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Ethan Leib

*Fordham University School of Law*, ethan.leib@law.fordham.edu

Stephen Galoob

*University of Tulsa College of Law*, stephen-galoob@utulsa.edu

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# INTENTIONS, COMPLIANCE, AND FIDUCIARY OBLIGATIONS\*

Stephen R. Galoob  
*University of Tulsa College of Law*  
Ethan J. Leib  
*Fordham Law School*

This essay investigates the structure of fiduciary obligations, specifically the obligation of loyalty. Fiduciary obligations differ from promissory obligations with respect to the possibility of “accidental compliance.” Promissory obligations can be satisfied through behavior that conforms to a promise, even if that behavior is done for inappropriate reasons. By contrast, fiduciary loyalty necessarily has an intentional dimension, one that prevents satisfaction through accidental compliance. The intentional dimension of fiduciary loyalty is best described by what we call the “shaping” account. This account both explains the conscientiousness that loyalty demands and improves on other accounts of the intentional dimension of loyalty. Our analysis challenges two of the most prominent ways of conceptualizing fiduciary obligations. “Contractarianism” configures fiduciary obligations as a species of contractual duties. The view that we call “proscriptivism” reduces fiduciary obligations to the juridical prohibitions that apply to fiduciaries. Neither of these approaches is satisfactory, because each neglects the intentional dimension of fiduciary loyalty.

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## I. INTRODUCTION

There is a prominent tradition, sometimes called “contractarianism,” that reduces fiduciary obligations to promissory obligations.<sup>1</sup> Debates over the

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1. See Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 38 J.L. & ECON. 438 (1993); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995); Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434 (1998). Our terminology here conflates contract-based

contractarian approach raise questions about the nature of fiduciary obligations. Does the structure of fiduciary obligation ultimately differ from that of promissory obligation? Contractarianism succeeds as an account of fiduciary obligation only if fiduciary and promissory obligations have the same underlying structure.

We argue that there is at least one important structural difference between fiduciary obligations and promissory obligations: fiduciary obligations have intentional requirements that promissory obligations do not necessarily have. A fiduciary obligation characteristically shapes the fiduciary's deliberation vis-à-vis her beneficiary in a particular way. A fiduciary whose deliberation is not shaped in this way does not live up to her fiduciary obligation, no matter what else she does. Thus the fiduciary duty of loyalty does not admit of what we call *accidental compliance*: it is not satisfied by actions done for inappropriate or illicit reasons.

By contrast, promissory obligations do not have the same intentional requirements. There is nothing incoherent about inadvertently keeping a promise. Your promise need not shape your deliberation in any particular way in order for your action to count as promise-keeping. Therefore, intentions matter to the satisfaction of fiduciary obligations in a way that they do not matter to promissory obligations. You can accidentally keep a promise, but you cannot accidentally be loyal.

Our analysis proceeds in three parts. Section II explores the asymmetry between promissory obligations and the fiduciary obligation of loyalty with respect to accidental compliance. As normative concepts, loyalty does not admit of accidental compliance, while promise-keeping does.

This asymmetry indicates that loyalty has a unique intentional dimension, which we describe in more detail in Section III. There, we provide a model of the intentional dimension of fiduciary loyalty (which we call the "shaping" account) and demonstrate its superiority over two alternatives, the "adopting" and "aiming" accounts.

Section IV utilizes the "shaping" account to critique two prominent strategies that reduce fiduciary obligations to other normative phenomena. The contractarian approach, which conceives of fiduciary obligations as a species of contractual obligations, is misguided. Fiduciary obligations cannot be reduced to promissory obligations because the former have at least one structural feature that the latter do not have. A second strategy, which we term the "proscriptivist" approach,<sup>2</sup> reduces loyalty to the legal "no conflict" and "no profit" rules that constrain fiduciaries. This approach also fails to capture fiduciary obligations as normative phenomena. One can successfully (but accidentally) comply with these proscriptive rules, while

accounts with promise-based accounts, which some theorists separate. See, e.g., JONATHAN R. MACEY, *CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN* (2010).

2. See Matthew Conaglen, *The Nature and Function of Fiduciary Loyalty*, 121 *LAW Q. REV.* 452, 459–460 (2005); Darryn Jensen, *Prescription and Proscription in Fiduciary Obligations*, 21 *KING'S L.J.* 333 (2010).

fiduciary loyalty does not admit of accidental compliance. In other words, some actions that do not violate these rules nevertheless fail to be loyal.

## II. ACCIDENTAL COMPLIANCE: AN ASYMMETRY BETWEEN PROMISSORY AND FIDUCIARY OBLIGATIONS

Subsection A first lays out some preliminaries of our analysis. Subsection B argues that accidentally complying with a promissory obligation is plausible, while accidentally complying with a fiduciary obligation is not.

### A. Preliminaries

Before offering our argument, we should clarify our terminology and methodology, then motivate our inquiry. Our main aim is to account for promises and fiduciary obligations conceptually, as features of our “normative landscape.”<sup>3</sup> Although we offer doctrinal examples in our discussion, it is entirely possible that the juridical treatment of these phenomena deviates from their more fundamental normative structure. Doctrine sometimes only hints at the underlying normative terrain. There are rule-of-law values and pragmatic considerations of institutional design that weigh against the perfect correspondence between legal doctrine and the underlying normative phenomenon. To wit, it is routine to think of fiduciary law as exhorting moral behavior<sup>4</sup> or involving the underenforcement of moral norms.<sup>5</sup> Contract law similarly invokes norms of promise-keeping without necessarily being coextensive with promissory morality. One such example is that promises can be unilateral and gratuitous, but the law does not enforce promises without bilateral consideration.<sup>6</sup>

Ultimately, the prospect of a discrepancy between legal doctrine and the core features of normative phenomena should not be surprising. However, there would be plausible reason for concern if the juridical instantiation of the normative phenomena did violence to the underlying normative phenomena—for example, if consistently adhering to the norms of contract made it difficult or impossible for one to be a promise-keeper.<sup>7</sup> Our analysis supposes that there is and should be a connection between the institutional and noninstitutional versions of certain normative concepts. However, we do not offer a sustained defense of this assumption nor do we think that this relationship between normative and juridical phenomena need be one of identity. While doctrine only hints at an underlying normative terrain,

3. See DAVID OWENS, *SHAPING THE NORMATIVE LANDSCAPE* (2012).

4. See, e.g., Robert C. Clark, *Agency Costs versus Fiduciary Duties*, in PRINCIPALS AND AGENTS 55, 75–76 (John W. Pratt & Richard J. Zeckhauser eds., 1985).

5. See Easterbrook & Fischel, *supra* note 1, at 427, 428 n.6.

6. See RESTATEMENT (SECOND) OF CONTRACTS §17 (1982).

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

there *is* a normative terrain of obligations that arise out of relationships of entrustment and vulnerability. Our project is to explore this terrain.

Promises and fiduciary relationships both characteristically generate obligations. Fiduciary obligations arise out of fiduciary relationships, such as the trustee-beneficiary relationship or the attorney-client relationship. While there are many aspects to fiduciary obligation, the core duties are generally seen as loyalty and care. The duty of loyalty is usually thought to require the fiduciary to pursue the interests of her beneficiary above her own.<sup>8</sup> The duty of care requires acting with reasonable diligence and prudence on behalf of the beneficiary.<sup>9</sup> Most fiduciary scholars identify loyalty as the paradigmatic fiduciary obligation;<sup>10</sup> we adopt this convention and focus our attention on the criteria for and structure of fiduciary loyalty.<sup>11</sup>

Many commentators analyze the connection between promissory and fiduciary obligations in terms of formation, content, or available remedies. In what follows, however, we mostly ignore these issues. Instead, we focus on satisfaction, or the conditions under which someone can be said to have lived up to or discharged the obligations that apply to her. Thus we use the phrase “A kept her promise to B” instead of the awkward (but more accurate) “A satisfied her promissory obligations to B regarding  $\Phi$ ’ing.” Likewise, we take the phrase “A acted loyally toward B” as equivalent to “A, in  $\Phi$ ’ing, satisfied her duty of loyalty toward B.”

Judgments about satisfaction and nonsatisfaction can reveal the contours of promissory and fiduciary obligations in the same way that evidence about “reactive attitudes” (like resentment or indignation) are said to reveal the content of moral principles.<sup>12</sup> Moral prohibitions are characteristically associated with reactive attitudes, which both respond to and criticize the violation of moral norms. Thus, examining when people react with resentment or indignation to the conduct of others provides some insight into what kinds of actions are morally prohibited. Similarly, violating an

8. See, e.g., *Bayer v. Beran*, 49 N.Y.S.2d 2, 5 (Sup. Ct. 1944); *Birnbaum v. Birnbaum*, 539 N.E.2d 574, 576 (N.Y. 1989).

9. See TAMAR FRANKEL, *FIDUCIARY LAW* (2011), at 169–173.

10. See, e.g., Paul Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969 (2013); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1 (1975).

11. Whether our conclusions about loyalty’s intentional dimension apply to the duty of care depends on whether “care” is defined in terms of an objective standard (behaving in the way that a careful person would behave) or a more subjective standard (being careful). To preview our later argument about loyalty, it seems possible to be careful accidentally if an objective standard applies, and impossible to be careful accidentally if a subjective standard applies. We largely sidestep this issue in this article. Some legal contexts (e.g., corporate law) define carefulness in terms of an objective standard, while others (e.g., the law governing lawyers) seem to define it in a more subjective way. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §16(1) (requiring a lawyer’s representation to “proceed in a manner reasonably calculated to advance a client’s lawful objectives, as defined by the client after consultation”).

12. E.g., R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* (1994); P.F. Strawson, *Freedom and Resentment*, 48 PROC. BRIT. ACAD. 1 (1960); STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* (2006).

obligation invites a distinctive form of criticism of the violator.<sup>13</sup> That a particular mode of criticizing someone's actions seems appropriate suggests that these actions violate her obligations. If such criticism seems inappropriate, then it seems plausible to say that she has lived up to her obligation.<sup>14</sup>

## B. Conformity and Compliance; Or, Why Loyalty Is Not Promise-Keeping

The requirements for satisfying a fiduciary obligation differ from the requirements for satisfying a promissory obligation. In particular, there is an asymmetry between promise-keeping and loyalty regarding the possibility of what we call *accidental compliance*.

To demonstrate what accidental compliance means, consider Joseph Raz's distinction between conformity and compliance. For Raz, a person conforms to an obligation if she does what the obligation requires—that is, if her behavior matches the pattern specified in the obligation. By contrast, someone complies with an obligation when she acts for it. Compliance, then, not only requires conforming behavior but also has a further intentional dimension.<sup>15</sup> We use the term “accidental compliance” to describe a subset of actions that conform to but do not comply with an obligation; namely, ones where an agent's behavior matches the pattern specified by the obligation, but the obligation does not have the requisite influence on her deliberation to count as compliance.

We use the term “accidental” in the sense that some philosophers use the notion of deviant or “wayward” causation.<sup>16</sup> One way to interpret Gettier

13. For example, it licenses a particular grievance by the person to whom the obligation was directed. *See, e.g.*, Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 PHIL. & PUB. AFF. 119 (2003).

14. Because we address the intentional dimensions of promissory and fiduciary obligations specifically, one more preface is in order. Our discussion of the relevance of intention to compliance is neutral on the question of whether, *in general*, intention is central to determining the permissibility of an action. Our view is also neutral on whether intention generally determines the moral worth of an action. Rather, our inquiry concerns whether intention is fundamental to complying with certain kinds of obligations. One might assert that *in general*, intentions do not directly determine permissibility or moral value while maintaining that intentions matter to whether an action constitutes acting loyally or keeping a promise.

15. *See* JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (1999), at 178; Scott Hershovitz, *Legitimacy, Democracy, and Razian Authority*, 9 LEGAL THEORY 201 (2003); OWENS, *supra* note 3, at 15. Our distinction between these terms is at odds with common legal usage, which sees compliance and conformity as synonymous.

16. *See generally* Kieran Setiya, *Reasons and Causes*, 19 EUR. J. PHIL. 129, 135 (2011). Donald Davidson provides the following example of wayward causation:

A climber might want to rid himself of the weight and danger of holding another man on a rope, and he might know that by loosening his hold on the rope he could rid himself of the weight and danger. This belief and want might so unnerve him as to cause him to loosen his hold.

DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* (1980), at 73. In Davidson's example, the desire to be rid of the other man figures into the explanation of why the climber loosens his

problems,<sup>17</sup> for example, is as ruling out that justified true belief entails knowledge in cases where the connection between the justification and the formation of the belief is “accidental,” in particular, where an agent’s arrival at a correct belief does not proceed through the justification for that belief. Such cases are often said to exhibit “deviant” causation. “Accidental” for us has a similarly broad usage. It describes both the unwitting agent who does not specifically aim to comply with the obligation, as well as cases when an agent’s conforming behavior reflects bad faith toward either the principal or the obligation itself. We focus on the case of the unwitting agent, since if the asymmetry is reflected here, then it is presumably also reflected in the case of an “illicit” agent.

Promissory obligations seem capable of satisfaction through accidental compliance. To see how, consider the following example:

**Lucky Payer:** Abner promises to pay Barry five dollars on Tuesday. On what Abner believes to be Wednesday, he gives over the contents of his wallet (which contains a single bill that Abner believes to be a one-dollar bill) to Barry. Unbeknownst to Abner, it is actually Tuesday, and the bill in Abner’s wallet is actually a five-dollar bill.

We think Abner has kept his promise even though he didn’t mean to do so. Accidental compliance with a promissory obligation seems intelligible because promise-keeping is typically about conformity rather than compliance.<sup>18</sup> If you promise to  $\Phi$ , then you usually keep your promise if your behavior counts as  $\Phi$ ’ing. In general, *how* your behavior comes to overlap with the content of your promise does not matter to the question of *whether* you have kept your promise.

This is not to say definitively that promise-keeping lacks an intentional dimension. Intentions might be part of the content of a promise. If someone promises to look after your best interests in making a decision, then determining whether she has kept her promise will require some reference to her intentions as well as her behavior. Rather, our point is that promises are not always like this. They do not necessarily or routinely have intentional requirements. Where they do, they do so as part of the content of what is promised rather than because of a structural feature of promises.

If promises do not necessarily have an intentional component, then promissory obligations can be satisfied through either conformity or compliance. Consider the Lucky Payer case again. There are many ways to criticize Abner. We might think him inconsiderate, unreliable, a lout. But we do not

grip, but indirectly rather than in the standard way that reasons figure into the explanation of our actions.

17. See E. L. Gettier, *Is Justified True Belief Knowledge?*, 23 ANALYSIS 121 (1963).

18. Here we follow Raz and Herskovitz, who argue that “in general reasons are reasons for conformity and not compliance.” Herskovitz, *supra* note 15, at 202 n.4 (citing JOSEPH RAZ, *THE AUTHORITY OF LAW* (1979), at 179–182).

think it is appropriate to say that Abner has violated his core promissory obligation. Abner's actions seem to be promise-keeping because his behavior (paying five dollars on Tuesday) matches the content of his promise to Barry.

Our argument that accidental compliance satisfies promissory obligations is largely intuitive, although it has theoretical plausibility.<sup>19</sup> However, some theorists might dispute this argument and contend instead that there is an irreducibly intentional dimension to promise-keeping. For example, the defender of an instrumental account of the normativity of promises (which sees promises as significant insofar as they serve some other basic interest) might see an intentional dimension to promise-keeping as necessary to facilitate the central values served by promises. Something like this instrumentalist argument undergirds David Owens's contention that nonconscientious conformity with the terms of one's promise is not really promise-keeping.<sup>20</sup>

Consider also a noninstrumentalist account of promises such as T.M. Scanlon's, which establishes the normativity of promises in terms of the "value of assurance."<sup>21</sup> On such an approach, it is unclear whether behavior that conformed to but did not comply with the terms of a promise would be compatible with Scanlon's account of the principle of fidelity (what he calls "Principle F"), which explains both how promises can provide assurance and why they have normative significance.<sup>22</sup> Along these lines, Michael Pratt sees promises as characteristically forming a valuable kind of relationship, and "[m]erely to do as you said you would do is not to effect a relationship of any special value with me, except insofar as your doing what you said counts as the discharge of a duty that you owed to me."<sup>23</sup>

19. This plausibility arises out of the epistemic costs of attaching intentional requirements to obligations. If satisfying an obligation has an intentional dimension, then determining whether someone has lived up to her obligation is a complicated matter. It is not enough to look at the pattern of her behavior. We must also look to her deliberations or motivations, each of which is notoriously difficult to discern (perhaps even introspectively). These epistemic costs are not as daunting in the kinds of intimate settings where loyalty is most commonly invoked, as we argue below. However, given that promises apply to both intimate and arms-length transactions, these epistemic costs of monitoring might well be counterproductive. Thus it makes sense that a structural aspect of promises would not impose costs that only a subset of promises would find useful. Moreover, it seems possible to add intentional dimensions to promises, for example, by including deliberative requirements within the content of the promise or else undertaking another modality (like a vow or an oath) that more plausibly has an intentional dimension "off the shelf."

20. OWENS, *supra* note 3, at 90–91 (noting that conscientious agency requires respecting a promise by "giving it the right role in . . . deliberations," although respecting a promise does not necessarily involve fulfilling it); *id.* at 91–92 ("One who takes their promises at all seriously will sometimes fulfill, sometimes respect, and sometimes acknowledge them. Conscientiousness is a matter of degree and only someone who neither respects nor acknowledges promises and fulfils them by accident alone is totally devoid of it.")

21. See generally T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1998), at 302–309.

22. *Id.* Scanlon's invocation of fidelity transforms the focus of promise-keeping from mere behavior into something that resembles loyalty.

23. Michael G. Pratt, *Promises, Contract, and Voluntary Obligations*, 26 *LAW & PHIL.* 531, 569–70 (2007). Alternatively, one might argue that the accidental complier discharges her promissory obligation without living up to it. This seems to be Michael Stocker's position. See Michael



In addition to the intuitive and theoretical considerations in favor of our case, we think it is possible to answer the arguments that posit an intentional dimension to promise-keeping. However, one might say that it takes a theory to beat a theory, and we do not have a fully developed theory of promising to offer here. Thus we are reluctant to assert that those who deny the intelligibility of accidental promise-keeping (and by implication attribute an irreducibly intentional dimension to promissory obligations) are incorrect. Even if there is an intentional dimension to promise-keeping, though, our main claim about the asymmetry between promissory and fiduciary obligations can go forward. The asymmetry would exist (and the reductionist strategies we discuss in Section IV would still be problematic) if the intentional dimension of promise-keeping differed from the intentional dimension of loyalty.

In contrast with promissory obligations, the fiduciary's obligation of loyalty is not satisfied by accidental compliance. In other words, it does not seem possible to act loyally by accident. Consider the following hypothetical example:

**Dartboard Trustee:** Tammy Trustee is considering three courses of action on behalf of Bernice Beneficiary. Through her investigation, Tammy has learned that Option 1 would best advance Bernice's interests, while Options 2 and 3 would substantially set back Bernice's interests. To decide which course of action to take, Tammy fastens three sheets of paper on a dartboard, marked 1, 2, and 3. Tammy will undertake whichever course of action corresponds with the sheet on which the dart lands. Tammy's thrown dart hits the sheet marked 1, which corresponds to Option 1. Because of this, Tammy undertakes Option 1 on Bernice's behalf.

Stocker, *Intentions and Act Evaluations*, 67 J. PHIL. 589, 601 (1970) ("One can adequately and fully and completely discharge an obligation without performing a morally good act, without acting with or from a good, much less a conscientious, intention.")

However, Pratt ultimately understands accidental compliance to be a "discharge of a duty," and Stocker concedes the possibility of "full[] and complete[] discharge" without intentional requirements. Even Raz's conforming/complying distinction hints that conformity substantially satisfies promissory obligations: the promisee has no valid complaint and is owed no remedy if the promisor has conformed. Promises paradigmatically involve conveying objects, acting in certain ways, or bringing about states of affairs. If a promisor conveys, acts, or effectuates the relevant state of affairs, then she has kept the promise. Accidental compliance is a way of discharging one's obligation. Perhaps it is not the best way, but it is a way that both law and morality acknowledge.

Vows may work differently, as they seem to carry with them an implied demand of loyalty to a person or project. Imagine the spouse who sets out one night to engage in adultery with a new interest but whose date gets called away for an emergency surgery. From one perspective—the promissory perspective—the spouse did not violate the promise not to cheat (assuming that monogamy was promised). But the accidental compliance with the vow falls short of the spirit of fidelity. The marriage vow seems to require more than accidental compliance.

This feature of vows, however, counts in favor of the idea that ordinary promissory obligations do not have an intentional dimension. A vow can be seen as a way to add an intentional dimension to a promise, to ensure compliance when conformity is not enough. If promises had an intentional dimension "off the shelf," then this feature of vows would be otiose.

Has Tammy Trustee acted loyally toward Bernice Beneficiary? We think not. However, the Dartboard Trustee case parallels the Lucky Payer in several respects. In both scenarios, the protagonist's pattern of behavior conforms to the substantive requirements of the obligation. Abner takes the course of action that a promise-keeper would, and Tammy Trustee takes the course of action that a loyal trustee would. Yet both cases involve a deviant form of causation. There is a missing or nonstandard linkage between the protagonist's deliberation and his or her behavior. Yet we reach different verdicts: Abner keeps his promise, but Tammy Trustee does not act loyally.

There is doctrinal support for the view that loyalty has an intentional dimension, that a fiduciary does not satisfy her duty of loyalty by accidentally complying with it. As one court put it, the heart of loyalty is "an attitude, not a rule."<sup>24</sup> Another court found that a corporate director violated his fiduciary duty of good faith by "intentionally act[ing] with a purpose other than that of advancing the best interests of the corporation."<sup>25</sup>

These doctrinal tidbits raise a more fundamental issue: namely, that the notion of loyalty seems to have an intentional dimension "off the shelf." Loyalty is in part a term used to describe a set of behaviors. Certain patterns of behavior can by their very nature be incompatible with acting loyally.<sup>26</sup> However, loyalty also has an irreducibly intentional component. As Simon Keller notes:

The fact that you act towards something in the way that you would if you were loyal to it does not establish that you really are loyal to it. Whether or not you are loyal to something depends not only on what you do, but on how you are motivated.<sup>27</sup>

One cannot, then, unwittingly act loyally. Unwitting action is action done for no reason, and the unwitting agent would fail to act for the reasons (whatever they are) that ground loyalty. "Illicit" loyalty is also incoherent. If your behavior on behalf of a principal mirrors that of a loyal fiduciary, but you are motivated by a desire to subvert the interests of the principal, then you do not act loyally. Otherwise, the double agent who feigns allegiance to one principal in order to act on behalf of another would act loyally toward both.

Accordingly, there is an asymmetry between promise-keeping and loyalty. Acting loyally necessarily has an intentional dimension to it. As such, acci-

24. *Chiles v. Robertson*, 767 P.2d 903, 911–912 (Or. Ct. App. 1989).

25. *In re Disney*, 906 A.2d 27, 67 (Del. 2006). To be sure, there are plenty of cases holding that good faith and good intentions are not *sufficient* conditions for loyalty. See *Boardman v. Phipps*, [1967] 2 A.C. 46 (H.L.); *Regal (Hastings) v. Gulliver*, [1967] 2 A.C. 134n (H.L.). But our argument is that certain kinds of intentions are necessary rather than sufficient for acting loyally.

26. Thus we do not mean to assert that intentions are all that matter to loyalty. Our claim is merely that no full account of loyalty can deny its intentional components.

27. SIMON KELLER, *THE LIMITS OF LOYALTY* (2007), at 3.

dental compliance is insufficient to satisfy the fiduciary obligation of loyalty. Keeping a promise, by contrast, does not necessarily have an intentional dimension. Someone can keep her promise when her behavior conforms to its terms regardless of her intentional stance. Alternatively, if both promises and loyalty have intentional dimensions, then the intentional requirements for acting loyally are different from (and more exacting than) those for keeping a promise.

### III. THE INTENTIONAL DIMENSION OF FIDUCIARY LOYALTY

In this section, we describe the intentional dimension of fiduciary loyalty. Subsection A articulates a view that we term the “shaping” account. The shaping account both explains the asymmetry regarding accidental compliance that we identified in Section II and hones in on the structural differences between fiduciary and promissory obligations. Subsection B compares the shaping account to two extant candidates, which we term the “adopting” and the “aiming” accounts. The shaping account captures the strengths of these alternatives without inviting the objections against them.

#### A. The Shaping Account of Loyalty

Just what are the intentional requirements for fiduciary loyalty? We contend that fiduciary loyalty has a characteristically “shaping” function: *in deliberating, a loyal fiduciary robustly attributes nonderivative significance to her beneficiary’s interests.*<sup>28</sup> The exact shaping required for loyalty varies across fiduciary contexts. However, if a fiduciary’s deliberation is not shaped in appropriate ways, then she does not satisfy her obligation of loyalty.

The core of the shaping account is the robust attribution of nonderivative significance to the beneficiary’s interests. That a particular course of action would affect the beneficiary’s interests must matter to the fiduciary’s deliberation. It is, of course, possible to assign significance to a consideration without assigning it preemptive significance or incorporating it into one’s ends. This is the crux of Rawls’s notion of seeing people as “self-originating

28. Our description of the shaping account of loyalty is drawn from T.M. Scanlon’s account of the shaping function of wrongness. See T.M. Scanlon, *Wrongness and Reasons: A Re-examination*, in 2 OXFORD STUDIES IN METAETHICS 5 (Russ Shafer-Landau ed., 2007). For Scanlon, the judgment that an action is morally wrong should bear on the deliberation of a moral agent in a particular way. To judge that an action is wrong is to see it as “not providing eligible reasons for action,” rather than as “outweighed by some powerful ‘reason to be moral’ that is triggered by the fact that the action would be wrong.” *Id.* at 7–8. Scanlon’s formula identifies a deliberative or agential component to the moral value of action that is short of seeing intentions as directly determining whether an action is permissible. Ultimately, Scanlon contends, there would be something defective about an agent’s moral deliberation if it were not shaped by considerations of wrongness in this way.

sources of valid claims.”<sup>29</sup> One need not take the internal point of view regarding the claims of another in order to recognize the validity of those claims. Further, the question of a claim’s validity is distinct from the question of its weight. The shaping account requires that the beneficiary’s interests necessarily matter to the fiduciary’s practical deliberation, but it does not impose any particular weight that these interests must have (beyond having priority over the fiduciary’s self-interests).

Moreover, the beneficiary’s interests must matter to the fiduciary *solely in virtue of their connection with the beneficiary*. The importance of attributing nonderivative significance can be seen in the following example adapted from Bernard Williams.<sup>30</sup> After a shipwreck, a number of people are drowning, including an agent’s spouse. Various impartial moral schemes might justify the husband’s saving his wife rather than a stranger. For example, partiality towards one’s wife in a life-and-death scenario might contribute to the impartial value of marital relationships. Suppose that the agent saves his wife because of the impartial justification for spousal favoritism rather than because she is his wife. Here the husband’s pattern of behavior (i.e., rescuing his spouse) conforms to the demands of spousal loyalty because the husband assigns significance to his wife’s interests. Yet it is difficult to say that the husband has acted loyally. This difficulty arises because the husband attributes only derivative significance to his wife’s interests. Her interests matter only in virtue of the broader utilitarian justification for marital partiality. The husband would have, in Williams’s memorable phrase, “one thought too many,” since “it might have been hoped by someone (for instance, by his wife) that his motivating thought, fully spelled out, would be the thought that it was his wife, not that it was his wife and that in situations of this kind it is permissible to save one’s wife.”<sup>31</sup> Likewise, on the shaping account, loyalty requires not only that the beneficiary’s interests matter, but also that these interests matter because of their connection with the beneficiary and not in virtue of some other consideration.

Shaping also has a counterfactual element: regardless of what the beneficiary’s interests happen to be, if these interests were different, then the loyal fiduciary’s deliberative situation would be different as well. In other words, the beneficiary’s interests shape the fiduciary’s deliberation only if the fiduciary is disposed to revise her deliberation in accordance with changes in the beneficiary’s interests. This robustness requirement rules out cases of accidental compliance in which the beneficiary’s interests (formulated in a particular way) happen to matter to the fiduciary but would not matter

29. See John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 543 (1980) (construing people as “self-originating sources of claims” to mean that “their claims carry weight on their own without being derived from prior duties or obligations owed to society or to other persons, or, finally, as derived from, or assigned to, their particular social role”).

30. See BERNARD WILLIAMS, *Persons, Character, and Morality*, in MORAL LUCK 18 (1982).

31. *Id.* For Williams, one major shortcoming of utilitarianism is that its theory of value implies that only considerations of welfare can have nonderivative significance; everything else can matter only derivatively.

if formulated in any different way. Loyalty is more robust than this kind of accidental compliance would allow.

Thus our shaping account posits three elements for fiduciary loyalty.<sup>32</sup> A fiduciary acts loyally toward a beneficiary only if (1) the beneficiary's interests matter to the fiduciary's deliberation; (2) these interests matter solely because they are the interests of the beneficiary rather than for some other reason; and (3) the fiduciary is disposed to revise her deliberation based on changes to the beneficiary's interests.<sup>33</sup>

The shaping account explains why Tammy Trustee does not act loyally, even though her pattern of behavior matches that of a loyal trustee. Tammy violates element (1) because Bernice's interests do not matter to Tammy's deliberation at all. Tammy's deliberation is structured by the vicissitudes of a dart throw, which has nothing to do with Bernice's interests. This account also explains why the double agent does not act loyally toward her false principal. Although her behavior otherwise mirrors that of a loyal agent, the false principal's interests only matter to the double agent derivatively in virtue of their capacity to advance the true principal's interests. This violates element (2).<sup>34</sup>

Why must loyalty shape a fiduciary's deliberation? We think the answer lies in a variety of aspects of paradigmatic fiduciary relationships. Fiduciary relationships characteristically involve discretionary powers and high levels of entrustment. Given imbalances of expertise and power, these relationships also make it difficult for the beneficiary to monitor the fiduciary's actions. As a result, the beneficiary in a fiduciary relationship is subject to the predation of her fiduciary in a way that people generally are not. Each of

32. There are many varieties of loyalty other than fiduciary loyalty, including partisanship, patriotism, filial loyalty, and professional loyalty. KELLER, *supra* note 27, at x. We make no claim about whether the shaping account described here also characterizes loyalty in all of these guises nor whether (as Keller denies) there are any meaningful unifying features of loyalty.

33. We phrase these elements of the "shaping" account as necessary rather than sufficient conditions to leave open the possibility that loyalty might have other requirements in both nonfiduciary and nonlegal contexts. See, e.g., Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457, 491 (2009) (noting the possibility that loyalty could involve "being true" to a particular project or relationship type); KELLER, *supra* note 27, at 16 (positing that motive of loyalty "depends upon or makes essential reference to a special relationship" in which subject and object stand).

34. The shaping account can also explain why theorists who posit an intentional dimension to promises (like Owens, Pratt, and Scanlon) can recognize an asymmetry between promise-keeping and loyalty. For these theorists, keeping a promise might plausibly require attributing significance to the interests of the promisee, thus ruling out the possibility of accidental promise-keeping. Yet none of these accounts of promise-keeping could require that this significance be nonderivative or robust. Consider a scenario where A promises B to  $\Phi$ . In such a case, it seems possible for A to keep her promise even though B's interests figure only derivatively into A's reasons for action (e.g., where all that matters to A is the intrinsic importance of  $\Phi$ 'ing and not the importance of  $\Phi$ 'ing to B). Also, in  $\Phi$ 'ing, A might be said to keep her promise to B even though A lacks a disposition to have made or kept a different promise to  $\gamma$  should B have needed or requested that promise. Because the asymmetry between promise-keeping and loyalty is key to our critiques of contractarianism and proscriptivism in Section IV, the shaping account supports our main points even if one denies our conclusion in Section II about the intelligibility of accidentally complying with promissory obligations.

these aspects (discretion, trust, vulnerability, difficulties of monitoring and accountability) contributes to the explanation of why loyalty has an intentional component. Given a beneficiary's vulnerability to the fiduciary, the beneficiary can be expected to be concerned with not only the fiduciary's behavior but also her faithfulness. Ensuring that the beneficiary's interests shape the fiduciary's deliberation in a certain way is essential to ensuring that the beneficiary will not be exploited or have unnecessary risks imposed upon her.

This functionalist explanation for the connection between shaping and loyalty makes the shaping account ecumenical. The requisite weight of the beneficiary's interests on the fiduciary's deliberation will vary across fiduciary contexts in virtue of the beneficiary's vulnerability or level of entrustment. The greater the discretion, trust, or vulnerability, the tighter the intentional requirements for acting loyally. Thus the shaping account can explain why obligations of loyalty are calibrated differently across different kinds of fiduciary relationships, which is often said to be a desideratum of any viable theory of fiduciary obligations.<sup>35</sup>

## B. Alternatives: Adopting and Aiming

The shaping account is one of many ways to specify the intentional dimension of fiduciary obligations. Two alternative proposals are the "adopting" account and the "aiming" account. Both of these alternatives recognize that fiduciary obligations have an intentional dimension, so both are on the right track. However, both alternatives are more demanding than the shaping account, and as a result, each faces difficulties that the shaping account avoids.<sup>36</sup>

The adopting account articulated by Arthur Laby (among others) posits that "the irreducible core of the fiduciary relationship is the fiduciary's obligation to adopt the principal's goals, objectives, or ends."<sup>37</sup> Laby formulates the adopting account in Kantian terms. Fiduciary loyalty is open-ended, so it is a species of what Kant calls "imperfect" duties.<sup>38</sup> Disloyalty is a similarly open-ended inquiry, involving the fiduciary's "adopting of an end indifferent to, or in opposition to, the obligatory end"—that is, the ends of the beneficiary.<sup>39</sup> The adopting account can get the intuitively right answers in both the Dartboard Trustee and double agent cases. In neither case does

35. See Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 910 n.48, 911 (1993); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1483–1484 (2002).

36. We refrain here from discussing even more demanding standards that would require identification with a beneficiary. If the adopting and aiming accounts fall short, then such an "identification" account would also.

37. Arthur B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFF. L. REV. 100, 103 (2008).

38. *Id.* at 142.

39. *Id.* at 148.

the protagonist satisfy the obligation of loyalty because neither protagonist adopts her beneficiary's ends as her own.

We see two main problems with the adopting account, neither of which seriously wounds the shaping account. The first problem is that the adopting account cannot easily recognize the limits of fiduciary obligations. Consider Lord Brougham's statement that:

[The] advocate, in discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons . . . is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.<sup>40</sup>

One way to interpret the adopting account is as generalizing Brougham's dictum, substituting "fiduciary" for "advocate" and "beneficiary" for "client." As Laby sees it, in adopting the ends of the beneficiary, the fiduciary forsakes the ends of anyone else (including herself).<sup>41</sup> Yet this reading of the adopting account would have the implausible implication that loyalty could justify or require the fiduciary's adoption of the beneficiary's morally illicit ends.

To see why, imagine an attorney for Tony Soprano. Tony has a variety of ends, most of them illicit. Attorneys characteristically have fiduciary obligations toward their clients, including obligations of loyalty. On the adopting account, Tony's attorney could act loyally toward Tony only by adopting Tony's illicit ends. We find this implication implausible. Loyalty is often taken to have normative force: that an action is required as a matter of loyalty can change the deontic status of doing it.<sup>42</sup> Yet Tony's attorney would not have any reason to further Tony's illicit ends. The generally applicable prohibitions on this kind of facilitation apply to efforts on Tony's behalf.<sup>43</sup>

If fiduciary loyalty could justify fiduciaries in adopting the illicit ends of their principals, then the fiduciary relationship would implicate a form of bootstrapping. By forming fiduciary relationships, one could generate moral permissions or requirements to act in otherwise impermissible ways.<sup>44</sup>

40. 2 THE TRIAL OF QUEEN CAROLINE (J. Nightingale ed., Albion Press, 1820–1821), at 8.

41. Laby, *supra* note 37, at 135 ("The fiduciary must appropriate the objectives, goals, or ends of another and then act on the basis of what the fiduciary believes will accomplish them—a happy marriage of the principal's ends and the fiduciary's expertise.")

42. See, e.g., GEORGE FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* (1995), at 38–39 (discussing duties generated by various aspects of loyalty); Andrew Oldenquist, *Loyalties*, 79 J. PHIL. 173 (defending obligations based on loyalties).

43. See Bernard Gert, *Loyalty and Morality*, in *NOMOS LIV: LOYALTY* 19 (Sandy Levinson, Joel Parker & Paul Woodruff eds., 2013) ("Loyalty is morally acceptable only when it does not involve violating a moral rule.")

44. See ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES* (1999), at 3. On bootstrapping of reasons generally, see John Broome, *Are Intentions Reasons? And How Should We Cope with Incommensurable Values?*, in *PRACTICAL RATIONALITY AND PREFERENCE: ESSAYS FOR DAVID GAUTHIER* 98–120 (Christopher Morris & Arthur Ripstein eds., 2001); MICHAEL E. BRATMAN, *INTENTIONS, PLANS AND PRACTICAL REASONS* (1999).

Bootstrapping is problematic on a variety of theoretical grounds, not least of which is that it denies the overridingness of moral verdicts.<sup>45</sup> Loyalty is a form of partiality, a way of treating someone's interests differently from the (potentially conflicting) interests of others. To the extent that partiality can be justified, this justification has limits. Generally applicable principles of partiality seem capable of requiring or forbidding actions that are otherwise optional but not of permitting or requiring actions that are otherwise morally prohibited.<sup>46</sup> Thus, if loyalty is taken to have normative significance, then the adopting account (at least as Laby formulates it) cannot easily recognize the limits of loyalty. This account cannot explain why loyalty does not provide a justification for Tony Soprano's attorney to adopt her client's illicit ends.

The shaping function avoids these difficulties. One can attribute significance to a beneficiary's interests (in accordance with element (1) of the shaping account) without adopting those interests as one's own. Of course, adopting the ends of a beneficiary is sometimes an effective way of ensuring that a fiduciary makes the kinds of attributions constitutive of loyalty. It is sometimes easier to see how to advance the ends of another when you take those ends to be your own. But taking this stance is not a necessary condition for acting loyally.<sup>47</sup> Moreover, one can attribute nonderivative significance to a consideration without seeing it as preeminent. On the shaping account, then, Tony Soprano's lawyer can act loyally and within the bounds of partiality by taking Tony's licit ends to have significance in virtue of their being his ends; taking Tony's illicit ends to be normatively inert in virtue of being illicit, based on general constraints concerning partiality; and being disposed to advance Tony's ends if they were to become licit. The legal limits on what loyalty can permit or require thus cohere with loyalty's deeper normative structure.

A second (and more fundamental) problem with the adopting account is that it admits of accidental compliance. Laby's version of the adopting account is concerned primarily with the requirement that the fiduciary adopt the beneficiary's ends. Laby does not discuss the process by which this adoption must occur.<sup>48</sup> Yet this leaves the adopting account susceptible to fulfillment through deviant causation—that is, to cases where a fiduciary adopts a beneficiary's ends in a way that does not seem to exhibit loyalty toward the beneficiary. Say that a fiduciary and beneficiary are both members

45. See Seana Valentine Shiffrin, *Moral Overridingness and Moral Subjectivism*, 109 *ETHICS* 772 (1999).

46. See, e.g., Niko Kolodny, *Which Relationships Justify Partiality? The Case of Parents and Children*, 38 *PHIL. & PUB. AFF.* 37 (2010); Brenda Almond, *Reasonable Partiality in Professional Relationships*, 8 *ETHICAL THEORY & MORAL PRAC.* 155, 166 (2005).

47. See Philip Pettit, *The Paradox of Loyalty*, 25 *AM. PHIL. Q.* 163, 168 (1988) ("Loyalty can hardly require the agent to prize the individual essence of the principal; on the contrary, it is compatible with severe reservations about his particular worth. What it demands is rather susceptibility to the fact that the principal is, relatively speaking, one of his own.")

48. See Laby, *supra* note 37, at 130 ("The fiduciary's adoption of the principal's ends, regardless of the overall consequences of doing so, is the unifying theme in fiduciary cases.")



of a highly demanding religion. By virtue of their common membership in this religious group, the fiduciary might adopt the beneficiary's ends. However, the beneficiary would not figure necessarily in this adoption story: that these ends were the ends of the beneficiary would not explain why the fiduciary adopts them. This scenario does not indicate loyalty to the beneficiary so much as loyalty to a group of which the beneficiary happens to be a member. Yet Laby's version of the adopting account cannot capture this result. On his view, the fiduciary who adopts the beneficiary's ends based on considerations unrelated to the beneficiary acts just as loyally as the fiduciary who adopts these ends because they are the beneficiary's.

The shaping view avoids the prospect of accidentally complying with obligations of loyalty. If the interests of the beneficiary matter to the fiduciary solely in virtue of their membership in a common religion, then the fiduciary attributes only derivative significance to the interests of the beneficiary. This would violate element (2) of the shaping standard. Moreover, the beneficiary's interests might (*ex hypothesi*) cease to matter to the fiduciary if they deviated from the ends set by the common religion. This would violate element (3) of the shaping standard.

Another way of specifying loyalty's intentional dimension is what might be called, after Lionel Smith, the "aiming" account.<sup>49</sup> On this view, fiduciary loyalty requires aiming to act in beneficiary's best interest. Loyalty is thus largely a question of motivation: "Whatever powers a fiduciary has, he must exercise (or not exercise them) with a particular motive. He must act (or not act) in what he perceives to be the best interests of the beneficiary."<sup>50</sup> For Smith, this intentional requirement differentiates the fiduciary duty of loyalty from the duties of care and diligence: the latter depend on whether "a particular objective standard was not met. Motive is irrelevant." By contrast, "the exercise of a power can be set aside for a breach of the duty of loyalty if the power was exercised (and presumably if a decision was made not to exercise a power) with the wrong motive."<sup>51</sup>

On the aiming account, then, loyalty is determined by whether consideration of the beneficiary's interests figured causally into the agent's behavior. If a concern for advancing these interests caused the fiduciary to act, then the fiduciary has acted loyally. Where this concern does not play this causal role, the fiduciary has not acted loyally. As Smith puts it, fiduciary loyalty is about the "justiciability of motive."<sup>52</sup> Chancellor Leo Strine and co-authors contend that Delaware corporate law embodies something like the aiming account:

49. See Lionel Smith, *The Motive, Not the Deed*, in RATIONALIZING PROPERTY, EQUITY AND TRUSTS: ESSAYS IN HONOUR OF EDWARD BURN 53 (Joshua Getzler ed., 2003).

50. *Id.* at 67.

51. *Id.* at 70–71.

52. *Id.* at 64.

The term good faith has long been used as the key element in defining the state of mind that must motivate a loyal fiduciary. To wit, the duty of loyalty most fundamentally requires that a corporate fiduciary's actions be undertaken in the good faith belief that they are in the best interests of the corporation and its stockholders.<sup>53</sup>

Aside from its power to explain a major source of fiduciary jurisprudence, the aiming account has important strengths. Like the adopting account, the aiming account can explain why neither the Dartboard Trustee nor the double agent acts loyally. Neither protagonist is moved to act by the interests of the beneficiary. Further, unlike the adopting account, the aiming account does not admit of accidental compliance. To wit, the coreligionist fiduciary does not act loyally toward her beneficiary because she does not act in order to advance the beneficiary's interests so much as to advance interests that the beneficiary happens to have.

Despite these strengths, however, we think the aiming account fails to capture the intentional dimension of fiduciary loyalty for at least two reasons. First, the aiming account raises concerns about fairness. It is generally thought to be unfair to hold someone responsible for something she cannot control or help.<sup>54</sup> If "ought" implies "can," then the aiming account relies on the voluntarist assumption that people can control the reasons for which they act. It would not be fair to hold a fiduciary to account for an action done for an illicit reason while holding him harmless for doing that same action for a licit reason (as the aiming account does) unless the fiduciary were capable of acting for one of these reasons but not the other. Furthermore, the aiming account assumes self-knowledge, or that people have privileged access to their own motivational states and know why they do what they do.

Yet both these voluntarist and self-knowledge assumptions are (at best) controversial. Smith acknowledges that the motives of others "are inscrutable at the best of times"; this inscrutability, he claims, grounds the no-profit and no-conflict legal rules that govern fiduciaries.<sup>55</sup> Some philosophers (influenced by developments in neuroscience and psychology) suggest that our own motives are similarly inscrutable to introspective analysis.<sup>56</sup>

53. Leo E. Strine, et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporate Law*, 98 GEO. L.J. 629, 633 (2010). Strine et al. make this point in service of a larger argument that the Delaware corporate law fiduciary duty of loyalty presupposes that the fiduciary act in "good faith," which in turn requires that the fiduciary be "motivat[ed] to serve the legitimate interests of those to whom fiduciary duties are owed." *Id.* at 663–664.

54. See Ethan J. Leib, *Responsibility and Social/Political Choices about Choice*, 25 LAW & PHIL. 453 (2006).

55. Smith, *supra* note 49 at 74.

56. See, e.g., Eric Schwitzgebel, *The Unreliability of Naïve Introspection*, 117 PHIL. REV. 245, 247 (2008) ("Contemporary philosophers and psychologists often doubt the layperson's talent in assessing such nonconscious mental states as personality traits, motivations and skills, hidden beliefs and desires, and the bases of decisions; and they may construe such doubts as doubts about introspection."). Many of the findings questioning the reality of privileged

Furthermore, there is good reason to deny that people have the power to intend at will.<sup>57</sup> We do not mean to resolve whether either the voluntarist or self-knowledge assumption is true. However, if either assumption is false, then the aiming account is unfair, assuming that “ought” implies “can.”

By contrast, the shaping account does not require that fiduciaries have privileged access to their mental states or voluntary control over the reasons for which they act. Rather, it requires only that the beneficiary’s interests structure the fiduciary’s deliberation in the specific way described above: namely, that the beneficiary’s interests have nonderivative significance and that the fiduciary be disposed to update her deliberative orientation given changes in the beneficiary’s interests. Without fully elaborating an argument (which would require, among other things, a complete account of practical deliberation), it seems much more likely that these requirements do not ask too much. It is more plausible that you know how, why, and how much something matters to you than that you know why you act.<sup>58</sup> It is also more plausible that you can control the significance of a consideration in your deliberation (say, by adjusting your reasoning in order to make the requisite attributions) than that you can control your motivations for acting.<sup>59</sup>

A second problem is that the aiming account deems loyalty impossible in cases where we have good reason to think it is possible and, indeed, to be expected. In particular, the aiming account denies that a fiduciary who is alienated from the beneficiary’s interests could act loyally toward that beneficiary. Yet, to the extent that some form of alienation appears in many fiduciary relationships (and is perhaps inevitable in the modern world), this conclusion would be highly revisionist.

Consider the case of a disaffected attorney who knowingly undertakes the best course of action for her client as part of going through the motions. We think it is possible for such a disaffected attorney to live up to her fiduciary

introspective access arise in social psychology and moral psychology. Whether introspection provides privileged access to one’s motivations is a highly contested question. However, even those who believe in the possibility of robust self-knowledge can accept that agents are often prone to self-deception about why they act. Irit Samet draws on (mostly philosophical) research about self-deception to make a similar point that structural features of the fiduciary relationship render fiduciaries especially prone to self-deception (and as a result, self-dealing) in conflict-of-interest scenarios. See Irit Samet, *Guarding the Fiduciary’s Conscience—A Justification of a Stringent Profit-Stripping Rule*, 28 OXFORD J. LEGAL STUD. 763, 781 (2008).

57. See Gregory S. Kavka, *The Toxin Puzzle*, 43 ANALYSIS 33 (1983); Pamela Hieronymi, *Controlling Attitudes*, 87 PAC. PHIL. Q. 45, 63 (2006). Indeed, the psychological difficulty of controlling the reasons for which one acts (coupled with a commitment to the slogan that “ought implies can”) lead some to reject the notion that motive matters for rightness at all. See, e.g., W. DAVID ROSS, *THE RIGHT AND THE GOOD* (2002), at 4–5.

58. As David Owens puts it, the “capacity to determine which reasons have weight in [one’s] practical deliberation and which do not” is a requirement of practical agency, of being “fully in control of [one’s] practical reasoning.” OWENS, *supra* note 3, at 88–89.

59. Still, we acknowledge that the shaping standard might present some legitimate concerns about fairness, because whether an agent is counterfactually disposed to deliberate in a certain way might not be fully within her control.

obligations, to act loyally toward her client.<sup>60</sup> Yet the aiming account could not reach this verdict; because the disaffected attorney is “just doing her job” rather than being moved by the goal of advancing her client’s interests, she cannot act loyally toward her client.

By contrast, on the shaping account, the intentional dimension of loyalty imposes deliberative requirements rather than motivational ones.<sup>61</sup> Motives are one way of specifying loyalty’s intentional dimension, but not the only (or even the best) way to do so. Many phenomena that have intentional components do not impose specific or strict motivational requirements. Take the example of instrumental rationality. Acting rationally has intentional components (e.g., the requirement to structure deliberation and respond to evidentiary considerations in certain ways) but no explicit motivational requirement. Why you act rationally is not necessarily connected with whether you act rationally.<sup>62</sup>

Similarly, on the shaping account, whether you act loyally is not solely (or necessarily) a function of *why* you act. We agree with Smith’s more recent argument that the intentional component of loyalty is not solely a function of motive.<sup>63</sup> A wide variety of motivations seem compatible with acting loyally.<sup>64</sup> Both the alienated attorney and the true believer can act loyally, since both are capable of making the requisite attributions and having the appropriate dispositions regarding their clients’ interests. However, we disagree with Smith’s further conclusion that motive is irrelevant to determining whether one has satisfied her duty of loyalty. Rather, *certain* motives can preclude the possibility of loyal action by negating intentional requirements of loyalty.<sup>65</sup> The double agent comes to mind: her motives for furthering the false

60. Indeed, we can envision a variety of situations where such self-conscious detachment from a role (or, as Meir Dan-Cohen describes it, “role distance”) could have salutary effects. See MEIR DAN-COHEN, *HARMFUL THOUGHTS* (2002), at 235.

61. In recent work Smith rejects the aiming account. See Lionel Smith, *Can We Be Obligated to Be Selfless?*, in *THE PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* (Andrew Gold & Paul Miller eds., forthcoming 2014). In the terms we use here, Smith acknowledges that there is an intentional dimension to fiduciary loyalty but denies that this dimension is defined solely (or at all) by the motives of the agent. Smith rejects the aiming account largely for its incompatibility with Kantian notions of duties. For Smith, fiduciary loyalty is a duty of right, and (on Kant’s framework) motives are irrelevant to determining whether one has lived up to a duty of right. Although we agree with Smith’s rejection of the aiming account, we think that Smith goes too far in completely denying the relevance of motives. As we discuss below, some motivations can bear on whether one has acted loyally, although in many cases a wide variety of motivations are compatible with acting loyally. Moreover, we disagree with Smith’s reasons for rejecting the aiming account—namely, the goal of compatibility with Kantian notions of duties. The shaping account that we defend here is inconsistent with the Kantian framework because it sees loyalty as a duty of right (in that loyalty is both directed and legally enforceable) yet allows for the possibility that someone’s motives could bear directly on whether she acts loyally.

62. See Niko Kolodny, *Why Be Rational?*, 114 *MIND* 509 (2005).

63. Smith, *Can We Be Obligated to Be Selfless?*, *supra* note 61.

64. See KELLER, *supra* note 27, at 21 (“There are many different ways of being loyal; a particular loyalty may involve any of several kinds of motive, so long as they have a certain basic structure.”).

65. See, e.g., Gert, *supra* note 43, at 7 (“Motives for loyalty must not depend upon beliefs about the consequences for oneself of showing loyalty.”).

principal's interests rule out the possibility that she could attribute the kind of nonderivative significance to the interests of the false principal that would be required of loyal action.

In sum, we agree with Laby's and Smith's (erstwhile) positions that fiduciary loyalty has an intentional dimension. However, neither the adopting nor the aiming standard best describes this dimension. The shaping account is superior because it can resolve cases that undermine these other standards. Fiduciary loyalty requires robustly attributing nonderivative significance to a beneficiary's interests in virtue of the beneficiary's having them. If the fiduciary fails to attribute this significance to the beneficiary's interests and ends, then no matter what else we can say about her actions, she does not act loyally.

#### IV. AGAINST REDUCING FIDUCIARY OBLIGATIONS

Our analysis of the intentional dimension of fiduciary obligation, if sound, has important implications for ongoing theoretical debates. Both "contractarianism" and a view that we call "proscriptivism" are attempts to reduce fiduciary obligations to some other normative phenomenon. Debates about contractarianism, discussed below in Subsection A, concern whether fiduciary obligations can be reduced to contractual obligations. Debates about proscriptivism, discussed below in Subsection B, concern whether fiduciary obligations can be reduced to the legal rules that prohibit fiduciaries from conflicts of interests and profiting from beneficiaries. Neither of these reductionist strategies captures the intentional dimension of fiduciary obligations, the way that loyalty must shape the deliberation of the fiduciary. Therefore, neither of these positions describes the normative structure of fiduciary obligations.

##### A. Against Contractarianism

The so-called contractarian position sees fiduciary obligations as a species of contractual obligations. The contractarian asserts that it is possible to redescribe fully the former in terms of the latter. Contractarianism is in part an argument about how fiduciary obligations arise—namely, from voluntary arrangements, just as contractual obligations do.<sup>66</sup> As Larry Ribstein puts it, "one becomes a fiduciary only by contract, including by contracting for a relationship in which the law says fiduciary duties arise."<sup>67</sup> The contractarian also contends that fiduciary and contractual obligations have a common structure and content: the content is fixed by agreement, with doctrinal

66. See Langbein, *supra* note 1, at 650; Easterbrook & Fischel, *supra* note 1; James Edelman, *When Do Fiduciary Duties Arise?*, 126 *LAW Q. REV.* 302 (2010).

67. Larry E. Ribstein, *Fencing Fiduciary Duties*, 91 *B.U. L. REV.* 899, 902 (2011).

provisions serving as default rules.<sup>68</sup> As such, fiduciary obligations (like contractual obligations) can be modified and disclaimed by the agreements of the parties.<sup>69</sup> These commonalities in origin and structure indicate a common instrumental goal: the point of both fiduciary and contractual obligations is to maximize the utility of the parties to these obligations.

Because the contractarian position has its roots in the law-and-economics tradition, many contractarians utilize (sometimes unwittingly) an additional premise that contractual performance is solely about behavior. The promises underlying contracts concern behaviors (“pay or perform”), and you satisfy your contractual obligation by behaving in the way specified by your contractual obligation or by paying expectation damages.<sup>70</sup> By implication, the contractarian is committed to the position that fiduciary obligations are also about behavior: you satisfy your fiduciary obligation by behaving in the way that loyalty specifies, or else by paying damages.

Several commentators have argued against the contractarian position, denying that contractual and fiduciary obligations share a common origin<sup>71</sup> or a common structure.<sup>72</sup> However, the contractarian can evade many of these criticisms by recasting fiduciary obligations as based on a hypothetical bargain, reflecting the terms that the fiduciary and beneficiary would have agreed upon if they had considered them. Thus the contractarian can explain any putatively distinct elements of fiduciary obligations as a species of promissory obligations.

The contractarian position has many strengths. It can explain some core features of fiduciary law, as well as its variation across contexts. However, our analysis points to a deep problem with the contractarian view, one that cannot be evaded by the legerdemain of appeal to hypothetical bargain. In general, it is possible to reduce A to B only if every element of A is also an element of B. Thus the contractarian’s reduction is possible only if every element of fiduciary obligation is also an element of contractual obligation. Yet, as the arguments of Sections II and III indicate, these two phenomena have different intentionality requirements. Promissory obligations can be satisfied through accidental compliance; given the intentional dimension to fiduciary loyalty, fiduciary obligations cannot. Thus the con-

68. To the extent that some aspects of contractual and fiduciary obligations are not modifiable (e.g., unconscionability and good faith in contract, and good faith in fiduciary law), the contractarian can argue that these parallel each other. As we explain below, however, these good-faith obligations likely differ in their content, so the superficial parallel here is more complicated than it looks.

69. See generally Henry N. Butler & Larry E. Ribstein, *Opting out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1 (1990).

70. See Alan Schwartz & Joel Watson, *Conceptualizing Contract Interpretation*, 42 J. LEGAL STUD. 1 (2013); Steve Thel & Peter Siegelman, *Willfulness versus Expectation: A Promisor-Based Defense of Willful Breach Doctrine*, 107 MICH. L. REV. 1517 (2009).

71. See, e.g., Tamar Frankel, *How to Water Down Fiduciary Duties*, in THE PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (Andrew Gold & Paul Miller eds., forthcoming 2014).

72. See Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303 (1999); Daniel Markovits, *Sharing Ex Ante and Ex Post*, in THE PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (Andrew Gold & Paul Miller eds., forthcoming 2014).

tractarian position is conceptually mistaken. Acting loyally has requirements that promise-keeping does not.<sup>73</sup>

The contractarian might respond to our critique by denying that there is any asymmetry between contractual and fiduciary obligations. For example, the contractarian might relax the behaviorist assumption described above and posit that fiduciary loyalty involves both a promise to behave in a particular manner and a promise to regard the interests of the beneficiary in certain ways. Alternatively, the contractarian might contend that promissory obligations (like fiduciary obligations) have an intentional dimension that is captured in the requirement of “good-faith performance.”<sup>74</sup> If either of these efforts to deny the asymmetry succeeds, then the contractarian could still redescribe fiduciary obligations as promises or concatenations of promises.

Before examining these rehabilitative efforts, it is important to note how much they would concede. Broadening the notion of promise-keeping to include more than mere behavior (“pay or perform”) would, as noted above, undermine a fundamental tenet of the law-and-economics tradition out of which the contractarian position arises. Arguably, the analytic tractability of the behaviorist assumption is what inspired the effort to reduce diverse legal phenomena to contract. Thus, giving up behavior-based criteria for promise-keeping is no small concession. Likewise, many law-and-economics scholars deny that good-faith requirements are either useful or coherent tools for analyzing contractual obligations. Thus the contention that these standards form part of the core of two different (and prominent) types of obligations would not sit well with many contractarians.

In any event, it is not clear that either of these attempts to rehabilitate contractarianism by denying the asymmetry succeed. Seeing fiduciary obligations as constellations of promises to behave and to consider interests would not change the fact that all of the component promises can be satisfied through accidental compliance. Consider the following scenario involving a promise to consider someone’s interests:

**Big Decision Hypnosis:** Annie promises Betty to consider Betty’s interests in making a big decision that will affect Betty (among others). Prior to making the decision, Annie is hypnotized such that, in making the big decision, she will consider the interests of the next person she sees after awaking from the hypnotic state. After awaking from the hypnotic state, the first person Annie sees is Betty. Thus Annie considers Betty’s interest in making the big decision.

73. One intriguing implication of our analysis is that the intentional aspects of loyalty may not be disclaimable in whole or in part. In some legal environments, the duty of loyalty itself can be disclaimed altogether. Our analysis might imply that this legal doctrine is fundamentally mistaken. However, even if it were possible to disclaim the duty of loyalty itself, it might not be possible (or coherent) to establish by agreement that accidental compliance satisfies the duty of loyalty. We leave the exploration of this topic for future work.

74. See RESTATEMENT (SECOND) OF CONTRACTS §205; U.C.C. §1–304.

We think that Annie keeps her promise to consider Betty's interests. If so, then promises to consider someone's interests can be satisfied through accidental compliance. What matters is that interests are considered, not how this consideration comes about. However, given the contingency of Annie's consideration of Betty's interests, it seems that Annie has not acted loyally toward Betty.

The shaping account can explain why Annie has failed to act loyally. While Annie attributes some significance to Betty's interests, this attribution is derivative (in virtue of seeing Betty after being hypnotized) rather than nonderivative (in virtue of the interests being Betty's). Thus it violates element (2) of the shaping account. Moreover, the attribution is not robust. Although Annie happens to consider Betty's interest in this scenario, she might not have done so if she had come across someone other than Betty after awaking from hypnosis. Thus her actions also violate element (3) of the shaping account. In sum, the asymmetry regarding accidental compliance remains, and the redescription of fiduciary obligations in terms of contractual obligations fails.<sup>75</sup>

Likewise, appealing to a good-faith requirement for the satisfaction of contractual obligations would not save the contractarian position. For the contractarian's reductionist strategy to succeed, it is not enough that both promissory and fiduciary obligations have *some* intentional requirements. Rather, they must have the *same* intentional requirements—the conditions for keeping a promise must be identical to those for acting loyally. One prominent view construes contractual good faith in terms of opportunistic behavior.<sup>76</sup> Under this standard, there is nothing necessarily defective about accidental compliance. For example, the Lucky Payer is an example of accidental compliance without opportunism at all. Even on a broader construction of good faith, examples of accidental compliance would not necessarily constitute promise-breaking.<sup>77</sup>

This argument can be framed in more positive terms. The broadest construction of contractual good faith (which, incidentally, most contractarians would reject for its breadth) requires the promisor to attribute significance

75. The contractarian might try to redescribe the obligation of loyalty in terms of a promise to act loyally. However, this move would involve assigning intentional requirements as part of the content of a promise and thus would concede that there are structural differences between promissory obligations and the duty of loyalty.

76. See Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980).

77. E.g., Robert S. Summers, *The General Duty of Good Faith: Its Recognition and Conceptualization in the New Restatement of Contracts*, 67 CORNELL L. REV. 810 (1982); Robert S. Summers, *Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968). Summers essentially defines bad faith as that which is not in good faith. However, even here, accidental compliance is not necessarily bad-faith compliance. The Lucky Payer case does not involve abuse of power, interference with a promisee, failure to cooperate with a promisee, or the intentional rendering of imperfect performance. Maybe Lucky Payer involves an evasion of "the spirit of bargain," but this contention would beg the question as to whether loyalty can be the subject matter of a bargain in the first place (which the shaping account denies).



to the interests of the promisee. This requirement parallels element (1) of the shaping account of fiduciary loyalty. However, contractual good faith imposes no counterpart to element (2) of the shaping account, which requires that the interests of the beneficiary have nonderivative significance to the fiduciary. Nor is there any counterpart to element (3), which requires that the beneficiary's interests matter robustly to the fiduciary. Indeed, such a requirement would seem absurd in the context of promises, tantamount to the notion that where A promises B to  $\Phi$ , A keeps this promise to  $\Phi$  only if she would have been similarly disposed to  $\gamma$  had B asked (or bargained) for it. Even if good faith imposes an intentional dimension to promise-keeping, the requirements of acting loyally are far more exacting than the requirements of performing in good faith, so the contractarian's reduction does not succeed. The "good faith" required of contractual performance (which is usually considered in objective terms) is not coextensive with the intentional dimension of fiduciary loyalty, which has an undeniably subjective component.<sup>78</sup>

### B. Against Proscriptivism

Our analysis in Sections II and III also casts doubt on efforts to redescribe fiduciary obligations in terms of the proscriptions applicable to fiduciaries, a strategy we call proscriptivism. Some advocate for proscriptivism directly.<sup>79</sup> Others embrace it indirectly by distinguishing between "minimal" and "maximal" notions of loyalty and arguing that both are legally cognizable.<sup>80</sup>

Matthew Conaglen offers the most developed version of the proscriptivist position.<sup>81</sup> Conaglen seeks to identify what is distinctive about fiduciary obligations under British Commonwealth law. He argues that the "no conflict" rule (which prohibits fiduciaries from "acting with a conflict between duty and interest") and the "no profit" rule (which prohibits fiduciaries from "making a profit off of the fiduciary position") both "form the core of the fiduciary doctrine and . . . constitute its conceptualization of loyalty."<sup>82</sup> Conaglen contends that the conjunction of these rules facilitates the fiduciary's discharge of his nonfiduciary duties toward the beneficiary (which may be promissory in nature). Every other aspect of fiduciary obligations (like the duty of care and the duty not to act for improper purposes) has a parallel in nonfiduciary obligations. So, Conaglen argues, the fiduciary's

78. See generally Strine et al., *supra* note 53.

79. See Conaglen, *supra* note 2; Jensen, *supra* note 2; Peter Birks, *The Content of Fiduciary Obligation*, 34 ISR. L. REV. 3 (2000); Ribstein, *supra* note 67, at 908. The contractarian position need not overlap with the proscriptivist position—but it sometimes does, especially if contractarian invokes an institutional notion of fiduciary obligation rather than a colloquial or conceptual notion.

80. See Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 37 (2003) (citing FLETCHER, *supra* note 42, at 9).

81. See Conaglen, *supra* note 2.

82. *Id.* at 459–460.

duty of loyalty can be completely redescribed as the conjunction of the “no conflict” and “no profit” rules.

Conaglen’s analysis is incomplete as a description of positive law and conceptually confused as a description of loyalty as a normative concept (although, to be sure, Conaglen does not aspire to the latter task). First, the “no conflict” and “no profit” rules are not the only ways to conceptualize fiduciary loyalty. For example, the shaping account of loyalty offers an alternative way of appreciating what is distinctive about fiduciary obligations. On this view, fiduciary obligations differ from other types of obligations based on the specific intentional requirements that they impose on fiduciaries.

Second, Conaglen’s proscriptive account is problematic because it neglects the intentional dimension of fiduciary loyalty. In life (if not in law), it seems possible for a fiduciary to satisfy both the “no conflict” and “no profit” rules while failing to act loyally. For example, in circumstances of accidental compliance, a fiduciary could meet the “no conflict” and “no profit” rules without acting loyally.

Consider the Dartboard Trustee case once again. Tammy Trustee has no conflicts of interest in her representation of Bernice Beneficiary. Nor does Tammy reap unwarranted profit at Bernice’s expense. Therefore, Tammy does not run afoul of either the “no conflict” or “no profit” rules. Conaglen’s view, then, implies that Tammy acts loyally, although he might contend that Tammy’s actions run afoul of one or more of her nonfiduciary duties. But Tammy does not seem to act loyally. Her actions violate elements (2) and (3) of the shaping account. Because proscriptivism cannot capture the intentional dimension of loyalty, it cannot account for the structure of fiduciary obligations. To cite a real-world example, in a traditional hedge fund operation the asset managers’ fee of “two and twenty” (two percent as a set management fee plus 20 percent of the profits of the fund) might be earned without conflict or extra profit, with managers and investors all receiving a substantial return on investment. Yet if the managers’ “proprietary software” that makes the trading decisions in the fund were to invest based on a random algorithm, then the managers would seem to run afoul of their requirement of loyalty. In this scenario, the “two and twenty” fee would seem to be susceptible to disgorgement, the standard remedy for a breach of the legal duty of loyalty.

The proscriptivist might try to evade our critique by casting her position solely in descriptive terms, eschewing any attempt to describe loyalty as a normative phenomenon. (The contractarian might try a similar move.) On this gambit, proscriptivism (and contractarianism) attempts only to describe how judges decide cases involving alleged breaches of fiduciary duties. We think that this strategy is mistaken. For example, epistemic difficulties in determining subjective mental states might prompt legal institutions to utilize specialized tests for measuring whether a fiduciary’s actions were in good faith. However, this utilization would not actually establish whether good faith (as a normative phenomenon) is ultimately subjective or

objective. What loyalty is and whether someone has acted loyally seem to have answers that are independent of judicial determinations.<sup>83</sup> The utilization of objective standards might make the inquiry manageable, but this concern about administrability does not mean that the result of the inquiry is the unvarnished truth about the underlying normative phenomenon. Indeed, administrability concerns might preclude an inquiry from tracking the normative truth. Thus, if proscriptivists and contractarians recast their projects as simply describing how judges deploy a purely juridical concept, then they must relinquish any ambition to explain the underlying normative phenomena. We think that a project that aims to describe legal concepts while eschewing the broader normative landscape is problematic, even on its own terms.<sup>84</sup>

## V. CONCLUSION

Loyalty makes demands on us. Some of these demands concern our actions, and others concern our deliberation. Fiduciary loyalty's deliberative demands are best captured by the "shaping" account. When you act loyally toward someone, she should matter to your deliberation in specific ways. If someone does not matter to your deliberation in these ways, then you do not act loyally toward her.

Promises also impose demands, but not the same kinds of demands as loyalty. The demands of promises concern behaviors. They do not center on intentions. How you deliberate about a promise (or a promisee) is usually irrelevant to whether your actions count as promise-keeping. Thus promises and loyalty are not the same thing, and the latter cannot be accounted for solely in terms of the former. Those (like the contractarian or the proscriptivist) who attempt to reduce fiduciary loyalty to something else miss the essence of what loyalty is and why it matters.

Our account of the structure of fiduciary obligations has other important implications that we cannot explore at length here. For example, an ongoing debate in fiduciary theory concerns the extension of fiduciary concepts to various areas in public law, where public offices are often considered to

83. Some judges appreciate this fact, *see* Strine et al., *supra* note 53, which perhaps explains (in part) why moral rhetoric is so common in fiduciary law. Easterbrook and Fischel dismiss the rhetoric rather than engage the more abstract question of how accurately legal rules should attempt to capture the normative landscape. Easterbrook & Fischel, *supra* note 1.

84. In response, the proscriptivist or contractarian might simply deny that analyzing loyalty's conceptual structure is relevant to legal debates about fiduciary obligations. On this argument, the legal use of terms like "loyalty" and "promise" would have no essential connection to the nonlegal use of these terms. Rather, it could be argued that fiduciary loyalty is an isomorphism of loyalty in general, and an imperfect reproduction at that. The contractarian or proscriptivist would still owe an argument for why it is a good idea for the legal version of a concept like "promise" or "loyalty" to diverge significantly from the noninstitutional version of that concept. Moreover, this isolation itself seems descriptively inaccurate, since courts routinely appeal to the noninstitutional features of promises and loyalty in deciding cases in contract and fiduciary law.

be public trusts.<sup>85</sup> Yet efforts to extend fiduciary principles may vary in their success, and the intentional dimension of fiduciary obligations can explain why. In general, extensions of fiduciary concepts are most likely to be fruitful in areas of law and politics where the imposition of intentional requirements is independently plausible, and unfruitful in areas of law where there is independent reason to believe that intentions do not or should not matter. The normative structure of loyalty constrains these and other efforts to theorize fiduciary obligations.

85. See EVAN FOX-DECENT, *SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY* (2011); Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91 (2013); Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301 (2009).