FIDUCIARY-ISMS: A STUDY OF ACADEMIC INFLUENCE ON THE EXPANSION OF THE LAW

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ABSTRACT

Fiduciary law aspires to nullify power imbalances by obligating strong parties to give themselves over to servient parties. For example, because of profound imbalances of legal know-how, lawyers as fiduciaries must pursue their clients' interests, not their own, lest clients get lost in the competitive shuffle. As a peculiar hybrid of status and contract relations, politics and law, and compassion and capitalism, fiduciary law is very much in vogue in academic circles. As vogue as it is, there remains room for a meditation on the expansion of fiduciary law from its origins in the law of trusts to a current usage at times so cut off from its doctrinal origins as to be idiomatic and no longer technical. Surprisingly, this expansion in fiduciary law—which is unhappily no longer dependent on property—owes to academic influences that have operated on courts in the past half-century, despite the widespread perception that academics have sway only with their own. That fiduciary law has been expanded, though not improved, by academic endeavors reveals that the scholarly activity of expanding the law is a mixed bag: both high art, crucial to the path of the law, but also low theatricality, more likely to create than alleviate legal snags.

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

I. INTRODUCTION

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

1. J.L. AUSTIN, SENSE AND SENSIBILIA 75 (G.J. Warnock ed., 1963).

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

3. *Id.* at 314–15.

4. *Id.* at 315 & n.1 (citing 15 U.S.C. § 1 (1982)) ("Every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States . . . is declared to be illegal.").

5. *Id.* at 316–17.

circumstances, which owed instead to overpaying for rights to exhibit *Voyage of the Damned* while offering nothing for *Star Wars* and *Close Encounters of the Third Kind*.[6]

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

When summoned to report back to the judge on *Balmoral Cinema*—my summer school class on antitrust law fresh on my mind—I sided with Balmoral Cinema and what I saw as the public interest in non-rigged bidding processes for first-run films. Judge Merritt listened as I detailed my professor's arguments on why we should throw the book at the split and the distributors for impeding competition by stymying a true auction for film exhibition. Excluding Balmoral Cinema from bidding for first-run films, I parroted, would profit everyone *but* movie-goers, to whom the monopsonist-buying group would *not* pass on its savings in a market with fewer buyers than under competition.[9] After all, only a monopolist can offer a discount, which, after running off rivals, invariably ends, replaced by competition-free price hikes.[10] When I finished my recitation, the judge set forth the jarring

6. Balmoral Cinema, Inc. v. Buena Vista Distrib. Co., 673 F. Supp. 219, 222 (W.D. Tenn. 1987), *aff'd sub nom.* Balmoral Cinema Inc. v. Allied Artists Pictures Corp., 885 F.2d 313.

7. ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY: ANTITRUST LAW AND ECONOMICS 93–94 (1993); *see* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS 34, 86–87 (2010) (mentioning specifically bid rigging among movie theatres).

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

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

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

costs of finding a violation of the Sherman Antitrust Act: millions of dollars change hands, businesses shut down, and people lose jobs. The judge was unsurprised that my arguments had been lifted from a professor, since that is what professors *do*: they see it as their job to expand the law in their field. However, it is not, he cautioned, what courts do. The Sixth Circuit ruled unanimously in favor of defendants, affirming the lower court's decision.[11]

The full import of this encounter in the judge's chambers was largely lost on me until my employer, California Western School of Law (CWSL), was proposing a merger with University of California at San Diego (UCSD). Throughout the merger discussions (2007–2011), CWSL faculty, administrators, and lay board members debated whether, in hammering out a workable arrangement with UCSD, legal barriers would arise if CWSL faculty turned out to be "fiduciaries" of the school. If faculty members were fiduciaries, then it was their duty to act for their principals, that is, the parties whose interests fiduciaries must put above their own. Accordingly, faculty looking to get a better deal for themselves than for the school or other principals would be breaching their fiduciary duty, a tortious act.

I thought the merger was a bad idea, at least in its proposed iteration. My image of the reconstituted post-merger law school had an ominous vibe of layoffs, demotions, and uncertainty that worried me. After 20 years at the same school, I liked things well enough the way they were. As a husband and father of three, I resisted anything that might be, well, bad for me personally. But if I really was a fiduciary, then maybe what *I* wanted was beside the point. At the same time, if I really was a fiduciary, then who was my principal? The school? Who is *that*? Is it the administration? Current students? Alumni? Employees? The community? No answers from the merger's proponents were forthcoming.

11. *Balmoral Cinema I*, 673 F. Supp. at 224. Among the various court challenges to splits, there was some contrary authority supporting my professor's position, notably *General Cinema Corp. v. Buena Vista Distribution Co.*, 532 F. Supp. 1244 *passim* (C.D. Cal. 1982). There, a district court, relying on academic lawyers, ruled in favor of the very same film distributor, this time as counterclaimant *opposing* the split, which exhibitors were accused of manipulating to suppress the profits of distributors and producers through price fixing. *Id.* at 1249, 1264 & n.9 (citing Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 826 & n.162 (1965); James S. Gordon, *Horizontal and Vertical Restraints of Trade: The Legality of Motion Picture Splits Under the Antitrust Laws*, 75 YALE L.J. 239, 250 (1965)); *see also* United States v. Capitol Serv., Inc., 756 F.2d 502, 507 (7th Cir. 1985) (holding motion picture split agreements to be illegal per se under the Sherman Antitrust Act).

Fiduciaries are said to operate outside the capitalist free-for-all of exchange relations,[12] where the freedom of contract is backed up by the power of contract, which provides judicially coerced remedies for breach.[13] Breaching fiduciaries cough up not just the market and consequential damages inflicted on victims, but *all* gains and savings, even those exceeding the rental rate the parties would have reached in a voluntary exchange.[14] Nor can an insolvent fiduciary's creditors reach the property, which is said to have been held all along, however fictitiously, for the victim-principal, never becoming part of the estate of the fiduciary.[15]

Fiduciaries operate in Platonic relations within which the weak or naïve party (the "principal" or "beneficiary") is subordinate to the strong or knowing party, who inverts the relation by subordinating him- or herself to the weak party.[16] The strong-party fiduciary takes responsibility for the

12. Fiduciary relations are not necessarily contractual. Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 813 (1983) [hereinafter Frankel, *Fiduciary Law*]. Trustees' relations with trust beneficiaries, for instance, are not contractual, nor can corporate shareholders negotiate the corporate charter, bylaws, or managers' employment terms. *Id.*; *see also* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 887 [hereinafter DeMott, *Beyond Metaphor*] (noting partners' acts in dissolution may violate fiduciary duties even if permitted by partnership agreement).

13. *See* Ian R. Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495, 495 (1962); *cf.* Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763, 777 (1998) (noting contracts both create and restrain power).

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

Macneil, *supra*.

14. *See, e.g.*, Am. Master Lease LLC v. Idanta Partners, Ltd., 171 Cal. Rptr. 3d 548, 577 (Ct. App. 2014) ("Where a person profits from transactions conducted by him as a fiduciary, the proper measure of damages is full disgorgement of any secret profit made by the fiduciary regardless of whether the principle suffers any damage." (citation omitted)); DeMott, *Beyond Metaphor*, *supra* note 12, at 888.

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

16. *See* Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 922–23.

power and knowledge disparity by negating its effects by putting the weak party's interests first.[17]

Identifying fiduciary relationships is done by analogy to the law of trusts.[18] The more a candidate for fiduciary status resembles a trustee, the more likely he or she will be treated like one. The purpose of the analogy is to smooth out conflicts of interest between wealth managers and their clients. Yet this venerable process of arguing by analogy, an essential lawyerly shtick, has allowed for a peculiar extension of fiduciary law.[19] The cause? Another essential lawyerly shtick: the sort of pressure Judge Merritt alluded to above that is placed on law by academic lawyers.

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

17. *See id.* at 927.

18. *See, e.g.*, DeMott, *Beyond Metaphor*, *supra* note 12, at 891 ("The evolution of the law of fiduciary obligation illustrates, perhaps more powerfully than most bodies of law, the power of analogy in legal argumentation."); Calvin Massey, *American Fiduciary Duty in an Age of Narcissism*, 54 SASK. L. REV. 101, 102 (1990); Scallen, *supra* note 16, at 903; L.S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69, 70.

19. Frankel, *Fiduciary Law*, *supra* note 12, at 805 ("[C]ourts are inconsistent in choosing their analogies. One decision, for example, held that directors are trustees, and applied trust rules against self-dealing to them. But, in order to avoid applying trust law's strict liability for unauthorized unintentional acts to the directors, the court then proceeded to hold that those directors were not trustees." (citing Litwin v. Allen, 25 N.Y.S.2d 667 (Sup. Ct. 1940))).

II. FIDUCIARIES IN TRUST RELATIONS

The idea of the fiduciary owes to the law of trusts.[20] A trust, in turn—like its historical antecedent, the "use"[21] —is a gift.[22] While ordinary gifts are two-party transfers of real or personal property from donor to donee, trusts involve three parties: the donor (settlor) arranges with the trustee to divide title to the donated property (trust res) between trustee and beneficiary.[23] In trust relations, *fiduciary* describes the trustee, whose divided interest received from the settlor is the "legal" title to the res, which the settlor directs the trustee-fiduciary to manage for the enjoyment of the settlor's beneficiary.[24] The beneficiary's divided interest received from the settlor is the "equitable" title to the trust property, which will eventually be reunited with the divided legal title interest to the beneficiary's sole advantage, according to the trust's terms.[25]

"The trust developed at the end of the Middle Ages, . . . [when] real estate was the principal form of wealth. The primary purpose of the trust was to facilitate the transfer of freehold land within the family. . . . The trust allowed landowners 'to make decent provision for their wives, daughters and younger sons and to prevent escheat'" while avoiding other vestiges of bizarre feudal restrictions.[26] Early trustees "were mere stakeholders, . . . with

20. *In re* W. of Eng. & S. Wales Dist. Bank (1879) 11 Ch 772 at 778 (Fry J) (Eng.) ("What is a fiduciary relationship? It is one in respect of which if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*.").

21. *See generally* RESTATEMENT (THIRD) OF TRUSTS § 6 (AM. LAW INST. 2003); 4 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 407–80 (3d ed. 1945) (summarizing the development of uses and trusts and "the extent to which they have come to influence all branches of English law").

22. AMY MORRIS HESS ET AL., THE LAW OF TRUSTS AND TRUSTEES § 2, at 17 (3d ed. 2007). At least trusts were gifts until trustees began accepting compensation for operating between settlor and beneficiary. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 638–39 (1995).

23. *Id.* at 632.

24. Giraldin v. Giraldin (*In re* Estate of Giraldin), 290 P.3d 199, 204 (Cal. 2012).

25. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 553 (4th ed. 2012).

26. Langbein, *supra* note 22, at 632–33 (quoting William F. Fratcher, *Trust*, in 6 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW § 11-1, at 3, § 11-9, at 12 (1973)).

no serious powers or responsibilities of management. Commonly, the beneficiaries lived on the land and managed it."[27]

In an era (the fourteenth to seventeenth centuries) when property was less alienable than now, the trust, apart from facilitating conveyances within families, was a way to circumvent the ban on unmarried adults, clerics, Christians, foreigners, criminals, and slaves owning property.[28] Trusts let property owners arrange for the enjoyment of property by these banned classes by passing legal title to a trustee who held it *for* the equitable owner, a member of the banned class.[29]

Trusts eventually became an effective way to manage a portfolio of financial assets,[30] guard against waste of property by an immature or irresponsible family member, or avoid taxes on the settlor's estate.[31] Because trustees are exposed to the temptation to use trust assets for personal benefit, they may collect fees for their services in amounts authorized by the trust or by court approval, but may not otherwise profit from the trust.[32] Consequently, any profits diverted by the trustee are disgorged and conveyed to the beneficiary in restitution as the remedy for the trustee's unjust enrichment.[33] Not surprisingly in this Platonic relationship of inverted power, both the trustee's resignation[34] and removal[35] are far from automatic.

27. *Id.* at 633.

28. 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 231, 238–29 (2d ed. 1898).

29. *Id.*

30. Langbein, *supra* note 22, at 629.

31. *See, e.g.*, Richard W. Nenno, *Planning to Minimize or Avoid State Income Tax on Trusts*, 34 ACTEC J. 131, 143–44 (2008).

32. *See, e.g.*, 4C FRANCIS M. HANNA, MISSOURI PRACTICE SERIES: TRUST CODE AND LAW MANUAL § 2:15 (2015–2016 ed.), Westlaw (databased updated Nov. 2015).

33. *See, e.g.*, *In re* Beatty's Estate, 63 A. 975, 976 (Pa. 1906).

34. *E.g.*, TEX. PROP. CODE ANN. § 113.081 (West 2016).

35. Frankel, *Fiduciary Law*, *supra* note 12, at 806 ("Under trust law, a beneficiary cannot remove the trustee without proving in court that the trustee is incapacitated or has a substantial conflict of interest."); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 664 (2004) ("[Law] does not necessarily permit removal for breaches that are not 'serious' or for simple disagreements. Trustees who were chosen by the settlor, as compared to those named by a third party or a court, are even less readily removed; there is . . . a thumb on the scale for them." (footnote omitted)).

III. FIDUCIARIES IN TRUST-LIKE RELATIONS

Fiduciary law expanded from the trust, to partnerships, to joint stock companies and corporations, to agents and factors.[36] Much of the pioneering work in the development of the scope of the word "fiduciary" was done not by courts but by treatise writers of the Romantic era: Jeremy (1828), Lewin (1837), Maddock (1837), and Story (1839).[37] The pioneering continues.[38]

A. *Partnerships*

The principle that middlemen or trustees must tend others' interests, not their own, has been converted into a more generalized constraint on professionals' permissible range of wealth-maximizing endeavors. For example, partnerships, which emerged in the sixteenth century[39] (or before),[40] have always traded on the criteria or structure of trusts.[41] So it is by now hornbook that "[i]n defining fiduciary responsibilities, courts . . . borrow from the . . . standards applied to fiduciaries in other contexts," even though "[s]tandards developed to regulate other fiduciaries would not control the conduct expected of partners."[42] To be sure, the analogy between trusts and partnerships is strained.

Partnerships are "association[s] of two or more persons to carry on as co-owners a business for profit."[43] Within this structure, partners may

36. Frankel, *Fiduciary Law*, *supra* note 12, at 805.

37. Sealy, *supra* note 18, at 72 n.11.

38. *See, e.g.*, DeMott, *Beyond Metaphor*, *supra* note 12, at 881 ("The evolution of fiduciary obligation . . . owe[s] much to the situation-specificity and flexibility that were Equity's hallmarks."); Alaimo v. Royer, 448 A.2d 207, 209 (Conn. 1982) ("This court has, however, specifically refused to define 'a fiduciary relationship in precise detail and in such a manner as to exclude new situations' . . . ." (quoting Harper v. Adametz, 113 A.2d 136, 139 (Conn. 1955))).

39. *See* 1 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1, at 2–3 (Morton S. Wolf ed., perm. ed., rev. vol. 1974) (discussing history of corporations, including early organizations with analogous characteristics).

40. Frankel, *Fiduciary Law*, *supra* note 12, at 795 n.3 (citing ALAN R. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP § 2, at 11 (1968)).

41. *See, e.g.*, BROMBERG, *supra* note 40, § 2, at 10.

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

43. E. Merrick Dodd, Jr., *Partnership Liability of Stockholders in Defective Corporations*, 40 HARV. L. REV. 521, 522 (1927) (quoting UNIF. P'SHIP ACT (UPA) § 6(1) (UNIF. LAW COMM'N 1914), http://www.uniformlaws.org/shared/docs/partnership/

shield themselves from personal liability for debts incurred by the partnership.[44] As co-owners, partners may sue each other; the partnership, too, as an entity separate from its members, may sue and be sued by the partners.[45] Eccentric from the standpoint of the grammar of trusts, partners as fiduciaries are considered both trustee and beneficiary at once.[46] In other words, in partnerships, the weak-party beneficiary is also the strong-party trustee in the Platonic sense referred to above, thus stretching excessively the notion of divided title. "The fiduciary as joint owner," therefore, "is something of a contradiction in terms," since the fiduciary lacks the beneficial interest aspect of true ownership.[47] "Partners, on the other hand, are always joint owners" in both senses, all rowing together for the greater good of the partnership.[48] There is, in sum, no middleman manager of partnership assets, a key element of (real) trust relations.[49] Nor does the function of settlor in a trust have specific application to partnerships.

Although trusts and partnerships share only a vague family resemblance, breaches that go to the essence of a partnership agreement are considered betrayals, not just run-of-the-mill derelictions of a contracting party's promises.[50] At times the partnership-as-trust analogy is literalized. For example, in Massachusetts, "partners act as trustees for the benefit of each other with respect to the trust res which consists of the partnership

upa1914.pdf).

44. *E.g.*, N.C. GEN. STAT. ANN. § 59-45 (West 2016) ("[A] partner in a registered limited liability partnership is not individually liable for debts and obligations of the partnership . . . solely by reason of being a partner . . . .").

45. REVISED UNIF. P'SHIP ACT (RUPA) § 405(a)–(b) (UNIF. LAW COMM'N 1997) (amended 2013), http://www.uniformlaws.org/Shared/Docs/Partnership/UPA%20_Final_2014_2015aug19.pdf; *cf.* State v. Gard, 742 N.W.2d 257, 262 (S.D. 2007) ("[T]he law in most states today is that a partner can be found guilty of embezzlement when he misappropriates funds from his partnership."(citations omitted)).

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

47. Hillman, *supra* note 42, at 458.

48. *Id.*

49. *See* Donald J. Weidner, Cadwalader*, RUPA, and Fiduciary Duties*, 54 WASH. & LEE L. REV. 877, 900 (1997) [hereinafter Weidner, Cadwalader*, RUPA, and Fiduciary Duties*].

50. Bohatch v. Butler & Binion, 905 S.W.2d 597, 601–02 (Tex. App. 1995) (discussing bad faith breaches of partnership fiduciary duties), *aff'd*, 977 S.W.2d 543 (Tex. 1998).

assets."[51] If there were any doubt about what this means, a federal bankruptcy court has clarified both that "Massachusetts partnerships satisfy the necessary elements of an express trust and that partners act in a fiduciary capacity toward each other for purposes of" determining whether a breaching fiduciary's debt to the partnership is dischargeable in bankruptcy.[52] Massachusetts is not alone.[53]

While in normal contractual settings capitalism encourages opportunism, tort law expects much more from fiduciaries. Central to the sort of high-mindedness that has always pervaded fiduciary law is Justice Benjamin Cardozo's celebrated downstage declamation in *Meinhard v. Salmon* (cited some 5,000 times since 1928), a highly theatricalized elevation of the fiduciary over the base "morals of the market place."[54]

Despite the moralizing,[55] "[a] partner," it turns out, "is not the sort of fiduciary who must behave as a disinterested trustee";[56] partners can and do pursue self-interest.[57] If the law saw things otherwise, unprofitable partners would be expected to withdraw for the good of the partnership—but they are not.[58] Indeed, the Revised Uniform Partnership Act of 1997 (RUPA), now adopted by some two-thirds of the states,[59] codified the

51. Baker v. Friedman (*In re* Friedman), 298 B.R. 487, 498 (Bankr. D. Mass. 2003) (emphasis omitted).

52. *Id.* at 499 (citing 11 U.S.C. § 523(a)(4) (2012)). *But cf*. Holaday v. Seay (*In re* Seay), 215 B.R. 780, 786 & n.6 (B.A.P. 10th Cir. 1997) (detailing Tenth Circuit split on whether partnerships are also trusts for purposes of 11 U.S.C. § 523(a)(4)).

53. For example, Arizona and California follow the Massachusetts position. DeSantis v. Dixon, 236 P.2d 38, 41–42 (Ariz. 1951); Leff v. Gunter, 658 P.2d 740, 744 (Cal. 1983) (in bank); *see also* Humphries v. Rogers (*In re* Humphries), 516 B.R. 856, 868 & n.8 (Bankr. N.D. Miss. 2014) (detailing circuit split over nature of partners' relations for purposes of 11 U.S.C. § 523(a)(4)).

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

55. *Compare* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993) ("Fiduciary duties . . . have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings."), *with* Hillman, *supra* note 42, at 456 ("There is a moral theme to the concept of fiduciary responsibilities.").

56. Weidner, Cadwalader*, RUPA, and Fiduciary Duties*, *supra* note 49, at 905.

57. Hillman, *supra* note 42, at 465.

58. *See* Weidner, Cadwalader*, RUPA, and Fiduciary Duties*, *supra* note 49, at 896.

59. John M. Taylor, *Professional Partner Expulsion: The Effects of RUPA and Section 736*, BUS. ENTITIES, May/June 2007, at 6, 11; Clay B. Wortham, Note, *Revised*

judgment that partners cannot realistically be expected to be out only for others.[60] Specifically, section 404(e) of RUPA provides: "A partner does not violate . . . this act or . . . a partnership agreement merely because the partner's conduct furthers the partner's interest."[61] While trustees are strictly liable for acting against their beneficiaries' interests, partners' duties are only to avoid harms to the partnership through gross negligence or worse.[62] Section 404(e) therefore diverges from what is found in many judicial opinions: an injunction against a partner's pursuit of advantage over the partnership.[63]

This divergence reflects developments in corporate law, where judicial supervision of fiduciaries has backed off from traditional fiduciary law rhetoric.[64] In particular, under RUPA, partners may re-bargain their agreement on the fly, lend money to the partnership, purchase its assets, or obtain waivers of fiduciary duties for specific purposes.[65] By codifying the permissible pursuit of self-interest, RUPA acknowledges that sweeping statements of fiduciary duties invite costly litigation and threats of litigation, including by partners who seek to avoid some aspect of their partnership agreement.[66] As the reporter for RUPA has summarized: "The partner is no longer a trustee."[67]

Uniform Partnership Act: Anomalies of a Simplified, Modernized Partnership Law, 92 KY. L.J. 1083, 1083 n.4 (2003–2004) (citing ROBERT W. HILLMAN ET AL., THE REVISED UNIFORM PARTNERSHIP ACT 1, 531–32 (2003)).

60. Weidner, Cadwalader*, RUPA, and Fiduciary Duties*, *supra* note 49, at 905.

61. *Id.*; *see also* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1486 (2002) [hereinafter Smith, *Critical Resource Theory*].

62. CHRISTINE HURT ET AL., BROMBERG AND RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT (2001) § 8.404, at 322 (2013 ed. 2013).

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

64. *See, e.g.*, Hillman, *supra* note 42, at 457–58.

65. Weidner, Cadwalader*, RUPA, and Fiduciary Duties*, *supra* note 49, at 905–07. These waivers only go so far. *See* RUPA § 103(b) (UNIF. LAW COMM'N 1997) (amended 2013) (listing non-waivable provisions), http://www.uniformlaws.org/Shared/Docs/Partnership/UPA%20_Final_2014_2015aug19.pdf.

66. Weidner, Cadwalader*, RUPA, and Fiduciary Duty*, *supra* note 49, at 905–06.

67. Donald J. Weidner, *Pitfalls in Partnership Law Reform: Some United States Experience*, 26 J. CORP. L. 1031, 1039 (2001); *see also* Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 BUS. LAW. 1, 1 (1993–1994) ("RUPA makes clear that partners are not fiduciaries among

When push comes to shove, partners see their own function as more Darwinist than the mincing agents Justice Cardozo associated with fiduciaries 85 years ago. Indeed, in a suit over a Wall Street law firm's decision to close its West Palm Beach branch and fire all 17 branch partners, the co-chair of the management committee defended the firm's position by testifying that "life is not made up of love, it is made up of fear and greed and money—how much do you get paid in large measure."[68] Right or wrong, the license afforded to partners to look out for themselves reveals a fundamental flaw in the trust analogy, which operates in partnership law in only an extended sense.

B. *Corporations*

Like the partnerships of the sixteenth century, the predecessors of the modern corporation—the joint stock companies or overseas trading companies of the seventeenth and eighteenth centuries—imported fiduciary law[69] to tighten up what were seen as weak constraints placed by contract law on the self-dealing temptations of those at the helm.[70] To this day, "fiduciarians" continue to defend that move against "contractarians," who find fiduciary law a drag on the rough and tumble advantage-taking permitted by contract law, which, contractarians insist, can competently regulate conflicts on its own.[71] Yet mapping fiduciary law onto corporate law is far from light work, given that the legal nature of corporations—what they

themselves in the same sense as disinterested trustees.").

68. Weidner, Cadwalader*, RUPA, and Fiduciary Duty*, *supra* note 49, at 880–81.

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

70. *See* Smith, *Critical Resource Theory*, *supra* note 61, at 1459 ("The fiduciary duties of directors . . . [include] a requirement to abstain from self-interested behavior.").

71. *See, e.g.*, Rutherford B. Campbell, Jr., *Bumping Along the Bottom: Abandoned Principles and Failed Fiduciary Standards in Uniform Partnership and LLC Statutes*, 96 KY. L.J. 163, 173 nn.37–38, 174 n.139 (2007–2008); Mark J. Loewenstein, *Fiduciary Duties and Unincorporated Business Entities: In Defense of the "Manifestly Unreasonable" Standard*, 41 TULSA L. REV. 411, 411 n.1, 413–14 (2006).

are, who owns them, whom they should benefit—is a fog.[72] Still, as a way of talking about corporate ownership,[73] the trust analogy works well enough for locating shareholders in the role of beneficiary or equitable title holder.[74] But the analogy weakens when attempting to locate boards of directors and corporate managers in the role of trustee or legal title holder that they occupy in only the most etiolated sense.[75]

1. *Divided Title: Shareholders as Equitable Owners*

Until the early twentieth century, corporations were seen as aggregates of individual shareholders woven together by contracts.[76] As such, corporations possessed no identity apart from those individuals and relations.[77] Under that "aggregate" or "property" approach, "[d]irectors were seen as agents of stockholders."[78] However, directors were considered corporations' legal owners—fiduciaries charged solely with the wealth-building of their shareholders who,[79] in trust terms, were considered equitable owners of corporate property.[80] Another way of saying this is that corporations are owned by shareholders,[81] who delegate control to a board

72. Alfred F. Conard, *Beyond Managerialism: Investor Capitalism?*, 22 U. MICH. J.L. REFORM 117, 120–21, 121 n.3 (1988); *see also* John C. Coates IV, Note, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 815–18, 834 (1989) ("The 'directors of a corporation owe various fiduciary duties to that corporation, and, indirectly, to the corporation's shareholders insofar as the corporation's affairs are concerned.'" (quoting Treadway Cos. v. Care Corp., 638 F.2d 357, 375 (2d Cir. 1980))).

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

74. *See id.* at 427.

75. *See* Richard A. Booth, *Who Owns a Corporation and Who Cares?*, 77 CHI.-KENT L. REV. 147, 150 (2001) [hereinafter Booth, *Who Owns a Corporation*]; Frankel, *Fiduciary Law*, *supra* note 12, at 805–06.

76. *See* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 267–68 (1992).

77. *See id.*

78. *Id.* at 267.

79. Smith, *Shareholder Primacy*, *supra* note 69, at 277–78.

80. Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 149, 149–50 (1888).

81. Joseph William Singer, *No Right to Exclude: Public Accommodations and*

of directors,[82] who in turn set policy and hire, fire, and compensate the chief executive officer (CEO), who, under board oversight, runs the company with the CEO's management team.[83]

Typical of trustee–beneficiary relations—predicated on separation of ownership and control[84]—shareholders, like trust beneficiaries, act very little like owners, confident as they are that management will look out for them.[85] Nor *could* shareholders act much like owners, given their quite limited rights to "elect directors and, under some circumstances, remove them," but in no case "tell them what to do."[86] Shareholders hold title to no corporate property (factories, computers, pencils),[87] can initiate nothing, approve almost nothing, nor join large stock blocks or otherwise freely communicate or coordinate with other shareholders.[88]

Similar enough to the interests of equitable owners of a trust res, shareholders get the leftovers when the company dissolves,[89] can take income in the form of dividends or stock repurchases,[90] and bring "derivative" suits against officers and directors reluctant to sue themselves, "with recovery going to the corporation (and presumably to be distributed among stakeholders pro rata)."[91] Unlike trust beneficiaries, however,

Private Property, 90 NW. U. L. REV. 1283, 1455 (1996) ("Who owns a corporation? We are accustomed to saying that the shareholders own it.").

82. Smith, *Critical Resource Theory*, *supra* note 61, at 1458 ("[I]n large corporations . . . actual control resides with the directors rather than with the shareholders.").

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

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

85. Booth, *Who Owns a Corporation*, *supra* note 75, at 157.

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

87. *Id.* at 291 n.97.

88. Bainbridge, *supra* note 84, at 616; Singer, *supra* note 81.

89. *E.g.*, Booth, *Who Owns a Corporation*, *supra* note 75, at 163; Laura Lin, *Shift of Fiduciary Duty upon Corporate Insolvency: Proper Scope of Directors' Duty to Creditors*, 46 VAND. L. REV. 1485, 1488 (1993); Smith, *Critical Resource Theory*, *supra* note 61, at 1458.

90. Booth, *Who Owns a Corporation*, *supra* note 75, at 163.

91. Bruce A. Markell, *The Folly of Representing Insolvent Corporations: Examining*

shareholders have official leverage with those at the controls by auditioning "takeover" management teams to lead them,[92] voting on some matters,[93] and selling the company out from under management, subject to so-called poison pills designed to run off bidders, whose ownership is diluted by discounts in the company's or bidder's stock made available to stockholders.[94]

Even if managers' control *is* like that of trustees "(though it was never very clear that trust law bore much relation to corporation law),"[95] there is authority for the proposition that shareholders are *not* the equitable owner-beneficiaries.[96] Specifically, by the late nineteenth century, corporations had taken on a vibe of entities (natural or artificial) with a legal (albeit fictitious) personality separate from its shareholders.[97] This separate personality, evidenced by limited liability, enabled such entities to sue and be sued; own, inherit, and dispose of property; and survive the human actors through whom they act.[98] This entity view reversed the legal notion that directors' and shareholders' interests align through directors' fiduciary

Lawyer Liability and Ethical Issues Involved in Extending Fiduciary Duties to Creditors, 6 J. BANKR. L. & PRAC. 403, 421 (1997). The shareholder's derivative action emerged in the mid-nineteenth century as an equitable device enabling shareholders to enforce rights that the corporation failed to assert on its own behalf. Colin P. Marks, *Jiminy Cricket for the Corporation: Understanding the Corporate "Conscience,"* 42 VAL. U. L. REV. 1129, 1138 (2008). Those rights include the recovery of losses occasioned by self-dealing or fraudulent or grossly negligent misconduct by directors or managers. *See, e.g.*, Jones v. H.F. Ahmanson & Co., 460 P.2d 464, 470 (Cal. 1969) (in bank).

92. Coates, *supra* note 72, at 818, 837–39.

93. Bainbridge, *supra* note 84, at 616–17 ("Under the Delaware Code, for example, shareholder voting rights are essentially limited to the election of directors and approval of charter or bylaw amendments, mergers, sales of substantially all of the corporation's assets, and voluntary dissolution.").

94. For a description of various poison pills, see Heith D. Rodman, Comment, *Death Toll for the Dead Hand?: The Survivability of the Dead Hand Provision in Corporate America*, 48 EMORY L.J. 991, 994–95 (1999).

95. Booth, *Who Owns a Corporation*, *supra* note 75 (citing A.A. Sommer, Jr., *Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later*, 16 DEL. J. CORP. L. 33 (1991)).

96. E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147 & n.6 (1932) (stating issuance of dividends or new stock does not implicate equally corporate and shareholder interests); *see* Allen, *supra* note 76, at 275 ("Whose interests is the board of directors suppose[d] to foster or protect when substantially all of the shareholders want to sell control of the corporation?").

97. Marks, *supra* note 91, at 1133.

98. Coates, *supra* note 72, at 810.

duties.[99] Instead, on behalf of the entity, directors juggle the interests not just of shareholders, but "of employees, managers, customers, consumers, and surrounding communities" as well, quite apart from their contractual claims.[100] This expanded group of beneficiary-stakeholders includes prospective shareholders in their dealings with insiders[101] and creditors when the corporate-debtor is insolvent or on the brink.[102] And so the notion of trusteeship speaks to a distinct worry: how to rationalize corporate control of vast amounts of wealth without somehow impressing corporations with a public interest beyond management and perhaps even stockholders.[103] "In the eyes of the law, corporate directors are a unique form of fiduciary who . . . resemble trustees[,] . . . constrained primarily by their fiduciary duties [and] . . . mak[ing] trade-offs between the conflicting interests of different corporate constituencies."[104]

In sum, the shareholder-primacy view of the corporate form as expressed in the trust analogy, though frequently dismissed as passé[105] or plainly wrong,[106] does somehow manage continually to rehabilitate itself from criticism.[107]

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

As putative owners of legal title to the corporate res, directors and managers, unlike shareholders, *do* act like owners, though not like trustees,

99. Allen, *supra* note 76, at 276.

100. Coates, *supra* note 72, at 870; *see also* Allen, *supra* note 76, at 270–72; Blair & Stout, *supra* note 86; Singer, *supra* note 81.

101. Smith, *Critical Resource Theory*, *supra* note 61, at 1419 n.78.

102. Rutheford B. Campbell, Jr. & Christopher W. Frost, *Managers' Fiduciary Duties in Financially Distressed Corporations: Chaos in Delaware (and Elsewhere)*, 32 J. CORP. L. 491, 500–01 (2007); *see* Markell, *supra* note 91, at 405, 420–21.

103. Booth, *Who Owns a Corporation*, *supra* note 75, at 167.

104. Blair & Stout, *supra* note 86.

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

106. Blair & Stout, *supra* note 86, at 291, 303, 327; Booth, *Who Owns a Corporation*, *supra* note 75, at 169 ("Despite all the talk about how the stockholders own the company, there is really no statutory authority for the proposition.").

107. Singer, *supra* note 81 (citing ROBERT A.G. MONKS & NELL MINOW, POWER AND ACCOUNTABILITY (1991)) (alluding to "a new movement in recent years to reassert the rights of shareholders as owners").

despite talk to that effect both on a literal level[108] and by way of simile.[109] That managers own little compared to the wealth they manage, while shareholders defer to them and to the directors whom managers install with shareholder acquiescence, makes corporations arguably "ownerless."[110] Directors inquire, suggest, and approve or disapprove of managers' actions, but resignation is their only recourse if they disagree profoundly.[111] Likewise, the control exerted over managers by "institutional investors—pension funds, mutual funds, trustees, and foundations—to whom individual savers . . . entrust[] . . . their funds" further destabilizes conventional notions of ownership when applied to corporate actors.[112]

Unlike trustees, directors and managers do not hold title to corporate property, which is in the entity's name.[113] Moreover, because shareholders may diversify, they are not shy about taking risks at the company level to make a big score.[114] Managers, oppositely, cannot diversify: their fate follows their company's. Thus it is managers (particularly CEOs) —staked more than shareholders in company performance—who think like owners, preferring a fair return and company survival to high-stakes gambling.[115] To avoid shirking of duties by managers, their relations with shareholders are at least theoretically mediated by boards of directors.[116]

While managers act like owners of the corporate res, they, like directors, fall too far outside the criteria of trustees in the strict sense to justify the linguistic move.[117] No one thinks of managers as trustees, an analogy that at least one expert has called "corny."[118] Under trust law, as

108. 3A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 1180, at 345–46 (Carol A. Jones ed., rev. vol. 1998).

109. *See* DeMott, *Beyond Metaphor*, *supra* note 12, at 880–81.

110. Conard, *supra* note 72, at 121, 140.

111. *Id.* at 140.

112. *Id.* at 135.

113. Blair & Stout, *supra* note 86, at 291 n.97.

114. Booth, *Who Owns a Corporation*, *supra* note 75, at 155.

115. *Id.* at 154–55; *see* Booth, *Five Decades of Corporation Law*, *supra* note 105.

116. Blair & Stout, *supra* note 86; Booth, *Five Decades of Corporation Law*, *supra* note 105, at 474.

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

118. Booth, *Who Owns a Corporation*, *supra* note 75, at 167.

legal owners, trustees can have no beneficial interest in the trust res.[119] In contrast, corporate law permits manager ownership,[120] whereby stock options and the funding of pension plans with stock have boosted the stakes of active manager-investors and passive employee-investors.[121]

C. *Agency*

The fig leaf that all fiduciaries are trustees of sorts is removed in agency law. In a form that took shape in the nineteenth century[122]—strongly influenced by treatise writers[123]—agents are cast as fiduciaries but with no homage to divided title.[124] Formally, "[a]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."[125] With such an open standard, agents abound, held out to include, to name a few: executors, guardians, receivers, escrow agents, banks, partners, corporate managers and directors, shareholders of a close corporation, doctors, securities brokers, real estate brokers, and

119. *Id.*

120. *Id.* Trustees are obligated to administer trusts solely in the interest of beneficiaries. Smith, *Critical Resource Theory*, *supra* note 61, at 1483–84. Similarly, agents are obligated to act solely for their principals' benefit in all matters related to the agency. *Id.* at 1484 (citing RESTATEMENT (SECOND) OF AGENCY § 387 (AM. LAW INST. 1958)). By contrast, corporate directors are obligated simply to treat shareholders fairly. *Id.*

121. *See* Booth, *Who Owns a Corporation*, *supra* note 75, at 150–52.

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

123. *See* Deborah A. DeMott, *The Contours and Composition of Agency Doctrine: Perspectives from History and Theory on Inherent Agency Power*, 2014 U. ILL. L. REV. 1813, 1817–18, 1818 n.12 [hereinafter DeMott, *Contours and Composition*].

124. Kinert v. Wright, 185 P.2d 364, 368 (Cal. Dist. Ct. App. 1947).

125. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006).

accountants.[126] Though not trustees,[127] agents are subject to many of the same rules that constrain trustees.[128]

As for lawyers, they are "first and foremost agents"[129] whose clients are principals.[130] As "quintessential fiduciar[ies],"[131] lawyers are bound both by professional code to "represent [a] client zealously within the bounds of the law"[132] and by tort law's "fiduciary obligations of utmost propriety and consideration for the interests of the client."[133] Lawyers are not, however, "trustee[s] of any claim or asset owned or sought by [a] client."[134]

There is both a procedural and remedial legal significance in the law's finding that "liability rules"[135] compensating plaintiffs in contract and

126. *See* BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION INCOME, ESTATES AND GIFTS ¶ 82.4 & n.1 (2016), Westlaw (citations omitted). *But see* People v. Riggins, 132 N.E.2d 928, 928 (Ill. 1956) (Schaefer, J., dissenting) (stating that if agent encompasses "'clerk, agent, servant, solicitor, broker, apprentice or officer' . . . each of the other terms is superfluous because all are embraced within the single term 'agent'").

127. Estate of Djeljaj, 954 N.Y.S.2d 853, 855 (Sur. Ct., Bronx Cty. 2012) (stating "an agent is not a trustee in the technical meaning of the word").

128. RESTATEMENT (THIRD) OF TRUSTS § 5 cmt. e (AM. LAW INST. 2003) ("[M]any of the same legal principles that are applied to trustees may be applied to agents . . . ."); RESTATEMENT (SECOND) OF AGENCY § 387 cmt. b (AM. LAW INST. 1958) ("[The agent's] duties of loyalty to the interests of his principal are the same as those of a trustee to his beneficiaries.").

129. Charles Silver, *Litigation Funding Versus Liability Insurance: What's the Difference?*, 63 DEPAUL L. REV. 617, 637 (2014) (quoting Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle over the Law Governing Insurance Defense Lawyers*, 4 CONN. INS. L.J. 205, 230–31 (1997–1998)).

130. Downs v. McNeil, 520 F.3d 1311, 1320 (11th Cir. 2008) (quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 396 (1993)).

131. Lester Brickman, *The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000's Revision of Model Rule 1.5*, 2003 U. ILL. L. REV. 1181, 1191. Lawyers are more closely regulated than other agents to provide additional safeguards to clients. *See* Buhai, *supra* note 122, at 579–80 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2, Introductory Note (AM. LAW INST. 2000)).

132. MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (AM. BAR ASS'N 2010).

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

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

135. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105–06 (1972) (defining "liability rule" as "an external, objective standard of value . . . used to facilitate the transfer of the entitlement from the holder to the nuisance").

negligence actions are insufficient to regulate agents bent on self-dealing, competing with, or ripping off their principals.[136] Procedurally, fiduciary law sides with plaintiffs by (1) blocking defenses of contributory or comparative fault, (2) prolonging statutes of limitations, and (3) burden-shifting on the issue of breach.[137] Remedially, the Restatement (Third) of Agency imposes "property rules"[138] —accounting for profits, disgorgement of ill-gotten gains, and constructive trust (a coerced transfer back to the victim of property acquired by the breaching fiduciary)—even absent harm to the principal.[139] Likewise, fiduciaries are subject to forfeiture of commissions or fees,[140] again, even when the breach earns the lawyer no profit, as in the divulgence of non-commercial confidences, the revelation of which causes the client no damage, emotional or otherwise.[141] By coercing breaching lawyers into surrendering their fees, invariant either to their exploitive gains or clients' losses, fiduciary law has the effect of punishing wrongdoers while evading the otherwise essential scienter requirement.[142]

So in what ways, exactly, do lawyers and trustees differ? It is not so much that lawyers' relations with clients are too competitive to allow for the

136. *Cf.* RESTATEMENT (THIRD) OF AGENCY § 8.02 cmts. b, e (AM. LAW INST. 2006) (stating remedies for breach of fiduciary duty include and surpass compensation of victims).

137. Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137, 1155–56 (1999).

138. *See generally* Emily Sherwin, *Introduction: Property Rules as Remedies*, 106 YALE L.J. 2083, 2083 (1997) (stating a "property rule" provides "state intervention to prevent involuntary transfers from the holder of the entitlement to others").

139. *E.g.*, Hendry v. Pelland, 73 F.3d 397, 401–02 (D.C. Cir. 1996) (disgorgement); Burrow v. Arce, 997 S.W.2d 229, 240, 245 (Tex. 1999) (constructive trust); *see also* RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d.

140. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (AM. LAW INST. 2000).

141. RESTATEMENT (THIRD) OF AGENCY § 8.02 cmt. e; Brian M. Serafin, Note, *Comparative Fault and Contributory Negligence as Defenses in Attorney Breach of Fiduciary Duty Cases*, 21 GEO. J. LEGAL ETHICS 993, 994–95 n.10 (2008). For example, an attorney using a prior document as a template for a new one might inadvertently disclose to the new client and others the identity and factual background of the prior client's matter, thus breaching confidences owed the prior client but potentially causing no damage.

142. *See* Andrew Kull, *Restitution's Outlaws*, 78 CHI.-KENT L. REV. 17, 23–24 (2003). For a strong case against a generalized right to throw the book at breaching fiduciaries in the absence of harm to their principals, see Duncan, *supra* note 137 *passim*.

professional selflessness expected of trustees, though tensions do inhere such relations.[143] Instead, the rub is that lawyers in no sense hold legal title for the benefit of others. Just as "[a] trust cannot be created unless there is trust property,"[144] nor can a trust-like relation, which trades on the grammar of trusts.[145] In contrast to trustees, or even partners and corporate managers, lawyers are paid for advice, much of which has a financial upshot, but precious little of which can count as investment management.[146] Much more centrally do they safekeep, not invest, client property (e.g., a settlement or damages award),[147] as often as not to avoid extending clients credit during representation (e.g., a retainer).[148]

Admittedly, much of fiduciary law is trained on determining when a principal is responsible for an agent's dealings with third parties.[149] For example, when a bill collector (agent) hired by a store (principal) absconds with payments collected from a debtor-customer on behalf of the store, that

143. For example, in *Evans v. Johnson ex rel. Jeff D.*, 475 U.S. 717 (1986), the Supreme Court upheld a federal civil rights settlement against Idaho officials who conditioned their acceptance of the injunctive relief plaintiffs sought on a waiver of plaintiffs' statutory, prevailing party attorney's fees. *Id.* at 720–26. Plaintiffs' attorneys understandably expected plaintiffs to pursue and assign to them attorney's fees coerced from defendants by the court in lieu of a contingency fee arrangement, which plaintiffs could not afford. *Id.* at 721. In sum, with the Court's imprimatur, the plaintiffs got the relief they sought while selling out their attorneys, who had no choice but to accept the raw deal, given their fiduciary duty to their clients, not to their own enrichment. *Id.* at 740–42.

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

144. RESTATEMENT (SECOND) OF TRUSTS § 74 (AM. LAW INST. 1959).

145. *But cf.* United States v. Tanabe, No. CR 11-0941 SBA, 2012 WL 5868968, at *1, *3–5 (N.D. Cal. Nov. 19, 2012) (finding deputy sheriff who arrested DUI suspects in exchange for cocaine and gun from the private investigator representing arrestees' estranged wives breached his fiduciary duty to county).

146. *See, e.g.*, Nesvig v. Nesvig, 676 N.W.2d 73, 79–80 (N.D. 2004).

147. *See, e.g.*, Pollack v. Crocker, 660 F. Supp. 1284, 1286 (S.D.N.Y. 1987) (finding client's tax refund paid to and held for client by attorney subject to attorney's lien).

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

149. DeMott, *Contours and Composition*, *supra* note 123, at 1815–16.

portion of the debt stolen by the agent is discharged.[150] But third parties cannot fairly be characterized as beneficiaries of lawyers' fiduciary duties, though we can posit extraordinary facts posing such a setup departing from the convention whereby lawyers' obligations run uniquely to the client.[151] Under agency law, agents' dealings with third parties bind their principals, but not because agents are co-obligated fiduciaries serving two masters—a conflict that would alarm any first-year student of torts.[152] Just as third parties hold nothing like equitable title to a principal-client's property, agents hold nothing like legal title to a principal's property.[153] Boiled down, when it comes to third parties, an agent-lawyer is more mediator than trustee, more conduit than wealth manager.[154]

Once anything resembling a trust res drops out as a possible element in a legal relationship (lessening the likelihood of applying trust law), it follows that agency law, and hand in hand, fiduciary duty, expand. For instance, according to the latest Restatement of Agency, all employees are agents, and all agents fiduciaries;[155] the intention being to reduce the

150. This much is implied by *People v. Riggins*, 132 N.E.2d 519, 522 (Ill. 1956) (majority) (concluding that "defendant was an 'agent' of the complaining witness, receiving money in a 'fiduciary capacity' and, therefore, within the purview of [the] embezzlement statute," but vacating and remanding because of prejudicial error by trial court). *But cf. id.* at 928 (Schaefer, J., dissenting) (reasoning that because bill collector was *not* store's agent, his actions would *not* expose store to vicarious liability in tort suit filed by debtor).

151. *E.g.*, Tuttle, *supra* note 15, at 895 (summarizing case in which attorney's client held power of attorney to act for an ailing relative, and court held attorney's fiduciary duty ran to beneficiaries of ailing relative's estate, which was squandered by client under power of attorney used with attorney's assistance).

152. *E.g.*, H.H. Woodsmall, Inc. v. Steele, 141 N.E. 246 *passim* (Ind. App. 1923).

153. *Cf.* DANIEL B. YEAGER, CRIMINAL LAW: HOMICIDE AND EXCULPATION 377 (2015) (citing People v. Traster, 4 Cal. Rptr. 3d 680 (Ct. App. 2003) (certified for partial publication)) (summarizing case in which defendant–computer consultant received $132,296 for Microsoft licenses, but he had received only *possession* of the money because "[t]itle would vest in defendant only once he had performed the agreed-to purchase of the licenses, which he neither did nor ever intended to do").

154. *But cf.* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. h (AM. LAW. INST. 2006) (references to "intermediaries" are to brokers, not lawyers).

155. *Id.* § 1.01 cmts. c, g. *But cf. Discussion of Restatement of the Law Third, Agency*, 78 A.L.I. PROC. 536, 537 (2001) ("My problem isn't with the statement itself, it is that the Restatement goes on to say that all employees are agents, and therefore all employees are fiduciaries, which just seems wrong to me." (testimony of Richard E. Gutman)). For a thoughtful take on employee-agents under the Restatement of

temptations of employees, who hold their employers' goodwill and wealth over the barrel.[156] By handling key functions and cash to boot,[157] employees might steal or at a minimum withhold "their best efforts to produce, innovate, cooperate with management, or share information."[158] No wonder, the story goes, employers spy on their employees.[159]

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

> I can think of no relationship in which one party, the employee, places more reliance upon the other, is more dependent upon the other, or is more vulnerable to abuse by the other, than the relationship between employer and employee. And, ironically, the relative imbalance of economic power between employer and employee tends to increase rather than diminish the longer that relationship continues. Whatever bargaining strength and marketability the employee may have at the moment of hiring, diminishes rapidly thereafter. Marketplace? What market is there for the factory worker laid-off after 25 years of labor in the same plant, or for the middle-aged executive fired after 25 years with the same firm?[160]

Under such a view, employees resort to countermoves like sabotage only to fend off their own powerlessness and exploitation.[161] Nonetheless, managers of employee health and retirement plans serve as the only legally recognized,

Employment Law, see Deborah A. DeMott, *Relationships of Trust and Confidence in the Workplace*, 100 CORNELL L. REV. 1255 *passim* (2015).

156. *Compare* Laurel Valley Oil Co. v. 76 Lubricants Co., 797 N.E.2d 1033, 1039 (Ohio Ct. App. 2003) ("Not all employees are fiduciaries."), *with* William Lynch Schaller, *Disloyalty and Distrust: The Eroding Fiduciary Duties of Illinois Employees*, 3 DEPAUL BUS. L.J. 1, 13 (1990–1991) (stating it is "well-established" in Illinois "that employees are fiduciaries of their employers").

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

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

159. *See* Jessica Fink, *In Defense of Snooping Employers*, 16 U. PA. J. BUS. L. 551, 570–79 (2014) (discussing employer motivations for snooping on employees).

160. Foley v. Interactive Data Corp., 765 P.2d 373, 414–15 (Cal. 1988) (in bank) (Kaufman, J., concurring and dissenting), *quoted in* Gudel, *supra* note 13, at 790–91.

161. *See* Getman & Marshall, *supra* note 158.

recurring example of the employer-fiduciary,[162] despite some push from academics to expand.[163] Realistically, neither side could be expected to renounce self-interest, given "the inherently antagonistic character of the traditional employer–employee relationship."[164] If there were any question about this, check out final-offer arbitration in Major League Baseball:

> Teams risk injuring their relationship with a player by arguing that his worth is well below what the player thinks he is worth. A team might be forced to defend its proposal by "insulting a player and presenting arguments that harp on a player's physical or mental defects, or demeaning his past contributions to the club, playing record or public appeal."[165]

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

IV. ACADEMIC INFLUENCE ON FIDUCIARY LAW

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

162. *See* Crouch v. Bussen Quarries, Inc., 124 F. Supp. 3d 947, 955 (E.D. Mo. 2015); Trs. of the Colo. Ironworkers Pension Fund v. Popovich (*In re* Popovich), 359 B.R. 799, 801–02 (Bankr. D. Colo. 2006) ("[A] 'person is a fiduciary with respect to a plan,' and therefore subject to ERISA fiduciary duties, 'to the extent' that he or she 'exercises any authority or control respecting management or disposition of [plan] assets . . . .'" (quoting 29 U.S.C. § 1002(21)(A) (2000))).

163. Samuel J. Samaro, *The Case for Fiduciary Duty as a Restraint on Employer Opportunism Under Sales Commission Agreements*, 8 U. PA. J. LAB. & EMP. L. 441, 497–503 (2006); P. Prestin Weidner, Note, *The Misappropriation of Trust Fund Taxes Under the Guise of Reasonable Cause*, 57 VAND. L. REV. 287, 326–27 (2004).

164. Sarah J. Bannister, Note, *Low Wages, Long Hours, Bad Working Conditions: Science and Engineering Graduate Students Should Be Considered Employees Under the National Labor Relations Act*, 74 GEO. WASH. L. REV. 123, 134 (2005).

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

classifying *Hamlet* as a comedy, is possible. Flexibility is a virtue sure enough,[166] but it is also a vice[167]: "'Fiduciary' is what the judge calls you before ruling against you. And I think we see a lot of those sort[s] of complex connotations of the term, which could make it problematic as used in black-letter text."[168] Indeed, the term has become so extended that no longer is it a stretch to say that fiduciary duties emerge—with or without anything resembling a trust res—whenever one party has a broad grant of discretion over the other's interests amidst a dependency relation due to information asymmetry.[169] If all agents are fiduciaries, then who else among power-wielders might we add to the list?

A. *Franchisors*

Consider franchises, where a successful chain like McDonald's adds on entrepreneurial owners while maintaining a tight grip on its brand by "micromanag[ing] the conduct of its franchisees in excruciating detail, even specifying the order in which condiments should be placed on hamburgers."[170] Despite the one-sidedness of franchise contracts,[171] franchisors are not fiduciaries of their franchisees.[172]

166. *See, e.g.*, Tamar Frankel, *Fiduciary Law in the Twenty-First Century*, 91 B.U. L. REV. 1289, 1290 (2011) ("[T]his area of the law has existed for centuries because it is open ended." (emphasis omitted)).

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

168. *Discussion of Restatement of the Law Third, Agency*, *supra* note 155, at 542 (testimony of James Steven Rogers).

169. *See, e.g.*, Adelphia Recovery Tr. v. Bank of Am., N.A., 624 F. Supp. 2d 292, 323 (S.D.N.Y. 2009) ("Under Pennsylvania state law a fiduciary duty will arise 'where by virtue of the respective strength and weakness of the parties, one has a power to take advantage of or exercise undue influence over the other.'" (citation omitted)); City of Hope Nat'l Med. Ctr. v. Genentech, Inc., 181 P.3d 142, 150–52 (Cal. 2008); Scallen, *supra* note 16, at 922.

170. Bechtel v. FCC, 10 F.3d. 875, 880 n.4 (D.C. Cir. 1993) (citing Lois Therrien*, McRisky,* BUS. WEEK*,* Oct. 21, 1991, at 114). *See generally* Melissa Ann Gauthier, Note, *The SJC and Dunkin' Donuts: Squeezing the Filling Out of the Small Franchisee*, 41 NEW ENG. L. REV. 757, 761–72 (2007) (discussing the franchise system and product uniformity in the United States).

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

172. Picture Lake Campground, Inc. v. Holiday Inns, Inc., 497 F. Supp. 858, 869 (E.D. Va. 1980) ("A franchise relationship is inherently a business relationship, not a

Yet in testifying in 1970 before the U.S. Senate Select Committee on Small Business, General Counsel for the Federal Trade Commission, John Buffington, observed that "franchisors frequently speak of their relationship with their franchisees as being one of trust and confidence. It is truly a fiduciary relationship."[173] The next year, Boston attorney Harold Brown,[174] relying solely on Buffington's "informal" position,[175] published *Franchising—A Fiduciary Relationship* in the *Texas Law Review*, where Brown made what he claimed to be the first pitch for fiduciary law as a check on franchisor power.[176] The following year, a New York trial court, unable to find "any American cases that have either applied or rejected the fiduciary theory to franchises," ruled anyway that out of Mobil Oil's "dominant economic position" and "control" over a single-station franchisee—a former Mobil gas-station worker—arose a fiduciary relationship.[177] The court's authority? Harold Brown's "well researched article[]."[178]

fiduciary relationship."); John A. Donovan et al., *Franchising*, *in* 10 SECTION OF LITIG., ABA, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 111:36, at 454 (Robert L. Haig ed., 3d ed. 2011); Robert W. Emerson, *Fortune Favors the Franchisor: Survey and Analysis of the Franchisee's Decision Whether to Hire Counsel*, 51 SAN DIEGO L. REV. 709, 711 & n.9 (2014) ("Only a small minority of courts has found that as a matter of law a fiduciary relationship exists between a franchisor and a franchisee.").

173. *The Impact of Franchising on Small Business: Hearings Before the Subcomm. on Urban & Rural Econ. Dev. of the S. Select Comm. on Small Bus.*, 91st Cong. 329 (1970) (statement of John V. Buffington, General Counsel, FTC).

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

175. Harold Brown, *Franchising—A Fiduciary Relationship*, 49 TEX. L. REV. 650, 664 (1971) [hereinafter Brown, *A Fiduciary Relationship*] ("[T]he fiduciary nature of the franchise relationship was recently informally recognized by the Federal Trade Commission . . . .").

176. HAROLD BROWN, FRANCHISING: REALITIES AND REMEDIES § 9.08, at 9–66 (rev. ed. 1998), *quoted in* Dunkin' Donuts Inc. v. N.A.S.T., Inc., 266 F. Supp. 2d 826, 828–29 (N.D. Ill. 2003). Brown made the fiduciary claim repeatedly. *See, e.g.*, HAROLD BROWN, FRANCHISING: TRAP FOR THE TRUSTING 41–44 (1969); Harold Brown & Jerry Cohen, *Franchise Equities*, 63 MASS. L. REV. 109, 110–12 (1978); Harold Brown & Jerry Cohen, *Franchise Misuse*, 48 NOTRE DAME L. REV. 1145, 1146–47 (1973); Harold Brown, *Franchising: Fraud, Concealment and Full Disclosure*, 33 OHIO ST. L.J. 517, 548–53 (1972).

177. Mobil Oil Corp. v. Rubenfeld, 339 N.Y.S.2d 623, 632, 637 (Civ. Ct. 1972), *rev'd*, 370 N.Y.S.2d 943 (App. Div. 1975).

178. *Id.* at 632.

From there, Brown's progress in expanding fiduciary law has been iffy, relying on over-readings that get promptly repudiated. For example, William Killion, in his A.L.R. Annotation entry summarizing the franchising cases on point, cites *Mister Donut of America, Inc. v. Harris* for the proposition that franchisors are fiduciaries of their franchisees.[179] Specifically, Killion concludes that the Arizona Supreme Court found the fast food chain was the fiduciary of a franchisee to whom the chain had misleadingly understated the hassles in getting donut ingredients.[180] But *Mister Donut* did not so hold; instead, the Arizona high court merely called the franchisor–franchisee relation "special," citing Harold Brown.[181] Two years later a federal district court, applying Arizona law, corrected Killion's misreading.[182] To Brown's credit, not only do those courts that reject his position first explicitly consider following his advice,[183] but academic lawyers stand by his position even after courts have abandoned it.[184]

179. William L. Killion, Annotation, *Existence of Fiduciary Duty Between Franchisor and Franchisee*, 52 A.L.R.5th 613, § 5, at 650–53 (1997) (citing Mister Donut of Am., Inc. v. Harris, 723 P.2d 670 (Ariz. 1986) (in banc)).

180. *Id.*

181. *Mister Donut*, 723 P.2d at 673 (citing Brown, *Franchising—A Fiduciary Relationship*, *supra* note 175).

182. *See* R.L.M. Dist. Co. v. W.A. Taylor, Inc., 723 F. Supp. 421, 429 (D. Ariz. 1988) ("[B]ecause Arizona's courts have never decided whether a franchise relationship is fiduciary, this court does not find a fiduciary relationship present."). The other two cases summarized by Killion also turned out unreliable. Killion, *supra* note 179. Applying South Dakota law, see Bain v. Champlin Petroleum Co., 692 F.2d 43, 48 (8th Cir. 1982) (distinguishing Arnott v. Am. Oil Co., 609 F.2d 873, 883 (8th Cir. 1979)). Applying Missouri law, compare Jimmy Dan, Inc. v. Chrysler Credit Corp., 643 F. Supp. 368, 369 (W.D. Mo. 1986) ("Missouri law is quite clear that no fiduciary relationship exists between a franchisor and a franchisee."), with ABA Distribs., Inc. v. Adolph Coors Co., 542 F. Supp. 1272, 1286 (W.D. Mo. 1982) (noting a Missouri statute, enacted before the agreement at issue was signed, imposed a fiduciary duty of good faith and fair dealing, and thereby distinguishing the factual situation in *Arnott v. American Oil Co.*, 609 F.2d 873).

183. *E.g.*, Phillips v. Chevron U.S.A., Inc., 792 F.2d 521, 523–54 (5th Cir. 1986); Murphy v. White Hen Pantry Co., 691 F.2d 350, 355 & n.6 (7th Cir. 1982); Dunkin' Donuts Inc. v. N.A.S.T., Inc., 266 F. Supp. 2d 826, 828–29 (N.D. Ill. 2003); Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., No. 91 CIV. 4544 (MGC), 1992 WL 170559, at *5 (S.D.N.Y. July 2, 1992); Gen. Bus. Machs. v. Nat'l Semiconductor Datachecker/DTS, 664 F. Supp. 1422, 1425 & n.4 (D. Utah 1987).

184. Scallen, *supra* note 16, at 957–60 (explaining that certain decisions "ignore the equitable origins of fiduciary theory and, further, that courts have applied the theory to a great variety of relationships"); *cf.* Anne L. Austin, Comment, *When Does a Franchisor*

Indeed, to call the franchise relationship "fiduciary" overshoots the intentionally incomplete contractual terms the parties have sketched out, whereby ownership resides in the franchisee (who operates much like an independent contractor) and control resides in the franchisor (who operates much like an employer).[185] Thus, throwing around the word "fiduciary" to characterize franchisors' obligations to franchisees completely abandons assessing the complexity of the relation, its long-term nature, the give and take, and notably, the reality that, in the commercial world, we are all subject to others, none of us wholly subservient nor powerful—a reality that "fiduciary" as a label obscures.[186]

B. *Insurers*

If attempts to insinuate tendentious academic positions into fiduciary law were unusual, I would not be pointing to them here. But they are not. In 1974, two Boalt Hall students, William Goodman and Thomas Seaton, published in their home law review a foreword reviewing four cases then pending in the state high court where they had interned.[187] One of the four, *Silberg v. California Life Insurance Co.*, reinstated a jury's compensatory damages in favor of a plaintiff whose insurer refused to pay losses from a foot injury incurred when he fell into a working washing machine.[188] According to California's Supreme Court, because the insurer's unjustifiable attempt to avoid the policy breached "its duty of good faith and fair dealing implied in every policy," the $75,000 compensatory award would stand.[189] But the trial court had vacated the jury's $500,000 punitive damages award due to insufficient proof of scienter, an element of just punishment.[190]

Become a Fiduciary?: Crim Truck & Tractor Co. v. Navistar International Transportation Corporation, 43 CASE W. RES. L. REV. 1151, 1161–64 (1993).

185. *See* IAN R. MACNEIL & PAUL J. GUDEL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS 195 (Robert C. Clark et al. eds., 3d ed. 2001) (discussing purposeful contract omissions in franchise contracts).

186. *See* Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 927–28, 932 (1990).

187. William M. Goodman & Thom Greenfield Seaton, Foreword, *Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court*, 62 CALIF. L. REV. 309 *passim* (1974).

188. Silberg v. Cal. Life Ins. Co., 521 P.2d 1103, 1110 (Cal. 1974) (in bank).

189. *Id.* at 1109–10.

190. *Id.* at 1106, 1110.

Goodman and Seaton lobbied the high court to reinstate the punitive damages award:

> It was in failing to meet its fiduciary obligations that the insurer in *Silberg* exposed itself to compensatory and even punitive damages. The company was aware of Silberg's predicament; its behavior during his financial, physical, and mental collapse can only be described as grossly insensitive, displaying a lack of humanity that should have insulted not only the plaintiff and jurors but California Life's competitors as well. Its actions were the direct result of its misconception of its proper loyalties. The *Silberg* opinion, hopefully, will leave insurers with no doubt that with great power goes great responsibility.[191]

The authors did not elaborate on what the inclusion of the word *fiduciary* added to an insurer's good-faith obligations.[192] When the trial court's ruling vacating the punitive damages award was affirmed, nowhere in Justice Stanley Mosk's eight-page opinion for the court did the word *fiduciary* appear.[193]

The efforts of Goodman and Seaton to expand fiduciarian values were not in vain, however. Five years later, in *Egan v. Mutual of Omaha Insurance Co.*, the California Supreme Court again affirmed a compensatory award while denying a punitive award.[194] This time, the plaintiff's suit against his insurer was for failure to investigate his claim over four back injuries suffered over seven years.[195] Justice Mosk, again writing for the court, favorably quoted the recently published foreword of Goodman and Seaton:

> [A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust.[196]

191. Goodman & Seaton, *supra* note 187, at 347.

192. *See id.*

193. *See Silberg*, 521 P.2d at 1105–12.

194. Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 143 (Cal. 1979) (in bank).

195. *Id.* at 143–44.

196. *Id.* at 146 (alteration in original) (quoting Goodman & Seaton, *supra* note 187, at 346–47).

From this dictum on a principle of insurance contracts began a series of judicial faux pas. Specifically, while admitting that *Egan* did not exactly rule on the matter, yet finding "little room for doubt" that insurers are fiduciaries of their insureds, one court of appeal was content "assuming" as much.[197] Soon after, another, while finding "no support in case law, other than dicta in a few Supreme Court cases," found insurers "akin to" but not quite fiduciaries, leaving room for insurers' pursuit of self-interest.[198]

Six weeks later, Judge Judith Keep, sitting in diversity, summarized California law on the "difficult question" of whether insurers are fiduciaries.[199] Delineating the difference between the thing itself (a fiduciary relation) and the "seeming trend" toward something similar ("fiduciary-like responsibilities"),[200] she concluded that an "insurer is not required to put the insured's interest before its own."[201] In dismissing plaintiff's fiduciary claim against defendant insurer, Judge Keep summed up that *Egan* was *not* saying that an insurer *is* a fiduciary; rather, *Egan* said only that an insurer "must exhibit those characteristics of humanity and decency which are similar to what is required of a fiduciary."[202] To Judge Keep, if the *Egan* court or its successors "had meant to say that an insurer *is* a fiduciary, they would have said so."[203] A relation may therefore be special or akin to fiduciary without at once being fiduciary.[204]

Undeterred, commentators excusably thereafter continued to cite *Egan* for the idea that insurers are fiduciaries of their insureds.[205] Litigants

197. Gibson v. Gov't Emps. Ins. Co., 208 Cal. Rptr. 511, 513–14 (Ct. App. 1984).

198. Henry v. Associated Indem. Corp., 266 Cal. Rptr. 578, 586 & n.16 (Ct. App. 1990).

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

200. *Id.* at 790–91.

201. *Id.* at 792 & n.1.

202. *Id.* at 791–92.

203. *Id.* at 792.

204. Lennane v. Am. Zurich Ins. Co., No. 2:13-cv-02311 JAM AC, 2014 WL 546061, at *4 (E.D. Cal. Feb. 10, 2014) (stating the insurer–insured relationship requires "special and heightened duties," but it is not a true fiduciary relationship).

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

not only did the same,[206] but what is worse, continued on[207] even after the California Supreme Court explicitly sided with Judge Keep.[208] This, decades after the notion of insurer as fiduciary was just a gleam in the eyes of a pair of Berkeley law students.

C. *Professors*

In 1976, the New Hampshire Supreme Court noted a "trend . . . toward liberalizing" the scope of fiduciary duties.[209] As support for this trend, the court cited a 1937 case from the Maine Supreme Court in which the word "fiduciary" is absent, plus an entry from a 1925 legal encyclopedia.[210] In suits brought by disgruntled students against their professors for breach of fiduciary duty, liberalizing the tort had to await the New Hampshire Supreme Court's 1999 decision, *Schneider v. Plymouth State College*.[211] Trends must start somewhere; New Hampshire's expansion of professorial obligations started in the academic literature.

The court in *Schneider* held, "In the context of sexual harassment by faculty members, the relationship between a post-secondary institution and its students is a fiduciary one."[212] The court's proffered authority for the proposition? Ronna Greff Schneider's 1987 article, *Sexual Harassment and Higher Education*, published in the *Texas Law Review*.[213] There, after positing that "[t]he faculty-student relationship is best characterized as one of fiduciary and beneficiary," Professor Schneider cited professor of education and literature Billie Dziech and university administrator Linda Weiner, both from the University of Cincinnati where Schneider teaches

206. *See, e.g.*, Appellant Alliance Mortgage Co.'s Opening Brief at 22, All. Mortg. Co. v. Rothwell, No. A077559 (Cal. Ct. App. Apr. 7, 1998), http://appellatecases.courtinfo.ca.gov/search/case/disposition.cfm?dist=1&doc_id=29474&div=2&doc_no=A077559, 1997 WL 33820170, at *21–24.

207. *See, e.g.*, Tran v. Farmers Grp., Inc., 128 Cal. Rptr. 2d 728, 735 (Ct. App. 2002).

208. Vu v. Prudential Prop. & Cas. Ins. Co., 33 P.3d 487, 491–92 (Cal. 2001).

209. Cornwell v. Cornwell, 356 A.2d 683, 686 (N.H. 1976) (citing RESTATEMENT (SECOND) OF TRUSTS § 44 cmt. a (AM. LAW INST. 1959)).

210. *Id.* (citing Austin v. Austin, 191 A. 276, 276–78 (Me. 1937); E.S.O., *Grantee's Oral Promise to Grantor as Giving Rise to Trust*, 35 A.L.R. 280, § III(c)(1), at 308 (1925)).

211. Schneider v. Plymouth State Coll., 744 A.2d 101, 103–04 (N.H. 1999).

212. *Id.* at 105.

213. *Id.* (citing Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 552 (1987)).

law.[214] While Dziech and Weiner's *The Lecherous Professor* alludes to "students' natural trust of teachers,"[215] the co-authors nowhere attribute legal significance to that trust. Others have, however.[216] Relying on Professor Schneider's quoted utterance above, Professor Carrie Baker's *Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment* argued two decades ago that, like Delaware,[217] states should criminalize sexual harassment.[218]

The origins of an academic push to liberalize the law go back further. "Historically," noted BYU law professors Brett Scharffs and John Welch in 2005, "the association of teachers and their students has been viewed as a fiduciary relationship."[219] The authority for this assertion? A 1957 article by Harvard law professor Warren Seavey published in his home journal stating: "Since schools exist primarily for the education of their students, it is obvious that professors and administrators act in a fiduciary capacity with reference to the students."[220] Because Professor Seavey declared his assertion obvious, no supporting authority was forthcoming.[221] After Seavey lobbed that grenade over the wall, academic attempts to project fiduciary principles onto

214. Schneider, *supra* note 213, at 552 & n.161 (quoting BILLIE WRIGHT DZIECH & LINDA WEINER, THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS 93 (2d ed., Bd. of Trs. of the Univ. of Ill. 1990) (1984)).

215. *Id.* at 552 n.161 (quoting DZIECH & WEINER, *supra* note 214).

216. *See, e.g.*, Carrie N. Baker, *Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 LAW & INEQ. 213, 242 n.203 (1994) ("The breach of an established relationship should be considered more egregious than criminal solicitation that occurs among strangers or acquaintances." (citations omitted)).

217. *Id.* at 245–46 & nn.211–13 (citing DEL. CODE ANN. tit. 11, § 763 (Supp. 1992) (unclassified misdemeanor)). As Professor Baker notes, North Carolina criminalizes sexual harassment by landlords, N.C. GEN. STAT. § 14-395.1 (1993), and Texas criminalizes "official oppression," which includes sexual harassment by state actors, TEX. PENAL CODE ANN. § 39.02 (West Supp. 1994).

218. Baker, *supra* note 216, at 241–42, 242 n.203.

219. Brett G. Scharffs & John W. Welch, *An Analytic Framework for Understanding and Evaluating the Fiduciary Duties of Educators*, BYU EDUC. & L.J., no. 2, 2005, at 159, 163.

220. *Id.* at 163 n.24 (quoting Warren A. Seavey, Comment, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407 n.3 (1957)).

221. *See* Seavey, *supra* note 220.

student–faculty relations have continued[222]—whether viewed as "sporadic"[223] or "new,"[224] often relying on Seavey and other academics.

While litigated outcomes within this niche have largely resisted the expansion of fiduciary duties,[225] professors as students' fiduciaries does make some sense when the dispute is over something resembling a trust res, such as ownership of intellectual property produced within a senior–junior, Platonic relation in a university lab.[226] Those cases reveal that doctrinally it is the *combination* of the personal (that is, whole-person) and commercial (that is, discrete) that characterizes fiduciary law.[227] Fiduciaries thus stand in

222. *See, e.g.*, Gerard A. Fowler, *The Legal Relationship Between the American College Student and the College: An Historical Perspective and the Renewal of a Proposal*, 13 J.L. & EDUC. 401, 414–16 (1984); Salar Ghahramani, *Professors as Corporate Fiduciaries: Implications for Law, Organizational Ethics, and Public Policy*, 10 VA. L. & BUS. REV. 237, 250 (2016) ("The fiduciary nature of the professor-student . . . relationship has been recognized in certain cases . . . ."); Alvin L. Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KY. L.J. 643, 671 (1966); Paul G. Haskell, *The University as Trustee*, 17 GA. L. REV. 1, 5 & n.14 (1982) ("The teaching function . . . may be defined as a fiduciary function that imposes duties upon the university similar to those of a true trustee."); Nancy M. Maurer & Robert F. Seibel, *Addressing Problems of Power and Supervision in Field Placements*, 17 CLINICAL L. REV. 145, 153 (2010); Gregg L. Katz, Note, *Conflicting Fiduciary Duties Within Collegiate Athletic Conferences: A Prescription for Leniency*, 47 B.C. L. REV. 345, 365–66, 372 (2006).

223. *See* Robert Faulkner, Note, *Judicial Deference to University Decisions Not to Grant Degrees, Certificates, and Credit—The Fiduciary Alternative*, 40 SYRACUSE L. REV. 837, 855 (1989) ("[S]poradic scholarly attempts have been made calling for fiduciary principles in collegiate law . . . .").

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

225. *See, e.g.*, Valente v. Univ. of Dayton, 438 F. App'x 381, 387 (6th Cir. 2011); Zumbrun v. Univ. of S. Cal., 101 Cal. Rptr. 499, 506–07 (Ct. App. 1972).

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

227. *See, e.g.*, Frankel, *Fiduciary Law*, *supra* note 12, at 801 ("[F]iduciary relations combine the bargaining freedom inherent in contract relations with a limited form of the

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

While student–professor skirmishes over intellectual property rights reflect a tension between fiduciarian and contractarian values,[228] students also have attempted to stretch fiduciary law when denied passing grades,[229] athletic eligibility,[230] special accommodations,[231] degrees,[232] or professional opportunities.[233] Those attempts to expand fiduciary law by suing faculty, administrators, or the schools themselves[234] may be desperate responses to the inefficacy of suits for breach of contract[235] and "educational malpractice."[236] Yet rather than somehow casting tuition dollars as a sort of

power and dependence of status relations."); Steven L. Schwarcz, *Fiduciaries with Conflicting Obligations*, 94 MINN. L. REV. 1867, 1870 (2010) ("[B]ecause trust law developed in the context of gratuitous trusts, it does not necessarily govern commercial-trust arrangements. And commercial law generally addresses arm's length, not fiduciary, transactions." (footnote omitted)).

228. For a thoughtful perspective on this tension between lawful and unlawful exploitation, see generally Carmenelisa Perez-Kudzma, *Fiduciary Duties in Academia: An Uphill Battle*, 48 IDEA 491 (2007–2008).

229. André v. Pace Univ., 655 N.Y.S.2d 777, 780–81 (App. Term 1996) (denying recovery for breach of fiduciary duty for allegedly "false, deceptive and misleading" course description).

230. Hendricks v. Clemson Univ., 578 S.E.2d 711, 715–16 (S.C. 2003).

231. Bird v. Lewis & Clark Coll., 303 F.3d 1015, 1023 (9th Cir. 2002).

232. Manning v. Temple Univ., 157 F. App'x 509, 511 & n.1 (3d Cir. 2005); Ho v. Univ. of Tex. at Arlington, 984 S.W.2d 672, 679, 692–93 (Tex. App. 1998); Maas v. Corp. of Gonzaga Univ., 618 P.2d 106, 108 (Wash. Ct. App. 1980).

233. Moy v. Adelphi Inst., 866 F. Supp. 696, 700–01, 707–08 (E.D.N.Y. 1994); Demas v. Levitsky, 738 N.Y.S.2d 402, 407–08 (App. Div. 2002).

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

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

236. *E.g.*, Ross v. Creighton Univ., 957 F.2d 410, 414–15, 414 n.2 (7th Cir. 1992).

trust res, those cases appeal to level playing fields as an offset against strong-party opportunism.

And from there it is not far to where fiduciary relations are "social, domestic, or merely personal," entailing no property or "financial duty" whatsoever.[237] Professor D. Gordon Smith, pointing out the "pitfalls" that reliance on property poses for fiduciary law, proposes to sub in for a trust res any "critical resource" subject to the servient party's control.[238] Smith is particularly keen on including as critical resources a client's noncommercial confidences, a conventional item of non-property.[239] For Smith, "critical resources," unlike any realistic notion of property, include one's body as being entitled to a fiduciary's protection.[240]

And it takes such a repudiation of a trust-res element to explain *Schneider*, where the plaintiff's body was subject to her fiduciary professor's unwelcome touches.[241] With *Schneider* on the books, other commentators felt free to declare it hornbook.[242] A decade later, a federal district court, applying New Hampshire law, noted that *Schneider* made fiduciaries of

237. John E. Rumel, *Back to the Future: The* In Loco Parentis *Doctrine and Its Impact on Whether K-12 Schools and Teachers Owe a Fiduciary Duty to Students*, 46 IND. L. REV. 711, 719–20 (2013) (quoting Kurth v. Van Horn, 380 N.W.2d 693, 695–96 (Iowa 1986)). *But cf.* Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 202 (2000) ("[Despite] an increasing tendency for courts to create fiduciary duties in moral, social, domestic, or in purely personal relationships where one party needs additional protection, students are out of luck." (footnote omitted)).

238. Smith, *Critical Resource Theory*, *supra* note 61, at 1404.

239. *Id.*

240. *Id.* at 1463.

241. *See* Schneider v. Plymouth State Coll., 744 A.2d 101, 103 (N.H. 1999). Awarding plaintiff $115,000 on claims for violating Title IX and breach of fiduciary duty against her college, a jury found that the college failed to investigate her complaints that her male professor had inflicted on her "a pattern of sexual harassment and intimidation." *Id.* at 104–05. This included "taking off her shirt, and placing her hand on his genitalia," and after she rebuffed him, yelling at, threatening, and ridiculing her in front of other faculty and lowering her grade. *Id.* at 103–04.

242. *See* Kent Weeks & Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153, 159 (2002) ("One situation in which courts will not hesitate to find fiduciary relationships between universities and students is in sexual harassment claims.").

professors *only* in cases of sexual harassment,[243] which happens to be an actionable tort without the need for any fiduciary law tinkering.[244]

V. EXPANDING THE LAW: HIGH ART OR AXE-GRINDING?

With social, domestic, or purely personal relations implicating critical resources, parents too are held out as fiduciaries, not just when parents divert their child's earnings to themselves,[245] but in cases of child abuse as well.[246] The same is said of married couples, not just in the disposition of marital property, but also where one aggresses against the other's critical resources.[247] In this vein it is unsurprising that clergy-abuse cases are characterized as breaches of fiduciary duties to protect the physical integrity, not just property, of servient parties.[248]

This path of the law strikes me as eccentric. Suppose, for example, an attorney (the "quintessential fiduciary"[249]) impulsively settles a quarrel with a client by punching him in the face. Should the client bring an action for breach of fiduciary duty? Can *fiduciary* really be so cut off from its grammar, so "beyond metaphor"[250] that it becomes an idiomatic usage that *trades on* the criteria of fiduciary (selflessness, anti-opportunism, protection of the weak) while at once denying those criteria (a trust res to conserve or grow)?

Fiduciary in this idiomatic sense is a movement in academic literature, where the term now is deployed as a way of getting across an ideal—that opportunism is bad, that other-regarding behavior is good.[251]

243. Franchi v. New Hampton Sch., 656 F. Supp. 2d 252, 263–64 (D.N.H. 2009).

244. *See, e.g.*, Doe v. Celebrity Cruises, Inc., 394 F.3d 891, 894 (11th Cir. 2004); Wilson v. Muckala, 303 F.3d 1207, 1212 (10th Cir. 2002).

245. *See* Jillian Benbow, Short Article, *Under My Roof: Parents' Rights to Children's Earnings*, 16 J. CONTEMP. LEGAL ISSUES 71, 71 (2007).

246. *See* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2473 (1995).

247. *See* Lauren Rakow, Note, *Do Ask, Do Tell: California's Spousal Fiduciary Duty and Financial Disclosure Obligations*, 47 LOY. L.A. L. REV. 771, 773 (2014).

248. *E.g.*, Malicki v. Doe, 814 So. 2d 347, 351 n.2, 358 (Fla. 2002) (collecting state and federal cases discussing breach of fiduciary duty by clergy members).

249. *See supra* note 131 and accompanying text.

250. DeMott, *Beyond Metaphor*, *supra* note 12.

251. *See, e.g.*, Scott FitzGibbon, *Educational Justice and the Recognition of Marriage*, 2011 BYU EDUC. & L.J. 263, 263 (arguing that teachers are "morally . . . fiduciar[ies]"

Indeed, some scholars seem to mean nothing at all by it, one even using fiduciary in the title and then again for the first time in the conclusion of a 55-page tract.[252]

These fiduciary-isms, bending over backwards to expand the law, have succeeded to a point in that some have prevailed in court rulings rendered by judges who are open to academic commentary. This is no mean feat, given that scholarship about scholarship, of which there is much,[253] agrees that judges cite professors infrequently.[254] Even when they do, the citations count for little,[255] only really mattering about 18 percent of the time.[256] With the exception of a "few transformative scholarly works"[257] (e.g., Kathleen Sullivan's *Unconstitutional Conditions*,[258] Justice Louis Brandeis and Samuel Warren's *The Right to Privacy*,[259] Charles Reich's *The New*

but should not "be held legally liable for violations" of their duties).

252. Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 806 (2004).

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

254. *See, e.g.*, ROBERT J. SPITZER, SAVING THE CONSTITUTION FROM LAWYERS: HOW LEGAL TRAINING AND LAW REVIEWS DISTORT CONSTITUTIONAL MEANING 181 (2008); Joshua D. Baker, Note, *Relics or Relevant?: The Value of the Modern Law Review*, 111 W. VA. L. REV. 919, 928 (2009). *But see* Gregory Scott Crespi, *The Influence of Two Decades of Contract Law Scholarship on Judicial Rulings: An Empirical Analysis*, 57 SMU L. REV. 105, 117 (2004); David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1359 (2011).

255. Benjamin H. Barton, *Saving Law Reviews from Political Scientists: A Defense of Lawyers, Law Professors, and Law Reviews*, 45 GONZ. L. REV. 189, 205–06 (2009–2010); James W. Harper, *Why Student-Run Law Reviews?*, 82 MINN. L. REV. 1261, 1278 (1997).

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

257. *Id.* at 55.

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

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

Property[260]), professors, to their disappointment,[261] write mainly for each other.[262] Heavy hitters like Catherine MacKinnon, Laurence Tribe, and Anthony Amsterdam (among others)[263] are consequently seen as outliers: unrepresentative of the group.[264]

The reasons for the irrelevance of scholarly efforts are familiar.[265] Prominent among content-related reasons is the contempt with which highfalutin academic lawyers hold doctrine, including precedent, which they get paid to transcend.[266] It is hard to put a positive spin on the fact that only 7 percent of judges regularly read law reviews.[267] But spin we do. Law professors "influence . . . how judges decide cases,"[268] even when un-cited,[269] if only by informing "the processes, individuals, and institutions that create the public policies that judges and lawyers eventually encounter in the cases that come before them."[270] From this perspective, professors' "subtle influences"[271] have an ethereal quality by which scholarship "provide[s] a

260. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

261. Dow, *supra* note 253, at 329–30.

262. Harrison & Mashburn, *supra* note 256, at 55; *see also* Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1342 (2002).

263. Wayne LaFave has been cited some 160 times by the high court. *See Wayne R. LaFave*, UNIV. ILL. L., https://www.law.illinois.edu/faculty/profile/waynelafave (last visited Nov. 21, 2016).

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

265. Dolores K. Sloviter, *In Praise of Law Reviews*, 75 TEMP. L. REV. 7, 8–10, 9 n.8 (2002); *see* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992) [hereinafter Edwards, *The Growing Disjunction*]; Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 682 (1998).

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

267. Rhode, *supra* note 262, at 1337.

268. Richard A. Wise et al., *Do Law Reviews Need Reform? A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 3 (2013); *see* Rhode, *supra* note 262, at 1328.

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

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

271. Vitiello, *supra* note 264, at 523 (citing John O. McGinnis et al., *The Patterns and*

contextual social background for legal disputes, helps to make judges aware of the underlying reasons for the decisions that they make and offers useful suggestions for reform."[272] Because "a law review's treatment of an issue . . . often provides the jump spark that allows the judge to get underway in the intellectual effort of shaping the opinion,"[273] it has been said that "[n]o principled approach to decision-making can ignore the contribution of academics."[274]

Be that as it may, most judges cannot be bothered.[275] In a recent reboot of his controversial 1992 critique of law reviews,[276] Judge Harry Edwards cites Supreme Court Justices as among those on the bench who locate journal writing somewhere from not particularly helpful (Justice John Roberts) to out of touch (Justice Antonin Scalia) to "outer space" (Justice Stephen Breyer).[277]

The Ninth Circuit's Judge Alex Kozinski is an exception.[278] Some of the academic influence he detects is dilute, as in the lasting impression casebooks make on anyone with a J.D.[279] Other influence is stronger, as where the writings of stubborn academics, like dissenting opinions, keep

Implications of Political Contributions by Elite Law School Faculty, 93 GEO. L.J. 1167, 1196 (2005)).

272. Michel Bastarache, *The Role of Academics and Legal Theory in Judicial Decision-Making*, 37 ALTA. L. REV. 739, 746 (1999).

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

274. Bastarache, *supra* note 272.

275. Schwartz & Petherbridge, *supra* note 254, at 1346–47 & nn.2–6.

276. Edwards, *The Growing Disjunction*, *supra* note 265, at 34.

277. Harry T. Edwards, *Another Look at Professor Rodell's* Goodbye to Law Reviews, 100 VA. L. REV. 1483, 1488–49 (2014).

278. Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, 37 HOUS. L. REV. 295, 296 (2000). So is Judge Richard Posner—when he is not running them down. *Compare* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: (1962–1987)*, 100 HARV. L. REV. 761, 777 (1987) (arguing law reviews have caused a "growth of interdisciplinary legal analysis"), *and* Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1117–19 (1981) (arguing law reviews are integral to doctrinal study), *with* Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1135 (1995) (arguing that increasing the size of law review staff decreases efficiency and quality of work).

279. Kozinski, *supra* note 278, at 298.

"the flame alive" of disfavored positions, or introduce "an entirely new legal idea or line of argument."[280]

To illustrate, Judge Kozinski recounts the "remarkable" doings of Professor Paul Cassell, whose mid-1990s writings were at war with 1960s icon *Miranda v. Arizona*.[281] In 1997, Cassell filed an amicus brief in the Fourth Circuit reviving a stillborn federal statute, the unconstitutionality of which had been justifiably taken for granted since its 1968 enactment.[282] Exploiting what he saw as a loophole in *Miranda*'s celebrated "prophylactic" rule regulating police interrogation, Cassell induced the Fourth Circuit to deem defendant Charles Dickerson's un-Mirandized confession admissible.[283] Although Cassell's run in the high court ended just after Judge Kozinski's article was published,[284] Kozinski, anticipating that possibility, nonetheless fancied Cassell's efforts a "monumental academic achievement."[285]

But why? Wasn't Cassell doing exactly what Judge Merritt thought my antitrust professor was doing—just putting stuff out there (at best), stooping to axe-grinding (at worst)? There was a reason, after all, that no federal prosecutor had ever invoked the statute to admit a confession.[286] Yet to Judge Kozinski, Cassell's activity instantiates high professorial art.[287] I wonder what he would say about a recent article positing the unconstitutionality of the National Security Agency's metadata program because the program relies on *Katz v. United States*,[288] a 1967 ruling which,

280. *Id.* at 305, 307.

281. Miranda v. Arizona, 384 U.S. 436 (1966); Kozinski, *supra* note 278, at 309–10.

282. Brief of the Washington Legal Foundation and Safe Streets Coaliton [sic] as Amici Curiae in Support of Appellant United States at 2, United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750), *rev'd*, 530 U.S. 428 (2000), 1997 WL 33484776, at *2 (citing 18 U.S.C. § 3501 (1996), *invalidated by* Dickerson v. United States, 530 U.S. 428).

283. United States v. Dickerson, 166 F.3d at 689, 695.

284. Dickerson v. United States, 530 U.S. 428. Without use of Dickerson's confession at his trial for, *inter alia*, robbing a Virginia bank of $876, he was convicted anyway and sentenced to 125 months in prison. United States v. Dickerson, 27 F. App'x 236, 248–49 (4th Cir. 2001) (per curiam). *See generally United States v. Dickerson*, 166 F.3d at 673 (summarizing factual background).

285. Kozinski, *supra* note 278, at 311.

286. *See* Peter L. Strauss, *The President and Choices Not to Enforce*, 63 L. & CONTEMP. PROBS. 107, 117–18 (2000).

287. Kozinski, *supra* note 278, at 311.

288. Katz v. United States, 389 U.S. 347 (1967).

by coming to rely on a concurring opinion, is—get this—no authority at all.[289] So can all attempts to dispose of 50 years of precedent count as high art like *Brown v. Board of Education of Topeka*,[290] which overthrew a case finally seen as "wrong the day it was decided"?[291] How about an article contorting concepts of *mens rea* and causation in order to call suicidal reactions to cyberbullying "homicide"?[292] Or a student comment petitioning to criminalize whistling at women in public?[293] As entertaining as these exercises may be, are they, like Cassell's articles once were, the beginnings of "monumental academic achievement"?[294] Possibly. Or they could be the sort of indulgences that led Justice Scalia at an oral argument to accuse counsel of "bucking for a place on some law school faculty" by looking to overrule the *Slaughter-House Cases*,[295] "contrary to 140 years of our jurisprudence."[296]

Recall the strides made by Professor Schneider imposing fiduciary law on professors, Harold Brown on franchisors, and student-authors William Goodman and Thomas Seaton on insurers.[297] Thanks to them and other like-minded scholars, fiduciary law really is anything goes. In court, its grammar is not only cut off from the law of trusts (or trust-like relations), but quite recently devolved into an altogether non-technical term of art. This explains the scholarly output on fiduciary voting,[298] judging,[299] governance,[300]

289. Randy Barnett, *Why the NSA Data Seizures Are Unconstitutional*, 38 HARV. J.L. & PUB. POL'Y 3, 12–14 (2015).

290. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 494–95 (1954).

291. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 863 (1992) (citing Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by Brown*, 347 U.S. 483).

292. *See* Audrey Rogers, *Death by Bullying: A Comparative Culpability Proposal*, 35 PACE L. REV. 343, 351–60 (2014).

293. *See* Amanda Roenius, Comment, *My Name Is Not "Beautiful," and No, I Do Not Want to Smile: Paving the Path for Street Harassment Legislation in Illinois*, 65 DEPAUL L. REV. 831, 834 (2016).

294. Kozinski, *supra* note 278, at 311.

295. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

296. Transcript of Oral Argument at 7, McDonald v. City of Chicago, 561 U.S. 742 (2010) (No. 08-1521).

297. *See supra* Part IV.

298. Edward B. Foley, *Voters as Fiduciaries*, 2015 U. CHI. LEGAL F. 153, 153.

299. Ethan J. Leib et al., *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 702–03 (2013).

300. Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L.

politics,[301] juries,[302] and friendship,[303] not to mention fiduciary administrative,[304] criminal,[305] equal protection,[306] and health[307] law. I could go on.[308]

VI. CONCLUSION

It would be misleading to say that professors write only for each other within the world of fiduciary law. There they have made and continue to make their mark, for better or worse. And what *should* they be doing if not "the business of creating a new stock of legal ideas"?[309] Professors must "have better things to do with their time than to provide free research for judges,"[310] whose law clerks should be the ones knocking out the wooden 50-state surveys and other documents of practicality.

Yet so too is there a responsibility, a need to acknowledge that *Hamlet* is not a comedy, even if you can convince someone that it is. Certainly our "language provides conventions for speaking . . . strangely or in extraordinary ways: speaking, for instance, metaphorically, cryptically, loosely, personally."[311] Language changes; meanings "will of course, stretch

REV. 1145, 1148 (2014); Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 519 (2015).

301. D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 677 (2013).

302. Ethan J. Leib et al., *Fiduciary Principles and the Jury*, 55 WM. & MARY L. REV. 1109, 1114–15 (2014).

303. Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665, 668 (2009).

304. Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 120 (2006).

305. Malcolm Thorburn, *The Constitution of Criminal Law: Justifications, Policing and the State's Fiduciary Duties*, 5 CRIM. L. & PHIL. 259, 270 (2011).

306. Gary Lawson et al., *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415, 418 (2014).

307. Margaux J. Hall, *A Fiduciary Theory of Health Entitlements*, 35 CARDOZO L. REV. 1729, 1732 (2014).

308. Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1823–24 (2016); Ethan J. Leib et al., *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91, 93 (2012–2013).

309. McGinnis et al., *supra* note 271, at 1193.

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

311. DANIEL YEAGER, J.L. AUSTIN AND THE LAW: EXCULPATION AND THE EXPLICATION OF RESPONSIBILITY 129 (2006).

and shrink, and they will be stretched and be shrunk."[312] That language inevitably changes is no reason to change it just for the sake of change. Language is natural, and so its changing is natural,[313] not homemade or arbitrary.[314] Legal language can accordingly get pushed and pulled,[315] and like all exertions, at times too far or in the wrong direction to where, as J.L. Austin cautioned in the opening epigraph above, "there would clearly be no future in it."[316]

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

312. Stanley Cavell, *Must We Mean What We Say?*, *in* MUST WE MEAN WHAT WE SAY?: A BOOK OF ESSAYS 1, 42 (updated ed. 2002).

313. *Id.*

314. Stanley Cavell, *Austin at Criticism*, *in* MUST WE MEAN WHAT WE SAY?, *supra* note 312, at 97, 102.

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

316. AUSTIN, *supra* note 1.