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## FIDUCIARY LAW AND CORRUPTION

by

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THE OXFORD HANDBOOK ON FIDUCIARY LAW (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., Oxford University Press, 2019)

## Fiduciary Law and Corruption

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### CHAPTER 43

THE OXFORD HANDBOOK ON FIDUCIARY LAW (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., forthcoming Oxford University Press 2019)

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\* Professor of Law, UCLA School of Law. Prior drafts of this chapter were presented at workshops at Notre Dame School of Law and Harvard Law School. The author is grateful for the insightful comments provided by workshop participants and by Iman Anabtawi, Stephen Bainbridge, Benjamin Chen, Evan Criddle, Hanoch Dagan, Seth Davis, Stephen Galoob, Andrew Gold, Paul Miller, Jim Park, and Julian Velasco. Jonathan Simmons and Natalie Mackary provided excellent research assistance.

## I. Introduction

In this chapter, I argue that the common law of fiduciary obligation contains an anti-corruption norm, which broadly (albeit inconsistently) proscribes and remedies the *use of an entrusted position for self-regarding gain*. In Part I, I begin with the conventional definition of public corruption, the *use of public office for private gain*, to derive a general definition of corruption that is applicable to both public and private sector contexts. I define corruption generally as the *use of an entrusted position for self-regarding gain*. In Part II, I argue that courts have aimed to prevent corruption and invoked the anti-corruption norm in cases applying fiduciary law's proscriptive rules, the no-conflict and no-profit rules, in various fiduciary contexts. These rules are generally grounded in the rationale that fiduciaries should avoid being tempted into using their positions to seek their own advantage. In Part III, I argue that one of the main insights to be gained from understanding that fiduciary law contains an anti-corruption norm is that fiduciary law helps to preserve and promote the legitimacy of important social institutions. While this chapter principally relies on the prevailing "public-office-centered" definition of

corruption, which is used by contemporary social scientists and which attempts to identify corrupt behavior,<sup>1</sup> it shows how a broader, classical understanding of corruption, which emphasizes the moral decay and depravity of an individual's character,<sup>2</sup> has also informed fiduciary law.

## II. A General Definition of Corruption

To make the case that fiduciary law contains an anti-corruption norm, one must first craft a general definition of corruption. Drawing extensively from prior work,<sup>3</sup> in this Part, I provide and justify a general definition of

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<sup>1</sup> See Introduction to Part I, in *Political Corruption: Concepts & Contexts* 3, 7-8 (Arnold J. Heidenheimer & Michael Johnston eds., 2002).

<sup>2</sup> See Carl J. Friedrich, *Corruption Concepts in Historical Perspective*, in *Political Corruption: Concepts & Contexts* 15, 16 (Arnold J. Heidenheimer & Michael Johnston eds., 2002) (referring to a broader notion of corruption and noting its likely *religious* roots). I refer to this broader notion of corruption as “classical,” as it is not the one generally embraced by contemporary social scientists for application to modern political systems.

<sup>3</sup> Part I is to some extent duplicative of Sung Hui Kim, *Insider Trading as Private Corruption*, 61 *UCLA L. Rev.* 928, 952-58 (2014) [hereinafter Kim, *Private Corruption*]; Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 *Cornell L. Rev.* 845, 894-901 (2013) [hereinafter Kim, *Legislator Insider Trading*]; and Sung Hui Kim, *What Governmental Insider Trading Teaches Us About Corporate Insider Trading*, in *Research Handbook on Insider Trading* 166, 171-

corruption. Because the academic literature on public or political corruption far outstrips that on private corruption, I start with the conventional definition of *public corruption* as the *use of public office for private gain*. Then I transpose elements of this conventional definition to devise a general definition of corruption applicable to both public and private sector contexts: the *use of an entrusted position for self-regarding gain*.

#### A. Public Corruption as the Use of Public Office for Private Gain

Selecting a general definition of corruption is challenging because there are so many types of corruption discussed in the academic literature. The literature recognizes, for example, individual and institutional

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76, 183-84 (Stephen M. Bainbridge ed., 2013) [hereinafter Kim, Governmental Insider Trading].

corruption,<sup>4</sup> private<sup>5</sup> and public corruption, grand corruption,<sup>6</sup> as well as white, grey, and black corruption.<sup>7</sup> Thankfully, we can start with a definition of *public* or political corruption for which there is significant consensus among contemporary social scientists. That definition relies on a prior normative conception of how the duties of public office are supposed to be exercised, namely, for public-regarding purposes. Since at least Cicero, it has been “beyond debate that officials of the government are relied upon to act for the public interest not their own enrichment.”<sup>8</sup>

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<sup>4</sup> Dennis Thompson, *Ethics in Congress: From Individual to Institutional Corruption* 7 (1995) (noting that institutional corruption involves political, rather than personal, gain to the public official); see also Benjamin Nyblade & Steven R. Reed, *Who Cheats? Who Loots? Political Competition and Corruption in Japan, 1947-1993*, 52 *Am. J. Pol. Sci.* 926 (2008) (distinguishing between corruption in the form of looting versus cheating); Michael A. Genovese, *The Politics of Corruption and the Corruption of Politics*, in *Corruption and American Politics* 3 (Michael A. Genovese & Victoria Farrar-Myers eds., 2011) (distinguishing between individual and systemic corruption).

<sup>5</sup> See, e.g., Tanya Rabl, *Private Corruption and its Actors: Insights into the Subjective Decision Making Processes* (2008).

<sup>6</sup> See Susan Rose-Ackerman, *Corruption: Greed, Culture, and the State*, *Yale L.J. Online* 125, 132 (2010) (defining “grand corruption” as “corruption at the top of the state hierarchy that involves political leaders and their close associates and concerns the award of major contracts, concessions, and the privatization of state enterprises”).

<sup>7</sup> See Arnold J. Heidenheimer, *Perspectives on the Perception of Corruption*, in *Political Corruption: A Handbook* 149, 158 (Arnold J. Heidenheimer et al. eds., 1989) (categorizing corrupt behavior as (i) petty or white, (ii) routine or grey, and (iii) aggravated or black).

<sup>8</sup> John T. Noonan, Jr., *Bribes* 704 (1984).

Accordingly, public corruption is conventionally defined as the “use of public office for private gain.”<sup>9</sup> Reflecting this simple understanding, the first page of the House Ethics Manual commands that members, officers, and employees of the U.S. House of Representatives “should not in any way use their office for private gain.”<sup>10</sup>

The term “public office” is fairly uncontroversial, arguably covering all elected public officials and administrators who have been entrusted with the power and the duty to advance the public interest. “Private gain” is more controversial because it could be defined expansively to cover something as unobjectionable as one’s official salary. As I have argued elsewhere, private gain is better understood as “personal gain that is supererogatory”<sup>11</sup>—neither part of the explicit compensation allocated to the public official nor *culturally* viewed as an acceptable or unavoidable

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<sup>9</sup> See Kim, Private Corruption, *supra* note 3, at 952 n.117 (citing sources). Alternatively, the definition of corruption could be reframed as the “misuse of public office for private gain,” which would locate the disapprobation inherent in corruption in the term “misuse,” rather than in the term “private gain,” which I have defined as “*improper* personal gain.” See text accompanying notes 11 to 14 *infra*.

<sup>10</sup> H. Comm. on Standards of Official Conduct, 110th Cong., House Ethics Manual, (2008), [http://ethics.house.gov/Media/PDF/2008\\_House\\_Ethics\\_Manual.pdf](http://ethics.house.gov/Media/PDF/2008_House_Ethics_Manual.pdf).

<sup>11</sup> “Supererogatory” sometimes has a virtuous connotation, which is not the meaning intended here.

perquisite of the role.”<sup>12</sup> Hence, the term “private gain” should generally exclude one’s official salary and all necessary or incidental perquisites of the position. The crucial point here is that private gain is *improper personal gain*—i.e., gain—financial or otherwise<sup>13</sup>—that is culturally seen as something that *ought not* to redound to the public official as part of her job.<sup>14</sup> Put another way, if there is no general disapprobation of the gain in question, then its accrual would not constitute a misuse of one’s position.<sup>15</sup>

To be sure, incorporating cultural views to identify what constitutes private gain risks indeterminacy. After all, cultural views are shifting,

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<sup>12</sup> See Kim, *Legislator Insider Trading*, *supra* note 3, at 899.

<sup>13</sup> While “private gain” should presumptively cover financial gain, there is no good reason to restrict the definition of corruption to improper *financial* benefits. See, e.g., Noonan, *supra* note 8, at 375 (discussing the case of Samuel Pepys, a clerk of the acts to the Naval Board, who not only used his position for cash, food, and other items of value, but also for sex). That said, the term “private gain” should generally exclude, without more, unavoidable consequences of holding public office, such as increased prestige or increased name recognition.

<sup>14</sup> Cf. Andrew Stark, *Conflict of Interest in American Public Life* 76 (2000) (“The modifier *private* suggests a kind of gain—a trip on a corporate jet, attending an association meeting at a resort, an all-expense paid trip to a charity event—that does not, or ought not, or need not, redound to the official as part of his or her job.”).

<sup>15</sup> To be clear, the determination of private gain or self-regarding gain is based on an objective, albeit sometimes indeterminate, standard. See note 31 *infra*.

vague, contradictory, and hard to measure.<sup>16</sup> As observed by Michael Johnston and as confirmed by empirical research on attitudes about corruption,<sup>17</sup> cultural views about corruption reflect “few sharp divisions between right and wrong, but rather a spectrum of finely graded judgments.”<sup>18</sup> Given such difficulties, it is tempting to define private gain more narrowly and definitively, for example, as *personal gain that breaches a formal rule or legal norm*. But this alternative definition would buy clarity at the cost of accuracy because corruption undeniably has a cultural dimension.<sup>19</sup> One reason why this is so is because, as explained

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<sup>16</sup> To the extent that cultural views about the propriety of the gain in question are either highly variable or not ascertainable, or there is a genuine dispute about whether the nexus between the gain and the entrusted position can be definitively established, judgments about whether the conduct is corrupt will likely be variable. In such cases, courts may depart from applying the proscriptive rules, at least in their strict forms. See text accompanying notes 69 to 74 *infra*.

<sup>17</sup> See, e.g., John G. Peters & Susan Welch, Political Corruption in America: A Search for Definitions and a Theory, or If Political Corruption Is in the Mainstream of American Politics Why Is It Not in the Mainstream of American Politics Research?, 72 Am. Pol. Sci. Rev. 974 (1978) (empirical study finding differential views toward different potentially corrupt acts); Susan Welch & John G. Peters, Attitudes of U.S. State Legislators toward Political Corruption: Some Preliminary Findings, 2 Legis. Stud. Q. 445 (1977) (same).

<sup>18</sup> Michael Johnston, The Political Consequences of Corruption: A Reassessment, 18 Comp. Pol. 459, 460 (1986).

<sup>19</sup> Kim, Private Corruption, *supra* note 3, at 953. Defining corruption with reference to a formal rule is problematic because, as the history of bribery demonstrates, there is often a gap between prevailing cultural attitudes and the positive law at the time.

by Deborah Hellman, “corruption is a derivative concept, meaning it depends on a theory of the institution or official involved.”<sup>20</sup> Accordingly, whether a given official’s conduct is corrupt depends on shared understandings about how that official is supposed to act, which in turn depends on collective understandings about the social purpose of the institution that employs the official. To the extent that the social purpose of an institution in a given society is genuinely contested or still evolving, such as in emerging political systems where private and public roles are not clearly delineated, there will be good faith dissensus about the propriety of an official’s conduct. As John Kleinig and William C. Heffernan have observed,

Even if we confine ourselves to what we now familiarly speak of as public corruption, it soon becomes clear that what “we” consider to be corrupt is often contentiously so. One group’s perquisite is another’s corruption; one group’s tradition of patronage is another’s nepotism; one group’s campaign contribution is another’s bribery; one group’s just rectification is another’s misappropriation. Both historically and cross-

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<sup>20</sup> Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 Mich. L. Rev. 1385, 1389 (2013).

culturally, instantiations of corruption have been contested, not only with respect to their identity but also, in certain instances, with respect to their undesirability.<sup>21</sup>

Suffice it to say that when people refer to a given practice as corrupt, they are not emphasizing the fact that a law has been broken<sup>22</sup> but, rather, that the actor has offended the social norms associated with the role. They are essentially invoking a sociocultural conception of corruption.<sup>23</sup>

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<sup>21</sup> John Kleinig & William C. Heffernan, *The Corruptibility of Corruption*, in *Private and Public Corruption 3* (William C. Heffernan & John Kleinig eds., 2004); Kim, *Governmental Insider Trading*, *supra* note 3, at 172.

<sup>22</sup> As observed by Laura Underkuffler, “It is apparent that notions of illegality are far broader than notions of corruption” and “at the other end of the spectrum, what is illegal may fail to capture what we (nevertheless) firmly believe to be corrupt conduct.” Laura S. Underkuffler, *Captured By Evil: The Idea of Corruption in Law* 11 (2013).

<sup>23</sup> Kim, *Private Corruption*, *supra* note 3, at 953-54. In arguing that corruption is a culturally contingent concept, I am subscribing to the view that corruption is not reducible to immorality. Although many corrupt acts will also be immoral, they are not co-terminous concepts. For example, I would agree with Hellman that a Nazi official who accepted a bribe from a Jew for letting them escape may be acting corruptly but that such conduct may be morally “good” from an all-things-considered standpoint. See Hellman, *supra* note 20, at 1393 n.28.

## B. Corruption Generally as the Use of an Entrusted Position for Self-Regarding Gain

Having adopted the conventional definition of public corruption, the next task is to transpose the definition into more general contexts relevant to both public and private sector actors.

### 1. From Private Gain to Self-Regarding Gain

Let us begin with “private gain,” the second element of the analytic definition of public corruption. In the public corruption context, the term “private gain” usefully distinguishes between a public official’s improper personal gain and gain that is generally seen as proper—an acceptable or unavoidable perquisite of the role. But in the private sector context, all gain may be classified as “private” and, thus, the term fails to distinguish legitimate benefits from those that smack of corruption. Still, legal and social norms that govern institutional behavior in the private sector do distinguish between an individual’s proper and improper personal gain. For example, it is generally seen as improper for corporate officers and directors to use funds in the corporate treasury to pay down their personal mortgages and other personal debts. Therefore, an alternative, more general term, such as “personal gain,” may be more appropriate.

However, the term “personal gain” might be construed too narrowly as gain strictly to the individual in question. Accordingly, the more expansive term “self-regarding gain,” which *potentially* includes gains accrued by an individual’s relatives, friends, and acquaintances, seems more apt. After all, an important facet of corruption is its “expression of particularism—the felt obligation to help, to give resources to persons to whom one has a personal obligation, to the family above all but also to friends and membership groups.”<sup>24</sup> Indeed, corporate law in the United States, for instance, treats nepotism with suspicion, as reflected in legal constraints on the ability of a corporate fiduciary to transact with her beneficiary where the fiduciary’s relatives would financially benefit.<sup>25</sup> (By contrast, corporate law reflects ambivalence toward other forms of

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<sup>24</sup> Seymour Martin Lipset & Gabriel Salman Lenz, Corruption, Culture, and Markets, in *Culture Matters: How Values Shape Human Progress* 112, 119 (Lawrence E. Harrison & Samuel P. Huntington eds., 2000).

<sup>25</sup> See, e.g., Model Bus. Corp. Act §§ 8.60 (1)(i), (3) (2016) (defining “related person” to include spouse, child, grandchild, parent, etc. for purposes of scrutinizing director’s conflicting interest transactions). Concern about public sector nepotism is reflected in the federal anti-nepotism statute, enacted in 1967 as part of the Federal Postal Act, 5 U.S.C. § 3110 (2012). See also anti-nepotism restrictions in H.R. Doc. No. 112-161, at 936 (2013), <http://www.gpo.gov/fdsys/pkg/HMAN-113/pdf/HMAN-113-pg934.pdf>, and state level anti-nepotism restrictions, for example, Ala. Code § 41-1-5 (1975).

particularism, such as cronyism, or favoritism toward friends.<sup>26</sup>) In light of the greater consensus about the illegitimacy of nepotism, “self-regarding gain” should presumptively cover advantages garnered through nepotism.

Finally, as with positions in the public sector, the relevant private sector roles are generally not charitable ones—that is, society does not demand that individuals in the private sector work for free. Accordingly, the term “self-regarding gain” should similarly be confined to gain that is supererogatory—neither part of the explicit compensation allocated to the individual nor culturally viewed as an acceptable or unavoidable perquisite of the role.

## 2. From Public Office to Entrusted Position

Turning to the first element of the analytic definition of public corruption, the term “public office” covers both elected and appointed public positions. But what’s so special about those positions such that

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<sup>26</sup> See Claire Hill & Brett McDonnell, Sanitizing Interested Transactions, 36 Del. J. Corp. L. 903, 911 (2011) (noting, with respect to Delaware corporate law’s treatment of directorial independence, that “[s]ocial ties, even close ones, have generally (though not quite always) not been enough [to find lack of independence]” and citing sources).

particular breaches are capable of drawing our condemnation? As Laura Underkuffler has noted about public officials, “It is the particular nature of the *trust* relationship between the citizen and her legislator, or the citizen and her judge, which makes these relationships particularly crucial and their betrayal particularly heinous.”<sup>27</sup> But public fiduciaries<sup>28</sup> are not the only ones embedded in special relationships of trust. Both public and private fiduciaries hold positions that are in some sense *entrusted*. These positions are imbued with shared social expectations that seem to warrant or justify the trust that may be reposed in the holder. According to social conventions, by accepting an entrusted position, the holder is understood as *inviting* others to rely on him. For some entrusted positions (e.g., judgeships, high-level government officials, lawyers, and doctors), the holder upon assuming the role takes an express oath—an *explicit* promise—to uphold other-regarding values. For other entrusted positions,

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<sup>27</sup> Underkuffler, *supra* note 22, at 21 (emphasis added).

<sup>28</sup> Courts have recognized several, but not all, elected and appointed public officials as fiduciaries. Regardless of whether their fiduciary status has been judicially recognized, I agree with the proposition that all high-level public officials are fiduciaries, at least for some purposes. See Kim, *Legislator Insider Trading*, *supra* note 3, at 877-80, 889-91 (for a listing of judicially recognized public fiduciaries); see also Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 *Wm. & Mary L. Rev.* 513 (2015); *Fiduciary Government* (Evan J. Criddle, Evan Fox-Decent, Andrew S. Gold, Sung Hui Kim, & Paul B. Miller eds., forthcoming 2018).

the acceptance of the position signifies the holder's *implicit* promise to exercise his discretion in a manner generally consistent with the social expectations of the role—namely, selflessly and disinterestedly and actuated by a purpose to advance the interests of certain others. Hence, an entrusted position can be defined as one in which the holder, either expressly or implicitly through social convention, has invited individual or collective others to yield to the holder's discretion their own interests or at least interests that they care about.<sup>29</sup> This definition comfortably covers most public and private fiduciaries.

By substituting private gain with self-regarding gain and public office with entrusted position, corruption can be roughly defined as the *use of*

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<sup>29</sup> Cf. Matthew Harding, *Manifesting Trust*, 29 *Oxford J. Legal Stud.* 245, 253 (2009) (“To entrust is to expose voluntarily, to the discretion of another person, interests that one cares about, with a trusting attitude towards and usually also trusting expectations of that other person.”). To be clear, in my view, for a definition of entrusted position, it shouldn't matter whether the reliance on the holder's discretion is voluntary or not. In many cases, such as with public officials and guardians, reliance by the beneficiary will be compulsory. For example, citizens generally have no choice but to rely on the head of the Environmental Protection Agency to advance our collective environmental concerns. In cases of compulsory reliance, the holder's “invitation to rely” is mostly symbolic but nonetheless signifies the holder's promise to uphold the other-regarding values inherent in the role.

*one's entrusted position for self-regarding gain.*<sup>30</sup> While this definition does not fully convey the full spectrum of moral connotations inherent in the term “corruption,” it succinctly and objectively<sup>31</sup> identifies the type of

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<sup>30</sup> This definition is similar to other definitions of *organizational* corruption found in the academic literature on organizational behavior. See Kim, Private Corruption, *supra* note 3, at 957-58, n.143 (summarizing those definitions).

<sup>31</sup> The question naturally arises: does the holder's subjective reasons matter in determining whether his behavior is corrupt and thus may constitute a breach of trust? Stated another way, must the holder subjectively understand his actions to be wrongful—i.e., contrary to the best interest of the beneficiary, in order for his conduct to qualify as corrupt? In my view, for a general sociocultural definition of corruption, the answer is no. Under my definition, what is important is that the self-regarding gain is one that is *culturally* seen as an improper benefit from the role, regardless of whether the particular holder understood it to be improper. After all, one's own capacity for moral reasoning can be distorted by the pursuit of selfish interests. See Blake E. Ashforth & Vikas Anand, The Normalization of Corruption in Organizations, 25 Res. Org. Behav. 1, 29 (2003) (noting that power “tends to non-consciously activate personal goals and biases, guiding information processing and behavior—which the individual then rationalizes in socially desirable terms”); Iris Samet, Guarding the Fiduciary's Conscience—A Justification of a Stringent Profit-stripping Rule, 28 Oxford J. Legal Stud. 763 (2008). Indeed, the classical understanding of corruption clearly acknowledges the likelihood of self-deception. See text accompanying note 59 *infra*.

Also, because corrupt behavior offends collective norms, the holder will usually appreciate the impropriety of his conduct and, as a result, will likely engage in duplicity or secrecy in an effort to conceal his corrupt behavior. Interestingly, experts studying the historical evolution of corrupt practices will often rely on evidence about the degree of transparency surrounding a given practice in order to ascertain cultural views about the practice's propriety. That said, because corrupt conduct is widely understood to be a form of intentional behavior, there are *de minimus mens rea* conditions: the

behavior that is generally capable of eliciting our harsher judgments. To call something corrupt is not merely to call something fraudulent, unjust, illegal, wrongful, or even harmful. It is to emphasize the betrayal of an entrusted position. Put another way, the self-regarding gain is achieved in a manner that is inconsistent with and violates the trust ordinarily reposed in the holder of the position.

### III. The Anti-Corruption Norm in Fiduciary Law

Having provided a general definition of corruption as the use of an entrusted position for self-regarding gain, can one reasonably say that fiduciary law contains an anti-corruption norm? In prior work, I've shown that an anti-corruption norm has been invoked in a variety of different contexts within fiduciary law.<sup>32</sup> This norm has broadly, albeit inconsistently, proscribed and remedied the use of an entrusted position

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holder must have voluntarily engaged in the behavior and, at the time of the behavior, must have been consciously aware of the attendant personal gain.

<sup>32</sup> Sung Hui Kim, *Fiduciary Law's Anti-Corruption Norm*, in *Research Handbook on Fiduciary Law* (Gordon Smith & Andrew Gold eds., 2018) [hereinafter Kim, *Anti-Corruption Norm*].

for self-regarding gain in cases involving the fiduciary's taking of a bribe or secret commission; the fiduciary's exploitation of profit-making opportunities, including the taking of lease renewals and reversions; and the fiduciary's use of confidential information for personal gain.<sup>33</sup> One can identify the norm as part of fiduciary law's proscriptive standards of loyalty.

#### A. The No-Conflict and No-Profit Rules

The anti-corruption norm is generally reflected in the judicial application of one of two alternative proscriptive rules: the "no-conflict" rule and the "no-profit" rule. These rules prohibit fiduciaries from placing themselves in situations of unauthorized conflicts of interests and from receiving unauthorized profits in connection with the fiduciary relationship.<sup>34</sup> There is some disagreement about whether these rules are two independent rules or whether the no-profit rule is subsumed within a no-conflict principle.<sup>35</sup> I subscribe to the latter view but, for simplicity's

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<sup>33</sup> See *id.* (describing cases illustrating the anti-corruption norm).

<sup>34</sup> See Paul B. Miller, *Justifying Fiduciary Duties*, 58 *McGill L. Rev.* 969, 977-78 (2013).

<sup>35</sup> See, e.g., Pearlie Koh, *Once a Director, Always a Fiduciary*, 62 *Cambridge L.J.* 403, 406 (2003) ("Although there have been judicial statements suggesting that the no-profit doctrine or theme is part of the wider no-conflict rule, it is perhaps more accurate to say that these are really independent rules . . ."); Stephen A. Smith, *The Deed, Not the*

sake, will refer to these as two separate rules in accordance with convention. For purposes of this chapter, suffice it to say that the anti-corruption norm has been roughly operationalized by courts through the no-conflict rule and, where a conflict involves the fiduciary's selfish pursuit of profit, through the no-profit rule.<sup>36</sup>

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Motive: Fiduciary Law without Loyalty, in *Contract, Status, and Fiduciary Law* 213, 223-24 (Paul B. Miller & Andrew S. Gold eds., 2017) (arguing that the no-profit rule is part of the no-conflict rule and that both rules aim to prevent fiduciaries from breaching their mandates); David Kershaw, *Lost in Translation: Corporate Opportunities in Comparative Perspective*, 25 *Oxford J. Legal Stud.* 603, 607 (2005) ("The no-profit rule is . . . better understood as an instantiating rule of the no-conflicts principle."); see also note 36 *infra*.

<sup>36</sup>Several cases hold that the fiduciary must account for his profit because he had wrongfully placed himself in a position in which his self-interest conflicted with his duty. See, e.g., *In re eBay, Inc. Shareholders Litig.*, No. C.A. 19988-NC, 2004 WL 253521 (Del. Ch. Jan. 23, 2004) (requiring an accounting of profits and noting, "it is easy to understand how steering such commercial rebates to certain insider directors places those directors in an obvious conflict between their self-interest and the corporation's interest"); *Maas v. Goldman*, 203 N.Y.S. 524 (N.Y. Sup. Ct. 1924) (requiring an accounting of profits for the taking of reversion on the same footing as a lease renewal, noting, "The possibility of conflict between a partnership interest and a landlord interest is not essentially different."); *United States v. Carter*, 217 U.S. 286, 305 (1910) ("[J]ustice will not tolerate . . . that a public official shall retain any profit or advantage he may realize through the acquirement of an interest in conflict with his fidelity as an agent."); see also text accompanying note 41 *infra*.

To illustrate how the no-profit rule<sup>37</sup> lines up with the elements of the anti-corruption norm, I turn to the famous House of Lords decision, *Regal (Hastings) Ltd. v. Gulliver*.<sup>38</sup> In *Regal*, the directors of the Regal company were held liable to account for profits accrued in connection with their taking of a corporate opportunity. These directors personally purchased shares of their company's subsidiary in an effort to enable the subsidiary to acquire certain valuable leases. They made these investments only after the landlord demanded that the subsidiary be sufficiently capitalized and only after the directors had determined that the Regal company itself was financially unable to meet those demands. Despite these ostensibly good reasons, the court described their conduct as a "fundamental breach of fiduciary duty"<sup>39</sup> and invoked the no-profit rule,<sup>40</sup> requiring the directors to disgorge their profits (equal to a 300% return on their investments).

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<sup>37</sup> For an example of the no-conflict rule lining up with the elements of the anti-corruption norm, see *Boardman v. Phipps* [1967] 2 AC 46 (majority rule).

<sup>38</sup> *Regal (Hastings) Ltd. v. Gulliver* [1942] 1 ALL ER 378, [1967] 2 AC 134 (HL) (appeal taken from Eng.). See Gareth Jones, *Unjust Enrichment and Fiduciary Duty of Loyalty*, L.Q. Rev. 472, 494 (1968) ("[The Regal case] is a good illustration of the approach of English courts.").

<sup>39</sup> *Regal (Hastings) Ltd. v. Gulliver* [1967] 2 AC 134, 154 (HL) (per Lord Wright).

<sup>40</sup> *Id.* at 144-45 (per Lord Russell) ("The rule of equity which insists of those, who by use of a fiduciary position to make a profit, being liable to account for that profit . . .").

Acknowledging the rationale of “no conflicts,” the court openly wondered how the directors would have acted if “there had not been the temptation to seek [their] own advantage, if, in short, interest had not conflicted with duty.”<sup>41</sup>

In clarifying the application of the no-profit rule, the court noted that “liability arises from the mere fact of a *profit* having, in the stated circumstances, been made,” without regard to whether the profiteer had been “honest and well-intentioned.”<sup>42</sup> Here, of course, the “profit” represents the “self-regarding gain” of the general definition of corruption. The court further noted that those “stated circumstances” included the fact that “these shares . . . were acquired *by reason and only by reason of* the fact that they were directors of Regal, and *in the course of* their execution of that office” and that the directors stood in a fiduciary relationship to Regal “in regard to the exercise of their powers as directors.”<sup>43</sup> In other words, the court highlighted the fact that the defendants were fiduciaries of Regal and that the profit-making opportunity came to them by virtue of their positions. Therefore, so long as there was a (proximate) causal nexus

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<sup>41</sup> Id. at 154 (per Lord Wright).

<sup>42</sup> Id. at 149 (per Lord Russell) (emphasis added).

<sup>43</sup> Id. (emphasis added).

between their fiduciary positions and the profit, the directors would be held to account. In short, the directors would be liable if they had used their entrusted positions for self-regarding gain.

But Lord Russell suggested there was one path for relief: the directors “could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting.”<sup>44</sup> Because shareholder approval was absent, the directors had to account for their profits. By clarifying that the no-profit rule was inapplicable where the shareholders have consented, the court reflected an important component of the general definition of corruption—namely, that the “self-regarding gain” be “supererogatory—neither part of the explicit compensation allocated to the individual nor culturally viewed as an acceptable or unavoidable perquisite of the role.”<sup>45</sup> In *Regal*, because shareholders had not consented to treating these profits as part of the directors’ compensation and because these profits were extraordinary in nature, the court concluded that they were *improper*. Hence, in *Regal* and cases like it, we see an alignment between the elements of the no-profit rule and the anti-corruption norm.

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<sup>44</sup> Id. at 150.

<sup>45</sup> See *supra* Part I.B.1.

An important caveat is in order. Not all jurisdictions have adopted the no-conflict and no-profit rules, at least in their strict forms without qualification, for every fiduciary context. Indeed, one enduring feature of fiduciary law is its capacity to tailor duties to different contexts,<sup>46</sup> and some courts have opted to introduce nuances into what might otherwise be a fairly blunt approach. For example, Section 409(e) of the current version of the Uniform Partnership Act provides, “A partner does not violate a duty or obligation under this [act] or under the partnership agreement solely because the partner’s conduct furthers the partner’s own interest.”<sup>47</sup> This provision seems to qualify the no-conflict rule, at least with respect to less troubling conflicts of interest.<sup>48</sup> Another

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<sup>46</sup> As Justice Frankfurter once wrote, “To say that a man is a fiduciary only begins the analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary?” *SEC v. Chenery Corp.*, 318 U.S. 80, 85-86 (1943).

<sup>47</sup> Unif. Partnership Act § 409(e) (1997, last amended in 2013). See also Stephen M. Bainbridge, *Must Salmon Love Meinhard? Agape and Partnership Fiduciary Duties*, 17 *Green Bag 2d* 257, 264-65 (2014) (discussing this provision).

<sup>48</sup> Discussing the provision’s counterpart in the California partnership law, a California appeals court has held that the “apparent purpose” of the provision is “to excuse partners from accounting for incidental benefits obtained in the course of partnership activities *without detriment to the partnership*.” *Enea v. Superior Court*, 34 Cal. Rptr. 3d 513, 518 (Cal. Ct. App. 2005). To the extent that this court’s interpretation tolerates *only* incidental gains to the fiduciary, it seems consistent with my definition of “self-regarding gain,” which excludes perquisites that are “acceptable or unavoidable.” Stated another way,

example is Delaware corporate law's adoption of a murkier, factors-based standard (in lieu of the proscriptive rules) for determining whether a director has wrongfully taken a corporate opportunity.<sup>49</sup> The current approach in Delaware considers, among other things, "whether the opportunity is in the company's line of business, whether the company has an interest or a reasonable expectancy in the opportunity, whether the company has the financial capacity to take the opportunity and whether the director encountered the opportunity in his personal or professional capacity."<sup>50</sup> But, even under Delaware's imprecise "totality of circumstances" approach to corporate opportunities,<sup>51</sup> one can locate

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this interpretation may simply reflect the court's judgment that incidental gains are culturally seen as *proper* in the partnership context. See Part I.B.1 *supra*. Hence, this particular departure from the no-conflict rule may merely be an attempt to flesh out a more precise rule that more closely tracks prevailing cultural views about what constitutes corrupt conduct in the partnership context.

<sup>49</sup> See Stephen M. Bainbridge, Interest Group Analysis of Delaware Law: The Corporate Opportunity Doctrine as Case Study, in *Can Delaware Be Dethroned?: Evaluating Delaware's Dominance of Corporate Law* 120, 126-27 (Stephen M. Bainbridge, Iman Anabtawi, Sung Hui Kim, & James Park eds., 2018) (describing the current Delaware approach and concluding that "[t]he standard that emerges from the Delaware cases . . . is quite imprecise").

<sup>50</sup> Kershaw, *supra* note 35, at 608. That said, Delaware's departure from the proscriptive rules may be slightly overstated, as some of the factors can be interpreted as judicial attempts to operationalize the element of nexus between the fiduciary position and the self-regarding gain.

<sup>51</sup> Bainbridge, *supra* note 49, at 128.

holdings that are in line with results obtainable under the no-conflict and no-profit rules.<sup>52</sup>

### B. The Avoidance of Temptation Rationale

Accepting that there is congruity between the proscriptive rules and the anti-corruption norm, what's the evidence that courts were targeting corruption when applying such rules? How do we know that the congruity wasn't merely accidental and that judges were genuinely worried about the possibility of corruption?

In some cases—for example, with respect to bribes and secret commissions—courts did not hesitate to expressly condemn an action as “corrupt,” even in the absence of any finding of harm to the beneficiary. For example, in *Harrington v. Victoria Graving Dock Company*, the court refused to enforce a commercial bribery agreement (despite the jury's finding that there was no impact on the agent's judgment), declaring that the agreement was a “corrupt bargain” that “vitiate[d] the contract” awarded and administered by the agent on behalf of his principal.<sup>53</sup>

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<sup>52</sup> See, e.g., Kim, Anti-Corruption Norm, *supra* note 32, for discussion of *In re eBay, Inc. Shareholders Litigation*, No. C.A. 19988-NC, 2004 WL 253521 (Del. Ch. Jan. 23, 2004).

<sup>53</sup> *Harrington v. Victoria Graving Dock Company* (1878) 39 LT (QBD) 120 (Eng.).

Similarly, in *City of Findlay v. Pertz*, the court refused to enforce a municipal supply contract that was tainted by a secret commission paid to the responsible procurement officer on the ground that “[a]ny agreement or understanding by which [the officer’s] judgment or duty conflicted with his private interest was corrupting in its tendency” and that the conflict of interest was “utterly vicious, unspeakably pernicious, and an unmixed evil.”<sup>54</sup> In other less objectionable situations, such as in some director self-dealing or corporate opportunity cases, courts were less inclined to speak forthrightly about corruption, as they were also less inclined to apply the proscriptive rules, at least in their strict forms.

Yet, even in the less objectionable cases, courts would refer to the fiduciary’s *temptation*, seemingly expressing a fear that the fiduciary may have already taken the *first step* on the path of corruption. As Lionel Smith has observed, “[p]erhaps the most frequently heard of explanation for the prophylactic rules [the no-conflict and no-profit rules] is that they are designed to prevent fiduciaries from being *tempted*.”<sup>55</sup> This worry that the fiduciary—by placing himself in a position of temptation—may have

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<sup>54</sup> *City of Findlay v. Pertz*, 66 F. 427, 435 (6th Cir. 1895).

<sup>55</sup> Lionel Smith, *The Motive, Not the Deed*, in *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* 53, 60 (Joshua Getzler ed., 2003) (emphasis added).

started down an odious path to depravity is consistent with classical understandings of corruption.

The broader, classical notion of corruption emphasizes corruption as a degenerative process—a corporeal or spiritual change—that is “induced by infection, contamination, or other adulteration.”<sup>56</sup> The process is brought about by “an external force which preys upon its victims and to which they, eventually, succumb,” and this external force is described either in “pathogenic terms (e.g., as a ‘virus’ or ‘fungus’) or in human terms (e.g., as a ‘corruptor’ or ‘tempter’).”<sup>57</sup> Transposed to the political context, corruption is a “disease of the body politic,” “[l]ike a virus invading the physical body,” which would “enfeebl[e] the spirit of the laws and undermin[e] the principles of the regime.”<sup>58</sup>

This classical emphasis on process, as exemplified by organic metaphors of disease and decay, suggests a rationale for the no-conflict and no-profit rules. Just as all humans are innately vulnerable to disease, we are all on some level susceptible to the corrupting power of a tempter or seducer, whether that tempter is another individual (e.g., the briber) or

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<sup>56</sup> Underkuffler, *supra* note 22, at 77.

<sup>57</sup> *Id.* at 87.

<sup>58</sup> Thompson, *supra* note 4, at 28.

money itself, the proverbial root of all evil. Moreover, resisting these corrupting influences is inherently difficult. This dual recognition of our common moral vulnerability and the likelihood of capitulation to temptation ostensibly justify early intervention at an inchoate stage of corruption. By prohibiting fiduciaries from placing themselves in conflicts of interest in the first place, courts are attempting to foreclose further temptation and to arrest the process of corruption at an incipient stage.<sup>59</sup> But what precisely is it that fiduciaries are urged to avoid? What exactly do these proscriptive rules aim to prevent? Temptation from what?

As Matthew Harding has explained, the duty of “no conflict” is normatively grounded in a moral duty “not to make choices deliberately for the wrong reasons.” In fiduciary contexts, he argues that this moral duty translates into the fiduciary’s obligation to refrain from *taking advantage of* her beneficiary. Specifically, a fiduciary takes advantage of her beneficiary when, in deciding what to make of an opportunity that is available to her only qua fiduciary, she apprehends that her beneficiary’s

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<sup>59</sup> The possibility of temptation can never be eliminated. Fiduciaries must still be capable of exercising judgment and identifying conflicts of interests in order to avoid them. Avihay Dorfman, *On Trust and Transubstantiation: Mitigating the Excesses of Ownership*, in *Philosophical Foundations of Fiduciary Law* 339, 343 (Andrew S. Gold & Paul B. Miller eds., 2014).

interests weigh in favor of choosing  $x$  and “that her own interests weigh in favour of  $y$  and deliberately chooses  $y$  over  $x$ .”<sup>60</sup> Hence, under this account, the proscriptive rules are designed to prevent the fiduciary *from being tempted into taking advantage of the beneficiary*.

The objective of preventing the fiduciary from being tempted into taking advantage of the beneficiary is broadly consistent with the caselaw. However, the precise rationale that is articulated in judicial opinions often emphasizes, somewhat more narrowly, the dangers of self-interested intentions—namely, that the fiduciary must not be *tempted into using the fiduciary position to seek her own advantage*. For example, in *Regal (Hastings) Ltd. v. Gulliver*, the court warned of the “temptation to seek [one’s] own advantage” when it strictly applied the no-profit rule.<sup>61</sup> In *Guth v. Loft*,<sup>62</sup> Delaware’s seminal corporate opportunities case, the court explained the purpose of the no-profit rule as being grounded in the “wise public policy that, for the purpose of removing all *temptation*, extinguishes the possibility of profit flowing from a breach of the

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<sup>60</sup> Matthew Harding, Trust and Fiduciary Law, 33 Oxford J. Legal Stud. 81, 94 (2013).

<sup>61</sup> *Regal (Hastings) Ltd. v. Gulliver*, [1967] 2 AC 134, 154 (HL) (per Lord Wright).

<sup>62</sup> 5 A.2d 503 (Del. Ch. 1939).

confidence imposed by the fiduciary relation.”<sup>63</sup> In *Diamond v. Oreamuno*,<sup>64</sup> a case in which the defendants exploited confidential information “acquired by them solely by virtue of their positions”<sup>65</sup> through insider trading, the New York state court observed—more subtly—that the no-profit rule<sup>66</sup> was designed ““to *prevent* [wrongs], by removing from agents and trustees all *inducement* to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates.””<sup>67</sup> Whether articulated as preventing the fiduciary *from being tempted into taking advantage of the beneficiary* or preventing the fiduciary *from being tempted into using the fiduciary position to seek her own advantage*, it seems that the rationale is to prevent corruption from taking root.<sup>68</sup>

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<sup>63</sup> Id. at 510 (emphasis added).

<sup>64</sup> 248 N.E.2d 910 (N.Y. 1969).

<sup>65</sup> Id. at 911.

<sup>66</sup> The court referred to the rule “that prohibits a trustee or agent from extracting secret profits from his position of trust.” Id. at 912 (citations omitted).

<sup>67</sup> Id. (emphasis added) (citations omitted).

<sup>68</sup> To observe that the rationale is prophylactic in nature does not mean that the proscribed conduct itself is necessarily or even likely innocent. The conduct may still be dishonest or breach the trust reposed in the fiduciary. See, e.g., Kim, Anti-Corruption Norm, *supra* note 32, for discussion of *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888) L.R. 39 Ch. D. 339 (Eng.).

Of course, as noted above,<sup>69</sup> courts have occasionally departed from the proscriptive rules, at least in their strict forms, in some fiduciary contexts. Some of these departures can be understood as judicial attempts to flesh out a more precise rule that more closely tracks contemporaneous cultural understandings about what conduct is improper in the particular fiduciary context.<sup>70</sup> Other departures can be explained as a judicial resolve to move away from the goal of *preventing* corruption (or arresting corruption at an incipient stage) in favor of the more judicially taxing mission of determining whether the fiduciary in question has *actually* succumbed to corruption (and then confining remedies to clearer cases of actual corruption).<sup>71</sup> In doing so, courts seem to be influenced by the classical distinction between an individual's moral character and the conduct that manifests such character while introducing an element of

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It should be noted that not all legal scholars subscribe to the view that the fiduciary duty of loyalty is principally grounded in a prophylactic rationale. See, e.g., Evan J. Criddle & Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (2016); Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 *Tex. L. Rev.* 993 (2017); Miller, *supra* note 34.

<sup>69</sup> See text accompanying notes 46 to 52 *supra*.

<sup>70</sup> See note 48 *supra*.

<sup>71</sup> Cases in which courts have found fiduciaries to have acted in good faith may fall into this category. See *Broz v. Cellular Information Systems, Inc.*, 673 A.2d 148, 152 n.5 (Del. 1996) (observing that, despite the fiduciary's failure to formally present the opportunity to the board, the fiduciary "was not acting surreptitiously or in bad faith").

subjectivity into the inquiry.<sup>72</sup> As noted by Underkuffler, “What we mean by corruption cannot be captured by conduct alone, no matter how identified. It is . . . far more. It is an idea that describes an individual’s deepest character.”<sup>73</sup> These departures, grounded in non-mutually exclusive explanations, are likely to take place in fiduciary contexts where cultural views are either more heterogeneous or have shifted to a significant degree.<sup>74</sup>

In sum, fiduciary law contains an anti-corruption norm. The norm has been reflected in the no-conflict and no-profit rules and has been invoked in a variety of contexts. When applying the norm, courts would often remark that the proscriptive rules were needed to prevent fiduciaries from being tempted into taking advantage of their beneficiaries. This rationale evidences an acknowledgment of the common human vulnerability to corruption and an understanding of corruption’s dynamic, incremental

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<sup>72</sup> By considering the fiduciary’s subjective intentions, courts seem to be moving away from the “public-office-centered” definition of corruption, from which my definition of corruption is based. In other words, courts are moving away from focusing on corrupt behavior toward focusing on corrupt intentions.

<sup>73</sup> Underkuffler, *supra* note 22, at 69.

<sup>74</sup> Of course, an alternative explanation is that the judiciary itself has been corrupted. See, e.g., Lynn M. LoPucki, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts* (2006) (for an account of corruption of the bankruptcy courts).

nature. That said, courts have departed from the proscriptive rules in fiduciary contexts where cultural views seem to be more heterogeneous or have shifted to a significant degree.

#### IV. The Legitimacy of Important Social Institutions

Now that I've argued that fiduciary law contains an anti-corruption norm, the task is to show the benefit of this enhanced understanding. In this Part, I argue that one of the main insights to be gained from this understanding is that fiduciary law helps to preserve and promote the legitimacy of important social institutions.

As Smith has observed, one of the most striking and clearest features of fiduciary law is that its proscriptive rules “produce their effects without any regard as to whether harm was caused.”<sup>75</sup> There is no inquiry into whether the beneficiary suffered harm, nor any inquiry into whether any other norm (apart from the rules themselves) was violated. For example, in *Regal*, the court rejected the defense that the corporation was financially incapable of exploiting the investment opportunity taken by the directors.

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<sup>75</sup> Lionel Smith, *Deterrence, Prophylaxis, and Punishment in Fiduciary Obligations*, 7 J. Equity 1 (2013).

In doing so, the court was effectively rejecting the defense that the directors caused *no harm* to Regal.<sup>76</sup> Also, in *Reading v. Attorney-General*, the court found a British Medical Corps army sergeant liable for using, without permission, his uniform to assist the illegal activities of a third party, even though those activities were completely unrelated to and thus did not impair his Medical Corps tasks.<sup>77</sup> In *United States v. Drumm*, the court found a USDA poultry inspector liable for moonlighting in a private consulting capacity, in violation of USDA policy, even though his private consulting duties did not undermine any of his USDA duties.<sup>78</sup> In *Snepp v. United States*, the court found a former CIA agent liable for publishing (post-retirement) a book without submitting it for prepublication review, in violation of CIA policy, even though the book contained no classified information and there was no demonstrable harm to the CIA.<sup>79</sup> In *Diamond v. Oreamuno*, the court found corporate insiders liable for unauthorized insider trading, even though they had not deprived

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<sup>76</sup> See text accompanying notes 38 to 45 *supra*. According to this argument, because Regal would never have been able to take advantage of the opportunity itself in the first place, the directors actually did not deprive Regal of anything.

<sup>77</sup> See *Reading v. Attorney-General* [1951] A.C. 507 (Eng.); *Reading v. The King* [1948] 2 K.B. 268 (Eng.) (prior history).

<sup>78</sup> 329 F.2d 109 (1st Cir. 1964).

<sup>79</sup> 444 U.S. 507 (1980).

their company of concrete gains, as the company had not engaged in contemporaneous trading.<sup>80</sup> In *Irving Trust Co. v. Deutsch*, as in *Regal*, the court found corporate directors liable for wrongfully taking a corporate opportunity, despite the district court's factual finding that the corporation was not financially capable of exploiting the opportunity.<sup>81</sup>

To be sure, this indifference about actual harm perhaps more accurately describes the law in commonwealth jurisdictions than in the United States. For example, under Delaware law, an inquiry into harm can often slip in under the guise of judicial scrutiny about the fairness of the conflicted transaction to the beneficiary.<sup>82</sup> Still, even for the United States, it is perhaps safe to generalize that fiduciary law exhibits a diminished concern for harm.

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<sup>80</sup> 248 N.E.2d at 910. But see *Freeman v. Decio*, 584 F.2d 186, 196 (7th Cir. 1978) (not liable); *Schein v. Chasen*, 313 So. 2d 739, 749 (Fla. 1975) (not liable). For an argument that *Diamond* was wrongly reasoned, see Stephen M. Bainbridge, *Insider Trading Law and Policy* 18-22 (2014).

<sup>81</sup> 73 F.2d 121, 124 (2d Cir. 1934). Although the court harbored doubts about the directors' hasty conclusion that their company was financially incapable of taking advantage of the opportunity, it declined to revisit this factual finding and declined to create an explicit exception for financial incapacity.

<sup>82</sup> Del. Code Ann. tit. 8, § 144(a)(3) (2016).

In my view, the reason for fiduciary law's diminished attention to harm is grounded in part in an understanding that corruption's worst harms are inherently difficult to identify and quantify, that the principal damage wrought by corruption tends to be intangible and systemic. As Underkuffler has written,

Corruption . . . carries more than the threat of some individual transgression; it presents a vital threat to the larger societal fabric of which it is a part. The popular visualization of corruption as a "cancer" or "virus" is not incidental; it is a critical part of what the idea of corruption, under the common conception, attempts to convey. Corruption, in this view, is not simply an official's poor choice or bad act; it has *institutional effects and institutional dangers* that distinguish it from acts that are simply evil, or dangerous, or morally depraved.<sup>83</sup>

Recognition of corruption's corrosive institutional effects appears to have driven the U.S. Congress in the late 1980s and early 1990s to ban the seemingly banal practice of accepting honoraria for speeches and

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<sup>83</sup> Underkuffler, *supra* note 22, at 139.

appearances.<sup>84</sup> By the late 1980s, after inflation had substantially eroded their salaries, members of Congress increasingly leaned on honoraria as a source of income.<sup>85</sup> According to one report, “members . . . received \$9.1 million in honoraria fees in 1988.”<sup>86</sup> Though honoraria had long been viewed as a proper supplement to Congressional salaries, members finally came to recognize their corrosive effects, including the impact on how members allocated their time and attention. For example, Senator Robert C. Byrd (D-W.Va.) not only noted that “[t]here [was] nothing honorable about honoraria” and that honoraria were “simply a way for special interests to gain access to senators[.]”<sup>87</sup> he also pointed out the high distraction costs: “Chasing honoraria takes time away from the people who send us here to represent them. It takes time from the reflection, study, and debate that Senators ought to engage in.”<sup>88</sup>

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<sup>84</sup> Honoraria is defined as the “payment of money or anything of value an organization makes to a legislator in return for a speech, appearance, or article.” Congressional Pay and Perquisites: History, Facts, and Controversy 19 (1992).

<sup>85</sup> *Id.*

<sup>86</sup> Michael H. Chang, Protecting the Appearance of Propriety: The Policies Underlying the One-Year Ban on Post-Congressional Lobbying Employment, 5 Kan. J.L. & Pub. Pol’y 121, 127 n.31 (1996).

<sup>87</sup> 137 Cong. Rec. 18,746-749, 18,747 (July 17, 1991) (statement of Sen. Byrd).

<sup>88</sup> 137 Cong. Rec. 18,746-749 (n 92).

Eventually, the growing practice of accepting honoraria came to be perceived as a threat to the integrity of the Congress. One member described honoraria as a “cancer on the deliberative process,”<sup>89</sup> while others noted that the practice of obtaining honoraria was “clearly destroying the public’s confidence in Congress,”<sup>90</sup> “an embarrassment to this institution,”<sup>91</sup> “insidious and corrosive,”<sup>92</sup> and “looked upon [by the American people] as something evil.”<sup>93</sup> As Dennis Thompson, an expert on legislative ethics, concluded, “Honoraria had become more than merely personal gain; they had become the core of a system of income enhancement that interfered with institutional gain.”<sup>94</sup> As a result, in 1989 and 1991, the U.S. House of Representatives and the U.S. Senate, respectively, passed across-the-board bans on honoraria.<sup>95</sup>

The systemic and institutional harms of corruption have long been familiar to experts on public corruption. In summarizing the research,

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<sup>89</sup> 135 Cong. Rec. 29,498 (1989) (statement of Rep. Carper).

<sup>90</sup> 135 Cong. Rec. 29,503 (1989) (statement of Rep. Wolpe).

<sup>91</sup> 135 Cong. Rec. 29,504 (1989) (statement of Rep. Weiss).

<sup>92</sup> 135 Cong. Rec. 29,504 (1989) (statement of Rep. Skaggs).

<sup>93</sup> 135 Cong. Rec. 29,506 (1989) (statement of Rep. Ravenel).

<sup>94</sup> Thompson, *supra* note 4, at 21.

<sup>95</sup> Ethics Reform Act of 1989, 5 U.S.C. appx. § 501(b), Pub. L. No. 101-194, 103 Stat. 1716 (2012); Congressional Operations Appropriations Act of 1992, Pub. L. No. 102-90, § 6(b), 105 Stat. 447 (amending 5 U.S.C. §§ 503(1)(B), 505(1)-(2)).

Alan Doig and Stephanie McIvor described how corruption can be “deeply damaging to the social and political fabric” of a nation:

[Corruption] has contributed to political instability, military intervention and regime change, and undermined governmental institutions, such as customs, taxation, other revenue-generating departments, and service delivery. It has alienating social effects, adding to growing cynicism about politics and the political process amongst citizens, often exacerbating inequality, leading to unbalanced competition in democratic politics and skewed developmental priorities. It is also a factor in the alleged widespread withdrawal of people from the political sphere.<sup>96</sup>

These effects are the by-products of a loss of state legitimacy, particularly in democracies but not necessarily confined to them. While all states possess coercive powers, they rely on the public perception of legitimacy to maintain law and order. When citizens lose faith because they have come to judge the system as corrupt, unfair, and rigged, the

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<sup>96</sup> Alan Doig & Stephanie McIvor, Feature Review, *Corruption and its Control in the Developmental Context: An Analysis and Selective Review of the Literature*, 20 *Third World Q.* 657, 660 (1999) (citations omitted).

legitimacy of the state erodes and citizens disobey laws,<sup>97</sup> opt out of political participation, or, in extreme cases, galvanize to overthrow the regime.

But governments are not the only institutions that rely on legitimacy for their continued flourishing. Private fiduciary institutions, which are critical to welfare-enhancing social and economic interactions, such as trusteeships, pension funds, and the legal and medical professions, also depend on a form of legitimacy in order to endure as integral fixtures of modern life. Without legitimacy, public demand for services provided by these institutions would wane and the market for these fiduciary services would dry up, impoverishing our collective welfare. Courts play an instrumentally valuable role in preserving and promoting the legitimacy of these institutions. They perform this function by creating the conditions under which relatively high levels of trust might develop and flourish, which in turn encourages the formation of fiduciary relations and promotes public faith in these fiduciary institutions.

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<sup>97</sup> Tom Tyler's groundbreaking 1990 panel study on legal compliance supplies strong evidence to support the proposition that when citizens believe that legal authorities violate norms of procedural fairness, the legitimacy of those legal authorities erodes, and citizens become less compliant with laws. See Tom R. Tyler, *Why People Obey the Law* 64 (1990).

As I've discussed elsewhere,<sup>98</sup> courts can facilitate the cultivation of high levels of trust so essential to the functioning of fiduciary relationships by furnishing would-be beneficiaries with objective reasons to rely on the fiduciary's discretion, notwithstanding low levels of trust. As explained by Harding, courts perform this role by providing beneficiaries with a robust legal guarantee, backed by a sanction, that the fiduciary's actions will conform to the minimum requirements of trustworthiness.<sup>99</sup> Once the beneficiary has relied on the fiduciary, the fiduciary will be obliged by law to act consistently with what trustworthiness minimally requires. Importantly, the beneficiary's reliance affords the fiduciary a concrete *opportunity* to prove trustworthy. If the fiduciary takes up this opportunity and actually demonstrates trustworthiness, then the beneficiary now has tangible reasons to repose deeper levels of trust and to continue to rely, potentially setting in motion a beneficial cycle of trust and trustworthiness characteristic of enduring and successful fiduciary relationships.<sup>100</sup>

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<sup>98</sup> See Sung Hui Kim, The Supreme Court's Fiduciary Duty to Forgo Gifts, in *Fiduciary Government* (Evan J. Criddle, Evan Fox-Decent, Andrew S. Gold, Sung Hui Kim, & Paul B. Miller eds., forthcoming 2018).

<sup>99</sup> *Id.* (citing Harding, *supra* note 60, at 98).

<sup>100</sup> Harding, *supra* note 60, at 98-99.

By creating the conditions under which high levels of trust might develop in this way, courts are not only encouraging the formation of individual fiduciary relations but also cultivating the reputation of the associated fiduciary institutions. This in turn increases public trust in those fiduciary institutions. In short, courts are supporting the legitimacy of fiduciary institutions.

Some courts seem to understand the need to facilitate trusting relationships and to preserve the legitimacy of fiduciary institutions, as suggested by their references to broader systemic concerns. For example, in *Drumm* noted above, a case that applied the no-profit rule against a public bureaucrat, the court dismissed arguments alleging the lack of harm, proclaiming, “The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent.”<sup>101</sup> In *Guth* noted above, the court justified the application of the no-profit rule to a corporate opportunity case, noting that the rigid rule “does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of

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<sup>101</sup> *Drumm*, supra note 78, at 113.

confidence, but upon a broader foundation of a wise public policy.”<sup>102</sup> In *City of Findlay* noted above, the court noted that “[j]ustice, morality, and public policy unite” to apply the no-conflict rule to the situation at hand.<sup>103</sup> Also, in *Diamond* noted above, despite the lack of demonstrable harm to the company, the court raised reputational concerns when it invoked the no-profit rule in denying the defendants’ motion to dismiss.<sup>104</sup>

Consciously or not, courts were generating a key benefit when administering the proscriptive rules, especially in their stricter forms. Courts were preserving and promoting the legitimacy of certain fiduciary institutions by providing guarantees that enable the development of trusting relationships. Courts were displaying sensitivity to the larger, systemic threat to those institutions posed by fiduciaries using their entrusted positions for self-regarding gain.

## V. Conclusion

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<sup>102</sup> Guth, *supra* note 55, at 270.

<sup>103</sup> City of Findlay, *supra* note 42.

<sup>104</sup> Diamond, *supra* note 57, at 911, 912-13 (noting that the company’s ability to maintain “a reputation of integrity, an image of probity, for its management and in insuring the continued public acceptance and marketability of its stock” was harmed).

In this chapter, I've argued that fiduciary law contains an anti-corruption norm, as reflected in the no-conflict and no-profit rules, and discussed one of the key insights that can be gained from this understanding. To be sure, as Underkuffler has shown, corruption is a "troubled concept in law,"<sup>105</sup> as classical understandings of corruption, with its emphasis on shame, permanent taint, and moral character, conflict with many of the modern liberal and judicial values that we hold. Notwithstanding the shortcomings of corruption's utility in the law, there remains some value in retaining corruption as a notion that informs our understanding of fiduciary law. The idea of corruption helps us recognize our common human vulnerability to temptations posed by the promise of selfish enrichment. It helps us see that some kind of moral vigilance—expressed in the application of the proscriptive rules or in close judicial scrutiny—may be necessary to address what is fundamentally a moral problem. It helps us appreciate, as Lyman Johnson has written with respect to corporate law, that "a moral vocabulary has been, and should remain, central to" fiduciary law discourse.<sup>106</sup> Bereft of a moral framing that emphasizes the virtue of loyalty, the cycle of trust and trustworthiness

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<sup>105</sup> Underkuffler, *supra* note 22, at 248.

<sup>106</sup> Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 Del. J. Corp. L. 27, 72 (2003).

that is at the foundation of productive fiduciary relationships will be that much harder to cultivate.