel D. Smith, *Equity Is Not a Single Thing*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY, *supra* note 87, at 144.