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Andrew S. Gold

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Andrew S. Gold*

Abstract: In the abstract, the limits on a lawyer's loyalty obligations could take several forms. For example, constraints on a fiduciary's loyalty obligations may be derived from a correct understanding of that fiduciary's loyalty itself. Indeed, violations might count as a form of disloyalty to the client. Alternatively, such constraints could stem from obligations owed to parties other than a lawyer's client, or even something more abstract like the rule of law. Notably, such constraints could be derived from legal principles that have nothing to do with fiduciary law. Each of these options is a conceptual possibility, contingent on the choices made by a given legal system. Constraints on a loyalty obligation that are implications of that loyalty obligation itself are defined here as *internal*. Constraints imposed from outside a given fiduciary loyalty obligation are defined as *external*. This paper seeks to deepen our understanding of a particular type of fiduciary loyalty (the loyalty owed by lawyers) by focusing on the role of such internal constraints, and in the process to elaborate on the scope of loyalty obligations more generally. This paper will also indicate why we should care about the internal/external distinction. Among other things, this distinction helps determine whether lawyers are better seen as private or public fiduciaries, and in practice it may bear on both judicial reasoning and legal compliance.

Keywords: legal ethics, fiduciary loyalty, rule of law

I. Introduction

Fiduciary loyalty is often equated to an obligation to act in what the fiduciary perceives to be her beneficiary's best interest. Yet, even where loyalty obligations take a prescriptive form, they are rarely as simple as that. Some loyalty duties are not owed to any determinate beneficiaries, and instead involve advancement of an abstract purpose.[1] Other loyalty duties are shaped by obligations to follow a beneficiary's instructions, as occurs with agency relationships. Yet other loyalty duties may be limited by obligations to obey positive law, even where doing so

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[1] See Paul B. Miller and Andrew S. Gold, "Fiduciary Governance," *William & Mary Law Review* 57 (2015): 513-86.

will curtail advancement of a beneficiary's best interests.[2] These are only a few examples, but they illustrate the degree of variation in fiduciary loyalty.

Whatever standard of loyalty applies, it may be subject to constraints. Such limitations are a standard component of most types of loyalty, whether instantiated in legal systems or in our daily lives. A less remarked upon feature of fiduciary loyalty is that such constraints can be either external or internal. A loyalty obligation may be constrained by the existence of another duty – such as a separate fiduciary duty of loyalty owed to an additional beneficiary, or a non-fiduciary duty that limits the acceptable means of acting loyally—in which case the constraint is *external.*[3] Or, alternatively, the constraint may be built into a particular loyalty duty itself. For example, the limit imposed by an agent's duty of obedience may be understood as a component of a single loyalty duty owed to a particular beneficiary. In that case, the constraint is *internal.*

Do fiduciary principles require in general that constraints on loyalty obligations be internal or external? There is no evident reason to think that they do (and the law provides examples of both types of constraint). The more interesting question is whether particular internal constraints make sense, given legal and extra-legal understandings of how loyalty works. In this article, I will pursue the question whether certain constraints on fiduciary loyalty—notably those that concern conformity to positive law or similar ethical obligations—are plausible candidates for treatment as internal constraints. I will further consider whether violation of such internal constraints could be a form of disloyalty. I will conclude that the answer is yes, but not in all cases.

While the nature of the constraints on a fiduciary's loyalty obligations has bearing on a range of fiduciary relationships, they are especially salient in the setting of lawyer-client relationships, and that setting will be the primary focus here. Lawyers are often thought to owe fiduciary duties to their clients.[4] Yet lawyer-client relationships also implicate a number of basic constraints on the pursuit of a client's best interests or even pursuit of her general objectives. These include obligations of obedience to a client's instructions, and they include obligations related to the proper functioning of the legal system and the rule of law. Indeed, on a prominent view, the latter category may require a type of fiduciary loyalty to the law itself.[5]

The central focus of this paper's argument is conceptual, but there are reasons to care about the internal versus external question beyond obtaining conceptual clarity. In part, this is because legal systems have options when they define fiduciary loyalty obligations. Loyalty obligations are not necessarily moral

[2] For discussion of how this prohibition can still count as a part of loyalty, see Andrew S. Gold, "The New Concept of Loyalty in Corporate Law," *U.C. Davis Law Review* 43 (2009): 457-528.

[3] While I use independent duties as an example, it is possible for external constraints to take other forms. For example, a statute might curtail the scope of certain fiduciary duties without making it a violation of duty for a fiduciary to exceed the limits set by that statute.

[4] See W. Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton: Princeton University Press, 2010), 38 (describing loyalty duties within the law governing lawyers).

[5] Ibid., 122 (describing an obligation of fidelity to the law itself); ibid., 168: "[t]he lawyer-client relationships should be structured by the ideal of fidelity to law, not to clients—that is, by legal and ethical ideals of fiduciary obligations."

obligations, and they are sensitive to social conventions and individual commitments in a variety of ways.[6] Legally defined loyalty duties may also diverge considerably from loyalty duties as they exist outside the law.[7] If in fact an internal or external source of loyalty constraints is desirable, legal systems can deliberately select one of these options.

Yet there are additional reasons to think the distinction matters. One possibility is that incorporating constraints on loyalty within a loyalty duty will affect rates of compliance with that duty. Fiduciaries may view certain loyalty duties differently from the other duties they owe, with consequent changes in conduct when a constraint is built into those loyalties. Or, fiduciaries may show greater concern about reputation effects if they are found to have violated a duty of loyalty than if they have violated another, external obligation (including another type of fiduciary obligation).[8] It may also turn out that fiduciaries that must balance loyalty obligations against external constraints will take those external constraints less seriously because they are not internal to the loyalty the fiduciary owes. These hypotheses depend on empirical findings, but it is reasonable to surmise that the distinction between internal and external constraints sometimes matters for a fiduciary's behavior.

The above examples focus on the conduct of the fiduciary whose loyalty is being defined (e.g., a lawyer with respect to her client), but our concern may instead be with spillover effects in other pockets of fiduciary law outside the lawyer-client setting. For example, it has a particular meaning when one person is an agent of another, and a major part of that meaning is that the agent's central concern is with advancement of the instructions and goals of her principal. Lawyer-client relationships are also agency relationships. A lawyer-client relationship with substantial external impositions on the lawyer's loyalty obligations may send a signal that agency relationships in general involve similar external constraints on loyalty. This, in turn, might corrode the expressive effects and trust-related benefits that attach to agency law more generally.

Furthermore, the internal versus external question may bear on the degree to which the lawyer-client relationship is a private law institution, as opposed to a public law institution. Some, such as Alice Woolley, recognize lawyer-client

[6] For this reason, I am hesitant to draw close ties between the perspective adopted in this paper and inclusive legal positivism. While an inclusive legal positivist might find much to agree with in these pages—and there is a structural similarity between approaches—an inclusive legal positivist perspective is not necessary in order to adopt the arguments discussed here. I thank an anonymous reviewer for noting the structural parallel.

[7] For several perspectives on this divergence, see Stephen A. Smith, "The Deed, Not the Motive: Fiduciary Law Without Loyalty," in *Contract, Status, and Fiduciary Law*, ed. Paul B. Miller and Andrew S. Gold (Oxford: Oxford University Press, 2016); Paul B. Miller, "The Dimensions of Fiduciary Loyalty," in *Research Handbook on Fiduciary Law*, ed. D. Gordon Smith and Andrew S. Gold (Cheltenham and Northampton, MA: Edward Elgar Publishing, 2018); Andrew S. Gold, "Accommodating Loyalty," in Miller & Gold, *Contract, Status, and Fiduciary Law*.

[8] See Gold, "The New Concept of Loyalty in Corporate Law," 524-25: "A legal opinion that chastises a director for failing to keep a commitment, or for leading the corporation astray from positive law, is different in kind from a legal opinion that characterizes that director's behavior as disloyal."

relationships as a private law institution with public law justifications.[9] Others, such as Evan Fox-Decent and Evan Criddle, see public law loyalty obligations as regulating private law loyalty obligations in this setting.[10] On their view, lawyers are at least in part public fiduciaries.[11] Does an external view on loyalty constraints bear on these views? Is it easier to see lawyer-client relationships as a private law institution if the constraints on fiduciary loyalty to a client are internal to that fiduciary loyalty? It may be that our views on regulation of lawyer-client relationships will be shaped differently based on the sense that such relationships are more or less public or private law institutions, and accordingly it may make a difference how the internal/external question is answered.[12]

This paper's argument will unfold in several stages, showing how limits on a lawyer's fiduciary loyalty can fit within an internal constraints structure should a legal system so choose. Part II of this paper will consider the duty of obedience common to all agency law relationships. This constraint readily fits within some understandings of what it is to be loyal, not only from a legal perspective but also extra-legally. On such views, it just is a part of loyalty to follow instructions, and accordingly where loyalty is constrained by duties of obedience these are internal constraints. Part III will turn toward rule of law and similarly system-oriented constraints on a lawyer's duty of loyalty. At first glance, this category is more difficult to square with an internalist perspective, but both legal and extra-legal examples of loyalty may incorporate constraints of this type as well. Part IV will consider the degree to which a lawyer's objectives as a loyal fiduciary can differ from the aim of pursuing a beneficiary's best interests. Internal constraints suggest that something other than best interests-centered loyalty will operate in certain contexts. Thus, if internal constraints are part of fiduciary loyalty there will be at least some divergence from a best interests-focused account of fiduciary loyalty. This is not problematic, but it does pose a challenge for theories of fiduciary law that presuppose a best interests standard of fiduciary conduct. Part V will consider whether the internal/external distinction bears (or can bear) on judicial reasoning. As will be developed, internal constraints can potentially implicate a distinctive pathway to legal outcomes, and this pathway may itself be desirable. Part VI will then conclude.

[9] Alice Woolley, "The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations," *University of Toronto Law Journal* 65 (2015): 285-334.

[10] See Evan J. Criddle and Evan Fox-Decent, "Guardians of Legal Order: The Dual Commissions of Public Fiduciaries," in *Fiduciary Government*, ed. Evan J. Criddle, Evan Fox-Decent, Paul B. Miller, Andrew S. Gold, and Sung Hui Kim (New York: Cambridge University Press, 2018), 71-75, 80 (indicating lawyers have second-order fiduciary duties to the public as a whole and to the justice system). Their account also suggests another reason the difference may matter: on their view, second order fiduciary duties must trump first order fiduciary duties. See ibid., 81.

[11] Ibid., 87.

[12] Note also that the divide between public law and private law may be a dynamic one. See Thomas W. Merrill, "Private and Public Law," in *Oxford Handbook of the New Private Law*, ed. Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily L. Sherwin, and Henry E. Smith (Oxford: Oxford University Press, forthcoming, 2020).

II. Loyalty and the Duty of Obedience

Perhaps the most basic example of an internal loyalty constraint emerges in agency-type relationships. An agent's duty of obedience is understandable as a loyalty obligation, and this includes the case of lawyers.[13] Even if obedience is just a constraint on loyalty (and not a loyalty obligation in its own right), it may still be seen as an outgrowth of a certain conception of loyalty. Indeed, this possibility implicates one of the most fundamental splits in loyalty categories within fiduciary law. Trustee-type loyalty characteristically allows for paternalistic treatment of a beneficiary whether or not a beneficiary agrees, while agency-type loyalty characteristically requires adherence to the expressed wishes of the beneficiary. Agency-type loyalty involves internal constraints, at least to the extent such obedience is understood as an implication of the agent's distinctive type of loyalty rather than an external imposition on the loyalty that agents owe.

Granted, the agent's duty of obedience does not have to be construed as a fiduciary loyalty duty. It might instead be a fiduciary duty of another type.[14] But obedience is sometimes seen as a loyalty duty,[15] and that reading is entirely consistent with commonly held extra-legal perspectives on the subject. As Simon Keller notes: "If you are loyal to something, then you probably favor it, in one way or another, in your actions. You might promote its interests, treat it with respect or veneration, *follow its orders*, or act as its advocate."[16] Whether or not the law in fact takes a lawyer's duty of obedience to be a component of loyalty, it is a recognizable extension of existing loyalty concepts for the law to do so.

Importantly, loyalty constrained by internal duties of obedience need not be a less stringent form of loyalty, or a diluted version. It can be a different form of loyalty. Acting obediently may preclude some conduct that would advance a beneficiary's best interests, but those acts of obedience can still be examples of loyalty to that same beneficiary. Attempting to comply with a principal's instructions may also be just as demanding as attempting to advance a principal's best interests. And, from a principal's perspective, a failure to conform to his or her instructions may be a greater betrayal than a failure to advance his or her best interests. There is no deep conceptual challenge in recognizing an obedience-based constraint as a component of a fiduciary's loyalty rather than an exception to that loyalty or a carve-out from its requirements, nor does recognition of such constraints require watering down of fiduciary loyalty obligations.

[13] On the importance of the agency law component, see Deborah A. DeMott, "The Lawyer as Agent," *Fordham Law Review* 67 (1998): 301-26.

[14] See Rob Atkinson, "Obedience as the Foundation of Fiduciary Duty," *Journal of Corporation Law* 34 (2008): 47-48. It also bears noting that the *Restatement (Third) of Agency* has separate sections covering obedience and conventional loyalty duties.

[15] See, e.g., Douglas R. Richmond, "Yours, Mine, and Ours: Law Firm Property Disputes," *Northern Illinois University Law Review* 30 (2009): 26: "Agents owe a duty of obedience as an aspect of their duty of loyalty, and they are accordingly bound to follow their principals' lawful instructions."

[16] See Simon Keller, *The Limits of Loyalty* (Cambridge: Cambridge University Press, 2007), vii. (emphasis added).

Correctly understanding some forms of loyalty means observing that these forms of loyalty include duties of obedience. These internal features are nonetheless also constraints on an otherwise robust obligation to act in the best interests of a beneficiary or to act in a way that advances her comprehensive goals in life. Whether we speak of fiduciary law, friendships, or other loyal relationships, duties of obedience may take the form of internal constraints.

III. Loyalty, Internal Constraints, and the Rule of Law

Rule of law and similar limits on loyalty are more visibly detached from a lawyer's advancement of her client's interests. Accordingly, they are a more difficult explanatory challenge. Initially, these limits may seem like natural candidates for treatment as external side constraints on loyal conduct. Such limits on loyalty may, however, be interpreted in a variety of ways, and among these possibilities is an internal constraints understanding.

A. Internal Constraints as a Potential Interpretation

The idea that these limits on lawyer conduct are merely side constraints has been subject to criticism. For example, in a draft paper, Bradley Wendel has suggested that lawyers owe a loyalty duty to the law, with the effect that lawyers are like agents empowered by two principals (with loyalty owed to both their client and the law).[17] An advantage to this suggested perspective is that it allows for lawyers to be subject to limits on the scope of their loyalty while also recognizing that such limits are a source of the lawyer's power.[18] This argument thus captures something important about the way we conceptualize the constraints on lawyers' fiduciary conduct.

Indeed, it is reasonable to suggest that fiduciary loyalty could be owed to the law. There is nothing in fiduciary law to preclude loyalty obligations to advance goals or purposes.[19] Charitable purpose trusts are a prime example, but we may also understand a lawyer's obligation to conform to the law—or for that matter a judge's obligation to do so – as a fiduciary loyalty obligation that is not owed to any particular beneficiary. We might also see fiduciaries as parties that owe their obligations to multiple beneficiaries; such relationships are common, as multiple beneficiary relationships arise quite frequently in corporate law settings.[20] For that matter, it is not rare to see hybrid relationships that incorporate

[17] See W. Bradley Wendel, "Should Lawyers Be Loyal To Clients, The Law, or Both?," (unpublished manuscript).

[18] Ibid., 19. Criddle and Fox-Decent, "Guardians of Legal Order," 80, likewise seek to avoid seeing these constraints as mere side constraints.

[19] These are fiduciary governance cases, as described in Miller & Gold, "Fiduciary Governance."

[20] On the significance of multiple beneficiary cases in fiduciary law, see Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2011); Paul B. Miller, "Multiple Loyalties and the Conflicted Fiduciary," *Queen's Law Journal* 40 (2014): 301-40; Andrew S. Gold, "Reflections on the State as Fiduciary," *University of Toronto Law Journal* 63 (2013): 655-70.

fiduciary duties to determinate beneficiaries as well as fiduciary duties to advance abstract purposes. Public benefit corporations are a prominent hybrid example, and lawyer-client relationships may be another one.[21]

Still, there is an alternative path, for Wendel's suggested interpretation is not the only option that avoids treating rule of law or similar limits on attorney conduct as mere external side constraints. We do not have to see lawyers as agents to two principals (or, as Criddle and Fox-Decent put it, as fiduciaries with dual commissions) in order to avoid the mere side constraint reading.[22] It is also possible to think that lawyers possess loyalty obligations that require respect for the law—and for the rule of law—that are incorporated into a single agency relationship, or into a single fiduciary commission. These limits do not have to result from relationships with two principals, nor from dual commissions. Fiduciary loyalty allows for the possibility of internal constraints incorporated within a single loyalty to a specific beneficiary.

It may nonetheless be counterintuitive to recognize such constraints as internal in this sphere. If there are legal limits on a lawyer's loyalty to her client based on the rule of law or even based on the strictures of impartial morality, mustn't they come from other legal relationships external to the lawyer-client relationship? I do not wish to downplay the possibility of tensions between loyalty to a client and loyalty to the law, as that potential is quite real.[23] Nor should we ignore the importance of external constraints on loyalty when legal systems adopt a set of rules that govern lawyers. Even so, internal limits on loyalty may exist, and may even include a mandate to comply with positive law or to act ethically. Internal constraints may arise if a legal system makes that choice just as readily as external constraints may do so. Fiduciary law concepts are open-ended enough to allow for either possibility (or for both possibilities simultaneously).

Nor is this an entirely untried option. Significantly, in some settings fiduciary law *does* make use of internal loyalty constraints to ensure that fiduciary loyalty not undermine the rule of law or otherwise demonstrate an overtly disrespectful perspective toward the law. Internal limits on loyalty are already a feature of existing fiduciary law in these settings. Indeed, violations of such internal constraints may qualify as a type of disloyalty in their own right. A prominent example is the prohibition against corporate directors intentionally violating positive law. Here, what appears to be a systemic goal of advancing legal compliance and rule of law values is subsumed within a director's loyalty obligations, and these loyalty obligations are owed to her corporation itself.

[21] See Andrew S. Gold and Paul B. Miller, "Fiduciary Duties in Social Enterprise," in *Cambridge Handbook of Social Enterprise Law*, ed. Benjamin Means and Joseph W. Yockey (New York: Cambridge University Press, 2019).

[22] See Criddle & Fox-Decent, "Guardians of Legal Order," 70 (describing a dual commissions view).

[23] See John Gardner, "The Twilight of Legality," *Australasian Journal of Legal Philosophy* 43 (2018): 15-16 (indicating a potential for conflict between a lawyer's role as a representative of a client's interests and a responsibility for upholding the rule of law).

B. Internal Constraints, Commitments, and Moral Limits

As suggested above, the corporate context is interesting for an additional reason, as it suggests something more than just the existence of internal constraints. The internal constraints at issue in the corporate context are not merely constraints; their violation is a form of disloyalty. For example, in Delaware, shareholder plaintiffs can successfully sue directors for breaches of loyalty when those directors have purposely caused the corporation to violate positive law. And, this result is not couched in terms of public policy but rather in terms of what directors owe as fiduciaries to the corporation and its shareholders. The legal understanding is that the directors have acted disloyally to the corporation by means of their choice to have the corporation act illegally.[24] This admittedly leaves us with the question of how courts can reach this conclusion without distorting conceptions of loyalty as it is usually understood. But the legal point of view that this is disloyalty to the corporation is well established.

How can there be a loyalty breach in cases where directors believe that violating positive law would cause the corporation to benefit financially? An answer lies with the fiduciary duty of good faith (which is itself a subpart of loyalty). It is a breach of fiduciary good faith to betray a commitment the directors have made to the corporation, and one of those commitments is to follow the terms of the corporation's charter. In turn, the terms of the corporation's charter are understood to incorporate positive law among their requirements. By extension, intentionally violating positive law means intentionally violating the corporation's charter.[25] And this, it follows, means that intentionally violating positive law is betraying the corporation and acting disloyally toward it. We have a recognizable loyalty breach in such cases, and it involves a constraint on loyalty that is internal to the loyalty that directors owe to their corporation.

The case of the lawyer may seem different, for even if we accept that loyalty to the corporation means not violating the corporation's charter—and that this means not intentionally violating positive law—no similar relationship exists for the lawyer. A lawyer-client relationship does not come with a charter that the lawyer can violate with the consequent effect of betraying her client by violating positive law. Moreover, we might wonder if the Delaware courts haven't stretched fiduciary loyalty concepts to the breaking point, even in corporate contexts where charters are a component of the parties' relation.

[24] This is made clear in the *Disney* case, which explicitly describes violations of positive law as fiduciary bad faith, and in *Stone v. Ritter*, which makes clear that fiduciary bad faith is a type of fiduciary disloyalty. See *In re Walt Disney* Deriv. Litig., 906 A.2d 27, 67 (Del. 2006); *Stone v. Ritter*, 902 A.2d 362, 370 (Del. 2007).

[25] The view that such breaches are a form of disloyalty to the corporation is developed in then-Vice Chancellor Strine's jurisprudence. See *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del.Ch. 2006); *Desimone v. Barrows*, 924 A.2d 908, 934 (Del.Ch. 2007). For further discussion of the concepts of loyalty involved and how they can be rendered coherent, see Gold, "The New Concept of Loyalty in Corporate Law,"475-477.

Yet this reading should not surprise us, for being true to commitments is one of the classic ways of demonstrating loyalty.[26] If the notion of being true to commitments underpins these constraints on director loyalty duties, the loyalty involved is well within the mainstream of loyalty conceptions. Furthermore, even in the absence of commitments like those found in a corporation's charter, there is a non-legal basis for thinking that loyalty can incorporate constraints that require conformity to positive law or to ethical rules. It is possible to see a lawyer's obligations to act consistently with the law (or even the rule of law) as internal constraints on loyalty in a way that broadly tracks common understandings of how extra-legal loyalty can be constrained. For example, Tim Scanlon's analysis of the obligations in friendships is suggestive of an internally constrained loyalty obligation that is itself sensitive to moral obligations.

In *What We Owe to Each Other*, Scanlon worries that a certain kind of "amoralist" individual "could be immune to the claims of strangers while still enjoying friendship and the goods of other relations with specific individuals."[27] Scanlon's concern is that some may object to his contractualist account of morality on the grounds that it does not leave enough room for friendships that we have reason to value. In response, he suggests that the obligations of friendship may actually incorporate the need for moral justification to other parties.

As Scanlon argues:

> Friendship ... involves recognizing the friend as a separate person with moral standing—as someone to whom justification is owed in his or her own right, not merely in virtue of being a friend. A person who saw only friends as having this status would therefore not have friends in the sense I am describing: their moral standing would be too dependent on the contingent fact of this affection. There would, for example, be something unnerving about a "friend" who would steal a kidney for you if you needed one.[28]

True, there are things we owe to friends that we do not owe to others. But, as Scanlon indicates: "what the kidney example brings out is that friendship also requires us to recognize our friends as having moral standing as persons, independent of our friendship, which also places limits on our behavior."[29]

Importantly for our purposes, the upshot of this understanding is that friendship will not be downgraded by recognizing such internal limits on the appropriate behavior of friends. As Scanlon emphasizes: "If ... the conception of friendship that we understand and have reason to value involves recognizing the moral claims of friends qua persons, hence the moral claims of nonfriends as well, then no sacrifice of friendship is involved when I refuse to violate the rights

[26] See Keller, *The Limits of Loyalty*, 154 (discussing the idea of being loyal in terms of being true); Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 354: "All social forms involve ways of being true to the project or to the relationship which they define."; Gold, "The New Concept of Loyalty in Corporate Law,"489-92; Matthew Harding, "Disgorgement of Profit and Fiduciary Loyalty," in *Equitable Compensation and Disgorgement of Profit*, ed. Simone Degeling and Jason N.E. Varuhas (Oxford: Hart Publishing, 2017), 21.

[27] See T.M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998), 164.

[28] See ibid.

[29] See ibid., 165.

of strangers in order to help my friend."[30] As Scanlon also notes: "this is not a watered-down version of friendship in which the claims of friends have been scaled back simply to meet the demands of strangers."[31]

I take this to be an implicit argument for a kind of loyalty that incorporates a constraint barring at least some immoral behavior. If we accept his argument, when Scanlon says "no sacrifice of friendship is involved," we might as readily say that no sacrifice of loyalty is involved. The loyalty obligations of friends may incorporate internal constraints such that loyal behavior is not understood to require certain immoral conduct toward other individuals. And, whether or not all friendship looks that way—Scanlon is ready to concede that the friendship between Achilles and Patroclus might be different[32]—it is reasonable to think that mainstream examples of friendship include loyalty that incorporates moral limits.[33]

None of this is to say that friends are fiduciaries, or that lawyers are best thought of as being like friends.[34] I have serious doubts about both views, as do others. It is nonetheless valuable to draw on friendship-based conceptions of loyalty to better understand fiduciary loyalties, and occasionally it is useful in order to better understand the loyalties specific to lawyer-client relationships. This is one of those occasions. What Scanlon's example suggests is that some types of loyalty may incorporate moral constraints on pursuit of a beneficiary's best interests. This is not a far cry (structurally at least) from a fiduciary loyalty that incorporates rule of law constraints. While the content and setting differ, there is room for internal constraints on loyalty based on commitments (as demonstrated by the corporate law setting), and based on morality (as demonstrated by the friendship setting). A rule of law-based constraint is different in content, but it is not significantly different in type. The lawyer-client relationship is a unique fiduciary relation, and it may have unique internal constraints in light of that relationship.

C. The Betrayal Objection

At this point, there is a potential objection. Recall that in the corporate setting internal constraints are not only constraints, they are joined by loyalty obligations. While internal constraints are not loyalty obligations as such, at least in some cases courts treat their violation as a type of disloyalty. This is the result in Delaware corporate law when directors intentionally cause their corporation to violate positive law. The intentional violation is viewed as a form of disloyalty to the corporation. Does it make sense to see conduct that breaches internal

[30] See ibid.
[31] See ibid.
[32] Ibid.
[33] Cf. Wendel, *Lawyers and Fidelity to Law*, 136 (discussing the view that lawyer-client conversations that track friendship norms will need to deal with moral issues in the way that friends deal with moral issues).
[34] But cf. Ethan J. Leib, "Friends as Fiduciaries," *Washington University Law Review* 86 (2008): 665-732; Charles Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship," *Yale Law Journal* 85 (1976):1060-89.

constraints as disloyalty? For some, the notion that this conduct is a kind of disloyalty will be counterintuitive.

The concern may be linked to the reactive attitudes that are characteristic responses in cases of breached loyalty obligations. Note that disloyalty is often understood to be more than just a wrong; it is understood to be a betrayal, and victims of disloyalty tend to feel betrayed.[35] I have suggested that internal constraints can be partly constitutive of a fiduciary's loyalty, such that breaches of internal constraints will sometimes be a form of disloyalty. With this reading in mind, we should consider not only how parties subject to loyalty obligations experience a purported internal constraint, but also how *beneficiaries* experience a breach of such a constraint. Would a client who understood that her lawyer broke the law or otherwise acted unethically on her behalf see this conduct as a betrayal? The client might very well be disappointed, upset, or regretful—particularly if she feels somehow complicit—but would she think her lawyer had betrayed her?

The skeptic's concern then is that breaches of internal constraints are not always experienced as betrayals by their victims (especially if the victim is better off as a result of the breach), and accordingly that these constraints are not best conceptualized as a form of disloyalty. For example, a client will not necessarily feel betrayed by a lawyer who undermines the rule of law on her behalf, if in fact this conduct works to the client's benefit. Arguably, if feeling betrayed is not an apt reactive attitude in such contexts, then a breach of an internal constraint is not best understood as a disloyal act. I will refer to this objection as the "betrayal" objection. Several responses are available, some of which are more compelling than others.

Before proceeding with these responses, however, some caveats are in order. To the extent our goal is to understand how a fiduciary's beneficiaries will react to a breach of internal constraints, this raises empirical questions. Understanding how beneficiaries perceive a loyal party's conduct may require social psychology research beyond the scope of this paper. Context is also significant, as different relationships implicate different loyalty types. Indeed, constraints on loyalty can qualify as internal constraints even if their breach is not a form of disloyalty. Only a subset of legally recognized internal constraints may implicate loyalty obligations when a fiduciary exceeds their limits. Suppose, however, that we consider a case in which a legal system does claim that violating an internal constraint is a form of disloyalty (as occurs in Delaware corporate law). Is that claim a plausible one?

First, note that some internal constraints on loyalty do implicate a sense of betrayal when they are breached—and this occurs even outside the law. A classic example is when a recipient of loyalty expects obedient, agency-type loyalty and instead receives paternalistic, trust-type loyalty. The resulting sense of betrayal is well-represented in literature and in life. If we reasonably expect a person to

[35] See, e.g., Keller, *The Limits of Loyalty*, 200: "Disloyalty appears to be a distinctive and profound kind of wrong, and the ideas with which it is associated—ideas of letting someone down, betrayal, abandonment, treason and treachery—are highly morally charged."

follow our instructions—because they are a loyal friend or a loyal employee—and that person ignores those instructions, this is often seen as a betrayal. In such cases, the sense of betrayal may exist even if we are better off as a result of the disobedience. Not all loyal relationships implicate such agency-type loyalty, but some do. Thus, at least to the extent this kind of internal constraint is at issue, a betrayal reaction in cases of breach is plausible.

Indeed, some instances that implicate a feeling of betrayal are closer to ethical or rule-of-law-type constraints. Imagine a case in which parents paid off a school administrator to give their daughter an advantage on a test during the grading process. If she received an "A" and subsequently learned what happened, she very well might feel betrayed by her parents (let alone the school administrator).[36] Indeed, she might feel betrayed even if her parents thought they were acting in her best interests, and even if it turned out she were overall better off. As a beneficiary of her parents' loyalty, she might think that they owed her loyal conduct pursued in the right way, and that it actually betrays her to help her advance in the wrong way.

Another response is to shift the analysis from breach cases to compliance cases. Perhaps the better question to ask is whether a beneficiary would feel a sense of betrayal if the loyalty-owing party *fails* to break the law or act unethically. How would a beneficiary react if her friend didn't steal for her? Perhaps she would say: "You didn't steal for me? You're not a true friend!"[37] But perhaps instead she would be glad to hear that no theft had occurred, and she would understand that friendship's loyalty is constrained by morality. The difficulty with shifting the question in this fashion, however, is that it doesn't suggest the precise phenomenon we need to see. It suggests that there may not be a loyalty breach where internal constraints are followed, but it fails to show that an internal constraint has the right features such that non-compliance is a betrayal.

Here is a further conjecture: perhaps not all kinds of disloyalty register emotionally as betrayals, even when a beneficiary recognizes (or is capable of recognizing) that a betrayal exists. There may be cases where people can see that another person has technically betrayed them if they ponder the matter, yet not feel the classic emotional responses because any such feelings are swamped by appreciation for what was done by the loyalty-owing party, or by other considerations that are more important to the beneficiary than the loyalty at issue.[38] In the right circumstances, one might feel relief that a promise was broken, or gladness that a relationship was betrayed.[39] By the same token, one might feel indifferent. Recognition that a wrong has occurred in these cases is separable from

[36] I thank Ben Zipursky for suggesting a variation on this hypothetical.

[37] I thank Brad Wendel for this suggestion.

[38] Indeed, the central case of fiduciary disloyalty is the conflicts of interest case. Here, too, a betrayal reaction may be hit or miss. Cf. *In re Will of Gleeson*, 124 N.E.2d 624 (Ill.App.Ct. 1955) (a case involving a conflict-based loyalty breach that was apparently both a product of good faith and in the best interests of the beneficiary).

[39] For the idea that a betrayal can be a part of how we look out for someone's best interests, see Raz, *The Morality of Freedom*, 354: "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 this is in the best interest of the loved one."

the standard reactive attitudes. Similarly, if a fiduciary breaks a law on a beneficiary's behalf, she might not feel the classic emotions that go with a betrayal, yet she could still perceive that a betrayal occurred upon considering the matter.

Lastly, one might respond by returning to the law and the way it is expressed in legal opinions. It is a fact that some internal constraints are understood by the courts to implicate affirmative loyalty duties. As indicated, this is true for intentional violations of the law in the corporate setting. Even if the parties themselves do not experience the standard reactions associated with betrayals in these contexts, the courts take the relevant constraints to implicate loyalty duties (and from the perspective of the law, their violation is a type of disloyalty). Courts are free to adopt such conceptions in other areas beyond the corporate sphere—such as the lawyer-client relationship—whether or not the courts' perspective on loyalty is internalized by real-world fiduciaries and their beneficiaries. Fiduciary law often adopts stylized conceptions of loyalty,[40] and this context may simply be another instance.

D. Summary

As a conceptual matter, it is feasible to recognize loyalty obligations for lawyers and for other fiduciaries that incorporate at least some rule of law or system-oriented constraints on how that loyalty is carried out. Such constraints can be internal to the loyalty at issue. It is also possible to see violations of these constraints as types of disloyalty, although this latter view is not entailed by the existence of internal constraints. Notably, constraints that require conformity to positive law are already recognized as internal constraints within corporate law, and roughly analogous constraints appear in extra-legal loyalty-focused relationships like friendships. A lawyer's loyalty may not presently reflect an internal constraints perspective, but it *could* reflect one without having to diverge significantly from recognizable forms of loyalty within the law. Likewise, such an approach could fit well with recognizable forms of loyalty outside the law.

IV. Relevance for the Best Interests Standard

It is one thing to say that a fiduciary's obligation to pursue another's best interests is constrained by the existence of external obligations, and quite a different thing to say that a fiduciary's loyalty may itself require something different from, or less than, pursuit of a beneficiary's best interests. For those attracted to the idea that fiduciary loyalty necessarily means advancement of a beneficiary's best interests (or advancement of what the fiduciary perceives those best interests to be), the idea of an internally constrained fiduciary loyalty may seem

[40] For a strong version of this claim, see Smith, "The Deed not the Motive," 213, 214-15 (questioning whether fiduciary loyalty is truly a loyalty duty in light of loyalty's temporal features and its requirement of the right kind of motive).

problematic.[41] An analogous concern arises for extra-legal loyalty, which some may see in similar terms. Yet these worries are not justified if we focus on loyalty practices in common law jurisdictions, let alone in extra-legal settings. Non-best-interests loyalties are commonplace, and they may even be more abundant than best interests versions.[42]

Let us turn first to lawyer-client relationships. Notice that, at the level of a lawyer's loyalty obligation, the obligation may not be directly concerned with best interests, or at least not under several common understandings of that obligation. For example, consider the idea that lawyers' loyalty obligation means that they should advance their clients' goals. Not only may those goals be subpar from a societal perspective or from a moral perspective, they may not actually be in the client's best interests. Or, consider the view that lawyers should act so that clients are enabled to use the legal system to advance their goals.[43] The effect is similar, for once again a client's best interests may rapidly diverge from what the client is enabled to seek.

Notice also that the concerns here go beyond the issue of complying with a client's instructions. Alice Woolley notes that lawyers have a duty "to avoid usurping a client's decision making."[44] "A lawyer has, that is, a duty to avoid a client's epistemic dependence and to seek to understand deeply and empathically the client's own perspective."[45] This understanding suggests a picture of loyalty related to preservation of a client's perspective, and it means more than following instructions. The obligation bears on behavior that will impact what those instructions will turn out to be. This account can readily be seen in loyalty terms, and it is unclear why advancement of a client's perspective would coincide in all cases with a client's best interests.

Likewise, consider the view that a lawyer should seek to be a "mouthpiece" for her client.[46] This idea may advance human dignity under the right circumstances,[47] but it can also sound in loyalty. Acting as a mouthpiece for someone is ultimately a way of seeking to advance one of their goals (or perhaps several of their goals), and it is readily subsumed within a loyalty that involves advancement of a beneficiary's best interests. When we succeed in our goals that can contribute to our well-being more generally, and lawyers may perceive their task in this way. This is not, on the other hand, the same thing as advancing someone's overall best interests, unless it happens that the lawyer is a mouthpiece for

[41] See, e.g., Lionel Smith, "Contract, Consent, and Fiduciary Relationships," in Miller & Gold, *Contract, Status, and Fiduciary Law*, 135: "If the result of the interpretive exercise is the conclusion that the powers are held managerially, the relationship is fiduciary. This means, first, that the powers must be exercised in what the fiduciary believes are the best interests of the beneficiary."

[42] For a helpful discussion of the non-legal context, see Keller, *The Limits of Loyalty*, 4.

[43] See Woolley, "The Lawyer as Fiduciary."

[44] Ibid., 315.

[45] Ibid.

[46] Cf. David Luban, *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007), 69; Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton: Princeton University Press, 2010).

[47] For a suggestion that the circumstances are limited to specific settings, see Wendel, "Should Lawyers Be Loyal To Clients, The Law, or Both?," 18-19.

statements that turn out to benefit her client overall in light of the various factors that enter into a full account of human well-being. That result is contingent on facts that cannot be assumed.

As these examples indicate, lawyer-client relationships, like a number of other fiduciary relationships, have only a loose connection to advancement of a beneficiary's best interests. It is not difficult to locate fiduciary loyalty obligations (or interpretations of those obligations) that diverge from a best interests standard. That divergence need not result from an internal constraint, given that an unconstrained loyalty obligation may simply call for advancement of something other than best interests (e.g., advancement of a client's goals as she understands them). Nonetheless, where divergence from a best interests approach does result from the existence of internal constraints, this ought not to be problematic in fiduciary settings. Fiduciary law is already quite open to the idea of a fiduciary's pursuing something other than a beneficiary's best interests. Recognition of internal constraints may instead put added pressure on the viability of fiduciary theories that insist on a best interests standard of loyalty; such theories may need reconsidering.

V. The Significance for Legal Reasoning

There is, however, another possibility that bears mention, and this is the possibility that the internal/external distinction does not much matter at the level of legal reasoning. Assume one accepts that internally constrained loyalties are features of both legal and extra-legal loyalty, at least for some relationships. I have attempted above to show that this is a realistic conceptual possibility. Even if we begin from that standpoint, it might appear that internal constraints in legal contexts are largely a consequence of courts imposing these constraints based on external concerns such as social policy. In other words, the internal constraints on fiduciary loyalty may originate in much the same way that external constraints do, and with roughly the same content in each case. They may be the product of similar reasoning, with similar consequences.

To make this concern more concrete, assume that a lawyer's loyalty obligations engage lawyers in the endeavor of acting as a client's "mouthpiece." Such loyalty obligations may be constrained by a requirement that the lawyer advance the rule of law.[48] If legal systems recognize a rule of law-based constraint, they might do so because courts think something external to the lawyer's loyalty obligations to her client should take precedence over those loyalty obligations. On the other hand, legal systems might instead find that rule of law constraints on the lawyer's mouthpiece role are *internal* to the loyalty that the lawyer owes her client. One might nonetheless think the distinction is trivial. If a court adopts the latter viewpoint but does so based on system-wide policy concerns, does it really matter if the resulting rule of law constraint is taken to be an internal constraint?

[48] See Gardner, "The Twilight of Legality," 15-16.

Isn't the policy analysis effectively the same as it would be if it were an external constraint?

The policy analysis might be similar in either case, but note that the expressive consequences might diverge. Lawyers may approach rule of law constraints and similar requirements differently when they take them to be internal to the loyalty they owe their clients, and they may look to the language in judicial opinions, statutes, or regulations for guidance on the content and scope of their loyalty obligations. If courts indicate that a constraint is an internal constraint, this may alter the manner in which fiduciaries internalize that constraint and it may ultimately affect the extent of their compliance. Fiduciary law is often thought to have a distinctive moral language, and this moral language may build on an internal constraint approach in a different way (and perhaps in a more coherent way) than otherwise. Where the law selects an internal constraints option in describing fiduciary loyalty, it could impact how fiduciaries respond to their obligations.

Yet there is also a further point to bear in mind: many internal constraints on loyalty can be elaborated by means of a judicial focus on the fiduciary relationship at issue. When this happens, the internal constraint on a fiduciary's loyalty may be derived from a court's interest in the values and concepts that underpin that fiduciary's loyalty to her client rather than through a judicial reflection on external policy considerations. An internal constraint will then result from a very different type of legal reasoning even in cases where the content of the constraint is the same regardless of its internal or external status.

Moreover, there is cause to think that differences in legal reasoning that lead to an internal constraint can be desirable. Suppose that a court recognizes an obligation to advance the rule of law—and a corresponding constraint on a lawyer's loyalty to her client—as an internal constraint. Suppose, however, that the court reaches this conclusion not by figuring out whether the legal system as a whole would be better off if this were an internal constraint. Instead, our hypothetical court reaches this conclusion based on its understanding of what gives the lawyer-client relationship its distinctive features and justification, of what makes that relationship a fiduciary relationship, and of what kind of loyalty fits within that fiduciary relationship. Even if the legal outcome (an internal constraint on loyalty) is identical to the outcome reached through an externally focused policy analysis, the pathway to that outcome differs in potentially valuable ways.

For example, if courts are reasoning from a given loyalty-centered relationship's value for its participants, reasoning based on that relationship's objectives, or reasoning based on a given loyalty obligation's contours, then they are concerned with the micro-level of interpersonal relationships. Many of the concepts that apply in such local, small-scale settings are modular—that is, they carve away context in a manner that imposes less severe information burdens.[49] To the extent courts recognize internal loyalty constraints by assessing fiduciary

[49] See generally Andrew S. Gold & Henry E. Smith, "Sizing Up Private Law," *University of Toronto Law Journal* (forthcoming, 2020) (discussing the import of modular conceptual structures at the micro-level of private law reasoning).

relationships and concepts, they may largely bypass the intricacies of system-level or even large-scale institutional policy analysis. The advantages to this approach involve something different from expressive effects. A benefit to this approach is that it can substantially limit information and delineation costs.[50]

To be sure, the particular legal reasoning that leads courts to an internal loyalty constraint need not be especially important, but it could be. At times, the pathway to a legal result is significant, and not merely the result itself. This paper does not draw a firm conclusion regarding the empirical puzzles involved in assessing such questions. What I hope to suggest is that internal constraints are not merely different in origin from external constraints; the reasoning that leads to their recognition may be distinctive as well. Whether it is overall worthwhile to adopt internal constraints for a given type of fiduciary loyalty will depend on the loyalty at issue, the nature of the constraint, and the context in which it applies. Whether courts should recognize internal constraints through wide-ranging policy analysis or through analysis of a particular fiduciary relationship and its conception of loyalty likewise hinges on the context and relationships at stake.

VI. Conclusion

The constraints on a lawyer's fiduciary loyalty obligations may be understood as internal features of those very obligations. For example, it could be that an obligation to advance the rule of law—even where this constrains advancement of the client's interests—is internal to the loyalty that a lawyer owes a client. Such constraints may also be understood as external constraints resulting from a dual fiduciary commission. It is a separate question whether one approach is more desirable than the other, and a fiduciary relationship could even adopt both approaches simultaneously. Even so, it plausibly could be valuable for loyalty constraints to be incorporated into the loyalty that a lawyer owes to his or her client. This paper considers the implications of the latter view.

The reasons to care about these distinctions are several. One basic reason is that the fiduciary obligations of lawyers may be elaborated differently if lawyers are taken to be public fiduciaries (a view which is often implicit in the dual commission approach). It is wise to be cautious about colonization of private law institutions by public law analysis.[51] Another reason is that internal constraints on fiduciary loyalty may result in greater compliance with the underlying loyalty duties at issue (or perhaps with the constraints themselves). And a further reason is that adopting internal constraints on loyalty will impact how certain categories of fiduciary relationship are understood more generally.

If internal constraints are recognized, the loyalties owed by lawyers to their clients may show a complexity similar to the loyalties owed by other fiduciaries,

[50] Note also that the manner in which courts describe loyalty obligations may also impact the pathways of judicial reasoning in other ways. Cf. Gregory S. Alexander, "A Cognitive Theory of Fiduciary Relationships," *Cornell Law Review* 85 (2000): 777.

[51] Cf. Merrill, "Private and Public Law," (describing an expansion of the public law side).

such as corporate directors. Lawyers may then owe a complex loyalty that brings several strands of loyalty obligations together into a whole. Any fiduciary that must show obedience to instructions is already demonstrating something different from a straightforward best interests-centered loyalty. Yet, given the many private and public law concerns that arise in lawyer-client contexts, it should not surprise us if the loyalties that lawyers owe are especially intricate. Lawyers are subject to constraints on their loyalty that are unique to the lawyer-client context. Those constraints could be, and perhaps even should be, seen as internal features of that loyalty. Whether internal constraints are in fact desirable requires further analysis, but this possibility merits a closer look.