
**FIDUCIARY LAW’S “HOLY GRAIL”: RECONCILING
THEORY AND PRACTICE IN FIDUCIARY
JURISPRUDENCE**

LEONARD I. ROTMAN*

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Fiduciary law has experienced tremendous growth over the past few decades. However, its indiscriminate and generally unexplained use, particularly to justify results-oriented decision making, has created a confused and problematic jurisprudence. Fiduciary law was never intended to apply to the garden variety of cases. Rather, it was established for use only where the laws of contract, tort and unjust enrichment were silent or deficient. Yet, even in those circumstances, it applied solely in regard to socially or economically important or necessary interactions of high trust and confidence creating implicit dependency and peculiar vulnerability. This Article lays the foundation for developing a more sound fiduciary jurisprudence by identifying the “holy grail” that unites the theory of fiduciary obligations with its practical application. It demonstrates how fiduciary law may properly facilitate situationally-appropriate justice in ways that the ordinary laws of civil obligation cannot. Further, it establishes an enhanced understanding of fiduciary law that both complements the laws of contract, tort, and unjust enrichment and is consistent with fiduciary law’s historical and theoretical foundations.

* Visiting Scholar, Hennick Centre for Business and Law, Osgoode Hall Law School, York University (2010-11); Professor, Faculty of Law, University of Windsor. This paper is dedicated to Tamar Frankel, whose insight and wisdom have been an important and constant inspiration for my work in the area of fiduciary law.

INTRODUCTION

Fiduciary law has been a part of the common law tradition since its crystallization in the landmark case of *Keech v. Sandford* in 1726.¹ It again captured legal imaginations during its major renaissance in the 1970s and 1980s, particularly in the area of corporate law.² However, the vast majority of judgments implementing it have exhibited little concern about fiduciary law's application beyond individual cases. This failure to consider the broader implications of applying fiduciary principles has resulted in a confused and problematic jurisprudence, thereby reducing fiduciary law's effectiveness in redressing civil claims in circumstances where the ordinary laws of contract, tort, and unjust enrichment are silent or insufficient.³

¹ *Keech v. Sandford*, (1726) 25 Eng. Rep. 223, (Ch.) 223-24 (U.K.) (requiring a lessor to convey and account for profits of a lease that was devised to a trustee for the benefit of an infant). Although fiduciary law is most notably associated with common law jurisdictions whose systems continue from the historic basis provided by English common law and equity, it also exists in various civil law jurisdictions, including France, Scotland, Germany, Quebec, and Louisiana, where it is derived from essentially similar principles emanating from ancient Roman law. See DAVID JOHNSTON, *THE ROMAN LAW OF TRUSTS* 1 (1988); ERNEST A. VINTER, *A TREATISE ON THE HISTORY AND LAW OF FIDUCIARY RELATIONSHIPS AND RESULTING TRUSTS* 7 (1955).

² These situations include, *inter alia*, corporate opportunity cases. See, e.g., *Miller v. Miller*, 222 N.W.2d 71 (Minn. 1974) (alleging wrongfully diverted corporate opportunities against corporate defendants); *Queensland Mines Ltd. v. Hudson* (1978) 18 ALR 1, 2 (Austl.) (raising the issue whether a managing director abused his position to make a profit for himself); *Canadian Aero Servs. Ltd. v. O'Malley*, [1974] S.C.R. 592, 592 (Can.) (presenting a claim arising from allegedly taking corporate opportunity benefits while another party had a continuing interest); *Indus. Dev. Consultants Ltd. v. Cooley*, [1972] 2 All E.R. 162, 174 (acknowledging that defendant may violate the law when his corporate and personal duties conflict). These situations also include cases where directors arranged the purchase of shareholders' shares. See *Jordan v. Duff & Phelps Inc.*, 815 F.2d 429, 429 (7th Cir. 1987) (presenting a former shareholder-employee bringing a fraud action against a closely held corporation.); *Bell v. Source Data Control Ltd.* (1989), 53 D.L.R. 4th 580, 584-86 (Can. Ont. C.A.); *Tongue v. Vencap* (1994), 148 A.R. 368 (Can. Alta. Q.B.) (arguing that one party used confidential information during a sale negotiation with another party), *aff'd*, (1996), 184 A.R. 368 (Can. C.A.); *Coleman v. Myers* [1977] 2 NZLR 297, 298-99 (CA) (presenting claims that arose from the conduct of father-son managing directors who orchestrated an acquisition by forming a new company). Finally, these situations include cases from the takeover wave of the 1980s. See *Revlon Inc. v. MacAndrews & Forbes Holdings Inc.*, 506 A.2d 173, 176 (Del. 1986) (deciding whether a corporation may use defensive measures in active bidding processes and whether a corporation may consider impact of takeover on parties other than its shareholders); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 949 (Del. 1985) (deciding the validity of a corporation's self-tender that excludes stockholder participation, which creates a hostile tender offer); *Olympia & York Enters. Ltd. v. Hiram Walker Res. Ltd.* (1986), 59 O.R. 2d 254, 261 (Can. Ont. H.C.J.).

³ This effect may be most readily seen in U.S. corporate law jurisprudence, where the lingering confusion over whether the doctrine of good faith is a part of directors' fiduciary

Although pleadings alleging breaches of fiduciary duty are now commonplace, fiduciary law has been characterized as one of the least understood of all legal constructs.⁴ While this characterization appears at odds with fiduciary law's lengthy existence,⁵ it helps explain why fiduciary law's role within the contemporary law of civil obligations remains unclear so many years after its initial appearance.

This Article contends that any confusion associated with fiduciary law is not the result of substantive uncertainty existing within the fiduciary concept. Rather, this confusion exists because of a widespread and fundamental failure to recognize the foundational elements, or "holy grail" of fiduciary jurisprudence. This "holy grail" is comprised of the pairing of the unique space in which fiduciary law operates within the law of civil obligations and the foundational goals that fiduciary law is designed to accomplish. Neither of these elements has received sufficient attention in academic commentary or judicial decisions to date.

In her laudable work in the area of fiduciary law,⁶ Tamar Frankel has always reminded us of the importance of context in fiduciary analysis. In identifying

duty of loyalty or if it exists as an independent obligation is a significant factor in the judicial reluctance to apply fiduciary law to corporate directors. *Compare* *Stone v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006) (describing the duty of good faith as part of the duty of loyalty), *with In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996) (illustrating a situation that was previously regarded as a case involving the duty of care, as a duty of loyalty case). For the initial discussion of the so-called "fiduciary triad" of duties comprised of the duties of care, good faith, and loyalty that created the present day confusion, see *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (providing that a shareholder plaintiff has the burden of showing that a director breached one of the triads of fiduciary duty, and further defining the triad as encompassing the duty of good faith, loyalty, and due care).

⁴ See, e.g., *Lac Minerals Ltd. v. Int'l Corona Res. Ltd.*, [1989] 2 S.C.R. 574, 643-44 (Can.) ("There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship."). Meanwhile, scholar Deborah DeMott has called fiduciary obligation "one of the most elusive concepts in Anglo-American law." Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 5 DUKE L.J. 879, 879 (1988); see also Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 W. AUSTRALIAN L. REV. 1, 18 (1996) (describing fiduciary law as "a blot on our law, and a taxonomic nightmare").

⁵ While fiduciary law is generally traced to *Keech v. Sandford*, its origins in English law have been traced to *Walley v. Walley*, (1687) 23 Eng. Rep. 609 (Ch.) 609; 1 Vern. 484, 484 (Ch.), a case that preceded *Keech* by almost forty years and possesses rather similar facts. See LEONARD I. ROTMAN, FIDUCIARY LAW 59 (2005) ("When one considers the nature of the dispute in *Walley* and the basis upon which it was resolved, it is clear that it used the same principles that were later applied in *Keech*, albeit without the eloquence of reasoning put forward in the latter.").

⁶ Beginning with Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795 (1983), and culminating, for the time being, in (the appropriately titled) TAMAR FRANKEL, FIDUCIARY LAW (2011).

the fiduciary “holy grail,” this Article attempts to both concretize Frankel’s important message and give it greater emphasis in the practical application of fiduciary principles.

Indeed, the improper application of fiduciary principles in contemporary jurisprudence demonstrates the need for a more complete understanding of fiduciary law. In attempting to further develop existing understandings of fiduciary law, this Article may be dissected into three discrete, but related, sections. In Part I of this paper, the discussion of fiduciary law’s “holy grail” will illustrate how result-oriented misapplications have contributed to the present confusion surrounding fiduciary law. This is done by analogy to the “Bring out your Dead” scene from the film *Monty Python and the Holy Grail*,⁷ and the scene’s reference to fiduciary jurisprudence’s result-oriented tendency. The fiduciary holy grail is discussed next in Part I, followed by a brief canvass of the problems associated with attempts to pin down fiduciary law in a precise manner, and an illustration of the broad postulates that underlie contemporary fiduciary theory. The way these postulates influence fiduciary theory is illustrated first, by examining the seminal fiduciary case of *Keech v. Sandford*,⁸ and second, by analogy to the law of negligence and its initial development in *Donoghue v. Stevenson*.⁹

Part II seeks to contextualize fiduciary law’s role within the law of civil obligation. The sometimes difficult relationship between fiduciary law and the pursuit of legal certainty is discussed and suggestions are offered as to why fiduciary law cannot subscribe to the same degree of certainty as the other facets of civil obligation. This helps to explain why some previous attempts to precisely define fiduciary law have been unsuccessful. This Part will then consider fiduciary law’s roots in ancient Greek thought and its need to balance certainty and discretion.

Part III of the Article articulates fiduciary law’s perspective that is distinct from those of contract, tort, and unjust enrichment by drawing upon the division between the legal and equitable that was established in the ancient doctrine of *lifnim mishurat hadin* that is observed in the Old Testament. This Part then discusses fiduciary law’s purpose and function, further illustrated through Chief Judge Cardozo’s legendary opinion in the case of *Meinhard v. Salmon*,¹⁰ and through the more contemporary Supreme Court of Canada decision in *Hodgkinson v. Simms*.¹¹ The Article concludes by emphasizing

⁷ MONTY PYTHON AND THE HOLY GRAIL (Python (Monty) Pictures 1975).

⁸ (1726) 25 Eng. Rep. 223 (Ch.) 223-24.

⁹ [1932] A.C. 562 (H.L.) 562 (establishing the modern concept of negligence in Scot and English Law by providing a manufacturer duty to take reasonable care that products are not defective nor likely to cause injury).

¹⁰ 164 N.E. 545, 546 (N.Y. 1928) (concluding that “joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty”).

¹¹ [1994] 3 S.C.R. 377, 404-07 (Can.) (arguing that fiduciary liability often “flows” from principles underlying fiduciary duties).

fiduciary law's function of maintaining the important goal of social and economic interdependency.

By placing fiduciary law in an appropriate space within the law of civil obligations and emphasizing the goals it is designed to accomplish, this Article demonstrates the scope of fiduciary authority and deflects criticism that suggests fiduciary law threatens jurisdictions traditionally belonging to contract or tort.¹² The Article lays the foundation for a more sound fiduciary jurisprudence that complements the laws of contract, tort, and unjust enrichment, and proposes a meaningful, alternative cause of action for interactions that create implicit dependency and peculiar vulnerability. In doing this, the Article unites fiduciary theory with its practical application, and it demonstrates the value of fiduciary law in facilitating situationally appropriate justice in ways that the ordinary laws of civil obligation cannot.

I. FIDUCIARY LAW'S "HOLY GRAIL"

When fiduciary law was initially developed in English law, it was not distinguished terminologically from the concept of the trust. At that time, it was a common practice to describe a variety of equitable causes of action that involved the reposing of confidence by one person in another, including what we would now call breaches of fiduciary duty or breaches of confidence, as "trusts."¹³ Over time, fiduciary law expanded into the realm of non-trustees who occupied positions of trust and confidence or who were entrusted by others for particular purposes, but did not satisfy the criteria associated with express trusts.¹⁴

¹² See *Breen v Williams* (1996) 186 CLR 71, 95 (Austl.) (referring to the tendency in the United States to view a fiduciary relationship as "imposing obligations which go beyond the exaction of loyalty and as displacing the role hitherto played by the law of contract and tort by becoming an independent source of positive obligations and creating new forms of civil wrong"); Peter Birks, *The Content of Fiduciary Obligation*, 34 *ISR. L. REV.* 3, 5 (2000) ("There is a real fear that the old duality between chancery and common law may be giving birth to a wholly illusory wrong, duplicating the work of the ordinary law of tort."); Paul D. Finn, *The Fiduciary Principle*, in *EQUITY, FIDUCIARIES AND TRUSTS* 1, 28 (Timothy G. Youdan ed., 1989) (arguing if fiduciary interests were determined by asking whether beneficiary interests were serviced, then accepted relationship roles in the law of torts and of contract would be disturbed); John D. McCamus, *The Evolving Role of Fiduciary Obligation*, in *MEREDITH LECTURES* (1998-1999) 202, 209-10 (Cowansville, Les Éditions Yvon Blais, 2000) ("This new version of fiduciary doctrine has blurred the distinctions between the domains of contract, tort and restitution or unjust enrichment.").

¹³ L.S. Sealy, *Fiduciary Relationships*, 1962 *CAMBRIDGE L.J.* 69, 70-72 (contrasting the original, general concept of trust that included confidence, with the present, more precise concept that separates the law of trusts and fiduciary law).

¹⁴ That is, the circumstances could not satisfy the three certainties of Trust law: (1) intention (the desire of the settlor/testator to create the trust), (2) subject (the existence of clearly identifiable property which constitutes the *res* of the trust), and (3) object (the purpose or function of the trust, including who or what will benefit under it). See *Knight v.*

After lying dormant for some time, fiduciary law experienced a renaissance, particularly in the area of corporate law and other significant socially and economically valuable or necessary relationships of high trust and confidence in which beneficiaries become implicitly dependent upon and peculiarly vulnerable to their fiduciaries' use (or abuse) of power over their interests. Curiously, this resurgence occurred in spite of the fact that fiduciary law's broader implications have never been adequately scrutinized.

This lack of scrutiny – and the uncertainty created thereby – is well illustrated by analogy to the “Bring Out Your Dead” scene from the movie *Monty Python and the Holy Grail*.¹⁵ The quirky and haphazard manner in which the scene unfolds reflects the inappropriate manner in which fiduciary law has been implemented in contemporary jurisprudence.

At the beginning of the scene, a mortician is seen wandering through a plague-ridden peasant village collecting dead bodies.¹⁶ The mortician leads his cart of corpses through the village, calling attention to his presence by shouting, “Bring out your dead!” to the inhabitants.¹⁷ A large man appears with an old man's body slung over his shoulder.¹⁸ The large man wishes to place the old man on the cart but the old man protests that he is not yet dead.¹⁹ The mortician informs the large man that he cannot take the old man's body, as it is against the regulations.²⁰ The old man continues to protest, maintaining that he is “getting better” and, indeed, might “go for a walk.” The mortician and the large man gaze at each other for a moment while the still-alive old man sings, “I feel happy . . . I feel happy.”²¹ The mortician and the large man furtively look up and down the street, whereupon the mortician clubs the old man over the head.²² The old man's body goes limp, and the large man then unloads the body onto the cart and thanks the mortician for his assistance.²³

Just then, one man wearing a crown and dressed in a flowing robe, and another man clapping together coconut shells, pass through the village.²⁴ It is Arthur, King of the Britons, and his man-servant Patsy.²⁵ The peasants engage

Knight, (1840) 49 Eng. Rep. 58, 63-64; 3 Beav. 148, 160-62 (Ch.) (requiring these three showings for a court to execute a constructive trust); Glanville L. Williams, *The Three Certainties*, 4 MOD. L. REV. 20, 20 (1940) (describing the three certainties required for declaring a trust).

¹⁵ MONTY PYTHON AND THE HOLY GRAIL, *supra* note 7.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

in a mass genuflection as the two men pass by.²⁶ Noticing this, the large man asks, "Who's that then?", and the mortician shrugs and answers, "I don't know. Must be a king."²⁷ When the large man questions the mortician's conclusion, the mortician immediately responds with the rationale: "He hasn't got shit all over him."²⁸

Although the mortician's conclusion is correct, the "Bring Out Your Dead" scene helps illustrate the problematic basis upon which fiduciary law has often been implemented. The large man wants to get rid of the old man and does not wish to wait until the latter dies to do so.²⁹ Since placing a live body on the cart of corpses is against the regulations, the mortician clubs the old man to grant the large man his wish while still conforming with the law. Just as the mortician's results-oriented action resolves the dilemma of what to do with the old man, judges have applied fiduciary law in a similarly results-oriented fashion purely to achieve results that they otherwise would be unable to reach. A common goal of this results-oriented approach is to enable the transfer of property via a constructive trust.³⁰ Generally, this has occurred where common law remedies are inadequate to resolve the problem at hand.³¹ Since a constructive trust is properly used only where there is a breach of an equitable obligation,³² judges have imposed fictitious fiduciary relationships merely to facilitate a constructive trust order.³³

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See id.*

³⁰ *See Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.*, [1981] Ch. 105 at 106 (Eng.) (concluding a defendant is a trustee after a mistaken money transfer); *Goodbody v. Bank of Montreal* (1974), 47 D.L.R. 3d 335 (Ont. H.C.).

³¹ One of the clearest examples of the limitations of common law actions versus equitable actions is seen in the law of tracing. Tracing funds in equity is more wide-ranging than tracing under the common law, essentially imposing a charge on the asset being traced, which allows it to be followed into mixed funds (where money from different sources are combined). This is a result that common law tracing cannot achieve, since it needs to determine precisely what money belong to the claimant in order to lay claim to it. *See generally* LIONEL D. SMITH, *THE LAW OF TRACING* pt. 3 (1997) (offering a detailed background of tracing and offering examples in clean and mixed substitutions).

³² That equitable relief, such as a constructive trust or equitable tracing, is properly available only in response to a demonstrated equitable cause of action, such as a breach of trust or fiduciary duty, is indicated in the statements of Attorney-General Sir John Coleridge, who promoted the legislation fusing common law and equitable jurisdictions in England in the Nineteenth Century:

The defect of our legal system was, not that Law and Equity existed, but that if a man went for relief to a Court of Law, and an equitable claim or an equitable defence arose, he must go to some other Court and begin afresh. Law and Equity, therefore, would remain if the Bill passed, but they would be administered concurrently, and no one would be sent to get in one Court the relief which another Court had refused to give It was more philosophical to admit the innate distinction between Law and Equity,

A prime illustration of this practice may be seen in *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.*³⁴ In that case, the plaintiff, Chase Manhattan Bank, had transferred two million dollars into the defendant's account as part of a bona fide transaction.³⁵ Later that same day, a clerical error by Chase Manhattan resulted in a mistaken transfer of another two million dollars into the same defendant's account.³⁶ On discovering its error, the plaintiff gave instructions to stop the mistaken payment, but the instructions were not received in sufficient time and the defendant was put into receivership shortly thereafter.³⁷ Chase Manhattan sought the return of the second two million dollars based on the fact of mistaken payment.³⁸

On a straightforward assessment of the facts, the second payment was clearly made in error and ought to have been recovered by the plaintiff.³⁹ However, the defendant's receivership made recovery of the mistaken payment anything but straightforward. Once the defendant was placed into receivership, the money paid by mistake would have become part of the defendant's general assets and therefore would be subject to the prioritized claims of the defendant's secured creditors unless good reason could be shown why this ought not be done.⁴⁰ Moreover, since Chase Manhattan would not have been able to register its claim against the defendant prior to the latter being placed in receivership, it would have been an unsecured creditor and, therefore, highly unlikely to recover the full amount of the mistaken transfer.⁴¹

The defendant's receivership, therefore, imposed a significant barrier preventing Chase Manhattan from recovering funds that properly and uncontroversially should have been restored. The only way to avoid this result was for a court to segregate the mistakenly-transferred funds from the other funds belonging to the defendant. Justice Goulding facilitated this result by

which you could not get rid of by Act of Parliament, and to say, *not that the distinction should not exist, but that the Courts should administer relief according to legal principles when these applied, or else according to equitable principles. That was what the Bill proposed*, with the addition that, whenever the principles of Law and Equity conflicted, equitable principles should prevail.

216 PARL. DEB., H.C. (3d ser.) (1873) 644-45 (U.K.) [hereinafter PARL. DEB.], *quoted in* P.H. PETTIT, *EQUITY AND THE LAW OF TRUSTS* 10 (8th ed. 1997) (emphasis added).

³³ See Goodbody, 47 D.L.R. 3d at 339-40; *Chase Manhattan Bank*, [1981] Ch. at 106.

³⁴ [1981] Ch. 105 (U.K.).

³⁵ *Id.* at 114 (stating that that Chase Manhattan Bank paid Israel-British Bank about two million dollars as part of regular business).

³⁶ *Id.*

³⁷ *Id.* at 115.

³⁸ *Id.*

³⁹ *Id.* ("If one party P pays money to another party D by reason of factual mistake . . . few conscientious persons would doubt that D ought to return it.").

⁴⁰ *Id.* at 115-16.

⁴¹ *Id.* at 116 (presenting the question whether this plaintiff bank should have any priority over the other ordinary creditors).

imposing a constructive trust on the mistakenly-forwarded funds.⁴² This finding meant that the defendant was holding the money in question for the benefit of the plaintiff, the rightful owner.⁴³ As a result, the defendant's creditors had no legitimate claim to the money in question and the plaintiff effectively leapfrogged over the creditor priority scheme that crystallized upon the defendant's receivership.⁴⁴

While the result of the case appears just, the method by which it was achieved is, at best, highly questionable. To impose a constructive trust on the funds in question, Justice Goulding determined that he first had to find the parties to be in a fiduciary relationship.⁴⁵ However, the only bond between the banks in *Chase Manhattan* was the transfer of funds, which hardly qualifies as the sufficiently substantive interaction needed to create fiduciary obligations.⁴⁶ Instead, like the results-oriented actions of the mortician in clubbing the old man, Goulding found a fiduciary relationship to exist merely to substantiate his imposition of a constructive trust. The problem with this practice is that it uses fiduciary principles where the *indicia* of a fiduciary relationship are absent.

Neither the clubbing of the old man nor the fashioning of a fictitious fiduciary relationship in *Chase Manhattan* is properly supported by the facts. Live men, even old ones, ought not be clubbed to death so they may be placed immediately with dead corpses rather than waiting until they are actually dead. Equally, equitable relief ought not be imposed in the absence of valid equitable causes of action, regardless of the desirability or justness of the result achieved.⁴⁷ While placing the old man on the corpse cart in the film and imposing a constructive trust in the *Chase Manhattan* case complied facially with existing regulations, those actions seriously discredit the results obtained. Achieving just results cannot validate flawed actions or analyses.

⁴² *Id.* at 128

⁴³ *Id.*

⁴⁴ Israel-British Bank's creditors would have no claim to any funds subject to a constructive trust because they have claims only against funds properly belonging to the defendant, whereas the equitable title to funds subject to a constructive trust belong to the party on behalf of whom the funds are being held (in this case, *Chase Manhattan*). *See id.* at 128.

⁴⁵ *See Id.* (relying on *Ministry of Health v. Simpson*, [1951] A.C. 251 (H.L.), *aff'g sub nom. Re Diplock*, [1948] Ch. 465 (C.A.)). *See also* 216 PARL. DEB., *supra* note 32, at 644-45 (stating that equitable relief, such as a constructive trust, is only appropriate given an equitable cause of action).

⁴⁶ As will be discussed below, a fiduciary relationship is properly imposed only where a significant interaction of social and/or economic importance exists that creates an implicit dependency and peculiar vulnerability of the beneficiary to the fiduciary. *See generally* ROTMAN, *supra* note 5, at ch. 5 (discussing situations where fiduciary relationships may be imposed, which require significant interaction between the parties).

⁴⁷ *See* 216 PARL. DEB., *supra* note 32, at 644-45 (arguing that an equitable cause of action is prerequisite for the creation of a constructive trust).

The misapplication of fiduciary law in cases like *Chase Manhattan* demonstrates that the broad measure of relief available for breaches of fiduciary duty is so desirable and often unavailable under other heads of civil obligation that judges are sometimes willing to fabricate fiduciary relations solely to facilitate them. In this manner, fiduciary law functions much like the Holy Grail being pursued in the film, which some legends hold has magical powers to heal.⁴⁸ Like the healing powers of the Grail, fiduciary law has extraordinary powers to rectify injustice in circumstances where the ordinary laws of contract, tort, or unjust enrichment cannot. Yet, as will be discussed further, the extensive relief available for a breach of fiduciary duty is but one indication of fiduciary law's important role within the law of civil obligation.

The clubbing of the old man is not the only part of the movie that bears a resemblance to the faulty application of fiduciary principles. The mortician's assertion that Arthur must be a king is not based on the obvious and logical clues that would ground such a conclusion – the crown, the flowing robe, or the genuflecting peasants. Instead, the assertion is based upon the rather peripheral lack of feces covering his body. However, while it is logical to conclude that a king would not usually be covered in feces, there are many others who would also not be that filthy, even in the Dark Ages. Thus, the lack of feces covering one's body is not, by itself, indicative that a person is a king.

In cases like *Chase Manhattan*, which are premised upon using fiduciary law to validate a particular result, judges also tend to rely on peripheral matters – such as the inherent inequality between the parties⁴⁹ or the presence of vulnerability⁵⁰ – to justify their findings of fictitious fiduciary relationships, rather than looking to whether the relationship in question truly warrants

⁴⁸ While not all legends of the Holy Grail endow it with healing qualities, it is generally regarded as a mysterious and sacred object, as seen particularly in Christian tradition and in Arthurian romances. See ROGER S. LOOMIS, *THE GRAIL: FROM CELTIC MYTH TO CHRISTIAN SYMBOL* 3 (Princeton Univ. Press 1991) (1963) (stating that principal texts about the Grail fall into two main categories, which are those relating King Arthur's adventures and those describing the vessel's history from the time of Christ to the time of Merlin).

⁴⁹ See *Follis v. Albemarle Tr.*, [1941] 1 D.L.R. 178, 181-82 (Can. Ont. C.A.) (relying on the inherent inequality of the parties' positions).

⁵⁰ See *Ubacol Invs. Ltd. v. Royal Bank of Can.* (1995), 171 A.R. 122 (Can. Alta. Q.B.), for an example of such a focus on the vulnerability inherent in a fiduciary relationship:

If you try, it is possible to find in almost any relationship between two individuals, a time or a circumstance when one party has the ability to exercise some discretion that could significantly affect the other party and over which the party has no say and is particularly vulnerable. Taking the most mundane, a person who wants to eat in a restaurant enters into a relationship with that restaurant. How the food is cooked is a matter of discretion for the restaurant, including whether on any particular occasion, the cook follows safe procedures. If the customer becomes ill from the food for failure to follow safe cooking procedures, it may be that there is a case in negligence, but surely, there is no fiduciary relationship.

Id. at 126.

fiduciary characterization.⁵¹ Yet, there are many relationships in which parties are unequal or one person becomes vulnerable to another's actions, which do not sufficiently evidence the fiduciary character of an interaction. An example covering both of these situations is the relationship between pedestrians and the operators of motor vehicles. Pedestrians and motorists have unequal power, as the latter are in control of heavy and powerful machinery that can cause serious bodily harm or death. Further, pedestrians become rather vulnerable to motorists once they step off the sidewalk. The law recognizes this inequality by providing a right of way to pedestrians lawfully crossing streets. This does not create a fiduciary relationship, however, but imposes legal weight to enforce a socially valuable norm and prescribes penalties for non-conformity.

The simple inequality of parties is not, therefore, determinative of the existence of a fiduciary relationship.⁵² Similarly, while vulnerability is an important factor in fiduciary interactions, its presence, on its own, is not conclusive of the fiduciary character of an interaction.⁵³ Something more is required. As Paul Finn has aptly stated:

It is obviously not enough that one is in an ascendant position over another: such is the invariable prerequisite for the unconscionability principle. It is obviously not enough that one has the practical capacity to influence the other: representations are made, information is supplied (or not supplied) as of course with the object of, and in fact, influencing a host of contractual dealings. It is obviously not enough that the other

⁵¹ See SMITH, *supra* note 31, at pt. 3 (discussing the concept of tracing).

⁵² While fiduciary relationships create an inequality of the beneficiary vis-à-vis the fiduciary within the confines of that relationship, there is no need for any pre-existing or inherent inequality between the parties for a fiduciary relationship to exist. See *Hosp. Prods. Ltd. v U.S. Surgical Corp.* (1984) 55 ALR. 417, 433 (Austl.) (Gibbs, C.J.) (stating that a relation of confidence is neither necessary nor conclusive of a fiduciary relationship); *Lac Minerals Ltd. v. Int'l Corona Res. Ltd.*, [1989] 2 S.C.R. 574 (Can.) (La Forest, J.); Frankel, *supra* note 6, at 810 ("[T]he entrustor's vulnerability to abuse of power does not result from an initial inequality of bargaining power between the entrustor and the fiduciary. . . . Rather, the entrustor's vulnerability stems from the *structure* and *nature* of the fiduciary relation."). Further, as Frankel explains in Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209, 1216 (1995), "[e]ven entrustors who are in a strong bargaining position before they enter the relationship become vulnerable immediately after they entrust power or property to their fiduciaries." *Id.*

⁵³ Vulnerability cannot be the *sine qua non* of fiduciary obligation because there are other forms of interaction which are not generally understood to be fiduciary, but in which one party is significantly vulnerable to another. See, e.g., *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 405 (Can.) ("[T]he concept of vulnerability is not the hallmark of fiduciary relationship though it is an important *indicium* of its existence. Vulnerability is common to many relationships in which the law will intervene to protect one of the parties. It is, in fact, the 'golden thread' that unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation.").

party is in a position of vulnerability: such is the almost inevitable state in greater or lesser degree of all parties in contractual relationships. It is obviously not enough that some degree of trust and confidence are there: these are commonly placed in the skill, integrity, fairness and honesty of the other party in contractual dealings. It is obviously not enough that there is a dependence by one party upon the other: as the good faith cases illustrate, a party's information needs can occasion this. Indeed elements of all of the above may be present in a dealing – and consumer transactions can illustrate this – without a relationship being in any way fiduciary.⁵⁴

If inequality and vulnerability, individually or collectively, cannot establish a fiduciary relationship without something more, what does give rise to such a characterization? This is where the “holy grail” of fiduciary law steps in.

Fiduciary law's “holy grail” refers to the knowledge of what separates fiduciary law from the other areas of civil obligation existing within the laws of contract, tort, and unjust enrichment. Fiduciary law may be said to occupy a distinct “space” from contract, tort, and unjust enrichment that allows it to mete out justice in a distinct manner from the latter. Indeed, fiduciary law is premised upon broad-based notions of justice and morality that extend well beyond any comparables associated with the ordinary laws of civil obligation.⁵⁵ Moreover, fiduciary law, as a fundamental precept of equity, stresses modes of behavior to which those holding power over the interests of others should aspire. These foundational fiduciary values differ significantly from those underlying contract, tort, and unjust enrichment, which “although substantively attentive to fairness, are not associated with any similar emblematic reference to what is just.”⁵⁶

Fiduciary law plays an important role in ensuring the continued efficacy of social and economic interdependency by preventing those who hold power in fiduciary interactions from abusing the trust and confidence reposed in them. Trust is central to the security of these interdependent relations. While there

⁵⁴ Finn, *supra* note 12, at 46 (citation omitted) (stating that several conditions indicating unequal positions of two parties may be present without constituting a fiduciary relationship).

⁵⁵ See Frankel, *supra* note 6, at 829-30 (“Courts regulate fiduciaries by imposing a high standard of morality upon them. This moral theme is an important part of fiduciary law.”); see also John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1658 (1989) (“[F]iduciary law is deeply intertwined with notions of morality and the desire to preserve a traditional form of relationship.”).

⁵⁶ See Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U. L. REV. 1443, 1448 (2004) (citing Warren A. Seavey & Austin W. Scott, *Restitution*, 54 L.Q. REV. 29, 29-32 (1938)) (indicating that while contract and tort focus on “wrong and harm,” restitution is premised upon the goal of achieving justice, and while the fiduciary concept is also predicated upon achieving justice, the forms of justice sought differs rather significantly from those pursued by restitution).

are obvious benefits associated with trusting in the knowledge and skill of others, significant risks exist as well. Where these risks outweigh the benefits, interdependency is shunned in favor of more individualized pursuits. Eliminating the benefits gained by leveraging the knowledge and skill of others generates tremendous opportunity costs and fosters inefficiency. However, in providing those who place their trust in others with sufficient assurances that their reliance will be protected from abuse, fiduciary law allows beneficiaries to benefit from the knowledge and skill of others while dispensing with the need to monitor those others' activities.⁵⁷

But fiduciary law does not protect just any relationship between individuals. Fiduciary law protects only those important social and economic interactions of *high* trust and confidence that create an *implicit* dependency and *peculiar* vulnerability of the beneficiary to the fiduciary.⁵⁸ While placing ordinary trust and confidence in others may create contractual or tortious obligations, only high trust and confidence reposed within the context of the types of important social and economic relations contemplated above will give rise to fiduciary obligations. Fiduciary interactions rank among the most valuable in society by enhancing productivity and knowledge, facilitating specialization, and creating fiscal and informational wealth. To protect these vulnerable interactions, fiduciary law subordinates individual interests to its broader social and economic goals. Relationships, not individuals, are the prime concern of fiduciary law.⁵⁹ This differs significantly from contract law, which expects

⁵⁷ See *Bennett v. Newark Milk & Cream Co.*, 156 A. 4, 6 (N.J. Ch. 1931) (stating a claim of misrepresentation of the price of company shares), *aff'd*, 162 A. 580 (N.J. 1932); *Carl B. Potter Ltd. v. Mercantile Bank of Can.*, [1980] 2 S.C.R. 343, 343 (Can.) (discussing whether a banker may be made into a constructive trustee for his customer's account); *Dir. of the Shropshire Union Rys. & Canal Co. v. The Queen*, [1875] 7 L.R.E. & I. App. 496, 507-08 (Lord Cairns L.C.) (appeal taken from Exch. Chamber) (Eng.) (describing the obligations of an equitable owner to trustees on such owner's land); *id.* at 515 (Lord O'Hagan) (arguing that Courts have a duty to force misrepresenting parties to be responsible for their actions); *Nationwide Bldg. Soc'y v. Balmer Radmore*, [1999] P.N.L.R. 241 (Ch.) 281-82 (Eng.); *Re Vernon, Ewens & Co.*, (1886) 33 Ch.D. 402 at 410 (Eng.); J. Derek Davies, *Equitable Compensation: Causation, Foreseeability and Remoteness*, in *EQUITY, FIDUCIARIES AND TRUSTS* 317 (D.W.M. Waters, ed., 1993); Frankel, *supra* note 6, at 824 (discussing ways that courts uncover and discourage fiduciary abuse of power); David Hayton, *Fiduciaries in Context: An Overview*, in *PRIVACY AND LOYALTY* 284 (Peter Birks ed., 1997); Leonard I. Rotman, *Deconstructing the Constructive Trust*, 37 *ALTA. L. REV.* 133, 143 n.56 (1999) (arguing that fiduciary law is concerned only with restoring fiduciaries to the position prior to when a wrong occurred).

⁵⁸ See generally ROTMAN, *supra* note 5, at ch. 5 (discussing the specific types of relationships that fiduciary law protects).

⁵⁹ See Paul D. Finn, *Contract and the Fiduciary Principle*, 12 *U.N.S.W. L.J.* 76, 84 (1989) ("The true nature of the fiduciary principle . . . originates, self-evidently, in public policy. To maintain the integrity and utility of relationships in which the (or a) role of one party is perceived to be the service of the interests of the other, it insists upon a fine loyalty in that service."); Peter D. Maddaugh, *Definition of Fiduciary Duty*, in *LAW SOCIETY OF*

and encourages self-interest, or tort and unjust enrichment, which are primarily concerned with facilitating individual justice between parties.

The fiduciary character of a relationship, then, is determined by looking at both the degree of dependence and vulnerability that exists within it, and the value of the interaction to society at large. Thus, the goals of fiduciary law and the methodology of identifying fiduciary interactions differ significantly from the goals and identification of more traditional bases of civil obligation. Viewed narrowly, fiduciary law's strict adherence to beneficiaries' interests counteracts the susceptibility of dependent relations to abuses of the trust that is endemic to them. More expansively, fiduciary law subordinates individual interests emphasized by contract, tort, and unjust enrichment to broader social and economic goals that are consistent with the construction and preservation of social and economic interdependency. As will be discussed below, this distinction in focus is premised upon the different emphasis held by equity versus that of the common law.

A. *Contextualizing Fiduciary Law*

Much like the actions of the mortician and the large man in *Monty Python and the Holy Grail*, the application of fiduciary law in existing jurisprudence has often appeared strange and nonsensical.⁶⁰ However, unlike the movie, which is intended to be funny, the results-oriented use of fiduciary law, and its justification by peripheral references, is a rather serious matter.⁶¹ For fiduciary

UPPER CANADA SPECIAL LECTURES 1990: FIDUCIARY DUTIES 15, 26-27 (1991) ("Thus, by gaining clarity as to the essential purpose underlying the fiduciary concept – namely, to maintain the integrity of trust and trust-like relationships – we are able to identify with some precision the particular duty that is owed by one who occupies a fiduciary position . . ."); Julie K. Maxton, *Contract and Fiduciary Obligation*, 11 J. CONT. L. 221, 225 (1997) ("[F]iduciary law aims to maintain the integrity and utility of relationships in which the (or a) role of one party is perceived to be the service of the interests of the other."); Leonard I. Rotman, *Fiduciary Doctrine: A Concept in Need of Understanding*, 34 ALTA. L. REV. 821, 826 (1996) ("The policy underlying the law of fiduciaries is focused upon a desire to preserve and protect the integrity of socially valuable or necessary relationships which arise from human interdependency."); see also 2475813 Nova Scotia Ltd. v. Rodgers, [2001] 189 N.S.R. 2d 363, ¶ 58 (Can. C.A.) ("In considering whether a fiduciary relationship exists, the fundamental purpose of this equitable concept must be kept in mind. These purposes, which have been expressed in both scholarly and judicial writing, are to protect and foster the integrity of important social relationships and institutions where one party is given power to affect the important interests of another.").

⁶⁰ See *MONTY PYTHON AND THE HOLY GRAIL*, *supra* note 7.

⁶¹ Finn, *supra* note 12, at 24-25 ("A compliant judiciary, particularly in some North American jurisdictions, has been prepared on occasion to use the fiduciary principle to provide desired solutions in situations where the law is otherwise deficient or is perceived to be so."); see also *Chase Manhattan Bank v. Israel-British Bank*, [1981] Ch. 105 at 118 (Eng.) (determining that to allow Chase Manhattan to recover the mistakenly forwarded funds, the banks in question had to be in a fiduciary relationship to provide the basis for an equitable tracing order).

law to be better understood, and more appropriately applied, it must be placed within a proper context within the law of civil obligations. Past attempts to define the fiduciary concept have sought to provide greater clarity, but have largely ignored fundamental characteristics of fiduciary law that make it quite resistant to precise definition. To achieve a fuller understanding of how fiduciary law operates, it is necessary to have regard for the "holy grail" of fiduciary obligation and how it functions within the law of civil obligations.

Fiduciary law facilitates situationally-appropriate justice in ways that the ordinary laws of civil obligation cannot. The universality of the common law of contract, tort, and unjust enrichment often prevents the common law from adequately responding to the unique requirements of individual circumstances. As a means of enforcing civil obligations in circumstances where the laws of contract, tort, or unjust enrichment are unable to do so, fiduciary law is potentially applicable to an infinite variety of actors involved in an indefinite number of circumstances. For this reason, fiduciary principles "can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case."⁶²

While the protean character of fiduciary law facilitates its potential application to numerous individuals or circumstances, fiduciary law was never intended to apply to the garden variety of cases.⁶³ Fiduciary law supplements the laws of contract, tort, and unjust enrichment by filling in their gaps where they are either silent or deficient and enforcing both the spirit and intent of law, not merely its letter. As indicated above, though, fiduciary law applies only to discrete relationships and circumstances of dependency and vulnerability, rather than to any interaction in which fiduciary principles may provide a particular result.⁶⁴

Further, fiduciary law may be distinguished from the other elements of civil obligation in that it prescribes other-regarding behavior that looks beyond the limitations and immediacy of self-interest that govern the law of contract.⁶⁵ It requires fiduciaries to abnegate all self-interest or the interests of third parties that may conflict with their beneficiaries' interests. Consequently, fiduciary law may be said to be far broader in its reach than the laws of contract, tort, or unjust enrichment.⁶⁶ In short, fiduciary law is designed to supplement the

⁶² Boardman v. Phipps, [1967] 2 A.C. 46 (H.L.) 123.

⁶³ See Dudley v. Dudley, (1705) 24 Eng. Rep. 118 (Ch.) 119 (stating that fiduciary law is meant neither to destroy nor create law, but rather supplement the law).

⁶⁴ See *supra* text accompanying note 46 (asserting that fiduciary relations properly arise only where discretion conferred to the fiduciary places the beneficiary in economic vulnerability).

⁶⁵ See, e.g., Sidney E. Smith, *The Stage of Equity*, 11 CAN. B. REV. 308, 312 (1933) (explaining how a court of equity looks further than formal common law duties between parties to additional circumstances that might amount to a breach of faith in equity).

⁶⁶ See *id.* (illustrating that fiduciary law reaches beyond contract law where a person who holds legal title to a parcel of land cannot enjoy the use of that parcel if he is holding it in trust for a beneficiary).

common law of civil obligation where it is deficient or where its lack of flexibility may result in the denial of justice.⁶⁷

B. *Defining Fiduciary Law*

It is rather simple to describe a person, relationship, or obligation as fiduciary. Infusing that description with substance is a far more difficult task. Justice Frankfurter recognized this difficulty in *Securities & Exchange Commission v. Chenery Corp.*⁶⁸ when he wrote:

[T]o say that a man is a fiduciary only begins the analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?⁶⁹

Understanding fiduciary law thus requires not only knowing what that law *is*, but also what it *is for*.⁷⁰

⁶⁷ See *Re Vandervell's Trusts (No. 2)*, [1972] Ch. 269, 322 (C.A.); see also Smith, *supra* note 65, at 312. As explained in *Dudley*:

Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtilities [*sic*], invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it.

Dudley, [1705] 24 Eng. Rep. at 119; see also *Cowper v. Earl Cowper*, [1734] 24 Eng. Rep. 930 (Ch.) 941 (finding that where the law is clear courts of equity, though afforded discretion, should follow it for otherwise "great uncertainty and confusion would ensue"). Many of the most significant discussions of the relationship between the common law and Equity adhere to this same conceptual separation. See GEORGE W. KEETON, AN INTRODUCTION TO EQUITY 22 (G. W. Keeton ed., 6th ed. 1965) ("The builders of the common law *created*; the builders of equity *supplemented*."); FREDERICK W. MAITLAND, EQUITY: A COURSE OF LECTURES 153 (John Brunyate ed., 6th ed. 1965) ("[W]e ought to think of the relation between common law and equity not as that between two conflicting systems, but as that between code and supplement, that between text and gloss."); EDMUND H.T. SNELL, THE PRINCIPLES OF EQUITY 21 (A. Brown ed., 11th ed. 1894) ("The common law . . . represented our first great effort to state the principles of social obligation in terms of enforceable rules. Afterwards equity developed to fill in the outline, and to supply the omissions."); 1 SELDEN SOCIETY, *Introduction*, in CASES CONCERNING EQUITY AND THE COURTS OF EQUITY 1550-1660 (W.H. Bryson ed., 2001) ("Equity does not compete with the common law but tunes it more finely.").

⁶⁸ 318 U.S. 80, 85-86 (1943).

⁶⁹ *SEC v. Chenery Corp.*, 318 U.S. 80, 85-86 (1943).

⁷⁰ Chief Justice Bora Laskin of the Supreme Court of Canada states that the distinction between what the law is and what it is for "is between a purely formal, mechanical view of the law, antiseptic and detached, and a view of the law that sees it as purposive, related to

In far too many situations, courts have proceeded to determine whether a particular relationship is fiduciary without providing much, if any, indication of the criteria they have used in making their determinations. Madam Justice Huddart explicitly references this approach in her judgment in *Lefebvre v. Gardiner*,⁷¹ where she states, “[a] review of the substantial jurisprudence to which counsel referred me suggests that the court will recognize a fiduciary relationship when it sees one although it may not be able to say why and it may not even call it that.”⁷² This “I know one when I see one” approach recalls Justice Stewart’s dictum in *Jacobellis v. Ohio*,⁷³ where Stewart declined to provide a definition of obscenity in relation to charges laid under Ohio obscenity laws, yet proceeded to determine whether the film in question was, indeed, obscene.⁷⁴

Gillease has characterized the problem of defining fiduciary law in a comparable fashion, stating that “although we could not define ‘the beast,’ we could recognize one when we saw it so lack of a definition was not a problem.”⁷⁵ However, as Oliver Wendell Holmes has suggested, merely recognizing the fiduciary “beast” is, as was said by Justice Frankfurter in *Chenery Corp.*,⁷⁶ insufficient:

When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his

our social and economic conditions, and serving ends that express the character of our organized society.” Bora Laskin, *The Function of the Law*, 11 ALTA. L. REV. 118, 119 (1973).

⁷¹ (1988), 27 B.C.L.R. 2d 294, 299 (Can. B.C.C.A.).

⁷² *Id.*

⁷³ 378 U.S. 184 (1964).

⁷⁴ See *id.* at 197 (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”). The “I know one when I see one” approach has even been used in the title of a student note on fiduciary law. See G.B. Westfall, Note, “*But I Know It When I See It*”: A Practical Framework for Analysis and Argument of Informal Fiduciary Relationships, 23 TEX. TECH L. REV. 835 (1992). For an interesting discussion of the “I know it when I see it” dictum in the *Jacobellis* case and as an element of judicial decision-making generally, see Paul Gewirtz, *On “I Know It When I See It”*, 105 YALE L.J. 1023 (1996) (asserting that the hostile criticism of Justice Stewart’s “I know it when I see it” approach both “wrongly characterizes what Stewart was doing in *Jacobellis*” and “understates the role that emotion and nonrational elements properly play in forming judicial judgments and in presenting those judgments in judicial opinions”).

⁷⁵ Eileen E. Gillease, *Fiduciary Relations and Their Impact on Business and Commerce*, in TRUSTS AND FIDUCIARY RELATIONS IN COMMERCIAL TRANSACTIONS 2, 7 (Insight Press 1988).

⁷⁶ 318 U.S. 80, 85-86 (1943).

strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.⁷⁷

Law's desire for certainty and tendency towards taxonomy has led to various attempts to "tame" the fiduciary concept by providing it with an absolute definition. One early, lamentable attempt may be observed in *In re West of England & South Wales District Bank, ex parte Dale & Co.*,⁷⁸ where Justice Fry stated, in response to his question "what is a fiduciary relationship?," that "[i]t is one in respect of which if a wrong arise, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*."⁷⁹

Justice Fry's response is, in fact, not truly a definition at all, since it identifies a fiduciary relationship solely by reference to the relief available for its breach and the similarity of that remedy to that available to the beneficiary of a trust. It makes no reference to the nature of the relationship between the parties or why it ought to be described as fiduciary. Nor, for that matter, does it explain why some relationships are fiduciary while others are not. As Ernest Weinrib has commented, "[t]his definition in terms of the effect produced by the finding of a fiduciary relation begs the question in an obvious way: one cannot both define the relation by the remedy and use the relation as a triggering device for remedy."⁸⁰ The most telling deficiency of Justice Fry's attempt to define fiduciary relationships is that, as Sealy notes, "[the definition] is really not a definition at all: although it describes a common feature, it does not teach us to recognise a fiduciary relationship when we meet one."⁸¹

Another prominent attempt to define fiduciary relations may be seen in *McCord v. Roberts*,⁸² where it was said:

A fiduciary relationship extends to every possible case in which there is confidence reposed on one side and resulting superiority on the other. The relation and the duties involved are not necessarily legal. They may be moral, social, domestic, or merely personal. If the confidence in fact exists and is reposed by one party and accepted by the other, the relation is fiduciary, and equity will regard dealings between the parties according to the rules which apply to such relation.⁸³

That case drew upon comments made in *Higgins v. Chicago Title & Trust Co.*,⁸⁴ where the court said that "[a] fiduciary relation . . . exists in all cases in which influence has been acquired and abused, in which confidence has been

⁷⁷ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

⁷⁸ (1879) 11 L.R. Ch.D. 772.

⁷⁹ *Id.* at 778.

⁸⁰ Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 5 (1975).

⁸¹ Sealy, *supra* note 13, at 72-73.

⁸² 165 N.E. 624, 626 (Ill. 1929).

⁸³ *Id.*

⁸⁴ 143 N.E. 482, 484 (Ill. 1924).

reposed and betrayed. The origin of the confidence . . . may be moral, social, domestic, or merely personal.”⁸⁵ Meanwhile, in *Warren v. Pfeil*,⁸⁶ the Illinois Supreme Court, citing both *McCord* and *Higgins*, offered the following definition of a fiduciary relationship:

A fiduciary relationship is not limited to cases of trustee and cestui que trust, guardian and ward, attorney and client, and other recognized legal relationships, but extends to every possible case in which there is confidence reposed on one side and a resulting superiority and domination on the other. The origin of the confidence may be moral, social, domestic, or merely personal. If the confidence in fact exists and is reposed by one party and accepted by the other, the relation is fiduciary, and equity will regard dealings between the parties according to the rules which apply to such relation.⁸⁷

These attempts at definition look more to the characteristics of fiduciary interactions and the obligations owed by fiduciaries to their beneficiaries than what was seen in *In re West of England*.⁸⁸

In *Pepper v. Litton*,⁸⁹ however, a case concerning the fiduciary duties of the dominant/controlling stockholder of an alleged “one man” corporation, the United States Supreme Court took a somewhat different approach to fiduciary definition in stating:

He who is in such a fiduciary position cannot serve himself first and his cestuis second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. He cannot by the use of the corporate device avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the

⁸⁵ *Id.*

⁸⁶ 178 N.E. 894 (Ill. 1931).

⁸⁷ *Id.* at 900 (citing *McCord* 165 N.E. at 624 and *Higgins*, 143 N.E. at 482).

⁸⁸ Compare *Warren*, 178 N.E. at 900 (finding that the scope of fiduciary duty is not limited to purely legal obligations, but rather extends to “moral, social, domestic, or [] personal” obligations), and *McCord*, 165 N.E. at 626 (describing the relations and duties of a fiduciary as encompassing not only legal obligations, but also moral and personal obligations), with *In re West of England & South Wales District Bank*, (1879) 11 L.R. Ch.D. 772, 778 (defining a fiduciary relationship by the remedies available for the breach of the relationship rather than describing the factors that give rise to a fiduciary relationship).

⁸⁹ 308 U.S. 295 (1939).

equitable limitation that it may not be exercised for the aggrandisement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation.⁹⁰

This case, unlike those illustrated above, focuses more on the implications of a finding of fiduciary obligation than on the characteristics of fiduciary relationships. That may be a result of the focus on the duties owed by the respondent, Litton, as dominant/controlling shareholder of the bankrupt corporation in question.

More recent attempts to define fiduciary relations have tended to describe characteristics of fiduciary relationships rather than indicating why a relationship ought to be characterized as fiduciary or detailing the implications of such a finding; one such example is *DHL International (NZ) Ltd. v Richmond Ltd.*,⁹¹ where Justice Richardson states:

The fiduciary duty arises where one party to the relationship (A) is reasonably entitled to expect of the other (B) that B will act in the interests of A, not in the interests of B or a third party and not merely having regard to A's interests. Under the fiduciary standard the fiduciary must act solely and selflessly in the interests of the beneficiary.⁹²

Somewhat more helpful is Justice Wilson's "rough and ready guide" from the Supreme Court of Canada's decision in *Frame v. Smith*.⁹³ This guide, which has been cited approvingly by numerous Canadian courts ever since, describes fiduciary relations in the following manner:

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

The fiduciary has scope for the exercise of some discretion or power.

The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.⁹⁴

As with the attempt at definition in the *DHL International* case, however, Justice Wilson's guide is merely a grouping of common characteristics of fiduciary interactions, even if it does identify the most common or identifiable ones.

It may be seen, from these attempts, that defining fiduciary law or fiduciary relations is a difficult task. In *Tate v. Williamson*,⁹⁵ the English Court of Appeal recognized this truth when it stated:

⁹⁰ *Id.* at 311.

⁹¹ (1993) 3 NZLR 10 (CA).

⁹² *Id.* at 23.

⁹³ [1987] 2 S.C.R. 99 (Can.).

⁹⁴ *Id.* at 99.

The jurisdiction exercised by Courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise.⁹⁶

More recently, Deborah DeMott has explained that “[t]he evolution of fiduciary obligation . . . owed much to the situation-specificity and flexibility that were Equity’s hallmarks. . . . [A]s Equity developed to correct and supplement the common law, the interstitial nature of Equity’s doctrines and functions made these doctrines and functions resistant to precise definition.”⁹⁷

To facilitate a definition of fiduciary law, some have attempted to understand fiduciary principles by analogy to contract law.⁹⁸ Others have suggested that the principles of fiduciary obligation are ordinary rules of contract law with no special status or operation.⁹⁹ These attempts at definition suffer from a common, but fatal flaw; equitable constructs like fiduciary law arose specifically in response to the overly rigid application of the common law, including the law of contract.¹⁰⁰ Consequently, to try to understand fiduciary law by analogy to common law constructs when it was created in response to the common law’s inadequacies is illogical. Nonetheless, some commentators have steadfastly maintained the need “to pin down fiduciary obligations with the precision demanded by the rule of law.”¹⁰¹

Rather than defining fiduciary law by the more rigid and rule-oriented scheme of contract law or other common law schemes giving rise to civil obligation, fiduciary law ought to be understood by reference to the broad postulates that underlie it and give it meaning. Fiduciary law exists to protect important social and economic interactions of high trust and confidence that create an implicit dependency and peculiar vulnerability of the beneficiary to

⁹⁵ [1866] 2 Ch.App. 55 (Eng.).

⁹⁶ *Id.* at 60-61.

⁹⁷ DeMott, *supra* note 4, at 881-82.

⁹⁸ Most prominently, Austin W. Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539 (1949) (detailing the distinctions between the metes and bounds of contractual as opposed to fiduciary duties).

⁹⁹ Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J. L. & ECON. 425, 427 (1993) (suggesting that fiduciary law is simply a species of contract law, albeit one with uncommonly high costs of specification and monitoring and that “[t]he duty of loyalty replaces detailed contract terms, and courts flesh out the duty of loyalty by prescribing the actions the parties themselves would have preferred if bargaining were cheap and all promises fully enforced”).

¹⁰⁰ See ROTMAN, *supra* note 5, at 192-216; see also D.M. KERLY, AN HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY (1890) (discussing the history and development of the English Court of Chancery).

¹⁰¹ Birks, *supra* note 12, at 5.

the fiduciary.¹⁰² Fiduciary law accomplishes this task by imposing strict duties on fiduciaries, including, as indicated above, requiring fiduciaries to act selflessly and in the best interests of their beneficiaries.¹⁰³ As a result, fiduciaries may not benefit themselves or third parties at the expense of their beneficiaries' interests that are tangibly related to the fiduciary nature of the parties' interaction, as expressed by the fiduciary rules against conflicts.¹⁰⁴

The strictness with which fiduciary law protects beneficiaries' interests is well-illustrated by reference to what is generally regarded as the first substantive case illustrating fiduciary principles, *Keech v. Sandford*.¹⁰⁵ Since that seminal case, fiduciary law has operated on the principle that removing the fruit giving rise to temptation rather than simply placing it on a higher shelf eliminates fiduciaries' abilities to contravene their duties to their beneficiaries.¹⁰⁶

In *Keech*, the lessee of the rights to a market in Romford, a town a dozen miles east of London, died and left those rights in trust for the benefit of an infant. The trustee of the lease sought to renew it in favor of the infant prior to its expiration, but the lessor refused to do so.¹⁰⁷ When the lease expired, the

¹⁰² See Frankel, *supra* note 6, at 804 (stating that the various forms of fiduciary relationships all demand that the fiduciary exercise discretion delegated from the beneficiary in order for the relationship to be worthwhile, while carrying the risk that the fiduciary will abuse that delegation of discretion).

¹⁰³ See, e.g., *Keech v. Sandford*, (1726) 25 Eng. Rep. 223 (Ch.) 223 (U.K.) (requiring that the fiduciary in no way benefit from exploiting the beneficiary).

¹⁰⁴ Including conflicts of interest, conflicts of duty, as well as conflicts of interest and duty.

¹⁰⁵ See *Keech*, 25 Eng. Rep. at 223; *supra* text accompanying notes 1 & 5.

¹⁰⁶ See *Wormley v. Wormley*, 21 U.S. 421, 463 (1823) (“[T]here are canons of the Court of equity which have their foundation, not in the actual commission of fraud, but in that hallowed orison, ‘lead us not into temptation.’”); see also *Guth v. Loft Inc.*, 5 A.2d 503, 510 (Del. Ch. 1939) (finding that the rule of depriving the agent in breach of a fiduciary relationship of any gain that the agent acquires and bestowing the agent’s gain on the principal, rests upon the “wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation”); *Midcon Oil & Gas Co. v. New British Dominion Oil Co.* (1958), 12 D.L.R. 2d 705, 716 (Can. A.R.) (Rand, J., dissenting) (asserting that equity, “by an absolute interdiction . . . puts temptation beyond the reach of the fiduciary by appropriating its fruits”); E.R. Sunderland, *An Inroad upon Fiduciary Integrity*, 4 MICH. L. REV. 349, 349 (1906) (“[T]he temptations to dishonesty are necessarily so great . . . that the law will not even permit the trustee to be placed in a situation which has an intrinsic tendency to encourage unfaithfulness. . . . Public policy demands that the temptation itself be removed so far as possible, in order to throw an additional and needed safeguard about the performance of trust duties. . . . The law looks deeper than the immediate results of the particular case; it looks to the underlying tendencies of the situation and pronounces them dangerous and fraught with evil consequences. Therefore it prohibits the situation itself.”).

¹⁰⁷ 25 Eng. Rep. at 223 (“[The] [l]essor, before expiration of the lease, refuses to renew to the infant.”).

trustee obtained a new lease of the market for himself.¹⁰⁸ An action was then brought on the infant's behalf against the trustee for an assignment of the lease and an accounting of profits obtained by the trustee from the lease.¹⁰⁹

In finding that the trustee held the benefit of the lease for the infant, Lord Chancellor King explained that the trustee's position prohibited him from personally obtaining the benefit of the lease, notwithstanding the lessor's refusal to renew it for the infant:

This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que use*.¹¹⁰

The decision in *Keech* is not premised upon the demonstration of fraud, or even wrongful action on the part of the trustee, but on the mere potential for such activity.¹¹¹ As the Lord Chancellor indicated:

[I]f a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to *cestui que use*; though I do not say there is a fraud in this case, yet he [the trustee] should rather have let it run out, than to have had the lease to himself.¹¹²

The prohibition against even the semblance of impropriety in *Keech* tells us much about the fundamental premise that Lord Chancellor King sought to establish as the basis for fiduciary law: that in relationships of high trust and confidence where one person possesses significant power over the interests of another that carries with it the potential for abuse, the courts will jealously guard those interests and impose harsh sanctions for any deviation from them.¹¹³

The rationale behind the strict rule enunciated in *Keech v. Sandford* is that the potential for fiduciaries' self-interested or opportunistic behavior at the direct expense of their beneficiaries is so great that it must be prohibited.¹¹⁴ As Lord Justice Russell explained much later in *Phipps v. Boardman*,¹¹⁵ the

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* ("Bill is now brought to have the lease assigned to him, and to account for the net profits [that the trustee enjoyed in refusing to renew the infant's lease].")

¹¹⁰ *Id.*

¹¹¹ *See id.* (finding that while fraud may not be present in the case, the negative consequences of relaxing the rule in any way are "obvious").

¹¹² *Id.*

¹¹³ *Id.* ("[T]he rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que use*.")

¹¹⁴ *See id.*

¹¹⁵ [1965] Ch. 992 (C.A.) (U.K.), *aff'd*, [1967] 2 A.C. 46 (H.L.).

rigidity of the no-conflict rule is necessary “if cases deserving of no sympathy are not to escape.”¹¹⁶

Relying upon broad postulates, as was done in *Keech*, rather than more specific rules or tests, establishes general, overarching principles that apply to all incidents of fiduciary interaction.¹¹⁷ These overarching principles are then applied to the specific facts of individual fiduciary relations, a practice not unique to fiduciary law.¹¹⁸ Tort law uses similarly broad strokes in the area of negligence, which is premised upon the overarching principle that one must not injure one’s neighbor.¹¹⁹ Indeed, the basis upon which Lord Atkin formulated the “neighbor” principle in *Donoghue v. Stevenson*¹²⁰ reveals that the foundation of negligence law is premised on broad criteria rather than specific *indicia*:

The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer’s question ‘Who is my neighbour?’ receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.¹²¹

At no point, however, does Lord Atkin provide a list of “neighbors” in his judgment.

Rather than generating a definitive list of neighbors, Lord Atkin provides criteria for determining who may fit properly within that designation.¹²² By articulating negligence in light of the broad notion that liability ought to be imposed upon persons whose actions might foreseeably cause harm to others likely to be harmed therefrom, Lord Atkin established an overarching principle

¹¹⁶ *Id.* at 1032; *see also Re Biss*, [1903] 2 Ch. 40, 47 (C.A.) (“[I]f a trustee of a term surrender and take a further term, that shall be for the benefit of the cestuis que trust.”).

¹¹⁷ *See Phipps*, [1965] Ch. 992 at 1032 (determining the proper rule for fiduciary liability not by looking to the fairness of that rule applied to the case at hand but rather to the aggregate of cases).

¹¹⁸ For a discussion regarding the development of tort, contract, and the law of restitution in light of over-arching principles, *see Seavey & Scott, supra* note 56, at 31-32.

¹¹⁹ *See* Richard Castle, *Lord Atkin and the Neighbour Test: Origins of the Principles of Negligence in Donoghue v. Stevenson*, 7 *ECC. L.J.* 210, 214 (2008) (attributing the principle of not injuring one’s neighbor as the foundation of negligence law to Lord Atkin).

¹²⁰ [1932] A.C. 562 (H.L.).

¹²¹ *Id.* at 580.

¹²² *See id.* (defining a “neighbour” as those “persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”).

to provide structure and coherence to the law of negligence.¹²³ While the vagueness of the standard initially caused frustration and confusion, this abated over time as subsequent applications and academic examinations furnished the details omitted from Lord Atkin's broad conceptualization. However, the reasonable person's sustained centrality to the law of negligence exists precisely because of the concept's generality and conceptual abstraction, not in spite of it.¹²⁴

As with the establishment of the reasonable person in the law of negligence, future applications and examinations of fiduciary law's broad principles have furnished the particulars omitted from the initial articulation of fiduciary law's fundamental purpose in *Keech v. Sandford*.¹²⁵ The detail garnered from these subsequent treatments has enhanced the understanding of what fiduciary law is and what it is for, satisfying both the mechanical and purposive views of law articulated above by Chief Justice Laskin.¹²⁶ Removing the uncertainty from fiduciary law therefore does not require the creation of rigid or absolute rules to govern the use of fiduciary principles.

II. CERTAINTY AND FIDUCIARY OBLIGATION

The law likes certainty. Certainty facilitates the ability to ascertain acceptable legal conduct and the standards by which it is measured. However, certainty, by definition, cannot be absolute.¹²⁷ Indeed, law, as a human construct, can be no more perfect or complete than its architects. Yet, efforts to achieve legal certainty may also have negative effects. Too much emphasis on achieving certainty can sterilize rather than invigorate legal concepts by sacrificing necessary flexibility in favor of more rigidly applied doctrine. Therefore, while achieving greater certainty in law is generally thought to be desirable, too great of an emphasis on its attainment creates a *reductio ad absurdum*.

Curiously, one of the greatest barriers to advancing legal certainty is the illusion of its achievement. Where one is under the (false) impression that certainty has been attained, the perceived need to continue one's process of

¹²³ See *id.* (finding that one must "take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour").

¹²⁴ See JOHN G. FLEMING, *THE LAW OF TORTS* 118 (9th ed. 1998) ("[T]he judge is obliged, in formulating his instruction to the jury, to convert the problem of conduct into an abstraction sufficiently intelligible to guide them on the legal considerations which they ought to apply in assessing the quality of the defendant's conduct.")

¹²⁵ (1726) 25 Eng. Rep. 223 (Ch.) 223 (U.K.).

¹²⁶ See Laskin, *supra* note 70, at 119 (stating that fully understanding fiduciary law requires an understanding not only of the mechanics of fiduciary law, but also the policy goals those mechanics achieve and from there tailoring the mechanics further to better achieve the policy goals).

¹²⁷ See JOHN STUART MILL, *ON LIBERTY* 11 (1865) ("There is no such thing as absolute certainty, but there is assurance sufficient for the purposes of human life.").

inquiry is reduced or abandoned. Familiarity with fiduciary jurisprudence and commentary suggests that the more often the word “fiduciary” is used to characterize people or relationships, the perceived need to define the term or infuse it with meaning is reduced. This frequency of use creates familiarity which can be subconsciously conflated with actual knowledge or understanding. The result is the simple, but unexplained use of the word “fiduciary” as imprecise shorthand for more substantive meaning. Justice Holmes captured the effect of this phenomenon in *Hyde v. United States*¹²⁸ when he stated that “[i]t is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.”¹²⁹

The effectiveness and efficiency of law are premised upon competing notions: (1) that the law must provide a readily ascertainable basis for its standards of behavior, and (2) that the law must retain sufficient flexibility to respond to new and unique circumstances to remain just. Too much certainty leaves little room for discretion and the situationally-appropriate application of law. But discretion, while necessary, possesses a limited mandate and must be exercised judiciously. To maintain its authority, law must balance its desire for certainty with an appropriate measure of discretion.

Law’s need to balance certainty with discretion is illustrated by the coexistence in many legal systems of positive laws of general application and equitable principles designed to mollify the former and fill in their gaps. The authority of law is reinforced by the coexistence of these complementary, yet distinct legal methodologies.

Having equitable principles co-exist alongside positive law is easily discernable in principles distilled in Ancient Greek society relating to the distinction between natural and conventional forms of justice.¹³⁰ Both Plato and Aristotle recognized and articulated these distinctions and the need for a system of law to encompass both forms within it in order to be fully just.¹³¹

Plato examined whether positive legal rules may be appropriately viewed as universal truths in the following dialogue between a stranger and the young Socrates:

Stranger: There can be no doubt that legislation is in a manner the business of a king, and yet the best thing of all is not that the law should rule, but that a man should rule supposing him to have royal power accompanied by wisdom. Do you see why this is?

Young Socrates: Why?

¹²⁸ 225 U.S. 347 (1911).

¹²⁹ *Id.* at 391.

¹³⁰ See 3 PLATO, *Statesman*, in THE DIALOGUES OF PLATO 429, 509 (Benjamin Jowett trans., Oxford Univ. Press 4th ed. 1953) (c. 360 B.C.E.).

¹³¹ See *id.*

Stranger: Because the law cannot comprehend what is noblest and most just for all and therefore cannot enforce what is best. The differences of men and actions, and the endless irregular movements of human things, do not admit of any universal and simple rule. And no art whatsoever can lay down a rule which will last for all time. Do you agree so far?

Young Socrates: I do.

Stranger: But the law, it is plain, is always striving to secure this object; – like an obstinate and ignorant tyrant, who will not allow anything to be done contrary to his appointment, or any question to be asked – not even in sudden changes in circumstances, when something happens to be better than what he commanded for someone.

Young Socrates: Certainly; the law treats us all precisely in the manner which you describe.

Stranger: A perfectly simple principle can never be applied to a state of things which is the reverse of simple.¹³²

Here, Plato explained that positive law requires a supplemental form of equity to smooth over the former's imperfections and to fill in its the gaps, either because of positive law's inability to contemplate all applicable situations or to enable it to account for unique circumstances.

Plato more colorfully explained the working arrangement between positive law and equity in *Laws*, where he positioned laws of general application alongside equitable principles designed to modify the former according to specific needs:

Athenian: Suppose that someone had a mind to paint a figure in the most beautiful manner, in the hope that his work instead of losing would always improve as time went on ok – do you not see that being a mortal, unless he leaves someone to succeed him who will correct the flaws which time may introduce, and be able to add what is left imperfect through the defect of the artist, and who will further brighten up and improve the picture, all his great labour will last but a short time?

Cleinias: True.

Athenian: And is not the aim of the legislator similar? First, he desires that his laws should be written down with all possible exactness; in the second place, as time goes on and he has made an actual trial of his decrees, will he not find omissions? Do you imagine that there ever was a legislator so foolish as not to know that many things are necessarily omitted, which someone coming after him must correct, if the constitution and the order of government is not to deteriorate, but to improve, in the state which he has established?¹³³

¹³² *Id.*

¹³³ 4 PLATO, *Laws*, in THE DIALOGUES OF PLATO, *supra* note 130, at 337.

In these dialogues, Plato demonstrated both how and why positive law and equitable principles merge, and why they must merge, through the use of the ancient Greek notion of *ἐπιείκεια* (“*epieikeia*”).

In *Nichomachean Ethics*, Aristotle furthered the idea that the creation and application of general laws, while necessary, are imperfect. However, he stressed that the application of equitable principles, or *epieikeia*, can ameliorate the injustice created by the universal application of positive law:

Our next subject is equity and the equitable (το ἐπιεικές), and their respective relations to justice and the just. . . . [T]he equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. . . . When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by over-simplicity, to correct the omission – to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice – not better than absolute justice, but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality.¹³⁴

Here, Aristotle, as Plato before him, recognized that the creation and application of general laws, while necessary, is imperfect. While positive laws of general application perform an important function, he noted that their universal application sometimes leads to inequitable results. Thus, in order to mitigate the harsh application of positive law and keep the law just, a proper system of justice must introduce fundamental principles of humanity, as expressed through equity. Otherwise, the law will become unjust and lose its authority.

To avoid the argument that infusing equitable principles into positive law refutes the justness of the latter, Aristotle maintained that supplementing the latter with principles of *epieikeia* must only be done in the spirit of the law itself.¹³⁵ By incorporating the spirit and intent of law, equitable principles gain a fuller meaning but remain within the original contemplation of the legislators.¹³⁶ Early English commentaries on equity express essentially

¹³⁴ ARISTOTLE, NICHOMACHEAN ETHICS, in THE BASIC WORKS OF ARISTOTLE bk. V, ch. X, at 1019-20 (Richard McKeon ed., W.D. Ross trans., 1941) (c. 384 B.C.E).

¹³⁵ *Id.* at 1019.

¹³⁶ Note also the following statement by Aristotle:

It is equitable to excuse the common failings of mankind; to consider, not the law as it stands, down to the letter, but the legislator and his intention; not the action in itself, but the deliberate choice of the agent; not the part, but the whole; and not the momentary disposition of the agent, but his past character as invariably or usually displayed. It is equitable to remember benefits one has received more than injuries, and

similar sentiments to those propounded by Aristotle, often quoting or referring to the *Nichomachean Ethics*.¹³⁷

As seen in the examples above, having a more flexible, ameliorative source of law to supplement the generality and rigidity of the positive common law is neither unique to fiduciary law nor a new legal phenomenon. Every legal system faces the challenge of maintaining an appropriate balance between certainty and fairness. Most achieve this balance through the introduction of a form of equity.¹³⁸ The working arrangement between law and equity establishes fundamental notions of justice that maintain the objectivity of law. At the same time, the arrangement retains sufficient flexibility to avoid inappropriate and excessive rigidity that detracts from the legitimacy of the law. For this reason, Joseph Story has opined that "equity must have a place in every rational system of jurisprudence, if not in name, at least in substance."¹³⁹

To paraphrase Keeton, the distinction between the common law and equity is not just historical but attitudinal.¹⁴⁰ Equity exists alongside the common

benefits one has received more than those one has conferred. It is equitable . . . to be willing that a difference shall be settled by discussion rather than by force; to agree to arbitration rather than go to court – for the umpire in an arbitration looks to equity, whereas the juryman sees only the law. Indeed, arbitration was devised to the end that equity might have full sway. [For the purposes of rhetoric] let this suffice as a sketch of the nature and province of equity.

ARISTOTLE, *THE RHETORIC OF ARISTOTLE* bk. 1.13, at 77 (Lane Cooper trans., D. Appleton & Co. 1932). Similarly, see *infra* Part III.A for a discussion of the "spirit and intent" of law in reference to the Old Testament's notion of *lifnim mishurat hadin*.

¹³⁷ See WILLIAM LAMBARDE, *ARCHEION* 116 (Charles H. McIlwain & Paul L. Ward eds., Harvard Univ. Press 1957) (1635) (referring to Aristotle's statement regarding equal beauty in Hesperus and Lucifer). This book was first released posthumously in 1635, although the bulk of it was finished in 1591. See Charles H. McIlwain, *Introduction* to LAMBARDE, *supra*, at vii; see also WILLIAM WEST, *THE SECOND PART OF SYMBOLEOGRAPHY* (Garland Publ'n 1979) (1601).

¹³⁸ HAROLD G. HANBURY, *ENGLISH COURTS OF LAW* 94 (David C.M. Miller ed., Oxford Univ. Press 5th ed. 1979) (1944) ("Every legal system has had to face this problem: how, while preserving rigidity in the law, to prevent that rigidity from causing real suffering in individual cases. Few legal systems have succeeded in solving this problem without the aid of equity.").

¹³⁹ JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* 6 (1884); see also SHELDON AMOS, *THE SCIENCE OF LAW* 35 (1894) ("[T]he method of supplementing the prevalent legal system by a subsidiary system of less rigidity, and of greater capacity for fine moral discrimination, is almost universal and indeed necessary in all advanced countries if law is in any measure to carry out the dictates of practical justice.").

¹⁴⁰ KEETON, *supra* note 67, at 43-44 ("[T]he distinction between common law and equity is not only one of history, but also one of attitude."). As he explains:

The common law was concerned with the establishment and enforcement of rights. Equity looked farther, and sought to make the parties conform to a standard of social conduct prescribed by itself. It operated upon the "conscience of the wrongdoer." The Chancery is a Court of Conscience, and to purge a guilty conscience it was first necessary that the wrongdoer should redress the harm done, so far as that was possible

law, informs it and modifies it where necessary, but still maintains a conceptual separation. Equity extrapolates beyond the common law by instituting principles designed to provide context to judicial decision-making. Equity's presence facilitates law's ability to respond to disparate situations by emphasizing its spirit and intent.

Law's need to achieve a balance between certainty and discretion helps explain the role of fiduciary law within the larger realm of civil obligations. As the most doctrinally pure expression of equity,¹⁴¹ fiduciary law performs this same function vis-à-vis many of the interactions that give rise to civil obligation. Thus, fiduciary law supplements rather than supersedes the common law of civil obligation. Unlike traditional bases of civil obligation, which impose liability upon wrongdoers and award relief to aggrieved persons, fiduciary law facilitates the construction and preservation of social and economic interdependency. The protection of trust and how the reposing of and caring for that trust affects human interaction is central to fiduciary law.

This section has emphasized the need to balance the strict application of law with the flexible and situation-specific focus of equitable constructs like fiduciary law. Tempering law's desire for certainty with equity's focus on situationally-appropriate applications provides a more robust understanding of why fiduciary law exists and how it ought to be applied.

III. ESTABLISHING FIDUCIARY FUNCTIONALITY

While the spectre of uncertainty has plagued the development of a more coherent fiduciary jurisprudence, the danger remains that the quest for certainty can create more problems than it solves. As with Ahab's pursuit of the great white whale in Herman Melville's *Moby Dick*,¹⁴² the single-minded desire to achieve certainty can easily degenerate into an enterprise that emphasizes procedure over purpose. Too great a focus on rules can easily overshadow the spirit and intent of the legal concept that those rules were designed to further, and render that concept ineffective. Unlike the concepts that underlie contract, tort, and unjust enrichment, fiduciary law's emphasis,

and compellable.

Id. at 22.

¹⁴¹ See ROTMAN, *supra* note 5, at 154 (citing G.E. DAL PONT & D.R.C. CHALMERS, EQUITY AND TRUSTS IN AUSTRALIA AND NEW ZEALAND 71 (2d ed. 2000) (describing the fiduciary concept as "arguably the premier equitable concept which illustrates equity's jurisdiction")); McCamus, *supra* note 12, at 205 ("[F]iduciary obligation seems now to have assumed the traditional mantle and role of equity jurisprudence as a device for correcting defects in the common law.").

¹⁴² HERMAN MELVILLE, MOBY DICK 721-23 (Charles Feidelson, Jr. ed., Bobbs-Merrill Co. 1964) (1851) (describing how Ahab's monomaniacal fixation on killing the whale ultimately destroys both him and his ship).

founded in broad notions of justice and morality, is on conscience and fairness.¹⁴³

Fiduciary law's prescription of other-regarding behavior looks beyond the self-interest that governs the law of contract to ensure fiduciaries' complete fidelity to their beneficiaries' interests. It requires fiduciaries to abnegate all self-interest or the interests of third parties that may conflict with their beneficiaries' interests. Further, it removes the need for beneficiaries to monitor their fiduciaries' actions.¹⁴⁴ Fiduciary law facilitates relations of dependence by placing the burden of compliance on those parties holding power in fiduciary interactions. This is something that contract law, being premised upon self-interested behavior and the need to engage in self-help, cannot do. This distinction in approach

requires not the imposition of uniformity or equality on all relevant cases, but rather reasonableness or responsiveness (*epieikeia*) in the application of general rules to individual cases. Equity means doing justice with discretion; around, in the interstices of, and in the areas of conflict between our laws, rules, principles and other general formulae. It means being responsive to the limits of all such formulae, to the special circumstances in which one can properly make exceptions, and to the trade-offs required where different formulae conflict.¹⁴⁵

Maintaining trust is vital to the continuation of interdependent relations. The common law is largely ill-equipped to protect trust; its goals are, for the most part, relatively modest and direct, focusing on individual rights and their enforcement.¹⁴⁶ Equity, meanwhile, institutes principles designed to provide the context to judicial decision-making often lacking in common or civil law regimes. As a result of equity's emphasis on conscience, equitable principles stress modes of behavior that one aspires to meet. For this reason, they are more ideologically suited for maintaining trust.

Fiduciary law supplements rather than supplants the common law by looking to the spirit and intent of the common law rather than focusing only on its positive statements. Having regard for the spirit and intent of law allows

¹⁴³ See Sherwin, *supra* note 56, at 1448 (asserting that tort and contract law do not have a connection to what is "just" while unjust enrichment is broad enough to invite such claims).

¹⁴⁴ See sources cited, *supra* note 57 (citing back to several cases and articles emphasizing that beneficiaries can rely completely on a fiduciary's actions).

¹⁴⁵ Stephen Toulmin, *Equity and Principles*, 20 OSGOODE HALL L.J. 1, 8-9 (1982). Also see 16(2) HALSBURY'S LAWS OF ENGLAND ¶ 404 (4th ed. Reissue 2003), which states that Equity "implies a system of law which is more consonant than the ordinary law with opinions current for the time being as to a just regulation of the mutual rights and duties of persons living in a civilised society."

¹⁴⁶ This is not to suggest that the common law does not also seek to promote broad-based social and economic goals, but that it does so in a profoundly different manner and is often limited by its focus on individuals' rights.

fiduciary law to take a more individualized approach to particular situations than the common law may. As Frank Tudsbery explains:

It is not possible that the letter of the law can be so expressed as to provide for the infinite variety of circumstances which may qualify particular cases. The influence of equity must therefore have a twofold application in the administration of statute law; in the first place it should influence the general terms of the law in the light of reason and justice; and secondly, it should assist in the interpretation of the law in accordance with the particular demands of individual circumstances.¹⁴⁷

A. “*Spirit and Intent*”: *Equity, Fiduciary Law and Lifnim Mishurat Hadin*

Looking to the spirit and intent of positive law is an ancient technique for circumventing the rigidity of law that predates even Ancient Greek thought. It may be traced back to a concept illustrated in the Old Testament called *lifnim mishurat hadin*, which means “going beyond the line of the law.”¹⁴⁸ *Lifnim mishurat hadin* was used in conjunction with the strict *halachic*, or levitical, law which established positive Jewish laws and customs, to form a symbiotic relationship that functioned much like the contemporary link between fiduciary law and the common law.¹⁴⁹

The concept of *lifnim mishurat hadin* has been described by some commentators as “inside” or “within” the scope of the law to designate that observance of the law requires following not only its minimum requirements, but its spirit and intent as well.¹⁵⁰ However, “going beyond the line of the law” more accurately captures the important distinction between ritualistic observance and a more holistic and encompassing form of religious adherence. While the former entails that the *halachic* decrees are followed to the letter, *lifnim mishurat hadin* extrapolates the obligations of religious observance beyond what a literal reading of the *halachic* law suggests.

An example of the distinction between literal observance and observance *lifnim mishurat hadin* is revealed in the interpretation of *Deuteronomy* 6:18: “Do what is right and good in the sight of the Lord, that it may go well with you”¹⁵¹ From what initially appears as a redundancy springs the essence of *lifnim mishurat hadin*. It is insufficient for one to simply *do right*; one is

¹⁴⁷ Frank Tudsbery, *Equity and the Common Law*, 29 L.Q.R. 154, 157 (1913).

¹⁴⁸ See Shmuel Shilo, *On One Aspect of Law and Morals in Jewish Law: Lifnim Mishurat Hadin*, 13 ISR. L. REV. 359, 359 (1978) (stating the term means “beyond the line of the law”).

¹⁴⁹ HAIM H. COHEN, *Ancient Jewish Equity*, in *EQUITY IN THE WORLD’S LEGAL SYSTEMS: A COMPARATIVE STUDY* 45, 73 (Ralph A. Newman ed., 1973) (“[B]etween the ways of the pious and the ways of the mere law-abiding, may be – it is the sum total of all of them together that makes up Jewish law.”).

¹⁵⁰ See *id.* at 45.

¹⁵¹ THE TORAH: THE FIVE BOOKS OF MOSES 337 (Jewish Pub. Soc’y of Am. 1st ed., 2d impr. 1962).

also obliged to *do good*. The distinction is explained in the following commentary:

It is not enough to do *that which is right*; *i.e.* to act according to the strict letter of the law; as such action often involves hardship and harshness, and the truly pious avoid taking advantage of the letter of strict legality. There is a higher justice, which is equity, and this bids man to be true to something more than the mere letter of his bond.¹⁵²

An often-cited example of acting *lifnim mishurat hadin* is the story of Rabba, who had hired some porters to transport a number of jugs of wine.¹⁵³ The porters were negligent in performing their task and broke the jugs. Rabba seized the porters' clothing and withheld their wages in response. The porters then appealed Rabba's actions to the community's religious leader, Rab.¹⁵⁴

Rab ordered Rabba to return the porters' garments and pay them their withheld wages. Rabba protested, arguing that seizing the porters' garments and not paying them was consistent with the existing law. Rab agreed with Rabba's legal analysis but referred Rabba to the Scripture, which said "thou mayest . . . keep the path of the righteous."¹⁵⁵ Rab's meaning was that while Rabba *could* lawfully do what he had done, it was not consistent with what he *ought* to have done. Instead, Rabba should have acted as a righteous man and not deny the porters their wages, notwithstanding their negligence. By his decree, Rab instructed Rabba not to be content with acting lawfully but rather to act compassionately in order to facilitate a higher order of justice.¹⁵⁶

The idea that *lifnim mishurat hadin* entails an observance of both the strict application of law as well as its spirit and intent is further explained by the noted thirteenth century Spanish Torah commentator Nachmanides. He used as his illustration the commandment contained in *Leviticus* 19:2: "You shall be holy, for I, the Lord your God, am holy."¹⁵⁷ The Torah, which provides the precepts of Jewish doctrine and law, contains 612 additional commandments, or "*mitzvot*."¹⁵⁸ Each of these *mitzvot* is directed to the objective of being holy. Why, one might wonder, is it necessary to include a general commandment to

¹⁵² THE PENTATEUCH AND HAFTORAHS 772 (J.H. Hertz ed., 2d ed. 1960); *see also* Shilo, *supra* note 148, at 361 ("In its human, legal context, the phrase *lifnim mishurat hadin* undoubtedly refers to action above and beyond what one is expected to do according to strict legal rights and duties.").

¹⁵³ BABYLONIA TALMUD, Bava Metzia 83a (I. Epstein ed., 1975).

¹⁵⁴ *Id.* ("Thereupon he seized their garments; so they went and complained to Rab.").

¹⁵⁵ *Id.*

¹⁵⁶ In a similar vein, Aristotle states that the equitable man, "though he has the law on his side is equitable." ARISTOTLE, *supra* note 134, bk. V, c. X, at 142. As with acting *lifnim mishurat hadin*, doing equity means going beyond the strict requirements of law, although not beyond the bounds of its spirit.

¹⁵⁷ THE TORAH, *supra* note 151, at 216.

¹⁵⁸ 18 ARON KIRSCHENBAUM, EQUITY IN JEWISH LAW: BEYOND EQUITY – HALAKHIC ASPIRATIONISM IN JEWISH CIVIL LAW 120 (1991).

“be holy” when there are 612 specific commandments to be holy? Can any greater purpose be accomplished by adding this generalized commandment?

Nachmanides asserted that this generalized directive to “be holy” is not, in fact or principle, redundant in the face of the 612 more specific commandments directed at being holy. He stated that although the Torah both prescribes and forbids many things, it is not sufficient to merely do what is prescribed and avoid what is forbidden.¹⁵⁹ The commandment to “be holy,” according to Nachmanides, is properly understood as an overarching edict intended to guard against mere observance of the letter of the law while disregarding its intent.¹⁶⁰ When understood in this way, this commandment is neither superfluous nor redundant. Rather, it both supports and reinforces the other 612 commandments in the same way that fiduciary law supports and reinforces the laws of contract, tort, and unjust enrichment by ensuring that the spirit of the law is observed and not merely its letter.¹⁶¹

B. *The Function of Fiduciary Law: Sipping from the Fiduciary “Holy Grail”*

Fiduciary law maintains the viability of interdependent societies that are premised upon parties reposing trust and confidence in others. While it protects trust and confidence reposed in others,¹⁶² not all interactions, or parts thereof,¹⁶³ are appropriately characterized as fiduciary. A meaningful or

¹⁵⁹ See Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 CONST. COMMENT. 511, 521 (1998).

¹⁶⁰ DENNIS PRAGER & JOSEPH TELUSHKIN, EIGHT QUESTIONS PEOPLE ASK ABOUT JUDAISM 56 (1979). Note also *Jeremiah 7:28*, quoted in THE PENTATEUCH AND HAFTORAHS, *supra* note 152, at 440, who condemns the mechanical observance of laws as betraying a lack of concern for their underlying ethical principles. As Hertz explains in his commentary: “So hardened have they become that faithfulness not only is dead in their hearts, but they do not even make pretence to it in their speech (*Kimchi*). Hypocrisy is the tribute of vice to virtue; they do not recognize the necessity of even lip-homage to truth.” *Id.*

¹⁶¹ See 18 KIRSCHENBAUM, *supra* note 158, at 120 (“Among some Ashkenazim [Jews of central and eastern Europe and their descendants, as opposed to Sephardim, the Jews of Spain and Portugal and their descendants], *lifnim mishurat hadin* actually became one of the ‘official’ 613 commandments given to Moses for all of Israel.”).

¹⁶² Frankel, *supra* note 6, at 836 (“As members in our society become increasingly interdependent, fiduciary relations become predominant and fiduciary law increasingly important.”); Weinrib, *supra* note 80, at 11 (“A sophisticated industrial and commercial society requires that its members be integrated rather than autonomously self-sufficient, and through the concepts of commercial and property law provides mechanisms of interaction and interdependence. The fiduciary obligation . . . constitutes a means by which those mechanisms are protected.”).

¹⁶³ While a physician may hold fiduciary duties regarding a patient’s health and well-being, that fact does not prohibit the physician from charging the patient for health services rendered even though it would truly be in the patient’s best interests to not have to pay for the service provided. The fact that not all aspects of an interaction may be fiduciary in

substantive relationship between parties is required before an interaction may be appropriately characterized as fiduciary. Mere acquaintances or fleeting interactions will not suffice. As indicated above, fiduciary law preserves the integrity of important social and economic interactions of high trust and confidence. That trust, in turn, facilitates specialization and leads to informational and fiscal wealth.

The growing complexity of human interaction and resultant increase in the specialization of knowledge and tasks over time has only enhanced the need for interpersonal dependency in various circumstances. Sir Henry Maine, in his treatise *Ancient Law*, suggests that "the movement of progressive societies has hitherto been a movement from Status to Contract."¹⁶⁴ Both Jethro Lieberman and Tamar Frankel have extrapolated beyond Maine's hypothesis and proposed that there has been a subsequent legal evolution from contract to fiduciary standards.¹⁶⁵ Frankel has ventured even further, postulating that "we are witnessing the emergence of a society predominantly based on fiduciary relations."¹⁶⁶

Frankel's attempts to place fiduciary law within larger social and economic structures assume that contemporary social values are best represented by the idea of fiduciary relations. As she explains:

In our society, affluence is largely produced by interdependence, but personal freedom is cherished. Society's members turn to an arbitrator, the government, to obtain protection from personal coercion by those on whom they depend for specialized services. A fiduciary society attempts

nature is most famously stated in *N.Z. Neth. Soc'y "Oranje" Inc. v. Kuys* [1973] 2 All E.R. 1222 (P.C.) 1225-26 ("A person . . . may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction, or group of transactions must be looked at."); *see also* *Henderson v. Merrett Syndicates Ltd.*, [1995] 2 A.C. 145 (H.L.) 206 (appeal taken from Eng.) ("The phrase 'fiduciary duties' is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. That is not the case."); P.D. FINN, *FIDUCIARY OBLIGATIONS* 4 (1977) ("But rarely would the activities of a doctor as such, bring him within the definition of a fiduciary for the purposes of the conflict of duty and interest rule."); J.C. SHEPHERD, *THE LAW OF FIDUCIARIES* 21 (1981) ("There are no identifiable relationship that are in all cases fiduciary in nature."); P.J. Millett, *Equity's Place in the Law of Commerce*, 114 L.Q. REV. 214, 218 (1998) ("Not every breach of duty by a fiduciary is a breach of fiduciary duty.").

¹⁶⁴ HENRY S. MAINE, *ANCIENT LAW* 174 (10th ed. 1906).

¹⁶⁵ JETHRO K. LIEBERMAN, *THE LITIGIOUS SOCIETY* 20 (1981) ("The course the law has taken may be denoted as a movement from *contract* to *fiduciary*, a phrase chosen deliberately to contrast with Sir Henry Maine's famous apothegm . . . that 'the movement of progressive societies has hitherto been a movement from status to contract.'"); *see also* Frankel, *supra* note 6, at 801-02 (stating that the United States during the Industrial Revolution was a contract society but that American society has evolved since then).

¹⁶⁶ Frankel, *supra* note 6, at 802.

to maximize both the satisfaction of needs and the protection of freedom.¹⁶⁷

In her view, fiduciary law allows for the appropriate balancing of the needs and legitimate interests for various actors in contemporary capitalistic societies.

The affluence found in these societies is premised upon having social and economic interdependency facilitate specialization that generates wealth creation. However, with increased interdependency comes increased risk. As dependency upon others increases, the potential for opportunistic behavior rises commensurately. Anderson explains that while “[s]pecialized exchange . . . forces each of us to rely on others to produce the goods and services which we need and to make them available on fair terms,” that same specialization “creates opportunities for some persons . . . to cheat those with whom they deal.”¹⁶⁸ Promoting interdependency and specialization runs the risk of creating what Anderson has called “distorted incentives,” which arise when specialists realize the personal benefits from taking advantage of others’ trust.¹⁶⁹

Yet, where trust is abused, the interdependency premised upon it is also jeopardized. Abuses of trust result in a reluctance to trust others, which facilitates generalization and isolationism. These occurrences inhibit productivity by reducing the opportunities for knowledge, growth, specialization, and advancement. Without protecting the trust reposed in others, individuals either will not trust at all or will erect barriers to insulate them from potential harm caused by trusting others.¹⁷⁰ One manifestation of

¹⁶⁷ *Id.*

¹⁶⁸ Alison G. Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, 25 UCLA L. REV. 738, 739-40 (1977).

¹⁶⁹ *Id.* at 794 (“Specialized exchange . . . creates distorted incentives as specialists find they can benefit from cheating while imposing the costs of their actions on others.”).

¹⁷⁰ *See id.* at 747.

If specialists take advantage of their skills to cheat, we may be inclined to forego the benefits of specialization in order to protect ourselves from cheating. Similarly, if individuals take advantage of our willingness to trust them in order to cheat us, we will be forced to spend massive social resources on the prevention and detection of cheating. Either the victims of the cheating or society as a whole will typically bear the costs of the reduced specialization or the increased transaction costs. Very little of such cost will fall on those who cheat . . .

Id. While Anderson’s characterization is mostly consistent with the ideas postulated above, it incorrectly portrays specialists who cheat as obtaining benefits and not suffering the costs associated with their behavior. This is untrue, insofar as the ideal of specialization is that all persons are specialists and must depend on others. Consequently, even those specialists who take advantage of others cannot prevent becoming victims outside of their areas of specialty. Over the long term, however, those who cheat will lose their ability to do so because of individuals’ reluctance to deal with them. Where cheating is pervasive, the ability to cheat will eventually be reduced commensurately with either (1) the reduction in trust effected by the cheating behavior or (2) the erection of legal mechanisms that restrain

this behavior is the guarding of self-interest through the drafting of complex contractual terms. These actions create tremendous agency costs, promote excessive self-reliance, and deprive society of specialization benefits facilitated by social and economic interdependency.

It has already been said that fiduciary law does not protect all forms of interdependency.¹⁷¹ Where other means are both available and suitable to the task of regulating individual interactions, fiduciary law is not needed. Further, one party's power over the interests of others, one person's dependency upon another, or one person's vulnerability to another are each insufficient to characterize an interaction, or parts thereof,¹⁷² as fiduciary. If only ordinary reliance, vulnerability, or the simple ability of individuals to adversely affect others' interests gave rise to fiduciary responsibility, many relationships in contemporary society would be tinged by fiduciary duties. This classification casts the fiduciary net far too wide.

Fiduciary law was never intended to apply to garden variety interactions. While pedestrians crossing city streets rely on motorists to observe traffic laws and are vulnerable to harm from passing motor vehicles, the pedestrians' dependence and vulnerability to the motorists does not warrant fiduciary characterization.¹⁷³ The harsher sanctions imposed on fiduciaries in default of their duties, and the provision of a wider range of relief for aggrieved individuals under fiduciary law would amount to overkill where common law causes of action provide adequate relief.

Relationship "fiduciarity" is assessed on the degree of existing dependence and vulnerability, the nature and quality of the relationship itself, and its value or importance to society at large.¹⁷⁴ It is not assessed by ascertaining whether the interaction in question belongs to a category previously identified as fiduciary.¹⁷⁵ More importantly, fiduciary characterization is not determined by

the ability to cheat.

¹⁷¹ See discussion *supra* Part II ("Fiduciary law plays an important role in ensuring the continued efficacy of social and economic interdependency by preventing those who hold power in fiduciary interactions from abusing the trust and confidence reposed in them.").

¹⁷² See sources cited *supra* note 163.

¹⁷³ In addition to not meeting the appropriate level of dependence and vulnerability, the minimal interaction between pedestrians and motorists does not warrant fiduciary characterization. Finally, fiduciary law is not needed in such a scenario because the availability of regulations governing driving behavior and tort law to award injured pedestrians compensation relieves the need for fiduciary law.

¹⁷⁴ Ordinary trust and confidence in others can create obligation, but they do not give rise necessarily to *fiduciary* obligations. Refer back to the comments in *Ubacol Investments Ltd. v. Royal Bank of Canada* (1995) 171 A.R. 122, 126 (Can. Alta. Q.B.) ("What the bank did may have been negligent, but there was no fiduciary relationship created.").

¹⁷⁵ *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 389 (Can.) (finding that the Canadian government did have a fiduciary duty to an "Indian band" that the government violated by not leasing the band's land out on the terms specified by the band); *Tate v. Williamson*, [1866] 2 Ch.App. 55 at 60-61 (Eng.) (remarking that courts have not defined clear limits

the willingness of one party to undertake fiduciary responsibility. The characterization of a person or interaction as fiduciary is, ultimately, the result of statute or judicial decree.¹⁷⁶ Thus, in *Noranda Australia Ltd. v. Lachlan Resources N.L.*,¹⁷⁷ even though a joint venture agreement precisely stipulated that “the relationship of the parties shall be fiduciary in nature,” the judicial characterization of the parties’ interaction was not conclusive.¹⁷⁸ Instead, a mere contractual relationship was found to exist between the parties.¹⁷⁹

Fiduciary law counterbalances individualistic ideas founded in contract, such as the “reasonable expectations of the parties” and private ordering, by emphasizing broader social and economic goals consistent with constructing and preserving interdependency. The fiduciary nature of a relationship describes both the law governing its existence and the resulting bundle of rights and duties. Fiduciary relationships are an amalgam of specific duties and benefits. They only exist in a meaningful way because the parties’ respective entitlements are enforced through fiduciary norms. This situation creates a legal equilibrium of fiduciary duties and beneficiary entitlements. Like Wesley Hohfeld’s judicial correlatives,¹⁸⁰ while fiduciaries have a duty to act with honesty, integrity, fidelity, and in the utmost good faith toward their beneficiaries’ best interests, beneficiaries have a correlative right to rely upon their fiduciaries’ fulfilment of duty without having to inquire into or otherwise monitor the fiduciaries’ activities. Where both the fiduciary and beneficiary

regarding fiduciary relationships).

¹⁷⁶ Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 595 n.1 (1997) (“Notwithstanding that the parties’ relationship may originate in contract or consent, the accompanying fiduciary obligations are imposed by the state, even in the absence of consent to the relationship, or at least the absence of consent to assume those obligations.”); see also JOHN GLOVER, *COMMERCIAL EQUITY* 47 (1995) (“Just as parties cannot decide to attract equitable jurisdiction by agreement, they may be unable to impose fiduciary relationships on themselves. For courts will not readily enforce a contractual pre-emption of judicial discretion to characterise a relation as fiduciary or not. It is for the court and not the parties to decide upon intervention.”); Finn, *supra* note 12, at 54 (“A fiduciary responsibility, ultimately, is an imposed not an accepted one. . . . The factors which lead to that imposition doubtless involve recognition of what the alleged fiduciary has agreed to do. But equally public policy considerations can ordain what he must do, whether this be agreed to or not.”).

¹⁷⁷ (1988) 14 NSWLR 1 (Austl.).

¹⁷⁸ *Id.* at 13-16.

¹⁷⁹ *Id.* The basis for this finding was that other terms of the agreement allowed the parties to pursue “recognisable and distinct interests of their own.” *Id.* at 14.

¹⁸⁰ Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710 (1916) (mentioning that same set of correlatives used in the 1913 article); Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913) (referring to Hohfeld’s attempt to example legal relations in a scheme of “correlatives” with specific examples).

act according to their respective responsibilities and entitlements, the integrity of the interaction is maintained.

Fiduciary law facilitates an expansive understanding of parties' obligations that is consistent with the spirit and intent of their interaction and transcends its strict, common law limits. The differences between fiduciary law and common law in their underlying policy rationale and protected interests helps explain why fiduciary law cannot be conceptualized in the same manner as common law concepts.

Fiduciary law imposes strict duties consistent with the prescriptivism of equity, which stresses modes of behavior that are to be aspired to because of equity's focus on conscience and its emphasis on substance rather than form. The prescriptivism of equity conflicts sharply with the common law's proscriptivism, which generally dictates what individuals are not to do. The common law's attitude is profoundly illustrated by Holmes' "bad man" approach to law:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.¹⁸¹

As a creature of equity, fiduciary law presupposes the goodness of conscience and seeks to maintain or restore that goodness. Where fiduciaries fail to act in good conscience, fiduciary law intervenes to purge their consciences of the effects of their bad behavior.¹⁸² Unlike Holmes' bad man, who regards law selfishly and in light of his own, personal interests, fiduciaries are obliged to regard the law as a good person does,¹⁸³ with an emphasis upon the larger social or economic benefits that may be enjoyed by society as a whole.

A fiduciary's duties of integrity, loyalty, and selflessness require, *inter alia*, that the fiduciary acts with the utmost good faith, makes full and complete

¹⁸¹ Holmes, *supra* note 77, at 459.

¹⁸² As a court of conscience, the primary object of the Court of Chancery was to "purge the corrupt conscience of the defendant," not to redress the wrong done to the plaintiff. WALTER ASHBURNER, *PRINCIPLES OF EQUITY* 38 (1902) (stating that as a court of conscience, the primary object of the Court of Chancery was to "purge the corrupt conscience of the defendant," not to redress the wrong done to the plaintiff); *see also* D.E.C. Yale, *Introduction to 1 LORD NOTTINGHAM'S CHANCERY CASES*, at cvi-cvii (D.E.C. Yale ed., 1957) ("Equity is concerned not to enforce or even primarily assist legal rights but is rather concerned to prevent their abuse."). In spite of its different focus than the common law, Chancery's cleansing of a wrongdoer's conscience did generally have the ancillary effect of redressing wrongs perpetrated against the complainants.

¹⁸³ *See* Hayton, *supra* note 57, at 306 ("Equity, with its 'good man' philosophy, prevents a defendant subjected to the fiduciary duty of loyalty from denying that he was a good man and did what he did in the interests of his beneficiaries.").

disclosure of relevant information affecting the beneficiary's interests, avoids conflicts, and does not profit from information or opportunities gained while serving as a fiduciary. These duties attach to all beneficiary interests that are tangibly related to the fiduciary interaction. This explains why fiduciaries must eschew any correlative personal¹⁸⁴ or third party interests within the context of their fiduciary associations, regardless of whether those interests are complementary or antagonistic to their beneficiaries' interests.¹⁸⁵ Since fiduciaries only occupy the position of "fiduciary" within the confines of their fiduciary interactions, any actions outside of those interactions are not subject to fiduciary duties, even if they involve the same people.¹⁸⁶ Thus, in matters outside of the fiduciary nature of their associations, fiduciaries may do whatever they wish.

The harsh sanctions levied against fiduciaries for failing to ascribe to the high standards imposed by fiduciary law may include the disgorgement of profits or amounts equal to losses avoided, equitable compensation, a constructive trust or the presumption of most advantageous use in calculating lost opportunities by a beneficiary wrongfully deprived of property.¹⁸⁷

¹⁸⁴ As stated in *Rosenfeld v. Black*, 445 F.2d 1337, 1342 (2d Cir. 1971), "no matter how high-minded a particular fiduciary may be, the only certain way to insure full compliance with that duty is to eliminate any possibility of personal gain."

¹⁸⁵ An exception to this rule may prevail, however, with the voluntary, independent, and informed consent of beneficiaries. See ROTMAN, *supra* note 5, at 381 ("The beneficiary may agree to waive the application of fiduciary norms in relation to a very specific activity proposed by the fiduciary about which the beneficiary possesses sufficient knowledge in order for the beneficiary's consent to be effective.").

¹⁸⁶ See *Noranda Austl. Ltd. v Lachlan Res. NL* (1988) 14 NSWLR 1, 15 (Eq. Div.) (Austl.) ("[A] person under a fiduciary obligation to another should be under that obligation in relation to a defined area of conduct, and exempt from the obligation in all other respects.").

¹⁸⁷ This presumption holds that beneficiaries who have been wrongfully deprived of assets by a breach of fiduciary duty will be presumed to have put those assets to their most advantageous use had they retained possession of them. See *Maguire v Makaronis* (1997) 188 CLR 449, 467-68 (Austl.) (listing various remedies for breach of fiduciary duty, including equitable compensation, account of profits, constructive trust, and compensation for that which was lost as a result of the fiduciary's breach); *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 362 (Can.) (finding that an "Indian band" was entitled to damages on the basis of "lost opportunity" when the Crown breached its trust in an unauthorized land lease); *McNeil v. Fultz* (1906), 38 S.C.R. 198, 205 (Can.) (finding a trustee who was wrongfully withholding securities from a beneficiary liable to make reparation for the loss and that the loss "must be calculated on the assumption that the securities would have been sold at the best price obtainable"); *Huff v. Price* (1990), 76 D.L.R. 4th 138, 150 (Can. B.C.C.A.) ("[W]here there is specific trust property the remedy for breach of trust, fraud, or breach of fiduciary duty may include return of the property or restitution measured by its highest value in the period after the breach and before the breach is discovered."); *Armory v. Delamirie*, (1722) 93 Eng. Rep. 664 (K.B.) 664; ASHBURNER, *supra* note 182, at 53-54 (referring to an account of profits ancillary to an injunction as an equitable remedy distinct from damages in

Fiduciary sanctions have a strong, exemplary quality to them to deter fiduciaries from being tempted to act contrary to their duties. This, in turn, facilitates beneficiaries' ability to rely upon their fiduciaries' good faith actions. By prescribing other-regarding behavior that looks beyond the limitations and immediacy of self-interest,¹⁸⁸ fiduciary law facilitates the specialization that results from social and economic interdependency.

C. *Meinhard v. Salmon*

Fiduciary law's protection of relationships rather than doing justice between individual parties, as the common law does, is reflected by the landmark case of *Meinhard v. Salmon*.¹⁸⁹ This is, perhaps, the most famous case involving the application of fiduciary principles. It is easily the most often quoted. In the case, Chief Judge Cardozo makes full use of equity's unique methodology to fashion a situationally appropriate result that is consistent with fiduciary law's mandate and the equities dictated by the circumstances.

Joint venturers Meinhard and Salmon held a twenty-year lease on a hotel.¹⁹⁰ Under the terms of their agreement, Salmon had the sole power to "manage, lease, underlet and operate" the property.¹⁹¹ When the lease drew near its end, Elbridge Gerry, the new owner of the hotel, planned to enter into a long-term lease for the hotel and some adjoining properties.¹⁹² He intended to demolish the existing buildings and redevelop the properties in question.¹⁹³ With less

which a court of equity "measures the wrongdoer's liability by its own peculiar measure"); Jeff Berryman, *Equitable Compensation for Breach by Fact-Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals*, 37 ALTA. L. REV. 95, 108-11 (1999) (discussing, in the context of equitable compensation for fiduciary breach, the presumption that a plaintiff is "entitled to have his or her damages assessed on the basis that he or she would have made the best use of the assets that are in dispute"); John D. McCamus, *Equitable Compensation and Restitutionary Remedies: Recent Developments*, in LAW OF REMEDIES: PRINCIPLES AND PROOFS, LAW SOCIETY OF UPPER CANADA SPECIAL LECTURES, 1995, at 299, 332-40 (1995) (discussing potential restitutionary remedies for breach of fiduciary duty, including constructive trust, accounting of profits, and "subtraction measures" in cases of unjust enrichment).

¹⁸⁸ Self-interested behavior is purely a means unto itself and concentrates upon the immediate benefits to be obtained from a particular interaction. It is difficult to sustain on a long-term basis, insofar as those who practice self-interest will not generate the loyalty of others and will not benefit from continued associations with those others (or, for that matter, persons associated with those others).

¹⁸⁹ 164 N.E. 545, 546 (N.Y. 1928) ("Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties.").

¹⁹⁰ *Id.* ("The two were coadventurers, subject to fiduciary duties akin to those of partners.").

¹⁹¹ *Id.* ("Salmon, however, was to have sole power to "manage, lease, underlet and operate" the building.").

¹⁹² *Id.*

¹⁹³ *Id.*

than four months remaining on the hotel lease, Gerry approached Salmon with his proposal.¹⁹⁴ A twenty-year lease for the entire tract (with potential renewals for a further eighty years) was granted to the Midpoint Realty Company, which was controlled by Salmon.¹⁹⁵ The value of the new lease ranged between \$350,000 and \$475,000 (as compared to \$55,000 under the hotel lease held by Meinhard and Salmon).¹⁹⁶

Meinhard did not learn about Salmon's new lease arrangements with Gerry until after the lease had been concluded.¹⁹⁷ Upon learning of the changed circumstances, Meinhard demanded that the new lease be held in trust as an asset belonging to the joint venture.¹⁹⁸ Meinhard offered to share the financial burdens of the new arrangement with Salmon, but Salmon refused.¹⁹⁹ Meinhard then commenced legal action against Salmon, in which he sought an interest in the new lease.²⁰⁰ At first instance, Meinhard was successful, obtaining a twenty-five-percent interest in the new lease.²⁰¹ Following cross-appeals of this judgment, Meinhard was awarded a fifty-percent interest in the new lease.²⁰² Salmon subsequently appealed to the New York Court of Appeals.²⁰³

Chief Judge Cardozo's majority judgment determined that joint venturers, like partners, owe each other "the duty of the finest loyalty" while their enterprise continues.²⁰⁴ Then, in one of the most celebrated statements in fiduciary jurisprudence, Chief Judge Cardozo asserted that:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a condition that is unbending and inveterate. Uncompromising rigidity had been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

that trodden by the crowd. It will not consciously be lowered by any judgment of this court.²⁰⁵

Chief Judge Cardozo also emphasized that while "[t]o the eye of an observer, Salmon held the lease as owner in his own right, for himself and no one else," in point of fact "he held it as a fiduciary, for himself and another, sharers in a common venture."²⁰⁶ He indicated that had Gerry known this, it ought to be fairly assumed that he would have presented his proposal to both joint venturers and not merely to Salmon.²⁰⁷

Chief Judge Cardozo's judgment in *Meinhard v. Salmon* indicates that Salmon's conduct "excluded his coadventurer from any chance to compete, from any chance to enjoy the opportunity for benefit that had come to him alone by virtue of his agency."²⁰⁸ As a result, Salmon was bound, at a minimum, to disclose this chance.²⁰⁹ The fact that the chance would have been of little value was deemed to be immaterial.²¹⁰ Further, since Salmon was responsible for operating the hotel, Meinhard was entitled to assume that Gerry was willing to extend the lease or let it stand at will absent any indication from Salmon to the contrary.²¹¹ Indeed, as Chief Judge Cardozo stated, "there was nothing in the situation to give warning to any one that while the lease was still in being, there had come to the manager an offer of extension which he had locked within his breast to be utilized by himself alone."²¹²

Chief Judge Cardozo determined that the new lease was not, strictly speaking, a renewal because of the many changes that had taken place, including the significant expansion of the properties included under it.²¹³ He nonetheless held that Salmon's obligations to Meinhard remain the same, insofar as "the standard of loyalty for those in trust relations is without the fixed divisions of a graduated scale."²¹⁴ Chief Judge Cardozo recognized that Salmon may not have intended to defraud or otherwise take advantage of Meinhard, but simply took up an offer that was made to him and not to the joint venture.²¹⁵ The lack of mala fides, however, was inconsequential, since

²⁰⁵ *Id.* (citation omitted). Note that Cardozo used similar language in *Wendt v. Fischer*, 154 N.E. 303, 304 (N.Y. 1926): "Only by this uncompromising rigidity has the rule of undivided loyalty been maintained against disintegrating erosion."

²⁰⁶ *Meinhard*, 164 N.E. at 547.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* Cardozo also held that insofar as Salmon was actively operating the hotel for the joint venturers, he had a duty to disclose the existence of the new opportunity to Meinhard "since only through disclosure could opportunity be equalized." *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 548.

“Salmon had put himself in a position in which thought of self was to be renounced, however hard the abnegation.”²¹⁶

For this reason, Chief Judge Cardozo concluded that as a “managing coadventurer” who appropriated to himself the benefit of a new lease that was an extension of an existing lease, Salmon should have “fairly expect[ed] to be reproached with conduct that was underhand, or lacking, to say the least, in reasonable candor, if the partner were to surprise him in the act of signing the new instrument.”²¹⁷ Furthermore, “[c]onduct subject to that reproach does not receive from equity a healing benediction.”²¹⁸ Chief Judge Cardozo’s majority judgment affirmed the judgment below, but altered the award to Meinhard by reducing his share of the new lease to a fifty-percent share, less one share, in order to preserve Salmon’s control and management of the new venture.²¹⁹

Although Meinhard, as the beneficiary of fiduciary duties owed to him by Salmon, was awarded a significant interest in the new lease, Chief Judge Cardozo’s judgment in *Meinhard v. Salmon* is primarily directed at preserving the integrity of the relationship between joint venturers who rely upon and can become vulnerable to each other. Meinhard’s vulnerability was created as a result of the particular nature of the joint venture arrangement, which provided Salmon with exclusive control over the business arrangement. Thus, when Gerry came to Salmon with his proposal, Meinhard could only have come to know of it if Salmon had voluntarily disclosed it. Chief Judge Cardozo’s judgment emphasizes that without obliging Salmon to disclose the existence of the opportunity to his co-adventurer, the integrity of joint venture agreements would be jeopardized.²²⁰ The similarity between Chief Judge Cardozo’s reasoning in *Meinhard v. Salmon* and that of Lord Chancellor King in *Keech v. Sandford*,²²¹ in which the latter found that a trustee cannot benefit from the renewal of a lease formerly belonging to his beneficiary or else “few trust-estates would be renewed to *cestui que use*,” is evident.²²² Chief Judge Cardozo’s rhetoric clearly indicates that his judgment is not predicated primarily upon benefitting Meinhard or punishing Salmon, but ensuring that “the rule of undivided loyalty” which exists to reinforce the integrity of trusting relations, remains “relentless and supreme.”²²³

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *See id.* (“For [Salmon] and for those like him the rule of undivided loyalty is relentless and supreme.”); *see also* Weinrib, *supra* note 80, at 17 (“[T]he majority [in *Meinhard v. Salmon*] felt that the integrity of the commercial arrangements between the litigants required a holding for the plaintiff.”).

²²¹ *Keech v. Sandford*, (1726) 25 Eng. Rep. 223 (Ch.) (U.K.).

²²² *Id.* at 223 (“[I]f a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to *cestui que use*.”).

²²³ *Meinhard*, 164 N.E. at 548.

Lest one think that *Meinhard v. Salmon* is an isolated case or one whose rhetoric has more bite than its actual legal effects, a more recent case from the Supreme Court of Canada, *Hodgkinson v. Simms*,²²⁴ reveals rather the same analysis and conclusion in holding an investment advisor liable as a fiduciary for failing to disclose a conflict of interest to his client.²²⁵

D. Hodgkinson v. Simms

Hodgkinson, a stockbroker, had changed jobs from a conservative firm dealing in blue-chip securities to one engaged in underwriting speculative junior resource stock.²²⁶ As a result of this change, Hodgkinson saw his income increase tenfold in the first year alone and considerably thereafter.²²⁷ Consequently, he sought advice on tax sheltering from Mr. Simms, a chartered accountant who specialized in providing such advice.²²⁸

Hodgkinson advised Simms that he wanted to defer tax, but also acquire stable, long-term investments to achieve that end.²²⁹ Simms suggested that Hodgkinson invest in multi-unit residential buildings (MURBs), which were conservative real estate investments according to conventional wisdom at the time.²³⁰ Hodgkinson relied upon Simms's advice and purchased four MURBs recommended by Simms.²³¹ Three of these MURBs had been developed by Jerry and Bob Olma.²³² Later, the real estate market experienced a sharp decline and, as a result, Hodgkinson lost virtually all of his investments in the MURBs.²³³

In 1985, Hodgkinson learned that Simms may have received fees and payments from the Olma brothers regarding three of the MURB developments in which Hodgkinson had invested.²³⁴ In 1986, he commenced legal action against Simms for negligence.²³⁵ In early 1987, he discovered that Simms's accounting firm had collected fees from the Olma brothers on these projects and amended his pleadings to include, inter alia, a claim for breach of fiduciary duty.²³⁶ At no time had Simms disclosed to Hodgkinson the payments he had personally received from the Olma brothers, nor the money collected by his

²²⁴ *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (Can.).

²²⁵ *Id.* at 439.

²²⁶ *Id.* at 395.

²²⁷ *Id.*

²²⁸ *Id.* at 395-96.

²²⁹ *Id.* at 396.

²³⁰ *Id.*

²³¹ *Id.* at 397.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 457.

²³⁵ *Id.* at 457-58.

²³⁶ *Id.* at 458.

firm from them.²³⁷ In fact, Simms had specifically assisted the Olma brothers by providing them with advice to maximize the tax deductible expenses that could be incorporated into their projects, thereby making them more desirable tax sheltering investments.²³⁸ During 1980 and 1981, Simms billed the Olma brothers an amount that represented one-sixth of his firm's total billable hours.²³⁹ In calculating his bills to the Olma brothers, Simms accounted both for his time spent on the projects, as well as the extent to which the MURB units were purchased by his firm's clients.²⁴⁰ Simms described this practice as "bonus billing."²⁴¹

Hodgkinson claimed that he believed Simms was an independent and trustworthy advisor.²⁴² This was important to Hodgkinson, whose job made him wary of the high risk world of promoters.²⁴³ He did not question Simms about his advice, but trusted in his expertise and had confidence in his recommendations.²⁴⁴ The gravamen of Hodgkinson's complaint lay in the fact that he would never have invested in the MURBs in question had he known of Simms' relationship with the Olma brothers.²⁴⁵

Justice La Forest's majority judgment placed significant emphasis upon the broader implications of advisor-client relations. He emphasized that "the essence of professional advisory relationships is precisely trust, confidence, and independence."²⁴⁶ For this reason, he explained, "[c]ourts exercising equitable jurisdiction have repeatedly affirmed that clients in a professional advisory relationship have a right to expect that their professional advisors will act in their best interests, to the exclusion of all other interests, unless the contrary is disclosed."²⁴⁷ Justice La Forest also paid particular attention to the policy considerations that inform fiduciary law. This is profoundly indicated by his statement that "[t]he desire to protect and reinforce the integrity of

²³⁷ *Id.* at 401.

²³⁸ *Id.* at 398.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 396.

²⁴⁴ *Id.* at 397.

²⁴⁵ *Id.* at 397-98. For the purposes of the *Hodgkinson* judgment and fiduciary law generally, whether or not Hodgkinson would have invested in some other MURBs and still lost his money as a result of the decline in the real estate market is an irrelevant consideration based on the principle espoused in *Brickenden v. London Loan & Savings Co.*, [1934] 3 D.L.R. 465, 469 (Can. P.C.) ("When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor.").

²⁴⁶ *Hodgkinson*, [1994] 3 S.C.R. at 415.

²⁴⁷ *Id.* at 417.

social institutions and enterprises is prevalent throughout fiduciary law.”²⁴⁸ Hodgkinson’s suit against Simms was successful and he obtained relief for the totality of his lost investment in the MURBs, notwithstanding the independent impact of the market decline.²⁴⁹

As with Chief Judge Cardozo’s judgment in *Meinhard v. Salmon*, Justice La Forest placed significant emphasis upon the integrity of the relationship in question in *Hodgkinson*. Similar to Chief Judge Cardozo’s treatment of Meinhard’s interests in *Meinhard v. Salmon*, Justice La Forest’s judgment in *Hodgkinson* was not premised simply upon Hodgkinson’s vulnerability created by the nature of his interaction with Simms.²⁵⁰ Rather, it was towards the broader purpose of protecting important social and economic relations of dependency and vulnerability that Justice La Forest spoke of the “social importance of the fiduciary concept” in *Hodgkinson*.²⁵¹ Further, he emphasized that “the law has recognized the importance of instilling in our social institutions and enterprises some recognition that not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules,”²⁵² which is rather reminiscent of Chief Judge Cardozo’s statements that “[a] trustee is held to something stricter than the morals of the marketplace” and “[m]any forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties.”²⁵³

Both Chief Judge Cardozo’s judgment in *Meinhard v. Salmon* and Justice La Forest’s judgment in *Hodgkinson v. Simms* illustrate how the approach taken by fiduciary law differs from the conclusions that would have been reached in the circumstances under contract, tort, or unjust enrichment. As indicated earlier, there is not only an historical distinction between the common law and equity, but an attitudinal one.²⁵⁴ The practical effect of this distinction is described more specifically by Andrew Burrows:

[W]hat may not be a wrong when committed by a non-fiduciary may be a wrong when committed by a fiduciary. Hence undue influence or non-disclosure, while not in themselves wrongs, may be wrongs where committed by a fiduciary because they may then constitute a breach of the duty to look after another’s interests. This explains why compensation was awarded for a fiduciary’s – a solicitor’s – negligent misrepresentation in *Nocton v Lord Ashburton* 50 years before the development of the tort

²⁴⁸ *Id.* at 422.

²⁴⁹ *Id.* at 454-55.

²⁵⁰ *Id.* at 405 (“[T]he concept of vulnerability is not the hallmark of fiduciary relationship though it is an important *indicum* of its existence.”).

²⁵¹ *Id.* at 421.

²⁵² *Id.* at 422.

²⁵³ *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

²⁵⁴ See *supra* note 140 and accompanying text (paraphrasing prior scholarship to explain the attitudinal distinction between common law and equity).

of negligent misstatement, outside a fiduciary relationship, in *Hedley Byrne & Co. Ltd. v Heller and Partners Ltd.*²⁵⁵

Burrows' indication that applying fiduciary law and common law principles to the same interaction may result in different outcomes demonstrates that fiduciary law and the common law not only have distinct methodologies, but equally distinct goals. Fiduciary law imposes far more onerous duties on fiduciaries than what the common law of contract, for example, imposes on the parties to an agreement. Fiduciary law recognizes the need to maintain socially and economically beneficial interactions that facilitate the specialization of knowledge and tasks and enhance fiscal and informational wealth.²⁵⁶ Consequently, fiduciary law puts in place, in appropriate situations, mechanisms to both foster and protect trusting relationships that create implicit dependency and peculiar vulnerability of one party to another. Contract law, meanwhile, has little direct regard for such a broad purpose, focusing instead on doing justice between individuals. Neither tort nor unjust enrichment have such grand aspirations either.

In short, fiduciary law plays a significant role in ensuring the continued efficacy of the web of human interdependency by governing the conduct of fiduciaries holding power over others.²⁵⁷ Nowhere is this expressed more clearly than in Justice La Forest's judgment in *Hodgkinson v. Simms*, which bears repeating:

The desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law. The reason for this desire is that the law has recognized the importance of instilling in our social institutions and enterprises some recognition that not all

²⁵⁵ Andrew Burrows, *We Do This at Common Law but That in Equity*, 22 O.J.L.S. 1, 9 (2002) (footnotes omitted). See also Patricia Loughlan's comment, which cites with approval Justice McLachlin's minority judgment in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, 542-43 (Can.):

Since equitable principles such as those applicable to fiduciaries fulfil a different social purpose from the law of contract and of tort, imposing, as they do, a strong duty to act only in the interests of the other, it is by no means clear that principles developed in respect to common law obligations should be utilised in the equitable jurisdiction.

Patricia Loughlan, *The Historical Role of the Equitable Jurisdiction*, in *THE PRINCIPLES OF EQUITY* 3, 23-24 (Patrick Parkinson ed., 2d ed. 2003) (footnotes omitted).

²⁵⁶ See Anderson, *supra* note 168, at 739 ("In order to be efficient, our society must rely on the specialized production of goods and services and on an extensive system of exchange to make such goods and services available to those who need them. Both specialization and exchange enormously increase the total value of resources produced and consumed in our economy. All of us share, to a greater or lesser extent, in that increased value.").

²⁵⁷ In the corporate context, note the similar sentiments expressed in Lawrence A. Hamermesh, *Calling Off the Lynch Mob: The Corporate Director's Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087, 1145 (1996) ("[F]iduciary law helps preserve the socially efficient relationship of specialization that exists when directors are entrusted with authority to manage the resources of others.").

relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules. By instilling this kind of flexibility into our regulation of social institutions and enterprises, the law therefore helps to strengthen them.²⁵⁸

CONCLUSION

The function of fiduciary law within the law of civil obligation, as presented herein, is to facilitate and maintain social and economic interdependency. Few legal principles are premised upon such grand aspirations. However, while fiduciary law's broad purpose, and the wide range of interactions that it potentially applies to, renders it particularly resistant to definition, this Article has attempted to demonstrate that it is neither difficult to ascertain fiduciary law's purpose nor to pinpoint key characteristics of fiduciary interactions that provide appropriate parameters for its use. Indeed, as Mitchell observes:

It may be that fiduciary doctrine is not crystal clear, in the sense of a rule requiring traffic to stop at red lights. But the argument from certainty can be overblown. . . . For lawyers to argue that fiduciary duty creates significant uncertainty is specious. Anybody reading the cases soon develops a sense of what is and what is not allowed.²⁵⁹

Fiduciary law possesses a solid foundation in broad principles developed in English Equity centuries ago, but which draw upon ideas traceable to ancient times. These principles provide sufficient signposts to assist jurists and commentators in ascertaining fiduciary law's doctrinally appropriate application. For this reason, fiduciary law should not be "feared for its unpredictability" as Davies has suggested.²⁶⁰

Maintaining a balance between certainty and flexibility in law is no simple task. Too great a focus on certainty can result in rigidity and inflexibility that might leave legitimate claims, existing outside of the garden variety of cases, without remedy.²⁶¹ Too much flexibility, however, eliminates predictability

²⁵⁸ *Hodkinson v. Simms*, [1994] 3 S.C.R. 377, 422 (Can.).

²⁵⁹ Lawrence E. Mitchell, *The Naked Emperor: A Corporate Lawyer Looks at RUPA's Fiduciary Provisions*, 54 WASH. & LEE L. REV. 465, 485-86 (1997).

²⁶⁰ J.D. Davies, *Keeping Fiduciary Liability Within Acceptable Limits*, 1998 SING. J. LEGAL STUD. 1, 1 (stating that fear of fiduciary liability's unpredictability is "not groundless").

²⁶¹ This is precisely why the jurisdiction of Equity was created in English common law: to provide relief in circumstances where it was just, but no applicable prerogative writ existed to allow for the action to be heard in the common law courts. These writs were, effectively, grants of jurisdiction from the monarch to a court over a particular dispute. See JOHN NORTON POMEROY, 1 A TREATISE ON EQUITY JURISPRUDENCE 21 (1881) ("Every remedial right must be enforced through one of these forms; and if the facts of a particular case were such that neither of them was appropriate, the injured party was without any legal remedy, and his only mode of redress was by an application made directly to the king."); GEORGE SPENCE, 1 THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 227 (1846)

about expected standards and likely outcomes. This conundrum profoundly affects fiduciary law, which is simultaneously applauded for its innate ability to respond to an infinite variety of circumstances, yet criticized for its lack of certainty.

In the process of establishing fiduciary law's "holy grail" to enhance the understanding of fiduciary law's foundational purpose and effects, this Article emphasizes the need to be mindful of the limitations of achieving certainty in law. While achieving greater legal certainty may reduce doubt, it does not always facilitate justice. The zealous pursuit of legal certainty overlooks the inevitable limitations of law and, with it, the important and necessary benefits to be obtained from the creation of equitable principles, like fiduciary law, that enhance law's functionality. While there are some difficulties associated with more fluid legal doctrines such as fiduciary law, there are also significant benefits to be achieved from this fluidity. Fiduciary law facilitates the dispensing of situationally appropriate justice in ways that the common law cannot. This reinforces the legitimacy of law and justifies the cost associated with leaving a degree of indeterminacy within it.

Although there are definite advantages to fiduciary law's protean quality, the very flexibility that is of such benefit may just as easily be abused when we do not know the limitations of fiduciary applications. Fiduciary principles were never intended to be applied to the garden variety of interactions creating civil obligations. The laws of contract, tort, and unjust enrichment are quite capable of handling the vast majority of these situations. The limits of fiduciary applicability have been captured by Sir Robert Megarry, who once said that "[t]he traditional beauty of a land flowing with milk and honey is marred by the realisation that it would be very sticky. What of a land awash with fiduciary relationships?"²⁶²

Fiduciary law's emphasis on selfless behavior, utmost good faith, and conscience distinguishes it fundamentally from the laws of contract, tort, or unjust enrichment. Fiduciary law promotes selflessness in order to ensure the integrity of important social and economic interactions of high trust and

("The writ . . . alone gave jurisdiction to the justices, and equally defined its limits."). In the absence of such a writ, no court could properly entertain the matter in question, leaving only the uncertain option of applying directly to the sovereign for relief. *See* *Smith v. Wilmer*, (1747) 26 Eng. Rep. 1143 (Ch.) 1145 ("[W]hat is the nature and foundation of original writs? To be sure they were commissional to courts of common law, for without an original none of these courts had a commission to hold plea; and a judgment where there is no original is void, unless by reason of privilege."); 2 FLETA, *in* 72 SELDEN SOCIETY 137 (H.G. Richardson & G.O. Sayles eds. & trans., 1955) ("The king also has his court and his resident justices, who all have record in those matters which have been pleaded before them and who have jurisdiction over all pleas and actions, real and personal and mixed, provided they have received warrant by the king's writ to take cognisance of them, for without that warrant they have neither jurisdiction nor coercive power.").

²⁶² Sir Robert E. Megarry, *Historical Development, in* FIDUCIARY DUTIES, LAW SOCIETY OF UPPER CANADA SPECIAL LECTURES, *supra* note 59, at 11.

confidence, whereas contract, tort, and unjust enrichment focus on individuals – whether facilitating individuals' self-interests, or facilitating justice between parties.

Fiduciary law has been demonstrated to play an important role in the law of civil obligation. While facilitating a greater sense of certainty in its purpose and use is a worthwhile endeavor, the process of clarifying fiduciary law ought not see it be reined in by rigid formulae or arbitrary restriction of its scope of influence. Fiduciary law must be used judiciously and only where the circumstances require its application. While overly ambitious applications of fiduciary principles lessen their impact and lend credence to criticism that fiduciary law may annex fields traditionally belonging to contract or tort,²⁶³ such designs are not consistent with the underlying rationale for fiduciary law's existence. Nor, for that matter, are they consistent with the fiduciary concept's role to complement, rather than supersede, the common law.

The "holy grail" of fiduciary law has been shown to not be as elusive as the legendary chalice to which it is analogized. This Article has attempted to set out the unique space within which fiduciary law functions, as well as the foundational goals that it is designed to accomplish, in order to provide greater clarity to the fiduciary concept and enhanced guidance for its use. Like the rumored curative powers of the holy grail, fiduciary law's "holy grail" may heal the wounded reputation of fiduciary law and allow it to be used with greater confidence by lawyers and judges alike. One thing, however, is certain: fiduciary law can rectify injustice in places and ways that the laws of contract, tort, and unjust enrichment cannot. For this reason alone, it is a valuable component of the law of civil obligation.

²⁶³ See sources cited *supra* note 12 (listing references supporting the criticism that fiduciary law threatens fields traditionally belonging to contract and tort).