

THE DOMAINS OF LOYALTY: RELATIONSHIPS BETWEEN  
FIDUCIARY OBLIGATION AND INTRINSIC MOTIVATION

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ABSTRACT

*Recent scholarly inquiry into fiduciary law predominantly focuses on whether the subject is a coherent field and not a piecemeal assortment of doctrinal detail. This Article looks to the future and to relationships between the formal domain of fiduciary law and other factors that shape conduct. These include intrinsic motivation, markets for professional services, and forces like the operation of reputation. The Article demonstrates that looking across domains, from the legal to the extralegal, casts in sharp relief the reasons why fiduciary law is distinctive. These stem from the specific qualities of relationships to which fiduciary law applies, as well as the mandatory nature of the distinctively fiduciary duty of loyalty that backstops parties who rely on the trustworthiness of others.*

*The Article also engages with implications to be drawn from extensive behavioral research on intrinsic and extrinsic motivation. The Article argues that fiduciary law can operate to reinforce loyal conduct motivated by nonlegal factors by “crowding in” loyalty, not crowding it out. Elaborating further, the Article uses concrete examples to examine how factors beyond the law that shape conduct likely vary in significance along dimensions of variation among fiduciary relationships.*

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## INTRODUCTION

By imposing an obligation of loyalty, does fiduciary law undercut or “crowd out” the force of intrinsic motivation to act loyally? Alternatively, does fiduciary law reinforce or enhance intrinsic motivation, including a disposition to trust another person to act loyally? Are the relationships between the law and intrinsic motivation antagonistic, or complementary and mutually reinforcing? Looking to future developments in fiduciary law and theory, this Article explores these relationships. This inquiry implicates the power of extralegal norms and reputational concerns to reinforce loyalty and deter or sanction disloyal conduct.

Extensive behavioral research examines many dimensions of intrinsic motivation. Scholarship exploring the legal implications of intrinsic motivation addresses fiduciary law but mostly focuses on implications for contract, property, and tort law, as well as tax administration, and criminal law and its enforcement. The Article detangles distinct strands in prior scholarship and identifies the sharp limitations of “crowding-out” arguments as applied to fiduciary law. To test the implications, the Article introduces three examples from the fiduciary realm, chosen because they differ along multiple dimensions and illustrate how these issues might matter in concrete settings.

Scholars who premise critiques of legal and regulatory interventions on behavioral research often assume the superiority of intrinsic motivation over the duty to comply with legal mandates. They rely on experimental findings that a person who does what is right because it is right or otherwise intrinsically satisfying experiences a “warm glow” that is diminished or eliminated when obeying a legal mandate to do the same thing.<sup>1</sup> Another strand of scholarship emphasizes that complying with a legal mandate—which could originate from a legally enforceable contract between the parties—may yield fewer gains to reputation than when the same conduct is not legally compelled.<sup>2</sup> The implications of these accounts can be combined if it is intelligible to say that an actor can

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1. See *infra* text accompanying notes 17-20.

2. See *infra* text accompanying notes 21-23.

derive “warm-glow” satisfaction from an enhanced reputation in others’ eyes or from the prospect of enhanced reputation.<sup>3</sup>

Relatedly, some scholarship premised on experimental findings associates legal mandates with decreased interpersonal trust and willingness to cooperate.<sup>4</sup> Separately, to the extent a legal mandate changes the reason for an action, it can change the meaning an actor attributes to the action over time, with consequences for the capacity to define oneself that could prove regrettable.<sup>5</sup> Finally, some accounts may verge on nostalgia for a prelapsarian imaginary in which interpersonal trust, nonlegal sanctions, and intrinsically motivated rightful behavior made legal rules and formal institutions for their enforcement either unnecessary or relatively unimportant.<sup>6</sup>

Experimental and behavioral research also supports counters to arguments that rely on “crowding-out” theories. For starters, research findings show that sometimes the law can “crowd in” intrinsic motivation—for example, by helping to inculcate loyalty to interests other than an actor’s own, thus supplementing and not displacing intrinsic motivation.<sup>7</sup> Legal mandates can increase the willingness to trust others by undergirding the likelihood that actors who enlist others’ trust will prove worthy of that trust.<sup>8</sup> Additionally, arguments that rely on the power of reputation and

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3. The concept of *amour propre* captures this possibility. See CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY 190 (2011) (defining *amour propre* as requiring the capacity to compare oneself with others and as involving “a passion for self-promotion, consisting in a preference to shine in comparison with others and prompting a desire to attain a position of superiority, or at least to avoid a position of inferiority”). It “represents the dark side of self-identification.” *Id.* A separate question is whether a secure self-image—for example, as a law-abiding or moral person—licenses subsequent conduct that is immoral. This possibility is beyond the scope of this Article.

4. See *infra* text accompanying notes 26-27.

5. See Emad H. Atiq, *Why Motives Matter: Reframing the Crowding Out Effect of Legal Incentives*, 123 YALE L.J. 1070, 1097 (2014). For further discussion, see *infra* text accompanying note 140.

6. Scholarship focused on the law merchant and other instances of non-state systems furnishes an illustration: “To the degree that legal academics are capable of romance, few theories have conjured more romantic enthusiasm than that of the law merchant, the commercial broker credited for reviving trade in medieval Europe by convening commercial fairs and forging international trade routes.” BARAK D. RICHMAN, STATELESS COMMERCE 133 (2017). Admiration for law that “emerges voluntarily and organically with substantive rules tailored to address pressing problems” sparked projects “to construct commercial law that reflects the law merchant’s ideal.” *Id.*

7. See *infra* text accompanying notes 34-36.

8. See *infra* text accompanying notes 50-51.

assume that actors are unwilling to jeopardize reputation are vulnerable to evidence that reputational sanctions vary in strength, depending on the stakes and the context.<sup>9</sup>

More generally, offsetting the lure of “warm-glow” satisfaction and the intrinsic satisfaction of interpersonal trust is a deeply felt distaste for feeling like a chump or a dupe once it is evident that others betrayed the trust reposed in them.<sup>10</sup> Separately, “warm-glow” accounts do not appear to offset the harm done by betrayal when it occurs.<sup>11</sup> Additionally, law can help allay concerns about the strength of others’ intrinsic motivation in relationships in which the risk of betrayal is always at least a theoretical possibility. Law can stiffen the spine of those in positions of trust when tempted to act disloyally.<sup>12</sup> Triggered as it is by relationships that mostly fall within legally defined categories, fiduciary law serves a channeling function—facilitating reliance on actors whose conduct induces trusting conduct—by furnishing a signal that legally enforceable duties bind actors who occupy fiduciary roles.<sup>13</sup> For actors situated outside a channel of designation created and reinforced by fiduciary law and regulation, the absence of such a signal can be a salient note of caution to prospectively vulnerable parties.<sup>14</sup> The significance of signalling in particular contexts creates incentives for actors seeking to occupy fiduciary roles to do what is required to enter the channel.<sup>15</sup>

General scholarly inquiries into fiduciary law predominantly focus on accrediting the subject as a coherent field and not a piecemeal assortment of doctrinal detail. Looking to the future invites reflection on relationships between the formal domain of fiduciary law and other factors that shape conduct. These include intrinsic motivation as well as markets for professional services and forces such as the operation of reputation. The Article demonstrates

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9. See *infra* text accompanying notes 161-68.

10. See *infra* text accompanying note 51.

11. See Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1460 (2005) (noting that scholarship often overlooks adverse consequences of misplaced trust); Claire A. Hill & Erin Ann O’Hara, *A Cognitive Theory of Trust*, 84 WASH. U. L. REV. 1717, 1720 (2006) (arguing the overall policy of law should be optimizing, not maximizing trust).

12. See *infra* text accompanying notes 38-46.

13. See *infra* text accompanying notes 122-26.

14. See *infra* text accompanying notes 125-26.

15. See *infra* text accompanying note 126.

that looking across domains, from the legal to the extralegal, casts in sharp relief the reasons why fiduciary law is distinctive. These stem from the distinctive qualities of the relationships to which fiduciary law applies, as well as the mandatory nature of the distinctively fiduciary duty of loyalty that backstops parties who rely on the trustworthiness of others. Moreover, fiduciary law can operate to reinforce loyal conduct motivated by nonlegal factors by crowding in loyalty, not crowding it out. Using concrete examples, the Article explores how factors beyond the law that shape conduct likely vary in significance along dimensions of variation among fiduciary relationships.

The Article opens by surveying relevant findings from behavioral research, beginning with studies that identify “crowding-out” effects when an externally prompted motivation—including compliance with a legal mandate or a legally enforceable contract—reduces or eliminates an actor’s intrinsic motivation to perform the same act. Scholars using the same methodologies also document the presence of “crowding-in” effects, when the law or other exterior motivation complements and enhances intrinsic motivation. Behavioral scholarship also engages with trust as a distinct focal point for research, but how best to define trust remains a contested question. The Article next turns to implications for fiduciary law. Its distinctive features, which lend coherence at a general level to a subject characterized by disparities when viewed at a more granular level, are invulnerable to critique on crowding-out grounds, even taking into account a backdrop of extralegal sanctions, including reputational effects.

To explore further implications of crowding-out and crowding-in effects across a variety of relationships, the Article uses three concrete examples. These are broker-dealers who furnish investment advice to clients, in light of state-by-state variations in whether fiduciary duties apply; individuals who organize fundraising campaigns with philanthropic objectives; and trustees of family trusts who act subject to a conflict to which the settlor consented in structuring the trust. These relationships differ along several dimensions, including the presence or absence of prior ties linking the parties that are consistent with the presence of strong pulls toward intrinsic motivation; the economic stakes of the

relationship for its more vulnerable party; and the nature of the role assumed by the person in whom the vulnerable party must repose trust. Examining these examples confirms the significance of fiduciary law as a constraint on conduct, as well as its capacity to signal expectations to parties in fiduciary relationships, in which (one way or another) one party “has to” trust the other to act loyally and is thereby always subject to risks of betrayal.

### I. CROWDING-OUT AND CROWDING-IN: BEHAVIORAL EVIDENCE AND THEORIES

Unsurprisingly, research into motivation that underpins crowding-out and crowding-in assessments of legal doctrine and institutions has multiple components. This Part surveys behavioral research exploring relationships between intrinsic motivation and motivations stemming from extrinsic interventions, including the law, beginning with studies that find these extrinsic interventions have crowding-out effects. This Part also surveys studies that find that the law and other sources of external motivation can crowd in intrinsic motivation. Finally, the Part discusses scholarship contesting the assumption that intrinsic and extrinsic motivation are completely separable, not complementary. A distinct but related component of this body of scholarship focuses on trust—however defined—and how it may be undermined or reinforced, including through the design of complex contracts.

#### *A. Intention, Motivation, and Crowding-Out Effects*

Accounts of motivation distinguish it from intention, whether explicitly or implicitly. As Stephen Galoob and Ethan Leib define these terms, to inquire into an actor’s intention is to ask what the actor was trying to do; to inquire into motivation is to ask why.<sup>16</sup> In turn, scholarship premised on behavioral research distinguishes intrinsic motivation from externally prompted reasons for acting (or

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16. Stephen R. Galoob & Ethan J. Leib, *Motives and Fiduciary Loyalty*, 65 AM. J. JURIS-PRUDENCE 41, 43 (2020). More formally, an intention is “an executive attitude toward a plan” constituting the content of the plan; a motivation is “an appraisal of how an intention connects with action.” *Id.*

not acting) in a particular manner. In Bruno Frey's influential formulation, intrinsic motivation acknowledges the fact that "people undertake many activities simply because they like them"; when an action is intrinsically motivated, the actor receives no apparent reward except the pleasure or satisfaction of engaging in the activity itself.<sup>17</sup> In contrast, extrinsic motivation is "induced from outside" and encompasses legal commands and regulations.<sup>18</sup> In laboratory experiments, Frey's research found that promises of higher monetary compensation can "crowd out" inner motivations for performance in some circumstances.<sup>19</sup> Frey does not associate crowding-out effects with "abstract interactions," such as those effected via electronic stock exchanges or, in a retail context, "paying for bread in the supermarket"; instead, crowding-out effects typify less "abstract" markets for labor and many goods.<sup>20</sup>

Other scholarship focuses on the relationship between legally enforceable contracts—a salient source of extrinsic motivation—and interpersonal trust between parties. Using laboratory experiments, Deepak Malhotra and J. Keith Murnighan tested and established the proposition that in the presence of a binding contract, parties "attribute[d] others' cooperation to the constraints imposed by the contract" and not to qualities of the individuals themselves, thereby decreasing the likelihood of trust between the parties going forward.<sup>21</sup> Malhotra and Murnighan conclude that binding contracts and trust function as substitutes for each other.<sup>22</sup> Nonbinding contracts, in contrast, permit more attribution of cooperative conduct to the disposition of the individuals involved as opposed to externally imposed constraints introduced by a binding contract.<sup>23</sup> As developed later in this Section, definitions of "trust" vary; for these authors, trust "refer[s] to the reduction of uncertainty (or the management of risk) via informal structures."<sup>24</sup> They define trust

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17. BRUNO S. FREY, NOT JUST FOR THE MONEY, at ix (1997).

18. *Id.*

19. *Id.* at 15.

20. *Id.* at x.

21. Deepak Malhotra & J. Keith Murnighan, *The Effects of Contracts on Interpersonal Trust*, 47 ADMIN. SCI. Q. 534, 534, 553 (2002).

22. *See id.* at 547.

23. *Id.* at 552.

24. *Id.* at 536.



“as a psychological state of the individual, comprising positive attributions about another’s behavior that is subject to influence by formal structures in a relational context.”<sup>25</sup> Writing in the same vein, Eileen Chou and her coauthors conducted a mix of laboratory and field studies, finding that the presence of a contract leads parties to anticipate more contentious interactions and to reduce their cooperative behavior.<sup>26</sup> By suggesting a contract, a party signals low expectations for a relationship, hindering the development of a cooperative relationship; parties whose preference is to initiate contracts tend to overestimate the efficacy both of surveillance of their contractual partners as well as sanctions to deter breach.<sup>27</sup>

Reputation is also a distinct focal point for behavioral research, in particular to test whether reputational rewards for conduct are stronger when the conduct is not mandated by law or regulation, relative to the reputational penalties triggered by not doing what is required by a mandate. Beginning with the insight that a legal mandate changes the signal sent by conduct when an actor subject to the mandate obeys it, Hajin Kim observes that reputational rewards and penalties may be asymmetric.<sup>28</sup> Actors who disobey the law look especially bad and thereby inflict a loss on their reputation, but complying with the law may not result in symmetrical gains to reputation.<sup>29</sup> Thus, an asymmetry in reputational effects suggests that a legal mandate could backfire via a net reduction in reputational rewards for the same conduct when done voluntarily.<sup>30</sup> Kim’s laboratory studies tested these effects as applied to corporate social responsibility (CSR) to assess the effectiveness of legally binding CSR mandates compared to legal approaches that permit but do not require pro-social conduct.<sup>31</sup> Kim found that the force of

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25. *Id.*

26. Eileen Chou, Nir Halevy & J. Keith Murnighan, *The Hidden Cost of Contracts on Relationships and Performance* 11 (May 21, 2010) (unpublished manuscript), <https://ssrn.com/abstract=1612376> [<https://perma.cc/BW2V-79MX>].

27. *See id.*

28. Hajin Kim, *The Benefits of Allowing, Rather than Mandating, Corporate Social Responsibility* 31 (Dec. 13, 2019) (unpublished manuscript) (on file with the *William & Mary Law Review*).

29. *See id.* at 31-32.

30. *Id.*

31. *See id.* at 47.

the legal mandate does not compensate for the reduced reputational rewards otherwise generated by the permissive regime.<sup>32</sup> Additionally, when Kim placed her subjects in the role of corporate managers making purchasing decisions, they reduced their pro-social behavior once they were told the CSR mandate was unenforceable but did so less than subjects who attributed their decisions to the mandate.<sup>33</sup>

### *B. Crowding-In and Complementarity Effects*

Scholars using behavioral methodologies also document the presence of “crowding-in” effects that stem from extrinsic motivation under some circumstances. Frey found that crowding in through an external intervention—such as the law—can follow when the intervention is perceived to be supportive of intrinsic motivation.<sup>34</sup> The message an external motivation implies matters, and the strength with which it acknowledges intrinsic motivation particularly matters.<sup>35</sup> As other scholarship establishes, the use of moral language can serve as a mechanism toward crowding in intrinsic motivation.<sup>36</sup> Additionally, Frey acknowledges the complexity of motivation; an actor may have multiple motives that mix intrinsic with extrinsic motivation.<sup>37</sup>

Iris Bohnet and her coauthors found differences among small and large groups: Within small groups that interact frequently, reputation matters to the extent that cooperation can be maintained even in the absence of intrinsic motivation to cooperate.<sup>38</sup> In contrast, larger groups need institutions such as the law “to facilitate efficient outcomes.”<sup>39</sup> Introducing empirical evidence of the long-run effect of legal rules and institutions on behavior, these authors found that

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32. *Id.*

33. *Id.* at 49-51.

34. FREY, *supra* note 17, at 33.

35. *Id.*

36. *Id.* “Moral priming,” in particular the use of moral language, can crowd in intrinsic motivation, especially among people who internalized moral norms and are inclined to act on them. See Yuval Feldman & Henry E. Smith, *Behavioral Equity*, 170 J. INSTITUTIONAL & THEORETICAL ECON. 137, 148 (2014).

37. FREY, *supra* note 17, at 14.

38. Iris Bohnet, Bruno S. Frey & Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AM. POL. SCI. REV. 131, 131 (2001).

39. *Id.*

law may not only create incentives but also influence preferences, a finding that links intrinsic motivation to extrinsic motivation in a causal sequence.<sup>40</sup> Moreover, “crowding-in” and “crowding-out” effects are not constant over time but can change.<sup>41</sup> In particular, crowding out is associated with low levels of legal enforcement, which leads parties who are first movers in a sequence of proposed transactions or other interactions to be extremely cautious.<sup>42</sup> Stronger levels of enforcement can signal to a first mover that the other party is trustworthy.<sup>43</sup> Crowding-out effects follow when enforcement levels are not high enough to deter breach by second movers.<sup>44</sup> When enforcement is at a medium level, a first mover’s expected payoff from proceeding can be higher than the payoff from abstaining out of extreme caution.<sup>45</sup> But in the worst legal regimes, the level of enforcement is high enough to induce the first mover to proceed without sufficient caution; dishonest second movers enjoy economic success; and the market’s overall share of “dishonest types” grows.<sup>46</sup> Thus, “institutional changes affect behavior,” and by altering behavior, they affect and shape preferences.<sup>47</sup>

Likewise focused on the role of law and legal institutions, Samuel Bowles criticizes the assumption of separability, that is, the assumption that other-regarding motives are unaffected by policies that appeal to economic self-interest.<sup>48</sup> In recent experiments, the separability assumption often fails because incentives can induce long-term changes in motivations, which would make preferences endogenous, not exogenous.<sup>49</sup> Law is important, Bowles writes, because “[t]he rule of law and ... institutional designs” not only “limit the more extreme forms of antisocial behavior,” they “facilitate mutually beneficial interactions beyond the family.”<sup>50</sup> By

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40. *Id.* at 142.

41. *Id.*

42. *Id.* at 132.

43. *See id.* at 141.

44. *Id.* at 132.

45. *Id.*

46. *Id.* at 136.

47. *Id.* at 142.

48. Samuel Bowles, *Policies Designed for Self-Interested Citizens May Undermine “The Moral Sentiments”*: Evidence from Economic Experiments, 320 SCIENCE 1605, 1605-06 (2008).

49. *Id.* at 1607.

50. *Id.* at 1609.

providing an assurance of sanctions against those who do not conform to moral norms, law and legal institutions allay the fear of “being the sucker who is exploited by defectors” from the norm, a fear that may be stronger than a non-defector’s wish to cooperate or comply with the norm.<sup>51</sup>

Finally, some legal scholarship contests the separability assumption implied in portions of the behavioral scholarship discussed above, which posits that legally enforceable contracts are categorically distinct from and opposed to (or rivalrous with) informal agreements.<sup>52</sup> Ronald J. Gilson and his coauthors found greater complexity in relationships between formal and informal contracts.<sup>53</sup> This is because agreements that combine “low-powered enforcement” with formal governance structures can complement, not crowd out, informal mechanisms that rely on increased levels of trust among parties.<sup>54</sup> Their study scrutinized contracts between parties who “braided,” or intertwined, both formal and informal elements, a design that allowed parties to assess each other’s inclinations and capacity to cooperate and respond effectively when confronted by unforeseen circumstances.<sup>55</sup> Formal contractual governance structures regulated the exchange of nonpublic information without necessarily requiring either party to buy or sell anything, enabling “collaborative innovation in a world of heightened uncertainty.”<sup>56</sup> This structure—a technique that can build both trust and problem-solving capacity—is beyond the ambit of conventional contract theory, which posits a binary opposition between legally enforceable formal contracts and a realm of informal enforcement reliant on reputation and intrinsic motivation or character traits in which trust is an endowment of the actors that formalities would crowd out.<sup>57</sup>

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51. *Id.*

52. *See, e.g.,* Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377, 1379, 1383-84 (2010).

53. *Id.* at 1386-87.

54. *Id.* at 1380-81, 1403.

55. *Id.* at 1382-83.

56. *Id.* at 1382.

57. *See id.* at 1379-81.

Complementarity also typifies the counter-theoretic<sup>58</sup> agreements for merger and acquisition (M&A) transactions that Cathy Hwang scrutinized.<sup>59</sup> Advised by sophisticated lawyers and investment bankers, the business-savvy parties to M&A agreements frequently invest effort in drafting elaborate term sheets that articulate agreed-to business terms for the transaction but are conceded to be legally nonbinding.<sup>60</sup> Other terms in the overall agreement, including confidentiality provisions, are legally enforceable but do not replicate the content of business terms.<sup>61</sup> Term sheets incorporated in deal agreements become components of what overall looks like a contract while those terms lack the legal bite of enforceability; the package enables parties to construct their own relational “ecosystem” for future steps in the same transaction.<sup>62</sup> “Faux contracts,” in Hwang’s terminology, help build trust among the parties to any particular deal, given the incompleteness of its contractual provisions in light of the complexity of M&A transactions and the multistage nature of the deal process.<sup>63</sup> By engaging in the process of drafting a contract, the parties (and their representatives) practice collaboration. The lengthy result can serve as a formal or substantive nudge to comply with the nonbinding terms.<sup>64</sup> Business terms articulated in term sheets also prove “sticky.”<sup>65</sup> Completed in stages, M&A deals encourage parties to care about their reputation within that deal’s ecosystem.<sup>66</sup> Deal lawyers, by bundling binding and nonbinding terms in the same document or by making them interdependent, can “steer” parties at least to take the nonbinding provisions seriously.<sup>67</sup> Outside the relational bubble of a particular deal’s ecosystem, the deal lawyers Hwang interviewed, although caring more broadly about their own reputations, did not understand concern with reputation in M&A markets more generally as

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58. For this terminology, see *id.* at 1404-05.

59. Cathy Hwang, *Faux Contracts*, 105 VA. L. REV. 1025, 1043 (2019).

60. *Id.* at 1029.

61. *Id.* at 1043.

62. *Id.* at 1034.

63. *Id.*

64. *Id.* at 1061.

65. *Id.* at 1056.

66. *Id.*

67. *Id.* at 1056-57.

a necessary deterrent to bad behavior by parties.<sup>68</sup> But most of the time, the final legally binding acquisition contract contained business terms substantially similar to the nonbinding contents of the term sheet.<sup>69</sup> Having negotiated those terms and signed the term sheet, parties tend to act as if those terms have legally binding effect.<sup>70</sup>

### *C. Trust, Trustworthiness, and Trusting Behavior*

Definitions of trust vary and so far elude consensus among scholars, both within and across disciplines. A principal point of disagreement is whether trust can be compatible with calculatedly seeking advantage through a relationship with another person in whom one places trust, as occurs in many fiduciary relationships, elaborated in the next Section.<sup>71</sup> Some definitions of trust turn on the specifics of an individual's psychological state.<sup>72</sup> Malhotra and Murnighan, discussed in Section A, acknowledge that an individual's psychological state attributing positive attributes to another's behavior can be influenced by formal structures and is embedded within a relationship.<sup>73</sup> By positing that trust and contract are rivals, these authors seem to leave little or no room for trust in contractualized relationships, including those that are multistaged or otherwise evolve over time.<sup>74</sup> Nonetheless, theirs is not the most sparing definition of trust. For Malhotra and Murnighan, trust "refer[s] to the reduction of uncertainty (or the management of risk) via informal structures."<sup>75</sup> In contrast, for the celebrated economist Oliver Williamson, to speak of "calculated trust" is to indulge in a "contradiction in terms."<sup>76</sup> Williamson writes that trust and "risk"

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68. *Id.* at 1055 ("[L]awyers, in general, felt that reputation was not entirely irrelevant, but when push came to shove, a bad reputation did not prevent a player from reentering the market for a future deal.").

69. *Id.* at 1033.

70. *Id.* at 1029, 1051.

71. See Oliver E. Williamson, *Calculativeness, Trust, and Economic Organization*, 36 J.L. & ECON. 453, 453, 485-86, 486 n.136 (1993).

72. Malhotra & Murnighan, *supra* note 21, at 536.

73. *Id.* at 536.

74. See *id.* at 538.

75. *Id.* at 536.

76. Williamson, *supra* note 71, at 485.

are incompatible ideas because parties to commercial interactions who assess each other and then take risks based on their assessments of others' instrumental interests are not engaging in trusting behavior.<sup>77</sup> Scholars in this tradition define trust in terms that limit it to affective trust stemming from optimism about others in whom one places trust and their propensity to act with honorable motives.<sup>78</sup>

The conceptual sparseness of this line of definition is at odds with the law as well as the richly developed usage associated with “trust” and the social understandings it reflects. For example, when I say that I “trust that” my investment advisor will manage my portfolio consistently with the terms of our management agreement and will not self-deal using assets in the account, it is possible that I am expressing a belief about an attribute possessed by the advisor. More likely, if I say no more I am making a prediction about the advisor's conduct, a prediction in which my confidence is enhanced by the legal doctrines and regulations applicable to investment advisors. If my intention is a statement of belief in the advisor's intrinsic attributes, it is likely that I would say I “trust in” the advisor.<sup>79</sup> Moreover, a “trust that” statement concerning my investment advisor's conduct likely reflects more than a prediction and indicates more than my reliance on the advisor,<sup>80</sup> in this context likely marrying expectation with vulnerability. Given the context in which I have situated the statement, my expectations about the advisor's conduct are heightened because I have institutional routes toward recourse if they are not met, even if I am not keenly aware of the specifics.<sup>81</sup> As Thomas Gallanis terms it, sometimes—as with an investment advisor—we have to trust that an actor's conduct will not betray or harm us once the relationship is underway, although those possibilities are always theoretically possible, as are more

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77. *Id.* at 463, 485.

78. *E.g.*, Cross, *supra* note 11, at 1464.

79. On the distinction between “trust-in” and “trust-that” trust, see Hill & O'Hara, *supra* note 11, at 1725-26.

80. On the essential role of trust to fiduciary advisory relationships, see Arthur B. Laby, *Advisors as Fiduciaries*, FLA. L. REV. 953, 997 (2020).

81. Thomas P. Gallanis, *How Much Trust Do Trusts Require?*, in *FIDUCIARIES AND TRUST* 316, 317 (Paul B. Miller & Matthew Harding eds., 2020).

mundane departures from what is required or expected of a person in a role assumed by a particular actor.<sup>82</sup>

More robustly defined, trust can be positioned in a relationship to law that is not rivalrous. Law can enable action “as-if” another person—such as an investment advisor—is in fact trustworthy.<sup>83</sup> Or, as Frank Cross explains, law can operate as a “form of hedging” against misplaced trust.<sup>84</sup> Fiduciary law in particular can help to allay doubts about another’s trustworthiness harbored by a person who reposes trust.<sup>85</sup> Likewise, design choices about transactional structures can create their own sort of hedges.<sup>86</sup> As the studies of complex contracting discussed in the preceding Section demonstrate, in some settings parties design deal structures that create opportunities to learn about each other.<sup>87</sup> Experience within deal structures can help inculcate more trust in another party or can reveal that placing more trust in that party could be unwarranted.<sup>88</sup> Trust (or distrust), in short, does not always or necessarily stem from a prior attitudinal endowment that parties bring to an interaction or relationship.<sup>89</sup> In some contexts trust in others is learned through experience; it is not necessarily innate to individual actors.<sup>90</sup>

Moving outside the realm of bilateral contracting between savvy deal partners, attitudinal trust is a trait that can be induced by actors who seek clients or other beneficiaries of services within the category of “have to trust” relationships.<sup>91</sup> Prospective recipients of trust often seek to generate trusting relationships, taking steps to engender and invite trust from others.<sup>92</sup> The reality of induced trust—in particular to enable the formation of relationships in which betrayal is always a possibility—does not appear to be a focal

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82. *See id.* at 317-18.

83. For further elaboration, see *infra* text accompanying notes 192-95.

84. Cross, *supra* note 11, at 1466.

85. *See* Hill & O’Hara, *supra* note 11, at 1759-60.

86. *See* Gilson et al., *supra* note 52, at 1382.

87. *Id.* at 1385.

88. *See* Hwang, *supra* note 59, at 1062-63.

89. *See* Gilson et al., *supra* note 52, at 1383-84.

90. Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1766-67 (2001).

91. *See* Laby, *supra* note 80, at 997; Gallanis, *supra* note 81, at 317-18.

92. Laby, *supra* note 80, at 997.



point of the behavioral scholarship on trust discussed above. This omission distances that scholarship from a significant part of the context for fiduciary law and regulation.

## II. IMPLICATIONS FOR FIDUCIARY LAW

The distinctiveness of the relationships to which fiduciary law applies explains why crowding-out effects do not support critiques of fiduciary doctrine and remedies. To be sure, intrinsic motivation is relevant to compliance with the law in general.<sup>93</sup> A felt obligation to obey the law matters to legal compliance, as does the influence of social values on individuals' decisions along with the perception that the law and legal regime in question are legitimate.<sup>94</sup> Additionally, crowding-out effects may be more salient in rationalizing the structure of doctrine in other fields of law, in particular property law and tort law.<sup>95</sup> Among the reasons Robert Ellickson gives for the limited affirmative duties owed by property owners is the concern that legally imposed affirmative duties may reduce intrinsic motivations to do the same thing.<sup>96</sup> Imposing a duty may generate disappointing outcomes: if the objective is to increase cost-sharing between neighbors, "requiring an abutting owner to contribute to the costs of a party wall might" not accomplish much toward the broader cost-sharing objective if, once imposed, the requirement overall has the effect of reducing cooperative conduct.<sup>97</sup> Separately, the affirmative duties of care imposed by contemporary tort law do not include a general duty to rescue another from risks not created by the actor in question.<sup>98</sup> Although the absence of a general duty to rescue in almost all jurisdictions in the United States has long attracted criticism,<sup>99</sup> its defenders justify the absence of a duty to rescue in

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93. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 178 (2006).

94. *Id.* at 57, 178.

95. Robert C. Ellickson, *The Affirmative Duties of Property Owners: An Essay for Tom Merrill*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 43, 51 (2014).

96. *Id.*; see also GREGORY S. ALEXANDER, *PROPERTY AND HUMAN FLOURISHING* 41-42 (2018) (situating Ellickson's treatment of affirmative obligations within welfarist analyses that disregard the significance and implications of membership in a community).

97. See Ellickson, *supra* note 95, at 51.

98. RESTATEMENT (THIRD) OF TORTS § 37 (AM. L. INST. 2012).

99. *Id.* cmt. e, reporters' note e. Comment e acknowledges that if the law conveys the message that it condones failure to rescue persons in mortal peril when an actor could do so

part by arguing that imposing a duty could stifle altruistic attempts at rescue.<sup>100</sup> In contrast, much about fiduciary law reflects the circumstances under which it applies, which involve “have to trust” relationships in which the trusted party voluntarily undertakes a particular role.<sup>101</sup>

This Part delineates those circumstances and the distinctive functions served by fiduciary law, opening with an acknowledgment that fiduciary law itself spans relationships and discrete bodies of legal doctrine that vary significantly.<sup>102</sup> Relationships to which fiduciary law applies are often ones in which revelations of disloyal conduct may provoke extralegal sanctions, a possibility that bears on fiduciary law’s distinctive functions. The Part closes by examining the unsettled question of whether a fiduciary’s subjective motivation does or should matter to the law.

### *A. The Distinctiveness of Fiduciary Relationships and Fiduciary Law*

Fiduciary relationships pose challenges for systematic or theoretical accounts that aim to reduce them to essential elements or necessary properties. Synthesizing is difficult, given “[t]he

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safely and at little cost, the consequence is “a proposition that is morally repugnant.” *Id.*

100. David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 703 (2006). Hyman’s empirical study concluded that more lives are lost through failed attempts to rescue than in proven cases of non-rescue. *Id.* at 668. Most likely, people attempt rescue even when it is risky out of “hard-wired altruism”; Hyman doubts whether the scorn and public shaming to which identified non-rescuers can be subjected are likely factors in explaining whether particular rescues are attempted. *Id.* at 703-04.

101. See, e.g., Laby, *supra* note 80, at 997.

102. Fiduciary law is not the only body of legal doctrine with this characteristic. For some scholars, tort doctrine is a collection of causes of action and associated doctrines, each with distinctive rationales and justifications. In one recent characterization, “it would be an overstatement to say that tort law is governed by a set of goals or guiding principles.” GEORGE C. CHRISTIE, JOSEPH SANDERS, W. JONATHAN CARDI & MARY J. DAVIS, *CASES AND MATERIALS ON THE LAW OF TORTS* 2 (6th ed. 2019). Of course tort law occupies a secure place, not just among required law school courses but in the practice of many lawyers and as a subject of scholarly inquiry. It is a “proper title in the law,” with a settled place on a metaphorical bookshelf of law books. For the history of the “proper title” metaphor and its argumentative force, see Deborah A. DeMott, *The Contours and Composition of Agency Doctrine: Perspectives from the History and Theory on Inherent Agency Power*, 2014 U. ILL. L. REV. 1813, 1817-19, 1832. A newer entrant on the metaphorical shelf of “proper titles,” fiduciary law’s place is less assured.

incredible heterogeneity of fiduciary relationships.”<sup>103</sup> These include relationships in some well-settled categories in which an actor’s status triggers the imposition of fiduciary obligations (agents, trustees, and corporate directors) as well as non-categorical instances in which a court imposes fiduciary obligations on a particular actor based on the facts of a relationship.<sup>104</sup> Nonetheless, some unifying points of commonality are evident despite variations in relational specifics.<sup>105</sup> A unifying characteristic of fiduciaries is the duty of loyalty they owe to the beneficiary of the relationship, which characteristically grounds liability on a conflict between the beneficiary’s interest and the self-interest of the fiduciary, or a conflict between duties the same fiduciary owes to multiple beneficiaries.<sup>106</sup> Examined more closely, what duties of loyalty require varies across types of fiduciaries.<sup>107</sup> A trustee must act in the beneficiary’s sole interest, a stringent obligation reinforced by a “no further inquiry rule” that makes certain conflicted transactions voidable by the beneficiary unless the trust’s settlor authorized the conflict.<sup>108</sup> In contrast, transactions with a corporation to which a director is a party may proceed, without judicial scrutiny of their merits, when disinterested directors (or a committee of disinterested

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103. Paul B. Miller, *The Identification of Fiduciary Relationships*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 367, 367 (Evan J. Criddle et al. ed., 2019) [hereinafter OXFORD HANDBOOK].

104. Daniel B. Kelly, *Fiduciary Principles in Fact-Based Fiduciary Relationships*, in OXFORD HANDBOOK, *supra* note 103, at 3.

105. Miller, *supra* note 103, at 367-68. For a recent example in the investment advisory context, see *Bamford v. Penfold L.P.*, No. 2019-6005-JTL, 2020 WL 967942 at \*8-10 (Del. Ch. Feb. 28, 2020) (holding that allegations in complaint stated claim for breach of fiduciary duty owed to plaintiff by longtime friend and financial advisor; although uncommon in Delaware cases as a basis for a fiduciary-duty claim, a “person-to-person” fiduciary relationship can stem from a defendant’s role as a financial advisor coupled with unrestricted access to another person’s confidential information, superior knowledge, and a degree of intimacy comparable to a familiar relationship).

106. Andrew S. Gold, *The Fiduciary Duty of Loyalty*, in OXFORD HANDBOOK, *supra* note 103, at 385 [hereinafter Gold, *Duty of Loyalty*]. Another source of variation is the difference between internal and external constraints on a fiduciary’s loyalty. In particular, some limits stem from internal facets of the fiduciary’s relationship with the beneficiary, including an agent-type fiduciary’s duty to obey instructions received from the beneficiary (or principal), or a constraint implicit in the fiduciary’s role, such as a lawyer’s relationships to the rule of law and legal institutions. See Andrew S. Gold, *The Internal Limits on Fiduciary Loyalty*, 65 AM. J. JURISPRUDENCE 65, 65-66 (2020) [hereinafter Gold, *Internal Limits*].

107. Gold, *Duty of Loyalty*, *supra* note 106, at 386.

108. *Id.* at 388.

directors) approve the transaction, at least under many circumstances.<sup>109</sup> But neither the possibility of a settlor's consent to a conflict nor disinterested directors' approval of a conflicted transaction obviates the duty of loyalty in general or in terms that sweep across an entire fiduciary relationship.<sup>110</sup> The duty abides, a point further explored in Part III.C in the context of trusts law.

One commonality among fiduciaries and fiduciary law is that, as Arthur Laby explains, a breach of fiduciary duty is weightier than a breach of contract or tort liability stemming from professional negligence or malpractice.<sup>111</sup> A breach of fiduciary duty supports a cause of action with distinct elements that is separate from a tort or breach of contract claim.<sup>112</sup> In Laby's characterization, "stronger and more flexible" remedies are available to successful claimants, even those unable to prove loss or harm.<sup>113</sup> A defendant's fiduciary status can also open a gateway to legal theories that regulators or third parties may assert, including liability based on insider trading in securities.<sup>114</sup> Complementing and accentuating these practical stakes, breaches of fiduciary duty have attracted a distinct and morally charged vocabulary.<sup>115</sup> Nouns connoting moral condemnation such as "disloyalty," "betrayal," "sabotage," and "abandonment," are inapposite when a party's breach of duty amounts only to negligence or breach of contract.<sup>116</sup> Consistent with theories of "crowding-in" effects explored above, the distinct legal vocabulary tied to fiduciary obligation, by expressing moral disapproval of an actor's conduct, furnishes formal reinforcement for intrinsic motivation both to disapprove of a disloyal actor and to avoid engaging in the conduct.<sup>117</sup>

Notwithstanding variations across types of fiduciaries and specifics of the duties they owe, the underlying character of fiduciary law—a fundamental point of coherence across the field—is

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109. *Id.*

110. *See id.*

111. Laby, *supra* note 80, at 962.

112. *Id.* at 961-62.

113. *Id.* at 962. For a catalog of remedies, see Samuel L. Bray, *Fiduciary Remedies*, in OXFORD HANDBOOK, *supra* note 103, at 449.

114. Laby, *supra* note 80, at 963.

115. *See* Gold, *Internal Limits*, *supra* note 106, at 75.

116. *See id.*

117. Gold, *Duty of Loyalty*, *supra* note 106, at 385, 393-94.

obligational in a distinctive fashion.<sup>118</sup> That is, although conduct that would otherwise breach a fiduciary's duties may be amenable to consent under some circumstances, fiduciary law in Joshua Getzler's formulation consists of "mandatory terms forming pre-set categories of right and duty, excluding unauthorised interference with assets and reaching to bind third parties."<sup>119</sup> A fiduciary assumes that role voluntarily, but the defining content of fiduciary law is mandatory, a characteristic present in duties of loyalty owed by fiduciaries in otherwise disparate categories.<sup>120</sup>

Functional consequences follow from the mandatory or obligational quality of fiduciary law. To some extent, these echo functional consequences of the formal requirement of consideration in contract law, delineated by Lon Fuller.<sup>121</sup> In addition to an evidentiary function conventionally associated with the consideration requirement, Fuller discerned two additional and distinct functions of consideration and other legal formalities: the consideration requirement serves both cautionary and channeling functions.<sup>122</sup> Through its cautionary function it "act[s] as a check against inconsiderate action."<sup>123</sup> Through its channeling function it serves "to mark or signalize ... enforceable promise[s]."<sup>124</sup> To be sure, fiduciary relationships vary in whether the law imposes formal requirements; an agent-principal relationship may be formed without a contract, let alone a written instrument.<sup>125</sup> However, fiduciary law "signalizes" that an actor has assumed a particular role with mandatory duties. If a particular actor is outside a fiduciary "channel," especially one in which fiduciary duties are further defined by regulation, the signal conveyed to a prospective client or other beneficiary invited to trust that actor is negative, or cautionary in

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118. Joshua Getzler, "As If." *Accountability and Counterfactual Trust*, 91 B.U. L. REV. 973, 975 (2011).

119. *Id.*

120. *See id.*

121. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 799-802 (1941).

122. *Id.* at 800-01.

123. *Id.* at 800.

124. *Id.* at 801.

125. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. d (AM. L. INST. 2006). In some circumstances, "the law [may] require[] a writing or record signed by the principal to evidence an agent's authority to bind [the] principal to a contract or other transaction," typically one that requires a signed writing or record by the party to be charged. *Id.* § 3.02.

Fuller's terminology. Fiduciary law's channeling and cautionary functions also serve actors who might undertake fiduciary roles by indicating, or signaling, what the law will require. In particular, fiduciary law (and regulation) carries distinct value in clarifying what an actor in a fiduciary role should do—for example, by specifying the kinds of facts or other material that should be disclosed to a beneficiary.<sup>126</sup> The force of the channelling or signaling function of fiduciary law likely forms the premise for recent print advertisements from the financial firm, Charles Schwab & Co., that ask, "Is your financial advisor a fiduciary?"<sup>127</sup>

Fiduciary law overall is adapted to, and enabling of, fiduciary relationships. Despite their heterogeneity, an inherent property of fiduciary relationships is, in Henry Smith's summary, that they present "more than the usual danger of opportunism."<sup>128</sup> The danger of misbehavior by a fiduciary—stemming from entrusting by the beneficiary and the consequent vulnerability inherent to the relationship—is heightened by difficulties in monitoring the relationship.<sup>129</sup> Results the fiduciary achieves may be hard to measure, while the means used to achieve them can elude both measurement and observation.<sup>130</sup>

Moreover, for many fiduciary relationships, moving toward closer monitoring and measurement could defeat the point of forming the relationship, in addition to adding costs. For example, common law agents act subject to the principal's power of control—including the

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126. Cross, *supra* note 11, at 1502.

127. Charles Schwab & Co., Inc., Advertisement, *Is Your Financial Advisor a Fiduciary?*, WALL ST. J., June 30, 2020, at A5. In somewhat smaller type, the advertisement states, "Independent registered investment advisors are fiduciaries. Obligated to act in the best interest of their clients. Continuously. Comprehensively. Completely." *Id.* Charles Schwab & Co. itself provides order-execution, custody, and other non-advisory services for independent advisors. Through a subsidiary, Schwab is registered as an investment advisor and provides advisory services to its proprietary mutual funds and exchange-traded funds. See Tamar Frankel, *Charles Schwab in Praise of Independent Fiduciary Advisors*, VERDICT (Dec. 6, 2019), <https://verdict.justia.com/2019/12/06/charles-schwab-in-praise-of-fiduciary-independent-advisers> [<https://perma.cc/8LMF-FFK9>]. For more on the regulatory and legal context, see *infra* text accompanying notes 200-03. For one astute observer, it is significant that Schwab chose to highlight "fiduciary" as a descriptor of a distinct cohort within the world of investment professionals. See Frankel, *supra*.

128. Henry E. Smith, *Why Fiduciary Law Is Equitable*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 261, 261 (Andrew S. Gold & Paul B. Miller eds., 2014).

129. *Id.* at 271.

130. See *id.*

power to give interim instructions to the agent—as well as the principal’s ongoing power to terminate the agent, albeit in breach of contract.<sup>131</sup> Nonetheless “agency is a categorical instance of a fiduciary relationship”; an agent’s fiduciary status reduces potentially grave risks for the principal that are inherent to the relationship.<sup>132</sup> But the point of the relationship is the extension, through the agent, of the principal’s “legal personality.”<sup>133</sup> A principal who sought to perfectly monitor an agent or to continually exercise control would defeat the point of engaging an agent. To be sure, agency is atypical within fiduciary relationships in its hardwired provision of self-help solutions. As Samuel Bray writes, “the principal tends to be present, uncowed, and able to assert control.”<sup>134</sup> In other fiduciary relationships, a beneficiary more typically remains at the fiduciary’s mercy.<sup>135</sup> Along these lines, writing of contemporary express trusts in the United States—in which beneficiaries’ interests typically are discretionary—Thomas Gallanis justifies the presence of stricter fiduciary rules because beneficiaries “hav[e] to trust” the trustee “despite the risk of betrayal and harm.”<sup>136</sup>

Thus, “crowding-out” critiques of the law have no traction when the law in question focuses on defined types of relationships in which vulnerable parties, notwithstanding their differences, “have to trust” the other party. Additionally, as Arthur Laby explains for investment advisors, attracting a client’s trust can be a calculated or designed process, leading to a relationship in which the client reasonably believes the advisor is telling the truth and can be trusted.<sup>137</sup> In one way or another requisite to establishing a practice in many professions, the process of enlisting trust is not captured by definitions of trust that focus on affective states entirely arising from a person’s internal disposition and orientation toward the

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131. See Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 128, at 321, 334-35.

132. See *id.* at 328-29.

133. Deborah A. DeMott, *Fiduciary Principles in Agency Law*, in OXFORD HANDBOOK, *supra* note 103, at 23, 24.

134. Bray, *supra* note 113, at 449, 461.

135. See *id.* at 461 (emphasizing significance of historical role of equity in shaping remedies in fiduciary fields apart from agency law).

136. Gallanis, *supra* note 81, at 318 (internal quotation marks omitted).

137. Laby, *supra* note 80, at 997, 1002-03.

world and other people.<sup>138</sup> Indeed, if law substitutes for and does not complement this form of trust, crowding out may be desirable, and not something to lament, once we take into account the harm inflicted by disloyal conduct on beneficiaries, however motivated.<sup>139</sup>

Additionally, fiduciary relationships are not ones in which, by changing actors' motives over time, the law interferes with the meaning and value the actors ascribe to their actions. Emad Atiq justifies the common law's refusal to enforce promises to make gifts by arguing that, over time, enforceability would change the motives of gift promisors and change the meaning of ultimate compliance with a gift promise, "crowd[ing] out the norms and motivations that make gifts valuable."<sup>140</sup> Fiduciary relationships are different. For starters, the promisee to whom a gift is promised has a bilateral relationship with the promisor on the basis of which the promisee may form hopes, not legally enforceable expectations.<sup>141</sup> The result is not a relationship that implicates property the beneficiary owns or that, like a relationship of common law agency, triggers the implications of legally consequential representation by another person. Although the promisee may be confident that the promisor will fulfill the gift promise, the result is not a "have to trust" relationship of vulnerability. Finally, moving away from promises to make gifts, the motivations of a person who assumes a fiduciary role may themselves shift to comply with fiduciary law and regulation—but why assume that which is crowded out is benevolent?

### *B. Extralegal Sanctions*

The distinctiveness of fiduciary law and the functions it serves are underscored by taking into account the potential force of extralegal sanctions, including positive and negative reputational effects. Although extralegal sanctions can be potent ways to deter

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138. Larry E. Ribstein, *Law & Trust*, 81 B.U. L. REV. 553, 556 (2001).

139. As others learn of their prospective vulnerability, both to the same fiduciary and to others occupying the same role, this benevolent form of crowding out may become a more generalized effect.

140. Atiq, *supra* note 5, at 1102-04. Put differently, making a gift promise enforceable "kills' the gift." *Id.* at 1103 (quoting Robert A. Prentice, "Law & Gratuitous Promises, 2007 U. ILL. L. REV. 881, 934).

141. *See id.* at 1102-03.



and penalize conduct inconsistent with a fiduciary's assumed role, whether such sanctions are available heavily depends on context, while their relative potency is intertwined with law and applicable regulation. Negative consequences for reputation and their aftermath that follow adverse outcomes in formal legal proceedings can exemplify the widespread effects of the law's expressive power. In contrast, whether reputation is an effective disciplinary mechanism for commerce in general is open to dispute. The contingency and fragility of reputation as a mechanism to incentivize rightful conduct—distinct from the prospect of adverse consequences that follow errant conduct—underscore the misfit between crowding-out critiques and fiduciary law.

Whether and how strongly concern for reputation can operate to constrain conduct also appears to vary with an actor's role, as illustrated in Hwang's study of parties to M&A agreements and their lawyers.<sup>142</sup> All were concerned for their reputation within the bubble-world of a particular deal; only the lawyers cast reputational concerns more broadly.<sup>143</sup> The two concrete examples that follow begin with a highly visible case within a distinct market context in which extralegal sanctions may well have exceeded in impact the damage awards imposed by a court. Much earlier examples within interconnected premodern markets illustrate that negative reputational consequences did not necessarily follow for perpetrators of serious fraud, notwithstanding adverse outcomes in formal legal proceedings.<sup>144</sup>

When the painter Mark Rothko died in 1970, his estate principally consisted of 798 of his own paintings.<sup>145</sup> The estate's three executors transferred ownership of the paintings to a commercial gallery that had worked with Rothko during his lifetime.<sup>146</sup> The same gallery had a contract with one of the executors, a much less successful painter; another executor served the gallery as a director and officer.<sup>147</sup> The artist's children and the Attorney General of New

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142. Hwang, *supra* note 59, at 1031, 1042.

143. *Id.* at 1055.

144. *In re Estate of Rothko*, 372 N.E.2d 291, 293 (N.Y. 1977), *remanded to* 407 N.Y.S.2d 954 (Sur. Ct. 1978).

145. *See id.*

146. *Id.* at 294.

147. *Id.*

York challenged the terms of the sale as a disposition of estate assets for grossly inadequate value effected by executors in breach of fiduciary duty.<sup>148</sup> Two executors' economic ties to the gallery placed each in an evident conflict of interest, while the third executor acted negligently by going along with the transaction, aware of his fellow executors' conflicts.<sup>149</sup> The court agreed with the challengers, removing the executors and awarding damages premised on the paintings' present market value, or appreciation damages.<sup>150</sup> One legal commentator critical of the decision found the damage awards "shocking" and likely to impose unjustified costs on honest estate administrators.<sup>151</sup> Another attributed the executors' predicament to erroneous legal advice that a court would not entertain a petition for instructions about the legality of the executors' proposed conduct.<sup>152</sup> The overriding objective of the lawsuit, though, was recovering the paintings—the defendants' monetary liability would be reduced for each painting returned<sup>153</sup>—which enabled sales and other dispositions over time more likely consistent with Rothko's wishes, including the permanent placement of groups of paintings in public museums.<sup>154</sup>

These points of dispute aside, the extralegal consequences were, if anything, worse for the three ousted executors and the gallery that shared in their disrepute. One executor died a few months after filing for bankruptcy.<sup>155</sup> The not-so-successful artist-executor could not obtain representation by a top-tier gallery.<sup>156</sup> And the gallery's position was harmed, the damage to its reputation underscored when it resigned under pressure from membership in its trade

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148. *Id.* at 293. The Mark Rothko Foundation, a charitable corporation, was a principal residual beneficiary under Rothko's will. *Id.* at 293-94.

149. *Id.* at 294.

150. *Id.* at 295, 300 (affirming judgment of Appellate Division, which affirmed judgment of Surrogate's Court removing executors and, with one small revision, affirmed Surrogate's award of damages).

151. Richard V. Wellman, *Punitive Surcharges Against Disloyal Fiduciaries—Is Rothko Right?*, 77 MICH. L. REV. 95, 96 (1978).

152. John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 963 n.168 (2005).

153. *See Rothko*, 372 N.E.2d at 295.

154. *See* Judith H. Dobrzynski, *A Betrayal the Art World Can't Forget: The Battle for Rothko's Estate Altered Lives and Reputations*, N.Y. TIMES, Nov. 2, 1998, at E1.

155. *Id.* at E4.

156. *Id.*

association (the Art Dealers Association of America).<sup>157</sup> On the one hand, this episode exemplifies the potency of extralegal sanctions—shunning visited on both the disloyal painter-executor and the complicit gallery—in the wake of formal legal proceedings. On the other hand, art markets are distinctive in many ways, including the density and nontransparency of interconnected relationships among dealers, artists, collectors, auction houses, trade associations, and art museums.<sup>158</sup> Dealers follow well-established customary practices in interactions with each other and with collectors.<sup>159</sup> The market for visual art is one of the largest contemporary markets not subject to formal regulation (at least, not much) apart from generally applicable legal principles, which may heighten the importance of extralegal sanctions.<sup>160</sup> Nonetheless, although the Rothko executors and the gallery may have been misinformed about aspects of estate-administration law, it is hard to believe that they were naïve about the market and the force of reputation within it. The prospect of extralegal consequences once they came into disrepute did not deter their breaches of fiduciary duty.

Moving back in time to the salience of reputation in premodern markets in which interconnections among merchants and their face-to-face ties could have assigned a prominent role to reputational effects in disciplining market participants, the record of reputation is contested. As is true at present, in premodern markets reputation was susceptible to manipulation.<sup>161</sup> And reputation was not necessarily effective as a constraint against small cheats, at

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157. *Id.*

158. On the significance and history of dealers within art markets, see Mark A. Reutter, *Artists, Galleries and the Market: Historical, Economic and Legal Aspects of Artist-Dealer Relationships*, 8 VILL. SPORTS & ENT. L.J. 99, 103-11 (2001). Scholars often use the metaphor of an ecosystem to characterize the world of art, with its multiple interlinked components. For examples and implications, see Deborah A. DeMott, *Looking Beyond the Easel: Artists' Contexts and Resale Payments*, 27 DUKE J. GENDER L. & POL'Y 135, 137 (2020).

159. On customary practices among dealers, see Deborah A. DeMott, *Artful Good Faith: An Essay on Law, Custom, and Intermediaries in Art Markets*, 62 DUKE L.J. 607, 631, 638-42 (2012).

160. On the unregulated status of art markets, see Marc Spiegler, *The Art Trade Is the Last Major Unregulated Market*, ART NEWSPAPER (June 2005), <http://www.marcspiegler.com/Articles/Artnewspaper/ArtNewspaper-2005-06-MarketReform.htm> [<https://perma.cc/A49E-SV3W>].

161. Emily Kadens, *The Dark Side of Reputation*, 40 CARDOZO L. REV. 1995, 1997-98 (2019).

least in part because they were more difficult to detect.<sup>162</sup> Focusing on “the dark side” of reputation, legal historian Emily Kadens uses court records and merchant correspondence from sixteenth- and seventeenth-century England to explore the complexities of reputation.<sup>163</sup> Created from rumors and gossip—rarely verified by market participants—reputation’s openness to manipulation enabled fraud.<sup>164</sup> Public trials of fraudfeasors that resulted in guilty verdicts did not necessarily doom their businesses.<sup>165</sup> Reputational signals were often mixed because a person with accurate negative information about another actor might prefer to “hoard” it, sometimes to seek an advantage over others.<sup>166</sup> Reputations are fluid; they respond to new information, which might prove to be false, or consist of gossip that is hard to interpret or evaluate.<sup>167</sup> And, at some point in trade processes, “each person is forced to take a risk and trust the other,” a reality that fraudfeasors exploit.<sup>168</sup> Historical studies like these lend no support to a conjecture that reputation carries greater potential to regulate actors who occupy fiduciary roles in relationships whose structure means that risks posed for the other party are often graver than those in merchants’ transactions.

### *C. The Motive, the Deed, and Acting “As-If”*

Whether intrinsic motivations do (or should) matter to fiduciary law is unsettled among legal scholars. The implications for “crowding-out” critiques are twofold. First, if there is no necessary relationship between affective or intrinsic trust and legally enforceable expectations of trustworthy conduct, the prospect that fiduciary law might crowd out intrinsic trust is not salient to legal doctrine or its application. Second, for actors who assume fiduciary roles, fiduciary law in operation may, as discussed above, crowd out motivators that engender harmful conduct when actors either

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162. Emily Kadens, *Cheating Pays*, 119 COLUM. L. REV. 527, 530 (2019).

163. See Kadens, *supra* note 161, at 1997.

164. *Id.*

165. *Id.* at 1998.

166. *Id.* at 2020.

167. *Id.* at 2021, 2023.

168. *Id.* at 2023.

simply comply with the law or internalize signals the law sends. What remains intriguing is whether it matters how an actor in a fiduciary role is in fact motivated.

In some accounts—and criminal law aside—the law does not concern itself with subjective motivation. Most stringently stated by Oliver Wendell Holmes, the position is that the law is “wholly indifferent to the internal phenomena of conscience” because what matters is externally observable compliance or noncompliance with what the law requires.<sup>169</sup> For Holmes,

A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not. What the law really forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise.<sup>170</sup>

To be sure, Holmes wrote as a scholar of the common law, not equity, and his claims about the law’s indifference to subjective motivation (“the internal phenomena of conscience”) may in part reflect epistemic concerns plus practical challenges of reliable proof in formal legal proceedings.<sup>171</sup> Of course, the latter concern may be less pressing at present, when text messages, email, tweets, and other forms of expression and communication can serve as contemporaneous documentation of self-declared motivations and intentions, distinct from inferences to be drawn from actions taken.<sup>172</sup>

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169. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 110 (1923).

170. *Id.*

171. *Id.* Famously, Holmes also justified the “reasonable man” standard in negligence law as one of “general application” that “does not attempt to see men as God sees them.” *Id.* at 108. This is for several reasons, including the “impossibility of nicely measuring a man’s powers and limitations,” which is clearer than the impossibility of “ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law.” *Id.* For a more recent statement of the same epistemic limitation, see Cross, *supra* note 11, at 1468 (“Given our inability to read souls, we may be unable to distinguish [among] types of trust in many practical applications.”). Put differently, in formal legal processes as in everyday life, we are not in a position comparable to a novel’s omniscient narrator who delves into the internal mental states and motivations of fictional characters.

172. See generally Barry Bridges, *Text Messages Establish Motive in Murder Case*, R.I. LAWS. WKLY. (Jan. 15, 2020), <https://rilawyersweekly.com/blog/2020/01/15/text-messages->

In any event, when fiduciary law governs a relationship, a beneficiary's lack of affective or subjective trust is irrelevant to legal consequences for an actor who assumed a fiduciary role.<sup>173</sup> As Laby characterizes fiduciary advisory relationships, trust is an essential component to a relationship in which one party, the advisor, invites the client to trust that she is telling the truth and will meet her obligations.<sup>174</sup> The social context for the interaction is "one of trust," which dominates the "attitudinal response" from any particular client.<sup>175</sup> Likewise, in contemporary express trusts, in which beneficiaries' interests typically are discretionary and both the trust's settlor and the beneficiaries lack ongoing control over the trust's assets, Gallanis characterizes the relationship as one "requiring trust," in which the "most realistic course of action is to behave as if one trusts" the trustee.<sup>176</sup> What matters, and backstops affective or intrinsically motivated trust, is the trustee's legally enforceable commitment to conduct that complies with duties the law of trusts imposes.<sup>177</sup>

In general, for actors who assume fiduciary roles, it is open to dispute whether conduct that complies with duties of loyalty requires a particular intrinsic motivation. If so, one implication might be a conflict between intrinsically motivated conduct and conduct that is externally motivated in response to the law, on the assumption that the presence of mixed motives creates conflicts among them.<sup>178</sup> Stephen Galoob and Ethan Leib advance a compatibility account of motivation: an action is disloyal "if the actor's motivations are incompatible with robustly attributing non-derivative significance to the ... interests or ends" of the object of loyalty.<sup>179</sup> As

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establish-motive-in-murder-case/ [https://perma.cc/23DX-APJA] (jury determined intent from text messages sent from the defendant to the victim on the day of the murder).

173. Laby, *supra* note 80, at 1005; *see also* Evan J. Criddle, *Stakeholder Fiduciaries*, in FIDUCIARIES AND TRUST, *supra* note 81, at 105, 108 ("[T]he law does not care whether beneficiaries subjectively trust their fiduciaries."); Andrew S. Gold, *Trust and Advice*, in FIDUCIARIES AND TRUST, *supra* note 81, at 35, 55 (characterizing trust as not inevitable in fiduciary relationships and seemingly "an irrelevancy from the legal point of view").

174. Laby, *supra* note 80, at 997.

175. *Id.* at 1001-02.

176. Gallanis, *supra* note 81, at 318 (internal quotation marks omitted).

177. *See* RESTATEMENT (THIRD) OF TRUSTS § 2 (AM. L. INST. 2001).

178. *See* Galoob & Leib, *supra* note 16, at 44-45.

179. *Id.* at 53. Writing earlier, Lionel Smith wrote that the essence of fiduciary law lies in "the surveillance and the justiciability of motive," drawing on examples from the law of trusts

opposed to “devotional account[s]” that define action as loyal only when it is motivated to advance a beneficiary’s interests,<sup>180</sup> to require only that a motivation be compatible with loyalty acknowledges the reality of mixed or multiple motives.<sup>181</sup> These could include compliance with the law and “mundane motives,” such as earning a commission or generating a positive reputation.<sup>182</sup> But for Galoob and Leib, some motives, when present, suffice “to defeat the possibility of a loyal action,” whether or not they prompt action, including “sabotage or betrayal.”<sup>183</sup> Their concrete illustrations come from cases involving defense lawyers in felony proceedings whose conduct raises concerns about counsel’s motivations in the criminal-defendant’s representation,<sup>184</sup> a distinctive context that may limit the generality of their argument.

Galoob and Leib’s account is attractive because it connects fiduciary law to loyalty as more generally understood.<sup>185</sup> If the law can have “crowding-in” effects on the intrinsic motivations held by actors in fiduciary roles, some connection appears necessary.<sup>186</sup> Nonetheless, the compatibility account leaves open how noncompatible motives should be defined as a more general matter, apart from the distinctive jurisprudence associated with claims of ineffective assistance of counsel.<sup>187</sup> The heterogeneity of fiduciary relationships, as well as variations in doctrine across relationships, pose obstacles to generalized definitions of noncompatible motives.

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(cases applying the doctrine of fraud on a power) and company law (cases inquiring into whether directors acted with a proper purpose). Lionel Smith, *The Motive, Not the Deed*, in *RATIONALIZING PROPERTY, EQUITY AND TRUSTS* 53, 67 (Joshua Getzler ed., 2003).

180. Galoob & Leib, *supra* note 16, at 45.

181. *Id.* at 54.

182. *Id.*

183. *Id.*

184. Whether counsel’s conduct amounted to ineffective assistance of counsel under the Sixth Amendment to the U.S. Constitution can implicate counsel’s motives; for example, otherwise-deficient assistance can be justified by the presence of a “sound strategic motive.” Galoob & Leib, *supra* note 16, at 56 (quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003)).

185. Some scholars deny the possibility of a connection between ordinary meanings of loyalty and fiduciary law. *See, e.g.*, Stephen A. Smith, *The Deed, Not the Motive*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* 213, 220 (Paul B. Miller & Andrew S. Gold eds., 2017) (“[F]iduciary law has nothing to do with loyalty in the ordinary sense of the word.”).

186. Along these lines, the law might “frame” the fiduciary-beneficiary relationship as one that “calls for a psychological commitment to trustworthy, other-regarding behavior.” Blair & Stout, *supra* note 90, at 1743.

187. *See* Galoob & Leib, *supra* note 16, at 58-61.

Consider how “betrayal” might be defined as applied to a conventional fiduciary category, agents. In general, it is not a breach of an agent’s duties of loyalty to plan to compete with the principal following termination of the agency relationship, to take concrete steps toward that end,<sup>188</sup> and to do either or both without disclosure to the principal.<sup>189</sup> Once an agency relationship has ended, the now-former agent owes no duty to the principal to refrain from competing with the principal unless the agent is contractually bound not to do so.<sup>190</sup> An agent’s duties proscribe tactics that can be used to compete or prepare to compete—in particular, making unconsented-to use of the principal’s confidential information or property—but what a now-former principal may see as “betrayal” contemporaneous with an agency relationship, or planned “sabotage,” does not violate the agent’s fiduciary duties to the principal.<sup>191</sup> Thus, Galoob and Leib’s formulation, if generalized across fiduciary relationships, only partly captures relevant doctrine.

More generally but less ambitiously stated, fiduciary law has an “as-if” connection to subjective or intrinsic motivation.<sup>192</sup> That is, actors who assume fiduciary roles—whatever their internal motivations may be—are subject to a mandatory legal constraint that requires conduct “as if” they were trustworthy, unconflicted, and otherwise compliant with fiduciary law. Baseline remedies for breach of fiduciary duty mirror this constraint.<sup>193</sup> The same “as-if” quality enables even skeptical beneficiaries to enter a fiduciary relationship with the law’s assurance notwithstanding doubts they may harbor about the fiduciary’s motives or prospective conduct or about their own ability to discern the truth.<sup>194</sup> As a consequence, the law’s “as-if” relationship to a fiduciary’s subjective or intrinsic motivation may be inevitable, even when plausibly connected to the

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188. RESTATEMENT (THIRD) OF AGENCY § 8.04, cmt. c (AM. L. INST. 2006).

189. *Id.* § 8.11. An agent’s duty to disclose material information to the principal does not require advance warning that the agent will terminate the relationship. *See id.* § 8.04, cmt. c.

190. *Id.* § 8.04, cmt.c.

191. *Id.* § 8.05 & cmt.b.

192. This is not the sense in which the phrase “as if” is used by characters in the movie *Clueless*, Amy Heckerling’s 1995 adaptation of Jane Austen’s *Emma*. CLUELESS (Paramount Pictures 1995). In the movie (and not in the novel), “as if” means something unlikely if not impossible. *Id.*

193. *See Getzler, supra* note 118, at 973-74.

194. *See id.*



fiduciary's breach of duty. Fiduciary law's "as-if" properties require compliant conduct from actors in fiduciary roles, regardless of their subjective or intrinsic motivations; the same "as-if" connection to subjective motivation assures prospective beneficiaries that the law will backstop them.<sup>195</sup>

### III. FIDUCIARY RELATIONSHIPS ON MULTIPLE DIMENSIONS

The variety of relationships that are (or potentially might be) included within the fiduciary realm makes it possible to assess the persuasiveness of crowding-out critiques along dimensions that differ among relationships.<sup>196</sup> These include whether ties between the parties precede their fiduciary relationship, the nature of those ties, the magnitude of the stakes at issue for the party made vulnerable through the relationship, plus the parties' reasons for forming the relationship and its likely duration. Prior ties between the parties can be consistent with circumstances conducive to the presence of intrinsic motivations to act in a loyal manner.<sup>197</sup> What the parties already know about each other may enable a prospectively vulnerable party to make an informed choice. Alternatively, looking to the dark side, knowledge and insights gleaned from prior associations may enable a more efficient choice of prey by an actor who will prove unworthy of a fiduciary's role.<sup>198</sup> The stakes involved also carry divergent implications: prospectively vulnerable parties may be willing to proceed with less care or caution when the stakes seem low, but accompanying higher stakes are risks of greater harm when trust is misplaced.<sup>199</sup> Arrayed along these dimensions, relationships to which fiduciary law applies illustrate its multiple functions. The examples that follow in this Part begin with relatively high-stakes interactions among parties assumed to have been relative strangers to each other previously, followed by lower-stakes interactions among strangers, and concluding with high-stakes interactions among people already linked by family ties.

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195. *See id.* at 973-75.

196. *See* FREY, *supra* note 17, at 96-100.

197. *Cf.* Gold, *supra* note 106, at 400 (stating that fiduciary law "is responsive to the purpose of the relationships in which it figures").

198. *See* Stephen R. Galoob & Ethan J. Leib, *Fiduciary Loyalty, Inside and Out*, 92 S. CAL. L. REV. 69, 70-71 (2018).

199. *See* Blair & Stout, *supra* note 90, at 1774-75.

A fundamental—and initial—question is whether a legally mandated duty of loyalty demonstrably shapes conduct.

*A. Securities Broker-Dealers, Their Customers, and Investment Recommendations*

It is long settled in the United States that an investment manager or advisor who is registered as an adviser under the Investment Advisers Act of 1940 owes fiduciary duties to her clients,<sup>200</sup> a fact recently underscored and applauded in advertisements from Charles Schwab & Co. discussed in the prior Part.<sup>201</sup> More contested is the status of broker-dealer firms and the individual brokers associated with them. The business stakes intensified when, over time, furnishing advice to customers became more financially significant for broker-dealers as the costs—and profit—associated with executing transactions as an agent on behalf of clients markedly declined.<sup>202</sup> Although federal securities law does not treat brokers as fiduciaries when—unlike registered investment advisors—they recommend investments to customers, courts in some—but not all—states have held that broker-dealers and their broker associates are fiduciaries within state borders.<sup>203</sup>

This difference among states makes it possible to examine whether the investment recommendations that brokers give their clients differ depending on a broker-dealer's location and its implications for fiduciary duties. Vivek Bhattacharya and his coauthors used a data set of transaction-level data for sales of deferred annuities from a large anonymous provider of financial

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200. For the foundational case, see *SEC v. Cap. Gains Rsch. Bureau Inc.*, 375 U.S. 180 (1963).

201. See *supra* note 127 and accompanying text.

202. SEC, RECOMMENDATION OF THE INVESTOR ADVISORY COMMITTEE BROKER-DEALER FIDUCIARY DUTY (2012), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/fiduciary-duty-recommendation-2013.pdf> [<https://perma.cc/G584-BXBR>].

203. For a comprehensive treatment documenting differences among states, see THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 14.133 (2020). For broader analytic frameworks, see Kelly, *supra* note 104, at 8, and Howell E. Jackson & Talia B. Gillis, *Fiduciary Law and Financial Regulation*, in OXFORD HANDBOOK, *supra* note 103, at 851, 866-68. An unpublished paper known within the advisory industry details state-by-state contrasts. See Michael Finke & Thomas Langdon, *The Impact of the Broker-Dealer Fiduciary* 11-15 (Mar. 9, 2012) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2019090](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2019090) [<https://perma.cc/P2AN-FFH3>].

services, a top-five company by market sales of annuities and representative of large companies in the industry, combined with data from Morningstar and the Center for Research in Security Prices (CRSP) relevant to annuity-related investment options.<sup>204</sup> The data set included every annuity contract sold by the provider from 2013-2015, details about the product and individual advisor, plus limited data for each client.<sup>205</sup> The researchers observed the fiduciary status of the advisor plus detailed geographical information about clients' and advisors' locations.<sup>206</sup> The study compared broker-dealers' behavior in states in which a fiduciary duty was owed to clients with ones in which it was not, using as a control the difference in behavior of registered investment advisors.<sup>207</sup> Controlling for differences across states, the researchers restricted the study to counties along borders of states in which the law applicable to brokers changed.<sup>208</sup>

The research findings confirm the significance of fiduciary duty in shaping conduct. When brokers were subject to fiduciary duty under state law, they sold annuity products with risk-adjusted investment returns that were twenty-five basis points higher, a change in returns the researchers attribute to a change in products sold, away from variable annuities and toward fixed annuities.<sup>209</sup> Within the variable-annuity category, the shift was toward products with more investment options, more highly rated investment options, and investment options with higher historical returns.<sup>210</sup> The study also considered whether the differences resulted from the presence in a market of brokers who offer higher quality advice, coupled with the exit of brokers offering lower quality advice, which would induce the entry of brokers who offer higher quality advice into previously unprofitable markets.<sup>211</sup> Overall, the study's results are consistent with finding that "fiduciary duty [acts] as a constraint

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204. Vivek Bhattacharya, Gastón Illanes & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice 16* (May 1, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3281345> [<https://perma.cc/ES3N-BQWP>].

205. *Id.* at 71.

206. *Id.* at 3.

207. *Id.* at 10-11, 10 n.14.

208. *Id.*

209. *Id.* at 3-4.

210. *Id.*

211. *Id.* at 4-5.

on low-quality advice” and does not simply increase fixed costs, as firms enter and leave the relevant markets.<sup>212</sup> The results for clients are investment choices comparable to those that the market would reward were all customers consistently sophisticated and rational.<sup>213</sup>

The findings in this study are a baseline illustration of the impact of fiduciary law relative to other factors that shape conduct, including reputational effects in markets for investment securities and advice about investing. In particular, the study demonstrates that actors’ conduct can respond to the belief that fiduciary law applies.<sup>214</sup> The state-by-state contrasts are striking, in part because in some states, whether a broker is treated as a fiduciary requires a factually intense analysis by the court, in contrast with the categorical determination for registered investment advisers and other fiduciaries whose status is determined by a formally defined trigger.<sup>215</sup> The study does not reveal the mechanisms through which brokers came to conform to fiduciary standards in advising their clients, which might have included firm-level training or industry-level sources of information and guidance. Although the study does not assess the overall merits of case-by-case determinations of fiduciary status as opposed to categorical triggers, it may imply that—through the operation of some unobserved mechanism—broker-dealers acted “as if” they categorically owed fiduciary duties to advisory clients on the basis of judicial precedents stemming from fact-intensive case-by-case adjudication.<sup>216</sup>

More generally, the study’s findings are consistent with understanding fiduciary law as a complement to, and not a substitute for, other incentives and motivations toward conduct, whether generated through markets or actors’ intrinsic motivations. While individual advisors may well have ties to their clients that conduce toward intrinsically motivated loyal conduct, many advisor-client relationships are closer to what Frey characterized as “impersonal and purely abstract interactions” positioned toward the end of a relational spectrum typified by electronic stock markets.<sup>217</sup> But

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212. *Id.* at 7-8.

213. *See id.* at 4.

214. *See id.* at 45-46.

215. *See id.* at 10-11.

216. *See id.* at 2-3, 45-46.

217. FREY, *supra* note 17, at x.

advising necessarily invokes trusting conduct if not subjective or affective trust in clients, in this study potentially in connection with high stakes for clients.<sup>218</sup> Broker-dealers' belief that they owe fiduciary duties to clients may or may not operate to reinforce intrinsic motivations toward loyal conduct, but the impact for clients is straightforwardly positive.

*B. Philanthropic Crowdfunding, Campaign Organizers, and Their Donors*

Investment decisions effected through financial markets combine investors or prospective investors who—one way or another—seek economic benefits via transactions that typically require the intervention of an intermediary advisor or agent, whose conduct is structured by a defined professional role within a complexly regulated and multicomponent industry, as illustrated in the preceding example. In contrast, donors to philanthropic organizations or campaigns more likely fit within paradigms dominated by intrinsic motivation. For some donors, motivations likely represent a mix of felt desire to help a worthy cause or institution, an interest in enhancing self-regard and reputation in others' eyes, as well as extrinsic motivations of the sort created by tax incentives.<sup>219</sup> Likewise, individuals associated with organizations that solicit donations to charity often act from a mix of motives, including earning an income. In the United States, philanthropic organizations that qualify for favorable federal tax treatment for the organization and its donors are subject to a web of regulation that, through disclosure and public filing requirements, can operate to reveal and discourage problematic conduct.<sup>220</sup>

Against this relatively settled backdrop, the introduction of platform-based crowdfunding, which enables individuals to initiate wide-reaching campaigns for charitable objectives, raises issues that remain unresolved in the United States.<sup>221</sup> Chief among them are

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218. Laby, *supra* note 80, at 997.

219. See, e.g., *Tax-Deductible Donation*, GOFUNDME, <https://support.gofundme.com/hc/en-us/articles/360039267752-Tax-Deductible-Donation> [<https://perma.cc/3STY-KFQV>].

220. For some specifics, see RESTATEMENT OF THE L. OF CHARITABLE NONPROFIT ORGS. § 5.03 (AM. L. INST., Tentative Draft No. 3, 2019).

221. Beyond the scope of this Article, crowdfunding raises tax questions, including whether crowdfunding contributions should be treated as gross income to the organizer, whether the

the legal status of a campaign's organizer and the treatment of funds received through the campaign that are not turned over to a conventional charitable organization.<sup>222</sup> Paradigmatically, identifiable individuals or community groups organize charitable campaigns for benevolent or humanitarian purposes tied by locale to the organizers; platform-based fundraising harnesses the internet to amass widespread public support to assist deserving individuals or causes, independent of community-based ties or geographic proximity.<sup>223</sup> In Canada, beginning in 2011, informal public appeals are addressed by provincial legislation sparked by a uniform act launched in 2009 by the Civil Section of the Uniform Law Commission of Canada (the UCLC).<sup>224</sup> In 2019, the UCLC circulated a proposed revision that encompasses platform-enabled philanthropic crowdfunding within the same overall statutory structure.<sup>225</sup> In the United States, the Uniform Law Commission (the ULC) has begun work on a counterpart uniform act. Its key provisions noticeably depart from the Canadian approach,<sup>226</sup> as explained below.

Donors to philanthropic campaigns conducted via GoFundMe or another platform or via Facebook or other internet-facilitated possibilities often lack prior ties to the campaign's organizer.<sup>227</sup> A campaign combines the philanthropic motivations of donors with the motivations of campaign organizers, which may be hard for donors to discern. If the organizer misuses donated funds by putting them

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organizer may take a charitable deduction after donating the funds, and so forth. See Andrew M. Wasilick, *The Tax Implications of Crowdfunding: From Income to Deductions*, 97 N.C. L. REV. 710, 711-12, 714-15 (2019).

222. See *id.*

223. UNIF. INFORMAL PUB. APPEALS AND CROWDFUNDING ACT pt. I (UNIF. L. CONF. CAN., Consultation Paper 2019), <http://unilaw.ca/data/documents/Consultation-Paper-2019.htm> [<https://perma.cc/UAD5-BMNU>].

224. *Id.*

225. *Id.*

226. For a detailed examination of the Canadian approach to fiduciary relationships in philanthropic crowdfunding campaigns, see Karen E. Boxx, *A New Member of the Fiduciary Family: Crowdfunding Campaign Organizers* (2019) (unpublished manuscript) (on file with the *William & Mary Law Review*).

227. GoFundMe itself charges no "platform fee." *Everything You Need to Know About GoFundMe's Fees*, GOFUNDME, <https://www.gofundme.com/c/blog/gofundme-fees#:~:text=%E2%80%9C%20or%20%E2%80%9CHow%20much%20does%20GoFundMe,can%20help%20even%20more%20peopleunilaw.ca/data/documents/Consultation-Paper-2019.htm> [<https://perma.cc/ZJ99-FJE3>]. It provides an opportunity to organizers to make a donation to the organization and charges a per-transaction fee of 2.9 percent plus thirty cents for credit and debit card transactions. *Id.*

to a self-interested use or another use beyond the terms of the campaign, donors suffer direct harm because they intended to benefit the object of the campaign.<sup>228</sup> A crowdfunding platform may mitigate this harm by providing refunds under some circumstances.<sup>229</sup> If an organizer's misuse of funds becomes generally known (even when the platform makes refunds to donors who seek them), a less direct and more diffuse type of harm may follow because the campaign's donors have a new basis for skepticism about giving in response to future appeals, whoever the organizer might be. In the past, scandals associated with particular charitable organizations were followed by declines in giving to the organization, notwithstanding ongoing demand for the services it provided.<sup>230</sup>

More generally, donors who learn they have been duped by placing trust in an organizer who proved unworthy may look askance at requests for charity in the future because the deep-set intrinsic fear of being a sucker has been evoked.<sup>231</sup> An additional concern over time is the impact on the proportion of campaign organizers who are "dishonest types," drawn to opportunities to exploit the benevolent impulses of others.<sup>232</sup> Fiduciary law, by assuaging donors' doubts and providing public recourse, could undergird donors' willingness to act on their intrinsic motivations toward philanthropy.<sup>233</sup> On the other hand, legal interventions—beyond the terms imposed by a crowdfunding platform or the terms of a campaign—could deter prospective organizers through the introduction of legal formalities.<sup>234</sup>

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228. See, e.g., *Charges: Richfield Woman Stole over \$2,000 from GoFundMe Account*, FOX9 (Apr. 20, 2018), <https://www.fox9.com/news/charges-richfield-woman-stole-over-2000-from-gofundme-account> [<https://perma.cc/GHJ5-EN9Q>] (reporting that an organizer collected \$2,645 raised from a campaign whose donors believed would benefit a grieving family).

229. GoFundMe will refund the amount of contributions when they are not delivered to the intended beneficiary or when a campaign's organizer or beneficiary has misled donors, up to \$1000 per donor per campaign. For details, see *The GoFundMe Guarantee*, GOFUNDME, <https://www.gofundme.com/c/safety/gofundme-guarantee> [<https://perma.cc/K8HJ-DBMA>].

230. Deborah A. DeMott, *Self-Dealing Transactions in Nonprofit Corporations*, 59 BROOK. L. REV. 131, 134 (1993).

231. On the fear, see Bowles, *supra* note 48, at 1609. For the phenomenon of "looking askance," see MICHAEL LEJA, LOOKING ASKANCE 12-13, 20 (2004). As Leja describes its origins, "adjusting to modern life in New York [from] 1900 [onward] meant learning to see skeptically ... to process visual experiences with some measure of suspicion, caution, and guile." *Id.* at 1.

232. For this terminology, see Bohnet et al., *supra* note 38, at 136.

233. See *supra* notes 50-51 and accompanying text.

234. See *supra* notes 122, 125 and accompanying text.

Under the Canadian Act, a campaign organizer who directs the management and disbursement of a fund or has authority to do so is defined to be a trustee.<sup>235</sup> Although many of the Act's provisions are default terms that may be varied by the terms of a public appeal, the definition of "trustee" is not among them.<sup>236</sup> This mandatory statutory definition is consistent with the general legal definition of a "trust" as

a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.<sup>237</sup>

It follows from this definition that not all benevolence is "charitable" in the legal sense; property held on behalf of identified persons is not held for the benefit of "charity" but is held in trust on behalf of "one or more" identified persons or an identified class of persons.<sup>238</sup> A trustee is "[t]he person who holds property in trust."<sup>239</sup> The Canadian Act specifies the organizer's duties as trustee. These duties include using the fund's income and capital for the fund's object and considering at least annually whether any remaining money or property is still needed.<sup>240</sup> When a campaign generates a surplus, the result is not a trust in favor of donors.<sup>241</sup> The terms of a campaign or trust instrument may specify how to distribute a surplus. According to the Canadian Act, court approval is not required if the terms are consistent with "the spirit of the appeal," including distribution to a charitable object if consistent with the

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235. UNIF. INFORMAL PUB. APPEALS ACT § 4(1) (UNIF. L. CONF. CAN. 2012).

236. *Id.* § 2(3)(a).

237. RESTATEMENT (THIRD) OF TRUSTS § 2 (AM. L. INST. 2001).

238. A charitable trust requires a purpose focused on public, not private benefit, concerned with a "social interest" or "benefit to the community." *Id.* § 28 cmt. a.

239. *Id.* § 3(3).

240. UNIF. INFORMAL PUB. APPEALS ACT § 24 (UNIF. L. CONF. CAN. 2012).

241. *Id.* § 10(1). GoFundMe permits organizers to continue fundraising once a campaign reaches its goal, with progress reflected on a meter displayed for each campaign. An organizer may "edit" the terms of a campaign to increase its goal. GoFundMe's website recommends explaining why a goal amount has been increased. See *Editing Your Fundraiser*, GOFUNDME <https://support.gofundme.com/hc/en-us/articles/360001992687> [<https://perma.cc/G8SA-N78J>].



spirit of the campaign.<sup>242</sup> The Canadian Act grants standing to enforce the trust to a trustee, a person or member of a class for whose benefit the campaign was conducted, the Attorney General, or a donor or any other person with a sufficient interest as determined by the court.<sup>243</sup>

In contrast, the Draft Uniform Act in the United States does not use the word “trustee.”<sup>244</sup> The drafters considered characterizing a campaign organizer as a trustee when the object of the campaign was an incapacitated person or a minor but feared making the end product “unenactable” by state legislatures.<sup>245</sup> Reportedly, the drafters were also concerned about providing sufficient notice to campaign organizers of their legal status,<sup>246</sup> a concern that could be mitigated for organizers of crowdfunding campaigns if the platform were to provide notice.

Nor does the Draft Act use the word “fiduciary.”<sup>247</sup> The Draft Act imposes duties on fund organizers. For example, they must distribute funds consistently with the terms of the appeal and hold the funds in a regulated financial institution un-commingled with their own funds.<sup>248</sup> The Act also limits organizers’ liability to losses caused by dishonesty or willful misconduct.<sup>249</sup> Under the Draft Act, donors do not have standing to sue.<sup>250</sup> De facto, Karen Boxx argues, the Draft Act creates “a new category of fiduciary, with minimal duties” and one constrained by fewer potential resources for enforcement because donors would lack standing to sue.<sup>251</sup> The position of donors who typically are unable to monitor how the organizer uses funds would warrant stricter fiduciary duties. But how would organizers receive sufficient notice of the legal implications of what

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242. See UNIF. INFORMAL PUB. APPEALS ACT § 10(2), (5)(b) (UNIF. L. CONF. CAN. 2012).

243. See UNIF. INFORMAL PUB. APPEALS AND CROWDFUNDING ACT § 8 (UNIF. L. CONF. CAN., Consultation Paper 2019), <https://unilaw.ca/data/documents/Consultation-Paper-2019.htm> [<https://perma.cc/UAD5-BMNU>].

244. See FUNDRAISING THROUGH PUB. APPEALS ACT §§ 5, 10, cmt. (NAT’L CONF. OF COMM’RS ON UNIF. STATE L., Draft June 6, 2019).

245. Boxx, *supra* note 226, at 9.

246. *Id.*

247. See FUNDRAISING THROUGH PUB. APPEALS ACT § 10, cmt. (NAT’L CONF. OF COMM’RS ON UNIF. STATE L., Draft June 6, 2019).

248. *Id.*

249. *Id.* § 10(a),(f), cmt.

250. *Id.* § 12, cmt.

251. Boxx, *supra* note 226, at 9.

they have undertaken, which go beyond the general legal obligation not to commit fraud?<sup>252</sup> To be sure, the Draft Act could assign responsibility to provide notice to crowdfunding campaign platforms, but this possible route toward notice would not apply when an organizer proceeds with an appeal but does not use a platform.

Characterizing the organizer of a crowdfunding campaign as a trustee, as does the Canadian Act, is an example of the “channeling” function served by fiduciary law, discussed above.<sup>253</sup> Both the Draft Act in the United States and the Canadian Act expressly do not apply to appeals by organized charities or to funds payable to or paid over to an organized charity.<sup>254</sup> If a crowdfunding campaign has a charitable “object”—not one directed toward specific individuals—an organizer is not deemed to be a trustee under the Canadian Act.<sup>255</sup> Similarly, an organizer is not a *de facto* fiduciary under the Draft Act in the United States if funds raised by the campaign will go directly to, or will be paid over to, an organized charity.<sup>256</sup> This exception places ownership of the funds within a regulated organization, as discussed above, and allays concerns the organizer might otherwise have about assuming the status of a trustee or fiduciary (assuming the organizer is made aware of those consequences, as a crowdfunding platform could do). To be sure, when the object of a campaign is particular needy individuals, the object is not “charitable” in the legal sense;<sup>257</sup> channeling toward a regulated charity is not an option unless the campaign’s object is broadened.

Whether designating campaign organizers as trustees has the effect of channeling campaigns toward organized charities could be a testable empirical question and more than a theoretical conjecture, given the availability of almost a decade of experience under

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252. *See id.* at 11.

253. *See supra* notes 122-26 and accompanying text.

254. FUNDRAISING THROUGH PUB. APPEALS ACT § 4 (1), (3), cmt. (NAT’L CONF. OF COMM’RS ON UNIF. STATE L., Draft June 6, 2019); UNIF. INFORMAL PUB. APPEALS AND CROWDFUNDING ACT § 2(2)(a), (b) (UNIF. L. CONF. CAN., Consultation Paper 2019), <http://unilaw.ca/data/documents/Consultation-Paper-2019.htm> [<https://perma.cc/UAD5-BMNU>].

255. UNIF. INFORMAL PUB. APPEALS AND CROWDFUNDING ACT §§ 1, 4(1) (UNIF. L. CONF. CAN., Consultation Paper 2019), <http://unilaw.ca/data/documents/Consultation-Paper-2019.htm> [<https://perma.cc/UAD5-BMNU>].

256. FUNDRAISING THROUGH PUB. APPEALS ACT § 8, cmt. (NAT’L CONF. OF COMM’RS ON UNIF. STATE L., Draft June 6, 2019).

257. *See* RESTATEMENT OF THE L. OF CHARITABLE NONPROFIT ORGS. § 1.01 (AM. L. INST., Tentative Draft No. 3, 2019).

the Canadian Act. Experience with organized charities in the United States over a somewhat longer period of time suggests an additional possibility toward allaying concerns by and on behalf of donors.<sup>258</sup> At least for large tax-exempt charitable organizations, the public availability of a rich body of information generated by mandatory tax filings has enabled deep-reaching scrutiny into organizations' conduct and efficacy.<sup>259</sup> Making the phenomenon of crowdfunding and its individual campaign organizers more transparent to prospective donors through readily accessible data—perhaps assembled by platforms or other hosts with organizers' consent, and amenable to analysis by third parties—could mitigate concerns that stem from prospective donors' lack of information about campaign organizers and inability to monitor their use of funds.

Gifts to organized charities also mitigate issues stemming from charitable campaigns that succeed to a degree beyond the organizers' and donors' likely expectations. Following catastrophic wildfires in Australia in 2019 and 2020, celebrities and others organized appeals to support firefighters; one campaign conducted via Facebook raised \$34 million.<sup>260</sup> "Flush" with tens of millions of dollars from that campaign and other sources, the New South Wales Rural Fire Service could support itself for decades, while it is unclear that individual donors fully realized their contributions

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258. See, e.g., David C. Hammack, *Nonprofit Organizations in American History*, 45 AM. BEHAV. SCIENTIST 1638, 1640 (2002).

259. For the history, see RESTATEMENT OF THE L. OF CHARITABLE NONPROFIT ORGS. § 5.03, cmt. b. (AM. L. INST., Tentative Draft No. 3, 2019). Publicly accessible information concerning charities has enabled the work of nongovernmental organizations such as Charity Navigator, which rates charities and provides easily searchable information about individual charities. See *About Us*, CHARITY NAVIGATOR, <https://www.charitynavigator.org/index.cfm?bay=content.view&cpid=1653> [<https://perma.cc/M455-J6N4>]. Publicly available information facilitates journalistic scrutiny of the charitable sector. For an example, see Joe Stephens & Mary Pat Flaherty, *Inside the Hidden World of Thefts, Scams and Phantom Purchases at the Nation's Nonprofits*, WASH. POST (Oct. 26, 2013), [https://www.washingtonpost.com/investigations/inside-the-hidden-world-of-thefts-scams-and-phantom-purchases-at-the-nations-nonprofits/2013/10/26/825a82ca-0c26-11e3-9941-6711ed662e71\\_story.html](https://www.washingtonpost.com/investigations/inside-the-hidden-world-of-thefts-scams-and-phantom-purchases-at-the-nations-nonprofits/2013/10/26/825a82ca-0c26-11e3-9941-6711ed662e71_story.html) [<https://perma.cc/6G9W-HY4Y>]. It also furnishes reliable data for quantitative inquiry. For a recent example, see Erica Harris, Christine M. Petrovits & Michelle H. Yetman, *The Effect of Nonprofit Governance on Donations: Evidence from the Revised Form 990*, 90 ACCT. REV. 579, 580, 582-83 (2015).

260. Isabella Kwai, *Donations Are Pouring into Australia. Now What?*, N.Y. TIMES (Jan. 18, 2020), <https://www.nytimes.com/2020/01/18/world/australia/fires-donations-help.html?searchResultPosition=1> [<https://perma.cc/6KXC-P7GA>].

would go to a single fire service.<sup>261</sup> Likely the Fire Service—and not the celebrity who organized the Facebook campaign—has discretion whether to distribute money to other organizations, which individual donors may not have contemplated.<sup>262</sup> In contrast, donations to organized charities focused on disaster relief facilitate that end in a more transparent and efficient manner.<sup>263</sup> To be sure, that institutional route toward charity may carry less pizzazz than platform-based and Facebook-facilitated campaigns. It may be less compelling to campaign organizers, whether or not celebrities, as a route toward self-redefinition and potential prominence. Nonetheless, clarifying organizers' fiduciary status would reduce risks for both campaign donors and organizers.

### *C. The Family Trust and the Conflicted Trustee*

Intrinsic motivations to trust and to prove worthy of being trusted seem more likely when the parties to a relationship are linked by family ties, not just acquainted with each other.<sup>264</sup> In some recurrent situations in which a person in a fiduciary role proceeds in the face of a structural conflict—one embedded in the situation that cannot be avoided—intrinsic motivation toward loyal conduct serves a self-evidently important function, as does fiduciary law. The relationship between the two merits exploration. Some common situations pose structural conflicts that are intrinsic to a situation and not created by a fiduciary. One in particular arises when a family member serves as the trustee of a trust created by another family member, when the trustee is also a life or remainder beneficiary of the trust. The beneficiary-trustee's position is conflicted, but the conflict was created by the trust's settlor, who chose the trustee.

Among settled fiduciary categories, trust law casts a trustee's fiduciary duties in especially rigorous terms, in particular the duty of loyalty. Undivided loyalty is required from a trustee, who must administer the trust solely in the beneficiaries' interest.<sup>265</sup> And a trustee is "strictly prohibited" from engaging in self-dealing or

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261. *Id.*

262. *Id.*

263. *Id.*

264. *See supra* note 50 and accompanying text.

265. RESTATEMENT (THIRD) OF TRUSTS § 78(1) (AM. L. INST. 2005).

otherwise creating a conflict between the trustee's personal interests and fiduciary duties.<sup>266</sup> The "no further inquiry" rule, discussed above, reinforces those obligations by foreclosing judicial examination of the trustee's subjective motives or the substantive outcome wrought by the breach.<sup>267</sup> The rationale for the rule, observes the Restatement (Third) of Trusts, "begins with a recognition that it may be difficult for a trustee to resist temptation when personal interests conflict with fiduciary duty."<sup>268</sup> Relatedly, a trustee's misconduct may easily be concealed.<sup>269</sup> At the same time, as Robert Sitkoff characterizes it, trust law recognizes a trust settlor's freedom of disposition and accords great weight to the terms of the trust.<sup>270</sup> As a consequence, "most fiduciary principles in trust law are default rules that may be varied by the terms of the trust."<sup>271</sup> By naming a beneficiary of a trust as sole trustee or cotrustee, the settlor has varied the applicability of the rules canvassed above.<sup>272</sup> The settlor has created a structural conflict in the face of which the trustee must administer the trust. Although the trustee may succeed in applying to the court for instructions, the trustee would commit a breach of the duty to administer the trust by failing to act.<sup>273</sup> Having accepted the role of trustee, a trustee's resignation, if in accord with the terms of the trust, requires the court's approval or consent from all beneficiaries.<sup>274</sup>

Although trust law is clear that a trustee's fiduciary duty of loyalty survives in some form, notwithstanding a structural conflict created by the settlor, the law furnishes little concrete guidance to a conflicted trustee. Consider a trust established by Father (F) with a life interest to Spouse (S) and a remainder interest to Child (C). The trust names C as sole trustee and gives C discretionary power

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266. *Id.* § 78(2).

267. *See supra* note 108 and accompanying text.

268. RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. b (AM. L. INST. 2005). Thus, the law's preference is "to remove altogether the occasions of temptation rather than to monitor fiduciary behavior and attempt to uncover and punish abuses when a trustee has actually succumbed to temptation." *Id.*

269. *Id.*

270. Robert H. Sitkoff, *Fiduciary Principles in Trust Law*, in OXFORD HANDBOOK, *supra* note 103, at 41, 60.

271. *Id.*

272. *See supra* notes 265-68 and accompanying text.

273. RESTATEMENT (THIRD) OF TRUSTS §§ 71, 76 (AM. L. INST. 2005).

274. *Id.* § 36.

to invade the corpus of the trust for current distribution. To the extent C exercises discretion to benefit S, C may well diminish the value of C's own remainder interest. If C is stingy toward S, C may augment the value of C's remainder interest. Depending on S's other resources, C may deprive S contrary to C's nonlegal filial obligations toward a parent through self-serving conduct that might disappoint F, were he still alive.

To be sure, despite the settlor-created structural conflict in this common situation, trust law subjects a trustee in C's position to a duty of impartiality that requires giving "due regard to the beneficiaries' respective interests as defined by the settlor."<sup>275</sup> The duty of impartiality can be ambivalent in application. On the one hand, the settlor's choice of a beneficiary-trustee like C could be a basis on which to infer some preference for C or confidence in C's judgment. On the other hand, although in general impartiality is assessed by whether a trustee acted reasonably, a conflicted trustee's decisions attract "close scrutiny" for abuse or inadequate regard for the duty of impartiality.<sup>276</sup>

This simple example illustrates complexities inherent in the law's role in a recurrent situation in which it is likely that the trustee's actions would be consistent with strongly felt inherent motivation to act in a trustworthy fashion when making decisions that affect the interests of a close family member. The history of the relationship between the settlor and the trustee could warrant the settlor's confidence in the trustee.<sup>277</sup> But this recurrent situation can also be characterized by the presence of hard-to-detect abuse and uncertain prospects for an eventual legal reckoning.<sup>278</sup>

These dilemmas aside, the impact of the law is not consistent with crowding-out critiques because duties imposed by trust law complement and do not suppress a conflicted trustee's intrinsic motivations toward loyal conduct.<sup>279</sup> Rather, the law's impact on

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275. Sitkoff, *supra* note 270, at 52; RESTATEMENT (THIRD) OF TRUSTS § 79 (AM. L. INST. 2005); *see also* Criddle, *supra* note 173, at 123 (characterizing a settlor-appointed beneficiary trustee as an example of a stakeholder fiduciary who is subject to an expectation that other beneficiaries will be treated equitably relative to the purposes of the trust).

276. RESTATEMENT (THIRD) OF TRUSTS § 79 cmt. (b)(1) (AM. L. INST. 2005).

277. *See supra* notes 87-90 and accompanying text.

278. *See supra* notes 268-69 and accompanying text.

279. *See supra* note 139 and accompanying text.

intrinsic motivation depends on crowding-in effects.<sup>280</sup> Just as the basic rationale for the “no further inquiry” rule relies on the insight that resisting temptation can be difficult in order to justify removing predictable occasions that can tempt trustees toward disloyalty,<sup>281</sup> the abiding presence of the fiduciary duty of loyalty in structural-conflict situations recognizes that the law may stiffen a trustee’s spine through a reminder that the settlor conferred discretion on the trustee coupled with duties toward other beneficiaries.<sup>282</sup> In simpler terms, creating a trust with a structural conflict is not the same as making an outright present gift to the trustee or promising one in the future, perhaps via a provision in a will.<sup>283</sup> Fiduciary law in this example serves to remind the conflicted trustee that to some extent—and to what extent remains unspecified—a trustee always occupies an other-regarding role that the law takes seriously. The law channels trustees who are subject to structural conflicts into a fiduciary category and not a category that permits the unconstrained pursuit of self-interest.

Varying the initial example, suppose the trustee chosen by F as settlor is not F’s child but a commercial trust company. That alters many (but not all) dimensions of the parties’ relationship. F’s trust will be administered by an individual trust officer employed or otherwise associated with the trust company and subject to the terms of a trust instrument, in which F may consent to conflicts, such as the trust company’s investment of trust assets in affiliated entities. Prior ties may or may not link the trust company and the trust officer to the settlor. Unlike C, an individual trustee-beneficiary, the trust company and its trust officer occupy well-defined professional roles.

The professional nature of the services provided by these fiduciaries is not inconsistent with loyal action; professionalization itself may serve to orient actors toward the implications of assuming a fiduciary role.<sup>284</sup> Commercial trustees and individual trust officers may well be motivated by intrinsic commitments to loyalty toward clients, which can be enhanced by training and role-orientation. In

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280. See *supra* note 186 and accompanying text.

281. See *supra* note 267 and accompanying text.

282. See *supra* notes 265, 275 and accompanying text.

283. See *supra* note 140 and accompanying text.

284. See, e.g., *supra* note 127 and accompanying text.

this respect, they resemble the broker-dealers and their associated brokers discussed earlier in this Section.<sup>285</sup> However, the commercial trust company and its trust officer occupy roles that conventionally trigger fiduciary status,<sup>286</sup> unlike the broker-dealers who gave investment advice consistent with a fiduciary mandate notwithstanding issues about its meaning and applicability.<sup>287</sup> In both cases, fiduciary law serves the distinct function of hedging against the risk of ill-motivated actors.<sup>288</sup> And occupying a professional role—along with training and appropriate role-orientation—may be no less likely to strengthen fiduciary loyalty than a family affiliation.

For trustees—whether family members or professionals situated within commercial service providers—fiduciary law furnishes a backdrop normative standard that abides notwithstanding provisions in trust instruments consenting to conflicts or structural conflicts created by a settlor.<sup>289</sup> Admittedly, to establish that this backdrop standard shapes conduct—comparable to the demonstrated impact on broker-dealers who sell annuities while believing themselves to be subject to fiduciary duties<sup>290</sup>—may fall beyond the reach of quantitative empirical study. But the backdrop standard applicable to conflicted trustees appears no less likely to shape conduct than state fiduciary law applicable to broker-dealers. The backdrop fiduciary standard guides trustees' conduct whether it operates through the force of extrinsic motivation induced by the law or through more nuanced relationships among the law, extra-legal constraints, and the intrinsic motivations of individuals and business firms that assume fiduciary roles.

## CONCLUSION

Crowding-out effects are not persuasive as critiques of fiduciary law given its distinctive functions, which are grounded in qualities of the relationships to which fiduciary law applies. Exploring why this is so helps identify characteristics within fiduciary law that

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285. *See supra* Part III.A.

286. *See supra* note 104 and accompanying text.

287. *See supra* note 209 and accompanying text.

288. *See supra* note 84 and accompanying text.

289. *See supra* notes 265-68, 275 and accompanying text.

290. *See supra* notes 209-13 and accompanying text.



lend overall coherence to the subject as general points of unification across widely divergent relationships. Through their structure, these are “have to trust” relationships in which betrayal by the party in whom trust is reposed always remains a possibility. The three case studies that conclude this Article illustrate the potential for complex relationships between the law and intrinsic motivation. Even when parties have prior ties that enhance the likelihood that trust will not be betrayed once it is reposed, fiduciary law as exemplified in the law of trusts underscores the meaning of a trustee’s role. When the parties are not as likely to have such ties, fiduciary law backstops constraints on problematic behavior that can stem from market-generated signals and reputational effects. By informing actors of what is required, fiduciary law also furnishes reassurance to actors who assume roles in which others repose trust in them.