INSTITUTIONAL CORRUPTION: A FIDUCIARY THEORY

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Dennis F. Thompson developed a theory of "institutional corruption" in order to explain a phenomenon that he believed the Congressional ethics rules failed to address: Congress' systematic deviation from its proper purpose as a consequence—not merely of individual wrongdoing—but of the influence of several general systemic features of the legislative process. Researchers at Harvard University's Edmond J. Safra Center for Ethics have recently deployed the language of institutional corruption broadly in analyses of various other public and private institutions, such as regulatory agencies, banks, pharmaceutical companies, and think tanks. The states of affairs that researchers have identified as "institutional corruption" fall into four categories: 1) breaches of fiduciary duty, 2) fraud or otherwise unfair commercial practices, 3) destructive firm behavior, and 4) mistake, inefficiency, or incompetence. This Article reveals that only the first of these represents a true application of Dennis F. Thompson's theory of institutional corruption, which was originally developed in the context of Congressional ethics. Research projects that deploy the terminology of institutional corruption in non-fiduciary contexts are certainly valuable, but they do not address the subject matter of institutional corruption, properly understood.

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INTRODUCTION

In 1995, Dennis F. Thompson coined the term "institutional corruption" to explain a phenomenon that he believed the Congressional ethics rules failed to address: Congress' systematic deviation from its proper purpose as a consequence—not merely of individual wrongdoing—but of the influence of several general systemic features of the legislative process.[1] Lawrence Lessig recently embraced a version of Thompson's institutional corruption theory, presenting his own conception of institutional corruption applicable to Congress in the context of a call for campaign finance reform.[2] While Thompson's theory focuses on systemic influences inside of Congress,[3] Lessig's account focuses on the systemic effect that Congress' dependency on campaign donations has on its legislative activities.[4] Lessig also offers a somewhat different specification of the public purpose from which he argues that Congress has deviated.[5]

Although Lessig's own institutional corruption research focuses on Congress, he aspires to promote the use of institutional corruption theory's distinctive analytical framework in non-governmental contexts as well. Lessig has summarized the basic components of the institutional corruption framework thus:

> An economy of influence that weakens the effectiveness of an institution, especially by weakening public trust of that institution.[6]

The concept of an institutional purpose is not explicitly mentioned in this formulation, but its role in institutional corruption theory is implied by the stipulation that the economy of influence in a corrupt institution "weakens [its] effectiveness." In order to determine whether or not

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1 *See* DENNIS F. THOMPSON, ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION (1995).

2 *See generally* LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—-AND A PLAN TO STOP IT (2011).

3 THOMPSON, *supra* note 1, at 8.

4 LESSIG, *supra* note 2, at 125–71.

5 *See generally* Lawrence Lessig, *Institutional Corruptions* (Edmond J. Safra Ctr. For Ethics, Working Papers No. 1, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233582 (comparing his conception of institutional corruption to Thompson's conception).

6 Memorandum, Lawrence Lessig, Request for Proposals for the Lab "Project on Institutional Corruption," Harvard University 3 (Nov. 12, 2010) (on file with author).

an institution's effectiveness has been weakened, we must have some baseline—an "institutional purpose"—according to which we can assess institutional performance. Lessig therefore considers the identification of an institutional purpose to be a basic "assumption" of any institutional corruption analysis.[7] He writes, "Institutions have purposes. We can measure the success of these institutions by how well they serve these purposes. Success can be measured by the output of the institution."[8]

Recently, researchers at the Edmond J. Safra Center for Ethics have begun producing literature that deploys the terminology of institutional corruption broadly in analyses of various public and private institutions. This growing body of work illustrates the theoretical challenge that researchers must meet in order to effectively broaden the reach of institutional corruption theory. In each new context, a researcher must identify the institutional purpose to which the theory properly applies.

This challenge is both more complex and more important than is immediately apparent. Thompson's and Lessig's accounts of institutional corruption in the context of Congress share a common feature that many plausible private sector analogs do not: an obligatory purpose. Political theorists may disagree about what specifically constitutes the proper purpose of the state, but they generally agree that the state *has* a proper purpose, for which alone the exercise of state authority is justified.[9] When state actors coerce us merely to enrich themselves or their friends, they abuse their power and weaken the effectiveness with which the state achieves its proper purpose. Thus, in the context of legislative ethics, we at least know the general nature of the "institutional purpose" we are seeking.

But private organizations are not states. Because private organizations usually do not coerce us, they are not generally obligated to act for the state's public purpose. Moreover, it is not obvious that all private organizations have an obligatory purpose of any sort. Intuitively, we tend to think that many private organizations may permissibly adopt or discard all kinds of different purposes. The question of how institutional corruption theorists ought to determine the purpose of private institutions in the course of institutional corruption analyses is therefore critical for those who would apply the theory outside of its original context.

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7 *Id.* at 1.

8 *Id.*

9 David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2350 (1992) ("In its classical form, the key idea of natural law is that legal systems are legitimately instituted in order to promote the common good."); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 719 (2013) ("Even if opinions differ regarding whether representatives should be acting in the general public interest or in the interests of their specific constituents, people are likely to agree that representatives should not be acting primarily in their own interests.").

This Article points the way toward a coherent theory of institutional corruption applicable to some private sector institutions. Part I analyzes Thompson's and Lessig's original accounts of institutional corruption in the context of Congress, develops a model of institutional corruption applicable to both accounts, and describes in detail the challenges raised by the application of institutional corruption theory to other institutions. Part II reviews the recent literature deploying the terminology of institutional corruption in various private sector contexts and identifies four distinct categories of institutions—Fiduciaries, Frauds, Fiends, and Fools—that researchers have identified as institutionally corrupt. Part III develops a generalized institutional corruption model that reveals institutional corruption theory to be a theory of organizational fiduciary duty and breach. Properly understood, institutional corruption theory is applicable only to Fiduciaries—public and private sector institutions that have a fiduciary obligation to act solely for the purposes of a principal or principals. While research projects that focus on the categories dubbed Frauds, Fiends, and Fools are certainly valuable, they do not address the subject matter of institutional corruption.

I. INSTITUTIONAL CORRUPTION: PAST AND PRESENT

To understand and evaluate current efforts to apply institutional corruption theory more broadly, it helps to begin at the beginning. Thompson developed institutional corruption theory while studying Congressional ethics in the 1990s, and Lessig used a slightly modified version of Thompson's theory as the basis of his argument in favor of federal campaign finance reform. What follows is a description of this early work, a model of institutional corruption called the Thompson-Lessig Model, and a description of the challenges faced by researchers who propose to apply the theory in new institutional contexts.

A. The Origin of Institutional Corruption Theory

Institutional corruption theory first appeared in the context of legislative ethics.[10] Dennis Thompson developed the theory in order to account for the ways in which institutional corruption differs from individual corruption. Institutional corruption does not necessarily involve individuals who engage in illegal or unethical conduct.[11] Instead, "institutional corruption" in the context of legislative ethics refers to states of affairs in which political benefits—such as campaign contributions, endorsements, organizational support, or media exposure—are

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10 *See generally* THOMPSON, *supra* note 1.

11 *Id.* at 25 ("Members who act not for personal gain but out of mixed, even noble, motives may still be the agents of a most serious corruption.").

made available to lawmakers under conditions that, in general, tend to promote private interests at the expense of the legislature's public purpose.[12]

Of course, people reasonably disagree about the content of the concept of "public purpose"—a purpose for which the state's exercise of coercive authority is justified.[13] Thompson's own account of institutional corruption therefore includes a substantive claim about what makes it the case that lawmakers act for a public purpose: lawmakers must act in a way that is consistent with principles of deliberative democracy.[14] He writes:

> Members of the legislature seek agreement while expecting that disagreement will persist. The challenge for legislative ethics is to devise rules that will help legislators make good and just policy even while they continue to disagree about what that is. Under these circumstances the best hope is to encourage *a process that is justifiable* from as many moral perspectives as possible.[15]

The process that Thompson argues is widely justifiable, and therefore legitimating, should ensure that lawmakers legislate on the basis of a sincere exchange of what John Rawls called "public reasons."[16] Thompson concludes that a legislature acts for a public purpose only insofar as it follows this decision-making procedure: "In a deliberative process, members consider policies on their merits, treat citizens and colleagues fairly, and publicly account for their actions."[17]

Thompson doesn't deem a legislature corrupt simply because its members vote on the basis of honest mistakes about the nature of justice or the limits of state power. However, he does stipulate that a legislature is institutionally corrupt if it is subject to "patterns of political influence" that are "clearly irrelevant to any process of deliberation."[18] Political gains associated with catering to such influences are "improper."[19] Lawmakers are "independent" of improper influences so long as they consider policies on their "merits," or whatever lawmakers reasonably understand to be those merits.

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12 *See id.* at 30–31; *see also* Lessig, *supra* note 5, at 5.

13 THOMPSON, *supra* note 1, at 18 ("In a pluralist society, citizens do not always agree on what is good or just legislation.").

14 Lessig, *supra* note 5, at 8–9.

15 THOMPSON, *supra* note 1, at 18 (emphasis added).

16 *See generally* Dennis F. Thompson, *Public Reason and Precluded Reasons*, 72 FORDHAM L. REV. 2073 (2003).

17 THOMPSON, *supra* note 1, at 20.

18 *Id*. at 20–21. *See also* Thompson, *supra* note 16 (2003).

19 THOMPSON, *supra* note 1, at 25.

Lawrence Lessig recently adopted Thompson's institutional corruption theory in order to develop his own account of institutional corruption in the U.S. Congress. As a starting point, Lessig echoes Thompson's observation that in the context of political decision-making, "independence" doesn't usually refer to choices made at random. Rather, a public official acts independently if her actions depend on the proper considerations—"independence," Lessig concludes, is better described as "the proper dependence."[20] Lessig uses the term "dependence corruption" to refer to the state of an institution that deviates from its proper dependency due to an improper dependency. A competing dependency is thus one kind of influence that can give rise to institutional corruption.

For Thompson, Lessig explains, legislative deliberations are independent if they depend on the "merits" of the relevant public policy questions.[21] Just as Thompson's account of institutional corruption in Congress reflects his commitment to a deliberative process, Lessig's account reflects his commitment to a representational standard of democratic legitimacy, for which he makes an originalist constitutional argument. Lessig argues that the Framers of the U.S. Constitution intended for the House of Representatives to be "dependent upon the People alone."[22] Like Thompson, Lessig does not consider politicians' honest mistakes about the nature of the public interest to be evidence of institutional corruption, so long as they are responsive to the voters they represent.

In modern times, Lessig argues, Congressional candidates cannot in fact be elected without substantial support from the small minority of Americans who fund political campaigns ("the funders"). Lessig concludes that this de facto requirement makes politicians effectively dependent on the funders—a dependency that corrupts Congress by causing it to deviate from its proper dependency "upon the People alone." To those who object that funders are people, too, [23] Lessig responds that the funders' collective possession of an effective veto is nonetheless objectionable according to any reasonable interpretation of the Framers' intent as expressed by James Madison, because "there is no plausible theory under which [the funders] are 'representative' of 'the People.' Not demographically, not ideologically, not experientially, not at all."[24]

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20 LESSIG, *supra* note 2, at 131.

21 Lessig, *supra* note 5, at 8–9.

22 LESSIG, *supra* note 2, at 128 (citing THE FEDERALIST NO. 52 (James Madison)).

23 *See, e.g.*, Richard L. Hasen, *Is "Dependence Corruption" Distinct from a Political Equality Argument for Campaign Finance Laws?A Reply to Professor Lessig*, 12 ELECTION L.J. 305, 310 (2013).

24 Lessig, *supra* note 5, at 17. Hasen responds to Lessig's argument by examining the context of James Madison's exhortation, which indicates that Madison was referring to the

Lessig appears to think that a Congress that properly represents the people will legislate in a manner consistent with the public's expressed policy preferences. He writes that our government can be deemed corrupt insofar as it "doesn't track the expressed will of the people, whether on the Left or on the Right."[25] He also cites Martin Gilens' research establishing the existence of "a wide gap in the policy preferences of 'the funders' and 'the People,' [and that] in the face of that gap, Congress tracks not 'the people' but 'the funders.'"[26] In Lessig's view, this gap is evidence that Congress has deviated from its proper purpose due to its dependence on the funders. A second way in which Congress deviates from its institutional purpose, Lessig writes, is by prioritizing issues about which the funders care deeply at the expense of issues about which a majority of the American people care deeply.[27]

Thompson and Lessig have two different conceptions[28] of "public purpose"—different specifications of a shared parent concept—which function as Congress' institutional purpose in their respective analyses. Some states of affairs will count as "institutional corruption" according to both conceptions, but other states of affairs are "institutional corruption" under one conception but not the other.

B. A Model of Institutional Corruption

Although Thompson and Lessig specify Congress' "public purpose" somewhat differently, their accounts are different specifications of the

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importance of making the House of Representatives independent of the state governments. *See* Hasen, *supra* note 23, at 314–15. Hasen concludes that the specific way in which the Framers intended the House of Representatives to be "dependent on the people alone" was that it be *independent* of state governments. *Id.* Insofar as both the funders and the people writ large are independent of state governments, the funders would—in this narrow but perhaps sufficient sense—be representative of the people.

25 LESSIG, *supra* note 2, at 8.

26 *Id.* at 151–52.

27 *Id.* at 151.

28 The similarities and differences between Thompson's and Lessig's accounts of "institutional corruption" in Congress illustrate a classic distinction—drawn by philosophers such as John Rawls, Ronald Dworkin, and W.B. Gallie— between a "concept" and its various "conceptions." *See* John Rawls, *Two Concepts of Rules*, 64 THE PHILOSOPHICAL REVIEW 3, 3–32 (1955); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134–36 (1977); W. B. Gallie, *Art as an Essentially Contested Concept*, 6 THE PHILOSOPHICAL QUARTERLY 97 (1956). Following Mark Criley, a concept can be conceived of as a cluster of one or more norms (i.e. rules) that limit the particular objects or states of affairs that count as instances of that concept. *See* Mark Edward Criley, Contested Concepts and Competing Conceptions (2007) (unpublished Ph.D. dissertation, University of Pittsburgh). In many cases, a concept is "underspecified," meaning that its limiting conditions are not sufficient to identify, even in principle, a distinct category of instances that fall under the concept. *Id.* Such a concept, "public purpose" in this case, may give rise to competing "conceptions," understood as further specifications of the concept in question that are consistent with the parameters of the original underspecified concept, but which identify a non-contradictory subset of the possible claims that fall under the original concept. *Id.*

same theory of institutional corruption, understood as the shared conceptual framework that they apply in the course of their analyses. This framework is depicted here as the Thompson-Lessig Model. See Figure 1.

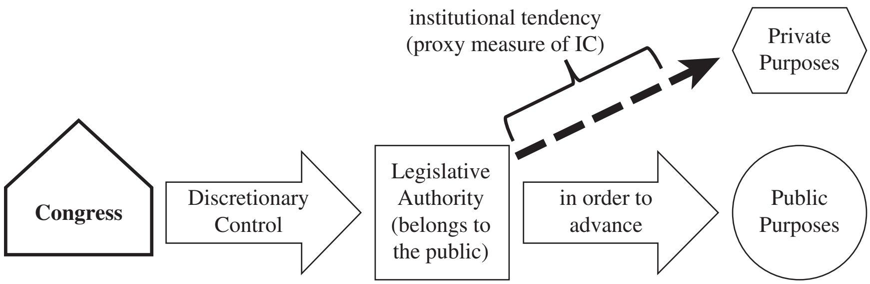

FIGURE 1: THE THOMPSON-LESSIG MODEL

Lessig and Thompson agree that Congress' legislative authority does not rightfully belong to its members. Like all of the U.S. government's legitimate powers, the legislative authority belongs in the first instance to the people of the United States, who have delegated this authority to Congress on the condition that it will be exercised solely for public purposes.[29] The Constitution affords Congress significant discretion to make laws for public purposes, but if the members of Congress legislate for private purposes, they abuse the public resource—the legislative authority—over which they have been given conditional stewardship.

Thompson and Lessig agree that Congress is institutionally corrupt, but the process of actually identifying and measuring its institutional corruption is complicated by the fact that lawmakers' honest mistakes are not evidence of institutional corruption. Mere failure to achieve some well-defined ideal, therefore, is not proof that Congress is corrupt.[30] Thompson explains, "[T]he purposes of government (and many other public institutions) are multiple and contestable, and therefore cannot be fully specified and endorsed independently of a legitimate collective decision making process."[31] Thompson and Lessig therefore identify institutional corruption through a proxy: the extent to which Congress

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[29] *See* U.S. CONST. art. I.

[30] *See* LESSIG, *supra* note 2, at 328 n.6 ("[T]he term dependence corruption describes the process of governance. It doesn't point to a particular tainted result."); Hasen, *supra* note 23, at 309 ("Distortion of policy is an effect of dependence corruption and not the 'pathology' itself.")

[31] Dennis F. Thompson, *Two Concepts of Corruption* 1, 5 (Edmond J. Safra Ctr. for Ethics, Working Paper No. 16, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304419.

systematically advances purposes that cannot plausibly be considered public. The Thompson-Lessig Model depicts this phenomenon as a dashed line reflecting an "institutional tendency" to advance private purposes.[32] Because public purposes are understood to be the outcomes of democratic processes, systematic influences that corrupt Congress do so by undermining "legitimate institutional procedures."[33]

Thompson assesses the degree to which Congress has deviated from its proper purpose primarily by examining inputs. Excessive time spent on individual constituent service, for example, may undermine Congress' ability to advance public purposes through legislation.[34] Lessig attempts to measure the extent of institutional corruption in Congress both in terms of inputs, such as the percentage of time spent advancing private priorities that differ from public priorities, and in terms of outputs, such as the extent to which legislative outcomes reflect private preferences that differ from public preferences.[35]

The basic structure of the Thompson-Lessig Model could be used to describe individual as well as institutional corruption in the context of Congress, although some of the component concepts in the individual and institutional models would differ. The differences between individual and institutional corruption are: (1) the nature of the incentives that cause the institution to deviate from its purpose, and (2) whether the deviation is the result of individual choice or institutional tendency. Whereas private gain motivates perpetrators of individual corruption, institutional corruption is the unintended by-product of legitimate incentives such as positive media attention, legal campaign contributions, and ultimately electoral success.[36] Whereas individual corruption consists of individuals' choices to violate their duty to act solely on the public's behalf, institutional corruption is the institution's failure to act on the public's behalf due to its dysfunctional incentive structures.[37] Congress may in principle be institutionally corrupt even if no lawmaker is individually corrupt, but lawmakers are morally accountable for any failure to combat institutional corruption.[38]

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32 *See* THOMPSON, *supra* note 1, at 31.

33 Thompson, *supra* note 31, at 4–5.

34 *See* THOMPSON, *supra* note 1, at 84–85

35 Lessig identifies these two kinds of deviation as "substantive distortion" and "agenda distortion." LESSIG, *supra* note 2, at 151.

36 *See* THOMPSON, *supra* note 1, at 30 ("Political gain involves goods that are usable primarily in the political process and are necessary for doing a job or are essential by-products of doing it.").

37 *Id.* at 31 ("In individual corruption, the link between the gain and the service is an *individual motive* in the mind of the legislator. . . . In institutional corruption, the link is an *institutional tendency*.").

38 *See* Thompson, *supra* note 31, at 8 ("It is important to notice that a charge of institutional corruption does not mean that only the institution is at fault. (This is a common misap-

C. The Challenge

Although Thompson developed his theory in the context of legislative ethics, he believes that it can be applied more broadly. In *Ethics in Congress*, Thompson suggested, "[T]he approach to legislative ethics developed here applies to corruption in many different kinds of institutions."[39] Thompson recently reaffirmed, "[T]he basic [institutional corruption] framework and much of the analysis can be applied to [private] institutions."[40] Lessig's own institutional corruption writings have likewise focused on Congress, but he shares Thompson's belief that the theory is more broadly applicable.[41]

The task of applying institutional corruption theory beyond its original legislative context brings to the fore a challenge that largely hibernated so long as the theory remained on its native turf: articulating criteria for institutional purpose identification. Richard L. Hasen frames this ambiguity in terms of the identity of the person or persons whose goals for the institution properly determine its institutional purpose: "[A]n institution is in a state of corruption when there is a gap between developed dependence and dependence desired—but the definition does not tell us *who* must desire a particular type of dependence."[42] In the legislative context, the answer—at least in its most abstract form—seems obvious: "the people," united under law, are the agent that determines the purpose of Congress. Different democratic theories may tell slightly different stories about the way in which the people's purpose must be Congress' purpose, and they may tell substantially different stories about what more specifically that purpose is and how it should be pursued. However, these differences are merely further specifications of the same, shared concept of "institutional purpose," which can roughly be articulated as: the purpose for which the institution's activities must be conducted in order to avoid wronging others. This kind of purpose can be called an "obligatory purpose." Because legislators coerce the people through laws, their activities wrong the people unless they act for the people's purpose. This is why the people's purpose should guide the analysis.

plication of the idea, as will be indicated below.) We should recognize that it is still individuals who are the agents of institutional corruption and individuals who are to be held accountable for it.").

39 THOMPSON, *supra* note 1, at xiii.

40 Thompson, *supra* note 31, at 6.

41 *See* Lawrence Lessig, *"Institutional Corruption" Defined*, 41 J.L. MED. & ETHICS 553, 555 (2013) ("My hope is that this collection might inspire a similar examination elsewhere. For however familiar are the views of some that the pharmaceutical industry's influence on medical practice and public health is an example of institutional corruption, I am convinced there are many other examples even more significant to the public good.").

42 Hasen, *supra* note 23, at 309.

By contrast, applying this same concept of "institutional purpose" (i.e. the same criteria for institutional purpose identification) in many private sector contexts seems impossible, because many organizations do not have obligatory purposes. Indeed, many of them seem to engage in activities that do not wrong anyone if undertaken for any of an infinite variety of purposes. For example, an organization called "Patti's Piping Pies" might bake pies for profit, for charity, for fun, out of habit, for individuals, for grocery stores, for soldiers and sailors, or it might alternate between these purposes without pie-baking becoming wrongful. Indeed, without knowing more, it also seems that Patti's Piping Pies could redirect its institutional efforts from pie-baking to cake-baking or candlestick-making without wronging anyone.

There are two different ways in which institutional corruption theorists might respond to this challenge. The first alternative (and the one that this Article will ultimately endorse) is to acknowledge that institutional corruption theory is inapplicable to institutions that do not have an obligatory purpose—a purpose for which the institution's activities must be conducted in order to avoid wronging others. Lessig gestures at this possibility when he writes, "[T]he definition [of "institutional corruption"] does not purport to specify the institution's purpose or even to presume that any particular institution has a purpose. If an institution does not have a purpose, then it cannot be corrupted in this sense."[43] It is implausible that any institution lacks a "purpose" on *any* understanding of that term. Surely, for any institution, there is someone for whom its activities are useful, or someone who has subjective goals for the institution or subjective beliefs about what the institution "is for." But Lessig is correct that, on some possible criteria for institutional purpose identification, not all institutions will have one. This appears to be true of the "obligatory purpose" criteria that I have proposed: the purpose for which the institution's activities must be conducted in order to avoid wronging others. If my proposed criteria are the correct means of identifying institutional purposes in the context of institutional corruption analyses, then only some institutions will have a "purpose" in the relevant sense, and other institutions will not be candidates for institutional corruption analysis.

The second alternative is to adopt different criteria for institutional purpose identification, and therefore a different concept of "institutional purpose." Selecting an alternative to the "obligatory purpose" criteria would require choosing from among a wide array of possible options. Does an institution's purpose depend on the subjective goals of its owners, its managers, its employees, political actors, or society at large?

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[43] *See* Lessig, *supra* note 41, at 554.

Does it depend on a "meeting of the minds" on the part of some or all of these? Does an institution's purpose depend on its moral obligations, its public claims, widespread perceptions about its purpose, or its usefulness to others? Is an institution's purpose determined by someone's ultimate goal with respect to the organization, or might the means chosen to pursue an ultimate goal sometimes be determinative?

Clarity on this point is important, because the criteria adopted for institutional purpose identification will determine the result of any institutional corruption analysis. For example, Noel may start a business for the purpose of selling Christmas trees in order to earn money, which she plans to use to feed her children. One could plausibly claim that Noel's business exists for at least three different purposes: Christmas tree sales, earning money, and feeding her children. In this simple example, suppose that feeding her children is the only purpose that Noel actually cares about, and she sells Christmas trees and earns money only because she believes that these activities are the most efficient means to her end.

In order to determine whether an influence operating within or upon Noel's small business is weakening its effectiveness, it would be necessary to decide which of its purposes should be treated as "true north"—the baseline from which to measure any deviation.[44] If "making money" is the baseline, Noel's organization may not be corrupted by a rich customer who offers her a lucrative contract to bake so many Christmas cookies that she will have little time to sell Christmas trees. On the other hand, if "selling Christmas trees" is the baseline, the rich customer may indeed be exerting a corrupting influence.

Institutions may also have multiple purposes that are not linked together, as Noel's are, in chains of means and ends. In cases of non-linkage, two or more purposes are to some extent in competition for institutional resources. For example, most universities are widely considered to have at least two purposes: education and research. A university like Harvard might plausibly argue that some amount of research makes its educational efforts more effective, and also that some amount of teaching makes its research activities more effective, but it is very implausible that these claims are true of the last marginal hour actually expended by its faculty either on teaching or on research. In such cases (assuming we are unwilling conclude either that a university is a research institution corrupted by students or that it is an educational institution with a regrettable research problem), any institutional corruption analysis must adopt some theory about how resources ought to be allocated be-

[44] LESSIG, *supra* note 2, at 19.

tween an institution's multiple independent purposes before it is possible to determine whether or not it has become institutionally corrupt. [45]

A further complication, as ethicist Jonathan Marks observes, is that on some understandings of what "institutional purpose" means, institutional purposes may change over time.[46] For example, Goldman Sachs famously transformed itself from a partnership into a publicly held corporation.[47] Some of Goldman's partners perceived that transformation to be a corruption of the firm, while others saw it as the adoption of a new business purpose: creating value for shareholders. To distinguish changes in institutional purpose from institutional corruption, there must be some way of determining when prior institutional purposes should remain the analytical baseline, and when institutional corruption researchers should disregard old purposes in favor of new ones.

Thompson has written that institutional corruption is the result of an influence that undermines an institution's purpose only in a very specific way: by undermining its "legitimate institutional procedures."[48] At first blush, this emphasis on the means of corruption—the undermining of legitimate procedures—seems to offer a possible escape from the necessity of formulating criteria for institutional purpose identification. This hope proves illusory, however, as "Institutional procedures should not be considered legitimate just because they happen to be in place even if they are widely accepted. They are legitimate only if they are necessary to protect the institution against interests that would undermine its effectiveness in pursuing its primary purposes."[49]

In order to determine which procedures are legitimate and which are not, therefore, we must return to the problem of identifying an institutional purpose or purposes. Otherwise, we have no way of knowing whether or not any procedures being undermined are "legitimate" procedures, and thus no way of knowing whether or not an institution is institutionally corrupt.

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[45] *See* Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 12 BUS. ETHICS Q. 235, 237–38 (2002) ("[A]ny organization must have a single valued objective as a precursor to purposeful or rational behavior. . . . It is logically impossible to maximize in more than one dimension at the same time."). This does not mean, of course, that an organization cannot pursue multiple purposes, so long as the organization adopts some function that combines these purposes by prioritizing them, for example, or by giving them relative weights.

[46] *See* Jonathan Marks, *What's the Big Deal?: The Ethics of Public-Private Partnerships Related to Food and Health* 11 (Edmond J. Safra Ctr. For Ethics, Working Paper No. 11, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2268079.

[47] *The End of an Era for Goldman*, CNN, (May 3, 1999, 7:28 PM), http://money.cnn.com/1999/05/03/markets/goldman/.

[48] Thompson, *supra* note 31, at 5.

[49] *Id.*

For example, suppose that a pharmaceutical company named Profitable Pills has established complex, highly specific procedures for deciding which research and development efforts it will undertake. This process is designed to focus institutional resources on the most potentially profitable products regardless of medical importance. As a result of this process, Profitable Pills is exclusively engaged in the development and sale of aesthetic treatments, such as hair-loss remedies and wrinkle reducers.

Next, suppose that the American Heart Association has learned that the vice president for R&D at Profitable Pills has a weakness for attractive young representatives. The American Heart Association sends a string of attractive young representatives to Profitable Pills in order to lobby the company to direct funds to the development of important new heart disease medications. Perhaps unconsciously, the vice president responds to these efforts by encouraging some sloppiness among staff members who apply the company's rigorous standards to research and development proposals for heart disease medications. As a result, heart disease medications become an additional line of business for Profitable Pills, even though they would be excluded under a rigorous and impartial application of the company's profit maximizing procedures for selecting R&D projects.

Has the American Heart Association institutionally corrupted Profitable Pills? The answer depends on whether or not the company's R&D procedures are "legitimate," which in turn depends on what serves as the company's "institutional purpose." The company has indeed been corrupted if its purpose is "making money." It has not been corrupted if its purpose is "developing new drugs," and it has certainly not been corrupted if its purpose is "improving health." If Profitable Pills should be understood to have two or more institutional purposes, then we must also know how these purposes should be weighted against each other in order to know whether its R&D procedures are legitimate.

Thompson offers in passing: "In medical institutions, for example, the purposes include conducting trustworthy research, providing effective patient care and protecting the public health."[50] These seem like plausible purposes for at least some of what we think of as "medical institutions" according to a variety of different plausible criteria for identifying institutional purposes. But because Thompson does not say what criteria he uses to arrive at this set of purposes, it is hard to know whether or on what basis he might intend to impute such purposes to a company like Profitable Pills, which has procedures that ensure it does nothing on balance to protect public health.

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[50] *Id.*

Thompson offers a second judgment about institutional purposes, this time about corporations: "In the case of a corporation, the 'institutional purpose' refers primarily to the interests of stakeholders, and in that sense is usually regarded as private."[51] But Thompson does not articulate the criteria by which he arrives at this conclusion about corporations. Is a corporation's purpose determined by its legal obligations? Is Thompson making an empirical claim that stakeholders generally determine the actual activities of a firm? Or does Thompson think that moral considerations make it the case that stakeholders' purposes ought to be considered firm purposes?

Thompson also writes:

> The procedures in many public or quasi-public institutions must satisfy some of the same requirements we impose on government, such as transparency and accountability, but the degree and extent of the requirements vary with the purposes of the institution. For example, in medical institutions transparency may be limited in order to protect patient confidentiality; accountability may be owed to other professionals and the governing board rather than directly to the public. Medical institutions, like others that rely on professional expertise (including universities), are not properly governed by a full-blown democratic process, but insofar as they can be considered public institutions, they should be at least indirectly accountable to public authorities.[52]

Thompson is here offering examples of institutional procedures that he believes are legitimate, and we know that what makes it the case that procedures are legitimate is that they "are necessary to protect the institution against interests that would undermine its effectiveness in pursuing its primary purposes."[53] But because Thompson has specified no criteria for institutional purpose identification, it is not possible to evaluate his judgments regarding institutional purposes, and therefore it is also not possible to evaluate his judgments about the legitimacy of specific procedures.

Lessig writes that institutional corruption theory "does not purport to specify the institution's purpose."[54] This seems wise. The application of any theory to any set of facts requires the exercise of what Immanuel Kant called "judgment," and reasonable disagreements on matters of

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[51] *Id.* at 5 n.5.
[52] *Id.* at 6.
[53] *Id.* at 5.
[54] Lessig, *supra* note 41, at 554.

judgment will always exist at the margin.[55] Because no theory can definitively attribute specific purposes to specific institutions, no theory should purport to do so.

However, a theory must specify criteria for the application of its key features, or its key features will merely be ambiguous terms—rhetoric—instead of concepts. This is not a trivial semantic point. The point is not that the term "institutional purpose" must mean X, or that it cannot mean Y. The point is that these words must mean *something* insofar as they refer to an essential feature of institutional corruption theory's analytical framework. Philosopher Mark Criley describes a concept as "a cluster of norms that provide standards for the correct classification of objects" as instances of that concept.[56] In other words, not only must concepts *have* criteria for their proper application, concepts *consist* of criteria for their proper application. And any theory worthy of recognition as such must be built out of concepts, not mere words.

The current lack of widely understood criteria for institutional purpose identification has confused institutional corruption researchers. Journalist Gregg Fields compared institutional corruption to pornography, because it supposedly lacks defining features, but we "know it when [we] see it."[57] Some scholars have attempted to sidestep institutional corruption theory's apparent indeterminacy by stipulating their own definitions of "institutional corruption" for use in individual projects.[58] These stipulations sometimes specify "institutional corruption" in mutually inconsistent ways.

For example, sociologist Garry C. Gray focuses specifically on the independence of professionals: "Institutional corruption involves *influences* that implicitly or purposively serve to distort the *independence* of a professional in a position of trust . . . institutional corruption broadens

[55] Kant writes, "To show generally how one ought to subsume under these rules, i.e., distinguish whether something stands under them or not, this could not happen except once again through a rule. But just because this is a rule, it would demand another instruction for the power of judgment, and so it becomes clear that although the understanding is certainly capable of being instructed and equipped through rules, the power of judgment is a special talent that cannot be taught but only practiced." IMMANUEL KANT, CRITIQUE OF PURE REASON 268 (Paul Guyer & Allen W. Wood eds., Cambridge Univ. Press 1998) (1781).

[56] Criley, *supra* note 28, at 50.

[57] Gregg Fields, *What Institutional Corruption Shares With Obscenity* 4 (Edmond J. Safra Ctr. For Ethics, Working Paper No. 6, 2013) (citing Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2252033.

[58] Michael Pierce has observed, "Institutional corruption . . . is an important and valuable concept. But its precise definitions (and there are many) are either too complicated or too susceptible to divisive normative judgments for would-be institution reformers to effectively employ." Michael Pierce, *Divided Loyalties: Using Fiduciary Law to Show Institutional Corruption* 5 (Edmond J. Safra Ctr. For Ethics, Working Paper No. 19, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2313321.

the scope of white-collar criminological theory to include unethical practices by professionals."[59] By contrast, Marks offers an account that focuses on loss of institutional trust or trustworthiness regardless of the presence or absence of professional discretion or individually unethical conduct: "Although there is some debate about the definition of institutional corruption, I use the term here to identify concerns about widespread or systemic practices that undermine the integrity and/or trustworthiness of an institution, and/or trust and confidence in that institution."[60]

While unilateral stipulations about the meaning of "institutional corruption" can smooth the way for specific projects, they alone cannot foster a mutual understanding of the shared subject matter, if any, that the efforts of these individual researchers address. If institutional corruption theory is to identify a distinct phenomenon—if "institutional corruption" is to mean anything specific—then researchers must have the benefit of some criteria for the critical task of institutional purpose identification. Only a meeting of the minds on this point will make it possible, even in principle, for researchers to identify relevantly similar states of affairs in different institutions. Criteria for institutional purpose identification will enable institutional corruption researchers to say that they are all studying the same phenomenon. Otherwise, they will merely be using the same ambiguous words to describe a variety of different phenomena.

II. RECENT "INSTITUTIONAL CORRUPTION" RESEARCH

A stream of recent research has taken up the challenge of applying the institutional corruption framework to private organizations such as investment consulting firms,[61] ratings agencies,[62] investment banks,[63] think tanks,[64] and even whole professions, such as psychiatric medicine.[65] A literature review indicates that institutional corruption researchers have identified at least four distinct phenomena as private-sec-

59 Garry C. Gray, *Insider Accounts of Institutional Corruption Examining the Social Organization of Unethical Behaviour*, 53 BRIT. J. CRIMINOL. 533 (2013).

60 Marks, *supra* note 46, at 7.

61 *See generally* Jay Youngdahl, *Investment Consultants and Institutional Corruption* (Edmond J. Safra Ctr. For Ethics, Working Paper No. 7, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2255669.

62 *See id.* at 17–18.

63 *See generally* Malcolm S. Salter, *Short-Termism at Its Worst: How Short-Termism Invites Corruption. . . and What to Do About It* (Edmond J. Safra Ctr. For Ethics, Working Paper No. 5, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247545.

64 *See* Brooke Williams, *Influence Incognito* 6 (Edmond J. Safra Ctr. For Ethics, Working Paper No. 3, 2013)., *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2239839.

65 *See* Lisa Cosgrove & Robert Whitaker, *Finding Solutions to Institutional Corruption: Lessons from Cognitive Dissonance Theory* 3 (Edmond J. Safra Ctr. For Ethics, Working Paper No. 9, 2013), *available at* http://ssrn.com/abstract=2261375.

tor "institutional corruption," corresponding to different implicit sets of criteria for identifying an institution's purpose in the context of an institutional corruption analysis. The institutions belonging to these four categories can be nicknamed "Fiduciaries," "Frauds," "Fiends," and "Fools." Attending to the distinctive features of states of affairs that qualify institutions to be members of each category may inform our search for general criteria for institutional purpose identification, and may also establish clearer limits on the range of application of the theory.

A. *Fiduciaries*

Researchers have identified the institutions in this category as corrupt because their incentive structures have caused them to violate fiduciary duties owed to others. "Fiduciary" is a legal term of art for a person or organization that acts on behalf of a "principal" by exercising discretion with respect to property or some other "critical resource" belonging to that principal.[66] When managing a principal's resource, a fiduciary is obligated to act solely to advance that principal's purposes.[67] Larry E. Ribstein has characterized fiduciary duty as "a duty of selflessness," because none of a fiduciary's purposes may permissibly affect that fiduciary's management of its principal's affairs.[68] Relationships between lawyers and their clients, trustees and their beneficiaries, guardians and their wards, and managers and their company's shareholders are traditionally considered fiduciary in nature.[69]

All fiduciaries are agents for their principals in the sense that they act on behalf of those principals. However, not everyone who acts on behalf of another qualifies as a fiduciary, because discretion is also a prerequisite for fiduciary status.[70] For example, ordinary employees are agents of the firms for which they work in the sense that they execute their managers' instructions, but they are not fiduciaries if they lack discretion over the management of a critical resource that belongs to the firm.[71] Workers who spend too much time gossiping by the water cooler

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66 *See* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1402, 1404 (2002). Smith's theory uses "beneficiary" broadly to refer to the party on who's behalf the fiduciary acts. *Compare id.* at 1400 (listing examples of the relationships the duty is imposed on, including the distinct trustee-beneficiary relationship), *with id.* at 1402. This Article uses principal except when referring to the economic usage of principal-agent.

67 *See* RESTATEMENT (SECOND) OF TRUSTS § 170 (1959).

68 Larry E. Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899, 904 (2011).

69 *See* Smith, *supra* note 66, at 1400.

70 *See* Ribstein, *supra* note 68, at 902–03.

71 *See* Smith, *supra* note 66, at 1403 ("[T]o say that a fiduciary exercises discretion implies something more than having *mere access* to critical resources [belonging to the principal]. This admittedly fine distinction helps to differentiate fiduciaries and service providers, such as electricians or mechanics.").

manifest what economists call a "principal-agent problem," but they are not breaching a fiduciary duty.

A fiduciary relationship differs from a merely contractual relationship. Both parties to an ordinary business transaction may maximize their own advantage subject only to contractual obligations that inform a duty of good faith and fair dealing.[72] By contrast, a fiduciary must act solely to advance its principal's interests because that fiduciary undertakes ongoing control over its principal's resource—be it money, property, confidential information, or legal rights[73]—on condition that the fiduciary manages that resource on the principal's behalf. [74] Arthur B. Laby persuasively characterizes a fiduciary duty in Kantian terms as a duty to adopt a principal's ends with respect to the use of that principal's resources.[75] Various institutions have been identified as corrupt by institutional corruption researchers on the basis that they have breached a fiduciary duty.

Jay Youngdahl diagnoses widespread institutional corruption among investment consulting firms, which provide ongoing strategic advice to the trustees of retirement funds for the purpose of achieving "sufficient and sustainable investment returns."[76] Youngdahl argues, consistently with some language in the Dodd-Frank Wall Street Reform and Consumer Protection Act,[77] that investment consultants are fiduciaries, and are therefore obligated to advise their clients solely for their clients' benefit.[78] Nonetheless, he reports, "the industry is riddled with conflicts" of interest[79] that consultants do not consistently disclose to clients.[80] For example, money managers often pay investment consultants large fees in return for the opportunity to pitch the consultants' clients.[81] A fiduciary

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[72] *See* Ribstein, *supra* note 68, at 909 ("The implied covenant of good faith and fair dealing . . . [is] a duty that all contracting parties have and whose content is derived from the parties' agreement. This is less a separate duty than an approach to interpreting contracts. In contrast to fiduciary duties, the implied covenant enables contracting parties to act selfishly as long as this conduct is at least broadly consistent with the parties' ex ante expectations based on the contract.").

[73] *See* Smith, *supra* note 66, at 1404.

[74] *See* Ribstein, *supra* note 68, at 902, 904.

[75] *See* Arthur B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFF. L. REV. 99, 129 (2008) (noting the duty entails "a commitment by the fiduciary to adopt the principal's objectives, goals, or ends as the fiduciary's own and to promote those ends.").

[76] *See* Youngdahl, *supra* note 61, at 8, 14.

[77] *See* 15 U.S.C. § 78o(k) (2012); 15 U.S.C. § 80b-11(g) (2012).

[78] *See* Youngdahl, *supra* note 61, at 18–19. *But see* Ribstein, *supra* note 68, at 916–17 (maintaining that investment advisors should not be considered fiduciaries, and also that Dodd-Frank does not establish a true fiduciary standard despite Congress' inclusion of the term).

[79] Youngdahl, *supra* note 61, at 9 (quoting Janice Revell, *Are Your Savings Safe? The Seamy Side of Pension Funds*, FORTUNE, Aug. 12, 2002, at 105).

[80] *See id.* at 38–40.

[81] *See id.*

is theoretically forbidden from using its discretionary authority with respect to the principal's affairs to enrich itself without that principal's explicit consent.[82] Youngdahl reports that this expectation is largely ignored in an industry characterized by "ferocious sales competition."[83] He concludes that widespread conflicts of interest, as well as a sales-oriented rather than professional culture,[84] have weakened the effectiveness with which investment-consulting firms pursue their client's goals.

If investment consultants are doing their jobs poorly, why do retirement funds continue to employ them? Youngdahl argues that investment consultants often corrupt the retirement funds themselves by influencing fund trustees in ways that weaken the effectiveness with which the funds pursue the purposes of their beneficiaries. Fund trustees have a fiduciary obligation to exercise their authority solely on behalf of beneficiaries.[85] However, because they are usually unpaid volunteers, they are often receptive to tokens of appreciation for their hard work.[86] Youngdahl reports that investment consultants and money managers have responded to this natural receptiveness by developing "a sophisticated 'educational' industry" to provide trustees with all expenses paid trips to exotic travel destinations.[87] Youngdahl warns that such generous perks blunt trustees' motivation to second-guess their consultants and venders. "[S]uch exquisite conferences," he concludes, "make trustees unlikely to wish to rock the boat, or to challenge their financial professionals."[88]

Senior managers of publicly traded firms have a fiduciary duty to protect and increase the long-term value of their firm on behalf of its shareholders.[89] Yet, Harvard Business School professor Malcolm S. Salter has suggested that the widespread practice of linking executive compensation to short-term stock performance has systematically influenced the management structures of many financial firms in ways that favor short-term stock performance at the expense of long-term value.[90] Salter describes the management practices of various Savings and Loan institutions during the Savings and Loan ("S&L") crisis of the 1980's as paradigmatic examples of fiduciary breach because management systematically squandered firm resources for short-term, high-risk gains.[91] Experts on the S&L crisis have "characterized the gaping disparity between

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[82] Ribstein, *supra* note 68, at 904.

[83] *See* Youngdahl, *supra* note 61, at 42.

[84] *Id.* at 16 ("Much of the investment business, including that of investment consultants, is premised on an economic model of sales.").

[85] Ribstein, *supra* note 68, at 901.

[86] Youngdahl, *supra* note 61, at 43.

[87] *Id.*

[88] *Id.* at 44.

[89] Ribstein, *supra* note 68, at 901.

[90] Salter, *supra* note 63, at 20–21.

[91] *Id.* at 21.

what bank owners and executives captured over the short-term and the losses they created as 'looting.'"[92]

B. Frauds

This category is composed of institutions that have been identified as institutionally corrupt because, researchers have concluded, their incentive structures have caused them to engage in fraudulent, exploitative, or at least disingenuous business practices in the context of non-fiduciary business relationships with employees, customers, or consumers. With the caveat that not all of these organizations are alleged to have violated the law, they are called "Frauds."

Salter identified Citigroup as institutionally corrupt, in part because its economy of influence—including compensation schemes that tied bonuses to short-term stock performance—led the company to engage in deceptive marketing practices.[93] Citigroup created a "mind-numbingly complex, high-risk investment fund" comprised of credit default swaps that were tied to the fortunes of holders of subprime residential mortgage debt.[94] Citigroup's marketing materials to commercial customers represented the firm's role as that of neutral go-between, when in fact it had "exercised significant influence" over the composition of the fund, in which it took an undisclosed short position.[95] Citigroup did warn investors in general terms that it *might* take a short position in the fund, and the firm's actions were probably not illegal.[96] Nonetheless, Salter concluded, "Citigroup's negligent behavior was clearly unethical, if not fraudulent: the disclosures obfuscated the truth, gamed existing SEC and industry rules pertaining to disclosing conflicts of interests, violated norms of fairness, and caused substantial injury to poorly informed and unsuspecting investors."[97]

Garry C. Gray,[98] law professor Mark A. Rodwin,[99] and sociologist Donald W. Light[100] have identified at least some pharmaceutical companies as members of this category of institutional wrongdoers. According to one pharmaceutical industry whistleblower, Gray reports, many sup-

[92] *Id.* (citing George A. Akerlof et al., *Looting: The Economic Underworld of Bankruptcy for Profit*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY, no. 2 1993).

[93] Salter, *supra* note 63, at 7.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 8–9.

[97] *Id.* at 9.

[98] *See* Gray, *supra* note 59, at 537–38.

[99] *See generally* Mark A. Rodwin, *Conflicts of Interest, Institutional Corruption, and Pharma: An Agenda for Reform*, 40 J.L MED. & ETHICS 511 (2012).

[100] *See* Donald W. Light, *Strengthening the Theory of Institutional Corruptions: Broadening, Clarifying, and Measuring* 3–4 (Edmond J. Safra Ctr. For Ethics, Working Paper No. 2, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2236391.

posedly scientific studies examining the safety and efficacy of drugs already on the market have "more marketing than science behind them."[101] Scientists who directed such studies have sometimes "resorted to 'playing' with the data that had originally failed to show the expected result," and then omitting their initial negative results from their publications. [102] This pattern of behavior may cause a pharmaceutical company to provide systematically misleading information to physicians and end consumers about the safety and efficacy profiles of its drugs. Light likewise identifies some pharmaceutical companies as institutionally corrupt on the basis that their research practices "result in distorted medical knowledge" about the drugs they sell.[103]

Youngdahl offers that independent ratings agencies, such as Standard & Poor's ("S&P"), may be institutionally corrupt insofar as they make misleading claims about providing unbiased evaluations of financial products.[104] Ratings agencies operate under a conflict of interest, since the firms they rate pay for the rating process, and Youngdahl suggests that such conflicts have led ratings agencies to offer intentionally misleading ratings. [105] A civil complaint filed by the U.S. Department of Justice and several states alleges that S&P, in particular, deliberately understated the market risks associated with some financial products it rated in order to preserve and increase its sales.[106] Nonetheless, Youngdahl argues, S&P inaccurately marketed its advice to the public as "objective, independent, and free from conflict of interest."[107]

Similarly, journalist Brooke Williams has suggested that some think tanks are institutionally corrupt insofar as they mislead consumers about the degree to which their public policy research is independent of special interests.[108] While think tanks hold themselves out to be "dedicated to independent, innovative research that benefits society as a whole,"[109] Williams argues, some of them are in fact "attempting to shape public policy on behalf of [the] private interests"[110] of undisclosed corporate sponsors by subtly biasing their research "in favor of [sponsor's] bottom lines."[111]

101 Gray, *supra* note 59, at 537.

102 *Id.*

103 Light, *supra* note 100, at 3.

104 Youngdahl, *supra* note 61, at 17.

105 *Id.* at 18.

106 *Id.*

107 *Id.*

108 Williams, *supra* note 64, at 14.

109 *Id.* at 6.

110 *Id.* at 14.

111 *Id.* at 3.

C. *Fiends*

Institutions in this category are not necessarily mistreating their customers or clients. Indeed, their customers and clients may benefit from their business practices. However, institutional corruption researchers have identified them as "institutionally corrupt" because, these researchers conclude, their incentive structures have given rise to an institutional tendency to damage or recklessly endanger the security of the general public. These institutions are collectively called "Fiends."

Fields suggests that the availability of FDIC insurance and the federal government's propensity to bail out financial institutions deemed "too big to fail" jointly influenced banks to become institutionally corrupt. Fields deems large financial institutions corrupt if they responded to these artificial incentives by making reckless market decisions in pursuit of short-term profits, secure in the knowledge that taxpayers would foot the bill for any enormous losses.[112] One result of these reckless decisions, Fields writes, was "the mortgage meltdown that ushered in the worst economic collapse since the Great Depression."[113]

Salter argues that firms are institutionally corrupt insofar as they engage in what he calls "the rule-making game"—the activity of influencing legislation in ways that undermine the law's suitability for achieving legitimate state objectives.[114] For example, Salter reports that the financial industry successfully lobbied for a variety of technical exemptions to the so-called Volcker rule, a provision in the Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) of 2010, which was intended to prohibit proprietary trading by FDIC-insured banks.[115] Such gaming, Salter writes, "inflicts a social injury when it subverts legislative intent and weakens the social contract between the capitalist system and the citizenry."[116]

Justin O'Brien cites the conduct of banks caught up in the recent scandal involving the manipulation of the London Interbank Offered Rate (LIBOR) benchmark as examples of institutional corruption.[117] These banks engaged in "systematic false reporting" in order to "increase the potential profit of the submitting firms or to convey a misleading

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112 Gregg Fields, *supra* note 57, at 6–10.

113 *Id.* at 5.

114 Salter, *supra* note 63, at 11.

115 *Id.* at 14.

116 *Id.* at 12.

117 *See generally* Justin O'Brien, *Culture Wars: Rate Manipulation, Institutional Corruption, and the Lost Underpinnings of Market Conduct Regulation* 6 (Edmond J. Safra Ctr. For Ethics, Working Paper No. 14, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2277172.

picture of the relative health of the submitting banks."[118] As a result, O'Brien reports, public confidence in the benchmark, which references $350 trillion in derivative contracts, has declined. This lack of confidence threatens the ongoing stability and health of the worldwide financial system.[119]

Finally, Light speculates that the Roman Catholic Church and the Boy Scouts of America might be considered "institutionally corrupt" if reputational and financial incentives caused them to systematically suppress evidence of criminal acts of sexual abuse.[120] Worse, by covering up these crimes, the organizations may have permitted widespread and systemic abuse to continue, violating a "fundamental moral baseline."[121] Caregivers may have fiduciary responsibilities toward children when they serve *in loco parentis*, but violent crimes are wrong regardless of the presence or absence of any fiduciary duty. An organization that systemically suppressed evidence of child sexual abuse would fall into the category of malefactors designated as "Fiends."

D. Fools

Institutions in this category have not necessarily betrayed, deceived, or endangered anyone (although many specific institutions have been alleged to fall into more than one of these four categories). Scholars have suggested that these institutions may be "institutionally corrupt" on the basis that their incentive structures give rise to faulty business practices or failed strategies, which weaken their ability to effectively achieve the shared subjective goals of organizational insiders, despite those insiders' best efforts. Such organizations can be called "Fools."

Lisa Cosgrove and Robert Whitaker describe cognitive behavioral research suggesting that organizational decision-makers are often sincerely unaware of the ways in which their relationships, financial interests, and preexisting beliefs can affect their judgment.[122] Such decision-makers may fail to adopt optimal policies addressing these sources of bias simply because they do not appreciate the way in which various sources of bias are weakening the effectiveness with which their organizations achieve the goals to which the decision-makers are subjectively committed.

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118 FINANCIAL STABILITY OVERSIGHT COUNCIL, 2013 ANNUAL REPORT 137(April 25, 2013).

119 O'Brien, *supra* note 117.

120 Light, *supra* note 100, at 17.

121 *Id.*

122 *See generally* Lisa Cosgrove & Robert Whitaker, *Finding Solutions to Institutional Corruption:Lessons from Cognitive Dissonance Theory* 5 (Edmond J. Safra Ctr. For Ethics, Working Paper No. 9, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2261375.

For example, the editors of a psychiatric journal may subjectively intend to publish the highest quality research submitted to the journal for consideration. However, as they select among the many articles submitted to them for review, their judgment may be impaired by a subconscious bias in favor of the pharmaceutical companies who support the journal by taking out paid advertisements.[123] Such advertisements are not concealed from the public, nor do the journal editors make less than their honest best effort to produce a top-flight academic publication. Yet, Cosgrove and Whitaker suggest, the journal's policy of accepting paid advertising could weaken its effectiveness at achieving the purpose to which its editors are subjectively committed.[124]

Until recently, it was not uncommon for medical schools to allow pharmaceutical companies to provide free lunches and dinners to cash-poor medical residents—young doctors with long prescribing careers ahead of them—at which lectures touted the benefits of the company's drugs.[125] Residents were also given small gifts such as pens and textbooks.[126] Cosgrove and Whitaker argue that such gifts create a sense of reciprocity among young doctors. Moreover, they warn, residents who develop an optimistic view about the general efficacy of drug treatment approaches to disease are likely to retain this intellectual predisposition throughout their careers due to a psychological phenomenon called "confirmatory bias."[127] It was not unreasonable for past medical school presidents to conclude that such small perks were harmless in the context of an educational environment that offered many opportunities for students and residents to question the claims of pharmaceutical companies in classroom and clinical settings. Nonetheless, Cosgrove and Whitaker muster recent evidence to suggest that, by permitting such practices, medical schools may have inadvertently weakened the effectiveness with which they trained doctors to exercise independent medical judgment.

Because membership in the category of Fools depends on a failure to achieve subjective goals rather than a failure to meet moral or legal obligations, nothing prevents organizations with essentially nefarious purposes from being identified as Fools if their faulty incentive structures prevent them from attaining their evil ends. In the context of ongoing discussions about whether institutional corruption theory should be considered normative or descriptive, Frances Kamm and others have asked whether a mafia family would be deemed institutionally corrupt if, for example, its business associates' custom of providing the gang with large

123 *Id.* at 9.
124 *Id.*
125 *Id.*
126 *Id.* at 10.
127 *Id.* at 6 ("Confirmatory bias is the tendency to look for evidence that supports one's prior beliefs and hypotheses.").

amounts of free alcohol reduced the quality of deliberation at management meetings, thus weakening the gang's ability to effectively accomplish its members' shared subjective goal of profit through coercion.[128] If and when criminal gangs are identified as institutionally corrupt for this kind of reason, they are Fools.

III. THE NATURE AND LIMITS OF INSTITUTIONAL CORRUPTION

Most recent research that deploys the terminology of institutional corruption focuses on institutional states of affairs that fall into one or more of the four broad categories described above. These categories differ from one another along several parameters. A brief review of their similarities and differences will help frame this inquiry: which if any of these categories of states of affairs are good candidates for analysis using institutional corruption theory's trademark analytical framework?

Institutions belonging to three out of the four above-described categories were identified as "institutionally corrupt" on the basis that their conduct wrongs others in some way. Fiduciaries are alleged to have breached affirmative obligations to act solely for their principals' purposes while managing those principals' resources. Frauds are said to have deceived customers or consumers about the nature of the products they distribute. Fiends are accused of menacing the public at large. By contrast, Fools are identified as corrupt only because they have failed to efficiently pursue the subjective ends of organizational participants, whether or not those ends are obligatory, and indeed whether or not those ends are even morally or legally permissible. Designation as a "Fool" indicates a strategic failure rather than any wrongdoing.

Category:	**Wrongdoing?**	**Contract or Status Relationship?**	**Failure to Meet an Affirmative Goal?**	**Discretionary Control Over Another's Resource?**
Fiduciaries:	✓	✓	✓	✓
Frauds:	✓	✓	χ	χ
Fiends:	✓	χ	χ	χ
Fools:	χ	χ	✓	χ
Congress:	✓	✓	✓	✓

Two out of the four above-described categories—Fiduciaries and Frauds—identify institutions that are alleged to have violated their contract or fiduciary obligations to customers or principals. By contrast, Fiends are accused of acts that wrong others even in the absence of any special relationship. Fools are not necessarily accused of wronging any-

128 Lessig, *supra* note 41, at 555 ("Perhaps there is something to learn about the corruption of auditing by understanding better the corruption of the Mafia.").

one, but are merely identified as corrupt on the basis that they are failing to achieve their participants' subjective goals.

A different pair of categories—Fiduciaries and Fools—includes institutions that are said to have failed to pursue specific ends. Fiduciaries have failed to unswervingly pursue the ends of their principals, while Fools have failed to effectively pursue participants' subjective ends. By contrast, Frauds and Fiends are better described as having violated negative side constraints on their conduct: they have deceived or endangered others in the course of pursuing commercial or social goals that are permissible, but not obligatory, when pursued by legal and ethical means.

Of the four categories identified above, only Fiduciaries have undertaken the management of a critical resource belonging to another party. It is the Fiduciaries' discretionary control over others' resources that gives rise to their fiduciary duty to manage those resources solely for the purposes of the principals to whom the resources belong. Frauds deceive those with whom they do business, but they do not make arrangements on behalf of others. Fiends wrongly endanger or destroy the resources of others, but they have undertaken no affirmative obligation to manage those resources for others' benefit. Fools squander their own assets, but they do not necessarily fritter away assets belonging to anyone else.

Significantly, only Fiduciaries share all of the above features with Congress, the institution that inspired Thompson to develop institutional corruption theory. See Figure 2. Congressional abuses of power wrong the people because they exercise the people's authority for private purposes. Such abuses are unjust even if no individual intentionally brought them about. Institutional corruption of Congress is therefore an injustice that we cannot rightfully endorse, and one that organizational insiders, at least, have an obligation to attempt to remedy.[129] Congress' actions may also wrong or otherwise damage the interests of foreign citizens living overseas, but such wrongs and harms are not contemplated or captured by the Thompson-Lessig Model. Rather, the Model captures the distinctive way in which Congressional abuses of power wrong the very people whose authority Congress claims to exercise.

Institutional corruption in the context of Congress refers to the institution's deviation from the purpose for which it is obliged to act in virtue of its claim to wield the state's coercive authority. Congress may adopt a variety of different means to achieve its public purpose, but Congress cannot rightfully choose to discard its public purpose in order to pursue other purposes instead. Only the Fiduciaries share an analogous obligation to act solely for an independently determined purpose. By contrast,

129 Thompson, *supra* note 31, at 17 ("[J]ust 'blaming the system' lets too many individuals in the system off the moral hook. It ignores the need to pin some responsibility for making changes (or failing to make changes) on some people in the institution.").

institutions identified as Frauds, Fiends, and Fools might all pursue a wide variety of purposes without being considered institutionally corrupt *for that reason*. Frauds, Fiends, and Fools have been deemed institutionally corrupt on alternative bases, namely the violation of legal or moral side constraints or the adoption of poor strategies.

A. *Generalizing the Thompson-Lessig Model*

It is no mere accident that the Fiduciaries share more characteristics with Congress than do the Frauds, Fiends, and Fools. Congress *is* a Fiduciary, entrusted to exercise the people's legislative authority on their collective behalf for their shared purposes. Indeed, Robert G. Natelson has amassed considerable historical evidence that participants in the 1787 federal constitutional convention explicitly regarded lawmakers as fiduciaries for the people.[130] Natelson and D. Theodore Rave also observe that influential enlightenment figures such as John Locke presaged the idea of lawmakers as fiduciaries. Rave writes:

> In his *Second Treatise of Civil Government*, John Locke argued that the government with supreme legislative power stood in a fiduciary relationship to the people. In the original social contract, according to Locke, the people delegated power to the legislature on the condition that the power be used only for the "public good of society." The legislature was "only a fiduciary power to act for certain ends."[131]

The fiduciary character of Congress' relationship to the people well explains the prominence often given to the idea of "public trust" by institutional corruption theorists. Thompson writes:

> The often cited slogan "public office is a public trust" expresses in a simple form the important idea that public officials have fiduciary obligations, which in both law and morality are more demanding than most ordinary obligations.[132]

Lessig likewise affords prominence to the idea of trust in his more general formulation of the institutional corruption theory as "an economy of influence that weakens the effectiveness of an institution, *especially by weakening public trust* of that institution."[133] All fiduciary relationships are relationships of entrustment, in which a principal entrusts the

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130 *See* Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1083–88 (2004).

131 Rave, *supra* note 9, at 708–09 (footnotes omitted).

132 THOMPSON, *supra* note 1, at 197 n.9.

133 Lessig, *supra* note 6, at 3 (emphasis added).

management of her property or other critical resource to a fiduciary on condition that the fiduciary manages that property or resource solely for the principals' purposes.[134]

Michael Pierce has observed parallels between fiduciary analysis and Lessig's institutional corruption analysis:

> The fiduciary concept produces a similar framework to Lessig's, in that the exclusive benefit principle provides a baseline of undivided loyalty, the violation of which can be framed as a betrayal.[135]

He therefore suggests that "analogizing"[136] to fiduciary duties would be a helpful "analytical shortcut"[137] for institutional corruption researchers.

Pierce is surely right to identify similarities between fiduciary duty doctrine and institutional corruption theory. The only flaw in his argument is that he understates his own case. The relationship between institutional corruption and breach of fiduciary duty is not merely one of striking resemblance or helpful analogy. Generalizing the component concepts of the Thompson-Lessig Model reveals it to *actually be* a model of organizational fiduciary duty and breach.

Derek Parfit distinguishes between what he calls a "token"—a specific object, duty, person, or event that occurs in the world, and a "type"—a concept of possible objects, duties, persons, or events that are relevantly similar.[138] For example, the orange that I am holding in my hand right now is a token, but the concept of an orange is a type, of which there are many existing and possible tokens. With the aid of this distinction, Figure 2 illustrates that institutional corruption theory has a quintessentially fiduciary character.

134 Smith, *supra* note 66, at 1402.
135 Pierce, *supra* note 58, at 9.
136 *Id*. at 15.
137 *Id*. at 3.
138 *See* DEREK PARFIT, REASONS AND PERSONS 293–94 (1984).

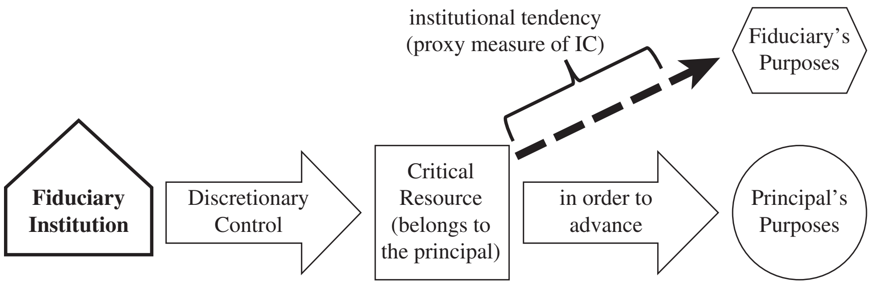

FIGURE 2: THE FIDUCIARY INSTITUTIONAL CORRUPTION MODEL

No substantive changes to either the structure or the conceptual content of the model were made in order to affect this transition. The only change made is the substitution of general conceptual categories ("types") for institutions and purposes that were specifically identified (that is, were "tokens") in the Thompson-Lessig Model. The token, "Congress," has been replaced by a type—"Fiduciary"—of which Congress is a specific example. The type, "critical resource belonging to the principal," has supplanted the token of the people's legislative authority. The token, "public purposes," has been replaced with the relevant type, "principals' purposes." This generalized model can be called the "Fiduciary Institutional Corruption Model."

Like the Thompson-Lessig Model, the Fiduciary Institutional Corruption Model assumes that a fiduciary's honest mistake is not considered a breach of fiduciary duty. Therefore, institutional corruption cannot be measured by comparing actual performance to some ideal performance. Instead, as is true in the specific case of Congress, the corruption of a fiduciary must be assessed by reference to a proxy—the extent to which influences that are, in Thompson's words, "clearly irrelevant" to the principals' purposes undermine a fiduciary's effective stewardship of its principal's critical resource.[139]

Also, like the Thompson-Lessig Model, the Fiduciary Institutional Corruption Model identifies institutional rather than individual corruption. Whereas individual corruption depends on the subjective intent of an individual actor, institutional corruption occurs when an organization with a fiduciary duty is hampered by incentives that give rise to an "institutional tendency" to manage its principals' resources for the private purposes of the fiduciary institution or its individual agents. As is the case with institutional corruption in the context of Congress, a private fiduciary institution may in principle breach its duty to act solely for the inter-

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139 THOMPSON, *supra* note 1, at 20.

ests of its principals even if individuals with the organization are not personally corrupt.

The Fiduciary Institutional Corruption Model neatly answers many of the difficult questions raised by the challenge of institutional purpose identification, at least in principle. Recall that it was not clear which of a private organization's many plausible purposes should serve as its institutional purpose in order to identify institutional corruption. The Model stipulates that the relevant concept of "institutional purpose" is identical to the one this Article originally proposed in the context of Congress: an obligatory purpose—a "purpose for which the institution's activities must be conducted in order to avoid wronging others."[140] Because a fiduciary manages a principal's critical resource on that principal's behalf, it must do so solely for that principal's purpose in order to avoid wrongdoing. A principal's purpose therefore serves as a fiduciary institution's normative baseline. Although it may at times be difficult to determine empirically what a principal's purpose is, the Model at least clarifies that this is the kind of purpose that institutional corruption analysis requires. This is our long-sought set of criteria for institutional purpose identification.

Recall that it was not clear how an institution with multiple independent purposes should allocate resources between those purposes in order to avoid a charge of institutional corruption. The Model implies that each principal's resource must be managed in accordance with that principal's purpose. When a principal has multiple goals—for example, low risk and high growth in the investing context—the fiduciary and principal must come to an understanding about how these multiple purposes are weighted in a single function, which the fiduciary can then strive to maximize.[141] An institutional trustee that manages multiple funds must therefore manage each fund's resources in accordance with the purpose of the principal who owns them. A law firm with multiple cases must manage each case in accordance with the purpose of the client it represents in that case. It is therefore not necessarily accurate to say that a private sector institutional fiduciary has a single purpose for which all of its activities must be conducted. Instead, the fiduciary has a different institutional purpose specific to the management of each individual client's resources.

Recall that it was not clear how institutional corruption researchers should distinguish between institutional corruption and a mere change in institutional purpose. Although the relevant empirical inquiries may be difficult, the Model again offers clear theoretical guidance on this question: the institutional purpose for which a private fiduciary organization

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140 *See supra* text accompanying notes 42–43.
141 *See* Jensen, *supra* note 45, at 248.

acts changes when and if its principal either changes her purpose or ceases to entrust the fiduciary organization with the management of her affairs. A unilateral change in the purpose for which an organizational fiduciary manages a principal's affairs, on the other hand, would be institutional corruption.

Finally, the Fiduciary Institutional Corruption Model's accuracy as a generalization of Thompson's original theory is demonstrated by the fact that the two models accord institutional procedures the same role in any institutional corruption inquiry. Ordinary commercial actors may pursue their own self-interest subject to side constraints. Violations of side constraints, because they involve the doing of prohibited things, can be identified directly. Fiduciaries, on the other hand, are affirmatively obligated to act solely for their principal's purposes. Because honest misjudgments are not breaches of a fiduciary duty, the degree to which a fiduciary duty is discharged cannot be measured directly. Instead, analysts must look to the proxy of an institutional tendency to advance irrelevant purposes as indirect evidence of a fiduciary breach.

This is why conflicts of interest are acceptable among ordinary commercial actors so long as they are disclosed, but they are prohibited for fiduciaries in the absence of specific and explicit consent: conflicts, in the fiduciary context, are a kind of irrelevant purpose. As Ribstein explains, "[E]limination of conflicts is necessary [in the fiduciary context] because the parties cannot otherwise identify breaches of duty."[142] It follows that avoiding institutional corruption—now understood as organizational breach of fiduciary duty—requires establishing institutional procedures that eliminate conflicts of interest by excluding irrelevant influences from a fiduciary institution's decision making processes. It follows that institutional corruption is caused by influences that undermine those institutional procedures.

The foregoing analysis suggests that institutional corruption theory is actually a theory of organizational fiduciary duty and breach. In its generalized form, represented by the Fiduciary Institutional Corruption Model, Thompson's theory of institutional corruption is applicable to public sector institutions and also to a limited range of private sector institutions that have undertaken fiduciary obligations. So understood, institutional corruption theory identifies an important area of study. Academic interest in whether and how we ought to attribute moral and legal responsibility to organizations has increased in a world heavily influenced by organizational activities.[143] Institutional corruption theory can occupy a distinctive niche in this larger field by focusing on organizational fiduciaries.

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142 Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 227.

143 *See, e.g.*, Luban et al., *supra* note 9.

In days past, a single lawyer usually represented each individual client.[144] Today, law firms increasingly represent clients by dividing responsibility for their legal representation among many specialized lawyers and paralegals. [145] Institutional corruption theory is well suited for the task of determining whether the incentive structures of large law firms foster an institutional tendency to manage clients' cases for firm purposes rather than for clients' purposes. Similarly, financial institutions that serve as trustees may divide responsibility for managing a beneficiary's fund among multiple organizational actors.[146] Institutional corruption theory is a highly appropriate tool for addressing the question of whether incentives operating within or upon these financial institutions give rise to an institutional tendency to manage beneficiaries' resources in a way calculated to profit the institutions themselves or their employees or agents.

B. Frauds, Fiends, And Fools Are Not Institutionally Corrupt

Importantly, the Fiduciary Institutional Corruption Model demonstrates the limits of institutional corruption theory even as it extends its reach. Frauds, Fiends, and Fools are not appropriate subjects for the application of institutional corruption theory if they lack fiduciary duties—that is, if they are not entrusted to manage property or another critical resource belonging to a principal in accordance with that principal's purposes. A functional analysis shows that the trademark dynamics of the institutional corruption model are not replicated in these other contexts, even in theory.

Frauds and Fiends are alleged to have wronged others in the course of pursuing otherwise permissible, self-interested commercial activities. Because a non-fiduciary commercial actor is not obligated to act for the purposes of any other person or organization, its institutional purpose is not externally determined. Instead, an institution's subjective purposes, however they are understood and ascertained, must guide the analysis. Because Frauds and Fiends do not manage critical resources belonging to others, they must be understood to be directing the use of their own resources in ways that impermissibly affect others. The Frauds and Fields

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144 *See* Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 4 (1991) ("[A]s late as 1951, sixty percent of the bar practiced alone.").

145 *See id.* at 8 ("Many, perhaps most, of the tasks performed in large firms are assigned to teams. Teaming not only encourages lawyers to take ethical risks they would not take individually, but also obscures responsibility, which makes it difficult for both complainants and disciplinary authorities to determine which lawyers committed a wrongful act." (footnotes omitted)).

146 *See generally* Jayne W. Barnard, *Institutional Investor and The New Corporate Governance*, 69 N.C. L. REV. 1135, 1141 (1991) (noting that financial institutions will often have interests more aligned with managers than shareholders).

are said to be corrupt, not because they deviate from some obligatory purpose, but because some of their subjective purposes (e.g. deceiving customers or endangering the public as means to their ends) are unjust. Making these substitutions in the Fiduciary Institutional Corruption Model yields the "Side Constraints Model" shown in Figure 3.

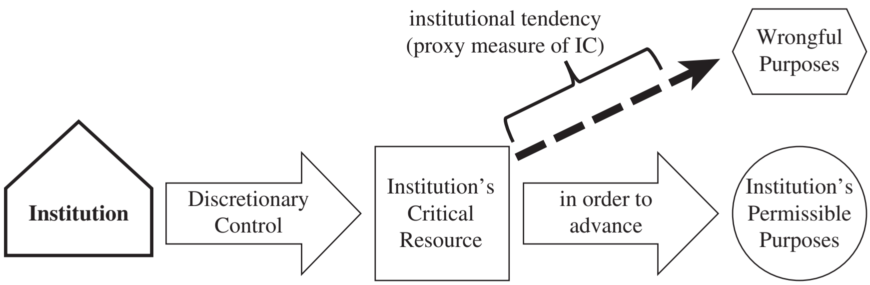

FIGURE 3: THE SIDE CONSTRAINTS MODEL

Because the trademark dynamics of the Fiduciary Institutional Corruption Model fail to operate between these new components, the Side Constraints Model is incoherent. In the Fiduciary Institutional Corruption Model, it is not possible to directly observe institutional corruption, understood as the institution's improperly weakened effectiveness at achieving the purposes of a principal. Instead, institutional corruption is observed and measured by proxy—the institutional tendency to advance irrelevant purposes. Insofar as an institution is systematically advancing these irrelevant purposes, it cannot be said to be acting solely for its principals' purposes. By contrast, and contrary to the Side Constraints Model, it is not true that an institutional tendency to advance unjust purposes necessarily reduces an institution's effectiveness at achieving its permissible subjective purposes. Indeed, unjust activities such as deceit, reckless endangerment, or cover-ups of criminal misconduct can sometimes be effective means to a variety of ends—increasing market share or bringing about social change, for examples—that are themselves permissible. The Side Constraints Model does not make sense because the pursuit of unjust purposes is not a reliable proxy for weakened institutional effectiveness.

More importantly, the Side Constraints Model diagnoses the wrong kind of thing as "institutional corruption." In the Side Constraints Model, the weakened effectiveness with which an institution achieves its subjective goals is supposedly what makes it the case that it is institutionally corrupt. But from the perspective of public concern, that is not what has actually gone wrong with the Frauds and Fiends. The Frauds and Fiends are problematic because they are wronging others. The Side Constraints Model implausibly relegates this real problem to the status of a proxy for the red herring of business efficiency.

Fools have been deemed institutionally corrupt because their faulty business practices weaken the effectiveness with which these organizations achieve their participants' shared subjective goals. Because they do not manage critical resources belonging to anyone else, they must be thought of as managing their own resources. Because the supposedly inconsistent purposes that Fools advance are not distinguishable from mere mistakes (indeed, they are mere mistakes), they can only be very generally described as "other purposes." Making these substitutions in the Fiduciary Institutional Corruption Model yields the Business Inefficiency Model depicted in Figure 4.

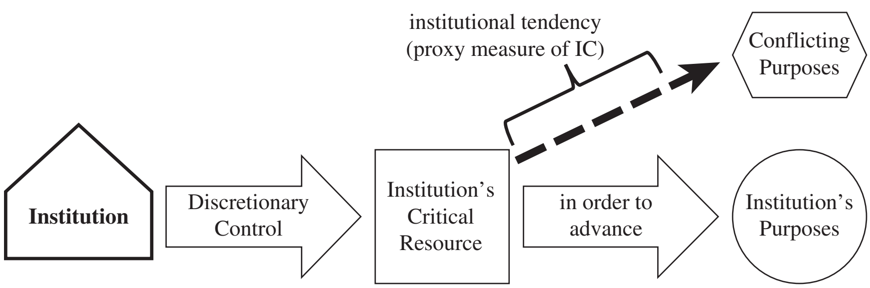

FIGURE 4: THE BUSINESS INEFFICIENCY MODEL

As we saw in the case of the Side Constraints Model, the trademark dynamics of institutional corruption theory fail to play out between the component concepts of the Business Inefficiency Model. Recall that institutional corruption cannot be observed directly because honest mistakes are not evidence of corruption. For this reason, institutional corruption theory looks to a proxy—private interests, in the case of the Thompson-Lessig Model—to determine whether an institutional tendency is improperly weakening the effectiveness with which an organization achieves its purpose. Because the Business Inefficiency Model obliterates the distinction between mistakes and improper purposes, it does not actually identify a proxy for anything distinct from the kinds of honest misjudgments that institutional corruption theory denies are evidence of institutional corruption in any other context.

C. Should We All Be Considered Fiduciaries?

The fiduciary obligation to act solely for someone else's purposes may appear an uplifting departure from grubby marketplace norms. In the famous words of Justice Cardozo: "A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[147]

Surely, society could only benefit from more honor and sensitivity in human relations. Yet, this Article has so far followed Smith in supposing that a fiduciary duty, well-described by Ribstein as a "duty of selflessness,"[148] properly obligates only those individuals and organizations that have undertaken the management of someone else's critical resource on their behalf.[149]

If violations of the relatively modest standards of the marketplace, such as those perpetrated by Frauds, or the even lower standards of common decency, such as those transgressed by Fiends, do not make it the case that a malefactor is "institutionally corrupt," then perhaps the problem is that widely-accepted legal and moral standards for the behavior of these institutions are too low. Perhaps the world would be a better place if more market actors understood themselves to be constrained by fiduciary duties to their customers, or even to the world at large. The attribution of fiduciary duties to a wider range of actors could potentially transform many more instances of organizational malfeasance into tractable subjects for institutional corruption analysis. But would an obligation of "selflessness" in the conduct of ordinary commercial transactions actually make our society more just or humane?

The question of when and why fiduciary duties should be recognized under law is the subject of a robust jurisprudential literature to which august private law experts have contributed their wisdom.[150] This Article does not pretend to add substantively to this ongoing debate, and those who want to familiarize themselves with the high-level discussion on this issue should consult this literature directly. Nonetheless, institutional corruption researchers, who may resist the conclusion that institutional corruption theory has a limited range of application, deserve to be offered a few common-sense considerations against attributing a duty to exclusively pursue someone else's purposes to most or all commercial actors.

147 Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

148 Ribstein, *supra* note 68, at 904.

149 *See* Smith, *supra* note 66, at 1402.

150 *See, e.g.*, Matthew Conaglen, *A Re-appraisal of the Fiduciary Self-Dealing and Fair-Dealing Rules*, 65 CAMBRIDGE L.J. 366 (2006); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993); TAMAR FRANKEL, FIDUCIARY LAW (2011); Laby, *supra* note 75; Ribstein, *supra* note 142; Ribstein, *supra* note 68; L.S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69; Smith, *supra* note 66. For a recent discussion of the possible expansion of fiduciary obligations in the finance industry, see Kristina A. Fausti, *A Fiduciary Duty for All?*, 12 DUQ. BUS. L. J. 183 (2010).

Because most fiduciary duties are created by contracts that confer managerial authority over a principal's property or other critical resource to a fiduciary, one can begin to assess the desirability of such arrangements by comparing the choices that people frequently choose to turn over to fiduciaries to choices that are seldom so delegated. We often empower fiduciaries to manage our financial affairs, our real estate holdings, our businesses, and our legal rights. We seldom empower fiduciaries to manage our diets, our social calendars, our wardrobes, or our marital choices.

To generalize from these examples, people often find fiduciaries helpful when their purposes are fairly stable and can be reasonably well articulated to an appropriate expert, but when the best means of achieving those purposes requires making a complicated series of strategic judgment calls on the basis of specialized information and experience. People seldom find fiduciaries helpful when the means of achieving their purposes are straightforward, and when those purposes themselves are very nuanced or are prone to rapid change. Few people, in this society at least, imagine that they can so perfectly explain what they want in a spouse that they are willing to delegate that decision to someone else. Many people generally strive to eat healthy food, but few of them invariably resist enjoying a ballpark hot dog or an extra-large serving of rocky road ice cream.

Occasionally, someone elects to turn over the management of some part of her life to another person who will not allow her to succumb to her occasional bouts of *akrasia*—failure of will.[151] Dissertating Deborah might ask her husband to change the password on the Internet router before he goes to work. More formally, Pudgy Paul might deposit his grocery budget into a trust account every month, from which only his grocery fiduciary is empowered to withdraw funds for the purpose of purchasing healthy groceries for Paul. Moreover, Paul has provided all local grocers with a signed document requesting that they refuse to sell him any groceries directly until at least thirty days after he revokes this request in writing. Such voluntary arrangements can enhance individuals' abilities to achieve their chosen goals. But does it follow that all grocers, or all Internet providers, ought to conceive of themselves as fiduciaries for those to whom they sell goods and services?

Fiduciaries manage principals' affairs in order to advance those principals' purposes, but this exercise of discretion is coupled with some responsibility for the purposes advanced. A lawyer cannot legally represent a client in a frivolous lawsuit, and she may feel morally obligated to refuse to file a merely spiteful one. A trustee might refuse to manage

151 For a general overview, see Alfred R. Mele, *Akrasia, Self-Control, and Second-Order Desires*, 26 NOûS 281(1992).

the fund of a beneficiary who insists that money be squandered on objectively hopeless investments recommended by a dissembling religious leader. A surgeon might refuse to conduct a surgery that he believes is unduly risky given that its purpose is to preserve a patient's athletic abilities rather than her general health or longevity.[152]

A compunctious fiduciary might try to explain that a purpose she refuses to promote is not *really* her client's purpose in some relevant sense. In the fiduciary's judgment, the objectionable purpose may be irrational, or it may be inconsistent with other purposes that the fiduciary believes her client is in some way required to have, such as health or financial security. On this sort of theory, a grocer who considered himself a fiduciary for his customers might feel obligated to refuse to sell ice cream to visibly overweight shoppers, sugar cereals to patrons with small children, or cheap beer to anyone who tries to purchase it more frequently than, in the grocer's judgment, they should.

That grocers who act like this are exceedingly rare in the marketplace suggests that most people do not *want* to have this kind of relationship with the person who sells them food. But if grocers are deemed "institutionally corrupt" insofar as they fail to police what they (or some external authority) judge to be their customers' rational best interests, tools to address this corruption could be forthcoming in the form of public censure or even business regulations that constrain all grocers to act as though they were fiduciaries with respect to their customers' diets. In the many spheres of life in which people prefer to exercise their own judgment, however flawed their priorities may appear to some observers, a broad attribution of fiduciary duties to commercial actors may thus threaten the exercise of personal choice.

Moreover, attributing fiduciary duties to participants in arms-length commercial transactions would impede the ability of contractual fiduciaries to do their jobs. Stockbrokers are rightly subject to ordinary commercial side constraints of good faith and fair dealing, but if they adhere to a fiduciary duty to sell only those products that they judge to be the best investments for buyers, trustees would be deprived of options that *they* might judge best for their clients. Pharmaceutical companies, like stockbrokers, owe consumers and prescribing physicians a duty of good faith and fair dealing, and to meet that obligation they must not misrepresent the drugs that they manufacture and sell. But if pharmaceutical companies had a fiduciary duty to sell patients only the drugs that the companies judged to be optimal for those patients' conditions, doctors would be deprived of choices when they exercised their own judgment

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152 *See* Thomas L. Hafemeister & Richard M. Gulbrandsen Jr., *The Fiduciary Obligation of Physicians to "Just Say No" if an "Informed" Patient Demands Services that Are Not Medically Indicated*, 39 SETON HALL L. REV. 335, 346 (2009).

concerning a patient's medical care. Because expert opinions differ, requiring too many fiduciaries to exercise their honest best judgment on the same person's behalf can deprive that person of a result consistent with anyone's considered opinion,[153] including the person or organization she actually entrusted to do the job.

Finally, if corporations were thought to have fiduciary duties to their counterparts in ordinary commercial transactions, the officers and directors of those corporations would find themselves hobbled by unavoidable and intractable conflicts of interest.[154] According to traditional legal doctrine, corporate officers and directors have a fiduciary obligation to conduct business on behalf of shareholders.[155] If this is the case, then they cannot be simultaneously obligated to conduct business exclusively for the purposes of customers, any more than a lawyer can coherently represent opposing parties in a single lawsuit, or a physician can simultaneously practice medicine on behalf of her patient and his insurance company.[156] One duty would require corporate managers to maximize profits while the other would require them to sell goods at cost. Laby explains this conundrum in the context of arms-length financial transactions: "When acting as a dealer, the firm seeks to buy low and sell high—precisely what the customer seeks. It is hard to see how any dealer can act in the 'best interest' of his customer when he is trading with her."[157]

To be sure, most commercial transactions (unlike lawsuits) are mutually beneficial, but neither party generally obtains the maximum possible benefit from any given transaction. The value created by every commercial transaction is divided between the parties according to the result of a mutually self-interested negotiation against the backdrop of legal rights and market conditions. In this negotiation, managers are traditionally thought obligated to represent the interests of firm shareholders, subject to ordinary legal side constraints of good faith and fair dealing. It would not be fair to managers who earnestly strive to discharge all of their obligations to render the achievement of this laudable goal logically impossible.

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153 *See generally* Bertram L. Levy et al., *Problems and Benefits of Multiple Fiduciaries: An Estate Planning Perspective*, 33 MERCER L. REV. 355 (1981) (discussing problems arising from appointing multiple fiduciaries in the estate planning process).

154 *See, e.g.*, Arthur B. Laby, *Reforming the Regulation of Broker-Dealers and Investment Advisers*, 65 BUS. LAW 395 (2010) (discussing conflict of interests arising between financial managers and customers).

155 Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 367 (Del. 1993) ("Duty of care and duty of loyalty are the traditional hallmarks of a fiduciary who endeavors to act in the service of a corporation and its stockholders.").

156 *See* Alexei M. Marcoux, *A Fiduciary Argument Against Stakeholder Theory*, 13 BUS. ETHICS QUARTERLY 1, 11 (2003).

157 *See* Laby, *supra* note 154, at 425.

Fiduciary duties to clients, and therefore institutional corruption, are certainly compatible with the corporate form, but they depend on the existence of a *chose*—a piece of property or other identifiable critical resource belonging to a principal, over which the fiduciary corporation exercises discretion.[158] A large corporate bank, for example, acts as a fiduciary for the beneficiaries of trusts that it manages, but it is not obligated to conduct its unrelated business activities for the purposes of those trustees. A law firm incorporated as an LLC must manage clients' legal rights solely for those clients' purposes, but the firm can permissibly make decisions about which cases to take in accordance with the partners' purpose of earning money. Analogously, a member of Congress must exercise the lawmaking power solely for public purposes, but she can permissibly decide whether or not to run for re-election based on her own personal considerations, and she can likewise spend her off-hours pursuing private purposes, so long as she is not pursuing them with public resources.

By contrast, attributing fiduciary duties to counterparts in ordinary commercial transactions would produce conflicts of interest for corporate officers and directors, because it is the presence of property or another critical resource belonging to a principal, over which the putative fiduciary exercises control, that defines and limits the sphere of activity to which fiduciary duties apply. In an ordinary commercial transaction there is no such limiting principle, because there is no delegation of control over an identified resource belonging to a consumer. Instead, a good or service is exchanged for a negotiated sum of money, and a consumer's legitimate interest in receiving the benefit of such a bargain can be reconciled with shareholders' interest in maximizing firm value by means of a legal and moral side constraint of good faith and fair dealing on the part of the transacting firm. A corporation that violates such a side constraint belongs to the category named "Frauds," but it is not institutionally corrupt.

Justin O'Brien objects to the traditional understanding of the firm elucidated above, according to which corporate officers and directors have fiduciary obligations to shareholders in virtue of the fact that they manage a firm that is owned by those shareholders. O'Brien complains that "the formulation is static, restrictive of application of common law and equity considerations, and silent on the reality of how political calculation frames the parameters of obligation in financial services."[159]

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[158] *See* Marcoux, *supra* note 156, at 3 ("The fiduciary relation is a triadic relation existing among and between two parties and some asset or project.").

[159] Justin O'Brien, *Singapore Sling: How Coercion May Cure the Hangover in Financial Benchmark Governance* 26 (Edmond J. Safra Ctr. For Ethics, Working Paper No. 29, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2350445.

However, to deny that firms have fiduciary obligations to non-owner constituencies is not to deny that they have *any* duties to those constituencies. On the contrary, firms are generally obligated not to violate the rights of individuals or communities by endangering others, creating nuisances, or encroaching on public or private property without legal permission. Firms are also obligated, in their dealings with others, to adhere to ordinary commercial standards of good faith and fair dealing. These kinds of obligations are side constraints: finite obligations to refrain from doing things or to fully honor defined and limited affirmative commitments that were incurred initially for a firm's benefit. A fiduciary duty, by contrast, is the obligatory goal to which a principal's otherwise unencumbered resources must be devoted by the fiduciary that manages them.[160] To see the difference, consider the example of employee wages. Good faith and fair dealing require that all wages due must be paid on time, but firms are not generally thought obligated to pay their employees as much as they possibly can, because firms are not generally considered to be fiduciaries for their employees. If firms *were* fiduciaries for their employees, then firm managers would suffer from a conflict of interest, because they are ostensibly already obligated to manage their firm's resources on behalf of the shareholders who own it.

Nor is it the case that supposing firms to have fiduciary obligations to customers or other non-owner constituencies is the only way to embrace "the reality of how political calculation frames the parameters of obligation."[161] Insofar as good relationships with constituencies such as politicians, customers, and community activists are important to the long-term prospects of firms—and they usually are—it is perfectly consistent with what Jensen has called "enlightened shareholder theory" to make investments in good relationships with these constituencies.[162] The two primary manifestations of good corporate citizenship are adhering to standards of good faith and fair dealing on one hand, and building constructive working relationships with those who might either harm or help a firm's prospects on the other. Neither activity is inconsistent with the traditional fiduciary obligation that corporate managers are thought to have to shareholders.

This Article argues that institutional corruption theory is a theory of organizational fiduciary duty and breach as the term "fiduciary" is traditionally understood in the law. Nothing in its argument denies that firms have non-fiduciary obligations to other constituencies, nor does it suggest that corporate cultivation of non-owner constituents is not good bus-

160 *See* Laby, *supra* note 75, at 103 ("[T]he irreducible core of the fiduciary relationship is the fiduciary's obligation to adopt the principal's goals, objectives, or ends.").

161 *See id.*

162 *See* Jensen, *supra* note 45, at 245–46.

iness. Instead, it observes that Congress owes the people a fiduciary duty as that concept is traditionally understood in the law, and that relationships giving rise to fiduciary duties so understood have certain distinctive features: 1) discretionary management, 2) over property or another critical resource, 3) belonging to a principal. Corporate relationships that have these characteristics are fiduciary relationships. It makes sense to conclude that corporations with incentive structures that undermine the effectiveness with which they meet fiduciary obligations are institutionally corrupt, because they, just like Congress, are failing to effectively pursue an obligatory purpose. Corporations that violate side constraints or fail to cultivate good relationships with constituencies that can harm them may be Frauds, Fiends, or Fools, but it does not make sense to say that they are "institutionally corrupt" if they do not have an obligatory purpose to which they must direct the otherwise unencumbered resources under their control.

CONCLUSION

Thompson developed a useful model of organizational fiduciary duty and breach that can be applied to some private sector organizations as well as to public institutions. However, the very distinctive features that make the theory useful also make it the case that the theory has limited application. "Institutional corruption" cannot simply refer to any institutional state of affairs to which a researcher objects, or the term will lose its meaning, and institutional corruption will fail to develop into a distinctive new research field.

Scholars and journalists have recently pursued a wide variety of interesting and important projects under the rubric of "institutional corruption." Those among them who have focused on institutional Frauds, Fiends, or Fools have generated new findings and analyses regarding matters of widespread concern. These projects, while certainly valuable, do not address the subject matter of institutional corruption theory if they do not focus on cases of organizational fiduciary duty and breach.

Some institutional corruption researchers may intend to attribute fiduciary duties to commercial actors that have not previously been considered fiduciaries. In such cases, researchers should explicitly argue for any novel claim of fiduciary status instead of treating that claim as the unexamined assumption of an institutional corruption analysis. The robust existing jurisprudential and policy debate about the nature and advisable extent of fiduciary obligations in the law would be enriched by their direct engagement.