
FIDUCIARY RELATIONS AND THE NATURE OF TRUST

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I shall comment on the account of trust that Tamar Frankel develops in her stimulating book, suggest some correctives, and then explore some consequences for the account of fiduciary relationships.

Frankel writes:

Reliance and trust are closely related. Both trust and reliance are self-contradictory. I define trust as a reasonable belief that the other party will tell the truth and perform its promises. Volitional reliance may be viewed as active trust. Both reliance and trust are socially valuable, especially in situations involving high cost of verifying the truth of other people's statements and the reliability of their promises. The Russian proverb "Trust but verify" is self-contradictory but true. People compare the cost of trusting and relying on others with the cost of verification (or avoiding interaction).¹

What does she think is self-contradictory here? I take it that the idea is that if one reasonably believes that trustees will play their proper part, then there is no need to verify that they will.² So following the proverb – that is, both trusting and verifying – involves, if not a straight-out contradiction, at least some irrational behavior.³ Verification will have costs, and it is irrational to pay them if one believes that the trust will be honored.⁴

Now there are plenty of philosophers who delight in the contradictory, but I am not one of them. If a definition of trust leads us to the conclusion that good advice is irrational, then that suggests that something is wrong with the definition. My suggestion is that trust should not be understood to be a belief at all.

One way to see this is to reflect on the idea that one can *decide* to trust.⁵ In *Les Misérables*, Myriel, the Bishop of Digne, decides to trust Valjean not to

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¹ TAMAR FRANKEL, *FIDUCIARY LAW*, at xvi (2011).

² *Id.*

³ *See id.*

⁴ *See id.*

⁵ *See* Richard Holton, *Deciding to Trust, Coming to Believe*, 72 *AUSTRALASIAN J. PHIL.* 63, 63-69 (1994) ("Trust, I will suggest, is a distinctive kind of attitude involving a distinctive state of mind. My project is to look at the ways in which it is distinctive, and the ways in which it interacts with belief and with the will.").

steal from his house.⁶ Does he thereby come to believe that Valjean is trustworthy? Surely not. Myriel is disappointed, but does not seem greatly surprised, when Valjean steals a basket of silver.⁷ In deciding to trust Valjean, Myriel does not decide to believe that Valjean will not steal. Indeed, one cannot decide to believe at will. So what does he decide to do? It seems that he decides to act *as if* he believes Valjean will not steal – to treat him as he would treat someone perfectly trustworthy.⁸

Understood this way, the contradiction evaporates. In general, to trust is not to believe in performance; it is to act *as if* one believed. But the action-as-if can be partial. Indeed, it is almost bound to be partial. If one acted *exactly* as if one believed, then it would be hard to tell one's state from genuine belief. If the trust leaves one very vulnerable, one might act to lessen the vulnerability. In particular, whilst trusting, it may be rational to verify that one will not be let down. Thus, the action-as-if only extends so far. Whether verification is rational depends on why one is trusting and what is at stake. If one is trusting from convenience, then the only consideration may be the cost of verification relative to the cost of someone betraying the trust. However, one can also trust to cement a relationship. And, as Myriel's action shows, one can trust in order to engender trustworthiness – an action that, in Valjean's case, eventually and painfully succeeds.⁹ If one is trusting to cement a relationship, or to engender trustworthiness, then any attempt to verify may wreck the very thing that one is trying to achieve. One will hardly engender trustworthiness in those who realize someone is spying on them. So even if the costs of the trust failing are high, verification in such cases may be out of the question.

In suggesting that trust can engender trustworthiness, it might appear that we have merely exchanged one problem for another. How can it be that trusting someone can bring about the very thing – trustworthiness – that seems to be a prerequisite for trust? I'm in no position to answer that question completely, but we can start by distinguishing trust from reliance; this distinction is, in turn, important for the issue of fiduciary relationships. Like Frankel, I think that trust and reliance have much in common. Like trust, reliance can be thought of as a kind of acting-as-if. For instance, I can rely on a rope to hold me up, or on a car to get me home, even without the belief that they will do so: I simply act as if they will, often in the absence of an

⁶ VICTOR HUGO, *LES MISERABLES* 85-87 (Norman Denny trans., Penguin Books 2d ed. 1982) (demonstrating his trust, Myriel told Valjean, "You are in trouble, you are hungry and thirsty, and so you are welcome. . . . Let me assure you, passer-by though you are, that this is more your home than mine.").

⁷ *Id.* at 109-10.

⁸ *Id.* at 84-91 (explaining Myriel's attitude toward Valjean, Mademoiselle Baptistine wrote that Myriel refrained from "preaching or moralizing" and that he "dined with Jean Valjean precisely as he would have done with the provost or the curé of the parish").

⁹ *Id.* at 111 (saving Valjean from being arrested, Myriel told Valjean, "Do not forget, do not ever forget, that you have promised me to use the money to make yourself an honest man.").

alternative. But reliance is a thinner notion than trust. Although we might talk of trusting the rope or the car, we would not mean it literally. Trust is a relationship reserved for other actors – mainly for people, and perhaps, by extension, for corporate or government bodies.

Quite how to understand this relationship is controversial. Some philosophers have suggested that to trust is to rely on the trustee's good will.¹⁰ Some have suggested that to trust is to take the reactive stance: to treat failure to honor the trust not just as disappointment, but as betrayal, as grounds for resentment.¹¹ Some have suggested that trust requires getting the trustee to recognize one's own vulnerability.¹² I shall not try to adjudicate between these proposals here. There may well be some truth in all of them: trust may be better seen as a cluster concept, not as a term with a simple definition. However one explains the details of the relationship, the explanation should enable us to understand how trust will cement a relationship when simple reliance will not. The citizens of Königsberg apparently relied on Kant's punctual walk to set their watches. So far that puts Kant under no obligation.¹³ But, suppose that their reliance became known to Kant and developed into a relationship that we might characterize as trusting. Then Kant would have plausibly gained a reason to maintain his punctuality. Once reliance moves into trust, the extra features that are in place provide a reason for living up to that trust. So, provided that the trustee is responsive, trust can provide the conditions for its own success.

What consequences do these reflections have for fiduciary relationships? I suggest two. First, understanding both trust and reliance as actions-as-if explains how a court order can change a simple contractual relationship into a fiduciary relationship. Let me take an example that Professor Frankel has discussed. Financial advisors have fiduciary duties to their clients, but brokers do not.¹⁴ However, if the clients are especially vulnerable, a court can impose fiduciary duties on a broker.¹⁵ Does a court thereby give clients a belief that

¹⁰ See Annette Baier, *Trust and Antitrust*, 96 ETHICS 231, 235 (1986) ("When I trust another, I depend on her good will toward me.").

¹¹ See Holton, *supra* note 5, at 66 ("In cases where we trust and are let down, we do not just feel disappointed, as we would if a machine let us down. We feel betrayed.").

¹² See Karen Jones, *Trust as an Affective Attitude*, 107 ETHICS 4, 4-5 (1996) ("This way of seeing the other, with its constitutive patterns of attention and tendencies of interpretation, explains the willingness of trusters to let those trusted get dangerously near the things they care about."). The idea is that the truster expects the trust to move the trustee. *Id.* at 4 ("I defend an account of trust according to which trust is an attitude of optimism that the goodwill and competence of another will extend to cover the domain of our interaction with her, together with the expectation that the one trusted will be directly and favorably moved by the thought that we are counting on her.").

¹³ Baier, *supra* note 10, at 235.

¹⁴ FRANKEL, *supra* note 1, at 46-47.

¹⁵ See, e.g., *de Kwiatkowski v. Bear Stearns & Co.*, 306 F.3d 1293, 1308 (2d Cir. 2002) ("The transformative 'special circumstances' recognized in the cases are circumstances that

the broker will neither let them down, nor act in his own interests, nor withhold information that would benefit them? The clients may gain such a belief, but it should not be at the court's behest. It is not the business of the court to change the clients' beliefs. What the clients will gain is an entitlement to behave as if they believed this, knowing that the court will protect them if they are let down.

In this case, we might need to speak of nothing more than reliance. But, as Professor Frankel points out, the courts have been extending the notion of fiduciary relations to personal and familial relations where it is quite appropriate to speak of trust.¹⁶ This brings me to my second point. Once fiduciary relations are extended into this sphere, then the rules that govern when verification should be expected of a trustor will need to be changed. If one is merely relying, then the damage done by verification is negligible, and the cost of verification is cheap. But if one is trusting, then, as we have seen, the act of verifying may greatly damage the relationship. In such cases, we will not think badly of trustors if they do not verify; we are more likely to think badly of them if they do. The same expectations should be extended to the legal sphere. Courts should not expect that those in a personal fiduciary relationship will verify that their trust is being honored. The failure to verify is more a mark of the personal nature of the relationship than it is an indication of negligence.

I say that trust is appropriate when fiduciary relations are personal. However, we should not define personal relationships too narrowly. The relationship with a financial advisor might be very impersonal, which is surely part of what the courts mean when they talk of an "arms-length" relationship.¹⁷ The relationship might also be very personal, in which case the court should reduce the trustor's duty to verify. I suspect these considerations partly explain why, as Professor Frankel argues so compellingly, fiduciary law cannot be subsumed under contract, and why a violation of fiduciary duties carries "a moral taint" that is not appropriate to violations of contract.¹⁸ Unlike contract, trust is a moral relationship; its unwarranted violation is a moral failing.

render the client dependent – a client who has impaired faculties, or one who has a closer than arms-length relationship with the broker, or one who is so lacking in sophistication that de facto control of the account is deemed to rest in the broker.”).

¹⁶ FRANKEL, *supra* note 1, at 53-54, 57.

¹⁷ See, e.g., *In re Mid-Island Hosp., Inc.*, 276 F.3d 123, 130 (2d Cir. 2002) (“[W]hen parties deal at arms length in a commercial transaction, no relation of confidence or trust sufficient to find the existence of a fiduciary relationship will arise absent extraordinary circumstances.” (internal quotations omitted)); *de Kwiatkowski*, 306 F.3d at 1308 (explaining that a financial broker generally has no fiduciary duty to a client, unless special circumstances render the client dependent and the broker is in a position to take unfair advantage of the client).

¹⁸ FRANKEL, *supra* note 1, at 238.