The Fiduciary Duty of Dissent

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ABSTRACT

Organizations increasingly identify “dissent”—meaning the expression of disagreement with organizational strategies, decisions, or actions by employees who lack the power to execute change on their own—as a best practice and core value. But despite these pronouncements, employees at all levels often remain silent. Even powerful directors on corporate boards routinely decline to express disagreement with what they assume is the majority consensus. Alarming, this mindset can extend to critical safety issues. When asked why they do not speak up, many employees cite a fear of adverse personal or professional repercussions. Others simply believe that speaking up is pointless because they will be ignored. When these attitudes prevail, firms are deprived of the important knowledge gains that result from dissent. In extreme cases, the lack of dissent can lead to major ethical lapses and even the loss of human life.

This Article argues that organizational dissent is much more than a facet of management ethics and good institutional citizenship; it is a firmly embedded—albeit traditionally overlooked—feature of classic fiduciary law. By illuminating the strong pro-dissent norms that are inherent in the traditional duties of care, loyalty, and performance owed by corporate fiduciaries, this Article reconceptualizes dissent as a fiduciary duty. In so doing, it not only reinvigorates the academic and legal understanding of organizational dissent; it also gives new teeth to managerial efforts to stimulate meaningful dissent. A fiduciary understanding of dissent enhances organizational engagement with dissent and helps to re-center efforts to promote compliance, manage risk, and diversify all levels of organizations, including corporate boards.

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**Introduction**

“The temptation to tell a Chief in a great position the things he most likes to hear is one of the commonest explanations of mistaken policy.”

An increasing number of organizations encourage their employees to dissent. For example, the global consulting firm McKinsey describes dissent as an obligation that all employees owe to each other and to their clients. Similarly, in what has been called “the most important document” in Silicon Valley’s history, the original Netflix Value Statement asks employees to “challenge prevailing assumptions” and be “extraordinarily candid with each other.” The Statement goes on to say: “We [at Netflix] farm for dissent... Silent disagreement is unacceptable and unproductive.”

Support for dissent within organizations originates in the desire for knowledge. Simply put, dissent facilitates organizational learning by exposing people to new ideas and challenging the status quo. These qualities spur innovation and help generate the fresh thinking critical to success in today’s knowledge economy. Dissent’s ability to identify hidden problems and counteract cognitive biases like groupthink also improves decision-making, compliance, and planning. In each respect, dissent operates as an ongoing education and warning system capable of helping firms respond in time for courses to be changed, opportunities seized, and corrective actions taken.

Yet, as positive a force as organizational dissent can be, it remains a difficult resource for firms to manage. For one thing, dissent invites the possibility of disruption. The spirit of defiance that so often drives dissenters to speak out may cause others to question the wisdom and authority of management in ways that lower morale, decrease commitment, or prompt people to exit. On the flip side are concerns about silence. Just


because a company asks its employees to dissent does not mean they will. Many employees become too scared to express negative feedback. Some feel uncomfortable voicing criticism and worry their co-workers or managers will think less of them for doing so. Others believe, often with good reason, that dissent carries a high risk of retaliation—regardless of any assurances to the contrary—or that their views will be ignored. When these perceptions start to impede open communication, the ensuing lack of knowledge can cause considerable harm. Indeed, attitudes of fear and futility have grown so strong in some firms as to dissuade employees from dissenting even in situations where human life is at stake.

This Article takes an in-depth look at the complex issue of balance surrounding organizational dissent. How can firms best capture the benefits of dissent while mitigating the risk that its expression will trigger negative effects in the workplace? At the same time, can measures be deployed to better calibrate potential dissenters’ sense of safety and value so they feel free to express the quality of critical feedback that firms depend on to succeed?

One promising way to answer these questions is by focusing greater attention on dissent’s relationship to corporate and fiduciary law. This Article argues that dissent is more than an aspirational goal or organizational “best practice” in need of managerial shepherding; the default fiduciary duties of corporate officers and other agents already compel them to dissent over matters material to their firms’ interests. That is, for many employees, dissent is not optional; it is a legal requirement. This obligation originates in the often overlooked and misunderstood fiduciary duty of candor, which should be understood to include a pro-dissent norm. The argument for the existence of this norm is based on a theoretical analysis showing that the justification for fiduciary duties relating to information flow is their ability to enhance the principal-beneficiary’s knowledge and decision-making power—a purpose that depends, at its core, on the expression and tolerance of dissent.

Once we recognize the fiduciary link between candor and dissent, several important implications follow. The first is that firms should be deemed far more limited in their ability to retaliate against dissenters than is frequently thought, even in a legal regime that otherwise prizes the flexibility and near-total discretion of at-will employment. This conclusion stems from the set of reciprocal obligations that principal-beneficiaries owe to all

5. Recently, for example, the president of the University of Missouri told his deans and other senior administrators that they should quit if they disagree with him. Mizzou Journalism School Faculty Criticize System President, ASSOCIATED PRESS (Sept. 15, 2020, 5:05 PM), https://apnews.com/article/education-columbia-michael-brown-journalism-virus-outbreak-32be00a11fba29c997f7e16d0b3b6e0 [https://perma.cc/U34Z-NZY].

6. See generally REPORT OF THE COLUMBIA ACCIDENT INVESTIGATION BOARD (2023), https://sma.nasa.gov/SignificantIncidents/assets/columbia-accident-investigation-board-report-volume-1.pdf [perma link unavailable] (documenting how the failure to raise or respond to critical feedback and dissenting opinions contributed to the circumstances leading up to the Columbia space shuttle disaster on February 1, 2003). For further discussion, see infra notes 8, 12–15, 17–20.
agents who act in a fiduciary capacity. If an agent dissents in a manner consistent with their duty of candor, then the organization’s reciprocal duties to deal fairly and in good faith with that agent mean they ought not be punished for doing what they are supposed to do.

The second consequence of conceptualizing dissent along fiduciary lines is expressive. Consistent with notions of soft-law power, a key function of fiduciary duties is to express and reinforce the values and ideals that society thinks should govern how people in fiduciary relationships interact.\(^7\) Drawing greater attention to dissent’s fiduciary contours will signify to members of an organization the importance of candor and honesty, including in situations where the news to be shared might seem unpleasant. By the same token, as dissent is increasingly understood to be a feature of loyal and careful fiduciary performance, additional norms ought to develop such that firms and employees come to see dissent more as an organic and collectively valued part of corporate culture rather than as something personally or institutionally threatening.

A final benefit of looking at dissent through a fiduciary lens is the clarity this approach can bring to a host of other puzzles in corporate law and governance. In particular, by shedding new light on the scope and impact of the duty of candor’s pro-dissent norm, this Article will help advance current policy debates on matters ranging from the board’s proper role in oversight to the wisdom of legal efforts designed to increase board diversity.

This Article proceeds as follows. Part I opens with a brief, descriptive account of the dangers posed by a lack of dissent within organizations. Next, Part II provides important background context by defining key terms and describing the factors that traditionally influence (or complicate) efforts to promote, accommodate, and respond to organizational dissent. Part III considers whether and to what extent a corporate agent’s basic duty of candor includes a pro-dissent norm, as well as what the recognition of that norm means for firms looking to punish dissent they find unwelcome. Part IV then completes the analysis by addressing potential counterarguments, answering a few remaining practical questions, and explaining how this Article’s findings can help organizations better harness the positive attributes of dissent while mitigating any potential negative ones. This final Part also demonstrates why developing an improved understanding of dissent’s fiduciary character will provide new insight into several related challenges of corporate governance.

I. Dangers Posed by Lack of Dissent Within Organizations

Twenty-one years ago, on February 1, 2003, the Space Shuttle \textit{Columbia} disintegrated upon atmospheric reentry 40,000 feet above Texas.\(^8\) All

\(^7\) See Evan J. Criddle, \textit{Fiduciary Foundations of Administrative Law}, 54 UCLA L. Rev. 117, 133–34 (2006) (noting that this is one reason why many judges “encourage fiduciaries to view their role as a call to service, drawing motivation from a spirit of duty and honor as much as from a fear of coercion or sanctions”).

\(^8\) \textit{Report of the Columbia Accident Investigation Board, infra} note 6, at 6.
seven astronauts on board died. The accident led NASA to suspend its shuttle program and open an investigation into what went wrong.

The investigation identified two reasons for the malfunction. The first was the immediate physical cause. Eighty seconds after Columbia’s launch from the Kennedy Space Center, “a piece of foam insulation the size of a briefcase” broke from the main external fuel tank and struck the shuttle’s left wing.\(^9\) The impact damaged the wing’s outer heat shield.\(^10\) With the heat shield now compromised, super-heated air seeped inside the wing as the shuttle reentered Earth’s atmosphere during its subsequent return from space. The penetrating air melted the wing to a point where aerodynamic forces caused the shuttle to fall out of control at supersonic speeds, resulting in a complete loss of structural integrity and catastrophic breakup.\(^11\)

The second explanation for the disaster—and the one of most relevance here—was characterized as a problem with NASA’s “organizational culture.”\(^12\) Investigators found that certain workplace attitudes and beliefs within NASA “had as much to do with this accident as the . . . foam.”\(^13\) This aspect of the investigation began with the observation that foam-related incidents like the one involving Columbia were nothing new. Foam breakages and debris strikes occurred during dozens of prior shuttle launches, including several where wing damage was later discovered. Investigators thus became confused. If foam strikes were so common, why did NASA fail to fix the problem before sending more people to space? Likewise, once they learned that a piece of foam struck Columbia during its ascent, how did the mission’s managers come to decide that nothing should be done about it?

In confronting these questions, investigators determined that the influence of NASA’s culture on employee communication was a central contributor to both the accident and the circumstances leading up to it. They first noted that there was a widely held view within NASA that the agency’s position at the forefront of human space flight made it a “perfect place” singularly capable of unprecedented scientific feats.\(^14\) This view produced a corresponding sense of extreme self-confidence that eroded the willingness of managers to accept criticism and outside advice. The many great historical successes of NASA also contributed to an intense “can do” attitude among employees, something that led many


\(^10\) Id.


\(^12\) REPORT OF THE COLUMBIA ACCIDENT INVESTIGATION BOARD, supra note 6, at 177.

\(^13\) Id.

\(^14\) Id. at 102 (quoting Garry D. Brewer, Perfect Places: NASA as an Idealized Institution, in SPACE POLICY RECONSIDERED 157, 158 (Radford Byerly, Jr. ed., 1989)).
of them to believe that nothing was ever impossible.\footnote{Id. at 101–02.} Such a firm belief, while conducive to driving people to work hard and take pride in their jobs, had the parallel effect of causing employees to shy away from voicing doubts or expressing skepticism.

When investigators considered these underlying social traits in their review of NASA’s historical response to foam incidents, a few gray areas became clearer. For one, since damage from prior foam debris had not proven dangerous to shuttle flight operations, they discovered that this fact in conjunction with managers’ preexisting confidence and unshakable optimism gradually conditioned employees to regard the matter as devoid of safety concerns. A consensus grew that debris-strike damage was, if anything, a post-mission maintenance responsibility rather than a “safety-of-flight” risk.\footnote{Cause and Consequences of the Columbia Disaster, SPACE SAFETY MAG. (May 6, 2014), https://www.spacesafetymagazine.com/space-disasters/columbia-disaster/columbia-tragedy-repeated/ [https://perma.cc/2ZAK-WRZJ].} As that view became established orthodoxy within the organization’s upper echelons, lower level engineers holding contrary views no longer felt free to contradict it. The engineers believed “that by raising contrary points of view about Shuttle . . . safety, they would be singled out for possible ridicule by their peers and managers.”\footnote{Report of the Columbia Accident Investigation Board, supra note 6, at 169.}

This reluctance to question authority ultimately came to shape NASA’s response to the specific foam incident affecting Columbia. When they first learned of the strike, several engineers did recommend studying it more thoroughly since the piece of foam at issue was larger than any that hit shuttles in the past.\footnote{Id. at 170.} However, already aware of management’s conviction that foam strikes were innocuous, the engineers chose not to press their argument once they encountered initial resistance.\footnote{Id. at 169–70.} Indeed, the mission managers in charge of reviewing the issue began to seek out and welcome only those opinions that reinforced their long-held view that debris strikes were routine and acceptable. This approach effectively blocked “the flow of effective communications” and “demoralized” concerned employees to the point where they gave up trying to change anyone’s mind.\footnote{Id. at 192.}

Admittedly, whether the presence of greater and more sustained dissent would have led to a different fate for Columbia’s crew is impossible to know. But as investigators observed, “[i]mage the difference if any Shuttle manager had simply asked, ‘Prove to me that Columbia has not been harmed,’” rather than starting with the default assumption that maintaining the status quo was reasonable.\footnote{Id. at 192, 201 (Columbia’s mission managers further “created huge barriers against dissenting opinions by stating preconceived conclusions based on subjective knowledge and experience, rather than on solid data”).}

\footnotesize{15. Id. at 101–02.}
\footnotesize{17. Report of the Columbia Accident Investigation Board, supra note 6, at 169.}
\footnotesize{18. Id. at 170.}
\footnotesize{19. Id. at 169–70.}
\footnotesize{20. Id. at 169, 192, 201 (Columbia’s mission managers further “created huge barriers against dissenting opinions by stating preconceived conclusions based on subjective knowledge and experience, rather than on solid data”).}
\footnotesize{21. Id. at 192.}
taken by the leaders of the U.S. Navy’s nuclear reactor program. In the Navy’s program, which enjoyed a perfect safety record, leadership maintained a formal policy of telling all employees that minority opinions, “bad news,” and critical questions are always welcome.22 The Navy’s managers emphasized that a lack of dissent should be taken not as a sign of organizational health but as an alert that unknown problems may exist. Such strategic thinking was foreign to NASA where, rather than search for different views, investigators found that too many people in leadership actively discouraged debate and “no longer ask[ed] . . . hard questions about risk.”23 Tragically for Columbia and her crew, NASA’s decision-making process eventually grew so infected with silence that a major accident became inevitable.

II. DISSERT AS A FUNCTION OF MANAGEMENT ETHICS AND ORGANIZATIONAL VALUES

A. Defining Organizational Dissent

Scholars of organizational behavior define dissent as the expression of disagreement with organizational strategies, decisions, or actions by employees who lack the power to execute change on their own.24 Dissent thus represents a subcategory of expression that falls within the broader concept of employee “voice.”25 Voice is the term theorists use to describe improvement-oriented speech within a firm.26 An important caveat, however, is that dissent challenges the status quo in ways not always present in other voice behaviors.27 For instance, while voice includes such noncontroversial activities as speaking during an informal brainstorming session or reporting the latest sales data, dissent takes on the harder edge of criticism and challenge. Dissenters may even push back against ideas, proposals, or practices in ways that start to resemble civil disobedience.28 Additionally, while traditional voice behaviors often occur across the same rungs of the organizational ladder, dissent is typically aimed at the “higher-ups” within a firm (e.g., supervisors, managers, and directors). This characteristic leads many commentators to equate dissent with the

22. Id. at 183.
23. Id. at 185.
24. Jeffrey W. Kassing, Speaking Up: Identifying Employees’ Upward Dissent Strategies, 16 MGMT. COMM’N Q. 187, 189 (2002) (“Dissent is a particular form of employee voice that involves the expression of disagreement or contradictory opinions about organizational practices or policies.” (citations omitted)).
26. Id.
27. Id. at 174, 176.
management concepts of “critical upward feedback” and “critical upward communication.”

As for why employees might dissent, it can be tempting to assume that they do so on account of their moral or ethical beliefs, as is often the case with other forms of protest. But those motives are not essential. Many employees contemplate dissent less out of principle and more so because they believe current work conditions could improve in any number of areas, including product manufacturing, advertising, methodologies for determining promotions and raises, etc. That said, when the subject of employee dissent is illegal, unethical, or otherwise wrongfult behavior, the communication is recast as “whistleblowing.” Like dissent in general, whistleblowing refers to challenge-oriented expressions of work-related disagreement. The key difference is that whistleblowing is characterized by the nature of the information being shared, namely, reports on actual or perceived violations of law, ethics, or policy.

To be sure, not every employee who considers dissenting ends up doing so. As this Article will explore in detail below, many employees shy away from dissent because they worry it will get them into trouble. Others choose to stay quiet because they assume no one will take their comments seriously. These concerns bring us to silence. Silence in the organizational context is not simply the “lack of speech, as not speaking

29. See Morrison, supra note 25, at 175, 177; Dennis Tourish & Paul Robson, Sensemaking and the Distortion of Critical Upward Communication in Organizations, 43 J. MGMT. STUD. 711, 711 (2006); Kassing, supra note 24, at 189; see also Scott B. MacKenzie, Philip M. Podsakoff & Nathan P. Podsakoff, Challenge-Oriented Organizational Citizenship Behaviors and Organizational Effectiveness: Do Challenge-Oriented Behaviors Really Have an Impact on the Organization’s Bottom Line?, 64 PERS. PSYCH. 559, 560 (2011) (observing that dissent is one of several challenge-oriented organizational behaviors meant to be change-oriented and “characterized by making constructive suggestions with the intent to improve and speaking out and challenging the status quo for the good of the organization”).

30. See Kassing, supra note 24, at 189; see also Leslie A. Perlow & Stephanie Williams, Is Silence Killing Your Company?, HARV. BUS. REV., May 2003, [https://hbr.org/2003/05/is-silence-killing-your-company] [https://perma.cc/U92X-LEZN]. Within many firms, voice and dissent tend to focus either on how to improve circumstances at work (described as “promotive” voice), or on what problems exist or are expected to arise (described variously as “prohibitive,” “remedial,” or “problem-focused” voice). Morrison, supra note 25, at 174.


32. Near & Miceli, supra note 28, at 155–56. Though some whistleblowers choose to remain anonymous by relying on tips or hotlines, my focus is on employees who dissent openly and solely within the organization that employs them. This Article also largely restricts its analysis to voice in the private employment setting, and accordingly, will not wade into the potential constitutional implications at play in cases of public employee internal and external expression.

33. Id.

34. See infra Section II.C.2.
can occur for many reasons, including having nothing meaningful to convey.”

Rather, silence for our purposes means “not speaking up when one has a suggestion, concern, information about a problem, or a divergent point of view that could be useful or relevant to share.”

The term thus represents the opposite of dissent, forming one side of the decision-making coin carried by every employee who thinks something at work should change. The employee can choose action or passivity, electing to speak or remain quiet. If neither option seems palatable, then the employee’s final alternative is to simply exit the organization, effectively severing communication between the employee and the firm.

B. Why Firms Value Organizational Dissent

Many firms now make it a point to ask their employees to dissent. Some do this by positioning dissent within a broader organizational ethos. Recall Netflix’s commitment to “farming” for dissent, as well as the characterizations by McKinsey and the U.S. Navy that dissent is part of the job responsibilities of every employee. In other cases, dissent is mandated by a specific company policy. For example, with respect to whistleblowing, several companies—including Apple, Meta, and Microsoft—expressly instruct their employees to speak up if they see possible violations of company policies or the law, with the failure to do so being grounds for punishment.

What explains the increasing organizational push for dissent? The most straightforward explanation centers on dissent’s ability to enhance knowledge. Every firm depends on access to high-quality information to function effectively. However, leaders are often unaware of what or
how much they do not know.\textsuperscript{41} Dissent helps close those potential knowledge gaps by expanding the total mix of information available. By their very nature, dissenters challenge assumptions and add to the intellectual “repertoire that the organization can bring to bear on any new problem that it faces.”\textsuperscript{42} The resulting increase in cognitive heterogeneity promotes the consideration of new ideas and new points of view, factors that support organizational “learning, improved work processes, innovation, error correction, the curtailment of illegal or immoral behavior, and crisis prevention.”\textsuperscript{43}

To illustrate, consider the analyst who argues for a novel interpretation of data that convinces a board to retreat from an unsound financial transaction, or the dissident within a firm’s research team who alerts management to a potential product safety risk. When taken seriously, the information provided by dissenters in these situations can positively contribute to organizational success by eliminating blind spots and mitigating problems like groupthink and confirmation bias. Not only is this one of the key lessons drawn from the Columbia accident investigation, but it is also one observed in the aftermath of major accounting failures, large-scale consumer frauds, medical emergencies, and sexual harassment scandals.\textsuperscript{44} By contrast, when leaders become aware of concerns at an early stage through the free sharing of dissent and critical feedback, they often find themselves in much better positions to prevent or mitigate problems in time to avoid negative consequences.

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41. Gorga & Halberstam, supra note 40, at 1162–64.
43. Morrison, supra note 25, at 178; Orly Lobel, Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations, 97 CALIF. L. REV. 433, 462 (2009) (“Rather than suppressing dissent, organizations that encourage employees to voice objections and difficulties will have the upper hand in managing uncertainty and exercising judgment. Internal dissent contributes to detection, problem solving, and organizational learning. . . . Most importantly, internal whistleblowing creates an emphasis on prevention and contributes to an ethical culture within the organization.” (footnotes omitted)).
\end{flushright}
C. The Costs of Organizational Dissent

Despite growing awareness that dissent carries many practical benefits, two major issues remain that make it a difficult practice for firms and employees to manage successfully. First, the aura of challenge that so often accompanies dissent can easily lead to turmoil and distraction in the workplace. Second, while it is true that many firms seek out and say they welcome dissent, there are also often several strong countervailing forces present that convince employees to choose silence instead.

1. The Potential for Disruption and Noise

The first challenge to managing organizational dissent is its potential to cause disruption to a degree that makes it appear to be doing more harm than good. This concern arises because dissenting employees often create a destabilizing effect within firms that hinders performance. Indeed, the mere presence of dissent represents a challenge to “the organization’s authority structure (specifically, the manager’s right to make decisions),” a factor that may cause other employees to question their loyalty or commitment to the firm.45 What’s more, some employees dissent precisely because they want to stir up a commotion, typically because they are angry or frustrated with something else happening at work.46

Another potentially negative aspect of dissent involves the problem of “noise.” Noise refers to a wide variability among informational inputs and opinions that may hinder rather than help the communicative process.47 In the case of dissent, critical feedback can seem like noise if it becomes more intense, more varied, or more frequent over time. Under those conditions, there is a risk that managers will get so overloaded with the nuances and varied vantage points contained in dissent that they become unable to adequately assess it.48 Likewise, the time spent reviewing and analyzing dissent can also divert management’s focus away from other important tasks. For example, if an investigation or formal policy review is initiated in response to critical feedback, the logistics necessary to get those processes off the ground will demand managerial attention and carry transaction costs—both factors that could cannibalize resources from other operational activities that leadership believes would better serve the firm’s long-term best interests.

Finally, dissent presents a classic “be careful what you ask for” danger. By bringing management’s attention to new problems and concerns, employees who speak up may cause unforeseen ripple effects that—from

48. See id.
either their perspective or that of their colleagues—seem less than ideal.\footnote{Klass, Olson-Buchanan & Ward, supra note 31, at 330 (discussing how exercise of voice seen as positive from speaker’s perspective can cause harms to others in organization, such as when a dissenter says a department has too many employees and then the firm responds by firing some).}

For example, firings, demotions, suspensions, salary cuts, and reorganizations are all possible outcomes in the wake of dissent. These risks are especially pronounced due to the managerial tendency “to respond to problems that are brought to their attention by assigning blame to individuals instead of addressing the underlying systemic causes.”\footnote{Tangirala & Ramanujam, supra note 38, at 45.}

2. \textit{The Risk of Self-Censorship}

A second overarching challenge to managing dissent relates to evidence that many employees elect to self-censor, including in situations where their firms would otherwise prefer that they speak up.

One of the first empirical studies of this issue found that seventy percent of employees felt afraid to raise certain work-related topics with their managers.\footnote{Morrison, supra note 25, at 178.}

A similar review found that eighty-five percent of young professionals declined to raise a concern at work on at least one occasion, with forty-nine percent adding that they were uncomfortable speaking to persons in positions of authority about issues that bothered them.\footnote{Id.}

A later examination of full-time employees determined that forty-two percent withheld information when they believed “they had nothing to gain, or something to lose, by sharing it.”\footnote{Detert, Burris & Harrison, supra note 53.}

The same project found that approximately twenty-five percent of workers withheld suggestions about ordinary matters or how to fix routine problems.\footnote{Detert, Burris & Harrison, supra note 53.}

A further study on the specific issue of whistleblowing found that approximately fifty percent of employees refrain from reporting illegal acts they observe at work.\footnote{Morrison, supra note 25, at 178 (citing Marcia P. Micol, Janet Pollex Near & Terry M. Dworkin, Whistle-blowing in Organizations (2008)).}


Sonnenfeld states: “Directors are, almost without exception, intelligent, accomplished, and comfortable with power. But if you put them into a group that discourages dissent, they nearly always start to conform.” Sonnenfeld, supra, at 111.
not raise or talk about important problems."\(^{57}\) Alarmingly, this mindset can extend to critical issues of personal safety. A 2005 report suggests only three percent of nonsupervisory employees will confront a nurse or other clinical-care providers over competence concerns, and less than one percent confront physicians.\(^{58}\)

Theories about why employees frequently remain silent tend to coalesce around what Professor Elizabeth Wolfe Morrison calls the "efficacy and safety calculus."\(^{59}\) This phenomenon refers to the thought process that employees go through when deciding whether to dissent. It posits that if the expected benefits of speaking up (efficacy) are high while the perceived threats of negative consequences (safety) are low, then dissent becomes more likely.\(^{60}\) By the same token, one’s willingness to dissent usually decreases as either the odds of suffering harm increase or the prospects of the speech doing any good diminish.\(^{61}\) The factors that influence how this calculus plays out for each employee implicate a variety of social, behavioral, and organizational considerations.

First, with respect to efficacy, one problem is that employees who believe their opinions will be ignored often lean toward silence.\(^{62}\) This attitude is most common when employees see a pattern or history within an organization where leadership either fails to act on critical feedback or expresses hostility toward it.\(^{63}\) The same inclination can also develop when firms create a culture of "pseudo-participation."\(^{64}\) This phenomenon develops when managers solicit feedback but then never appear to use it.\(^{65}\) Employees working in environments of "pseudo-participation" are effectively taught that dissent is a waste of time, which in turn bolsters their sense of futility.\(^{66}\) Beliefs about efficacy can also be a product of one’s status, age, and level of experience.\(^{67}\) For instance, employees who

\(^{57}\) Morrison, supra note 25, at 178.


\(^{59}\) Morrison, supra note 25, at 180.

\(^{60}\) Id.

\(^{61}\) Id.


\(^{63}\) Morrison, supra note 25, at 181–82 ("In many organizations . . . leaders may not be seen as very open or interested in input from employees, which may serve to stifle voice. In some cases, this may be because they do not actually want nor see the value of input. Research on power has shown that power holders tend to be overconfident in their own competence and decisions and thus fail to appreciate the value of input and advice from others." (citations omitted)).

\(^{64}\) Detert & Treviño, supra note 58, at 257.

\(^{65}\) Id.

\(^{66}\) Id.

\(^{67}\) Morrison, supra note 25, at 180–82.
are younger, newer, or lower in an organization’s hierarchy often refrain from expressing dissent because they assume others will see their comments as naive or uninformed. 68

Similar considerations inform employees’ sense of how safe or dangerous it is to dissent. Simply put, many employees stay quiet because they believe their peers and colleagues will retaliate against them, or at least think poorly of them, if they do not. People often worry, for example, that they will be labeled as complainers, rabblerousers, or malcontents if they challenge the status quo. 69 Likewise, because employees rarely receive praise for raising difficult issues or pointing out why things might go wrong, many become conditioned to believe that silence is the least risky path. 70

This general concern recalls the so-called “shoot the messenger” effect, a term coined in response to evidence suggesting that people often view dissenters and others who share “bad news” as unlikeable, incompetent, or, in some cases, as disloyal or malicious. 71 Professor Cass Sunstein illustrates the power of this dynamic in his description of the Kennedy administration’s failures during the United States’ attempted invasion of Cuba at the Bay of Pigs. 72 He notes how, “[n]otwithstanding their experience and talent, no member of [President Kennedy’s administration] opposed the invasion or proposed alternatives. Some of Kennedy’s advisers entertained private doubts, but . . . they ‘never pressed, partly out of a fear of being labeled “soft” or undaring in the eyes of their colleagues.’” 73 A later study of internal communication patterns among private sector employees engaged in strategy, research, development, marketing, and sales found similar forces at work. 74 The study discovered that employees working for a large, multinational technology company regularly refrained from sharing ideas about how to improve efficiency because they thought their managers would interpret the feedback as insulting or threatening. 75

69. Milliken, Morrison & Hewlin, supra note 44, at 1467 (“[Employees’] desire to avoid negative outcomes played an important role in their decisions to remain silent.”). “The most frequently anticipated negative outcome related to damaging one’s image or being labelled in a negative manner. . . . Many respondents [also] expressed concerns about damaging relationships and losing relational currency.” Id.
73. Id. at 3 (quoting Arthur Schlesinger, Jr., A Thousand Days 258–59 (1965)).
75. Id. (defining this assumption as “presumed target identification,” meaning “a taken-for-granted belief in managers’ identification with the status quo, which leads to the causal assumption that those higher in an organizational hierarchy hear suggestions as personal criticism”).
A parallel factor affecting employees’ sense of danger is the common fear that dissent will result in adverse professional consequences like termination, loss of pay, loss of promotion, a poor performance review, or reassignment. Indeed, because managers control many of the variables that have the most direct impact on their daily professional lives, employees often go to great lengths to avoid any behavior that might jeopardize their relationships with them, including by suppressing critical comments they think might be unwelcome. Consider the following remarks from employees surveyed about their attitudes toward dissent at work:

- I raised a concern about some policies and I was told to shut up and that I was becoming a troublemaker. I would have pursued [the issue] further but presently I can’t afford to risk my job. This has made me go into a detached mode, making me a ‘yes man.’

- A co-worker was being phased-out and it was unclear to those around why this was happening. I did not feel that I could speak honestly and openly to his bosses despite my strong working relationship with them. I felt that I would be fired or fall out of favour if I spoke up. I felt it was a moral imperative to act, but in the end, I did nothing.

- Managers would take mental notes and you couldn’t really express yourself. They would hold it against you. They valued loyalty above all else . . . You had to watch what you said. If you did an okay job and never said anything controversial, you would move up in the organization.

- “What good is it going to do me to stand up and have a legitimate question or maybe challenge [my supervisors] about something? Nothing but put me lower in the basement.”

- “If I disagree, they would maybe hold that grudge against me—like our end-of-year review, they might be nit-picky.”

- “My manager determines my destiny at this company . . . I dare not challenge him and what he’s telling me to do. So, in a sense, it’s not safe to speak up.”

- “Basically you’re just trying to make the person above you love you . . . If you start raising uncomfortable questions

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76. Id. at 461; Naomi Schoenbaum, Towards a Law of Coworkers, 68 Ala. L. Rev. 605, 620 (2017); Veronica Root Martinez, Combating Silence in the Profession, 105 Va. L. Rev. 805, 842 (2019).
77. Morrison, supra note 25, at 181.
78. Milliken, Morrison & Hewlin, supra note 44, at 1453 (alteration in original).
79. Id. at 1462.
80. Id. at 1464 (alteration in original).
81. Detert & Edmondson, supra note 74, at 468.
82. Id.
83. Id.
and being holier-than-thou, you may be absolutely right, but you shoot yourself in the foot.”

Though anecdotal, the logic behind each quote is clear: if expressing a contrary or critical viewpoint creates the real or imagined risk of hindering one’s career—or at least might make one’s life at work less comfortable—then employees become incentivized to remain silent. In fact, most employees arrive at work already taught to err on the side of silence. This is because situations where dissent leads to adverse professional consequences are usually much more noticeable than any perceived or actual problems caused by silence. Making matters worse is the frequent tendency of organizations to reward conformity and praise employees who preserve internal harmony. Such patterns create a culture where “it is more important to be ‘on the team’ than to be right.”

They also reflect how, even though many firms say they welcome dissent, much of American corporate culture is perceived as discouraging any behavior that might “rock[] the boat.”

A final point worth considering is that among all dissenters, whistleblowers arguably face the greatest social and professional pressures to stay quiet. Recent history is replete with instances where they have been “ostracized, harassed, given empty or impossible assignments, reprimanded, demoted, transferred, dismissed, or blacklisted.” These direct forms of retaliation are often further accompanied by acts of character assassination—as when whistleblowers are portrayed as traitors or snitches—or the spreading of rumors about a whistleblower’s “sexual activity, drug habits, laziness, [mental health], and—ironically—illegal actions such as stealing or accepting bribes.” While these tactics are most common when organizational leaders are the ones involved in the alleged wrongdoing and thus want to keep their actions hidden, they are also frequently used when leaders simply hope to create a climate that will convince others not to challenge authority.

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84. Perlow & Williams, supra note 30.
85. Detert & Edmondson, supra note 74, at 465.
86. Sunstein, supra note 56, at 76.
87. Detert & Edmondson, supra note 74, at 468 (“Said one sales representative, explaining his reluctance to speak up, ‘It’s just corporate America in general.’”); Milliken, Morrison & Hewlin, supra note 44, at 1455 (“Other scholars note that organizations are often intolerant of criticism and dissent, and that employees may withhold information in order to not ‘rock the boat’ or create conflict.”). In future work, I hope to examine how the professional workplace cultures in other countries compare to the United States when it comes to norms surrounding organizational dissent.
88. Brian Martin, Corruption, Outrage, and Whistleblowing, in Research Companion to Corruption in Organizations 206, 210 (Ronald J. Burke & Cary L. Cooper eds., 2009).
89. Id.
90. Mesmer-Magnus & Viswesvaran, supra note 62, at 280–81. For example, even if a manager is not engaged in wrongdoing, she may feel that a whistleblower in her ranks will cause her superiors to perceive she lacks sufficient control over her direct reports. Id. at 281.
that by making visible and powerful shows of hostility toward whistleblowers they can make a convincing case that silence is the only way for others to avoid suffering similar fates.\footnote{Detert & Edmondson, supra note 74, at 465 (“To the individual, silence appears to work (that is, it keeps him/her safe) . . . .”).}

D. \textit{Balancing the Costs and Benefits of Organizational Dissent}

With the foregoing considerations in mind, how should firms and employees approach dissent if they wish to tap its potential benefits while mitigating potential negative effects and practical challenges? Most of the guidance offered to date proceeds from the premise that dissent is a positive resource that firms should encourage and cultivate.\footnote{See, e.g., Taylor, supra note 2; Perlow & Williams, supra note 30.} From there, commentators typically recommend that firms apply focused managerial techniques designed to make employees reach a point on the efficacy-safety scale “when the motivators or driving forces [for dissent] are stronger than the inhibitors.”\footnote{Morrison, supra note 25, at 185.}

For example, a common recommendation from management scholars is for leaders to set a pro-dissent “tone from the top” by “convey[ing] sincere receptivity” to criticism.\footnote{Detert & Trevino, supra note 58, at 267; Morrison, supra note 25, at 189–90.} Managers are also urged to create a workplace climate where they are seen as “approachable and responsive,” as well as one where dissenters are praised and treated fairly.\footnote{Milliken, Morrison & Hewlin, supra note 44, at 1455.} Similar ideas include working to build greater levels of trust with employees by interacting with them informally in hallways or cafeterias, following up with them about any actions taken in response to their feedback, and consulting them directly about perceived barriers to dialogue.\footnote{Detert & Trevino, supra note 58, at 267.} Other, more formalized recommendations include creating company-wide ombuds offices and anonymous hotline systems so that employees will have the structural means available to share confidential concerns with management.\footnote{Milliken, Morrison & Hewlin, supra note 44, at 1473.}

As far as best practices go, each of these suggestions has merit. They have all been applied from time to time to make productive dialogue more likely to occur. The problem with relying on them exclusively to calibrate dissent, however, is that they remain incomplete. Specifically, they falter in terms of reliability and predictability. For one, managers and policies come and go. Just because a current manager expresses an openness to dissent does not mean their successor or their peers across the organization will do the same. Furthermore, maintaining objective fidelity to a pro-dissent “policy” is often easier said than done. This is especially true once reality sets in about how critical speech can affect different people in different ways within highly politicized work environments. Any firm can hold up dissent as an ideal, but how it is handled in
practice will come down to the actions of individual managers applying their own subjective judgement on a case-by-case basis as to what speech is, on balance, helpful or disruptive.

The latter realization often puts employees in a Catch-22 situation. Even when their firms tell them that they should feel free to speak candidly, employees know that any eventual judgment about whether their speech is positive or negative will depend on the whims of managers working with the benefit of hindsight. Indeed, among firms that expressly instruct their personnel to blow the whistle, many have later retaliated against certain employees who actually abide by that policy.\textsuperscript{98} Even ombuds offices and anonymous hotlines, while safe and benign on the surface, may do more to hinder rather than promote transparent dialogue. As one commentator put it, “why do organizations need formalized systems that promise anonymity . . . if it is not inherently unsafe to speak up” without them?\textsuperscript{99}

The bottom line is that firms and employees struggle a great deal with the challenges and complexities surrounding organizational dissent. Because firms clearly value dissent, we can expect to see continued efforts to prioritize the voicing and tolerance of dissent in corporate values statements, employee handbooks, and statements of corporate responsibility. But another more promising (and often overlooked) way forward is to start focusing less on managerial best practices and more on legal duties and responsibilities.\textsuperscript{100} The following Part situates dissent as a central feature of the classic fiduciary relationships that comprise modern corporations and other organizations.

\section*{III. Dissent as a Fiduciary Obligation}

Dissent holds a special place within corporate and fiduciary law. Reconceptualizing dissent as a fiduciary obligation helps to bolster dissenters’ sense of safety and efficacy while also helping firms create productive workplaces and cultures built on continuous learning. The first step in this process is to examine when agents and employees are required to speak. The focal point for this inquiry is the agent’s duty of candor. As this Article will explain, the theoretical underpinnings that support the duty of candor go far toward explaining why it contains a pro-dissent norm.

\subsection*{A. The Duty of Candor}

The duty of candor is a feature of the law of agency. Agency is the fiduciary relationship that arises whenever one person (the agent) agrees

\begin{itemize}
\item \textsuperscript{98} Boles, Eisenstadt & Pacella, \textit{supra} note 39.
\item \textsuperscript{99} Detert & Trevino, \textit{supra} note 58, at 264.
\item \textsuperscript{100} Specifically, by developing a richer understanding of how dissent intersects with corporate and fiduciary law, this Article will show how we can craft a uniquely promising blueprint for bolstering dissenters’ sense of safety and efficacy while also helping firms create and sustain productive cultures built on continuous learning.
\end{itemize}
to act on behalf of and under the control of another (the principal).\textsuperscript{101}
As a matter of black-letter law, agency governs most employment relationships, including the relationship between corporate officers and their board of directors.\textsuperscript{102} Indeed, as this Article will unpack further below, almost every corporate employee with at least modest discretionary power is an agent of their employer.

Once an agency relationship is created, the law provides that the principal may become legally responsible for the acts of the agent in both contract and tort.\textsuperscript{103} The law also provides that agents and principals owe specific duties to one another.\textsuperscript{104} With respect to the duties owed by the agent to the principal, the one of most relevance here is the duty of candor.

According to the \textit{Restatement (Third) of Agency}, the duty of candor obliges the agent to disclose information to the principal in two situations. The first is when the agent discovers information that is material to their specific responsibilities.\textsuperscript{105} For example, if an agent is hired to deliver packages, they must tell their principal if the delivery van they need to use has been stolen. Likewise, if an agent is hired to sell the principal’s home, the agent must disclose any intention they have to purchase the home for themselves. Though perhaps obvious, disclosure in the latter context is required so the principal will be aware of a conflict of interest affecting the agent’s assigned task.

The second situation where candor is legally compelled covers a broader range of potential activity. Agents are bound to disclose any information they know or reasonably should know their principal would wish to have.\textsuperscript{106} This obligation would apply, for instance, if an agent hired to deliver packages discovers that one of their principal’s competitors is planning to offer considerably lower fees for comparable services. Though not directly connected to the narrow job of delivering packages from point A to point B, the information the agent acquired relates to something their principal would reasonably want to know about, presumably so it can review its own pricing strategy and make any adjustments necessary to remain competitive.

The standard two-prong formulation of the duty of candor is also frequently refined to align with the parlance or practices of specific agency relationships. For example, many state partnership statutes codify a version of the duty by requiring each partner to disclose to their co-partners, “\textit{without demand}, any information concerning the partnership’s business and affairs reasonably required for the proper exercise of the partner’s rights and duties under the partnership agreement or

\begin{footnotes}
\item[101.] \textit{Restatement (Third) of Agency} § 1.01 (Am. L. Inst. 2006).
\item[103.] \textit{Restatement (Third) of Agency} § 2.
\item[104.] \textit{Id.} § 8.01 cmt. b.
\item[105.] \textit{Id.} § 8.11.
\item[106.] \textit{Id.}
\end{footnotes}
Alternatively, in health law and in the rules of professional responsibility for attorneys, the duty of candor is often couched along the lines of informed consent. The attorney, as their client’s fiduciary agent, must share information with their client that the attorney knows or should know the client needs to make an informed decision about the matter for which the attorney has been retained to advise. Physicians must similarly disclose to their patients “the choices with respect to proposed therapy and the dangers inherently and potentially involved.” These field-specific disclosure requirements may not be labeled duties of candor as such, but they operate in much the same way.

B. Situating Dissent Within the Duty of Candor

Most cases where the duty of candor applies are straightforward. As noted above, if an agent sees or hears something of material significance to either their assigned role or their principal’s affairs, then the law says they must pass that information along. What is less clear is whether the duty of candor should also extend to cases featuring employee dissent. Recall that dissent refers to expressions of disagreement with organizational strategies, decisions, or actions, including acts of whistleblowing. This definition covers a wider range of potential expression than just statements about observable fact. Hence, if an agent believes that an organizational strategy is unwise or that another employee is violating the law, does the duty of candor compel them to share this information with someone at their firm? Does it matter whether the content of the agent’s dissent is based on subjective opinion or belief rather than objective or verifiable data? The law appears settled that an agent hired to deliver packages must tell their boss if their van gets stolen: that is a piece of concrete information with a direct bearing on the job the agent was hired to perform. But must the same agent also speak up if they honestly believe—but do not know as a fact—that the company’s hiring practices are discriminatory or simply misguided?

Though few cases speak directly to dissent’s place within the duty of candor, several practical and doctrinal considerations suggest that agents are legally obliged to dissent under certain circumstances. This conclusion follows from candor’s role in facilitating the principal’s ability to control its agents and make decisions, as well as from a review of the


109. Canterbury v. Spence, 464 F.2d 772, 782 (D.C. Cir. 1972); see also Cobbs v. Grant, 502 P.2d 1, 9–10 (Cal. 1972) (“[T]he patient, being unlearned in medical sciences, has an abject dependence upon and trust in his physician for the information upon which he relies during the decisional process.”).
norms and standards implicit in the agent’s broader fiduciary duties of care and loyalty.

1. Control and Decision-Making

From a practical standpoint, the duty of candor is a natural outgrowth of agency’s core purpose of enabling one party, the principal, to conduct business more efficiently through the help of another, the agent. This is apparent given that much of what agency law accomplishes involves powers of delegation. Through their ability to delegate legal authority to an agent for the completion of certain tasks, the principal becomes free to devote their time, energy, and expertise to other pursuits. At the same time, because agency law also obliges agents to follow instructions set by the principal, the principal is still able to maintain significant control over how assigned tasks are performed even when they are not present to monitor their actual execution.

Candor enters this mix as a consequence of delegation making the agent a legal extension of the principal both for the purposes of taking action and for acquiring knowledge. As the principal’s legally salient representative, the agent functionally serves as the principal’s own eyes and ears when out in the world. In this capacity, the agent may very well observe details during their work that, if their principal knew of them, would alter the principal’s judgment about what the agent should do under the circumstances. The duty of candor thus ensures that those details make it back to the principal in time to facilitate the principal’s right to control their agent by, for example, instructing them to handle the assigned matter differently. Moreover, candor’s relationship to control is consistent with the duty’s overall power to improve the quality of the principal’s decision-making. When an agent reports what they discover as they perform their work, the principal acquires information that may help them mitigate a previously unknown risk, take advantage of new opportunities, and generally proceed on a more fully informed basis.

A relevant example comes from Delaware where, in 2016, the Court of Chancery considered the application of the duty of candor to corporate officers. The case, Amalgamated Bank v. Yahoo! Inc., involved a request by shareholders to inspect Yahoo!’s books and records in connection with the company’s hiring and subsequent firing of its chief operating officer (COO) fourteen months later. The COO’s short tenure garnered significant attention because, pursuant to the terms of his employment contract, his termination without cause entitled him to a

111. Id. at 859 (observing how the absence of a duty of candor would limit the principal’s knowledge base and “undermine its legitimate powers of control”).
“stratospheric” $60 million severance package.\textsuperscript{113} A potential breach of the duty of candor became central to the case due to conduct by Yahoo!’s CEO in the lead up to the COO’s appointment. The shareholders cited this conduct as justification for their inspection request. They alleged that the CEO “cryptically” withheld from the board of directors the COO candidate’s name, position, and qualifications during the early stages of the hiring process.\textsuperscript{114} They also claimed the CEO provided inaccurate information to the board about the proposed total compensation package for the COO position.\textsuperscript{115}

In reviewing these claims, Chancellor Laster confirmed that a corporate officer’s status as both a fiduciary to the corporation and an agent who reports to the board means they have a “duty to provide the board of directors with the information that the directors need to perform their statutory and fiduciary roles” in protecting corporate and shareholder interests.\textsuperscript{116} The court then went on to find that the facts alleged by the shareholders established a credible basis to suspect the CEO breached this candor obligation by withholding key pieces of information about the COO candidate’s background, thereby making the shareholders’ inspection request proper under Delaware law as an inquiry into possible corporate wrongdoing.\textsuperscript{117}

Given the interdependence between the duty of candor and the principal’s interests in control and decision-making, it seems intuitive that dissent, as a specific category of candor, must fall within the duty’s scope. Whistleblowing presents perhaps the easiest case. A rule that compels agents to report potential law and policy violations bolsters the principal’s ability to take corrective action and mitigate the risk of suffering adverse reputational or legal consequences. For instance, an agent’s report of misconduct might be the only way for the principal to discover the need to dismiss certain personnel, increase monitoring efforts, adjust its amount of capital reserves, or retain legal counsel. This rationale was central to In re Allegheny International, Inc.,\textsuperscript{118} a case where the Third Circuit found that a senior corporate executive was bound by the duty of candor to inform his company’s board of directors about material accounting improprieties he discovered at two of the subsidiaries he was responsible for overseeing. The court found the candor obligation to exist regardless of the terms of the executive’s employment contract, adding further that the affirmative duty to speak up is “especially strong” when a corporate officer knows of legal violations that are “either continuing or likely to

\begin{footnotes}
\item[113] Id. at 772–73.
\item[114] Id. at 777, 782.
\item[115] Id. at 777–80.
\item[116] Id. at 781.
\item[117] Id. at 780–83 (note that the court did not hold the Yahoo! CEO breached her fiduciary duty; rather, the court only held that further investigation was warranted, with the question of breach ultimately hinging on the CEO’s motives for withholding information from the board (i.e., negligent or intentional)).
\item[118] 954 F.2d 167 (3d Cir. 1992).
\end{footnotes}
continue."  

Consistent with Amalgamated Bank, the court said the duty of candor performs a vital role in this context because of “how important full corporate knowledge of [illegality or misbehavior] might be to the corporation’s profitability or its existence.”

The same rationale extends to other forms of dissent, including dissent based on an agent’s subjective or speculative judgment about the meaning of information they acquire. A useful illustration comes in Evtex Co. v. Hartley Cooper Associates Ltd. In that case, a jewelry company, Evtex, purchased an insurance policy from Hartley Cooper through an intermediary, Mr. Finch. After Evtex lost approximately $700,000 worth of goods to theft, the company submitted a claim to Hartley Cooper for recovery of that amount under its policy. Evtex also instructed Hartley Cooper to transfer the settlement funds to Mr. Finch, who would then pay them over to Evtex. Unfortunately, Mr. Finch absconded with the funds as soon as Hartley Cooper deposited them in his account. Evtex subsequently sued Hartley Cooper to recover the stolen money on the theory that the insurer breached its duty of candor. Specifically, Evtex argued that Hartley Cooper, as its insurance agent, owed a fiduciary duty to share reservations it had developed about Mr. Finch’s trustworthiness while working with him on other deals—an obligation it breached by keeping those worries to itself.

In affirming the district court’s judgement in favor of Evtex on the fiduciary duty issue, the U.S. Court of Appeals for the Second Circuit first observed that a fiduciary’s “duty to disclose information includes situations where the agent should have known this information would affect the desires and conduct of the principal.” The court then continued:

Here, Hartley Cooper’s knowledge affected its own conduct. Hartley Cooper hired [a private investigator] to alleviate its own concerns of collecting the money [from Finch]. As Finch was entrusted with $697,176 of Evtex’s money, Hartley Cooper should have known that Evtex reasonably would share the same concerns . . . . Thus, the district court did not err in finding that Hartley Cooper breached its fiduciary duty to Evtex.

The Second Circuit also upheld the lower court’s finding that Hartley Cooper’s silence was the proximate cause of Evtex’s injury. Though it did not reference the principal’s right to control explicitly, the court noted that if Hartley Cooper had objected to Evtex’s plan to deal with Mr. Finch and explained why, then presumably Evtex would have instructed its agent to handle the insurance payout differently.

119. Id. at 179.
120. Id. at 180; see also Item Software (UK) Ltd v. Fussibi [2004] EWCA (Civ) 1244 (appeal taken from Eng.) (holding that a fiduciary has an obligation to disclose commission of an unlawful act).
121. 102 F.3d 1327 (2d Cir. 1996).
122. Id. at 1333.
123. Id. (footnote omitted).
124. Id. at 1334.
2. Care and Loyalty Generally

In addition to bolstering the principal’s practical interests in control and decision-making, the notion that pro-dissent norms and actions are consistent with the duty of candor is also reflected in the agent’s overarching fiduciary duties of care and loyalty. To explain, we should begin by reviewing the theory behind all fiduciary obligations. The law generally imposes fiduciary status on relationships that feature the “principal-agent” problem. The principal-agent problem “arises whenever one person, the principal, engages another person, the agent, to undertake imperfectly observable discretionary actions that affect the welfare of the principal.” This relationship is thought to present a problem because the principal’s decision to empower an agent to work on their behalf exposes them to a risk of abuse—the most immediate of which is that the agent might not act as the principal hopes. For example, an agent might be selfish or lazy, as when they take longer than necessary to complete an assignment or arrive late to work. These behaviors implicate “agency costs,” the term used to describe the losses that accrue whenever an agent does something that is contrary to the principal’s interests. Agency costs are never zero, and they are a natural outgrowth of the fact that only the principal bears the full risk of loss from whatever venture forms the basis of the agency relationship.

Much of fiduciary law—and indeed much of corporate law—is aimed at mitigating agency costs. The main strategy to emerge is the imposition of fiduciary duties. Fiduciary duties establish standards of behavior that agents must observe when working on a principal’s behalf. To be sure, if a principal could easily contract for or monitor how an agent acts in every situation, then they probably would. But practically speaking, it is impossible to do so—and would be prohibitively expensive to try—given the range, complexity, and uncertainty of the potential circumstances an agent may face in service to their principal. Besides, at some point the amount of energy a principal spends trying to watch or control their agents becomes self-defeating. It would make little sense, for example, for a business owner to accompany the members of their sales team every time they pitch a prospective client. This approach

126. Id.
127. Id.
129. Sitkoff, supra note 125, at 424.
would certainly help the owner watch for agency costs, but it would also cut against the efficiency benefits that led them to rely on agents to do that work in the first place. Fiduciary duties thus aim to pick up the slack left by monitoring and contracting gaps by exposing agents to after-the-fact liability for acting adverse to the principal’s interests.  

The standards that operationalize the agent’s fiduciary duties break down into three categories: care, loyalty, and performance. The duties of care and loyalty are the most expansive of the three and are traditionally thought of as the “primary” fiduciary duties. First, the duty of care requires agents to perform their responsibilities with the same degree of care that a prudent person would display in like conditions. This standard is objective. It is assessed by reference to the “training, skills, and expertise typically possessed and exercised by persons occupying the role that the [agent] was occupying at the time of the alleged misconduct.” Second, the duty of loyalty obliges agents “to act loyally for the principal’s benefit in all matters connected with the agency relationship.” This duty is frequently described as establishing the rules of “no conflict” and “no profit.” These two rules mean that, at a minimum, the fiduciary must avoid acting under a conflict of interest or engaging in self-dealing, and they must also refrain from appropriating secret profits or opportunities from the principal.

The duties of performance are narrower by comparison and arise from commonly recurring circumstances where more precision is necessary to show how the duties of care and loyalty should be implemented. That is, while the law treats the duties of care and loyalty as “open-ended standards” flexible enough to cover a diverse range of facts and situations, the duties of performance provide targeted, context-specific guidance for what the principles of care and loyalty require in particular fiduciary scenarios. A case in point comes from the prudent investor rule in the fiduciary field of trust law. Professor Robert Sitkoff describes how the prudent investor rule represents “an elaborated standard that, by focusing on risk-and-return and diversification, gives specific content to the open-ended, primary duty of care, called prudence in trust parlance, as applied to the investment function of trusteeship.” Put another way, the

133. Sitkoff, supra note 125, at 424.
135. Id. at 406.
137. Sitkoff, supra note 125, at 426.
138. Id.
139. Id.
140. Id. at 420.
prudent investor rule is a rule of performance that “implements the duty of care (prudence) by supplying additional detail on what a prudent person would do in the more specific context of investment management.”\textsuperscript{141}

3. \textit{Dissent and Candor as Elaborations of Care and Loyalty}

Like the prudent investor rule, the duty of candor operates as a rule of performance that elaborates how care and loyalty should manifest when agents develop knowledge in the course of their fiduciary service. Beginning with care, an agent’s obligation to provide information to the principal frequently correlates to the diligence and prudence expected of agents operating in specific situations.\textsuperscript{142} A principal will reasonably expect to be told, for instance, if an agent fails to accomplish an assigned task, or if they encounter an obstacle that makes it difficult for them to achieve the desired result.\textsuperscript{143} This observation is reflected in cases like \textit{Nu-Air Manufacturing Co. v. Frank B. Hall & Co.},\textsuperscript{144} where an agent failed to inform her principal that the coverage she was offered by an insurer—and which she subsequently purchased—was for an amount lower than what the principal requested.\textsuperscript{145} By failing to tell the principal of the variation between the expected and actual scope of the coverage, and thereby failing to afford the principal an opportunity to obtain insurance elsewhere, the agent did not exercise the reasonable diligence expected of a similarly situated agent. The same considerations also inform cases when doctors relay test results to their patients, as well as when homebuyers rely on their real estate agents to pass along any disclosure documents about a property that sellers are legally compelled to provide.\textsuperscript{146} The duty of candor enhances the duty of care in these situations by demanding that agents fully and accurately share the information that emerges from the performance of tasks entrusted to them because of their purported knowledge or specialization. To paraphrase one court, why rely on an agent’s care at all if they are under no obligation to tell the principal what the execution of that care means for the principal’s interests?\textsuperscript{147}

The duty of candor’s alignment with the duty of loyalty is arguably even more salient than in the context of care. This point follows from the sheer breadth of the duty of loyalty, an obligation requiring “that one party completely subordinate self-interest \textit{and} act exclusively for the benefit of the other party.”\textsuperscript{148} Though this definition is often recast as imposing the narrower rules of “no conflict” and “no profit”—proscriptive rules

\begin{flushright}
\textsuperscript{141} \textit{Id.} at 428.
\textsuperscript{142} \textit{Restatement (Third) of Agency} § 8.11 (Am. L. Inst. 2006).
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} 822 F.2d 987 (11th Cir. 1987).
\textsuperscript{145} \textit{Id.} at 989–90; \textit{Restatement (Third) of Agency} § 8.11 cmt. d, illus. 12.
\textsuperscript{146} \textit{See}, e.g., Súir v. Horn, 668 N.W.2d 332, 336 (S.D. 2003).
\textsuperscript{147} \textit{Id.}
\end{flushright}
suggesting the avoidance of self-interested behavior—it also contains a prescriptive component that compels agents to take positive action in ways not so easily categorized. For example, courts observe that not only does the duty of loyalty demand that fiduciaries “absolutely refrain from any act which breaches the trust reposed in them, but also to affirmatively protect and defend those interests entrusted to them.”149 The positive side of the duty is consistent with an understanding of loyalty as akin to devotion or allegiance.150 It implies a proactive responsibility to help and support one’s beneficiary beyond simply “subduing self-serving impulses.”151

Given the affirmative dimension of the duty of loyalty, the notion that candor would play a role in actualizing what the principles of loyalty require becomes virtually self-evident. The key is the fiduciary agent’s power to exercise discretion while working on behalf of another. Every time an agent faces a choice among a range of options, their legal obligation to loyally serve the principal’s best interests must guide their ultimate decision about how to behave. The fiduciary is not free to act, or fail to act, however they like. The fiduciary must exercise their judgment in the manner they believe is in the best interests of the principal-beneficiary.152 This requirement extends to any information the fiduciary encounters. Information that comes within the fiduciary’s purview must be filtered through the same loyalty-driven decision matrix as all other matters. Thus, if the fiduciary acquires information reasonably germane to the beneficiary’s interests, they must disclose it—just as they must pass along any profits generated by their management of the beneficiary’s property.153 This recognition helps explain the outcome in the Evvtex case discussed earlier, where the court found that an agent breached its fiduciary obligation by depriving a principal of an informational resource it was entitled to receive as a beneficiary.154

The clear communicative demands of care and loyalty are what ultimately evidence the pro-dissent norm within the duty of candor. Imagine, for example, that a principal instructs their agent to inspect a house for potential purchase. The agent’s general duty of candor requires them to tell the principal if they discover the structure is not up to code or shows signs of severe water damage. The agent’s role in the inspection positions them to be the conduit for objective, material information relating

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to downside risk that will enable the beneficiary to acquire knowledge about whether to buy the house or how much to pay. From this basic and noncontroversial scenario, it is easy to see why at least one major form of dissent, whistleblowing, also aligns with an agent’s candor obligations. If a beneficiary has the right to know about any underlying legal or structural problems with a home being contemplated for purchase, then it is reasonable to find that an organizational principal has the right to know about illegal acts or other forms of objective misconduct that agents observe within the firm. Courts in the U.S. and U.K. have reached the same conclusion, recognizing that facts about unlawful activity constitute the type of information a principal would reasonably want to know in the course of its operations. Whether framed as commensurate with the level of prudence expected of agents in the performance of their work—an element of due care—or as affirmative action taken to protect the principal’s best interests—the requirement of loyalty—the disclosure of unlawfulness represents an informational resource that is relevant and valuable to the principal’s interests. Indeed, to the latter point, when whistleblowers do speak up, many believe “that they [are] behaving in a loyal manner, helping their employers by calling top management’s attention to practices that could eventually get the firm in trouble.”

A more complicated picture emerges when the content of candor strays from objective matters like observed wrongdoing to the realm of subjective or speculative information, beliefs, and opinions. Do the care and loyalty obligations of organizational agents compel them to dissent when they reasonably believe in good faith, but may not know, that a manager’s proposed decision will harm the firm? Consider, for instance, a situation where an agent in a corporate marketing department believes that their boss’s idea for an advertising campaign is offensive to women. Though the firm’s leadership might desire or encourage its employees to speak up in a situation like this as a matter of good business practice, is the agent bound to do so such that their silence would constitute a breach of fiduciary duty? Should it matter whether the agent’s silence stems from a fear of suffering adverse personal or professional repercussions?

In examining these questions, it is important to note that knowledge involves more than just scientific or objective fact. As Nobel Prize-winning economist Friedrich von Hayek observes, knowledge includes “knowledge of the particular circumstances of time and place. . . . To know of and

155. See, e.g., In re Allegheny Int’l, Inc., 954 F.2d 167, 180 (3d Cir. 1992); Item Software (UK) Ltd v. Fassihi [2004] EWCA (Civ) 1244 (appeal taken from Eng.).


157. Near & Miceli, supra note 28, at 165; see also Robert A. Larmer, Whistleblowing and Employee Loyalty, 11 J. Bus. Ethics 125, 127 (1992) (“A more adequate definition of being loyal to someone is that loyalty involves acting in accordance with what one has good reason to believe to be in that person’s best interests. . . . [T]he argument can be made that the employee who blows the whistle may be demonstrating greater loyalty than the employee who simply ignores the immoral conduct, inasmuch as she is attempting to prevent her employer from engaging in self-destructive behaviour.”).
put to use a machine not fully employed, or somebody’s skill which could be better utilized . . . .”\textsuperscript{158} Professor Matthew Bodie adds similarly that “[k]nowledge is defined both as explicit sets of . . . information as well as the ability to apply a repository of unspecified information in developing an answer or approach to a . . . problem.”\textsuperscript{159} Given these understandings of knowledge, it is clear that many fiduciary relationships are established because a beneficiary desires the fiduciary’s subjective input. This is true in most fiduciary relationships built around an agent’s advisory function, including those between lawyers and clients, financial advisors and clients, and doctors and patients. A hallmark of these relationships is the beneficiary’s partial transfer of autonomy to another whose advice or judgment they rely on when making decisions (e.g., whether to settle, where to invest, or what medical treatment to seek).\textsuperscript{160} When the fiduciary provides whatever advice they feel is warranted under the circumstances of the relationship, their voice might reasonably manifest as dissent.

For example, if a criminal defendant with several prior convictions says they want to testify in their own defense at trial, the attorney should explain the risks involved with that choice and why they disagree as a matter of strategy (assuming the attorney feels the testimony would be a mistake). The client may choose to ignore the attorney’s advice, but the attorney is still obliged to render the dissenting opinion so the client can decide what to do based on all relevant information—which, in cases like this one, must include the attorney’s subjective judgment about the relative wisdom of different choices formed through years of specialized training and experience. We also see in this scenario how the knowledge attributes of dissent intersect with and support a positive understanding of loyalty that requires fiduciaries to do what they think will best advance the well-being of their beneficiaries. In cases where a beneficiary enters a fiduciary relationship with an agent bound to exercise discretion or provide advice consistent with what they consider to be in the beneficiary’s best interests, the performance of those functions may require sharing objective or subjective information that challenges the beneficiary’s initial preferences or desires. They might not enjoy hearing it, but the defendant in the example above may fail to realize or fully appreciate the dangers inherent in testifying in one’s own defense if the attorney does not dissent—just as a patient may not fully appreciate the risks associated with a particular health treatment if the physician does not challenge the patient’s prevailing assumptions about, say, the side effects of herbal remedies.\textsuperscript{161}


\textsuperscript{160} Smith, supra note 150, at 618.

\textsuperscript{161} Goldberg, supra note 134, at 414 (“Disclosure of treatment risks and benefits can be understood in part as a precaution against the physician—understandably, given her expertise and experience—falling into the trap of making a unilateral
Indeed, it would be hard to say that lawyers, physicians, and other fiduciary advisors could ever fulfill their care or loyalty obligations by failing to push back when their subjective judgment leads them to believe a beneficiary’s decision-making process is headed toward self-harm. This would be especially true if the fiduciary refrains from sharing dissenting advice because they think silence will serve their own interests rather than those of the beneficiary. As Professor Lionel Smith observes, allowing selfish motivations to dictate the manner or content of advice would transform the fiduciary’s behavior into something more accurately described as manipulation.162

4. Dissent and Candor in Specific Agency Contexts

Admittedly, the observation that dissent aligns well with the candor obligations of lawyers, doctors, and financial counselors might seem intuitive given the prototypical advisory purposes they serve. It is difficult to imagine any client or patient wanting their expert adviser to passively go along with whatever plan they propose; clients and patients often find themselves in uniquely vulnerable positions, and legal, financial, and medical affairs rarely lend themselves to obvious recommendations or “one-size-fits-all” solutions. But, returning to the organizational context, the notion that all forms of dissent are implicit in a corporate agent’s general duty of candor may seem less apparent as an elaboration of care and loyalty.

For one thing, agents at many firms are hired into non-advisory positions, and others may lack the type of specialized education, experience, or training necessary to provide well-informed judgments or opinion-based feedback. From the perspective of what will best serve a firm’s interests, dissent from these agents may end up seeming more disruptive than helpful. This concern gets to the crux of the hypothetical marketing agent who thinks her boss’s advertising strategy will offend female customers. On one hand, determining that the agent must dissent as a matter of fiduciary obligation may trigger a dialogue that eventually spares the firm considerable reputational or financial damage. The agent’s challenge to the proposed strategy could add value to the firm’s total mix of information in a manner comparable to the lawyer who dissents from their client’s impulse to take the stand. On the other hand, if the agent is mistaken, then the dissent may cause their boss to suffer unwarranted distress, anger co-workers, or contribute to an excess of “noise” that frustrates decision-making.

162. Smith, supra note 150, at 619. On the notion that withholding dissent impugns the duty of loyalty, see also Chancellor Allen’s comments in In re RJR Nabisco, Inc. S’holders Litig., No. 10389, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989) (“Greed is not the only human emotion that can pull one from the path of propriety; so might hatred, lust, envy, revenge, . . . shame or pride. Indeed any human emotion may cause a director to place his own interests, preferences or appetites before the welfare of the corporation.”).
As with all inquiries into the scope of fiduciary duties, the appropriate way to address these issues is by examining the context and surrounding circumstances of the fiduciary relationship under scrutiny. The standards of care and loyalty that fiduciaries must adhere to are informed by whatever signals, conditions, and instructions the principal provides to the agent. Professor Deborah DeMott describes the principal’s manifestations in this regard as setting the “interpretative framework through which the agent determines actions to take on the principal’s behalf.”163 The Restatement (Third) of Agency adds that “an agent’s fiduciary duties to the principal vary depending on the parties’ agreement and the scope of the parties’ relationship.”164 With respect to the duty of candor in particular, its requirements for dissent will fluctuate in keeping with the specificity or breadth of the fiduciary’s assigned responsibilities. An agent who is given precise instructions regarding disclosure or who is charged with managing only a single transaction will be subject to candor obligations that are much narrower in scope than an agent charged with providing advice or exercising discretion across a range of subjects or transactions.165

In many firms, answers to questions about scope will be provided through specific instructions to agents about how to act. One example cited earlier is Netflix’s declaration in its original corporate Value Statement that employees should “share information openly, broadly and deliberately,” be “extraordinarily candid with each other,” and “challenge prevailing assumptions.”166 The Statement further provides that “[s]ilent disagreement” from employees “is unacceptable and unproductive” given the company’s commitment to “farm for dissent.”167 For an agent contemplating what to do in light of these categorical statements in support of dissent, they must interpret the language used by the company in tandem with the overarching fiduciary obligation to act in accord with what they think will serve the firm’s best interests. There are presumably many situations where this combination of influences will cause the reasonable agent to feel bound to offer objective or subjective dissent on issues like business strategy, operations, compliance, or product development. The agent must, as a fiduciary, act as the agent believes the principal would have acted in the same position—and here, the agent is told the principal would dissent.168

163. Deborah A. DeMott, The Fiduciary Character of Agency and the Interpretation of Instructions, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 321, 329 (Andrew S. Gold & Paul B. Miller eds., 2014); see also Restatement (Third) of Agency § 8.01 cmt. b (Am. L. Inst. 2006) (“The general fiduciary principle facilitates a principal’s ability to exercise control over an agent because it provides a benchmark standard against which the agent must interpret manifestations by the principal . . . .”).

164. Restatement (Third) of Agency § 8.01 cmt. c.

165. Id. § 8.11 cmt. c.

166. Netflix, supra note 3.

167. Id.

168. DeMott, supra note 163, at 322 (“[A]s the principal’s representative, the agent should aim to act ‘as if’ the principal personally had taken action and as the principal ‘would have’ acted—which suffices to fulfill the agent’s duty although
Instructive pro-dissent language also often appears in organizational codes of conduct. At the accounting firm Ernst & Young, for instance, employees “who become aware of misconduct” are required “to report any deviations or violations of the Code to the firm.” Apple and Meta (Facebook) similarly mandate reporting of actual or suspected misconduct, with the failure to do so being grounds for disciplinary action. Though these instructions do not target dissent as a general matter, for dissent categorized as whistleblowing, they tell agents what they must do in ways that leave little room for any subjective interpretation as to the principal’s intent. That the agent’s explicit reporting obligations are simultaneously reinforced by their fiduciary status only makes the instruction to blow the whistle even more plain.

A final contextual clue about the application and proper scope of fiduciary dissent comes from the qualities that many firms say they want in employees working in the modern knowledge economy. Professor Katherine Stone observes that today’s “[f]irms can no longer succeed if employees simply perform their tasks in a reliable but routine manner.” Employees must “commit their imagination, energies, and intelligence on behalf of the firm. They [are expected] to innovate, . . . to have an entrepreneurial attitude toward their jobs, to behave like owners.” This recognition reflects how the main drivers of profitability in the modern economy are entrepreneurship, innovation, and the willingness to adapt to shifting consumer preferences. The competitive

the principal has not, as a matter of historical fact, specifically ‘consented’ to the agent’s action. And, acting as the principal’s extension, the agent’s duty is one of faithful interpretation, aimed at accurate replication of how the principal would have acted at the time the agent determines what to do.”)


Speak up. If you see or hear of any violation of Apple’s Business Conduct Policy, other Apple policies, or legal or regulatory requirements, you must notify either your manager, People Team, Legal, or Business Conduct.

Use good judgment and ask questions. Apply Apple’s principles of business conduct, and review our policies and legal requirements. When in doubt about how to proceed, discuss it with your manager, your People Business Partner, Legal, or Business Conduct. Any failure to comply with Apple’s Business Conduct Policy—or failure to report a violation—may result in disciplinary action, up to and including termination of employment.

Id. at 2–3.


172. Id.

survival of the modern firm depends on the development, application, and enhancement of new technologies, new strategies, new business models, and operating environments that “embrace new resource combinations.” In pursuit of these objectives, firms seek to become “learning organizations” built on an employee base adept at “creating, acquiring, and transferring knowledge.” They often indicate as much through formal statements about employee ideals. For example, Apple says it prioritizes collaboration, which it says “is more than simply working together—it means passionate, collaborative debate. . . . [W]e advocate ideas, contest points of view and ultimately build on each other’s thinking to come up with the best solution.”

What the shift toward the knowledge economy and the rise of learning organizations means in practical terms is a “[g]reater dispersion of decision-making authority within firms,” decentralized management, and growing dependence on the individual discretion and problem-solving abilities of employees with specialized expertise and training. The fiduciary upshot of these developments is the important message they send to the corporate agent bound by duties of care, loyalty, and candor. Learning can only happen through open discussion, dialogue, candor, and the appreciation of difference. If agents are asked to contribute positively to an organizational environment that prioritizes learning, then complying with that mandate will require sharing and appreciating opposing views—that is, it will require dissent. Indeed, given the modern corporate goal of constant innovation across all levels of firm activity, it is worth remembering that dissent, like innovation, is at root an expression of creativity and invention.

C. The Pro-Dissent Norms of the Obligations of Good Faith and Fair Dealing

Recognizing the duty of candor’s pro-dissent norm is important not only for defining the proper scope of the agent’s fiduciary obligations, but also in connection with the reciprocal duties owed by the principal to the agent. The Restatement (Third) of Agency makes clear that “[a] principal has a duty to deal with the agent fairly and in good faith.” In general, this duty “obliges the principal to refrain from engaging in conduct that will foreseeably result in loss for the agent when the agent’s own conduct is without fault.” It also requires the principal to refrain

175. Garvin, Edmondson & Gino, supra note 173, at 87.
179. Id. at 88–89.
180. Perlow & Williams, supra note 30.
182. Id. cmt. b.
from conduct that will injure the agent’s reputation or “reasonable self-respect.”  

While the application of this duty does not mean a principal cannot revoke or change an agent’s authority, it does mean that the way a principal interacts with the agent must comport with good faith and fair dealing. Consider, for instance, the case of Shen v. Leo A. Daly Co. Mr. Shen, a U.S. citizen, moved to Taiwan to become a corporation’s general manager. As manager, Mr. Shen was designated the firm’s responsible person, or legal representative, under Taiwanese law. However, after Mr. Shen was fired, the company failed to de-list him as its responsible person. This became a problem for Mr. Shen when his former employer was later accused of tax fraud. Even though he no longer worked for the company, because Mr. Shen was still listed as the firm’s responsible person, Taiwanese authorities refused to allow him to leave the country until the tax issue was settled. When Mr. Shen sought relief in U.S. federal court, the Eighth Circuit held that his employer breached its duty of good faith by failing to alter his corporate legal status after his termination. The court found the employer liable for damages, including attorney’s fees, to compensate Mr. Shen for the unfair losses and expenses he incurred by being forced to remain in Taiwan due to the company’s inaction.

In the narrower context of dissent and candor, the principal’s obligation of good faith becomes most significant when considered alongside the efficacy-safety calculus affecting employee expression. As noted previously, a chief barrier to dissent is the agent’s frequent fear that dissent will result in negative social or professional consequences. This concern is compounded by the background condition of at-will employment. At-will employment is the law in almost every U.S. jurisdiction and provides that, absent a separate agreement, an employer can dismiss an employee or revise the terms of the employment relationship at any time and for any reason (or for no reason). Unconstrained, the flexibility that this doctrine affords employers leaves dissenters highly vulnerable. All it may take for an otherwise well-performing employee to lose their job is a manager who grows frustrated by their feedback, either because of how it makes the manager feel or because of how the manager perceives the speaker’s actions are affecting the workplace environment. Indeed, even if an individual manager might appreciate the informational benefits of dissent, they may nonetheless punish the speaker if others in the firm have hostile reactions.

Against this backdrop, the principal’s reciprocal duties of good faith and fair dealing should serve to protect agents who dissent in a manner consistent with their overarching fiduciary candor obligations. Though at-will employment provides firms with wide discretion to dismiss

184. 222 F.3d 472 (8th Cir. 2000).
185. The at-will doctrine also gives employees a corresponding right to resign at any time and for any reason.
agents, if an agent is dismissed for complying with their fiduciary duty when dissenting, then presumably, the firm would act in bad faith by penalizing them for doing what the law requires them to do—much like the firm in *Shen* breached its duty to the plaintiff when it failed to adjust his formal legal status upon termination. This conclusion does not mean a firm must always retain an employee who dissent, only that any action taken against an innocent dissenting employee must comport with principles of fairness to avoid subsequent liability.

The same rule is reflected in the implied duty of good faith that applies to all employment contracts as a feature of employment law. Consistent with the broader definition of good faith found in agency law, the *Restatement of Employment Law* posits that “where employees are under a legal duty to act or refrain from acting in particular ways, employers violate the implied duty of good faith and fair dealing by using their at-will power to terminate or otherwise discipline employees for performing those legal obligations.”186 The *Restatement* provides an illustration of this rule by applying it to employee dissent in a whistleblowing scenario. Specifically, the *Restatement* notes that a firm would breach its implied duty of good faith by firing an accounting manager for reporting financial crimes committed by the firm’s president.187 This result follows since an accounting manager who operates in this capacity ordinarily owes “a contractual (if not legal) duty to certify whether [the firm’s] financial statements are in accord with applicable accounting standards.”188

To be sure, the recognition of a duty of good faith and fair dealing in the context of employment should not be interpreted as suggesting there is an implicit “for good cause” requirement in terminations made pursuant to the at-will doctrine. As courts make clear, the duty is narrow: it applies only where “the employer ‘prevent[s] the vesting or accrual of an employee right or benefit’; if the employer retaliates against the employee because of an earned right or benefit; or if the employer retaliates because the employee performed his or her obligations under the employment contract itself or under the law.”189 This Article will soon consider whether the implied duty of good faith featured in both agency and employment law should differ in scope and application depending on the nature of each employee’s level of discretion, managerial authority, or position in the organizational hierarchy. For now, however, the point remains that in both employment relationships and agency relationships more broadly, there is an implied understanding that one party

187. *Id.* cmt. d, illus. 2.
188. *Id.*
189. Bodie, *super* note 159, at 849 (alteration in original) (quoting *Restatement of Emp. L.* §§ 2.07(c), 3.05(c)).
will not harm the other for doing what either the law or a contractual agreement requires under the circumstances.\textsuperscript{190}

Importantly for our purposes, the absence of a reciprocal duty of good faith would frustrate many of the theoretical and practical justifications that provide the foundation for dissent’s fiduciary character. For example, with respect to dissent’s ability to facilitate the principal’s right of control and decision-making responsibilities, agents who perceive no meaningful protection from retaliation in response to their good faith exercise of the duty of candor will likely come to consciously or unconsciously “interpret information in a way that does not give rise to the duty (e.g., rationalize or explain away evidence of wrongdoing by others).”\textsuperscript{191}

Again, as we will see, imposing a standard of fairness on principals does not render them incapable of clarifying how or to whom dissent should be communicated, or what issues or concerns should fall within the ambit of the duty of candor’s pro-dissent norm. It also does not eliminate employment at-will. Rather, the principal’s reciprocal obligation in this context exists solely as a final safety net for dissenters—interpreted through a lens of reasonableness—designed to “strike a balance ‘between an employer’s interest in managing his business as he sees fit and the employee’s interest in not being unfairly and improperly exploited.’”\textsuperscript{192}

\section*{IV. Counterarguments, Remaining Questions, and Implications for Governance}

As explained above, the duty of candor contains a pro-dissent norm that tracks and elaborates its overarching disclosure requirements. Recognizing this norm is consistent with the duty of candor’s control and decision-making functions as well as with its elaboration of the agent’s broader fiduciary obligations of care and loyalty. The existence and application of the norm promotes intra-firm learning and knowledge development while also making fiduciary dissenters less vulnerable to retaliation in keeping with the principal’s reciprocal obligation to treat them in good faith.

This Part now considers several counterarguments and questions relating to the analysis undertaken so far. It then concludes with an assessment of how the Article’s findings should enhance organizational engagement with dissent and improve our understanding of several related issues of corporate governance.

\textsuperscript{190} Grad v. Roberts, 198 N.E.2d 26, 28 (N.Y. 1964) (“The law contemplates fair dealing and not its opposite. Persons invoking the aid of contracts are under implied obligation to exercise good faith not to frustrate the contracts into which they have entered.”).

\textsuperscript{191} Langevoort, supra note 102, at 1211.

A. Open Questions and Counterarguments

1. The Fiduciary Status of Employees?

Because employees are agents, the law traditionally treats all employees as fiduciaries of their employers. However, some argue that fiduciary status should be confined only to employees who occupy positions of “trust and confidence,” with lower level, rank-and-file employees owing either no fiduciary duties to their employers or duties of limited scope. These limited formulations of fiduciary status, if correct, raise obvious questions about the impact of the duty of candor’s pro-dissent norm across different levels of the organizational hierarchy. If the duty of candor compels a classic trust-and-confidence employee like a corporate CEO to dissent under certain circumstances, then when, if ever, should the same be true for a mid-level manager or an employee in the company mailroom?

Initially, agency law appears to leave little doubt that employees are fiduciaries of their employers and thus owe all commensurate fiduciary duties. The Restatement (Third) of Agency begins by declaring, “[a]gency is [a] fiduciary relationship.” The comments to that provision further specify that “[t]he elements of common-law agency are present in the relationships between employer and employee, corporation and officer, client and lawyer, and partnership and general partner.” This view is supported by several courts. For example, the Supreme Court of Illinois holds that it is not just officers and directors who owe fiduciary duties to a corporation, but all employees. The Virginia Supreme Court adds, “under the common law an employee, including an employee-at-will, owes a fiduciary duty of loyalty to his employer during his employment.”

In more recent years, some courts and commentators maintain that bestowing blanket fiduciary status on all employees no longer makes sense because of the wide variation of employee responsibilities throughout the market. The Restatement of Employment Law reflects this position. It provides that fiduciary duties should be limited to employees whose job functions “expose an employer to special vulnerabilities that are too costly

194. Compare Aditi Bagchi, Fiduciary Principles in Employment Law, in The Oxford Handbook of Fiduciary Law, supra note 108, at 187, 187 (observing that employees who do not occupy positions of trust and confidence nor possess trade secrets do not owe any default fiduciary duty of loyalty), with Restatement of Emp. L. § 8.01 cmt. a (stating at most, employees may “owe an implied contractual duty of loyalty if, for example, their position gives them the opportunity to misappropriate the employer’s property or otherwise engage in self-dealing”).
195. Restatement (Third) of Agency § 1.01 (Am. L. Inst. 2006).
196. Id. cmt. c.
or impractical for the employer to protect itself against contractually, and for which ordinary contract damages are likely to be undercompensatory because the harm is unusually difficult to establish and quantify.”

What this distinction means practically is that rank-and-file employees arguably should not owe default fiduciary duties, including any duty of candor, because they can be supervised more easily and do not exercise substantial discretion in their work. This reasoning reflects a view that the agency cost concerns described earlier as the main justifications for imposing fiduciary duties in agency relationships are not as applicable in the case of lower level employees. By contrast, the Restatement would still imbue higher level and managerial employees with fiduciary duties because their ability to exercise substantial discretion in the absence of close oversight makes their employers far more vulnerable to the range of agency cost risks that the duties of care and loyalty are meant to mitigate.

While the distinction drawn by the Restatement may make some sense in the context of an open labor market—strict application of the duty of loyalty could make it harder for rank-and-file employees to leave their positions to join a competitor—the rationale for dividing fiduciary obligation solely along status lines is less sound when it comes to the duty of candor. First, one of the key elements of most relationships defined as fiduciary in nature is a disparity between knowledge and information “such that the relationship’s beneficiary is or becomes vulnerable to the actor who occupies the fiduciary role.” This characteristic is not limited to managerial or other higher level employees routinely described as holding positions of trust and confidence. The agent-employee’s duty to provide relevant, material information (including dissenting information) to the principal-employer is a feature of loyalty that enables principals to make better informed decisions and adjust their level of

199. Bagchi, supra note 194, at 191.

200. The Restatement does make a distinction for trade secrets and “implied contractual duties of loyalty ‘in matters related to their employment’ depending on the nature of the positions they hold.” See Deborah A. DeMott, Relationships of Trust and Confidence in the Workplace, 100 CORNELL L. REV. 1255, 1270 (2015) (quoting Restatement of Emp. L. § 8.01(a) (Am. L. Inst. 2015)).

201. Bagchi, supra note 194, at 191 (“The more restricted view treats employee fiduciary duties as exceptional. It applies only to employees ‘in a position of trust and confidence with their employer.’ This majority view, reflected in the Restatement of Employment Law, effectively limits employee fiduciary duties to those contexts that expose an employer to special vulnerabilities that are too costly or impractical for the employer to protect itself against contractually, and for which ordinary contract damages are likely to be undercompensatory because the harm is unusually difficult to establish and quantify.” (footnotes omitted) (quoting Restatement of Emp. L. § 8.01(a))).

202. Id. at 188–89 (“Fiduciary duties normally attach to the more powerful party in a relationship and that party is usually the employer. It is thus anomalous on its face to anoint the employer the beneficiary of an employee fiduciary duty of loyalty. By making it harder for a departing employee to start or staff new companies, an exaggerated employee duty of loyalty also raises barriers to industry entry . . . .” (footnote omitted)).

203. DeMott, supra note 200, at 1259 (footnote omitted).
control over their agents as necessary under evolving circumstances. The work that the duty of candor does in this regard is valuable across the organizational hierarchy, not just at the top. Both lower and higher level employees will, at times, discover information or develop unique knowledge that their employer would want to learn so it can protect its interests.

Moreover, even if fiduciary status is limited to employees who occupy positions of trust and confidence, there is no reason to limit this categorization only to senior or managerial employees, especially in “an increasingly knowledge-based economy in which business firms choose less hierarchical organizational structures.” If the primary distinguishing factor used to define what “trust and confidence” means in this context is the ability to exercise unsupervised discretion, then many more employees will fit the bill—at least in large, complex organizations—than is often suggested. For example, as Professor DeMott observes, nonmanagerial associates at large law firms presumably occupy trust-and-confidence roles because they often work without close supervision, may come into contact with or develop unique information affecting firm clients, and frequently need to exercise at least some discretion when assisting those clients.

Indeed, courts confirm that associates who fall within this general description will breach their duty of candor by failing to alert their firms to significant developments they discover in the performance of their ordinary responsibilities (e.g., evidence of professional misconduct with the firm or a partner’s plan to exit).

There is an important caveat that deserves mention before moving on, and that is to note who the duty of candor is owed to when the identity of the principal-beneficiary may not be immediately clear. This issue arises most often in cases where the relevant fiduciary relationship involves an organization rather than just natural persons. Consider, for instance, the candor obligations of a mid-level employee of a large corporation. As an agent, who exactly is their principal? Do their fiduciary duties run to their immediate supervisor in the company’s hierarchy (e.g., a divisional manager), to the CEO, to the board of directors—or to some combination thereof?

Answering these questions requires reviewing the roles and responsibilities of the corporation’s three main internal constituent groups: directors, officers, and non-officer employees. As an inanimate legal entity that exists separate from its shareholders, the corporation can only act through human actors. A person or group of persons must be given the authority to make decisions about what the corporation will do. Corporate law addresses this issue by granting the board of directors the power to manage the business and affairs of the corporation.

204. Id. at 1278.
205. Id. at 1272–73.
206. Meehan v. Shaughnessy, 535 N.E.2d 1255, 1265 (Mass. 1989) (holding that law firm associate, as employee occupying position of trust and confidence, breached his fiduciary duty of loyalty to law firm employer through manner in which he and others exited the firm).
The directors, in turn, delegate responsibility for carrying out the day-to-day running of the firm to corporate officers. Put into agency terms, the directors act as or on behalf of the principal (the corporation) in a relationship with the officers—and other firm employees who the officers hire or manage—who operate as the corporation’s agents and subagents.207

Matters become more complicated once we start to trace the fiduciary threads that emerge from this basic corporate structure. For directors, courts typically provide that they owe their fiduciary duties of care and loyalty “to the corporation and its shareholders,” or, alternatively, that they must act in “the best interests of the corporation for the benefit of its shareholder owners.”208 These formulations make sense since shareholders elect and put their trust in the board of directors to pursue the firm’s competitive success, profitability, and creation of shareholder wealth. The separation of ownership and control between shareholders and directors is what creates the agency-cost problem that director fiduciary duties are meant to address.

Officers, by contrast, occupy a unique bifurcated position within the corporation that leads courts to divide their fiduciary allegiances along two paths. In the first instance, officers are held to owe the corporation and its shareholders the same fiduciary duties as those owed by directors. This rule reflects the practical reality of corporate decision-making. While the board of directors serves as the highest overseer of corporate policy and performance, it is usually the senior officers who have the most direct impact on shareholder interests by virtue of their charge to run the company on a day-to-day basis. Shareholders are therefore just as vulnerable to suffering agency-cost losses brought about by officer behavior as they are in their relationship to directors. At the same time, the board of directors is who appoints and monitors the officers. Officers are accountable to the board and generally must follow its instructions. Accordingly, pursuant to agency law, officers also owe fiduciary duties directly to the board in their capacity as agent-employees of an entity-based principal that, by statute, ultimately acts by and through the board. This was the lesson drawn from Amalgamated Bank, and it is a logical corollary to the distinct responsibilities and agency-cost risks associated with officers relative to directors.209

207. DeMott, supra note 110, at 852. As Langevoort notes, the board is not a pure principal in that corporate law reserves certain actions as the exclusive domain of shareholders. But in most matters, the board is in charge, though it exercises control primarily through the appointment and supervision of officers. Shareholders then monitor the board through voting, derivative litigation, and inspection rights. Langevoort, supra note 102, at 1191–92.


Finally, as explained above, other corporate employees besides officers are also fiduciaries of the firm. More precisely, the common law treats officers and non-officer employees “as co-agents of a common incorporated principal.” This suggests that non-officer employees should speak directly to the board as the principal’s representative body when their duty of candor is implicated. However, as discussed more thoroughly below, such a rule would present practical challenges in all but the smallest corporations, likely resulting in the board being flooded with more information than it needs, wants, or could meaningfully process. Corporate boards generally navigate this concern by directing employees to share information along specified channels in accordance with the organization’s overall hierarchy of authority. For example, drawing on a standard governance template, the delineated order of communication in a corporate accounting department might go from accounting associate, to accounting manager, to vice president for finance, to chief financial officer, to CEO, and so on. At each step of the way, the employee in question fulfills their fiduciary disclosure obligation by acting “reasonably and consistently” with the guidance provided by the board in reporting to their immediate superior.

The one nuance comes if an employee becomes aware of a breakdown in the proper chain of communication. This issue could arise if the associate in the example above shares information with their manager that the manager then either conceals from others in the chain or alters in a way the associate deems misleading. Must the associate take corrective action to ensure the original information makes it beyond the manager’s level, perhaps all the way to the board? The answer to this question hinges on the associate’s reasonable interpretation of the manager’s motives and the application of any additional instructions from the board that address this scenario. If the associate simply disagrees with the manager’s business judgment about what to do with the information, then the associate should reflect further on the matter and, if they continue to disagree, seek to change the manager’s mind; they have fulfilled their fiduciary duty by making the initial disclosure. The manager’s decision regarding the information may later prove deleterious to the company, but that is their mistake to make given the board’s chosen command structure.

A different situation arises, however, if the associate believes the manager’s treatment of the initial disclosure is motivated by a desire to serve selfish interests or interests adverse to the corporation. Under those conditions, the associate’s ultimate fiduciary responsibility to the

210. DeMott, supra note 163, at 325.
211. Restatement (Third) of Agency §§ 8.01 cmt. c, 8.11 cmt. b (Am. L. Inst. 2006).
212. Id. § 8.11 cmt. b. The Restatement (Third) of Agency endorses this approach through the language of subagency, noting that “[a] subagent owes fiduciary duties to the principal as well as to the appointing agent.” Id. § 8.01 cmt. c.
213. DeMott, supra note 163, at 325.
214. Id.
incorporated entity suggests they cannot sit on their hands without potentially breaching their own duties or aiding and abetting a breach by the manager. Even here, though, the shape of the associate’s response can be ordered in advance by the principal, as when firm policy specifies that any necessary reports outside of ordinary channels should go directly to the general counsel’s office, an anonymous hotline, a designated board committee, or the like.

2. The Role of Private Ordering

Skeptics of recognizing a pro-dissent norm within the duty of candor might respond by arguing that much of what the norm allegedly accomplishes could be achieved through other, perhaps less novel legal means. There is some merit to this idea. Agents and employees remain under the control of their principal-employers and, as such, must obey the latter’s reasonable instructions. A firm could therefore specify when, how, or if an agent should dissent. For instance, firms could limit the proper scope of employee dissent to legal or policy violations only, or they could require all dissent to be channeled through a specific organizational system, such as a formal hotline or ombuds office. This approach would effectively enable firms to “buy” and control as much or as little candor as they want, either through tailored provisions in individual employment contracts or through the routine management and supervision of employees. Moreover, even if one accepts the fiduciary character of dissent, the duty of candor that serves as its foundation is a default obligation that parties to an agency relationship can modify through express contract.

There are several issues to consider in response to these observations. First, as noted above, a principal’s instructions to their agent must be interpreted in light of the full context of the fiduciary relationship and any preferences expressed by the principal. Accordingly, attempts to modify an agent’s candor obligations could fail to effectively cabin dissent if they are not drawn with adequate specificity or tailored to address other signals being communicated by the firm to its employees. For example, if agents are instructed in one context to dissent only over “legal” violations but are then told in another to speak up if they see someone behaving “unethically,” an agent might subsequently dissent in a way that comports with a reasonable interpretation of their employer’s preferences while conflicting with the principal’s own ex ante expectations.

Two related and more immediate concerns with a contractual or waiver approach to managing dissent are transaction costs and the lingering threat of retaliation. As dissent gains wider acceptance as a valuable organizational resource, more firms seek to encourage it. Yet, as noted

216. Restatement (Third) of Agency § 8.11 cmt. b.
earlier, firms are not always happy with how dissent impacts other facets of operations. This reality leads firms to attempt to manage dissent in ways that will enhance its positive attributes without simultaneously producing unwanted problems. As noted, one option in keeping with that strategy is to define in advance the nature or manner of dissent firms wish to see from each employee. The difficulty here, though, is the expense and practical challenge associated with such an approach. Given the uncertainty surrounding when or if dissent might add organizational value, it will likely prove unworkable to dictate on a contract-by-contract or case-by-case basis the range of situations where employees should or should not speak up. This reality is what presumably leads many firms to attempt to govern dissent not with individual employment contracts but through firm-wide policies, values statements, or employee handbooks. By expressing a desire for dissent in broad strokes, firms can encourage candor as a general organizational principle without needing to pursue the costly and administratively challenging path of predefining its precise contours under conditions that are often rife with informational asymmetry.

Even here, though, the purported efficiency benefits of sweeping dissent policies take on a different gloss once we consider the perspective of the agents whose judgments and behaviors will be immediately affected by the applicable guidelines. Again, there is a predictability dilemma for agents given that individual acts of dissent may be judged differently by employers in hindsight depending on the impact of dissent in the workplace. Expressions of dissent that a reasonable agent deems consistent with a company’s articulated values can easily trigger retaliatory acts such as termination or demotion if they rub managers the wrong way or upset employees who may be the targets of good faith criticism or whistleblowing. Many firms attempt to combat the perceived risk of retaliation by including express promises of non-retaliation alongside general pro-dissent policies. However, those assurances offer little real security. As other commentators note, courts ordinarily hold that internal company codes and pronouncements setting forth expected standards of behavior are not binding contracts.219 Generalized non-retaliation language therefore cannot be relied upon to obviate the at-will employment doctrine. Similarly, while narrower promises in employee handbooks may be deemed legally enforceable in some cases, most employers now include disclaimers that have been upheld by courts as converting the handbooks into non-contracts.220

Given these interpretive and contractual vulnerabilities facing dissenters, the importance of recognizing the duty of candor’s pro-dissent norm takes on additional significance. While firms are free to structure the mechanics and scope of dissent in whatever way they think best to achieve organizational goals, the duty of candor provides an important fiduciary backstop to ensure that such modifications comport with

220. Id. at 201.
basic notions of fairness and equity. If, for example, a firm promises non-retaliation in cases of good faith dissent, then the fiduciary nature of the duty of candor in combination with the principal’s reciprocal obligation of fairness should obviate the limited protection that those statements have otherwise been deemed to provide.

3. **Lingering Concerns About Noise and Disruption**

   A remaining challenge raised by fiduciary dissent is the possibility that even the good faith exercise of dissent in a manner consistent with agent candor obligations might still produce “noise” or disruption within firms. Imagine, for example, a subordinate who blows the whistle on their manager’s objectively illegal behavior, or one who simply argues in favor of a contrary business strategy. In either situation, the dissent may fall well within the proper bounds of the agent’s duty of candor. However, at the same time, the dissent might also produce additional costs. The discovery of a manager’s wrongdoing could cause other employees to exit out of fear they will suffer adverse reputational consequences from being associated with them, while expressions of strategic disagreement might distract management or else erode trust in management to a degree that employee morale or performance suffers.\(^{221}\) If a firm determines that these costs exceed the real or perceived benefits derived from the dissent in question, management may wish to punish or terminate the speaker responsible for initiating them based on a desire to protect legitimate business interests. Under those circumstances, does the pro-dissent facet of the duty of candor mean employers are powerless to address these potentially unwanted ripple effects?

   In answering this question, it is important to first recall the work done by the concept of materiality. Firms remain free to discipline employees who express dissent that is immaterial—that is, dissent that neither relates to the subject of the employee’s assigned responsibilities nor constitutes information that a reasonable employer would wish to have.\(^{222}\) The same is true for dissent offered in bad faith. A dissenter who blows the whistle with the intent to harm a co-worker they dislike or to frustrate other aspects of operations can expect no legal protection if the claim is unfounded or reckless. Likewise, a dissenter who speaks up on the basis of incomplete information or in disregard to underlying evidence could still be punished or fired for exercising poor judgment.

   Beyond issues regarding materiality or bad faith, it is also important to remember that firms are free to define the practices and policies applicable to dissent to accommodate their organizational objectives and minimize information overload or other problems. Managers can also provide robust training and guidance to help employees understand the degree of expressive conduct that is demanded and expected of them.

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\(^{221}\) Langevoort, *supra* note 102, at 1212.

\(^{222}\) *Id.* at 1197 (“The agent need not tell everything it knows [pursuant to the duty of candor], but simply that which is relevant to the principal’s decision-making in the relationship.”).
What dissent’s fiduciary and equitable valences do not allow, however, is for firms to preserve the default duty or modify its parameters and then punish employees when they comply along either path. To allow a contrary result would run counter to both basic fairness and the principal-employer’s reciprocal obligation of good faith and fair dealing, and it would improperly substitute a bright-line rule for what must be a context-specific inquiry into the scope of each agent’s fiduciary duty.

Finally, in thinking about the possibility of noise and disruption, we should not overlook the potential of fiduciary law to positively shape organizational culture around expression more generally. By clarifying the agent’s obligation to dissent under certain circumstances, the hope is that this understanding will begin to normalize dissent to a degree where managers and employees come to see it as an accepted and desirable facet of ordinary operations. As they do so, the temptation to retaliate against dissenters should diminish, and the practice of speaking up critically will appear routine, positive, and welcome. This development would be consistent with the expressive powers of fiduciary duty, something that will be explored in greater detail below.

B. Implications for Governance

This section considers the theoretical and practical consequences that flow from a recognition of the duty of candor’s pro-dissent norm. Namely, this new understanding of corporate law empowers firms to engage with dissent as a positive and productive organizational resource. An additional insight is the clarity that this understanding can bring to related issues of corporate governance, including the board’s role in oversight and the importance of board diversity.

1. Organizational Engagement with Dissent

Recognizing the duty of candor’s pro-dissent norm places a renewed emphasis on fiduciary law’s expressive function. This observation originates in the “uncompromising moralistic rhetoric” that so often accompanies judicial descriptions of the content of fiduciary duties. From Justice Cardozo’s famous statement that fiduciaries owe the “punctilio of an honor the most sensitive,” to other courts observing that fiduciaries must manifest the highest standards of honor and honesty, fiduciary law overflows with powerful judicial expressions of what fiduciary obligations entail. These expressions, in turn, reflect the “soft” law side of fiduciary law. Each example plays an important practical role in “reinforcing the extralegal aspirational norms that shape fiduciary behavior.” Indeed, by signaling to fiduciary agents the standards of behavior and responsibility that their communities expect from them,

223. Criddle, supra note 7, at 133.
225. Criddle, supra note 7, at 134.
226. Id. at 133.
fiduciary law seeks to influence individual actions “not primarily by threatening liability but by expressing and reinforcing social norms of careful and loyal behavior.”

From this general description of fiduciary law’s expressive power, we can start to drill down to the more specific effects of the duty of candor’s pro-dissent norm on organizations. First, when we acknowledge that dissent is consistent with the fiduciary agent’s candor obligations, corporate employees will develop a better understanding of whether and to what extent it falls within the bounds of acceptable and desirable behavior. Absent any instructions to the contrary from their employer, it will become intuitive that the decision to speak up critically on relevant and material matters will be interpreted as consistent with their proper role. When this signaling function is further considered alongside the principal-employer’s reciprocal good faith obligation, a cycle of mutual trust develops such that employees no longer fear that they will be unfairly punished or treated opportunistically for complying with what a more nuanced understanding of candor requires. That is, as employees and employers abide by their respective fiduciary responsibilities over time, both groups will learn to perceive dissent and candor as safe and mutually advantageous organizational traits worthy of lasting protection.

Second, the duty of candor’s pro-dissent norm should assist firms in mitigating the transaction costs associated with knowledge development. Employees will reasonably become more prone to silence if they are unable to predict what will happen if they dissent. If they lack legal protection from retaliation, for instance, then they will justifiably think twice before voicing controversial or critical views. This result generates significant costs for firms. We have seen how vital it is for firms to become aware of and consider divergent opinions throughout all facets of operations and decision-making. Without dissent, firms must expend additional resources on information gathering, expertise, or monitoring to make up for the gaps created by widespread employee silence. Dissent’s role as a feature of the agent’s default candor obligations thus helps to offset costs by encouraging the free sharing of information.

227. Id. at 133–34 (quoting Margaret M. Blair & Lynn A. Stout, Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law, 149 U. Pa. L. Rev. 1735, 1794 (2001)).

228. Sung Hui Kim, Fiduciary Law and Corruption, in The Oxford Handbook of Fiduciary Law, supra note 108, at 813, 829–30 (“Once the beneficiary has relied on the fiduciary, the fiduciary will be obliged by law to act consistently with what trustworthiness minimally requires. Importantly, the beneficiary’s reliance affords the fiduciary a concrete opportunity to prove trustworthy. If the fiduciary takes up this opportunity and actually demonstrates trustworthiness, then the beneficiary now has tangible reasons to repose deeper levels of trust and to continue to rely, potentially setting in motion a beneficial cycle of trust and trustworthiness characteristic of enduring and successful fiduciary relationships.” (emphasis omitted)).

229. Morrison, supra note 25, at 178–79 (“Moreover, it has been argued that individual acts of silence can become self-reinforcing, producing norms of silence within work units and organizations that can be highly dysfunctional and difficult to break.”).
Retaliation ought to be prohibited except when employees run afoul of ex ante guidance, act in bad faith, or fail to stay within the bounds of materiality.\textsuperscript{230}

2. **Board Oversight and Risk Management**

   It is axiomatic to say that a corporation’s board of directors plays an important role in monitoring and oversight.\textsuperscript{231} This is true as both a practical and legal matter. Practically, the board’s main function is to calibrate the firm’s attitude toward risk. In performing this task, the board must “identify key business risks, establish a system of board-level compliance monitoring and reporting to oversee the management of these risks, and make a good-faith effort to ensure that the system is working effectively.”\textsuperscript{232} These last two points are tied directly to the board’s legal responsibilities. Under Delaware corporate law, the directors’ duty of loyalty includes the duty to monitor. Directors can be held personally liable for breaching this duty—known as the board’s Caremark obligation—if they engage in a “sustained or systematic failure” to exercise oversight by intentionally failing to implement any reporting system or controls or, having implemented such a system, intentionally failing to monitor it.\textsuperscript{233}

   Within this context, one of the most striking ways in which the duty of candor’s pro-dissent norm can support knowledge-building within firms is in relation to risk and compliance. The board’s ability to carry out its oversight and risk-management functions depends on learning about red flags when they arise so that it can determine what steps are necessary to correct or eliminate them. As with operations more generally, the effectiveness of any compliance program depends on access to regular and reliable information.\textsuperscript{234} If firms become aware of potential compliance and risk problems early on, then they stand a better chance of preventing or mitigating them in time to avoid adverse reputational, legal, or regulatory consequences.\textsuperscript{235} Indeed, most compliance failures result from a lack of communication and a corresponding lack of knowledge about

\textsuperscript{230} Langevoort, supra note 102, at 1204 (“Were . . . ritualized candor to become more commonplace, I think there would be a change in corporate governance practice that could improve the quality of internal decision-making.”).
\textsuperscript{231} Id. at 1200–01 (“[T]he board’s most important task is not business decision-making, but monitoring and supervision . . . . [T]o carry out its monitoring function, the board must gain a fair sense of the aggregate level of risk assumed by the firm.”).
\textsuperscript{233} In re Caremark Int’l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996).
\textsuperscript{234} Veronica Root Martinez, Complex Compliance Investigations, 120 Colum. L. Rev. 249, 275 (2020).
the wrongdoing at issue. Reaffirming the duty of candor’s pro-dissent norm helps by signaling to agents the importance of reporting up when they perceive problems. As agents provide material critical feedback about potential policy violations or poor strategic decisions, the board will be prompted to weigh those concerns when deciding how to direct senior management. The process of evaluating competing and sometimes “jarring” considerations will then, in turn, help to mitigate any cognitive biases that the board might otherwise be suffering under. Getting to this point is most important during the early stages of a possible wrong. As Professor Donald Langevoort observes, misbehavior in organizations tends to develop gradually as small transgressions go undetected and are allowed to persist. In this sense, fiduciary law’s role in promoting dissent represents part of an early warning system capable of alerting management to compliance problems before they gain momentum.

Another benefit of recognizing dissent’s fiduciary character rests in its ability to counter the so-called “mum effect” within organizations. As noted earlier, employees of all types are often fearful of dissenting at work. This attitude is especially common among employees at lower levels of the organizational hierarchy. The separation of status and power between subordinates and managers frequently reinforces in the former group a heightened sense of vulnerability that makes silence appear safer than speaking up. Individuals who occupy positions of higher status, such as corporate officers and directors, also often react more harshly and negatively when they receive criticism from lower status individuals or groups. Thus, while the duty of candor’s pro-dissent norm should enhance employee feelings of safety in general,

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236. Martinez, supra note 234, at 256.
237. As Alexander Hamilton noted when advocating for a bicameral legislature in the United States, “[t]he differences of opinion, and the jarring of parties in [the legislature], though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority.” The Federalist No. 70, at 426–27 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
239. Milliken, Morrison & Hewlin, supra note 44, at 1453–54.
240. Morrison, supra note 25, at 175 (“Many well-meaning leaders are unintentionally reinforcing an authority-ranking social frame that is so pervasive and fundamental that most employees enter organizations expecting to ‘tread lightly’ around those in power.” (quoting Detert & Treviño, supra note 58, at 264)).
241. Id. at 181 (“Power asymmetry may also cause voice to be seen as risky. Because supervisors and individuals in more senior positions typically control rewards, resources, and assignments, employees may not want to jeopardize their relationships with them, which may lead them to be particularly reluctant to engage in voice up the hierarchy.” (citations omitted)); see Milliken, Morrison & Hewlin, supra note 44, at 1455; Craig C. Finder & Karen P. Harlos, Employee Silence: Quiescence and Acquiescence as Responses to Perceived Injustice, 20 Res. Peks. & Hum. Res. Mon. 331 (2001); Morrison, supra note 25, at 182 (“Research on power has shown that power holders tend to be overconfident in their own competence and decisions and thus fail to appreciate the value of input and advice from others.”).
an additional hope is that it will promote values of open communication to such an extent that perceptions of risk associated with gaps in status become less debilitating.\(^{242}\)

3. The Relationship Between Board Diversity and Dissent

The goal of improving diversity in corporate leadership has gained significant traction in recent years. For example, in 2021, the U.S. Securities and Exchange Commission (SEC) approved a proposal from the NASDAQ securities exchange to require NASDAQ-listed companies to (1) disclose annual statistics about board diversity, and (2) appoint at least two “diverse” directors or else explain why they have not.\(^ {243}\) Prior to that proposal, California passed legislation mandating diverse gender, racial, and ethnic representation on the boards of all publicly held companies based in the state.\(^ {244}\) Investors have also been active in this area. Several major public pension funds and private mutual fund managers have advocated for greater gender and racial diversity on boards, as did the leading proxy advisory firm, Institutional Shareholder Services.\(^ {245}\) Many of these efforts have proven successful, with reports showing that, at least with respect to gender, rates of diversity on boards have increased steadily since 2016.\(^ {246}\)

\(^ {242}.\) Morrison, supra note 25, at 190 (“There is a natural reluctance to convey negative or potentially threatening information, particularly to individuals in positions of authority or higher status. This means that active efforts need to be taken to counterbalance these inhibiting forces and to ensure that they are not reinforced by negative leadership behaviors, a climate of fear, or a work environment that causes employees to feel disengaged or powerless.”).

\(^ {243}.\) Emmerich, Savitt, Niles & Abdel-Malek, supra note 232, at 305.


\(^ {246}.\) See Jill E. Fisch, Promoting Corporate Diversity: The Uncertain Role of Institutional Investors 5–6 (U. Pa. Carey L. Sch. Inst. for L. & Econ., Working Paper No. 23-11, 2022) (“State Street reports that its Fearless Girl campaign [initiated in 2017] has led to 948 of the companies that it identified as not having a single woman board member adding a woman director. Similarly, the adoption of California’s ‘Women on Boards’ statute (SB 826) was associated with an increase in the number of female directors on boards of California companies from 12.9% in 2016 to 23.2% in 2020.” (footnote omitted)).
Amid the increasing focus on board diversity, where does dissent factor into the discussion? Approaching this question requires a threshold inquiry into the purpose of diversity initiatives. Though some advocate for greater board diversity as a means of advancing social justice and principles of equity, the main rationale offered by the finance industry centers on improved business results. Professor Jill Fisch notes the claims by leading private funds that “diversity of perspective and thought—in the boardroom, in the management team, and throughout the company—leads to better long-term economic outcomes for companies,” as well as that “management teams with a critical mass of racial, ethnic, and gender diversity are more likely to generate above-average profitability.”

These arguments reflect the view that diverse groups with a variety of skills, experiences, and perspectives are more innovative and less susceptible to groupthink and confirmation bias. Moreover, as Professor Fisch observes, because “corporations have grown in size and influence, it is valuable for their decisions to reflect a range of viewpoints. The most effective way to accomplish that goal is to give voice to different groups.”

While the overall business case for diversity holds strong intuitive appeal, one of its underlying assumptions is that a diversity of views will emerge once a diverse group is assembled. That is, advocates for greater board diversity appear to assume directors from different backgrounds will share their thoughts openly so that the board can benefit from their perspectives when making decisions. As explained above, however, the soundness of this assumption is highly suspect. Despite holding positions of authority and high status, many corporate directors remain silent when their opinions conflict with what they perceive to be the majority consensus.

Other research shows that people of all genders, education levels, and income levels are prone to remaining silent when they fear others will think poorly of them for speaking up or ignore what they have to say. In other words, the factors that drive employees to self-censor and conform are not unique to people below the board or C-suite.

As firms look to resolve the potential tension between diversity and silence, a final benefit of emphasizing the duty of candor’s pro-dissent norm is the positive role the norm can play in ensuring that the knowledge advantage of forming groups with diverse views will be fully realized. If directors come to understand that there are circumstances when their fiduciary obligations to the company requires them to dissent, then they


248. See id. at 12.

249. See supra discussion in Section II.C.2.

250. Detert, Burris & Harrison, supra note 53.
should start to feel more secure in expressing and entertaining it. We can draw a parallel analogy to the way the duty of care now influences board behavior. After the Delaware Supreme Court held in the famous case of *Smith v. Van Gorkom*251 that directors breach their duty of care by being grossly negligent in the decision-making process, the response across the corporate governance landscape was a much greater prioritization of information gathering and the robust evaluation of questions and concerns surrounding each matter for their review. Something similar happens when we define dissent in fiduciary terms. Adding a fiduciary gloss to dissent should normalize and legitimatize this form of expression to the point where, just like the need for rigorous analysis in the duty of care context, the airing and embracing of dissent simply becomes another part of what it means to be a director.

**Conclusion**

Organizational dissent is a critical resource necessary for sound decision-making; it is also one of the most valuable informational assets in a firm’s arsenal. For this reason, management theorists have worked to ensure that the voicing and tolerance of dissent are viewed as best practices. And firms—from global consulting and advisory firms to leading tech giants—have embraced dissent as a core value.

But organizational dissent is much more than a facet of management ethics and good institutional citizenship; it is a firmly embedded feature of classic fiduciary law. The duty of candor contains a pro-dissent norm that tracks and elaborates its overarching disclosure requirements. Recognizing this norm is consistent with the duty of candor’s control and decision-making functions as well as with its elaboration of the agent’s broader fiduciary obligations of care and loyalty. The existence and application of the norm promotes intra-firm learning and knowledge-development while also making fiduciary dissenters less vulnerable to retaliation in keeping with the principal’s reciprocal obligation to treat them in good faith.

By illuminating the pro-dissent norms that are inherent in the traditional duties of care, loyalty, and performance owed by corporate fiduciaries, this Article reconceptualizes dissent as a fiduciary duty. In so doing, it reinvigorates the academic and legal understanding of organizational dissent and gives new teeth to corporate management of dissent. A fiduciary understanding of dissent helps to empower employees at all levels of an organization to speak up and challenge orthodox views. It also helps to illuminate and justify legal efforts to promote compliance, effectively manage risk, and diversify corporate boards.