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Other Fiduciary Duties: Implementing Loyalty and Care

*Robert H. Sitkoff**

I. Introduction

Across the fiduciary fields, we find a common doctrinal architecture to the duties owed by a fiduciary—a *duty of loyalty*, which addresses conflicts of interest; a *duty of care*, which imposes an objective standard of care; and a host of *other fiduciary duties*, such as duties of disclosure, recordkeeping, keeping confidences, and so on, that vary across the fields.

The duties of loyalty and care, which we might call the *primary* fiduciary duties, are typically structured as broad, open-ended standards that speak generally.[1] The precise contours of the loyalty and care standards vary across the fiduciary fields, but there is a common structure to each that is consistent across the fields.[2] By contrast, the *other* fiduciary duties, which we might call the *subsidiary* or *implementing* fiduciary duties, are typically structured as *rules* or at least as *more specific standards* that speak with greater specificity.[3] Although a version of some of these subsidiary duties is detectable in multiple fiduciary fields, they manifest with field-specific variations, and other of the subsidiary rules are so field-specific that they are without counterparts in other fiduciary fields.

This chapter considers the nature and function of the subsidiary fiduciary duties. Two limiting caveats are in order at the outset, however. First, following the earlier chapters in this volume, the focus is on American law. Second, this chapter takes as given that these other duties are fiduciary in character. Whatever their taxonomic classification, as shown in the earlier chapters of this volume, these duties exist in positive law. And the explanation for their nature and function given in this chapter,

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[1] See Andrew Gold, The Fiduciary Duty of Loyalty **[this volume]**; John C.P. Goldberg, The Fiduciary Duty of Care **[this volume]**.

[2] On the "no conflict" and "no profit" rules of loyalty specifically, see infra notes 36-37 and text accompanying.

[3] The claim is one of relative specificity. See text accompanying infra notes 39-40.

which is deeply intertwined with the primary fiduciary duties of loyalty and care, is an argument in favor of classifying them as fiduciary in character.[4]

The core claim of this chapter is that the subsidiary fiduciary duties are field-specific elaborations of the primary duties of loyalty and care that implement those duties as applied to commonly recurring circumstances within the particular type or kind of fiduciary relationship. Together, the primary duties of loyalty and care, structured as open-ended standards, and the subsidiary duties, structured as rules or at least more specific standards, provide for fiduciary governance by a mix of rules, specific standards, and open-ended standards that mitigates the weaknesses of governance entirely by rules or standards alone.[5]

In economic jargon, the subsidiary duties reduce transaction costs by providing more detailed specification within the incomplete contract that gives rise to the agency problem at which the fiduciary solution is directed.[6] However, one need not subscribe to an economic theory of fiduciary law to accept that the function of the fiduciary duties other than the primary duties of loyalty and care is to implement those primary duties by giving content to them. This basic insight is consistent with a wide variety of theoretical perspectives.

Consider an example from the paradigmatic fiduciary field of trust law.[7] Among the subsidiary fiduciary principles in trust law is the *prudent investor rule*. Structurally the prudent investor rule is an elaborated standard that, by focusing on risk-and-return and diversification, gives specific content to the open-ended, primary duty of care, called prudence in trust parlance, as applied to the investment function of trusteeship.[8] The prudent investor rule is found also within pension law, charity and nonprofit law,

[4] But note one specific coverage exception: the duty of good faith, which this chapter sets aside and on which see Hillary Sale, Fiduciary Law, Good Faith, and Publicness, **[this volume]**.

[5] I previewed this claim in prior work, on which this chapter freely draws without further citation or acknowledgment. See Robert H. Sitkoff, An Economic Theory of Fiduciary Law 202-04, in Philosophical Foundations of Fiduciary Law (Andrew Gold & Paul Miller eds., 2014) [hereafter "Sitkoff, Economic Theory"]; see also Robert H. Sitkoff, The Economic Structure of Fiduciary Law, 91 B.U. L. Rev. 1039, 1044-45 (2011); Robert H. Sitkoff, An Agency Costs Theory of Trust Law, 89 Cornell L. Rev. 621, 682-83 (2004) [hereafter "Sitkoff, Agency Costs"]; Robert H. Sitkoff, Trust Law, Corporate Law, and Capital Market Efficiency, 28 J. Corp. L. 565, 578 (2003) [hereafter "Sitkoff, Trust Law, Corporate Law"]. The claim was inspired by John H. Langbein, The Contractarian Basis of the Law of Trusts, 105 Yale L.J. 625, 656 (1995) (referring to fiduciary subrules being "subsumed under the duties of loyalty and prudence"). Citing my earlier work in the accompanying reporter's notes, Restatement (Third) of Agency § 8.01 cmt. b (Am. Law Inst. 2006) embraced the concept, referencing the "general fiduciary principle" and its "elaborate[ion] by the more specific duties." A conceptually related idea was also suggested in Matthew Conaglen, A Re-Appraisal of the Fiduciary Self-Dealing and Fair-Dealing Rules, 65 Cambridge L.J. 366 (2006).

[6] See Sitkoff, Economic Theory, supra note 5.

[7] See Robert H. Sitkoff, Fiduciary Principles in Trust Law **[this volume]**.

[8] See Sitkoff, supra note 7; Max M. Schanzenbach & Robert H. Sitkoff, The Prudent Investor Rule and Market Risk: An Empirical Analysis, 14 J. Emp. Legal Stud. 129 (2017); infra notes 44-48 and text accompanying.

and investment advice, each of which includes a similar investment function.[9] The rule does not appear across the fiduciary fields generally, because the investment function originating in trusteeship is not a characteristic attribute of those other fields. But within the fiduciary fields that do include an investment function, the prudent investor rule encompasses the accumulated learning on what the duty of care requires in fiduciary investment. In consequence, rather than start from scratch in every fiduciary investment matter, fiduciaries, beneficiaries, and courts may look to the elaboration within the prudent investor rule to discern the application of the duty of care.

As this example illustrates, by making use of an integrated mix of overlapping open-ended standards, more specific standards, and rules, fiduciary law improves on the familiar trope of rules versus standards as competing governance strategies.[10] The increased specification provided by the subsidiary duties simplifies application of fiduciary obligation to cases that fall within their terms. But because the primary duties of loyalty and care remain operative, the specification for recurring matters provided by the subsidiary duties does not provide a roadmap for strategic avoidance behavior.[11] If a fiduciary acts in a manner that is inimical to the principal's interests and not addressed by a subsidiary duty, the principal may still invoke the open-ended primary duties of loyalty and care in challenging the fiduciary's actions. Fiduciary law's combination of the primary duties of loyalty and care (open-ended standards) plus specific subsidiary duties (more specific standards and rules) provides the flexibility of standards plus the specification of rules while minimizing their respective disadvantages.[12]

Two further insights and one puzzle follow. First, this account of the nature and function of the subsidiary fiduciary duties implies a causal story in which the subsidiary rules reflect a hardening into law of accumulated learning under the primary duties of loyalty and care within each fiduciary field.[13] Over time, the accumulation of precedents plus the rise of norms and practices, which are themselves probative in assessing loyalty and prudence, tend toward crystallization as formal subsidiary duties, obviating the need continually to reestablish them under the broader rubrics of loyalty and prudence for recurring fact patterns. Thus, in addition to adapting the contours of the primary

[9] See Dana Muir, Fiduciary Principles in Pension Law **[this volume]**; Lloyd Hitoshi Mayer, Fiduciary Principles in Charities and Nonprofits **[this volume]**; Arthur Laby, Fiduciary Principles in Investment Advice **[this volume]**; Max M. Schanzenbach & Robert H. Sitkoff, Financial Advisers Can't Overlook the Prudent Investor Rule, J. Fin. Plan., Aug. 2016, at 28.

[10] See, e.g., Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557 (1992); Carol M. Rose, Crystals and Mud in Property Law, 40 Stan. L. Rev. 577 (1988); Pierre Schlag, Rules and Standards, 33 UCLA L. Rev. 379 (1985); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976); Isaac Ehrlich & Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. Leg. Stud. 257 (1974); see also Robert H. Sitkoff & Jesse Dukeminier, Wills, Trusts, and Estates 380-81 (10th ed. 2017) (discussing rules tempered by exceptions versus standards tempered by presumptions).

[11] For a related conceptualization of fiduciary principles as "second order" law, see Henry Smith, Fiduciary Law and Equity **[this volume]**.

[12] See infra Part II.C.

[13] See infra note 40 and text accompanying.

duties of loyalty and care within each fiduciary field, courts and legislatures have also recognized specific subsidiary duties to fit the particular needs of those fields.

Second, the variable nature of the subsidiary or implementing fiduciary duties helps to explain why commentators so often call fiduciary law elusive.[14] The purported elusiveness of fiduciary law, with variation across the fiduciary fields, is more properly regarded as context-specific adaptation. This adaptation is found not only in the subtle variations across the fields in the contours of the primary duties of loyalty and care,[15] but even more clearly in the sometimes substantial variations in the subsidiary or implementing duties. Yet these variations follow from the diversity of fiduciary relationships. The prudent investor rule, so apt for elaborating the duty of care in fiduciary investment, would be peculiar in a fiduciary relationship that lacks an investment function.

Finally, the puzzle: What of the fact-based fiduciary cases in which fiduciary duties are imposed ad hoc?[16] The core claim developed in this chapter is that the subsidiary fiduciary duties are field-specific elaborations of the primary duties of loyalty and care that address commonly recurring circumstances within the particular type or kind of fiduciary relationship. The claim presumes recurring circumstances—some homogeneity—within a type or kind of fiduciary relationship. But what of a person who is deemed to be a fiduciary not by reason of the person's category or status, such as agent or trustee, but rather owing to facts indicating special trust and confidence warranting fact-based, ad hoc imposition of fiduciary status?

The plan for the remainder of this chapter is as follows. Part II develops the core claim, offering a simple agency costs model of subsidiary fiduciary duties on the functional terms sketched above. Part III tests the claim, undertaking to prove the explanatory power of the model by drawing on the earlier chapters in this volume to canvass the subsidiary or implementing duties across the fiduciary fields, both within private law and public law, and in the puzzling context of fact-based fiduciary relationships. A short conclusion follows in Part IV.

II. A Simple Model of Subsidiary Fiduciary Duties

The core claim of this chapter is that the nature and function of the fiduciary duties other than loyalty and care is to provide implementing principles that elaborate or specify the meaning of loyalty and care as applied to recurring facts and circumstances. This claim is rooted in a simple agency costs theory of fiduciary law and the familiar tradeoff between decision costs and error costs in choosing between governance by rules versus standards.[17]

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[14] See D. Gordon Smith, The Critical Resource Theory of Fiduciary Duty, 55 Vand. L. Rev. 1399, 2400 (2002) (canvassing examples of this claim).

[15] See Gold, supra note 1; Goldberg, supra note 1.

[16] See Daniel B. Kelly, Fiduciary Principles in Fact-Based Fiduciary Relationships, **[this volume]**.

[17] On the former, see Sitkoff, Economic Theory, supra note 5. On the latter, see the sources cited in supra note 10.

Let us now consider the claim in three steps: (1) a recap of the familiar economic theory of fiduciary duties as the law's answer to agency problems arising from incomplete contracts (Section A); (2) a recap of the role of the duties of loyalty and care in providing open-ended standards for containing the resulting agency costs across (Section B); and (3) the role of the subsidiary fiduciary duties in further containing agency costs by way of specifying fiduciary principles applicable to recurring circumstances, reducing decision costs without aggravating error costs because the open-ended primary duties of loyalty and care remain applicable.

Crucially, however, one need not subscribe to an agency cost theory of fiduciary law to accept that the function of the fiduciary duties other than the primary duties of loyalty and care is to implement those primary duties by giving content to them. This basic insight is consistent with a wide variety of theoretical perspectives.

The punchline may be summarized in capsule form thus: The primary duties of loyalty and care, structured as open-ended standards, and the subsidiary duties, structured as rules or at least more specific standards, provide for fiduciary governance by a mix of rules, specific standards, and open-ended standards that minimizes both decision costs and error costs in containing agency costs in fiduciary relationships.

A. Agency Problems and Incomplete Contracts

The law tends to impose fiduciary status on relationships that present what economists call a *principal–agent* or *agency problem*.[18] An agency problem arises whenever one person, the principal, engages another person, the agent, to undertake imperfectly observable discretionary actions that affect the welfare of the principal.[19] By delegating a task to an agent, the principal benefits from the agent's expertise and is released to pursue other activity.

The benefits of engaging an agent, however, come at the cost of being made vulnerable to abuse. The agent does not bear the full costs and benefits of the agent's actions on behalf of the principal, a divergence of interests that gives rise to *agency costs*.[20] Agency problems arise from the coupling of imperfect monitoring to the inability owing to transaction costs of prescribing in advance precisely what the agent should do in all possible future circumstances. In many circumstances, the very purpose of

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[18] See Michael Jensen & William Meckling, Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure, 3 J. Fin. Econ. 305, 308-09 (1976) ("We define an agency relationship as one in which one or more persons (the principals) engage another person (the agent) to perform some service on their behalf which involves delegating some decisionmaking authority to the agent."). For a survey of how fiduciary relationships are identified, see Paul B. Miller, The Identification of Fiduciary Relationships **[this volume]**.

[19] Agency theory uses the vocabulary of agency law but is not limited to relationships governed by agency law. See Deborah DeMott, Fiduciary Principles in Agency Law, **[this volume]**.

[20] See Jensen & Meckling, supra note 18.

retaining an agent is to exploit the agent's expertise, which requires granting the agent broad discretion to apply that expertise as circumstances evolve.

Agency problems are the hallmark of categorical fiduciary relationships, such as those between trustee and beneficiary, guardian and ward, principal and agent (in law), director and corporation, and lawyer and client.[21] Agency problems are also the hallmark of fact-based fiduciary relationships, in which a principal justifiably reposes special trust and confidence in an agent, warranting ad hoc recognition of the relationship as fiduciary even though it is not of a categorically or status-based fiduciary nature.[22]

Fiduciary duties are the primary legal strategy to contain agency costs in status-based and fact-based fiduciary relationships. In relationships deemed fiduciary, whether categorically based on status or ad hoc in light of the facts, imposition of fiduciary obligation ameliorates the underlying agency problem by completing the underlying incomplete contract.[23] Under the fiduciary governance strategy, an agent who has broad discretionary power may act in the moment, but afterwards the principal is invited to scrutinize whether the agent acted loyally and carefully in pursuit of the principal's best interests.[24]

Stripped of legalistic formalisms and moralizing rhetoric, therefore, the functional core of fiduciary obligation is *deterrence*.[25] The agent is induced to act in the best interests of the principal, minimizing agency costs, by the threat of after-the-fact liability for failure to have done so.[26]

Fiduciary law thus minimizes *transaction costs*. Instead of trying in advance to reduce to writing provisions for every future contingency, the parties need only specify those contingencies that are important and likely enough to warrant the transaction costs of express provision. For all other contingencies, fiduciary obligation fills the gap. In effect, the court completes the contract after the fact by considering whether in view

[21] See Sitkoff, supra note 7; Nina Kohn, Fiduciary Principles in Surrogate Decisionmaking, **[this volume]**; DeMott, supra note 19; Julian Velasco, Fiduciary Principles in Corporate Law, **[this volume]**; Richard W. Painter, Fiduciary Principles in Legal Representation, **[this volume]**.

[22] See Kelly, supra note 16; Miller, supra note 18. For an example, see Burdett v. Miller, 957 F.2d 1375, 1381–82 (7th Cir. 1992).

[23] See Sitkoff, Economic Theory, supra note 5.

[24] By way of illustration, the Restatement (Third) of Trusts, characterizes this as "a basic principle of trust administration," namely, that "a trustee presumptively has comprehensive powers to manage the trust estate and otherwise to carry out the terms and purpose of the trust, but that all powers held in the capacity of trustee must be exercised, or not exercised, in accordance with the trustee's fiduciary obligations." Restatement (Third) of Trusts § 70 cmt. a (Am. Law Inst. 2007); see also Sitkoff, supra note 7.

[25] See Frank H. Easterbook and Daniel R. Fischel, Corporate Control Transactions, 91 Yale L.J. 698, 702 (1982).

[26] On the available remedies, see Samuel Bray, Fiduciary Remedies, **[this volume]**.

of all the circumstances the fiduciary acted in accord with what the parties would have agreed if they had been able to anticipate those circumstances.[27]

B. The Primary Fiduciary Duties of Loyalty and Care

The primary fiduciary duties are *loyalty* and *care*. The duty of loyalty regulates conflicts of interest, in many cases proscribing an undisclosed conflict, by requiring a fiduciary to act in the "best" or even "sole" interests of the principal.[28] The duty of care prescribes the fiduciary's standard of care by establishing a "reasonableness" or "prudence" standard that is informed by industry norms and practices. The fiduciary standard of care is objective, measured by reference to a reasonable or prudent person in like circumstances, akin to the reasonable person test in tort law.[29]

Structurally, the primary duties of loyalty and care are open-ended standards that speak at a level of generality apt for application to heterogeneous circumstances. Their generality allows for application to a diverse array of facts, ensuring an outcome that more precisely connects the particular facts to the governance purpose of the duty. In this way, the duties of loyalty and care minimize *error costs*, as is typical of governance by an open-ended standard. However, the price of an open-ended standard is increased *uncertainty* and *decision costs*. The contextual nature of a standard can make ex ante prediction more difficult and typically requires a more intensive judicial role. The tradeoff is between error costs on the one hand, and decision costs and ex ante uncertainty on the other hand.

To be sure, "when based on lay intuition [standards] may actually be more intelligible, and thus in a sense clearer and more precise, to the persons whose behavior they seek to guide than rules would be."[30] A fiduciary who understands the gist of the duty of loyalty, for example, will know to avoid an undisclosed conflict of interest. Nevertheless, outside of easy heartland cases, the "vague and open-ended" nature of standards relative to rules "make business planning difficult, invite the sometimes unpredictable exercise of judicial discretion, and are more costly to adjudicate."[31]

The normal accretive process of common law development, increasingly augmented by legislative codification, has ameliorated the uncertainty and decision costs inherent to the standards-based nature of the primary duties of loyalty and care in two related ways. First, as shown across the earlier chapters of this volume, the primary duties of loyalty and care vary in nuanced ways across the fiduciary fields, reflecting the

[27] The leading statement of this hypothetical bargain framework is Frank H. Easterbrook & Daniel R Fischel, Contract and Fiduciary Duty, 36 J.L. & Econ. 425 (1993); see also Richard R.W. Brooks, The Economics of Fiduciary Law, **[this volume]**.

[28] See Gold, supra note 1.

[29] See Goldberg, supra note 1.

[30] Mindgames, Inc. v. Western Pub. Co., Inc., 218 F.3d 652, 656-57 (7th Cir. 2000) (Posner, C.J.).

[31] Id.

subtle differences in the particulars of the governance challenges across those fields.[32] Although the primary duties of loyalty and care must be flexible enough for application to all manner of unknown future circumstances, within a given field the range of possible future circumstances narrows, allowing for additional specification.

By way of illustration, the duty of loyalty in trust law is presumptively absolute, enforced by a no-further-inquiry rule that makes a conflicted trustee's good faith and fairness irrelevant. The rationale is prophylactic, reflecting the typicality in trust practice of weak monitoring plus the small number of transactions excluded by forbidding undisclosed conflicts.[33] By contrast, in corporate law the duty of loyalty allows a conflicted director to establish a defense of good faith and fairness, reflecting different assumptions about the viability of monitoring and the range of opportunity costs.[34] The demands on the duty of loyalty for agency cost containment are different in a multigenerational family dynasty trust with inalienable beneficial interests versus a public corporation with chares that trade in thick public markets.[35]

Second, the primary fiduciary duties of loyalty and care have been elaborated by a host of subsidiary duties that give more specific content to the meaning of loyalty and prudence, implementing those primary duties as applied to recurring facts and circumstances. Such specification is possible owing to an increasing homogeneity in the facts in the move from the general (the primary duties) to the specific (the subsidiary duties).

Before we turn to the subsidiary duties, however, a final point about taxonomy and the primary duty of loyalty is in order. The duty of loyalty is commonly said to impose "no conflict" and "no profit" rules on a fiduciary.[36] On this view, the duty of loyalty is perhaps more specific and less open-ended than suggested by the foregoing model. But an alternative understanding of the no conflict and no profit rules is that they, too, are subsidiary duties that implement a more general, primary duty of loyalty. This point is a helpful reminder that taxonomy should be a means, not an end. Moreover, the possible classification of the no conflict and no profit rules as subsidiary duties might help advance the debate about the nature of those rules.[37]

C. The Subsidiary Fiduciary Duties

As suggested at the outset, the core claim of this chapter is that the subsidiary fiduciary duties are field-specific elaborations of the primary duties of loyalty and care

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[32] See Gold, supra note 1; Goldberg, supra note 1.

[33] See Sitkoff, supra note 7, at __.

[34] See Velasco, supra note 21, at __.

[35] See Sitkoff, Trust Law, Corporate Law, supra note 5.

[36] See Gold, supra note 1.

[37] Compare Lionel Smith, The Motive, Not the Deed, in Rationalizing Property, Equity, and Trusts: Essays in Honour of Edward Burn (Joshua Getzler ed., 2003), with Matthew Conaglen, Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties (2011), and Matthew Conaglen, The Nature and Function of Fiduciary Loyalty, 121 L.Q. Rev. 452 (2005).

that implement those duties as applied to commonly recurring circumstances within a particular type or kind of fiduciary relationship. Together, the primary duties of loyalty and care, structured as open-ended standards, and the subsidiary duties, structured as rules or at least more specific standards, improve on the familiar trope of rules versus standards by providing for fiduciary governance by a mix of rules, specific standards, and open-ended standards.

Blending rules and standards allows fiduciary law to have its proverbial cake and eat it too. The increased specification provided by the subsidiary duties simplifies application of fiduciary obligation to cases that fall within their terms. Yet this specification does not provide a roadmap for strategic avoidance behavior, because the primary duties of loyalty and care remain operative for application to matters inimical to beneficiary welfare but not covered by a subsidiary duty.

The foregoing claim may be unpacked on five margins. *First*, the subsidiary fiduciary duties provide ex ante clarity and reduce decision costs ex post by specifying how the duties of loyalty and care should be applied to recurring circumstances. For example, a beneficiary need not show that under the circumstances the duty of care required a fiduciary to keep accurate records if the beneficiary can invoke a subsidiary rule that specifically imposes such a duty on the fiduciary.[38] Such specification also gives the fiduciary guidance on compliance, in this case what the duty of care will require with respect to keeping records, reducing the likelihood of litigation in the first place. The subsidiary duties are thus "addressed to two audiences:" (i) a fiduciary who is subject to fiduciary governance, and (ii) a court that must discern whether a fiduciary has complied with her fiduciary obligations.[39]

Second, this understanding of the subsidiary fiduciary duties implies a causal story in which a subsidiary duty arises by way of a hardening into law of accumulated learning in applying the more general primary duties of loyalty and care to recurring facts and circumstances. Returning to the record keeping example given in the prior paragraph, after enough cases hold that in a particular context the duty of care requires a fiduciary to keep accurate records, a subsidiary duty to keep such records may be deduced from those cases.[40] The rise of such subsidiary fiduciary duties, first by judicial

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[38] Compare Restatement (Third) of Trusts § 77 (Am. Law Inst. 2007) (primary duty of prudence), with id. § 83 (subsidiary duty to keep adequate records).

[39] Ehrlich & Posner, supra note 10, at 261.

[40] In an early work on rules versus standards, Ehrlich and Posner made a similar observation thus:

> Initially a particular type of case is decided under a general standard which permits a broad-ranging factual inquiry. Successive decisions convey information about how such cases should be decided. A point is eventually reached at which the additional information imparted by another decision under the standard is not worth the additional costs … of decision by standard as compared to decision by rule. So a rule is adopted, based on the information previously obtained, to control subsequent decisions.

Id. at 266; see also Sitkoff & Dukeminier, supra note 10, at 644 ("These rules flesh out the primary duties of loyalty and prudence as applied to recurring facts and circumstances for which customary practice has hardened into rules of trust fiduciary law.").

decision and now increasingly by statute,[41] obviates the need continually to reestablish for recurring fact patterns specific conclusions under the general rubrics of loyalty and care. To be sure, whether a given subsidiary duty in fact evolved in this way is a question of historical excavation that is beyond the scope of this chapter. But it seems likely that many did, a suggestion that can be explored in future work.

Third, the emergence of subsidiary fiduciary duties, elaborating the primary duties of loyalty and care, reflects not only learning over time but also sensitivity to heterogeneity versus homogeneity in the facts and circumstances to which such fiduciary principles will be applicable. "At first, a problem area may seem immensely complex and various, but over time elements of commonality will emerge."[42] Without such commonality, specification by subsidiary duty will not be effective. The greater the homogeneity in the facts and circumstances, the more the applicable legal principles can be specific without risk of over- or underinclusion. The story of the emergence of subsidiary fiduciary duties is thus a story of discovering pockets of homogeneity within the various fiduciary fields,[43] that is, identifying recurring patterns in the facts and circumstances to which the primary duties of loyalty and care have been applied.

Fourth, to say that the subsidiary fiduciary duties elaborate on and implement the primary duties of loyalty and care is not to impose on the subsidiary duties a rigid classification as "rules" in contrast to the primary duties as "standards." In truth, all fiduciary principles, whether primary or subsidiary, fall along a continuum with rules and standards as the ideal types at opposite endpoints. The claim here is relative rather than absolute; the subsidiary duties are relatively more specific than the primary duties. Accordingly, the work of elaborating on the primary duties is achieved by the relatively greater specification within the subsidiary duties. In this way, the subsidiary duties give content to the primary duties, implementing them as applied to relatively more homogenous pockets of recurring facts and circumstances.

Consider again the example from the introduction of the prudent investor rule.[44] In the gross typology of rules versus standards, the prudent investor rule is more a standard than a rule. It looks to whether a portfolio's "overall … risk and return objectives" are "reasonably suited to" the purpose of the fiduciary account;[45] requires diversification unless the fiduciary "reasonably" concludes diversification is not warranted;[46] and allows the fiduciary a "reasonable time" upon inception of the

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[41] Thus, for example, in trust law we find a recordkeeping duty not only in canonical authorities summarizing the case law, such as Restatement (Third) of Trusts § 83 (Am. Law Inst. 2007), but also in codifications, such as Uniform Trust Code § 810(a) (Unif. Law Comm'n 2000).

[42] Ehrlich & Posner, supra note 10, at 273.

[43] Cf. id. at 266 ("This analysis assumes that the relevant primary behavior is homogeneous, so that (as we shall see) governance by rule is clearly appropriate, and the problem is to discover the basic homogeneity.").

[44] See supra notes 7-9 and text accompanying.

[45] Unif. Prudent Investor Act § 2(b) (Unif. Law Comm'n 1994).

[46] Id. § 3.

relationship to make an implement a complaint investment program.[47] Yet these principles are nonetheless more specific than the even more general primary duty of care (prudence), which requires a fiduciary to act "as a prudent person would."[48] The prudent investor rule implements the duty of care (prudence) by supplying additional detail on what a prudent person would do in the more specific context of investment management—namely, attend to overall risk and return and to diversify, and to do so within a reasonable time.

Fifth, because the subsidiary fiduciary duties supplement rather than supplant the primary fiduciary duties of loyalty and care, so that the primary duties of loyalty and care remain operative, the benefits of specification for recurring matters provided by the subsidiary duties do not come at the normal cost associated with specification by rule of underinclusiveness. Fiduciary law thus implements the idea, raised as a theoretical possibility but without concrete example in the early literature on rules and standards, that rules and standards (read: more and less specified principles) could be combined to obtain the benefits of each while mitigating their respective weaknesses.[49]

In this respect, fiduciary law improves on the familiar trope of rule versus standards as competing modes of governance. In fiduciary law, overlapping principles framed with varying levels of specificity work in concert over the same terrain. Fiduciary law's combination of the primary duties of loyalty and care, structured as open-ended standards, with a host of specific subsidiary duties, structured variously as more specific standards and rules, obtains the error cost suppression of a flexible standard and the decision cost suppression of specification by rule or more specific standard.

III. Testing the Model

We are now in a position to test the explanatory power of the foregoing model of subsidiary fiduciary duties by canvassing those duties as described more fully in the earlier chapters of this volume. Although the discussion will emphasize categorical fiduciary relationships across private law (Section A), it will consider also public fiduciary law (Section B) and the puzzle of subsidiary duties in ad hoc or fact-based fiduciary relationships (Section C).[50]

Three themes emerge from the canvassing of doctrine that follows. First, as emphasized above, the subsidiary duties are relatively more specific than the primary duties of loyalty and care, and by this relative increase in specificity the subsidiary

[47] Id. § 4. Risk and return, diversification, and reasonable time are reflected also in Restatement (Third) of Trusts §§ 90, 92 (Am. Law Inst. 2007).

[48] Unif. Trust Code § 804 (Unif. Law Comm'n 2000); Restatement (Third) of Trusts §§ 77 (Am. Law Inst. 2007).

[49] See Ehrlich & Posner, supra note 10, at 275 & n. 24 ("Yet it should now be clear that one method of increasing deterrence is to specify the prohibited conduct more exactly. … Assuming that the loophole effect (underinclusion) is avoided by backing up the specific prohibition with a general prohibition.").

[50] As indicated earlier, see supra note 4, this discussion sets aside the duty of good faith.

duties implement the primary duties as applied to recurring facts and circumstances in a particular type or kind of fiduciary relationship. Second, the subsidiary duties vary across fiduciary relationships, reflecting the different contexts of those relationships, and therefore the different needs in applying loyalty and care to locally recurring circumstances. Third, a version of several of the subsidiary duties are evident in multiple fiduciary fields, reflecting a commonality in recurring circumstances across those fields. The doctrine as expressed in the earlier chapters of this volume, in other words, is consistent with the model sketched above.

A. Private Law

Let us begin with the heartland fiduciary fields of agency, trust, and corporate law. In the chapter on agency law,[51] we find that an agent's primary duty of loyalty has been elaborated by more specific subsidiary duties governing self-dealing, material benefit, competition with the principal, and use of the principal's property. Likewise, we find that an agent's primary duty of care has been elaborated by more specific subsidiary duties governing a variety of matters including compliance with instructions, disclosure of material facts, commingling, recordkeeping, and rendering accounts. Little imagination is required to see how these specifications would fit recurring circumstances in an agency relationship.

In the chapter on trust law,[52] we find that a trustee's primary duties of loyalty and prudence have been elaborated by a wide array of more specific subsidiary duties that are tailored to the context of fiduciary property management via legal title to a ring-fenced asset pool held for the benefit of another.[53] These more specific, subsidiary duties include the prudent investor rule, as discussed above,[54] as well as duties: (i) to administer the trust in accordance with its terms but to petition the court if adhering to those terms would work harm upon the beneficiaries; (ii) to collect and protect the trust property, to earmark it, and not to commingle it; (iii) the duty to keep adequate records of the administration of the trust; (iv) the duty to bring and defend claims of the trust; (v) the duty to be cost sensitive in the sense of incurring only reasonable costs; and (vi) the duty to give information and account to the beneficiaries. Of particular note, we find that trust fiduciary law includes a rather specialized subsidiary duty of impartiality, which implements the primary duties of loyalty and care (prudence, in trust jargon[55]) in aggregating the potentially conflicting interests of multiple beneficiaries, an especially salient difficulty in trust fiduciary administration.

In the chapter on corporate law,[56] we find implementation of the primary duties of loyalty and care by more specific subsidiary duties that speak to recurring issues in

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[51] See DeMott, supra note 19, which is the source for the rest of this paragraph.

[52] See Sitkoff, supra note 7, on which this paragraph freely draws, given the common authorship.

[53] See Sitkoff, Agency Costs, supra note 5.

[54] See supra notes 7-9 and 44-48 and text accompanying.

[55] See Sitkoff, supra note 7.

[56] See Velasco, supra note 21, which is the source for the rest of this paragraph.

corporate fiduciary governance. Thus, the more specific, subsidiary duties in corporate fiduciary law address matters such as: (i) usurpation of a corporate opportunity; (ii) the role of management during a contest for corporate control; (iii) actions that might impair the efficacy of shareholder voting or meetings; (iv) the need for monitoring and compliance within the company; and (v) disclosure of information to shareholders.

Moving on to unincorporated entity, charity and nonprofit, and pension law, which in a gross sense are more specialized incarnations of the core fields of agency, trust, and corporate law, we find the same pattern holds—and with echoes to agency, trust, and corporate law. For example, in the law governing unincorporated entities,[57] we find subsidiary duties governing matters such as competition with the entity, dealings on behalf of parties with adverse interests, accounting for profits, and disclosure. In the law governing charities and nonprofits,[58] we find subsidiary duties governing matters such as usurping opportunities, private inurement, prudent investment, and disclosure. And in the law governing pensions,[59] we find familiar subsidiary duties governing matters such as prudent investment and investment menu construction, recordkeeping, and disclosure. That there is an echo in the subsidiary fiduciary duties in these more specialized fields to the subsidiary duties in the foundational fields of agency, trust, and corporation reflects obvious overlap in recurring circumstances across those fields.

In this light, let us consider three more fields: bankruptcy, investment advice, and employment law. In the chapter on bankruptcy and insolvency,[60] we find subsidiary fiduciary duties to account for all property received and that address the potential for conflicting interests among different classes of beneficiaries (i.e., secured creditors, unsecured creditors, and the debtor), all of which resonate with the subsidiary duties in trust fiduciary law. Likewise, in the chapter on investment advice,[61] we find the prudent investor rule, reflecting the existence in this field too of a fiduciary investment function, and a variety of other subsidiary duties that speak to keeping books and records, custody of property, and best execution of instructions, which resonate with similar principles in both trust and agency law. Finally, in the chapter on employment law,[62] which has deep historical roots in agency law under the now outmoded rubric of master-servant, we find agency-like subsidiary duties pertaining to competition with the employer and misappropriation of trade secrets or business opportunities.

Finally, let us consider the subsidiary fiduciary duties noted in the chapters on legal representation and health care. These subsidiary duties provide specification of loyalty and care to matters that recur in those professional contexts. Thus, in the chapter

[57] See Mohsen Manesh, Fiduciary Principles in Unincorporated Entities Law, **[this volume]**.

[58] See Mayer, supra note 9.

[59] See Muir, supra note 9.

[60] See John A.E. Pottow, Fiduciary Principles in Bankruptcy and Insolvency, **[this volume]**.

[61] See Laby, supra note 9.

[62] See Aditi Bagchi, Fiduciary Principles in Employment Law, **[this volume]**.

on legal representation,[63] we find subsidiary duties that elaborate on the meaning of loyalty as applied to conflicts of interest, confidentiality, identifying the client, and communication with the client. We also find subsidiary duties that elaborate on the meaning of care as applied to familiarity with the client's affairs and safeguarding the client's confidences. In the chapter on health care,[64] we find subsidiary fiduciary duties pertaining to informed consent, confidentiality, and conflicts of interest.

B. Public Fiduciary Law

A burgeoning literature has considered public fiduciary theory, finding a host of fiduciary principles in public law. Setting to the side the debate about whether these principles are truly fiduciary in character,[65] and the vexing question of enforcement of such principles, the earlier chapters in this volume on public fiduciary law identify a variety of principles in existing law that, taken at face value, could fairly be characterized as subsidiary fiduciary duties on the terms sketched above.[66] In this respect, the project of public fiduciary theory shows fidelity to the architecture of fiduciary principles in private law.

Let us begin with the chapter on public offices.[67] We find in that chapter pointers to several principles recognized in positive law that fit the pattern of subsidiary fiduciary duties, including: (i) the Emoluments Clauses of the U.S. Constitution, which are specific bans on certain potential conflicts of interest; (ii) the ethics rules of the U.S. Senate, which are explicitly styled as "fiduciary," and that are most naturally read as subsidiary duties that implement a duty of loyalty; (iii) the duty under the Due Process Clause of a judge to avoid even the potential for bias, which is likewise amenable to being read as a subsidiary duty that implements the duty of loyalty; and (iv) various conduct rules for judges that impose disclosure and accounting duties that read like subsidiary fiduciary duties.

Next, in the chapter on the state,[68] we find pointers to positive law elaborating the public trust doctrine, and a duty under that doctrine not to alienate natural resources held in such a trust. We also find the suggestion that the *Chevron* doctrine imposes a duty on administrative agencies to interpret statutes reasonably, and that combined with the reasoned process rules of the Administrative Procedure Act, agencies are

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[63] See Richard W. Painter, Fiduciary Principles in Legal Representation, **[this volume]**.

[64] See Martin Hall, Fiduciary Principles in Health Care, **[this volume]**.

[65] Compare Seth Davis, The False Promise of Fiduciary Government, 89 Notre Dame L. Rev. 1145 (2014), with Evan Fox-Decent, New Frontiers in Public Fiduciary Theory, **[this volume]**.

[66] This discussion therefore sets to the side the more aspirational principles identified in the earlier public law chapters of this volume, and focuses on salient principles that have a clear basis in either domestic positive law or prevailing international law.

[67] See Ethan J. Lieb & Stephen Galoob, Fiduciary Principles and Public Offices, **[this volume]**, which is the source for the rest of this paragraph.

[68] See D. Theodore Rave, Fiduciary Principles and the State, **[this volume]**, which is the source for the rest of this paragraph.

subject to subsidiary principles requiring reasoned deliberation akin to those of a private fiduciary.[69]

Finally, in the chapter on public international law,[70] we find multiple principles of international law that read like subsidiary duties to primary duties of loyalty and care. These include: (i) the duty under customary international law of a mandatory not to annex territory or take natural resources; (ii) a variety of duties to report, such as under the U.N. Charter for an administering power; (iii) the duty of a military occupant under the Geneva Conventions and Hague Regulations to maintain a viable system of government and respect local laws and institutions for the benefit of the inhabitants to the extent practicable; and (iv) the duty of a diplomat, such as under the Vienna Convention on Diplomatic Relations, not to undertake commercial activity abroad for personal profit.

C. Fact-Based Fiduciaries

The core claim of this chapter is that fiduciary law employs a mixed governance strategy of open-ended primary fiduciary duties of loyalty and care plus more specific subsidiary duties that elaborate on the application of loyalty and care to recurring facts and circumstances. This combination of open-ended standards (the primary duties) with more specific standards and rules (the subsidiary duties) obtains the error cost suppression of a flexible standard plus the decision cost suppression of specification by rule or more specific standard.

A similar mixed strategy is evident in the identification of fiduciary relationships. As shown elsewhere in this volume, in addition to categorical or status-based fiduciary relationships, other relationships that are not per se fiduciary by category or status may nevertheless be deemed fiduciary ad hoc based on facts and circumstances indicating a potential for abuse that warrants imposition of fiduciary duties.[71] In identifying fiduciary relationships, therefore, the availability of a fact-based standard backs up the more specific trigger rules of the categorical fiduciary relationships, thereby capturing circumstances that warrant fiduciary governance but that do not fit into an established categorical pattern.[72]

Fact-based fiduciary relationships recognized ad hoc, however, pose a challenge for theorizing the subsidiary fiduciary duties. The model developed above posits that such duties are field-specific elaborations of the primary duties of loyalty in light of commonly recurring circumstances—pockets of homogeneity—within the particular

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[69] For further discussion, see Evan J. Criddle, The Constitution of Agency Statutory Interpretation, 69 Vand. L. Rev. En Banc 325 (2016); Evan J. Criddle, Fiduciary Foundations of Administrative Law, 54 UCLA L. Rev. 117 (2006).

[70] See Evan J. Criddle, Fiduciary Principles in Public International Law, **[this volume]**, which is the source for the rest of this paragraph.

[71] See Kelly, supra note supra note 16; Miller, supra note 18.

[72] See Sitkoff, Economic Theory, supra note 5, at 200-01.

type or kind of fiduciary relationship. The model therefore presumes recurring circumstances within a specific type or kind of fiduciary relationship.

There are at least two possible answers to this challenge. First, in a fact-based fiduciary relationship recognized ad hoc, courts might draw by analogy on subsidiary fiduciary duties from the categorical fiduciary fields, just as similar subsidiary fiduciary duties are found across fiduciary categories with similar circumstances. Second, there might be recurring facts and circumstances in certain recurring forms of fact-based fiduciary relationships such that courts might develop subsidiary fiduciary duties for those cases.

These two suggestions are amenable to preliminary testing against the earlier chapters in this volume. Thus, in the chapter on fact-based fiduciaries,[73] we find the observation that courts commonly impose duties of confidentiality and disclosure on such fiduciaries. Likewise, in the chapter on fiduciary principles in banking law,[74] which appear to arise chiefly ad hoc based on the facts rather than categorically based on status, we again find an emphasis on disclosure.

The prominence of disclosure in these chapters is interesting. An ad hoc finding of a fact-based relationship tends to involve a determination that the principal has reposed special trust and confidence in the fiduciary in a circumstance of information asymmetry.[75] A recurring application of a subsidiary duty of disclosure is apt to such circumstances, and consistent with the model of subsidiary fiduciary duties sketched above.

IV. Conclusion

The purpose of this chapter was to consider the nature and function of the duties in fiduciary law other than the primary duties of loyalty and prudence. The core claim was that these other fiduciary duties are subsidiary duties that are field-specific elaborations of the primary duties of loyalty and care toward implementing those duties as applied to commonly recurring circumstances within a particular type or kind of fiduciary relationship. Together, the primary duties of loyalty and care, structured as open-ended standards, and the subsidiary duties, structured as rules or at least more specific standards, provide for fiduciary governance by a mix of rules, specific standards, and open-ended standards that mitigates the weaknesses of governance entirely by rules or standards alone.

Blending rules, specific standards, and open-ended standards in this manner allows fiduciary law to have its proverbial cake and eat it too, improving on the familiar trope of rules versus standards as competing governance strategies. The increased specification provided by the subsidiary duties simplifies application of fiduciary

[73] See Kelly, supra note 16.

[74] See Andrew F. Tuch, Fiduciary Principles in Banking law, **[this volume]**.

[75] See Kelly, supra note 16.

obligation to cases that fall within them. But because the primary duties of loyalty and care remain operative, the specification for recurring matters provided by the subsidiary duties does not provide a roadmap for strategic avoidance behavior.

In fiduciary law, therefore, overlapping principles framed with varying levels of specificity work in concert over the same terrain, obtaining the error cost suppression of general principles and the decision cost suppression of more specific principles. This account of the subsidiary fiduciary duties fits neatly within an agency costs theory of fiduciary law, but it does not depend on that theory. It also suggests a causal story consistent with that theory's underlying hypothetical bargain, transaction costs framework.

Finally, the chapter tested the account against the doctrinal surveys provided by the earlier chapters of this volume, both in private and in public law, and suggested some tentative answers to the puzzle of how the account would apply to a fact-based fiduciary relationship recognized ad hoc.