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Fiduciary-isms: A Study of Academic Influence on the Expansion of the Law

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TABLE OF CONTENTS

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> We have this kind of wine, not real port, but a tolerably close approximation to port, and we call it "port type". But then someone produces a new kind of wine, not port exactly, but also not quite the same as what we now call "port type". So what are we to say? Is it port-type type? It would be tedious to have to say so, and besides there would clearly be no future in it.[1]

I. Introduction

On arriving in Nashville in August 1989 to clerk for Gilbert Merritt, Jr., then Chief Judge of the United States Court of Appeals for the Sixth Circuit, I was asked to read a draft opinion of *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp*.[2] Oral argument had been in March. The judge just wanted to bounce his position off his new clerks before publication. Twelve years earlier, a handful of movie theaters in Memphis had formed a buying group or "split" that would nominate a member to receive exclusive rights to show a first-run film without competitive bidding against other theaters, a scheme in which the film distributors (who were arms of the producers) acquiesced.[3] Balmoral Cinema, who was outside the split, sued the distributors and theaters, alleging that the practice was an anticompetitive boycott in violation of the Sherman Antitrust Act.[4] Both groups of defendants insisted that the agreement lawfully enhanced rather than stifled competition by bypassing distributors' pricey licensing auctions and sizeable cash guarantees, which elevated costs to theaters and moviegoers.[5] Likewise did defendants

[1] J.L. AUSTIN, SENSE AND SENSIBILIA 75 (1962).

[2] Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313 (6th Cir. 1989).

[3] Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313, 314-15 (6th Cir. 1989).

[4] 15 U.S.C. § 1 (1982) ("Every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States . . . is declared to be illegal.").

[5] *Balmoral Cinema*, 885 F.2d at 316.

deny that the split caused Balmoral Cinema's dire financial circumstances, which owed instead to overpaying for rights to exhibit "Voyage of the Damned" while offering nothing for "Star Wars" and "Close Encounters of the Third Kind."[6]

That same summer of 1989 I had taken a course in antitrust law at University of Florida from Professor Jeffrey Harrison, a gifted teacher who had written the leading books and articles on point. During that course I came to adopt his position as my own: the arrangement between the members of the split and the participation by the distributors placed an illegal drag on competition. As Professor Harrison later summarized, "'cooperative buying' may be nothing more than a euphemism for collusive monopsony that drives prices below competitive levels and has negative economic effects on social welfare similar to those caused by price fixing sellers."[7] To clarify, monopsony is to concentrated buying power what monopoly is to concentrated selling power.[8]

When summoned to report back to the judge on *Balmoral Cinema* – my summer-school class in antitrust fresh on my mind – I sided with Balmoral Cinema and what I saw as the public interest in non-rigged bidding processes for first-run films. Judge Merritt listened as I detailed my professor's arguments on why we should throw the book at the split and the distributors for impeding competition by stymying a true auction for film exhibition. Excluding Balmoral Cinema from bidding for first-run films, I parroted, would profit everyone *but* movie-goers, to whom the monopsonist-buying group would

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[6] Balmoral Cinema, Inc. v. Buena Vista Distrib. Co., Inc., 673 F. Supp. 219, 224 (W.D. Tenn. 1987), *aff'd*, 885 F.2d 313 (6th Cir. 1989).

[7] ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY: ANTITRUST LAW AND ECONOMICS 93-94 (1993); *see* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS 34, 86-87 (2010).

[8] Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 VAND. L. REV. 1539, 1565-68 (1989).

not pass on its savings in a market with fewer buyers than under competition.[9] After all, only a monopolist can offer a discount, which, after running off rivals, invariably ends, replaced by competition-free price hikes.[10] When I finished my recitation, the judge set forth the jarring costs of finding a violation of the Sherman Act: millions of dollars change hands, businesses shut down, people lose jobs. The judge was unsurprised that my arguments had been lifted from a professor, since that's what professors *do*: they see it as their job to expand the law in their field. It's not, however, he cautioned, what courts do. The Sixth Circuit ruled unanimously in favor of defendants, affirming Judge McRae's decision below.[11]

The full import of this encounter in the judge's chambers was largely lost on me until my employer, California Western School of Law [CWSL], was proposing a merger with University of California at San Diego [UCSD]. Throughout the merger discussions (2007-2011), CWSL faculty, administrators, and lay board members debated whether, in hammering out a workable arrangement with UCSD, legal barriers would arise if CWSL faculty turned out to be "fiduciaries" of the school. If faculty were fiduciaries, then it was

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[9] Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 303-04 (1991).

[10] *See, e.g.*, Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 287 (2003).

[11] Balmoral Cinema, Inc. v. Buena Vista Distrib. Co., Inc., 673 F. Supp. 219, 224 (W.D. Tenn. 1987), *affirmed*, 885 F.2d 313 (6th Cir. 1989). Among the various court challenges to splits, there was some contrary authority supporting my professor's position, notably General Cinema Corp. v. Buena Vista Distribution Co., 532 F. Supp. 1244 (C.D. Cal. 1982). There, a district court, relying on academic lawyers, ruled in favor of the very same film distributor, this time as counterclaimant *opposing* the split, which exhibitors were accused of manipulating to suppress the profits of distributors/producers through price-fixing. Gen. Cinema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244, 1264 n.9 (C.D. Cal. 1982) (citing Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 826 & n.162 (1965); James S. Gordon, *Horizontal and Vertical Restraints of Trade: The Legality of Motion Picture Splits under the Antitrust Laws*, 75 YALE L.J. 239, 250 (1966)); *see also* United States v. Capitol Service, Inc., 756 F.2d 502 (7th Cir. 1985).

their duty to act for their principals, that is, the parties whose interests fiduciaries must put above their own. Accordingly, faculty looking to get a better deal for themselves than for the school or other principals would be breaching their fiduciary duty, a tortious act.

I thought the merger was a bad idea, at least in its proposed iteration. My image of the reconstituted post-merger law school had an ominous vibe of layoffs, demotions, and an up-in-the-airness that worried me. After twenty years at the same school, I liked things well enough the way they were. As a husband and father of three, I resisted anything that might be, well, bad for me personally. But if I really was a fiduciary, then maybe what *I* wanted was beside the point. At the same time, if I really was a fiduciary, then who was my principal? The school? Who is *that*? Is it the administration? Current students? Alumni? Employees? The community? No answers from the merger's proponents were forthcoming.

Fiduciaries are said to operate outside the capitalist free-for-all of exchange relations,[12] where the freedom of contract is backed up by the power of contract, which provides judicially coerced remedies for breach.[13] Breaching fiduciaries cough up not just the market and consequential damages inflicted on victims, but *all* gains and savings,

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[12] Fiduciary relations are not necessarily contractual. Trustees' relations with trust beneficiaries, for instance, are not contractual, nor can corporate shareholders negotiate the corporate charter, by-laws, or managers' employment terms. *See* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 887 (1988) (partners' acts in dissolution may violate fiduciary duties even if permitted by partnership agreement); Tamar Frankel, *Fiduciary Law,* 71 CAL. L. REV. 795, 813 (1983) (citing AUSTIN W. SCOTT, THE LAW OF TRUSTS § 106 (3d ed. 1967)).

[13] *See* Ian R. Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495, 495 (1962):

> Power of contract is one of the two sides of freedom of contract. On one hand, freedom of contract is a freedom from restraint, an immunity from legal reprisal for making or receiving promises. On the other hand, it is not really a freedom of contract, but a power of contract, a power to secure legal sanctions when another breaks his promise.

Cf. Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763, 777 (1998) (contracts both create and restrain power).

even those exceeding the rental rate the parties would have reached in a voluntary exchange.[14] Nor can an insolvent fiduciary's creditors reach the property, which is said to have been held all along, however fictively, for the victim-principal, never becoming part of the estate of the fiduciary.[15]

Fiduciaries operate in Platonic relations within which the weak or naïve party (dubbed "principal" or "beneficiary") is subordinate to the strong or knowing party, who inverts the relation by subordinating him- or herself to the weak party. The strong-party fiduciary takes responsibility for the power/knowledge disparity by, in effect, negating its effects by putting the weak party's interests first.

Identifying fiduciary relationships is done by analogy to the law of trusts.[16] The more a candidate for fiduciary status resembles a trustee, the more likely he or she will be treated like one. The purpose of the analogy is to smooth out conflicts of interest between wealth managers and their clients. Yet this venerable process of arguing by analogy, an essential lawyerly shtick, has allowed for a peculiar extension of fiduciary law.[17] The

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[14] *E.g.*, Am. Master Lease v. Idanta Partners, Ltd., 171 Cal.Rptr.3d 548, 572-77 (Cal. App. 2014).

[15] *E.g.*, In re Mushroom Transp. Co., Inc., 227 B.R. 244, 253-55 (E.D. Pa. 1998); Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 896 (1994).

[16] *E.g.*, Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 891 (1998) ("The evolution of the law of fiduciary obligation illustrates, perhaps more powerfully than most bodies of law, the power of analogy in legal argumentation."); Calvin Massey, *American Fiduciary Duty in an Age of Narcissism*, 54 SASK. L. REV. 101 (1990); Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897 (1993); L.S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69 (1962).

[17] Tamar Frankel, *Fiduciary Law,* 71 CAL. L. REV. 795, 805 (1983):

> [C]ourts are inconsistent in choosing their analogies. One decision, for example, held that directors are trustees, and applied trust rules against self-dealing to them. But, in order to avoid applying trust law's strict liability for unauthorized unintentional acts to the directors, the court then proceeded to hold that those directors were not trustees.

cause? Another essential lawyerly shtick: the sort of pressure Judge Merritt alluded to above that is placed on law by academic lawyers.

After Part II of this Article sets out the structure of trusts, Part III tests whether the trust analogy makes non-misleading sense within the laws of partnerships, corporations, and agency. Specifically, Part IV demonstrates how academic writing, deploying a sense of "fiduciary" so open as to be empty, has influenced courts to designate franchisors, insurers, and professors as fiduciaries. After Part V posits how this influence has brought about an idiomatic, no-longer technical sense of this essential term of art, I conclude that professors' penchant for pressuring law to change is an activity of uncertain value.

II. Fiduciaries in Trust Relations

The idea of the fiduciary owes to the law of trusts.[18] A trust, in turn, like its historical antecedent – the "use"[19] – is a gift.[20] While ordinary gifts are two-party transfers of real or personal property from donor to donee, trusts involve three parties: the donor (settlor) arranges with the trustee to divide title to the donated property (trust *res*) between trustee and beneficiary.[21] In trust relations, "fiduciary" describes the trustee, whose divided interest received from the settlor is "legal" title to the *res*, which the settlor

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[18] In re West of England and South Wales District Bank, ex. P. Dale & Co., 11 Ch.D. 772, 778 (1879):

> What is a fiduciary relationship? It is one in respect of which if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*.

[19] *See generally* RESTATEMENT (THIRD) OF TRUSTS § 6 (AM. LAW INST. 2003); 4 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 407–79 (3d ed. 1945).

[20] At least trusts were until trustees began accepting compensation for operating between settlor and beneficiary. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 639 (1995).

[21] John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 632 (1995).

directs the trustee-fiduciary to manage for the enjoyment of the settlor's beneficiary.[22] The beneficiary's divided interest received from the settlor is "equitable" title to the trust property, which, according to the trust's terms, will eventually reunite the divided legal and equitable title interests to the beneficiary's sole advantage.[23]

The trust developed at the end of the Middle Ages, when real estate was the principal form of wealth. The primary purpose of the trust was to facilitate the transfer of freehold land within the family.[24] The trust allowed landowners "'to make decent provision for their wives, daughters and younger sons and to prevent escheat'" while avoiding other vestiges of bizarre feudal restrictions.[25] Trustees early on were mere stakeholders with no serious powers or responsibilities of management. Commonly, the beneficiaries lived on and managed the land.[26]

In an era (fourteenth to seventeenth centuries) when property was less alienable than now, the trust, apart from facilitating conveyances within families, was a way to get around the ban on unmarried adults, clerics, Christians, foreigners, criminals, and slaves owning property.[27] Trusts let property owners arrange for the enjoyment of property by these banned classes by passing legal title to a trustee who held *for* the equitable owner, a member of the banned class.

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[22] In re Estate of Giraldin, 55 Cal. 4th 1058, 1065-68 (2012).
[23] DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 553 (4th ed. 2012).
[24] John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 632 (1995).
[25] John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 633 (1995) (quoting WILLIAM F. FRATCHER, *Trust,* in 6 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW § 9, at 12 (1973)).
[26] John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 633 (1995).
[27] 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 231, 237-38 (2d ed. 1898).

Trusts eventually became an effective way to manage a portfolio of financial assets,[28] guard against waste of property by an immature or irresponsible family member, or avoid taxes on the settlor's estate.[29] Because trustees are exposed to temptation to use trust assets for personal benefit, they may collect fees for their services in amounts authorized by the trust or by court approval, but may not otherwise profit from the trust.[30] Consequently, any profits diverted by the trustee are disgorged and conveyed to the beneficiary in restitution as the remedy for the trustee's unjust enrichment.[31] Not surprisingly in this Platonic relation of inverted power, both the trustee's resignation[32] and removal[33] are far from automatic.

III. Fiduciaries in Trust-Like Relations

Fiduciary law expanded from the trust, to partnerships, to joint stock companies and corporations, to agents and factors.[34] Much of the pioneering work in the development of the scope of the word "fiduciary" was done not by courts, but by treatise

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[28] John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 629 (1995).

[29] *See, e.g.*, Richard W. Nenno, *Planning To Minimize or Avoid State Income Tax on Trusts*, 34 AM. COLL. OF TR. AND EST. COUNSEL 131, 143-44 (2008).

[30] *See, e.g.*, 4C MISSOURI PRAC. TRUST CODE & LAW MANUAL § 456.7-708 (2015-16 ed.).

[31] In re Beatty's Estate, 214 Pa. 449 (1906).

[32] TEX. PROPERTY CODE ANN. § 113.081 (West 1984).

[33] Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 806 (1983) ("Under trust law, a beneficiary cannot remove the trustee without proving in court that the trustee is incapacitated or has a substantial conflict of interest."); Robert H. Sitkoff, *An Agency Costs Theory of Trusts Law*, 89 CORNELL L. REV. 621, 664 (2004) (Law "does not necessarily permit removal for breaches that are not 'serious' or for simple disagreements. Trustees who were chosen by the settlor, as compared to those named by a third party or a court, are even less readily removed; there is ... a thumb on the scale for them.").

[34] Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 805 (1983).

writers of the Romantic era: Jeremy (1828), Lewin (1837), Maddock (1837), and Story (1839).[35] The pioneering continues.[36]

A. *Partnerships*

The principle that middle-men/trustees must tend others' interests, not their own, has been converted into a more generalized constraint on professionals' permissible range of wealth-maximizing endeavors. For example, partnerships, which emerged in the sixteenth century[37] (or before),[38] have always traded on the criteria or structure of trusts. So it is by now hornbook that "[i]n defining fiduciary responsibilities, courts ... borrow from the ... standards applied to fiduciaries in other contexts," even though "standards developed to regulate other fiduciaries would not control the conduct expected of partners."[39] To be sure, the analogy between trusts and partnerships is strained.

Partnerships are "association[s] of two or more persons to carry on as co-owners a business for profit."[40] Within this structure, partners may shield themselves from personal liability for debts incurred by the partnership.[41] As co-owners, partners may sue each other; the partnership, too, as an entity separate from its members, may sue and be sued

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35 L.S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69, 72 n.11.

36 *E.g.*, Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 881 (1988) ("The evolution of fiduciary obligation ... owe[s] much to the situation-specificity and flexibility that were Equity's hallmarks."); Alaimo v. Royer, 188 Conn. 36, 41 (1982) (This court has, however, specifically refused to define "a fiduciary relationship in precise detail and in such a manner as to exclude new situations.").

37 WILLIAM M. FLETCHER, FLETCHER'S CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1 (rev. perm. ed. 1974).

38 Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 795 n.3 (1983) (citing JUDSON CRANE & ALAN BROMBERG, CRANE & BROMBERG ON PARTNERSHIP 11 (1968)).

39 Robert W. Hillman, *Private Ordering within Partnerships*, 41 U. MIAMI L. REV. 425, 459 (1987).

40 E. Merrick Dodd, Jr., *Partnership Liability of Stockholders in Defective Corporations*, 40 HARV. L. REV. 521 (1927) (quoting UNIFORM PARTNERSHIP ACT § 6(1) (1917)).

41 *E.g.*, N.C. GEN. STAT. ANN. § 59-45 (West 1999).

by the partners.[42] Eccentric from the standpoint of the grammar of trusts, partners as fiduciaries are considered both trustee and beneficiary at once.[43] In other words, in partnerships, the weak-party beneficiary is also the strong-party trustee in the Platonic sense referred to above, thus stretching reed-thin the notion of divided title. "The fiduciary as joint owner," therefore, "is something of a contradiction in terms, since the fiduciary lacks the beneficial interest aspect of true ownership. Partners, on the other hand, are always joint owners" in both senses,[44] all rowing together for the greater good of the partnership. There is, in sum, no middle-man manager of partnership assets, a key element of (real) trust relations.[45] Nor does the function of settlor in a trust have specific application to partnerships.

Although trusts and partnerships share only a vague family resemblance, breaches that go to the essence of a partnership agreement are considered betrayals, not just run-of-the-mill derelictions of a contracting party's promises.[46] At times the partnership-as-trust analogy is literalized. For example, in Massachusetts, "partners act as trustees for the benefit of each other with respect to the trust *res* which consists of the partnership assets."[47] If there were any doubt about what this means, a federal bankruptcy court has clarified both that "Massachusetts partnerships satisfy the necessary elements of an

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[42] REVISED UNIFORM PARTNERSHIP ACT § 405 (a)-(b) (2014); *cf.* State v. Gard, 742 N.W.2d 257, 262 (S.D. 2007)("[T]he law in most states today is that a partner can be found guilty of embezzlement when he misappropriates funds from his partnership").

[43] Karrick v. Hannaman, 168 U.S. 328, 334-35 (1897) (Partnership is "a contract of mutual agency, each partner acting as a principal in his own behalf and as agent for his co-partner.").

[44] Robert W. Hillman, *Private Ordering within Partnerships*, 41 U. MIAMI L. REV. 425, 458 (1987).

[45] Donald J. Weidner, *Cadwalader, RUPA, and Fiduciary Duties*, WASH. & LEE L. REV. 877, 900 (1997).

[46] Bohatch v. Butler & Binion, 905 S.W.2d 597, 601-02 (Tex. Ct. App. 1995).

[47] In re Friedman, 298 B.R. 487, 498 (D. Mass. 2003) (italics omitted).

express trust and that partners act in a fiduciary capacity toward each other" for purposes of determining whether a breaching fiduciary's debt to the partnership is dischargeable in bankruptcy.[48] Massachusetts is not alone.[49]

While in normal contractual settings capitalism encourages opportunism, tort law expects much more from fiduciaries. Central to the sort of theatricalized lingo that has always pervaded fiduciary law is Justice Cardozo's celebrated downstage declamation in *Meinhard v. Salmon*, cited some 5,000 times since 1928, a highly theatricalized elevation of the fiduciary over the base "morals of the market place."[50]

Despite the moralizing,[51] a partner, it turns out, "is not the sort of fiduciary who must behave as a disinterested trustee":[52] partners can and do pursue self-interest.[53] If the law saw things otherwise, unprofitable partners would be expected to withdraw for the good of the partnership; but they are not.[54] Indeed, the Revised Uniform Partnership Act of 1997 [RUPA], now adopted by some two-thirds of the states,[55] has codified the

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48 In re Friedman, 298 B.R. 487, 499 (D. Mass. 2003) (reading 11 U.S.C. § 523(a)(4) (2016). *But cf.* In re Seay, 215 B.R. 780, 786 & n.6 (10th Cir. 1997) (detailing Tenth Circuit split on whether partnerships are also trusts for purposes of § 523(a)(4)).

49 For example, Arizona (DeSantis v. Dixon, 72 Ariz. 345, 236 (1951)), and California (Leff v. Gunter, 33 Cal. 3d 508, 514 (1983)), follow the Massachusetts position. *See generally* In re Humphries, 516 B.R. 856, 868 n.8 (N.D. Miss. 2014) (detailing circuit-split over nature of co-partners' relations for purposes of 11 U.S.C. § 523(a)(4)(2016)).

50 Meinhard v. Salmon, 249 N.Y. 458, 463-64 (1928).

51 *Compare* Robert W. Hillman, *Private Ordering within Partnerships*, 41 U. MIAMI L. REV. 425, 456 (1987)("There is a moral theme to the concept of fiduciary responsibilities"), *with* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty,* 36 J.L. & ECON. 425, 438 n.28 (1993)("Fiduciary duties ... have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings.").

52 Donald J. Weidner, *Cadwalader, RUPA, and Fiduciary Duties*, WASH. & LEE L. REV. 877, 905 (1997).

53 Robert W. Hillman, *Private Ordering within Partnerships*, 41 U. MIAMI L. REV. 425, 465 (1987).

54 Donald J. Weidner, *Cadwalader, RUPA, and Fiduciary Duties*, WASH. & LEE L. REV. 877, 896 (1997).

55 John M. Taylor, *Professional Partner Expulsion: The Effects of RUPA and Section 736*,

judgment that partners cannot realistically be expected to be out only for others.[56] Specifically, section 404(e) of RUPA provides that "[a] partner does not violate ... this act or ... a partnership agreement merely because the partner's conduct furthers the partner's interest."[57] While trustees are strictly liable for acting against their beneficiaries' interests, partners' duties are only to avoid harms to the partnership through gross negligence or worse.[58] Section 404(e) therefore diverges from what is found in many judicial opinions: an injunction against a partner's pursuit of advantage over the partnership.[59]

This divergence reflects developments in corporate law, where judicial supervision of fiduciaries has backed off from traditional fiduciary-law rhetoric.[60] In particular, under RUPA, partners may re-bargain their agreement on the fly, lend money to the partnership, purchase its assets, or obtain waivers of fiduciary duties for specific purposes.[61] By codifying the permissible pursuit of self-interest, RUPA acknowledges that sweeping statements of fiduciary duties invite costly litigation and threats of

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BUSINESS ENTITIES 1, 5 (May/June 2007); Clay B. Wortham, *Revised Uniform Partnership Act: Anomalies of a Simplified, Modernized Partnership Law*, 92 KY. L.J. 1083, 1083 n.4 (2004)(citing ROBERT W. HILLMAN ET AL., THE REVISED UNIFORM PARTNERSHIP ACT 1, at 531-32 (2003)).

[56] Donald J. Weidner, *Cadwalader, RUPA, and Fiduciary Duties*, WASH. & LEE L. REV. 877, 905 (1997).

[57] *See* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1485-86 (2002).

[58] CHRISTINE HURT ET AL., ON LIMITED LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT § 8.404, at 326 & n.124 (2001) (Wolters-Kluwer 2015).

[59] Dennis J. Callahan, *Medieval Church Norms and Fiduciary Duties in Partnership*, 26 CARDOZO L. REV. 215, 268 & n.266 (2004).

[60] *See, e.g.*, Robert W. Hillman, *Private Ordering within Partnerships,* 41 U. MIAMI L. REV. 425, 458 (1987).

[61] Donald J. Weidner, *Cadwalader, RUPA, and Fiduciary Duties*, WASH. & LEE L. REV. 877, 905-07 (1997). These waivers only go so far. *See* UNIFORM PARTNERSHIP ACT § 103(b) (1997).

litigation, including by partners who seek to avoid some aspect of their partnership agreement.[62] As the reporter for RUPA has summarized: "The partner is no longer a trustee."[63]

Push comes to shove, partners see their own function as more Darwinist than the mincing agents Justice Cardozo associated with fiduciaries 85 years ago. Indeed, in a suit over a Wall Street law firm's decision to close its West Palm Beach branch and fire all 17 branch partners, the co-chair of the management committee defended the firm's position by testifying that "life is not made up of love, it is made up of fear and greed and money – how much do you get paid in large measure."[64] Right or wrong, the license afforded partners to look out for themselves reveals a fundamental flaw in the trust analogy, which operates in partnership law in only an extended sense.

B. *Corporations*

Like the partnerships of the sixteenth century, the predecessors of the modern corporation – the joint stock companies or overseas trading companies of the seventeenth and eighteenth centuries – imported fiduciary law[65] to tighten up what were seen as weak

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[62] Donald J. Weidner, *Cadwalader, RUPA, and Fiduciary Duties*, WASH. & LEE L. REV. 877, 905-06 (1997).

[63] Donald J. Weidner, *Pitfalls in Partnership Law Reform: Some United States Experience*, 26 J. CORP. L. 1031, 1039 (2001); Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 BUS. L. 1, 1 (Nov. 1993).

[64] Donald J. Weidner, *Cadwalader, RUPA, and Fiduciary Duties*, WASH. & LEE L. REV. 877, 881 (1997).

[65] William L. Baldwin, *The Corporation and Society: An Evolutionary/Institutional Approach,* 27 VERMONT L. REV. 841, 842 (2003); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 307 (1998) ("The trust metaphor was first applied in the 1830s by a minority shareholder in an attempt to hold a director personally liable for a breach of fiduciary duty.") (citing George D. Hornstein, *A Remedy for Corporate Abuse – Judicial Power to Wind Up a Corporation at the Suit of a Minority Stockholder,* 40 COLUM. L. REV. 220, 220 (1940)).

constraints placed by contract law on the self-dealing temptations of those at the helm.[66] To this day, "fiduciarians" continue to defend that move against "contractarians," who find fiduciary law a drag on the rough and tumble advantage-taking permitted by contract law, which, contractarians insist, can competently regulate conflicts on its own.[67] Yet mapping fiduciary law onto corporate law is far from light work, given that the legal nature of corporations – what they are, who owns them, whom they should benefit – is a fog.[68] Still, as a way of talking about corporate ownership,[69] the trust analogy works well enough for locating shareholders in the role of beneficiary or equitable-title holder. But the analogy weakens when attempting to locate boards of directors and corporate managers in the role of trustee or legal-title holder, which they occupy in only the most etiolated sense.[70]

1. *Divided Title: Shareholders as Equitable Owners*

Until the early twentieth century, corporations were seen as aggregates of individual shareholders woven together by contracts. As such, corporations possessed no

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[66] D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1459 (2002) ("The fiduciary duties of directors ... is a requirement to abstain from self-interested behavior.").

[67] *See, e.g.*, Rutherford B. Campbell, Jr., *Bumping Along the Bottom: Abandoned Principles and Failed Fiduciary Standards in Uniform Partnership and LLC Statutes*, 96 KY. L.J. 163, 173-74 & nn.37-39 (2007); Mark J. Lowenstein, *Fiduciary Duties and Unincorporated Business Entities: In Defense of the "Manifestly Unreasonable" Standard*, 41 TULSA L. REV. 411, 411 n.1, 413-14 (2006).

[68] Alfred F. Conrad, *Beyond Managerialism: Investor Capitalism?*, 22 U. MICH. J.L. REF. 117, 120-21 & n.3 (1988); *see also* John C. Coates IV, Note, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 815-18, 835-39 (1989) ("The directors of a corporation owe various fiduciary duties to that corporation, and, indirectly, to the corporation's shareholders insofar as the corporation's affairs are concerned.").

[69] *E.g.*, Joseph Biancalana, *Defining the Proper Corporate Constituency: Asking the Wrong Question*, 59 U. CINN. L. REV. 425, 425 (1990) ("In 1932 E. Merrick Dodd asked for whom are corporate managers trustees? Since that time the question has been asked many times, in many contexts, for many purposes.").

[70] Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 805 (1983); Richard A. Booth, *Who Owns a Corporation and Who Cares?*, 77 CHI.-KENT L. REV. 147, 150 (2001).

identity apart from those individuals and relations.[71] Under that "aggregate" or "property" approach, "[d]irectors were considered agents of shareholders."[72] What is not the same, directors were considered corporations' legal owners – fiduciaries[73] charged solely with the wealth-building of their shareholders who,[74] in trust terms, were considered equitable owners of corporate property.[75] Another way of saying this is that corporations are owned by shareholders,[76] who delegate control to a board of directors,[77] who in turn set policy and hire, fire, and compensate the CEO, who, under board oversight, runs the company with the CEO's management team.[78]

Typical of trustee-beneficiary relations – predicated on separation of ownership and control[79] – shareholders, like trust beneficiaries, act very little like owners, confident as they are that management will look out for them.[80] Nor *could* shareholders act much like owners, given their quite-limited rights to "elect directors and, under some

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71 William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 270 (1992).

72 William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 267 (1992)(citing Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919)(ruling that Ford's corporate mission was to produce shareholder profits, not the meaningful jobs and affordable cars Henry Ford envisioned).

73 D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 306-07 (1998).

74 D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 277-78 (1998).

75 *See, e.g.*, Gail Cagney, Note, *Corporate Officers as Employers: Eristic Liability under ERISA*, 52 BROOKLYN L. REV. 1211, 1217 n.27 (1987).

76 Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1455 (1996) ("Who owns a corporation? We are accustomed to saying that the shareholders own it.").

77 D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1458 (2002) ("[I]n large corporations ... actual control resides with the directors rather than with the shareholders.").

78 Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691, 694 (1986).

79 Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 619-28 (2006).

80 Richard A. Booth, *Who Owns a Corporation and Who Cares?*, 77 CHI.-KENT L. REV. 147, 157 (2001).

circumstances, remove them," but in no case "tell them what to do."[81] Shareholders hold title to no corporate property (factories, computers, pencils),[82] can initiate nothing, approve almost nothing, nor join large stock blocks or otherwise freely communicate or coordinate with other shareholders.[83]

Similar enough to the interests of equitable owners of a trust *res*, shareholders get the leftovers when the company dissolves,[84] can take income in the form of dividends or stock repurchases,[85] and bring "derivative" suits against officers and directors reluctant to sue themselves, recovery going to the corporation, presumably to be distributed *pro rata* among stakeholders.[86] Unlike trust beneficiaries, however, shareholders have official leverage with those at the controls by auditioning "takeover" management teams to lead them,[87] voting on some matters,[88] and selling the company out from under management,

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[81] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 291 (1999) (It thus may make only misleading sense to call managers/directors "agents" of shareholders).

[82] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 291 n.97 (1999).

[83] Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 616-17 (2006); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1455 (1996).

[84] Richard A. Booth, *Who Owns a Corporation and Who Cares?*, 77 CHI.-KENT L. REV. 147, 163 (2001); Laura Lin, *Shift of Fiduciary Duty Upon Corporate Insolvency: Proper Scope of Directors' Duty To Creditors*, 46 VAND. L. REV. 1485, 1488 (1993); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1458 (2002).

[85] Richard A. Booth, *Who Owns a Corporation and Who Cares?*, 77 CHI.-KENT L. REV. 147, 165 (2001); Laura Lin, *Shift of Fiduciary Duty Upon Corporate Insolvency: Proper Scope of Directors' Duty To Creditors*, 46 VAND. L. REV. 1485, 1488 (1993).

[86] Bruce A. Markell, *The Folly of Representing Insolvent Corporations: Examining Lawyer Liability and Ethical Issues Involved in Extending Fiduciary Duties to Creditors*, 6 J. BANKR. L. & PRAC. 403, 420-21 (1997). The shareholder's derivative action emerged in the mid-nineteenth century as an equitable device enabling shareholders to enforce rights that the corporation failed to assert on its own behalf. Those rights include the recovery of losses occasioned by self-dealing or fraudulent or grossly negligent misconduct by directors or managers. *See, e.g.*, Jones v. H.F. Ahmanson & Co., 1 Cal. 3d 93 (en banc 1969).

[87] John C. Coates IV, Note, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 815-18, 835-39 (1989).

subject to so-called poison pills designed to run off bidders, whose ownership is diluted by discounts in the company's or bidder's stock made available to stockholders.[89]

Even if managers' control *is* like that of trustees ("though it was never very clear that trust law bore much relation to corporation law"),[90] there is authority for the proposition that shareholders are *not* the equitable owner-beneficiaries.[91] Specifically, by the late nineteenth century, corporations had taken on a vibe of entities (natural or artificial) with a legal (albeit fictive) personality separate from its shareholders. This separate personality, evidenced by limited liability, enabled such entities to sue and be sued, own, inherit, and dispose of property, and survive the human actors through whom it acts.[92] This entity view reversed the legal notion that directors' and shareholders' interests align through directors' fiduciary duties.[93] Instead, on behalf of the entity, directors juggle the interests not just of shareholders, but "employees, managers, customers, consumers, and surrounding communities as well," quite apart from their

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[88] Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 616-17 (2006).

[89] For a description of various poison pills, see Heith D. Rodman, Comment, *Death Toll for the Dead Hand?: The Survivability of the Dead Hand Provision in Corporate America*, 48 EMORY L.J. 991, 994-96 (1999).

[90] Richard A. Booth, *Who Owns a Corporation and Who Cares?*, 77 CHI.-KENT L. REV. 147, 150 (2001) (citing A.A Sommer, Jr., *Whom Should the Corporation Serve?: The Berle-Dodd Debate Revisited Sixty Years Later*, 16 DEL. J. CORP. L. 33 (1991)).

[91] E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147 & n.6 (1932) (issuance of dividends or new stock does not implicate equally corporate and shareholder interests); *see* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 275 (1992) ("Whose interests is the board of directors supposed to foster or protect when substantially all of the shareholders want to sell control of the corporation?").

[92] John C. Coates IV, Note, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 810-15, 873 (1989).

[93] William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 276 (1992).

contractual claims.[94] This expanded group of beneficiary-stakeholders includes prospective shareholders in their dealings with insiders[95] and creditors when the corporate-debtor is insolvent or on the brink.[96] And so the notion of trusteeship does speak to a distinct worry: how to rationalize corporate control of vast amounts of wealth without somehow impressing corporations with a public interest beyond management and perhaps even stockholders.[97] "In the eyes of the law, corporate directors are a unique form of fiduciary who ... resemble trustees ... constrained primarily by their fiduciary duties, making trade-offs between the conflicting interests of different corporate constituencies."[98]

In sum, the shareholder-primacy view of the corporate form as expressed in the trust analogy, though frequently dismissed as passé[99] or plain wrong,[100] does somehow manage continually to rehabilitate itself from criticism.[101]

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[94] John C. Coates IV, Note, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 870 (1989). *See also* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 270-72 (1992); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 291 (1999); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1455 (1996).

[95] D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1419 n.78 (2002).

[96] Rutheford B. Campbell, Jr. & Christopher W. Frost, *Managers' Fiduciary Duties in Financially Distressed Corporations: Chaos in Delaware (and Elsewhere)*, 32 J. OF CORP. L. 491 (2007); *see* Bruce A. Markell, *The Folly of Representing Insolvent Corporations: Examining Lawyer Liability and Ethical Issues Involved in Extending Fiduciary Duties to Creditors*, 6 J. BANKR. L. & PRAC. 403, 405-09, 420-21 (1997).

[97] Richard A. Booth, *Who Owns a Corporation and Who Cares?*, 77 CHI.-KENT L. REV. 147, 167 (2001).

[98] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 291 (1999).

[99] Richard A. Booth, *Five Decades of Corporation Law: From Conglomeration to Equity Compensation*, 53 VILL. L. REV. 459, 473 (2008).

[100] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 291, 303, 327 (1999); Richard A. Booth, *Who Owns a Corporation and Who Cares?*,

2. *Divided Title: Directors/Managers as Legal Owners*

As putative owners of legal title to the corporate *res*, directors and managers, unlike shareholders, *do* act like owners, though not like trustees, despite talk to that effect both on a literal level[102] and by way of simile.[103] That managers own little compared to the wealth they manage, while shareholders defer to them and the directors whom managers install with shareholder acquiescence, makes corporations arguably "ownerless."[104] Directors inquire, suggest, and approve or disapprove of managers' actions; but resignation is their only recourse if they disagree profoundly.[105] Likewise does the control exerted over managers by institutional investors – pension funds, mutual funds, trustees, and foundations to whom individual savers entrust their funds – further destabilize conventional notions of ownership when applied to corporate actors.[106]

Unlike trustees, directors and managers do not hold title to corporate property, which is in the entity's name.[107] Moreover, because shareholders may diversify, they are not shy about taking risks at the company level to make a big score. Managers,

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77 CHI.-KENT L. REV. 147, 169 (2001) ("Despite all the talk about how the stockholders own the company there is really no statutory authority for the proposition.").

[101] Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1455 (1996) (alluding to "a new movement in recent years to reassert the rights of shareholders as owners") (citing ROBERT A.G. MONKS & NELL MINOW, POWER AND ACCOUNTABILITY (1991)).

[102] 3A FLETCHER CYCLOPEDIA OF CORPORATIONS § 1180 (1998).

[103] Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 880-81 (1988).

[104] Alfred F. Conrad, *Beyond Managerialism: Investor Capitalism?*, 22 U. MICH. J.L. REFORM 117, 121-22 (1988).

[105] Alfred F. Conrad, *Beyond Managerialism: Investor Capitalism?*, 22 U. MICH. J.L. REFORM 117, 140 (1988).

[106] Alfred F. Conrad, *Beyond Managerialism: Investor Capitalism?*, 22 U. MICH. J.L. REFORM 117, 135 (1988).

[107] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 291 n.97 (1999).

oppositely, cannot diversify: their fate follows their company's. Thus is it managers (particularly CEOs) – staked more than shareholders in company performance – who think like owners, preferring a fair return and company survival to high-stakes gambling.[108] To avoid shirking of duties by managers, their relations with shareholders are at least theoretically mediated by boards of directors.[109]

While managers act like owners of the corporate *res*, they, like directors, fall too far outside the criteria of trustees in the strict sense to justify the linguistic move.[110] No one thinks of managers as trustees, an analogy at least one expert has called "corny."[111] Under trust law, as legal owners, trustees can have no beneficial interest in the trust *res*. Corporate law, contrariwise, permits manager ownership,[112] whereby stock options and the funding of pension plans with stock has boosted the stakes of active manager-investors and passive employee-investors.[113]

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108 Richard A. Booth, *Who Owns a Corporation and Who Cares?*, 77 CHI.-KENT L. REV. 147, 154-55 (2001); Richard A. Booth, *Five Decades of Corporation Law: From Conglomeration to Equity Compensation*, 53 VILL. L. REV. 459, 473 (2008).

109 Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 291 (1999); Richard A. Booth, *Five Decades of Corporation Law: From Conglomeration to Equity Compensation*, 53 VILL. L. REV. 459, 474 (2008).

110 Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) ("While technically not trustees, [directors] stand in a fiduciary relation to the corporation and its stockholders.").

111 Richard A. Booth, *Who Owns a Corporation and Who Cares?*, 77 CHI.-KENT L. REV. 147, 165 (2001).

112 Richard A. Booth, *Who Owns a Corporation and Who Cares?*, 77 CHI.-KENT L. REV. 147, 167 (2001). Trustees are obligated to administer trusts solely in the interest of beneficiaries. Similarly, agents are obligated to act solely for their principals' benefit in all matters related to the agency. By contrast, corporate directors are obligated simply to treat shareholders fairly. D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1483-84 (2002).

113 Richard A. Booth, *Who Owns a Corporation and Who Cares?*, 77 CHI.-KENT L. REV. 147, 150-52, 167 (2001).

C. *Agency*

The fig leaf that all fiduciaries are trustees of sorts is removed in agency law. In a form that took shape in the nineteenth century[114] – strongly influenced by treatise writers[115] – agents are cast as fiduciaries, but with no homage to divided title.[116] Formally, agency "is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."[117] With such an open standard, agents abound, held out to include, to name a few: executors, guardians, receivers, escrow agents, banks, partners, corporate managers and directors, shareholders of a close corporation, doctors, securities brokers, real-estate brokers, and accountants.[118] Though not trustees,[119] agents are subject to many of the same rules that constrain trustees.[120]

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[114] *See* Mary Szto, *Limited Liability Company Morality: Fiduciary Duties in Historical Context*, 23 QUINNIPIAC L. REV. 61, 100 (2004) (on nineteenth century agency principles). Western law wrestled with the problem of agency, particularly in legal representation, long before we spoke of "fiduciary duty," which has by any other name percolated as a high principal of loyalty since Socrates. Sande Buhai, *Lawyers as Fiduciaries*, 53 ST. LOUIS U. L.J. 553, 555-56 (2009).

[115] Deborah DeMott, *The Contours and Composition of Agency Doctrine: Perspectives from History and Theory on Inherent Agency Power*, 2014 U. ILL. L. REV. 1813, 1817-18 & n.12 (2014); L.S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69, 72 n.11.

[116] Kinert v. Wright, 185 P.2d 364, 368 (Cal. App. 1947).

[117] RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006).

[118] BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION INCOME, ESTATES & GIFTS ¶ 82.4 (2016). *But see* People v. Riggins, 132 N.E.2d 928, 928 (Ill. 1956) (Schaefer, J., dissenting) (if "agent" encompasses "clerk, ... servant, solicitor, broker, apprentice or officer, ... each of the other terms is superfluous because all are embraced within the single term 'agent'").

[119] Estate of Djeljaj, 954 N.Y.S.2d 853, 855 (Bronx Surrogate's Ct. 2012) (agents are not trustees "in the technical meaning of the word").

[120] RESTATEMENT (THIRD) OF TRUSTS § 5 cmt. e (Tentative Draft No. 1, AM. LAW INST. 1996); RESTATEMENT (SECOND) OF AGENCY § 387 cmt. b (AM. LAW INST. 1958).

As for lawyers, they are "first and foremost agents,"[121] whose clients are principals.[122] "Quintessential fiduciaries,"[123] lawyers are bound both by a professional code to "represent a client zealously within the bounds of the law,"[124] and by tort law's "fiduciary obligations of utmost propriety and consideration for the interests of the client."[125] Lawyers are not, however, "trustee of any claim or asset owned or sought by [the] client."[126]

There is both a procedural and remedial legal significance in the law's finding that "liability rules"[127] compensating plaintiffs in contracts and negligence actions are insufficient to regulate agents bent on self-dealing, competing with, or ripping off their principals.[128] Procedurally, fiduciary law sides with plaintiffs by 1) blocking defenses of contributory or comparative fault, 2) prolonging statutes of limitations, and 3) burden-shifting on the issue of breach.[129] Remedially, the Restatement (Third) of Agency

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[121] Charles Silver, *Litigation Funding Versus Liability Insurance: What's the Difference?,* 63 DEPAUL L. REV. 617, 637 (2014).

[122] Downs v. McNeil, 520 F.3d 1311, 1320 (11th Cir. 2008) (quoting Pioneer Inv. Serv. Co. v. Brunswick Ass'n. Ltd. Partnership, 507 U.S. 380, 396 (1993)).

[123] Lester Brickman, *The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000's Revision of Model Rule 1.5,* 2003 U. ILL. L. REV. 1181, 1191. Lawyers are more closely regulated than other agents. *See* Sande Buhai, *Lawyers as Fiduciaries*, 53 ST. LOUIS U. L.J. 553, 579-80 (2009) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS 2 Intro. Note (AM. LAW INST. 2000).

[124] MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (AM. BAR ASS'N 2010 ed.).

[125] Ray Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort, and Contract: A Primer on the Legal Malpractice Puzzle*, 47 S.M.U. L. REV. 235, 246 (1994).

[126] Birchfield v. Harrod, 640 P.2d 1003, 1009 (Okla. App. 1982).

[127] *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 HARV. L. REV. 1089 (1972).

[128] *Cf.* RESTATEMENT (THIRD) OF AGENCY § 8.02 cmt. b (AM. LAW INST. 2006) (remedies for breach of fiduciary duty include and surpass compensation of victims).

[129] Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim does not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137, 1155-56 (1999).

imposes "property rules"[130] – accounting for profits, disgorgement of ill-gotten gains, and constructive trust (a coerced transfer back to the victim of property acquired by the breaching fiduciary) – even absent harm to the principal.[131] Likewise are fiduciaries subject to forfeiture of commissions or fees,[132] again, even when the breach earns the lawyer no profit, as in the divulgence of non-commercial confidences, the revelation of which causes the client no damage, emotional or otherwise.[133] By coercing breaching lawyers into surrendering their fees, invariant either to their exploitive gains or clients' losses, fiduciary law has the effect of punishing wrongdoers while evading the otherwise essential scienter requirement.[134]

So in what ways, exactly, do lawyers and trustees differ? It is not so much that lawyers' relations with clients are too competitive to allow for the professional selflessness expected of trustees, though tensions do inhere such relations.[135] Instead, the

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[130] *See generally* Emily Sherwin, *Introduction: Property Rules as Remedies*, 106 YALE L.J. 2083 (1997).

[131] Hendry v. Pelland, 73 F.3d 397, 401-02 (D.C. Cir. 1996); Burrow v. Arce, 997 S.W.2d 229, 240, 245 (Tex. 1999); RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d (1) (AM. LAW INST. 2006).

[132] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996).

[133] RESTATEMENT (THIRD) OF AGENCY § 8.02 cmts. d & e (AM. LAW INST. 2006); Brian M. Serafin, *Comparative Fault and Contributory Negligence as Defenses in Attorney Breach of Fiduciary Duty Cases,* 21 GEO. J. LEGAL ETHICS 993, 994 n.10 (2008). For example, an attorney using a prior document as a template for a new one might inadvertently disclose to the new client and others the identity and factual background of the prior client's matter, thus breaching confidences owed the prior client, but potentially causing no damage.

[134] *See* Andrew Kull, *Restitution's Outlaws,* 78 CHI.-KENT L. REV. 17, 17 n.1, 23-30 (2003). For a strong case against a generalized right to throw the book at breaching fiduciaries in the absence of harm to their principals, see Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137 (1999).

[135] For example, in Evans v. Jeff. D., 475 U.S. 717 (1986), the Supreme Court upheld a federal civil-rights settlement against Idaho officials who conditioned their acceptance of the injunctive relief plaintiffs sought on a waiver of plaintiffs' statutory, prevailing-party attorney's fees. Plaintiffs' attorneys understandably expected plaintiffs to pursue and assign to them attorney's

rub is that lawyers in no sense hold legal title for the benefit of others. Just as "[a] trust cannot be created unless there is trust property,"[136] nor can a trust-like relation, which trades on the grammar of trusts.[137] In contrast to trustees, or even partners and corporate managers for that matter, lawyers are paid for advice, much of which has a financial upshot, but precious little of which can count as investment management.[138] Much more centrally do they safe-keep, not invest, client property (e.g., a settlement or damages award),[139] as often as not to avoid extending clients credit during representation (e.g., a retainer).[140]

Admittedly, much of fiduciary law is trained on determining when a principal is responsible for an agent's dealings with third parties.[141] For example, when a bill collector (agent) hired by a store (principal) absconds with payments collected from a debtor-customer on behalf of the store, that portion of the debt stolen by the agent is

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fees coerced from defendants by the court in lieu of a contingency-fee arrangement, which plaintiffs could not afford. In sum, with the high court's imprimatur, plaintiffs got the relief they sought while selling out their attorneys, who had no choice but to accept the raw deal, given their fiduciary duty to their clients, not to their own enrichment.

For additional proof of the inherent conflicts in attorney-client relations, see Muzelak v. King Chevrolet, Inc., 368 S.E.2d 710, 717 (W. Va. 1988), where the West Virginia Supreme Court stated that punitive damages and statutory attorney's fees both offset litigation costs that leave plaintiffs undercompensated when plaintiffs share an award with counsel in contingency-fee cases.

[136] RESTATEMENT (SECOND) OF TRUSTS § 74 (AM. LAW INST. 1959).

[137] *But cf.* United States v. Tanabe, No. CR 11-0941 SBA, 2012 WL 5868968, at *3-5 (N.D. Cal. Nov. 19, 2012) (deputy sheriff who arrested DUI suspects in exchange for cocaine and gun from private investigator representing arrestees' wives breached his fiduciary duty to county).

[138] *E.g.*, Nesvig v. Nesvig, 676 N.W.2d 73 (N.D. 2004).

[139] *E.g.*, Pollack v. Crocker, 660 F. Supp. 1284, 1286 (S.D.N.Y. 1987) (finding client's IRS refund paid to and held for client by attorney subject to attorney's lien).

[140] Disciplinary Counsel v. Dockry, 979 N.E.2d 313, 315 (Ohio 2012) (defendant-lawyer "handled cases on an hourly fee basis and deposited the fee advances received from his clients into his client trust account").

[141] Deborah DeMott, *The Contours and Composition of Agency Doctrine: Perspectives from History and Theory on Inherent Agency Power*, 2014 U. ILL. L. REV. 1813 (2014).

discharged.[142] But third parties cannot fairly be characterized as beneficiaries of lawyers' fiduciary duties, though we can posit extraordinary facts posing such a setup departing from the convention whereby lawyers' obligations run uniquely to the client.[143] Under agency law, agents' dealings with third parties bind their principals, but not because agents are co-obligated fiduciaries serving two masters, a conflict that would alarm any first-year student of torts.[144] Just as third parties hold nothing like equitable title to a principal-client's property, agents hold nothing like legal title to a principal's property.[145] Boiled down, when it comes to third parties, an agent-lawyer is more mediator than trustee, more conduit than wealth manager.[146]

Once anything resembling a trust *res* drops out as an element, it follows that agency, and what goes hand in hand, fiduciary duty, expand. For instance, according to the latest Restatement of Agency, all employees are agents, and all agents fiduciaries,[147]

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[142] This much is implied by People v. Riggins, 132 N.E.2d 519 (Ill. 1956). *But cf id.*, 132 N.E.2d at 928 (Schaeffer, J., dissenting) (because bill collector is *not* store's agent, his actions would *not* expose store to vicarious liability in tort suit filed by debtor).

[143] *E.g*., Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 895 (where attorney's client holds power of attorney to act for an ailing relative, attorney's fiduciary duty is to beneficiaries of ailing relative's estate squandered by client under power of attorney with attorney's assistance).

[144] *E.g*., H.H. Woodsmall, Inc. v. Steele, 141 N.E. 246 (Ind. App. 1923).

[145] *Cf.* Daniel Yeager, CRIMINAL LAW: HOMICIDE & EXCULPATION 377-78 (Wolters-Kluwer 2015) (citing People v. Traster*,* 4 Cal. Rptr. 3d 680 (Cal. App. 2003) (when defendant-computer consultant received $132,296 for Microsoft licenses, he got only possession of the money – title would vest in defendant only once he had performed the agreed-to purchase of the licenses, which he neither did nor ever intended to do).

[146] *But cf.* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. g (AM. LAW. INST. 2006) (references to "intermediaries" and "middlemen" are to brokers, not lawyers).

[147] RESTATEMENT (THIRD) OF AGENCY § 1.01 cmts. c & g (AM. LAW. INST. 2006). *But cf. Discussion of Restatement of the Law (Third), Agency*, 2001 A.L.I. Proceedings 53 ("My problem isn't with the statement itself, it is that the Restatement goes on to say that all employees are agents, and therefore all employees are fiduciaries, which just seems wrong to me.") (Statement of Richard E. Gutman). For a thoughtful take on employee-agents under the Restatement of Employment Law, see Deborah A. DeMott, *Relationships of Trust and Confidence in the Workplace*, 100 CORNELL L. REV. 1255 (2015).

the intention being to reduce the temptations of employees, who hold their employers' good will and wealth over the barrel.[148] By handling key functions and cash to boot,[149] employees might steal or at a minimum withhold "their best efforts to produce, innovate, cooperate with management, or share information."[150] No wonder, the story goes, employers spy on their employees.[151]

From an employee perspective, however, *they* are the ones over the barrel:

> I can think of no relationship in which one party, the employee, places more reliance upon the other, is more dependent upon the other, or is more vulnerable to abuse by the other, than the relationship between employer and employee. And, ironically, the relative imbalance of economic power between employer and employee tends to increase rather than diminish the longer that relationship continues. Whatever bargaining strength and marketability the employee may have at the moment of hiring, diminishes rapidly thereafter. Marketplace? What market is there for the factory worker laid off after 25 years of labor in the same plant, or for the middle-aged executive fired after 25 years with the same firm?[152]

Under such a view, employees resort to counter-moves like sabotage only to fend off their own powerlessness and exploitation.[153] Nonetheless, managers of employee health and retirement plans serve as the only legally recognized, recurring example of the

[148] *Compare* Laurel Valley Oil Co. v. 76 Lubricants Co., 797 N.E.2d 1033, 1039 (Ohio App. 2003) ("Not all employees are fiduciaries"), *with* William Lynch Schaller, *Disloyalty and Distrust: The Eroding Fiduciary Duties of Illinois Employees*, 3 DEPAUL BUS. L.J. 1, 13 (1991) (It is "well-established" in Illinois "that employees are fiduciaries of their employers.").

[149] Douglas Laycock, *Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 COLUM. L. REV. 1373, 1407 (1981) ("Every employee is a fiduciary for his employer.").

[150] Julius G. Getman & F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 YALE L.J. 1803, 1879-80 (1993).

[151] *See* Jessica Fink, *In Defense of Snooping Employers*, 16 U. PA. J. BUS. L. 551, 570-79 (2014).

[152] Foley v. Interactive Data Corp., 765 P.2d 373, 414-15 (Cal. 2003) (Kaufman, J., dissenting) (quoted in Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763, 790-91 (1998)).

[153] Julius G. Getman & F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 YALE L.J. 1803, 1879-80 (1993).

employer-fiduciary,[154] despite some push from academics to expand.[155] Realistically, neither side could be expected to renounce self-interest, given "the inherently antagonistic character of the traditional employer-employee relationship."[156] If there were any question about this, check out final-offer arbitration in major league baseball, where

> [t]eams risk injuring their relationship with a player by arguing that his worth is well below what the player thinks he is worth. A team might be forced to defend its proposal by "insulting a player and presenting arguments that harp on a player's physical or mental defects, or demeaning his past contributions to the club, playing record or public appeal."[157]

Who is the other-regarding, supererogatory fiduciary there? At work, in markets, in capitalism, we are all over the barrel, though not all of us are fiduciaries.

IV. *Academic Influence on Fiduciary Law*

There is a nontrivial cost to decoupling fiduciary law from trusts or trust-like circumstances in which a colorable claim of divided title can be made: counting *all* relations based on imbalances of power/knowledge as fiduciary renders the criteria so

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[154] Crouch v. Bussen Quarries, Inc., 124 F. Supp. 3d 947, 955-56 (E.D. Mo. 2015); In re Popovich, 359 B.R. 799, 801-02 (D. Colo. 2006) ("[A] person is a fiduciary with respect to a plan," and thus subject to ERISA fiduciary duties, "to the extent" he or she "exercises any authority or control respecting management or disposition of [plan] assets….") (quoting 29 U.S.C.

§ 1002(21)(A))(internal quotation marks omitted).

[155] Samuel J. Samaro, *The Case for Fiduciary Duty as a Restraint on Employer Opportunism under Sales Commission Agreements*, 8 U. PENN. J. LAB. & EMP. L. 441 (2006); P. Prestin Weidner, Note, *The Misappropriation of Trust Fund Taxes Under the Guise of Reasonable Cause*, 57 VAND. L. REV. 287 (2004).

[156] Sarah J. Bannister, Note, *Low Wages, Long Hours, Bad Working Conditions: Science and Engineering Graduate Students Should Be Considered Employees under the National Labor Relations Act*, 74 GEO. L. REV. 123, 124-25 (2005).

[157] Eldon L. Ham & Jeffrey Malach, *Hardball Free Agency - The Unintended Demise of Salary Arbitration in Major League Baseball: How the Law of Unintended Consequences Crippled the Salary Arbitration Remedy - and How to Fix It*, 1 HARV. J. SPORTS & ENT. L. 63, 80 (2010) (quoting Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 AMER. REV. INT'L ARBITRATION 383, 390 (1999)).

open as to be empty, where *anything*, like classifying *Hamlet* as a comedy, is possible. Flexibility is a virtue sure enough;[158] but it is also a vice:[159]

> I have a friend who is fond of defining 'fiduciary' as follows: "Fiduciary" is what the judge calls you before ruling against you. And I think we see a lot of those sort of complex connotations of the term, which could make it problematic as used in black-letter text.[160]

Indeed, the term has become so extended that no longer is it a stretch to say that fiduciary duties emerge whenever – with or without anything resembling a trust *res* – one party has a broad grant of discretion over the other's interests amidst a dependency relation due to information asymmetry.[161] If all agents are fiduciaries, then who else among power-wielders might we add to the list?

1. *Franchisors*

Consider franchises, where a successful chain like McDonald's adds on entrepreneurial owners while maintaining a tight grip on its brand by "micromanag[ing] the conduct of its franchisees in excruciating detail, even specifying the order in which

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[158] *See, e.g.*, Tamar Frankel, *Fiduciary Law in the Twenty-First Century*, 91 B.U. L. REV. 1289, 1290 (2011).

[159] *See, e.g.*, J.A.C. Hetherington, *Defining the Scope of Controlling Shareholders' Fiduciary Responsibilities*, 22 WAKE FOREST L. REV. 9, 11 (1987).

[160] Discussion of Restatement of the Law Third, Agency, 2001 A.L.I. Proceedings 53 (statement of Professor James Steven Rogers).

[161] *E.g.*, Adelphia Recovery Trust v. Bank of America, 624 F. Supp. 2d 292, 323-24 (S.D.N.Y 2009) ("Under Pennsylvania state law a fiduciary duty will arise where by virtue of the respective strength and weakness of the parties, one has a power to take advantage of or exercise undue influence over the other") (citation omitted); City of Hope Nat. Med. Ctr. v. Genentech, Inc., 181 P.3d 142, 150-52 (Cal. 2008); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS 2 Intro. Note (AM. LAW INST. 2000); Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 922.

condiments should be placed on hamburgers."[162] Despite the one-sidedness of franchise contracts,[163] franchisors are not fiduciaries of their franchisees.[164]

Yet testifying in 1970 before the Senate Select Committee on Small Business, General Counsel for the Federal Trade Commission John Buffington observed that "franchisors frequently speak of their relationship with their franchisees as being one of trust and confidence. It is truly a fiduciary relationship."[165] The next year, Boston attorney Harold Brown,[166] relying solely on Buffington's "informal" position,[167] published "Franchising – A Fiduciary Relationship" in the *Texas Law Review*, where Brown made what he claimed to be the first pitch for fiduciary law as a check on franchisor power.[168] The following year a New York trial court, unable to find "any

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[162] *See* Melissa Ann Gauthier, Note, *The SJC and Dunkin' Donuts: Squeezing the Filling Out of the Small Franchisee*, 41 NEW ENG. L. REV. 757, 761-72 (2007); Lois Therrien, *McRisky*, BUSINESS WEEK, Oct. 21, 1991, at 114.

[163] Peter C. Lagarias & Robert S. Boulter, *The Modern Reality of the Controlling Franchisor: The Case for More, Not Less, Franchisee Protections*, 29 FRANCHISE L.J. 139, 144-45 (2010).

[164] Picture Lake Campground, Inc. v. Holiday Inns, Inc., 497 F. Supp. 858, 869 (E.D. Va. 1980) ("A franchise relationship is inherently a business relationship, not a fiduciary relationship."); Crim Truck & Tractor Co. v. Navistar Intern. Transp. Corp., 823 S.W.2d 595 n.5 (Tex. 1992); 10 BUS. & COM. LITIG. FED. CTS. § 111:36 (AM. BAR ASS'N 3d ed. 2011); Robert W. Emerson, *Fortune Favors the Franchisor: Survey and Analysis of the Franchisee's Decision whether To Hire Counsel*, 51 SAN DIEGO L. REV. 709, 711 & n.9 (2014) ("Only a small minority of courts has found that as a matter of law a fiduciary relationship exists between a franchisor and a franchisee.").

[165] *Hearings on the Impact of Franchising on Small Business Before the Subcomm. on Urban and Rural Economic Development of the Senate Select Comm. on Small Business*, 91st Cong., 2d Sess. 143 (1970) (statement of John V. Buffington).

[166] *See* Newark Motor Inn Corp. v. Holiday Inns, Inc., 472 F. Supp. 1143, 1151 n.* (D.N.J. 1979).

[167] 49 TEX. L. REV. 650, 664 (1971) ("[T]he fiduciary nature of the franchise relationship was recently informally recognized by the Federal Trade Commission....").

[168] Harold Brown, FRANCHISING: REALITIES AND REMEDIES § 9.08 (rev. ed. 1998), *quoted in* Dunkin' Donuts, Inc. v. N.A.S.T., 266 F. Supp. 2d 826, 828-29 (N.D. Ill. 2003). Brown made the fiduciary claim repeatedly. *See, e.g.*, Harold Brown, FRANCHISING: TRAP FOR THE TRUSTING (Little Brown 1969); Harold Brown & Jerry Cohen, *Franchise Equities*, 63 MASS. L. REV. 109 (1978); Harold Brown & Jerry Cohen, *Franchise Misuse*, 48 NOTRE DAME L. REV. 1145 (1973); Harold Brown, *Franchising: Fraud, Concealment and Full Disclosure*, 33 OHIO ST. L.J. 517

American cases that have either applied or rejected the fiduciary theory to franchises," ruled anyway that out of Mobil Oil's "dominant economic position" and "control" over a single-station franchisee (a former Mobil gas-station worker) arose a fiduciary relationship.[169] The court's authority? Harold Brown's "well-researched article."[170]

From there, Brown's progress in expanding fiduciary law has been iffy, relying on over-readings that get promptly repudiated. For example, William Killion, in his ALR entry summarizing the franchising cases on point, cites *Mister Donut of America, Inc. v. Harris* for the proposition that franchisors are fiduciaries of their franchisees.[171] Specifically, Killion concludes that the Arizona Supreme Court found the fast-food chain the fiduciary of a franchisee to whom the chain had misleadingly understated the hassles in getting donut ingredients.[172] But *Mister Donut* did not so hold; instead, the Arizona high court merely called the franchisor-franchisee relation "special," citing Harold Brown.[173] Two years later a federal district court, applying Arizona law, corrected Killion's misreading.[174] To Brown's credit, not only do those courts that reject his

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(1972).

[169] Mobil Oil Corp v. Rubenfeld, 339 N.Y.S.2d 623, 637 (Queens County 1972).

[170] Mobil Oil Corp v. Rubenfeld, 339 N.Y.S.2d 623, 632-33 (Queens County 1972).

[171] William L. Killion, *Existence of Fiduciary Duty between Franchisor and Franchisee*, 52 A.L.R.5TH 613 (2016).

[172] William L. Killion, *Existence of Fiduciary Duty between Franchisor and Franchisee*, 52 A.L.R.5TH 613 §5 (2016) (citing Mister Donut of Am., Inc. v. Harris, 723 P.2d 670 (Ariz. 1986) (en banc).

[173] Mister Donut of Am., Inc. v. Harris, 723 P.2d 670, 673 (1986) (en banc).

[174] R.L.M. Dist. Co. v. W.A. Taylor, Inc., 723 F. Supp. 421, 429 (D. Ariz. 1988) ("[B]ecause Arizona's courts have never decided whether a franchise relationship is fiduciary, this court does not find a fiduciary relationship present."). The other two cases summarized by Killion also turned out unreliable. Applying South Dakota law, see Bain v. Champlin Petroleum Co., 692 F.2d 43, 48 (8th Cir. 1982), *distinguishing* Arnott v. American Oil Co., 609 F.2d 873, 881 (8th Cir. 1979). Applying Missouri law, see Jimmy Dan, Inc. v. Chrysler Credit Corp., 643 F. Supp. 368, 369 (W.D. Mo. 1986) *distinguishing* ABA Distrib., Inc. v. Adolph Coors Co., 542 F. Supp. 1272, 1286 (W.D. Mo. 1982).

position first explicitly consider following his advice,[175] but academic lawyers stand by his position even after courts have abandoned.[176]

Indeed, to call the franchise relation "fiduciary" overshoots the intentionally incomplete contractual terms the parties have sketched out, whereby ownership resides in the franchisee (who operates much like an independent contractor) and control resides in the franchisor (who operates much like an employer). Thus throwing around the word "fiduciary" as a way of characterizing franchisors' obligations to franchisees completely gives up on assessing the complexity of the relation, its long-term nature, the give and take, and mostly, the reality that in the commercial world, we are all subject to others, none of us wholly subservient nor powerful, a reality that "fiduciary" as label obscures.[177]

2. *Insurers*

If attempts to insinuate tendentious academic positions into fiduciary law were unusual, I would not be pointing to them here. But they're not. In 1974, two Boalt Hall students, William Goodman and Thomas Seaton, published in their home law review a foreword reviewing four cases then pending in the state high court where they had interned.[178] One of the four, *Silberg v. California Life Ins. Co.*, reinstated a jury's

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[175] *E.g.*, Phillips v. Chevron U.S.A., Inc., 792 F.2d 521, 523-54 (5th Cir. 1986); Murphy v. White Hen Pantry Co., 691 F.2d 350, 355 & n.6 (7th Cir. 1982); General Business Machines v. National Semiconductor Datachecker/DTS, 664 F. Supp. 1422, 1425 n.4 (D. Utah 1987); Dunkin' Donuts Inc. v. N.A.S.T., Inc., 266 F. Supp. 2d 826, 828-29 (N.D. Ill. 2003); Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 1992 WL 170559, at *5 (S.D.N.Y.).

[176] Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 958-59 (1993); *cf.* Anne L. Austin, *When Does a Franchisor Become a Fiduciary?*, 43 CASE W. RES. L. REV. 1151 (1993) (some franchisors are fiduciaries, others not).

[177] *See* Gillian Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927 (1990) (quoted in IAN R. MACNEIL & PAUL J. GUDEL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS (3rd ed. 2001).

[178] William M. Goodman & Thomas Greenfield Seaton, *Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court*, 62 CALIF. L. REV. 309 (1974).

compensatory damages in favor of a plaintiff whose insurer refused to pay losses from a foot injury incurred when he fell into a working washing machine.[179] According to California's high court, because the insurer's unjustifiable attempt to avoid the policy breached "its duty of good faith and fair dealing implied in every policy," the $75,000 compensatory award would stand.[180] But the trial court had vacated the jury's $500,000 punitive-damages award due to insufficient proof of scienter, an element of just punishment.[181] Goodman and Seaton lobbied the high court to reinstate the punitive damages award:

> It was in failing to meet its fiduciary obligations that the insurer in *Silberg* exposed itself to compensatory and even punitive damages. The company was aware of Silberg's predicament; its behavior during his financial, physical, and mental collapse can only be described as grossly insensitive, displaying a lack of humanity that should have insulted not only the plaintiff and jurors but California Life's competitors as well. Its actions were the direct result of its misconception of its proper loyalties. The *Silberg* opinion, hopefully, will leave insurers with no doubt that with great power goes great responsibility.[182]

Just what the word "fiduciary" was meant here to add to an insurer's good-faith obligations the authors did not elaborate. When the trial court's ruling vacating the punitive-damages award was affirmed, nowhere in Justice Mosk's twelve-page opinion for the court did the word "fiduciary" appear.

The efforts of Goodman and Seaton to expand fiduciarian values were not in vain, however. Five years later, in *Egan v. Mutual of Omaha Insurance Company*,[183] the California Supreme Court again affirmed a compensatory award while reversing a

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[179] 11 Cal. 3d 452 (1974).

[180] Silberg v. Cal. Life Ins. Co., 521 P.2d 1103, 1109-10 (Cal. 1974).

[181] Silberg v. Cal. Life Ins. Co., 521 P.2d 1103, 1110 (Cal. 1974).

[182] William M. Goodman & Thom Greenfield Seaton, *Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court*, 62 CAL. L. REV. 309, 347 (1974).

[183] Egan v. Mutual of Omaha Ins. Co., 598 P.2d 452 (Cal. 1979).

punitive award. This time, plaintiff's suit against his insurer was for failure to investigate his claim over four back injuries suffered over seven years.[184] Justice Mosk, again writing for the court, favorably quoted the recently published foreword of Goodman and Seaton:

> [A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust.[185]

From this dictum on a principle of insurance contracts began a series of judicial *faux pas.* Specifically, while admitting that *Egan* did not exactly rule on the matter, yet finding "little room for doubt" that insurers are fiduciaries of their insureds, one court of appeal was content "assuming" as much.[186] Soon after, another, while finding "no support in case law, other than dicta in a few Supreme Court cases," found insurers "akin to" but not quite fiduciaries, leaving room for insurers' pursuit of self-interest.[187]

Six weeks later, Judge Keep, sitting in diversity, summarized California law on the "difficult question" of whether insurers are fiduciaries.[188] Delineating the difference between the thing itself (a fiduciary relation) and the "seeming trend" toward something similar ("fiduciary-like responsibilities"),[189] she concluded that an "insurer is not required

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[184] Egan v. Mutual of Omaha Ins. Co., 598 P.2d 452, 457 (Cal. 1979).

[185] Egan v. Mutual of Omaha Ins. Co., 598 P.2d 452, 457 (Cal. 1979) (quoting William M. Goodman & Thom Greenfield Seaton, *Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court*, 62 CAL. L. REV. 309, 346-47 (1974).

[186] Gibson v. Government Employees Ins. Co., 208 Cal. Rptr. 511, 513-15 (Cal. App. 1984).

[187] Henry v. Associated Indemnity Corp., 266 Cal. Rptr. 578, 586-87 (Cal. App. 1990).

[188] Hassard, Bonnington, Roger & Huber v. Home Ins. Co., 740 F. Supp. 789, 790 (S.D. Cal. 1990).

[189] Hassard, Bonnington, Roger & Huber v. Home Ins. Co., 740 F. Supp. 789, 790-92 (S.D. Cal. 1990).

to put the insured's interest before its own."[190] In dismissing plaintiff's fiduciary claim against defendant-insurer, Keep summed up that *Egan*, in stating that "the obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary," was *not* saying that an insurer *is* a fiduciary; rather, *Egan* said only that an insurer "must exhibit those characteristics of humanity and decency which are similar to what is required of a fiduciary."[191] To Judge Keep, if the *Egan* court or its successors "had meant to say that an insurer *is* a fiduciary, they would have said so."[192] A relation may therefore be special or akin to fiduciary without at once being fiduciary.[193]

Undeterred, commentators excusably thereafter continued to cite *Egan* for the idea that insurers are fiduciaries of their insureds.[194] Litigants not only did the same,[195] but what is worse, continued on[196] even after the California Supreme Court explicitly sided with Judge Keep.[197] This, decades after the notion of insurer as fiduciary was just a gleam in the eyes of a pair of Berkeley law students.

3. *Professors*

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[190] Hassard, Bonnington, Roger & Huber v. Home Ins. Co., 740 F. Supp. 789, 792 & n.1 (S.D. Cal. 1990).

[191] Hassard, Bonnington, Roger & Huber v. Home Ins. Co., 740 F. Supp. 789, 792 (S.D. Cal. 1990).

[192] Hassard, Bonnington, Roger & Huber v. Home Ins. Co., 740 F. Supp. 789, 792 (S.D. Cal. 1990).

[193] Lennane v. American Zurich Ins. Co., 2014 WL 546061 at *4 (E.D. Cal.).

[194] *See, e.g.,* Niels B. Schaumann, *The Lender as Unconventional Fiduciary,* 23 SETON HALL L. REV. 21, 23 & n.11 (1992); Jennifer A. Emmaneel, Note, *Hiding Behind Policy: Confusing Compensation with Indemnification*, 30 GOLDEN GATE U. L. REV. 637, 639-40 (2000).

[195] *See, e.g.*, Appellant's Opening Brief, Alliance Mort. Co. v. Rothwell, 886 P.2d 606 (1994), No. A077559, 1997 WL 33820170 at *21-24 (Cal. App. 1st Dist.).

[196] *See, e.g.,* Tran v. Farmers Group, Inc., 128 Cal. Rptr. 2d 728, 735 (Cal. App. 2002).

[197] Vu v. Prudential Property & Casualty Ins. Co., 33 P.3d 487, 491-92 (Cal. 2001).

In 1976, the New Hampshire Supreme Court noted a "trend ... toward liberalizing" the scope of fiduciary duties.[198] As support for this trend, the court cited a 1937 case from the Maine Supreme Court[199] in which the word "fiduciary" is absent, plus an entry from a 1925 legal encyclopedia.[200] In suits brought by disgruntled students against their professors for breach of of fiduciary duty, liberalizing the tort had to await the New Hampshire high court's 1999 decision, *Tracy Schneider v. Plymouth State College*.[201] Trends must start somewhere; New Hampshire's expansion of professorial obligations started in the academic literature.

Schneider ruled that "in the context of sexual harassment by faculty members, the relation of a post-secondary institution and its students is a fiduciary one."[202] The court's proffered authority for the proposition? – Ronna Greff Schneider's 1987 "Sexual Harassment and Higher Education," published in the *Texas Law Review*.[203] There, after positing that "[t]he faculty-student relationship is best characterized as one of fiduciary and beneficiary," Professor Schneider cited professor of education and literature Billie Dziech, and university administrator Linda Weiner, both at University of Cincinnati where Schneider teaches law.[204] While Dziech and Weiner's *The Lecherous Professor*

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[198] Cornwell v. Cornwell, 356 A.2d 683, 686 (N.H. 1976) (citing RESTATEMENT (SECOND) OF TRUSTS § 44, comment a, at 114 (1959).
[199] Austin v. Austin, 135 Maine 115 (1937).
[200] 35 A.L.R. 280, 308 (1925).
[201] 744 A.2d 101 (N.H. 1999).
[202] *Tracy Schneider v. Plymouth State College*, 744 A.2d 101, 105 (N.H. 1999).
[203] 65 TEX. L. REV. 525, 552 & n.161 (1987).
[204] Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 552 & n.161 (1987).

alludes to a “student’s natural trust of teachers,”[205] the co-authors nowhere attribute legal significance to that trust. Others have, however. Relying on Professor Schneider’s quoted utterance above, Professor Carrie Baker’s “Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment” argued two decades ago that states should criminalize sexual harassment just like the one state that has,[206] Delaware.[207]

The origins of an academic push to liberalize the law go back further. “Historically,” noted BYU law professors Brett Scharffs and John Welch in 2005, “the association of teachers and their students has been viewed as a fiduciary relationship.”[208] The authority for the proposition? – a 1957 article by Harvard law professor Warren Seavey published in his home journal, where he stated: “Since schools exist primarily for the education of their students, it is obvious that professors and administrators act in a fiduciary capacity with reference to the students.”[209] Because Professor Seavey declared his assertion obvious, no supporting authority was forthcoming. After Seavey lobbed that grenade over the wall, academic attempts to project fiduciary principles on to student-faculty relations have continued,[210] whether viewed as “sporadic”[211] or “new,”[212] often relying on Seavey and other academics.[213]

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[205] Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 552 & n.161 (1987) (quoting BILLIE DZIECH & LINDA WEINER, THE LECHEROUS PROFESSOR 93 (Urbana: 1984)).

[206] Carrie N. Baker, *Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 LAW & INEQ. 213, 242 & n.203 (1994).

[207] 11 Del. Code Ann. § 763 (1989) (unclassified misdemeanor).

[208] Brett Scharffs & John Welch, *An Analytic Framework for Understanding and Evaluating the Fiduciary Duty of Educators*, 2005 BYU EDUC. & L.J. 159, 163 & n.24.

[209] Warren A. Seavey, *Dismissal of Students: “Due Process”*, 70 HARV. L. REV. 1406, 1408 n.3 (1957).

[210] *See, e.g.*, Alvin L. Goldman, *The University and the Liberty of Its Students – A Fiduciary Theory*, 54 KY. L.J. 643, 671 (1966); Paul G. Haskell, *The University as Trustee*, 17 GA. L. REV. 1, 5 & n.14 (1982) (“The teaching function … may be defined as a fiduciary function that imposes duties upon the university similar to those of a true trustee.”); Gerald A. Fowler, *The*

While litigated outcomes within this niche have largely resisted the expansion of fiduciary duties,[214] professors as students' fiduciaries does make some sense when the dispute is over something resembling a trust *res*, such as ownership of intellectual property produced within a senior-junior, Platonic relation in a university lab.[215] Those cases reveal that doctrinally it is the *combination* of the personal (that is, whole-person) and commercial (that is, discrete) that characterizes fiduciary law.[216] Fiduciaries thus stand in a sort of "Platonic plus" relation to servient parties: the Platonic part referring to

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Legal Relationship Between the American College Student and the College: An Historical Perspective and the Renewal of a Proposal, 13 J. L. & EDUC. 401, 414-16 (1984); Salar Ghahramani, *Professors as Corporate Fiduciaries: Implications for Law, Organizational Ethics, Public Policy*, 10 VIRG. L. & BUS. REV. 237, 250 (2016) ("The fiduciary nature of the professor-student … relationship has been recognized in certain cases…."); Nancy M. Maurer & Robert F. Seibel, *Addressing Problems of Power and Supervision in Field Placements*, 17 CLINICAL L. REV. 145, 153 (2010) (teachers are fiduciaries of students).

[211] *See* Robert P. Faulkner, *Judicial Deference to University Decisions Not to Grant Degrees, Certificates, and Credit – the Fiduciary Alternative,* 40 SYRACUSE L. REV. 837, 839-40 (1989) ("[S]poradic scholarly attempts have been made calling for fiduciary principles in collegiate law.").

[212] Barbara A. Lee, *Student-Faculty Academic Conflicts: Emerging Legal Theories and Judicial Review*. 83 MISS. L.J. 837, 839 (2014) ("Application of the fiduciary duty theory is relatively new to higher education.").

[213] *E.g.*, Gregg L. Katz, Note, *Conflicting Fiduciary Duties within Collegiate Athletic Conferences: A Prescription for Leniency*, 47 B.C. L. REV. 345, 365-66, 372 (2006) (citing Professors Goldman and Seavey for the proposition that professors are fiduciaries).

[214] *See, e.g.,* Valente v. Univ. of Dayton, 2011 WL 3156309 *5 (6th Cir.); Zumbrun v. Univ. of Cal., 101 Cal. Rptr. 499, 506-07 (Cal. App. 1972).

[215] *See* Chou v. Univ. of Chicago, 254 F.3d 1347, 1362-63 (Fed. Cir. 2001) ("Given the disparity of their experience and roles, and [Professor] Roizman's responsibility to make patenting decisions regarding Chou's inventions, Chou has adequately pleaded the existence of circumstances that place on [Professor] Roizman a fiduciary duty with respect to her inventions."); Johnson v. Schmitz, 119 F. Supp. 2d 90, 97-98 (D. Conn. 2000) ("Given the collaborative nature of the relationship between a graduate student and a dissertation advisor who necessarily shares the same academic interests, the Court can envision a situation in which a graduate school, knowing the nature of this relationship, may assume a fiduciary duty to the student.").

[216] *See, e.g.*, Steven L. Schwarcz, *Fiduciaries with Conflicting Obligations*, 94 MINN. L. REV. 1867 (2010) ("[B]ecause trust law developed in the context of gratuitous trusts, it does not necessarily govern commercial-trust arrangements. And commercial law generally addresses arm's length, not fiduciary, transactions."); Tamar Frankel, *Fiduciary Law,* 71 CAL. L. REV. 795, 801 (1983) ("[F]iduciary relations combine the bargaining freedom inherent in contract relations with a limited form of the power and dependence of status relations.").

power and information asymmetries, the plus part referring to the trust *res* and arm's-length commercial exchange. To be sure, the co-production of valuable ideas might well occur within a nurturing Platonic relation conducted solely for the servient party's betterment; yet so too might it occur within a mutually exploitive relation, where the servient party trades immediate property interests for career advances made possible only by sitting at the elbow of a great teacher.

While student-professor skirmishes over intellectual-property rights reflect a tension between fiduciarian and contractarian values,[217] students also have attempted to stretch fiduciary law when denied passing grades,[218] athletic eligibility,[219] special accommodations,[220] degrees,[221] or professional opportunities.[222] Those attempts to expand fiduciary law by suing faculty, administrators, or the schools themselves[223] may be desperate responses to the inefficacy of suits for breach of contract[224] and "educational malpractice."[225] Yet rather than somehow cast tuition dollars as a sort of trust *res*, those cases appeal to level playing fields as an offset against strong-party opportunism.

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[217] For a thoughtful perspective on this tension between lawful and unlawful exploitation, see Carmenelisa Perez-Kudzma, *Fiduciary Duties in Student's Work Product*, 48 IDEA 491 (2008).

[218] André v. Pace Univ., 655 N.Y.S.2d 777 (App. Div. 1996).

[219] Hendricks v. Clemson Univ., 578 S.E.2d 711 (S.C. 2003).

[220] Bird v. Lewis & Clark Coll., 303 F.3d 1015 (9th Cir. 2002).

[221] Manning v. Temple Univ., 157 Fed. Appx. 509, 513 (3d Cir. 2005); Ho v. Univ. of Texas (Arlington), 984 S.W.2d 672 (Tex. Ct. App. 1998); Maas v. Corp. of Gonzaga Univ., 618 P.2d 106, 108 (Wash. App. 1980).

[222] Moy v. Adelphi Inst., 866 F. Supp. 696, 708 (E.D.N.Y. 1994); Demas v. Levitsky, 738 N.Y.S.2d 402, 408 (App. Div. 2002).

[223] On who if anyone owns a law school – the public, students, faculty, administrators, or lay boards of trustees – see Lloyd Cohen, *Comments on the Legal Education Cartel*, 17 J. CONTEMP. LEGAL ISSUES 25, 29-45 (2008).

[224] *E.g.*, Gally v. Columbia Univ., 22 F. Supp. 2d 199, 206-07 (S.D.N.Y. 1998).

[225] *E.g.*, Ross v. Creighton Univ., 957 F.2d 410, 414-15 (7th Cir. 1992).

And from there is it not far to where fiduciary "relations are social, domestic, or merely personal," entailing no property or "financial duty" whatsoever.[226] Professor D. Gordon Smith, pointing out the "pitfalls" that reliance on property poses for fiduciary law, proposes to sub in for a trust *res* any "critical resource" subject to the servient party's control.[227] Smith is particularly keen on including as critical resources a client's noncommercial confidences, a conventional item of non-property.[228] For Smith, "critical resources," unlike any realistic notion of property, include one's body as entitled to a fiduciary's protection.[229]

And it takes such a repudiation of a trust *res* element to explain *Schneider*, where the plaintiff's body was subject to her fiduciary-professor's unwelcomed touchings.[230] With *Schneider* on the books, other commentators felt free to declare it hornbook.[231] A

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[226] John E. Rumel, *Back to the Future: The In Loco Parentis Doctrine and Its Impact on Whether K-12 Schools and Teachers Owe a Fiduciary Duty to Students,* 46 IND. L. REV. 711, 719-20 (2013) (quoting In re Estate of Karmey, 2002 WL 207572, at *5 (Mich. Ct. App.) (per curiam), *rev'd on other grounds*, 658 N.W.2d 796 (Mich. 2003). *But cf.* Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MARYLAND L. REV. 183, 202 (2000) (Despite "an increasing tendency for courts to create fiduciary duties in moral, social, domestic, or in purely personal relationships where one party needs additional protection, students are out of luck.").

[227] D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1485-86 (2002).

[228] D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1404, 1442-47 (2002).

[229] D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1463-64 (2002).

[230] Awarding plaintiff $150,000 on claims for violating Title IX and breach of fiduciary duty against her college, a jury found that the college failed to investigate her complaints that her male professor had inflicted on her "a pattern of sexual harassment and intimidation." This included "taking off her shirt, and placing her hand on his genitalia" and, after she rebuffed him, yelling at, threatening, and ridiculing her in front of other faculty, and lowering her grade. Tracy Schneider v. Plymouth State Coll., 744 A.2d 101, 103-04 (N.H. 1999).

[231] Kent Weeks & Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 JOURNAL OF COLLEGE & UNIVERSITY LAW 153, 159 (2002) ("One situation in which courts will not hesitate to find fiduciary relationships between universities and students is in sexual harassment claims.").

decade later, a federal district court, applying New Hampshire law, noted that *Schneider* made fiduciaries of professors *only* in cases of sexual harassment,[232] which happens to be an actionable tort without the need for any fiduciary-law tinkerings.[233]

V. Expanding the Law: High Art or Axe-Grinding?

With social, domestic, or purely personal relations implicating "critical resources," parents, too, are held out as fiduciaries, not just when parents divert their child's earnings to themselves,[234] but in cases of child abuse as well.[235] The same is said of married couples, not just in the disposition of marital property, but also where one aggresses against the other's "critical resources." In this vein is it unsurprising that clergy-abuse cases are characterized as breaches of fiduciary duties to protect the physical integrity, not just property, of servient parties.[236]

This path of the law strikes me as eccentric. Suppose, for example, an attorney (the "quintessential fiduciary") impulsively settles a quarrel with a client by punching him in the face. Should the client bring an action for breach of fiduciary duty? Can "fiduciary" really be so cut off from its grammar, so beyond "Beyond Metaphor"[237] and into an idiomatic usage that *trades on* the criteria of fiduciary (selflessness, anti-opportunism, protection of the weak) while at once denying those criteria (a trust *res* to conserve or grow)?

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[232] Franchi v. New Hampton Sch., 656 F. Supp. 2d 252, 261-65 (D.N.H. 2009).

[233] *E.g.*, Doe v. Celebrity Cruises, Inc., 394 F.3d 891 (11th Cir. 2004); Wilson v. Muckala, 303 F.3d 1207 (10th Cir. 2002).

[234] *See* Jillian Benbow, *Under My Roof: Parents' Rights to Children's Earnings*, 16 J. CONTEMP. LEGAL ISSUES 71, 71 (2005).

[235] *See* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries,* 81 VIRG. L. REV. 2401, 2473 (1995).

[236] *E.g.*, Malicki v. Doe, 814 So. 2d 347, 351 n.2 (Fla. 2002).

[237] Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879 (1988).

"Fiduciary" in this idiomatic sense is a movement in academic literature, where the term now is deployed as a way of getting across an ideal – that opportunism is bad, that other-regarding behavior is good.[238] Indeed, some scholars seem to mean nothing at all by it, one even using "fiduciary" in the title and then again for the first time in the conclusion of a fifty-three page tract.[239]

These fiduciary-isms, these bendings over backwards to expand the law, have succeeded to a point in that some have prevailed in court rulings rendered by judges who are open to academic commentary. This is no mean feat, given that scholarship about scholarship, of which there is much,[240] agrees that judges cite professors infrequently.[241] Even when they do, the cites count for little,[242] only really mattering about 18% of the time.[243] With the exception of "a few transformative scholarly works" (e.g., Kathleen

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[238] *See, e.g.*, Scott FitzGibbon, *Educational Justice and the Recognition of Marriage*, 2011 BYU EDUC. & L.J. 263, 263 (teachers are "morally fiduciaries" but should not "be held legally liable for violations" of their duties).

[239] Robert P. Schuwerk, *Law Professor as Fiduciary: What Duties Do We Owe to Our Students,* 45 S. TEX. L. REV. 753 (2004).

[240] "In 1998, the Mercer Law Review published a bibliography of books, articles, and colloquia that deal with legal scholarship; the bibliography ran to nearly thirty printed pages." David R. Dow, *The Relevance of Legal Scholarship: Reflections on Judge Kozinski's Musings*, 37 HOUS. L. REV. 329, 330 (2000) (citing Mary Beth Beazley & Linda H. Edwards, *The Process and the Product: A Bibliography of Scholarship About Legal Scholarship*, 49 MERCER L. REV. 741 (1998).

[241] *E.g.*, ROBERT J. SPITZER, SAVING THE CONSTITUTION FROM LAWYERS: HOW LEGAL TRAINING AND LAW REVIEWS DISTORT CONSTITUTIONAL MEANING 181 (2008); Joshua D. Baker, *Student Work: Relics or Relevant?: The Value of the Modern Law Review,* 111 W. VA. L. REV. 919, 928 (2009). *But see* David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345 (2011); Gregory Scott Crespi, *The Influence of Two Decades of Contract Law Scholarship on Judicial Rulings: An Empirical Analysis*, 57 S.M.U. L. REV. 105, 117 (2004).

[242] Benjamin H. Barton, *Saving Law Reviews from Political Scientists: A Defense of Lawyers, Law Professors, and Law Reviews*, 45 GONZ. L. REV. 189, 205-06 (2009-2010); James W. Harper, *Why Student-Run Law Reviews?*, 82 MINN. L. REV. 1261, 1278 (1998).

[243] Jeffrey L. Harrison & Amy R. Mashburn, *Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45, 70-73 (2015).

Sullivan's "Unconstitutional Conditions,"[244] Brandeis and Warren's "The Right to Privacy,"[245] Charles Reich's "The New Property"[246]), professors, to their disappointment,[247] write mainly for each other.[248] Heavy hitters like Catherine MacKinnon, Laurence Tribe, and Anthony Amsterdam (among others)[249] are consequently seen as outliers: unrepresentative of the group.[250]

The reasons for the irrelevance of scholarly efforts are familiar.[251] Prominent among content-related reasons is the contempt with which high-falutin' academic lawyers hold doctrine, including precedent, which they get paid to transcend.[252] It's hard to put a positive spin on the fact that only seven percent of judges regularly read law reviews.[253] But spin we do. Law professors "influence how judges decide cases,"[254] even when un-cited,[255] if only by informing "the processes, individuals, and institutions that create the

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[244] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

[245] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[246] Charles Reich, *The New Property,* 73 YALE L.J. 733 (1964).

[247] David R. Dow, *The Relevance of Legal Scholarship: Reflections on Judge Kozinski's Musings*, 37 HOUS. L. REV. 329, 329-330 (2000).

[248] Jeffrey L. Harrison & Amy R. Mashburn, *Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45, 54-55 (2015).

[249] Wayne LaFave has been cited some 180 times by the high court.

[250] Michael Vitiello, *Liberal Bias in the Legal Academy: Overstated and Undervalued*, 77 MISS. L.J. 507, 560-61 (2007).

[251] Dolores K. Sloviter, *In Praise of Law Reviews*, 75 TEMPLE L. REV. 7, 8-10 & n.8 (2002); *see* Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659 (1998); Harry T. Edwards, *The Growing Disjunction between Legal Education and The Legal Profession*, 91 MICH. L. REV. 34 (1992).

[252] *See* Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 42 (2001); Amanda Frost, *In Defense of Scholars' Briefs*, 16 GREEN BAG 2D 135, 138 (2013) (citing Richard H. Fallon, Jr., *Scholars' Briefs and the Vocation of a Law Professor,* 4 J. LEGAL ANALYSIS 223, 229-30, 256 (2012)).

[253] Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1337 (2002).

[254] Richard A. Wise et al., *Do Law Reviews Need Reform? A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 3 (2013); *see* Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1328 (2002).

[255] Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI.-KENT L. REV. 871, 877-78 (1996).

public policies that judges and lawyers eventually encounter in the cases that come before them."[256] From this perspective, professors' "subtle influences"[257] have an ethereal quality by which scholarship "provides a contextual social background for legal disputes, helps to make judges aware of the underlying reasons for the decisions that they make and offers useful suggestions for reform."[258] Because "a law review's treatment of an issue ... often provides the jump spark that allows the judge to get underway in the intellectual effort of shaping the opinion,"[259] it has been said that "no principled approach to decision-making can ignore the contribution of academics."[260]

Be that as it may, most judges can't be bothered.[261] In a recent reboot of his controversial 1992 critique of law reviews,[262] Judge Harry Edwards cites Supreme Court justices as among those on the bench who locate journal writing somewhere from "not particularly helpful" (Roberts) to out of touch (Scalia) to "outer space" (Breyer).[263]

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[256] Toni M. Massaro, *Dean's Welcome*, 50 ARIZ. L. REV. 1, 8 (2008).

[257] Michael Vitiello, *Liberal Bias in the Legal Academy: Overstated and Undervalued*, 77 MISS. L.J. 507, 523 (2007), *citing* John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculties*, 93 GEO. L.J. 1167, 1196-97 (2005).

[258] Michel Bastarache, *The Role of Academics and Legal Theory in Judicial Decisionmaking*, 37 ALBERTA L. REV. 739, 746 (1999).

[259] Kenneth F. Ripple, *The Role of the Law Review in the Tradition of Judicial Scholarship*, 57 N.Y.U. ANNUAL SURV. AM. L. 429, 437 (2000).

[260] Michel Bastarache, *The Role of Academics and Legal Theory in Judicial Decisionmaking*, 37 ALBERTA L. REV. 739, 746 (1999).

[261] David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1346-45 & nn.2-6 (2011).

[262] Harry T. Edwards, *The Growing Disjunction between Legal Education and The Legal Profession*, 91 MICH. L. REV. 34 (1992).

[263] Harry T. Edwards, *Another Look at Professor Rodell's "Goodbye to Law Reviews*," 100 VIRG. L. REV. 1483, 1488-49 (2014).

The Ninth Circuit's Alex Kozinski is an exception.[264] Some of the academic influence he detects is dilute, as in the lasting impression casebooks make on anyone with a J.D.[265] Other influence is stronger, as where the writings of stubborn academics, like dissenting opinions, keep "the flame alive" of disfavored positions,[266] or introduce "an entirely new legal idea or line of argument."[267]

To illustrate, Kozinski recounts the "remarkable" doings of Professor Paul Cassell, whose mid-90's writings were at war with 60's icon *Miranda v. Arizona*.[268] In 1997, Cassell filed an *amicus* brief in the Fourth Circuit reviving a stillborn federal statute, the unconstitutionality of which had been justifiably taken for granted since its 1968 enactment.[269] Exploiting what he saw as a loophole in *Miranda*'s celebrated "prophylactic rule" regulating police interrogation, Cassell induced the Fourth Circuit to deem defendant Charles Dickerson's un-Mirandized confession admissible.[270] Although Cassell's run in the high court ended just after Kozinski's article was published,[271]

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[264] Alex Kozinski, *Who Gives a Hoot about Legal Scholarship?*, 37 HOUS. L. REV. 295 (2000). So is Judge Posner, when he is not running them down. *Compare* Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1135 (1995), *with* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: (1962-1987),* 100 HARV. L. REV. 761, 777 (1987) *and* Richard A. Posner, *The Present Situation in Legal Scholarship,* 90 YALE L.J. 1113, 1117-19 (1981).

[265] Alex Kozinski, *Who Gives a Hoot about Legal Scholarship?*, 37 HOUS. L. REV. 295, 298-302 (2000).

[266] Alex Kozinski, *Who Gives a Hoot about Legal Scholarship?*, 37 HOUS. L. REV. 295, 305 (2000).

[267] Alex Kozinski, *Who Gives a Hoot about Legal Scholarship?*, 37 HOUS. L. REV. 295, 307 (2000).

[268] 384 U.S. 436 (1966).

[269] United States v. Dickerson, 1997 WL 33484776, No. 97-4750 (4th Cir. 1997) (citing 18 U.S.C. § 3501).

[270] United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999).

[271] Dickerson v. United States, 530 U.S. 428 (2000). Without use of Dickerson's confession at his trial for, *inter alia*, robbing a Virginia bank of $876, he was convicted anyway and sentenced to 125 months in prison. United States v. Dickerson, 27 Fed.Appx. 236 (4th Cir. 2001).

Kozinski, anticipating that possibility, nonetheless fancied Cassell's efforts a "monumental academic achievement."[272]

But why? Wasn't Cassell doing exactly what Judge Merritt thought my antitrust professor was doing – just putting stuff out there (at best), stooping to axe-grinding (at worst)? There was a reason, after all, that no federal prosecutor had ever invoked the statute to admit a confession. Yet to Judge Kozinski, Cassell's activity instantiates high professorial art. I wonder what he would say about a recent article positing the unconstitutionality of the NSA's meta-data program because the program relies on *Katz v. United States*,[273] a 1967 ruling which, by coming to rely on a concurring opinion, is, get this: no authority at all.[274] So can all attempts to dispose of 50 years of precedent count as high art like *Brown v. Board of Education*,[275] which overthrew a case finally seen as "wrong the day it was decided"?[276] How about an article contorting concepts of *mens rea* and causation in order to call suicidal reactions to cyberbullying "homicide"?[277] Or a student comment petitioning to criminalize whistling at women in public?[278] As entertaining as these exercises may be, are they, like Cassell's once were, the beginnings of "monumental academic achievement?" Possibly. Or they could be the sort of

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272 Alex Kozinski, *Who Gives a Hoot about Legal Scholarship?*, 37 HOUS. L. REV. 295, 311 (2000).
273 Katz v. United States, 389 U.S. 347 (1967).
274 Randy Barnett, *Why the NSA Data Seizures Are Unconstitutional*, 38 HARV. J.L. & PUB. POL'Y 3, 12-14 (2015).
275 347 U.S. 483, 494-95 (1954).
276 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 863 (1992) (Joint Op. of O'Connor, Kennedy, and Souter, JJ.) (discussing Plessy v. Ferguson, 163 U.S. 537 (1896)).
277 Audrey Rogers, *Death by Bullying: A Comparative Culpability Proposal*, 35 PACE L. REV. 343 (2014).
278 Amanda Roenius, Comment, *My Name Is Not "Beautiful," and No, I Do Not Want to Smile: Paving the Path for Street Harassment Legislation in Illinois*, 65 DEPAUL L. REV. 831 (2016).

indulgences that led Justice Scalia at an oral argument to accuse counsel of "bucking for a ... place on some law school faculty" by looking to overrule the Slaughter-House Cases,[279] "contrary to 140 years of our jurisprudence."[280]

Recall the strides made by Professor Schneider imposing fiduciary law on professors, Harold Brown on franchisors, and student-authors William Goodman and Thomas Seaton on insurers. Thanks to them and other like-minded scholars, fiduciary law really is anything goes – in court too – its grammar now not only cut off from the law of trusts (or trust-like relations), but quite recently having devolved into an altogether non-technical term of art. This explains the scholarly output on fiduciary voting,[281] judging,[282] governance,[283] politics,[284] juries,[285] and friendship,[286] not to mention fiduciary administrative,[287] criminal,[288] equal protection,[289] and health[290] law. I could go on.[291]

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[279] 83 U.S. 36 (1872).

[280] Transcript of Oral Argument, McDonald v. City of Chi., 561 U.S. 742 (2010) (No. 08-1521), https://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1521.pdf. (cited in Michael C. Dorf, *Justice Scalia Suggests that the Legal Academy Is Out of Touch: Is He Right?*, FINDLAW.COM (Dec. 13, 2010), http://writ.news.findlaw.com/dorf/20100308.html.

[281] Edward B. Foley, *Voters as Fiduciaries*, 2015 U. CHI. L.F. 153.

[282] Ethan J. Leib et al., *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 702-03 (2013).

[283] Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 519 (2015); Seth Davis, *The False Promise of Fiduciary Government,* 89 NOTRE DAME L. REV. 1145 (2014).

[284] D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671 (2013).

[285] Ethan J. Leib, et al., *Fiduciary Principles and the Jury*, 55 WM. & MARY L. REV. 1109 (2014).

[286] Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 (2009).

[287] Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006).

[288] Malcolm Thorburn, *The Constitution of Criminal Law: Justifications, Policing and the State's Fiduciary Duties*, 5 CRIM. L. & PHIL. 259 (2011).

[289] Gary Lawson, et al., *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415 (2014).

[290] Margaux J. Hall, *A Fiduciary Theory of Health Entitlements*, 35 CARDOZO L. REV. 1729 (2014).

[291] Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820 (2016); Ethan J. Leib, et al., *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91 (2013).

VI. Conclusion

It would be misleading to say that professors write only for each other within the world of fiduciary law. There they have made and continue to make their mark, for better or worse. And what *should* they be doing if not "the business of creating a new stock of legal ideas"?[292] Professors must "have better things to do with their time than to provide free research for judges,"[293] whose law clerks should be the ones knocking out the wooden 50-state surveys and other documents of practicality.

Yet so too is there a responsibility, a need to acknowledge that *Hamlet* is not a comedy, even if you can convince someone that it is. Certainly our language provides conventions for speaking strangely or in extraordinary ways: speaking, for instance, metaphorically, cryptically, loosely, personally.[294] Language changes; meanings "*will* of course, stretch and shrink, and they will be stretched and shrunk."[295] That language inevitably changes is no reason to change it just for the sake of change. Language is natural, and so its changing is natural,[296] not homemade or arbitrary.[297] Legal language can accordingly get pushed and pulled,[298] and like all exertions, at times too far or in the wrong direction to where, as J.L. Austin cautioned in the opening epigraph above, "there would clearly be no future in it."

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292 John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1193 (2005).

293 Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEO. L.J. 173, 177 (2001).

294 DANIEL YEAGER, J.L. AUSTIN AND THE LAW 129 (Bucknell 2006).

295 STANLEY CAVELL, MUST WE MEAN WHAT WE SAY? 42 (2d ed. 2002).

296 STANLEY CAVELL, MUST WE MEAN WHAT WE SAY? 42 (2d ed. 2002).

297 *Austin at Criticism*, in STANLEY CAVELL, MUST WE MEAN WHAT WE SAY? 102 (2d ed. 2002).

298 *E.g.*, Pellegrini v. Landmark Travel Group, 628 N.Y.S.2d 1003, 1007 (1995) ("Today's travel agent is the consumer's agent and a fiduciary with duties commensurate therewith...").

Knowing when, exactly, that sort of excess is staked is a knack.