

## **The Reasonably Loyal Person**

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John Gardner's contributions to fiduciary theory arise in his discussions of neighboring fields. Perhaps for this reason, some of his major contributions take the form of puzzles left to be solved. This chapter explores a leading example of such a puzzle: the absence of the "reasonably loyal" person from fiduciary law. Tantalizingly, Gardner only hints at why there is no reasonably loyal person in fiduciary law. Still, his initial exploration of this question offers profound insights. I will consider Gardner's puzzle – why is there no reasonably loyal person standard? – together with his proposed answers. The inquiry sheds light on fiduciary loyalty, on loyalty in our personal lives, and on how the two interrelate.

The central concern is whether the law can look to extra-legal standards to fill in legal loyalty obligations – i.e., whether the law can engage in "buck passing", as Gardner refers to it. There is cause for doubt, if fiduciary law relationships lack law-independent counterparts. This chapter will suggest that these relationships do have law-independent counterparts, and that the law can readily pass the buck to extra-legal loyalty norms. Indeed, it may do so in multiple ways. That leaves open whether such buck passing is desirable. I will suggest three reasons why it might be: a) buck passing to extra-legal loyalty practices is a useful anti-opportunism device; b) buck passing allows fiduciary loyalty to better accommodate the lived experience of extra-legal loyalties; and c) buck passing provides an interface between legal and extra-legal conceptions of loyalty that can facilitate legal evolution.

### **I. Buck Passing and the "Reasonably Loyal" Trustee**

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To begin, we will need an understanding of what buck passing means. On Gardner's account, the law sometimes delegates resolution of a problem to non-legal standards: the law "helps itself to standards of justification that are not themselves set by the law".<sup>1</sup> Thus, when the reasonable person standard is used, courts are not asking a legal question as to how someone should act. The basic idea is expressed "by saying that the question of what a reasonable person would have thought or done or said or decided (etc) is a question of fact, not a question of law."<sup>2</sup> In such cases, the law is allowed to "help itself *pro tempore* to standards of justification that are not themselves set by the law".<sup>3</sup> As a consequence: "A ruling which is arrived at 'on the facts' is to that extent not subject to legal generalization."<sup>4</sup>

Let us adopt this starting point as a given. I will assume for discussion that tort law's reasonable person is best seen in buck passing terms. I take it that buck passing is a conceptual possibility (irrespective of whether it is the best interpretation of tort law's reasonable person), and I wish to consider the insights we can glean from seeing the legal landscape in this way.

Why engage in buck passing? There are multiple reasons why the law might do so, but Gardner locates a moral reason in Aristotle's reflections on law and equity. As Aristotle indicated, legal rules are inevitably overinclusive.<sup>5</sup> Equity, however, provides a means to resolve cases in a less rule-based fashion, permitting "discretionary departures, within limits, from mandatory legal rules".<sup>6</sup> Aristotle's account does not end there – he was famously also

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<sup>1</sup> John Gardner, 'The Many Faces of the Reasonable Person' in *Torts and Other Wrongs* (Oxford University Press 2020) [hereinafter, 'Reasonable Person'], at 279.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid. at 280.

<sup>5</sup> See *ibid* at 282 (citing Aristotle, NE 1137b10ff).

<sup>6</sup> See *ibid* at 284. There is another way that equity may intersect with Gardner's thought. I have argued elsewhere that equity allows for a special application of Gardner's continuity thesis. See Andrew S. Gold, 'Delegation and the Continuity Thesis' (2021) 40 *Law & Philosophy* \_\_ (forthcoming). While Gardner discusses legal norms of corrective justice as a means to assist wrongdoers in conforming to their reasons for action, he often has in mind defendants. Equity can assist *plaintiffs* in conforming to their reasons for action when those plaintiffs are themselves wrongdoers.

concerned with those who are sticklers for justice “in a bad sense”.<sup>7</sup> But for present purposes, our focus will be on equitable reasoning as an alternative to rule-based reasoning.

Rule following can provide justice according to law, but it is not the only way to provide justice – and in some settings, it may not be the best way. In Gardner’s view, the courts’ resort to equity can be justice’s ‘rebellion against law’.<sup>8</sup> As he argues:

Not every manifestation of justice is an act of following a sound rule. For some, just rulings are not governed by nor capable of being elevated to any sound rule of justice. They are based on a weighing of allocative considerations in their raw, unruly form. Solomon’s justice was justice ad hoc.<sup>9</sup>

Suppose that law’s use of equity does provide justice in this ad hoc way. Even so, the challenge posed by legal rules is not fully evaded in Gardner’s view, for he sees the law of equity itself as “a body of legal rules which license discretionary departures, within limits, from mandatory legal rules”.<sup>10</sup> And this means that the law’s equitable measures “wed the judge to further rules,” with the end result that both overinclusiveness and underinclusiveness remain a part of the picture.<sup>11</sup> This seems right, and the more so when we recognize that equity’s interventions can crystallize into a rule-like form.<sup>12</sup>

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<sup>7</sup> See Aristotle, *Nicomachean Ethics* in Jonathan Barnes, (ed), *The Complete Works of Aristotle*, vol. 2 bk V (Princeton University Press 1984) 1796 (‘It is also evident from this who the equitable man is; the man who chooses and does such acts, and is no stickler for justice in a bad sense but tends to take less than his share though he has the law on his side....’). For recent analyses of equity as a response to such sticklers, see Andrew S. Gold, *The Right of Redress* (Oxford University Press 2020) 195-202; Dennis Klimchuk, ‘Equity and the Rule of Law’ in Lisa M Austin & Dennis Klimchuk, (eds), *Private Law and the Rule of Law* (Oxford University Press 2014) 247.

<sup>8</sup> See John Gardner, ‘The Virtue of Justice and the Character of Law’ in *Law as a Leap of Faith* (Oxford University Press 2012) 254.

<sup>9</sup> See *ibid.*

<sup>10</sup> See Gardner, ‘Reasonable Person’, *supra* note 1, at 284.

<sup>11</sup> *Ibid.*

<sup>12</sup> For further discussion of the ways that equity can supplement law, see Paul B Miller, ‘Equity as Supplemental Law’, in Dennis Klimchuk, Irit Samet & Henry E. Smith, (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press 2020) 92.

Gardner suggests a potential answer is to engage in buck passing, for it means that the rule-like features of law can be evaded. Indeed, when buck passing decides a legal question, it is by definition resolved through something other than the law:

One more radical solution is to build into a legal rule ... a legally deregulated zone in which the many and varied underlying reasons are to be confronted by the decision-maker in their ordinary form, and applied direct, unmediated by law. Now there is, if you like, a non-rule embedded in the rule.<sup>13</sup>

In this sense, buck passing is a step beyond equity.

The reasonable person is a prime example of this approach, as a measure which can “take the edge off the rule”.<sup>14</sup> Importantly, it is not the only such measure. The reasonable person also has “neighbours” – persons who share features in common with the basic, plain vanilla reasonable person but with added qualities, heightened standards, or special constraints. Examples include the “reasonably competent carpenter” or the “ordinary prudent man of business.”<sup>15</sup> These neighbours, moreover, allow for a kind of middle path between pure buck passing and legally delineated standards of conduct. As Gardner indicates, “[The reasonable person] exists to create legally deregulated zones in the law. Yet, with a bit of tweaking, he can also help, as needed, to put a little bit of law back in.”<sup>16</sup>

There are various ways of putting a little bit of law back in. In some cases, the reasonable person is reined in by customary standards. Examples include cases where the law borrows the customary standards of a trade or profession, as happens with medical doctors. One might think that figuring out what the reasonable person would do in such cases is sufficiently reined in to become a question of law. But Gardner suggests that, properly understood, this is

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<sup>13</sup> See Gardner, ‘Reasonable Person’, *supra* note 1, at 284.

<sup>14</sup> *Ibid* at 285.

<sup>15</sup> Note that Gardner’s use of the male gender (e.g., the “reasonable man”) in contexts where the courts use that wording is not accidental; he wishes to draw attention to the problematic features of that conception of the reasonable person. See *ibid* at 278-79. While I will generally use gender-neutral language in describing the reasonable person, I quote his language directly as it is a component of his argument.

<sup>16</sup> *Ibid* at 289.

“an example of the law passing the buck to customary standards”; we are still confronted in these settings with a question of fact.<sup>17</sup> In other cases, the reasonable person is subject to specialized standards. Thus, the reasonable person might become the “reasonable civil engineer or the reasonable neurosurgeon or the reasonable hairdresser”.<sup>18</sup>

In yet other cases, the reasonable person is subject to distinctive rational priorities. As Gardner emphasizes, “there are many ways of being reasonable, and some are associated with one trait of character, some with another.”<sup>19</sup> Different virtues can predominate in the reasonable person’s thoughts, with different consequences for his or her conduct. This last category of reasonable person – involving distinctive rational priorities – is of particular importance here. Various traits, such as prudence, can be tacked onto the “reasonable person”, and in some settings the law does so. A quick survey of the reasonable person’s neighbours, however, shows that they are a rather incomplete bunch; the village of reasonable people is missing some inhabitants.

And here we arrive at the concern that motivates this chapter. Conceptually, it is not a large step from the reasonably prudent person to the reasonably loyal person. Why not take that step? As Gardner recognizes, there is an intriguing absence in the law’s characterization of fiduciary loyalty:

Is the person of ‘undivided loyalty’ supposed also to be the person of reasonable loyalty? Clearly the law thinks him justified (hence reasonable) in what he does. He is held up as setting the proper standard of behaviour for the role of trustee. But interestingly he is not described as a ‘reasonably loyal trustee’ or the like.<sup>20</sup>

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<sup>17</sup> Ibid at 290. Gardner clarifies that in this setting, such customary standards are not examples of customary law. Ibid.

<sup>18</sup> Ibid at 291. Note that in some cases, the reasonable person might be modified in light of what is customary within a given community. Cf. Anita Bernstein, ‘The Communities that Make Standards of Care Possible’ (2002) 77 Chicago-Kent Law Review 735.

<sup>19</sup> See Gardner, ‘Reasonable Person’, *supra* note 1, at 296.

<sup>20</sup> Ibid at 298.

Are obligations that rely on buck-passing, like the “reasonable person” in tort law, different from fiduciary loyalty obligations? I will suggest that they can be, but that it is also possible to develop a useful buck-passing account of fiduciary loyalty. The remainder of this chapter will discuss reasons why.

## **II. Assessing Arguments Against a “Reasonably Loyal” Trustee Standard**

### **A. The Excusatory Latitude Concern**

As Gardner suggests, there are some settings in which a “reasonable person” standard is designed to provide someone with an excusatory latitude. Criminal law is a classic setting. Someone acting under duress when confronted with grave threats may act based on a justified fear without it being the case that what she does in response to that fear is a justified action. On this view, one can perform unjustified actions in response to a justified emotion. The justified emotion provides an excuse. Significantly, then, the reasonable person “may be free of vice, but he is decidedly not free of shortcomings.”<sup>21</sup> The reasonable person is justified in what he or she does, but the reasonable person is not “justified in every which way at once.”<sup>22</sup>

Something similar might be said for fiduciaries. As Gardner notes:

[W]hen applied to virtue-names like ‘loyalty’ the qualification ‘reasonable’ allows a measure of excusatory latitude. That is what we get with ‘reasonable fortitude’ and ‘reasonable self-restraint’ in the criminal law.<sup>23</sup>

That is not necessarily a bad thing in the right context, but perhaps fiduciary law is not the right context. There could be good policy reasons – or perhaps moral reasons – for treating trustees

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<sup>21</sup> Ibid at 275.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid at 298.

differently. Gardner does not indicate these reasons, but given the risks of fiduciary abuses of power, it is not overly difficult to imagine them. As he concludes:

To be reasonably virtuous, we might think, it is sufficient but not necessary to perform justified actions, so long as one performs unjustified actions only on the strength of justified beliefs and justified emotions and the like. We may want to deny any such excusatory latitude to trustees.<sup>24</sup>

Someone who is reasonably loyal could, perhaps, engage in unjustified actions on the justified belief that their conduct passed muster. In addition, opportunistic fiduciaries, like corporate directors, can manufacture arguments for the reasonableness of behavior that involves half-hearted loyalty, self-serving behaviour. Good faith fiduciaries may also rationalize sub-loyal conduct without realizing it, and this may pose the greater risk. In turn, such cases could erode valuable relationships between fiduciary and beneficiary (whether intrinsically valuable or valuable for their systemic consequences). Fiduciary law regularly engages in overinclusive legal rules and stringent remedies to discourage opportunism and limit the effects of cognitive biases; it may have good cause to act similarly in adopting standards of loyalty that deny an excusatory latitude.<sup>25</sup>

## **B. The Absence of a “Law-Independent” Trust Relationship**

Alternatively, Gardner suggests that the “reasonably loyal trustee” is not used because the trust law relationship does not have a counterpart legal relationship to pass the buck to:

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<sup>24</sup> Ibid at 298-99.

<sup>25</sup> Limited exceptions, however, may exist. Both inside and outside the law, loyalty obligations have internal constraints that limit certain types of otherwise loyal behaviours. For discussion of legal settings, see Andrew S. Gold, ‘The Internal Limits on Fiduciary Loyalty’ (2020) 65 *The American Journal of Jurisprudence* 65. On such constraints in friendship settings, see T.M. Scanlon, *What We Owe to Each Other* (1998) 164-65. On the import of cabining such constraints in fiduciary law, see Andrew S. Gold ‘Pernicious Loyalty’ (2021) 62 *William & Mary Law Review* 1187, 1224.

A second explanation is that the role of trustee (unlike that of parent, businessperson, observer, physician, etc.) has no law-independent existence. There is no measure of a ‘reasonably loyal trustee’ until the law says just how much loyalty is expected of a trustee. So here, we might conclude, there is little or no scope for the law setting trustee standards to pass the buck to ‘those considerations which ordinarily [i.e. apart from this very law] regulate the conduct of human affairs’.<sup>26</sup>

Courts could still provide guidance as to what must be done by such a fiduciary, but, as Gardner further adds:

That being so, we now know, the reasonable person and his familiars would not be the right choice to do the standard setting. They would be reined in to the point of having little or no work left to do.<sup>27</sup>

In sum, there may be nowhere to pass the buck to, and to the extent law fills the gap to address this challenge, we are back in the world of legal rules with their attendant weaknesses.<sup>28</sup>

### **III. Fiduciary Loyalty as a Different Kind of Loyalty**

#### **A. Is Fiduciary Loyalty Not Genuine Loyalty?**

The above possibilities suggest that if we are to address Gardner’s puzzle, we will need to think through fiduciary loyalty’s relationship to extra-legal loyalty. Before proceeding further, it will be important to first address a related concern raised by Stephen Smith’s work. Smith is

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<sup>26</sup> See Gardner, ‘Reasonable Person’, *supra* note 1, at 299 (brackets in original).

<sup>27</sup> *Ibid.*

<sup>28</sup> Note that it is possible to think of other reasons why fiduciary law does not use a “reasonably loyal trustee” standard. One is the possibility of harm to the value of certain special relationships, if the “reasonably loyal trustee” approach produces too many qualifications of a fiduciary’s loyalty obligations. Another concern is opportunism risk.



also troubled by the relationship between legal and extra-legal loyalty obligations, but his worry is more radical than Gardner's worry. Smith contends that there is a mismatch between fiduciary loyalty and extra-legal counterparts, for he believes fiduciary loyalty is not loyalty at all.<sup>29</sup> If we hold that view, there is little need to figure out whether buck passing is possible in fiduciary settings, since fiduciary "loyalty" is a conceptual mismatch for real-world loyalty, full stop. Gardner's puzzle is not much of a challenge if it turns out that fiduciary loyalty is not loyalty in the first place.

Smith's concern is grounded in a feature of loyalty obligations that is easily recognizable in our non-legal lives (what Gardner would term our "personal life"). He denies that we can have "instant loyalty".<sup>30</sup> Loyalty is something that requires people to have a history together, a meaningful prior relationship. Thus, he contends: "Helping someone whom you have just met – for example helping a stranger to cross the street – is commendable, but it is not an instance of loyalty."<sup>31</sup>

As Smith further argues:

[T]he impossibility of acting loyally or disloyally towards others – unless you are already in a meaningful relationship with them – is a problem for loyalty-based accounts of fiduciary law regardless of how 'meaningful' is defined.<sup>32</sup>

The difficulty stems from a central feature of fiduciary law: "fiduciary relationships may arise – and do arise in full force – between parties who have no prior relationship."<sup>33</sup> The examples are legion, and they are especially prominent in commercial settings, as with money managers or corporate directors.

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<sup>29</sup> See Stephen A. Smith, 'The Deed, Not the Motive: Fiduciary Law Without Loyalty' in Paul B. Miller & Andrew S. Gold, (eds), *Contract, Status, and Fiduciary Law* (Oxford University Press 2016) 213.

<sup>30</sup> Ibid at 214 ("[A]scriptions of loyal behaviour always have a temporal element: there is no such thing as instant loyalty.").

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid at 215.

Notably, Smith's goal is to understand loyalty as that word is commonly used in ordinary language. He recognizes that courts sometimes use terms of art, and that fiduciary loyalty might mean "loyalty" in some specialized sense.<sup>34</sup> Yet, with that cautionary note, he contends that "the way that courts and commentators employ the concept of loyalty suggests that the concept is meant to carry its ordinary meaning."<sup>35</sup> He does not think that fiduciary loyalty is presented as having a special sense, and thus it is problematic if fiduciary loyalty does not match loyalty's ordinary meaning. There is another implication, however. If Smith's claims are right, buck passing to the loyal person should be a non-starter for fiduciary law. We need not worry about the "reasonably loyal trustee" on this view because fiduciary law isn't genuinely concerned with loyalty as usually understood.<sup>36</sup>

## **B. The Problem with Emphasizing Meaningful Relationships**

Yet Smith's account does not fully track ordinary usages of loyalty, or at least not all such usages. It is a mistake to think that all fiduciary loyalty needs to be built on a meaningful relationship if it is to count as genuine loyalty, as ordinarily understood. True, the loyalty we owe to friends and others within meaningful relationships is a paradigmatic instance of loyalty, and one of the most salient in our daily lives. This is also a loyalty that must be built up over time. Still, insisting that loyalty requires prior meaningful relationships may be an example of relying too much on the most common cases (or the most idealized cases).

Smith is concerned with ordinary usages of loyalty, and I share his methodology. Ordinary usages of loyalty, however, are incredibly broad – they range from loyalty to friends, to family, to country; from loyalty to a cause through loyalty to a sports team. One may also be

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<sup>34</sup> Ibid at 220.

<sup>35</sup> Ibid. Smith also suggests a motivational requirement; when acting loyally, he contends, one must be motivated by a meaningful relationship. See *ibid* at 215. This argument loses much of its force if one can have derived loyalty outside of a meaningful relationship. That said, the relevance of loyal motives for fiduciary law raises complexities that cannot be fully addressed here.

<sup>36</sup> Another option is to find that fiduciary loyalty is a kind of loyalty but also that it is *sui generis*. See, e.g., Paul B. Miller, 'Dimensions of Fiduciary Loyalty', in D. Gordon Smith & Andrew S. Gold, (eds), *Research Handbook on Fiduciary Law* (Elgar Publishing 2017).

loyal to the terms of a relationship, and not just the parties to that relationship.<sup>37</sup> The “loyal opposition” is a special case of loyalty in some polities.<sup>38</sup> Even brand loyalty has its place, as when we buy Coke versus Pepsi.<sup>39</sup> Not all of these loyalties have plausible linkages to fiduciary loyalty, but we should recognize the very wide-ranging palette that fiduciary theorists can work with if ordinary usages are our starting point.

Moreover, instantaneous strong feelings of attachment to others do sometimes arise, and in some cases these attachments may incorporate feelings of loyalty. Some cases are ambiguous. Is it realistic to say that a mother can feel loyalty to her infant at the instant the mother first sees her child’s face? One might say that it is love rather than loyalty in this context. Still, a case can be made that such cases involve both love *and* loyalty, and in any event other examples exist. As an alternative example, consider someone moved by a deeply motivational speech (for a literary illustration, consider a soldier who heard the St. Crispin’s Day speech in Shakespeare’s *Henry V*).<sup>40</sup> If the speech strikes the right chord, it could produce immediate loyalty to the speaker, or to the cause she represents, or to the country she supports. Or, imagine someone has just saved your life. Some might feel an instantaneous loyalty – of a type – to the rescuer.<sup>41</sup>

Another way to discern instantaneous loyalty obligations is to consider more institutional types of relationship. If we shift to these other settings, loyalty’s basis begins to look very different. In these settings, at least, loyalty obligations may have a transactional origin; we may consciously opt into loyalty.

Simon Keller notes that we can sometimes make a choice to be loyal:

Some kinds of loyalty are such that the loyal agent is able to choose the object of her loyalty. If you are loyal to a political party, for example, then your loyalty

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<sup>37</sup> See Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) 354-55.

<sup>38</sup> For discussion, see Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press 2016) ch.5. I thank Paul Miller for the example.

<sup>39</sup> On the range of loyalty practices, including brand loyalties, see Simon Keller, *The Limits of Loyalty* (Cambridge University Press 2007) 22.

<sup>40</sup> See William Shakespeare, ‘The Life of Henry the Fifth’, in Stanley Wells & Gary Taylor, (eds), *William Shakespeare: The Complete Works* (Oxford University Press 1986) (Original-Spelling Edition) 660.

<sup>41</sup> Cf. Keller, *supra* note 39, at 4 (suggesting loyalty to someone “who did something kind for you many years ago”).

probably originated in a choice to favor this party over others, and is probably experienced as an ongoing choice; you could, at least in principle, transfer your loyalty to a different party, if you choose.<sup>42</sup>

This understanding opens up the possibility that we can adopt loyalty obligations from the moment we join an organization or begin an employment relationship, or for that matter a fiduciary-type relationship.

Nor is this phenomenon limited to commercial or corporate contexts. Speaking from experience, when I first moved to Chicago in 2004, I made a choice to be loyal to the Chicago Cubs, and I understood this to require an instantaneous loyalty to the team. When Chicago's other baseball team then won the World Series shortly afterwards, I was in no position to switch teams, as my loyalty to the Cubs was already in place. I understood it to apply from the moment I made my choice. While my choice was somewhat idiosyncratic, it is not unheard of for people to decide on a sports team loyalty on the spur of the moment.

Such choices may also be more formalized. In honor cultures, feudalistic societies, and some organizational settings it is possible to pledge loyalty, and loyalty oaths and promises to act loyally are a longstanding practice. Quite famously, loyalty oaths have been required as a prerequisite for holding various public offices.<sup>43</sup> While there is evidently a public law aspect in some of these cases, these oaths don't make much sense if their reference to loyalty couldn't bind someone within a commonly accepted meaning of loyalty in our personal lives. And, one can just as easily comprehend a loyalty oath as a prerequisite to membership in a club, a society, or a social clique.

A loyalty oath is hardly something required of a close and trusted friend, and it would be bizarre in most settings for a family member to pledge loyalty to another family member. As Smith notes, promises between parties in a close relationship may signal that the relationship is

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<sup>42</sup> See *ibid* at 58.

<sup>43</sup> See Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, 'Faithful Execution and Article II' (2020) 132 *Harvard Law Review* 2111, 2141-46 (providing history of oaths of office from the medieval era).

not so close after all.<sup>44</sup> Yet these oath-taking contexts are contexts where loyalty is a central preoccupation. It would be strange to think that such oaths were intended to have anything less than an instantaneous effect once made. If, for example, an individual taking a loyalty oath as a precondition to holding office says he will be loyal as soon as the relevant bonds form – hopefully! – this would surely not suffice for the participants in the practice. The oath is meant to create an obligation of loyalty from the moment it is uttered.

Role-based loyalties also implicate instantaneous loyalties, at least some of the time. It isn't difficult to think up archetypal lawyer-client relationships in which a lawyer feels an immediate loyalty obligation to her client – whom she might otherwise not have supported given her suspicions of wrongdoing – in light of how the lawyer perceives her role as an attorney. What motivates such a lawyer, moreover, is not necessarily that the law tells her to act in a certain way. We can plausibly imagine cases where what makes the difference is that this is a part of her self-conception, a part of how she understands her role in the legal system, and a part of how she understands her extra-legal relationship to her client.

Keller's work offers a helpful nomenclature that fits these lawyer-client settings. As he argues, loyalties may be "non-derived" or "derived".<sup>45</sup> A non-derived loyalty is a kind of loyalty that is not itself a manifestation of another, deeper commitment. In the case of a derived loyalty, however, loyalty is itself the product of another prior commitment:

Your loyalty to a political candidate might be derived from a more fundamental commitment to certain political values, or from a more fundamental loyalty to a candidate's political party. ... You might maintain your loyalty to the Red Sox out of loyalty to your father, with whom you used to go to the games.<sup>46</sup>

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<sup>44</sup> See Smith, *supra* note 29, at 215 n.7 (citing Daniel Markovits, 'Promise as an Arm's Length Relation, in Hanoch Sheinman, (ed), *Promises and Agreements* (Oxford University Press 2011)).

<sup>45</sup> Keller, *supra* note 39, at 58.

<sup>46</sup> See *ibid* at 58-59. As my father was a fan of the New York Yankees, I have qualms about the specifics of this hypothetical, but the argument nonetheless seems sound.

A longstanding prior loyalty – one which may even have built up over time – can plausibly support an instantaneous loyalty to something else. The instantaneous loyalty is an expression of the prior background loyalty. Attorney-client settings are a rich source of examples for this kind of loyalty. A deep-seated loyalty to the justice system could readily support a lawyer's derived loyalty to her client (and it could do so instantaneously). Moreover, her prior loyalty to the justice system might be an extra-legal loyalty, and the derived loyalty to her client could be an extra-legal loyalty as well.

There is no evident reason why the prior commitment that supports a derived loyalty obligation should be a loyalty obligation itself. We might have prior obligations of various sorts that are expressed through our subsequent, instantaneous loyalty to something else. To modify Keller's example, why couldn't one instantaneously be loyal to the Red Sox because one promised to one's father that one would be loyal to the Red Sox? Once we allow for derived loyalties that find their source in a prior loyalty-based commitment, it seems artificial to limit the category of derived loyalties to only those cases where the prior commitment is itself a loyalty obligation.

In each of the above examples, we confront longstanding practices that use the terminology of loyalty, that are adopted in non-legal settings or from an extra-legal point of view, and that are engaged in by parties who take their loyalties seriously. They involve obligations that recognizably fit patterns of loyalty in other contexts (e.g., they call for selfless behavior and require efforts to advance the best interests of a beneficiary). Given these features, it is possible to see these practices as loyalty practices, even if they involve kinds of loyalty that would be utterly inadequate for friendships or family relationships.<sup>47</sup>

There is room for fiduciary loyalty to be built upon agreements, undertakings, oaths, or other loyalty-creating transactions. Not everyone sees loyalty in this way, but enough people do to bring such instantaneous loyalty within ordinary usage. If buck passing does not work well in fiduciary law settings, the reasons why are not built into the concept of loyalty itself.

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<sup>47</sup> In this respect, the divide between thin and thick versions of loyalty resembles the divide between thin and thick versions of trust. On the latter divide, see Matthew Harding, 'Fiduciary relationships, fiduciary law, and trust', in D. Gordon Smith & Andrew S. Gold, (eds), *Research Handbook on Fiduciary Law* (Elgar Publishing 2018) 58, 60. For further discussion of the idea that loyalty can be thin or thick, see Irit Samet, 'Fiduciary Loyalty as Kantian Virtue', in Andrew S. Gold & Paul B. Miller, (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014) 125, 126; George P Fletcher, *Loyalty: An Essay on the Morality of Relationships* (Oxford University Press 1993) 40.

#### **IV. The Existence of a Law-Independent Counterpart**

##### **A. Fiduciary Relationships with Law-Independent Counterparts**

The possibility that fiduciary loyalty is genuine loyalty still leaves us with the question of law-independent counterparts. Some may argue that any relationship that is built around the exercise of legal powers will lack a law-independent counterpart. If that view were adopted, then trust relationships would be on very shaky ground, given their close conceptual linkage to legal ownership of property. Indeed, even agency relationships might be in trouble. One of the most basic and important features of agency law is that it enables a principal to enter into a legally binding contract by means of the conduct of an agent – legally binding contracts, of course, only exist within systems of law.

Yet, as Gardner notes, the idea of buck passing is consistent with the idea that a reasonable person would take the law into account in deciding how to act.<sup>48</sup> We may also have morality-based reasons for exercising or not exercising legal powers that apply in roughly the same fashion that they apply in our private lives. For example, I argue in *The Right of Redress* that there are moral reasons not to bring a private right of action, notwithstanding its legal legitimacy.<sup>49</sup> Reasons to show mercy, or reasons to forgive, could militate against bringing suit. This same point applies to the fiduciary in respect to her fiduciary authority, with the added consideration that the fiduciary's reasons for exercising (or not) her legal powers may center on reasons of loyalty. While not decisive, these features suggest the potential for loyalty-based relations in contexts where legal powers are involved.

The example of trust law is nonetheless a difficult one, given the degree to which legal concepts can be central to its structure. Perhaps some trusts do have law-independent counterparts. It is telling that some theories of the state's relation to the people it governs, such as John Locke's, make use of a trust analogy.<sup>50</sup> Moreover, some theories of morality suggest a

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<sup>48</sup> See Gardner, 'Reasonable Person', *supra* note 1, at 282, 293.

<sup>49</sup> See Andrew S. Gold, *The Right of Redress* (Oxford University Press 2020) 192-95.

<sup>50</sup> See John Locke, The Second Treatise of Government, §149, in David Wootton, (ed), *Political Writings of John Locke* (1993) 337 ("[T]he legislative being only a fiduciary power to act for certain ends, there remains still in the

trust structure could justify moral duties (as T.M. Scanlon suggests in respect to the moral obligations humans owe to other animals).<sup>51</sup> Indeed, Gardner himself describes aspects of our ethical obligations in terms of an “implied trust”.<sup>52</sup> While these references to a trust relationship are somewhat loosely made, they signal that trust-like, law-independent relationships could be a part of political and moral theorizing.

Whatever our views on law-independent counterparts for trusts in the formal sense, it is also worth considering whether other fiduciary relationships have law-independent counterparts. Gardner’s query about the reasonably loyal trustee is apparently aimed at fiduciary relationships generally. I think such counterparts exist in non-trustee fiduciary settings, and I will turn to some examples now.

Agency relationships are a likely candidate. With or without the law, we often have people act on our behalf, in much the way that agency law empowers us to act. Some aspects of agency relationships are necessarily law-dependent – it does not make much sense to speak of someone acting as a legal substitute for another in the absence of the law. The capacity of an agent to sign a legally binding contract on behalf of another does not plausibly pre-exist a legal system. Nonetheless, in our personal lives we can still have someone make a promise on our behalf. We might think that an agent’s powers to contract on our behalf have law-independent analogues that are close enough to support buck passing to the loyal agent. Moreover, notions of loyalty as obedience regularly crop up in extra-legal settings,<sup>53</sup> suggesting that the extra-legal loyalty of agents could be a fruitful context for this approach.

Joint ventures and partnerships are another classic category. We often team up with others in pursuit of a project or series of projects, with or without the law. These relationships are probably vital for the success of pre-legal societies. They are also easily discernible parts of

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people a supreme power to remove or alter the legislative when they find the legislative act contrary to the trust reposed in them.”).

<sup>51</sup> See T.M. Scanlon, *What We Owe to Each Other* (Harvard University Press 1998) 183.

<sup>52</sup> See John Gardner, *From Personal Life to Private Law* (Oxford University Press 2018) 105.

<sup>53</sup> See Keller, *supra* note 39, at vii (emphasis added).



modern life, with their own distinctive forms of loyalty.<sup>54</sup> Further, the law will recognize their legal validity even in cases where the participants were entirely unaware that they had formed a legally recognized relationship, and this in itself may be indicative of a law-independent notion of partnerships.<sup>55</sup> The loyalty owed to team members is so deeply ingrained in loyalty practices that buck passing is almost certainly a feasible option for at least some partnerships.

Parent-child relationships are a prominent but also more complex example. Here, there is some jurisdictional variation, as parent-child relationships are not uniformly considered to be fiduciary. But, in those jurisdictions that do treat these relationships as fiduciary relationships, it is overwhelmingly evident that these relationships have law-independent existence. Indeed, the law-independent forms of this relationship are more prominent and arguably more important than the legal forms. And, here too, the relationship at issue has been used to theorize the state's loyalty obligations to its citizens.<sup>56</sup> Where parent-child relationships are considered to be fiduciary, it is a reasonable choice for courts to consider the factual question of what a loyal parent would do.

Lastly, some fiduciary relationships are based on the unique circumstances of a given fact pattern. Such ad hoc fiduciary relationships are often built in part upon friendships, and these relationships can thus incorporate the kind of loyalty that develops gradually within meaningful relationships (they accordingly can also fit Stephen Smith's account of loyalty reasonably well).<sup>57</sup> If so, these relationships are premised on the existence of *involvements* which take shape

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<sup>54</sup> On the distinctiveness of partnership loyalty in legal settings, see Evan J. Criddle, 'Stakeholder Fiduciaries', in *Fiduciaries and Trust: Ethics, Politics, Economics, and Law* (Paul B. Miller & Matthew Harding, eds., Cambridge University Press 2020) 105.

<sup>55</sup> On the possibility of entering into fiduciary relationships without realizing it, see Gregory Klass, 'What if Fiduciary Relationships are like Contractual Ones?' in Paul B. Miller & Andrew S. Gold, (eds), *Contract, Status, and Fiduciary Law* (Oxford University Press 2016) 93, 102; Andrew S. Gold, 'Trust and Advice', in Paul B. Miller & Matthew Harding, (eds), *Fiduciaries and Trust: Ethics, Politics, Economics, and Law* (Cambridge University Press 2020) 35, 51-53.

<sup>56</sup> See, e.g., Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford University Press 2011). I have argued against the parent-child analogy for purposes of theorizing the state-citizen relationship, but the usage of such analogies is still indicative of the law-independent existence of parental loyalty obligations. Cf. Andrew S. Gold, 'Reflections on the State as Fiduciary' (2013) 63 *University of Toronto Law Journal* 655.

<sup>57</sup> See, e.g., *Burdett v. Miller*, 957 F.2d 1375 (7<sup>th</sup> Cir. 1992) (Posner, J.) (finding an ad hoc fiduciary relationship in part based on a friendship).

incrementally without a specific act of relationship creation.<sup>58</sup> They bring two or more parties together in a way that is not formally announced, but which is readily apparent to the participants and to third parties in the relevant community. Such extra-legal involvements are also clear cases of law-independent relationships.

## **B. Fiduciary Relationships Without Law-Independent Counterparts**

Interestingly, the lack of a law-independent counterpart in a given moment need not be fatal to a buck passing account. A fiduciary relationship that lacks a law-independent counterpart *ab initio* may not always lack a law-independent counterpart in the future. The loyalties owed within a given relationship can evolve over time. For example, it may become an expression of loyalty for two friends to call each other on their birthday given their past practices of doing so, even if initially their friendship did not require birthday calls.<sup>59</sup> This is true even against a backdrop of rule-based obligations; relationships built on contracts can implicate evolving loyalty obligations that effectively supersede the terms of the agreement.<sup>60</sup> And a version of this process may hold true for fiduciary relationships that begin with a legal mandate, rather than a contractual one. Parties to such a relationship may then end up with a law-independent counterpart even if they did not begin with one.

At a larger scale, the loyalty obligations that attach to an entire category of special relationship may also evolve over time, extending beyond (or in place of) the terms set by law. There was a time in history when lawyer-client relationships did not exist. Now, there are characteristic forms of loyalty – extra-legal loyalty – that lawyers customarily show toward their clients. These are products of social norms which have taken time to form, but which are

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<sup>58</sup> See David Owens, *Shaping the Normative Landscape* (Oxford University Press 2012) 97 (citing Erving Goffman, *Interaction Ritual* (1963) ch.7).

<sup>59</sup> See *ibid* at 108. See also *ibid* at 101.

<sup>60</sup> Daniel Markovits, ‘Sharing Ex Ante and Sharing Ex Post: The Non-Contractual Basis of Fiduciary Relations’, in Andrew S. Gold & Paul B. Miller, (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014) 220-23. See also Owens, *supra* note 58, at 107 (suggesting obligations of friendship can start life with a promissory obligation, and concluding that no obligation constitutive of friendship is a promissory obligation). Gardner shows apparent sympathy for Markovits’s understanding. See Gardner, *From Personal Life*, *supra* note 52, at 44-45.

presently well-established and suitable for factual inquiries into what a loyal party would do. Whenever it was that lawyers first appeared on the scene, there would have been no law-independent counterpart that was a perfect fit for the lawyer-client relationship; this relationship only needed to exist when law existed. That doesn't preclude the subsequent emergence of a law-independent relationship for an entire legal category like the lawyer-client relationship. While some of the extra-legal loyalty at issue may simply be a direct reflection of whatever the law has mandated, other features can be products of custom within a community.<sup>61</sup>

These possibilities suggest law-independent counterparts can evolve for fiduciary relationships that do not initially have such counterparts. Assume, however, that we are dealing with a fiduciary relationship that does not evolve in this way. Courts may still borrow from another fiduciary sphere that does have a law-independent counterpart. Doctrinal borrowing is already well-established. In *Meinhard v. Salmon*, Judge Cardozo looked to trust law loyalty in thinking about joint venture loyalty. Corporate law regularly builds on both trust law and agency law. The loyalty required for novel fiduciary relationships is frequently based on analogies to more established fiduciary relationships,<sup>62</sup> and legal transplants are commonplace.<sup>63</sup> Similarly, in cases where a fiduciary law relationship has no law-independent relationship that is a genuine counterpart, the law might pass the buck to the loyal participant in some other fiduciary relationship – one that does have a law-independent counterpart. If that legal relationship is close enough in its central features, this kind of buck passing could work quite well.<sup>64</sup>

Note also that specialized legal concepts often implicate a higher level, more abstract concept (e.g., employment-related concepts can be understood at the specialized level of

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<sup>61</sup> A powerful illustration is the tendency of plaintiffs' lawyers to eschew "blood money" when representing their clients. For discussion, see Tom Baker, 'Blood Money, New Money, and the Moral Economy of Tort Law in Action' (2001) 35 Law & Society Review 275.

<sup>62</sup> On the role of analogies in fiduciary law, see Deborah A. DeMott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation' 1988 Duke Law Journal 879.

<sup>63</sup> Such transplants may also be problematic. See Edward Rock & Michael Wachter, 'Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Transplants' (2002) 96 Northwestern University Law Review 651.

<sup>64</sup> Compare Gardner's discussion of buck passing to the "reasonably competent carpenter" in determining liability for an ordinary house owner. Cf. Gardner, 'Reasonable Person', supra note 1, at 292.

employment relationships or, alternatively, at the more abstract level of contract relationships).<sup>65</sup> If trust law lacks a law-independent counterpart at the level of the trust relationship, we might move up the ladder to the more abstract idea of a fiduciary relationship. In that case, a court could buck pass to whatever it is that a loyal *fiduciary* would do, even if it cannot readily buck pass to whatever it is that a loyal trustee would do. A higher level of abstraction could mean greater indeterminacy, but for some disputes the most basic answers (e.g., no self-dealing) may suffice.

## V. The Buck Passing Account Revisited

Let us now turn briefly to the merits. In assessing the merits of buck passing to the loyal person, it is important to recognize the flexibility involved in adopting this approach. This flexibility is built into Gardner's understanding of the buck passing idea. While he sees buck passing as a kind of legally "deregulated" zone, it is a deregulated zone that can be shaped, enhanced, and customized in various ways. With that in mind, it is quite plausible for the law to occasionally use a buck passing strategy in assessing fiduciary loyalty.

First, a buck passing account of fiduciary loyalty could be adopted without employing the excusatory latitude of the "reasonably loyal" person. One might simply ask, factually, what a loyal person would do in a given set of circumstances. Or, one might use what Gardner refers to as an enhanced standard if the circumstances call for it. Second, buck passing to the loyal person can be subjected to legal constraints. If courts are concerned that extra-legal loyalties will be *overly* stringent – that they will be harmful because unregulated loyalty can become excessive – then the law can place boundaries around this legally unregulated zone. As Gardner expresses the idea, courts may "put a little law back in". Buck passing to the loyal person is consistent with various carve outs or constraints where the law imposes legal rules.

In short, the law can pass the buck for fiduciary loyalty without the excusatory latitude of the "reasonably loyal" person, and it can opt for narrower limitations on loyalty where

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<sup>65</sup> For helpful discussion, see Simon Deakin, 'Juridical ontology: the evolution of legal form' (2015) 40 *Historical Social Research* 170, 173.

appropriate. What the above possibilities suggest is that fiduciary law can buck pass in a manner that is not overly excusatory nor overly inviting of loyalty's excesses. Still, that just means that buck passing is an option. Are there any arguments that actually work in its favor? As noted, I will suggest three possibilities: a) the buck passing approach to loyalty is a useful anti-opportunism device; b) buck passing allows fiduciary loyalty to better match extra-legal loyalties; and c) buck passing provides a valuable interface between legal and extra-legal concepts of loyalty that can facilitate legal evolution.

Our first basis for buck passing is actually an extension of Gardner's Aristotelian justification. Recall that, for Gardner, there is a moral argument for buck passing that draws on Aristotle's argument for equity. On this view, buck passing is a step beyond equity as a response to the overinclusiveness of legal rules. This view indicates one reason why buck passing to the loyal person could be valuable, for loyalty is capable of acting much like the law of equity acts in other realms. Loyalty can mold itself to the particularities of new fact patterns,<sup>66</sup> subtly addressing opportunism while also providing predictability and accessibility to those familiar with loyalty practices. Indeed, Henry Smith has offered a powerful theory of fiduciary law as equitable, with loyalty as an important component.<sup>67</sup> On this account, fiduciary loyalty, with its associated burdens of proof and strict remedies for breach, is an anti-opportunism device that tracks equity's proxies for opportunism while going beyond them.

We should be careful not to confuse acting loyally with acting equitably in the realm of our personal lives (it would be an interesting but also distinct development for the law to pass the buck to the "reasonably equitable person"). After all, it is possible for individuals to be equitable toward someone while still falling short of what loyalty requires. I might act equitably toward an acquaintance by partially forgiving her debt, given the difficulty my acquaintance will have in paying this debt; if I acted loyally toward her as a friend, however, I might forgive the debt in its entirety. Likewise, one can be loyal toward someone by giving her a very large share of a pool of assets, with the effect that one is inequitable toward someone else who thereby gets a smaller

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<sup>66</sup> On fiduciary law's atomistic quality, see DeMott, *supra* note 62, at 915.

<sup>67</sup> See Henry E. Smith, 'How Fiduciary Law is Equitable', in Andrew S. Gold & Paul B. Miller, (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014).

share. The equitable person is not inevitably loyal, and the loyal person is not inevitably equitable.<sup>68</sup>

But these considerations don't preclude the law from using loyal behavior – including the factual question of what a loyal person would do – as a mechanism for policing opportunistic behavior, in much the same way that equity operates to address opportunism in other settings. Loyalty is often a very good tool for combatting opportunism by those who exercise fiduciary discretion. Loyalty is also accessible to fiduciaries, beneficiaries, and even courts in a way that other standards might not be. While we ought not view the loyal as equivalent to the equitable, what is loyal can function as a rough proxy for what is equitable.

Another reason to buck pass is that this enables the law to accommodate the extra-legal loyalties that fiduciaries actually experience. Indeed, it allows for this loyalty to better match beneficiary expectations. One basic reason for such accommodation is that, where successful, it will lessen the burden on fiduciaries who take their loyalties seriously; they will not face a conflict between what the law deems loyal and what they subjectively feel is loyal.<sup>69</sup> Another possibility is that the loyalty at issue will be easier for regulated parties to understand, as it will be more accessible.<sup>70</sup> A further consequence may be to improve compliance by limiting perceived gaps between legal and extra-legal standards. Where legal obligations diverge from their perceived moral counterparts, this divergence can decrease compliance with those legal obligations.<sup>71</sup> The same could be true for loyalty.

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<sup>68</sup> In this respect, as in others, the virtues relevant to the law may be in tension. Gardner was of course well aware of such tensions. See John Gardner, 'The Virtue of Justice and the Character of Law', in *Law as a Leap of Faith* (Oxford University Press 2012) 238, 252-53 (describing differences between rules of justice and of loyalty).

<sup>69</sup> See generally Andrew S. Gold, 'Accommodating Loyalty', in Paul B. Miller & Andrew S. Gold, (eds), *Contract, Status, and Fiduciary Law* (2016) 185. For a general account of the accommodationist approach, see Seana Valentine Shiffrin, 'The Divergence of Contract and Promise', (2007) 120 *Harvard Law Review* 708. Relatedly, this may also be a means to limit contractual reductivism regarding fiduciary loyalty. For Gardner's arguments against such reductivism, see Gardner, *From Personal Life*, supra note 52, at 44-46. While I believe fiduciary loyalty is sometimes contractual, there are reasons to not want all forms of fiduciary loyalty to be understood in that way.

<sup>70</sup> See Gold, supra note 69, at 200.

<sup>71</sup> See *ibid* at 198-99. Cf. Paul Robinson & John Darley, 'The Utility of Desert' (1997) 91 *Northwestern University Law Review* 453 (discussing a similar idea in the criminal law setting).

Buck passing also permits something else that is implicit in the above suggestions. Buck passing may allow external, non-legal understandings of loyalty to eventually be incorporated into internal, legal understandings of loyalty. In such cases, the value of buck passing is how it affects the law's content in contexts that do not involve buck passing. This claim might appear to be in tension with some of Gardner's other legal theory commitments, but it need not be.

Gardner emphasizes that when read as a whole, his account of buck passing is an argument against incorporationism; that is, it is an argument against the view that standards like the reasonable person, once applied by courts, are by that fact alone legal standards.<sup>72</sup> Yet, if we accept Gardner's anti-incorporationist view (I take no position here), it would not follow that the standards which emerge from a buck passing approach can *never* be incorporated into the law. Particularly in the fiduciary context, where fact finders are typically judges and not juries, one might anticipate that understandings of loyalty that surface in a buck passing context could gradually migrate over to the law, and even become legal rules. For example, it is now a legal rule that a corporate director's loyalty doesn't require intentional violations of positive law, but this legal rule could have evolved from a factual analysis of what a certain kind of loyal person would do.

Legal concepts are at least somewhat mutable.<sup>73</sup> They are also "defeasible" – that is, they are partly open-ended or indeterminate.<sup>74</sup> These features exist to varying degrees within legal systems, and certainly within private law, but it should be evident that fiduciary law's concepts have both characteristics. Fiduciary loyalty also evolves with regularity, especially in heavily litigated fields like corporate law. Although this is ultimately an empirical question, fiduciary loyalty concepts thus appear susceptible to the influences of extra-legal conceptions of loyalty. If that hypothesis is right, the loyalty that manifests in a buck passing context could readily cross over to the law's own conceptions of fiduciary loyalty.

Granted, it may not always be obvious when courts are engaging in buck passing, especially in the fiduciary setting. As noted, juries are not the usual fact finder in fiduciary law

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<sup>72</sup> See Gardner, 'Reasonable Person', *supra* note 1, at 302-03.

<sup>73</sup> See Deakin, *supra* note 65, at 180.

<sup>74</sup> See *ibid* at 173.

cases, and judges do not always identify buck passing cases as such.<sup>75</sup> *Meinhard v. Salmon* itself may provide examples of a court buck passing to the loyal person, yet that is less than clear.<sup>76</sup> But this very ambiguity between incorporated legal standards and potential buck passing may allow for the conduct of the “loyal person” to influence the legally adopted rules that govern loyal fiduciaries. Particularly where courts do not always identify buck passing cases as such, there is room for judicial pronouncements on loyalty that begin as buck passing to end as legal rules.<sup>77</sup>

Importantly, the resulting legal standards may not precisely match whatever it is that the “loyal person” or the “reasonably loyal person” would do as a factual question. They may, nonetheless, be influenced by that factual question, and they may approximate its answer. If so, the result could be more recognizably loyal, to the untrained eye, than what the law would otherwise have provided. That approximation is itself valuable.<sup>78</sup> Fiduciary loyalty is a kind of loyalty, but it is often quite distinct from its extra-legal counterparts. The need for a gap between legal loyalty and extra-legal loyalty can be real. Still, the gap between legal and extra-legal loyalty need not be a huge gulf, and buck passing to the loyal person could be a way to maintain a close but reasonable distance between the law’s understanding of loyalty and the understanding of fiduciaries themselves.

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<sup>75</sup> As Gardner recognizes, a court may engage in buck passing where the court itself is the fact finder. See Gardner, ‘Reasonable Person’, *supra* note 1, at 301.

<sup>76</sup> At times, Cardozo uses language that suggests he is applying standards of loyalty that are extra-legal in their source. For example, see *Meinhard*, at 468 (“A managing coadventurer appropriating the benefit of such a lease without warning to his partner might fairly expect to be reproached with conduct that was underhand, or lacking, to say the least, in reasonable candor, if the partner were to surprise him in the act of signing the new instrument.”). That reading is not conclusive, however, and *Meinhard* is an isolated case. For a suggestion that fiduciary relationships regularly draw on “precepts of social morality and practice”, see Scott Fitzgibbon, ‘Fiduciary Relationships Are Not Contracts’ (1999) 82 *Marquette L Rev* 303, 338-40.

<sup>77</sup> Such a process is also consistent with fiduciary law’s pattern of adopting rules and standards that work in combination. On that pattern, see Smith, *supra* note 67, at 273; Robert H Sitkoff, ‘An Economic Theory of Fiduciary Law’, in Andrew S. Gold & Paul B. Miller, (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014) 197, 202-03. The rules might be legal while the standards result from a buck passing approach.

<sup>78</sup> The benefits of using legal concepts of loyalty that are “recognizably loyal” may roughly track the benefits of using legal concepts that are “recognizably moral”. On the latter, see Andrew S Gold & Henry E Smith, ‘Restatements and the Common Law’ (ms on file with author); Andrew S. Gold & Henry E. Smith, ‘Sizing Up Private Law’ (2020) 70 *University of Toronto Law Journal* 489.



## **VI. Conclusion**

John Gardner was right to ask why there is no “reasonably loyal trustee”, and pursuing his question further leads to a range of insights. This chapter suggests that buck passing is a realistic option for fiduciary law. A fiduciary’s loyalty can be a question of fact just as much as it can be a question of law, and for most fiduciary relationships both perspectives are available. Under the right circumstances, both perspectives could also be desirable.