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# Purposive Loyalty

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## I. Introduction

Fiduciary loyalty is an increasingly rich topic of study,<sup>1</sup> and many of its most interesting applications now arise in the corporate law setting. In part, this is a product of legal change.

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\* Professor, DePaul University College of Law. I am grateful to Oren Bar-Gill, Christopher Bruner, Erin Delaney, Dick Fallon, Evan Fox-Decent, John Goldberg, Matthew Harding, Lyman Johnson, Arthur Laby, Paul Miller, Tim Scanlon, Henry Smith, and Deborah Tuerkheimer, as well as participants at a Washington & Lee Law Review Symposium, and at a workshop at the Wharton School of the University of Pennsylvania, for helpful discussion of the ideas in this Paper. Any errors are my own.

1. For recent theoretical accounts of fiduciary loyalty, see Paul B. Miller, *Dimensions of Fiduciary Loyalty*, in RESEARCH HANDBOOK ON FIDUCIARY LAW (D. Gordon Smith & Andrew S. Gold eds.) (forthcoming); Stephen R. Galoob & Ethan J. Leib, *Intentions, Compliance, and Fiduciary Obligations*, 20 LEGAL THEORY 106 (2014); Andrew S. Gold, *The Loyalties of Fiduciary Law*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 176 (Andrew S. Gold & Paul B. Miller eds., 2014) [hereinafter Gold, *The Loyalties of Fiduciary Law*]; Daniel Markovits, *Sharing Ex Ante and Sharing Ex Post: The Non-Contractual Basis of Fiduciary Relations*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 207 (Andrew S. Gold & Paul B. Miller eds., 2014).

Directors' fiduciary obligations—and the way they are conceptualized—have shifted noticeably over the past twenty years. This change is especially evident in the area of fiduciary good faith, now recognized as a part of loyalty.<sup>2</sup> In this paper, I will discuss an additional, less heralded strand of loyalty: loyalty to a corporation by advancing its purposes.

In recent work, Lyman Johnson has powerfully captured the idea that legal duties of loyalty can be prescriptive, and not just proscriptive—and he has explained why the law should include both types of loyalty.<sup>3</sup> I will address two key ideas in this work: first, that loyalty can involve affirmative devotion, and second, that loyalty can involve the pursuit of corporate purposes. Both ideas help us to better understand the significance of loyalty in fiduciary law. I will suggest, however, that these ideas do not interrelate in quite the way Johnson suggests. In Johnson's view, when a director acts to advance a corporation's purposes, she is acting to advance its best interests.<sup>4</sup> This may not be true. In fact, when a director advances a corporation's purposes, she is not necessarily acting to advance that corporation's best interests, for she may be showing affirmative devotion in a different way.

One can readily describe advancement of another's purposes as a form of loyalty to their best interests, given that in individual cases the advancement of a corporation's purposes will accomplish exactly that. But it is a mistake to insist that this is always the case. We can see why if we make a basic comparison to the lives of human beings. It is reasonable to think that sometimes people adopt aims in life that are inconsistent with their best interests, and it is similarly reasonable to think that

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2. See *Stone v. Ritter*, 902 A.2d 362, 370 (Del. 2006). For discussion of this development and its connection to loyalty concepts more generally, see Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457 (2009) [hereinafter Gold, *The New Concept of Loyalty in Corporate Law*].

3. See generally Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27 (2003) [hereinafter Johnson, *After Enron*].

4. See Lyman Johnson, *Relating Fiduciary Duties to Corporate Personhood and Corporate Purpose*, in RESEARCH HANDBOOK ON FIDUCIARY LAW (D. Gordon Smith & Andrew S. Gold eds.) (forthcoming 2017) (manuscript at 3) (on file with author) [hereinafter Johnson, *Relating Fiduciary Duties*] (“[T]he directorial fiduciary duty of loyalty is to act in the best interests of the corporation (a distinct person) by affirmatively advancing the articulated corporate purpose(s).”).

corporations are subject to this same circumstance.<sup>5</sup> Granting this point, however, the implications may be unsettling. If we consider it vital that directors must be loyal to the corporation, the idea that advancing corporate purposes can detach from best interests may sound like a genuine difficulty.

Suppose that we start from the assumed premise that directors are acting loyally toward the corporation when they advance a corporation's purposes. This is a common enough assumption, and in most contexts people do not imagine that directors who try to advance their corporation's purposes are being disloyal. Once we adopt this premise—that loyalty to purposes is a form of loyalty to the corporation—we are faced with a challenge: advancing a corporation's purposes may not be in the actual best interests of the corporation, and it may not even be in the best interests of the shareholders or any other evident grouping of constituencies. How are we to square loyalty to purposes with loyalty to the corporation, if not by thinking about best interests?

The answer is to recognize that loyalty does not always involve the advancement of another's best interests, even in cases involving affirmative devotion. There are other kinds of loyalty, and these alternatives are prominently visible if we look outside the law for guidance. There is a type of loyalty—I will refer to it as “purposive loyalty”—that governs the advancement of purposes, and it is just as important as best interests loyalty. This Paper will elaborate on this other kind of loyalty, and offer an initial account of its significance. Part II of this Paper will provide a brief overview of the different strands of loyalty recognized in corporate law. This Part will focus especially on loyalty as the avoidance of self-interested behavior, loyalty as affirmative devotion, and loyalty as being true. Part III will provide an overview of purposive loyalty. This Part will draw out both the import of purposive loyalty, and its potential divergence from best interests loyalty. Part IV will conclude.

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5. And, even if we were to insist that from a legal perspective pursuit of another's purposes is by definition a form of loyalty to their best interests, this is not the form in which loyalty to best interests is ordinarily understood outside the law.

## II. Three Strands of Loyalty

### A. Loyalty as the Avoidance of Self-Interested Behavior

Loyalty comes in many varieties, both within the law and outside the law.<sup>6</sup> Sometimes loyalty overlaps with morality, sometimes it doesn't—loyalty can be a socially desirable practice, or it can be a pernicious influence.<sup>7</sup> The types of behavior that count as loyal behavior are also highly varied, with different types of loyalty pulling in different directions.<sup>8</sup> We can, however, discern certain patterns in the types of loyalty that concern the courts. The classic understanding of loyalty in fiduciary settings is a loyalty that proscribes conduct: the loyal fiduciary must avoid temptation, or, in Cardozo's language, she must show an abnegation of self.<sup>9</sup> This kind of loyalty is exemplified by the rules addressing director conflicts of interest.<sup>10</sup>

For some courts and scholars, the avoidance of conflicts of interest or conflicts of duty simply is fiduciary loyalty. That view is prominent in Australia—a jurisdiction in which fiduciary loyalty is commonly considered to be only proscriptive—and it has adherents elsewhere as well.<sup>11</sup> Arguments for recognizing the anti-conflicts rules as the only type of loyalty are often grounded in an author's views on pre-existing law: The proscriptive view is

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6. See Johnson, *After Enron*, *supra* note 3, at 27 (2003) (indicating that the duties of loyalty and care carry “profound social, philosophical, and literary meaning outside of corporate law”).

7. See Andrew S. Gold, *Accommodating Loyalty*, in CONTRACT, STATUS, AND FIDUCIARY LAW 185, 188–89 (Paul B. Miller & Andrew S. Gold eds., 2016) [hereinafter Gold, *Accommodating Loyalty*].

8. See *id.* at 186 (describing divides among loyalty types).

9. See *Meinhard v. Salmon*, 164 N.E. 545, 548 (N.Y. 1928) (“Salmon had put himself in a position in which thought of self was to be renounced, however hard the abnegation.”).

10. See Gold, *The New Concept of Loyalty in Corporate Law*, *supra* note 2, at 457 (describing conflicts of interest as the traditional area governed by the duty of loyalty).

11. For analysis of several distinct perspectives on proscriptive fiduciary duties in Australia, see ROSEMARY TEELE LANGFORD, *DIRECTORS' DUTIES: PRINCIPLES AND APPLICATION* 39–56 (2014). I take no stance on the correct interpretation of Australian law in these pages.

frequently an interpretive claim.<sup>12</sup> In other cases, proponents may draw on policy considerations: They are concerned that if courts adopt broader understandings of director loyalty it will result in undesirable consequences.<sup>13</sup> I will bracket these concerns for present purposes. Whatever the normative merits, there is a clear consensus that avoidance of self-interested conduct is a fundamental type of fiduciary loyalty. Unless appropriate disclosure and approval has been secured, director self-dealing is a classic example of disloyal behavior.<sup>14</sup>

### *B. Loyalty as Advancing Best Interests*

As soon as we consider what loyalty looks like outside the law, the proscriptive view of loyalty begins to look strange. It offers a very constrained picture of what loyalty requires, much more constrained than we are used to seeing in non-legal contexts.<sup>15</sup> On the other hand, fiduciary loyalty may also involve more than just the anti-conflicts rules. Drawing on George Fletcher's philosophical work, Lyman Johnson has argued that corporate law discourse actually makes use of two different dimensions of loyalty: loyalty understood as a minimum condition for behavior, and loyalty understood as a maximum condition.<sup>16</sup>

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12. Cf. Paul B. Miller, *Justifying Fiduciary Remedies*, 63 U. TORONTO L.J. 570, 604–06 (2013) (“[I]t is at least widely accepted that, whatever else it may require, the duty of loyalty prohibits fiduciaries from acting under conflicts of interest.”).

13. See Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 584–88 (2008) (discussing the expansion of the duty of loyalty and the policy implications for corporate governance).

14. See *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 751 (Del. Ch. 2005) (“The classic example that implicates the duty of loyalty is when a fiduciary either appears on both sides of a transaction or receives a personal benefit not shared by all the shareholders.”).

15. For some, the gap between the law and extra-legal loyalty is large enough to call into question whether fiduciary loyalty qualifies as a type of loyalty. See Stephen A. Smith, *The Deed Not the Motive: Fiduciary Law Without Loyalty*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* 213 (Paul B. Miller & Andrew S. Gold eds., 2016).

16. See Johnson, *After Enron*, *supra* note 3, at 37–42 (discussing the account of loyalty in GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* (1993)).

As Johnson notes, the minimum condition “requires the loyal actor to ‘reject temptation’ and consists of ‘not betraying the object of one’s loyalty.’”<sup>17</sup> Outside the corporate sphere, this loyalty norm is focused on the various ways in which people may be self-serving, thus betraying the object of their loyalty. In corporate settings, the minimum condition is a match for the proscriptive, anti-conflicts rules of fiduciary law.<sup>18</sup> On the other hand, the maximum condition for loyalty requires “an element of devotion.”<sup>19</sup> There is an attachment to a specific party or cause, and the loyal individual shows affirmative devotion to their beneficiary.<sup>20</sup> The maximum condition for loyalty is therefore not just proscriptive, it is prescriptive.

Johnson argues that corporate law discourse has long recognized both types of loyalty.<sup>21</sup> And, while there is some debate about the degree to which duties of affirmative devotion were historically recognized in loyalty terms, the affirmative devotion view is now firmly established in corporate law jurisprudence.<sup>22</sup>

As developed in the in re *Walt Disney Company Derivative Litigation*<sup>23</sup> case:

A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate positive law, or where the fiduciary intentionally fails to act in the face of a

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17. *Id.* at 38 (quoting FLETCHER, *supra* note 16, at 40).

18. *See id.* at 39 (“Those courts and commentators emphasizing the necessity of personal gain or benefit as the hallmark of a loyalty breach, or the corresponding need to ‘refrain from’ or ‘avoid’ self-interest to fulfill the duty, are describing the ‘minimal condition for loyalty.’” (citations omitted)).

19. *Id.* at 38 (quoting FLETCHER, *supra* note 16, at 9, 24).

20. *See Gold, The New Concept of Loyalty in Corporate Law, supra* note 2, at 488 (“An emphasis on affirmative devotion opens up a much more extensive and demanding view of loyalty than corporate law has sometimes recognized.”).

21. *See Johnson, After Enron, supra* note 3, at 27 (arguing that loyalty includes both affirmative devotion and non-betrayal).

22. *See id.* at 40 (describing the Delaware Supreme Court’s adherence to an affirmative devotion conception).

23. 907 A.2d 693 (Del. Ch. 2005).

known duty to act, demonstrating a conscious disregard for his duties.<sup>24</sup>

In the subsequent decision in *Stone v. Ritter*,<sup>25</sup> the Delaware Supreme Court clarified that this standard is a component of a director's loyalty obligation.<sup>26</sup> Affirmative devotion—understood in terms of advancing a beneficiary's best interests—is thus part of fiduciary loyalty.

### *C. Loyalty as Being True*

There is another type of loyalty that cuts across the above two categories, yet doesn't necessarily belong to either of them. This is the type of loyalty that concerns things like honesty and keeping commitments. One could comply perfectly with the anti-conflicts rules and show a thoroughgoing devotion to a beneficiary's best interests while also regularly deceiving that beneficiary. Complete satisfaction of the first two types of loyalty does not guarantee that an individual is showing loyalty in all respects. Loyalty has multiple strands, and the overlapping types appear in both legal and non-legal understandings of loyal behavior.

The philosopher Simon Keller has offered a helpful account of this third category of loyalty, in terms of a character trait.<sup>27</sup> As he notes:

There is a sense of "loyal" that is associated with being dependable, or reliable, or dutiful, or true—as in, "straight and true." In telling you that somebody is loyal in this sense, I am telling you that you can trust him; he is not scheming or deceitful or manipulative; he will not sell you out; he takes his promises and commitments seriously; he knows his job and he gets it done.<sup>28</sup>

This is a view of loyalty that coheres with honesty, obedience, keeping commitments, steadfastness.

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24. *Id.* at 755; see also *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006) (endorsing the same language the chancery court used).

25. 911 A.2d 362 (Del. 2006).

26. See *id.* at 370.

27. See SIMON KELLER, *THE LIMITS OF LOYALTY* 153–54 (2007).

28. *Id.* at 154.

Joseph Raz also assesses loyalty in terms of being true, although the scope of his account is arguably broader.<sup>29</sup> Raz notes that some types of conduct are incompatible with certain relationships, and he discusses loyalty in this setting.<sup>30</sup> As he then argues: “All social forms involve ways of being true to the project or the relationship which they define.”<sup>31</sup> Being loyal can thus be understood as being true to a relationship, according to its terms. This picture of loyalty also has interesting features, as the content of such loyalty is dependent on the terms of the relationship at issue.

Notice that being true in this way does not necessarily mean doing what will best further the aim of a relationship. One might actually be dreadful at advancing the relationship’s aim, while nonetheless acting according to its terms. In fact, one could also “do a lot of good as a parent, spouse, employee, music lover, etc., while being false to one’s pursuit or relationship.”<sup>32</sup> And this brings out a notable feature of this kind of loyalty. As Raz notes:

Indeed people have been known to betray their friends or their employers in the interests of those friends. Many a soap opera has capitalized on the idea of the lover who is disloyal in order to break the relationship because he realizes, correctly, that that is in the best interest of the loved one. Such cases may show that being false to one’s pursuit or relationship is, sometimes, justified. But even a justified betrayal is a betrayal.<sup>33</sup>

As this example suggests, being true is not always the same thing as acting in someone’s best interests.

Intentional failures to perform known legal duties are one example of a failure to be true. In the options backdating cases, courts have addressed this category of disloyalty when directors show dishonesty toward shareholders.<sup>34</sup> It comes into play when

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29. See generally JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

30. See *id.* at 353–54.

31. *Id.* at 354.

32. RAZ, *supra* note 29, at 354.

33. *Id.*

34. See, e.g., *Ryan v. Gifford*, 918 A.2d 341, 355 (Del. Ch. 2007) (“[I]t is difficult to conceive of a context in which a director may simultaneously lie to his shareholders (regarding his violations of a shareholder approved plan, no less), and yet satisfy his duty of loyalty.”); *Desimone v. Barrows*, 924 A.2d 908, 933 (Del. Ch. 2007) (concluding that the alleged deception discussed in *Ryan* “is

directors breach commitments they made to their shareholders. Arguably, a variation also shows up when directors intentionally violate positive law: the violation of positive law in such cases can be understood as a breach of the corporation's charter, a commitment to shareholders that incorporates positive law mandates. And, in certain contexts, a director choice to encroach on shareholder authority may likewise qualify as a failure to be true.<sup>35</sup>

One striking thing about loyalty as being true is that it can be violated even by directors who sincerely think they are acting in their corporation's best interests. Indeed, it can be violated by directors who also lack any conflicts of interest; no self-dealing is necessary. Plainly, there are many directors who lie to their shareholders and do not care about helping the corporation or its shareholders, and this dishonest behavior frequently corresponds to conflicts of interests. But even in the absence of these factors, a director can still fail to be true. The *Disney* standard on fiduciary good faith sweeps in this category, but we should not conclude that it involves the same type of conduct as affirmative devotion in the standard sense.

### III. Purposive Loyalty

In the Part that follows, I want to elaborate on a different type of prescriptive loyalty duty. This type of loyalty is shown by advancing someone's purposes—and while this can be viewed as a form of affirmative devotion, it is also not necessarily the same thing as advancing someone's best interests. Like loyalty as being true, this type of loyalty can detach from what is in a beneficiary's best interests.

It is possible to be loyal to an artificial person, such as a corporation, by respecting the purposes for which it was

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itself a disloyal act").

35. I discuss each of the above examples in Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457, 472–84 (2009). For the relevance of loyalty as being true, see *id.* at 488–94. For further analysis of Raz's account, see Gold, *The Loyalties of Fiduciary Law*, *supra* note 1, at 180–81; Matthew Harding, *Disgorgement of Profit and Fiduciary Loyalty*, in *EQUITABLE COMPENSATION AND DISGORGEMENT OF PROFIT* (Simone Degeling & Jason Varuhas, eds. 2017).

established, as set forth in its founding documents.<sup>36</sup> A corporate charter may tell us what it means for a director to advance her corporation's purposes, and compliance with such charter provisions can be understood as a type of loyalty.<sup>37</sup> More controversially, it might be possible to show this kind of loyalty even if such purposes are not set forth in a charter (although I will leave that question open for the present discussion). On the other hand, there is more than one way to interpret this conduct. What exactly makes such conduct loyal?

Advancing corporate purposes could simply be seen as a type of loyalty we have already discussed: affirmative devotion, in the sense of advancing a beneficiary's best interests.<sup>38</sup> On a case-by-case basis, that view is surely correct. In many contexts, advancing a corporation's purposes will correspond reasonably well with advancing its best interests.<sup>39</sup> Suppose, however, that we face a fact pattern where advancing the corporation's purposes will not be in the corporation's best interests? This seems likely to happen under the right circumstances, and I will suggest that there can still be loyalty in such cases. Acting to advance a corporation's stated purposes may be loyal to the corporation,

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36. Cf. Johnson, *Relating Fiduciary Duties*, *supra* note 4 (“[C]orporations as distinct entities can and do have purposes separate and apart from those of its shareholders and other constituencies who choose, so to speak, to submit voluntarily to the jurisdiction of the corporation.”).

37. Cf. Martin Gelter & Genevieve Helleringer, *Constituency Directors and Corporate Fiduciary Duties*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 302, 319 (Andrew S. Gold & Paul B. Miller eds., 2014) (“Directors to a large extent determine by their deliberations the corporate objective—and thus determine the content of the duty of loyalty—themselves.”). Note also that this conception of loyalty may be implicated by the view that directors who knowingly cause their corporation to violate the law are acting disloyally. *See, e.g., Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) (indicating that directors may not act loyally “by causing the corporation to violate the laws it is obliged to obey”). Notably, corporate purpose clauses often incorporate a requirement that the corporation act lawfully. *See* Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1314–22 (2001) (examining evidence for understanding illegal corporate acts as *ultra vires*). For further discussion of the loyalty implications, see Gold, *The New Concept of Loyalty in Corporate Law*, *supra* note 2, at 477.

38. *See supra* notes 20–26 and accompanying text (discussing affirmative devotion).

39. Indeed, advancing the corporation's purposes may prove to be a useful heuristic in that regard.

even where consideration of its purposes dictates a course of action inconsistent with its overall best interests.

One way that this conduct could be understood as loyal is if we view corporate purposes as a limit on best interests loyalty, as a condition on this type of loyalty's existence. Perhaps best interests loyalty is sensitive to certain constraints—such as purposes clauses in charters—constraints that are partly constitutive of this loyalty. An analogous view may crop up outside the law, if we think that moral constraints are partly constitutive of the loyalty that exists between friends.<sup>40</sup> In this sense, advancing corporate purposes may not coincide with advancing best interests, but it will qualify nonetheless as part of loyalty. I have in mind a different relationship between loyalty and corporate purposes. I will argue that the advancement of corporate purposes as such demonstrates a kind of loyalty, and that this kind of loyalty is not specifically concerned with the best interests of a beneficiary.<sup>41</sup>

This poses a contrast to Johnson's recent work. Johnson also sees advancement of purposes in terms of loyalty, but he adopts a different view on what makes this conduct loyal.<sup>42</sup> He argues that when directors act to pursue the corporation's purposes they simply *are* acting in the corporation's best interests.<sup>43</sup> This perspective suggests that acting in the best interests of a beneficiary and advancing that beneficiary's purposes just are the

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40. Cf. T.M. SCANLON, WHAT WE OWE TO EACH OTHER 165 (1998) ("Compatibility with the demands of interpersonal morality is built into the value of friendship itself").

41. *Infra* notes 72–95 and accompanying text.

42. See generally Johnson, *Relating Fiduciary Duties*, *supra* note 4.

43. See *id.* (manuscript at 3) ("[T]he directorial fiduciary duty of loyalty is to act in the best interests of the corporation (a distinct person) by affirmatively advancing the articulated corporate purpose(s)."); *id.* (manuscript at 20) ("Under this approach, in discharging their statutory governance responsibilities to act in the best interests of the corporation, directors must act to advance the purpose(s) of the corporation, whatever they may be."). Arthur Laby might be making a similar type of argument in his account of fiduciary loyalty. See Arthur B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFF. L. REV. 99, 132 (2008) ("Given the infinite number of actions available for the fiduciary to pursue, how does he determine what actions will benefit the principal? The answer is the fiduciary must become aware of the principal's subjective purposes, objectives, or ends and adopt the principal's ends as the fiduciary's own ends."). This would depend on the extent to which purposes, objectives, or ends play an evidentiary role.

same thing. There may well be judicial opinions that adopt this viewpoint, and to the extent courts do so, director loyalty has these features. But I have doubts that this is the best perspective to take. Like Johnson, I think we should give careful consideration to how legal and extra-legal loyalty conceptions match up.<sup>44</sup> With these concerns in mind, it is worthwhile to look more closely at the potential differences between advancing purposes and advancing best interests.

For example, what does it mean if the directors of a corporation devoted to journalism have caused it to pursue neutral journalistic principles at the expense of profits? We could argue that this pursuit of journalistic principles is still in the corporation's best interests, on the view that the corporation is being made to act in a manner consistent with its own preferences.<sup>45</sup> Yet this requires us to imagine both that corporations have preferences in a way that is analogous to the way that humans have preferences, and also that corporations are better off when their preferences are met. Even if we accept the former claim, it is hard to say exactly how a corporation is better off when its preferences are met; it won't plausibly be because the corporation will then experience happiness or a sense of satisfaction.<sup>46</sup>

We might think that the corporation is better off in such a case because it is doing what it is supposed to do when it acts

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44. See Johnson, *After Enron*, *supra* note 3, at 49 (expressing concern that "moral language is ill-fitting and risks debasement if used to describe persons who are not genuinely regarded as full-blown moral actors at all, but who are instrumentally conceived of as economic functionaries"); Andrew S. Gold, *Accommodating Loyalty*, *supra* note 7, at 192–204 (discussing the significance of divergence between legal and extra-legal loyalty norms).

45. I put to one side the contingent possibility that doing neutral journalism will result in greater corporate profits. That may be. The issues here, however, are not the ordinary business judgment rule issues concerning deference to business judgments that could plausibly result in benefits to the corporation and shareholders, but rather standard of conduct issues regarding what it means to act in pursuit of purposes.

46. Theories of well-being that focus on desire or preference satisfaction are also subject to some well-known challenges. See, e.g., SCANLON, *supra* note 40, at 113–26 (discussing challenges for desire theories of well-being). Some of the complexity involves variation in the degree to which a given aim is worth pursuing, but it can also involve the extent to which a given aim is central to a person's life. See *id.* at 121–22.

pursuant to journalistic principles—i.e., it is doing well at its intended purpose. This is a form of success, and success in one's aims is often thought to be a component of one's best interests.<sup>47</sup> Still, success in one area may mean failure in another area. If we are talking about overall best interests (and presumably that is what a director concerned with acting in a corporation's best interests should care about), it is less than obvious how acting pursuant to a given set of principles such as neutral journalism will automatically advance those overall best interests. Such things can happen, but they seem contingent on various uncertain features of the world, not outcomes to be assumed.<sup>48</sup>

In the extreme case, advancing corporate purposes means the corporation will cease to exist. Suppose, for example, that a board decides that, consistent with a corporation's purposes, it would make sense to dissolve the business. Perhaps the corporation was founded with an aim of producing the best buggy whips in the market, but there no longer is a market for buggy whips (or even a market for the next best thing). If the board decides to dissolve the corporation on this basis, this seems consistent with fidelity to the corporation's purposes, but it is hard to see how the corporation is better off as a result. It might be better off, arguably, if its purposes were changed so that it could profit from investments in a different industry.

Notice also that, if we accept that acting in the best interests of a corporation means advancing its purposes, we have already left behind the simpler idea that best interests equates to profit maximization.<sup>49</sup> Advancing a corporation's purposes is not inevitably the same thing as profit maximization; while corporate

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47. See *id.* at 118 (noting that "success in one's aims, at least insofar as these are rational, is one of the things that contribute to the quality of a life, viewed from a purely personal perspective").

48. Cf. *id.* at 121 ("But it does not seem that a person's well-being is in fact always increased by increasing the number of desires or even aims that he or she fulfills."); JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT AND MORAL IMPORTANCE* 10 (1986) ("It is depressingly common that when even some of our strongest and most central desires are fulfilled, we are no better, even worse, off.").

49. See Eric Rasmusen, *The Goals of the Corporation Under Shareholder Primacy: Just Profit—or Social Responsibility and Religious Exercise Too?* (Jan. 12, 2014) (unpublished manuscript at 1), <http://ssrn.com/abstract=2365135> (on file with the Washington and Lee Law Review), for discussion of a broader notion of best interests in the corporate setting.

purposes are characteristically quite similar, they can vary considerably in individual cases.<sup>50</sup> Assuming that advancing best interests and advancing purposes must coincide means that advancing best interests will have a content that varies with the purposes at issue. But once we are open to multiple understandings of best interests, why adopt the view that these two phenomena must coincide? Best interests can refer to many things, and if we are to understand what it means to act in the corporation's best interests, we must make an inquiry into broader notions of what "best interests" really are.

Let's start with an inquiry into the meaning of best interests, and then turn to conceptions of loyalty. As I will suggest below, advancing best interests is plausibly seen as different from advancing purposes, or at least it is under the right circumstances. Once we recognize this, we can more easily see what is at stake if loyalty involves advancement of purposes.

### *A. Human Well-Being*

If "best interests" does mean something broader than profit maximization, what does it refer to? For these purposes, it may be helpful to compare contexts involving human beings rather than corporations. To the extent "best interests" is not just a legal term of art, intuitions on what the phrase means are likely to draw on notions of acting in a person's best interests, as they exist outside the legal sphere. Unfortunately, this is also a quite difficult area on which to reach consensus. When we talk about advancing best interests in the setting of individual lives, presumably we have in mind something like overall well-being—but overall well-being is both complex and contested.

Broadly speaking, theories of well-being tend to divide into three basic types: experiential theories, desire theories, and substantive-good theories.<sup>51</sup> We can focus on how a person

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50. Cf. *id.* at 7 ("One cannot look to a corporation's charter to discover whether it is intended to maximize profits. The main specification in a charter is the corporation's 'purpose'—the activities in which it can engage—rather than its 'goal' . . .").

51. This is Scanlon's division. See SCANLON, *supra* note 40, at 113 (providing an analysis on the purpose of the division). For another well-known division, albeit relatively similar in content, see DEREK PARFIT, REASONS AND

experiences her life, for example whether she is happy; we can focus on whether she has been able to satisfy her preferences, whatever those may be; or, we can focus on whether her life measures up well against some good or group of goods that is considered valuable. And, quite possibly, overall well-being involves some combination of success in each of these areas, and the key question is the difficult question of how to weight the different components.<sup>52</sup> Each individual theory has its proponents and detractors.

There are ways to put pressure on experiential theories. For example, if Jane's friends don't really care for her, but she never finds out about it, is she just as well off as she would be in the case where her friends did care for her?<sup>53</sup> Many of us would say that she has a lower level of well-being, but if so it isn't due to her experiential differences.<sup>54</sup> Or, what if, like Freud, one chooses to experience chronic pain by foregoing pain-killing drugs—for the sake of mental clarity?<sup>55</sup> We might find some measure along

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PERSONS 4 (1984) (suggesting a Hedonistic Theory, a Desire-Fulfilment Theory, and an Objective List Theory). Scanlon offers reasons for preferring his division of categories at T.M. Scanlon, *Value, Desire, and Quality of Life*, in *THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY* 169, 173 (2003).

52. See SCANLON, *supra* note 40, at 125 (questioning whether "we will find a general theory telling us how much weight to assign to the different elements of well-being I have listed").

53. See *id.* at 112

[I]t makes sense to say that the life of a person who is happy only because he does not know that the people whom he regards as devoted friends are in fact artful deceivers is worse, for the person who lives it, than a similar life in which the person is made happy by true friends.

See also GRIFFIN, *supra* note 48, at 13 ("Or if a father wants his children to be happy, what he wants, what is valuable to him, is a state of the world, not a state of his mind . . ."); *id.* at 9 (describing a preference for the bitter truth over "consummate actors able to give me sweet simulacra of love and affection"). I am bracketing the difficulty in applying this view to corporations, given that they do not experience happiness or other emotions, or for that matter pain and pleasure.

54. There is also the possibility that different pleasures merit different weights. For a famous example of this view, see JOHN STUART MILL, *UTILITARIANISM*, ch. 2 (Roger Crisp ed. 1998) (distinguishing higher and lower pleasures); see also GRIFFIN, *supra* note 48, at 38 (linking Mill's views to an informed desire theory).

55. This example has been used to call into question experiential theories. See GRIFFIN, *supra* note 48, at 8 ("But can we find a single feeling or mental

which Freud's experiences are desirable, but it seems that well-being doesn't always equate to an increase in pleasant experiences. Then again, perhaps some cases are even more difficult. Consider Sisyphus, pushing a boulder up a hill for all eternity. This is usually considered a punishment, but imagine that Sisyphus actually likes the task and finds it fulfilling. As Susan Wolf suggests, better to be Sisyphus happy than Sisyphus unhappy.<sup>56</sup> On the other hand, as she also adds, "better still not to be Sisyphus at all".<sup>57</sup> If we share in Wolf's intuition, this suggests that well-being may involve something more than experiential factors.

This is not to downplay the importance of experiential theories for our understanding of well-being. Even if we are not drawn to experiential theories as a complete answer, it is hard to deny that experiences like happiness or pleasure have bearing on someone's well-being. All else equal, happiness is usually considered to add to well-being—and it is the rare theorist who would deny this. The challenges arise when we adopt an experiential theory of well-being to the exclusion of other factors that plausibly also bear on the question. An experiential theory alone produces counterintuitive results for many people.<sup>58</sup>

Desire theories focus on the extent to which an individual's desires have been met. These theories face a different set of challenges, including criteria for the desires that should matter.<sup>59</sup> For one thing, there is great difficulty in assessing how to weigh different desires.<sup>60</sup> Some desires, such as those associated with

state in both of Freud's options in virtue of which he ranked them as he did?").

56. See Susan Wolf, *Happiness and Meaning: Two Aspects of the Good Life*, in *THE VARIETY OF VALUES: ESSAYS ON MORALITY, MEANING, & LOVE* 107, 121 (2015).

57. *Id.*

58. See SCANLON, *supra* note 40, at 113.

59. In order to avoid counterintuitive results, a common limit suggests that we should care about those desires that concern our own lives. See PARFIT, *supra* note 51, at 494

Suppose that I meet a stranger who has what I believe to be a fatal disease. My sympathy is aroused, and I strongly want this stranger to be cured. We never meet again. Later, unknown to me, this stranger is cured. On the Unrestricted Desire-Fulfillment Theory, this event is good for me, and makes my life go better. This is not plausible.

60. *Infra* notes 61–63 and accompanying text.

comprehensive goals or aims in life, seem to merit a great deal of weight.<sup>61</sup> Yet attaining one's comprehensive goals is occasionally going to mean that one fails to satisfy many less overarching goals.<sup>62</sup> For example, someone whose life goal is to be a world-famous scientist may not be able to focus enough on other, small-scale goals sufficiently to attain those other goals.<sup>63</sup> There are also questions concerning the exact type of desires that should matter. Should we focus on desires as they actually exist? Or, rather, on someone's informed desires, those desires they would have if they knew more?<sup>64</sup> This question does not have an obvious (or uncontroversial) answer, and our responses may depend at least partly on which desires are at issue.

Substantive-good theories incorporate experiential theories as a subset, but they can also extend to goods that are not solely appreciated in terms of experiential factors, such as their happiness- or pleasure-producing qualities. Likewise, they need not be determined by an individual's success in achieving her

61. On comprehensive goals, see RAZ, *supra* note 29, at 293. On their weight for purposes of assessing well-being, see SCANLON, *supra* note 40, at 122. Yet there is a complication in these cases when comprehensive goals change, for it is not always clear which goal or goals should be central. See GRIFFIN, *supra* note 48, at 16 ("Suppose that for much of his life a person wanted his friends to keep him from vegetating when he retired, but, now that he is retired, wants to be left to vegetate."). Corporations, of course, are subject to a similar question when corporate goals change or are under consideration for change.

62. The significance of quantities is also not obvious here. One challenge is that having a greater sum total of preferences met—simply because, say, one desires a larger number of things—does not obviously equate to having a greater level of well-being than the well-being possessed by someone who has a smaller number of preferences. SCANLON, *supra* note 40, at 121.

63. Note also that someone who has had great success in meeting her preferences may turn out to be miserable as a consequence. I discuss this problem below in connection with substantive good theories. See *infra* notes 65–69 and accompanying text.

64. For a discussion on informed desire approaches, see SCANLON, *supra* note 40, at 114–15. As Scanlon notes, a challenge here is that informed desires may not always be connected to the quality of life of the person who holds them. *Id.* at 115. There is also an apparent shift from satisfaction of desires as the basis for well-being, toward reasons for desirability as the basis for well-being. See *id.* ("What makes it the case that I have reason to learn French is the enjoyment and other benefits I would gain from being able to speak it, not the desire that full awareness of these benefits would generate."). A further shift to rational aims offers responses to some of these concerns, but it still faces challenges. *Id.* at 120–21.

desires, preferences, or goals. As Tim Scanlon notes: “Many goods that contribute to a person’s well-being depend on the person’s aims but go beyond the good of success in achieving those aims. These include such things as friendship, other valuable personal relations, and the achievement of various forms of excellence, such as in art or science.”<sup>65</sup> Likewise, Susan Wolf suggests that a life may be better when it possesses connections to “value outside ourselves.”<sup>66</sup> This type of view separates well-being, at least in part, from questions that can be purely boiled down to experiential goods or to preference-based reasoning.<sup>67</sup>

Substantive-good theories that take a broad perspective on what counts as a good may lead to counter-intuitive results in some cases. After all, there is a potential for tension between certain substantive goods and the level of happiness or preference satisfaction that an individual achieves, and it is difficult for most of us to view happiness or preference satisfaction as completely irrelevant in such cases. Suppose that someone is able to act morally with great success—perhaps making large sacrifices for others in the process—but that he is nonetheless both unhappy and unable to satisfy the vast majority of his preferences on a day-to-day basis. Or imagine an individual is able to do something deeply meaningful in her life, but the result is a life of hardship and misery.<sup>68</sup> How should we assess well-being in these cases? This problem, moreover, can become even more challenging if an individual’s projects in life shift over time, as sometimes happens.<sup>69</sup>

65. *Id.* at 125.

66. See Wolf, *supra* note 56, at 123 (noting, however, that it is difficult to determine “[w]hat precisely is better”). For her arguments distinguishing preference-based theories and experiential theories from an account that focuses on the meaningful, see *id.* at 120–23. Cf. GRIFFIN, *supra* note 48, at 19 (“If I want to accomplish something with my life, it is not that I want to have a *sense* of accomplishment.”).

67. See WOLF, *supra* note 56, at 123 (proposing that we live “in a world full of value independent of ourselves”).

68. See SUSAN WOLF, MEANING IN LIFE AND WHY IT MATTERS 14 (2010) [hereinafter WOLF, MEANING IN LIFE] (“[S]omeone whose life is fulfilling has no guarantee of being happy in the conventional sense of that term. Many of the things that grip or engage us make us vulnerable to pain, disappointment, and stress.”).

69. Cf. GRIFFIN, *supra* note 48, at 16 (noting that “preferences change, and not always in a way that allows us totally to discount earlier ones.”).

I will not seek to resolve the various debates about well-being in these pages, and the important details of these debates extend well beyond what is mentioned here. The above discussion is intended merely to sketch some of the relevant terrain, and to make clear that attending to someone's best interests is not easily reducible to a simple formula. It is also indicative of the difficulty in claiming that advancement of someone's purposes amounts to the same thing as advancement of their best interests.

When dealing with human beings, it is not at all evident that advancing their purposes in life will mean that one has advanced their overall well-being. Success at one's comprehensive goals may tend to coincide with greater happiness, or fulfillment, or perhaps preference satisfaction. But not in all cases, and if an individual does poorly enough in those other categories we may doubt that they have a high level of well-being. Likewise, if their comprehensive goals are dubious (or subject to change), advancing those goals may be a questionable way of advancing their overall well-being even if it leads to some happiness.<sup>70</sup> There is nonetheless a potentially important link between well-being and an individual's comprehensive goals in life, between their well-being and their purposes.<sup>71</sup> Indeed, perhaps advancing someone's comprehensive goals is at least an integral *part* of acting in their best interests. This brings us to the topic of loyalty.

### *B. The Place for Purposive Loyalty*

As the above discussion suggests, there is at least room to debate whether advancing a human being's purposes will advance their overall well-being. Why think, then, that advancing a corporation's purposes will always equate to advancing a corporation's best interests? Corporations are, of course, a whole different question. I am unsure how to fully transpose the above

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70. Cf. WOLF, *supra* note 56, at 111–12 (discussing examples of people engaged in the pursuit of questionable life goals).

71. For example, it may be impossible to determine what will advance someone's overall well-being without knowing their aims in life. See SCANLON, *supra* note 40, at 131 ("Well-being becomes much more determinate only once our central aims are chosen.").

concerns from the human setting to the corporate setting.<sup>72</sup> Arguably there are corporate analogues in some cases (for example, corporate preferences might be satisfied to a greater or lesser degree), but the life of a corporation is not straightforwardly assessed in the same way as the life of a human being. Acting in a corporation's best interests, if it means anything outside the law, likely means something different from acting in a human being's best interests. Whatever the right answer may be, however, to claim that advancing purposes is the same thing as advancing best interests is not a simple matter of applying the idea of best interests as it exists extra-legally, in the interpersonal context.

With this in mind, it may be worth considering another possibility. As far as loyalty goes, do we even need to think in terms of a corporation's best interests when we talk about advancing a corporation's purposes? Arguably not. Admittedly, loyalty commonly involves the advancement of someone's best interests, and the salience of this conception might motivate us to seek linkages between best interests and purposes. It is unsurprising that a best interests conception of loyalty may be the first place we turn. Yet there is also another possibility: there is a distinct conception of loyalty that concerns advancement of a beneficiary's purposes, *tout court*. This subpart will elaborate on this conception of loyalty, and offer illustrations in support.

Notice, first, that best interests loyalty is not the only type of loyalty that is recognized in the law, or outside of it. Loyalty is frequently shown in cases where the loyal behavior at issue involves obedience to commands, instructions, or requests.<sup>73</sup> This category cannot be the same as best interests loyalty, given that beneficiaries frequently instruct loyal parties to engage in

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72. Query also whether it should matter if a corporation's chosen goals are, while legal, nonetheless execrable.

73. See KELLER, *supra* note 27, at vii ("If you are loyal to something, then you probably favor it, in one way or another, in actions. You might promote its interests, treat it with respect or veneration, follow its orders, or act as its advocate."); Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 559 (2015) (noting that following instructions "may be described as an element of loyalty"). Requests are less frequently noted in analyses of loyalty, but following a request is another example. Cf. DAVID OWENS, *SHAPING THE NORMATIVE LANDSCAPE* 99–100 (2012) (indicating that a friend's request may create an obligation).

conduct that is not in their best interests, and given that the loyalty mandate in such cases is not limited to cases in which good outcomes are likely. Nor is following instructions just a heuristic for advancing best interests. In fact, outside of the law the kind of loyalty that involves following instructions tends to require a distinct kind of motivation: a principal could rightly be concerned if her agent said she is only following her instructions because the agent thought this would work out best for the principal. That would sound like a very unstable basis for loyalty, and the principal could rightly say that this isn't the kind of loyalty she requires.<sup>74</sup>

But purposive loyalty does not look quite the same as instruction-following loyalty. When a loyal party seeks to act in ways that advance the purposes of her principal, this need not be because of anything the principal (or a third party) has commanded.<sup>75</sup> The loyal party need not be acting out of obedience to an order. This, however, raises a question: If purposive loyalty is neither best interests loyalty nor instruction-following loyalty, what is it?

Such purposive loyalty has an analogue outside the legal sphere. Unlike corporations, natural persons do not have charters that specify their purposes. But they may very well develop a clear and deeply meaningful set of purposes over time, and these purposes can inform our understanding of what it means to be loyal to them. During the course of their lives, individuals acquire

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74. Within the law, the relation between a duty to follow instructions and a duty to be loyal is an interesting one. Cf. RESTATEMENT (THIRD) OF AGENCY, § 8.01 (AM. LAW INST. 2006) ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."); Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 321, 321 (Andrew S. Gold & Paul B. Miller eds., 2014) ("The agent's fiduciary duty to the principal furnishes a benchmark for interpretation and for assessing actions the agent takes in response.").

75. This conduct also need not qualify as loyalty to a determinate beneficiary (and thus, not all loyalty that involves advancement of purposes involves the same phenomena as the loyalty described in this paper). See Miller & Gold, *supra* note 73, at 562 ("Loyalty, however, need not be directed toward persons. It may instead be directed toward abstract purposes that transcend the interests of determinate persons."). The purposive loyalty described here does involve loyalty to a determinate beneficiary.

ground projects that give their lives meaning.<sup>76</sup> As Bernard Williams notes, a person may thus be “identified with his actions as flowing from projects and attitudes which in some cases he takes seriously at the deepest level, as what his life is about.”<sup>77</sup> Loyalty may be concerned with advancement of these ground projects, and if so it takes on a distinctive cast.<sup>78</sup>

A loyal friend or family member may take advancement of purposes—as reflected in a person’s ground projects—as a means to be loyal to that person, even where they fear that pursuit of these purposes will not advance (or might impair) her objectively-construed best interests. And, just as instruction-following loyalty can involve a thoroughgoing devotion to a beneficiary, so too with purposive loyalty. Indeed, purposive loyalty may actually supersede other types of loyalty: this is not an inferior or second-best loyalty, but rather a different category of loyalty that has its own merits. It is, in some cases, a type of loyalty that reflects a profound caring about the beneficiary.

For example, suppose that Jack is good friends with Jill. Jill has always wanted to become a novelist and, over time, this pursuit has become a ground project for her. The goal of becoming a novelist is something that gives Jill’s life meaning, and from her perspective, purpose. She has ordered her career, educational, financial, and other significant matters accordingly.

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76. For seminal accounts of ground projects and their role, see generally J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR & AGAINST* (1983); Bernard Williams, *Persons, Character and Morality*, in *MORAL LUCK* 1, 13–14 (1981). As Susan Wolf has noted, the term “projects” may be less than ideal. See Susan Wolf, *The Meanings of Lives*, in *THE VARIETY OF VALUES: ESSAYS ON MORALITY, MEANING, & LOVE* 89, 94 (2015) (“[T]he use of the word ‘project’ is not ideal: It is too suggestive of a finite, determinate task, something one takes on and, if all goes well, completes.”). For example, there are cases where what we really have in mind are relationships. See *id.* (“Relationships, in particular, seem at best awkwardly described as projects.”). This concern seems especially apt when we are worried about questions of loyalty. Like Wolf, I will read the term “projects” broadly for purposes of the present argument, so as to include things like relationships.

77. SMART & WILLIAMS, *supra* note 76, at 116.

78. While efforts to advance ground projects may comprise a subset of what Arthur Laby describes as the pursuit of a principal’s ends, it appears that many of the ends Laby has in mind are less foundational to a beneficiary’s life. Cf. Laby, *supra* note 43, at 135 (referring to the responsibility of a fiduciary to appropriate the “objectives, goals, or ends of another”).

Jack, out of loyalty to Jill, might ordinarily seek to act in her best interests. But suppose he realizes that there is an opportunity to assist Jill in becoming a novelist. Let's say that Jack is unconvinced that being a novelist is in Jill's best interests (it probably won't pay well, he anticipates she will find the lifestyle stressful, and he is not even convinced she would find it fulfilling). Jack hopes and expects she will change her mind eventually. Out of loyalty, he might nevertheless attempt to help Jill achieve her purposes as she understands and values them.<sup>79</sup> This form of loyalty is not concerned so much with what is best for someone as with what they wish to be in life.<sup>80</sup>

It may be helpful to compare Tim Scanlon's work in moral philosophy, as it captures some of the key insights. Scanlon notes that there are people who, due to their interpersonal relationships, are benefactors for others.<sup>81</sup> And, as he notes, a benefactor "has reason to do what will benefit his or her intended beneficiary and to do it because that person will benefit."<sup>82</sup> Examples include friends and parents. In many cases, what the beneficiary wants is actually to help someone else.<sup>83</sup> In such cases, a benefactor who helps the beneficiary to help others will nonetheless be acting with the aim of benefitting the beneficiary: "If my benefactor saves my child or my parents, or restores some buildings in my city, and does this *qua* benefactor, that is to say, *for me*, he is doing it because he sees this as benefitting me in some way, or at least because *I* want it."<sup>84</sup> Many cases of loyalty have this quality, in that a loyal party is motivated by the principal's best interests or preferences even though the principal's own reasons for desiring assistance are altruistic.

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79. Cf. SIMON KELLER, *PARTIALITY* 144 (2013) ("When you act for the sake of a person, you can think of yourself as doing something that is valuable from her point of view.").

80. Indeed, it is a characteristic of seeking fulfillment that the process and end result may be different from what makes that individual happy. See WOLF, *MEANING IN LIFE*, *supra* note 68, at 14 ("[S]omeone whose life is fulfilling has no guarantee of being happy in the conventional sense of that term. Many of the things that grip or engage us make us vulnerable to pain, disappointment, and stress.").

81. See SCANLON, *supra* note 40, at 134–35 (discussing friends and family members as benefactors).

82. *Id.* at 134.

83. See *id.* at 134–35 (discussing such cases).

84. *Id.*

Yet, in some cases, something more may be going on. As Scanlon points out: "It is not always clear that someone who stands in one of these relations to us therefore has reason to do what will 'make our life go better,' as opposed to reason to help us to do what we have reason to want to do, whether or not this will conduce to our well-being."<sup>85</sup> This possibility makes room for a purposive loyalty that differs from best interests loyalty. Consider Scanlon's illustration:

Suppose, for example, that I have good reason to want to pursue a career as an artist, or as a labor organizer, even though this may lead to a lower level of well-being for me overall because of the difficulty and discomfort that this life involves. Suppose also that I cannot do this without help from some friends or family members. Do they have reason to help me even though they are not thereby promoting my well-being? It seems to me that they may.<sup>86</sup>

This suggestion seems exactly right; benefactors may well have reason to advance someone's comprehensive goals, whether or not that is going to promote their well-being. All we need to add is that these reasons can also qualify as reasons of loyalty.<sup>87</sup>

Some readers might focus on the possibility of success presented by the above example: being an artist or a labor union organizer can lead to fulfillment and happiness, and the parents or friends in the above fact pattern may pin their hopes on this. Perhaps that is so, but not necessarily. In any event, we can make the example more extreme, to avoid too much overlap with a happiness-based or otherwise hedonistic picture of the intended outcome. Consider the case of Owen Wingrave, a character from the work of Henry James.<sup>88</sup> As Bernard Williams describes his story:

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85. *Id.* at 135.

86. *Id.* at 135.

87. Notice also that friends and parents may have reason to help in this example even if they are not requested or instructed to do so. Accordingly, this type of loyalty can fall outside of loyalty as obedience (and, potentially, loyalty as being true). This depends, however, on how broadly we construe loyalty as being true. If it means being true to the terms of a relationship, then loyalty as being true is so capacious that it will likely incorporate all categories of loyalty. If instead being true means being honest, keeping commitments one has made, and similar behavior of that nature then it may involve something different from purposive loyalty.

88. See generally HENRY JAMES, OWEN WINGRAVE (Cullen Press 2016) (1893). As I have not yet had the benefit of reading the Henry James story, this account is

Owen's family urge on him the necessity and importance of his joining the army, since all his male ancestors were soldiers, and family pride requires him to do to the same. Owen Wingrave has no motivation to join the army at all, and all his desires lead in another direction: he hates everything about military life and what it means.<sup>89</sup>

This is not, then, a career choice about which Owen is idealistic, at least not with respect to his dreams about what he will do with his career.

We can imagine, however, that further discussion with his family has convinced Owen to make this choice regardless. As Williams puts it: "Owen Wingrave might come to join the army because (now) he believes that it is a reason for him to do so that his family has a tradition of military honour."<sup>90</sup> Owen, let us assume, holds out no hope that this will make him happy or lead to a fulfilling life; he simply thinks it is the right thing for him to do given the family tradition, and he genuinely cares about making the sacrifice. In such a case, a benefactor could plausibly assist Owen, despite being quite convinced (as Owen himself is) that this will not lead to happiness or fulfillment even if Owen is successful as a soldier. Granted, assisting Owen could advance what is meaningful to him (and this could have some bearing on his well-being on some theories),<sup>91</sup> but it is difficult to see this case in terms of what will advance Owen's overall best interests.<sup>92</sup> The Owen Wingrave case nonetheless involves a form of loyalty.<sup>93</sup>

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reliant on Bernard Williams's summary of the plot. Williams, *supra* note 76, at 106.

89. Williams, *supra* note 76, at 106.

90. *Id.* at 107.

91. Cf. WOLF, *supra* note 56, at 122–23 (discussing connections between meaningfulness and well-being).

92. This example also underscores a further consideration. To the extent success in an individual's comprehensive goals is linked to that individual's well-being, it is often thought that those goals must be valuable goals. See RAZ, *supra* note 29, at 298 (contending that "a person's well-being depends on the value of his goals and pursuits"). If one adopts that perspective, advancement of goals will only sometimes involve advancement of well-being. Yet loyalty could involve advancing someone's comprehensive goals even when those goals are not valuable. A striking feature of loyalty is that it does not always match well with moral obligations, and in such a case loyalty obligations may diverge from the requirements of morality.

93. Note also that a loyal party might be concerned with helping someone have a life that is choiceworthy, even if this does not involve advancement of their

The strand of loyalty involved in advancing someone's purposes (or aims) is not reducible to any of the conventional strands of fiduciary loyalty, although as a contingent matter it can overlap with them. If we look at what loyalty means outside the law, there are ways to show devotion to someone that detach from their best interests, for example by following their instructions. Acting to advance someone's purposes in life is another possibility, and in some settings it is an especially important one.

Adapted to the corporate setting, a director may show loyalty to her corporation by advancing the purposes for its existence, and she need not conclude in doing so that she is advancing its best interests. This perspective, moreover, allows us to square loyalty to a corporation with a decision to vote in favor of dissolving that corporation when its purposes are no longer viable.<sup>94</sup> A similar point applies for partners that terminate a partnership when its planned undertaking is completed.<sup>95</sup> Advancing a corporation's purposes can be a way of advancing its best interests, but under the right circumstances it involves significant stretching to reach that conclusion. We should not therefore conclude that a loyalty framework is unavailable. There is, fortunately, another way to understand loyalty to a corporation in these settings.

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well-being. In some cases, people sacrifice their well-being for others, and this may mean that their life is choiceworthy when viewed from a certain perspective. Even if this does not match the Owen Wingrave fact pattern, it could readily match other fact patterns in which people sacrifice their interests for others, or for aims that they care about. Cf. SCANLON, *supra* note 40, at 112 ("We might say, for example, that there is reason to choose a certain life because of its great value, even though it involves a low level of well-being . . ."); see also *id.* at 131 (discussing how a life could be more choiceworthy "because it offered the only way of fulfilling an obligation to care for a relative").

94. Cf. WOLF, *supra* note 68, at 56 ("What gives meaning to our lives gives us reasons to live even when the prospects of our well-being are bleak. Indeed, what gives meaning to our lives may give us reasons beyond that. As Camus pointed out, if something is worth living for, it is also worth dying for.").

95. I do not pursue it here, but a similar set of issues might be raised in cases where directors wish to change a corporation's purposes. In that case, they might be advancing a corporation's higher-order preferences (or purposes), and this also raises interesting questions whether an amendment to purposes is, as such, an example of loyalty to a corporation's best interests.

*IV. Conclusion*

Fiduciary loyalty includes a range of obligations. Classically, it incorporates the anti-conflict rules, but it also calls for the loyal party to act in the best interests of her beneficiary. Furthermore, recent case law has recognized a distinctive element of loyalty: the requirement of being true. Loyalty in the sense of being true calls for honesty and a keeping of commitments. Interestingly, when directors act to advance the purposes of their corporation, they may be demonstrating a type of loyalty that fits into none of the above categories. They may be engaging in purposive loyalty, and that has its own distinctive meaning.

Purposive loyalty is the kind of loyalty that parents engage in when they seek to advance their daughter's career goals, despite a belief that her chosen career will not lead to happiness, or ultimately be in her best interests. It is the loyalty that friends show when they assist each other despite being convinced that they are helping their friend pursue a mistaken path. Of course, in many of these cases, the loyal party will think that they are helping the beneficiary advance her best interests, or at least they may be unsure of what her best interests entail. The relevant point is that this purposive loyalty shows a genuine devotion irrespective of whether the conduct at issue is thought to advance best interests, and irrespective of whether the loyal conduct was even requested by the beneficiary. Purposive loyalty is its own category of loyalty.

The realization that best interests are not always at issue when people are loyal might seem surprising. Yet we should not be surprised that there are types of loyalty that diverge from advancing someone's best interests. Obediently following instructions is a way of being loyal, and following instructions diverges from a principal's best interests with embarrassing frequency. This same point applies to other loyalty obligations, including fiduciary obligations. Just as avoiding conflicts of interest does not inevitably mean that one acts in another's best interests, and likewise just as telling the truth does not inevitably mean that one acts in another's best interests, by the same token advancing someone's purposes may not equate to acting in their best interests.

There are those who argue that advancing a corporation's purposes simply is the same thing as advancing the corporation's best interests. I suspect one reason why we sometimes see best interests loyalty identified with an advancement of purposes is due to a fear that, if these two types of conduct diverged, it would be harder to justify the advancement of corporate purposes. That is, it might be harder to describe this conduct in loyalty terms. This Paper suggests that this fear, if it exists, is overblown. Purposive loyalty is a genuine way of being loyal—indeed, it involves a very substantial type of devotion—and there is no reason to think that it can not apply to directors when they seek to advance their corporation's purposes. And, by thinking in this way, we do not have to engage in any awkward bending of the facts to locate a beneficiary's best interests. Loyalty often has other concerns in mind.