TOWARDS UNIVERSAL FIDUCIARY PRINCIPLES

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Abstract: This Article focuses on unifying fiduciary law in Civil Law and the Common Law systems. The problems that fiduciary law addresses are similar throughout history and in all societies. However, the legal systems which address these problems differ. While in the Common Law fiduciary law is founded on property law, in the Civil Law similar fiduciary principles are found in the category of contract. However, the reach and basis of contract law in each system differ. Common Law judges tend to strictly enforce the parties’ contract terms while Civil Law allows for far more judicial discretion to impose fairness principles on the parties’ contract terms. This Article offers a number of ways in which the two systems of law can coincide and concludes and suggests by-passing the differences between the two systems by focusing on the results reached in each and at the same time following the models of dual systems.

Introduction

Fiduciary relationships play an important role in societies around the globe. No groups of individuals can survive, let alone prosper, unless its members rely on each other to some extent. A number of members may specialize in services that many need, especially if the services require significant effort to acquire, while other members rely on these experts to avoid wasteful duplication of effort. Thus, the relying members must trust the experts to tell the truth, to keep their promises, and to provide the services they promise in a proficient way. Yet reliance and trust pose risks for the trusting and dependent persons. Trusted persons might not tell the truth, might not fulfill their promises, might misappropriate entrusted property or misuse their expertise for their own benefit, and might fail to perform their services as proficiently as they represented they would. When these risks are high, trusting persons might avoid the use of expert services, or attempt to acquire the expertise, or take steps to verify the truth and reliability of those whom they must trust. When members of society choose any of these alternatives, their society is likely to bear higher costs. Law plays a crucial role in facilitating reliance among members in society by reducing the risks of such interaction for entrusting members and increasing the incentives of trusted persons to act in a

trustworthy and expert manner. The costs of trusting people are reduced by prohibiting fiduciaries’ abuse of trust and negligent services, and the cost of fiduciaries is reduced by legal guarantees of their trustworthiness. 3

The Common Law and the Civil Law are the two governing legal systems around the globe. Both systems aim at facilitating trusting relationships and encouraging members of society to interact and avoid costly duplication. Both systems herald moral, honest and fair behavior among interacting parties. Yet, even though they share the same goal, the Common Law and Civil Law legal systems seek to reach this goal by different rules and through different routes. These differences may produce different rights, judicial approaches and detailed rules.

Indeed, there were periods in which the two systems intersected. The Common Law drew on Roman law in the 17th century, 4 and Latin words are still used in some contexts today. 5 However, nowadays, the regulation of trusted experts differs in each system drawing on a fundamentally different structure and culture and is enforced in a different judicial process. The Common Law draws the regulation of fiduciaries mainly from property law, while in the Civil Law the regulation is based on contract. 6 In the Common Law the judicial process is managed more actively by the parties in an adversarial mode as compared to the more passive parties and more ‘hands-on” Civil Law judges. 7

This Article was not designed to offer an overview of the differences between the Common Law and Civil Law systems. I had hoped to limit the discussion to particular situations, and specific source-rules. However, once I began the research, I could not avoid a broader view of the structure, approach, and history of the two systems. Nonetheless, I restrict the focus to the two legal categories which demonstrate the main difference between the Common Law and Civil Law regulation of fiduciary relationship. These categories and the differences they represent are fundamental and deeply rooted in the structure, culture, and implementation of trusting relationships under the two legal systems, even as both systems aim at facilitating trusting relationships among people.

Currently, as international trade expands and relationships come closer, scholars and practitioners in Common Law and in Civil Law would benefit from adjusting agreements and rules towards a more unified approach. 8 With global commerce and finance, the importance of the laws designed to

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3 TAMAR FRANKEL, TRUST AND HONESTY: AMERICA’S BUSINESS CULTURE AT A CROSSROAD 58 (2006). Fiduciary law has addressed the problem for thousands of years. (social pressures can substitute for legal regulation).
6 See Part One below.
8 Mathias Reimann, Parochialism in American Conflicts Law, 49 AM. J. COMP. L. 369 (2001)
strengthen trust relationships is rising, especially with the rising costs of verifying honesty and moral behavior by others. A unified legal language, even if pronounced in different accents and intonations, can lead to shared values, better understanding, and more binding relationships.

To encourage and smooth fiduciary interactions, this Article takes a number of steps. First, it highlights the difference between the two systems. Second, examines the practices of the two systems, and focuses on details that the practitioners of both systems can subscribe and agree to. And third, it proposes to establish principles of fiduciary law to which both systems are dedicated. These principles might lead to the selection of rules which would govern particular relationships in both systems. That is, a design of a dual and varied, yet universal fiduciary law.

This Article is organized as follows: Part One examines the benefits and risks that trusting relationships pose for the parties and for society, and the role of the law in encouraging these relationships by reducing the risks and costs of these relationships for each of the parties. Part Two explores the differences between the Common Law and Civil Law relating to fiduciary relationships. This Part highlights the general objectives of fiduciary law that are shared in the Common Law and Civil Law and notes the differences between the two systems in reaching these objectives. Part Three of the Article explores possible ways and approaches to unify fiduciary law within the two systems and recommends a dual system of fiduciary law.

**A word about naming:** In this Article trusting persons are called entrustors and trusted persons are named fiduciaries. Fiduciaries have been around for thousands of years. The Code of Hammurabi regulates agents as fiduciaries. There were property managers in Bible stories. There were trustees in England in the 17th century and the Wakf -- the trust in Muslim countries much before that. There are directors, officers and money managers today. All these actors can be named fiduciaries. The parties to fiduciary relationships, however, do not have one name. They are called “beneficiaries” of trust, and “principals” of the agents, “clients” of lawyers, and “investors” and “corporations” in their relationship to corporate managers and money managers. One reason for the absence of a general name for the trusting parties that deal with fiduciaries may be that the law focuses on the duties of fiduciaries and only secondarily on the rights of entrustors. Another reason may be that fiduciary law is open to new fiduciary newcomers. Because this Article deals with parties that trust fiduciaries, it names all the parties to fiduciaries—entrustors.10

**Part One. Relying on Others: Benefits and Risks. The Common Law and the Civil Law—Same Purpose; Different Route.**

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9 Franck Chantayan, *An Examination of American and German Corporate Law Norms*, 16 ST. JOHN'S J.L. COMM. 431, 456 (2002) (“In sum, even though Germany and America took different paths in corporate governance both reached similar results. Management under both systems is charged with directing corporate affairs. As a greater amount of global mergers occur, corporate governance in Germany, the United States and other countries will develop to be more uniform. Already Germany is moving toward a more American style of corporate ownership, and management. For example, Jurgen Schrempp, the German co-chairman of Daimler-Chrysler's management board has been called a ‘maverick’ because of his unique, American style approach to corporate governance, company performance and shareholder satisfaction. With each new deal small steps are taken to make cross-boarder corporate governance appear seamless. In the end there may be less distinctions then there are similarities”) (footnote omitted).

10 FRANKEL, FIDUCIARY LAW, at 4-6.
1. Relying on Others: Benefits and Risks

In most, if not all, societies, members specialize in providing services, and rely on each others’ expert services. These services usually involve two elements. One element is expertise: the acquisition of knowledge which requires significant investment of time and cost. Therefore, it is in the interest in society to avoid duplication in acquiring such expertise, and inducing entrustors to seek the experts’ services. It should be noted that not all trusting relationships are covered by fiduciary law. In delineating the difference between the relationships that are accorded the protection of fiduciary law, the starting point is not solely trust and reliance. Fiduciary relationship involves the kind of trust and reliance that society is interested in nurturing. Then and only then will the law impose on one party to the relationship—the fiduciary—strict duties of honesty and trustworthiness.

The second element of fiduciary relationship is entrustment of property or power. Entrusted property and power initially belong to the entrustors and continue to belong to the entrustors. Yet, barring entrustment, the fiduciaries cannot perform their services. For example, investment managers and corporate managements require entrustment of investors’ property. Otherwise, the managers cannot perform their services. Similarly, clients must provide lawyers with the power to represent them in court, without which lawyers cannot perform their services.

While entrustment is necessary for the performance of fiduciaries’ services, controlling the fiduciaries in the performance of their services and the use of entrusted assets may undermine the very usefulness of fiduciary services. The experts’ decisions depend on changing circumstances which cannot reasonably be specified in advance. An investor cannot control the expert money manager because seeking the investor’s consent to any and every transaction prevents the client from engaging in his business, and may prevent the fiduciary from making decisions in time-sensitive activities. Long-term fiduciaries’ services, involving changes in the environment, cannot be specified in advance.

In the case of some expert services, control of the service is impossible. A patient in surgery has no control over the surgeon’s performance. The surgeon may not know in advance how to proceed when the patient’s reactions change suddenly. A client who attempts to interfere in his lawyer’s court cross-examination is very likely to hurt his own case. Besides, not all entrustors can choose their fiduciaries. A beneficiary who is a child cannot choose or remove his trustee. The trustee was chosen by the trustor. Yet this trustee controls and invests the child’s property.

Entrustment, the inability to control fiduciaries’ performance, and the difficulty of evaluating the quality of the fiduciaries’ expertise, pose risks for entrustors. The entrusted fiduciaries might be tempted to misuse entrusted power and property and shirk their obligations. Ideally, fiduciaries will act in a moral-self-limiting-and honest way. Ideally, when they have duties to two conflicting entrustors they will know precisely what to do; and their conscience will guide them to the right solutions. However, ideals may fail. The entrustors may have to personally enforce the fiduciaries’ duties.

The duty of a fiduciary to put his interest before that of the other party is limited not to situations in which the other party trusts the fiduciary but rather to the situation in which the other party cannot
but trust the fiduciary. These are situations in which the fiduciary is entrusted with property or power for the benefit of the entrustor. To the extent that entrustors can do that, the law need not interfere. But when they cannot enforce the fiduciaries’ duties towards them, law interferes.

In addition, risks to entrustors can pose risks to society. Rising risks from entrustment might deter entrustors from resorting to the fiduciaries’ services. When the costs of fiduciaries’ guarantees of trustworthiness rise, the fiduciaries might cease to offer their services. In these cases the parties are not likely to interact, and society may suffer damage. In these circumstances fiduciary law interferes in the relationship.

Thus, as one author suggested, fiduciary relationship is treated as a distinct kind of legal relationship “in which one person (the fiduciary) wields discretionary power over the practical interests of another (the beneficiary),” and, “fiduciary duties are explicable solely in terms of normatively salient qualities of the fiduciary relationship.” These duties reflect the nature of the relationship.

2. Fiduciary Rules in Common Law and Civil Law: Same Purpose; Different Route.

Both Civil Law and Common Law address the risk to the entrustor from fiduciary relationships. However, they differ in their focus and treatment of the issue. The Common Law addresses the entrustors’ risks by protecting the entrustors’ rights in the entrusted property or power and balancing the protection against the entrustors’ ability to protect their interest in the relationship. The Civil Law addresses the entrustors’ risks by focusing on the terms of the agreement among the fiduciaries and entrustors, including the circumstances that led to the parties’ agreements. While the Common Law courts pay great attention to enforcing the parties’ intentions as manifested by the parties’ agreements, the Civil Law courts pay great attention to enforcing the fairness of the terms of the parties’ agreements.

To be sure, in both systems, law alone does not ensure trusting and trustworthy behavior. But law plays a role in enticing trusting and trustworthy people to interact. When the pendulum swings and scandals demonstrate a high risk of trusting, stricter rules and sanctions are enacted to persuade people to trust and entrust, as well as induce trusted persons to mend their ways.

The two systems of law aim at achieving the same purposes in different ways. The Common Law anchors its regulation of fiduciary relationship in equity and property law while the basis of Civil Law’s regulation of fiduciary relationships is statutory contract law. The focus in the Common Law is on protecting entrusted property or power. Therefore, the Common Law imposes duties on fiduciaries to prevent misappropriation of entrusted property and misuse of entrusted power because

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12 See Tamar Frankel, *Fiduciary Law*, 71 Calif. L. Rev. 795, 816 (1983) (“The law should . . . protect the entrustor by regulating the fiduciary to promote the relations.”).
13 It should be noted that the law’s deterrence and punishment can undermine a component of trustworthiness that is based on moral behavior and self-limitation. Law extinguishes the difference between persons who do not abuse the trust in them even if there are no police around, and those who do not abuse the trust in them because they fear of being caught and punished. Frankel, *Fiduciary Law*, ch. 6.
they do not belong to the fiduciaries.\textsuperscript{14} The Civil Law imposes fiduciary duties to avoid unfair and immoral terms of the agreement and enforce fair and moral obligations. Even as fiduciaries have the legal ownership of property or legal right to exercise power, the beneficial ownership of the property and power belongs to their entrustors.\textsuperscript{15} Therefore they may not act in conflict of interest or carelessly.\textsuperscript{16}

The Common Law puts great weight on the ability of the entrustor to protect his interests from the fiduciaries’ abuse of power. To the extent that entrustors can verify and control the trustworthiness of others with whom they deal, at a reasonable cost, society expects them to bear these costs.\textsuperscript{17}

In contrast to the Common Law, the focus in the Civil Law is on the fairness of the terms of the parties’ relationship, the fiduciaries’ behavior, that is, their trustworthiness in terms of their promise. The duty to act ethically and morally is grounded in the promise under the contract.

In contrast to the Common Law, Civil Law does not recognize bifurcated ownership. Once ownership of property or bestowing of power passes to the fiduciary the fiduciary is the owner of the property and the right to exercise the power.

The emphasis on morality in the two systems is not drastic, but is notable. American courts have mentioned morality in relationship to breach of fiduciary duties for decades. For example, court noted that equity applicable to fiduciary relationship is “based on the highest morality,”\textsuperscript{18} and a claim against an attorney must demonstrate a breach of fiduciary duties involving immoral behavior.\textsuperscript{19} Fiduciary duties raise “the highest and truest principles of morality.”\textsuperscript{20} There is a “need for enforcement of commercial morality in fiduciary relationships.”\textsuperscript{21} Yet the emphasis is not as much attached to misappropriation and misuse of entrustment rather than to the terms of the relationship. As one court noted: “This Court realizes that standards of corporate morality and fiduciary duties may be different in West Germany.”\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{14} FRANKEL, FIDUCIARY LAW, at 108.
\item \textsuperscript{15} Roman law had a similar idea when it imposed on a true owner of a slave the duty to abide by the slave’s contracts with third parties. It imposed on a recipient of a gift—such as slaves—under a will the duty to free the slaves according to the request of the trustor. In both cases the reason for the recognition of fiduciary relationship was the laws that did not recognize a slave’s obligation (being property) and the trustor’s directive to act rather than merely receive property under the will. Rather than change the laws the rules allowed for deviations. FRANKEL, FIDUCIARY LAW, at 90-91.
\item \textsuperscript{16} The law offers an escape route to the fiduciaries by allowing them to avoid the prohibition on misuse of entrustment after disclosing the facts to the entrustors and receiving their consent. Id..ch. 4.
\item \textsuperscript{17} The emphasis in this description of fiduciary law is not accepted by everyone in the Common Law system. Some scholars argue for viewing fiduciary law as part of the Common Law-type contract, in which each party must fend for itself. However, the disagreement focuses on the degree to which the entrustors can reduce or eliminate their risks from abuse of fiduciaries’ power and the extent to which society is harmed by abuse of fiduciaries’ entrusted power. See Henry Hansmann & Hugo Mattei, The Function of Trust Law: A Comparative Legal and Economic Analysis, 73 N.Y.U.L. REV. 434 (1998). See also Henry Hansmann & Reinier Kraakman, Property, Contract, and Verification: The Numerus Clauses Problems and the Divisibility of Rights, 31 J. LEGAL STUD. 373 (2002).
\item \textsuperscript{18} Alcorn v. Alcorn, 194 F. 275, 278 (W.D. Miss. 1911).
\item \textsuperscript{22} USACO Coal Co. v. Carbomin Energy, Inc., 539 F. Supp. 807 (D. Ky. 1982).
\end{itemize}
Civil Law contract draws on statutory law—prohibiting trusted persons from breaking their promise or acting immorally. A Civil Law lawyer who wishes to create an arrangement which is similar to a Common Law trust could do so by finding a similar statutory design in the Common Law jurisdiction. In addition, Civil Law defines unethical and immoral actions by a contract party more broadly than the Common Law, drawing on the statute as well as the courts’ statutory interpretations. Remedies in both systems may reflect the level of wrongful behavior and immorality by the fiduciary. But they may differ as well.

Property law in the following discussion relates to the law regulating agreements among parties concerning potential use of markets in property. Thus, contract, property and fiduciary relationships involve consensual relationships among parties or consents of at least one party to act in accordance with specified terms. The following are examples of how these situations are treated in the Common Law and the Civil Law systems.

Part Two: Fiduciary Rules in the Common Law and Civil Law

A. The Common Law

1. Contract Law Is Not the Source of Fiduciary Duties

a. Third parties have weak right under contract law

Fiduciary law recognizes the rights of a third party, such as a beneficiary, to a relationship by two other parties (e.g., trustor and trustee), rarely do Common Law contract rules recognize benefits to non-parties. Those who are not parties to contracts have no rights or liabilities under the contracts except when it is clear that the contract parties intended to benefit these non-parties. And even those who debate the issue agree that contract terms can regulate the transferability of the parties’ rights. Barring agreement, a binding transfer may depend on whether transfer changes the other parties’ interests. For example, in the past the identity of the creditor was very important to the debtor when creditors had the right to demand that delinquent debtors will be imprisoned. However, when creditors no longer had such a right, debts became assignable even without explicit consent of the debtor, unless the debt agreement prohibits such an assignment. On the other hand, the debtors’ obligations are not transferrable because the debtor’s ability to pay is relevant to the creditor. For similar reasons, contracts for personal services are not transferrable. Yet, if contracts provide for non-transferability the courts will in all likelihood enforce these provisions.

23 See John Henry Merryman, Ownership and Estate (Variations on a Theme by Lawson), 48 TUL. L. REV. 916, 939 (1974) (“[M]any of the functions served by the trust can be achieved in [a civil] legal system by using indigenous institutions, but each such arrangement would be significantly different in legal structure and in legal consequences from the trust.”).

24 See RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981) (“A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.”); id. § 302 (distinguishing intended and incidental beneficiaries).


26 See RESTATEMENT (SECOND) OF CONTRACTS § 318(2) (1981) (“Unless otherwise agreed, a promise requires performance by a particular person only to the extent that the obligee has a substantial interest in having that person
b. Parties are deemed to have equal bargaining power

Most importantly, in the Common Law, contract parties are deemed to have an equal bargaining power. With few exceptions, contract rules are based on an assumption that the parties have exercised an independent judgment and could fend for themselves. “Contract law relies on the premise that parties, rather than laws, create (or decline to create) a relationship. The parties do so by exercising personal choices.”27 Therefore, contract rules focus on non-volitional situations in which courts will not be enforced, such contracts made by parties that lack capacity to contract,28 or are under undue influence,29 or duress,30 or contracts reached by fraud,31 or mistake.32 But if a party made a mistaken judgment and lost, while the other party noticed the mistake but said nothing, each party reaped the fruits of its decision and judgment.33

c. The contract terms are determined mostly by the parties. Fairness plays a limited role in determining contract provisions

A prominent feature of contract relationship is that its terms are determined by the parties.34 Because contract is based on the parties’ equal bargaining power, the courts aim at determining and enforcing the intent and terms of the parties’ agreement. The Common Law’s and courts’ intrusion on the terms of the agreement is very limited. Apart from agreements that involve substantive illegality, the task of the Common Law courts is to give legal effect to the parties’ intentions, as expressed in their contracts.35

Fairness of terms and morality of behavior play a limited role in the courts’ determination of conflicts over contracts unless they reach fraud. Professor Daniela Caruso noted the United States’ “contraction of the welfare state. Many courts partake of the prevailing ideological shift away from socially sensitive adjudication and towards market mechanisms of private autonomy. In legal scholarship, this phenomenon has received considerable attention in the past decade. Other courts, however, strive to compensate for the shortage of welfare services and to pursue redistributive

29 Id. § 177.
30 Id. §§ 174-176.
31 Id. §§ 159-172 (misrepresentation).
32 Id. §§ 151-158.
33 See id. § 154(b) (“A party bears the risk of a mistake when . . . he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient . . . .”); id. cmt. a (stating that party generally bears risk of “most supervening changes in circumstances” and “many mistakes as to existing circumstances”).
35 Id.
goals.” With few exceptions, the courts will not seek to determine or enforce the fairness of the contract terms. The parties made their bed and must sleep in it.

An extreme view of this approach is demonstrated by scholars of the “law and economics” ilk. They proposed “efficient breach” theories. In these theories a breach of contract is permissible and even desirable if the promisor can get a price which is higher than the contract price and the promisee is free to buy or sell the same item in the market at the contract price (and thus is not harmed). Under this theory nothing but the financial benefit to the parties matters. The morality or lack of morality of breaching a contract is not a significant factor. Arguably, “efficient breach” may undermine the reliability of a contractual promise long term. The sole test is short term “efficiency.”

d. Remedies

Common Law remedies for a breach of contract fit the view and design of contract law. Perhaps because it is assumed that contract parties have equal bargaining and negotiation power, a breach of a contract usually results in payment of damages. "[C]ourts in Common Law systems, for reasons that are largely historical, regard specific performance as an ‘extraordinary’ remedy, to be granted only when an award of damages would not be ‘adequate.’"39

2. Property Law

a. Third parties have rights under contract law

In contrast to contract law, property relations in the Common Law must be transferable. The courts are hostile to the parties’ limitations on transferability and view such limitations to be against public policy. The sale of land on the condition that the buyer will not sell the land to a particular person or not raise certain grains or flowers on the land is not likely to be legally enforceable. Presumably, public policy of encouraging market liquidity trumps the parties’ intentions and design.

b. The contract terms are determined mostly by the parties. Fairness plays a limited role in determining contract provisions

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37 See, e.g., Leverso v. Southtrust Bank, 18 F.3d 1527, 1534 (11th Cir. 1994) (“It is well settled that a court cannot rewrite the terms of a contract in an attempt to make otherwise valid contract terms more reasonable for a party or to fix an apparent improvident bargain.”).
38 Fletcher Int’l, Ltd. v. ION Geophysical Corp., C.A. No. 5109-VCS, 2011 Del. Ch. LEXIS 53 (Del. Ch. Mar. 29, 2011) (Because the preferred stock holders in a Delaware corporation had the right to vote only against certain acquisitions of the corporation’s stock but not against acquisitions of the holding company’s stock, the court rejected the preferred stockholders’ complaint, even though the acquisition in the one case had the same effect as the acquisition in the other).
39 3 FARNSWORTH ON CONTRACTS § 12.4 (1990) [current version: 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.4, at 163-64 (3d ed. 2004)].
41 ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 2.2, at 35 (student ed. 1984); id. § 3.24, at 155.
The Common Law strictly limits the parties’ freedom to vary and design the terms of their contracts concerning property transactions. In contrast to contract rules, the courts reject custom-made rights to property.\textsuperscript{42} Relationships that may involve market transactions fall into fairly limited and standardized categories, determined by law.\textsuperscript{43} And while the courts exercise restraint in reviewing contract terms, the property relationships are usually governed not only by the parties’ terms but also by court or statutory rules that factor in the requirements of markets. Property relationship rules seem to contemplate and encourage impersonal transactions, including transactions through intermediaries, whether the parties know each other or are strangers. Presumably, the public policy of reducing the information costs of market transactions trumps conflicting intentions and design of the parties.

c. Remedies

Property law under the Common law extends strong remedies to the claimant of the property including specific performance. The property owner is protected more than a contract party is.

3. Fiduciary Law under the Common Law

a. The parties to fiduciary relationship are not deemed to have equal bargaining power. Their contract terms are not determined entirely by the parties. Fairness plays a significant role in determining contract provisions

“[Common Law] [c]ourts regulate fiduciary [relationships] by imposing a high standard of morality upon them. This moral theme is an important part of fiduciary law. Loyalty, fidelity, faith, and honor form its basic vocabulary.”\textsuperscript{44} It has been suggested that the theses of morality underlying fiduciary law in the Common Law, is based on altruism—serving members of society, contributing to society and treating self interest in a way that benefits others. The behavior is voluntary and self-enforcing, reducing risk to the other parties in the relationship. It has also been suggested that contract in Common Law “does not go beyond the morals of the marketplace.” Each party seeks its own benefits and self interest. Every party, not the law, must restrain the other. In fiduciary law the obligation to act for the benefit of another is only to the extent of entrustment. There is no duty to serve as a fiduciary. “On this point, fiduciary law is as individualistic as contract.”\textsuperscript{45}

However, “because the law gives the fiduciary the choice between avoiding conflicts of interest with another or refraining from acting altogether, the law may be viewed as encouraging altruistic and moral behavior. Thus, once a person becomes a fiduciary, the law places him in the role of a moral person and pressures him to behave in a selfless fashion, to think and act for others. In addition, the moral standard is not left to the fiduciary [or to the entrustors] or to custom. The courts do consider the parties' expectations and professional customs; but in the last analysis, it is

\textsuperscript{43} Francesco Parisi, \textit{Entropy in Property}, 50 Am. J. Comp. L. 595, 605 (2002) (property rights are usually restricted to standardized categories).
\textsuperscript{44} Tamar Frankel, \textit{Fiduciary Law}, 71 Calif. L. Rev. 795, 829-30 (1983).
the courts that determine the standards.” Embezzlement is stealing by a trusted person—seriously immoral. The remedies for breach of fiduciary duties fit the image of embezzlement. Not only damages, but also accounting for profits, specific performance, and injunction are imposed by the courts.

Another avenue for judicial interference is demonstrated in a New York case where the court noted that “New York caselaw establishes an implied contractual duty to disclose in business negotiations. Such a duty may arise where 1) a party has superior knowledge of certain information; 2) that information is not readily available to the other party; and 3) the first party knows that the second party is acting on the basis of mistaken knowledge. . . . Even though a fiduciary duty may not exist between the parties, this duty to disclose can arise independently because of superior knowledge. . . . (under New York law, the duty to deal fairly and in good faith requires affirmative action even though not expressly provided for by the agreement. In this case, that affirmative action was the necessity of providing certain notice).” This type of relationship is very close to fiduciary relationship.

While Common Law judges may deny enforcement to immoral contracts, and contracts against public policy, they do so relatively seldom. As one United States court noted: “We do not deny the role of morality -- of equity in the broad sense -- in contract law as in all law.” Yet in dismissing a contractor’s complaint as improper, the court noted: “Linan-Faye has failed to demonstrate how HACC's exercise of its rights under this contract violates principles of justice, morality, or common fairness.”

b. Remedies

Remedies for breach of fiduciary duties are far more extensive and serious than the remedies for breach of contract and include those that are awarded for breach of property rights.

4. In the Common Law, Property Classification Is More Suitable to Address Fiduciary Relationships

Common Law of contract is not suitable to address the problems that arise in fiduciary relationships. The assumption in Common Law contract law that the parties can fend for themselves and have equal bargaining power is contrary to the basic and necessary condition in fiduciary relationship that the parties will not be equal with respect to entrustment. And while contract parties can determine the terms that assure the performance of the parties’ obligations, the parties’ agreements are not sufficient for enforcing fiduciary duties which are hard to specify in detail.

47 Constance C. Vaughn, Comment, *The Dischargeability Debate: Are Punitives Damages Dischargeable Under 11 U.S.C. § 523(a)(2)(A)?*, 10 BANK. DEV. J. 423, 429 (1994) (embezzlement is “the fraudulent appropriation of property by a person to whom such property has been entrusted” (quoting Klemens v. Wallace (In re Wallace), 840 F.2d 762, 765 (10th Cir. 1988))).
48 FRANKEL, FIDUCIARY LAW, at 248-60.
52 FRANKEL, FIDUCIARY LAW Ch. 6c.
Therefore, Common Law contract rules are not appropriate to protect entrustors. Furthermore, the remedies in Common Law contract for breach of promise do not carry the mark of moral turpitude, which is a desirable pressure on fiduciaries to self-control abuse of entrustment. Therefore, breach of contract does not involve a high level of moral turpitude.

In contrast, properly law rules are calibrated to reflect the inequality among the parties and the risk, that the trusting party takes when entrusting to the fiduciary either property or power. Property rules are more suitable than contract law to address problems that arise in fiduciary relationships. For example, limits on transferability are far more important in fiduciary law than in contract law.53

In the Common Law structure property rights are bifurcated: The fiduciary—the service giver—holds the “legal title” to entrusted property and power and the entrustor—the true owner—holds the “beneficial ownership” to the property and power. As compared to a breach of contract promises, misuse of entrusted property, such as stealing and embezzlement, is morally more reprehensible.54 A breach of fiduciary obligations involves the vision of prohibited and morally pernicious misappropriation. Consequently, the remedies for such a breach are not only damages but also accounting for profits, punitive damages and specific performance. The stigma of violating fiduciary duties is attached to immoral and unfaithful performance treachery.

A more consistent application and reference to moral and public interest appear in property law. In the words of one Common Law court: “[T]he agreement with supplier, which resulted in supplier’s scheme to defraud customer, and its failure to respond to customer’s note as to the lease that had not been paid, was sufficient to show a breach of duty to customer.” The court noted that the remedy of “equitable estoppel does not arise out of contract but is based upon concepts of morality and justice.”55

5. The Theme of Morality

In the Common Law, fiduciaries are subject to a high standard of morality. “This moral theme is an important part of fiduciary law. Loyalty, fidelity, faith, and honor form its basic vocabulary. Two aspects of moral behavior are important to understanding the moral dimensions of fiduciary law. First, moral behavior is altruistic. The moral person serves other members of the society and contributes to society generally. He treats his own interests in a way that benefits others, and he prefers the community to the self. Second, moral behavior is voluntary. Thus, the more self-enforcing the altruistic behavior is, the more it is considered moral. Self-enforcement reduces risk.

53 To be sure, fiduciary service may be deemed personal services that cannot be transferred under contract law. However, fiduciary law prohibits such transfers far more strictly, and in light of the context of the relationship that is as it should be. In contrast, beneficiaries have greater freedom to transfer their rights to another. See RESTATEMENT (THIRD) OF TRUSTS § 51 (2003) (providing that “a beneficiary of a trust can transfer his or her beneficial interest during life to the same extent as a similar legal interest” unless there is a valid restriction on transfer); RESTATEMENT (SECOND) OF TRUSTS § 132 (1959) (similar).
and uncertainty in human relations, avoids enforcement costs and the need for a strong enforcement organization, precludes deception, and allays the fear that the actor will succumb to temptation.

The moral theme in fiduciary law contrasts with the role of morality in contract law. Today the law of contract has departed from the observation of Justice Holmes's that a party may break his contract upon payment of damages. In fact, some scholars have asserted a moral duty to perform a contract. Nevertheless, contract law does not go beyond the morals of the marketplace. Each party may follow its interests and act for its own benefit. In the world of contract, self-interest is the norm, and restraint on this self interest must be imposed by others. In contrast, the altruistic posture of fiduciary law requires that once an individual undertakes to act as a fiduciary, he should act to further the interests of another in preference to his own.

Generally the Common Law does not oblige any person to act as a fiduciary. A person may agree or refuse to serve as a fiduciary driven by purely selfish reasons. On this point, fiduciary law is as individualistic as contract law. Yet, because the law offers a fiduciary the choice between avoiding conflicts of interest with his entrustor or refraining from serving, the law may be viewed as encouraging altruistic and moral behavior. Thus, once a person becomes a fiduciary, the law places this person in the role of a moral person and pressures him to behave in a selfless fashion, to think and act altruistically--for others. In addition, courts do not leave the moral standard to the fiduciary or to custom. The courts consider the parties’ expectations and professional customs; but, in the last analysis, the courts determine the moral standards.

A number of reasons justify the judicial incorporation of morality into fiduciary law. First, courts may have resorted to this standard because of the historical jurisdictional authority over fiduciaries in the ecclesiastical and equity courts. Those courts imposed sanctions based on religion and morality, and not merely on force or self-defense of the other parties.

Second, preventing abuse of fiduciary power is difficult. The moral theme of the law exerts pressure on the fiduciary to fulfill his obligations once he has agreed to enter into the relation. Morality becomes an adjunct to law; because a sense of moral obligation may present a disguised threat to the fiduciary as well as a positive inducement, helping induce the desired behavior.

Third, emphasis on morality can elevate the purpose for which the fiduciary's power is granted to a position of priority over other values which may guide the fiduciary. For example, the corporate director’s primary duty is to help render the corporation profitable for the benefit of the shareholders; the duty of the attorney is to represent his client’s interests; and the duty of the physician is to heal and prolong patients’ life. The duties assume a greater moral stature than other, conflicting, moral values.

Thus, a physician's duty to prolong life may take precedence over mitigating the patient's suffering or consideration of the family's impoverishment. But because fiduciaries must use the power entrusted to them for one purpose only--to perform their services to the entrustor, ascribing the highest moral value to that purpose encourages the fiduciary's voluntary adherence to it. To be sure, the moral emphasis on the purpose of the relation is not free from difficulties and criticism as is
evidenced by the arguments for social responsibility of corporations and the competing claims on attorneys’ fidelity to law enforcement, among others.

A fourth reason for viewing the fiduciary as a moral actor and distinguishing him from a selfish, profit-seeking individual is that entrustors may refrain from entering into fiduciary relations unless they perceive fiduciaries to serve the entrustor's interests. By characterizing the fiduciary as an altruistic person, the courts emphasize and highlight the substitution aspect of the fiduciary relation, reassuring the entrustor that the fiduciary will act in the entrustor's interest.

Fifth, the moral posture of fiduciaries is related to the vulnerability of the entrustor. It is wrong to injure anyone. But it is more reprehensible to injure someone who cannot protect himself, as an entrustor in a fiduciary relation is. Thus, the degree of moral culpability of the fiduciary is positively related to the extent of the entrustor's helplessness.

Finally, the moral feature of fiduciary law forms a bridge between altruism and individualism by focusing on the objectives toward which the fiduciary must aim. These objectives should not be merely the interests of others, but also the collective good, in which the fiduciary also has an interest. To the extent that the law induces fiduciaries to work for the collective good, the law helps shape desirable social trends.56

B. The Civil Law

1. Contract

In the Civil Law, contract rules do not seem fundamentally different from those of the Common Law.57 What differs among the two systems is the perception regarding the source of contract rights. In the Civil Law the source is derived from the particular statutes. The statutes are organized in various ways, imposing duties and awarding rights on the parties.58

Thus, in Civil Law, contract rights must derive from a form specified in the law. To be sure, the law is broad and permissive, but it remains the starting point of the analysis and affirmation of the parties’ contract. Whatever is not expressly permitted is ineffective. The source of the parties’ contract rights and some of the parties’ terms of agreements are drawn not only, and perhaps not mostly, from their own consent but from the statutes and the statutory rules.

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58 See, e.g., LA. CIV. CODE arts. 1756-1905 (LEXIS, current through 2011 Regular Session) (obligations in general): *id.* arts. 1906-2282 (conventional obligations or contracts).
The consequences of this approach to the source of contract rights raise a number of characteristics and create a fundamental difference between the two systems. This difference spills over to fiduciary duties and the attitude of the law to the parties’ power to determine the substance of their agreement.

2. Property Law

It seems that Civil Law contracts evolved on more than one mode. Historically, under Roman law, which is a Civil Law source, only Roman citizens could take advantage of Roman law, while foreigners’ contracts were regulated by other, special rules. Thus, different laws regulated similar transactions depending on the identity of the parties. This distinction resulted in different rules for similar contract terms. In fact, a similar phenomenon has emerged when the Common Law courts were open only to the parties that purchased a writ, which granted a remedy for a particular wrong they claimed to have suffered.

In the Civil Law system the contract substance should be linked to a statutory contract form, which entitles parties to legal remedies. Thus, in contrast to the Common Law, in Civil Law, theoretically, one can distinguish between rights and remedies that derive from the terms of the parties’ agreements, and rights and remedies that derive from statutory terms.

Further, Civil Law vests in the judges more control to interpret the substance of the contract. Civil Law allows judges a broader scope and latitude to decide the meaning of the contracts, determine their effectiveness, and the remedies for their breach. The legal system grants the courts authority to consider the fairness and morality of the terms and the contracts’ consequences. This leeway is not afforded to, nor practiced by, judges in the Common Law system.

Civil Law can achieve results similar to those in the Common Law by resorting to a statutory source without necessarily distinguishing between contract and other branches of law. With respect to property law, the Civil Law has developed forms of property relationships that are unknown in the Common Law system. More importantly, because the root of the Civil Law contract is in the statutory codes, the classification of contract is more limited. At least theoretically Civil Law


60 See John P. Sullivan, Twombly and Iqbal: The Latest Retreat from Notice Pleading, 43 SUFFOLK U. L. REV. 1, 8 (2009) (noting that writ system had developed in England by thirteenth century; later, specific writs developed “[their] own procedural, factual, and evidentiary requirements and . . . remedies”).

61 See, e.g., Larry A. DiMatteo, Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law, 33 NEW ENG. L. REV. 265, 290 (1999) (“In the civil law, fairness analysis is theoretically to be applied in every contract enforcement decision.”).

contracts are relatively more standardized, falling under a limited number of headings—similar to the headings under the Common Law property laws.

When property rights are derived from statutes, unlike the rights derived from the parties’ agreed-upon terms, these rights can be fashioned more effectively to meet market requirements and can be interpreted by the courts to reflect social needs and mores rather than the needs and moral beliefs of the particular contract parties. Just as crucial, because contract rights are interpreted by the courts as derived from the statutes, a breach of contract can be deemed morally highly reprehensible. In contrast to Common Law, property and contract laws pose different expected moral levels in Civil Law. Therefore, the Civil Law contract category can better serve as a property law category.

3. **Fiduciary Law**

Civil Law expands its contract regulation to cover fiduciary principles and offer fiduciary rules of right and wrong behavior. Unlike the Common Law, which focuses mostly on the parties agreed terms, “[t]he concept of good faith plays a major role in civilian contract law. The most remarkable example is Article 242 of the German Civil Code, which requires parties to observe Treu und Glauben—a few words that have spawned a vast outpouring of caselaw. To the civilian mind, good faith is a broad reaching concept that covers far more territory than the comparable provision of Uniform Commercial Code 1-203 [now 1-304], which requires good faith in the performance of contracts.”63 Thus, Civil Law anchors its fiduciary law in its species of contract.

4. **Remedies**

“Courts in civilian legal systems routinely grant specific performance by ordering parties to perform their contracts.”64 In the contract area, Civil Law and its courts draw on general principles of morality and justice as guided by Codes.65 The Code is viewed as the source of measuring the fairness of the parties’ arrangement. One could say that the Civil Law regulates contract both in terms of the legal source of the right to contract as well as the substantive level of fairness of contract terms.

5. **Civil Law Regulation of Fiduciary Relationship**

In some respects contract rules in the Civil Law are similar to the Common Law property rights. Both are more intrusive into the parties’ terms of agreements and both focus on the fairness of the terms of the relationship. However, a fundamental difference between the two systems is that the Civil Law does not recognize nor accept the bifurcation of property rights. Once a transfer has been accomplished, the transferor, including a fiduciary, owns the property in full. If the trustee is

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63 E. Allan Farnsworth, *A Common Lawyer’s View of His Civilian Colleagues*, 57 LA. L. REV. 227, 234 (1996); id. at 234-35 (citing LA. CIV. CODE ANN. art. 1759 (1987)) (“Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation.”). “English law, at the opposite extreme from the civilians, adamantly refuses to recognize any such duty of good faith whatsoever.” Id. at 235.

64 Id. at 235.

unfaithful, it is contract law that would be resorted to punish him. A transfer of these rights is a full transfer. Contract in the Civil Law covers the property relationships in the Common Law.

In contrast to the Common Law, the Civil Law of contract is suitable for covering fiduciary relationships. That is because contract law in Civil Law focuses on, and directs the substance of the agreements. Rather than give effect to any bargain of the parties (if not illegal) the Civil Law courts treat all contracts with a view to ensure fairness and moral behavior of each party towards the other. In addition, the Civil Law does not distinguish between contract and property law in the same way. Civil Law contract is suitable to cover fiduciary relationships. Civil Law contract rules carry a high degree of moral requirements, and breach of contract by trusted parties is considered highly immoral. And like fiduciary law under the Common Law, Civil Law does not require consideration to bind contracts.66

Civilian jurists reject the view of fiduciary relationship as part of property rights. This rejection may not have been as fundamental as it is today. As one scholar noted: “Where *fiducia cum creditore* was concerned, the creditor was the titleholder, whereas the debtor retained his interest in reconveyance. It is not my intention to suggest, of course, that in the case of *fiducia* there was a divided title as known in modern trust law. After all, the depositor/debtor in case of *fiducia* only had access to an *actio in personam*. Nevertheless, the similarities are striking. As regards the similarities between the trust and *fiducia cum amico*, for example, it may be pointed out that use-like constructions were employed in England during the times of the Crusades, when people left their motherland on perilous expeditions to the Holy Land. They placed their property in the hands of a third party. . . .”67

Today, however, the rejection is strong. One explanation is historical. Bifurcated ownership during the French Revolution was viewed as reflecting feudalism. Hence the Civil Code established that there is one unit of ownership and only one--equal for every owner.68 In addition, one may speculate that under Civil Law the concern of standardization of property rights may have been less pressing because the written law could be designed to consider market liquidity. The Code determines the type of contract that the parties adopt, and seems to avoid the kind of variability that the Common Law courts consider to be against public policy. Thus, it may well be that because the Civil Law statutory source of contract, as compared to the parties’ freedom to design their own terms as recognized in the Common Law, limited the number of variations in the property relationships contracts, and in addition, Civil Law’s roots in the Roman law brought about into the law different standardized contracts; therefore, property relationships could remain governed by contract law.

While the Civil Law has avoided bifurcating property rights (into legal and beneficial rights), it avoided some of the problems in the Common Law as a result of such bifurcation. For example, if

the fiduciary, who is the ostensible owner, sells the property in violation of his fiduciary duties, the entrustor may follow the property to the buyer, under certain conditions. Because such a rule can undermine market trading, the Common Law protects third party buyers who paid full value for the property and did not have notice of the trustee’s violations. The issue of the voting trust is another demonstration of the problems posed by trustees that seem to be the owners but are not the owners. The Civil Law does not pose such problems. The entrustors may bring action only against the trustee—the ostensible owner. The status of a trust as a legal entity brings questions as well. In sum, the resistance to any bifurcation of ownership is deeply embedded in the Civil Law tradition and may be as difficult to overcome as the resistance of the Common Law judges to engage in judging fairness and morality of contracts.

6. The Theme of Morality

To judge the terms of a contract, the Civil Law courts draw on general principles of morality and justice guided by Codes. The Codes are viewed as the source of measuring the fairness of the parties’ arrangement. One could state that the Civil Law regulates contract both in terms of the legal source of the right to contract as well as the substantive level of fairness of these terms.

Civil law attaches the stigma of immorality to contract terms. Therefore, it seems that the need for significant differences between contract and property laws does not exist to the same extent as it does the Common Law. Contract under Civil Law can better meet the market needs than the Common Law.

This conclusion is illustrated by the following insertion of trust law into China’s legal system. On October 1, 2001 Trust Law of the People's Republic of China became effective. It was designed “to provide a legal foundation for the regulation of financial trust services and charitable activities. How well these legislative objectives are achieved will depend on how the trust law principles embodied in the Trust Law operate within the framework of Chinese law. China's legal system, although still being developed, is basically a Civil Law system.” Charles Zhen Qu suggested that the Trust Law “will not be of much practical value if it cannot be interpreted in light of the Civil

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72 Peter A. Alces, Unintelligent Design in Contract, 2008 U. ILL. L. REV. 505, 543-46 (2008); Dennis J. Callahan, Medieval Church Norms and Fiduciary Duties in Partnership, 26 CARDOZO L. REV. 215 (2004) (“The secularization of the venue in which morality trumped law prompted changes in nomenclature, if not in the substance of rulings Instead of appeals to God's will, faith, and salvation, the focal point of rulings shifted to the individual and the human conscience. This sixteenth century transition ‘was an important stage in English legal thought, not because it was new but because it linked the medieval world and the modern.’ Though the state, not the Church, would be the final arbiter of disputes in the marketplace, the prevailing view was that ‘the jurisdiction of Chancery was a moral necessity based upon the duty of government to give not merely law but justice to its subjects.’”) (footnotes omitted).
Law principles. Civil Law lawyers cannot viably approach their own trust law with Common Law principles.”

Qu asserted that “[a] relationship analysis helps answer the questions because the Trust Law was made to regulate trust relationships. The roles of each party to a trust are determined by how the concept of trust is defined, how a trust is created, and when a trust is constituted under the Trust Law.”

The details of the fiduciary relationships are not left to the parties. “The 2001 enactment of Trust Law makes it possible to use a special purpose trust to carry out securitization. Although passing the Trust Law is a major legislative achievement, the "trust" concept is still new to China, as [it] is to many other civil law countries. Therefore, it remains to be seen how the law will be applied and interpreted in the context of asset securitization. For example, one issue would be whether the beneficiary certificates issued by SPTs are considered securities.”

It should be noted, however, that China has built its legal system from zero, because when Mao Tse-tung took over the country he abolished all prior laws. Therefore, even thought China draws some of its legal understanding from the Civil Law it has no law except that which has been and is enacted by its Congress.

C. Conclusion: How Important Are the Differences Outlined Above?

1. The Distinctions Are Important

The property law umbrella seems more suitable for the Common Law system while the contract rules umbrella seems to fit the Civil Law system better. Common Law courts will enforce contracts among independent parties and give effect to the substance of their agreement. Under Civil Law the courts will seek authority in the Code for the validity of the contract among the parties and, taking into consideration their independence and ability to fend for themselves, will also consider the fairness and morality of the terms of the contract.

The distinctions between contract based on the parties’ negotiated terms and contract derived from a code provision are fundamental and have consequences relating to the source of the law and the role of the judges in determining the interpretation of the contracts. The existence of bifurcated property rights as compared to contract promises has serious consequences for both systems as well. Habits and cultures are hard to change just as they are hard to be established. An example of this barrier is the effort of Professor Louis Loss, the creator of securities regulation as an area of law, to combine the various securities acts into a code. He hoped that Congress would adopt the Code and the members of the Bar will use it. The American Law Institute and a group of expert members worked on the Code. It contained over 3000 sections, balancing directives and smoothing contradictions. Instead of adopting the Code the Securities and Exchange Commission absorbed into its regulation certain innovative provisions, but the Code itself did not become law. When I asked why was

74 Id.
76 See, e.g., Jeffrey D. Bauman, Loss and Seligman on Securities Regulation: An Essay for Don Schwartz, 78 GEO. L.J. 1753, 1780 (1990) (book review) (noting impact of Federal Securities Code on SEC); id. (noting that integrated disclosure system is based on Code concept of “company registration”) (citing 2 LOUIS LOSS & JOEL SELIGMAN,
this Code not adopted and why did it lose the support by the Bar, one answer that struck me related to the cost of the practitioners in learning the new section numbers of the Code? “Everyone understands when you say section 5 violation of the 1933 Act and section 17(a) of the 1940 Act” answered one renowned securities lawyer. “But in the Code these are designated by entirely different numbers. No one wishes to learn new numbers now.” As the Hague Report concludes: “[T]he mainstream in the Civil Law characterization of the trust . . . emphasizes its flexibility and sees it as a contract-like institution . . . .’ In Europe, contract does the work of trust.”

When building blocks of a legal system conflict, the chances of changing such building blocks are very slim. No wonder that the current literature on the sources and interaction between the Common Law and Civil Law demonstrates disagreements and uncertainty.

2. **Both Common Law and Civil Law Share a Goal in Common**

History demonstrates the commonality of the two systems striving to overcome rigid rules and searching for justice and fair treatment of the parties. It is helpful to recognize the two systems’ visions and objective. It has been suggested that “Roman, Canon and Germanic law (sources of the European *Ius-Commune* tradition) have provided elements of the law of [the English law of] trust.” Roman law had an impact on the Common Law. “William Blackstone (1723-1780) is an outstanding later example (see his *Commentaries on the Laws of England*, 1765-69). These authors were tempted to use Roman categories in systematising English law, since the Common Law, being a product of case law, could not provide the tools for its own systematisation. The result of their efforts was a description of indigenous English law based on Roman Law classification, often expressed by borrowed Roman Law terminology.” England’s equity law has not risen in an orderly fashion. The Court of Chancery may have had its roots as an administrative entity that

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Securities Regulation 599-620 (3d ed. 1989); Federal Securities Code §§ 401-06 (1978); id. ("[R]ule 176 under the 1933 Act is taken almost verbatim from the Code.") (citing 17 C.F.R. § 230.176 (1989); Federal Securities Code § 1704(g) (1978)).


81 Id. at 455.
administrates the king’s justice. The overall objective in the English system was to achieve justice in the name of the sovereign. Thus, on this high level the Civil Law and Common Law meet.

There are those who believe that “Civil and [C]ommon law seem to converge into a larger and more comprehensive Western liberal democratic family of legal systems, where some common values about law and democracy, as well as general legal principles in the area of public, administrative, criminal and private laws are shared by the legal traditions. Although a general sub-distinction between [C]ommon [L]aw and [C]ivil [L]aw still persists, the major distinctions between them, however, have been greatly diluted in a continuous convergence between the two legal traditions clearly evident from the current harmonization initiatives taken within the European legal community.”

I do not believe that the practice in the two systems is as described, but the description of this may point to the future.

These foundational principles may point to the road to uniformity. For example, while one system may view law as limiting the actors’ freedom another system may stress the law as the source of legal rights. Both views can be adapted to view law as a source of the victims’ rights against abusers of the victims’ freedom. That is especially true of fiduciary rules. Similarly, while bifurcation of property can represent the feudalism of the past, where the powerful party held its power by force and by law, today the seemingly powerful party in fiduciary relationship is the servant endowed with power by the other party. Property bifurcation may be viewed as the tool for protecting the true owners but weaker parties, against the powerful servants on whom the weak parties must depend, when such dependence is socially desirable.

3. Unifying the Laws Has Advantages

There are many advantages to unifying the law. Among them are the following. Unifying the law may help establish trusting relationships across state boundaries. Further, unification reduces the cost of agreements among the parties. Just as a Babel of languages is costly so can be a Babel of legal rules. In addition, unification brings closer the different ideas of trust and faithfulness and raises a better understanding of morality. Fourth, unification drives towards an understanding and compromises rather than a fight for “winning my way.” Fifth, unification avoids the need for a third party arbitrator between the two systems and the need for finding compromises. Therefore, if, alternatively, the two legal systems remain intact, and if we recognize that both aim at achieving a similar mission, how can their mission follow a combined approach?

Part Three. What can be done to unify fiduciary law?

1. What Can We Learn From the Attempts to “Transplant” Common Law Into the Civil Law systems?

a. The Experience of Japan

Arguably, it takes decades to evaluate the success of a “legal transplant.” Japan’s experience with respect to the fiduciary duty of loyalty shows that even a poorly motivated and ill-fitting legal transplant may become part of the system, dressed in traditional garb over time, as the legal infrastructure and political economy change. This might occur as legal and non-legal developments alter the mix of available substitutes and affect the motivation of the legal professionals who interpret and enforce the transplant. In fact, to this very day Japan’s courts might view the directors’ duty of care as including the duty of loyalty. Their approach may be influenced in part by the fact that in Japan the corporate directors are generally also the officers of the entity and that officers from the highest level down are deemed responsible for any occurrence at all levels of the organization below them. Therefore, the duty of care in Japan includes what the Common Law names duty of loyalty and is far broader than the duty of care in the Common Law system. But the substance of the duty is very similar in both systems.

b. The Experience of China

On October 1, 2001 Trust Law of the People's Republic of China was passed “to provide a legal foundation for the regulation of financial trust services and charitable activities. How well these legislative objectives are achieved will depend on how the trust law principles embodied in the Trust Law operate within the framework of Chinese law. China's legal system, although still being developed, is basically a Civil Law system.” Charles Zhen Qu suggested that the Trust Law in China “will not be of much practical value if it cannot be interpreted in light of the Civil Law principles. Civil Lawyers cannot viably approach their own trust law with Common Law principles.” He asserted that “[a] relationship analysis helps answer the questions because the Trust Law was made to regulate trust relationships. The roles of each party to a trust are determined by how the concept of trust is defined, how a trust is created, and when a trust is constituted under the Trust Law.” For other countries experimenting with codifying the duty of loyalty as a means of improving corporate governance, Japan’s lesson could either be reassuring or discomforting.

Chinese scholars seek specific rules for legal trusts. They “point out that even if beneficiaries are aware [of the existence of a trust], rules that promote secrecy of trusts may make it impossible for beneficiaries to fulfill the role American trust law assigns them as enforcer of trusts. Because no record exists of an invisible trust's purpose, property, parties, or fiduciary rights and duties, beneficiaries lack the information they need to monitor a trustee and hold that trustee accountable for any misconduct. Indeed, secrecy of trusts may effectively deny beneficiaries any claim whatsoever to trust property. As Zhong Ruidong and Chen Xiangcong observed, ‘if the trust is not

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87 Id. (footnote omitted).
established in writing, after a considerable period of time, when the beneficiary asserts his beneficial rights, no evidence [of those rights] will exist.’ To Chinese authors, the inevitable result is conflict and uncertainty.”

c. The Experience of South Korea and Taiwan

Taiwan can provide a model for attempts to merge the civil law and common law systems. One lesson taught by the legal transplants is the sliding movement. We can maintain the status quo and expect that, with usage, either Common Law or Civil Law or a hybrid will emerge. Scholars have observed that while Civil Law judges have been paying far more attention to precedents, the Common Law judges have been paying far more attention to the written law and the codes. Perhaps this form of “skidding” is being adopted more readily in fiduciary law because the category of fiduciaries is open-ended. And even though fiduciary relationships are many and varied, the fundamental objectives of fiduciary laws are the same or very similar, and appear in each jurisdiction. Subject to social and cultural pressures—they require the same or very similar treatment by law.

Taiwan has imported the duty of loyalty by copying Article 254-3. Like Japan, it was suggested that the fiduciaries’ duty of loyalty is poised to play a role in corporate governance because the two countries have similar legal and political-economy environments. It may take years (as it did in Japan) for other countries to adopt the duty of loyalty, and these countries may develop substitutes. Yet, whatever the names the essence of the duty of loyalty is similar.

“[C]ontrary to the approach of most scholars to date, it is virtually impossible to discuss the ‘success’ or ‘failure’ of wholesale transplants of entire bodies of law (such as Japan's transplantation of codes in the European Civil Law tradition in the late 19th century), or to extrapolate meaningfully from a single rule to the feasibility of legal transplants in general. Each legal rule or institution must be examined individually, and assessment of the overall feasibility of legal transplants as a form of legal change requires a more rigorous theoretical base than existing literature has provided.”

d. The movement to codification

In the Civil Law area of codification there is a trend toward “codes characterized by ‘open’ rules.” More general rule in such codes enable the court to further develop more focused specific rules.

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91 Id. at 901.
Thus, the Dutch Civil code of 1992 has abandoned even the “traditional hierarchy among the different sources of law.”

Similarly, Article 1261 of the Quebec Civil Code declares that a trust patrimony is distinct from that of the trustee or beneficiary and is a “patrimony by appropriation” (patrimoine d’affectation). The Law of Obligations in the Civil Law system is divided into particular rules concerning obligations and a more general “all the rest” part which is not itemized. Through these latter other obligations a trust similar to the Common Law trust can be established. In contrast, when the Supreme Court of Canada imposed on the Crown duties that stemmed from assertions that the Crown made before a contract was signed, the Crown was held to be a fiduciary even though it was not a trustee in the strict sense of the word. It was a fiduciary in the sense of the power relationship with the Indian tribe with whom it had signed the contract.

Civil law scholars seek specificity. As Frances H. Foster wrote: “Chinese scholars point out that even if beneficiaries are aware that such a trust exists, rules that promote secrecy of trusts may make it impossible for beneficiaries to fulfill the role American trust law assigns them as enforcer of trusts. Because no record exists of an invisible trust's purpose, property, parties, or fiduciary rights and duties, beneficiaries lack the information they need to monitor a trustee and hold that trustee accountable for any misconduct. Indeed, secrecy of trusts may effectively deny beneficiaries any claim whatsoever to trust property. As Zhong Ruidong and Chen Xiangcong observed, ‘If the trust is not established in writing, after a considerable period of time, when the beneficiary asserts his beneficial rights, no evidence [of those rights] will exist.’ To Chinese authors, the inevitable result is conflict and uncertainty.”

However the Common Law system has been moving in the Civil Law direction. As the number of court cases became increasingly costly to manage, the Common Law legal tradition may be “moving towards a more central role for written law. In England, the Parliament is continuously involved in law-making activities covering different aspects of legal relations. In 1998, the Parliament approved the new Civil Procedure Rules, which were strongly influenced by the [C]ivil [L]aw pattern. The legal system of the United States is historically less linked to the classical pattern represented by English [C]ommon [L]aw. The American system incorporates the fundamental elements of such a legal tradition,” but may also incorporate elements of civil law. The movements of the two systems are towards each other, the outcome is far from certain.

2. What Can We Learn From the Attempts to Unify Languages?

a. The effort to create a global language

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94 Osoyoos Indian Band v. Oliver (Town), [2001] 3 S.C.R. 746, 2001 SCC 85 (“[T]he Crown may not cite competing interests to exercise fiat in favour of public interests against the fiduciary relationship to aboriginal claims.”).
Attempts to create a universal or world-wide language may be instructive. There are hundreds of proposed universal languages which failed. Esperanto, for example, is well known yet it is not a living language; only a few enthusiasts use it. A more successful model is an imposed language that follows political power. Latin, French and English represent such universal languages. Their hegemony eroded with the eroding political power on whose coattails they rode.

Another language model worth noting is Yiddish, which retained the syntax of old German but has been absorbing particular words from the languages of the countries in which the users-Jews happened to live. Yiddish teaches us that the most difficult language part to change is the syntax. If the syntax remains unchanged, specific new words, which are easier to learn, can be absorbed into the same syntax, even though they are of an alien origin. German Yiddish and Russian Yiddish and English Yiddish are the same and different in this sense. “Sie ist beautiful” and “Sie ist krasavitska” retain the “Sie ist”—“She is”—and add the words beautiful in English and Russian. English as well has absorbed words of other languages (e.g., the Hebrew words of cherubim and seraphim).

Thus, to follow the language examples legal integration should retain one basic structure, while adopting different details or results that fit the local population and its culture. To a great extent federal systems share this trait. High level general principles and structures, as well as important governing tasks, are shared by all groups while the details are left to the determination of the particular states. With time, certain topics become prevalent and require uniformity while others may remain different and unique.

The problem in the case of fiduciary law is that the conflicting differences between the Common Law and Civil Law systems are at the “syntactic” or structural level. The laws’ objectives are similar, and closely the same. The guiding principles are similar. But changes in the detailed rules would require changes in legal categories and the underlying principles on which they rest, in other words—the syntax. The parties in this case are sufficiently independent and imposing on them one system on another is hardly an option. If the situations or documents before the parties and the decision makers are written in another legal language, how should they determine which system to apply? How should the lawyers draft documents for parties and transactions under different systems? What if they do not know when and how and where problems might arise in the future, and how particular judges or legislators will rule?

b. Can we change the Common Law “syntax” of fiduciary duties from property law to contract rules?

One jurist has suggested that the United States should move from fiduciary – property law to contract. “We are accustomed to think of the trust as a branch of property law. . . . This exposure of the trustee's capital informs the modern trust deal, effectively insuring the beneficiary against much potential harm and forming part of what the settlor buys when selecting a corporate fiduciary.”

97 FREDERICK BODMER, THE LOOM OF LANGUAGE ch. XII (1944).
The added concern of grounding fiduciary law in property law is precisely the one that the Civil Lawyers were expressing. 99

Regardless of the call toward contract in fiduciary law, it is not likely to bring the Common Law closer to the Civil Law. The preachers of fiduciary law as contract do not offer or recommend imposing on fiduciaries the Civil Law constraints of contract, nor do they suggest empowering the courts to impose on trusted persons the Civil Law strict fairness duties under contract. The purpose of the contractarians seems to be to free fiduciaries from strict conflict of interest rules and other legal limitations and yet keep the Common Law contract law intact, without introducing judicial regulation of contract parties to include high levels of moral behavior. Fiduciaries’ organizations and their followers have been arguing against tightening regulations of fiduciaries. The cost of regulation, they maintain is enormous. 100

Uniform international Principles of Fiduciary Law will be similar to standards in the technical world or Zamenhof’s world-wide language, the Esperanto. It is doubtful whether the system would be used. It does not fit either the Common Law or the Civil Law; it is probably the most alien to both. From the point of view of tradition, culture, and familiarity, such a system would be the most costly as it will – slowly but surely -- move towards avoidance of trust and reliance.

That prediction is evidenced by the slippery slope of fiduciary law when the property basis of the Common Law fiduciary is eroding, while the values of the Common Law contract have not moved closer to the values of Civil Law. Having tasted the bitter fruit of abused trust in 2008, which arguably resulted in part of trust without enforcement of fiduciary rules, Common Law is unlikely to move the contractarian way. More rules and stricter enforcement of fiduciary duties are proposed. Market enforcement and contract in the Common Law sense is not offered as a substitute for fiduciary law. 101 Perhaps the strong campaigns and enormous amounts of money that fiduciaries are using to fight off higher standards of fiduciary law demonstrates the benefits that these fiduciaries gain from weaker restrictions on their benefits.

The change to move fiduciary law towards the contract category and rules cannot be meaningful unless Common Law imposes on breaches of contract the obligations and remedies of fiduciary law—punitive damages, accounting for profits, and sometimes punitive damages. By imposing similar remedies there could emerge a more uniform global system. Unfair treatment as understood in the Civil Law would be accompanied by the same remedies imposed by the Common Law on breaches of fiduciary duties. Such a new system ought to be imposed on the parties if, and only if, they choose to adopt it, and any court, whether in the United States or in Europe or in any country

99 Id. at 646, 647, 667 (“[Austin] Scott was concerned] that a contractarian account could undermine the integrity of the trust in the dawning procedural system that was emerging from the fusion of law and equity. . . . In the case in which the trustee transferred trust property to an outsider who did not supply value, the Chancellor would enforce the beneficiary's claim to compel the transferee to return the asset to the trust even though that transferee was not a party to the trust deal between settlor and trustee. . . . I turn from the strengths of the contractarian analysis of the trust in accounting for trust fiduciary law to the weak point of contractarian analysis: the law of trustee insolvency, which governs the rights of outsiders to the trust deal.”).

100 See The Borzi Savings Bomb, WALL ST. J., Aug. 12, 2011, at A14, LEXIS, News Library, Wsj File (a strong argument against tightening the fiduciary duties of those who service pension funds under ERISA).

that agrees to impose this system, would follow as well as create this hybrid system and make it more robust as time goes on.

Many difficult issues must be answered by those who adopt this proposal. First, should there be a Uniform Code that embodies the entire legal system? If so, are there organizations of lawyers from different countries to prepare such a code? Second, would Common Law and Civil Law courts adopt the system? That might depend on amendments of the law in each jurisdiction that would allow the parties to choose it. This approach is complex but not necessarily impossible to achieve. If model documents develop and are used, the rules might follow the parties’ expectations and end as uniform codes of behavior. If laws recognize the forms prepared by the lawyers then the forms may result in a development of general practices. Custom is a source of law.

3. Should Market Parties Decide?

There is a body of law, dealing with transnational transactions, that grants the parties freedom to determine which laws should apply to their transaction, or allowing them to register in particular jurisdictions, thereby choosing the legal regimes that would apply to them. However, United States law has not allowed the parties to classify their relationship, especially when fiduciary law is concerned. The ultimate legal classification is within the authority of the courts and legislatures. This structure is required to achieve uniformity and ensure a minimal coherence of law.

One way in which a court can approach a foreign system is demonstrated by a Swiss Court that dealt with a Common Law trust. The court noted: “As there exists in Swiss law no legal institution which corresponds in all its elements to the legal relationship created by the . . . [attempted trust], it is necessary to examine which legal institutions of Swiss law . . . [have] the closest resemblance.’ Applying this method, the court determined that the trust had ‘certain elements of a contract of mandate, of a fiduciary transfer of property, of donation and of a contract for the benefit of a third party.’”

Thus, here there was no attempt to search for a governing rule. Rather the court found a mode of analysis to resolve the differences among the rules. In some respect this is a very fruitful route for the courts, as they often search for solutions among different rules that aim more or less at the same result.

While the focus of this article was on the law and their history one must not ignore another important factor that shapes fiduciary law, and that is the culture and special structure of the

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104 TAMAR FRANKEL, FIDUCIARY LAW, at 69.
particular communities. For example, John Cioffi noted the different Common Law and Civil Law approaches in labor-management relationship related to corporate governance regimes. There are problems in each approach. While the Civil Law (e.g., Germany) resorts to structured arbitration in an attempt to resolve differences among the parties, the Common Law leads to the courts after differences among the parties have arisen. Structured arbitration “cannot fashion coherent and determinate fiduciary duties privileging shareholder or managerial interests over those of employees in the internal governance of the firm.” American fiduciary law in contrast is litigious after the fact. The business common law judgment rule “reveals the impracticability of structuring corporate governance through formal rights and judicial enforcement.” In this scholar’s opinion fiduciary law is an “inherently flawed foundation” for regulating corporate governance. The form distinction “indicates that civil law systems will encounter substantial, perhaps insuperable, problems in fashioning and enforcing a law of fiduciary duties along Anglo-American lines.”

Hence, corporate governance regimes reflect the politics of institutional mechanisms. Existing institutional structures control and shape the political conflicts.

Common Law and Civil Law approaches to corporate governance reveal the problems of these governance regimes. In Germany conflicts “are adjusted within legally constructed bargaining fora and through the careful calibration of the parties’ bargaining power within them.” This affects the efficacy of the results. “American fiduciary law describes the structure of much ex post common law adjudication and judge made law” and “differs sharply” from “the ex ante” codified specificity of the Civil Law. The differences make the imposition of the Common Law on Civil Law on this subject very difficult. Judges cannot structure and manage the business, as the business judgment rule illustrates.

Not all is quiet on the Common Law front, however. In trust law, there are serious arguments among Common Law scholars regarding the virtues of the settlors’ grip on trustees’ exercise of power especially when the settlors have been dead for a number of years and the trustees have no power to change the settlors’ directives. Free market controls have their own weaknesses. The balance is hard to reach and maintain even in one regime let alone in the two distinct ones.

4. The Choice of a Dual System

a. The secrets of an effective dual system.

Arguably no comparison, no distinction, and no explanation, are perfect. But that does not prevent imperfect communication and comparisons. Different legal cultures prevent perfect interpretations,

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107 Id.
To “translate” or compare a system one must understand the systems in depth and search for shared commonalities. Highlighting differences may also highlight similarities. One scholar has emphasized that “immersion approach rejects the absolutist mentality. It contemplates a slow pushing against cultural barriers towards an ideal of mutual comprehension, a striving to approach comprehension, and a recognition that some distances will remain. Rather than failure, it implies the need to accept that others have different truths.” Gaining insights and understanding of foreign “cultures, . . . habits, history, language, preoccupations and social circumstances” helps bridge the distances. Learning the foreign legal system helps bridge the differences. \textsuperscript{111} In the opinion of this scholar it is important to try to “understand foreign legal cultures in an untranslated form; i.e., through the prisms that shape perceptions in the target legal culture. . . . The immersion approach travels from the inside of a foreign legal culture's many sources, from its rich, inchoate depths, to the outer, manifest level of the law.”\textsuperscript{112}

Presumably, the more one learns about another system, the easier it is to find the shared denominators of one’s own system and the other system. Often it does not matter whether the inquiry is driven to discover the common denominator or for the differences, so long as one seeks to learn and understand both systems in order to reach any one of these goals. In fact, the Civil Law is not identical in all Civil Law countries. The rules of law and enforcement are affected by the cultures and approaches in different countries. \textsuperscript{113}

b. The benefits and costs of creating hybrids

Creating hybrids is difficult, but maybe worth it. The United States is a fertile land for hybrids. For example, the relatively new limited liability company constitutes a hybrid of contract, corporate entity, and fiduciary relationships. “[T]he rules seeking to preserve a minimal core of fiduciary duties can be best understood as intent-implementing or contract-enforcing. . . . Just as the doctrine of unconscionability prevents grossly one-sided contracts, core fiduciary duties will prevent overreaching by a member-manager. . . . This is a middle ground between applying the full corporate and partnership-like duties found in most states and the elimination of all fiduciary duties allowed under the Delaware Act. The middle-ground approach includes the recognition of a minimum core of fiduciary duties and the use of good faith to prevent the repetitive use of manager-member contract rights to oppress minority interests.”\textsuperscript{114} The same idea was reflected by a scholar that saw the issue of unification as a conflict of law issue, noting that “American conflicts law must pay more attention to international sources.”\textsuperscript{115}

\textsuperscript{111} Id. at 91.
\textsuperscript{112} Id. at 57-60.
c. Establish principles

Both Common Law and Civil Law systems espouse moral and ethical principles in similar situations. If we ignored the source of the principles and articulated them, we could agree on a set of principles that each system follows today and may undertake to follow in the future.

There are reasons for creating a platform of uniform international principles for select types of fiduciaries, such as corporate management and directors or trustees or partners. The choice of a particular type of fiduciary should respond to need and circumstances. If, for example, trusts are used in the process of securitization and that process is world-wide, there may be a significant need for unifying the rules that govern trustees that deal in just this type of position. If the law governing directors or partners has been unified, the experience of unification in this context can be followed and provide extremely fruitful lessons. Yet, the more detailed the rules are the more disadvantages this system will carry; the more general the principles are, the more limited in scope the guiding principles would be, the better chance there is for the principles to follow. Perhaps if the number of the actors is relatively small, the fiduciary relationships that are chosen are the least complicated, and the existing rules are the least diverse, uniform rules may take hold.

d. Embodying same principles in different legal systems

Like any legal system, a multi-system need not be carved in granite. It may lead towards unification. Besides, there are benefits in diversity of approaches to solve the same or similar problems. As much as diversity results in additional confusion and costs, it may offer a field experiment in different solutions. This process may produce, perhaps decades from now, a unified system, or a fractured, but well understood system.

The reason for optimism is that the problems which lead to the different laws are in fact shared and the chances of their “going away” are very slim. And as people in different societies continuously interact, they might either learn to speak each other’s language or create a combined, somewhat new one. I conclude that a multi-system is not only more feasible but also more desirable.

Further, even though we considered here two paramount legal systems, in fact most if not all legal systems are not entirely uniform. Even a small community is governed by general rules that give way to other rules in smaller groups within the community, such as family rules. Therefore, every system contains methods by which rules of a different system are acceptable and enforced, depending on the facts and documents involved.

The system of conflicts of laws in the United States is one example.\textsuperscript{116} It is governed by general principles which apply to all and enforced generally by one type of mechanism. Yet, a second layer of the law is the federal law that applies to all in more detail, and under that layer is yet another consisting of state laws, and the laws of separate towns and other communities. Each layer offers choices to the citizens. In some cases the same entity may be governed by different legal systems. In the United States, while corporations choose their state of incorporation that govern their internal

\textsuperscript{116} See \textit{Restatement (Second) of Conflict of Laws} § 8(2) (1971) (listing choice-of-law principles for determining which local law should be applied).
affairs the operations of the corporations are governed by the state laws where the operations are performed.\textsuperscript{117}

e. **Provide a structure of choice of law**

The pyramid in the United States includes a constitution that operates to determine the areas in which Congress may superimpose its rules and preempt state law. However, there are many statutes that allow the two systems to operate together.\textsuperscript{118} In such cases the courts determine the extent to which state law may operate notwithstanding the imposition of federal law.\textsuperscript{119} It may well be that rules similar to conflicts of laws, corporate laws and the United States Constitution could be developed instead of searching for unified fiduciary laws. This is especially so when the values and ultimate results in different jurisdictions are similar.

Greater uniformity is necessary for some transactions that require predictability, such as promissory notes and bills of exchange, which involve everyday transfers of funds. “The European Parliament has declared itself to be favorable to the eventual adoption of a common civil code for all of Europe. Introduction to comparative law textbooks as well as general works which examine the great legal systems—with a few exceptions—set out the international unification of law as one of the aspirations of comparing laws. If the 19th century and the first half of the 20th century celebrated the inherently national character of law, the second part of the 20th century evinces an awareness of the inherent unity of law, and the inherent value of uniform legal rules. Vast programs of comparative research are devoted to the study of the ‘common core’ of several areas of private law. Listing the reasons in favor of legal uniformity and unification is too simple. There can be no doubt that conflicts of law are interfering with trade. Uniform law means cultural unity, and thus the elimination of misunderstandings and difficulties between different civilizations that must get on together.”\textsuperscript{120} Therefore, uniformity of specific rules may be desirable and even necessary, depending on the context of the relationships and the frequency of their use.

On the other hand, strong tendencies and desires may hinder uniformity, while the need for uniformity may not be as strong. For example, wills and will substitutes that serve to transfer wealth upon death are harder to unify because the strong desire of the writer of such a will to keep his or her freedom to change the terms and shield the terms of the wills from publicity. In this case the privacy right was strengthened in some jurisdictions and blocked the adoption of uniform state laws, requiring “a more nuanced approach is needed.”\textsuperscript{121}

If such a system of implementation is adopted, it must be accompanied by, and indeed depend on, an implementing judiciary. Similar to the international court of justice or international court of


\textsuperscript{118} Investment Company Act of 1940, 15 U.S.C. §80a-1-64 (2011); but see id. §35(b).


arbitration, there could be an international court of fiduciary law. If the judges of this court represent both systems, they can use the Common Law system of individual reasoned decisions to produce a decision based on a hybrid legal system. The decisions will reflect the conclusions—the outcomes similar to the rules and the rationales and sources that led to the decisions, similar to the development of the Common Law.

f. Establish an implementing court

The importance and value of such a court is its weakness. The fact that all other courts would be backed by strong governments and that no strong government will accept the decision of another strong government may lead to implementation of the law by a weaker court. This implementing court will be sensitive to the trends and strong convictions of those who appointed it and will mediate among the more powerful members that have an interest in the resolution.

The evolution of the Internet Corporation for Assigned Names and Numbers (ICANN) offers an instructive example. Initially, the American government supported the development of the Internet and controlled the management of the names and numbers which are the main stable structure of the Internet. They determine the “addresses” of receivers. Without a name one does not exist on the Internet. The power to establish and grant names is very valuable politically and financially. As the Internet developed and expanded, the American government sought to move this power to another entity, yet retain some control over the process and the entity that determined and managed the names and numbers.

“The IETF’s ‘requests for comments’ (‘RFCs’), which outline key functions of the Internet, are now firmly asserted as copyrighted by the Internet Society. The copyright is deployed as a flavor of ‘copyleft,’ meaning that it is used for the purpose of ensuring the widespread availability of the standards, preventing their privatization by any particular party. The intellectual property behind RFCs is thus held in trust by the Internet Society - the IETF umbrella group which still retains some influence over ICANN, and which . . . has been tentatively selected by ICANN to run the .org registry, providing an anticipated needed infusion of cash to the organization. In other words, there is no doubt that the Internet Society ‘owns’ its RFCs, and thus no battle is to be waged over who will rule them. There is only the question of whether the world at large will pay heed to them as they are published - since an RFC is not self-enforcing.”122

This conflict and debate resulted in the establishment of ICANN -- a corporation that did not have much power as compared to the governments that are interested in acquiring it. The agreement to bestow this power on a virtually powerless organization was reached because no country was willing to agree that another country will hold this power. Thus, power such as the one granted to ICANN was power by default. It was effective if all or most of the participants disagreed that any one of them would hold it, and the power could not be exercised by all.

The source of legal change in the Common Law and Civil Law differs somewhat from the ICANN experience. The courts in each system are the source and fountain of incremental and slow legal change.

g. **Encourage the move to codification of principles—the highest level**

In the Common Law system, even if courts began to interfere in the parties’ contract arrangements, the courts’ starting point is likely to remain the parties’ arrangement. However, the current tendency in the Common Law systems is to codify court decisions and pay great attention to codification and legislation.\(^\text{123}\)

In that respect the Common Law is moving towards a Civil Law system. The Civil Law courts start by examining the statutes and looking for guidance in moral and fairness principles. Thus, depending on the legislatures, statutes may be easier in the Civil Law countries than the Common Law countries to change or ameliorate some of the resistance to bifurcation of property rights.\(^\text{124}\) However, a recent change in the French statutes received a critical review noting that the change was facial and did not alter the resulting conflicts between the Civil Law and Common Law.\(^\text{125}\) Arguably, the attempt in China to unify Common Law of trusts contained similar faults and resulted in a similar failure. In contrast it seems that Taiwan has enacted a statute that coherently follows the Common Law and could be used in this Civil Law country to establish trusts.\(^\text{126}\) In conclusion, the scene in the transplants area seems to be at the stage of experimentations.

**Conclusion. Most Legal Systems Are Dual Systems: Why Not Fiduciary Law?**

Many examples of dual systems are described in the wonderful paper by Tony Honoré, about “On Fitting Trusts into Civil Law Jurisdictions.”\(^\text{127}\) Hong Kong’s constitution recognizes “one country and two systems,” although, unlike the United States, Hong Kong does not provide separate administration of the systems. It is not new or unusual for “two systems that belong to different legal families” such as the Common Law or Civil Law or variations within each, such as France and Germany. The variations are greater in private rather than public law. Usually however one system is prevalent, reflecting the political reality of the country, such as Scotland, Quebec, Louisiana (U.S.) and the Hong Kong SAR. And while in the first three countries, mentioned above, civil or partly Civil Law systems “prevail in a common law environment, Hong Kong is a common law system in a civil or partly civil law environment."

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\(^{124}\) One of my colleagues commented on the draft of this Article and wrote that his colleagues in Europe managed to introduce legislation that enabled them to act as if they were under the Common Law regime and thus compete with United States banks.


The United Kingdom provides a good example of the operation of two systems in one country. Both England/Wales and Northern Ireland impose Common Law legal systems that vary only in detail. Scotland, on the other hand, is governed by a mixed Civil Law and Common Law system. It has separate courts and a separate legal literature that reflects its former independence and present distinctness. It is separate in both private and criminal but less in public law, and even though it may reflect political reality, it need not demonstrate a particular constitutional structure. For minority systems to survive, Tony Honoré suggests, is the acceptance of a constitutional convention or at least respect for the applicability of the minority’s system.

Dual systems have disadvantages. They are imprecise, sometimes inefficient, often costly, and invite litigation. However, these disadvantages are mitigated by a current and evolving new technology. Many rules can be automatically imposed on particular activities. Some disagreements can be mediated online. In addition, if a sufficient number of people and institutions follow one of the systems in the dual structure, a habit--custom may develop. The longer the practice lasts the harder it will be to change and the lower the cost of its enforcement would become.

If the objectives of the public policy, which the legal systems are designed to protect and enforce, are related, and the immoral activities that the systems aim at eliminating are similar, then laws can become more uniform by focusing on these objectives. Misappropriation of entrusted property under the Common Law and breach of a promise under the Civil Law are covered, even if not entirely, by rules that condemn these actions. Unfaithful contract parties and misleading promises enticing a party to enter into a deficient contract are not fundamentally different from abusive fiduciaries. To be sure, there are gray areas in which the outcomes would differ depending on the applicable system. At the same time, the different approaches, cultures, and values of different systems can be maintained. Yet, in the common ground Common Law and Civil Law systems can impose similar remedies on similar wrongful behaviors aimed at achieving the purpose common to both systems. If important principles that are common to both systems are enunciated, agreed upon and publicized, the principles may be slowly accepted, leading to shaping more detailed rules and their enforcement.