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# THE NATURE OF FIDUCIARY LAW AND ITS RELATIONSHIP TO OTHER LEGAL DOCTRINES AND CATEGORIES

## FIDUCIARY LAW: WHY *NOW*? AMENDING THE LAW SCHOOL CURRICULUM

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### INTRODUCTION

Now is the time for the legal community to amend the standard American law school curriculum by introducing a new, separate, required, first- or second-year course in fiduciary law.<sup>1</sup>

Currently, schools teach fiduciary law as a chapter or segment in courses on corporations, trusts, family law, and agency. But this approach does not really cover the subject. It tends instead to focus students' attention on the question of when or whether a fiduciary duty exists, and fails to address the four other basic questions concerning that duty which are part and parcel of the concept:

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<sup>1</sup> I am informed by Professor Morris Litman, whom I met at the Symposium, that since 1992, the Faculty of Law at the University of Alberta, Canada, has in fact offered a separate course in fiduciary law, and that the course is fully subscribed whenever it is offered. See *Academic Resources: Faculty of Law Course Descriptions*, UNIVERSITY OF ALBERTA, [http://www.law.ualberta.ca/currentstudents/academicresources/course\\_info.php](http://www.law.ualberta.ca/currentstudents/academicresources/course_info.php) (last visited Feb. 2, 2011) (listing, for the Fall 2010 semester, a course called Fiduciary Obligation).

Towards whom is the duty owed (i.e., its ambit)? What does it entail (i.e., its scope)? When does it terminate? What are the remedies for its breach?

All five of these questions are fundamental to the consideration of any legal duty. In the case of tort and contract duties, the first question is easy to answer: everyone has a duty to refrain from committing torts, while contract duties arise when contracts are “formed.” In the case of fiduciary duties, on the other hand, the question of when they arise is complicated. As a result, we in the legal community tend to think that by considering this question we are covering the whole subject. But that is not true: fiduciary duty is complicated also in respect of its ambit, its scope, its termination, and the remedies for its breach. Unless we cover all of those questions methodically, we have not really covered the subject.

For this same reason, law schools cannot really teach fiduciary law as part of contract, tort, or property law. It is true that a fiduciary duty always arises by agreement,<sup>2</sup> but the agreement may form over time; it need not be entered into at an identifiable moment.<sup>3</sup> The fiduciary agreement does always involve a piece of property called the *res* – but the *res* can be something vague and intangible like a set of opportunities<sup>4</sup> or a secret<sup>5</sup> and may not always be the specific focus of the agreement.<sup>6</sup> Breach of the duty can give rise to remedies that include some usually associated only with tort – such as tort damages and punitive damages – and sometimes equitable remedies can be available. Although elements of tort, contract, and property law are always present, fiduciary relationships are *sui generis* and require their own set of principles to articulate. This is one reason we need a separate course to cover the topic.

But there are deeper reasons that a new law school course is needed today: educated people are becoming dissatisfied with contemporary contract law because of the development during the Twentieth Century of psychological

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<sup>2</sup> A direct, consensual relationship must exist between the parties in order for a fiduciary duty to arise. See RAFAEL CHODOS, *THE LAW OF FIDUCIARY DUTIES* § 1:20, at 44 (2000); see also *Kovich v. Paseo Del Mar Homeowners' Ass'n*, 48 Cal. Rptr. 2d 758, 760 (Ct. App. 1996) (holding that a homeowners' association has a fiduciary relationship with its members, but not with prospective purchasers).

<sup>3</sup> See *Brown v. Wells Fargo Bank, NA*, 85 Cal. Rptr. 3d 817, 835 (Ct. App. 2008) (holding that a fiduciary relationship arose between a stock broker and clients prior to the signing of a brokerage agreement).

<sup>4</sup> See *Guth v. Loft*, 5 A.2d 503, 511 (Del. 1939) (explaining that a corporate insider may not take for herself an opportunity that comes to her in her corporate capacity if the opportunity is in the corporation's line of business or the corporation has a legal interest in the opportunity); CHODOS, *supra* note 2, § 3:5, at 137-42.

<sup>5</sup> See *Selleck v. Globe Int'l, Inc.*, 212 Cal. Rptr. 838, 844-45 (Ct. App. 1985) (explaining that falsely attributing the revelation of a celebrity's secrets to his father libels the father); CHODOS, *supra* note 2, § 3:8a, at 147 (“[T]he fiduciary may sometimes . . . be required to receive and keep confidences . . .”).

<sup>6</sup> As, for example, in marriage in which fiduciary duty is certainly imposed by law, but is hopefully not the “focus” of the marriage contract. See CHODOS, *supra* note 2, § 1:14, at 29.

awareness,<sup>7</sup> and because of an increasing distrust of postindustrial hypercommercialism. Contemporary contract law, as I will explain, is after all a law of *transactions*, while fiduciary law is ultimately a law of *relationships*. Today, we in the legal profession care much more about relationships – and about the balances or imbalances in power in those relationships – than did the people who developed contemporary contract law. We need fiduciary law to ensure that the basic subject matter that we teach our students will really “cover” the whole range of human interactions – which is, after all, something the law is supposed to do.

Over the last few decades, a series of cases in California have held that relationships seemingly fiduciary in nature were in fact “mere contracts.”<sup>8</sup> The use of the adjective “mere” indicates that a fiduciary relationship is something *more* than a contractual relationship. It is a phrase that telegraphs a sense of comfort and security when the court is in the contract space, and a sense of discomfort and vague inadequacy when it is forced to stand in the fiduciary space. Reading those cases, we can see that the judges who authored the opinions were trained in a law school curriculum that was devised in the middle of the Nineteenth Century, that was shaped and honed to promote industry and commerce, and that has taken hold of the legal imagination and rendered it hostile to some deeper aspects of human life requiring the presence of the law. Considering the much-publicized breakdown of fiduciary responsibility in the financial markets, it has now become urgent for us to amend the law school curriculum to give fiduciary law a place parallel and coequal with contract and tort law.

#### I. THE DEEP-SEATED LIMITATIONS OF CONTEMPORARY CONTRACT LAW

I mention *contemporary* contract law deliberately, because that body of law – which we all take so much for granted today – is in fact a relatively recent manifestation of an older, richer, more balanced body of law.

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<sup>7</sup> The term is used here to refer to awareness of complex and unconscious motivations in ourselves and in those with whom we interact. While examples of such awareness might be said to have existed in earlier times, it was the writings of Freud and the other psychoanalysts of the early and middle Twentieth Century, which gave this kind of awareness a theoretical framework and a wide reach.

<sup>8</sup> See, e.g., *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 181 P.3d 142, 154 (Cal. 2008) (“[T]he trial court . . . erred in instructing the jury that a fiduciary relationship is necessarily created when a party, in return for royalties, entrusts a secret idea to another to develop, patent, and commercially develop.”); *Oakland Raiders v. Nat'l Football League*, 32 Cal. Rptr. 3d 266, 275 (Ct. App. 2005) (“[A] mere contract or a debt does not constitute a trust or create a fiduciary relationship.” (quoting *Waverly Prods., Inc. v. RKO Gen., Inc.*, 32 Cal. Rptr. 73, 78 (Dist. Ct. App. 1963))); *Wolf v. Superior Court*, 130 Cal. Rptr. 2d 860, 863-64, 866-68 (Ct. App. 2003); *Recorded Picture Co. [Prods.] v. Nelson Entm't, Inc.*, 61 Cal. Rptr. 2d 742, 754 (Ct. App. 1997); *Rickel v. Schwinn Bicycle Co.*, 192 Cal. Rptr. 732, 735-36 (Ct. App. 1983) (“But California law is that parties to a contract, by that fact alone, have no fiduciary duties toward one another.”).

The law of contract and promises is ancient and fundamental to our notion of an ordered society, and its development covers at least 5000 years – probably more. The idea that one should keep his promise is articulated in the biblical *Book of Deuteronomy*,<sup>9</sup> in many provisions of the *Code of Hammurabi*,<sup>10</sup> and in ancient Egyptian texts.<sup>11</sup> The development of commercial law predates, or is at least contemporary with, the rise of organized religion. It was indispensable to the development of local markets and trade routes which existed from the earliest times. Indeed, religious movements of the Second and First Millennia B.C. sought to claim authority and legitimacy by aligning themselves with established legal codes. This is the reason that, of the Ten Commandments, only the first four are in any way religious or new, and the rest, including “don’t steal,” reaffirm legal and moral principles that the community would recognize as valid.<sup>12</sup>

So deeply entrenched has the law of contract been throughout the ages, that it has been conscripted into various forms of service that you might not have thought possible. The notion of a covenant, for example, between God and His people is a strange application of contract principles to a relationship between parties with grossly unequal bargaining power. Even the notion of a marriage

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<sup>9</sup> *Deuteronomy* 23:21 (“If you make a vow to the Lord your God, do not postpone fulfilling it; for the Lord your God will surely require it of you, and you would incur guilt.”).

<sup>10</sup> See, e.g., *The Code of Hammurabi*, in *ANCIENT NEAR EASTERN TEXTS RELATING TO THE OLD TESTAMENT* 163, §§ 45-50, at 168 (James B. Pritchard ed., Theophile J. Meek trans., 2d ed. 1955); *id.* § 78, at 169; *id.* § 88, at 169; *id.* §§ 91-96, at 169-70. The full text of the *Code of Hammurabi* is also presented in *The Code of Hammurabi*, in C.H.W. JOHNS, *BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS* 44-67 (Gryphon, photo. reprint 1987) (1904).

<sup>11</sup> See, e.g., *The Instruction of Ptahhotep*, in 1 MIRIAM LICHTHEIM, *ANCIENT EGYPTIAN LITERATURE: A BOOK OF READINGS* 61, ¶ 8, at 65 (1973) (“If you are a man of trust, / Sent by one great man to another, / Adhere to the nature of him who sent you, / Give his message as he said it.”).

<sup>12</sup> This observation about the evolution of religious ethics has been made before. The unearthing and publication of copies of the *Code of Hammurabi* in the late Nineteenth Century spurred scholars to see the biblical legal codes in a new historical context. See, e.g., WILLIAM FOXWELL ALBRIGHT, *YAHWEH AND THE GODS OF CANAAN: A HISTORICAL ANALYSIS OF TWO CONTRASTING FAITHS* 102 (1968) (recognizing “identical laws” found in both the *Hebrew Book of the Covenant* and the *Babylonian Code of Eshnunna* or the *Babylonian Code of Hammurabi*); C.H.W. JOHNS, *THE RELATIONS BETWEEN THE LAWS OF BABYLONIA AND THE LAWS OF THE HEBREW PEOPLES*, at iii-iv, vi-vii, 49-62 (2d ed. 1917) (attempting to explain the similarities and differences between the *Code of Hammurabi* and the Hebrew laws); ROLF P. KNIERIM, *THE TASK OF OLD TESTAMENT THEOLOGY: SUBSTANCE, METHOD, AND CASES* 404 (1995) (explaining that portions of the Old Testament “have their antecedents in some ancient Near Eastern law codes such as Hammurabi’s”); J.H. Hertz, *Ancient Semitic Codes and the Mosaic Legislation*, 10 *J. COMP. LEGIS. & INT’L L.* 3d ser. 207, 214 (1928) (“It is now recognized that some of the stories of the Patriarchs [of Judaism] can be fully understood only in the light of Hammurabian family and shepherd law.”).

contract is strange because marriage is not a transaction but is instead a relationship. Yet marriage contracts were formed in ancient Egypt,<sup>13</sup> Greece,<sup>14</sup> and Rome,<sup>15</sup> so the idea seems to have caught on.

Of course, ancient contract law incorporated tort law principles<sup>16</sup> and was heavily intertwined with notions of status.<sup>17</sup> The flavor of the ancient contract was much closer to the flavor of covenant or joint venture than the flavor of modern contract. The promise, the oath, the covenant, the solemn undertaking – all these ideas were intertwined with notions of status, relationship, and community. The classical notion of contract was part of a much larger word field: contract, obligation, promise, bargain, transaction, stipulation, oath, troth, covenant, obligation, treaty, pact, *spondeo*, responsibility, duty – a long, rich field of related ideas, in which notions of promise, substance, procedure, rituals, and formalities all were intertwined, or, we might even say, confused.<sup>18</sup>

Contemporary contract law, on the other hand, was developed in the last decades of the Nineteenth Century and is basically a Victorian conception. Starting with Henry Sumner Maine's 1861 book, *Ancient Law*, which traces the development of law from status to contract,<sup>19</sup> and proceeding through the treatises of Williston and Corbin, as well as the writings of Oliver Wendell Holmes, we see contemporary contract theory described as the apotheosis of centuries of legal development (most of it European).<sup>20</sup> According to these

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<sup>13</sup> GAY ROBINS, *WOMEN IN ANCIENT EGYPT* 60 (1993) (explaining that marriage contracts in ancient Egypt had little “to do with the legal establishment of marriage” and instead “concerned . . . the disposition of property and the economic rights of spouses, especially in the event of the man repudiating his wife”).

<sup>14</sup> Arthur W.H. Adkins, *The “Speech of Lysias” in Plato’s Phaedrus*, in *THE GREEKS AND US* 224, 232-33 (Robert B. Loudon & Paul Schollmeier eds., 1996) (“Marriages [in ancient Greece] were contracted with a view to the well-being of the two families concerned.”).

<sup>15</sup> HENRY SUMNER MAINE, *ANCIENT LAW* 154 (Thoemmes Press photo. reprint 1996) (1861) (“Anciently, there were three modes in which marriage might be contracted according to Roman usage, one involving a religious solemnity, the other two the observance of certain secular formalities.”).

<sup>16</sup> See David Owen, *Duty Rules*, 54 *VAND. L. REV.* 767, 770 n.11 (2001) (“[T]he modern concept of duty in tort law may be loosely traced to the Roman law of obligations, which included both tort and contract law.”).

<sup>17</sup> See MAINE, *supra* note 15, at 169-70 (explaining that in ancient contract law, all “rights and duties . . . have their origin in the Family”).

<sup>18</sup> See *id.* at 313-14 (explaining that in ancient Rome, promises were not enforceable by law and that only promises “accompanied with a solemn ceremonial” were enforceable as contracts).

<sup>19</sup> *Id.* at 170 (“[T]he movement of the progressive societies has hitherto been a movement from Status to Contract.”).

<sup>20</sup> See, e.g., ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS: ONE VOLUME EDITION* § 1376, at 1166 (1952) (agreeing with Henry Sumner Maine that “the evolution of civilization included progress ‘from status to contract’”); O.W. Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 473 (1897) (“I venerate the law, and especially our system of law, as one of the

authors, man's free will and power of self-determination are given full expression in contract, and society recognizes the individual's freedom of choice by enforcing the bargains that individuals make.<sup>21</sup> This body of law documents the enrollment of the great legal thinkers of the Victorian Age in the grand projects of their ruling classes: industrialization, colonialization, and commercial development.<sup>22</sup>

There are of course all kinds of contracts: short ones and long ones, standard ones and special ones, written ones and oral ones. And in spite of itself, contemporary contract law has preserved certain doctrines which redeem it from the abject formality of some earlier ages: the doctrines of impossibility, mutual mistake, coercion, and duress. But those doctrines are applied in only marginal cases, and they are viewed as exceptions to rules rather than as parts of the rules. In some states, there is still a contractual duty of good faith and fair dealing,<sup>23</sup> though in California, this has been jettisoned outside the insurance context<sup>24</sup> where, frankly, it remains in name only. In order to bring

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vastest products of the human mind."); Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 367 (1921) (discussing the effects of eighteenth and nineteenth-century developments in metaphysics, politics, and economics that emphasize the freedom of the individual on contract law).

<sup>21</sup> See, e.g., CORBIN, *supra* note 20, § 1376, at 1166 ("[E]ach individual has gradually acquired a greater 'liberty of contract,' an increasing forbearance by organized society to forbid his bargains and an increasing readiness to enforce them, thus making his condition in the world more dependent on his own free-willed action than on the action of his ancestors."); Holmes, *supra* note 20, at 464 ("In my opinion no one will understand the true theory of contract . . . until he has understood that . . . the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs, – not on the parties' having *meant* the same thing but on their having *said* the same thing."); Hila Keren, *Considering Affective Consideration*, 40 GOLDEN GATE U. L. REV. 165, 180-83 (2010) (exploring the contributions in the late Nineteenth and early Twentieth Centuries of Langdell, Holmes, and Williston to the development of contract law based on objective elements rather than subjective intent); Williston, *supra* note 20, at 367 ("[I]t was a corollary of the philosophy of freedom and individualism that the law ought to extend the sphere and enforce the obligation of contract.").

<sup>22</sup> It may offend some readers to speak of the great jurists of the Nineteenth Century – or, indeed, of any century – as being "enrolled" in the projects of "their ruling classes." But that is the truth. We have but to look at our own contemporary body of law governing financial institutions to remind ourselves how inevitably law fails to lead society but rather follows its leaders.

<sup>23</sup> See Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 369 (1980) ("A majority of American jurisdictions, the *Restatement (Second) of Contracts*, and the Uniform Commercial Code (U.C.C.) now recognize the duty to perform a contract in good faith as a general principle of contract law." (footnotes omitted)).

<sup>24</sup> *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 679-80 (Cal. 1995) (adopting "a general rule precluding tort recovery for" breach of the implied covenant of good faith and fair dealing in contractual relationships except in the case of a breach of an insurance

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himself within any of the exceptions of impossibility, mutual mistake, coercion, and duress, the defendant must carry a heavy burden of proof and, with only minor exceptions, the focus tends to be on the specific circumstances of the bargain rather than on the parties' long-standing relationship.

A principal policy underlying contemporary contract law is that the parties should be able to limit the risks they are undertaking, with liability for breach limited to each party's obligation under the contract. This policy tends to favor large, industrial-scale players who interact with huge numbers of smaller players. As a mechanism for managing risk, contract law protects parties who take risks for a living, and those parties tend not to be the man in the street, or in the hospital waiting room, or in the line waiting for the loan officer at the bank.

When contract became detached from "status," it lost its connection with certain vital aspects of the human condition. It lost its consciousness of *vulnerability* and adopted the pretense that if the agreement is voluntary it is an expression of strength rather than weakness. It lost its connection with *loyalty* and adopted the pretense that the remedies written into the agreement are by definition adequate. And it altered the notions of *risk* and *uncertainty*, adopting the pretense that the allocation of risks written into the agreement is somehow correct or privileged, even when actual events develop far differently than the parties anticipated.

The fact is that risk, uncertainty, loyalty, and vulnerability are inconvenient for the development of industrial commerce, and Victorian contract law was a creature of the second Industrial Revolution. Its premises and prejudices were designed to encourage and facilitate commerce.

This new conception of contract law drove a wedge between the law and larger notions of ethics. As Holmes wrote in *The Path of the Law*, a "bad man" commits no legal wrong when he breaches his contract deliberately as long as he pays the damages provided in the contract.<sup>25</sup> And jurisprudence is, he wrote, just a branch of science whose project is to predict forensic outcomes.<sup>26</sup> These ideas developed into the notion of "efficient breach" and the whole cluster of ideas associated with Richard Posner and the Chicago School.<sup>27</sup> Today, the idea that the law is in the end a branch of economics reminds us of the looming failures of our postindustrial economic systems –

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contract); CHODOS, *supra* note 2, § 6:20, at 406-08.

<sup>25</sup> Holmes, *supra* note 20, at 461-62.

<sup>26</sup> *Id.* at 457.

<sup>27</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 120 (6th ed. 2003) ("[I]n some cases a party is tempted to break his contract simply because his profit from breach would exceed his profit from completion of the contract. If it would also exceed the expected profit to the other party from the completion of the contract, and if damages are limited to the loss of that profit, there will be an incentive to commit a breach. But there should be; it is an efficient breach.").

systems which we are now beginning to see as unsustainable and, in some ways, inhuman.

The Victorian contract law that took hold in the late Nineteenth Century flourished throughout the Twentieth Century. In today's world, the law of contract is again applied in settings where you might not think it could ever apply: a contract with yourself formed as part of a diet regimen; a contract with America as a political, propagandistic phenomenon; a contract with your software vendor formed through a shrink-wrap license or by a click-through license over the internet. There seems to be no real limit to contract as a legal category.

Perhaps the views of a bunch of Victorian ponces with pomaded moustaches and starched collars writing treatises in their oak-paneled libraries are just not "on" in today's world. Those gentlemen, brilliant and diligent as they were, had no inkling of psychological sophistication. If you said to Mr. Holmes, "The man may think he acted out of his own free will, and may have written it down that he did so; but he was driven by forces he could not see," Holmes would look at you quizzically and say, "Well, if it's true, so what?" Nor were those gentlemen troubled by any sort of doubts about the virtues of commerce. If you said to them, "Buying and selling, '[g]etting and spending' – '[t]he world is too much with us,'<sup>28</sup> and life is about so much more!," they would have responded, "Wordsworth? Yes, there may be more to life. But the promotion of commerce is one of the highest functions of our legal system and contract law embodies the highest of the highest: the law's endorsement of the bargains the people make voluntarily."

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<sup>28</sup> WILLIAM WORDSWORTH, *Miscellaneous Sonnet Number 18*, reprinted in POEMS, IN TWO VOLUMES, AND OTHER POEMS, 1800-1807, at 150 (Jared Curtis ed., 1983). Wordsworth's sonnet, which he presented to the public in 1807, reads in full:

The world is too much with us; late and soon,  
Getting and spending, we lay waste our powers:  
Little we see in nature that is ours;  
We have given our hearts away, a sordid boon!  
This Sea that bares her bosom to the moon;  
The Winds that will be howling at all hours  
And are up-gathered now like sleeping flowers;  
For this, for every thing, we are out of tune;  
It moves us not. Great God! I'd rather be  
A Pagan suckled in a creed outworn;  
So might I, standing on this pleasant lea,  
Have glimpses that would make me less forlorn;  
Have sight of Proteus rising from the sea;  
Or hear old Triton blow his wreathed horn.



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## II. TRANSACTIONS VERSUS RELATIONSHIPS

I have no intention of trying to persuade anyone to remove contract law from its pedestal. Instead, I come here to persuade you merely that we need to construct one more pedestal right next to it and place fiduciary law there.

I say contract law concerns itself with *transactions* while fiduciary law concerns itself with *relationships*. In today's world, laden as it is with psychological awareness and burdened with a heightened sensibility towards power imbalances and abuse, there is a greater interest in relationships than there ever was in the Victorian era.

Transactions are fixed in time: they are entered at a point in time, and then they are concluded. They are proper subjects of design and control. They are inherently unambiguous and, when they are ambiguous, we consider that to be because they were not properly defined in the first place. They are like the atoms and molecules of Newtonian physics rather than the quanta about which twentieth-century physicists began to talk. In the world of contracts, people are seen as discrete particles moving around in a volitional space, with trajectories that we can see and trace, and their interactions are "transactions." The only force that moves these particles is the force of their own choice and volition. This is the underlying model of Victorian contract theory and it remains the model of contemporary contract law, which is just an evolution of that theory.

Relationships are something else. They develop over time. The more important they are, the more they are unpredictable, and the more acute is the potential vulnerability of one party or the other, or even of both. Think of the relationship between husband and wife, teacher and student, lawyer and client, banker and borrower. Relationships involve cooperation in a way that mere transactions do not. They require trust over long periods of time and through changing circumstances, and they give rise to assumptions about loyalty that mere transactions do not. They have to survive unpredictable developments. Betraying a relationship is more hurtful than merely abandoning a transaction.

One goes to a prostitute, or engages in casual sex – a so-called "one-night stand": it is a *transaction*. One falls in love: it is a *relationship*. One commits to the relationship and perhaps it becomes a marriage. Issues of loyalty, integrity, trust, and faith arise. These are issues to which contract law is a stranger. In fact, these issues are odious to contract law and have no real place in it.

Although not all relationships are necessarily fiduciary, those relationships in which the parties share an aspiration towards mutual profits and in which the outcomes are indeterminate, although formed by a contract, may in fact be or become fiduciary.<sup>29</sup> Whether the parties aspire towards mutual profits rather than each towards his own profit is usually a question of fact, but is often

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<sup>29</sup> See *Brown v. Wells Fargo Bank, NA*, 85 Cal. Rptr. 3d 817, 835 (Ct. App. 2008); CHODOS, *supra* note 2, § 1:7, at 6-11 (analyzing California case law to demonstrate how fiduciary duties arise between joint venturers).

mistakenly viewed by our courts as a question of law.<sup>30</sup> In my own treatise, I spend many pages trying to identify the elements which, when present, create a fiduciary relationship, and I have concluded that the notion is fuzzy.<sup>31</sup> Professor Frankel talks about “entrustment” in her new book,<sup>32</sup> and that is a good shorthand term for these ideas. But her new book is almost 300 pages long, so perhaps she also will admit that defining fiduciary relationships is not easy. In my own view, the notion of “entrustment” itself may be too transactional: relationships which start out as being merely contractual can morph into fiduciary ones, and the issue of “entrustment” itself may be slippery.

Difficult as it may be to articulate criteria of the fiduciary relationship, the fact is that the purely transactional view of human interactions is losing its appeal. We need a required course in the law of relationships, and fiduciary law should be that course.

### III. AMENDING THE LAW SCHOOL CURRICULUM

The curriculum we have today was developed in the 1870s by Christopher Langdell at Harvard Law School.<sup>33</sup> It was an enormous improvement over preexisting legal curricula because, for the first time, the substantive areas of the law were reduced to what we would like to think of as a set of “primary colors” – contract, tort, and property – from which all other colors could be derived by combining them in different proportions.<sup>34</sup>

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<sup>30</sup> See *Shook v. Beals*, 217 P.2d 56, 60-61 (Cal. Dist. Ct. App. 1950) (discussing whether fishing enthusiasts who rented an airplane, only one of whom was a pilot, were joint venturers for the purpose of imputing liability for negligence and exploring whether the issue is a question of fact or of law).

<sup>31</sup> CHODOS, *supra* note 2, § 1:19-23.

<sup>32</sup> TAMAR FRANKEL, *FIDUCIARY LAW* 4 (2011) (“[A]ll definitions [of fiduciaries] share three main elements: (1) entrustment of property and power, (2) entrustors’ trust of fiduciaries, and (3) risk to the entrustors emanating from the entrustment.”).

<sup>33</sup> Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305, 309 (2000); Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 U. BALT. L. REV. 173, 192 (2010) (“Dean Langdell’s first-year curriculum at Harvard – contracts, torts, civil procedure, criminal law, and property – was widely copied by other American law schools.”).

<sup>34</sup> Readers who have experience doing color correction with Adobe Photoshop may be familiar with the way primary colors work. By combining the primary colors – red, green and blue – in different proportions, one can create any other color of the rainbow. But is there really an analogy to the law? Can the three basic courses – contract, property, and tort – really be seen as a rudimentary set of primary colors that we can combine in varying proportions to construct fiduciary duties? I suggest that the answer is no.

On a related point: those who work with color correction know that by using a richer set of primary colors – e.g., CMYK (cyan, magenta, yellow and black) – one obtains a richer color space and can adjust the colors more carefully. So we might think of fiduciary law as a fourth “primary color” and treat other courses, such as family law, agency law,

In Langdell's day, lawyers were trained by reading Blackstone, but Langdell improved greatly on Blackstone's structure. Blackstone's *Commentaries* in four volumes, published about 100 years before Langdell's curriculum, divided the law into persons, property, wrongs – public and private – and procedure (although that was not a separate volume).<sup>35</sup> While Blackstone's work was very successful,<sup>36</sup> and while it might be seen as articulating the structure of the law, it was not particularly original as the basis of a law school curriculum. From the time that the law curriculum was installed at Bologna in the Thirteenth Century,<sup>37</sup> right through the Eighteenth Century, the Roman architecture defined the Temple of the Law.<sup>38</sup> Langdell really changed all that when he established the four basic civil law courses – three substantive and one procedural course.<sup>39</sup> He demoted the distinction between public law and private law to a second-order classification, abandoned the notion of status of persons as a fundamental classification, and articulated three branches of civil law which, in his view, covered the whole field.<sup>40</sup>

Langdell's designation of the basic civil law courses – contract, tort, property, and procedure<sup>41</sup> – was a variation and grand improvement on the earlier classifications which were commonplace in law schools from late antiquity – here I speak of Theodosius, Gaius, and Justinian – through the early Renaissance.<sup>42</sup> German law, Salic law, and the customary law codes of Europe were all a mess compared with Langdell's elegant classification.<sup>43</sup>

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employment law, condominium law, and so on, as composites of the four primary colors.

<sup>35</sup> See 1-4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (University of Chicago Press photo. reprint 1979) (1765-1769) (dividing the discussion of the law into four volumes: *Of the Rights of Persons*, *Of the Rights of Things*, *Of Private Wrongs*, and *Of Public Wrongs*).

<sup>36</sup> See, e.g., George Anastaplo, *Abraham Lincoln, Lawyers, and the Civil War: Bicentennial Explorations*, 35 OKLA. CITY U. L. REV. 1, 36 & n.82 (2010) (remarking how greatly Blackstone's *Commentaries* influenced American lawyers, including Abraham Lincoln); Berring, *supra* note 33, at 307 (proclaiming the *Commentaries* “the ultimate legal classic” and “one of the most influential legal works in the English language”).

<sup>37</sup> See Walther Hug, *The History of Comparative Law*, 45 HARV. L. REV. 1027, 1037 (1932) (“From Bologna spread the gospel of a law which by its tradition and its character as *ratio scripta* claimed universal validity. It was received in nearly all the European countries and was taught in all the university centers . . . .” (footnotes omitted)).

<sup>38</sup> See, e.g., MAINE, *supra* note 15, at 364 (discussing the “vast influence of the specific jurisprudence of Contract produced by the Romans” upon modern contract law).

<sup>39</sup> Langdell's curriculum included the three “primary” substantive law courses – contract, tort, and property – and a fourth basic course in procedure.

<sup>40</sup> See Valentine, *supra* note 33, at 191-92 (describing Langdell's scientific approach to legal classification).

<sup>41</sup> *Id.* at 192.

<sup>42</sup> See, e.g., Hug, *supra* note 37, at 1034-44; M. Stuart Madden, *The Græco-Roman Antecedents of Modern Tort Law*, 44 BRANDEIS L.J. 865, 901-07 (2006).

<sup>43</sup> See, e.g., Fernanda Pirie, *Law Before Government: Ideology and Aspiration*, 30

From a pedagogic point of view as well, Langdell's approach was clearly superior to the pedagogic structures of Jewish Law, Islamic law, and even Roman Law. The Jewish and Islamic law curriculums are both based on the sacred texts and the student is trained by reading those texts in a specified order.<sup>44</sup> But neither the *Tanakh* nor the *Koran* was written as a specifically legal text, and trying to teach law by reading those texts is an inherently difficult thing to do. The six "orders" of the Jewish *Mishnah*, too, seem to display more disorder than order and offer a convincing demonstration of the need for a more rational approach.<sup>45</sup> The Islamic jurists of the Eighth through Tenth Centuries focused on the methodology of the law and produced a brilliant body of jurisprudence in that area.<sup>46</sup> Yet even with all that jurisprudence, there was very little change in the division of the law into subject areas since Roman times.

When we compare Langdell's curriculum with the previously existing standards, we see why its virtues were immediately appreciated and the Harvard Law School curriculum became standard throughout the United States. For more than 100 years, we have trained generations of lawyers to approach every civil case as if it can be broken down into contract, tort, and property concepts.

Curriculum design involves two general considerations: coverage and pedagogy. Coverage concerns itself with the degree to which the curriculum "covers" the intended subject. Pedagogy concerns itself with the degree to which the curriculum is easy to master in an orderly way.<sup>47</sup> We have already

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OXFORD J. LEGAL STUD. 207, 213 (2010).

<sup>44</sup> See, e.g., David Hollander, *Jewish Law for the Law Librarian*, 98 LAW LIBR. J. 219, 242 (2006) (listing the primary sources of Jewish law); Pirie, *supra* note 43, at 210 ("Shari'a is a textual tradition, at the heart of which is the *fiqh*, a body of authoritative texts developed by jurists in the early centuries of Islam.").

<sup>45</sup> See Hollander, *supra* note 44, at 224.

<sup>46</sup> See IMAM MALIK IBN ANAS, AL-MUWATTA OF IMAM MALIK IBN ANAS: THE FIRST FORMULATION OF ISLAMIC LAW (Aisha Abdurrahman Bewley trans., 1989) (containing and organizing early Islamic law); CHODOS, *supra* note 2, at 1497, 1501 (identifying Abu Hanifa, Malik ibn Anas, and Muhammad ibn Idris al-Shāfi'ī as important figures in medieval Islamic law); ISLAMIC JURISPRUDENCE: SHĀFI'Ī'S RISĀLA (Majid Khadduri trans., 1961) (developing Islamic legal theory).

<sup>47</sup> For example, no one would teach calculus before the student had mastered algebra and geometry, nor would anyone teach algebra or geometry before the student had mastered basic arithmetic. There is an agreed pedagogic structure to the mathematics curriculum, and Langdell tried to introduce something similar into the law school curriculum: the idea that we do not teach trusts until our students have mastered the basics of contracts and property. But some "higher level" courses, such as corporations (artificial persons), might just as easily be taught in the first year. Arguably, the law does not lend itself to this pedagogically hierarchical structure. Still, if we are to organize legal education into a coherent pedagogic sequence, we need a course in fiduciary law very early on in the curriculum.

seen why we need a separate course to “cover” fiduciary law: that body of law has its own complex set of answers to the “five questions” surrounding the duty. As a result, the body of law cannot be shoveled into, or reduced to, other areas.

From the pedagogic point of view also, we need a course in *relationships*, and fiduciary law is the obvious choice. Once students understand what a fiduciary “relationship” is – how it arises, towards whom it is owed, what it entails, how it terminates and what remedies are available for its breach – they will be equipped to deal with the wide range of specific relationships they already study in second- and third-year courses: marriage, brokerage, agency, employment, partnerships and corporations, condominiums, and so on. Those are all specific cases of relationships that have fiduciary qualities. Rather than trying to teach the basic ideas through complicated examples, we should teach the examples after presenting the basic ideas. The basic ideas exist in fiduciary law.

#### CONCLUSION

I know it is sacrilege to advocate changing the law school curriculum. When one walks into the Temple of the Law, one is supposed to stroll respectfully through the grand spaces and the chapels. It is only the curmudgeon who dares to say: “These walls are in the wrong place; this wall should have a door in it; and there is a room missing!” For most of us, the permanence of the architecture is the whole point: the sense that the Temple’s grand design contains the whole range of human interactions, and that although it may change slowly and in minor respects over time, the Temple’s architecture is basically eternal.

But now, at the beginning of the second decade of the Twenty-First Century, it has indeed become urgent for us to amend and correct the law school curriculum by giving fiduciary law a place in that curriculum parallel and coequal with contract law, property law, and tort law. It will require courage to make these changes, but that is a kind of courage the world may expect to find among the participants in this Conference. If not here, where else?