Canadian Journal of Law & Jurisprudence XXXV No.1 February 2022, 187-221
 doi: 10.1017/cjlj.2021.19

Moving Along the Continuum of Loyalty From a Standard Towards Rules

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Abstract

This article focuses on the location of the duty of loyalty—a unique legal norm in Common Law jurisdictions—both actual and desirable, on the continuum between rules and standards. A rule is a relatively 'closed' technical norm, at a high level of specificity; it requires little judicial discretion. A standard is an 'open' norm, with a greater degree of flexibility, that requires the exercise of discretion. The insights from this jurisprudential perspective are used to reveal the preferred way for further developing the duty of loyalty. The article explains that 'loyalty,' intuitively classified as a 'pure' standard, has been reconstructed over time as more specific rules. Moreover, it suggests that, ideally, this movement should continue; namely, when applying loyalty to a specific case, courts should include informative content that would promote predictability. It then illustrates that, unfortunately, this road is not always taken by the courts. A decision to retain loyalty as an ad hoc standard, or an inverse attempt to delineate the boundaries of this norm, has implications on the certainty, consistency, and ethical content of the law. Considering that this duty spreads across different legal fields, personal and commercial, the significance of this discussion becomes all the more evident.

Introduction

In Common Law jurisdictions, the duty of loyalty is a distinctive duty, which obliges one person, that is the fiduciary, to disregard their own self-interests and to act exclusively in the interest of the other person, the beneficiary. It applies to a variety of relationships, including parents and children, professional relations (doctors and lawyers), and commercial ones (officer and company). A breach of this duty could have severe outcomes, which include disgorgement of all unauthorized profits, a remedy that is applied in exceptional cases outside of fiduciary law. This duty applies not only to different kinds of relationships, but also to numerous factual situations. However, its content is not constant and could change according to the specific circumstance of the case. This article seeks to focus on the question of the location of this unique legal norm, both actual and desirable, on the continuum between rules and standards.

A well-known distinction is the one between the two possible forms of legal norms. A 'rule' is a relatively 'closed' norm, at a high level of specificity, that provides clear guidance. Its operation is technical and requires little judicial discretion. A 'standard,' on the other hand, is an 'open' norm, with a greater degree of flexibility, that requires judges to exercise discretion. This article shows how investigating a specific provision of law—the duty of loyalty—by placing it on the scale between these two 'pure' forms, contributes to the current debates

about this duty, as it singles out the conflicts and contradictions which arise from the way the legal norm is drafted. Hence, this discussion provides a different perspective to the general criticism of fiduciary law and could assist in solving some of the difficulties this literature has raised. By doing so, the article aims to both enrich the understanding of the duty of loyalty and elucidate the complexity of shaping legal standards in private law more generally.

The article shows that in certain situations, courts consistently have declared that no hard rules can be formulated to measure the standard of loyalty, as it should be tested in each case by many factual elements. However, in other cases, courts have chosen to formulate more concrete and clear instructions as to what would be considered a breach of this duty. A decision to retain the duty of loyalty as an ad hoc standard, applied to the specific circumstances of the case, or an inverse attempt to delineate the boundaries of this norm by creation of rules that reduce the judicial discretion needed for its operation, has implications on the certainty, consistency, and ethical content of the law. Therefore, it would also affect the relevant legal relations that the duty intends to regulate. Considering that the sphere of influence of this duty spreads across different legal fields, personal and commercial, the significance of this discussion becomes apparent.

The article continues as follows. ***Part I*** presents the relevant background needed for the discussion, meaning, it briefly presents the general literature on the distinction between rules and standards. Understanding the advantages, as well as disadvantages, of these two possible ways of designing legal norms, ***Part II*** explains the importance of examining 'loyalty' from this perspective. The discussion in *Part II(a)* begins by asking what the *actual* location of this legal norm is on the scale between rules and standards. It demonstrates that, while intuitively loyalty appears to be a 'pure' standard, a closer examination shows that as time passed, in specific contexts and relationships, the duty shifted across the continuum, from the extremity of standards towards that of rules. Through courts' decisions, as well as occasional codification, different aspects of the idea of 'loyalty' were designed in a form closer to rules. The article further claims that debates about the nature of this duty must take this legal 'movement' into account, in order to describe more accurately the meaning of 'loyalty.'

After clarifying the actual location of the duty, *Part II(b)* then asks whether this location on the continuum is a *desirable* one. Referring to general, often-heard criticisms about fiduciary law inconsistencies, the article explains how the rules-and-standards perspective presents possible solutions to some of these difficulties. It explains why deviating from the ideal of 'loyalty' as dictating a general standard of behavior and replacing it with only 'rules' is inadvisable. Hence, the mentioned movement of the law is not along a one-way street and does not aim to depart completely from the form of standard. Nevertheless, it also suggests that the implementation of the standard of 'loyalty' does not necessarily mean adopting a case-by-case approach for decision making. It claims that ideally, when implementing the general standard of 'loyalty,' courts should continue this movement across the continuum between standards and rules. Namely, when applying 'loyalty' to a specific case, courts should include, as

https://doi.org/10.1017/cjlj.2021.19 Published online by Cambridge University Press

far as possible, instructions that would allow its coherent application and promote its predictability, thus providing informative content to the standard of loyalty. The movement of 'loyalty' on the continuum should be understood as a pendulum-like movement, which constantly strives to reach the edge of rules, yet does not detach completely from its origin as a standard.

Finally, ***Part III*** of the article illustrates that this is not only a theoretical discussion. The application of the duty of loyalty in specific cases is not always performed in a way that creates new rules that could be applicable to future cases. The examples presented in Part III, from different Common Law jurisdictions, concern the duty of loyalty in the medical profession, in the legal one, and in the commercial relations of the officer and the company. These examples demonstrate how in similar situations, courts have implemented the duty differently, some in a way that is compatible with the idea of an 'informative standard,' while others have determined explicitly that the duty should be applied in an ad hoc method. The article then concludes, explaining that if the coherence of the law depends also on the question of form, some of the criticism against applying fiduciary law to certain relations is inaccurate. That is, since in both well-established fiduciary relations (e.g., between the company and the director) and with regards to relations where the existence of fiduciary law is controversial (e.g., between the doctor and the patient), the way loyalty would be implemented could either increase or decrease the clarity of the law. Finally, if it is possible to implement the complex duty of loyalty in a more consistent way, courts should aspire to develop more informative standards in other private areas of law as well.

I. Rules v. Standards

A well-accepted distinction concerning legal norms is the one between rules and standards. A 'rule' is a norm that stipulates the legal outcome in the fulfillment of one or more factual conditions.[1] It is a relatively 'closed' norm, at a high level of specificity, that provides clear guidance. Its operation is technical and requires little judicial discretion. Conversely, a 'standard' dictates the resolution of a legal issue based on the application of a criterion, which usually embodies a certain value, in particular circumstances.[2] It is an 'open' norm, with a greater degree of flexibility, that requires judges to exercise discretion in order to provide its final content. One central difference between the two is, therefore, the level of specificity of the norm or, in other words, the degree of discretion granted to the person implementing it.

1. HLA Hart, *The Concept of Law* (Oxford University Press, 2012) at 125. Vast literature has dealt with the question of the form of legal rules, including notable scholars such as Jeremy Bentham, John Austin, Ronald Dworkin, and many more. For further reference see Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89:8 Harv L R 1685 at 1687 n 4. Also see Henry M Hart & Albert M Sacks, *Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1958) at 124-37.
2. Hart, *supra* note 1 at 131.

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Naturally, this distinction between rules and standards is based on perceiving the two possible designs of legal norms as ideal types. The reality, as it is, does not always function according to ideal templates.[3] In many cases, the legal norm could not be easily classified as either a rule or a standard, and some norms could include the features of both.[4] Hence, in many cases, legal norms could in fact be classified as situated across a continuum between rules and standards. Accepting the complication reality brings, the distinction between the two ideal types is nonetheless valuable, as it sheds light on the advantages and disadvantages of each choice, therefore providing useful measures to evaluate the norm.

As explored by H.L.A Hart in his book, *The Concept of Law*, the considerations of a legislature before choosing between rules and standards reflect a conflict between two parallel needs. On one hand, there is a need for clear and reliable rules, which individuals in society can implement easily, without formal guidance. On the other hand, there exists a need for flexibility and an official's discretion in cases where the specific circumstances of the situation must be addressed.[5] Indeed, a rule provides guidance that seems clear and certain. Acting according to a specific rule does not require assumptions as to the intentions of its creator. The rule provides a description that could be used in order to understand what the appropriate behavior would be. All one needs to do is classify the specific facts under the relevant categories and then derive from them a simple syllogistic conclusion.[6]

However, in some circumstances, the ex ante formulation of clear rules that could be applied to future cases is not possible. In those situations, the regulator would enact a general standard. For example, the regulator could determine that an industry should supply 'safe working conditions.' The content of this standard would be determined after some judicial inquiry that would consider both parties' claims and thereafter decide on the considerations relevant to determining what would be considered 'safe' in a specific industry.[7] Of course, even if the standard is extremely general, in some cases it will be evident that it was not satisfied

3. As Cardozo says, "[n]o doubt the ideal system, if it were attainable, would be a code at once so flexible and so minute, as to supply in advance for every conceivable situation the just and fitting rule." Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) at 143.

4. Some theorists would even insist that, in fact, every legal norm could be subject to interpretation. Therefore, even with regard to what may seem like a very clear and specific rule, applying the law would include discretion. See Hanoch Dagan, "Lawmaking for Legal Realists" (2013) 1:1 Theory & Practice of Legislation 187 at 194.

5. Hart, *supra* note 1 at 130.

6. *Ibid* at 125. Accordingly, this discussion assumes that in many cases, it is possible to provide ex ante meaning to the law via rules and that in these cases, the adjudicator could, and in fact would, take this meaning into account. See also Frederick Schauer, "Rules and the Rule of Law" (1991) 14:3 Harv JL & Pub Pol'y 645 at 646, explaining why "rule-based decision-making, just like particularistic decisionmaking, has a place in any plausible account of what law is" [Schauer, "Rules"]; Ruth Gavison, "Comment: Legal Theory and the Role of Rules" (1991) 14:3 Harv JL & Pub Pol'y 727 at 727, criticizing some of Schauer's claims, yet also agreeing that "not all decisionmaking, and not even all legal decisionmaking, is rule-based, but much of it is."

7. Hart, *supra* note 1 at 31.

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(e.g., working at a height without taking any safety measures). Yet in contrast to a rule, which offers clear instructions as to the expected behavior, a standard provides only general guidance with regard to the binding substance of the legal norm.[8] On the other side, a clear advantage of this design is its flexibility. A standard would allow the judiciary to handle new situations and adapt the law to changing circumstances and new needs. The judiciary could shape the norm according to contemporary problems that might not have been predicted when it was created. In other words, the regulator passes to the judiciary the administrative power to determine the content of the legal norm according to the specific needs and circumstances.[9] Hence, another aspect of the choice between rules and standards is the choice between legislative and judicial rulemaking, a choice that dictates who will determine the final content of the norm.[10]

From an economic perspective, the discussion about rules and standards has focused on the relations between the degree of precision or specificity with which a legal command is expressed and the efficiency of the legal process.[11] In other words, the focus was on the costs and benefits of the different ways to design a legal norm as more or less precise. This literature suggested that legal norms address both the subjects of the norm and the participants in the legal process who would follow its violation (that is, judges, lawyers, etc.). Accordingly, it has been claimed that it is important to consider the effects of the level of *precision* on both the primary behavior of the subject of the legal norm and on the law enforcement mechanism.[12] A later analysis stressed that in order to determine the desirability of rules or standards, a central factor to consider is the *frequency* of the conduct that the law governs.[13]

Drawing from these different perspectives presented in the literature, the pros and cons of these two legal forms can now be briefly presented. A 'rule' is

8. Schauer discusses the connection between rules and the law while using the concept of 'ruleness' to explain the effect of rules on human behavior. See Schauer, "Rules", *supra* note 6 at 650-51. Also see Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision Making in Law and in Life* (Oxford University Press, 1991), aiming for a deeper understanding of the nature of rules and their employment.

9. A relevant yet separate discussion asks whether judges' interpretation of rules should also be based on principles. For further reading, see generally Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 1990) at 49-84, on whether rules can be interpreted independently of their underlying justifications (which may be standards). See also Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).

10. From this perspective, some claimed that rules could support the legitimacy of the judicial action, as the content of the rule is determined by the more 'democratically legitimate' institution, the legislature. See e.g. Kennedy, *supra* note 1 at 1707-08; Antonin Scalia, *A Matter of Interpretation* (Princeton University Press, 1997) at 7. For a comprehensive and detailed answer to these claims see Matthew Steilen, "The Democratic Common Law" (2011) 10 J Juris 437. Also see Kathleen M Sullivan, "Foreword: The Justice of Rules and Standards" (1992) 106:1 Harv L Rev 22 at 27.

11. Isaac Ehrlich & Richard A Posner, "An Economic Analysis of Legal Rulemaking" (1974) 3:1 J Leg Stud 257 at 258. For more relevant references also see Louis Kaplow, "Rules versus Standards: An Economic Analysis" (1992) 42:3 Duke LJ 557 at 559 n 1. This highly influential article reasoned that rules and standards differ by the degree of *precision*.

12. Ehrlich & Posner, *supra* note 11 at 261.

13. Kaplow, *supra* note 11 at 621.

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associated with more predictability and certainty.[14] Therefore, it would both be easier (for the subjects of the law) to follow and obey legal rules and be less costly (for the legal system) to enforce them. In cases where the undesirable activity could also be deterred by private actors, rules could alert the potential victims of the expected conduct.[15] Moreover, as rules are easier to follow without receiving legal advice, some have claimed they are more likely to influence the behavior of individuals.[16]

At the same time, it is important to remember that the costs of creating statutory rules are greater. Moreover, rules are also more difficult to modify.[17] Therefore, rules are preferable only when the relevant conduct is frequent and includes recurring circumstances, with the benefits from perfecting the rules outweighing the costs of creating them. In these cases, promulgation costs are borne once, and enforcing the law occurs more often.[18] Since rules are generally affected by changes in circumstance over time,[19] the more detailed a rule is, the more often it will have to be modified.[20] Further, the mechanical operation of rules, as opposed to standards, could lead to both over- and under-inclusion during their enforcement, at times punishing desirable behavior or disregarding unwarranted actions.[21]

In contrast, a 'standard' is associated with uncertainty and obscurity, but also with the advantage of flexibility. Due to the costs of understanding complex standards, individuals might not become informed with respect to them. Hence, the desirable fit between the legal norm and the behavior of individuals might not be accomplished.[22] The design of a legal norm as a standard could lead to uncertainty,[23] and some people might withdraw from conduct that is in fact desirable, out of concern that they are not complying with the legal standard.[24] Furthermore, standards that are very general and abstract could result in a permanent ad hoc approach of case-by-case adjudication that would threaten the idea of the 'rule of law.'[25] First, this approach suggests that the law does not provide

14. Kennedy, *supra* note 1 at 1688. See also PS Atiyah & RS Summers, *Form and Substance in Anglo-American Law* (Clarendon Press, 1987) (discussing which provides more certainty, rules or standards).
15. Kennedy, *supra* note 1 at 1696.
16. Kaplow, *supra* note 11 at 597-98, 621.
17. Ehrlich & Posner, *supra* note 11 at 274-75.
18. Kaplow, *supra* note 11 at 577.
19. This, since "[s]tandards are relatively unaffected by changes over time in the circumstances in which they are applied, since a standard does not specify the circumstances relevant to decision or the weight of each circumstance but merely indicates the kinds of circumstance that are relevant." See Ehrlich & Posner, *supra* note 11 at 277.
20. *Ibid* at 278.
21. Kennedy, *supra* note 1 at 1695-96.
22. Kaplow, *supra* note 11 at 592.
23. For an even stronger criticism see Jeremy Bentham, "Papers Relative to Codification and Public Instruction" in John Bowring, ed, *The Works of Jeremy Bentham* (Russell & Russell, 1962) at 488.
24. Kennedy, *supra* note 1 at 1696.
25. See also Cass R Sunstein, "Problems with Rules" (1995) 83:4 Cal L Rev 953 at 957, claiming that in certain situations, where lack of sufficient information restricts the ability to create rules, legal systems should abandon rules in favor of a form of *casuistry*.

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guidance for effective behavior, undermining its predictability. Second, ad hoc decision making implies that judges' preference, ideology, or sense of right and wrong determines the content of the law, without any external constraints, thereby threatening the conception of the rule of law as a constraint to power.[26] Moreover, from the perspective of the legal system, the cost of enforcement is higher, as deciding how to apply a standard to the facts of a specific case would require more resources.

Academic writing continues to deal with these important questions, for instance through literature that aims to explore further the efficiency of each choice, or examines how the level of specificity affects compliance or people's sense of commitment to the law.[27] Obviously, this review does not exhaust all the relevant literature.[28] While not providing a final answer to these complex jurisprudential questions, both the weaknesses and the strengths of the two possible methods for designing legal rules can be used in order to examine and evaluate the current design of the duty of loyalty. As has already been pointed out, both 'rules' and 'standards' are ideal types, while the reality is often more complex. That is, some legal concepts could be better understood as situated not at a specific edge, but rather along the continuum between the ideal types. Moreover, considering that each of the extreme forms has its disadvantages, the idea that legal norms should be examined with regard to their location on the continuum allows for making evaluative observations about the desirability of the chosen form.

These ideas will now be examined with regard to the duty of loyalty. As will be explained in the next part of the article, while it is possible to find indirect references to some of the mentioned weaknesses in the discussions about fiduciary law more generally, direct analysis of the difficulties of the duty of loyalty from the perspective of the literature on rules and standards could contribute to these discussions. It would allow for not only the better understanding of some of the criticism of the duty of loyalty, but also the identification of possible answers to the difficulties that are associated with the current design of the duty. Therefore, the considerations mentioned in this part will be used in the second part of the article, as a basis for examining the design of this duty. The discussion will first ask whether the duty of loyalty should be classified as a 'pure' legal standard and will then move to discuss the desirability of the duty's current design.

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26. While this is not the prominent view, some realists do endorse case-by-case adjudication. See Dagan, *supra* note 4 at 193-94. However, realists that appreciate these two aspects of the rule of law, would often support a rules-based regime, that would allow an application of the law that does not necessarily require first resolving normative questions and would also provide effective guidance to behavior. See Dagan, *supra* note 4 at 197. For further reading on this view, see Emily Sherwin, "Rule-Oriented Realism" (2005) 103:6 Mich L Rev 1578 at 1589-91.

27. See e.g. Alon Harel & Yuval Feldman, "Social Norms, Self-Interest and Ambiguity of Legal Norms: An Experimental Analysis of the Rule v Standard Dilemma" (2008) 4:1 Rev of Law & Economics 82 at 82, claiming that "[t]he more specific or rule-like the legal norm is, the more individuals are inclined to obey it," and more specifically, that "the ambiguity associated with legal standards would lead people to interpret legal standards in light of social norms."

28. For further references see Sullivan, *supra* note 10 at 57-58.

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II. The Continuum of Loyalty

II(a). To what extent is the duty of loyalty a legal standard?

Fiduciary relationships are concerned with situations in which one person, the fiduciary, has discretion, hence power, with regards to the other person's affairs, as the fiduciary undertakes or agrees to act in the interests of another.[29] These relationships arise in cases where the circumstances are such that they do not allow for the monitoring or supervision of the fiduciary in order to protect the interest of the other person, the beneficiary.[30] In these cases, mostly characterized by information gaps between the parties, Common Law jurisdictions recognize that it is necessary to monitor the relationships using a special legal norm, since contract or tort law would not provide sufficient protection of the interest of the beneficiary. Fiduciary law aims to ensure that the power given to the fiduciary will not be abused. It applies to many different legal relations, both personal and commercial, as "[t]he categories of fiduciary, like those of negligence, should not be considered closed."[31]

Throughout fiduciary law, one common thread is the concept of loyalty.[32] While some jurisdictions include other duties, such as the duty of care,[33] as an integral part of the obligations of a fiduciary, it is generally accepted that the idea of 'loyalty' stands at the core of fiduciary relations. The duty of loyalty aims to decrease a possible misuse of the power granted to the fiduciary. Similar to the concept of 'good faith,' the idea of loyalty is considered a general legal concept, that is, a concept that applies to diverse relationships across different legal categories. It is present in all fiduciary relationships, from trustee and

29. Some commentators have emphasized the role of 'undertaking' in understanding fiduciary law. See e.g. James Edelman, "When Do Fiduciary Duties Arise?" (2010) 126:65 Law Q Rev 302 at 326. From this perspective, fiduciary duties are explicit or implied conditions "into manifested undertakings to another." Others have pointed out that the idea of 'undertaking' could not fully explain fiduciary law. See e.g. Paul B Miller, "Justifying Fiduciary Duties" (2013) 58:4 McGill LJ 969 at 986-87; Joshua Getzler, "Ascribing and Limiting Fiduciary Obligations: Understanding the Operation of Consent" in Andrew S Gold & Paul B Miller, eds, *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 39 at 41.

30. Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26:1 UWA L Rev 1 at 18.

31. *Guerin v The Queen* [1984] 2 SCR 335 at 384 [*Guerin*]. This is not a unique example. See e.g. *Mobil Oil Corp v Rubenfeld* 1973 339 NYS2d 623 at 632; *Frame v Smith* [1987] 2 SCR 99 at para 57 [*Frame*], which states, "it has frequently been noted that the categories of fiduciary relationship are never closed."

32. See Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary* (Hart, 2010) at 1 n 5. Today, a vast body of literature accepts that fiduciary law is considered a distinctive body of law. For references see Paul B Miller, "The Fiduciary Relationship", in Andrew S Gold & Paul B Miller, eds, *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 63 at 65-66. However, it should be noted that the duty of loyalty is also present in some relationships that are not fiduciary in nature e.g., some jurisdictions have ruled that employees owe employers a duty of loyalty.

33. It should be pointed out that not all see the duties of disclosure as part of the duty of loyalty. For a perspective that includes the duty of care as a core fiduciary duty, see Robert H Sitkoff, "Other Fiduciary Duties: Implementing Loyalty and Care" in Evan J Criddle, Paul B Miller & Robert H Sitkoff, eds, *The Oxford Handbook of Fiduciary Law* (Oxford University Press, 2019) 419 at 425.

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beneficiary, to an officer and the company, an agent and the principal, and even a doctor and a patient.[34] Overall, loyalty requires that the fiduciary avoid any conflict of interest, as their actions should be directed towards promoting the best interests of the other.[35] The possibility of opt-out is limited, as in the vast majority of cases the duty of loyalty is a mandatory one.[36]

This primary idea of loyalty leads to different requirements, such as the prohibition of unauthorized profits (the 'no profit' rule)[37] or different duties of disclosure. The exact content of these requirements, or the determination of what exactly would count as acting in the best interests of the beneficiary, could vary depending on the purposes of the type of relationships. Moreover, the consequences of a conflict could also vary according to the specific type of relationship,[38] and hence the exact content of the duty is not predetermined.[39] According to some, the fiduciary's loyalty should be interpreted in light of 'moral' loyalty.[40] However, others have rejected this link between legal and moral understanding of loyalty,[41] and even suggest that the legal term 'loyalty' might be misleading. According to this perspective, fiduciary relationships are not concerned with the commonsense understanding of the term 'loyal.'[42] Indeed, legal and extra-legal meanings of 'loyalty' could be quite different, and it is not always clear

34. Of course, as discussed below, the exact meaning of the concept could and would change according to the nature of the relationship. See e.g. *ibid* at 385, discussing the differences between trusts and corporate law.

35. As Miller indicates, the idea that the fiduciary should avoid any conflict of interest includes two basic aspects: "First is the requirement that the fiduciary avoid conflicts between pursuit of his self-interest and fulfillment of his duty ... Second is the requirement that the fiduciary avoid conflicts between this duty and the pursuit of others' interests." See Paul B Miller, "A Theory of Fiduciary Liability" (2011) 56:2 McGill LJ 235 at 257.

36. For examples see Andrew S Gold, "The Fiduciary Duty of Loyalty" in Evan J Criddle, Paul B Miller & Robert H Sitkoff, eds, *The Oxford Handbook of Fiduciary Law* (Oxford University Press, 2019) 385 at 396.

37. The fiduciary could, of course, receive compensation for performing their duties, but otherwise, they are not allowed to profit from their position. See *ibid* at 389. A relevant question is whether a 'no profit' prohibition is a separated rule: see *ibid* at 390. Case law on this subject is not coherent. For further discussion see P Koh, "Once a Director, Always a Fiduciary?" (2003) 62:2 Cambridge LJ 403 at 405; Stanley M Beck, "The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered" (1971) 49:1 Can Bar Rev 80 at 90.

38. Gold, *supra* note 36 at 387.

39. Different types of fiduciary relationships deal with different specific concerns, and those differences affect the content of the duty of loyalty. See *ibid* at 388.

40. See e.g. Tamar Frankel, "Fiduciary Law" (1983) 71:3 Cal L Rev 795 at 829-39; Irit Samet, "Fiduciary Loyalty as Kantian Virtue" in Andrew S Gold & Paul B Miller, eds, *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) at 125.

41. See e.g. Frank H Easterbrook & Daniel R Fischel, "Contract and Fiduciary Duty" (1993) 36:1 JL & Econ 425 at 427. Also see Paul B Miller, "Dimensions of Fiduciary Loyalty" in D Gordon Smith & Andrew S Gold, eds, *Research Handbook on Fiduciary Law* (Edward Elgar, 2018) 180, discussing moralist interpretations of fiduciary loyalty, and claiming that the concept of loyalty in fiduciary law diverges from its moral conception.

42. James Penner, "Fiduciary Law and Moral Norms" in Evan J Criddle, Paul B Miller & Robert H Sitkoff, eds, *The Oxford Handbook of Fiduciary Law* (Oxford University Press, 2019) 781 at 788-89, 791: "the legal duty of 'loyalty'" is "misnamed".

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how these different meanings ought to fit together.[43] Considering all the above, understanding fiduciary loyalty is not an easy task, and theoretical writing on fiduciary law has been struggling to explain its aims and content.

Prima facie, the perception of the duty of loyalty as determining a general level of behavior, *acting for the interests of others*, does lead to its classification as a pure standard.[44] Respectively, much academic writing on fiduciary law tends to disregard this question and takes the 'loyalty-as-a-standard' view for granted.[45] Upon closer examination, the intuitive classification of this duty as a 'pure' standard is not accurate, as it fails to identify a different possible evolution of the duty, which might generate norms that could even be described as rules. Overall it is true that the content of the duty of loyalty is determined in the concrete cases in which it is applied, depending on the specific type of relationship and the relevant factual circumstances. Some aspects of this duty could still be classified as a standard at its 'ideal' type, providing only general guidance to the application of the law in a specific case. However, it is also clear that this is not always the case.

In fact, fiduciary law does include many formalistic rules, in certain cases also statutory,[46] which determine clearly what would be considered a breach of the duty of loyalty or when a conflicting interest transaction would be prohibited.[47] In different cases, as part of the process of implementation of loyalty, more specific rules have been developed. This development should confine the understanding of the duty as positioned only at the 'standard' edge of the continuum. In reality, it is possible to locate different legal norms that are closer to the form of 'rules,' which originated from the duty of loyalty. However, as these rules become more precise, their connection to the original general guiding principle of 'loyalty' is sometimes forgotten.

Aspects of this development were explored by Robert Sitkoff. Drawing on economic analysis theories of rules and standards, Sitkoff distinguishes between what he calls 'primary' fiduciary duties and 'subsidiary' fiduciary duties. Primary duties, such as the duty of loyalty, are "structured as broad, open-ended standards that speak generally," while subsidiary duties "are typically structured as rules or at least as more specific standards."[48] The claim is relative and not absolute,

43. Also see Andrew S Gold, "Accommodating Loyalty" in Paul B Miller & Andrew S Gold, eds, *Contract, Status, and Fiduciary Law* (Oxford University Press, 2016) 185 at 201, suggesting that there are reasons to understand fiduciary loyalty as relating to the external understanding of loyalty, whether or not a moral one.

44. See e.g. Henry E Smith, "Why Fiduciary Law Is Equitable" in Andrew S Gold & Paul B Miller, eds, *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 261 at 261, pointing out that "[f]iduciary law is celebrated as unbound by rules and deplored as unprincipled."

45. See Evan J Criddle, Paul B Miller & Robert H Sitkoff, "Introduction" in Evan J Criddle, Paul B Miller & Robert H Sitkoff, eds, *The Oxford Handbook of Fiduciary Law* (Oxford University Press, 2019) at xix, xxvii.

46. See e.g. *UK Companies Act 2006* (UK), ss 171, 175-177; *Canadian Business Corporations Act* RSC 1985, c C-44); Delaware Code Ann tit 8 §144(a) (2017); California Corp Code §310 (1999).

47. See e.g. discussion in Gold, *supra* note 36 at 389.

48. Sitkoff, *supra* note 33 at 419.

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meaning that it suggests that between the ideal types of 'rule' and 'standard,' *subsidiary* duties are more specific than the *primary* duty of loyalty.[49] Sitkoff focuses on the trade-off between 'decision costs' (the costs of conducting the judicial proceeding) and 'error costs' (the costs of applying an inappropriate norm on the specific situation) while designing a policy based on either rules or standards.[50] According to this view, standards would minimize error cost, while increasing uncertainty and decision costs.[51] Sitkoff further argues that *subsidiary* duties are "field-specific elaborations of the primary duties of loyalty and care that address commonly recurring circumstances within the particular type or kind of fiduciary relationship."[52]

Recognizing that the subsidiary duties vary across fiduciary relationships, Sitkoff also claims that "versions of several of the subsidiary duties are evident in multiple fiduciary fields, reflecting a commonality in recurring circumstances across those fields."[53] The claim is then tested with regard to different kinds of fiduciary relationships, in both private and public law. For example, in the sphere of agency law, the duty of loyalty was particularized to more specific duties, such as duties that focus on the material benefit of the agent, competition with the principal, and use of their property.[54] The same could be seen in corporate law, where rules about the role of management in the process for selling control over a company, or disclosure of information to shareholders, had developed from the general standard of loyalty.[55] Of course, these are not the only examples.[56] Sitkoff's main argument is that the function of what he calls *subsidiary* duties is to implement the *primary* duties of loyalty and care. He concludes that allowing a combination of *subsidiary* and *primary* duties to the same conduct provides fiduciary law with both the flexibility of standards and the specifications of rules.[57] Accordingly, it allows fiduciary law to mitigate the disadvantages of governance based on either rules or standards.[58]

Sitkoff bases his claims regarding the actual development of the law on an agency costs theory of fiduciary law.[59] In his view, "[s]tripped of legalistic formalisms and moralizing rhetoric, … the functional core of fiduciary

49. *Ibid* at 428. Also see generally on that issue Sullivan, *supra* note 10 at 61.
50. Sitkoff, *supra* note 33 at 422.
51. *Ibid* at 425.
52. *Ibid* at 422.
53. *Ibid* at 429.
54. *Ibid* at 429.
55. *Ibid* at 430.
56. *Ibid* at 430-32.
57. *Ibid* at 421.
58. *Ibid* at 420, 428. This claim was based on prior work by the author. See e.g. 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) at 197. As Sitkoff points out, this was inspired by the article of John H Langbein, "The Contractarian Basis of the Law of Trusts" (1995) 105:3 Yale LJ 625 at 656. Also see Matthew Conaglen, "A Re-Appraisal of the Fiduciary Self-Dealing and Fair-Dealing Rules" (2006) 65:2 Cambridge LJ 366.
59. For the purpose of this article, there is no need to elaborate on the well-known economic theory of fiduciary law. Further reading could be found in Sitkoff, *supra* note 33 at 423-24. See also e.g. Robert Cooter & Bradley J Freedman, "The Fiduciary Relationship: Its Economic Character and Legal Consequences" (1991) 66:4 NYUL Rev 1045.

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obligation is deterrence. . . . Fiduciary law thus minimizes transaction costs."[60] Indeed, as Sitkoff himself points out,[61] one does not have to subscribe to an agency cost theory of fiduciary law in order to accept this argument. Yet this point of view does not reveal the whole story, that is, why and how the primary duties evolved into subsidiary ones,[62] and how the conclusion as to the desirability of the combination between rules and standards should affect the future interpretation of primary duties. It should be emphasized that these are not (only) historical questions about how the duty of loyalty has evolved so far. Rather, the question is a normative one, determining how the court—*considering the advantages and disadvantages of legal standards*—should deliver and explain its conclusion when a claim for a breach of the duty of loyalty is brought before it. From this perspective, differentiating between subsidiary and primary duties (or even *implementing* duties[63]) might be confusing, as this usage could be understood as disconnecting the idea of 'loyalty' from the rules that follow it. Understanding of the nature and function of these 'subsidiary' duties requires comprehending where they originated—that is, from the need to provide specific content to the general standard of loyalty in a specific case.[64] Hence, the following part, directed towards the future, will use the taxonomy of 'implementation' and interpretation of the duty of loyalty, and not a *primary-subsidiary* distinction.

In light of the understanding that, contrary to the primary intuition, classifying 'loyalty' as an ideal standard might not be accurate, the question remains: what are the implications of the actual location of this duty on the continuum between rules and standards? The next part of the article will examine the different possibilities for 'movement' along this continuum. It will suggest how an adjudicator, facing a concrete dilemma about the implementation of 'loyalty' to a specific case, could and should act, considering the disadvantages that accompany legal standards.

II(b). Moving along the continuum

As discussed in the first part of the article, the design of legal norms as standards has costs. The idea of 'loyalty' as a legal standard might provide insufficient

60. Sitkoff, *supra* note 33 at 424.
61. *Ibid* at 424.
62. Sitkoff suggests that this perspective also tells a causal story, in which the subsidiary duty has developed from a process of application of the primary duty to recurring facts and circumstances, but does not focus on this question, which is, in his view, a historical question. *Ibid* at 427.
63. Also offered by Sitkoff, *ibid*, but less apparent in the article.
64. As Sitkoff himself pointed out: see Sitkoff, *supra* note 33 at 430. Indeed, as the examples mentioned by Sitkoff show, at least some of the rules developed or arise from the duty of loyalty (e.g., the duty of disclosure) could also be understood as 'separated' duties from the general duty. Yet, this does not undermine the importance of understanding what were the values and purposes behind their development.

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guidance for the expected behavior of fiduciaries, therefore diminishing compliance with fiduciary law.[65] A legal norm that is broad and ambiguous, such as the idea of 'loyalty,' might lead to uncertainty.[66] As explained above, difficulties arising from designing a legal norm as a standard do not relate solely to the predictability of the law. The concern is also that this design would result in arbitrariness, hence jeopardizing the rule of law. Finally, allowing the courts (rather than the legislator) to determine the underlying values of fiduciary loyalty might affect the legitimacy of fiduciary law, since as already mentioned, it raises the concern that the ideology of the judge would determine the concrete outcomes of the case.[67] As loyalty emerged from the courts of equity, which are associated with the employment of "flexible, morally sensitive principles, and a mode of legal reasoning that is ex post and discretionary in nature," questions of legitimacy might be even more prominent.[68]

In this regard, it is important to elucidate that the application of fiduciary law is not limited to a closed list of legal relationships or situations.[69] As already mentioned, the standard of loyalty could apply to commercial, professional, and even private relationships. In order to operate efficiently, the participants in the market should be able to make fully informed decisions, and legal uncertainty could limit the ability to act on such an informed basis.[70] Commercial activity, it is often said, depends on legal certainty, which allows for the planning of commercial transactions while anticipating the possible legal liability.[71] Clear rules also lead to faster and more efficient dispute resolution, with lower litigation costs, which are also necessary for an efficient commercial community.[72] Hence, undoubtedly, concerns about the lack of coherence and clarity of the law are also present with regards to this duty.[73]

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65. For private actors, lack of certainty and predictability caused by standards may have a chilling effect on socially productive behavior and jeopardize their confidence in the judicial process. See Sullivan, *supra* note 10 at 62.

66. Generally, it could be said that fiduciary law applies when one of the parties, the beneficiary, is vulnerable, which further stresses the need for certainty and compliance.

67. Guy Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016) at 192-93. The question is not only about the efficiency of each choice, rather it is about the normative implications of providing the adjudicator with more or less room for discretion to the judiciary.

68. Irit Samet, *Equity: Conscience Goes to Market* (Oxford University Press, 2019) at 15. For general reading on this point, see Sullivan, *supra* note 10 at 64-65, discussing the claim that "the choice of rules over standards advances constitutional democracy." Some have presented a different opinion. See Sullivan, *supra* note 10 at 68-69.

69. Fiduciary law "is vague and open-ended around the edges," as "[t]he categories of fiduciary, like those of negligence, should not be considered closed." See Smith, *supra* note 44 at 273, referring to *Guerin, supra* note 31 at 341. See also *Frame, supra* note 31 at para 57.

70. It should be emphasized that referring to the importance of efficiency in the market does not aim to undermine the claim regarding the existence of the relevant moral questions. The point here is simply to stress why the question of form is relevant also from this perspective.

71. Or in different words, "Businessmen have special needs . . . they require the decisions of the courts on commercial issues to be predictable so that they know where they stand." See L S Sealy & R J A Hooley, *Commercial Law: Text, Cases, and Materials* (Oxford University Press, 2009) at 10.

72. Iain MacNeil, "Uncertainty in Commercial Law" (2009) 13:1 Ed L Rev 68 at 72.

73. Indeed, "one reason for the frustration with fiduciary law is its corresponding open-endedness." See Smith, *supra* note 44 at 282.

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Indeed, it is not surprising that these concerns, while not necessarily understood as arising from the design of the duty of loyalty as a '*standard*,' are compatible with often-heard criticism about fiduciary law in general.[74] It is not hard to find critiques that point out that it is "impossible to predict whether a relationship will or will not be accounted fiduciary when a case comes to court,"[75] or that fiduciary law is accompanied by "inconsistency" and "uncertainty" and therefore "[has] troubling implications for the rule of law."[76] Yet, these discussions do not focus on the connection between the general literature about rules and standards and the difficulties involved in the development of the duty of loyalty.[77] As this literature reveals, the pertinent questions do not only regard the prominent disadvantages of legal standards, such as uncertainty; the location on the continuum is also of importance. Firstly, as mentioned above, while criticizing fiduciary law, it is easy to overlook the fact that the actual location of the duty of loyalty on the continuum of rules and standards is different than what might be initially assumed. Secondly, in order to determine whether the actual location of the duty is desirable, the disadvantage of *both* edges of the continuum should be taken into account.

Alternatively, one could suggest forsaking the standard of loyalty altogether and settling for the more specific rules developed in the case law. However, in reality, as many courts and commentators have clarified, the current design of the duty of loyalty as 'open-ended' is necessary and may even derive from the nature of fiduciary law. It allows fiduciary law to handle new situations, given the characteristics of the fiduciary relationship.[78] Loyalty as an open norm enables the law to be flexible and allows the court to develop the law and adapt it to changing circumstances and new needs. This is an important aspect of fiduciary law, specifically from a commercial perspective, which requires that it be able to take into account the latest business practices.[79] Another important consideration is that in situations of inequality between the parties, as in fiduciary relationships, standards might perform a role in preventing opportunism,[80] that is, restraining the stronger party from taking advantage of the intrinsic imperfections of legal rules. The existence of loyalty as a standard allows judges to shape the law according to contemporary human problems and social context.

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74. *Ibid* at 278, noting that "[s]cholars have criticized fiduciary duty for being unpredictable around the edges." As Smith points out, since it is often not so easy to become a fiduciary, it is an empirical question whether the stringent liability would have a significant chill effect on behavior.

75. Birks, *supra* note 30 at 18.

76. Miller, *supra* note 35 at 247-78.

77. For general criticisms about the unpredictability of fiduciary law, see e.g. L S Sealy, "Fiduciary Relationships" (1962) 20:1 Cambridge LJ 69 at 73; Conaglen, *supra* note 32 at 9; Peter J Hammer, "*Pegram v Herdrich*: On Peritonitis, Preemption, and the Elusive Goal of Managed Care Accountability" (2001) 26:4 J Health Pol Pol'y & L 767 at 771 n 6, stating that "[t]he term fiduciary is a slippery concept."

78. Smith, *supra* note 44 at 282. According to Smith, this is since "[t]he law needs to mirror the open-endedness of opportunism itself," which fiduciary law, as Equity more generally, aims to solve. Also see part II(A), above.

79. Sealy & Hooley, *supra* note 71 at 10.

80. See Smith, *supra* note 44 at 267.

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Moreover, as already explained, the *frequency* of the conduct governed by the law affects the design of the legal rules. Considering the vast range of situations fiduciary law governs, it would be extremely complicated to draft proper legal rules. The capability of rules to reduce uncertainty depends on having relatively few and simple rules, immutable, clear both in statements and applications.[81] If the rules that govern certain activities are numerous, people subject to them cannot satisfactorily learn them. At the same time, standards that capture lay intuitions about the right behavior, and hence are easy to learn, could produce more certainty than non-intuitive technical rules.[82] Hence, developing fiduciary law by "'testing it against life-wisdom,' benefitting from 'the sense and reason of some significantly seen type of life-situation,'"[83] is almost inevitable. Indeed, while general critique regarding the inconsistency of fiduciary law is not rare, it is hard to find supporters of an abundance of the standard of loyalty altogether. This suggests that the importance of 'loyalty' as a standard is hard to dispute.[84]

However, this does not lead to the conclusion that there is no solution to the difficulties mentioned, including some of the often-heard criticism regarding uncertainty in fiduciary law. An answer could be found by more closely examining the possible ways to apply legal standards. As noted by Hanoch Dagan, an often-overlooked consideration is that the use of standards does not necessarily imply ad hoc decision making. Legal standards could be used as a basis for future guidance, as long as their content is clear, and it is possible to estimate the expected results in new cases not yet resolved.[85] Indeed, if 'standard' stands for open-ended references to justice, fairness, or reasonableness—as the current applier of the law understands these terms in a specific case—it would limit the ability to anticipate the legal result and could be criticized as providing unconstrained discretion.[86] An application of standards that is not consistent could harm fairness and equal treatment by the law.[87] However, this is not the sole possible

81. See R A Posner, *The Problems of Jurisprudence* (Harvard University Press, 1993) at 48, pointing out that "as we become more realistic about rules their advantages vis-a-vis standards begin to dim." A derivative question, which goes beyond the scope of this article, is how much uniformity between such rules would be required. Clearly, there are differences between the rules which apply to each kind of fiduciary relationship. Nonetheless, it should be taken into account that "whether it is viewed from the perspective of relationships, rights and duties or wrongs and remedies, fiduciary law is a distinctive body of law." See Andrew S Gold & Paul B Miller, "Introduction" in Andrew S Gold & Paul B Miller, eds, *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) at 1.

82. *Ibid*.

83. Dagan, *supra* note 4 at 201. For an historical and philosophical perspective on these aspects of the Common Law see G J Postema, "Classical Common Law Jurisprudence (Part I)" (2002) 2:2 OUCLJ 155 at 166-68. Dagan also refers to Joseph Raz, "Law and Value in Adjudication" in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) 180 at 183-97, as claiming a similar point.

84. An analysis of issues concerning the criminal law could be found in Meir Dan-Cohen, "Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law" (1984) 97:3 Harv L Rev 625.

85. Dagan, *supra* note 4 at 199. Also see Sunstein, *supra* note 25 at 968-77, suggesting a more refined understanding of *the rule of law*.

86. Dagan, *supra* note 4 at 199.

87. See Sullivan, *supra* note 10 at 62.

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alternative for the operation of standards. A vague standard may still fulfill its purpose if the margin of discretion it provides is constrained by a careful delineation of the relevant factors on which the exercise of this discretion must be based.[88]

As Dagan explains, there are situations where commitment to the rule of law "implies allowing, or even preferring the social practice of a legal topic to be formed around a vague but informative standard."[89] These insights are extremely relevant to the duty of loyalty. Since the duty of loyalty governs a very wide range of conduct, relying solely on rules would be extremely complex. This technical non-intuitive complexity both may "undermine the guidance value of rules and may not necessarily constrain the discretion of law-appliers."[90] On the other hand, calibrated properly,

> [standards] may in fact generate predictable outcomes and thus serve as both a guide and a constraint. Standards may be action-guiding insofar as their addressees (or their lawyers) can take them on board, make for themselves the evaluative judgment that they require, and thus monitor and modify their behavior accordingly.[91]

Indeed, situating the discussion around the design of 'loyalty' as a standard does reveal some possible difficulties with this legal norm, as was explored above. However, it also sheds light on two available paths for the court when facing a need to implement the standard of loyalty—namely, the choice between an ad hoc implementation of the duty of loyalty based on the circumstances of the case and the development of legal rules based on the general standard, which could and would provide guidance for future behavior. Both concerns—that the subjects of the duty of loyalty will not understand their obligations in advance and that the discretion given to the judge would be used to promote their own personal values—could be answered if, in practice, the application of the duty of loyalty in concrete cases were done according to these guidelines. Moreover, while, as already mentioned, standards could in certain cases prevent opportunism, in other cases their limitation on private power might be inadequate. If a standard is extremely vague, the party with more social power might attempt to use the vagueness to their advantage, e.g., through lengthy legal proceedings. This concern would be reduced if in the process of implementing the duty of loyalty, the court would draft more specific rules regarding the meaning of the standard in circumstances similar to the current case.

To conclude, the desired location of 'loyalty' as a legal standard is not permanently situated on either edge of the continuum. The application of the duty in a

88. See also Hanoch Dagan & Avihay Dorfman, "Justice for Contracts" (November 2020) SSRN, online: http://dx.doi.org/10.2139/ssrn.3435781.

89. Dagan, *supra* note 4 at 198.

90. *Ibid*. See also Timothy Endicott, "The Value of Vagueness" in A Marmor & S Soames, eds, *Philosophical Foundations of Language in the Law* (Oxford University Press, 2011) 14, 23, 26-28, 30, explaining when vagueness can be valuable to lawmakers.

91. Dagan, *supra* note 4 at 198. See also Postema, *supra* note 83 at 178, "[t]he 'reason' and 'certainty' of law . . . depended on judges 'keep[ing] a constancy and consistency of the law to itself.'"

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specific case should generally be performed in a way that creates new 'rules,' deriving for the idea of loyalty, that could be applicable to future cases.[92] Hence, loyalty would be constantly moving on the continuum, from its initial location as a 'pure' standard towards new locations created from more specific rules. The movement toward more specific rules is not along a one-way street. As discussed in the first part of the article, the regulator could determine that a certain industry needs to supply 'safe working conditions.' If it is then determined that while working at a height one needs to wear a hard hat and fall-protection equipment, the application of the standard becomes clearer and relatively easier. Yet, new circumstances might still require asking whether this rule conforms to the general standard. Hence, these 'rules' of loyalty should not be understood as abandoning or departing from the general standard of dictating a general norm of behavior that obligates acting for the benefit of the other. On the other hand, understanding the dialectical aspect of loyalty should not lead to case-by-case decision making. The movement of 'loyalty' along the continuum should be understood as a pendulum-like movement, that constantly strives to reach the edge of rules and provide content to the general standard, yet does not detach completely from its original purpose, to ensure the fiduciary's loyalty to the beneficiary. Ideally, loyalty should continue to develop as an informative standard that includes, as far as possible, content that would allow its coherent application and promote its predictability. As will be discussed in the next part of the article, this is not always the case.

III. Case Law Along the Continuum

The third and final part of the article demonstrates the possible ways to develop the duty of loyalty by comparing cases from different Common Law jurisdictions. These examples illustrate how in similar situations, the duty of loyalty has been implemented in different ways.[93] This comparison reveals that, as suggested above, in some decisions the duty of loyalty was implemented in a way that is compatible with the idea of an 'informative standard,' explaining in more detail the relevant content of loyalty and hence providing guidance for future cases. However, not all cases were decided this way; other decisions determined explicitly that the duty should be applied in an ad hoc method, according to the specific facts and circumstances of each case.

92. It should be stressed that the focus of the argument is 'status-based' fiduciary relationships, rather than what is called 'fact-based' fiduciary relationships. The second group of cases refers to situations where it was stated that in the concrete circumstances of the case, the relationship established a duty of loyalty. See e.g. *Galambos v Perez*, 2009 SCC 48, where a claim about the existence of fiduciary relationships was rejected. Rather, when the group of the relationship is the source of fiduciary obligation, they would be considered 'status-based' fiduciary relationships. See Miller, *supra* note 35 at 241-52.

93. On the value of comparison, see Catherine Valcke & Matthew Grellette, "Three Functions of Function in Comparative Legal Studies" in Maurice Adams & Drik Heirbaut, eds, *The Method and Culture of Comparative Law* (Hart, 2014) 99 at 108-09. For general writing about the advantage in Comparative law see e.g. K Zweigert & H Kotz, *An Introduction to Comparative Law* (Oxford University Press, 1998).

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The discussion begins with an example regarding the duty of loyalty in the medical profession, then presents a dilemma regarding the duty of loyalty in the legal profession, and finally, discusses a debate about the obligation of loyalty in commercial relationships, between the officer and the company. In all examples, at least two cases will be discussed, each presenting a different possible way to implement loyalty in similar factual situations.

III(a). Loyalty of doctors

The question of whether doctors are fiduciaries and hence subjected to the standard of loyalty has received different answers in different Common Law jurisdictions. While some have emphasized that features of the relations between a doctor and a patient, such as dependence, trust, and information gaps, correspond with characteristics of other fiduciaries,[94] this classification has not been accepted throughout Common Law.[95] For the purpose of this discussion, further inquiry into this debate is not needed, as our interest lies in the way the duty of loyalty is implemented.[96] As will be shown, while the following court decisions deal with a similar question—whether the duty of loyalty obliges the doctor to provide certain information to the patient—they differ in the way in which they implemented the general standard under the circumstances of the case.

The relations between the doctor's loyalty and disclosure duties were discussed in the Supreme Court of California ruling in *Arato v. Avedon*.[97] This decision followed a long period of judicial discussions regarding the doctrine also known as 'informed consent.'[98] Under this doctrine, a physician holds a duty to disclose to the patient information that is material to a decision whether to undergo medical treatment. One of the postulates that laid the foundation for the doctrine, alongside the patient's sovereignty and autonomy, was the *fiduciary* obligations of the doctor, stemming from the patient's trust in the physician and their dependence on the physician for the information required for their decisional process.[99] As the court mentioned, the "accumulated

94. See Mark A Hall, "Fiduciary Principles in Health Care Law" in Evan J Criddle, Paul B Miller & Robert H Sitkoff, eds, *The Oxford Handbook of Fiduciary Law* (Oxford University Press, 2019) at 287, 288.

95. See e.g. Shaunnagh Dorsett, "Comparing Apples and Oranges: The Fiduciary Principle in Australia and Canada after *Breen v Williams*" (1996) 8:2 Bond L Rev 158. An interesting question, which deviates from the scope of the discussion in this article, is how the decision to classify the relationship as fiduciary relates to the characterization of the duty of loyalty as discussed here.

96. For further reading see e.g. Peter Bartlett, "Doctors as Fiduciaries: Equitable Regulation of the Doctor-Patient Relationship" (1997) 5:2 Med L Rev 193 at 196; E C Hui, "Doctors as fiduciaries: a legal construct of the patient-physician relationship" (2005) 11:6 Hong Kong Med J 527.

97. 5 Cal 4th 1172 (1993) [*Arato*].

98. One of the first decisions in California that dealt with this question was *Stafford v Shultz*, 42 Cal. 2d 767 (1954), which was followed by the important decision in *Cobbs v Grant*, 8 Cal. 3d 229 (1972). See generally Maxwell J Mehlman, "Why Physicians are Fiduciaries for Their Patients" (2015) 12:1 Indiana Health L Rev 1.

99. *Arato*, *supra* note 97 at 1183.

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medicolegal comment on the subject of informed consent is both large and discordant,"[100] and so was the legal writing on this subject.[101] The debate over the desirability of this legal doctrine is beyond our scope. However, the decision provides an example of the difficulties arising from an application of the standard of loyalty without proper guidance.

The question before the court was whether in recommending a course of chemotherapy treatment to a patient suffering from an aggressive form of cancer, the physicians breached their duty by failing to disclose the statistical life expectancy of the patient. The standard of disclosure, according to the trial court, is that a physician must disclose all "information which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject a recommended medical procedure."[102] Yet, the trial court also accepted that the doctrine of informed consent "recognizes that the primary duty of a physician is to do what is best for his patient."[103] The conclusion of the court was that in this case, the claim should be denied. This decision was overruled by the Court of Appeal. The Supreme Court of California, however, held that the Court of Appeal erred in holding that the instruction given by the trial court failed to convey accurately the governing legal standard. The court explained that

> [t]he contexts and clinical settings in which physician and patient interact and exchange information material to therapeutic decisions are so multifarious, the informational needs and degree of dependency of individual patients so various, and the professional relationship itself such an intimate and irreducibly judgment-laden one . . . it is unwise to require as a matter of law that a particular species of information be disclosed.[104]

Furthermore, it was explained that the fiduciary obligations prohibit misrepresenting the nature of the patient's medical condition and that the criterion for the scope of the disclosure is "a peculiarly fact-bound assessment."[105] It was also added that "certainly this is not territory in which appellate courts can usefully issue 'bright line' guides."[106]

The focus of the discussion is not whether *informed consent* is an advantageous legal norm,[107] neither is the purpose to dive deeply into the facts of the case and determine whether the disclosure of the statistical life expectancy was needed under the circumstances.[108] What this decision intends to demonstrate

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100. *Ibid* at 1184.
101. See e.g. Maytal Gilboa & Omer Y Pelled, "The Costs of Having (Too) Many Choices: Reshaping the Doctrine of Informed Consent" (2019) 84:2 Brook L Rev 367.
102. *Arato*, *supra* note 97 at 1186.
103. *Ibid* at 1180 n 3.
104. *Ibid* at 1185. Referring to an earlier judgment, the court agreed that "each patient presents a separate problem."
105. *Ibid* at 1186.
106. *Ibid*.
107. For criticism about the doctrine see Gilboa & Pelled, *supra* note 101.
108. Part of the debate was whether this information was specifically important in order for the patient to order his affairs in contemplation of his death, since the failure to do so lead to substantial financial losses following his death. See *Arato*, *supra* note 97 at 1179. The court

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is the difficulties entailed in a vague application of the standard of loyalty. On one hand, the trial court instructs the physician to disclose all relevant information in order to protect the patient's freedom to exercise control over their own body. On the other hand, it accepted that the physician has the discretion to decide what would be considered acting in the best interest of the patient. These two nearly contradictory instructions regarding the appropriate delivery of information seem to offer very little guidance for a doctor wishing to obey the legal standard.

In fact, even the Supreme Court of California, while refusing to determine that these instructions misled the jurors, agreed that saying that the primary duty of a physician is to do what is best for their patient was a "misstatement of governing law."[109] Yet the Supreme Court did not explain what the right balance between the doctor's loyalty and their disclosure duties are—should their commitment to the patient be taken into account at all, and if so, in what way? Not only was the duty of disclosure drafted as an extremely fact-based standard, but it was also not clarified whether the doctor's opinion as to what is best for the patient could or should, at least in certain cases, limit the duty of disclosure. Moreover, it should be noted that the controversial declaration, according to which the physician's primary duty is "to do what is best for his patient," was added as an instruction for the jurors at the physician's request. This fact strengthens the conclusion that the doctrine developed by the court was obscured, and the subjects of the law did not understand its content.

It is interesting to compare and contrast this example with the circumstances of the well-known decision of the Canadian Supreme Court in *McInerney v. MacDonald*.[110] This case concerned the refusal of a doctor to provide access to medical documents that were held by her but written by the patient's previous physicians. The court concluded that the relations between the doctor and the patient should be characterized as 'fiduciary,' and clarified that this does not suggest that "a fixed set of rules and principles apply in all circumstances or to all obligations arising out of the doctor-patient relationship."[111] Hence, the court needed to explain what *loyalty*, according to this characterization, demands of doctors in the context of the case.

The court concluded that this nature of the relationship gives rise to the physician's duty to make proper disclosure of information to the patient. To clarify the nature of the duty to provide information, the court explained that the information is held by the doctor "in a fashion somewhat akin to a trust."[112] The doctor is the owner of the actual record, yet the information in it "is to be used by the physician for the benefit of the patient."[113] The patient's trust-like "beneficial interest" in

therefore clarified that while being a fiduciary, a "physician is not the patient's financial adviser," and that the duty of disclosure has a therapeutic limitation. *Ibid* at 1188.

109. *Ibid* at 1192.

110. [1992] 2 SCR 138 [*McInerney*].

111. *Ibid* at 149.

112. *Ibid* at 150. It was further explained that the fiduciary qualities of the relation extend the duty, so the access should not be limited to the information used in administering treatment.

113. *Ibid* at 151.

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the information indicates that "as a general rule, he or she should have a right of access to the information and that the physician should have a corresponding obligation to provide it."[114] The court also elucidated that without access to the information, it would be hard to ensure that the doctor is fulfilling their primary duty: that is, to act with the utmost good faith and loyalty.[115]

While determining that the patient's right to information is almost absolute, the court also added that there could be exceptional reasons to override it.[116] Yet, when the doctor chooses to exercise this discretion and refuses to grant access, the onus lies on them to justify an exception from the "general rule of access."[117] Furthermore, while the court did not provide an exhaustive list of circumstances in which access could be denied, it did review the main possible claims for denying access and determined that the only persuasive grounds for refusal would be if there were a real potential for harm to the patient or to a third party.[118] Other possible reasons, such as that disclosure would lead to an increase in unfounded lawsuits, that the medical record might be misinterpreted by the patient, or that disclosure might have a negative effect on the quality of medical records, were rejected.[119] Even with regards to the acceptable grounds for refusal, the court emphasized that the physical well-being of the patient must be balanced with their right to self-determination. Hence, "[i]n short, patients should have access to their medical records in all but a small number of circumstances … unless there is a significant likelihood of a substantial adverse effect on the physical, mental or emotional health of the patient or harm to a third party."[120]

As this decision illustrates, the application on the standard of loyalty could be performed in a way that is compatible with clarity and predictability. Indeed, it is still not possible to classify the outcome of the case as creating a 'pure' rule, yet the content of loyalty is relatively very clear and easy to implement in future cases. That is, the doctor should always provide access to the patient's medical records, unless the case is an exceptional one in which the doctor believes in good faith that their loyalty toward promoting the best interest of the patient requires denial of access. The starting point is that essentially, the information belongs to the patient and is held by the doctor in a 'semi-trust.' The patient has a right to make an autonomous decision about their best interest, and hence denial would be warranted only if there is a "significant likelihood of a substantial adverse effect" to the patient. Other considerations, relating to the interest of the doctor themself, could not be taken into account. Hence, it seems that while the decision in *McInerney* does sketch general guidelines for future cases, it is not clear from the decision in *Arato* what 'loyalty' requires from the doctor.

114. *Ibid* at 152.
115. *Ibid*.
116. *Ibid* at 154.
117. *Ibid* at 155.
118. *Ibid*.
119. *Ibid* at 155-57.
120. *Ibid* at 158.

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III(b). Loyalty of lawyers

Across the Common Law, lawyers, unlike doctors, have long been recognized as fiduciaries, and these relationships are considered an "archetype for the fiduciary obligation."[121] A lawyer is expected to act in the best interest of their client, as "loyalty is a core value for the profession."[122] The lawyer has power and authority over the practical interests of their clients, and the duty of loyalty aims to protect the client and ensure that the lawyer will not exploit the control granted to them.[123] While the classification of the relations under fiduciary law is not disputed, the content and meaning of the lawyer's loyalty are indistinct. Some have gone so far as to claim that "[t]he uniform acceptance of the proposition that lawyers owe fiduciary duties to their clients is matched only by the absence of uniformity in the application and explanation of those duties."[124] Without examining further possible reasons for this lack of clarity,[125] the following discussion tries to illustrate how an unsystematic implementation of the standard of loyalty does not diminish but rather contributes to this lack of clarity.

The decisions examined have dealt with the question of conflicting duties of loyalty. Lawyers, like other fiduciaries, should not place themselves in situations where their loyalty to one beneficiary conflicts with their duty to another beneficiary. However, in some cases it was determined that the simultaneous representation of two clients would be allowed.[126] Yet, as this exception requires full disclosure and obtaining the clients' consent, the question remains: *under what circumstances will a decision to act for more than one client not bring about a breach of the lawyer's duty of loyalty?* In other words, the question of what 'loyalty' to the client requires from the lawyer in these situations still stands.

One aspect of this dilemma is the offset between the contractual relationship between the lawyer and their client and the fiduciary duties of the lawyer. As will be demonstrated in the following discussion, different solutions to this tension have been adopted in different courts, some increasing and others decreasing

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121. Sande Buhai, "Lawyers as Fiduciaries" (2009) 53:2 St Louis ULJ 553 at 554. For a historical perspective see William Allen Butler, *Lawyer and Client: Their Relation, Rights, and Duties* (Cornell University Library, 1871) at 17.

122. Adam Dodek, "Conflicted Identities: The Battle Over the Duty of Loyalty in Canada" (2011) 14:2 Leg Ethics 193 at 193.

123. Miller, *supra* note 35 at 284. Also see Richard W Painter, "Fiduciary Principles in Legal Representation", in Evan J Criddle, Paul B Miller & Robert H Sitkoff, eds, *The Oxford Handbook of Fiduciary Law* (Oxford University Press, 2019) at 265.

124. Alice Woolley, "The Lawyer as Fiduciary—Defining Private Law Duties in Public Law Relations" (2015) 65:4 UTLJ 285 at 286.

125. The complexity is also caused by the fact that lawyers are also subjected to ethical codes. In many cases, the breach of the duty of loyalty would be also considered a breach of an ethical duty, and it is hard to distinguish properly between the two. For further discussion see e.g. Deborah L Rhode & Alice Woolley, "Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada" (2012) 80:6 Fordham L Rev 2761. Also see Andrew S Gold, "The Internal Limits on Fiduciary Loyalty" (2020) 65:1 Am J Juris 65.

126. See Joshua Getzler, "Ascribing and Limiting Fiduciary Obligations" in Andrew S Gold & Paul B Miller, eds, *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 39 at 55-56.

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the clarity of the lawyer's loyalty. One significant decision on this issue was the Australian ruling in *Beach Petroleum NL v. Abbott*.[127] The facts of the case were extremely complicated and are not pertinent to this discussion. Briefly, it should be mentioned that the decision dealt with a company, Beach Petroleum, that was part of a group of companies controlled by one Mr. Johnson. Financial pressure on the group and a need for liquid assets led Mr. Johnson and several directors to devise a fraudulent scheme to withdraw assets from the company. This was done primarily through a transaction in which the company acquired an asset at a gross overvalue.[128] The company sued the attorneys who were hired by the directors of the group to advise on the process of re-planning its holdings. It argued, among other propositions, that they had breached their duty of loyalty due to their conflicting interests and hence should compensate the company for the damages caused by the fraud. The trial court denied the claim.[129]

The company sought to reverse the trial court's decision, which determined that since the company and the law firm did not sign a retainer agreement, there was no conflict of interest caused by the simultaneous representation. The court opened by stating that "[t]he solicitor is classically a fiduciary to the client and as such owes *certain* duties in *each particular case*."[130] It then continued to declare that "[w]hether or not there is a duty to advise on the wisdom of a particular transaction depends on the circumstances of the case."[131] That is, since while it has long been accepted that these are fiduciary relationships, the duty of the lawyer "is derived from what the solicitor undertakes, or is deemed to have undertaken, to do in the particular circumstances."[132] The court accepted that indeed equity preserves and protects the relationship of solicitor and client, yet emphasized that "the confidence and influence are not always so pervasive as to require equitable intervention in every facet of the relationship."[133] Of course, the court acknowledged that ultimately, fiduciary responsibility "is an imposed not an accepted one, one concerned with an imposed standard of behaviour."[134] Nonetheless, the court concluded that "[t]he existence and scope of the duty may derive from a course of dealing."[135]

According to these guiding propositions, the court decision was utterly fact-based and focused on a comprehensive analysis of the agreement between the parties.[136] The court agreed to assume that indeed client-lawyer relationships existed between the parties, yet thought it was also "necessary to specify the

127. *Beach Petroleum NL v Abbott Tout Russell Kennedy & Ors*, [1999] NSWCA 408 [*Beach*].
128. *Ibid* at para 1-6.
129. *Ibid*.
130. *Ibid* at para 185 [emphasis in original].
131. *Ibid* at para 187.
132. *Ibid* at para 188.
133. *Ibid* at para 189.
134. *Ibid* at para 192.
135. *Ibid* at para 194.
136. *Ibid* at para 210.

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scope of the retainer so that it can be determined whether a conflict of duty and duty arose relevant to an impeached transaction."[137] In this complex factual analysis, the court found evidence that the attorneys also worked for the specific company. Yet its final conclusion was that this was not sufficient to substantiate the company's claims. The court analyzed the details of the various transactions and concluded that the lawyers did not breach their duties during the simultaneous representation.[138] For example, in a particular transaction, the court held that there was no reason to impose liability because the attorneys were only required to advise on the execution of a transaction that was agreed upon.[139] In relation to another transaction, the representation was "limited to certain clerical acts."[140] Therefore, although the attorneys represented both parties to the transaction, the court concluded that it could not be stated that this was a breach of the duty of loyalty.

Again, it should be stressed that the discussion is not about whether, under the specific circumstances of the case, the lawyers should have been held responsible for a breach of duty. The aim is to focus on the ability of the decision to provide more specific content to the standard of 'loyalty.' The tendency toward case-by-case decision making is evident from the beginning of the discussion, as the court declares that the lawyer owes 'certain duties' in 'each particular case.' Furthermore, the propositions of the court that, on one hand, recognized that the duty of loyalty is inherent in an imposed duty, yet, on the other hand, allowed the content of the contract to determine its boundaries, cannot provide guidance or sufficient means for compliance with the legal norm. It is unclear how the ideal of 'acting in the best interest of the client' can be upheld, while allowing the lawyer unconstrained discretion in determining the scope of the relations.

Considering that loyalty aims to protect the weaker side in relationships—in this case, the client—allowing the content of the contract to set the limits of the duty, without a corresponding explanation of the requirement of the 'loyalty' standard, raises serious concerns as to the ability of the decision to convey any sensible message about the meaning of 'loyalty.' It is important to emphasize that the difficulty in the ruling does not arise from the mere consideration of the terms of the contract between the parties. Rather, it is caused by the fact that the relations between the contract and the fiduciary duties of the lawyer are not clear enough and that the meaning of loyalty in this context was not clearly explained, which necessarily leads to ad hoc decision making. Indeed, the result of the doctrine developed in *Beach*, as some commentators have already noticed, was that the content of the duty will be derived from what the solicitor is retained to do in particular circumstances, so "conduct which may fall within the fiduciary component of the relationships in one case may not fall within the fiduciary

137. *Ibid* at para 237.
138. *Ibid* at para 211.
139. *Ibid* at para 236.
140. *Ibid* at para 370.

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component in another."[141] Hence, the ability to make use of this case in order to anticipate further decisions of the court is very limited.[142]

In contrast, the Canadian Supreme Court's decision in *Strother v. 3464920 Canada Inc*[143] took a different approach.[144] Mr. Strother, a senior partner in a law firm whose field of expertise was tax law, had been advising, for many years, to a company called Monarch, which was involved in developing and marketing of investments in certain tax shelters. At some point, the retainer between the parties expressly prohibited Strother from acting on behalf of clients other than Monarch on these issues, but the provision was later cancelled.[145] In 1997, following specific regulations designed to deal with these tax shelters, Monarch contacted their attorney. Strother advised that the legal structure used by the company was no longer possible, advice that was undisputedly correct at that time, and so Monarch ended its business in this field.

However, Strother was later contacted by a former employee of Monarch, the owner of a shell company named Sentinel. The former employee presented Strother with a possible solution to the new regulations. To explore the viability of this solution, the lawyer agreed to provide his legal services free of charge, in exchange for receiving half of the future revenue of Sentinel. The inquiry with the tax authorities succeeded, and Sentinel operated accordingly for a number of years, generating tens of millions of dollars in profits. Strother did not notify Monarch of the tax authorities' position. Upon learning of the facts, Monarch sued the lawyer (and the law firm), claiming that Strother had breached his duty of loyalty by simultaneously representing Sentinel.

Strother tried to claim that since the provision that determined 'exclusive' representation had been cancelled, there was no duty obligating him not to advise Sentinel.[146] The Canadian court agreed, of course, that when a lawyer is retained by a client, "the scope of the retainer is governed by contract."[147] However, the court also added that these relationships are "overlaid with certain fiduciary responsibilities, which are imposed as a matter of law … fiduciary duties provide a framework within which the lawyer performs the work and may include obligations that go beyond what the parties expressly bargained for."[148]

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141. Sharon Christensen & W D Duncan, *Professional Liability and Property Transactions* (Federation Press, 2004) at 237.

142. It could also be pointed out that a later ruling of the UK House of Lords (*Hilton v Barker Booth and Eastwood*, [2005] UKHL 8), reached a similar conclusion about the offset between the contractual relationship and the fiduciary duties of the lawyer.

143. 2007 SCC 24 [*Strother*]. For further reading on the discussions that followed this decision in the Canadian Bar Association, see Dodek, *supra* note 122 at 211.

144. It should be mentioned that the minority opinion did conclude, relying on English ruling, that the limits of the duty of loyalty should be determined by the retainer agreement between the parties. See *Strother*, *supra* note 143 at paras 135,141.

145. *Ibid* at paras 2-6.

146. *Ibid* at para 37.

147. *Ibid* at para 34.

148. *Ibid* at para 34.

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The court then explained that included in these duties is the duty of loyalty, which demands avoidance of conflict of interest, and as was determined in previous decisions, "[l]oyalty includes putting the client's business ahead of the lawyer's business."[149] The court examined briefly the content of the retainer agreement, and emphasized that it should not, in these cases, "strain to resolve the ambiguities in favour of the lawyer over the client."[150] It concluded that the trial court erred while considering the *legal* effect of the *factual* findings on the content of the contract.[151] The fact that the continuing relationships "of trust and confidence"[152] between Strother and Monarch were based on his representation with regard to certain tax shelters, was enough to conclude that taking upon himself to act simultaneously for a new client on the same issues, could position him in a conflict of interest.

Aiming to explain the meaning of loyalty, the court elaborated that

> Monarch was dealing with professional advisors, not used car salesmen or pawnbrokers whom the public may expect to operate on the basis of 'didn't ask, didn't tell', and who collectively suffer a corresponding deficit in trust and confidence. Therein lies one of the differences between a profession and some businesses.[153]

Hence, his duty of loyalty obliged Strother to reveal that his previous negative advice was subject to reconsideration.[154] Finally, the court explained that this does not mean that a lawyer could never represent simultaneously clients that have competing *commercial* conflicts. However, "[t]he thing the lawyer must not do is keep the client in the dark about matters he or she knows to be relevant to the retainer."[155]

It is clear that the decision of the court still leaves the idea of 'loyalty' in the realm of standards. As noted, the discussion is relative, asking to locate 'loyalty' on a continuum between two ideal forms of legal norms. In comparison with *Beach*, this decision is much clearer as to the requirements of the legal norm. The lawyer could define, in the contract, the subject matters of the representation and the factual findings are relevant to determining the content of the relations. Yet this does not allow them to bypass their duties. They must notify the client of possible conflicting interests in the representation. They must not put their own business ahead of the client's business. As loyalty is their duty by law, they must take into account that the underlining principles of the duty are to protect the trust and confidence in the relationship and act accordingly. Any situations of uncertainty would be interpreted to the benefit of the client.

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149. *Ibid* at para 36.
150. *Ibid* at para 40.
151. *Ibid* at para 41.
152. *Ibid* at para 42.
153. *Ibid* at para 42.
154. In this case, it was even more evident, since the lawyer had a personal financial interest. See *ibid* at para 44.
155. *Ibid* at para 55.

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III(c). Loyalty of directors

Like lawyers, officers of a company are undisputedly considered fiduciaries and hence subject to the duty of loyalty. The managerial position, which generates control of and responsibility for others' money, entails that "the rule of undivided loyalty is relentless and supreme."[156] Loyalty requires that the officer avoid any conflict of interest between their own personal interest and their duties to the company. It emphasizes that they must not use their position to derive hidden profits.[157] This classification of the relationships is far from modern;[158] however, questions such as whether the duty is always mandatory, or is addressed to the company alone (and not, for example, to its shareholders), are still debated today. Over the years, different aspects of the duty have been enacted in specific corporate law legislation.[159] Yet these rules are not considered a closed list and are understood as upholding the idea of 'loyalty,' rather than detracting from it. Hence, courts still have an important role in developing the concept of 'loyalty.'

One example of the ongoing debate about the content of the officer's loyalty is centered on the appropriation of a business opportunity by the officer.[160] Again, the purpose here is to demonstrate, through different decisions that have dealt with this question, the difficulties that arise from the way in which the standard of loyalty has been implemented. As is noted by Andrew Gold, the "law on the taking of opportunities is generally much more standard-like, commonly involving a list of factors that must be weighed against each other."[161] Gold adds that these cases show "a more flexible, open-ended style of legal reasoning," unlike other loyalty doctrines that crystallized into a rule.[162] This observation is indeed accurate with regards to many decisions on this matter; however, as will now be illustrated, it is not a necessary development of the law.

Indeed, examples of the flexible, ad hoc decision making are not hard to find. Already the decision of the Supreme Court of Delaware in *Guth v. Loft*, *Inc.* had stated that "[t]he occasions for the determination of honesty, good faith and loyal conduct are many and varied, and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale."[163] Thenceforth, many rulings have echoed the idea that in cases concerning the taking of a business

156. *Meinhard v Salmon*, [1928] 249 NY 458.
157. Beth Nosworthy, "A Directors' Fiduciary Duty of Disclosure: The Case(s) Against" (2016) 39:4 UNSWLJ 1389 at 1392. Also see Koh, *supra* note 37 at 405.
158. See e.g. *The Charitable Corporation v Sutton*, (1742) 26 ER 642 at 645.
159. See e.g. Del Code Ann tit 8 §144(a) (2017); Cal Corp Code § 310 (1999); *Canada Business Corporations Act*, RSC 1985, c C-44.
160. For further reading see e.g. John Lowry & Ron Edmunds, "The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and its Remedies" (1998) 61:4 Mod L Rev 515; Sarah Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae" (2013) 72:3 Cambridge LJ 720.
161. Gold, *supra* note 36 at 389.
162. *Ibid*.
163. [1939] 5 A2d 503 at 510 (Del 1939). For an elaborate historical description of this decision, which could explain some of the inconsistency which followed from it, see David Kershaw, *The Foundations of Anglo-American Corporate Fiduciary Law* (Cambridge University Press, 2018) at 451-58.

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opportunity, the decision should be made on a case-by-case basis. A clear demonstration of this approach could be found in the frequently mentioned ruling in *Broz v. Cellular Information Systems, Inc*.[164] Broz was a director in Cellular Information Systems (CIS) and the sole stockholder of RFB Cellular, Inc. (RFBC), a company engaged in providing cellular telephone services in the Midwestern United States. CIS claimed that Broz had breached his fiduciary duty, as he had acquired for RFBC a cellular telephone service license that entitled its holder to provide cellular telephone services in parts of northern Michigan, without formally introducing the opportunity to the corporation. That is, while another cellular communications company named PriCellular, which was at the time engaged in the acquisition of CIS, was also interested in this license. The Court of Chancery concluded that Broz had indeed breached his fiduciary duty.[165] The Supreme Court of Delaware reversed the judgment, stating that the application of the legal standard by the court was erroneous and concluded that Broz had not breached his duties.

Considering whether to cast liability on Broz for a breach of his duty of loyalty, the court opened by stating that "[a] corporate fiduciary agrees to place the interests of the corporation before his or her own in appropriate circumstances."[166] Following this statement, the court explained that the doctrine holds that an officer may *not* take a business opportunity as their own if certain conditions apply, but could take it under other conditions. Claiming that "the contours of this doctrine are well established," the court noted that these tests should be considered by a reviewing court and that "[n]o one factor is dispositive and all factors must be taken into account insofar as they are applicable."[167] It was explained that these cases involve a multitude of factual settings; hence, "[h]ard and fast rules are not easily crafted to deal with such an array of complex situations."[168] Referring to a previous ruling, the court pointed out that this is "a factual question to be decided by reasonable inference from objective facts."[169] Finally, the court concluded that this approach is needed in order to uphold "[t]he right of a director or officer to engage in business affairs outside of his or her fiduciary capacity," since according to the court, "[a]bsent such a rule, the corporate fiduciary would be constrained to refrain from exploiting any opportunity for fear of liability based on the occurrence of subsequent events."[170]

Again, the question here is not whether or not Broz was justified in taking the business opportunity. What seems clear is that the ability of this decision to

164. [1996] 673 A.2d 148 (Del 1996) [*Broz*], is one of the most important decisions in Delaware on that issue. Gold, *supra* note 36 at 389, also refers to this decision as a good example of a standard-like approach.
165. See *Broz*, *supra* note 164 at 151.
166. *Ibid* at 154.
167. *Ibid* at 155.
168. *Ibid*.
169. *Ibid*.
170. *Ibid* at 159.

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provide guidance and constraint for future cases is limited. In fact, the very declaration of the content of the director's obligation is vague, as the court states that acting for the benefit of the company is required only in 'appropriate' circumstances. It is also hard to accept the argument that the contours of the doctrine are well established, considering that soon after the doctrine determines that an officer would not be able to take an opportunity for himself in certain cases, the court immediately adds that the director could seize it in other situations. Moreover, it is questionable whether the list provided by the court, of situations where the taking of an opportunity would be prohibited, provides satisfying information about the expected conduct (e.g., the condition that "by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable [sic] to his duties to the corporation").[171]

Even assuming that some of these instructions do provide some meaningful content to the general standard, the vagueness of the decision remains. As long as the decision does not clarify what loyalty requires from the directors in similar cases, the meaning of the standard stays incomprehensible. On one hand, the director is allegedly obligated to act for the benefit of the company; yet on the other hand, he is allowed to consider his own interest and base decisions on his 'right' to an opportunity. If the court fails to explain how these two contradicting interests should be balanced, the conclusion seems to follow that the doctrine does not provide useful guidance or constraints. If the court lists considerations that run in the opposite direction, with no explanation as to their significance, what the officer's 'loyalty' requires remains extremely obscure. Somewhat ironically, the court ends its decision by stating that "we note that certainty and predictability are values to be promoted in our corporation."[172] In reality, it seems that the court's effort to 'harmonize' the director's duties in 'a modern business environment' with interests unrelated to his role, left these duties without understandable content.

It is not surprising, therefore, that an often-heard criticism of this doctrine regards its inconsistency.[173] However, this is not the only possible implementation of loyalty in the context of business opportunities. One example of a different approach can be found in the UK. In *Regal (Hastings) Ltd. V. Gulliver*,[174] the court determined that the law prohibits any entity in a fiduciary position from making any unauthorized profit. This prohibition does not depend on

171. *Ibid* at 155.
172. *Ibid* at 159.
173. See e.g. Eric Talley, "Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine" (1998) 108:2 Yale LJ 299, criticizing the lack of coherence of this doctrine.
174. [1942] UKHL 1, [1967] 2 AC 134 (HL (Eng)) [*Regal*]. Regal filed a lawsuit against its former officers, claiming that they breached their fiduciary duty toward the company by purchasing shares in a subsidiary company formed by Regal and later selling those shares for a significant profit.

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> fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action.[175]

Rather, the liability arises from the mere fact that profit has been made while occupying a fiduciary position. This strict approach, expressly explaining what loyalty demands of the officer, does not require a comprehensive factual inquiry, as responsibility arises once the opportunity was taken in the course of execution of the office.

A later important ruling in *Boardman v. Phipps* concluded that if profits are acquired by the fiduciary "by reason of his fiduciary position and by reason of the opportunity and the knowledge, or either, resulting from it," and the fiduciary is not able to show that the profits were made "with the knowledge and assent of the other person," a demand to account for these profits would be accepted.[176] Evidently, this position provides much more clarity and guidance to the content of the officer's loyalty. The meaning of 'loyalty' in this context is that the officer must place the interests of the company above his personal ones and, therefore, cannot take for himself a business opportunity that emerged during his service. If nonetheless he is interested in taking the business opportunity, he must first acquire the full consent of the company. Hence, this ruling places 'loyalty' much closer to the 'rule' edge of the continuum, making compliance easier.

Adopting a rigid position is one possible alternative to increase certainty, but it is not the only one. Some court decisions have tried, without committing to an absolute prohibition on the taking of business opportunities, to create a more informative standard. One prominent decision is the Supreme Court of Canada ruling in *Canadian Aero Service v. O'Malley*.[177] The company's main business was the performance of complicated contracts of topographical mapping and geophysical exploration in developing countries. In order to obtain such contracts, considerable investment in equipment, fieldwork, and developing contacts with the local government was needed, all before the company had any guarantee that it would indeed win the contract. The focus of the dispute was a mapping project in Guyana. For several years, through two of its employees (who served as president and senior vice president), the company had invested time and money in an attempt to win this project. The two officers later resigned from the company and shortly thereafter were involved in the

175. *Ibid* at 144-45.

176. [1967] 2 AC 46 (HL (Eng)) at 105. It should be pointed out that while this is not a corporate law case (the decision concerned a solicitor of a family trust and one of the beneficiaries, who conducted negotiation on behalf of the trust), on numerous later occasions it was applied in the context of directors' duty of loyalty, and so it is relevant to the discussion in this section.

177. [1974] SCR 592 [*Canadian Aero*]. This ruling is still referred to as one of the leading precedents with regard to business opportunity doctrine. See e.g. *Matic v Waldner*, 1 WWR 504 (2017) at para 126; *Canadian Metals Exploration Ltd v Wiese*, 2007 CarswellBC 1315 (2007) at para 20.

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establishment of another company, which eventually won the Guyana project. The company sued the employees, claiming that the two took advantage of the company's business opportunity by submitting a proposal for the Guyana project through the new company.

The company's claim was denied. However, the Supreme Court allowed the appeal.[178] The court explained that the strict ethic in this area of the law "disqualifies a director or senior officer from usurping for himself ... a maturing business opportunity which his company is actively pursuing."[179] After determining that the relationships were indeed fiduciary ones,[180] the court had to determine whether the two officers had taken one of the company's business opportunities, thereby breaching their duty of loyalty. Referring to the UK ruling in *Regal* as the guiding principle, the court added that this decision should not be understood "as providing a rigid measure whose literal terms must be met in assessing succeeding cases" and that "as in other branches of the law, new fact situations may require a reformulation of existing principle to maintain its vigour in the new setting."[181] Accepting that some flexibility is needed, the court did not dispute the conclusion of a previous decision, that finding that the officer had behaved in "good faith" could be relevant to the decision (a position that was declined in *Regal*).[182] However, the court inferred that in light of the facts of the case, this had no bearing, as it was clear that the company was interested in the opportunity. Furthermore, the court needed to decide whether the duty of the directors had survived their resignation. It concluded that there were no obstructing considerations to the conclusion that their duty continued. However, the court added that liability in the specific case should not "be taken as laying down any rule of liability to be read as if it were a statute" and that "[t]he general standards of loyalty, good faith and avoidance of a conflict ... must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively."[183]

On the face of things, these declarations position the implementation of 'loyalty' in this case as a vague standard, particularly in comparison with the stricter rule. However, a closer reading reveals that unlike the Delaware court, in this case allowing some flexibility did not leave the content of the duty empty. As the court emphasized, the general standard of loyalty, where the roots of the

178. The Court of Appeals for Ontario held that there were no fiduciary relationships between the parties, due to a factual doubt concerning whether the two were officially appointed as directors. Thus, it concluded that the company's claim should be denied.

179. *Canadian Aero*, *supra* note 177 at para 25.

180. The Supreme Court concluded that there is no need to determine if there was a formal appointment of the two as directors, as their positions in the subsidiary company "charged them with initiatives and with responsibilities far removed from the obedient role of servants." See *ibid* at paras 22-23.

181. *Ibid* at para 30.

182. *Ibid* at para 46. However, the court denied the officer's claim regarding this earlier decision, *Peso Silver Mines Ltd v Cropper*, [1966] SCR 673 [*Peso*]. The court explained that in the current circumstances, even if a more lenient rule was suggested in *Peso,* it would still lead to the conclusion that there was a breach of loyalty.

183. *Canadian Aero*, *supra* note 177 at para 48.

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doctrine lie, reflects "the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behaviour."[184] This declaration sends a message to directors regarding the behavior expected of them. The Canadian court did not deviate from its focus on the roots of the general standard of loyalty, and the starting point of the decision remains that a director should not exploit their position for personal profits. Taking into account the good faith conduct of the officer does not significantly change the idea that 'loyalty' means promoting the company's interests rather than the officer's. If the officer failed to make full disclosure, they would be held accountable, and there would be no need to show that they caused actual loss to the company. As the general outlines of the doctrine remain clear, loyalty still contains understandable decipherable content. 'Loyalty' still requires that the officer avoid possible conflict of interest when considering whether to take a business opportunity for themself.

Nonetheless, it should be noted that if it is unclear at what point the duty ceases to exist, the predictability of the law is affected. The court tried to mitigate this problem by suggesting, similar to the decision in Broz, a list of different relevant considerations, such as "the factor of position or office held" or "the circumstances under which the relationship was terminated."[185] As mentioned above, a list alone will not solve the problem of vagueness. However, it is hard to say that allowing the courts some flexibility in determining the survival of the duty after the director has resigned completely undermines the coherence of the doctrine. Indeed, it would have been preferable if the court had avoided the wording that bore case-by-case implications and determined instead clearer exceptions to situations where the duty should survive a resignation. Still, this ruling is much clearer than the utterly ad hoc application of the case law in Delaware following *Broz*. It should also be added that similar examples of decisions that did not accept the strict rule yet tried to provide some meaning and content to director's obligations of 'loyalty' in these situations can also be found in different American courts outside of Delaware.[186]

Finally, it is reasonable to mention that while some commentators have insisted that a rigid approach—which would prohibit any exploitation of business opportunities—is necessary,[187] others have claimed that this approach is not adapted to the current corporate world and that there are good policy

184. *Ibid* at para 32.
185. *Ibid* at para 48.
186. See e.g. *MacIsaac v Pozzo* [1947] 81 Cal App 2d 278 at 238, where the court explained that "to the utmost measure of loyalty and accordingly he may not use a trust opportunity for personal advantage" and that accordingly, while negotiations for a new opportunity, "it was the duty of each of the parties to conclude those negotiations for the benefit of the firm and without seeking any advantage for itself to the detriment of the other." Also see *Industrial Indem Co v Golden State Co*, [1953] 117 Cal App 2d 519; *Alexander & Alexander v Fritzen* [1989] 147 AD 2d 241 (App Div 1989), where the court suggested different tests that should be taken into account to determine whether the opportunity belongs to the company.
187. That is, assuming that the approval of the shareholders (or the board of directors, under certain circumstances) has not been granted in advance, after full and complete disclosure of all the relevant facts. This was the approach supported by the UK courts, starting with *Regal*, *supra* note 174.

https://doi.org/10.1017/cjlj.2021.19 Published online by Cambridge University Press

considerations, such as the need for business innovation, which justify a more lenient approach.[188] Clearly, this discussion does not aim to reconcile these conflicting views. Rather, it tried to demonstrate again that 'loyalty' could be given more specific content even in these situations and that hence there is no reason to assume that ad hoc decision making is an indispensable part of this legal norm. Accordingly, it suggested that when deliberating on the appropriate doctrine for a specific context (whether the disclosure duty of doctors or the taking of a business opportunity by a director), the implications of the way the courts choose to design this legal norm must be taken into account.

To conclude, this review of the case law exemplified how the movement of loyalty along the continuum poses a continual challenge for the courts. It demonstrated how the theoretical concerns that accompany certain designs of legal norms are expressed in real factual situations. Presenting the actual and concrete ways the court can design loyalty as a legal norm that is closer to the form of a 'rule' illustrates why it should not be taken for granted that loyalty would or should be implemented in an ad hoc way. Hence, this comparison supports the claim that it is factually possible to compensate for the disadvantages of legal standards as discussed in the first part of the article. Indirectly, this discussion also answered the general criticism often heard about fiduciary law, by showing that the vagueness of this law could be decreased, as it is not predetermined nor intrinsic.

Conclusions

The idea that guidance and constraint are key elements in any legal system that aspires to uphold the rule of law is not a novel one. John Locke articulated this notion when he emphasized "that both the people may know their duty, and be safe and secure within the limits of the law, and the Rulers too kept within their due bounds."[189] The literature on rules and standards illustrates how the *form* of a legal norm has a direct effect on its ability to achieve these goals. The article suggested that exploring the duty of loyalty, a unique legal norm, by focusing on questions of form could provide important insights as to the nature of this duty.

First, the article examined the actual location of the duty on the continuum between rules and standards, showing that this location is not as close to the edge of an 'ideal' standard as may have been expected, hence revealing the dialectical aspect of loyalty. Then, it explained why it is desirable to continue and implement this duty in a way that would generate, in specific contexts, legal norms that are closer to 'rules.' It was claimed that the implementation of 'loyalty' as an informative standard would provide—both to the people who are required to follow

188. See David Kershaw, "Lost in Translation: Corporate Opportunities in Comparative Perspective" (2005) 25:4 Oxford J Leg Stud 603; David Kershaw, "The Path of Fiduciary Law" (2011) 6/2011 LSE Legal Studies Working Paper 1 at 3.

189. John Locke, *The Works of John Locke, Esq; in Three Volumes, Volume II* (John Churchill & Sam Manship, 1714) at 179.

https://doi.org/10.1017/cjlj.2021.19 Published online by Cambridge University Press

the law and the ones who enforce it—the needed information concerning the behavior expected from fiduciaries. The location of loyalty on the continuum of rules and standards should not be a permanent one. Ideally, loyalty should be realized as moving along the continuum in a pendulum-like movement, which aspires to reach the edge of rules, yet does not forsake its origin as a standard.

Further, by exploring cases from different courts, it was manifested how the discussion is not only theoretical. The discussion emphasized the importance of taking the consideration of 'form' into account when deciding on the content of loyalty in specific fiduciary relations or situations. This conclusion is relevant with regard to all fiduciary relationships, especially when the duty intends to regulate the conduct of the business market, as predictability of the law is essential for its efficient function. As the case law showed, the implementation of the standard of loyalty by the courts is a concrete and timely challenge. Somewhat surprisingly, even in commercial contexts, courts on occasion have declared that 'loyalty' should be examined on a case-by-case basis, hence, in fact, preserving its form as a 'pure' standard. However, parallel examples from the case law illustrated that ad hoc decision making is not a necessary or indispensable part of the standard of loyalty and that this duty could indeed be implemented as an informative standard, thus advancing coherence of the law. Hence, the discussion in the article exemplifies the importance of comparative law not just as a tool for learning about the content of the law in a foreign country, but rather as a way to enrich the theoretical writing on the law.

As discussed in the first part of the article, the choice of 'form' of the legal norm also determines who would decide on the normative content of the law, and in this context, what the values are that the duty of loyalty aims to promote. As long as the legislator avoids creating specific rules on these issues, courts reserve the discretion to determine those objectives. As briefly mentioned in the article, one example of such debate is whether doctors should be considered fiduciaries. Clearly, it was not possible to include the full debate on the matter here. Yet, the discussion above does provide some answers to criticism that was raised as to whether fiduciary law is the right tool to govern certain relationships, such as the one between doctors and patients or parents and their children.[190] As it shows, the claims against using fiduciary law in these new contexts cannot rely upon the assumption that this implication would necessarily lead to uncertainty and inconsistency of the law. In both well-established fiduciary relations and more controversial ones, the way in which the duty is implemented would affect these concerns. Therefore, this could not be the main reason to resist applying fiduciary law in these contexts.

190. See e.g. J E Penner, "Is Loyalty a Virtue, and Even If It Is, Does It Really Help Explain Fiduciary Liability?" in Andrew S Gold & Paul B Miller, eds, *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 159 at 173-74, arguing against the classification of parent-child relationships as fiduciary. For an opposite perspective see Lionel Smith, "Parenthood is a fiduciary relationship" (2020) 70:4 UTLJ 395.

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Finally, it should be added that although the article focused on the duty of loyalty, its conclusions are not limited to it. The concerns raised in the rules and standards literature are general. The case law examples discussed above imply that if in this unique, complicated, and vague legal institution, it is nonetheless possible to implement the legal norm in a way that is more consistent with the rule of law, there is no reason to doubt that with regard to private law more generally, courts should not settle for ad hoc decision making, but rather aspire to create more informative standards. In reality, as this article illustrates, the rulings of the court are not always compatible with this observation. For different reasons,[191] judges might choose to avoid setting clear rules and prefer resolving the concrete case before them without committing to its future implications. It is therefore worth mentioning, that even if the court states that the decision should be made on a case-by-case basis, the mere existence of the decision necessarily creates some precedential effect. Consequently, while standards would (and should) continue to be part of the Common Law, their location should not be understood as fixed. Legal standards should consistently move along the continuum, from standards toward rules.

Acknowledgments: I would like to thank Hanoch Dagan, the participants of the Edmond J Safra Center for Ethics Fellows Academic Program 2019-2020, and the participants of the Junior Scholars Workshop at The Hebrew University of Jerusalem 2020-2021, for very helpful comments. I'm particularly thankful to Amir Licht, who provided extremely valuable comments to the first version of this article. Last, I'm grateful to the Edmond J Safra Center for Ethics at Tel Aviv University for its generous financial support.

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191. The precise reasons for such a decision-making practice are outside of the scope of this article, but one can think of practical reasons, such as workload, or more fundamental reasons, such as the concern that a hard case would set a precedent for other cases, thus creating bad law (as famously said in *Winterbottom v Wright* (1842) 152 ER 402, "Hard cases make bad law").

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