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FIDUCIARY STANDARDS

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Abstract

"Fiduciary" law is, notoriously, all over the place. Many doubt it hangs together—that anything beyond the label "fiduciary" unites corporate directors and physicians. Others offer theories of the conditions under which the law refers to a relationship as "fiduciary"—to compensate for power dynamics, where legal power is exercised for another, in money management. What's missing is a theory of the standards guiding fiduciaries' exercise of legal power—what it means to be a fiduciary.

This Article argues that in making sense of fiduciary standards, we can turn to a longstanding debate in a particular fiduciary context—surrogate medical decision-making. There, two contested standards apply—"best interests," which asks the decision-maker to pursue the "objectively best" decision, and "substituted judgment," which seeks the decision the patient would have made. I argue that these standards offer a framework for organizing fiduciary decision-making generally. Some fiduciaries, like trustees, make decisions in the best interests of their beneficiaries. Others, like agents, make the decision their principal would have made. Most fiduciaries do some blend of both.

Moreover, the law allocates aspects of best interests and substituted judgment based on its views of the purpose of a given fiduciary relationship. Substituted judgment applies where the beneficiary is treated as an individual personal identity. Best interests applies where for some reason—efficiency, expertise, or because the beneficiary doesn't have one—the beneficiary is not treated as an individual personal identity. This account offers a new picture of fiduciary law, structured around agency and trust, and suggests how the law might consider allocating the best interests and substituted judgment frames.

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INTRODUCTION

There is a good chance that at some point you will occupy a role the law calls "fiduciary." After all, lawyers are "fiduciaries" of their clients.[1] Or perhaps you will serve as the executor of an estate;[2] a guardian, attorney-in-fact under a durable power of attorney, trustee, or healthcare proxy for a family member;[3] or maybe even a director of a corporation or non-profit.[4] These roles, and many more—including perhaps parents, spouses, and government officials[5]—are all referred to as "fiduciary" relationships in Anglo-American legal discourse. In undertaking any of these roles, you will be bound by a package of legal duties called "fiduciary duties."[6]

Despite its ubiquity, "fiduciary" has always been an odd word. Unlike, say, the concept of "promise" in contract law,[7] or even an intuitive sense of "ownership" that may be related to property,[8] the word "fiduciary" has no apparent correlate in ordinary speech—laypeople have no idea what it means, and the "fiduciary" concept appears exclusively legal.[9] Even the legal use of the word is largely reflexive and unreflective—applied to

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[1] *See, e.g.*, Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, The Law of Torts § 724 (2d ed. 2024) ("Lawyers are fiduciaries to their clients . . . .").

[2] *See, e.g.*, 15 N.C. Index 4th Executors and Administrators § 57 ("Executors have fiduciary duties to legatees, including a duty not to engage in self-dealing.").

[3] *See, e.g.*, Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 2 (2001) (describing durable powers of attorney as creating "a unique fiduciary relationship"); Nina A. Kohn, *Fiduciary Principles in Surrogate Decision-Making*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 249, 251 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff, eds., 2019) ("Upon appointment and acceptance, a guardian or conservator immediately enters into a fiduciary relationship with the individual subject to guardianship or conservatorship.").

[4] *See, e.g.*, Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L. J. 879, 908 (1988) ("Paradigms of [fiduciary] relationships include agent-principal, director-corporation, guardian-ward, lawyer-client, partner-fellow partner, and trustee-trust beneficiary relationships.").

[5] *See, e.g.*, Elizabeth S. Scott & Ben Chen, *Fiduciary Principles in Family Law*, in OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 3, at 227, 227 (discussing family members as fiduciaries).

[6] *See, e.g.*, Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 971 (2013) (describing legal fiduciary duties as emerging from fiduciary relationships).

[7] *See, e.g.*, Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 709 (2007) ("[T]o make a contract, one must make a promise.").

[8] *See, e.g.*, James Toomey, *Property's Boundaries*, 109 VA. L. REV. 131, 135 (2023) (arguing that an ordinary concept of ownership organizes and legitimizes property law).

[9] *See, e.g.*, GERRY W. BEYER, 1 REVOCABLE TRUSTS 5th § 3:3 ("The term 'fiduciary' appears to come from the Latin fiducia, referring to ideas of trust or confidence."); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2180–81 (2019) (surveying the recent and peculiarly legal history of the concept "fiduciary").

trustees, corporate directors, agents, lawyers, partners, guardians; sometimes physicians, parents, government officials, and more.[10] But despite a century of theorizing, what unites this category—what the word "fiduciary" *means*—if anything, remains elusive.[11] The possible answer "nothing"—that fiduciary law is just an ad hoc chain of analogies,[12] expressivist exhortation,[13] or an arcane way to refer to a kind of implied contract[14]—is a live one.

At the same time, it is hard to shake the legal intuition that there is *something* here—that lawyers aren't entirely out to lunch when they use the term.[15] There is some persistent sense that the set of relationships called "fiduciary" involve legal action in some sense "on behalf of" or affecting someone else—the exercise of "discretionary power over the significant practical interests of another."[16] And it is true that the decisions of all "fiduciaries" must be—the law insists—guided by something called the "duty of loyalty."[17] Entirely discretionary power is not "fiduciary."[18] What

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[10] *See, e.g.*, Andrew S. Gold & Paul Miller, *Introduction*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 2–3 (Andrew S. Gold & Paul B. Miller, eds., 2014) ("Most relationships considered to be fiduciary are treated as such as a matter of convention.").

[11] *See, e.g.*, Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665, 669 (2009) ("[T]he fiduciary concept is still very much contested . . . ."); Joshua Getzler, *Ascribing and Limiting Fiduciary Obligations: Understanding the Operation of Consent*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 10, at 39 (noting that courts "cannot quite agree on how [fiduciary] law should operate"); DeMott, *supra* note 4, at 879 ("Fiduciary law is one of the most elusive concepts in Anglo-American law.").

[12] *See, e.g.*, Robert Hockett, *Are Bank Fiduciaries Special?*, 68 ALA. L. REV. 1071, 1096 (2017) ("We have a rough idea as to what statuses are considered at least to be more or less fiduciary in nature—trustees, corporate officers and directors, business partners, lawyers, accountants, etc'"); Paul B. Miller & Charles Weijer, *Fiduciary Obligation in Clinical Research*, 34 J.L. MED. & ETHICS 424, 425 (2006) ("[C]ourts currently largely identify relationships as fiduciary simply in consideration of lists of recognized categories of fiduciary relationships.").

[13] *See, e.g.*, Boxx, *supra* note 3, at 36 (arguing that the "crux" of the fiduciary relationship is "whether there is a moral overtone to judgment of the wrongdoer").

[14] *See, e.g.*, *See* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993) (arguing that fiduciary obligations are a species of implied contract); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L. J. 625, 625 (1995) (same in the trust context).

[15] *See, e.g.*, Paul B. Miller, *The Fiduciary Relationship*, in FOUNDATIONS, *supra* note 10, at 63, 69 ("Lawyers and judges reason and act as though the fiduciary relationship is a distinctive form or kind of legal relationship.").

[16] *See, e.g.*, Miller, *supra* note 6, at 969 (2013); *see also infra* Part I.B.

[17] *See, e.g.*, Andrew S. Gold, *The Loyalties of Fiduciary Law*, in FOUNDATIONS, *supra* note 10, at 176, 190 ("Fiduciary relationships require a legal duty of loyalty, full stop.").

[18] *See, e.g.*, *id.*, at 72 ("[I]t is also an essential characteristic of fiduciary power that it is *specified*."); J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 L. Q. REV. 51, 75 (1981) (arguing that grant of fiduciary power is conditional).

any of this actually *means*, however, is the sticking point, as the substantive content of the "duty of loyalty" across relationships is nearly as diverse as those relationships themselves.[19]

This Article offers a novel theory of the standards by which fiduciaries must exercise the powers with which the law has entrusted them. In the particular fiduciary context of healthcare decision-making on behalf of incapacitated patients, a longstanding debate has pitted two alternative decision-making frameworks against one another—the so-called "best interests" and "substituted judgment" standards.[20] The best interests standard asks the surrogate to make the "objectively best" decision under the circumstances.[21] In contrast, substituted judgment asks the surrogate to do what *the patient* would have done if capacitated.[22] My claim is that these two decision-making standards can systematize the content of obligations across the domain of fiduciary relationships. That is, *all*—or at least most—fiduciary standards, even those that have nothing to do with healthcare, can be fruitfully thought of in terms of best interests and substituted judgment.[23]

From this perspective, in some fiduciary relationships—paradigmatically the classic common law trust—the fiduciary is expected to do what is in the objective best interests of the beneficiary, enforced through generalized, objective rules.[24] At the other end of the spectrum—in the paradigmatic agency relationship—fiduciaries are asked to make substituted judgments on behalf of their beneficiaries; an agent is to do what their principal *would have* done.[25] Between these poles, the standards governing most fiduciary relationships borrow some aspects of best interests and some aspects of substituted judgment.[26] Consider attorneys-in-

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[19] *See, e.g.*, Gold, *supra* note 17, at 177–184 (summarizing the content of the duty of loyalty across fiduciary relationships).

[20] *See infra* Part II.A.

[21] *See, e.g.*, Steven M. Richard, *Someone Make Up My Mind: The Troubling Right to Die Issues Presented by Incompetent Patients With No Prior Expression of a Treatment Preference*, 64 NOTRE DAME L. REV. 394, 408–09 (1989) ("Under [the best interests] approach, the surrogate evaluates the patient's best interests based upon objective socially shared criteria.").

[22] *See, e.g.*, Ben Chen, *Elder Financial Abuse: Fiduciary Law and Economics*, 34 NOTRE DAME J. L. ETHICS & PUB. POL. 1, 35 (2020) ("The equitable doctrine of substituted judgment . . . requires the court to give effect to what the incapable individual would have wanted if she was capable.").

[23] *See infra* Part II.B. Whether this framework captures the standards governing *all* fiduciaries, of course, depends in part on what relationships are, in fact, fiduciary. Here, I focus on uncontroversial cases, without taking a definitive view on more controversial cases such as parents, spouses, and government officials. *See infra* Part I.B.

[24] *See infra* notes 151–159 & accompanying text.

[25] *See infra* notes 160–169 & accompanying text.

[26] *See infra* Part II.B.

fact acting under durable powers of attorney, who are generally to make substituted judgments, but have best interests decision-making as a fallback where substituted judgment would harm the principal or others.[27]

Moreover, the balance between best interests and substituted judgment as decision-making modes across fiduciary relationships varies with the purposes of the relationship. Substituted judgment is, by its nature, a mode of decision-making that treats another person as an *individual, ongoing personal identity*.[28] The law deploys it in relationships, like agency, that are thought to be interpersonal in an individualized sense. In contrast, the law applies the best interests framework, with its objective generalizations about what is optimal, in circumstances, like trust, where for reasons of efficiency, morality, or, indeed, metaphysics (because a beneficiary is *not* an individual, ongoing personal identity), the legal relationship does not involve a posture towards another person *qua* individual personal identity.[29] From corporate directors to guardians, the law sees different fiduciary relationships as blending these individualized and de-individualized postures in different ways, and correspondingly applies different mixes of the substituted judgment and best interests frames in their standards of decision.[30]

This account—and the novel picture of fiduciary law it offers—has several implications, for both theory and practice. In fiduciary theory, it supports the notion that, as legal philosopher Carl Wellman and others have suggested, what we call "fiduciary law" is organized around *two* distinct paradigms—rather than just trust, as is often thought, this body of law is a spectrum organized around the poles of trust *and* agency.[31] Similarly, the account offers novel ways to think about the contested relationship between fiduciary law and contract law—fiduciary law is organized around two ways of deciding on behalf of another, whereas contract is a mode of deciding according to the content of an agreement. More broadly, the picture offered here emphasizes the significance of personal identity to any robust account of private law.[32] Finally, and more practically, the

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[27] *See infra* notes 183–185 & accompanying text.

[28] *See infra* Part III.A.

[29] *See infra* Part III.B.

[30] *See infra* Part III.C.

[31] *See infra* Part IV.A; *see also* CARL WELLMAN, REAL RIGHTS 114–118 (1995) (distinguishing between "the representation of agency" through agency-like relationships and "the representation of interests" in trust-like arrangements); Shepherd, *supra* note 18, at 51 ("Fiduciary relationships are children of the forced marriage of agency law and trust law . . . .").

[32] *See infra* Part IV.C; *see also* James Toomey, *Love, Liberalism, Substituted Judgment*, 99 IND. L. J. 1289, 1316–1317 (2024) (discussing the role of personal identity in private law).

framework offers guidance on when the substituted judgment and best interests standards might be best deployed—in health law, where we started, and in other, even novel, legal relationships.[33]

The argument has four parts. In Part I, I outline the architecture of fiduciary law, along with efforts to make sense of its domain and content. Building on increasingly accepted views in private law theory, I suggest that all fiduciary relationships involve one person deciding (in some sense) "on behalf of" another, constrained by some standard, which we refer to at least with the phrase "duty of loyalty." But a unifying theory of that standard has not been forthcoming.

Next, in Part II, I turn to the debate between best interests and substituted judgment as standards for making medical decisions for the incapacitated, and explain how, descriptively, these standards can illuminate fiduciary law. At the poles of fiduciary's domain, trust is governed by something like best interests reasoning, while agency something like substituted judgment. Between them, different fiduciary relationships mix different aspects of each decision-making paradigm.

In Part III, I offer an account of why that might be—why substituted judgment applies in some fiduciary contexts, and best interests in others. I suggest that substituted judgment is a mode of deciding literally on behalf of another person *qua* their individualized, ongoing personal identity, and applies in legal relationships where that is the aspiration. In contrast, best interests applies in contexts where, for a variety of reasons, a fiduciary is acting in some other mode.

Finally, in Part IV, I sketch the implications of this view—in fiduciary theory, private law theory, and for practical questions of legal design.

I. THE ARCHITECTURE OF FIDUCIARY LAW

"Fiduciary" comes from Latin—*fiducia*; trust or confidence.[34] But the word has had an odd genealogy. It is used in its legal sense today predominately by Anglophones—though we got it from Latin, derivatives of *fiducia* play a less prominent role in civil law regimes.[35] Moreover, the word is used overwhelmingly by Anglophone *lawyers*—"fiduciary" is a word of legal English, not English simpliciter. If "fiduciary" refers to

[33] *See infra* Part IV.D.

[34] *See, e.g.*, James Edelman, *The Role of Status in the Law of Obligations: Common Callings, Implied Terms, and Lessons for Fiduciary Duties*, in FOUNDATIONS, *supra* note 10, at 21, 23.

[35] *See, e.g.*, LIONEL SMITH, THE LAW OF LOYALTY 27 (2023) ("[I]n the modern world, it is a fact that the ideas of 'fiduciary obligations' and 'fiduciary relationships' are often seen as alien to the civilian tradition.").

anything, then, it is presumably to a common law legal concept.[36] And yet, even as a term of art in Anglo-American legal discourse, it has never been clear what the word is thought to mean, vulnerable to the persistent worry that there is no distinctive concept there at all.[37]

In theorizing about fiduciary law, it may be helpful to distinguish two kinds of theory. First are theories of fiduciary's *domain*—the kinds of factual circumstances or relationships to which the law applies the label "fiduciary." Second are theories of fiduciary *content*—what *follows*, legally, from the law's conclusion that a particular relationship is a fiduciary one.

This Part surveys the architecture of fiduciary law and extant theories of its character. First, I lay the groundwork with uncontroversial facts about the use of the word "fiduciary" in legal discourse—the relationships to which it is applied and the content it is thought to carry. Next, I show that there has been some rough theoretical convergence on fiduciary's *domain*—fiduciary relationships are those that involve (roughly) one person making legally effective decisions (in some sense) "on behalf of" another, guided by some standard. At the same time, there has been less progress on theories of the *content* of fiduciary standards—we can say that fiduciary decision-making is governed by *some* standard, called the "duty of loyalty," but diversity in what that means has foreclosed our saying much more.

A. "Fiduciary" in Law

Given longstanding doubts about the conceptual coherence of fiduciary law, most accounts start with the word's admittedly scattered extension—the set of relationships to which the law uncontroversially applies the label "fiduciary."[38] This Section follows suit.

The relationship between a trustee and beneficiary of a trust is generally taken to be the "paradigmatic" fiduciary relationship from which, as a historical matter, the body of law we call "fiduciary" arose.[39] In a trust

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[36] *See supra* note 9.

[37] *See, e.g.*, Hockett, *supra* note 12, at 1096 ("[F]ew of us seem to find time to develop any particular general account of the fiduciary relations and the form of obligation to which it gives rise."); LAC MINERAL LTD. V. INT'L CORONA RESOURCES LTD., 61 D.L.R. 4th 14 (Can. 1989) ("There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship.").

[38] *See supra* note 10.

[39] *See, e.g.*, Max Schanzenbach & Nadav Shoked, *Reclaiming Fiduciary Law for the City*, 70 STAN. L. REV. 565, 575 (2018) (describing "trusts, estates, corporations, partnerships and so on" as "the quintessential fiduciaries"); Robert H. Sitkoff, *Fiduciary Principles in Trust Law*, in OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 3, at 41, 41 ("A trust is the quintessential fiduciary relationship."); *see also* Miller & Weijer, *supra* 12, at 425 ("Taking the relationship between the trustee and beneficiary of an express trust as paradigmatic, courts have, over time, recognized certain other kinds of relationships to

(created by a "settlor," an owner of property who conveys it into trust), a "trustee" holds legal title and legal decision-making powers over property the "equitable title" of which is held by a "beneficiary," giving the beneficiary the right of enjoyment of the property (and a cause of action against the trustee for breach).[40] In other words, a trust involves legal management and control of a beneficiary's property by a trustee.

In exercising these legal decision-making powers, trustees are constrained by "fiduciary duties"—classically, the "duty of loyalty" and "duty of prudence" (in trust law; its correlate is often called the "duty of care" in other fiduciary relationships).[41] The trustee's duty of loyalty requires that they manage trust assets "solely in the interests of the beneficiaries."[42] Practically speaking, this forbids self-dealing with trust assets, alongside various other conflicts of interest, at the risk of automatic disgorgement and other remedies.[43] The trustee's duty of prudence requires them to manage the property broadly as a reasonable investor would, and encompasses a number of subsidiary duties, such as duties of accounting and disclosure.[44] The duty of prudence can largely be disclaimed or modified by the settlor, while the duty of loyalty cannot—leading many commentators to take the duty of loyalty to be fundamental to the trust relationship.[45]

The basic structure of a trust, in which a "fiduciary" has certain legal powers over the property of another, constrained by duties that prohibit conflicts of interest and demand some basic standard of reasonable conduct,

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be sufficiently similar to warrant recognition as fiduciary.").

[40] *See, e.g.*, ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUST AND ESTATES 375 (11th ed. 2022) (describing the structure of trusts); Restatement (Third) of Trusts § 2 ("A trust . . . is 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 . . . .").

[41] *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 40, at 599 (summarizing the fiduciary duties of trustees).

[42] Restatement (Third) of Trusts § 78; Robert H. Sitkoff, *Fiduciary Principles in Trust Law*, in OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 3, at 44 ("The trust fiduciary law *duty of loyalty* requires undivided loyalty from a trustee.").

[43] *See, e.g.*, Restatement (Third) of Trusts § 78 ("[T]he trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests."); Sitkoff, *Fiduciary Principles*, *supra* note 39, at 44 ("The trust law *sole interest rule* of undivided loyalty is implemented by a categorical prohibition, enforced by a *no further inquiry rule* . . . .").

[44] *See, e.g.*, Restatement (Third) of Trusts § 90 ("The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.").

[45] *See infra* Part I.B.

can be found in a number of other fiduciary relationships. For instance, corporate directors are uncontroversially thought to be fiduciaries of the "corporation and its shareholders."[46] Directors have legal decision-making powers over the corporation's property, which is "owned" by the shareholders.[47] As with trusts, directors owe a "duty of loyalty" to the corporation and shareholders, which requires them to avoid self-dealing and other conflicts at risk of disgorgement, though less strictly enforced than in trust.[48] Like trustees, directors owe a duty to care to act reasonably in their decision-making—although in this context only with minimally reasonable business judgment.[49]

Similar dynamics cover in a variety of other fiduciary relationships—partnerships,[50] joint venturers,[51] lawyers holding funds for clients,[52] retirement plan administrators,[53] and so on. In each of these contexts, which the law calls "fiduciary," an individual exercises legal decision-making authority over property that is (in some sense) owned by another, guided by

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[46] *See, e.g.*, NORTH AM. CATHOLIC EDUC. PROGRAMMING FOUNDATION, INC. V. GHEEWALLA, 930 A.2d 92, 99 (Del. 2007) ("It is well established that the directors owe their fiduciary obligations to the corporation and its shareholders."); Julian Velasco, *Fiduciary Principles in Corporate Law*, in OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 3, at 60, 61 ("Corporate law is a venerable fiduciary law field, with roots in trust fiduciary law.").

[47] *See, e.g.*, ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 112–116 (rev. ed. 1991) (discussing the separation of ownership and control as the essence of the corporate form).

[48] *See, e.g.*, Avi Z. Kestenbaum, *Duties and Liabilities of Nonprofit Directors and Officers*, 31 ESTATE PLANNING 218, 220 (2004) ("Directors and officers must avoid self-dealing activities and must act in the best interest of the organization under the duty of loyalty."); Restatement of Corporate Governance § 5.01 cmt. d (tentative draft 2022) ("The law does not prohibit transactions where there is a conflict of interest, but, absent an appropriate cleansing act, it subjects such transactions to the heightened scrutiny of an entire fairness review.").

[49] *See, e.g.*, Michael Bradley and Cindy A. Schipani, *The Relevancy of the Duty of Care Standard in Corporate Governance*, 75 IOWA L. REV. 17–19 (1989) ("Directors are required to exercise that degree of care ordinarily prudent persons would exercise under similar circumstances.").

[50] *See, e.g.*, Rev. Uniform Partnership Act § 404 ("The only fiduciary duties a partner owes to the partnership and other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c)).

[51] *See, e.g.*, 46 Am. Jur. 2d Joint Ventures § 28 ("[T]he relationship between joint venturers is fiduciary in character.").

[52] *See, e.g.*, Restatement (Third) of Law Governing Lawyers § 56 ("A lawyer must take reasonable steps to safeguard funds and other property in the lawyer's possession belonging to a client or third person to whom the lawyer owes fiduciary duties or in which a client or such a third person claims an interest.").

[53] *See, e.g.*, 1 Reg. of Invest. Mgmt. & Fiduciary Serv. § 13:12 ("A fiduciary includes any person who has discretionary authority or discretionary responsibility in the plan administration.").

a "duty of loyalty" that requires the decision-maker to avoid conflicts of interest and exercise prudence or care.[54]

But not all fiduciary relationships involve entrustment and management of property in this way. For example, the relationship between a principal and an agent is a fiduciary one.[55] In an agency relationship, a "principal" grants an "agent" the power to make specified legal decisions on their behalf—which may, but need not, include powers over the principal's property; it could just as well include the power to enter into contracts, represent the principal in legal proceedings, or passively receive information.[56] Like other fiduciaries, agents owe a "duty of loyalty" to their principals, alongside duties of care and competence.[57] An agent's duty of loyalty requires that they avoid certain conflicts and self-dealing, at the risk of disgorgement, while exercising their decision-making authority, in some sense, in the best interests of the principal.[58]

But with agents, the fiduciary duty of loyalty has different content than with trustees—agents owe a duty of *obedience* to the principal, often considered subsidiary to the duty of loyalty (and sometimes taken as a distinct, but equally fiduciary, duty).[59] Moreover, an agent's duty of loyalty requires them to interpret the principal's instructions reasonably in light of the principal's goals, and, if the principal is unavailable and the agent must decide, to make a reasonable effort to decide as the principal would have wanted, had they been available to consult.[60]

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[54] *See supra* notes 50–53.

[55] *See, e.g.*, Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 2 WM. & MARY L. REV. 513, 559 (2015) ("[A]gents are . . . fiduciaries . . . ."); Deborah A. DeMott, *Fiduciary Principles in Agency Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 23, 24 (2019) (characterizing agency relationships as fiduciary relationships).

[56] *See, e.g.*, Restatement (Third) of Agency § 1.01 ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests asset to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

[57] *See, e.g.*, 2A C.J.S. Agency § 266 ("The principal-agency relationship imposes upon the agent a duty of loyalty and good faith."); Restatement (Third) Of Agency § 8.08 ("Subject to any agreement with the principal, an agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances.").

[58] *See, e.g.*, 2A C.J.S. Agency § 270 ("An agent is under a strict duty to avoid any conflict between their self-interest and that of the principal to even the slightest extent.").

[59] *See, e.g.*, Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty*, J. CORP. L. 43, 47–48 (2008) (arguing that the duty of obedience is an aspect of the duty of loyalty in fiduciary relationships); Miller & Gold, *supra* note 55, at 559 ("[F]ollowing instructions is frequently viewed as an element of loyalty.").

[60] *See, e.g.*, Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 10, at 2 ("The fiduciary benchmark does not permit the agent to exploit gaps or

Lawyers are in some ways in a similar boat to agents—they are fiduciaries of their clients, and owe duties of loyalty and care.[61] Like trustees and corporate directors, attorneys' duty of loyalty requires them to avoid conflicts, and like agents, they have a duty to follow clients' instructions.[62] Lawyers are, however, also officers of the court and are hired because they have a body of expertise that clients do not, meaning that lawyers are not strictly agents of their clients—lawyers have discretion to draw on their expertise in pursuing their clients' goals, and "[t]here are situations in which the lawyer simply has to say no to the client."[63] A number of other professionals, including physicians, are fiduciaries with complex duties of loyalty much like lawyers.[64] Physicians are generally said to be fiduciaries of their patients, with corresponding duties of loyalty and care.[65] Their duty of loyalty, like agents, requires them to follow patient instructions,[66] and, like trustees, forbids certain financial conflicts.[67] Like lawyers, however, doctors have duties to pursue the goals of their patients consistent with their expertise and the norms of the profession.[68]

Next, the broad category of those charged with making decisions for adults without legal capacity—guardians, conservators, attorneys-in-fact under durable powers of attorney, and more—are fiduciaries.[69] All of these roles are subject to a duty of loyalty, including the obligation to avoid

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arguable ambiguities in the principal's instructions . . . .").

[61] *See, e.g.*, Richard W. Painter, *Fiduciary Principles in Legal Representation*, in OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 3, at 265, 285 (describing lawyers as fiduciaries of their clients).

[62] *See, e.g.*, Sande Buhai, *Lawyers as Fiduciaries*, 53 ST. LOUIS U. L. J. 553, 554–555 (2009) (discussing implications of lawyers' fiduciary status on their duties); Benjamin P. Cooper, *When Clients Sue Their Lawyers For Failing to Report Their Own Malpractice*, 44 HOFSTRA L. REV. 441, 443 (2015) (discussing enforcement of lawyers' fiduciary duties).

[63] Painter, *supra* note 61, at 278.

[64] *See, e.g.*, Thomas L. Hafemeister & Selina Spinos, *Lean On Me: A Physician's Fiduciary Duty to Disclose an Emergent Medical Risk to the Patient*, 86 WASH. U. L. REV. 1167, 1199–1200 (2009) (discussing physicians' duty of loyalty); Mary Anne Bobinski, *Law and Power in Health Care: Challenge to Physician Control*, 67 BUFF. L. REV. 595, 638 (2019) (describing physicians' "duty of loyalty" as "oft-mentioned").

[65] *Id.*

[66] *See, e.g.*, John C.P. Goldberg, *The Duty of Care*, in HANDBOOK, *supra* note 3, at 405, 414 (observing that the duty of loyalty requires that a "physician embrace the 'intersubjectivity of the physician-patient relationship—i.e., that she *work with each patient* toward the goal of the patient's good health.").

[67] *See, e.g.*, MOORE V. REGENTS OF THE UNIV. OF CAL., 793 P.2d 479, 483–84 (Cal. 1990) (holding that physicians have a fiduciary duty to disclose financial conflicts to their patients).

[68] *Id.*

[69] *See, e.g.*, Sally Hurme & Erica Wood, *Introduction*, 2012 UTAH L. REV. 1157, 1184–85 (2012) ("Some, but not all, states include conservators in the definition of a fiduciary . . . ."); *see also* note 3.

conflicts and self-dealing, and a duty of care requiring reasonable property management.[70] Unlike agents, this duty of loyalty does not require these sorts of fiduciaries to follow contemporaneous instructions from the individual for whom they act—that person, by hypothesis, lacks the legal capacity to make their own decisions.[71] But a guardian's duty of loyalty usually requires that they make decisions based on a reasonable belief of what the person would have wanted under the circumstances—a standard similar to that of agents unable to reach their principal.[72]

Executors of estates, too, are fiduciaries.[73] They owe a duty of loyalty to the beneficiaries of the will to avoid conflicts and exercise reasonable prudence in administering their bequests, just as a trustee would.[74] More like agents, executors also have a duty to comply with instructions in the will.[75] Indeed, executors' duties of obedience to the content of the will are stricter than agents'—executors must fulfill its written language, regardless of whether they reasonably believe the testator would have changed their mind under the circumstances.[76]

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[70] *See, e.g.*, Chen, *supra* note 22, at 317 ("[T]he duty of loyalty prohibits the guardian or agent from acting in any way other than in the *sole* interest of the incapable individual."); Karen E. Boxx & Terry W. Hammond, *A Call for Standards: An Overview of the Current Status and Need for Guardian Standards of Conduct and Codes of Ethics*, 2012 UTAH L. REV. 1207, 1218 (2012) (observing that the Uniform Guardianship Act "requires that the guardian follow the Prudent Person Rule and the Prudent Investor Rule when investing the ward's assets").

[71] *See, e.g.*, James Toomey, *Narrative Capacity*, 100 N.C. L. REV. 1073, 1076 (2022) ("If you have the cognitive abilities demanded by the law, you may make any decision you want; if you do not, your decision will not be acknowledged by the legal system.").

[72] *See, e.g.*, Lawrence A. Frolik, *Is a Guardian the Alter Ego of the Ward?*, 37 STETSON L. REV. 53, 86 (2007) ("The ultimate result was not only the creation of advance healthcare directives and statutorily designated proxies, but a redefining of the proper role of a guardian—from being a representative of the court to being more akin to a judicially appointed agent of the ward."); Boxx & Hammond, *supra* note 70, at 1215 (observing that the Uniform Guardianship Act generally requires a guardian to decide "what the ward would have decided if asked when competent").

[73] *See, e.g.*, 15 N.C. Index 4th Executors and Administrators § 57 ("Executors have fiduciary duties to legatees, including a duty not to engage in self-dealing.").

[74] *See, e.g.*, 31 Am. Jur. 2d Executors and Administrators § 407 ("In fulfilling his or her fiduciary duty to the beneficiaries of a will, a personal representative must not engage in self-dealing.").

[75] *See, e.g.*, PECK V. BOTSFORD, 7 Conn. 172, 175 (Conn. 1828) ("An executor stands in the place of his testator."); Richard F. Storrow, *Wills and Survival*, 34 QUIN. L. REV. 447, 479 (2016) ("In essence . . . the will is a set of directions to an agent . . . ."); *see also* James Toomey, *Executor Discretion*, 110 IOWA L. REV. (forthcoming 2025) [manuscript at 40] ("[E]xecutors have long been recognized to be *something like* an agent of the testator and estate.").

[76] *See, e.g.*, Toomey, *Executor Discretion*, *supra* note 75, at 39–40 (noting this distinction),

Beyond these core, uncontroversial fiduciary relationships, there are a few legal relationships that are sometimes, but not always, called "fiduciary." For instance, parents are sometimes (and controversially) referred to as fiduciaries of their minor children.[77] Either way, because "enforcement of these duties . . . is largely accomplished through informal bonding and monitoring mechanisms," the law on parents as fiduciaries is thin.[78] Similarly, there has been recent, mostly academic, interest in the possibility that government officials are fiduciaries of their constituents.[79] But because, if government officials are in fact properly called fiduciaries, their duties would primarily be enforced politically, the law on the question is thin, and the it remains open.[80]

Finally, just as we can say something about what the word "fiduciary" is understood to refer to and entail, there are some things it is thought *not* to cover. The concept of the fiduciary relationship is most frequently bounded by *contractual* relationships—contract partners are not fiduciaries.[81] Indeed, the most famous (if famously cryptic) dictum of fiduciary law insists that "[m]any forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties."[82] Similarly (although less discussed, for obvious reasons), people with no legal relationship to one another—strangers on the street, say—are in no fiduciary relationship with one another; whatever the content of their legal duties are provided by tort and criminal law, not fiduciary law.

In sum, a broad range of legal relationships—from trustees and corporate directors to agents and executors—are described as fiduciary, governed by polysemous standards of "loyalty" and "care;" set against contract partners and people who have never met.

B. Fiduciary's Domain

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[77] *See, e.g.*, Elizabeth S. Scott & Ben Chen, *Fiduciary Principles in Family Law*, in HANDBOOK, *supra* note 3, at 227, 227 ("The relationship between parents and minor children fits intrinsically into a fiduciary framework."); Miller, *Justifying Fiduciary Duties*, *supra* note 6, at 971 ("Parents and guardians are fiduciaries of their children and wards.").

[78] Scott & Chen, *supra* note 5, at 227.

[79] *See, e.g.*, Evan J. Criddle, *A Sacred Trust of Civilization: Fiduciary Foundations of International Law*, in FOUNDATIONS, *supra* note 10, at 404 (arguing that states are fiduciaries of the populations they govern).

[80] *Id.*

[81] *See* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1412 n. 49 (2002) ("Fiduciary duties do not arise only in contractual relationships"); ORIGINAL GREAT AM. CHOCOLATE CHIP COOKIE CO., INC. V. RIVER VALLEY COOKIES, LTD., 970 F.2d 273, 280 (7th Cir. 1992) (distinguishing between contract partners and fiduciaries).

[82] MEINHARD V. SALMON, 164 N.E. 545, 546 (N.Y. 1928).

With this set of relationships in mind, many theories of the *domain* of fiduciary law—the contexts to which it applies—have been offered over the years. Most have turned out to be descriptively inadequate in some way, either suggesting that some relationships we don't call "fiduciary" ought to be, or vice versa.

Some theorists, for instance, start with trust and corporation as paradigmatic and suggest that fiduciary relationships are those in which one person exercises decision-making powers over the *property* of another.[83] As we've already seen, however, many fiduciary relationships—from agency to the physician-patient relationship—do not (or do not necessarily) involve powers over property.[84] So other theorists have suggested more catholicly that the fiduciary framework is applied where there is a significant power imbalance or factual or legal vulnerability on the part of the beneficiary.[85] But where a property theory would jettison core fiduciary relationships like agency, a power-imbalance account would expand fiduciary's domain—many contractual relationships are characterized by power imbalances or vulnerability, but are not thought to be fiduciary.[86]

As a result of these difficulties, many scholars have argued that there *is* nothing distinctive about the fiduciary label, and that "fiduciary duties" are (at best) simply shorthand for a set of implied contractual duties, based on the anticipated intent of the parties in incomplete contracts.[87] To its credit, this account can explain the diversity of applications of the fiduciary

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[83] *See, e.g.*, Miller, *Justifying Fiduciary Duties*, *supra* note 6, at 987 (noting that a "popular reductivist argument holds that fiduciary duties are a kind of private property right or are necessarily incidental to private property rights"); Shepherd, *supra* note 18, at 63 ("This traditional view of fiduciary relationships can be simply stated as follows: a fiduciary relationship exists where one person has legal title and/or control over property or other advantage, and another is the beneficial owner thereof.").

[84] *See, e.g.*, Yifat Naftali Ben Zion, *The Underlying Conceptions of Fiduciary Law* in III Oxford Studies in Private Law Theory (Paul B. Miller & John Oberdiek, eds., forthcoming 2025) (manuscript at 10) ("[T]he relations between lawyers and clients, which do not necessarily involve such direct control [over property], are also unquestionably fiduciary."); Boxx, *supra* note 3, at 3–4 (observing that durable powers of attorney "generally arise[] in a non-commercial setting").

[85] *See* DeMott, *Beyond Metaphor*, *supra* note 4, at 910 ("According to this view, courts impose fiduciary constraints whenever one person's discretion ought to be controlled because of characteristics of that person's relationship with another."); Andrew S. Gold & Paul Miller, *Introduction*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 10, at 1,1 ("Fiduciary law governs relationships marked by asymmetries of power.").

[86] *See, e.g.*, Shepherd, *supra* note 18, at 62 (making this argument).

[87] *See* Austin Scott, *The Fiduciary Principle*, 37 CAL. L. J. 540 (1949) (outlining a theory of fiduciary law as implied contract); *see also* Miller, *Justifying Fiduciary Duties*, *supra* note 6, at 980 (noting that the "most prominent reductivist argument" of fiduciary's domain is "from contract").

label—but it is not entirely clear how it could be falsified.[88] And it is black letter law that fiduciary duties are not contractual,[89] many fiduciary relationships (such as guardianships) arise in the absence of anything resembling contract,[90] and the core content of fiduciary duties, particularly the duty of loyalty, cannot be substantially modified by agreement.[91]

Before surrendering fiduciary to contract's empire, there *is*, we have recently seen, an alternative—a set of theories that account, at least roughly, for the relationships that the law calls "fiduciary." For example, the most prominent account in recent years has been Paul Miller's—"[a] fiduciary relationship is one in which one party (the fiduciary) exercises discretionary power over the significant practical interests of another (the beneficiary)."[92] Similarly, J.C. Shepherd had previously suggested that "[a] fiduciary relationship exists whenever any person receives a power of any type on condition that he also receive with it a duty to utilise that power in the best interests of another, and the recipient of the power uses that power."[93] And Lionel Smith theorizes from the set of relationships "in which a person has been authorized and empowered to carry out a mission, an assignment, a function, a task, a charge for or on behalf of someone else."[94]

Theories in this vein plausibly cover the field of fiduciary law—all of the relationships discussed above involve (at least) one person making legally effective decisions (in some sense) "on behalf" of another.[95] At the

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[88] *See, e.g.*, Seana Valentine Shiffrin, *Must I Mean What You Think I Should Have Said?*, 98 VA. L. REV. 159, 171–72 (2012) ("Given these issues, why not think that the better interpretive strategy is to look at what people actually said (and perhaps what they think they said), rather than at what the model suggests they should have said?").

[89] *See, e.g.*, Restatement (Third) of Trusts § 169 cmt. c (trustee's duties "are not contractual in nature"); *see also* DeMott, *Beyond Metaphor*, *supra* note 4, at 880 ("[D]escriptions drawn exclusively from contract principles are surely mistaken.").

[90] *See, e.g.*, Miller, *Justifying Fiduciary Duties*, *supra* note 6, at 982 ("Fiduciary relationships may alternatively be established by non-contractual agreement, but unilateral undertaking, or by legislative or judicial decree."); Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*, 91 WASH. L. REV. 581, 587 (2016) (summarizing the process of guardianship appointment).

[91] *See, e.g.*, Lucian Ayre Bebchuck & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. U. L. REV. 489, 496 n. 16 (2002) (observing the duty of loyalty for corporate directors as an example of non-waivable, mandatory corporate governance); Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L. J. 67, 69 (2005) ("[T]rustees' fiduciary duties are not, and never have been, completely waivable.").

[92] Miller, *The Fiduciary Relationship*, *supra* note 15, at 69.

[93] Shepherd, *supra* note 18, at 75.

[94] SMITH, LAW OF LOYALTY, *supra* note 35, at 3.

[95] The divergent senses in which one might read "on behalf of" will turn out to be significant. *See, e.g.*, WELLMAN, *supra* note 31, at 114 ("[T]he expression 'to act for' is

same time, these accounts exclude, at least *prima facie*, contractual relationships and relationships between strangers. In particular, these accounts focus our attention on an important aspect of fiduciary relationships—they are essentially *other-regarding*; in making a decision (in some sense) "on behalf of" another, the fiduciary's posture is oriented towards someone else in a significant respect.[96] In contrast, in discharging one's contractual obligations, one's primary posture is towards the *content of the agreement*, not the *partner* on behalf of whom one has no power to make decisions.[97]

So let's start here—with a preliminary theory of the domain of fiduciary

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ambiguous; it can mean either 'to act in place of' or 'to act in the interest of.'").

Moreover, there are a handful of relationships called "fiduciary" in which *who the other is* on behalf of whom a fiduciary decides is importantly, and difficultly, ambiguous. Consider a three-member business partnership. The law says that each partner owes fiduciary duties to the other partners and the partnership. *See, e.g.*, Rev. Uniform Partnership Act § 404(a) (describing business partners as fiduciaries of "the partnership and the other partners"). The ambiguity in these sorts of cases is whether partners, in exercising their legal powers, are deciding "on behalf of" (1) each partner, (2) the partnership as an entity distinct from each partner, or (3) in some way on behalf of the partnership's joint decision-making in a way distinct from each partner but that also does not treat the partnership as an entity in its own right. The difficulty for our purposes is that resolving which of these is the right way to think about partnership decision-making turns on difficult and controversial questions of the metaphysical status of collective identity and intentionality that I am setting aside here. *See generally* David P. Schweikard & Hans Berhard Schmid, *Collective Intentionality*, STAN. ENCYC. PHIL. (Edward N. Zalta, ed., 2021).

Finally, there are some roles often called fiduciary that do not fit this preliminary account, most prominently advisory roles, where one person offers advice and expertise to another, but does not have the power to make legally effective decisions. Because the focus here is not which relationships are properly called fiduciary, I set these sorts of roles aside. If the preliminary theory of the boundaries of the fiduciary concept offered here ends up adequately bounding the concept, then these relationships are not, in fact, "fiduciary" ones. If on a revised account of fiduciary's boundaries they qualify, further work is required to consider whether and how they fit in the account of fiduciary standards offered below.

[96] *See, e.g.*, Chen, *supra* note 22, at 5 (describing fiduciary relationships as "other-regarding"); SMITH, LAW OF LOYALTY, *supra* note 35, at 19 ("More recent common law scholarship has increasingly placed other-regarding power at the heart of the fiduciary relationship.").

[97] *See, e.g.*, Daniel Markovits, *Sharing* Ex Ante *and Sharing* Ex Post*: The Non-Contractual Basis of Fiduciary Relations*, in FOUNDATIONS, *supra* note 10, at 209 (observing that contractual implementation "takes the terms of the contract as its lodestar," rather than the contract partner); D. Gordon Smith & Jordan C. Lee, *Fiduciary Discretion*, 75 OHIO ST. L. J. 609, 618 (2014) ("[T]he duty of good faith and fair dealing is unlike a fiduciary duty because the former requires fidelity to the deal, while the latter demands fidelity to the beneficiary of the duty."); SMITH, LAW OF LOYALTY, *supra* note 35, at 107 ("[W]e do not need a concept of loyalty to regulate contractual performance, because the question whether the contract was performed or not is answered objectively.").

relationships as those that involve one person's legally effective decision-making (in some sense) "on behalf of" another. This is an account of the domain of fiduciary law, but it doesn't tell us much, if anything, about its content. That is the question to which we now turn.

C. Fiduciary's Content

Fiduciary relationships involve a fiduciary making legally effective decisions (in some sense) "on behalf of" a beneficiary. To that end, the law necessarily recognizes that fiduciaries have discretion in their decision-making—if it didn't, it wouldn't be the *fiduciary* deciding; but rather, say, the beneficiary or the court.[98] At the same time, however, fiduciary discretion is not unbounded—fiduciaries have discretion, but they can't use it however they want.[99] If the law granted decision-makers *unlimited* discretion, that wouldn't be a fiduciary relationship.[100] Indeed, the law nowhere recognizes unlimited discretion over another's person,[101] and with respect to property, the law calls unlimited discretion ownership in fee simple, not any sort of fiduciary relationship.[102]

Fiduciary relationships, in other words, are not just those in which one person decides in a legally effective way (in some sense) "on behalf of" another—they are those where the fiduciary exercises discretion *subject to some standard*.[103] Compared to efforts to organize fiduciary's domain, less

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[98] *See, e.g.*, Toomey, *Executor Discretion*, 75, at 55 ("[D]iscretion entails deference."); Smith & Lee, *supra* note 97, at 632 (noting that "courts applying fiduciary law should respect the grant of discretion to the fiduciary, rather than attempting to displace that discretion with judicial mandate"); SMITH, LAW OF LOYALTY, *supra* note 35, at 88 ("[I]f there was always a legally determined correct course of action—then there would not be a discretionary power.").

[99] *See, e.g.*, Boxx, *supra* note 3, at 41 ("While the general nature of fiduciary responsibilities assumes that the fiduciary's role is open-ended and unspecified, thus requiring fiduciary duties to put limits on that discretion . . . .").

[100] *See, e.g.*, Miller, *supra* note 15, at 72 ("[I]t is also an essential characteristic of fiduciary power that it is *specified*.").

[101] *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW (rev. ed., 1969) (arguing that stability is a conceptual necessity of lawfulness).

[102] *See, e.g.*, Tamar Frankel, *Watering Down Fiduciary Duties*, in FOUNDATIONS, *supra* note 10, at 242, 246 ("The absence of these conditions converts a possible fiduciary relationship into a gift.").

[103] *See, e.g.*, Smith & Lee, *supra* note 97, at 621 ("The fiduciary duty of loyalty constrains . . . discretion by proscribing certain forms of self-interested behavior by fiduciaries."). In theorizing the content of fiduciary standards, it is worth setting aside for the moment whether they must be enforceable by private lawsuit—some theorists hold that it is essential to the concept, *see, e.g.*, Toomey, *Executor Discretion*, *supra* note 75, at 44–47 (summarizing this argument), while others do not, Velasco, *supra* note 46, at 63 (observing that in corporate fiduciary law the standard of conduct and the extent to which it

work has been done theorizing the content of fiduciary standards.[104] As a first step, we have seen that fiduciary conduct is universally governed by something called the "duty of loyalty;"[105] often thought to entail that the fiduciary act in the "best" or "sole" interests of the beneficiary.[106] Indeed, unlike the other "fiduciary" duties, the duty of loyalty cannot generally be modified by agreement, making it plausibly essential to the concept.[107] It is true that everywhere the law finds a fiduciary relationship, it finds a non-waivable set of duties it refers to as the "duty of loyalty."[108]

From this perspective, theories that describe fiduciary standards in terms of the duty of loyalty are true as far as they go.[109] But if the best we can say about the content of fiduciary standards is that they require a "duty of loyalty," it isn't very *helpful*.[110] As we've seen, the "duty of loyalty" means different things in different fiduciary relationships—sometimes it just requires conflict avoidance enforced with bright-line rules; sometimes it asks fiduciaries to make inferences about what their beneficiary would have wanted; sometimes both, or something else.[111] Defining the content of fiduciary relationships in terms of the "duty of loyalty" pushes the

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is enforceable diverge). In the end, of course, either conclusion would have to be argued for.

[104] *See, e.g.*, Edelman, *supra* note 34, at 22 (describing the different ways in which the law refers to fiduciary standards as motivated by "loyalty" or "best interests").

[105] *See, e.g.*, Karen E. Boxx, *Of Punctilios and Paybacks: The Duty of Loyalty Under the Uniform Trust Code*, 67 MO. L. REV. 279, 280 (2002) ("The duty of loyalty has been called 'the essence of the fiduciary relationship' and even has been considered an expression synonymous with fiduciary.").

[106] *See, e.g.*, SHEPHERD, *supra* note 18, at 35 (describing the essence of fiduciary relationships as one person's exercise of power in the best interests of another); Vincent R. Johnson, *The Fiduciary Obligations of Public Officials*, 9 ST. MARY'S J. LEGAL MAL & ETHICS 298, 312 (2019) ("The essence of fiduciary duty is loyalty—loyalty to the interests of the person who is the beneficiary of the relationship.").

[107] *See* SMITH, LAW OF LOYALTY, *supra* note 35, at 30 ("A great deal of judicial and academic writing on fiduciary law . . . treats loyalty as the central organizing concept . . . .").

[108] *See, e.g.*, Gold & Miller, *Introduction*, *supra* note 10, at 1 ("There is little doubt that fiduciary relationships generate at least one distinctive legal duty, the duty of loyalty.").

[109] *See, e.g.*, DeMott, *Beyond Metaphor*, *supra* note 4, at 882 ("If a person in a particular relationship with another is subject to a fiduciary obligation, that person (the fiduciary) must be loyal to the interests of the other person (the beneficiary).").

[110] *See, e.g.*, Boxx, *supra* note 3, at 17 (describing the duty of loyalty as "impossible to define with precision")

[111] *See supra* Part I.A; *see also* Shepherd, *supra* note 18, at 51 ("[T]he problem is constantly arising of the extent or scope of the duty of loyalty that arises from the fiduciary relationship"); Gold, *supra* note 17, at 190 (discussing the diversity of content in the fiduciary relationships duty of loyalty); SMITH, LAW OF LOYALTY, *supra* note 35, at 79–80 ("There is little consensus, however, as to what precisely [the duty of loyalty] means.").

theorizing to another level—it demands a theory of the "duty of loyalty."

Thus far, theories of the unified conceptual content of the duty of loyalty have not been forthcoming. For example, Andrew Gold has suggested that the best that can be said about fiduciary standards is that they "require a legal duty of loyalty, full-stop. There is no particular conception of what loyalty is that will fit all fiduciary relationships . . . ."[112] If this is indeed all there is, it's still fair to wonder whether there is any theoretical coherence to the content of fiduciary standards.[113] We can *call* anything we want "loyalty"—what we need under this account is a theory of what counts as a conception of fiduciary loyalty, once again punting the theorizing elsewhere in pursuit of coherence.

Similarly, Lionel Smith has argued that the standards that guide fiduciary decision-making are derived from the purpose or mission for which the fiduciary was granted legal powers—"a person who is granted a power for the pursuit of an other-regarding mission can only rightly use the power for that purpose."[114] Like an account that relies on bounded polysemy in the duty of loyalty, this view can explain the diversity of obligations the law imposes on fiduciaries.[115] But also like that account, it pushes the theorizing to another level—demanding theories of the different purposes of fiduciary roles.[116]

As we've seen, the question of the purpose of fiduciary relationships in general has proven difficult—theories of fiduciary's domain bounded by a unified purpose, whether intent implementation, correcting power imbalances, or facilitating money management have proven unsatisfactory.[117] Our best preliminary theory of fiduciary's domain—fiduciaries are those legally empowered to make decisions (in some sense) "on behalf of" others—suggests that the fiduciary framework might be allocated for a wide range of purposes.[118] But if there *is* some coherence to the standards governing fiduciary decision-making, that would suggest coherence in the purposes of fiduciary relationships. By theorizing about the standards governing fiduciary decision-making, then, we might end up shedding light on the purposes of different fiduciary relationships.[119]

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[112] Gold, *supra* note 17, at 190.

[113] *See, e.g.*, SMITH, LAW OF LOYALTY, *supra* note 35, at 30 ("[Loyalty] has so many meanings that some would suggest that it cannot usefully serve as an organizing concept in this field of law.").

[114] SMITH, LAW OF LOYALTY, *supra* note 35, at 15.

[115] *See* SMITH, LAW OF LOYALTY, *supra* note 35, at 46 (discussing different fiduciary roles and corresponding obligations).

[116] *Id.*

[117] *See supra* Part I.B.

[118] *See supra* Part I.B.

[119] *See infra* Part III (offering an account of the law's view of different purposes in

In short, while we can grant that fiduciary relationships involve one person's legally effective decision-making (in some sense) "on behalf of" another, subject to some standard, little progress has been made on theorizing the content of that standard or standards. We know that it is *called* the "duty of loyalty," but have little insight into what that *means*. In beginning that project, let's turn to health law.

II. BEST INTERESTS AND SUBSTITUTED JUDGMENT IN FIDUCIARY LAW

Fiduciary relationships involve one person's making legally effective decisions (in some sense) "on behalf of" another, subject to some standard called the "duty of loyalty." Our project is to theorize the content of that standard. In principle, it could be almost anything—the "duty of loyalty" could mean that fiduciaries must decide based on what they think is best for society overall, or what they think is best aesthetically.[120]

Most of the infinite possible standards are obviously theoretical non-starters. In getting a grip on fiduciary standards, it would be useful to start with standards that actually guide fiduciary decision-making in some concrete legal context. That is what this Part does. In the fiduciary sub-field of deciding on behalf of incapacitated patients, a vast literature and thorough legal apparatus debates two decision-making standards—"best interests" and "substituted judgment"—that might offer a lens on the standards of fiduciary decision-making generally.

This Part first discusses the structure of, and debate between, the best interests and substituted judgment standards in healthcare decision-making. It then turns to fiduciary law generally, arguing that these two standards can be seen to organize and systematize the standards by which other fiduciaries must decide.

A. Surrogate Decision-Making in Healthcare

Although there are many domains in which decisions have to be made for people who cannot decide for themselves, healthcare decision-making has generated the most substantial literature—perhaps because of its stakes, and the frequency with which it occurs.[121] When a patient is unconscious or

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different fiduciary relationships, derived from differences in the standards governing fiduciary decision-making).

[120] *See, e.g.*, Toomey, *Love, Liberalism, Substituted Judgment*, *supra* note 32 1290 (2024) (describing possible alternative decision-standards); Frolik, *supra* note 72, at 61 (listing conceivable standards that could guide surrogate decision-making).

[121] *See, e.g.*, Alexander A. Boni-Saenz, *Personal Delegations*, 78 BROOK. L. REV. 1231, 1253 (2013) (describing a "sizeable literature" on this topic); *see also* Kohn, *supra* note 3, at 249 ("[N]early half of older adults who are admitted into a hospital have at least

otherwise incapacitated to make their own medical decisions, the law enables another person—called a "surrogate decision-maker"—to decide on the patient's behalf. From surrogates selected by the patient, by durable power of attorney or healthcare proxy, to those selected by default, like a statutory surrogate or guardian, medical surrogate roles are generally understood to be fiduciary relationships, with the legal power to make healthcare decisions on behalf of the beneficiary patient vested in the fiduciary surrogate.[122]

In the voluminous literature discussing the standards by which these fiduciaries ought to decide, two alternatives have dominated—"best interests" and "substituted judgment."[123] Under the "best interests" standard, a surrogate is directed to make what is "objectively" the best all-things-considered decision for the patient.[124] The test is "objective" insofar as it takes into account the objective circumstances facing the patient alongside general social understandings of what the interests of the patient are and how they might be best promoted.[125] To that end, best interests decision-making considers factors like quality of life, likelihood of success of a given course of treatment and associated risks, and available alternatives—the sorts of things reasonable patients tend to care about.[126] Moreover, the best interests standard is generally understood to consider

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some of their treatment decisions made for them by a surrogate decision-maker.").

[122] *See, e.g.*, Kohn, *supra* note 3, at 255 ("A surrogate decision maker, regardless of type, has a duty of loyalty to the principal."); *In Matter of Elizabeth R. D'Arcy*, 19 QUINNIPIAC PROB. L. J. 40 (2005) (describing a decision-maker under a healthcare power of attorney as a fiduciary).

[123] *See, e.g.*, Jonathan Herring, *Entering the Fog: On the Borderlines of Mental Capacity*, 83 IND. L. J. 1619, 1632 (2008) (describing "fierce" and "familiar" debate "between those who support a best interests test and those who support a substituted judgment test"); Joan H. Krause, *Can Health Law Truly Become Patient Centered?*, 45 WAKE FOREST L. REV. 1489, 1500 n. 37 (2010) (referencing the "long-standing debate over whether surrogate decision-makers should be expected to act in accordance with a best-interests or a substituted-judgment standard").

[124] *See, e.g.*, Steven M. Richard, *Someone Make Up My Mind: The Troubling Right to Die Issues Presented by Incompetent Patients With No Prior Expression of a Treatment Preference*, 64 NOTRE DAME L. REV. 394, 408–09 (1989) ("Under [the best interests] approach, the surrogate evaluates the patient's best interests based upon objective socially shared criteria.").

[125] *See, e.g.*, Stewart G. Pollack, *Life and Death Decisions: Who Makes Them and By What Standards?*, 41 RUTGERS L. REV. 505, 524 (1989) (noting that the best interest test "[m]easure[s] by a standard of objective reasonableness . . . as viewed by a reasonable person"); *see also* Smith & Lee, *supra* note 97, at 627 (observing that "reasonableness" "cannot be understood and applied without reference to social norms.").

[126] *See, e.g.*, Kim Dayton, *Standards for Health Care Decision-Making: Legal and Practical Considerations*, 2012 UTAH L. REV. 1329, 1362–63 (2012) (describing factors under the best interests test).

only (or be overwhelmingly focused on) the patient's best interests now, rather than some broader sense of a person's lifelong "interests."[127]

Given its aspiration—making the "objectively best" decision for the patient—the best interests standard is agnostic to the values, preferences, and longer-term life story of the individual patient. Indeed, it treats the patient as a placeholder reasonable patient who would want what a reasonable person would want, rather than as a *particular* person who might decide something other than what is "objectively best," and be entitled to respect.[128] Indeed, best interests' agnosticism towards the broader identity of the patient is part of its appeal in the bioethical debate—the standard is often endorsed on the hypothesis that certain kinds of incapacitated patients may indeed no longer be the person they were previously, and might be a new person about whom we know little, or not a person at all but some other sort of entity to which we have moral obligations.[129]

In short, best interests reasoning is distinguished by the *impersonal*, or *de*-personalized, posture according to which it asks fiduciaries to decide—it decides for the patient as though they were a placeholder of a reasonable person, rather than any*one* in particular.[130] In the language of bioethics, the test is justified by "beneficence"—acting for the objective benefit of the patient.[131] Where it applies in law governing healthcare decision-making, best interests is typically operationalized through a multi-factorial balancing test.[132] But the same impersonal posture could conceivably justify prophylactic rules, rules of thumb, or heuristics—that, say, any illness that can be treated without side effects ought to be.[133]

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[127] *See, e.g.*, Rebecca Dresser, *Missing Persons: Legal Perceptions of Incompetent Patients*, 46 RUTGERS L. REV. 609, 636 (1994) ("'Best interests' is traditionally invoked as shorthand for treatment decisionmaking centered on protecting the incompetent patient's contemporaneous welfare.").

[128] *See, e.g.*, Norman L. Cantor, *The Real Ethic of Death and Dying*, 94 MICH. L. REV. 1718, 1733 (1996) ("[T]he best-interests standard assumes that the patient would want the same treatment that the average person in same circumstances would want."); Richard, *supra* note 21, at 408 (observing that the best interest test is not justified by reference to the patient's autonomy).

[129] *See, e.g.*, Rebecca S. Dresser, *Life, Death, and Incompetent Patients: Conceptual Infirmities and Hidden Values in the Law*, 28 ARIZ. L. REV. 373 (1986) (making this argument).

[130] *See supra* 124.

[131] *See, e.g.*, Pollack, *supra* note 125, at 524 (describing the best interests test as rooted in beneficence rather than autonomy); Janet L. Dolgin, *Medical Disputes and Conflicting Values: Is There a "Right to Die" Later?*, 2020 B.Y.U. L. REV. 95, 110 (same, and noting that beneficence and autonomy may conflict).

[132] *See, e.g.*, Cantor, *Death and Dying*, *supra* note 128, at 1733 (listing factors relevant to best interests analysis); Chen, *supra* note 22, at 45 (describing the best interests test as multifactorial).

[133] *Cf., e.g.*, JENNIFER S. BLUMENTHAL-BARBY, GOOD ETHICS AND BAD CHOICES: THE

Arrayed against this approach is the substituted judgment standard. Substituted judgment asks surrogate decision-makers to make the decision the patient would have made if they were able.[134] Indeed, a surrogate is to make the decision the patient would have made even if the surrogate thinks some other decision would be in their objective best interest.[135] Rather than considering the treatment options from an objective, third-person perspective, the substituted judgment standard directs a surrogate to what is known about what the *patient* would have done, subjectively; treated as a unique individual.[136] To make this sort of a decision, surrogates look to written evidence of treatment preferences, as well as to general knowledge of the patient's values, aspirations, and perspectives on medical treatment.[137]

In contrast to best interests, the substituted judgment standard takes into account a broader time-horizon—considering the patient's life and story rather than their interests at the time of decision.[138] Where best interests is, by design, agnostic to the patient's broader personal identity,[139] substituted judgment is focused on just that—and is instead agnostic to "objective," generalized social views about whether the decision is a good one. In bioethical terms, substituted judgment is justified with reference to "autonomy" over "beneficence."[140]

RELEVANCE OF BEHAVIORAL ECONOMICS FOR MEDICAL ETHICS (2021) (arguing that behavioral economics may justify heuristic nudges towards decisions generally in people's objective best interests in medical decision-making).

[134] *See, e.g.*, Chen, *supra* note 22, at 35 ("The equitable doctrine of substituted judgment . . . requires the court to give effect to what the incapable individual would have wanted if she was capable."); Boni-Saenz, *supra* note 121, at 1255 (describing substituted judgment as a "subjective test").

[135] *See, e.g.*, Michael P. Combs, Kenneth A. Raskinski, John D. Yoon & Farr A. Curlin, *Substituted Judgment in Principle and Practice: A National Physician Survey*, 88 MAYO CLINIC PROCS. 666, 666 (2013) (noting that substituted judgment requires physicians to do what the patient would have wanted, not what the surrogate thinks is best).

[136] *See, e.g.*, Toomey, *Love, Liberalism, Substituted Judgment*, *supra* note 32, at 1298 ("[T]he law asks surrogate decision-makers to do what the person would have done, based on their knowledge of and inferences about the person before their incapacity.").

[137] *See, e.g.*, Eric Virgil, *Substituted Judgment—How Do You Prove What an Incapacitated Person Would Want?*, 46 ACTEC L.J. 119 (2020) (discussing proof that a proffered substitute judgment is indeed what the patient would have wanted).

[138] *See, e.g.*, RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA AND INDIVIDUAL FREEDOM 190–96 (1993) (arguing that substituted judgment is an appropriate standard by virtue of considering an individual's life as a whole).

[139] *See supra* 128.

[140] *See, e.g.*, Boni-Saenz, *supra* note 121, at 1255 (arguing that substituted judgment "safeguards the ward's autonomy"); Rebecca Dresser, *Precommitment: A Misguided Strategy for Security Death With Dignity*, 81 TEX. L. REV. 1823, 1827 (2003) ("Scholars defending the authority of advance directives assign a high value to autonomy . . . .").

Although the debate is generally framed with best interests and substituted judgment as oppositional paradigms—and clearly the *postures* they ask fiduciaries to adopt are—scholars have pointed out that in implementation these standards can be blended in complex ways.[141] Indeed, when considering the "best interests" of a *person*, it is hard to disregard *their* interests.[142] And, indeed, many statutory formulations of the best interests test ask decision-makers to at least take into account the patient's values and known preferences, blending substituted judgment into best interests.[143] At the same time, since most people aspire to make decisions in their own best interests, substituted judgment can look a lot like best interest reasoning in practice.[144]

Moreover, while the debate between these standards has largely taken place in the pages of law reviews and philosophy journals, it has not been confined to academia—both standards have a long history of legal application. Indeed, their legal history is intertwined. Long before being applied to healthcare decision-making in the twentieth century, both the best interests and substituted judgment standards were developed in equity—the domain from which fiduciary law emerged—to make financial decisions for the incapacitated.[145] In the twentieth century, the law's interest in these standards, and the debate between them, drifted into healthcare, partially driven by a handful of high-profile cases—Karen Quinlan; Nancy Cruzan.[146]

Today, although the debate between best interests and substituted

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[141] *See, e.g.*, Daniel P. Sulmasy & Lois Snyder, *Substituted Interests and Best Judgments: An Integrated Model of Surrogate Decision Making*, 304 JAMA 1946, 1946 (2010) (observing that the bifurcation of substituted judgments and best interests "does not always reflect clinical reality"); Pollack, *supra* note 125, at 529 n. 123 (noting that "substituted judgment and best interests test[s] may sometimes overlap").

[142] *See, e.g.*, Helen J. Taylor, *What Are "Best Interests"? A Critical Evaluation of "Best Interests" Decision-Making in Clinical Practice*, 24 MED. L. REV. 176, 176 (2016) (arguing that objective best medical interests is not the way to understand the best interests of persons).

[143] *See, e.g.*, Alisa Balderas, Note, *The Variability of Schizophrenia and its Effects on Procreational Autonomy*, 28 S. CAL. INTERDISC. L. J. 473, 485 (2019) (discussing California's approach, described as "essentially a hybrid approach of the best interest and substituted judgment standards").

[144] *See, e.g.*, Thomas G. Gutheil & Paul S. Appelbaum, *Substituted Judgment: Best Interests in Disguise*, 13 HASTINGS CEN. REP. 8, 8 (1983) (arguing that substituted judgment bleeds into best interest analysis).

[145] *See, e.g.*, Dresser, *Missing Persons*, *supra* note 127, at 636–37 (observing that "best interests" was "[i]mported from the English law governing management of the 'lunatic's' estate, as well as disputes over child custody . . . ."); Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L. J. 1, 16–30 (1990) (describing the origins of the substituted judgment test in the equity courts).

[146] *See, e.g.*, Harmon, *supra* note 145, at 30–41 (summarizing this history).

judgment continues to rage in bioethics,[147] as a *legal* matter, the issue is largely settled in healthcare decision-making—substituted judgment won.[148] After drifting from guardianship law into healthcare decision-making in the mid-twentieth century, substituted judgment rapidly gained favor and was endorsed by the Supreme Court of the United States in *Cruzan*.[149] And after gaining traction in healthcare decision-making, substituted judgment has returned as the first choice decision-making standard to the fiduciary domain of its origins—financial decision-making on behalf of the incapacitated—endorsed by the Uniform Probate, Power of Attorney, and Guardianship Codes.[150]

In sum, with respect to fiduciary healthcare decision-making on behalf of incapacitated patients, there is robust literature and legal experience debating between two alternative standards—best interests (objective, de-personalized, perhaps easier, less likely to impose the values of no-longer-existent person on a new morally-significant entity) and substituted judgment (attuned to the personal identity of the patient). Let's now return to the broader domain of fiduciary law, and see how these two standards might be thought to organize fiduciary decision-making standards more generally.

B. Fiduciary Standards from Trustee to Agent

Fiduciaries are, we have seen, individuals who make legally effective decisions (in some sense) "on behalf of" another, guided by some standard. Best interests and substituted judgment are decision-making standards applied to fiduciaries making healthcare decisions for the incapacitated. As we'll see, these paradigms offer a lens through which to organize fiduciary standards across fiduciary's domain. Indeed, we might say that a fiduciary is a person making legally effective decisions (in some sense) "on behalf of" another, guided by the standards of best interests, substituted judgment, or some combination of the two.

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[147] *See, e.g.*, Samuel Dale, *Personhood, Critical Interests, and the Moral Imperative of Advance Directives in Alzheimer's Cases*, 7 VOICES IN BIOETHICS (2021) (summarizing the state of the debate).

[148] *See, e.g.*, Toomey, *Love, Liberalism, Substituted Judgment*, *supra* note 32, at 1299 ("[B]est interests has fallen broadly into disfavor as compared to substituted judgment.").

[149] CRUZAN V. DIR., MO. DEP'T HEALTH, 497 U.S. 261 (1990) (holding that a state may demand clear and convincing evidence of a patient's preference to enforce a substituted judgment based on it).

[150] *See, e.g.*, Mark R. Caldwell, J. Brian Thomas & Marisol Trottierr, *Ensure Powers of Attorney Fulfill Intended Purposes*, 45 EST. PLAN. 3, 4 (2018) (observing that the Uniform Power of Attorney Act endorsed substituted judgment); Boxx & Hammond, *supra* note 70, at 1215 (same for Uniform Guardianship Act).

Let's start with classic common law trust. Through the lens of healthcare decision-making, the duties that trustees owe beneficiaries look a lot like the best interests standard. Indeed, trustees' overriding duty is to maximize the value and longevity of the trust corpus, while making distributions as provided in the terms of the trust.[151] All of the fiduciary duties governing trustee behavior are tailored towards this end in one way or another. Self-dealing, for instance, raises too great risk of loss, too difficult to police by lay beneficiaries, and is banned outright, while other conflicts raise similar difficulties and are tightly regulated.[152] The trustee, similarly, has a duty to invest the corpus as a prudent investor would, to keep records and account to beneficiaries to shed light on any mismanagement.[153]

This is best interests reasoning. Like best interests reasoning in healthcare, the question that guides trustees is not about what the beneficiaries want as individuals—indeed, trustees have no general duty to concern themselves with the beneficiary's goals for the trust corpus.[154] To be sure, in making distributions, the trustee has a duty to follow the terms of the trust, and thus has to be concerned with the role of the money among *someone's* life projects—but that someone is the settlor, who set up the trust and wrote its terms, not the beneficiaries.[155] Beyond that, trustees' duties are to act in a way thought to maximize the value and longevity of the trust

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[151] *See, e.g.*, Trent S. Kiziah, *The Trustee's Duty to Diversify: An Examination of the Developing Case Law*, 36 ACTEC L.J. 357, 390 (2010) (discussing the trustee's duty to maximize trust corpus against their duty to follow the terms of the trust); Yun-chien Chang & Henry E. Smith, *An Economic Analysis of Civil Versus Common Law Property*, 88 NOTRE DAME L. REV. 1, 37 (2012) (same).

[152] *See, e.g.*, Peter J. Wiedenbeck, *Untrustworthy: ERISA's Eroded Fiduciary Law*, 59 WM. & MARY L. REV. 1007, 1071 (2018) ("This 'no-further-inquiry' rule establishes a prophylactic standard designed to bar deals involving a high risk of abuse."); Deborah S. Gordon, *Trusting Trust*, 63 U. KAN. L. REV. 497, 507–08 (2015) (describing the no further inquiry rule as a "strong prophylactic rule designed to counter-balance the potential for misappropriation"); SMITH, LAW OF LOYALTY, *supra* note 35, at 34 ("Conflicts of interest create a universal danger when judgment must be exercised unselfishly, because power can be improperly used entirely unconsciously.").

[153] *See, e.g.*, Uniform Prudent Investor Act § 2 ("A trustee shall invest and manage trust assets as a prudent investor would . . . ."); Boxx & Hammond, *supra* note 70, at 1218 (describing the Prudent Investor Rule as comprised of "standards").

[154] *See, e.g.*, Miller & Gold, *Fiduciary Governance*, *supra* note 55, at 559 ("A paternalistic form of fiduciary loyalty is arguably prominent in trust law, in which trustees have independent discretion to make choices that beneficiaries may disagree with.").

[155] *See, e.g.*, Uniform Prudent Investor Act § 3; *see also* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1118 (2004) ("The deviation doctrine is meant to be intent-serving, on an imputed intent standard (what the settlor would have wanted done had he or she known of the changed circumstances).").

corpus, while minimizing the risk of loss.[156] Maximizing the value and duration of property is, of course, what is in the objective, impersonal best interests of property owners.[157]

To be sure, unlike in health law, the fiduciary duties that guide trustee decision-making are paradigmatically strict rules rather than all-thing-considered balancing tests. But just as we can imagine heuristics crystallizing in best interests decision-making in healthcare—for example, a rule to treat anything easily treated with antibiotics—presumably the law has concluded that self-dealing is inconsistent with the objective best interests of beneficiaries *consistently enough* to justify a prophylactic rule.[158] Moreover, many of the standards governing trustee behavior *are* all-things-considered balancing tests under which the trustee must show that a decision is in the beneficiary's objective best interests, just as best interests is implemented in healthcare—from a trustee seeking prior court approval for a conflict to one claiming that their level of diversification was adequate.[159]

Contrast all this with the fiduciary duties of an agent. The distinctive duty of agency is, of course, the duty of obedience, which has no correlate in the relationship between trustee and beneficiary.[160] The duty of obedience is a duty to do as the principal instructs.[161] This is a form of substituted judgment. In some cases, what agency calls the "duty of obedience" just *is* decision-making according to the substituted judgment standard—where an agent cannot get in touch with the principal, they are to do what they reasonably believe the principal would have done.[162] That is the same standard as surrogates making healthcare decisions for

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[156] *See supra* note 44.

[157] *See, e.g.*, SMITH, LAW OF LOYALTY, *supra* note 35, at 111 ("Generally when the mission is to look after the financial or pecuniary affairs of another person or persons, what loyalty requires in the exercise of powers is that the powers be used to promote the interests of that other person or persons.").

[158] *See, e.g.*, Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. CORP. L. 565, 573–74 (2003) ("The underlying assumption is that in the trust law context these deals are so frequently undesirable that the costs of extirpating the entire class of transaction (a rule) are less than the costs of case-by-case adjudication (the fairness standard)."); Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor Langbein*, 47 WM. & MARY L. REV. 541, 541 (2005) (defending this assumption in the context of trust law).

[159] Restatement (Third) of Trusts § 78 cmt. c(3); SITKOFF & DUKEMINIER, *supra* note 40, at 611 (describing *a priori* judicial approval of conflicts in the beneficiary's best interest).

[160] *See supra* note 59 & accompanying text.

[161] *Id.*

[162] *See, e.g.*, DeMott, *Fiduciary Character*, *supra* note 60, at 7–8 (summarizing older cases demonstrating this dynamic).

incapacitated patients, where it is explicitly called "substituted judgment."[163]

But there is a broader point here, perhaps obscured by a focus on incapacitated or unavailable principals in health law—agency is *always* substituted judgment, or at least universally *justified* by substituted judgment-like reasoning.[164] It is true that where an agent for a capacitated principal has recently received explicit instructions, the law does not tell the agent to make what it calls a "substituted judgment"—the agent is simply to reasonably interpret the instructions and follow them.[165] But just as with trust, it is important to distinguish the justificatory *frame* the law is asking a fiduciary to adopt from the rules it prescribes to *implement* that frame—the distinction between the no-conflicts rules of trust and the best interests decision-making frame that justifies them, for example.[166]

Asking an agent to follow a principal's instructions (as opposed to deciding in their best interests, or according to any other conceivable standard) is ultimately only justifiable if what the law is *trying to do* is implement what the principal wants—otherwise there is no reason to care about what they said; we care about what people *say* because we presume, in general, it is a pretty good indication of what they *think*.[167] The inference that what a capacitated principal said recently is what they want is strong—much stronger than cases where an incapacitated principal made vague statements decades ago—and we might worry about principals later fraudulently claiming they did not mean what they said.[168] These sorts of

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[163] *See, e.g.*, Lawrence A. Frolik & Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 45 U. J. L. REFORM 739, 749 (2012) (noting that substituted judgment "may justify rejection of a previously stated preference when it is likely that the incapacitated person would make a different decision if able to comprehend the new circumstances").

[164] *See, e.g.*, DeMott, *Fiduciary Character*, *supra* note 60, at 33 ("Agency doctrine, in contrast, focuses an agent's interpretation on the principal's expressed or cognizable wishes at the time the agent determines how to act.").

[165] *See, e.g.*, Restatement (Third) of Agency § 2.01 ("An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.").

[166] *See supra* note 158.

[167] *See, e.g.*, Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 357; 379 (2007) ("Actual agreement matters in the law of contracts."); Toomey, *Executor Discretion*, *supra* note 75, at 13 ("[S]olicitude for objective intents could not justify a scheme of freedom of testation because objective intents do not exist."); *see also* DeMott, *Fiduciary Character*, *supra* note 60, at 906 ("How the agent should understand the principal's instructions is contingent on circumstances when the agent must determine the action to take and on an honest assessment of what the principal would then wish the agent to do.").

[168] *See, e.g.*, Toomey, *Executor Discretion*, *supra* note 75, at 20 ("If you're trying to

considerations plausibly justify a rule directing agents to act according to a reasonable interpretation of the principal's instructions—but that rule is only coherent if the broader goal is for the agent to do what the principal would have wanted; substituted judgment.[169]

Best interests and substituted judgment, then, give us two poles of fiduciary standards—paradigmatically, a trustee's duty of loyalty is a form of best interests reasoning; agents', substituted judgment. And just as these standards blend into one another in healthcare decision-making, the standards by which other fiduciaries act blend some aspects of best interests with some aspects of substituted judgment. Indeed, as we'll see, even in some cases involving trustees or agents, the lines are not so clean as they are at these polar exemplars.

Take corporate directors. Directors' duties to shareholders are, in general, close to the best interests pole.[170] Their overwhelming duty is to *maximize shareholder value*; the *monetary* returns on the shareholder's investments.[171] This is in the objective best interests of shareholders, and has nothing to do with them as individual persons—particularly clearly in publicly-traded corporations, where the identity of shareholders is literally interchangeable, and might be entirely different at two points in time, while the directors' duties remain constant. Through this lens, then, while directors are often called "agents" of the shareholders,[172] the standards governing their conduct is closer to those of trustees.[173]

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determine whether something I said reflects my intent now, your best heuristic might be *when* I said it."); Solan, *supra* note 167, at 379 ("[N]otwithstanding the enormous amount of attention it has received, the 'objective theory of contracts' appears to be a simple—and sensible enough—rule of evidence . . . designed to prevent litigating parties from relying upon testimony of an earlier state of mind without evidence."); *see also* DeMott, *Fiduciary Character*, *supra* note 60, at 4 ("[A]cting as the principal's extension, the agent's duty is one of faithful interpretation, aimed at accurate replication of how the principal would have acted at the time the agent determines what to do.").

[169] *Cf.* Toomey, *Executor Discretion*, *supra* note 75, at 17–19 (explaining the plain meaning rule in will interpretation on evidentiary grounds); Solan, *supra* note 167, at 379 (same in contracts).

[170] *See, e.g.*, Miller & Gold, *Fiduciary Governance*, *supra* note 55, at 559 ("[D]irectors may act contrary to their shareholders' known desires when executing their mandate").

[171] *See, e.g.*, IN RE RURAL METRO CORP., 88 A.3d 54, 80 (Del. Ch. 2014) ("In substance, the directors' fiduciary duties require that they seek to promote the value of the corporation for the benefit of the stockholders." (quotation omitted)).

[172] *See, e.g.*, John C. Carter, *The Fiduciary Rights of Shareholders*, 29 WM. & MARY L. REV. 823, 826 (1988) (describing corporate directors as agents); Dalia Tsuk Mitchell, *Status Bound: The Twentieth Century Evolution of Directors' Liability*, 5 N.Y.U. J.L. & BUS. 63, 64–65 (2009) (arguing that the law's understanding of corporate directors has towards an agency model).

[173] *See, e.g.*, Margaret M. Blair, *A Contractarian Defense of Corporate Philanthropy*, 28 STETSON L. REV. 27, 34 (1998) ("[T]he idea that managers and directors are 'agents' of

However, the directors' decision-making standards do sometimes integrate aspects of substituted judgment. Directors owe duties to follow a corporation's charter or bylaws—which, especially in closely-held corporations, may involve some religious or social end, say, or a commitment to a particular line of business.[174] And the corporation's charter and bylaws are ultimately crafted and amended by the shareholders.[175] Directors for purposive corporations engage in a something like substituted judgment—whether making inferences about the collective personal wishes of the shareholders as enshrined in the charter or (on stronger views of the realism of corporations) perhaps a substituted judgment on behalf of the corporation as an entity.[176]

A more thorough, if more complex, blend of the best interests and substituted judgment frames governs the behavior of fiduciary professionals like lawyers and physicians. Lawyers and physicians, of course, have a duty of obedience towards their clients and patients and are not to do anything the client or patient wouldn't do—they are to that extent frequently thought of as agents.[177] At the same time, lawyers and physicians don't just do what the client or patient would do themselves—a doctor or lawyer *can* do things, and *knows what* to do, in ways that an ordinary person does not.[178] So, in pursuing the goals of their client (a substituted judgment lens) professional fiduciaries adopt a best interests stance in making decisions

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'shareholders' has always been at odds with the way corporation law actually works."); Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049, 1049 (2007) ("[W]ithin U.S. corporate law, a corporation's shareholders do not have a relationship of common law agency with the corporation's directors."); SMITH, LAW OF LOYALTY, *supra* note 35, at 5 ("Although [directors of business corporations] are sometimes described as agents or mandataries, this is a mistake in both common law and civil law.").

[174] *See, e.g.*, 18 C.J.S. Corporations § 167 ("[B]ylaws have the same force and effect as provisions of a corporation's charter or articles of incorporation and must be obeyed by its directors, officers, and shareholders.").

[175] *See, e.g.*, Gabriel Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 YALE J. ON REG. 1124, 1132 (2021) ("The charter can be amended only if both the board and a majority of shareholders vote to approve the amendment.").

[176] *See* Andrew S. Gold, *Purposive Loyalty*, 74 WASH. & LEE L. REV. 881, 888 (2017) ("[B]eing true is not always the same thing as acting in someone's best interests."); Miller & Gold, *Fiduciary Governance*, *supra* note 55, at 560 ("[O]ne may be loyal to a beneficiary by advancing the purposes underlying the beneficiary or benefactor's directives.").

[177] *See, e.g.*, Deborah A. DeMott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301, 301 (1998) (observing that the law of agency governs a variety of aspects of the attorney-client relationship).

[178] *See, e.g.*, Richard R.W. Brooks, *Knowledge in Fiduciary Relationships*, in FOUNDATIONS, *supra* note 10, at 228 ("Fiduciaries are almost always hired for some skill, expertise, or technical knowledge . . . .").

about how best, objectively—in the professional's view, given their expertise and professional obligations—to accomplish those goals.[179] To be sure, best interests reasoning plays a larger role in the behavior of lawyers than doctors—consider the tactical choices that lawyers make in litigation, a prerogative the law encourages in a variety of ways.[180] Litigators get their client's goals in the exercise of substituted judgment, but use the best interests frame on the way.

In contrast, physicians are closer to the substituted judgment end of the spectrum—health law used to apply more of a best interests frame to the relationship between doctor and patient, but over the course of the twentieth century the model has moved more towards thorough-going substituted judgment.[181] There is still, however, a residuary best interests frame in some contexts, including narrow exceptions to informed consent, which allow physicians to make choices in the objective best interests of patients under some conditions, regardless of what the patient would have wanted.[182]

With professional fiduciaries somewhere in the middle, guardians and attorneys-in-fact for incapacitated adults are closer to the substituted judgment end of the spectrum. It is black-letter law that these sorts of fiduciaries exercise substituted judgment where possible—close to paradigmatic agency.[183] Unlike paradigmatic agency, however, the law governing fiduciaries for the incapacitated offers the best interests frame as

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[179] *See, e.g.*, Richard W. Painter, *Fiduciary Principles in Legal Representation*, in HANDBOOK, *supra* note 3, at 265, 285 ("Lawyers . . . are also professionals and like other professionals are obligated to practice their profession according to its own values and rules.").

[180] *See, e.g.*, STRICKLAND V. WASHINGTON, 466 U.S. 668, 689 (1984) ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .'"); *see also* DeMott, *Lawyer*, *supra* note [DEMOTT1998], at 303 ("Many lawyers, especially in litigation settings, make decisions with significant consequences for the client without the client's knowledge or assent.").

[181] *See, e.g.*, Joan H. Krause, *Reconceptualizing Informed Consent in an Era of Health Care Cost Containment*, 85 IOWA L. REV. 261, 267 (1999) ("Until the mid-twentieth century, medical decision making was guided by the principle of beneficence . . . ."); SCHLOENDORFF V. SOC. OF N.Y. HOSP., 105 N.E. 92, 93 (N.Y. 1914) (holding, for the first time, that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body").

[182] *See, e.g.*, George P. Smith II, *The Vagaries of Informed Consent*, 1 IND. HEALTH L. REV. 109, 118 & n. 47 (2004) (observing that "[a] therapeutic privilege exists to withhold information from a patient if it is either considered potentially harmful or it would cause any counter-therapeutic deterioration . . . .).

[183] *See* note 72 & accompanying text; *see also* Kohn, *supra* note 3, at 255 (describing the guardian's duty of loyalty to "require[] the surrogate to prefer actions that are consistent with the principal's instructions, values, and wishes"); Frolik, *supra* note 72, at 65 (describing guardians as "perhaps even more closely bound to the preferences of the ward than an agent is to the principal").

something of a backstop—available where there is no evidence of what the incapacitated person would have done, or the substituted judgment would cause objective harm to that person or others.[184] Capacitated principals, in contrast, *are* allowed to make decisions that harm them.[185]

Finally, it is worth briefly returning to our paradigms of trust-as-best-interest and agency-as-substituted-judgment, to note that, in practice, both of these roles can be more complicated than the emblematic cases suggest. Trustees *do* occasionally exercise substituted judgment, but not with respect to the beneficiaries, with whom the law *says* they are in a fiduciary relationship, but with respect to the *settlor*, with whom the law says they are not. Trustees are bound by instructions of settlors, whether or not those instructions are in the objective best interests of the beneficiaries, and any modifications to the trust must be consistent with the settlor's purposes and aspirations.[186]

The law does not call these duties "fiduciary," and indeed says that there is no legal relationship between trustees and settlors—and they are, it's true, the beneficiaries' duties to enforce.[187] But it is odd to characterize them as duties *to* the beneficiaries, when complying with them might be *contrary* to the beneficiary's best interests (suppose a vindictive settlor who provided

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[184] *See, e.g.*, Chen, *supra* note 22, at 17 ("If the individual's wishes are not known, or if giving effect to her wishes would unreasonably harm or endanger her, then the guardian owes a duty to act in her best interest."); Boxx, *supra* note 3, at 57 ("[T]he attorney-in-fact must be able to interject his or her own judgment when the principal's choices are potentially damaging.").

[185] *See, e.g.*, Boxx, *supra* note 3, at 50 ("Where the principal is competent, the attorney-in-fact can, except in extreme circumstances, follow the principal's direction, since the principal's desires are the defining fiduciary purpose in agencies."); DeMott, *Fiduciary Character*, *supra* note 60, at 18 ("[E]ven well-motivated departures from P's known preferences are inconsistent with A's position as P's representative.").

[186] *See, e.g.*, Kennedy Lee, *Representing the Fiduciary: To Whom Does the Attorney Owe Duties?*, ACTEC L. J. 469, 483 (2011) (noting trustees' duty to follow the terms of the trust); Uniform Trust Code § 814(a) ("Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust . . . the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries."). There is an important divergence on this point between American trust law and the trust law in the Commonwealth—where settlors have less continuing power over the decision-making of beneficiaries. *See* SMITH, LAW OF LOYALTY, *supra* note 35, at 73 (noting the common law rule, which does not apply in the United States, that "[i]f the beneficiaries of the trust are all fully capacitated and in agreement, they can override the terms of the trust . . . ."). From the perspective offered here, American trust law creates something more like an agency relationship between settlor and trustee than elsewhere, while the general common law approach integrates some aspects of the agency frame into the relationship between trustee and beneficiary.

[187] *See, e.g.*, Bogert's The Law of Trusts and Trustees § 42 ("After a settlor has completed the creation of a trust, the settlor is not . . . in any legal relationship with the beneficiaries or the trustee . . . .").

for nominal annual distributions to their child from a large corpus).[188] On the account suggested here, we might rather think that trustees are in *two distinct* fiduciary-style relationships—something like an *agency-type* fiduciary relationship with the settlor, governed by the substituted judgment standard, alongside a *trustee-type* relationship with the beneficiaries, guided by best interests.[189]

From this perspective, the fiduciary status of a trustee resembles that of an executor.[190] Executors have duties, enforceable by beneficiaries, to follow the text of a will.[191] This is an application of the substituted judgment frame towards the testator—once again, solicitude towards the testator's words can only ultimately be justified by solicitude for what the testator wanted.[192] The executor's stricter duty to follow the ordinary meaning of their instructions compared to ordinary agents is plausibly justified by their much more difficult epistemic position—executors can't call up the testator and ask what they *really* want.[193] At the same time, the

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[188] The Uniform Trust Code introduced a controversial, mandatory principle that a "trust and its terms be for the benefit of its beneficiaries." Uniform Trust Code § 404; *see also* Mary P. O'Reilly & Lee-ford Tritt, *Benefit-of-the-Beneficiary Rule*, 34 PROBATE & PROPERTY 24, 25 (2020) (discussing the "benefit-of-the-beneficiary rule."). From the perspective of the account offered here, what is at stake in the debate over the "benefit-of-the-beneficiary rule" is how to conceptualize the balance between the agent-type relationship between settlor and trustee and the trust-type relationship between trustee and beneficiary in trust law.

[189] *See, e.g.*, Boxx & Hammond, *supra* note 70, at 1241 ("A trustee has a duty to carry out the terms of the trust as set up by the trustor . . . ."); Miller & Gold, *Fiduciary Governance*, *supra* note 55, at 542 ("In cases like this, the fiduciary relationship is formed by the benefactor and fiduciary to facilitate a mediated benefaction to the beneficiaries."); *see also supra* note 186 (discussing the divergence between American trust law and that governing in the Commonwealth on the allocation of these frames).

[190] *See, e.g.*, Toomey, *Executor Discretion*, *supra* note 75, at 46 (describing the fiduciary status of executors); *see also* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984) (arguing for "a unified law of succession").

[191] *See, e.g.*, IN RE KARAVIDAS, 99 N.E. 296, 316 (Ill. 2013) (upholding finding of breach of fiduciary duty to the estate for failure to follow the will); PRIGNANO V. PRIGNANO, 934 N.E. 2d 89, 101 (Ill. Ct. App. 2010) (observing that the executor's fiduciary duties "included the duty to properly carry out the provisions of the will").

[192] *See, e.g.*, Toomey, *Executor Discretion*, *supra* note 75, at 17 ("[O]n any plausible theory of freedom of disposition, the law's fundamental concern must be the actual intent of testators.").

[193] *See, e.g.*, John H. Langbein, *Will Contests*, 103 YALE L. J. 2039, 2044 (1994) (describing as the "worst evidence problem" the phenomenon that probate courts are trying to discern the intent of a dead person); Kent Greenawalt, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 SAN DIEGO L. REV. 553, 549 (2005) ("When courts construe wills, their writers are not available to say what they were trying to do (or how their wishes might have changed by the time they died).").

executor owes some duties directly to beneficiaries—not to self-deal with the estate, for instance.[194] We might say that executors, then, much like trustees, owe agent-type fiduciary duties to the testator, guided by a variant of substituted judgment justified by their peculiar evidentiary circumstances, and trustee-type fiduciary duties to the beneficiaries.[195]

And finally, agency law too occasionally integrates aspects of the best interests frame. For instance, courts sometimes ratify agents who "depart from instructions, well understanding what the principal wished to be done under the immediate circumstances, because the agent believes that the principal's instruction was misguided"[196]—retroactive endorsement of best interests reasoning. Similarly, in some cases, courts seem to transform an agent's posture to that of a trustee—a line of older cases holds that stranded ships' captains, unable to reach the owner, ought to act in the owner's objective best interests.[197] Through the lens offered here, this is the law substituting a trust-type fiduciary frame in a particular agency context.

In short, the decision standards of best interests and substituted judgment from health law offer a lens to organize and systematize fiduciary standards generally. The domain of fiduciary law, from this perspective, is organized around two archetypes—trust, and the best interests decision-making standard it asks of trustees, and agency, with its standard of substituted judgment.[198] Between these poles, different fiduciary relationships prescribe different blends of best interests and substituted judgment.

III. FIDUCIARY LAW AND PERSONAL IDENTITY

That fiduciary law can be organized around the decision-making frameworks of best interests and substituted judgment is one thing. But without some theory of *when* the law looks to aspects of one frame rather than the other, and *why* it might be justified in doing so, the account might not be more than a novelty. But, indeed, the law calls on best interests and substituted judgments in consistent ways across the domain of fiduciary

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[194] *See, e.g.*, DENATALIE V. MAZZA, 145 A.D 2d 404, 405 (N.Y. App. Div. 1988) (executor owes a "fiduciary duty to the estate beneficiaries to account for the assets of the decedent).

[195] *See, e.g.*, Boxx & Hammond, *supra* note 70, at 1241 ("[A]n executor has a duty to carry out the intentions of the testator, and an agent has a duty to follow the instructions of the principal.")

[196] DeMott, *Fiduciary Character*, *supra* note 60, at 9.

[197] *See, e.g.*, Evan Fox-Decent, *Fiduciary Authority and the Service Conception*, in FOUNDATIONS, *supra* note 10, at 363, 380 (summarizing these cases).

[198] *See infra* Part IV.A.

law.[199] Where a fiduciary is deciding on behalf of another person *qua* their *individual personal identity*, the law applies something more like substituted judgment. Where a fiduciary is deciding for something else or in any other capacity, the law turns to best interests. This makes sense—substituted judgment is a mode of decision-making that treats another person *as* an individual person, while best interests is a mode of treating some entity as a placeholder or generalization.

This Part analyzes the contexts in which the law deploys each fiduciary standard in terms of the nature of the personality the relationship presupposes, and its relationship to the structure of substituted judgment and best interests. First, I discuss the relationship between agency and personal identity, before turning to the more impersonal structure of trust, and, once again, the spectrum of fiduciary relationships between these poles.

A. Personal Identity and Agency

Let's start, this time, with agency and its intimate relationship to the concept of personal identity. Agency, in its basic structure, grants another person the power to act on one's behalf *in a literal* sense—the power to act "in my name," or "as" me for legal purposes.[200] This relationship presupposes that the grantor of the power has the power themselves so to act—agency authorizes a *representation* of a person's legal powers, it does not create them.[201] To have legal powers is to be a legal person.[202] Thus, the concept of agency *presupposes the principal's personhood*.[203]

Indeed, legal fiduciary agency is arguably the law's recognition of an

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[199] *See, e.g.*, Chen, *supra* note 22, at 56 ("[F]iduciary law ought to regulate different guardianships and agency relationships differently.").

[200] *See, e.g.*, ADOLF REINACH, THE A PRIORI FOUNDATIONS OF THE CIVIL LAW (John F. Crosby, tr., 1983) ("[S]ocial acts can be performed 'for' or 'in the name of' another person . . . ."); DeMott, *Fiduciary Character*, *supra* note 60, at 30 ("[A]n agency relationship [is] an extension of the principal throughout its duration."); James Penner, *Understanding the Rules of Attribution in Private Law*, in INTERSTITIAL PRIVATE LAW 203, 205 (Samuel L. Bray, John C.P. Goldberg, Paul B. Miller & Henry E. Smith, eds., 2024) ("[T]he agent's acts . . . are attributed to their principal . . . .").

[201] *See, e.g.*, REINACH, *supra* note 200, at 86 ("There is only one person who can grant [agency], namely the person in whom the legal effects are supposed to come about."); WELLMAN, *supra* note 31, at 114 (observing that in agency relationships, "the agent is representing the agency of the principal").

[202] *See, e.g.*, JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 19 (1897) ("[T]he technical meaning [of 'person' in legal discourse] is a subject of legal rights and duties.").

[203] *Cf.* WELLMAN, *supra* note 31, at 117 (arguing that agency presupposes the autonomy of the principal).

ordinary social concept that exists outside of it—the way in which we ubiquitously grant other people the power to represent us. "If you see her, say hello,"[204] and so on. Both the ordinary concept and the legal one presuppose the personhood of the principal. "I represent my dog in this matter," is a ridiculous thing to say, alongside "I am at present acting on behalf of a rock." (It is not ridiculous to describe oneself as an agent of an abstract cause or movement, about which more below).[205]

In short, if one is an agent, one is necessarily acting on behalf of a person *as* a person; it is impossible to be an agent for anything else. But, more than that, agency does not just presuppose that the principal is *any* person—it is a structure by which one person represents another *as* the *individual* person that they are; it is their principal's judgments they must substitute, not anyone else's.[206] An individual's "personal identity" is what makes them the individual person that they are, as distinct from anyone else.[207] From this perspective, agency is a relationship essentially directed towards a principal's personal identity, not merely their status as *a* person. And, indeed, as an agency relationship goes on, it evolves with the changing identity of the principal; the agent's actions must be tied to who the principal is *now*, as that changes.[208]

Given this basic structure of agency law, then, we might expect the characteristic fiduciary standard for agents to be one that acknowledges the necessarily inter*personal* relationship of agency, tied to the principal's personal identity. Substituted judgment is just that. The hallmark of substituted judgment, as has already been alluded to, is its focal solicitude for an individual's personal identity.[209] It takes account of someone *as* an individual person—after all, to treat someone *as a person* is to follow the decisions they make for themselves, and that is what substituted judgment does.[210] Substituted judgment, in other words, is the standard one would use

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[204] Bob Dylan, If you See Her, Say Hello (Columbia – 1975).

[205] *See infra* Part III.D.

[206] *See, e.g.*, Restatement (Third) of Agency § 8.09 ("An agent has a duty to comply with all lawful instructions received from the principal and persons designated by the principal concerning the agent's actions on behalf of the principal."); Frolik, *supra* note 72, at 65 (describing guardians as bound to "channel" "what the ward would have done").

[207] *See, e.g.*, MARYA SCHECHTMAN, THE CONSTITUTION OF SELVES 68–93 (1996) (noting a sense of personal identity as the question of "which beliefs, values, desires, and other psychological features make someone the person she is").

[208] *See, e.g.*, DeMott, *Disloyal Agents*, *supra* note 173, at 1051 (describing a principal's continuing control over the agent as essential to agency).

[209] *See, e.g.*, Toomey, *Love, Liberalism, Substituted Judgment*, *supra* note 32, at 1311–1315 (describing the relationship between substituted judgment and personal identity); *see also* Boni-Saenz, *supra* note 121, at 1257 (noting the relationship between substituted judgment and personal identity).

[210] *See, e.g.*, Rebecca Morgan & Barbara Harty-Golder, *Constitutional Development of*

in deciding for someone else *while trying to treat them as an individual person*. This is the basic structure of agency law—granting to another person the power to act "on behalf of" (in a strict sense) or "as" the principal; substituted judgment implements decision-making that *is* strictly "on behalf of" or "as" the principal. [211]

Incidentally, it is this characteristic of substituted judgment—that it is sensitive to the individual personal identity of the person for whom the decision is made—that largely explains its popularity in contexts where the law aspires to treat a beneficiary as an individual person.[212] The push towards substituted judgment as the governing standard in healthcare was supported by many people with deeply held or idiosyncratic convictions worried about how they might be treated after losing capacity.[213] From this perspective, the adoption of substituted judgment in deciding for the incapacitated may be based on growing recognition that many individuals with cognitive disabilities remain individual persons with personal identities, and indeed, the *same* personal identity they have always had.[214] And while applying substituted judgment on behalf of young children or those with severe lifelong cognitive impairments has been ridiculed as incoherent,[215] we might understand it as a laudable (if, in some cases, silly)

Judicial Criteria in Right-to-Die Cases: From Brain Dead to Persistent Vegetative State, 23 WAKE FOREST L. REV. 721, 742 (1988) ("[Substituted judgment] is limited entirely by the individuality of the patient . . . .").

[211] *See, e.g.*, Alan Meisel, *Antecedent Law and Ethics of Aid in Dying*, 34 QUINNIPIAC L. REV. 609, 615 (2016) (arguing that substituted judgment "places the surrogate in the patients shoes . . . .").

[212] *See, e.g.*, DWORKIN, *supra* note 138, at 190–196 ("When we consider how the fate of a demented person can affect the character of his life, we consider the patient's whole life, not just its sad final stages, and we consider his future in terms of how it affects the character of the whole."); Frolik & Whitton, *supra* note 163, at 740 (describing substituted judgment as a "recognition of an adult's self-determination interests").

[213] *See, e.g.*, Charles Perez Golbert, *Health Care Surrogate Decision Making and Bioethics: Case Studies from the Files of the Office of the Cook County Public Guardian*, 6 NAELA J. 155, 174–75 (2010) (discussing the role of religion in substituted judgment); Naomi Cahn & Amy Ziettlow, *Religion and End-of-Life Decision-Making*, 2016 U. ILL. L. REV. 1713, 1736 (2016) ("Protecting the personal religious beliefs and practices of those patients and families will be tantamount to ensuring they have access to a critical source of guidance and encouragement during those liminal times between life and death.").

[214] *See, e.g.*, TOM KITWOOD, DEMENTIA RECONSIDERED, REVISITED: THE PERSON STILL COMES FIRST (2d ed. 2019) (arguing that persons with dementia are still persons); *see also* U.N. Convention on the Rights of Persons with Disabilities Art. 12 ("States parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law").

[215] *See, e.g.*, Norman L. Cantor, *The Bane of Surrogate Decision-Making: Defining the Best Interests of Never-Competent Persons*, 26 J. LEGAL MED. 155, 158 (2005) ("[T]he bulk of commentators and courts have rejected application of the substituted judgment standard . . . in the context of a never-competent person."); Allen E. Buchanan, *The Limits*

effort to affirm their individual personality.[216]

In short, the structure of agency involves the representation of another person *as an individual person*. Substituted judgment is a decision standard that takes its object as an individual person. It therefore makes sense that substituted judgment would provide agency's guiding standard.

B. Trust's Impersonality

Contrast agency, once again, with trust. To be the beneficiary of a trust, you need not be any*one* in particular—the trust is agnostic to you *as an individual person*.[217] From the trustee's perspective, "as well him as another."[218] Granted, to be the beneficiary of a trust, you have to be *identifiable*—maybe some spare sense of personal identity as numerical identity—the trustee has to be able make sure they are making distributions to the entity the settlor had in mind.[219] And, the trustee may have an obligation to inquire into *some* particulars of your life—your income, profligacy, "station in life"—*if the terms of the trust so provide*.[220] These sorts of duties are therefore about interpreting the *settlor's* intent—treating the *settlor* as an individual person—not anything about the beneficiary.[221]

Take two facts about contemporary trust law as illustrative of its

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of Proxy Decisionmaking for Incompetents, 29 U.C.L.A. L. REV. 386, 396–97 (1981) (describing as "nonsensical" applying substituted judgment to those with lifelong incapacity).

[216] *Cf.* Boni-Saenz, *supra* note 121, at 1251 ("As a symbolic matter, this is disconcerting because it sends the message that those with cognitive impairment are not worthy of the capabilities that inhere in the concept of human dignity.").

[217] *See, e.g.*, Boxx & Hammond, *supra* note 70, at 1216 (noting that financial fiduciaries, like trustees, "do not generally have responsibilities that relate to the beneficiaries' personal values and desires"); *see also* Penner, *supra* note 200, at 205 ("But trustees or advising solicitors do not act *as* their beneficiaries or advisees, nor do they act *on their behalf*, in the sense that their acts are attributed to their beneficiaries or advisees.").

[218] JAMES JOYCE, ULYSSES 643–44 (Gabler ed. 1986).

[219] *See, e.g.*, Uniform Trust Code § 402(1)(a) (listing ascertainable beneficiaries as a requirement for the creation of a trust); SITKOFF & DUKEMINIER, *supra* note 40, at 428 (same).

[220] *See, e.g.*, MARSMAN V. NASCA, 573 N.E.2d 1025 (Mass. App. 1991) (holding that, where a trust provides for discretionary distributions to maintain a beneficiary at a level of "comfortable support and maintenance," the trustee has an affirmative duty to inquire into the beneficiaries' finances).

[221] *See, e.g.*, DeMott, *Disloyal Agents*, *supra* note 173, at 1052 ("[A] trustee unquestionably owes fiduciary duties to the beneficiaries of a trust, the trustee is not subject to the control of either the beneficiaries or the settlor, except as provided in the terms of the trust."); Boxx, *supra* note 3, at 20 ("[A] trustee must exercise independent judgment regarding investment of trust assets . . . but an agent is under a duty to follow the principal's desires regarding investment of assets given to the agent to protect").

impersonality. First, in contrast to other fiduciary roles (the durable power of attorney, say), trusteeship has largely migrated to wealth management institutions over lay friends and family members.[222] This is at least in part because a trustee can comply with all their duties with very limited knowledge of the beneficiaries as individual persons—institutions with expertise in financial management but little personal knowledge of the beneficiaries can straightforwardly pursue their objective best interests, as they could anyone else's, by maximizing the value and longevity of the trust corpus. Institutional trustees would be much worse situated to decide in some way tied to the individual identities of the beneficiaries, if that were what trust law demanded—but it doesn't.[223]

Second, the trust form has been straightforwardly adapted to accommodate beneficiaries who are not persons at all.[224] Every state has passed legislation enabling trusts for the benefit of pet animals, which work basically the same as ordinary private trusts—with trustees subject to the same basic best-interests framework of fiduciary duties, objectively managing the corpus prudently and avoiding conflicts, enforceable by a person designated by the settlor.[225] The same goes for trusts for the maintenance of gravestones or burial sites, which have also authorized by statute in many states.[226] Moreover, common law has always recognized trusts for the benefit of individuals as-yet-unborn or even unconceived, who are clearly not any kind of persons (if you think fetuses *in utero* are persons, fine, I can settle a trust for "my niece's children" while *she's* an infant).[227]

It is not altogether clear whether the trust, like agency, corresponds to an extra-legal social practice, but if it does, surely it is some kind of en*trust*ment—the care of some*thing* for someone else.[228] And it is coherent

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[222] *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 40, at 403 (observing approximately $1.3 trillion in trust funds managed by financial institutions that are part of the Federal Reserve System).

[223] *See supra* Part II.B.

[224] *See, e.g.*, Brooks, *supra* note 178, at 227 (noting that in trust, "some beneficiaries are not rational"); Frankel, *supra* note 102, at 242, 245 ("[A] trust can be established for the benefit of a cat or a dog or an unborn child.").

[225] *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 40, at 437; Cal. Prob. Code § 15212(c) (2020). These sorts of trusts are enforced by guardians *ad litem*, just as where the beneficiary is an existing infant. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 40, at 174.

[226] *See id.*

[227] *See, e.g.*, Gail Boreman Bird, *Trust Termination: Unborn, Living, and Dead Hands—Too Many Fingers in the Trust Pie*, 36 HASTINGS L.J. 563, 592 (1985) (observing that unborn beneficiaries can be the sole beneficiaries of a trust, "whether or not [they] are in existence").

[228] To be sure, the relationship between an ordinary concept of entrustment and common law trust is not at all obvious—every legal system has a concept of entrustment of property subject to duties, but only the common law trust implements this idea with a

to say "that bottle of wine isn't mine, I'm holding onto it for my first child," even when there is no such person. In contrast, it is as preposterous to claim to be acting as an agent for, literally on behalf of, one's as-yet-unconceived first child, as one's pet raccoon. (If "I'm holding onto this wine for my pet raccoon" sounds weird to you, as it does to me, I'd suggest this is because you do not think raccoons are conceptually capable of ownership, not anything about trust per se.)[229]

Where substituted judgment is a decision-making standard attuned to the individual personal identity of the person for whom one is deciding, best interests is not. Best interests is an objective test—based in what a reasonable person might want or think is best.[230] A trustee *can* act in the best interests of a beneficiary they know almost nothing about—whoever they are, it is in their objective best interests that the trust corpus be maximized, while minimizing the risk of the trustee accidentally squandering it.[231] Similarly, the best interests test can be applied on behalf of entities that are not persons. Assuming that animals do not have personal identities of the sort that could sustain an agency relationship, it is at least plausible that they have interests—and a trustee could act to further those interests by maximizing the trust corpus so as to ensure the supply of a cat's apparently favorite food and pay veterinary bills.[232]

Now, you might at this point note that I also suggested above that trust beneficiaries may conceptually include such things as rocks and corpses,

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bifurcation of legal and equitable title. *See infra* Part IV.A. Indeed, common law recognizes another form that corresponds to ordinary concept of entrustment—bailment. *See, e.g.*, Danielle D'Onfro, *The New Bailments*, 97 WASH. L. REV. 97, 103–117 (2022) (summarizing the law of bailments); Christopher M. Newman, *Bailment and the Property/Contract Interface* (manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2654988) (same). Bailment is a notoriously difficult area of law, and the standard of care governing bailee decision-making remains controversial, as does whether that standard is contractual and can be so modified. *See, e.g.*, GEORGE V. BEKANS VAN & STORAGE CO., 205 P.2d 1037, 1041 (Cal. 1949) (describing bailment law as "conflicting and confusing"). On the account offered here, to the extent that bailment law imposes mandatory duties on bailees, bailment law could be thought of as another fiduciary relationship, perhaps a kind of proto-trust that accomplishes a similar goal without the mechanism of bifurcation of title. *See, e.g.*, D'Onfro, *supra* note 228, at 103 ("[T]rust is the lifeblood of the bailment relationship."). But the question of whether and how bailment in fact fits into the spectrum of fiduciary relationships is beyond the scope of this paper. *See supra* note 95.

[229] *See, e.g.*, Toomey, *Property's Boundaries*, *supra* note 8, at 168 (arguing that ownership requires the owner have the capacity to exercise absolute control over a thing).

[230] *See supra* Part II.A.

[231] *See supra* Part II.B.

[232] *See, e.g.*, *id.* at 118 ("There is a fundamental difference between a custodian, who cannot represent the object in her custody, and a trustee, who can represent the interests of another.").

and object that, unlike persons and animals, these sorts of things do not have "interests" of any kind.[233] I agree. But you could, to be frank, have the same concern about a human being in a vegetative state, to whom "best interests" reasoning has routinely been applied.[234] From this perspective, it seems that "best interests," or something *like* it actually *can* be deployed on behalf of entities that do not have interests. The best interests standard is, after all, an objective, third-person test that looks to what we socially understand to be the best choice. A trustee cannot literally act in the "interests," best or otherwise, of a gravestone—but they *can* avoid investing the trust corpus in their friend's midlife crisis, and we can call that standard "best interests," even if "interests" is something of a legal fiction.[235]

In short, unlike agency, the fiduciary duties of a trustee are not tied to the personal identity of the beneficiary. Indeed, trust law does not presuppose the personality of its beneficiaries at all—it largely presumes a placeholder with generalized interests and reasonable aspirations. It makes sense that in this posture, the law would turn to best interests—an objective decision-making standard that does not take its object as a distinctive personal identity.

C. Postures Towards Personal Identity

We once again find ourselves at two poles of fiduciary law, but this time with an account of why the poles might be structured the way they are. Agency is a legal form oriented towards the personal identity of another and relies on substituted judgment, a mode of deciding on behalf of others *qua* their individual personal identity.[236] Trust is different—a trust beneficiary usually is an individual person, but they are not, *in their capacity as trust*

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[233] *See, e.g.*, VISA A.J. KURKI, A THEORY OF LEGAL PERSONHOOD 64 (2019) ("[T]hings *matter* only to sentient beings."); Ori J. Herstein, *The Identity and (Legal) Rights of Future Generations*, 77 GEO. WASH. L. REV. 1173, 1188 (2009) ("Rights, by their nature, benefit the rightholder; as such, the rightholder must be capable of having interests.").

[234] *See, e.g.*, A.J. Fenwick, *Applying best interests to persistent vegetative state—a principled distortion?*, 24 J. MED. ETHICS 75, 75 (1998) (arguing that although "'[b]est interests' is widely accepted as the appropriate foundation principle for medico-legal decisions concerning treatment withdrawal from patients in persistent vegetative states," it may be incoherent, because they arguably do not have interests); MATTER OF GUARDIANSHIP OF L.W., 482 N.W. 2d 60, 75 (Wis. 1992) (applying the best interests test to determine whether to remove life support from an individual in a persistent vegetative state)

[235] *Cf., e.g.*, WELLMAN, *supra* note 31, at 133 ("I do not believe that any legal system, not even our mighty American legal system, could confer genuine rights on trees.").

[236] *See supra* Part III.A.

beneficiary, being treated as an individual personal identity.[237] My argument now is that this reasoning explains the composition of legal standards, in different mixes of best interests and substituted judgment, across the spectrum of fiduciary relationships.

To take corporate directors again, in most cases, particularly for directors of publicly traded companies, the individual identities of the shareholders are entirely irrelevant—it is this fact about directors' posture, of course, that enables the existence of large companies and liquid capital markets in the first place.[238] Indeed directors usually don't even know the identities of most of their shareholders, and they need not to fulfill their role—a major shareholder in Corporation X could be Shell Corporation Y, the true owners of which the directors of Corporation X have no reason or need to know. Corporate directors decide for shareholders as placeholders, not individual personal identities, and in general do so on a best interests paradigm.[239] Of course, as discussed above, some directors must introduce aspects of substituted judgment into their decision-making.[240] These just are the circumstances where directors *do* have to care about shareholders as individuals (or the corporation, on realist views)—closely-held corporations, non-profits, or cases where the shareholders have established guiding values.[241]

Particularly illuminating of the way in which the law might mix best interests and substituted judgment based on its views of the goals and nature of a given fiduciary relationship is the story of the physician-patient relationship in the twentieth century. Before the rise of informed consent in the 1920s, physicians were legally expected to treat patients based on their own views of the patient's best interests.[242] Under this paradigm, patients were conceptualized not as individual personal identities but as placeholder

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[237] *See supra* Part III.B.

[238] *See supra* notes 170–173 & accompanying text.

[239] *See, e.g.*, Richard P. Wolfe, *Minority Shares Under the Louisiana Business Corporation Act: Expulsion, Oppression, and Fiduciary Duty*, 64 LOY. L. REV. 25, 102 (2018) ("[A] director's paramount fiduciary duty is owed to the corporation in preference to its shareholders because the identity of the shareholders is subject to change. . . .").

[240] *See supra* notes 174–176 & accompanying text.

[241] *See, e.g.*, 18B Am. Jur. 2d Corporations § 1442 ("Other authority holds that the fiduciary duty of a director is owed to the individual stockholders as well as to the corporation."); *cf. also* Gold, *Purposive Loyalty*, *supra* note 176, at 901 (noting directors' duty to follow guiding values established in a corporate charter).

[242] *See, e.g.*, RUTH R. FADEN, ET AL., A HISTORY AND THEORY OF INFORMED CONSENT 100–101 (1986) ("[B]efore the mid-twentieth century, the beneficence model . . . was the only operative model of the physician's responsibility to the patient."); Charity Scott, *Why Law Pervades Medicine: An Essay on Ethics in Health Care*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 245, 263 (2000) ("Throughout most of the history of medicine, the doctor-patient relationship has been founded on the ethics of beneficence, or paternalism.").

complexes of symptoms and biological facts, to be treated as would be best for a reasonable patient in their circumstances. Veterinarians treat animals this way today.[243]

But over the course of the twentieth century, our legal and social understanding of the physician-patient relationship underwent a radical shift—today it is understood to be fundamentally based on respect for the individual identity and preferences of the patient.[244] Across that same time period, the law has reconceptualized physicians more as agents than trustees, guided more by substituted judgment than by best interests—a change in the mode of decision-making as our understanding of the purpose of the relationship changed in law and social expectation.[245]

A similar story could be told about the law governing guardians and attorneys-in-fact.[246] Historically, guardians were thought of as officers of the court, delegated the state's *parens patriae* responsibility to take care of those who could not take care of themselves.[247] The individual identity of the person subject to guardianship ("ward") had little to do with it.[248] Similarly, the incapacitated were not thought capable of serving as principals, and to that extent were not conceptualized as legal persons.[249] The development of durable powers of attorney and move towards guardianship-as-agency correspond to growing social and legal recognition of individuals with limited cognitive abilities as persons with personal

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[243] *See, e.g.*, American Veterinary Medical Association, *Principles of the veterinary medical ethics of the AVMA*, (last visited June 6, 2024), available at https://www.avma.org/resources-tools/avma-policies/principles-veterinary-medical-ethics-avma.

[244] *See, e.g.*, BARRY R. FURROW, ET AL., HEALTH LAW 409 (1995) ("The doctrine of informed consent developed out of strong judicial deference to individual autonomy . . . ."); Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 227 (2009) (observing that "private law . . . allocate[s] decision-making power to the patient rather than the physician").

[245] *See* Alicia R. Ouellette, *When Vitalism is Dead Wrong: The Discrimination Against and Torture of Incompetent Patients By Compulsory Life-Sustaining Treatment*, 79 IND. L. J. 1, 3 (2004) ("The past thirty years have seen a radical shift from medical paternalism to patient autonomy as the gold standard for ethical decision-making in medicine.").

[246] *See, e.g.*, WELLMAN, *supra* note 31, at 115 (observing that "[t]he relationship between guardian and ward . . . seems to be construed in the law as something of a mixture" of agency-type representation and trust-type representation).

[247] *See, e.g.*, Frolik, *supra* note 72, at 57 (observing that the guardian's power historically derived from the court).

[248] *See id.*

[249] *See, e.g.*, Boxx, *supra* note 3, at 5 ("The principal's incapacity automatically terminated the agency because of the assumption that an agent acts at the direction of the principal . . . ."); Kohn & Koss, *supra* note 90, at 589 ("In order to have the capacity to serve as a principal in an agency relationship, an individual generally must possess the legal capacity to carry out the acts he or she is delegating to the agent.").

identities.[250]

Finally, this account can even help make sense of the complicated ways in which best interests and substituted judgment bleed into one another in trust and agency. The relationship that a trustee has with a settlor (whether or not it has a name in the law) *is* a personal one—the trust is a creation of the intentions and aspirations of the settlor, by exercise of their personal powers.[251] It makes sense, then, that vis-à-vis the settlor—when, say, interpreting the terms of the trust—trustees apply a frame more like substituted judgment.[252] And the situations in which agents are expected to rely on best interests reasoning are those in which the agency is peculiarly impersonal—I don't know much about the relationship between ship owners and captains, but I imagine it's less solicitous of the owner's identity than archetypical representation.[253]

To be clear, the hypothesis that substituted judgment is a relationship of respect for the individual identity of a person, while best interests is not, does not imply much, if anything, about which mode is to be preferred as a matter of legal design and political morality.[254] That is, there is no reason to think that all fiduciary relationships *ought* to be governed by substituted judgment, and that the impersonality of trust law is necessarily a moral failing. To the contrary, there may be (and at least seem to be) compelling reasons in particular contexts for best interests to govern the decision-making of some fiduciaries.

For example, the straightforward, easy to apply generalizations governing the behavior of trustees and corporate directors enable wealth management at lower cost for far more people.[255] If the best interest frame were not available, structures like publicly-traded companies would not be

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[250] *See, e.g.*, Richard Cupp, *Cognitively Impaired Human, Intelligent Animals, and Legal Personhood*, 69 FLA. L. REV. 445, 495 (2017) ("Courts and activists increasingly recognize that humans with cognitive impairments have fundamental rights to, among other things, liberty, due process, and the pursuit of happiness."); JONAS-SÉBASTIEN BEAUDRY, THE DISABLED CONTRACT: SEVERE INTELLECTUAL DISABILITY, JUSTICE AND MORALITY (2021) (defending the moral personhood of people with severe intellectual disabilities).

[251] *See, e.g.*, Lee-Ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579, 2579 (2011) (noting that among the first principles of trust law is a process of "achieving the settlor's goals").

[252] *See supra* notes 187–89 & accompanying text.

[253] *See supra* note 197 & accompanying text

[254] *Cf., e.g.*, Dresser, *Precommitment*, *supra* note 140, at 1843 (noting that "most scholars and legal authorities . . . regard the best interests standard as morally suspect.").

[255] *See, e.g.*, Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 621 (2004) (justifying the architecture of trust law on economic grounds); David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1374 (1993) ("Deference to managerial discretion has been thought to have a value of its own . . . .").

feasible.[256] Similarly, there might be good reasons—moral, economic, or otherwise—to permit settlors the option of an ongoing, conditional gift of the kind donative trusts allow.[257] Perhaps it is a good thing for the law to enable wealth management for the benefit of the unborn, pets, and inanimate things that matter to people—certainly at least there is demand for these sorts of things.[258] Best interests reasoning in trusts or trust-like mechanisms makes pursuing these sorts of goals possible—and, indeed, has made possible the de-personalized structures of wealth management and growth that underlie modern economies.

D. Charitable Fiduciaries

Finally, it is worth situating one difficult feature of fiduciary law, thus far largely undiscussed, within the proposed framework—fiduciary relationships that appear to be "with" a cause.[259] Charitable trusts, for instance, do not have beneficiaries, but are rather organized for the benefit of "one or more *charitable purposes*."[260] On the one hand, causes are obviously not persons, and we might think that a fiduciary relationship with a cause is an impersonal one. From this perspective, it is not surprising that it is trust and corporate law that have developed a fiduciary infrastructure for the benefit of abstract causes.[261]

On the other hand, it is not at all semantically bizarre to describe oneself as the agent of a cause or other abstraction—people do this all the time. And it is precisely in the context of charitable trusts and corporations with dedicated causes that we see fiduciaries engage most prominently in

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[256] *See supra* 238–241 & accompanying text.

[257] *See, e.g.*, Natalya Shnitser, *Trusts No More: Rethinking the Regulation of Retirement Savings in the United States*, 2016 B.Y.U. L. REV. 629, 630 (2016) ("[T]he prototypical donative trust arises from and is structured to effectuate a particular kind of gift transfer . . . ."); F. Ladson Boyle, *Present Interest Gifts in Trust: Donor and Donee Problems*, 29 GONZ. L. REV. 453, 497 (1994) (noting many reasons that donors elect to give gifts in trust rather than outright).

[258] *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 40, at 437 (summarizing evidence of demand for pet trusts); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L. J. 356, 356 (2005) (finding that states that abolished the rule against perpetuities saw substantial increases in their trust assets).

[259] *See, e.g.*, Miller & Gold, *Fiduciary Governance*, *supra* note 55, at 523 (observing that some fiduciary relationships "entail fiduciary administration for purposes rather than persons").

[260] *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 40, at 768.

[261] *See, e.g.*, Terri Lynn Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board*, 19 CORNELL J.L. & PUB. POL'Y 1, 9 (2009) (discussing the organization of nonprofit corporations, "the predominant form of charitable organization in the United States").

substituted judgment-style reasoning. For example, under the *cy pres* doctrine, charitable trustees have *more* flexibility to modify the purpose of the trust to changed circumstances than private trustees, so long as they can show the new purpose would fall within the settlor's broader goals under the circumstances—a kind of substituted judgment adapted to the longevity of charitable trusts.[262]

Perhaps this is because, unlike rocks, animals, and individuals in persistent vegetative states, causes are not mind-independent constituents of the universe. Rather, a cause *just is* linguistically encoded intentional meaning—"For the children;" "global communist revolution;" "a scholarship for a graduate interested in shipbuilding each year at my alma mater."[263] To that extent, causes, like all linguistic meaning, presuppose intentions.[264] "For the children" means something *in English*—for us to do anything with it, we *have* to assume that a speaker *intended to communicate* something by it.[265] If that is not true, it is nothing.[266]

From this perspective, charitable trusts *are* meaningfully personal, and it is probably best to think of the relevant beneficiary not as an impersonal cause, but as the settlor of the trust or shareholders of a non-profit corporation—the persons who prescribed the cause in a linguistic way.[267] And, indeed, this is to a large extent how charitable law actually

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[262] *See, e.g.*, Miller & Gold, *Fiduciary Governance*, *supra* note 55, at 551 ("[G]overnance mandates enable extension of the personality of persons through delegation of powers to promote particular *abstract purposes*.").

[263] *See, e.g.*, H.P. Grice, *Meaning*, 66 PHIL. REV. 377, 385 (1957) ("x meant something is (roughly) equivalent to 'Somebody meant$_{nn}$ something by x.'").

[264] *See, e.g.*, Richard Ekins, *Objects of Interpretation*, 32 CONST. COMMENT. 1, 4 (2017) ("Persons have goals; communications do not."); Larry Alexander & Saikrishna Prakah, *Is That English You're Speaking—Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967, 976 (2004) ("Whenever someone reads the Constitution or any other text, he explicitly or implicitly does so with an author in mind.").

[265] *See, e.g.*, Grice, *supra* note 263, at 385("'x means$_{nn}$ (timeless) that so-and-so' might as a first shot be equated with some statement or disjunction of statements about what 'people' (vague) intend (with qualifications about 'recognition') to effect by x.")

[266] *See, e.g.*, Alexander & Prakash, *supra* note 264, at 977 ("Without an author who intends a meaning, such marks are meaningless."); Grice, *supra* note 263, at 383 ("*A* must intend to induce by *x* a belief in an audience, and he must also intend his utterance to be recognized as so intended.'"); Ekins, *supra* note 264, at 4 ("Language use consists in one person's attempt to convey an intended meaning by uttering some words in some context, which meaning other persons should try and recognize.").

[267] *See, e.g.*, Miller & Gold, *Fiduciary Governance*, *supra* note 55, at 564 ("In lieu of a best interests standard, one could, for example, argue that fiduciaries are obliged to act in a manner that would be most likely to advance the purposes specified for their mandates."); Lloyd Hitoshi Mayer, *Fiduciary Principles in Charities and Other Nonprofits*, in HANDBOOK, *supra* note 3, at 103, 105 ("[T]here is some uncertainty regarding whether the fiduciary relationship is with, and the fiduciary duties are to, the organization itself or its purposes.").

functions.[268] There has been, for instance, a broad trend towards granting settlors standing to sue for violation of the terms of a charitable trust, making charitable fiduciary law look more like agency.[269] Because causes, charitable or otherwise, are irreducibly personal in the relevant sense, that is indeed the better framework through which to view these sorts of relationships.

IV. IMPLICATIONS

In closing, the view offered here has a number of implications, both for theory and practical legal design. This Part sketches four. First, the account holds that agency is a fundamental relationship in fiduciary law, not reducible to analogy with trust. Second, it reveals connections and distinctions between fiduciary law and contract law. At the same time, the theory helps illuminate the role of the concept of personal identity in private law. Finally, it helps us think about the circumstances in medical decision-making in which substituted judgment is appropriate, and those in which it isn't.

A. Fundamental Nature of Agency

Trust, as has already been mentioned, is often considered the paradigmatic fiduciary relationship[270] and fiduciary law an outgrowth of it, perpetuated by ad hoc analogy.[271] There has always been something odd about this claim. The contemporary common law private trust is a relatively recent legal innovation—a product of nineteenth-century equity—and is often considered unique to the common law world.[272] And yet many relationships called "fiduciary" in common law—agency and partnerships, for example, not to mention, say, parent-child relationships—are more or less universal, precede the development of the common law trust, and

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[268] *See, e.g.*, Gold, *Purposive Loyalty*, *supra* note 176, at 882–889 (arguing that the duty of loyalty can be fulfilled in this way).

[269] *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 40, at 800 ("Today a majority of states allows the settlor of a charitable trust to enforce the trust.").

[270] *See supra* note 39 & accompanying text.

[271] *See, e.g.*, Daniel Yeager, *Fiduciary-isms: A Study of Academic Influence on the Expansion of the Law*, 65 DRAKE L. REV. 179, 185 (2017) ("Identifying fiduciary relationships is done by analogy to the law of trusts.").

[272] *See, e.g.*, FREDERIC W. MAITLAND, EQUITY: A COURSE OF LECTURES 23 (John Brunyate, 2d ed., 1936) ("Of all the exploits of Equity, the largest and most important is the invention and development of the Trust. . . ."); *see also* SITKOFF & DUKEMINIER, *supra* note 40, at 410 ("A fairer claim is that the use of the trust for donative transfer is a distinctive features of the Anglo-American legal tradition.").

function in roughly comparable ways everywhere.[273]

On the account offered here, trust is *not* the only fundamental fiduciary relationship—agency is just as basic.[274] From this perspective, agency is not reducible to trust—it is true that both are relationships in which a person makes legally effective decisions (in some sense) "on behalf of" another, as all fiduciary relationships, but by very different standards, with very different relationships to the other for whom they are deciding. The irreducible characteristic of agency makes some sense. After all, as has already been mentioned, agency and representation are ubiquitous features of ordinary social life—it would be odd if the *legal* version of agency, which facially bears such resemblance to the ordinary concept, were derivable from the specifics of an apparently-contingent nineteenth century development of the Anglophone Courts of Chancery.[275]

None of this is to say, however, that agency is *more* fundamental than trust. Trust isn't just a form of agency, either. It involves deciding according to a different standard, in a different posture, applicable in different contexts.[276] This makes sense too. The ordinary idea of entrustment, or of holding something on behalf of someone else, is hardly thought of as a variation of representation.[277] Since its development in common law jurisdictions, trust has indeed been thought to be fundamental.[278] (And, by the way, the canard that nothing like it exists in civil law is an exaggeration—holding property for the benefit of another, subject to legal duties not to abuse or destroy it, is a feature of all, or at least nearly all, legal systems).[279]

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[273] Obviously, there are differences, but the basic idea of representation and of collectivities with some particular legal status are more or less universal. *See, e.g.*, DeMott, *Fiduciary Character*, *supra* note 60, at 20 (discussing the civil law of agency); Jeffrey L. Patterson, *Development of the concept of corporation from earliest Roman times to A.D. 476*, 10 ACCOUNTING HIST. J. 1 (1983) (tracking the development of Roman corporate forms); *see also* Edelman, *supra* note 34, at 24 ("[A]lthough the concept of a 'fiduciary' undertaking is a recent one, the concept of an undertaking itself is extremely old.").

[274] *See* Brooks, *supra* note 178, at 230 (noting that on some accounts, agency is a "prototype fiduciary relationship"); Gabriel Rauterberg, *The Essential Roles of Agency Law*, 118 MICH. L. REV. 609 (2020) (arguing that agency is fundamental in corporate law and could not be replicated by contract).

[275] *See supra* Part III.A.

[276] *See, e.g.*, WELLMAN, *supra* note 31, at 116 ("A trustee can and ought to represent the interests, rather than the will, of the beneficiary.").

[277] *See supra* Part III.B.

[278] *See supra* note 39.

[279] *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 40, at 410 (summarizing foreign conceptions of trust law); *see also* Michele Grazieadei, *Virtue and Utility: Fiduciary Law in Civil Law and Common Law Jurisdictions*, in FOUNDATIONS, *supra* note 10, at 288, 294 ("Virtually all of the relationships that would be considered fiduciary in common law countries would, in most civilian jurisdictions, be considered to raise issues similar to those

In short, on this account, and as Carl Wellman and others have suggested, the domain of fiduciary law is organized around *two* fundamental relationships—agency *and* trust, with concomitant paradigmatic modalities of reasoning, substituted judgment and best interests.[280] The other fiduciary relationships mix aspects of agency with aspects of trust, based on the purposes and nature of the relationship. Seeing the role of best interests and substituted judgment in fiduciary law, in other words, helps map its domain, and focus once again on the agency relationship as at least as fundamental a fiduciary one as long paradigmatic trust.[281]

B. Fiduciary Standards and Contract

On the account offered here, the set of relationships the common law calls "fiduciary" involves two basic postures—a posture towards another person as an individual personal identity, and a de-personalized frame that treats them as a generalized abstraction.[282] Across the spectrum of fiduciary relationships, the law allocates these decision-making postures based on its views of the nature and purpose of each fiduciary relationship.[283] For the most part, the relevant blend of decisional standards seems to inhere in the relationships in which they appear—if a relationship is one of agency, the law guides it by substituted judgment standard; if it is not guided by the substituted judgment standard, it is not agency.[284] From that perspective, my account is consistent with a view of fiduciary law as rooted in legal status.[285]

Nevertheless, many fiduciary relationships are consensual.[286] And it is perhaps implicit in my claim that the standards of substituted judgment and best interests roughly correspond to ordinary intuitions governing social practices such as representation and entrustment.[287] From that perspective, it

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in the common law world.").

[280] *See, e.g.*, Charles E. Rounds, Jr., *A Case for a Return to Mandatory Instruction in the Fiduciary Aspects of Agency and Trusts in the American Law School, Together With A Model Fiduciary Relations Course Syllabus*, 18 REGENT U. L. REV. 251, 252–53 (2006) ("[A]gency and trust are two of the five elements of the periodic table of common law private relationships . . . .").

[281] *See, e.g.*, WELLMAN, *supra* note 31, at 114–115 (outlining this distinction).

[282] *See supra* Part III.

[283] *See supra* Part III.C.

[284] *See supra* Part II.B.

[285] *See, e.g.*, Markovits, *supra* note 97, at 224 (describing fiduciary relationships as essentially legal statuses, conceptually distinct from contract).

[286] *See, e.g.*, SMITH, LAW OF LOYALTY, *supra* note 35, at 26 ("Typically, a person is not required to accept a power, or to accept a role that carries powers with it.").

[287] *See supra* Part III.B–C.

is not implausible that, for example, the substituted judgment standard accords with the consensual expectations of parties entering into an agency relationship—raising the possibility that the theory could fit with an implied contract view of fiduciary law.[288]

The difficulty in figuring out whether that is right is that we would also need a theory of contract—only marginally less controversial than a theory of fiduciary law.[289] For instance, some scholars take it as analytic that contracts are the infinitely customizable product of specific consent.[290] If that is right, then fiduciary law cannot be fully contractual—the fiduciary standards of substituted judgment or best interests inhere non-waivably, as a descriptive legal matter, in certain kinds of relationships.[291] But other scholars have challenged the notion that mandatory rules are always extra-contractual, and if that is right, then perhaps fiduciary law could be accommodated in a broader conception of contract.[292]

The distinction between contract and fiduciary law I propose was mentioned earlier—fiduciary law involves some *other-regarding* posture (decisions made "on behalf of" another, in any sense), while contract involves a posture *towards the content of an agreement*.[293] We have learned that in fact fiduciary law is organized around two distinct other-regarding frames.[294] But *both* of those frameworks are different than that of contract partners whose duties are fulfilled entirely by complying with the meaning of an agreement—decision-making under a contract is not "on behalf of" the contract partner in any meaningful sense; it is determined by the meaning of the agreement. To be sure, this picture depends on a controversial theory of contract law—some scholars take contract to create an ongoing interpersonal relationship the content of which is not exhausted

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[288] *See supra* note 14.

[289] *See, e.g.*, Seana Valentine Shiffrin, *Is A Contract a Promise?* in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 241, 242 (Andrei Marmor, ed., 2014) (summarizing debates over whether contracts are promises or agreements); Gregory Klass, *Promise, agreement, contract*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY 39, 39 (Hanoch Dagan & Benjamin C. Zipursky, eds., 2020) ("Contract, promise, and agreement are contested concepts. One finds in the literature various conceptions of each, and the theorists' conceptions typically reflect their substantive commitments.").

[290] *See, e.g.*, DeMott, *Beyond Metaphor*, *supra* note 4, at 887 (arguing that fiduciary law cannot be contractual because it contains many mandatory rules).

[291] *See supra* Part I.A.

[292] *See, e.g.*, Crescente Molina, *Contracting Without Promising*, U. TORONTO L.J. (forthcoming 2025) (manuscript at 41) ("[T]he parties who agree to a juridical transaction need not have intentionally assumed the *conventionally imposed contractual obligations* for these obligations to *hold* or *exist* in the first place . . . .").

[293] *See supra* note 81 & accompanying text.

[294] *See supra* Part II.B.

by the meaning of the agreement between them.[295]

But the benefit of this perspective is the insight it offers on the relationship between contract and the content of fiduciary relationships. One common way to enter a fiduciary relationship is by contract. You and I can agree—"I will serve as your agent at the cattle auction for $20." On the view I am suggesting, there are two things going on here. We have a contractual relationship constituted by the content of the agreement. Each of our *contractual* duties is satisfied by complying with the meaning of the agreement—my serving as your agent; your giving me $20. But, as it happens, the content of this agreement requires me to adopt another sort of posture towards you—it requires me to be your "agent," a word that denotes the concept of agency. And the concept of agency requires me to decide according to the substituted judgment standard—to adopt a relationship towards your individual personal identity.

You can call all of this "contract" if you want. But I suspect doing so obscures more than it illuminates. On the one hand, it is obviously possible to have agreements that *don't* create anything other than a posture towards the content of an agreement—"1,000 widgets for $1,000." And it is possible (and may well be a good idea) for the law to sometimes require people to exercise substituted judgment without any agreement—guardianship being perhaps the clearest example.[296] Consider, moreover, trust. Trusts are, like many agency relationships, generally created by an agreement between settlor and trustee. The content of that agreement requires the trustee to begin a trust-type fiduciary relationship with a *beneficiary*—with whom the trustee has had no agreement, and therefore no contractual relationship.[297] The trustee's relationship with the beneficiary generates duties owed by the trustee to the beneficiary by virtue of their relationship—surely any duties owed by the trustee by virtue of their agreement with the settlor are owed to the *settlor*.[298]

Finally, treating each of these frameworks distinctively helps us see that each of the *three* relevant postures—substituted judgment, best interests, and agreement—have different purposes and functions. Agency treats a principal as an ongoing, evolving, individual person, and changes with them

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[295] *See, e.g.*, Andrew Jordan, *The Promise of Contract Pluralism*, 56 CONN. L. REV. 639, 645 (2024) (suggesting that contract law might be attuned to moral characteristics of the different ongoing relationships of contract partners).

[296] *See supra* Part I.A.

[297] And perhaps, as suggested above, an agency-type fiduciary relationship with the settlor. *See supra* notes 186–19 & accompanying text.

[298] *See, e.g.*, MARGARET GILBERT, JOINT COMMITMENT: HOW WE MAKE THE SOCIAL WORLD 8 (2014) (arguing that agreements create directed obligations to the other parties of the agreement); Klass, *Promise, agreement, contract*, *supra* note 289, at 44 (same).

over time.[299] Trust does not even presuppose the personhood of its beneficiary, and allows for financial management on behalf of virtually anything.[300] Contract is different than either. Like agency, contract presupposes the personhood of the parties to an agreement—you can be a trustee for your pet raccoon; you can't enter into a contract with it.[301] But, unlike agency, contract allows the parties to freeze the content of their duties towards one another at a particular moment in time.[302] And, like trust, *after* an agreement is formed, contract partners can be agnostic to the individuality of their contract partner and simply comply with the meaning of the agreement.

There is, of course, much more to be said about all of this. For now, suffice it to say that my account offers an illuminating way to see fiduciary law—and the relationships that comprise it—as distinct from at least some plausible theories of contract, clarifying the role of fiduciary and contractual postures in the architecture of private law.

C. Personal Identity and Legal Personality

Legal personhood—the characteristic of *being* a person in the eyes of the law—is widely recognized to be a foundational, constitutive feature of any legal system.[303] But the theory of fiduciary standards offered here reveals that even a comprehensive theory of legal person*hood* might not be sufficient to make sense of private law. A theory of personal identity, what makes one the *same* person across time, or one *the individual* person that one is as opposed to other legal persons, may be required.[304] And indeed, there is growing recognition in private law theory of the organizing significance of personal identity in a number of domains—from contracts to property.[305]

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[299] *See supra* note 208 & accompanying text.

[300] *See* Part III.B.

[301] Restatement (Second) of Contracts § 12 ("No one can be bound by a contract who has not legal capacity to incur at least voidable contractual duties.").

[302] *See, e.g.* Toomey, *Executor Discretion*, *supra* note 75, at 16 (describing contract as a mechanism for "enforcing intent crystallized at a particular, legally significant moment").

[303] *See, e.g.*, KURKI, *supra* note 233, at 1 (noting the importance of a concept of legal personhood); NGAIRE NAFFINE, LAW'S MEANING OF LIFE: PHILOSOPHY, RELIGION, DARWIN, AND THE LEGAL PERSON 1 (2009) (same); Paul B. Miller, *The Concept of Personality in Private Law*, in INTERSTITIAL PRIVATE LAW (Samuel L. Bray, John C.P. Goldberg, Paul B. Miller & Henry E. Smith, eds., forthcoming) (manuscript at 3) ("The concept of a *person* is *primordial*.").

[304] *See, e.g.*, James Toomey, *Narrative Capacity*, 100 N.C. L. REV. 1073, 1078 (2022) (distinguishing between theories of personhood and personal identity).

[305] *See, e.g.*, DeMott, *Fiduciary Character*, *supra* note 60, at 3 (noting that "agency doctrine does not treat the principal as personally discontinuous over time"); Evan Fox-

The theory of fiduciary law presented above offers another point of entry to the role of personal identity in private law—in agency and fiduciary law. Moreover, it suggests that the law's theory of personal identity must be a relatively thick one. In this context, it is worth turning to a distinction among theories of personal identity offered by the philosopher Marya Schechtman. Schechtman argues that there are two kinds of questions we might ask about personal identity—the Reidentification Question, "what makes a person at time t_2 the same person at time t_1," and the Characterization Question, "of which beliefs, values, desires, and other psychological features make someone the person she is."[306]

The theory offered here reveals that in some areas of private law, including trust law, the Reidentification Question may be what we care about. As mentioned, a private donative trust must have ascertainable beneficiaries—the trustee needs to be able to make sure that they are making distributions to the right person and not, say, an imposter.[307] This requires some theory of personal identity, but of a sort that could (perhaps) be satisfied by something like numerical, bodily identity.[308] Trust law itself does not demand much, if anything, beyond that—we don't need to know anything *about* that person; about *who* they are and what about them makes them themselves.[309]

Agency law, however, demands on its own terms a different sort of theory of personal identity. To determine whether an agent, or similar fiduciary making a substituted judgment, has fulfilled their duties, we need to know what the principal would have done in the relevant circumstances.[310] To make *that* judgment, we need to know *about* the principal, not just that the principal still exists—we need to know what makes them *the* person that they are, as distinct from others.[311] This sounds

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Decent, *Fiduciary Authority and the Service Conception*, in FOUNDATIONS, *supra* note 10, at 377 (describing the parent-child relationship as pre-occupied with the continuity of the personal identity of the child over time); Kaiponanea T. Matsumura, *Binding Future Selves*, 75 LA. L. REV. 71, 81 (2014) (observing that contract law "generally assumes the existence of a continuous personal identity").

[306] *See, e.g.*, SCHECHTMAN, *supra* note 207, at 2 (distinguishing these questions).

[307] *See supra* note 219.

[308] *See* SCHECHTMAN, *supra* note 207, at 68 ("The perceived tension between our competing intuitions concerning persons can thus be resolved by offering a physically based account of reidentification and a psychologically based account of characterization.").

[309] To be sure, there is no *a priori* reason a single theory of personal identity could not answer both questions. *See, e.g.*, Harold Noonan, *Introduction*, in PERSONAL IDENTITY xiv (Harold Noonan, ed., 1993) (discussing theories of personal identity that turn on psychological continuity).

[310] *See supra* Part III.A.

[311] *See supra* SCHECHTMAN, *supra* note 207, at 68; Markovits, *supra* note 97, at 224

more like Schechtman's Characterization Question—a theory of those things *about ourselves* that make us the person that we are, as opposed to someone else.[312] A number of such theories have been offered in the philosophical literature.[313] The structure of agency law or substituted judgment does not itself tell us how to select among these, but the point is that law must have *some* theory of personal identity in a thick, normative sense, at least to adjudicate agency cases.[314]

In short, the fundamental nature of agency in the pantheon of fiduciary relationships, and its reliance on the substituted judgment standard, offers another angle into the constitutive importance of personal identity in private law, increasingly recognized elsewhere. Whatever the law's theory of personal identity, it must account not only for the bare reidentification required by trust, but also for the kinds of considerations towards which substituted judgment is oriented—the story, relationships, values, commitments, and so on, that make up the person for whom we are deciding *who* they are.

D. The Future of Fiduciary Standards

This Article's contribution has been primarily theoretical—it offers a new lens through which to make sense of the distribution of decision-making standards across fiduciary relationships. In so doing, however, the account provided here suggests new ways to think normatively about how such standards—alongside alternatives such as contract[315]—*ought* to be distributed by the law. It suggests that relationships that the law (justifiably) thinks of as oriented towards an individual's personal identity ought to be guided by the substituted judgment standard, while best interests can have important roles in other sorts of relationships.[316]

From that perspective, how the law ought to think about the degree of individual inter-personality in particular relationships is an essential

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("[F]iduciaries engage each other not abstractly, for their universal humanity, but concretely, as the particular persons whom they are and become . . . ."); Brooks, *supra* note 178, at 237 ("Fiduciaries tend to acquire special knowledge about their beneficiaries.").

[312] *See* SCHECHTMAN, *supra* note 207, at 68 ("The most familiar examples of the characterization question are more specifically questions of which characteristics are *truly* those of some person (as opposed, say, to those which are his as a result of hypnosis, brainwashing, or some other form of coercion).").

[313] *See* SCHECHTMAN, *supra* note 207, at 93 (offering such a theory).

[314] *See, e.g.*, DeMott, *Fiduciary Character*, *supra* note 60, at 34 (noting that agency law is focused "on assuring a principal's autonomy through time and thus on the principal's present self and preferences.").

[315] *See supra* Part IV.B.

[316] *See supra* Part III.

question of normative legal design. This question can be approached in a variety of ways. First, one set of questions concerns the *ethical substance* of the proffered relationship as a matter of interpersonal morality. I've suggested above, for example, that the notion that ordinary relationships of representation are oriented towards the personal identity of another is intuitive.[317] But a number of philosophers have argued that, despite appearances, personal identity does not have normative weight.[318] If that is right, according ethical (and maybe legal) value to whatever illusion passes for the "evolving personal identity of another" would be based on a fundamental moral error.

On the other hand, some have suggested that at least many animals have the kind of self-identity over time that approximates the moral significance of personal identity.[319] If that's right, our relationship with animals might be better conceived in the ethical framework of representation rather than entrustment.[320] And at the same time, it is conceivable that there are cases in ordinary ethics where, notwithstanding the existence of an ongoing, genuine personal identity in another person, we ought to treat them as a placeholder or reasonable person—perhaps for reasons of discretion or privacy.

However those debates play out as a matter of interpersonal ethics, the extent to which the law should be responsive to them, or answer to reasons of its own in political and legal theory, is a separate question.[321] Indeed, it might be that the *law* has peculiar reasons—efficiency, for instance—to adopt the de-personalized frame of best interests in certain contexts. I've suggested this might justify the way in which the law conceptualizes the fiduciary status of trustees and corporate directors.[322] It might be that as a matter of interpersonal morality we ought always treat others as the individualized person that they are.[323] But perhaps the benefits of large-scale organization and wealth management outweigh strict compliance with

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[317] *See supra* Part III.A.

[318] *See, e.g.*, DEREK PARFIT, REASONS AND PERSONS 217 (1986) ("Personal identity is not what matters."); Galen Strawson, *Against Narrativity*, 17 RATIO 428, 437 (2004) ("My own conviction is that the best lives almost never involve this kind of self-telling . . . ").

[319] *See generally, e.g.*, EVELYN B. PLUHAR, BEYOND PREJUDICE: THE MORAL SIGNIFICANCE OF HUMAN AND NONHUMAN ANIMALS (1995) (arguing that many non-human animals have moral status in part by virtue of their capacity to care about what happens to themselves across time).

[320] *See supra* Part III.

[321] *See, e.g.*, SCOTT J. SHAPIRO, LEGALITY 109–119 (2011) (observing that law is answerable to different normative considerations than interpersonal morality in devising solutions to coordination problems).

[322] *See supra* Part III.C.

[323] *See, e.g.*, IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 38 (Mary Gregor, ed., 1997) ("*So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.*").

interpersonal morality in the aggregate.

Even in contexts where the law aspires to treat a beneficiary as an individualized person, it faces questions in how to operationalize that commitment. We have already seen this, for example, in the different ways in which the law implements the substituted judgment standard in cases involving, say, durable powers of attorney and executors interpreting wills.[324] In both cases, the law views the relationship as oriented towards the individual personal identity of another—but given the longevity of the former and the particularly difficult epistemic position of the latter, the law more strictly confines executor's decision-making to the plain meaning of what the testator wrote.[325] The point is that whatever one thinks of the substance of these relationships as a matter of interpersonal morality, the law faces normative questions of its own in implementing fiduciary standards in practice and guarding against abuse.

In short, while my project here has been theoretical, it offers a valuable perspective on the standards that ought to govern particular fiduciary relationships. My account points us toward theorizing about the extent to which a particular relationship is or ought to be oriented towards the individual personal identity of another, while answering to considerations of aggregation, efficiency, epistemic prophylaxis, and more.

CONCLUSION

Fiduciary law—a domain stretching from the S&P 500 to the hospice bed, with no apparent correlate in ordinary intuition—has long resisted theorization. Progress, however, has been made, in observing that all relationships we call fiduciary involve one person deciding (in some sense) "on behalf of" another, guided by some standard. But the question of *what standard* has remained.

This Article has argued that the decision-making paradigms of best interests and substituted judgment—debated, hashed out, and applied in health law—organize and make sense of the standards by which fiduciaries decide throughout the domain of fiduciary law. Agency, a relationship towards the personal identity of a principal, asks its fiduciaries to apply the substituted judgment standard—to do what the principal would have done. Trust, a relationship that takes its beneficiaries more as placeholders, asks its fiduciaries to act in their objective best interests.

Between these poles the spectrum of fiduciary relationships covers a broad range of postures towards beneficiaries—some more personal, some less, some governed more by substituted judgment, some closer to best

[324] *See supra* Part II.B.
[325] *See supra* Part II.B.

interests. In this way, fiduciary law can tailor standards of conduct for its myriad purposes—from organizing the management of money and economic growth, to making decisions for us in the first and last moments of our lives.