Fiduciary Relationships Are Not Contracts

Scott FitzGibbon
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The greatest good for humans consists in relations of mutual good faith.

Decree of Delphi, 125 B.C.¹

I. INTRODUCTION

We ought to call one province of the law “Affiliations,” or perhaps “Relationships.” Contract law is one of its parts. Another is fiduciary law—the law governing attorneys, trustees, guardians, corporate directors, and partners. Fiduciary law delineates the ways in which such relationships arise and identifies the standards of conduct to which a fiduciary must conform, including requirements of loyalty, zeal, and self-sacrifice.

A fundamental change in the jurisprudence and ethics of affiliations is underway, or at least several prominent writers are attempting to work such a change. An insurgent theory asserts that fiduciary relationships are really contractual in nature. Judge Easterbrook and Professor Fischel tell us: “Fiduciary duties are not special duties; they have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings.”²

Of course, fiduciary relationships do have an important feature in common with loan transactions, purchases and sales of goods and the like: namely, that they are (usually) entered into and perpetuated voluntarily. Having this important feature in common, these sorts of relationships and others as well—marriage, for example—can reasonably be organized together as part of a genus. Perhaps some contractualist thinkers intend no more than to point this out, and to propose that we use the word “contract” as the name for this genus. (Usage sometimes supports such an approach, as in the terms “marriage contract” and “partnership contract.”) The world does not need a full-blown law review article on this purely lexical proposal and this Article does not de-

Scholars of non- or antieconomic bent have had trouble coming up with a unifying approach to fiduciary duties because they are looking for the wrong things. They are looking for something special about fiduciary relations. There is nothing special to find. There are only distinctive and independently interesting questions about particular consensual (and thus contractual) relations. . . . Searching for the right definition of a fiduciary duty is not a special puzzle. In short, there is no subject here, and efforts to unify it on a ground that presumes its distinctiveness are doomed.


[T]he most important contribution of the law of trusts is that it facilitates the partitioning of assets into bundles that can conveniently be pledged separately to different classes of creditors. Of particular importance in this respect is the use of trust law to shield trust assets from claims of the trustee’s personal creditors. . . . [T]he creation and enforcement of fiduciary duties, seems a relatively unimportant reason for maintaining a separate law of trusts.

bate it.

But fiduciary relationships also have important features which differ from those of loan transactions and agreements for the purchase and sale of goods. Though fiduciary relationships may, like marriage relationships, be part of the same genus, they are, like marriage relationships, members of a different species. They differ in doctrinal structure. They differ in ethical basis. Some contractualist writing, going beyond suggestions as to lexical definition, denies one or the other of these two propositions. This Article aims to establish that both are true.

This Article explores the nature of fiduciary relationships, shows that they arise and function in ways alien to contractualist thought, and that they have value and serve purposes unknown to the contractualists. Notably, that they facilitate the doing of justice, that they promote virtue, and that they enhance freedom in a distinctive way.

Fiduciarist contractualism is the product of economic analysis of the law and thus suffers from the shallowness of “lawyer’s economics.” Economic analysis in this area is a branch of welfare economics and suffers from the shallowness of “economists' ethics.” This Article takes a close look at the professional literature in ethics and economics and demonstrates that the “fiduciary as contract” enterprise is built on an unsound theoretical foundation: Neither classic pleasure-based utilitarianism nor its economic preference-based version justifies the project.

“Explaining” things by reducing them to contract is a major academic industry. Sex, romance, marriage, and other family relationships have been approached this way. So has criminal justice. So has the State, in a leading tradition of political theory. Because the trend is underway in so many areas, we should spread a broader canvas.

We ought to develop a theory of affiliations. What is the architec-

3. See Langbein, supra note 2, at 630 (“Contract has become the dominant doctrinal current in modern American law. In fields ranging from corporations and partnership, to landlord and tenant, to servitudes, to the law of marriage, scholars have come to understand our legal rules as resting mainly on imputed bargains that are susceptible to alteration by actual bargains.”).


5. See POSNER, ECONOMIC ANALYSIS, supra note 4, at ch. 7.

6. On the other hand, fiduciary concepts also make an appearance in accounting for the nature of political authority. See, e.g., J.W. GOUGH, JOHN LOCKE'S POLITICAL PHILOSOPHY 136-71 (1956) (discussing the idea of trusteeship in political theory).
ture of affiliations? When is one affiliation the same as another? What are the ethics of affiliations? Why should someone have duties to an affiliate—duties above and beyond those we all have even to strangers? What is the psychology and the anthropology of affiliations? This Article clears the field of one approach and suggests others.

II. INTRODUCTION TO FIDUCIARY RELATIONSHIPS

Read the following catalogue of fiduciary categories and principles and derive from it a feel for what makes fiduciary relationships special.

An attorney is a fiduciary for a client, a corporate director or officer for the corporation or its shareholders, a promoter for the corporation, an agent for the principal, a guardian for the ward, joint venturers for one another, a partner for the other partners, a bailee for the


9. See Chestman, 947 F.2d at 568; Guth, 5 A.2d at 510; ALI PRINCIPLES, supra note 8.


13. See Finley v. Marathon Oil Co., 75 F.3d 1225, 1229 (7th Cir. 1996); Eagle-Picher Co. v. Mid-Continent Lead & Zinc Co., 209 F.2d 917, 919 (10th Cir. 1954); Libby v. L.J. Corp., 247 F.2d 78, 81 (D.C. Cir. 1957) (Burger, J.) (“The relationship of joint adventurers gives rise to certain reasonably well-defined fiduciary duties and obligations. The duty imposed is essentially one of good faith, fair and open dealing and the utmost of candor and disclosure to all concerned.”); Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

14. See Latta v. Kilbourn, 150 U.S. 524, 543 (1893) (stating that partners are in an
bailor,\textsuperscript{15} a securities broker for a customer,\textsuperscript{16} a member of a creditor’s committee for the creditors,\textsuperscript{17} and, in class action lawsuits, the representative of a class for its members.\textsuperscript{18} According to some authorities, a physician\textsuperscript{19} or a psychiatrist\textsuperscript{20} may be a fiduciary for a patient, an employee for his employer,\textsuperscript{21} a stockholder for the other stockholders in a closely held corporation,\textsuperscript{22} and a priest for a penitent.\textsuperscript{23} Other instances are oc-

“agency or fiduciary relation in respect to the business of the firm”); Wartski v. Bedford, 926 F.2d 11, 13 (1st Cir. 1991); \textit{In re USACafes, L.P.}, 600 A.2d 43 (Del. Ch. 1991); Helmore v. Smith, 35 Ch. D. 436, 444 (1887) (Bacon V.C.) (“I cannot conceive of a stronger case of fiduciary relation than that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that business goes on.”); Daniel J. Weidner, \textit{Three Policy Decisions Animate Revisions of Uniform Partnership Act}, 46 BUS. LAW. 427 (1991); Note, \textit{Fiduciary Duties of Partners}, 48 IOWA L. REV. 902 (1963). \textit{Cf. Uniform Partnership Act} § 21 (1914) (entitled “Partner Accountable as a Fiduciary”).

15. \textit{See} Hospital Products Ltd. v. United States Surgical Corp. (Austl. 1984) 156 C.L.R. 41; Re Hallett’s Estate, 13 Ch. D 696, 708-09 (1880).


19. \textit{See} Moore v. Regents of Univ. of Cal., 793 P.2d 479 (1990). \textit{Cf. Hospital Products Ltd.}, 156 C.L.R. at 69 (“[t]he relation of physician and patient . . . may be described as fiduciary when the question is whether there is a presumption of undue influence, but may be less likely to be relevant when an alleged conflict between duty and interest is in question.”) (dictum).


 Occasionally mentioned.\textsuperscript{24} A fiduciary must be beneficent. He must be zealous to serve the interests of the beneficiary.\textsuperscript{25} He has an especially high duty of disclosure: He must go beyond avoiding fraud and false statements; he is obliged to "volunteer" information.\textsuperscript{26} He must treat beneficiary confidences with


Justice Douglas once stated, in an opinion for the Court, that "a dominant or controlling stockholder" is charged with a fiduciary duty. Pepper v. Litton, 308 U.S. 295, 306 (1939). This is certainly not the general law, although California courts have gone some distance in that direction. \textit{See}, e.g., Jones v. H.I. Ahmanson & Co., 460 P.2d 464 (1969). Shareholders who participate in management or exercise the powers of directors or officers may become subject to fiduciary duties. \textit{See} McDaniel v. Painter, 418 F.2d 545, 547 (10th Cir. 1969). \textit{See generally} ALI PRINCIPLES, supra note 8 ("A controlling shareholder ... is ... subject to a duty of fair dealing.").

23. \textit{See} Hospital Products Ltd., 156 C.L.R. at 69 ("[T]he relation of ... priest and penitent[ ] may be described as fiduciary when the question is whether there is a presumption of undue influence, but may be less likely to be relevant when an alleged conflict between duty and interest is in question.") (dictum).


25. A corporate director, for example, must "affirmatively protect the interests of the corporation committed to his charge." Guth v. Loft, Inc., 9 A.2d 503, 510 (Del. 1939) (dictum). The lawyer's duty of zealous representation is imposed by Canon 7 of the \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY}. \textit{See MODEL RULES OF PROFESSIONAL CONDUCT}, Rule 1.3 cmt. ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

26. \textit{See} Libby v. L.J. Corp., 247 F.2d 78, 81 (D.C. Cir. 1957) (Burger, J.) ("The duty imposed [upon joint adventurers] is essentially one of good faith, fair and open dealing and the utmost of candor and disclosure to all concerned."); Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 483 (Cal. 1990) (holding that as a fiduciary a physician has a duty to disclose his "personal interests unrelated to the patient's health."); Day v. Rosenthal, 217 Cal. Rptr. 89,
the highest respect. His duty of "good faith" is especially strong—stronger than that which applies in commercial arrangements generally. He is sometimes required to refrain from competing with the beneficiary, from taking the beneficiary’s “opportunities,” from profiting from transactions with the beneficiary, from developing other

27. The Second Circuit recently characterized this duty as one “not to use or to communicate information confidentially given him by the [beneficiary] or acquired by him during the course of or on account of his [fiduciary status].” United States v. Chestman, 947 F.2d 551, 569 (2d Cir. 1991) (citation omitted). The lawyer’s duties with respect to the confidences of his client are established by Canon 4 of the MODEL CODE OF PROFESSIONAL RESPONSIBILITY and by Rule 1.6 of the MODEL RULES OF PROFESSIONAL RESPONSIBILITY. See RESTATEMENT OF THE LAW GOVERNING LAWYERS, ch. 5 (1998) [hereinafter THE LAW GOVERNING LAWYERS]; see also ALI PRINCIPLES, supra note 8, at § 5.04 (directors and executives) and § 5.11 (controlling stockholders).

28. See Union Miniere, S.A. v. Parday Corp., 521 N.E.2d 700, 703 (Ind. Ct. App. 1988) (“utmost good faith”); Rosenthal v. Rosenthal, 543 A.2d 348, 352 (Me. 1988) (good faith with a view to “furthering the interests of one another” as to the matters within the scope of the relationship); Weidner, supra note 14, at 461 (“[T]here is authority that suggests that the duty of good faith will be given a much more powerful reading in the partnership context.”). Cf. Kham & Nate’s Shoes No. 2, Inc. v. First Bank, 908 F.2d 1351, 1357 (7th Cir. 1990) (Easterbrook, J.) (applying a limited interpretation of the good faith requirement to a lender bank on the grounds that “[p]arties to a contract are not each others’ fiduciaries”).

29. On the duty of good faith imposed on contracting parties even when they are not fiduciaries, see Capital Options Investments, Inc. v. Goldberg Bros. Commodities, Inc., 958 F.2d 186 (7th Cir. 1992); Teachers Ins. & Annuity Assoc. v. Butler, 626 F. Supp. 1229 (S.D.N.Y. 1986), aff’d, 803 F.2d 61 (2d Cir. 1986); U.C.C. § 1-203 (1997) (“Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”). The difference between the contract-law requirement of good faith and that arising from the fiduciary relationship is discussed in John C. Coffee, Jr., The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role, 89 COLUM. L. REV. 1618, 1658 (1989) (stating that the main difference is that a “contracting party may seek to advance his own interests in good faith while a fiduciary may not”); E. Allan Farnsworth, Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract, 94 YALE L.J. 1339, 1356 (1985) (stating that the major difference is that “the disgorgement principle applies to breach of a fiduciary obligation while the expectation principle applies to a breach of contractual obligation”). See Katz v. Oak Indus., Inc., 508 A.2d 873 (Del. Ch. 1986).

30. See In re E.F. Hutton & Co., Exchange Act Release No. 25887, Fed. Sec. L. Rep. (CCH) ¶ 84,303 (July 6, 1988) (“It is hornbook law that, absent disclosure and a contrary agreement, a fiduciary cannot compete with his beneficiary with respect to the subject matter of their relationship.”). Restrictions on competition by corporate directors and senior executives are expressed in ALI PRINCIPLES, supra note 8, at § 5.06.
transactions with the beneficiary,\textsuperscript{32} from developing other adverse interests,\textsuperscript{33} and even from profiting for himself in other ways,\textsuperscript{34} at least in matters related to the fiduciary relationship. His dealings with a potential beneficiary—even preliminary dealings—readily put him under fiduciary obligations, and he is restricted in his right to terminate the relationship.\textsuperscript{35} The importance of his obligations has been strongly emphasized by the New York Court of Appeals:

[I]t is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. This is a sensitive and 'inflexible' rule of fidelity, . . . requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty. . . . [A] fiduciary . . . is bound to single-mindedly pursue the interests of those to whom a duty of loyalty is owed. . . .\textsuperscript{36}

\textsuperscript{31} For discussions of similar problems for corporate directors and officers, see ALI PRINCIPLES, supra note 8, at § 5.05; ROBERT CHARLES CLARK, CORPORATE LAW chs. 5 & 7 (1986); Victor Brudney & Robert Charles Clark, A New Look at Corporate Opportunities, 94 HARV. L. REV. 997 (1981). For restrictions on controlling shareholders, see ALI PRINCIPLES, supra note 8, at § 5.12.

\textsuperscript{32} See ALI PRINCIPLES, supra note 8, at § 5.02.

\textsuperscript{33} See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY (Canon 5); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7-1.9; THE LAW GOVERNING LAWYERS, supra note 27, at ch. 8.

\textsuperscript{34} See In re Estate of Swiecicki, 477 N.E.2d 488 (Ill. 1985); \textit{see also} Rosenthal v. Rosenthal, 543 A.2d 348, 352 (Me. 1988) (stating that directors and partners may “not use their position, influence or knowledge respecting the affairs and organization that are subject to the relationship to gain any special privilege or advantage over the other person or persons involved in the relationship”); ALI PRINCIPLES, supra note 8, at § 5.04. Section 21(1) of the REVISED UNIFORM LIMITED PARTNERSHIP ACT provides:

Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

\textit{See generally} RESTATEMENT (SECOND) OF AGENCY § 387 (1988) (“Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.”).

\textsuperscript{35} Limits on an attorney's right to withdraw from representation are imposed by Disciplinary Rule 2-110 of the MODEL CODE OF PROFESSIONAL RESPONSIBILITY and Rule 1.16 of the MODEL RULES OF PROFESSIONAL CONDUCT. Partners are also subject to restrictions on withdrawal. \textit{See} Weidner, supra note 14, at 431-53 and authorities cited therein.

\textsuperscript{36} Birnbaum v. Birnbaum, 539 N.E.2d 574, 576 (N.Y. 1989) (citations omitted). Another general statement of the duty of loyalty is the following from \textit{Guth v. Loft, Inc.}, 5 A.2d
The classic statement is that of Justice Cardozo:

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court . . . . Salmon had put himself in a position in which thought of self was to be renounced, however hard the abnegation.37

Courts regard themselves as chartered to develop new doctrines and, in some areas, to exercise an ongoing supervisory authority over fiduciaries

503, 510 (Del. 1939):

A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest.


A commercial partnership or joint enterprise, conceived as a fraternal association, is in that way different from even a long-standing contractual relationship. The former has a life of its own: each partner is concerned not just to keep explicit agreements hammered out at arm's length but to approach each issue that arises in their joint commercial life in a manner reflecting special concern for his partner as partner. Different forms of association presuppose different kinds of general concern each member is assumed to have for others.
III. A SHORT STORY ABOUT TWO LAWYERS

Alethia and Agatha founded a sporting goods company ("AA Corporation") in Belmont, Massachusetts in 1978. Working shoulder to shoulder together over the years, they have shared the losses and the profits, and many of the headaches and small triumphs. They built the business up to the point where by early 1998 it operated eight branches in the greater Boston area and had developed an acute need for additional financing for expansion.

Throughout the life of the business and until recently, Alethia and Agatha worked closely with Arthur Attorney, a partner in a mid-sized Boston firm who specialized in corporate and securities law. Arthur did the legal work involved in organizing the business back in 1978, and thereafter assisted them repeatedly, especially in matters concerning financing and labor relations. He also sat on the company's board of directors.

In January of 1998, Alethia and Agatha approached Arthur and described the company's need for major financing during the succeeding few months. For the greater part of an afternoon, the three discussed the range of possibilities: debt versus equity financings, bank borrowings, private placements, public offerings. No firm decisions were reached, but the three arranged to meet regularly during the succeeding three weeks and pursue the project.

During the first several business days after this meeting, Arthur discussed AA Corporation's interest in financing with several of his partners and with some of his acquaintances in the venture capital world. In many of these discussions, he portrayed the personal side of AA Corporation—the relationship between Alethia and Agatha and certain aspects of the corporate culture—looking for a financing possibility that would fit in well with that sort of business. He kept in close touch with Alethia and Agatha as possibilities developed. Regrettably, because of unsettling developments in his physical condition, he also found himself during this period obliged to keep in closer and closer touch with his cardiologist. In March he suffered a massive coronary and passed away.

Roger, a young man with an "of counsel" relationship with Arthur, had worked from time to time on AA Corporation matters and had from time to time accompanied Arthur to meetings with Alethia and Agatha. Upon Arthur's death, he told Alethia and Agatha, "I will take up the question of finding financing."
Roger has always had a very different style of lawyering from that of Arthur, and makes it a measure of his success to close as many deals as possible each year. After “touching base” briefly with Alethia and Agatha in a conference telephone call, Roger forwarded the AA Corporation financials and prospectus to Venture Investors, an aggressive venture capital limited partnership based in Wellesley, Massachusetts with which Roger had often worked in the past. Venture Investors submits a plan under which it would invest ten million dollars in AA Corporation in exchange for a new class of AA Corporation preferred stock. This plan would give Venture Investors two seats on the board of directors, set ambitious growth targets for AA Corporation earnings, and provide for generous conversion rights under which Alethia and Agatha would likely forfeit control of the company to Venture if earnings did not meet or exceed expectations.

Meanwhile, Alethia and Agatha are rethinking the structures and directions of AA Corporation. After several informal meetings in the company conference room at which some of the store managers and directors and other “friends of the business” are present, they circulate a draft “AA Corporation Mission Statement” which emphasizes collegiality, a “deeper commitment than can be found in most businesses to the well-being of managers and employees” and “a deeper employee loyalty and devotion to excellence in customer service than is prevalent in the industry.”

Alethia and Agatha send a copy of this document to Roger, who does not read it. Alethia and Agatha invite Roger to some of the drafting meetings, but he tells them “my job is to do what you hired me for, get the financing.” Alethia and Agatha tell Roger they are not sure they understand what the ramifications of the preferred stock provisions may be for the future of the business, but he tells them, “you’ll understand the ten million dollars when you get it.” AA Corporation completes the preferred stock financing in May in the amount and with the terms described above.

During the autumn of 1998, serious disagreements emerge on the board of directors about the direction and pace of expansion of AA Corporation and also over various personnel matters. Venture Investors presses for the replacement of three store managers, and in addition seek to remove Agatha from her position. In October, Alethia and Agatha seek a meeting with Roger for advice in connection with these disputes, but Roger tells them, “I am basically a deal lawyer. Get someone else.”

Alethia and Agatha say that Arthur would never have allowed
things to get to such a pass. They and AA Corporation bring a lawsuit against Roger alleging that he has violated his duties of zealous representation and loyalty.

As this Article progresses, it will refer to this lawsuit from time to time. A purist about contractualism could not find much to blame Roger for. But surely Alethia and Agatha are right to be unhappy, and only fiduciary law and morality of a sort unknown to the contractualists explains why.

IV. WHAT IS THE CONTRACTUALIST THESIS?

A. Some General Statements of the Contractualist Thesis

Judge Easterbrook and Professor Fischel state: "[T]he fiduciary principle is fundamentally a standard term in a contract."38 "Fiduciary duties are not special duties; they have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings."39 The objective of fiduciary law is the same as that of contract law, they say: namely, to "promote the parties' own perception of their joint welfare."40 Judge Posner agrees.41

Puzzlingly, Judge Easterbrook has also stated that "parties to a contract are not each others' fiduciaries"42 and Judge Posner has stated:

Contract law does not require parties to behave altruistically toward each other; it does not proceed on the philosophy that I am my brother's keeper. That philosophy may animate the law of fiduciary obligations but parties to a contract are not each other's fiduciaries . . . .43

40. Id. at 429. Further relevant language from this article is quoted in supra note 2.
41. See Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 446-47 (7th Cir. 1987) (Posner, J., dissenting) (implicitly approving Judge Easterbrook's statement that "[f]iduciary duties are not special duties").
42. Kham & Nate's Shoes No. 2, Inc. v. First Bank, 908 F.2d 1351, 1357 (7th Cir. 1990).
43. Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 280 (7th Cir. 1992). See also Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992) (Posner, J.) ("A fiduciary duty is the duty of an agent to treat his principal with the utmost candor, rectitude, care, loyalty, and good faith—in fact to treat the principal as well as the agent would treat himself.").
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B. A Longer and Harder Look at the Contractualist Thesis

1. The Contractualists Narrowly Focus on "Duties," Neglecting Their Context

After all, a rule about fiduciary duty is embedded in a history, a future, and a wider present. What Arthur or Roger is expected to do for Alethia and Agatha emerges from a formation process in which the fiduciary relationship is created; it is embedded in doctrines about how those expectations can be amended or terminated; it serves the purposes for which the relationship exists; and it is embedded in a set of practices and understandings about lawyers, about trust, and about fairness and justice which are instantiated in the social order as a whole. The "location" and meaning of Arthur's relationship with AA Corporation differs thoroughly from the relationship which a shoe manufacturer might have with that company.

Although the contractualists focus in a rather Kantian way on rules, the principles underlying contractualist thought seem to implicate all aspects of the fiduciary relationship. This Article will avert from time to time to the wider picture.

2. The Contractualists Mean More than to Draw a Helpful Analogy

Contractualists could mean only to point out some similarities. Most fiduciary duties arise, like contract duties, as a part of a relationship. Like contractual relationships, fiduciary relationships are shaped and perpetuated partly by the parties' actions, statements, interests, and purposes. Contract law and fiduciary law both employ the concepts of good faith, waiver, and reliance. Contract analysis and fiduciary discourse have something to learn from one another. But the contractualists plainly intend to go far beyond the drawing of helpful comparisons.

3. They Mean Either to Explain Fiduciary Law as It Is or to Reform It

The contractualists could mean to be descriptive—to have a better way of explaining fiduciary law as it actually is. This seems to be implied by Judge Easterbrook and Professor Fischel when they state, "we seek knowledge of when fiduciary duties arise and what form they take, not a theory of rhetoric—a theory of what judges do, not of explanations they give. [The objection] that the contractual perspective cannot explain the structure of legal rules . . . is compelling if true."\(^4\) If this is

\(^4\) Easterbrook & Fischel, Contract and Fiduciary Duty, supra note 2, at 429.
their thesis, the contractualists are not trying to change the law.\textsuperscript{45}

Alternatively, the contractualists could mean to be prescriptive—to offer a program for the reform of fiduciary law. This seems to be the implication of the statement by Judge Easterbrook and Professor Fischel that the law of fiduciaries has "no moral basis." The prescriptive project would involve replacing the principles of fiduciary thought with contract principles and its doctrines with ones consistent with contract theory.

This Article takes up first the descriptive approach and then the prescriptive one.

\textbf{V. PRIMITIVE DESCRIPTIVE CONTRACTUALISM: IS FIDUCIARY LAW REALLY BLACK-LETTER CONTRACT LAW?}

First, consider a primitive version of descriptive contractualism. (A more complex version will be introduced in the next Section.) Are fiduciary duties "standard term[s] in . . . contract[s]"\textsuperscript{46} "derived and enforced in the same way, as other contractual undertakings"\textsuperscript{47} in a simple, obvious sense, so that, for example, the merits of Alethia's and Agatha's claims against Roger could be established on the basis of the rules of contract law we now have on the books?

Put on the robes of a primitive contractualist judge—call him Justice Hornbook. He is "primitive" because he limits his work to looking things up in hornbooks and treatises. He is "contractualist" because he limits himself to the black-letter contracts law which he finds in hornbooks and treatises. If the primitive contractualist view is right, even Justice Hornbook would recognize fiduciary duties, to just the extent real judges do but using a different vocabulary. If the primitive contractualist view is right, Justice Hornbook would be favorably impressed by Alethia's and Agatha's case, since although real judges would look at it as primarily fiduciary in nature he could find full reason for granting relief on contract grounds. But in fact, as this Article here goes on to demonstrate, Justice Hornbook would readily conclude that their case is a weak one.

\textsuperscript{45} Indeed, some of their judicial decisions go on referring to standard fiduciary duties as though little needs to change. \textit{See, e.g., In re Marchiando v. Illinois, 13 F.3d 1111, 1116 (7th Cir. 1994)} (Posner, C.J.) (referring to the fiduciary status of lawyers, corporate directors, and managing partners without relying on contract law). Judge Posner does not cite Judge Easterbrook's and Professor Fischel's 1993 article referred to in \textit{supra} note 2.

\textsuperscript{46} Easterbrook & Fischel, \textit{Corporate Control}, \textit{supra} note 38, at 702.

\textsuperscript{47} Easterbrook & Fischel, \textit{Contract and Fiduciary Duty}, \textit{supra} note 2, at 427.
A. Formation of the Relationship

First of all, he doubts that Alethia and Agatha ever entered into any binding arrangement with Roger. Where was the offer? "I will take up the question of finding financing" is too vague. Where was the acceptance? Contract law only hesitantly recognizes silence as acceptance. Where were the terms spelled out? When the parties' expressions of agreement are scant, courts may refuse to recognize a contract. Fiduciary law is readier to recognize a binding relationship than is contract law. Fiduciary law would likely accept that a binding fiduciary relationship arose with Roger, but contract law probably would not.

Could Alethia and Agatha rely on a theory of implied contract to

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48. See generally Southworth v. Oliver, 587 P.2d 994 (Or. 1978) (noting that indefiniteness in a communication tends to support the conclusion that it is not an offer); RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981) ("Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain."); 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 213 (1990).

49. See FARNSWORTH, supra note 48, at 234. See also RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981).

50. See Jennison v. Jennison, 499 A.2d 302 (Pa. Super. Ct. 1985) (refusing specific performance of an agreement to sell stock because the price had not been agreed upon). In Moore v. Dilworth, 179 S.W.2d 940 (Tex. 1944), the court said:

It is essential to the validity of a contract that it be sufficiently certain to define the nature and extent of its obligations. If an agreement is so indefinite as to make it impossible for a court to fix the legal liability of the parties thereto, it cannot constitute an enforceable contract.

Id. at 942. But many judges try hard to avoid a finding of unenforceability because of vagueness. See, e.g., In re Gulf Oil/Cities Service Tender Offer Litigation, 725 F. Supp. 712, 739-40 (S.D.N.Y. 1989) (holding that the term "material" was not so vague as to render the contract unenforceable); Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768 (Tex. Ct. App. 1987); RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981); FARNSWORTH, supra note 48, at §§ 3.27-3.29.

51. See Dexter & Carpenter, Inc. v. Houston, 20 F.2d 647, 652 (4th Cir. 1927) (holding that the fiduciary obligation of joint venturers "begins with the opening of the negotiations for the formation of the syndicate"). See generally Hyman v. Regenstein, 222 F.2d 545 (5th Cir. 1955); Appleman v. Kansas-Nebraska Natural Gas Co., 217 F.2d 843 (10th Cir. 1954). Each of these cases holds that the relationship of joint venturers can be inferred from conduct and need not be founded on express agreement. A recent partnership decision states, "The rule generally accepted... imposes a fiduciary duty not only with respect to transactions occurring during the partnership but also with respect to 'those taking place during negotiations leading to the formation of the partnership.'" Waite v. Sylvester, 560 A.2d 619, 625 (N.H. 1989) (dictum) (citation omitted).

avoid these difficulties? Implied contract law is described this way by Judge Posner:

A doctor chances on a stranger lying unconscious on the street, treats him, and later demands a fee. Has he a claim? The law's answer is yes. The older legal terminology spoke of an implied contract between the physician and the stranger for medical assistance. This idea has been attacked as a fiction, and modern writers prefer to base the physician's legal rights on the principle of unjust enrichment. This term smacks of morality, but the cases are better explained in economic terms, and the concept of an implied contract is a useful shorthand . . . .

In the case of the doctor the costs of a voluntary transaction would be prohibitive. The cause of high transaction costs in that case is incapacity; in other cases it might be time (e.g., the stranger is conscious but bleeding profusely and there is no time to discuss the terms). In such cases, the law considers whether, had transaction costs not been prohibitive, the parties would have come to terms and if so what (approximately) the terms would have been. If a court can be reasonably confident both that there would have been a transaction and what its essential terms would have been[,] . . . it does not hesitate to write a contract between the parties after the fact.53

This doctor possesses the law professor's standard example of a strong claim under a contract implied in law. But Alethia's and Agatha's claim, like the claims of most people seeking to vindicate fiduciary rights, seems much weaker. He has acted when acceptance was impossible; they had every opportunity for further communication. His situation involved a threat to life and physical safety; theirs did not. He conferred benefits; they are seeking them. Their case might be compared to that of an accident victim who wakes up and demands that the physician perform a checkup and afford a full range of medical services. (And, finally, it may be noted that insofar as such physician cases can be

helpful at all to Alethia and Agatha it is in part because physicians may resemble fiduciaries—under some authorities they *are* fiduciaries—so that cases about them are not pure contracts cases.

B. Duties Entailed in the Relationship

Suppose there was a contract: Did Roger violate it? Alethia and Agatha can persuade him that a binding relationship had formed up, Justice Hornbook doubts that it imposed on Roger any duties to act other than as he did.

What has he done wrong? Alethia and Agatha, as described above, complain that Roger did not loyally and zealously represent them because he presented them with a financing arrangement which contravened their purposes and because he failed to discuss the implications of the preferred stock charter provisions. But Justice Hornbook can locate nothing in the communications between the parties that required Roger to act differently. Alethia and Agatha complain that Roger ditched them after the financing rather than staying on and helping them further, but as near as Justice Hornbook can discern, Roger's "job description" was more or less what he says it was. Roger ignored the mission statement, the new directions for AA Corporation and the like, but Justice Hornbook does not see why these developments are relevant, as they emerged after the formation of the contract and do not form a part of an amendment. 54

Alethia's and Agatha's difficulties will impede many fiduciary lawsuits in Justice Hornbook's court. Fiduciary duties are often not set forth—sometimes not even referred to—in agreements between the parties. Seldom does a contract between an attorney and his client specify the duty to avoid conflicts of interest; seldom does a trustee promise to be zealous in his dealings with the trust.

1. Fiduciary Duties as Plugs in Contractual Gaps?

Could Alethia and Agatha persuade Justice Hornbook to derive fi-

duciary duties from the part of contract law which tells how to fill the
gaps in agreements? Judge Easterbrook and Professor Fischel suggest
such an approach: "[T]he law is designed to promote the parties own
perception of their joint welfare. That objective calls for filling gaps in
fiduciary relations the same way courts fill gaps in other contracts. The
subject matter may differ, but the objective and therefore the process is
identical." 55

But this approach will not suffice, for several reasons. First, courts
fill gaps parsimoniously, recognizing implicit terms only when they are
fairly specific and close neighbors to the explicit ones. Second, courts do
not usually fill gaps with duties of the broader sort familiar to the trus-
tee, the attorney, the partner, and the other fiduciaries. Consider the
case of Bentley v. State, 56 discussed by Judge Posner in his book Eco-
nomic Analysis of Law:

The State of Wisconsin once hired a man named Bentley to
build wings on the state capitol under the direction of the state’s
architect. Bentley followed the architect’s plans faithfully, but
they were no good, and the wings collapsed 57 shortly after being
completed. 58 The state sued Bentley, 59 alleging that he had guar-
anteed his work against such a calamity. 60 The contract said
nothing germane on the subject; obviously neither party had
thought it likely that the wings would collapse because the archi-
tect’s plans were bad. The state lost its suit. This is the right
economic result. The state could have prevented the calamity at
lower cost than Bentley, by more careful selection or supervision
of the architect. 61

The analysis would have been quite different had Bentley been a lawyer
for the state after the collapse of a badly constructed loan transaction.
Even though officials in the office of the state treasurer might have

55. Easterbrook & Fischel, supra note 2, at 429.
56. 41 N.W. 338 (Wis. 1889).
57. Actually only one of the wings was alleged to have collapsed. See Bentley, 41 N.W.
at 339.
58. Actually, the collapse was alleged to have occurred shortly before completion. See id.
59. The lawsuit was actually brought by Bentley against the state. See id.
60. Actually, the state’s defense was not that Bentley guaranteed anything; it was that
Bentley had been paid the full contract amount and had no sufficient basis in the contract to
claim more even though he had been put to extra work to restore the collapsed wing.
61. POSNER, ECONOMIC ANALYSIS, supra note 4, at 94 (citation omitted).
acted as the "architects" of the loan transaction, courts would hold the lawyer to a standard of diligence, care, and zeal high enough to require him to do substantial analysis and checking of his own.\(^{62}\)

Courts usually fill gaps by looking hard at the facts of the transaction before them rather than proceeding "generically." But fiduciary law usually takes a generic approach, insisting that all trustees, attorneys, and so on are subject to a standard panoply of duties.

When courts do look beyond the specifics of the deal at issue to consider comparable transactions, they ask on what sorts of terms parties generally agree. But contracting parties seldom agree on wide open, "litigation-breeder" duties.\(^3\) They rarely include language mirroring the standard fiduciary duties such as those of "loyalty," "zeal," and the avoidance of conflicts of interest. Contracting parties tend to aim for rules rather than principles.\(^{64}\) Courts accordingly aim, as Farnsworth recommends, at "certainty and practicability" in devising gap-filling rules.\(^65\) The Supreme Court of Pennsylvania has stated: "It would obviously be quite unreasonable and wholly undesirable to imply an obligation that would necessarily be vague, uncertain and generally impracticable."\(^{65}\)

In any event, courts do not fill gaps unless there are gaps. In some standard fiduciary situations there are none. Some fiduciary relationships—those in venture capital partnerships, for example—are accompanied by full-blown contracts that are pretty much free of gaps: the trust indentures under which bonds are issued are pretty much free even of microscopic apertures. But these comprehensive agreements rarely include clauses identifying one of the parties as a fiduciary or echoing the duties characteristic of the fiduciary relationship.

\(^{62}\) See FITZGIBBON AND GLAZER ON LEGAL OPINIONS: WHAT OPINIONS IN FINANCIAL TRANSACTIONS SAY AND WHAT THEY MEAN, chs. 4 & 5 (1992) (describing the responsibilities of lawyers to conduct an investigation and analysis on their own in a business transaction, above and beyond what they may be told by officers of their client corporation or by other lawyers working on the matter).


\(^{64}\) A generic approach to gap-filling might be defended on utility grounds. It makes prediction easier by parties inclined to save time in bargaining. See Robert E. Scott, A RELATIONAL THEORY OF DEFAULT RULES FOR COMMERCIAL CONTRACTS, 19 J. LEGAL STUD. 597, 606-08 (1990). Further discussion of economic analysis of gap-filling is included infra at Part VI.C.

\(^{65}\) E. ALLAN FARNSWORTH, CONTRACTS 501 (3d ed. 1999).

\(^{66}\) Dickey v. Philadelphia Minit-Man Corp., 105 A.2d 580, 582 (1954) (refusing to supply a term which would have required tenant to continue to engage in the business of car cleaning even though the rent was calculated in part on the profits of that business).
A fortiori courts do not fill gaps with provisions that conflict with express terms in the agreement. Fiduciary duties, however, are sometimes imposed in the teeth of express terms to the contrary. For example, the lawyer's duty to avoid certain conflicts of interest applies notwithstanding client consent to the conflict, and the corporate director is subject to certain duties of loyalty which cannot be contracted away.

2. Fiduciary Duties as Protections for the Vulnerable?

Could Alethia and Agatha persuade Justice Hornbook to derive fiduciary duties from some part of contract law which applies where one party is especially vulnerable to abuse by the other? Fiduciary beneficiaries often are. Wards suffer from incapacity; clients, patients, corporate shareholders and the customers of securities brokers suffer from inexpertise; beneficiaries of broadly-worded trusts would suffer, were it not for fiduciary law, from an inability to pin down their trustees to specific obligations. Judge Posner seems to embrace a vulnerability theory when he writes:

The common law imposes [a fiduciary] duty when the disparity between the parties in knowledge or power relevant to the performance of an undertaking is so vast that it is a reasonable inference that had the parties in advance negotiated expressly over the issue they would have agreed that the agent owed the principal the high duty that we have described, because otherwise the principal would be placing himself at the agent's mercy. An ex-

67. "[A]ny term that a court would supply can be derogated from by agreement of the parties, either explicitly or by necessary inference. Such terms are therefore suppletory rather than mandatory." 2 FARNSWORTH, supra note 48, at § 7.16 (citation omitted).
68. This mandatory aspect of some fiduciary doctrines is discussed generally in Brudney, Contract and Fiduciary, supra note 2; Brudney, Corporate Governance, supra note 2, Frankel, Fiduciary Duties, supra note 2, at 1242-51.
69. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1972).
71. Professor Frankel accounts for fiduciary duties based on the vulnerability of beneficiaries, but does not make them out to be contractual—"fiduciary relations are not necessarily contractual." Frankel, Fiduciary Law, supra note 20, at 813. Another article noting vulnerabilities as a basis for fiduciary law but not accounting for them as contractual is Robert Cooter & Bradley J. Freedman, The Fiduciary Relationship: Its Economic Character and Legal Consequences, 66 N.Y.U. L. REV. 1045 (1991).
72. See Brudney, Corporate Governance, supra note 2, at 1411 ("[I]nvestors in general cannot, and do not, freely and knowingly choose, or indeed comprehend, the terms of the 'contract' which binds management to serve them . . .").
ample is the relation between a guardian and his minor ward, or a lawyer and his client. The ward, the client, is in no position to supervise or control the actions of his principal on his behalf; he must take those actions on trust; the fiduciary principle is designed to prevent that trust from being misplaced.\textsuperscript{73}

What branch of contract law does Justice Hornbook rely on here?

\textit{a. Gap Filling?}

Justice Hornbook has dipped into gap-filling law once; does he reach different conclusions if he bears in mind the vulnerabilities of certain parties to the relationship? Could Alethia and Agatha persuade him to fill the gaps with fiduciary duties because of their vulnerability to abuse by Roger? Do contract-law's gap-filling standards require special results where vulnerability is present?

Consider the standards, "what sort of bargain would the parties have struck had there not been vulnerability at the formation stage?" "What would the parties have agreed to had they thought about the vulnerability problem then (and had both been able to bargain about it effectively)?" Or, "what devices handle the vulnerability problem with certainty and practicability"? These questions do not readily call for answers which refer to fiduciary duties. Judge Hornbook may instead react to vulnerability at the formation stage, if it is bad enough, by holding the contract unconscionable and invalidating or reforming those clauses that are unjust.\textsuperscript{74} He may react to vulnerability during the rela-

\textsuperscript{73} Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992). The phrase "high duty we have described" refers to the statement that "a fiduciary duty is the duty of an agent to treat his principal with the utmost candor, rectitude, care, loyalty, and good faith—in fact to treat the principal as well as the agent would treat himself." \textit{Id.} at 1381. In \textit{Pohl v. National Benefits Consultants, Inc.}, 956 F.2d 126 (7th Cir. 1992), Judge Posner, in dicta, elaborated on this idea:

The reason for the duty is clearest when the agent has a broad discretion the exercise of which the principal cannot feasibly supervise, so that the principal is at the agent's mercy. The agent might be the lawyer, and the principal his client; or the agent might be an investment adviser, and the principal an orphaned child. If the agent has no discretion and the principal has a normal capacity for self-protection, ordinary contract principles should generally suffice.

\textit{Id.} at 129.

\textsuperscript{74} See, \textit{e.g.}, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (holding that certain installment-purchase contracts including provisions for the pro-rata application of payments among items of merchandise might be unconscionable); Cutler Corp. v. Latshaw, 97 A.2d 234 (Pa. 1954) (refusing to give effect to a confession-of-judgment clause).
tionship under the contract by imposing on Roger standards of reasonable dealing and good faith.

b. Good Faith?

In general, the contracting party's duty of good faith\textsuperscript{75} establishes nothing like the full panoply of fiduciary obligations.\textsuperscript{76} Judge Posner says as much in one of his judicial opinions:

The particular confusion to which the vaguely moralistic overtones of “good faith” give rise is the belief that every contract establishes a fiduciary relationship. A fiduciary is required to treat his principal as if the principal were he, and therefore he may not take advantage of the principal’s incapacity, ignorance, inexperience, or even naivete. . . . But it is unlikely that Wisconsin wishes, in the name of good faith, to make every contract signatory his brother’s keeper . . . . In fact the law contemplates that people frequently will take advantage of the ignorance of those with whom they contract, without thereby incurring liability. . . . [E]ven after you have signed a contract, you are not obliged to become an altruist toward the other party.\textsuperscript{77}

Could Alethia and Agatha plead their vulnerability to Justice Hornbook and thereby persuade him to expand Roger’s duty of good faith to encompass fiduciary duties? There are some authorities that may help them: authorities which emphasize a robust duty of good faith towards employees,\textsuperscript{78} towards purchasers under output contracts,\textsuperscript{79} and towards sellers under requirements contracts,\textsuperscript{80} all of whom suffer from obvious vulnerabilities.

\textsuperscript{75} See supra note 29.

\textsuperscript{76} See 2 FARNSWORTH, supra note 48, § 7.17A at 330 (“[T]he standard [of good faith] is not as exacting as the standard . . . applied to agents and other fiduciaries.”).

\textsuperscript{77} Market St. Assoc. v. Frey, 941 F.2d 588, 593-94 (7th Cir. 1991). Easterbrook and Fischel state: “When transaction costs reach a particularly high level, some persons start calling some contractual relations ‘fiduciary,’ but this should not mask the continuum. Contract law includes a principle of good faith . . . . Good faith in contract merges into fiduciary duties, with a blur and not a line.” Easterbrook & Fischel, supra note 2, at 438. Their point is that fiduciary duties are further out along the continuum. See also id. at 438 n.28 (noting that fiduciary duties are duties not just of good faith but of utmost good faith).

\textsuperscript{78} See 2 FARNSWORTH, supra note 48, § 7.17 at 320-37.

\textsuperscript{79} See id. at 312. See U.C.C. § 2-306(1) (1997) (“A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith . . . .”).

But there is a limit to such expansion. Some authorities indicate that the duty of good faith is mostly about honesty: telling the truth in full and acting according to the fair implications of promises. On this view good faith can expand naturally to encompass disclosure-related fiduciary duties, but not others.

Other authorities indicate that the duty of good faith is mostly about keeping implicit as well as express promises. Judge Posner embraces this view:

The concept of the duty of good faith like the concept of fiduciary duty is a stab at approximating the terms the parties would have negotiated had they foreseen the circumstances that have given rise to their dispute. . . . We could of course do without the term "good faith," and maybe even without the doctrine. We could . . . speak instead of implied conditions . . . . But whether we say that a contract shall be deemed to contain such implied conditions as are necessary to make sense of the contract, or that a contract obligates the parties to cooperate in its performance in "good faith" to the extent necessary to carry out the purposes of the contract, comes to much the same thing. They are different ways of formulating the overriding purpose of contract law, which is to give the parties what they would have stipulated for expressly if at the time of making the contract they had had complete knowledge of the future and the costs of negotiating and adding provisions to the contract had been zero.

On this view, good faith goes only so far as the implied terms; the limits on implication of terms as an explanation of fiduciary duties have been discussed above.

c. The Inadequacy of Any Vulnerability-Based Theory

Vulnerability-based doctrines have a limited goal: to bring the vulnerable party up to where he would have been had he not been vulnerable. Vulnerability theories, therefore, may explain those aspects of fiduciary law which are tort-like and harm-avoiding in nature: non-vulnerable parties protect themselves from harm. Harm-prevention

81. See U.C.C. § 1-201(19) (1997) ("'Good faith' means honesty in fact in the conduct or transaction concerned.").
82. But perhaps not all: "The duty of . . . good faith even expansively conceived, is not a duty of candor." Market St. Assoc. v. Frey, 941 F.2d 588, 594 (7th Cir. 1991) (Posner, J.).
83. Id. at 595-96.
theories justify, for example, doctrines prohibiting a corporate director from competing with his corporation and from taking corporate opportunities in which it has an interest or expectancy: actions like these harm the shareholders.

Vulnerability theories may also explain those aspects of fiduciary law which forbid the fiduciary to hog more than a fair share of the profit. Non-vulnerable parties make sure they get their fair share. An anti-hogging vulnerability theory can explain, for example, the duty of a corporate director to be fair in interested transactions and to cause the corporation to issue shares only for a fair price.

What vulnerability theories cannot do is explain the generous, zeal-requiring, benefit-conferring aspects of the fiduciary relationship. For example, vulnerability theories cannot explain the duty of a corporate director vigorously to enhance the profits of his corporation. They cannot explain the prominent "line of business" version of the corporate opportunity doctrine, which requires the director to give over to his corporation opportunities in which it has no "tangible interest or expectancy." Some of fiduciary law aims to give beneficiaries more than what even the most robust party would secure by contract.

C. Conclusion

Justice Hornbook ends up dismissing Alethia's and Agatha's lawsuit against Roger. The fiduciary relationship which establishes their claim is considerably "bigger" and more demanding than anything known to black-letter contract law.

VI. ADVANCED DESCRIPTIVE CONTRACTUALISM: IS FIDUCIARY LAW BASED ON CONTRACT ETHICS AND POLICIES?

What, then, of the thesis that fiduciary duties are "standard term[s] in contract[s]" derived and enforced in the same way, as other contractual undertakings? It is not accurate according to Justice Hornbook's analysis; will it be found compelling upon deeper reflection?

Put on the robes, now, of a different sort of judge, Justice Jurisprudence, who adjudicates fiduciary situations by applying not contract doctrines but contract theory: the purposes, policies, principles—the ethics—of contract.

84. Easterbrook & Fischel, Corporate Control, supra note 38, at 703.
85. Easterbrook & Fischel, Contract and Fiduciary Duty, supra note 2, at 423.
A. What is the Ethics and Anthropology Underlying Contractualism?

Here is a central passage from Easterbrook and Fischel:

What do terms such as "duty of loyalty" mean? Because the process is contractual—because both principal and agent enter this understanding for gain—the details should be those that maximize that gain, which the contracting parties can divide. Ever since Roger Coase published *The Problem of Social Cost*, it has been understood that legal rules can promote the benefits of contractual endeavors in a world of scarce information and high transactions costs by prescribing the outcomes the parties themselves would have reached had information been plentiful and negotiations costless. . . . With powers hedged in by competition and the price system, judges must choose between promoting the parties' contracting (and thus increasing both private and social wealth) and frustrating it (injuring the parties and society). That is not a hard choice. Providing, as a public service, the rules the parties themselves would have chosen in a transaction-cost-free world fosters instrumental and ethical objectives at the same time. . . . So . . . a "fiduciary" relation is a contractual one . . . .

Let us uncover the elements underlying this argument.

1. Utilitarian Ethics

Utilitarianism in some form underlies economic analysis of the law, including in the works of Judge Posner. In its classic form, utilitarian-

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86. *Id.* at 426-27 (citations omitted). The quoted passage ends with the phrase, "characterized by unusually high costs of specification and monitoring."

87. See *POSNER, ECONOMIC ANALYSIS, supra* note 4, which appears at some points to embrace a pleasure-based version of utilitarianism. The prescriptive aspect of the book is based on maximizing efficiency. *See, e.g., id.* at 23. "Efficiency" is defined as "that allocation of resources in which value is maximized." *Id.* at 13. "[V]alue" is "measured by willingness to pay." *Id.* What makes people willing to pay? The answer looks to their "satisfactions": economics assumes "that man is a rational maximizer of his ends in life, his satisfactions." *Id.* at 3. The term "satisfactions" appears to refer to experiences, feeling, and pleasant feelings, suggesting an interchangeability among such concepts. *See id.* at 15-16, 264 for other passages tying efficiency to utilitarianism. *But see id.* at 13:

Suppose that pituitary extract is in very scarce supply relative to the demand and is therefore very expensive. A poor family has a child who will be a dwarf if he does not get some of the extract, but the family cannot afford the price . . . . A rich family has a child who will grow to normal height, but the extract will add a few inches more, and his parents decide to buy it for him. In the sense of value used in this book, the pituitary extract is more valuable to the rich than to the poor family, be-
ism is

[t]he creed which accepts as the foundation of morals "utility" or the "greatest happiness principle" .... [It] holds that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain; by unhappiness, pain and the privation of pleasure. 88

Different definitions of "utility" can be constructed which leave out the experiential element and refer only to "preferences" or "choices." Economists sometimes speak this way without meaning to embrace any theory of ethics; they aim merely to relate choices and preferences to supply, price, or some other factor. But when economists go beyond prediction to recommend changes in the law, they are committed to advancing some theory of the good. So there is a theory of ethics which takes a similar form. John Harsanyi, for example, states that we should:

follow the economists in defining social utility in terms of the preferences ... of the individual members of society .... [W]e should help [other people] to obtain pleasure or to avoid pain, or to attain "mental states of intrinsic worth," or to achieve any other objective, only as far as they want to achieve it. 89

cause value is measured by willingness to pay; but the extract would confer greater happiness in the hands of the poor family than in the hands of the rich one.


88. JOHN STUART MILL, UTILITARIANISM 18 (Samuel Gorovitz ed., 1971) (1863). This Article throughout deals with utilitarianism in its "act-utilitarian" version; the alternative—"rule utilitarianism"—leads to impossible difficulties when it comes to identifying the relevant rule. See generally John C. Harsanyi, Rule Utilitarianism and Decision Theory, 11 ERKENNTNIS 25 (1977) [hereinafter Rule Utilitarianism].

89. Similarly, terms like "satisfaction" and "welfare" can be defined this way.
Professor Harsanyi calls his version “Preference Utilitarianism.”

2. Utilitarian Anthropology: Man as a Rational Utility Seeker

Many writers in the utilitarian tradition embrace not only an account of the good but also an account of the person; not only an ethic but also an anthropology: They describe a utilitarian or economic person. He is out for himself; he is interested in other people insofar as they can benefit Number One. As George Stigler says: “[W]e live in a world of reasonable well-informed people acting intelligently in pursuit of their self-interests.” Amartya Sen states: “In the usual economic literature a person is seen as maximizing his utility function, which determines all his choices.”

Classic writers describe him as “out for himself” in the sense of “out to satisfy his appetites”; but as with ethics, so with anthropology: In recent decades economists have attempted to develop a theory which is “bleached” of appetites and of almost all psychological content. A “canonical formulation” by Professor Sen indicates that

“we assume that each player’s objective is to maximize the expected value of his own payoff, which is measured in some utility scale.” The payoff function is a real-valued representation of the person’s preferences over the outcomes. Rationality is seen as intelligently maximizing such a payoff function, using all the available instruments, subject to feasibility.


91. Harsanyi, Rule Utilitarianism, supra note 88, at 27.
92. Another feature of anthropology is an emphasis on the will. See generally VERNON J. BOURKE, WILL IN WESTERN THOUGHT: AN HISTORICO-CRITICAL SURVEY (1964). The implications of emphasis on the will for contract thought are discussed in infra note 105.
93. For a general discussion of these issues, see L.D. Broad, Egoism as a Theory of Human Motives, in PROBLEMS OF MORAL PHILOSOPHY 111-18 (Paul W. Taylor ed., 1978).
95. AMARTYA SEN, ON ETHICS AND ECONOMICS 80 (1987).
96. As described in Martin Hollis & Robert Sugden, Rationality in Action, 102 MIND 1, 5-7 (1993).
This anthropology describes a man who is "rational" in the sense of internal consistency; the theory does not specify what goal he consistently pursues. 98

B. What These Ethical and Anthropological Doctrines Tell Us About Affiliations

The ethics tells us that affiliations are good insofar as they enhance utility. The anthropology tells us that people affiliate each for his own utility. Putting the ethics and the anthropology together leads to the conclusion that where conditions are conducive to each party's pursuit of his purposes and when under those conditions the parties elect to affiliate, the affiliation is good. 99

A relationship of friendship of kinship may enhance utility; and a transfer of goods or services within such a relationship—an anniversary present; a helping hand in time of trouble—may contribute to this good. The gift or service enhances not only the utility of the donee, but also that of the donor because of the phenomenon of "interdependent utilities." 100 The donor is better off because he takes pleasure in the pleasures of the friend, or because the satisfactions of the friend are high on his preference scale. Where his utilities are interdependent, one party looks out for the interests of both.

A relationship where there are no interdependent utilities may also enhance utility. Sales, barters, exchanges of goods or services: these may enhance the utility of both parties even though neither may care much what happens to the other. A sale, we can be reasonably sure, enhances the utility of both the seller and the buyer because each looks out for his own interests. With gifts between friends, it is something special about the two parties and the way they have related to one another above and beyond the transfer which establishes the gift's utility; with sales and exchanges, there need be nonsuch special personal feature—the parties may be strangers. The parties focus not on one another but on the goods, the services, and the price.

98. AMARTYA SEN, supra note 95, at 12-14. See Hollis, Rational Preferences, 14 PHILOSOPHICAL FORUM 246, 248 (1983) ("A rational agent, microeconomically speaking, is one whose actions are well calculated, in the light of their likely consequences (and costs) best to satisfy his existing preferences.").

99. Leaving aside effects on third parties; as to them, the Coase theorem provides a measure of reassurance.

This latter type of affiliation is the paradigmatic one for contractualists.

When a man possesses a certain commodity, he cannot benefit himself by giving it away. It seems to be implied, therefore, in the very fact of his parting with it for another commodity, that he is benefited by what he receives. His own commodity he might have kept, if it had been valued by him more than that for which he exchanges it. The fact of his choosing to have the other commodity rather than his own, is proof that the other is to him more valuable than his own.\footnote{101. John Stuart Mill, Elements of Political Economy 125-26 (3d ed. 1844). Similar views appear in Jeremy Bentham, General View of A Complete Code of Laws ch. XVI, in 3 The Works of Jeremy Bentham 155, 190 (J. Bowring ed., 1962). In preference utilitarian analysis, the reasoning is of course different: that a party chooses to enter into an affiliation is not "proof" of its "value" to him but an exercise of a preference.}

And here is Judge Posner to similar effect: "Where resources are shifted pursuant to [a voluntary transaction], we can be reasonably sure that the shift involves an increase in efficiency."\footnote{102. Posner, Economic Analysis, supra note 4, at 14. In the case of preference utilitarianism, the point is of course stronger than that of expertise: each party in a sense defines his own utility by way of formulating his preferences.} Let us call this sort of affiliation a Utility Contract.

An aggressive claim can be advanced about Utility Contracts for optimal market conditions: Here Utility Contracts not only enhance utility, they may enhance it to the maximum. When a commodity is sold in a well functioning market, it not only goes to some user who will be better off for it; it may go to the most efficient user. The interests of the seller lead him to demand the best price he can get. A more efficient user will pay more than an inefficient one. Here is an advantage of the Utility Contract over an affiliation of donation, according to this line of thought. There is no assurance that a gift goes to a recipient who can use it best.

\section*{C. What This Suggests For Contract Law}

All of this suggests that the guide for the law is this: "Look for a Utility Contract and enforce it appropriately." This mandate contains five elements:
1. Look for a Formation Process Appropriate for a Utility Contract

An appropriate process is one involving self-interested parties, as charitable donors do not form Utility Contracts; and capacities and conditions conducive to utility calculations, because incapacity, duress, or other circumstances which cast doubt on the occurrence of competent utility calculations undermine the case for enforcement.

2. Look for a Firm and Final Outcome Embraced by Both Parties

The law should fix on the outcome of the utility calculations, and not on hypotheses or preliminary determinations. Both parties, not just one, for reasons which are obvious from what has been said. The law should look for a moment—the “moment of formation”—when the parties concur on a firm and final set of terms.

3. Take this Firm and Final Determination as the Dominant Guide to Adjudication

The law should, according to this line of analysis, give preference to norms which trace their pedigrees to the final determination referred to above. It should reflect the view that “contractual obligations are by definition self-imposed.” (A good name for this is “positivism.”).

103. For authorities relating to the question whether preliminary understandings are enforceable, see supra note 48.

104. Authorities requiring a correspondence between offer and acceptance include Langelier v. Schaefer, 31 N.W. 690 (Minn. 1887). See 1 Farnsworth, supra note 48, at 259.

105. This approach is also supported by another aspect of anthropological thought: emphasis on the will. See generally P. S. Atiyah, The Rise and Fall of Freedom of Contract 405 (1979) (discussing the will as a central feature of contract analysis during the period 1770-1870); Morris A. Cohen, The Basis of Contract, 46 Harv. L. Rev. 553, 575 (1933) (“[T]he classic view [is that] the law of contracts gives expression to and protects the will of the parties, for the will is something inherently worthy of respect.”). The will is often spoken of as a simple element located at a single point in time. You can speak of “developing” taste and “growing” in wisdom, but an “act” of the will or an “object” of volition. Understanding contract as a matter of the wills therefore suggests understanding contract formation as the event of an instant: the “meeting of the minds.”

106. See generally Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 280 (7th Cir. 1992), in which Judge Posner denied that “judges have carte blanche to declare contractual provisions negotiated by competent adults unreasonable and to refuse to enforce them” and stated: “We understand the duty of good faith in contract law differently. There is no blanket duty of good faith; nor is reasonableness the test of good faith.”

4. Exclude Norms Which Were Not and Would Not Have Been Created by the Parties

So—the flip side of positivism—the law should be reluctant to undertake to create duties for contracting parties; it should stick to what they have settled (together, perhaps, with what they would have settled: see the next subsection). It should eschew norms which lie off the charts of normal Utility Contract anthropology: obligations of self-sacrifice; any duty to “renounce thought of self.”

5. Fill Gaps Parsimoniously and Only as Normal Utility Contractors Would

What, though, about those recurrent situations in which the determinations of the parties are incomplete or fuzzy? Some contractualist writings seem to say that fiduciary doctrines can be explained as the fillers for this sort of gap. We have seen that this is not true in the primitive sense: Justice Hornbook would not arrive at fiduciary duties that way. Is it true in a more advanced sense?

The academic literature contains two principal lines of approach to incomplete contracts. One recommends that the judge in some such situations apply the terms that the parties themselves would have ap-
plied had they reached a bargain under optimal conditions and agreed upon terms for the "gap." (Judge Posner seems to recommend this approach,110 and Judge Easterbrook and Professor Fischel seem to think it leads to fiduciary duties.111). The other recommends that the judges look beyond the specific bargain and its parties and apply the rule that would be best from the point of view of its effects on contracting generally (or on contracts of that "type").112 Neither approach leads to fiduciary law, for two reasons.

First, as proponents of both approaches candidly admit, judges can easily get it wrong. To quote Judge Posner,

[the people who make a transaction—thus putting their money where their mouths are—ordinarily are more trustworthy judges of their self-interest than a judge (or jury), who has neither a personal stake in nor first-hand acquaintance with the venture on which the parties embarked when they signed the contract.113

If the good of contracting is entirely a matter of pleasures, satisfactions, and preferences; if it lies entirely in foro interno; if parties always ration-

110. "$[T]he overriding purpose of contract law...[is] to give the parties what they would have stipulated for expressly if at the time of making the contract they had had complete knowledge of the future and the costs of negotiating and adding provisions to the contract had been zero." Market St. Assoc. v. Frey, 941 F.2d 588 (7th Cir. 1991) (Posner, J.).

111. See, e.g., Easterbrook & Fischel, Contract and Fiduciary Duty, supra note 2, at 429 ("[T]he law is designed to promote the parties' own perception of their joint welfare. That objective calls for filling gaps in fiduciary relations the same way courts fill gaps in other contracts. The subject matter may differ, but the objective and therefore the process is identical.").


113. POSNER, ECONOMIC ANALYSIS, supra note 4, at 93.
ally seek it, then little can be achieved by a judge who undertakes to re-
više their determinations (for example by making "intersubjective com-
parisons of utility"). He can only engage in judicial guesswork, unreli-
able because of the idiosyncratic nature of the parties' appetites and
preference scales. (In the fairly recent case of Jordan v. Duff &
Phelps, Inc., Judges Easterbrook and Posner applied their technique
to a fairly straightforward problem but bitterly disagreed as to its out-
come.).

Because judges can easily go wrong, they should be parsimonious;
reluctant to adopt aggressive and sweeping doctrines like those found in
fiduciary law. Being parsimonious will sometimes mean refusing to give
any legal effect to the agreement because of its failure of specificity.
This can be justified as a "penalty default" which gives subsequent con-
tracting parties an incentive to be specific and complete.

Second, any inferences made by judges who accept utilitarian ethics
and anthropology is for obvious reasons unlikely to attribute to parties
the self-sacrificing motives prominent in fiduciary law. Justice Jurispru-
dence would follow Justice Hornbook in seeing little warrant for fiduci-
ary duties such as those requiring self-sacrifice and renunciation of self.

**D. Where Does All This Take Justice Jurisprudence in Fiduciary
Lawsuits?**

If he encountered a lawsuit involving trusteeship, or the attorney-
client relationship, or one of the other standard relationships, Justice Ju-
risprudence would ask himself whether the conditions for and the ele-
ments of a Utility Contract are present and would seldom find them; he

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114. See generally Ian Ayres & Robert Gertner, Strategic Contractual Inefficiency and
there is small hope that lawmakers will be able to divine the efficient rule in practice.").


116. See supra note 48.

117. Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic
Theory of Default Rules, 99 YALE L.J. 87, 97 (1989). For a criticism of penalty-default analy-
sis, see Jay M. Feinman, Relational Contract and Default Rules, 3 S. CAL. INTERDISC. L.J. 43,

Perhaps some fiduciary duties could be defended as efficient "penalty defaults" as that
concept is developed in this article. See generally id. at 98-99 (noting the justifiability of de-
fault terms which specially disadvantage the better-informed party). This line of argument
could not, however, be extended so as to justify imposing the full panoply of fiduciary duties;
that would be to impose a penalty inefficiently disproportionate to the benefit. Further, many
judgments as to the utility of penalty-default terms are far more uncertain—hard to arrive at
with assurance—than those about the utility of gap-filling terms aimed to effect efficiencies
for the parties.
would examine the adjudicative techniques recommended for Utility Contracts and find them to miscarry. When he turned to the substance of fiduciary law he would find much of it indefensible, just as Justice Hornbook did but for more theoretical reasons.

1. He Would Object to the Permissiveness of Fiduciary Law as to Formation Procedures

Justice Hornbook doubted that Alethia and Agatha had ever entered into a binding relationship with Roger, so tentative and preliminary was their “moment of formation.” Justice Jurisprudence would have similar doubts. Utility Contract analysis is demanding about formation; fiduciary law is permissive and ready—too ready, he would conclude—to recognize formation.1

2. He Would Object to the Nonpositive Character of Many Fiduciary Doctrines

Justice Hornbook doubted that Alethia and Agatha had imposed on Roger many of the broad duties alluded to in their lawsuit, such as duties of loyalty and zeal. Justice Jurisprudence would have similar doubts: As they are created by judges, most fiduciary doctrines are unwarranted to maximize utility.

3. He Would Object to the Post-Formation Provenance of Certain Obligations of the Fiduciary

Justice Hornbook had difficulty with certain aspects of Alethia’s and Agatha’s case: in particular, those aspects which attributed to Roger duties to look after needs and respond to requests which emerged after the formation of the relationship. Justice Jurisprudence would agree: fiduciary law’s attentiveness to developments after the moment of formation would seem unjustifiable to him except in instances where the parties amend the contract in a procedure reflecting renewed utility calculations.

118. See supra note 105.

119. Furthermore, Justice Jurisprudence would refuse to adopt fiduciary law’s permissive attitude towards incapacity (and some other formation defects). Fiduciary law accepts that a binding relationship can be created between a guardian or trustee, on the one hand, and a minor or a lunatic; this makes little sense from the point of view of utilitarian ethics and anthropology since the incapacitated party’s utility calculations do not deserve deference.
4. He Would Object to the Self-Sacrifice Requirements of Fiduciary Law

Justice Hornbook was unable to find a sufficient basis for the duties of zeal, self-sacrifice, and similar generous, benefit-conferring aspects of the fiduciary relationship: for such principles as that "thought of self must be renounced." This aspect of fiduciary law seemed misguided to Justice Jurisprudence because, as suggested above, he believes self-interest is the engine that makes utility contracts utile.

E. Conclusion

Thus, Justice Jurisprudence will likely reach the same conclusion as did Justice Hornbook: in many fiduciary relationships, and as regards many requirements of fiduciary law, eschew enforcement. This is sufficient to refute one of Judge Easterbrook's and Professor Fischel's principal endeavors, which was to construct "a theory of what judges do."121

VII. PRESCRIPTIVE CONTRACTUALISM

Usually you think of Chicago School people as wielding the surgical knife; so maybe their real project is not descriptive but radically prescriptive. That seems to be a deeper implication of Judge Easterbrook's and Professor Fischel's assertion that "[f]iduciary duties . . . have no moral footing."122

A. Prescribing What?

Here is where we ought to discuss the merits of a prescriptive project; but we are handicapped by the fact that Judge Easterbrook and Professor Fischel and Judge Posner do not identify one. We need to see a careful description of what an attorney's duties to his client look like, for example, after they have been "contractualized." We need to hear what trustees do for trust beneficiaries, where trust duties to be zealous and avoid interested transaction profiting end up, and similar things about partners, guardians, and other fiduciaries.

If a case has not been stated it normally need not be answered; but because contractualism is a widespread phenomenon we had better pur-

120. See supra Part VI. D.
121. Easterbrook & Fischel, Contract and Fiduciary Duty, supra note 2 at 429 ("[W]e seek knowledge of when fiduciary duties arise and what form they take, not a theory of rhetoric—a theory of what judges do, not of explanations they give. [The objection] that the contractual perspective cannot explain the structure of legal rules . . . is compelling, if true.").
122. Id. at 427.
sue the matter further. Here, then, is an outline of what seem to be the elements of this unstated case: (1) Utility is not only a good, but the good; in this area, the principal guide to the law; (2) When it comes to affiliations, Utility Contracts serve this good best; other sorts of affiliation may not serve it at all; and therefore (3) Other forms of affiliation are best left unenforced or else enforced only to the extent that elements of them can be fitted into the Utility Contract mold. All judges, it follows, should think like Justice Jurisprudence and dismiss lawsuits like Alethia’s and Agatha’s.

B. How Prescriptive Contractualism Miscarries

1. Fiduciary Relationships Are a Social Phenomenon

Fiduciary relationships are not creatures only of law and lawyers. Fiduciary relationships and fiduciary duties reflect the precepts of social morality and practice. Alasdair MacIntyre illustrates this idea with a description of a fishing crew:

Consider ... a crew whose members ... have acquired ... an understanding of and devotion to excellence in fishing and to excellence in playing one’s part as a member of such a crew. The dependence of each member on the qualities of character and skills of others will be accompanied by a recognition that from time to time one’s own life will be in danger and that whether one drowns or not may depend upon someone else’s courage. And the consequent concern of each member of the crew ... will characteristically have to extend to those for whom those others care: the members of their immediate families ... and perhaps beyond them to the whole society of a fishing village. When someone dies at sea, fellow crew members, their families and the rest of the fishing community will share a common affliction and common responsibilities.123

These fishermen are fiduciaries for one another—not in the eyes of the law, but in their own eyes; in one another’s eyes; socially; as a matter of social morality. That is, they are bound, through social morality, by standards of conduct similar to those which traditional fiduciary law recognizes. Their obligations to one another evolve and cannot be

traced to an act of the will jointly made at the moment of formation. They are expected to be self-sacrificing and zealous in one another’s service. They renounce exclusive thought of self.

Some fiduciary relationships arose primarily as social institutions. This was the case, for example, with the etymologically primal fiduciary, the Roman *fiduciarius*. Under Roman law certain classes of persons—most unmarried adults—were disqualified to receive property by inheritance.

In order to circumvent these... restrictions... the practice had grown up... of requesting a validly appointed heir... to make over the whole or some part of what he received to the person whom the testator wished to benefit. Such a request was without legal effect: its fulfillment was “committed to the faith of” the heir... This entrusted heir was called *fiduciarius*. The root is *fides*—meaning faith, confidence, reliance, trust, and belief.126


125. B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 267 (1962).

126. The classic account of *fides* appears in Cicero:

The command of confidence can be secured [here, throughout, *fides* is translated *confidence*]... [first], if people think us possessed of practical wisdom combined with a sense of justice. For we have confidence in those who we think have more understanding than ourselves, who, we believe, have better insight into the future, and who, when an emergency arises and a crisis comes, can clear away the difficulties and reach a safe decision according to the exigencies of the occasion; for that kind of wisdom the world accounts genuine and practical. [Second], confidence is reposed in men who are just and true—that is, good men—on the definite assumption that their characters admit of no suspicion of dishonesty or wrong-doing. And so we believe that it is perfectly safe to entrust our lives, our fortunes, and our children to their care.

Of these two qualities [practical wisdom and justice], justice has the greater power to inspire confidence, for even without the aid of wisdom it has considerable weight: but wisdom without justice is of no avail to inspire confidence; for take from a man his reputation for probity, and the more shrewd and clever he is, the more hated and mistrusted he becomes. Therefore, justice combined with practical wis-
Today as well, many fiduciary relationships are structured outside the positive law: by custom, for example, and by authorities on professional ethics. Social fiduciary relationships are supported by traditional social virtues such as loyalty, civility, self-sacrifice, vocational excellence, and high standards of honesty. Even many business institutions, such as the corporation and the investment company, are a composite of contractual relationships and social fiduciary ones: a fiduciary element is involved in their relationships with lawyers, investment bankers, directors, and officers. It is not only from the Utility Contract with the butcher and the baker that we expect our dinner.

2. Disrupting the Continuity Between Law and Social Fiduciary Morality Would Undermine the Legitimacy of Important Institutions

Professor Coleman notes in his book *Markets, Morals and The Law*:

Traditional economic analysis is consequentialist. Moreover, it believes that what is to be justified are particular events or rules, in isolation. Constitutionalists, in contrast, believe that individual events—policies, market transactions, political decisions or the like—can be given content or meaning only within an institutional framework. In the constitutionalist view, the proper object of justification is not an event or rule in isolation but the network of rules that gives it life and substance. Moreover, these institutions are to be measured not by their effect on the pursuit of some socially desirable end state, for example, their capacity to increase social wealth; rather, their measure is the acceptance they secure within a given population or community.

This suggests an institutional constitutionalist objection to contractualism. The fiduciary nature of the professional, and the fiduciary structure of institutions such as hospitals, residential care facilities, charitable trusts, educational institutions, and some of the great law

dom will command all the confidence we can desire; justice without wisdom will not be able to do much; wisdom without justice will be of no avail at all.

*De Officiis* II, IX, at 203 l.33 (Walter Miller trans., 1943).


firms is important not only to the participants but to outside parties—to the public generally and to the honor and stability of the social order. If the law were to change the conduct of lawyers and of the officers, directors and trustees of business and charitable institutions in a contractualist direction, it might undermine their acceptability to the public. An attitude of hard-nosed self-seeking on the part of some lawyers, including partners at prominent law firms, has surely contributed to the decline in respect for the legal profession.\textsuperscript{129}

3. Disrupting the Continuity Between Law and Social Fiduciary Morality Would Be Disutile

A large canvas for disutility arguments is spread by Professor Francis Fukuyama in his recent book \textit{Trust: The Social Virtues and the Creation of Prosperity}.\textsuperscript{130} This book advances the thesis that “trust”—bonding beyond the family—is an important contributor to economic development. A legal system which neglected commitments of loyalty would probably undermine this social characteristic.

VIII. BEYOND PRESCRIPTIVE CONTRACTUALISM

A more fundamental objection to prescriptive contractualism looks beyond legitimacy-based and utility-based arguments and asserts that fiduciary affiliations serve different purposes than those known to utilitarianism. Different purposes call for different structures; in many instances, fiduciary law fits better.

\textbf{A. Beyond Utilitarian Ethics and Anthropology: There Are Goods Other Than Utility and People Really Seek Them}

Are there goods other than utility? In another context Judge Posner concedes that “the term efficiency, when used as in this book to denote that allocation of resources in which value is maximized, has limitations as an ethical criterion of social decision making. Utility in the utilitarian sense also has grave limitations . . . .”\textsuperscript{131} “[T]here is more to justice than economics, a point the reader should keep in mind in evaluating norma-

\begin{itemize}
\item \textsuperscript{129} See \textit{Sol M. Linowitz, The Betrayed Profession: Lawyering at the End of the Twentieth Century} (1994). Linowitz notes a 1993 poll finding that almost a third of Americans thought that lawyers were “less honest than most people.” \textit{Id.} at 24.
\item \textsuperscript{130} \textit{Francis Fukuyama, Trust: The Social Virtues and the Creation of Prosperity} (1995).
\item \textsuperscript{131} \textit{Posner, Economic Analysis}, \textit{supra} note 4, at 13. The next sentence states: “The fact that one person has a greater capacity for pleasure than another is not a very good reason for a forced transfer of wealth from the second to the first.”
\end{itemize}
tive statements in this book." But Judge Posner dismisses any systematic analysis with the airy comment that "[o]ther familiar ethical criteria have their own serious problems."

Are there motives other than the pursuit of utility? Prominent economists accept that there are (although some forget this once they get down to grinding out the theoretical sausages). Thus Professor Amartya Sen writes: "A divergence between choice and well-being can easily arise when behavior is influenced by some motivation other than the pursuit of one's own interest or welfare (e.g., through a sense of commitment, or respect for duty)."

Some classic economists including Adam Smith embraced similar views: Although people often do pursue each his own utility (especially, one author notes, in special situations such as "war and trade"), not everyone acts that way all the time.

A "thought experiment" based on Robert Nozick's Anarchy, State

132. Id. at 27. The complete quotation from this passage is as follows:

But there is more to notions of justice than a concern with efficiency. It is not obviously inefficient to allow suicide pacts; to allow private discrimination on racial, religious, or sexual grounds; to permit killing and eating the weakest passenger in the lifeboat in circumstances of genuine desperation; to force people to give self-incriminating testimony; to flog prisoners; to allow babies to be sold for adoption; to allow the use of deadly force in defense of a pure property interest; to legalize blackmail; or to give convicted felons a choice between imprisonment and participation in dangerous medical experiments. Yet all these things offend the sense of justice of modern Americans, and all are to a greater or lesser (usually greater) extent illegal. An effort will be made in this book to explain some of these prohibitions in economic terms, but most cannot be; there is more to justice than economics, a point the reader should keep in mind in evaluating normative statements in this book.


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135. Sen, supra note 97, at 386.

and Utopia supports these views:

Suppose there were an experience machine that would give you any experience you desired. Superduper neuropsychologists could stimulate your brain so that you would think and feel you were writing a great novel, or making a friend, or reading an interesting book. All the time you would be floating in a tank, with electrodes attached to your brain. Should you plug into this machine for life, preprogramming your life’s experiences? ... Of course, while in the tank you won’t know that you’re there; you’ll think it’s all actually happening. ... Would you plug in? What else can matter to us, other than how our lives feel from the inside?

Several years’ worth of asking this question of students confirms what common sense in any event suggests: most people would not get in the machine, and thus most people do not make pleasure or any other experience the point of it all. Utility is not the only motive. If you would not get into the machine, you accept the guidance of goods other than pleasure or any other experience.

Another argument to this effect is advanced by Professor Sen:

The hopeless beggar, the precarious landless labourer, the dominated housewife, the hardened unemployed or the overexhausted coolie may all take pleasures in small mercies, and manage to suppress intense suffering for the necessity of continuing survival, but it would be ethically deeply mistaken to attach a correspondingly small value to the loss of their well-being because of this survival strategy.

138. The omitted text here is: “Others can also plug in to have the experiences they want, so there’s no need to stay unplugged to serve them.” Id.
139. Suppose you were injected with a drug that deprived you of the ability to experience pleasure, pain, or any others of the feelings which consequentialists might identify as the point of life. Suppose you were an athlete, scheduled to compete in the Olympic hundred meter tomorrow, but were deprived permanently of any ability to derive any experiential good from the endeavor. Would you run the race? (Leave aside the possibility that you might be obliged to do so in order to foster the pleasures of others. Assume that as much pain as pleasure would be occasioned by your competing: pain, for example, to your defeated opponents and their supporters.) Again, several years’ worth of students attest to a widespread attraction to the course of participating in the event.
140. SEN, supra note 95, at 45-46.
There is something bad about the conditions in which such people find themselves, one must agree, that goes beyond the suffering.\(^\text{141}\) If there are goods beyond that identified by preference utilitarianism, then you have a reason to live and your neighbor has a reason to refrain from rubbing the lamp. And surely there may be.

### B. Justice is a Good

Justice requires some allocations and forbids others. It forbids giving a fatal disease to an innocent person. It forbids hanging him. It forbids en-slaving subject peoples.\(^\text{42}\) It forbids allocating the art treasures of Europe to Hitler. Precepts like these are not just rules of thumb about how to maximize utility. Better free the slaves than offer them the machine; liberate Europe and defeat the Reich rather than give all the victims a drug against pain; the justice done by Lincoln and Churchill was a good beyond its affective consequences.

The same can be said about less dramatic instances. Justice demands the return of stolen property, the payment of debts, and the performance of obligations under partnership agreements. You should stay out of the machine for the purpose of paying your debts, for example, and for purposes of sticking with your marriage. (It would be no substitute to put your creditor into the machine, or your spouse.).

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141. The above arguments relate to classic, pleasure-and-pains utilitarianism. Similar arguments can be deployed successfully against preference utilitarianism as follows. Less fortunate than Aladdin, you rub a lamp which turns out to be inhabited by a malevolent Genie. Towering above you in the clouds, he announces that he has become your Anti-Servant: never again will any of your wishes be granted—never will any of your preferences be satisfied; he will follow you around forever and see to that. Is life any longer worth living? Is there anything left to live for? If you think there is, then you apprehend the existence of some good for you other than the satisfaction of your preferences.

Out of a lesser lamp emerges a better Genie, but a weaker one. He cannot overcome the efforts of the malevolent one, but will do what he can do for you in any other way. Is this a comfort and a palliation of your distress? He might bring you good things you never dreamed of and so never “preferred.” If you think he can do you some good you are not a pure preference utilitarian.

Your neighbor finds a lamp which contains a Preference Genie. Should he rub the lamp? If he does, a Genie will tower over him throughout life, making sure that he obtains exactly what he prefers. But this preference Genie is a jealous Genie, and will see to it that nothing happens that your neighbor has not identified as desirable and embraced as among his preferences. Should he rub the lamp; is there any line of thought which would reasonably lead him to refrain?

142. See POSNER, \textit{supra} note 132, at 374-77 (conceding that the wealth-maximization principle would under some circumstances justify slavery and listing this as among the unanswerable objections to the wealth-maximization principle as a guide to law).
Utilitarianism makes no sufficient place for justice.\textsuperscript{143} Judge Posner generously admits something like this: "Since economics does not answer the question whether the existing distribution of income and wealth is good or bad, just or unjust... neither does it answer the ultimate question whether an efficient allocation of resources would be socially or ethically desirable."\textsuperscript{144}

Utility will sometimes be enhanced by unjust projects. For example, secretly inducing cancer in order to do medical research on the victim may be utile.\textsuperscript{145} Hanging an innocent man to avert a riot may be utile. Enriching the undeserving is utile if they take a disproportionate pleasure in wealth.\textsuperscript{146} Utilitarianism cannot recommend a permanent grasp on rules and principles of justice: it makes rules of justice into rules of thumb, to be disregarded when circumstances require.

C. Some Fiduciary Relationships are Aimed at Doing Justice Among Beneficiaries\textsuperscript{147}

The relationship of the representative with the class in class-action litigation is a good example. He has a duty to be fair in distributing benefits and burdens.\textsuperscript{148} His affiliation, in other words, serves justice, not

\begin{enumerate}
\item \textsuperscript{143} But cf. Harsanyi, Rule Utilitarianism, supra note 88, at 25 (discussing how rule Utilitarianism may escape this criticism).
\item \textsuperscript{144} POSNER, ECONOMIC ANALYSIS, supra note 4, at 14. See R.G. Frey, Introduction: Utilitarianism and Persons, in UTILITY AND RIGHTS 3 (R.G. Frey ed., 1984) ("[W]hat centrally matters in [utilitarianism]... is the amount of pleasure in the world, not its distribution.").
\item \textsuperscript{145} Philippa Foot, Utilitarianism and the Virtues, in CONSEQUENTIALISM AND ITS CRITICS 224 (Samuel Scheffler ed., 1988). See also John Rawls, Classical Utilitarianism, in id. at 1. An attempt to respond to this sort of argument appears in Dan W. Brock, Utilitarianism and Aiding Others, in THE LIMITS OF UTILITARIANISM 225 (Harlan B. Miller & William H. Williams eds., 1982). A similar line of analysis can be developed under the choice utilitarian formula: Many people would choose or prefer a cure to a deadly disease; they might prefer it over the life of a stranger's baby.
\item \textsuperscript{146} A utilitarian defense, partly successful, to some of these criticisms can be termed the "publicity-effect defense." Hanging the innocent man may forestall the riot but it may nevertheless be disutile because of the publicity effect—the spread of the knowledge that judges hang innocent people will make everyone insecure. This defense fails where the innocence of the victim can be kept secret. It also fails where the public is confident that "it can't happen to people like us." Injustice to a racial minority, for example, may never make the majority uncomfortable. Injustice to children and babies may not make grownups as uncomfortable.
\item \textsuperscript{147} It might well be argued that all relationships, including nonfiduciary, contractual ones, aim or should aim in part at doing justice, since even arms-length buyers and sellers ought to be fair to one another. See generally James Gordley, Equality in Exchange, 69 Cal. L. Rev. 1587 (1981).
\item \textsuperscript{148} See generally Lazos, supra note 18.
\end{enumerate}
merely utility. His obligations look backwards in time, not forwards; and they do not rest on an assessment of the pleasure one or another members of the class may take in compensation nor on the ordering of their preferences. The same can be said of a trustee in bankruptcy when he determines how assets should be distributed among creditors and of a corporate director when he decides how to distribute dividends among classes of stock.\textsuperscript{149} Something similar can be said of a lawyer called upon to adjust the interests of a class of clients in litigation, and of Roger’s activities in arranging financing for AA Corporation (since that involved adjusting the relationships between Alethia and Agatha and other participants in the business).

\textbf{D. Virtue—A Fully Developed, Well-Functioning Character—is a Good}

Professor Nozick’s thought experiment may suggest that it is mainly for the sake of \textit{activities} that we would stay out of the machine. But surely not only activities,\textsuperscript{150} but \textit{attributes of character} as well. Suppose the machine was structured so as to require the sacrifice not only of our activities and projects—not only of what we might \textit{do}—suppose it deprived us of much of what we \textit{are}. Suppose that a lifetime inside incurs the loss of the capacities of the mind and the coherence of the personality. Suppose your memory deteriorates, your logic slips, your reason clouds over, and your judgment wobbles.\textsuperscript{151} Suppose the effects of the machine are like those of alcoholism. Is it all worth it for the pleasure it buys? These hypotheticals indicate that there is a good in virtue—the virtues, taking that word to mean worthwhile attributes of the character—that there is a good in virtue beyond its utility.\textsuperscript{152}

\begin{itemize}
\item \textsuperscript{149} See generally Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947).
\item \textsuperscript{150} Certainly not only \textit{physical} activities, for a start. Projects of the mind as well, notably the practice of thought and reason. Similarly many projects which involve a combination of the powers of mind and body—to reason out what is just, for example, and then to instantiate it by participating with Lincoln in freeing the slaves or with Churchill in resisting the Nazis—if the opportunity to join in such a project came our way we would be happy to pursue it rather than enter the machine.
\item \textsuperscript{151} Actually it could not be structured any other way, since we would be sure to deteriorate during a lifetime without mental activities other than those involved in experiencing.
\item \textsuperscript{152} To demonstrate this further, imagine you have the opportunity to enter a Virtue Machine. Enter it, not for your entire life but just for a few hours, and it will enhance your character in whatever ways you request. It can make you wiser and smarter and more generous and braver. But the price is a diminution in your pleasure. It knows the patterns and mechanisms of your pleasures and pains and will make life materially less pleasant for you forever thereafter. Many people would pay this price and enter the machine. If you would, you have accepted that there is some good for you in virtue beyond its consequences as to pleasures and pains.
\end{itemize}
Utilitarianism cannot accept the good of the virtues except as instruments for pleasure. Posnerian analysis is to the same effect: "Honesty, trustworthiness, and love reduce the cost of transactions." Therefore, utilitarianism will sometimes recommend decisions which distort the personality. An individual seeking to enhance his own utility under Stalinism would be best advised to jettison habits of courageous speech and independent analysis. Utilitarianism cannot recommend a permanent grasp on virtue: A virtue should be discarded when it is no longer serviceable to utility. If the regime changes and Stalinism is replaced by Thatcherism utility is served by a change of character. An individual seeking to enhance his own utility in a modern liberal social order might be well advised to abandon those virtues which demand too much in the way of loyalty to friends and family.

E. Some Fiduciary Relationships are Aimed at the Promotion of the Virtues of Beneficiaries

The fiduciary duties of the guardian are a good example. They include the duty to educate and "to maximize opportunities for the ward's personal growth." The guardian of a minor is a substitute parent: he should help educate the child not only vocationally but also morally; not only to earn a good living but also to lead a good life.

The responsibilities of attorneys are to some extent similar. Assisting in the development of the virtues—especially the civic virtues—is one important aspect of the attorney-client relationship. Especially in business practice and other non-litigation situations, good lawyering involves more than seeing to it that the client wins; it has an educational side: It involves helping him fit himself to live well in his moral and social culture.

F. Some Fiduciary Relationships Also Promote the Virtue and Justice of the Fiduciary

In the Utility Contract each party acts for the sake of what he may get from the other and each would just as soon avoid giving much in exchange. In many fiduciary relationships, however, the fiduciary rightly regards the conferral of fiduciary benefits as a good for himself as well

153. See generally Roger Crisp, Utilitarianism and the Life of Virtue, 42 PHIL. Q. 139 (1992); Foot, supra note 145.
154. POSNER, ECONOMIC ANALYSIS, supra note 4, at 261.
155. Casasanto et al., supra note 12, at 543, 548.
as for the beneficiary. The lawyer may not practice only for the fee, nor the doctor or guardian for a stipend. Their roles involve the development of their own characters; growth in maturity; enhancement of wisdom; and attainment, even, of some degree of nobility.157

G. Freedom is a Good

Prominent writers tell us that freedom is something bestowed on mankind by nature (Aquinas),158 “our most precious possession” (Cicero),159 “God's most precious gift to human nature, for by it we are made happy here as men, and happy as gods in the beyond” (Dante),160 “the natural condition of the human race” (Lincoln),161 “our unalterable destiny” (Schiller),162 “an inalienable ingredient in what makes human beings human” (Berlin),163 something “of which a human being cannot divest himself or be deprived without temporarily or permanently ceasing to be human” (Oakeshott),164 and the source of love (Schiller).165


160. DANTE ALIGHIERI, Monarchy, Book One, XII, in MONARCHY AND THREE POLITICAL LETTERS 1309-17 (Donald Nicholl trans., Garland Library ed., 1947). To be precise, one should note that Dante is speaking here of “the fundamental principle of our freedom,” namely “free choice.” Id. at 18. Dante also states that “the human race is at its best when most free.” Id.

161. BRUCE CATTON, THE COMING FURY 240 (1961) (quoting L.E. CHITTENDEN, RECOLLECTIONS OF PRESIDENT LINCOLN AND HIS ADMINISTRATION 72-76 (quoting Abraham Lincoln)).

As to slavery, . . . [t]he voice of the civilized world is against it; it is opposed to its growth or extension. Freedom is the natural condition of the human race, in which the Almighty intended men to live. Those who fight the purposes of the Almighty will not succeed. They always have been, and they always will be, beaten.


163. ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY, at lx (1969) (“[T]hose who have ever valued liberty for its own sake believed that to be free to choose, and not to be chosen for, is an inalienable ingredient in what makes human beings human . . . .”).


165. MILLER, supra note 162, at 21 (quoting Johann von Schiller).
Utilitarianism suggests that freedom is an *instrumental* good; free markets, for example, maximize utility. But surely freedom is more than instrumentally good. Merely instrumental goods are dispensable, once their objects are achieved, but who would agree to give up his freedom once it had been employed in producing enough wealth? 166 Similarly, merely instrumental goods need not be afforded people who cannot or will not use them to pursue the relevant object, but who would approve of a government which deprived people of freedom on grounds of incompetence or unwillingness to compete in the marketplace?

Freedom seems to be a noninstrumental ("final") good in at least two principal ways. First, freedom relates to the moral standing of good action. When an action is a good one; when the objective, *foro externo* aspects of the action are commendable—then not only the act but also the person himself—the actor—may deserve credit. Freedom is a necessary condition for this. Only when he exercises freedom in acting is he fully the author of the act and only then does he fully deserve credit for it. 167

Second, freedom is a component of learning, self-development, and self-realization. 168 Doing good things and participating in good projects is a way to develop one's knowledge of their goodness. 169 Doing good things and participating in good projects is a way of bringing their goodness into yourself and making it a part of yourself. 170

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166. *But cf.* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 29 (1960) ("If there were omniscient men, if we could know not only all that affects the attainment of our present wishes but also our future wants and desires, there would be little case for liberty.").

167. *See* GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 110 (1988) ("It is because other persons are creators of their own lives, are shapers of their own values, are the originators of projects and plans, that their interests must be taken into account, their rights respected, their projects valued.").


169. Thought without action cannot achieve this fully: You could not really know intimately the good of loyalty to one's spouse or children without being married and caring for children.

170. *See* POPE JOHN PAUL II, APOSTOLIC EXHORTATION: THE ROLE OF THE CHRISTIAN FAMILY IN THE MODERN WORLD (Familiaris Consortio) (Vatican trans., 1981), § 34 at 56 ("[M]an, who has been called to live God's wise and loving design in a responsible manner, is an historical being who day by day builds himself up through his many free decisions; and so he knows, loves and accomplishes moral good by stages of growth."); JOHN FINNIS, FUNDAMENTALS OF ETHICS 141 (1983) ("[O]ne's free choices . . . constitute one the sort of person . . . one has made oneself.").

And when one's character is the product of one's own actions the good of deserving credit for it—for one's good character as well as one's good actions—emerges as another aspect of the good of freedom. *See* GERMAIN GRIZEZ, THE WAY OF THE LORD JESUS: CHRISTIAN MORAL PRINCIPLES (1983) ("One shapes one's own life, one determines one's
H. Fiduciary Relationships Promote Freedom

"Freedom of contract" is a familiar concept: What about "freedom of the fiduciary relationship"?

Alethia and Agatha may be more free in a fiduciary relationship than in a Utility Contract. Compare how they stood when Arthur was their lawyer with how things worked under Roger. Arthur consulted with them frequently and took their evolving wishes into account; Roger considered only their choices at the moment of formation. When new information came to Arthur's attention he communicated it to them; when a business development occurred he told them about it; when he felt he had been out of touch for too long he sat down with them. Roger

self, by one's free choices. To be responsible ultimately means to be a self one cannot blame on heredity, environment, or anything other than one's own free choices."

Another way in which freedom is good is that it is a component of the good of doing any reasonable thing and "being a player." It is not enough merely to think out what might be done and what might be achieved, nor enough to see those happy outcomes occur. It is better also actually to do the things one has settled on as worth doing and see the commendable outcomes occur as a result of one's own actions. Being in jail, and unable to act, would be a sorry state because it would deprive you of this opportunity. It would be a sorry state even if some genie brought about the changes in the outer world which you would have sought to achieve had you been at liberty to act. The good life has much to do with doing things; with being involved in the maturing of plans into achievements. Freedom is a component of the good of human action when it is human in the fullest sense; when the person is fully involved as the author of his acts. Cf. DWORKIN, supra note 167, at 111 ("[W]hat makes a life ours is that it is shaped by our choices.... The exercise of the capacity of autonomy is what makes my life mine."). See generally CHRISTINE SWANTON, FREEDOM: A COHERENCE THEORY 40-48 (1992) (discussing the relationship between freedom and "flourishing").

171. See, e.g., Tamar Frankel, The Legal Infrastructure of Markets: The Role of Contract and Property Law, 73 B.U. L. REV. 389, 394 (1993) ("Contract law represents the freedom to interact with others, free of government coercion."). See generally F. KESSLER & G. GILMORE ET AL., CONTRACTS: CASES AND MATERIALS 6 (3d ed. 1986) ("[A] system of free contract did not recommend itself solely for reasons of sheer expediency and utilitarianism; it was deeply rooted in the moral sentiments of the period in which it found strongest expression. The dominant current of belief inspiring nineteenth-century industrial society ... was the deep-felt conviction that individual and cooperative action should be left unrestrained ... "). A widely quoted British opinion stated:

[If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.

did none of those things. Arthur made it his professional business to have a good feel for their plans and aspirations; he knew they were not just out for money and that they aimed to be fair to one another and to their employees; he paid attention not only to their dictates but to the purposes and policies behind them. Roger, thinking (like most contractualists) only in terms of expressed preferences, did none of those things. Arthur represented Alethia and Agatha in a deep sense of the word. It may be an exaggeration, but not an extreme one, to say that Arthur was a sort of extension of Alethia and Agatha. No one could say that about Roger.

Remember the “goods of freedom” described above. Alethia and Agatha were the authors of their business lives to a greater extent because of Arthur than they were under Roger’s lawyering; they were moral participants in what Arthur did and developed better as moral people and members of the moral business community.

I. Promotion of Justice, Virtue and Freedom Justify Many of Fiduciary Law’s Special Characteristics

Recall, then, some of the characteristics of fiduciary law which made it objectionable to Justice Jurisprudence. Those characteristics often help the relationship serve justice, enhance virtue, and promote freedom.

1. Nonpositivism

Fiduciary law’s nonpositivism—its embrace of rules created by judges rather than parties—troubled Justice Jurisprudence. He was positivist about affiliations—reluctant to introduce norms of his own creation or even aggressively to fill gaps in incomplete contracts—because he believed in teachings of utilitarian ethics and anthropology which seemed to establish that the parties knew the good of contracting (utility) and aimed to achieve it with greater skill than he could bring to bear. These teachings have little relevance to affiliations which aim at goods other than utility. A judge in a guardianship case can reasonably apply his own conclusions about the education of a ward and a judge in a matter involving distribution of assets among class plaintiffs, stockholders, or trust beneficiaries may reasonably improve the fairness of the distribution.

2. Requirements of Self-Sacrifice

Fiduciary law’s requirements of self-sacrifice troubled Justice Juris-
prudence. Selfishness, not self-sacrifice, he thought, enhances utility in most relationships; selfishness, not self-sacrifice, directs a price competition which allocates goods and services to those who will derive the most utility from them.

This kind of market mechanism cannot be applied to the goods of justice, virtue, and freedom, for two reasons. First, because “market participants” do not necessarily want more of them: not everyone is in a position where he wants to be treated justly; not everyone seeks the arduous disciplines of virtue and freedom.

A second point doubts the possibility of determining whether one “market” system “allocates” goods and services in a way that “maximizes” justice, virtue, or freedom better than another. Any such determination implies some sort of weighing the degree of the good for one person against the degree of the good for another. Such a determination causes plenty of theoretical difficulty when the asserted good is pleasure or utility; worse problems loom when it is goods of the sorts involved in fiduciary relations. Requiring self-sacrifice on the part of the guardian in order to enhance the virtues of the ward may involve enhancing the virtues of the guardian as well. Requiring self-sacrifice on the part of the lawyer in order to assure that justice is done among participants in a corporation and that their freedom is enhanced may involve some sort of impairment of the freedom of the attorney; but no convincing analysis can establish that on balance his self-sacrifice is “inefficient.”

IX. CONCLUSION

A. Varieties of Relationalism

Justice Jurisprudence applied “relational positivism” to contracts: He made the determinations of the parties the dominant consideration. Relational positivism makes sense when the goal of a relationship is subjective—known best to the parties and likely to be peculiar to them—and when the parties are well motivated and well equipped to pursue it.

Fiduciary law and discourse is “relational semi-positivism”: The parties’ wills play an important role but the law also applies its own views of what is appropriate. Relational semi-positivism seems to be appropriate when the good of the relationship is not entirely subjective or peculiar to the parties; when the parties are only imperfectly positioned and motivated to pursue that good.
B. Fiduciary Relationships Are Not Contracts

The Delphic Oracle quoted at the outset of this Article seems to have been correct in suggesting that relations of mutual good faith involve the greatest goods. Mutual good faith and similar fiduciary characteristics lead a relationship to justice and virtue and they enhance freedom. The contractarians would distance that involvement and impoverish those goods.