

## Justifying Fiduciary Duties

Paul B. Miller

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Résumé de l'article

Les obligations fiduciaires sont essentielles pour assurer l'intégrité de multiples relations, telles que celles entre administrateur et bénéficiaire, directeur et société, mandataire et mandant, avocat et client, médecin et patient, parent et enfant, ou enfin gardien et pupille. Malgré leur variété, toutes les relations fiduciaires sont présumées jouir de caractéristiques communes et générer un ensemble d'obligations juridiques, particulièrement le devoir de loyauté. Étonnamment, la justification de ces obligations fiduciaires est cependant une énigme en théorie du droit privé. On ne sait pas exactement ce qui rend une relation fiduciaire et pourquoi ces relations attirent des obligations fiduciaires. Cet article s'attaque à cette énigme. Il examine les principales analyses réductionnistes et instrumentalistes qui tentent de justifier les obligations fiduciaires. Trouvant que celles-ci laissent à désirer, il offre une justification juridique alternative des obligations fiduciaires. L'auteur soutient que la relation fiduciaire est un type de rapport juridique particulier par lequel une personne (l'administrateur) exerce un pouvoir sur les intérêts pratiques d'une autre personne (le bénéficiaire). Le pouvoir fiduciaire est une forme d'autorité dérivée de la capacité juridique du bénéficiaire ou d'un bienfaiteur. Le devoir de loyauté est justifié car il sécurise l'exclusivité de la revendication du bénéficiaire sur le pouvoir fiduciaire ainsi compris.

## JUSTIFYING FIDUCIARY DUTIES

*Paul B. Miller\**

Fiduciary duties are critical to the integrity of a remarkable variety of relationships, including those between trustee and beneficiary, director and corporation, agent and principal, lawyer and client, doctor and patient, parent and child, and guardian and ward. Notwithstanding their variety, all fiduciary relationships are presumed to enjoy common characteristics and to attract a core set of demanding legal duties, most notably a duty of loyalty. Surprisingly, however, the justification for fiduciary duties is an enigma in private law theory. It is unclear what makes a relationship fiduciary and why fiduciary relationships attract fiduciary duties. This article takes up the enigma. It assesses leading reductivist and instrumentalist analyses of the justification for fiduciary duties. Finding them wanting, it offers an alternative account of the juridical justification for fiduciary duties. The author contends that the fiduciary relationship is a distinctive kind of legal relationship in which one person (the fiduciary) exercises power over practical interests of another (the beneficiary). Fiduciary power is a form of authority derived from the legal capacity of the beneficiary or a benefactor. The duty of loyalty is justified on the basis that it secures the exclusivity of the beneficiary's claim over fiduciary power so understood.

Les obligations fiduciaires sont essentielles pour assurer l'intégrité de multiples relations, telles que celles entre administrateur et bénéficiaire, directeur et société, mandataire et mandant, avocat et client, médecin et patient, parent et enfant, ou enfin gardien et pupille. Malgré leur variété, toutes les relations fiduciaires sont présumées jouir de caractéristiques communes et générer un ensemble d'obligations juridiques, particulièrement le devoir de loyauté. Étonnamment, la justification de ces obligations fiduciaires est cependant une énigme en théorie du droit privé. On ne sait pas exactement ce qui rend une relation fiduciaire et pourquoi ces relations attirent des obligations fiduciaires. Cet article s'attaque à cette énigme. Il examine les principales analyses réductionnistes et instrumentalistes qui tentent de justifier les obligations fiduciaires. Trouvant que celles-ci laissent à désirer, il offre une justification juridique alternative des obligations fiduciaires. L'auteur soutient que la relation fiduciaire est un type de rapport juridique particulier par lequel une personne (l'administrateur) exerce un pouvoir sur les intérêts pratiques d'une autre personne (le bénéficiaire). Le pouvoir fiduciaire est une forme d'autorité dérivée de la capacité juridique du bénéficiaire ou d'un bienfaiteur. Le devoir de loyauté est justifié car il sécurise l'exclusivité de la revendication du bénéficiaire sur le pouvoir fiduciaire ainsi compris.

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\* Assistant Professor, Faculty of Law, McGill University, M.Phil. (Cambridge), J.D. (Toronto), Ph.D. (Philosophy) (Toronto). I am grateful to Bill Bratton, Evan Criddle, Hanoch Dagan, Deborah DeMott, Chris Essert, Evan Fox-Decent, Tamar Frankel, Andrew Gold, Erik Knutsen, Ethan Leib, the late Larry Ribstein, Henry Smith, Lionel Smith, Stephen Smith, and Julian Velasco for their comments. This paper was presented at a roundtable on Fiduciary Foundations of Public Law at the Annual Meeting of the Law and Society Association in San Francisco in June 2011. I am grateful to members of the audience for their comments as well. I retain responsibility for any errors or omissions. Author contact information: McGill University Faculty of Law, 3674 Peel Street, Montreal, Quebec H3A 1W9; paul.miller@mcgill.ca.

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## Introduction

Fiduciary duties are critical to the integrity of a remarkably wide variety of relationships and institutions.<sup>1</sup> Lawyers, doctors, investment advisors, and other professionals are fiduciaries of their clients. Trustees, executors, and agents are fiduciaries of their beneficiaries, testators, and principals. Directors, officers, and trustees of corporations, hospitals, universities, and charities are fiduciaries of the legal entities under their charge. Parents and guardians are fiduciaries of their children and wards. These relationships and institutions are obviously of profound social and economic importance. Professional fiduciaries have charge of critical personal interests of their clients. Trustees have responsibility for great fortunes settled on trust for donative and commercial purposes. Directors and officers of non-profit and business corporations determine the disposition of vast amounts of wealth for charitable and commercial purposes. Parents and guardians determine most of what matters to the well-being of children and incapable adults.

Clearly, fiduciary duties are pervasive in modern civil society. Whether we are aware of it or not, virtually all of us have, in our lives or upon our deaths, interests subject to the discretion of a fiduciary. In most cases, where we rely on another person to represent us or to take care of our person or property, we do so within a fiduciary relationship. Fiduciary law, as much as contract, property, or tort law, is a dominant mode of imposing legal structure on day-to-day life.

The mandates under which fiduciaries act differ widely across categories of fiduciary relationship. However, despite the diversity of factual scenarios in which fiduciary duties arise, these relationships share a set of legal principles common to all fiduciary relationships. Furthermore, all fiduciary relationships attract the consequences attached by law to this kind. The consequences are several.<sup>2</sup> Most prominent is the asymmetrical assignment of le-

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<sup>1</sup> See generally Tamar Frankel, “Fiduciary Law” (1983) 71:3 Cal L Rev 795 [Frankel, “Fiduciary Law”] (“[f]iduciaries appear in a variety of forms, including agents, partners, directors and officers, trustees, executors and administrators, receivers, bailees, and guardians” at 795); D Gordon Smith, “The Critical Resource Theory of Fiduciary Duty” (2002) 55:5 Vand L Rev 1399 [Smith, “Critical Resource Theory”] (“[c]ourts routinely impose fiduciary duties in myriad relationships, including trustee-beneficiary, employee-employer, director-shareholder, attorney-client, and physician-patient” at 1400); Larry E Ribstein, “Are Partners Fiduciaries?” [2005] 1 U Ill L Rev 209 [Ribstein, “Are Partners Fiduciaries?”] (“[c]ourts and commentators apply fiduciary-type duties to many different types of relationships, including those between franchisees and franchisors, doctors and patients, and pharmacists and customers, among others” at 211 [footnotes omitted]).

<sup>2</sup> See Ernest J Weinrib, “The Fiduciary Obligation” (1975) 25:1 UTLJ 1 [Weinrib, “Fiduciary Obligation”] (“[t]he fiduciary concept, being regarded as a monolith, entails mono-

gal duties between the parties, notably the distinctive duty of loyalty.<sup>3</sup> All fiduciaries are, by virtue of this duty of loyalty, subject to exacting expectations of faithful service. Fiduciaries are expected only to pursue the interests of beneficiaries when executing a fiduciary mandate. To that end, the duty of loyalty strictly forbids conflicts of interest and conflicts of duty, on pain of powerful remedies that strip fiduciaries of any gains realized in breach.<sup>4</sup>

Surprisingly, given their importance, we know relatively little about the justification for fiduciary duties. Philosophers have generated important accounts of the justification for liability in tort, contract, property, and unjust enrichment.<sup>5</sup> However, they have been virtually silent on fiduciary duties.<sup>6</sup>

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lithic consequences” at 19); Robert Cooter & Bradley J Freedman, “The Fiduciary Relationship: Its Economic Character and Legal Consequences” (1991) 66:4 NYUL Rev 1045.

<sup>3</sup> For example, Deborah A. DeMott explains:

[D]uties of loyalty have distinctive functions and consequences, ones distinct from duties and consequences defined by other bodies of law. ... [D]istinctive legal consequences follow a breach of a duty of loyalty. These include but are not limited to an enhanced range of remedies for the principal (“Disloyal Agents” (2007) 58:5 Ala L Rev 1049 at 1049).

<sup>4</sup> See Cooter & Freedman, *supra* note 2 (“[t]he two fundamental rules of fiduciary conduct are the rule against conflicts of interest and duty and the rule against secret profits” at 1054).

<sup>5</sup> See e.g. Jules L Coleman, *Risks and Wrongs* (New York: Cambridge University Press, 1992); Stephen R Perry, “The Moral Foundations of Tort Law” (1992) 77:2 Iowa L Rev 445; Ernest J Weinrib, *The Idea of Private Law* (Cambridge, Mass: Harvard University Press, 1995) [Weinrib, *Idea*]; Arthur Ripstein, “Tort Law in a Liberal State” (2007) 1:2 Journal of Tort Law 1 [Ripstein, “Tort Law”]; John CP Goldberg & Benjamin C Zipursky, “Tort Law and Moral Luck” (2007) 92:6 Cornell L Rev 1123; John Gardner, “What is Tort Law For? Part 1; The Place of Corrective Justice” (2011) 30:1 Law & Phil 1; Peter Benson, “The Idea of a Public Basis of Justification for Contract” (1995) 33:2 Osgoode Hall L J 273; Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Oxford: Hart, 2003); Stephen A Smith, *Contract Theory* (Oxford: Oxford University Press, 2004); Jeremy Waldron, *The Right to Private Property* (New York: Oxford University Press, 1988); JE Penner, *The Idea of Property in Law* (Oxford: Clarendon Press, 1997); Hanoch Dagan, “The Social Responsibility of Ownership” (2007) 92:6 Cornell L Rev 1255; Larissa Katz, “Exclusion and Exclusivity in Property Law” (2008) 58:3 UTLJ 275; Avihay Dorfman, “Private Ownership” (2010) 16:1 Legal Theory 1; Lionel Smith, “Restitution: The Heart of Corrective Justice” (2000-2001) 79:7 Tex L Rev 2115 [Smith, “Heart of Corrective Judgment”]; Stephen A Smith, “Justifying the Law of Unjust Enrichment” (2000-2001) 79:7 Tex L Rev 2177; Hanoch Dagan, *The Law and Ethics of Restitution* (Cambridge, UK: Cambridge University Press, 2004); Dennis Klimchuk, “The Normative Foundations of Unjust Enrichment” in Robert Chambers, Charles Mitchell & James Penner, eds, *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009) 81.

<sup>6</sup> But see Arthur Ripstein, “Authority and Coercion” (2004) 32:1 Philosophy & Public Affairs 2 at 15-19; Lionel Smith, “The Motive, Not the Deed” in Joshua Getzler, ed, *Ra-*

Claims that have been made about the justification for fiduciary duties reflect two analytical strategies. Reductivists allege that fiduciary duties are derivable from nonfiduciary forms of private liability (e.g., contract or tort). Reductivists assert that the justification for fiduciary duties, as a secondary form of liability, is the same as that of the primary nonfiduciary form of liability. Instrumentalists, by contrast, claim that fiduciary duties are directly justifiable on the basis of some independently-valuable end (e.g., a policy goal or moral norm). Most reductivist and instrumentalist argument capitalizes on important insights about the juridical character of fiduciary liability. However, for reasons that I will develop below, these arguments are ultimately unsound. This article thus offers a novel account of the juridical justification for fiduciary duties.

Juridical justificatory argument aims to reveal the justificatory structure of the settled practices and principles of liability constitutive of a given legal form of an institution or mode of interaction (e.g., the idea of ownership, contract, gift, or treaty). As I shall explain, it is different from, but has certain affinities with, Weinrib's formalism and Zipursky's pragmatic conceptualism.<sup>7</sup> The juridical justification for fiduciary duties contends that formal characteristics of the fiduciary relationship support fiduciary duties in all circumstances in which fiduciary duties arise.

The argument will unfold as follows. Part I explains the nature of the problem of justification. Part II offers a thin description of the juridical character of fiduciary liability, making stipulations necessary to motivate the critical and constructive contributions of the article. Parts III and IV critically assess leading claims about the justification for fiduciary duties and emphasize insights about the juridical character of fiduciary liability that they afford. Collation of these insights permits the development of a thicker description of the juridical character of fiduciary liability. Part V advances this description as well as the novel juridical justification for fiduciary duties.

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*tionalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London: LexisNexis UK, 2003) 53. Evan Fox-Decent and Evan Criddle have written with great philosophical sophistication about fiduciary duties in public law but have not focused on their original and primary manifestation in private law: Evan Fox-Decent, "The Fiduciary Nature of State Legal Authority" (2005) 31:1 *Queen's LJ* 259; Evan J Criddle, "Fiduciary Foundations of Administrative Law" (2006) 54:1 *UCLA L Rev* 117; Evan J Criddle & Evan Fox-Decent, "A Fiduciary Theory of Jus Cogens" (2009) 34:2 *Yale J Int'l L* 331.

<sup>7</sup> Ernest J Weinrib, "Legal Formalism: On the Immanent Rationality of Law" (1988) 97:6 *Yale LJ* 949 [Weinrib, "Legal Formalism"]; Benjamin C Zipursky, "Pragmatic Conceptualism" (2000) 6:4 *Legal Theory* 457.

## I. The Problem of Justification

Many private law theorists, economists and doctrinalists in particular, claim only descriptive ambitions for their work. Doctrinalists aim to clarify the operation of principles of private liability, to analyze actual or apparent doctrinal problems (ambiguities in, or inconsistencies or gaps between, legal principles), and to suggest ways in which these problems may be resolved in a manner consistent with logic and precedent.<sup>8</sup> Economists aim to explain private law, not (or not principally) in its own terms, but rather in terms of its general economic context or impact on any of a number of measures of economic welfare (e.g., efficiency in respect of social costs, transaction costs, or information costs).<sup>9</sup>

While much of private law theory is concerned with descriptive problems of explanation and classification, much of it is also given over to the normative problem of justification. The problem of justification has many variants, but all are ultimately concerned with the normative coherence of, and foundations for, private law. Historically, normative private law theory has been the ken of philosophical theorists.<sup>10</sup>

The distinctions between problems of justification, on the one hand, and explanation and classification, on the other, are not neat. Doctrinalists sometimes address the justification for legal principles, particularly when offering a novel interpretation or recommending that principles be amended or extended in a way not clearly supported by precedent. Economists are well-known for combining descriptive with normative argument; indeed, some have been criticized for a tendency to make normative claims in the guise of explanatory statements.<sup>11</sup> And most philosophers are aware that justificatory argument about law must accurately account for its posited character. Inevitably then, efforts to explain and justify law become intertwined. An implication is that there is no monopoly on normative argument in private law theory.

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<sup>8</sup> See generally NE Simmonds, "Protestant Jurisprudence and Modern Doctrinal Scholarship" (2001) 60:2 Cambridge LJ 271; W Bradley Wendel, "Explanation in Legal Scholarship: The Inferential Structure of Doctrinal Legal Analysis" (2011) 96:4 Cornell L Rev 1035.

<sup>9</sup> See Richard A Posner, *Economic Analysis of Law*, 8th ed (New York: Aspen, 2011).

<sup>10</sup> See *supra* note 5 and accompanying text.

<sup>11</sup> See Jules L Coleman, "Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law" (1984) 94:4 Ethics 649; Eric A Posner, "Economic Analysis of Contract Law after Three Decades: Success or Failure?" (2003) 112:4 Yale LJ 829; Richard Craswell, "In That Case, What is the Question? Economics and the Demands of Contract Theory" (2003) 112:4 Yale LJ 903; Jules L Coleman, "The Grounds of Welfare" (2003) 112:6 Yale LJ 1511 at 1514-1515.

The problem of justifying fiduciary duties does not differ from that of justifying other kinds of private law duties. In each case, the challenge is one of identifying a normative basis for the duty. To qualify as a justificatory claim, an argument must articulate reasons for the imposition and enforcement of fiduciary duties. As is well-known, law has both positive and normative aspects; it is authoritatively articulated, and insofar as it purports to direct conduct, it makes a claim of obedience that stands in need of justification. Justificatory analyses accordingly may be evaluated for normative and descriptive merit.

Normative merit entails that the reasons given for the duty are good; that is, that they offer sufficient logical support for its content and any conditions on its imposition and enforcement. I take it that a justificatory argument need not be exhaustive or exclusive in the set of reasons offered in support of a duty in order to have normative merit. A given reason or set of reasons may have normative merit but be capable of supplementation by additional supporting reasons or broader normative argument (e.g., about the justification for any system of private liability or the various forms such a system might take).

Descriptive merit requires that the reasons said to support the obligation demonstrate a reasonable degree of fit or conformity with the positive law. Where the obligation is juridical (as is the case for common law and equitable obligations), fit is a function of the capacity of the reasons given to explain the juridical character of the obligation. As I will explain in Part V, juridical character is expressed in judicial reasoning on the basis, content, scope, and limits of the obligation.

## II. The Range, Content, and Basis of Fiduciary Duties

Before analyzing the justification for fiduciary duties, we must register some stipulations about the positive law. As noted above, justificatory analysis is impossible without some agreement on the subject matter; in this case, basic elements of the juridical character of fiduciary liability, including the duties considered fiduciary as well as their content and source. There is significant disagreement on aspects of the juridical character of fiduciary liability. However, there is sufficient consensus on basic aspects to motivate and orient our analysis.

As to the range of fiduciary duties, there is doubt over the status of several duties often said to be fiduciary.<sup>12</sup> For instance, it is uncertain

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<sup>12</sup> See Julian Velasco, "How Many Fiduciary Duties Are There in Corporate Law?" (2010) 83:6 S Cal L Rev 1231; Larry E Ribstein, "Fencing Fiduciary Duties" (2011) 91:3 BUL Rev 899.



whether the duty of confidence that governs the handling and use of confidential information by fiduciaries is properly considered a fiduciary duty.<sup>13</sup> It is likewise unclear whether the duty of care, which requires fiduciaries to act reasonably in fulfilling their mandates, is a fiduciary duty.<sup>14</sup> It has also been controversially suggested that fiduciaries are subject to a positive duty to act in the interests of beneficiaries.<sup>15</sup>

The boundaries of fiduciary obligation are poorly defined, but there is consensus on its essence. At the core lies the cardinal fiduciary duty of loyalty.<sup>16</sup> Whatever else fiduciary law might require of fiduciaries, it undeniably demands that they act faithfully toward beneficiaries. The duty of loyalty applies to all fiduciaries regardless of differences among the

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<sup>13</sup> Support for the notion that the duty of confidence is fiduciary is found in some cases and commentary: see Ray D Madoff, “Unmasking Undue Influence” (1997) 81:3 Minn L Rev 571 (“[c]onfidential relationships can be understood as both a form and an extension of fiduciary relationships” at 583). For an opposing perspective, see John Glover, “Is Breach of Confidence a Fiduciary Wrong? Preserving the Reach of Judge-Made Law” (2001) 21:4 LS 594 (“[b]reach of confidence and breach of fiduciary duty may be committed by the same person at the same time and the same informational interest may be protected by each wrong. Yet the actions are quite distinct” at 595).

<sup>14</sup> See William A Gregory, “The Fiduciary Duty of Care: A Perversion of Words” (2005) 38:1 Akron L Rev 181; Kelli A Alces, “Debunking the Corporate Fiduciary Myth” (2009) 35:2 J Corp L 239 (“[t]here is some debate about whether the duty of care is a fiduciary obligation at all” at 250); Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary Duties* (Oxford: Hart, 2010) [Conaglen, *Fiduciary Loyalty*] (“[d]uties of care and skill are also not peculiar to fiduciaries, given that many nonfiduciary actors are required to act carefully when performing their duties” at 35). But see Joshua Getzler, “Duty of Care” in Peter Birks & Arianna Pretto, eds, *Breach of Trust* (Oxford: Hart, 2002) 41.

<sup>15</sup> See Peter Birks, “The Content of the Fiduciary Obligation” (2000) 34:1 Isr LR 3 at 28 [Birks, “Content of Obligation”]; Conaglen, *Fiduciary Loyalty*, *supra* note 14 at 202-203.

<sup>16</sup> See Weinrib, “Fiduciary Obligation”, *supra* note 2 (the duty of loyalty is “the irreducible core of the fiduciary obligation” at 16 [footnote omitted]); Smith, “Critical Resource Theory”, *supra* note 1 (“[t]he duty that is distinctive of fiduciaries arises out of a concern that the fiduciary will take advantage of the beneficiary” at 1408); Deborah A DeMott, “Beyond Metaphor: An Analysis of Fiduciary Obligation” (1988) 37:5 Duke LJ 879 [DeMott, “Beyond Metaphor”] (“[i]f a person in a particular relationship with another is subject to a fiduciary obligation, that person (the fiduciary) must be loyal to the interests of the other person (the beneficiary)” at 882); Ethan Leib, “Friends as Fiduciaries” (2009) 86:3 Washington University Law Review 665 (“[t]he core fiduciary duty is the duty of loyalty, a duty of unselfishness” at 673); Conaglen, *Fiduciary Loyalty*, *supra* note 14 (“two ... equitable principles clearly are peculiar to fiduciaries: first, the principle that prohibits a fiduciary from acting in a situation in which there is a conflict between the duty that he owes to his principal and his personal interest; and secondly, the principle that prohibits a fiduciary from receiving any unauthorized profit as a result of the fiduciary position ... These two principles are widely recognised as being of universal application to fiduciaries” at 39).

mandates under which they act.<sup>17</sup> Indeed, it is the universal applicability of the duty in the face of marked factual differences among fiduciary mandates that underscores the importance of the problem of justification in fiduciary law theory. Accordingly, for present purposes, I focus exclusively upon the justification for the duty of loyalty.

While there is broad agreement that the duty of loyalty is distinctively fiduciary, there is some disagreement over its content. It is widely accepted that the duty of loyalty prohibits fiduciaries from acting under conflicts of interest.<sup>18</sup> This prohibition is usually expressed in the form of two rules. The *conflict of interest rule* prohibits the fiduciary from allowing personal interests actually or potentially to conflict with the interests of the beneficiary.<sup>19</sup> The conflict of interest rule thus prohibits disloyal conduct grounded in the self-interest of the fiduciary. The *conflict of duty rule* prohibits the fiduciary from acting under conflicting mandates.<sup>20</sup> In other words, it prohibits disloyal conduct grounded in conflicting duties to two third parties, even if the fiduciary's self-interest is not in play. The conflict of duty rule thus proscribes disloyal conduct rooted in inconsistent allegiances of the fiduciary.

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<sup>17</sup> As noted by Seavey, "The duties of loyalty are substantially the same for all fiduciaries, varying only in intensity" (Warren A Seavey, *Handbook of the Law of Agency* (St Paul, Minn: West, 1964) at 4). See also *Restatement (Third) of Trusts* § 2, comment b (2003) ("[d]espite the differences in the legal circumstances and responsibilities of various fiduciaries, one characteristic is common to all: a person in a fiduciary relationship to another is under a duty to act for the benefit of the other as to matters within the scope of the relationship").

<sup>18</sup> See *Birnbaum v Birnbaum*, 539 NE (2d) 574, 541 NYS (2d) 746, (1989) [*Birnbaum* cited to NE (2d)] ("a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect ... requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty" at 576).

<sup>19</sup> See *Birnbaum*, *supra* note 18. See also Kenneth B Davis, "Judicial Review of Fiduciary Decisionmaking: Some Theoretical Perspectives" (1985) 80:1 Nw UL Rev 1 ("[t]he principal is assured a remedy simply if he becomes dissatisfied with the results of the fiduciary's decision and can identify the fiduciary's conflict of interest" at 45); John H Langbein, "Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?" (2005) 114:5 Yale LJ 929 ("[t]he duty of loyalty requires a trustee 'to administer the trust solely in the interest of the beneficiary.' This 'sole interest' rule is widely regarded as 'the most fundamental rule' of trust law" at 931 [footnotes omitted]); Melanie B Leslie, "Trusting Trustees: Fiduciary Duties and the Limits of Default Rules" (2005) 94:1 Geo LJ 67 ("[t]he trustee is held *per se* liable simply upon the beneficiary's showing that the trustee had a personal interest in the transaction" at 112).

<sup>20</sup> See Arthur Laby, "Resolving Conflicts of Duty in Fiduciary Relationships" (2004) 54:1 Am U L Rev 75; Matthew Conaglen, "Fiduciary Regulation of Conflicts Between Duties" (2009) 125:1 Law Q Rev 111; Steven L Schwarcz, "Fiduciaries with Conflicting Obligations" (2010) 94:6 Minn L Rev 1867.

It is debatable whether there is anything else to the duty of loyalty. Some have argued that it includes a requirement of *good faith*.<sup>21</sup> But it is unclear what this obligation requires of the fiduciary and how it relates to the substance of the duty of loyalty.<sup>22</sup> Equally contentious is the question whether the duty of loyalty includes an independent rule prohibiting receipt of profits by fiduciaries under a fiduciary mandate.<sup>23</sup> The so-called *no profit rule* is ordinarily expressed as requiring the fiduciary to disgorge all profits received by virtue of a fiduciary office or position.<sup>24</sup> There is ample authority for the proposition that the rule exists and is enforceable as such. Nevertheless, it has been doubted that the rule is independent of the duty of loyalty.<sup>25</sup> Fortunately, for present purposes, it is of no consequence whether the duty of loyalty encompasses independent no profit and good faith requirements. It has minimum core content consisting of the conflict rules. Meaningful progress on the problem of justifying the duty of loyalty may be had in accounting for these rules.

Less scholarly attention has been paid to the basis of fiduciary duties. Fortunately, the authorities are clearer on this question. The conventional position is that fiduciary duties arise upon the establishment of a fiduciary relationship. The analytical priority of relationship to duty is reflected in many canonical statements of Commonwealth law.<sup>26</sup> American law is

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<sup>21</sup> See Hillary A Sale, “Delaware’s Good Faith” (2004) 89:2 Cornell L Rev 456; Andrew S Gold, “The New Concept of Loyalty in Corporate Law” (2009) 43:2 UC Davis L Rev 457; Leo E Strine Jr et al, “Loyalty’s Core Demand: The Defining Role of Good Faith in Corporation Law” (2010) 98:3 Geo LJ 629.

<sup>22</sup> See Melvin A Eisenberg, “The Duty of Good Faith in Corporate Law” (2006) 31:1 Del J Corp L 1; Stephen M Bainbridge, Star Lopez & Benjamin Oklan, “The Convergence of Good Faith and Oversight” (2008) 55:3 UCLA L Rev 559. For additional criticism, see Conaglen, *Fiduciary Loyalty*, *supra* note 14 at 40-44.

<sup>23</sup> See LS Sealy, “Some Principles of Fiduciary Obligation” [1963] 1 Cambridge LJ 119 at 135; Birks, “Content of Obligation”, *supra* note 15 at 10; Robert Flannigan, “The Fiduciary Obligation” (1989) 9:3 Oxford J Legal Stud 285 at 299 [Flannigan, “Fiduciary Obligation”]; Conaglen, *Fiduciary Loyalty*, *supra* note 14 at 114-25.

<sup>24</sup> It “requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position” (*Chan v Zacharia* (1984), [1983-84] 154 CLR 178 at 198, 53 ALR 417 (HCA)). See also *Meinhard v Salmon*, 164 NE 545, 249 NY 458 (1928) [*Meinhard* cited to NE]; *Boardman v Phipps* (1966), [1967] 2 AC 46 at 123, [1966] 3 All ER 721 HL (Eng).

<sup>25</sup> “The obligation to act disinterestedly is often put as an obligation not to profit from the trust. When we ask which profits are interdicted, in nearly every case the answer is given by the rule against conflicts of interest” (Birks, “Content of Obligation”, *supra* note 15 at 10).

<sup>26</sup> See e.g. *Re Hallett’s Estate* (1880), 13 Ch D 696 (available on WL Can) (CA), Jessel MR (“the moment you establish the fiduciary relation, the modern rules of Equity, as regards following trust money, apply” at 710); *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321, Dickson J [*Guerin* cited to SCR] (“[i]t is the nature of the relationship ... that gives

less explicit,<sup>27</sup> but an overwhelming majority of learned analyses accept the priority of relationship to duty.<sup>28</sup>

Given that fiduciary duties originate in fiduciary relationships, the nature of the fiduciary relationship is a matter of some importance. An account of the justification for fiduciary duties will be incomplete if it does

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rise to the fiduciary duty” at 384); *Re Goldcorp Exchange Ltd*, (1994), [1995] 1 AC 74, [1994] 2 All ER 806 (PC) [cited to AC] (“the essence of the fiduciary relationship is that it creates obligations of a different character from those deriving from contract itself” at 98); *Attorney-General v Blake* (1997), [1998] Ch 439, [1998] 1 All ER 833 (CA) [cited to Ch] (“[w]e do not recognize the concept of a fiduciary obligation which continues notwithstanding the determination of the particular relationship which gives rise to it. ... [T]hese duties last only as long as the relationship which gives rise to them lasts” at 453-54).

<sup>27</sup> See Smith, “Critical Resource Theory”, *supra* note 1 (“[c]ourts frequently consider whether fiduciary duties apply to a given relationship but have been extremely vague in articulating standards for making this determination” at 1411-12); Tamar Frankel, *Fiduciary Law: Analysis, Definitions, Duties, Remedies over History and Cultures* (Anchorage: Fathom, 2008) [Frankel, *Fiduciary Analysis*] (“[c]ourt decisions and legislation rarely provide a general definition of fiduciary relationships” at 26). But see also *Wolf v Superior Court of Los Angeles County*, 107 Cal App 4th 25, 130 Cal Rptr (2d) 860 (App Ct 2003) [cited to Cal App 4th] (“[t]raditional examples of fiduciary relationships in the commercial context include trustee/beneficiary, directors and majority shareholders of a corporation, business partners, joint adventurers, and agent/principal. ... Inherent in each of these relationships is the duty of undivided loyalty the fiduciary owes to its beneficiary” at 30 [references omitted]), remanded, 114 Cal App 4th 1343, 8 Cal Rptr (3d) 649 (App Ct 2004), remanded, 162 Cal App 4th 1107, 76 Cal Rptr (3d) 585 (App Ct 2008).

<sup>28</sup> See Smith, “Critical Resource Theory”, *supra* note 1 (“courts approach fiduciary claims by asking first whether they arise in the context of an established fiduciary relationship” at 1401, n 6); Frankel, *Fiduciary Analysis*, *supra* note 27 at 67-75 (explaining how American courts identify fiduciary relationships when making determinations of fiduciary liability); Cooter & Freedman, *supra* note 2 (“[t]he fiduciary relationship exposes a beneficiary/principal to two distinct types of wrongdoing. ... Each type of wrongdoing is controlled by imposing a legal duty upon the fiduciary” at 1047); Ribstein, “Are Partners Fiduciaries?”, *supra* note 1 (arguing that there is need “for a precise definition of the relationships that give rise to default fiduciary duties” at 212); DeMott, “Beyond Metaphor”, *supra* note 16 (“[j]udicial opinions in this well-established tradition first identify paradigm cases in which fiduciary obligation applies and then examine whether the relationship involved in the litigation is sufficiently like those in the paradigm cases to support an extension of the obligation to that relationship” at 879); Margaret M Blair & Lynn A Stout, “Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law” (2001) 149:6 U Pa L Rev 1735 (“[t]he hallmark of a fiduciary relationship is the legal requirement that the fiduciary act for the exclusive benefit of her beneficiary” at 1782); Lawrence E Mitchell, “The Fairness Rights of Corporate Bondholders” (1990) 65:5 NYU L Rev 1165 (describing the “central components of the fiduciary relationship [that] give rise to a set of [fiduciary] duties” at 1177); Eileen A Scallen, “Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle” [1993] 4 U Ill L Rev 897 at 907-11 (describing the fiduciary relationship and obligations generated by it).

not explain the connection between relationship and duty. This, in turn, requires that one have a clear concept of the fiduciary relationship.

Having identified the extent of consensus on the juridical character of fiduciary liability, we are now able to formulate the problem of justification more precisely. The problem lies in explaining why fiduciary relationships generate a duty that (at the very least) implies that the fiduciary is to act solely in the interests of the beneficiary, and prohibits her from acting in self-interest or for third parties with conflicting interests.

### III. Reductivist Justifications

One of the two dominant analytical strategies for dealing with this problem is characterized by reductivist reasoning. Reductivists claim that fiduciary duties are not distinctive but are rather derived from other bases of private liability.

#### A. *The Argument from Contract*

The most prominent reductivist argument is that from contract. This argument holds that fiduciary duties are justified just as ordinary contractual obligations are. There are two variants on the argument. The first provides that fiduciary duties have contractual justification because they are properly understood as contractual terms. The second holds that fiduciary duties have contractual justification in that they are founded on consent.

The argument from contract is rooted in three insights about fiduciary liability. The first is that fiduciary duties typically arise in relationships that are contractual or are otherwise voluntarily entered into by the fiduciary. The second is that fiduciary duties frequently constrain the performance of contractual undertakings. The third is that the application or effect of fiduciary duties, or extent of liability for breach, may be partially determined by mutual consent. These features of fiduciary liability are thought to suggest that fiduciary duties have contractual justification.<sup>29</sup>

Frank Easterbrook and Daniel Fischel have advanced the best-known version of the first variant on the argument from contract.<sup>30</sup> Noting the

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<sup>29</sup> As Victor Brudney explains, “It is the power thus to authorize (or consent to) departure from the exclusive benefit principle (coupled with the initial consent to enter into the relationship) that is said to establish that the fiduciary relationship is simply a species of contract” (“Contract and Fiduciary Duty” (1997) 38:4 BCL Rev 595 at 605 [Brudney, “Contract and Fiduciary Duty”]).

<sup>30</sup> Frank H Easterbrook & Daniel R Fischel, “Contract and Fiduciary Duty” (1993) 36:1 JL & Econ 425 [Easterbrook & Fischel, “Contract and Fiduciary”]; Frank H Easterbrook &

absence of a convincing theory of fiduciary duties that treats them as distinctive, they start with an inferential leap to the conclusion that they are not:

Scholars of non- or antieconomic bent have had trouble coming up with a unifying approach to fiduciary duties because they are looking for the wrong things. They are looking for something special about fiduciary relations. There is nothing special to find. ... [T]here is no subject here, and efforts to unify it on a ground that presumes its distinctiveness are doomed.<sup>31</sup>

Easterbrook and Fischel claim that fiduciary duties should instead be understood as implied terms of contract. More particularly, the duty of loyalty is an implied term of relational service contracts in which expertise is hired by a nonexpert. The implied term is required where complete contractual specification of terms would be impossible or inefficient. They explain:

One party to the contract may desire an objective (maximum income from an investment, a favorable outcome to litigation) but have neither an idea nor much concern how the objective is to be achieved. Specialists in achieving this objective (trustees, managers, lawyers) agree to lend their efforts. When the task is complex, when efforts will span a substantial time, when the principal cannot measure (or evaluate) the agent's effort, when an assessment of the outcome is not a good substitute for measuring effort ... and when a relative shortage of information hinders the drawing of conclusions even when the outcome may be highly informative, a detailed contract would be silly.<sup>32</sup>

The content of fiduciary duties is said to reflect exigencies of relational service contracts involving the hiring of expertise. In such contracts, the nonexpert faces agency costs—due to shirking and self-dealing—associated with delegation to the expert. Fiduciary duties protect against these costs:

When one party hires the other's knowledge and expertise, there is not much they can write down. Instead of specific undertakings, the agent assumes a duty of loyalty in pursuit of the objective and a duty of care in performance. These legal duties reflect both the nature of the principal's choice (he is hiring expertise) and an obvious condition (the principal is unwilling to put himself at the mercy of an

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Daniel R Fischel, "The Corporate Contract" (1989) 89:7 Colum L Rev 1416 [Easterbrook & Fischel, "Corporate Contract"]. See also John H Langbein, "The Contractarian Basis of the Law of Trusts" (1995) 105:3 Yale LJ 625; Robert H Sitkoff, "The Economic Structure of Fiduciary Law" (2011) 91:3 BUL Rev 1039.

<sup>31</sup> Easterbrook & Fischel, "Contract and Fiduciary", *supra* note 30 at 438.

<sup>32</sup> *Ibid* at 426.

agent whose effort and achievements are both exceedingly hard to monitor).<sup>33</sup>

Easterbrook and Fischel contend that courts are justified in recognizing fiduciary duties not on the basis of the actual common intent of the parties but instead on the basis of a hypothetical bargain. According to Easterbrook and Fischel, “[C]ourts flesh out the duty of loyalty by prescribing the actions the parties themselves would have preferred if bargaining were cheap and all promises fully enforced.”<sup>34</sup> They conclude that fiduciary duties “are not special duties ... [instead] they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings.”<sup>35</sup>

Easterbrook and Fischel’s argument has generated significant criticism.<sup>36</sup> Accepting the insights on which it is based, it is still deeply flawed. Let us consider first its descriptive failings.

First, the argument fails properly to account for the formation of fiduciary relationships. Many, but not all, fiduciary relationships are established through contract. Fiduciary relationships may alternatively be established by non-contractual agreement, by unilateral undertaking, or by legislative or judicial decree.<sup>37</sup> An argument from contract *law* cannot account for fiduciary duties generated by relationships established *other than by contract*.

Second, the argument does not accurately describe the nature of the fiduciary relationship. Some, but not all, fiduciary relationships involve the engagement of an expert by a nonexpert. Expertise is not a *de jure* or *de facto* qualification of fiduciaries.<sup>38</sup> Furthermore, one expert may hire

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<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid* at 427.

<sup>35</sup> *Ibid.*

<sup>36</sup> See Brudney, “Contract and Fiduciary Duty”, *supra* note 29; Robert C Clark, “Agency Costs Versus Fiduciary Duties” in John W Pratt & Richard J Zeckhauser, eds, *Principals and Agents: The Structure of Business* (Boston: Harvard Business School Press, 1985) 55 at 62; William W Bratton “The ‘Nexus of Contracts’ Corporation: A Critical Appraisal” (1989) 74:3 Cornell L Rev 407; Tamar Frankel, “Fiduciary Duties as Default Rules” (1995) 74:4 Or L Rev 1209 [Frankel, “Default Rules”]; Scott FitzGibbon, “Fiduciary Relationships Are Not Contracts” (1999) 82:2 Marq L Rev 303; Melvin A Eisenberg, “Corporate Law and Social Norms” (1999) 99:5 Colum L Rev 1253; Gregory S Alexander, “A Cognitive Theory of Fiduciary Relationships” (2000) 85:3 Cornell L Rev 767; Conaglen, *Fiduciary Loyalty*, *supra* note 14 at 214-21.

<sup>37</sup> These include, for example, relationships between parents and children, and trustee and *cestui que trust* of a declaratory trust.

<sup>38</sup> See *Hi-Ho Tower v Com-Tronics*, 761 A (2d) 1268, 255 Conn 20 (2000) (“[s]uperior skill and knowledge alone do not create a fiduciary duty among parties involved in a business transaction” at 1280 [references omitted]). In the trust law context, trustees are of-

another without their shared or similar levels of expertise being considered inconsistent with the fiduciary nature of their relationship.<sup>39</sup> The hiring of expertise is therefore not the *sine qua non* of the fiduciary relationship.

Third, the argument does not account well for the content of fiduciary duties. If the duty of loyalty really were an implied contractual term, one would expect its content and application to turn on material facts (other terms, the expectations of the parties, representations made by the parties, and industry practice). Instead, the core content of the duty of loyalty is fixed, and the duty applies wherever a fiduciary relationship exists.<sup>40</sup>

Finally, the argument is inconsistent with judicial practice. In deciding whether fiduciary duties should govern a particular relationship, courts do not generally engage in construction of contracts. Rather, they determine directly whether a relationship is fiduciary. The imposition of fiduciary duties follows from that determination and is not mediated by explicit or implicit contractual terms.

Easterbrook and Fischel's argument is also normatively unsatisfying. First, it fails to account for a deep inconsistency in presuppositions about the rightful conduct of people in contractual and fiduciary relationships, respectively. In contract it is assumed that the parties will act in a mutually self-interested manner. Each is responsible for securing their interests in dealings with the other. In fiduciary law, by contrast, it is assumed that the parties are interacting for the exclusive benefit of one of them—the beneficiary.<sup>41</sup> The fiduciary is responsible for the beneficiary. The beneficiary is entitled to the fiduciary's loyalty. There is no mutuality, for the beneficiary has no duty to the fiduciary by virtue of the fiduciary relationship as such.

Second, the argument is only falsely suggestive of a contractual justification for fiduciary duties. Easterbrook and Fischel do not in the end claim that fiduciary duties are contractual terms in the ordinary sense. They are not based on the common intent of the parties, express or implied. Rather, they are purportedly imposed by courts on a hypothetical footing, upon judicial determination of what reasonable people would do

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ten friends and relatives of the settlor with no understanding of legal formalities of trust administration, let alone professional skill in investment or maintenance of trust property.

<sup>39</sup> For example, a lawyer will be considered a fiduciary of her client regardless whether the client happens to be a fellow lawyer or a judge.

<sup>40</sup> See Seavey, *supra* note 17.

<sup>41</sup> Contrary to Easterbrook and Fischel's suggestion that the relationship exists for mutual gain: "Contract and Fiduciary", *supra* note 30 at 426.



in the circumstances. The normative difference between real and hypothetical bargains is immense. Hypothetical contracts are counterfactual constructions of reason; they lack the immediate and direct normative suasion for ordering private legal relations that real bargains have. Furthermore, their justificatory power turns on the real world tractability of presuppositions that inform the hypothetical (here, that the parties are free to behave, and would behave, as economically rational persons without contingent preferences, endowments, or capacities).

Ultimately, then, Easterbrook and Fischel's variant on the argument from contract rests on contractualist rather than contractual reasoning. It is thus not actually a reductivist argument. Hypothetical contracts do not furnish actual contractual justification. Indeed, their appeal to philosophers lies in their potential as a source of general moral and political justification.<sup>42</sup> But Easterbrook and Fischel do not employ the hypothetical contract device in that way.<sup>43</sup> They feel that it proves that fiduciary duties "are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings."<sup>44</sup> They are wrong.

Supposing fiduciary duties are not contractual, might they nonetheless share with contractual duties a normative foundation in consent? If so, the above-noted insights about fiduciary liability might be accounted for in a manner which demonstrates the affinity of fiduciary and contract law without raising problems generated by contract-based reductivist argument.

James Edelman has recently offered an argument of this sort.<sup>45</sup> He claims that fiduciary duties are best understood as founded on voluntary undertakings. More particularly, they are an express or implied term of an engagement accepted by the fiduciary. According to Edelman:

Fiduciary duties ... arise in the same manner as any other express or implied term: by construction of the scope of voluntary undertakings. They are not duties which are imposed by law nor are they

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<sup>42</sup> See generally John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1999); David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986); TM Scanlon, *What We Owe to Each Other* (Cambridge, Mass: Belknap Press, 1998).

<sup>43</sup> Easterbrook and Fischel write:

The rhetoric of contract is a staple of political and philosophical debate. Contract is a term for voluntary and unanimous agreement among affected parties. It is therefore a powerful image. It shows up in arguments about "social contracts" that justify political society. ... Yet arguments about social contracts are problematic. They are constructs rather than real contracts ("Corporate Contract", *supra* note 30 at 1428).

<sup>44</sup> Easterbrook & Fischel, "Contract and Fiduciary Duty", *supra* note 30 at 427.

<sup>45</sup> James Edelman, "When Do Fiduciary Duties Arise?" (2010) 126:2 Law Q Rev 302.

necessarily referable to a relationship or status. It is time to move from thinking of fiduciary duties as a matter of status to understanding them as based upon consent.<sup>46</sup>

Wishing to emphasize the continuity between contract and voluntary undertaking, Edelman argues that in each case obligations are founded on the consent of the obligor. Consent is a “necessary condition of fiduciary obligation.”<sup>47</sup> Courts are said to engage in construction of the terms of consent in determining whether fiduciary duties were thereby expressly or impliedly undertaken.<sup>48</sup> Fiduciary duties are typically implied in “circumstances of trust, confidence, power, vulnerability and/or discretion.”<sup>49</sup> These factors evidence “an understanding or expectation in a reasonable person that he would behave in a particular way (for example, not put himself in a position of conflict, not make an unauthorized profit, and act in good faith and in the best interests of the beneficiary).”<sup>50</sup>

Relative to Easterbrook and Fischel’s account, Edelman’s approach offers the virtues of parsimony and enhanced explanatory power. It is a purer and less intricate voluntarist account of the justification for fiduciary duties. The argument is, in essence, that fiduciaries are rightly subjected to fiduciary duties where they consent to them. However, Edelman’s concession that consent may be implied dilutes the voluntarist appeal of his argument and brings it quite close to that of Easterbrook and Fischel. Each says that fiduciary duties may be imposed on the basis of a judicial determination of whether this would be consistent with the expectations of reasonable persons. It is just that Easterbrook and Fischel focus on agreement (what reasonable parties to a hypothetical contract would have agreed to), while Edelman focuses on consent (what a reasonable person must be taken to have accepted, whether on a contractual or extracontractual basis). Each contemplates the imposition of fiduciary duties on the basis of actual or constructive consent, with construction guided by legal or economic standards of reasonableness. Edelman’s account enjoys improved explanatory power simply because most fiduciary relationships are entered into voluntarily by the fiduciary, even if not through contract.

Edelman improves on the argument from contract. However, his account is also unsound. Descriptive problems arise from the insistence that consent, divorced from any concept of the fiduciary relationship, is suffi-

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<sup>46</sup> *Ibid* at 302.

<sup>47</sup> *Ibid* at 310.

<sup>48</sup> See *ibid* at 316-25.

<sup>49</sup> *Ibid* at 317.

<sup>50</sup> *Ibid*.

cient to ground fiduciary duties.<sup>51</sup> To appreciate the significance of consent to fiduciary liability, one must understand how it factors into the formation and during the currency of the fiduciary relationship. It is true enough that fiduciary liability is ordinarily premised upon voluntary undertakings, as most fiduciary relationships are established consensually. But it turns out that consent in itself offers little explanatory yield.

First, while the engagement of a fiduciary is ordinarily consensual, fiduciary relationships are sometimes (if rarely) established constructively, and consent is never in itself sufficient to make a relationship fiduciary. Parents have fiduciary duties toward their children as a matter of right, without any requirement of consent.<sup>52</sup> In most countries, directors and fund managers have fiduciary duties to corporations and investors as a matter of legislative decree. Presumably, the occupation of these offices is consensual, but consent does not explain the imposition of fiduciary duties on all holders of the office as a matter of law. Fiduciary duties are attached to the office by the statute under which they are created or regulated. The same is true of relationships deemed to have fiduciary status.

Second, the list of factors said to support the implication of fiduciary duties raises the question of the significance of the fiduciary relationship to fiduciary liability. Edelman says implication is warranted where a rela-

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<sup>51</sup> Edelman states, “[T]he focus in fiduciary cases must shift from a debate about which relationships are fiduciary ... to a focus upon whether duties are expressed or implied in relationships involving manifestations of voluntary undertakings” (*ibid* at 325). Compare Easterbrook and Fischel, who implicitly recognize the importance of conceptualizing the fiduciary relationship by elaborating on characteristics of relationships between experts and nonexperts: “Contract and Fiduciary”, *supra* note 30; “Corporate Contract”, *supra* note 30.

<sup>52</sup> Michael Bryan states that

it is generally accepted that the parent-child relationship cannot be described in private law terms. Parental responsibilities are not, for example, founded on some implied contract to support and nurture the child. ... One private law concept, however, the fiduciary concept, has emerged from jurisprudential obscurity to become a general explanation of parental responsibility. Parents have been held to owe children fiduciary obligations arising from the dominance and influence which they can exert over their children in their formative years (“Parents as Fiduciaries: A Special Place in Equity” (1995) 3:2 *Int’l J Child Rts* 227 at 228).

According to Scott and Scott, the relationship is fiduciary as a matter of status. The only material contract is the notional one between the state and parents, under which the latter are accorded broad authority over their children, subject to fiduciary constraints. They write: “The contract metaphor makes explicit what is implicit in contemporary family law: parental ‘rights’ are granted as *ex ante* compensation for the satisfactory performance of voluntarily assumed responsibilities to provide for the child’s interests” (Elizabeth S Scott & Robert E Scott, “Parents as Fiduciaries” (1995) 81:8 *Va L Rev* 2401 at 2404).

tionship is characterized by “trust, confidence, power, vulnerability and/or discretion.”<sup>53</sup> However, he does not explain these terms, let alone the support they provide for implying fiduciary duties. It is telling, however, that these factors are among the most discussed indicia of fiduciary relationships.<sup>54</sup> Edelman’s argument appears to be that fiduciary duties are implied terms governing interactions that have the classic hallmarks of a fiduciary relationship. Fiduciary relationships generate fiduciary duties. That is right of course, but we want to know *why* fiduciary relationships generate fiduciary duties.

Edelman’s analysis has normative failings as well. Consent is capable of reconciling fiduciary duties with the imperative of respect for autonomy. With rare exceptions, it would be inconsistent with that imperative for the law to require one person to serve another as a fiduciary. That would be to enable individuals or the state to coercively extract servility from others. Consent is thus ordinarily a necessary condition of fiduciary liability. However, it is not a sufficient condition, as consent alone does not give reason for imposing the duty of loyalty. It is surely significant that most fiduciaries undertake voluntarily to act in the beneficiary’s interest, but it remains unclear why the law insists upon that undertaking as a condition of entering a fiduciary relationship.

### ***B. The Argument from Property***

Another popular reductivist argument holds that fiduciary duties are a kind of private property right or are necessarily incidental to private property rights. So understood, fiduciary duties enhance ownership by facilitating delegation of power over property and protect ownership interests by deterring misappropriation or misapplication of that property. The justification for fiduciary duties derives from that for ownership and private property rights.

The argument from property also draws attention to important aspects of fiduciary liability. The first is that many fiduciary relationships involve the exercise of power by the fiduciary over property owned (in a legal or equitable sense) by the beneficiary.<sup>55</sup> The second is that by con-

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<sup>53</sup> Edelman, *supra* note 45 at 317.

<sup>54</sup> I discuss these and other commonly cited indicia of fiduciary relationships in Paul B Miller, “A Theory of Fiduciary Liability” (2011) 56:2 McGill LJ 235 at 243-47, 253-56.

<sup>55</sup> The classic example is of course the relationship between trustee and *cestui que trust* with respect to trust property. The trustee holds the legal interest in the property and associated legal rights. The *cestui* holds the beneficial interest in the property and associated equitable rights. Fiduciary regulation of the relationship between trustee and *cestui* supports the functions of property law in the ways noted above. It enhances ownership (in particular, the effective authority of settlors) by facilitating delegation of

straining the exercise of power over property, fiduciary duties deter the misapplication or misappropriation of property. The third is that rights correlative to fiduciary duties have the appearance of property rights in that they secure the exclusivity of the beneficiary's claim on the exercise of fiduciary power. This suggests that fiduciary power over property may itself be a form of property belonging to the bundle of rights constitutive of ownership.

Here again there are two variants of the argument. The first, advanced by Larry Ribstein, blends arguments from contract and property. Ribstein claims that all fiduciary relationships "involve the contractual delegation of broad power over one's property."<sup>56</sup> Fiduciary duties are justified solely on the basis of characteristics of the fiduciary relationship, so understood.<sup>57</sup> Ribstein endorses Easterbrook and Fischel's argument that fiduciary duties are implied terms of contract.<sup>58</sup> He believes, however, that fiduciary duties respond to the exigencies of contractual delegation of power over property rather than to the hiring of expertise. All fiduciary relationships are said to feature separation of ownership and control of property. Beneficiaries are entitled to "residual benefit" from property subject to fiduciary administration. Fiduciaries exercise control over that property. Fiduciary duties govern fiduciary relationships by default because "the fiduciary's discretion cannot readily be constrained by devices other than fiduciary duties without undermining the owner's objectives in delegating control."<sup>59</sup>

The elements of Ribstein's analysis adopted from Easterbrook and Fischel are subject to the criticisms raised above. The innovative arguments from property are problematic as well. Consider first the descriptive issues.

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power over property to a third party. It protects property rights (of the settlor and, ultimately, her intended beneficiaries) by deterring misapplication and misappropriation of trust property received under delegated power.

<sup>56</sup> Ribstein, "Are Partners Fiduciaries?", *supra* note 1 at 212. See also Cooter & Freedman, *supra* note 2 (explaining that in "paradigmatic forms" of the fiduciary relationship, "a beneficiary entrusts a fiduciary with control and management of an asset" at 1046).

<sup>57</sup> "[T]he existence of default fiduciary duties depends solely on the structure of the parties' relationship—that is, on the terms of their express or implied contract—and not on any vulnerability arising other than from this structure" (Ribstein, "Are Partners Fiduciaries?", *supra* note 1 at 212).

<sup>58</sup> "Fiduciary duties are a type of contract term that applies, in the absence of a contrary agreement, where an 'owner' who controls and derives the residual benefit from property delegates open-ended management power over property to a 'manager'" (*ibid* at 215).

<sup>59</sup> *Ibid* [footnote omitted].

First, while many fiduciary relationships involve the exercise of power over property, not all do. The paradigmatic fiduciary relationship between trustee and beneficiary is a misleading paradigm in that respect. Many relationships of recognized fiduciary status do not necessarily implicate any of the beneficiary's proprietary interests. Parents enjoy fiduciary power over the person *and* property of their children. Lawyers enjoy fiduciary power over legal interests (rights, obligations, powers) of clients that often have no bearing on their property. In many cases, the interests subject to the fiduciary relationship cannot reasonably be construed as proprietary.

Second, it follows that fiduciary duties do not just prevent misapplication or misappropriation of property. The duty of loyalty also prohibits conflicts that might compromise the pursuit of a beneficiary's other practical interests.

This carries a clear normative implication. If beneficiaries are often not owners and the interests subject to fiduciary relationships are often not proprietary, it follows that the normative foundations for property rights and ownership cannot alone support fiduciary duties. Where fiduciary law protects property rights and enhances ownership, it does so in a manner incidental to its core purpose.

Gordon Smith has offered an interesting variant on the argument from property.<sup>60</sup> He is keenly aware of the limitations of an argument from the *law* of property:

Lawyers have long understood that one who deals with property on behalf of the beneficial owner of the property is subject to fiduciary duties. The quintessential fiduciary relationship—the trust—follows this pattern. Despite the obvious connection between property and fiduciary duty in the trust context, property-based theories of fiduciary duty have not commanded widespread support because so many fiduciary relationships appear to exist without the requisite property.<sup>61</sup>

Smith gets around the problem of identifying as “property” interests that are not by referring instead to “resources”. He defines the fiduciary relationship as follows: “fiduciary relationships form when one party (the ‘fiduciary’) acts *on behalf of* another party (the ‘beneficiary’) while exercising *discretion* with respect to a *critical resource* belonging to the beneficiary.”<sup>62</sup>

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<sup>60</sup> “Critical Resource Theory”, *supra* note 1.

<sup>61</sup> *Ibid* at 1403.

<sup>62</sup> *Ibid* at 1402.

Smith says that he substituted “critical resource” for “property” partly in recognition of the fact that fiduciary relationships must have an object.<sup>63</sup> He explains the meaning of “critical resource” as follows:

Like property, critical resources may be tangible or intangible. The “owner” of critical resources need not have legally enforceable rights in the same way that an owner of property has such rights, but she must have residual control rights that, at a minimum, provide practical control over the resources.<sup>64</sup>

Like Ribstein, Smith locates the justification for fiduciary duties in the nature of the fiduciary relationship. More particularly, he says that fiduciary duties are justified by the vulnerability of the beneficiary to the fiduciary. He explains, “[T]he beneficiary’s vulnerability emanates from an inability to protect against opportunism by the fiduciary with respect to the critical resource. ... [F]iduciary law can be justified on the grounds that it deters opportunistic behavior.”<sup>65</sup>

Smith claims superior explanatory power for his theory. He argues that other “attempts to rationalize the law of fiduciary duty ... share a common failing, namely, the inability to simultaneously identify all fiduciary relationships and distinguish fiduciary relationships from nonfiduciary relationships.”<sup>66</sup> Unfortunately, the substitution of “critical resource” for “property” does not appreciably increase the explanatory power of the argument. The former concept is not well-defined. We are told nothing about the character of a resource other than that, like property, it encompasses tangible and intangible things. In any event, fiduciary relationships feature objects that cannot plausibly be construed as resources, including persons.<sup>67</sup>

The critical resource theory is also normatively unconvincing. Smith argues that fiduciary duties are justified by the beneficiary’s need for protection from opportunistic appropriation of critical resources. But it is not clear that the concept of a critical resource has any normative significance at all. For its significance to be clear, one would need to know what makes

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<sup>63</sup> “[T]he concept of ‘property’ adds nothing to the analysis of fiduciary duty that a less encumbered concept like ‘critical resource’ cannot contribute. Whatever concept is selected, it must serve one crucial function: It must convey the idea that *something* resides at the core of the fiduciary relationship” (*ibid* at 1443).

<sup>64</sup> *Ibid* at 1444.

<sup>65</sup> *Ibid* at 1404 [footnote omitted].

<sup>66</sup> *Ibid* at 1423 [footnotes omitted].

<sup>67</sup> See Deborah A DeMott, “Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences” (2006) 48:4 *Ariz L Rev* 925 [DeMott, “Breach”] (“identifying the core ‘critical resource’ within some conventional fiduciary relationships taxes the theory considerably” at 935).

a resource “critical”, what kinds of interest one may have in such a resource, and how, if at all, those interests are recognized in law.

### *C. The Argument from Tort*

The last reductivist argument for consideration is one that has surprisingly found virtually no academic support. As I will explain, breach of fiduciary duty has sometimes been called a tort. But no one has yet argued that it is properly understood as a tort.

This is surprising because, in one sense, an argument from tort is the most logical avenue of reductive analysis. The boundaries of tort law are notoriously ill-defined. Indeed, it has been described as the “umbrella category”<sup>68</sup> of private law and, more colourfully, as a site of “indexed chaos”.<sup>69</sup> The coherence of tort law has been doubted.<sup>70</sup> If it is an “umbrella category”, why not place fiduciary duties within it? That might resolve the problem of classifying fiduciary duties, even if order is achieved at the cost of analyticity.

The problem is that the loss of analyticity is too much to bear. Treating torts as a collection bin for the bric-a-brac of private law affords taxonomical flexibility at the expense of genuine taxonomical utility. If it is unclear what characteristics an obligation must have to count as a tort duty, calling it a tort duty tells us nothing of its nature or relationship to other kinds of private law obligations.

Without purporting to resolve the question of its coherence, it may be noted that tort law may have some defining purpose. Several theorists have attempted to articulate the core aims of tort law. These efforts may enable us to entertain hypothetical arguments that breach of fiduciary duty should be considered a tort.

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<sup>68</sup> Peter Cane, *The Anatomy of Tort Law* (Oxford: Hart, 1997) at 201.

<sup>69</sup> Gerald J Postema, “Introduction: Search for an Explanatory Theory of Torts” in Gerald J Postema, ed, *Philosophy and the Law of Torts* (Cambridge, UK: Cambridge University Press, 2001) 1 at 1.

<sup>70</sup> Cane explains:

[W]hile “contract” and “trust” (and here I use this term to cover both the institution of the trust and the (fiduciary) principle against self-seeking behaviour) are coherent expository categories ... “tort” ... [is] much less coherent. ... The lack of coherence within tort law is reflected in the fact that many of the standard works on the law of tort begin by admitting how difficult it is to define “a tort” or even concisely to explain the scope and boundaries of the law of tort (*supra* note 68 at 201).



One theory is that torts are civil wrongs.<sup>71</sup> On this view, tort law is of uniquely broad scope when compared with the other bases of private liability in that it encompasses not merely wrongs against persons but also interference with property and contractual rights. The civil wrongs theory builds on the recognition that tort liability is premised on wrongdoing but not necessarily risk, harm, or fault.

The civil wrongs theory of tort law may well have more explanatory power than its competitors. But the concept of a civil wrong is so broad that the theory is of little use in dealing with core problems of classification and justification of private law obligations.<sup>72</sup> The concept is insensitive to differences in the character of discrete wrongs that are relevant to these problems.<sup>73</sup> It may be, for instance, that trespass to land and knowing interference with contractual relations are civil wrongs that have been classified as torts. But one must appreciate the nature of the right to exclusive possession of property or to performance of contractual undertakings to understand the character of the wrongs. Understanding the nature of rights, duties, wrongs, and remedies is essential to articulating their justification. It is also relevant to reasoned classification. Breach of fiduciary duty is a civil wrong. But that tells us nothing of its distinctive wrongful character and gives little reason for classifying it a tort.

Another view is that torts are civil wrongs of harmful interference. Tort law is focused primarily on compensation for harm to protected in-

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<sup>71</sup> The most highly developed account is that of John Goldberg and Benjamin Zipursky. They state:

Tort is indeed a basic category of law. To see this, however, one must abandon the notion, now deeply entrenched, that tort law is law for allocating the costs of accidents. As its name indicates, tort law is about *wrongs*. The law of torts is a law of wrongs and recourse—what Blackstone called ‘private wrongs’ (“Torts as Wrongs” (2010) 88:5 *Tex L Rev* 917 at 918).

See also Peter Birks, “The Concept of a Civil Wrong” in David G Owen, ed, *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 31.

<sup>72</sup> Goldberg and Zipursky claim conceptual unity for the idea of a civil wrong:

[T]he wrongs recognized by tort law hardly make for an eccentric or random collection. Tortious wrongdoing always involves an interference with one of a set of individual interests that are significant enough aspects of a person’s well-being to warrant the imposition of a duty on others not to interfere with the interest in certain ways, notwithstanding the liberty restriction inherent in such a duty imposition (*supra* note 71 at 937 [footnotes omitted]).

This may be a reasonable definition of a civil wrong, but it does not furnish a basis upon which to distinguish tortious wrongs from other kinds of wrongs. Breach of contract and breach of fiduciary duty can be construed as involving interference with interests significant to individual welfare. To consider them torts for that reason alone ignores the question how torts are differentiated from other kinds of civil wrongs.

<sup>73</sup> See John Gardner, “Torts and Other Wrongs” (2011) 39:1 *Fla St UL Rev* 43.

terests.<sup>74</sup> Protected interests range from the personal (e.g., interests in privacy and physical integrity) to the proprietary (e.g., interests in exclusive possession of property or performance of contractual obligations).

Breach of fiduciary duty sometimes involves harmful interference by the fiduciary with the beneficiary's personal or proprietary interests.<sup>75</sup> It might thus be thought that breach of fiduciary duty is just another tort of harmful interference. This view seems to be reflected in the second *Restatement of Torts*, which provides that an individual "standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation."<sup>76</sup>

The difficulty with this view is that fiduciary liability is not contingent on interference, let alone harmful interference. Disloyalty sometimes involves assault, theft, or misappropriation, but harmful interference with the person or property of the beneficiary is not essential.<sup>77</sup> Fiduciaries are liable where they personally take property or profits obtained through the exercise of fiduciary power, regardless of whether the beneficiary had a pre-existing entitlement to, or even a reasonable expectation of procuring, the property or profits. The duty of loyalty prohibits conflicts regardless of whether their realization entails a risk of harm to the beneficiary. Equally, fiduciary remedies are not merely compensatory. Gain-based remedies require the fiduciary to pay over profits and property to the beneficiary whether or not the underlying disloyalty involved conduct that could be

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<sup>74</sup> Jules Coleman and Gabriel Mendlow explain:

[T]orts require ... wrong and, in most cases, harm. A notable exception to the harm requirement is the case in which injunctive relief is awarded in order to prevent harm that is virtually certain but yet to occur. As a general rule though torts require both wrongs and harms ("Theories of Tort Law" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Summer 2010 ed, online: <<http://plato.stanford.edu/archives/sum2010/entries/tort-theories/>>).

See also Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press, 1970); Steven Shavell, "Liability for Harm Versus Regulation of Safety" (1984) 13:2 *J Legal Stud* 357; Stephen R Perry, "Risk, Harm, and Responsibility" in David G Owen, ed, *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 321; Ripstein, "Tort Law", *supra* note 5.

<sup>75</sup> Consider cases involving the sexual exploitation of a beneficiary by a fiduciary (e.g., *Norberg v Wynrib*, [1992] 2 SCR 226, 92 DLR (4th) 449 [*Norberg* cited to SCR]).

<sup>76</sup> *Restatement (Second) of Torts* § 874 (1979). See also Deborah A DeMott, "Causation in the Fiduciary Realm" (2011) 91:3 *BUL Rev* 851 at 852 (arguing that fiduciary duties are considered tort duties in the United States because fiduciaries are liable to compensate beneficiaries for any losses associated with breach of fiduciary duty).

<sup>77</sup> As Peter Cane recognized, "Fiduciary obligations are different from any obligation imposed by tort law. As a general rule, tort law does not require people to act for the benefit of others and to ignore their own interests, but only to avoid causing 'disbenefit' to others" (*supra* note 68 at 189-90).

construed as conversion.<sup>78</sup> Whether considered from the perspective of wrongs or of remedies, it is clear that breach of fiduciary duty is not merely a tort.

#### IV. Instrumentalist Justifications

Our discussion has thus far shown the failure of the reductivist strategy in justifying fiduciary duties. This alone gives us a reason to think that fiduciary duties are distinctive and to predict that a successful justificatory strategy will treat them as such. The other dominant analytical strategy—the instrumentalist strategy—accepts that fiduciary duties are distinctive but typically ignores, denies, or diminishes the possibility that a justification might be rooted in the juridical character of liability.

There are several varieties of instrumentalist argument.<sup>79</sup> The variation reflects differences in the character of stipulated ends for law as well as differences in the structure of justificatory analysis. Some instrumentalists state as normatively desirable ends the satisfaction of moral norms or the achievement of public policy goals.<sup>80</sup> Others understand the end to be a legal principle or a consideration peculiar to legal institutions or the integrity of law. Furthermore, instrumentalist justificatory analysis may be direct or indirect in structure. Direct analyses seek to justify the content of an obligation directly on the basis of the stipulated independent end. Indirect analyses accept that obligations are supported by juridical reasons but claim that the latter are best explained in light of a stipulated independent end. As we shall see, instrumentalist arguments about the justification for fiduciary duties tend to be direct.<sup>81</sup>

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<sup>78</sup> Deborah A DeMott explains, “[T]he basic rationale of tort law is to compensate people for injuries inflicted upon them and for losses they have suffered. In contrast, a fiduciary’s liability is often to account for profit realized by the fiduciary when the fiduciary’s conduct has not inflicted injury on anyone” (“Fiduciary Obligation Under Intellectual Siege: Contemporary Challenges to the Duty to Be Loyal” (1992) 30:2 Osgoode Hall LJ 471 at 488).

<sup>79</sup> See Robert Samuel Summers, *Instrumentalism and American Legal Theory* (Ithaca: Cornell University Press, 1982); David Lyons, “Legal Formalism and Instrumentalism: A Pathological Study” (1981) 66:5 Cornell L Rev 949.

<sup>80</sup> William W Bratton, for example, states that

[t]he traditional commentary justifies the imposition of the fiduciary’s legal duty on two grounds. One is ethical—fiduciary exercise of power for self-interested reasons is wrong. ... The other justification is practical—the imposition of the duty facilitates productive relationships, whether of trust or of agency (“Self-Regulation, Normative Choice, and the Structure of Corporate Fiduciary Law” (1993) 61:4 Geo Wash L Rev 1084 at 1101).

<sup>81</sup> It may be that indirect instrumentalism is the more attractive of the two forms of instrumentalist argument. An indirect instrumentalist may accept that fiduciary duties

### A. *The Argument from Morality*

It is sometimes said, without much elaboration or specificity, that fiduciary law is concerned with ensuring that fiduciaries behave morally<sup>82</sup> and that the duty of loyalty requires fiduciaries to act altruistically.<sup>83</sup> But, more commonly, one sees a narrower argument from morality. Specifically, it is said that fiduciary duties have moral justification because they provide a secure basis for interpersonal trust. Fiduciary relationships are said to be relationships of trust.<sup>84</sup> Fiduciary duties are thought justified on the basis that they promote trust either directly or by securing conditions

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are justified juridically on the basis of properties of fiduciary relationships but nevertheless maintain that the ultimate (i.e., philosophical rather than juridical) justification for fiduciary duties is instrumental. For instance, it might be said that fiduciary relationships are justifiably recognized as a form of legal relationship because they facilitate an economically efficient allocation of productive capacities (i.e., personal legal powers). Fiduciary duties are, by implication, justified on the basis that they preserve the efficient allocation of productive capacities accomplished by fiduciary relationships. An argument such as this might indeed be compelling. But for present purposes I am not interested in considering all possible justificatory arguments for fiduciary duties or even the relationship between juridical and philosophical justifications. My aim is instead to consider the strengths and weaknesses of leading arguments in the literature. It just happens that these arguments take a direct instrumentalist form. I am grateful to Henry Smith and Stephen Smith for pressing this point.

<sup>82</sup> The classic articulation is found in the judgment of Justice Cardozo in *Meinhard*: “A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior” (*supra* note 24 at 546). Austin Scott relied on the philosopher Josiah Royce for the proposition that, “[i]n loyalty, when loyalty is properly defined, is the fulfilment of the whole moral law” (Josiah Royce, *The Philosophy of Loyalty* (New York: Macmillan Company, 1908) at 15, cited in Austin Scott, “The Fiduciary Principle” (1949) 37:4 Cal L Rev 539 at 540). See also Frankel, “Fiduciary Law”, *supra* note 1 (“[c]ourts regulate fiduciaries by imposing a high standard of morality upon them. This moral theme is an important part of fiduciary law. Loyalty, fidelity, faith, and honor form its basic vocabulary” at 829-30 [footnote omitted]).

<sup>83</sup> *Ibid* (“moral behavior is altruistic ... The moral theme in fiduciary law contrasts with the role of morality in contract law” at 830); Arthur B Laby, “The Fiduciary Obligation as the Adoption of Ends” (2008) 56:1 Buff L Rev 99 (arguing that fiduciary duties are Kantian imperfect duties of virtue); Birks, “Content of Obligation”, *supra* note 15 (arguing that fiduciary duties compel altruistic behavior); Smith, “Heart of Corrective Judgment”, *supra* note 6 (arguing that the duty of loyalty requires fiduciaries to have other-regarding motives and thus to act altruistically).

<sup>84</sup> See *Dolton v Capitol Federal Savings and Loan Association*, 642 P (2d) 21 (available on WL Can) (Colo Ct App 1981) (fiduciary relationships arise “where there is a repose of trust ... along with an acceptance or invitation of such trust” at 23); *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, 85 DLR (4th) 129 [cited to SCR] (the “fiduciary relationship has trust, not self-interest, at its core. ... [E]quity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart” at 543).

of trustworthiness that make it rational to place trust in fiduciaries.<sup>85</sup> The moral value of interpersonal trust may be understood as intrinsic (e.g., trust is critical to human flourishing given our interdependence) or in instrumental terms (e.g., trust enables individuals to co-operate effectively toward achievement of socially desirable ends). In either event, the justification for fiduciary duties is attributed to the moral value of trust.

Lawrence Mitchell, for instance, has argued that fiduciary duties make trust rational in relationships for which trust has functional significance.<sup>86</sup> The functional significance of trust lies in its facilitation of coordinated productive activity.<sup>87</sup> Speaking of relationships between business partners, Mitchell explains:

No law or contract is likely to substitute for the trust and mutual regard of the parties. But law can be used in a way that will help to foster the development of trust and make it more rational. ...

Fiduciary duty ... [makes] trust rational. ... [A] fiduciary duty gives each party a reason to trust the other in a long-term relationship of unforeseeable consequences because, backed by legal sanctions, it requires each party to act as if it were trustworthy.<sup>88</sup>

On Mitchell's view, fiduciary relationships are not founded on trust but are instead relationships in which liability rules render placement of trust secure.<sup>89</sup> Rational actors will be willing to trust one another knowing that betrayal will be deterred by the threat of liability.

Robert Flannigan, by contrast, argues that fiduciary duties are founded on trust understood as a good (i.e., a form of social capital) with inherent moral value. According to Flannigan, "[t]here is ... no doubt as to the source of the fiduciary obligation. It is the trust which one person places

<sup>85</sup> See Frankel, *Fiduciary Analysis*, *supra* note 27 ("an important underlying objective of fiduciary law is to maintain trusting relationships" at 317). Frankel has since explained that placement of trust in the fiduciary is not essential, but she maintains that fiduciary duties secure the trustworthiness of fiduciaries. Arguing that fiduciary duties "entitle entrustors to trust and rely on fiduciaries' honesty," she states:

Although courts sometimes describe entrustors as persons who actually trust their fiduciaries, courts have not required such actual trust as a basis for finding fiduciary relationships and attendant duties. Fiduciaries should be *trustworthy*, not necessarily *trusted* ("Default Rules", *supra* note 36 at 1227-28).

<sup>86</sup> Lawrence E Mitchell, "The Naked Emperor: A Corporate Lawyer Looks at RUPA's Fiduciary Provisions" (1997) 54:2 Wash & Lee L Rev 465 at 480.

<sup>87</sup> Presumably, the instrumental value of trust is to be derived from the social or economic value of productivity itself or the economic value of goods produced.

<sup>88</sup> Mitchell, *supra* note 86 at 480-81.

<sup>89</sup> Compare Frankel, "Default Rules", *supra* note 36 at 1227-28; *supra* note 85 and accompanying text.

in another.”<sup>90</sup> Fiduciary duties are, he says, imposed “for the singular purpose of maintaining the integrity of trusting relationships.”<sup>91</sup> Elsewhere, he elaborates:

The traditional rationale for fiduciary responsibility is straightforward. People trust others to act on their behalf or to perform tasks for them. ... The mischief that can occur in such circumstances is that the trusted party will divert value away from the trusting party. The trust placed in the trusted party, in other words, will be abused. Public morality is offended by this kind of conduct. The courts, openly asserting this public morality or policy, formulated a liability rule to deter the abuse.<sup>92</sup>

Flannigan is right that fiduciary relationships place fiduciaries in a position of power and as such generate a risk of abuse. But it does not follow that fiduciary relationships are defined by trust or that fiduciary duties promote trust. Fiduciary relationships may implicate trust. But there are several problems with the notion that fiduciary duties are founded on the moral value of trust.<sup>93</sup>

First, the meaning of trust is contested.<sup>94</sup> Trust may be defined as any of a number of states of mind,<sup>95</sup> forms of conduct,<sup>96</sup> or both (e.g., a demonstrated attitude or emotion).<sup>97</sup> In any event, there is no agreement about

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<sup>90</sup> “Fiduciary Obligation”, *supra* note 23 at 297.

<sup>91</sup> *Ibid* at 310.

<sup>92</sup> Robert Flannigan, “Fiduciary Obligation in the Supreme Court” (1990) 54:1 Sask L Rev 45 at 46.

<sup>93</sup> For additional criticism, see Smith, “Critical Resource Theory”, *supra* note 1 at 1416-18.

<sup>94</sup> See Carolyn McLeod, “Trust” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Spring 2011 ed, online: <<http://plato.stanford.edu/archives/spr2011/entries/trust/>>.

<sup>95</sup> For example, Lawrence C Becker distinguishes between trust as a cognitive and a non-cognitive state of mind: “[L]et us call our trust ‘cognitive’ if it is fundamentally a matter of our beliefs or expectations about others’ trustworthiness; it is noncognitive if it is fundamentally a matter of our having trustful attitudes, affects, emotions, or motivational structures that are not focused on specific people, institutions, or groups” (“Trust as Noncognitive Security about Motives” (1996) 107:1 Ethics 43 at 44). See also Karen Jones, “Trust as an Affective Attitude” (1996) 107:1 Ethics 4.

<sup>96</sup> See Annette Baier, “Trust and Antitrust” (1986) 96:2 Ethics 231 (“[t]rust ... is letting other persons (natural or artificial, such as firms, nations, etc.) take care of something the truster cares about, where ‘caring for’ involves some exercise of discretionary powers” at 240); Philip Pettit, “The Cunning of Trust” (1995) 24:3 Philosophy & Public Affairs 202 (“[t]he word ‘trust’ is used in relation to a great number of things. The word may be used in connection with relying on natural phenomena as well as in connection with relying on people” at 203-204).

<sup>97</sup> For example, Matthew Harding argues that “trust is an attitude of optimism ... about the choices that people will make” (“Manifesting Trust” (2009) 29:2 Oxford J Legal Stud

what trust comprises. There are other complexities. Trust may be unilateral or reciprocal.<sup>98</sup> It applies to different levels and kinds of social interaction (interpersonal, organizational, public, and political). It also has different objects (e.g., one can trust in the testimony of another, their promises, their competence, and so on). The correlative concept, trustworthiness, is equally unclear.<sup>99</sup> It is uncertain whether trustworthiness is a function of the character, competencies, or motivations of a person in whom trust is to be placed; the nature of the relationship between those who give and receive trust; or the social, political, organizational, and legal contexts which might influence their motivation or behavior. So long as it lacks clear meaning, trust cannot justify fiduciary duties.

Second, claims that the functional value of trust justifies fiduciary duties rest on the questionable premise that these functions have stable moral value. There is reason to doubt this. Most consider that, whatever it is, trust is purposive—that is, one person trusts another *to do something* (e.g., to tell the truth, to keep promises).<sup>100</sup> If that is true, the moral value of trust turns at least in part on that of its purpose. As Annette Baier notes, there “are immoral as well as moral trust relationships, and trust-busting can be a morally proper goal.”<sup>101</sup>

Third, the case that the duty of loyalty is trust reinforcing has not been made out. Some have argued that threats of legal sanction, or the security the threat of sanctions provides, are inimical to trust.<sup>102</sup> Whether this is true or not, a positive argument must be made for the trust-reinforcing function of fiduciary liability. Without one, we have no reason to believe that there is any causal relationship between levels of trust and fiduciary liability.

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245 at 246). Furthermore, “[t]rust, like any attitude, is ‘mere potential’ until it is manifested in action” (*ibid* at 247).

<sup>98</sup> See Pettit, *supra* note 96 at 204-205 (distinguishing active from interactive trust).

<sup>99</sup> See Russell Hardin, *Trust and Trustworthiness* (New York: Russell Sage Foundation, 2002) (arguing that insufficient attention has been paid to trustworthiness and claiming that “the complexity of the problem of trust derives primarily from the complexity of the problem of trustworthiness. ... [T]he motivations for being trustworthy are manifold” at 31).

<sup>100</sup> See McLeod, *supra* note 94.

<sup>101</sup> Baier, *supra* note 96 at 232.

<sup>102</sup> For example, Larry Ribstein argues that “law has nothing to do with trust. ... [L]aw actually may undermine trust, and therefore serve as a substitute rather than a complement” (“Law v. Trust” (2001) 81:3 BUL Rev 553 at 576). For criticism, see Frank B Cross, “Law and Trust” (2005) 93:5 Geo LJ 1457.

Finally, trust is not an essential quality of fiduciary relationships.<sup>103</sup> Reposal of trust by a beneficiary, whatever that might mean, does not necessarily factor in the formation of relationships established by decree or undertaking. Further, depending how it is defined, trust may or may not arise subsequently. Even where present, trust is not a unique quality of fiduciary relationships. As DeMott observes, the “trusting behaviour that a fiduciary relationship may engender does not adequately furnish a basis on which to differentiate among relationships or actors.”<sup>104</sup> Trust may or may not be present in fiduciary relationships; likewise, it may or may not be present in nonfiduciary relationships (e.g., contractual relationships). The moral value of trust is therefore not alone sufficient to explain or justify fiduciary duties.

### *B. The Argument from Policy*

It is also sometimes said that fiduciary liability is founded on considerations of public policy.<sup>105</sup> Paul Finn has advanced the most influential argument from public policy.<sup>106</sup> Finn, author of the groundbreaking treatise

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<sup>103</sup> Unless one defines trust circularly as denoting properties of fiduciary relationships (see Baier, *supra* note 96), in which case, reference to trust simply begs the question concerning the meaning and normative salience of the properties.

<sup>104</sup> “Breach”, *supra* note 67 at 935.

<sup>105</sup> As stated in *Guth v Loft, Inc.*, 5 A (2d) 503 at 510 (available on WL Can) (Del Sup Ct 1939):

A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work to the injury of the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it. ... The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest.

See also *Dutton v Willner*, 52 NY 312 (available on WL Can) (App Ct 1873) (the duty of loyalty is “founded upon considerations of policy ... not merely to afford a remedy for discovered frauds, but to reach those which may be concealed” at 319); *Lac Minerals Ltd v International Corona Resources Ltd.*, [1989] 2 SCR 574, 61 DLR (4th) 14 [cited to SCR] (“[t]he essence of the imposition of fiduciary obligations is its utility in the promotion and preservation of desired social behaviour and institutions” at 672); *Hodgkinson v Simms*, [1994] 3 SCR 377, 117 DLR (4th) 161 [cited to SCR] (“[t]he desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law” at 422).

<sup>106</sup> PD Finn, “The Fiduciary Principle” in TG Youdan, ed, *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) at 1 [Finn, “Fiduciary Principle”]. It may be thought that a more influential argument from policy is that fiduciary duties are justified on the basis of economic efficiency. Various authors have cited efficiency when discussing the justifi-



tise *Fiduciary Obligations*, was originally dismissive of the significance of the fiduciary relationship to fiduciary liability.<sup>107</sup> He ultimately reversed course<sup>108</sup> but claimed that public policy concerns account for its significance to fiduciary liability:

[T]hough the courts often enough emphasize the rigorous standards exacted by the fiduciary principle ... they less often acknowledge explicitly that it is, itself, an instrument of public policy. It has been used, and is demonstrably used, to maintain the integrity, credibility and utility of relationships perceived to be of importance in a society. And it is used to protect interests, both personal and economic, which a society is perceived to deem valuable.<sup>109</sup>

Concerning the duty of loyalty, Finn argues that “[i]ts function ... is to secure the paramountcy of *one side’s* interests or in some instances, as with partnerships, of a joint interest.”<sup>110</sup> This is said to be a matter of pub-

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lication for fiduciary duties. However, no one has developed a comprehensive argument that fiduciary duties are justified solely on the basis of efficiency. Instead, arguments from efficiency emanate from claims that fiduciary duties are contractual duties. For example, Cooter and Freedman have argued that fiduciary duties are implied default rules that resolve transactional inefficiencies in relational contracts: *supra* note 2 at 1064-65. Ribstein and other adherents of law and economics have made similar claims: “[C]orporate rules ultimately are and, from an efficiency perspective, should be the product of private ordering, not government regulation. Even where liability rules are appropriate, they should be regarded as standard form contractual provisions that can be drafted around” (Henry N Butler & Larry E Ribstein, “Opting Out of Fiduciary Duties: A Response to the Anti-contractarians” (1990) 65:1 Wash L Rev 1 at 71). It may be that a comprehensive argument from economic efficiency could be disentangled from contractarian analyses of commercial fiduciary relationships. The suggestion is, however, purely speculative.

<sup>107</sup> Finn writes:

[F]iduciary ... is not definitive of a single class of relationships to which fixed rules and principles apply. Rather its use has generally been descriptive, providing a veil behind which individual rules and principles have been developed. This conclusion—an incontestable one—is the starting point of this work. In the following pages it will be suggested that it is meaningless to talk of fiduciary relationships as such (PD Finn, *Fiduciary Obligations* (Sydney: Law Book Company Limited, 1977) at 1 [footnotes omitted]).

<sup>108</sup> Finn wrote:

[O]ur present uncertainty is thought to be exacerbated by the lack of a workable and unexceptionable definition of a fiduciary. We have no shortage of rival approaches, but none has carried the day. ... [T]here is the obvious hazard of “fiduciary” becoming either a chameleon or an “accordion term.” Definition, howsoever imperfect, has its place (“Fiduciary Principle”, *supra* note 106 at 26 [footnotes omitted]).

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid* at 27.

lic interest and, as such, a proper concern for public policy. Finn concludes:

In this the true nature of the fiduciary principle is revealed. It originates, self-evidently, in public policy: in a view of desired social behaviour for the end this achieves. To maintain the integrity and the utility of those relationships in which the (or a) role of one party is perceived to be the service of the interests of the other, it insists upon a fine loyalty in that service.<sup>111</sup>

Finn rightly emphasizes the public importance of certain fiduciary relationships. Who could deny the personal and social significance of relationships between directors and corporations, doctors and patients, and parents and children? That being said, Finn leaves unarticulated the connection between the public importance of some fiduciary relationships and the policy justification for fiduciary duties in general. A policy justification is simply asserted. The assertion is hard to accept without analysis partly because of Finn's failure to explain the nature of the fiduciary relationship. If it is unclear what makes a relationship fiduciary, it is impossible to determine whether its characteristics engage matters of public interest, and if so, how.

Supposing that the nature of the fiduciary relationship is such that it does somehow engage the public interest, it remains unclear how fiduciary duties advance the public interest. It is not obvious that a duty that requires one person to focus exclusively on the interests of another will tend to advance social welfare or some other measure of the public good. The duty of loyalty asserts the exclusivity of interest of an individual or discrete class of individuals and demands blinkered devotion to a mandate defined in terms of the interests of that individual or class. It is not impossible that the duty of loyalty might thereby advance public policy. But the claim that it does is counterintuitive and, in any event, requires argument.

### *C. The Argument from (Nonfiduciary) Law*

The final form of instrumentalist argument holds that fiduciary duties are of consequential importance to the realization of values implicit in the law, to the promotion of lawful conduct, or to legality itself. The justification for fiduciary duties is thus found within law but beyond fiduciary law proper.

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<sup>111</sup> *Ibid.*

Matthew Conaglen has articulated an argument of this sort.<sup>112</sup> Conaglen offers a unique account of the function of the duty of loyalty. He claims that “[t]he concept of fiduciary ‘loyalty’ is an encapsulation of a subsidiary and prophylactic form of protection for non-fiduciary duties which enhances the chance that those non-fiduciary duties will be properly performed.”<sup>113</sup> On Conaglen’s view, the duty of loyalty always arises concurrently with nonfiduciary legal duties.<sup>114</sup> It is subsidiary in that its function is purely instrumental in relation to these duties. It is prophylactic in that conflict rules deter the nonperformance of these duties.<sup>115</sup>

Conaglen argues that the justification for fiduciary duties is as follows: “it is clear that the normative justification for [the] existence [of the duty of loyalty] is to avoid situations which involve a risk of breach of non-fiduciary duties.”<sup>116</sup> In other words, fiduciary duties are justified instrumentally on the basis that they provide needed security for the performance of nonfiduciary legal duties.

Conaglen’s account offers insights into fiduciary liability not mentioned thus far. First, fiduciary duties typically arise concurrently with nonfiduciary (often contractual) duties. Second, fiduciary duties always grant the beneficiary an expectation of performance. The fiduciary is expected to *act* in the interests of the beneficiary even if that expectation is not itself the object of prescriptive obligation.<sup>117</sup> Third, fiduciary duties are functionally prophylactic in that they insulate the beneficiary from the risk of compromised judgment by the fiduciary. The conflict rules require

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<sup>112</sup> Conaglen, *Fiduciary Loyalty*, *supra* note 14; Matthew Conaglen, “The Nature and Function of Fiduciary Loyalty” (2005) 121 LQR 452 [Conaglen, “Nature and Function”].

<sup>113</sup> *Ibid* at 453.

<sup>114</sup> Conaglen, *Fiduciary Loyalty*, *supra* note 14 (“fiduciary duties subsist concurrently alongside non-fiduciary duties with a view to making proper performance of those non-fiduciary duties more likely” at 75).

<sup>115</sup> As Conaglen would have it, under the conflict of interest rule, “a fiduciary is prohibited from acting in a situation where there is a conflict between the basic duty which he owes to his principal and his own personal interest because that personal interest is likely to lead the fiduciary away from the proper performance of his duty” (“Nature and Function”, *supra* note 112 at 461). Speaking of fiduciary law more generally, he explains that the “very nature of fiduciary doctrine ... is itself prophylactic in the sense that the very object of its rules and principles is to try to remove or neutralise incentives that might tempt or otherwise motivate a fiduciary not to perform properly his non-fiduciary duties” (*ibid* at 469).

<sup>116</sup> *Ibid* at 470.

<sup>117</sup> *Contra* Birks, “Content of Obligation” *supra* note 15. The difficulty, of course, lies in specifying precisely what the fiduciary is to do in acting in the interests of the beneficiary. Conaglen thinks the fiduciary is to perform nonfiduciary duties. I present a different view in Part V, below.

the fiduciary to avoid situations that would incentivize him to act contrary to the interests of the beneficiary.

Conaglen's rendering of fiduciary duties is highly sophisticated but still problematic. The most important descriptive problem is the now-familiar difficulty of accounting for the significance of the fiduciary relationship to fiduciary liability. Conaglen has recently confronted this problem, saying:

Legal obligations are frequently analyzed on the basis of a syllogism: where the circumstances are X, there is a duty of kind Y. ... It is commonplace, therefore, when seeking to identify the function that legal obligations serve, to focus attention on the question of when duties of that kind arise.<sup>118</sup>

Conaglen explains that this has resulted in "considerable attention [being] focused on the concept of a 'fiduciary relationship' as the key to unlocking the function served by fiduciary duties."<sup>119</sup> He declines to take this route, however, claiming that "the circumstances in which a fiduciary relationship arises ... are far from clear" and that it is debatable whether "the syllogistic mode of analysis ... accurately represents the manner in which fiduciary doctrine operates."<sup>120</sup>

Elaborating on the first point, Conaglen points out that established methods of identifying fiduciary relationships do not make clear "why the relationships are recognized as fiduciary in nature."<sup>121</sup> He claims that efforts to define the fiduciary relationship rest on "vain hope", with chances of success approximating those of the search for the Holy Grail.<sup>122</sup> Conaglen supports his second point by citing a few cases in which judges, influenced by Finn, have suggested that the syllogism operates in reverse (i.e., that identification of a relationship as fiduciary follows from the imposition of fiduciary duties).<sup>123</sup>

Neither of these arguments is convincing. The claim that fiduciary law is an outlier rests on thin authority and is not based on any analysis. Conaglen says that fiduciary relationships are identified by first determining whether fiduciary duties exist. But he does not convincingly explain the incidence of fiduciary duties. Fiduciary duties must either be imposed as a general rule of conduct or arise by virtue of an interaction

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<sup>118</sup> Conaglen, *Fiduciary Loyalty*, *supra* note 14 at 7.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid* at 8.

<sup>122</sup> *Ibid* at 9.

<sup>123</sup> *Ibid* at 7-10.

between individuals. They do not subsist in the air, as it were. A preponderance of authority treats the formation of a fiduciary relationship as a condition precedent to liability.<sup>124</sup>

The claim that it is impossible to define the fiduciary relationship is likewise unconvincing. A convincing definition has proven elusive. But as I will explain in Part V.B, existing approaches to the identification of fiduciary relationships provide a stable referent for definitional reasoning.

There are other problems. For instance, Conaglen's argument cannot explain the distinctively wrongful character of disloyalty and its remedial implications. Something in the character of disloyalty justifies remedies so robust that they would seem punitive in other contexts.<sup>125</sup> Yet Conaglen cannot account for the connection between disloyalty and the remedies that correct for it. On his view, disloyalty generates liability not because it is inherently wrongful but rather because it involves a risk of the realization of a nonfiduciary wrong (i.e., breach of a nonfiduciary duty). But if that is true, it is unclear why disloyalty attracts remedies more potent than those available to correct the nonfiduciary wrongs. If the duty of loyalty is subsidiary and disloyalty is thus not inherently wrongful, remedies should track those available upon breach of the underlying duty.

This problem has a normative corollary. Conaglen says that "the normative justification for [the duty of loyalty] is to avoid situations which involve a risk of breach of non-fiduciary duties."<sup>126</sup> But it is unclear why the risk of breach of nonfiduciary duties should justify a standard of conduct with the distinctive content and high burden of compliance of the duty of loyalty. Nonfiduciary duties are enforceable under independent liability rules,<sup>127</sup> and the risk of breach is deterred by the prospect of remedies ordinarily available upon breach. There is nothing about risk of breach of a nonfiduciary duty in itself that would justify the exacting demand for faithfulness made of fiduciaries.

## V. The Juridical Justification

So far, I have briefly described the juridical character of fiduciary liability, introduced the problem of justifying fiduciary duties, and reviewed prominent claims about the justification for fiduciary duties. The dominant justificatory strategies—reductivist and instrumentalist—have not proven successful.

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<sup>124</sup> *Supra* notes 26-28.

<sup>125</sup> See Cooter & Freedman, *supra* note 2 at 1069-74; Brudney, "Contract and Fiduciary Duty", *supra* note 29 at 602-603.

<sup>126</sup> "Nature and Function", *supra* note 112 at 470.

The failures are instructive. The failure of reductivism suggests that justificatory analysis should proceed on the basis that fiduciary liability is distinctive. The failure of instrumentalism suggests that justificatory analysis should properly confront the juridical character of fiduciary liability by examining justificatory reasons that may be derived from it. In what follows, I endeavour to act on these lessons in developing a juridical justification for fiduciary duties.

### *A. Recapitulation*

Leading claims about the justification for fiduciary duties may have proved unconvincing, but most illuminated important, sometimes underappreciated, aspects of fiduciary liability. It may be useful to begin by taking stock of what has been discussed thus far.

In Part II, I established the basic parameters of fiduciary liability. I noted that there is at least one distinctively fiduciary duty, the duty of loyalty,<sup>127</sup> and that this duty includes conflict rules. Specifically, the fiduciary must avoid conflicts between his mandate to serve the interests of the beneficiary and his self-interest or duty to others. It was also observed that the duty of loyalty is based on the existence of a fiduciary relationship.

The arguments canvassed in Parts III and IV emphasized other important aspects of fiduciary liability. The argument from contract highlights several important points. It is founded on the recognition that fiduciary duties are typically occasioned by fiduciary relationships established consensually. Pertinent modes of consent differ; they include contract, informed consent, informal agreements, and unilateral undertakings. The necessity of obtaining consent likewise varies. The consent or undertaking of the fiduciary is almost always required. The consent of the beneficiary or a third party (e.g., benefactor or guardian) will also be required in many cases.

The argument from contract also emphasizes the fact that fiduciary duties frequently constrain the performance of contractual undertakings. For instance, a lawyer who undertakes to represent a client on retainer is constrained by the duty of loyalty in the performance of that contractual undertaking.<sup>128</sup> The conflict of duty rule prevents her from representing another client in the same or conflicting matters.

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<sup>127</sup> The claim of distinctiveness in this part went to the content of the duty, not its foundation, and thus did not presuppose the failure of reductivist justification.

<sup>128</sup> See Lynn A Baker & Charles Silver, "Fiduciaries and Fees: Preliminary Thoughts" (2011) 79:5 Fordham L Rev 1833.

Finally, the argument from contract underscores the fact that enforcement of fiduciary duties may be partially determined by consent.<sup>129</sup> While broad waivers or contractual clauses purporting to completely exclude fiduciary liability are usually read down or held void, consent to partial exclusion of fiduciary duties or ratification of breach does limit enforcement.<sup>130</sup>

The argument from property draws attention to other aspects of fiduciary liability. It underscores the fact that fiduciaries are often vested with power over property owned by the beneficiary. Trustees, for instance, have power over trust property of which beneficiaries are equitable owners. Directors and officers have power over assets and income of which corporations are legal owners.

In fiduciary relationships of this sort, fiduciary duties constrain the exercise of power over property, prohibiting its misapplication or misappropriation. Thus the duty of loyalty bars the trustee from taking a personal interest in trust property.<sup>131</sup> Similarly, it forbids partners from making personal use of partnership property or diverting profits realized through its productive application.<sup>132</sup> When fiduciary duties operate this way, the correlative rights resemble property rights; they secure the exclusivity of the beneficiary's claim on the resource.

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<sup>129</sup> See Easterbrook & Fischel, "Contract and Fiduciary", *supra* note 30; Butler & Ribstein, *supra* note 106.

<sup>130</sup> Victor Brudney states:

The classic fiduciary loyalty restriction starts with a substantive background stricture that prohibits any gain for the fiduciary from any [self-dealing] transaction. ... Those prohibitions are relaxed if informed consent to the transaction is given by the beneficiary or principal, but even then, the fiduciary must demonstrate both the volitional and informed character of the consent, *and* that the transaction is "fair" ("Revisiting the Import of Shareholder Consent for Corporate Fiduciary Loyalty Obligations" (2000) 25:1 J Corp L 209 at 213 [footnote omitted]).

DeMott notes that "[a] provision in a trust instrument cannot relieve a trustee of liability for any profit derived from a breach of trust, and cannot relieve the trustee of liability for breaches of trust committed intentionally, in bad faith, or with reckless indifference to the interests of the beneficiary" ("Beyond Metaphor", *supra* note 16 at 923). See also Brudney, "Contract and Fiduciary Duty", *supra* note 29; Paul Finn, "Contract and the Fiduciary Principle" (1989) 12:1 UNSWLJ 76.

<sup>131</sup> See *Restatement (Second) of Trusts* § 170(1) (1959) ("[t]he trustee is under a duty to administer the trust solely in the interest of the beneficiaries"). See also Lawrence E Mitchell, "The Death of Fiduciary Duty in Close Corporations" (1990) 138:6 U Pa L Rev 1675 ("[i]t is clear that trustees are prohibited from self-dealing in trust property, and that non-trustee fiduciaries have been subjected to the same general principle" at 1697).

<sup>132</sup> See Ribstein, "Are Partners Fiduciaries?", *supra* note 1 ("[o]wners have joint rights in firm property and, therefore, may not appropriate the property to personal use without co-owner consent" at 221).

The argument from nonfiduciary law draws attention to yet other features of fiduciary liability. The first is that fiduciary duties typically arise concurrently with nonfiduciary duties. Fiduciary relationships established by contract invariably give rise to fiduciary and contractual duties. Where confidential information is disclosed in the execution of a fiduciary mandate, fiduciary duties will co-exist with duties of confidence.

Another important point is that fiduciary duties support an expectation of performance. Conaglen mistakenly claims that the expectation goes to the performance of nonfiduciary duties. The germane expectation is that of performance of the mandate underlying a fiduciary relationship. I will develop this point shortly. For now, it suffices to say that fiduciaries are expected to *act* in the interests of the beneficiary. The duty of loyalty supports that expectation notwithstanding the fact that there is no prescriptive fiduciary *obligation* of performance of a fiduciary mandate.<sup>133</sup>

### ***B. The Nature of Juridical Justification***

The justificatory analysis offered here articulates reasons for the imposition of fiduciary duties derived exclusively from the juridical character of fiduciary liability. Juridical justification differs from reductivist justification insofar as the reasons are taken to be distinctive of fiduciary liability. It differs from direct instrumentalist justification insofar as private law is taken to call for a distinctive kind of practical reasoning.<sup>134</sup>

Juridical justification treats the juridical character of private liability as a source rather than an object of justification.<sup>135</sup> It shares with Zipursky's pragmatic conceptualism the premise that the focal point for interpretive legal theory should be "the concepts and principles embedded in the law."<sup>136</sup> Unlike pragmatic conceptualism, however, juridical justification does not suppose that the normativity of private law is to be understood in terms of extrinsic values (e.g., those derived from social practices or conventions). Instead, it seeks to reveal the inherent justificatory struc-

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<sup>133</sup> In other words, fiduciary duties *constrain* the execution of a fiduciary mandate, but they do not *secure* its execution.

<sup>134</sup> Private law involves a distinctive form of practical reasoning in that judges, in fulfilling their responsibility to give reasons for judgment, must provide public justification for resolution of grievances that reflect and extend a coherent set of terms of interaction for private persons. Of course, the quality of justification provided in judicial reasoning turns on analytical properties shared by all norm-governed practical reasoning.

<sup>135</sup> Weinrib explains that "private law is a justificatory enterprise. The relationship between the parties is not merely an inert datum of positive law, but an expression of—or at least an attempt to express—justified terms of interaction" (*Idea, supra* note 5 at 32). See also Weinrib, "Legal Formalism", *supra* note 7.

<sup>136</sup> Zipursky, *supra* note 7 at 459.



ture of the settled principles of liability by focusing on legal forms around which these principles are organized (e.g., the form of legal personality, formal qualities of kinds of legal relationship, and formal characteristics of kinds of organization). Juridical justification is, to this extent, consistent with Weinrib's formalist method. The focus is on the "internal structure" or "internal principle of organization" of legal relationships with regard to "how the components of a legal relationship stand to one another and to the totality that they together form."<sup>137</sup>

Juridical justification involves the elucidation of coherent forms of rightful interaction. This is important to the extent that private law is partly constituted by discrete forms (again, forms of personality, relationship, and organization). It is important, however, that one be mindful of the limits of juridical justification. Juridical justification implies nothing beyond the normative coherence of given bases of private liability. *Contra* Weinrib, then, I do not think that juridical justification requires commitment to the idea that the normative structure of private law is expressed only in terms of corrective justice or that the only relevant measure of justice so understood is equal freedom.<sup>138</sup> Nor does it entail the view that pri-

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<sup>137</sup> Weinrib, *Idea*, *supra* note 5 at 25. On the nature and significance of juridical reasoning in historical context, see NE Simmonds, *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (Manchester: Manchester University Press, 1984) at 121.

<sup>138</sup> Weinrib seems to assume that attention to the juridical character of liability is a unique quality of corrective justice theories of private law, such that one could not be interested in juridical justification yet be agnostic about corrective justice:

The juridical conception of corrective justice is the centerpiece of a theory of liability. The object of the theory is to understand liability as a distinct and familiar normative practice, in which the law assesses and responds to the claim that a plaintiff makes against a defendant. ...

Within this practice, justification has a pervasive role. The rules, concepts, and principles that figure in the assessment of the plaintiff's claim are the ingredients and the products of a justificatory process. ... [T]he normative significance of a finding of liability depends on the cogency of the justifications that support it.

The juridical conception of corrective justice takes the justificatory ambitions of this practice seriously by focusing on its internal normative dimension (Ernest J Weinrib, "Correlativity, Personality and the Emerging Consensus on Corrective Justice" (2001) 2:1 *Theor Inq L* 107 at 113).

Other corrective justice theorists have not so readily assumed that the normative structure of private liability must be analyzed in terms of a unitary theory of justice. Compare Jules L Coleman, who explains:

Political philosophy often proceeds, as it were deductively, from a set of political-moral principles that are believed to have a claim on us, to a set of justified institutional structures. ...

vate law is an autonomous normative practice.<sup>139</sup> It may be that the normative structure of private liability reflects considerations of distributive or retributive justice as well as corrective justice.<sup>140</sup> The ultimate bases of normativity might include any number of values (e.g., equal freedom, fairness, equality, virtue, or social welfare). The point is not that juridical justification has no bearing on these questions. It is rather that the methodology of juridical justification does not entail a position on them.

### *C. The Juridical Basis of Justification for Fiduciary Duties*

As I explained in Part II, the entrenched position in the positive law is that fiduciary liability is contingent on violation of duties occasioned by the fiduciary relationship. This implies that appreciation of the nature of the fiduciary relationship is key to understanding the justification for fiduciary duties.

The juridical justification for fiduciary duties treats the fiduciary relationship as a distinctive kind of legal relationship with inherent normative salience for fiduciary liability. Its salience lies in the connection between the essential characteristics or formal properties of the relationship and the function of fiduciary duties.

The argument that there is something in the nature of the fiduciary relationship that compels the imposition of fiduciary duties presupposes that its formal properties can be identified. Some claim otherwise. For instance, Deborah DeMott says that “the characteristics of even the standard or conventional fiduciary relationships ... are too varied to enable one to distill a single essence or property that unifies all in any analytically satisfactory way.”<sup>141</sup> John Glover questions “[d]efinitional reasoning” that

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There are limits to the extent to which this approach can be brought to bear systematically on the concrete particulars of law. I prefer to begin not at the top, but in the middle, by asking what principles, if any, are embodied in the legal practices we are presently engaged in. ... We do not begin with any presupposition about the moral status of the principles we will find. Rather, we simply seek to identify the normatively significant elements of the practice and to explain them as embodiments of principle. ... [T]he moral or justificatory questions ... can grow out of the explanatory project (*The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001) at 5-6).

<sup>139</sup> Compare Weinrib, *Idea*, *supra* note 5 at 204-31; Hanoch Dagan, “The Limited Autonomy of Private Law” (2008) 56:3 Am J Comp L 809.

<sup>140</sup> See Anthony J Sebok, “Punitive Damages: From Myth to Theory” (2007) 92:3 Iowa L Rev 957; Ronen Perry, “The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory” (2006) 73:2 Tenn L Rev 177; Hanoch Dagan, “The Distributive Foundation of Corrective Justice” (1999) 98:1 Mich L Rev 138.

<sup>141</sup> “Breach”, *supra* note 67 at 934-35.

“assumes that when the term ‘fiduciary’ is applied to any type of relationship, there must be a subsisting common element.”<sup>142</sup>

Claims like this are understandable but not persuasive. The conclusion that a concept is indefinable because it has not yet been well- or convincingly defined follows an unwarranted leap of logic. Nevertheless, the fact that fiduciary law has evolved without consensus on a definition raises the question of the basis upon which one should be ventured and evaluated. I suggest that a definition of a juridical concept should cohere with judicial understanding and use of the concept. The purpose of definition is, after all, to make sense of the juridical character of liability expressed in the concepts through which determinations of liability are made. Fiduciary liability turns on relationship characterization under status- and fact-based methods of fiduciary relationship identification.<sup>143</sup> An effort to define the fiduciary relationship should thus start with these methods.

Under the status-based method, the identification of a relationship as fiduciary turns on the status of nonlegal categories of relationship. The relationships conventionally recognized as fiduciary (e.g., trustee-beneficiary, agent-principal, director/officer-corporation, lawyer-client, parent-child) are so recognized as a matter of status. Confronted with a particular relationship, the court will categorize it and determine whether the category enjoys fiduciary status. If so, the particular relationship is almost always deemed fiduciary. If not, the court may consider whether a category into which it falls merits fiduciary status. Fiduciary status is extended through loose analogical reasoning; a new category of relationship must be found sufficiently similar to one of established status to be labelled as fiduciary itself. The reasoning is loose in that it is not constrained by agreed (and therefore authoritative) criteria of relevance.

Under the fact-based method, judges determine whether a particular relationship is fiduciary by examining its characteristics. Here, facts about the properties of a relationship rather than its status drive the analysis. The most commonly cited characteristics of fiduciary relationships are

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<sup>142</sup> “The Identification of Fiduciaries” in Peter Birks, ed, *Privacy and Loyalty* (Oxford: Clarendon Press, 1997) 269 at 275.

<sup>143</sup> See generally Glover, *supra* note 142 at 275. See also Smith, “Critical Resource Theory”, *supra* note 1 at 1412-15; Frankel, “Fiduciary Law”, *supra* note 1 (“[c]ourts currently examine existing prototypes, such as agency, trust, or bailment that are defined as fiduciary. Then, courts create rules for new fiduciary relations by drawing analogies with these prototypes” at 804); DeMott, “Breach”, *supra* note 67 at 938-41 (contrasting status or “role-based” identification of fiduciary relationships with fact-based identification of fiduciary relationships).

discretion, power, inequality, dependence, vulnerability, trust, and confidence.<sup>144</sup>

The status- and fact-based methods of fiduciary relationship identification are flawed for reasons given elsewhere.<sup>145</sup> Neither provides the principled basis for ascription of liability demanded by the rule of law.<sup>146</sup> The status-based method is not disciplined by criteria of relevance. The fact-based method has generated widespread disagreement among judges over the meaning and relative salience of various purported characteristics of the fiduciary relationship.

I have argued that these methods should be, and at least in Canada have been, superseded by a general conception of the fiduciary relationship, defined as follows: “[A] fiduciary relationship is one in which one party (the fiduciary) exercises discretionary power over the significant practical interests of another (the beneficiary).”<sup>147</sup> This definition draws on the status- and fact-based methods of fiduciary-relationship identification. It also resonates with precedent<sup>148</sup> and with academic accounts<sup>149</sup> that treat

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<sup>144</sup> Typically, one or more of these characteristics is mentioned in the cases. See the influential dictum of Justice Wilson of the Supreme Court of Canada, dissenting in *Frame v. Smith*:

Relationships in which a fiduciary obligation [has] been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power ([1987] 2 SCR 99 at 136, 42 DLR (4th) 81).

See also Leib, *supra* note 16 at 671-72.

<sup>145</sup> See Miller, *supra* note 54.

<sup>146</sup> See Birks, “Content of Obligation”, *supra* note 15 (noting that it has “proved very difficult to pin down fiduciary obligations with the precision demanded by the rule of law” at 5).

<sup>147</sup> Miller, *supra* note 54 at 262.

<sup>148</sup> See *United States v Chestman*, 947 F (2d) 551 (available on WL Can) (2d Cir 1991) (a “[f]iduciary relationship involves discretionary authority and dependency” at 553); *Hospital Products Ltd v United States Surgical Corporation* (1984), 156 CLR 41, 55 ALR 417 (HCA) (“[t]he critical feature of [fiduciary] relationships is that the fiduciary undertakes or agrees to act for or on behalf of ... another person in the exercise of a power or discretion which will affect the interests of that person in a legal or practical sense” at 96-97); *Norberg*, *supra* note 75 (“[t]he essence of a fiduciary relationship ... is that one party exercises power on behalf of another” at 272); *Galambos v Perez*, 2009 SCC 48, [2009] 3 SCR 247 (“[t]he particular relationships on which fiduciary law focusses are those in which one party is given a discretionary power to affect the legal or vital practical interests of the other” at para 70).

*power* as an essential formal property of the fiduciary relationship. For present purposes, I offer the definition as *prima facie* plausible and ask that it be assumed sound for the sake of argument. I presently wish only to show that it reveals a juridical basis of justification for fiduciary duties. To appreciate how that is so, it is necessary that the definition be unpacked.

The key implication of the definition is that the exercise of *power* by one person over another is the object of the fiduciary relationship. Power is thus the constitutive or most basic formal property of the fiduciary relationship. It has been commonly claimed that fiduciary relationships implicate power. These claims, however, have not typically been elaborated at length, and even where they have, their authors have not always appreciated that power is ambiguous. Contrary to most, I maintain that fiduciary power is not properly understood as connoting relative strength, ability, or influence.<sup>149</sup> Rather, it ought to be understood as a form of *authority*.

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<sup>149</sup> See especially Weinrib, “Fiduciary Obligation”, *supra* note 2 (“the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other’s discretion” at 7); JC Shepherd, “Towards a Unified Concept of Fiduciary Relationships” (1981) 97:1 Law Q Rev 51 (“[a] fiduciary relationship exists whenever any person receives a power of any type on condition that he also receive with it a duty to utilise that power in the best interests of another, and the recipient of the power uses that power” at 75); Frankel, “Fiduciary Law”, *supra* note 1 (“[t]he second central feature of the fiduciary relation is that the fiduciary obtains power from the entrustor or from a third party for the sole purpose of enabling the fiduciary to act effectively” at 809 [footnote omitted]); Smith, “Critical Resource Theory”, *supra* note 1 (“fiduciaries ... exercise discretion with respect to a critical resource belonging to the beneficiary, where ‘discretion’ connotes the power to use or work with the critical resource in a manner that exposes the beneficiary to harm that cannot reasonably be evaded through self-help” at 1449); Ribstein, “Are Partners Fiduciaries?”, *supra* note 1 (“a fiduciary duty is appropriate only where the owner delegates open-ended power to the manager” at 217); Fox-Decent, *supra* note 6 (arguing that fiduciary duties arise “whenever one party unilaterally assumes discretionary power of an administrative nature over the important interests of another, interests that are especially vulnerable to the fiduciary’s discretion” at 275); Criddle, *supra* note 6 (“[f]iduciaries stand in as stewards with discretion over an aspect of their beneficiaries’ welfare” at 126). Apart from obvious differences of detail, my account departs from these in the way the concept of power is disambiguated (i.e., conceptualized as authority derived from capacities constitutive of legal personality) and the explanation of the nexus between fiduciary power, so understood, and fiduciary duties.

<sup>150</sup> Compare Frankel, “Fiduciary Law”, *supra* note 1 (“[t]he term ‘power’ here means an ability to make changes that affect the entrustor” at 809, n 47); Shepherd, *supra* note 149 (“[t]he concept of power here ... can be either legal or practical. ... Powers are also not restricted to powers over other people” at 75); Smith, “Critical Resource Theory”, *supra* note 1 (“[t]o the extent that ‘power’ refers to the ability of the fiduciary to inflict harm on the beneficiary, it is critical to all accounts of fiduciary duty, including the critical resource theory described in this Article” at 1424 [footnotes omitted]); Ribstein, “Are

More specifically, fiduciary power is a form of authority derived from capacities that are constitutive of the *legal personality* of another individual or group of individuals. I contend that power is a constitutive formal property of the fiduciary relationship only in this sense.

The claim that power is a constitutive formal property of the fiduciary relationship has formal and practical implications. The formal implications are that power is a more fundamental formal property of the fiduciary relationship than any of its other formal properties. The most important practical implication is that possession of power is the basis on which particular relationships may be identified as fiduciary.

Given that the concept of fiduciary power is derived from a more general concept of power, its disambiguation bears further analysis. I will clarify the meaning of authority first, as this will allow for discussion of other formal properties of the fiduciary relationship. Legal capacity, being the specific form of authority at stake in fiduciary relationships, will be analyzed at greater length in Part V.D, below.

Most abstractly, authority goes to the rightful character of the conduct of one person toward another. Rightfulness is at issue for conduct potentially inconsistent with the legal status or rights of another. Authority can render rightful conduct that would otherwise be wrongful. Fiduciary power is authority so understood. But many people have authority in this sense and are not thus considered fiduciaries. Fiduciary authority has three further qualities. First, it is *discretionary* in nature. Discretion entails latitude for judgment by the person invested with authority in determining its exercise. Second, fiduciary authority is *relational and derivative*. Fiduciaries do not enjoy a form of sovereign authority. Rather, they enjoy authority in relation to a specific individual or group and derive their authority from a legal capacity or set of capacities of that individual or group or from a benefactor of the individual or group (i.e., a private third party or the state).<sup>151</sup> Third, fiduciary authority is *specific*. Fiduciaries do not have plenary power. Rather, their authority is specified (and so limited) by grant or undertaking of authority or otherwise by law.

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Partners Fiduciaries?’, *supra* note 1 at 215-18 (equating power with managerial control over property).

<sup>151</sup> Consider the relationship between agent and principal. Authority inheres in the concept of agency. An agent is one who has the authority to make legally binding decisions on behalf of a principal, ordinarily in respect of contractual matters. The agent derives that authority from an express or implied grant of authority by the principal. The principal is capable of conferring authority on the agent because the authority in question is simply an extension of the legal capacity the principal has by virtue of her legal personality; in this case, the capacity to enter into legally binding contractual relationships with others.

The relational and derivative nature of fiduciary authority gestures at the position of the beneficiary in the fiduciary relationship. Fiduciaries wield discretionary authority relative to significant *practical interests* of beneficiaries and derive that authority from another person. That person is typically the beneficiary, but in rare cases, it may be a benefactor such as the state (e.g., delegating power *in loco parentis* over a child) or a private third party (e.g., a settlor establishing a trust for the benefit of named beneficiaries). A beneficiary's interest is practical where it connotes a real, ascertainable matter of personality, welfare, or right susceptible to the exercise of authority by another. Matters of personality include aspects of the personality of corporate or natural persons who lack legal capacity, including the determination of their ends.<sup>152</sup> Matters of welfare include decisions bearing on the physical and psychological integrity and well-being of natural persons.<sup>153</sup> Matters of right include decisions bearing upon the interests of corporate and natural persons relative to their legal rights, duties, powers, and liabilities, including those in relation to contract and property.<sup>154</sup> As I will explain in Part V.D., below, what unites matters of personality, welfare, and right is that they are matters for decision making ordinarily within the exclusive legal capacity of the person granting authority to the fiduciary.

Power is vested in fiduciaries to enable them to act for, or on behalf of, beneficiaries, or to otherwise serve their interests. Fiduciary power is thus a means by which to achieve the ends of beneficiaries. Power is a means in two senses. First, it may be exercised to *pursue* ends of the beneficiary that engage her practical interests. Second, it may be exercised in *setting* or *determining* ends of the beneficiary that engage her practical interests.

Established fiduciary relationships have structural properties that reflect the nature of fiduciary power as a distinct form of authority. It is commonly said that fiduciary relationships are characterized by inequality, dependence, and vulnerability. These characteristics are best understood as structural properties shared by all fiduciary relationships subsequent to relationship formation. Wherever one person enjoys fiduciary power over another, their relationship will be asymmetrical in respect of the power itself. The salient inequality lies in the enjoyment by the fiduciary of a particular authority that the beneficiary lacks (regardless of whether authorization may be rescinded). The pertinent forms of depend-

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<sup>152</sup> For example, the capacity to determine the objects to be pursued by business or non-profit corporations.

<sup>153</sup> For example, the capacity to determine a person's medical or psychiatric treatment.

<sup>154</sup> For example, the capacity to enter into contracts on behalf of another person, to exercise or waive contractual rights, to manage property, or to exercise or enforce rights in property.

ence and vulnerability simply reflect this inequality. Where effective, authority entails influence, including the risk of adverse influence. The beneficiary is invariably dependent upon the fiduciary as power is exercised to affect her practical interests. The beneficiary is likewise invariably vulnerable to the fiduciary as power may be abused, misused, or exercised carelessly with prejudice to the beneficiary's interests.

The nature of fiduciary power is also significant for our understanding of modes of fiduciary-relationship formation. Given that fiduciary power is a form of authority derived from the legal capacity of another person, the critical matter in determining how fiduciary relationships may be formed is to identify ways in which one person may be invested with authority in this sense over another. At the highest level of generality, authority may be conferred or undertaken, or both. Depending on the circumstances, it may be conferred by law or by the consent of an individual.<sup>155</sup> Ordinarily, given that fiduciary power is authority derived from the legal capacity of another person, it must be conferred by some manifestation of consent of the person from whose capacity it is derived. However it arises, conferral of authority usually requires acceptance to be effective.<sup>156</sup> Often, conferral and acceptance will be evidenced in an agreement.<sup>157</sup> Rarely, conferral might be effectuated by mandatory imposition of the state, in which case acceptance is not required.<sup>158</sup> Finally, in the rare case that express conferral is unnecessary or impossible, authority may arise upon an undertaking by the fiduciary.<sup>159</sup> All of this is to say that the formation of fiduciary relationships is accomplished through valid investiture of authority in the fiduciary by cession (or conferral otherwise) of legal capacity by the beneficiary or a benefactor.<sup>160</sup>

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<sup>155</sup> For example, the authority enjoyed by parents over children is conferred by law; the authority enjoyed by agents over principals is conferred by consent.

<sup>156</sup> For example, a parent may place a child for adoption or refuse to recognize and take custody of the child; a physician cannot be forced to accept a patient for treatment.

<sup>157</sup> As in articles of incorporation, medical consent forms, legal retainers, and agency contracts.

<sup>158</sup> For example, a parent need not expressly assent to the investiture of authority over a biological child.

<sup>159</sup> For example, administration of emergency treatment by a physician to an incapable adult without a surrogate.

<sup>160</sup> The modes of investiture described here are consistent with Justice Dickson's observation in *Guerin* that fiduciary relationships may be established "by statute, agreement, or perhaps by unilateral undertaking" (*supra* note 26 at 384).



#### *D. Elements of the Juridical Justification for Fiduciary Duties*

The character of fiduciary liability is such that a successful response to the problem of justification must address the connection between fiduciary relationships and fiduciary duties. The juridical justification holds that the duty of loyalty is best understood in terms of normatively salient formal properties of the fiduciary relationship.

The juridical justification for fiduciary duties has four parts, each of which goes to the normative import of the fiduciary relationship for fiduciary liability. First is an account of the constitutive formal properties of the fiduciary relationship. Second is an explanation of the import of structural formal properties of the fiduciary relationship. Third is a discussion about the significance of these properties to our understanding of the normative status of the fiduciary relationship. Last is the argument of justification proper, in which reasons for liability are located in the normative status of fiduciary power.

The constitutive formal properties of the fiduciary relationship, as reflected in the definition provided in Part V.C, are the exercise of discretionary power by the fiduciary over practical interests of the beneficiary. Power is the most basic of the constitutive properties of the fiduciary relationship; the practical interests of the beneficiary are the focal point or ground of fiduciary power, entailed by its relational character. The meaning of these properties hints at their normative salience. Fiduciary power is a form of legal authority. Normative import therefore inheres in it. Where it is validly invested and held, authority legitimates conduct that would otherwise be illegitimate or positively wrongful.<sup>161</sup> It therefore alters the normative conditions under which people interact. Authority enables the bearer to perform functions and to make decisions that would not otherwise be open to her. It also legitimates the subjection of others to decisions validly made pursuant to the performance of these functions.<sup>162</sup> Specifically, in the case of fiduciaries, authority enables the fiduciary to exercise legal capacities that, being derived from another person, would ordinarily be the beneficiary's or benefactor's alone to exercise. Exercise by the fiduciary of the legal capacity of another person entails their subjection to her will (i.e., the beneficiary or the benefactor from whose legal personality the capacity is derived is subject to the decision of the fiduciary in the exercise of that capacity).

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<sup>161</sup> Validity here refers to proper investiture of authority.

<sup>162</sup> Validity here goes to the proper exercise of authority (notably, that a decision taken under the guise of authority is valid in the sense of being *intra vires* and made for a proper purpose).

The relational and derivative character of fiduciary power specifies further the normative effect of the transformation. Fiduciary power is a form of authority wielded by the fiduciary relative to the beneficiary. As such, it transforms the terms on which fiduciary and beneficiary specifically interact. Fiduciary power enables the fiduciary to do things to or for the beneficiary that she would otherwise be prohibited from doing, inasmuch as it entails her exercise of legal capacities of the beneficiary or those of a benefactor relative to the beneficiary. In any given relationship, the mandate under which a fiduciary acts may include the power to determine the ends of a beneficiary, to make decisions affecting her person or property, or otherwise to alter, assume, or determine her legal rights, duties, powers, and liabilities.<sup>163</sup>

The nature of fiduciary power as a form of authority derived from the legal capacity of another person therefore has fundamental normative significance.<sup>164</sup> Fiduciary power does not simply legitimate conduct that would otherwise be wrongful; it legitimates a limited form of substitution of legal personality.<sup>165</sup> Again, fiduciary powers are legal capacities derived from the legal personality of other persons, natural or corporate (e.g., capacities to make or perform contracts or to manage, sell, or invest property).<sup>166</sup> In wielding them, the fiduciary stands in substitution for that person within the ambit of the power.

The discretionary character of fiduciary power goes to the effect of the substitution. In exercising another person's legal capacity, the fiduciary is not a mere proxy. The exercise of authority by the fiduciary is not subject to—and, in some cases, is not susceptible of—dictation. Its scope may be

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<sup>163</sup> For example, by exercising contractual or property rights on behalf of the beneficiary or by effectuating the donative intent of a benefactor in respect of property in which the beneficiary has an equitable property interest.

<sup>164</sup> The capacity is almost always that of the beneficiary. The capacity, however, may instead be that of a private or public benefactor (i.e., the state or a third party). Consider the express trust, where trust property is advanced by a settlor for the benefit of a third-party beneficiary. The trust exists to effectuate the donative intent of the settlor, and the capacities exercised by the trustee to that end are those of the settlor. The beneficiary is entitled to the beneficial exercise of those capacities consistent with the donative intent of the settlor in respect of the disposition of trust property.

<sup>165</sup> This is the sense in which it is right to speak of the fiduciary as a substitute. See Frankel, "Fiduciary Law", *supra* note 1 ("[a] central feature of fiduciary relations is that the fiduciary serves as a substitute for the entrustor" at 808); Criddle, *supra* note 6 ("[t]he starting point for all fiduciary relations is substitution" at 126).

<sup>166</sup> On the nature of legal personality in general, see Max Radin, "The Endless Problem of Corporate Personality" (1932) 32:4 Colum L Rev 643 (describing the conventional view that legal personality, like the personality of an ordinary man, can "be exhaustively described in the list of rights and capacities which come into practical being only ... when the individual performs certain specified acts in a certain specified way" at 645).

defined by instructions or limited by express retention of power. Nevertheless, within the scope of vested authority, the fiduciary is free to exercise judgment in determining whether, when, and how it is to be acted upon.<sup>167</sup> To that extent, the fiduciary has the capacity not merely to effectuate the will of the beneficiary or benefactor, or both, but to subject them to her will.

The specificity of fiduciary power reveals the circumscribed nature of its substitutive effect. The fiduciary does not overtake the personality of the beneficiary. This is true even where the fiduciary has broad authority to determine the ends of an incapable person, such as a child or corporation. Instead, the fiduciary exercises a particular legal capacity or range of capacities.<sup>168</sup> Exercise of these capacities may further be specified temporally or as to subject matter. The authorization under which a fiduciary acts may specify a term.<sup>169</sup> It might also stipulate the subject matter in relation to which authority is held.<sup>170</sup> The ability of the fiduciary to legitimately subject the beneficiary or benefactor, or both, to her will is therefore circumscribed. The fiduciary determines matters of choice only within the ambit of authority under which she acts.

As explained in Part V.C, the structural properties of the fiduciary relationship speak to the relative positioning of the fiduciary and beneficiary. I have said that there are three related structural properties of the fiduciary relationship—inequality, dependence, and vulnerability. These properties are normatively significant for the purposes of fiduciary liability only insofar as they represent the formal structural implications of the establishment of a fiduciary relationship for the parties to it.

Inequality of power inheres in the fiduciary relationship in that the fiduciary is vested with authority over the beneficiary. This inequality is not necessarily counterbalanced by reciprocal investment of power in the beneficiary.<sup>171</sup> Accordingly, the fiduciary relationship has an asymmetrical

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<sup>167</sup> See Weinrib, “Fiduciary Obligation”, *supra* note 2 (“[t]he reason that agents, trustees, partners, and directors are subjected to the fiduciary obligation is that they have a leeway for the exercise of discretion. ... [I]f they have no discretion to advise or negotiate and if their instructions are narrow and precise there is nothing on which the fiduciary obligation can bite” at 7).

<sup>168</sup> For example, a trustee has authority to manage or administer trust property, but no authority to personally bind the settlor or beneficiary in contract.

<sup>169</sup> For example, children attain authority implicit in legal capacity at a specified age of majority.

<sup>170</sup> For example, the authority of directors and officers of corporations may be limited to the pursuit of objects specified in enabling legislation or articles of incorporation.

<sup>171</sup> Though it is, in some cases, such as in partnerships, which are carried out on the basis of reciprocal agency relationships between partners.

formal structure. The fiduciary is, simply by virtue of the establishment of the relationship, in a dominant position relative to the beneficiary and, in some cases, the benefactor.

Dependence inheres in the fiduciary relationship given that fiduciary power entails influence. Fiduciary relationships enable one person to exercise the legal capacity of another relative to a beneficiary's practical interests. Decisions made by the fiduciary will ordinarily influence practical interests of the beneficiary (in a salutatory way, it is hoped). To the extent that fiduciary power entails influence, it establishes dependence.

Vulnerability follows in that the influence associated with fiduciary power entails risk. The fiduciary is expected to exercise power for the benefit of the beneficiary, but that expectation may be disappointed. The fiduciary may neglect the interests of the beneficiary or may prefer her own interests or those of a third party.

Having discussed the constitutive and structural properties of the fiduciary relationship, I am now better positioned to consider the normative implications of these properties for fiduciary liability. Fiduciary power is substitutive. The fiduciary exercises a legal capacity of another person in setting or pursuing practical interests of the beneficiary. Legal capacities are integral to the actual capacity of a person to set and pursue her ends. These capacities—to contract, to inherit, to establish a trust, to establish possessory interests in property—are the very means by which individuals act purposively through law. Fiduciary power, and by extension the fiduciary relationship, thus enables one person to act purposively on behalf of another. The ability to confer fiduciary power and so to establish a fiduciary relationship enhances the beneficiary's or benefactor's ability to effectively pursue her purposes, for it enables her to draw upon a fiduciary's means (e.g., skills, knowledge, experience, professional licensure) in the exercise of her capacities.

The purpose for which fiduciary power is held is implicit in its substitutive nature. It is rendered explicit in the innumerable authorities that hold that fiduciaries are to *act in the interests of beneficiaries*.<sup>172</sup> This requirement is not itself imposed by way of enforceable legal duty.<sup>173</sup> It is best understood as expressing the normative status of fiduciary power. Fiduciary power, being derived from capacities constitutive of the legal personality of another person, cannot but be understood as an extension of that other person's personality. It is partly through their legal capaci-

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<sup>172</sup> See *supra* notes 17-18.

<sup>173</sup> But see Birks, "Content of Obligation", *supra* note 15. See Conaglen, *Fiduciary Loyalty*, *supra* note 14 at 201-203; Darryn Jensen, "Prescription and Proscription in Fiduciary Obligations" (2010) 21:3 *King's Law Journal* 333.

ties that persons are recognized as such in private law (i.e., as purposive beings, with standing to act in ways permitted or facilitated by law). Fiduciary power, being an extension of the legal personality of the person from whose capacity it is derived, is thus properly understood as a means—that is, a way of effectuating one’s purposes—belonging rightfully to the beneficiary. Fiduciary power is a means of a beneficiary even where it is derived from the personality of a benefactor, for the effect of the benefaction is devotion of the power to the beneficiary’s ends. To say, as courts routinely do, that fiduciaries are to act in the interests of the beneficiary is simply to assert as normatively controlling the status of fiduciary power (i.e., its status as a constituent element of the personality of the beneficiary or benefactor) and the purpose for which fiduciary power is held (i.e., to enable the determination or pursuit of the ends of the beneficiary).

This permits clarification of the justification for fiduciary duties. Given that fiduciary power is a means of the beneficiary, the interaction between fiduciary and beneficiary must be presumptively conducted for the sole advantage of the beneficiary. Fiduciary power, as a means derived from or devoted to the beneficiary, is held for the advancement of the beneficiary’s ends alone. A fiduciary relationship may be formed by contract and so coincide with expectations of mutual advantage. But within the fiduciary relationship, the fiduciary is to serve the interests of the beneficiary.<sup>174</sup> Fiduciary duties help to ensure that fiduciary power is exercised in a manner consistent with its status and purpose.

The conflict rules constitutive of the duty of loyalty constrain fiduciaries in the exercise of fiduciary power. Specifically, the conflict of interest rule prohibits fiduciaries from exercising fiduciary power in self-interest. The conflict of duty rule prohibits fiduciaries from exercising fiduciary power in the interests of third parties under a conflicting mandate. The juridical reasons for imposing the duty of loyalty follow from what we

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<sup>174</sup> Contracts are both a mode of authorization and the basis on which consideration is paid for the value of means to be employed by the fiduciary (e.g., professional qualifications, skill, etc.). The fiduciary relationship is distinguishable as the purposive interaction through which ends of the beneficiary are pursued through the exercise of power by the fiduciary. The claim that the fiduciary relationship is presumptively to be conducted for the sole advantage of the beneficiary is consistent with limited allowances for self-interested conduct by fiduciaries. Such conduct is countenanced where *ex ante* or *ex post* authorization makes clear that it was intended that the fiduciary share personally in gains arising through the exercise of fiduciary power. In these circumstances, the person authorizing the fiduciary to act partially alienates fiduciary power as a means at her disposal. Courts strictly scrutinize the terms of the authorization and, where it was given *ex post*, the circumstances under which it was offered, precisely because allowances for self-interested conduct are inconsistent with the assumption that fiduciary relationships are, by their very nature, established for the exclusive benefit of beneficiaries.

have said about the juridical character of the fiduciary relationship and, particularly, what we have said about the status of fiduciary power, its most basic constitutive formal property. The content of the duty of loyalty is a direct reflection of the normative status of fiduciary power. The conflict rules proscribe appropriation by the fiduciary of fiduciary power understood as means belonging exclusively to the beneficiary. The fiduciary may not treat fiduciary power as an unclaimed means or as a personal means. The duty of loyalty secures the beneficiary's legitimate expectation that fiduciary power, as one of *her* means, will be used only to achieve her ends. The wrongful character of fiduciary disloyalty is the same regardless of whether the conduct of the fiduciary is self- or other-regarding; in either event, the fiduciary has treated fiduciary power as a means at his disposal and, in doing so, has violated the beneficiary's exclusive claim upon the disposition of her means.

### *E. Revisiting the Problem of Justification*

The juridical justification locates reasons for fiduciary duties in the nature of the fiduciary relationship and judicial assertions of the normative status of its most basic constitutive formal property—fiduciary power. Fiduciary power is a kind of authority derived from legal capacities integral to the legal personality of the beneficiary or benefactor. As an extension of the legal personality of the beneficiary or benefactor, fiduciary power is properly understood as a means belonging rightfully to the beneficiary (either by original status or through benefaction). The duty of loyalty ensures that fiduciary power is exercised in a manner consistent with its status by proscribing its appropriation by the fiduciary. The fiduciary may not treat fiduciary power as an unclaimed means. By regulating the ends for which fiduciary power may be exercised, the duty of loyalty does not guarantee satisfaction of the particular ends of beneficiaries in particular fiduciary relationships. It does, however, secure the exclusivity of their claim upon fiduciary power as a means to be applied to their ends.

The juridical justification for fiduciary duties does not offer whatever additional justificatory power may be found in normative moral or political theory. But that is an intentional concession made necessary by my aim for modest normative claims that prioritize consistency with the juridical character of fiduciary liability. Juridical justification is not inconsistent with philosophical justification. Rather, as a precondition of sound philosophical analysis, it simply leaves the question of the philosophical justification open.

The juridical justification fits well with thin and thick descriptions of fiduciary liability. Recalling the thin description provided in Part II, it is clearly consistent with the conventional view that fiduciary liability is contingent on the establishment of a fiduciary relationship. The juridical

justification locates reasons for liability in the nature of the fiduciary relationship. In doing so, it offers support for the assumptions implicit in practice that the fiduciary relationship is a distinctive kind of legal relationship and that fiduciary duties reflect properties of the fiduciary relationship so understood.

The juridical justification also fits well with the thick description of fiduciary liability that emerged over Parts III and IV. It is capable of explaining features emphasized by the argument from contract. First, it accepts that most fiduciary relationships are established consensually. Often, but not always, consent will be manifested in contract. Consent and contract are modes of authorization going to relationship formation. Second, it can accommodate the insight that fiduciary duties sometimes constrain the performance of contractual undertakings. Where conferred by contract, fiduciary power is typically subject to terms expressed contractually. These terms at once define the ambit of fiduciary power and generate a contractually enforceable obligation that power be exercised as agreed. Third, it is consistent with limited consensual exclusion of fiduciary liability. Fiduciary power is presumptively exercised for the sole benefit of the beneficiary. But the beneficiary may decide to partially alienate her means. Consent grounds limited departure from the conflict rules precisely because fiduciary power is a means belonging rightfully to the beneficiary.

The juridical justification also embraces insights of the argument from property. First, it is consistent with the claim that fiduciaries often have control over property owned by beneficiaries. Where fiduciary power is held in relation to property, the fiduciary is properly understood as exercising the legal capacity of another (the beneficiary or benefactor) in respect of it. Owners have authority over property secured by legal rights of ownership, including the right to manage it, to control its disposition, and to determine its use.<sup>175</sup> Ownership rights may be exercised personally by the owner or by a fiduciary acting as a substitute. But ownership interests are just one kind of practical interest over which fiduciary power may be exercised. Second, the juridical justification can account for the fact that fiduciary duties often prevent misapplication and misappropriation of property. Fiduciary power over property entails the risk of diversion of the property or its fruits. This is but an example of fiduciary disloyalty. The primary function of the duty of loyalty is to secure the exclusivity of the beneficiary's claim on power as a means, whatever the nature of the underlying interest.

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<sup>175</sup> See AM Honoré, "Ownership" in AG Guest, ed, *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961) 107.

Finally, the juridical justification addresses well the insights that motivated the argument from nonfiduciary law. First, it allows for concurrent liability and explains how it may arise. Depending on material facts relating to the nature of the power conferred, the mode of authorization through which the fiduciary relationship is formed, and the manner in which the fiduciary mandate is executed, fiduciary duties will frequently arise concurrently with nonfiduciary duties. But the concurrence is a contingent matter. Fiduciary duties are not called forth by nonfiduciary duties or vice versa. Second, it recognizes that fiduciary duties are premised on an expectation of performance. Fiduciaries are expected to exercise power to set or pursue the practical interests of beneficiaries. Exercise of power is the material kind of performance. Compliance with nonfiduciary duties is not, and for good reason; expectations of performance of nonfiduciary duties are secured by nonfiduciary principles of liability.

## Conclusion

Fiduciary duties govern relationships of great personal and social importance. Fiduciary relationships are a distinctive form of relationship through which myriad individual and joint ends are advanced. They range from interpersonal to institutional, undergirding family life, our interactions with most professionals, and the productive activities of many organizations. Notwithstanding their importance, the justification for fiduciary duties has been underanalyzed. Leading arguments employ reductivist and instrumentalist analytical strategies. Neither has yet produced convincing results, but both have generated arguments that highlight important aspects of fiduciary liability. The resulting enriched perspective on fiduciary liability points to a more promising avenue of justification.

That avenue is juridical. The juridical justification offered here holds that fiduciary duties are distinctive and supported by reasons derived from formal properties of the fiduciary relationship. In fiduciary relationships, one person (the fiduciary) exercises discretionary power over the practical interests of another (the beneficiary). Fiduciary power is a form of authority derived from the legal capacity of the beneficiary or a benefactor. The normative status of fiduciary power is that of a means belonging exclusively to the beneficiary. The duty of loyalty secures this status by prohibiting the fiduciary from treating fiduciary power as an unclaimed means.

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