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THE RISE OF FIDUCIARY LAW

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The Rise of Fiduciary Law Tamar Frankel

Introduction

The law that defines and regulates fiduciary relationships appears in many legal areas, such as family law,¹ surrogate decision-making,² international law,³ agency law,⁴ employment law,⁵ pension law,⁶ remedies rules,⁷ banking law,⁸ financial institutions' regulation,⁹ corporate law,¹⁰ charities law¹¹ not for profit organizations law,¹² and the law concerning medical services.¹³

Fiduciary relationships, and the concepts on which they are grounded, appear not only in the law. They appear in other areas of knowledge: economics,¹⁴ psychology;¹⁵ moral

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¹ Elizabeth S. Scott & Ben Chen, *Fiduciary Principles in Family Law* (Feb. 2, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3118349 (last visited July 11, 2018), in OXFORD HANDBOOK OF FIDUCIARY LAW (Evan Criddle, Paul Miller & Robert Sitkoff, eds., forthcoming 2018).

² Nina A. Kohn, *Fiduciary Principles in Surrogate Decision-Making*, in OXFORD HANDBOOK OF FIDUCIARY LAW (Evan Criddle, Paul Miller & Robert Sitkoff, eds., forthcoming 2018).

³ Evan J. Criddle & Evan Fox-Decent, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY, chs. 1-7 (Sept. 6, 2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850754 (last visited July 11, 2018).

⁴ Deborah A. DeMott, *Fiduciary Principles in Agency Law* (n.d.), available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6478&context=faculty_scholarship&mp=&sei-redir=1&referer=http%253A%252F%252Fwww.bing.com%252Fsearch%253Fq%253DFiduciary%252BPrinciples%252Bin%252BAgency%252BLaw%2526qs%253Dn%2526form%253DQBLH%2526sp%253D1%2526pq%253Dfiduciary%252Bprinciples%252Bin%252Bagency%252Blaw%2526sc%253D1-34%2526sk%253D%2526cvid%253D4CFB2E7E665A47CB896C5ADBEF2B0E1A#search=%22Fiduciary%20Principles%20Agency%20Law%22 (last visited July 11, 2018), in OXFORD HANDBOOK OF FIDUCIARY LAW (Evan Criddle, Paul Miller & Robert Sitkoff, eds., forthcoming 2018).

⁵ Aditi Bagchi, *Fiduciary Principles in Employment Law* (Apr. 30, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171180 (last visited July 11, 2018), in THE OXFORD HANDBOOK OF FIDUCIARY LAW (Evan Criddle, Paul Miller & Robert Sitkoff, eds., forthcoming 2018).

⁶ Dana M. Muir, *Fiduciary Principles in Pension Law*, in OXFORD HANDBOOK OF FIDUCIARY LAW (Evan Criddle, Paul Miller & Robert Sitkoff, eds., forthcoming 2018).

⁷ Emily L. Sherwin, *Formal Elements of Contract and Fiduciary Law* (last revised Sept. 11, 2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2634109 (last visited July 11, 2018), in CONTRACT, STATUS, AND FIDUCIARY LAW (Paul B. Miller & Andrew S. Gold eds., 2016).

⁸ Andrew Tuch, *Investment Banks as Fiduciaries: Implications for Conflicts of Interest*, 29 MELBOURNE U. L.R. 478 (2005).

⁹ Howell E. Jackson, *Regulation In A Multisector Financial Services Industry: An Exploration Essay*, 77 WASH. U. L.Q. 319 (1999).

¹⁰ Julian Velasco, *A Defense of the Corporate Law Duty of Care*, 40 J. CORP. L. 647 (2015).

¹¹ Lloyd Hitoshi Mayer, *Fiduciary Principles in Charities and Other Nonprofits* (Jan. 30, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3113465, in OXFORD HANDBOOK OF FIDUCIARY LAW (Evan Criddle, Paul Miller & Robert Sitkoff, eds., forthcoming 2018).

¹² *Id.*

¹³ Chalmers C. Clark, *Trust in Medicine*, 27 J. MED. & PHIL. 11 (2002).

¹⁴ Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U.L. REV. 1045 (1991).

¹⁵ Tess Wilkinson-Ryan, *Incentives to Breach*, 17 AM. L. & ECON. REV. 290 (2015).

norms¹⁶ and pluralism.¹⁷ Fiduciary law has a very long history. It was recognized in Roman law¹⁸ and the British common law¹⁹ and appeared decades ago in religious laws, such as Jewish law,²⁰ Christian law,²¹ and Islamic law.²² Internationally, fiduciary law has a place in European legal system²³ in Chinese law,²⁴ Japanese law²⁵ and Indian law.²⁶

This article offers an explanation to the evolution and expansion of fiduciary principles and a prediction of their future. Part One opens with a short description of fiduciary relationships, and the conditions under which they arise. Part Two describes the evolution of specialization of living being—from genetic to chosen cooperative specialization. Part Three notes the positive and negative social impact of fiduciary relations and the response of the law designed to encourage the relationships while discouraging the abuse they might lead to. Part four of the article highlights the criticism of fiduciary law and alternative solutions to the issues raised by fiduciary relationships. Part Five offers a prediction about the future of fiduciary law.

Part One. Fiduciary relationships and the conditions under which they arise

Fiduciary relationships are crucial to any individual in any society. That is because few individuals are self-sufficient and fewer, if any, can live alone. The services that

¹⁶ J E PENNER, *THE LAW OF TRUSTS* (10th ed. 2016).

¹⁷ Hanoch Dagan, *Fiduciary Law and Pluralism* (Nov. 12, 2017) (last revised Nov. 14, 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3010681 (last visited July 11, 2018), in *OXFORD HANDBOOK OF FIDUCIARY LAW* (Evan Criddle, Paul Miller & Robert Sitkoff, eds., forthcoming 2018).

¹⁸ B.W. Frier, *The Roman Law of Trusts*, 55 *CLASSICAL REV.* 282 (2005).

¹⁹ David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 *B.U.L. REV.* 1011 (2011).

²⁰ Chaim Saiman, *Fiduciary Principles in Classical Jewish Law* (Jan. 2018), available at http://www.academia.edu/35107055/Fiduciary_Duties_in_Classical_Jewish_Law.docx (last visited July 11, 2018), in *OXFORD HANDBOOK OF FIDUCIARY LAW* (Evan Criddle, Paul Miller & Robert Sitkoff, eds., forthcoming 2018).

²¹ H.H. Grooms, *Christianity and the Law*, 25 *ALA. LAW.* 311 (1964).

²² Mohammad Fadel, *Fiduciary Principles in Classical Islamic Law Systems* (Oct. 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3071834 (last visited July 11, 2018), in *OXFORD HANDBOOK OF FIDUCIARY LAW* (Evan Criddle, Paul Miller & Robert Sitkoff, eds., forthcoming 2018).

²³ Martin Gelter & Geneviève iHelleringer, *Fiduciary Principles in European Civil Law Systems* (Mar. 2018), available at

http://www.ecgi.global/sites/default/files/working_papers/documents/finalgelterhelleringer_0.pdf (last visited July 11, 2018), in *OXFORD HANDBOOK OF FIDUCIARY LAW* (Evan Criddle, Paul Miller & Robert Sitkoff, eds., forthcoming 2018).

²⁴ Nicholas C. Howson, *Twenty-Five Years On — The Establishment and Application of Corporate Fiduciary Duties in PRC Law* (Oct. 2, 2017), available at https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1257&context=law_econ_current (last visited July 11, 2018), in *OXFORD HANDBOOK OF FIDUCIARY LAW* (Evan Criddle, Paul Miller & Robert Sitkoff, eds., forthcoming 2018).

²⁵ J. Mark Ramseyer & Masayuki Tamaruya, *Fiduciary Principles in Japanese Law* (Sept. 28, 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3044758 (last visited July 11, 2018), in *OXFORD HANDBOOK OF FIDUCIARY LAW* (Evan Criddle, Paul Miller & Robert Sitkoff, eds., forthcoming 2018).

²⁶ Stelios Tofaris, *Trust Law Goes East: The Transplantation of Trust Law in India and Beyond*, 36 *J.L. HIST.* 299 (2015).

fiduciaries retender to others respond not only to the need of individual members of the human society, but to the needs of almost any human society as whole. For example, medical treatment addresses individual sicknesses as well as society-wide epidemics, keeping members of the society productive (perhaps happier as well).

As a group, fiduciaries benefit from their contribution to other people and organizations, as well as to society generally. That is because the recipients of fiduciary services cannot acquire the knowledge and expertise necessary for all the services that all fiduciaries can, and do, offer. Therefore, members of society reward fiduciaries for these services. One might note the same observation in a business context. Members of society pay for unique services as they pay for shoes they cannot make, and houses they cannot build. Like the markets for goods, there have developed markets for fiduciary services.

However, members of society become dependent on fiduciaries and their services. In addition, most recipients of the services cannot fully evaluate and judge the value, quality and reliability of services, and whether it satisfies their needs. Thus, fiduciaries acquire power over the persons to whom they provide their services. Like any power, this power too can be abused and misused, intentionally or negligently.

In all cases, power enables fiduciaries to harm the people who rely on them, as well as to harm society as a whole. Abuse may induce some society-members to avoid useful and sometimes essential services, and suffer from their abstention.²⁷

Fiduciaries' abuse of their power can result from the refusal of fiduciary experts' to relate and take care of problems posed by their expert service. Years ago, French women died when they gave birth in hospitals. Fear led women to give birth in the open spaces of the roads. Surprisingly in those conditions they and their children survived and lived! In 1880s, Louis Pasteur, a French biologist, examined the problem and discovered the killer: tiny germs.²⁸ He noted that the doctors did not wash their hands when they treated the women after dealing with human corpses. He resolved the problem by demanding that the doctors wash their hands. It took time to convince the medical profession to recognize the germs. But it finally did.

Fiduciary services are best rendered voluntarily. Forcing fiduciaries to provide services to others is far less effective than rewarding fiduciaries by pay, prestige, and other benefits.

²⁷ See generally TAMAR FRANKEL, FIDUCIARY LAW 77-78 (2010).

²⁸ **Louis Pasteur** ([/ˈluːi pæˈstɜːr/](#), French: [\[lwi pastœʁ\]](#); December 27, 1822 – September 28, 1895) was a [French biologist](#), [microbiologist](#) and [chemist](#) renowned for his discoveries of the principles of [vaccination](#), [microbial fermentation](#) and [pasteurization](#). He is remembered for his remarkable breakthroughs in the causes and prevention of [diseases](#), and his discoveries have saved many lives ever since. He reduced mortality from [puerperal fever](#), and created the first vaccines for [rabies](#) and [anthrax](#). His medical discoveries provided direct support for the [germ theory of disease](#) and its application in clinical medicine. He is best known to the general public for his invention of the technique of treating [milk](#) and [wine](#) to stop bacterial contamination, a process now called [pasteurization](#). He is regarded as one of the three main founders of [bacteriology](#), together with [Ferdinand Cohn](#) and [Robert Koch](#), and is popularly known as the "father of microbiology".^{[4][5][6]}

In fact, forced services might be dangerous to most recipients, who do not understand nor command the expertise necessary to provide these services to themselves and to others. Consequently, an angry provider of such services may be more dangerous than no services. To the extent that fiduciaries offer socially beneficial systems, such as health services and securities fundraising and trading, avoiding their services harms society's financial system and its benefits.

Thus, the purpose of fiduciary law is (i) to encourage people to seek expert services and (ii) to entice experts to continuously offer their expert services, which are socially beneficial to others, and (iii) to prevent the experts' abuse of the unequal power in these fiduciary dependent relationships.

Part Two: The evolution of live group to specialization – from genetic to cooperative.

With very few exceptions living beings cannot live alone.²⁹ Their survival depends on the support offered by others. They live by compulsory rules that meet the needs of other group-members as well as their own. In the case of many types of animals, these are compulsory, non-volitional rules of behavior, which are fixed genetically.

For example, the lion's family members live by genetically-fixed duties of functions and rights. The "lion's share" is provided to the male because the male lion is the protector of the group. He needs to be physically strong and large. The hunter is the female because she is small, agile, and ferocious. She needs less food.³⁰

However, there are animals that, in addition to genetic abilities to perform particular functions alone habitually cooperate, for example, in hunting for food. Cooperation requires adjustment of intentions and sometimes reaching an agreement to achieve the main project. In other words, it requires compromise not only of actions but also the division of power. Cooperation may be a genetic tendency not only to perform certain functions but also to cooperate in performing these functions for a collective purpose.

As noted, humans and their societies are more complex and flexible, as compared to the animals and their societies. Humans can develop new expertise in many areas. This expertise can contribute to all or many more humans. It can contribute to their longevity, pleasure, and well-being. Working together, learning from past successes and failures, and noting changes and opportunities, humans develop knowledge, which is useful to their communities, and members of their species. In addition, humans acquire more control over their actions and abilities.

²⁹ See HARRY W. YEATTS JR., SIMPLY COMPLICATED. UNDERSTANDING THE HUMAN BEING ch. 3 (1997), available at <http://www.threeleggeddragon.com/writings/simply/simple.survive.html> (last visited July 11, 2018).

³⁰ See, e.g., *The Female Lion*, WHERE LIONS ROAM, Jan. 26, 2015, available at <https://www.wherelionsroam.com/female-lion/> (last visited Apr. 27, 2018).

Yet, why do fiduciary relationships give rise to legal rules of behavior? One answer is that humans' service to others is not linked as tightly to their genes. Animals have little choice but to follow the rules of interdependence, which are dictated by their genes. Human genes allow them more freedom; and powers impose on them less compulsion to act. In addition, offered rewards may create a drive to acquire and develop various new specialties. In contrast to the lion's family, humans have created and developed additional and unique expert knowledge.

The expertise of the lion's family is *genetic; it is likely to change slowly*, while humans can *learn and acquire their expertise relatively faster*³¹ and just as importantly, by learning from others. To some extent, this ability may be genetic. But much, if not most, of it, can be taught and self-driven.

Therefore, unlike most animals, humans may choose to offer or withhold their expertise from others, as well as accept or reject the expertise of others. The source of the expertise may be chosen. But because it is provided by the experts, and because the provision of the service is not genetically induced, non-expert humans may have to persuade and induce the experts to provide them with the fruits of their fellow humans' expertise.

However, the current number of expert services that various humans can provide is spread among individual humans. No one human can master and apply all available humans' expertise. The difference between the lion's and humans' expertise is that the lion's expertise is fixed genetically in the expert provider; and if changes could be made, they would take many generations.

To be sure, human experts have a measure of innate drive to provide their expertise to others. Most parents, teachers and some experts may be driven to share their knowledge. But the sharing is less genetically in-bred. Further, human expertise is far more diverse. Therefore, experts in some areas are non-experts in other areas. Finally, as noted below, many, if not all, humans cooperate, thus creating expertise that none of each participant in the group can create alone.

Thus, all human societies develop mechanisms that enable the members to benefit from the expertise of others.³² Human expertise is marketable rather than innate. Givers and receivers must agree or be forced to the provision of the expertise. The rewards to both parties may differ and the terms of the exchange are far more flexible than the fixed genetic ones. Most importantly, expertise is rarely free. Often it can be induced to be offered only by an exchange of a reward of offer of a reward before the expert's service is provided. Thus, the model of receiving expertise has changed from automatic-genetic drive-- to an exchange or a gift, depending on both parties' desires and abilities to bargain. Relationships moved from an inherent drive to give and receive to an exchange, including a bargained exchange,

³¹ For the distinction between animals and humans on this point see LEE DUGATKIN, CHEATING MONKEYS AND CITIZEN BEES: THE NATURE OF COOPERATION IN ANIMALS AND HUMANS 14 (1999).

³² *Id.* at 23 (describing the effect of group on individuals that compose it).

Part Three. The positive and negative social impacts of fiduciary relations and the response of the law to encourage the relationships while discouraging the abuse they might lead to.

Pre-exchange inequality continues once the bargained relationship is established. The recipient of the expertise obtains its *benefits*, but not its *control and most importantly, not control over its abuse*. The experts have the power of knowledge over the recipients. This power is often on-going and, in many cases, can be hidden.

Power can be used to benefit or harm. Conflicting interests can be hidden from the other party. The inability of the recipients of the expertise to check its quality and the nature of the experts' service this inability can result in suspicion and withdrawal from the expertise. However, society is interested in its members' use of the experts. After all, the financial system, the health system, the legal system and the teaching systems, to name a few, are built on exchange and offerings of expert services for reward of the experts.

Thus, there are possible negative impacts of fiduciary relationships:

- i. Inability of the dependent person, to check the nature and quality of the expertise and its service.
- ii. The parties' unequal knowledge leads to imbalance of the power, which may lead to its abuse by the experts. Expert may undertake the service but hide the possible results or sometimes create a sham form of successful results, or accept rewards from those who seek the unsuccessful results, such as the other parties to a conflict.
- iii. An expert's gain of hidden rewards for withholding the best services to the trusting and relying party. The expert may undertake the service and hide the adverse possible results or sometimes create a sham form of successful results. The expert may do so for various reasons such as rewards from those whose interests conflict with the interests of the relying party.

In response, fiduciary law establishes duty of care and duty of loyalty. The weaknesses and inability to understand and control the experts' ability and honesty resulted in the need for law. That is especially so if the *recipients of the services* were unable to ensure the servicers' honesty by the threat of punishment. This is when fiduciary law entered the scene.

Fiduciary law can entice and protect those who need expert services. It entices members of the public to rely and trust their experts. The less the public members are able to check the experts' expertise and honesty, the more fiduciary law requires experts to use their expertise and act honestly. The law backs these requirements by punishment for abusing the expert's power and sometimes by prohibiting the expert to offer his or her expertise.

As noted, fiduciary rules appear in many areas of the law. Like other laws, such as criminal law, it is "sprinkled" throughout many branches of laws as well. Years ago, fiduciary law emerged to meet the need to use and rely on agents, trust law relationships, implied from contract law, and sometimes embedded in corporation law. Trust law

focused on the degree of necessary trust and the remedies for breach of trust that are involved in fiduciary relationships. Fiduciary is similar to constructive trust “[w]here a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.”³³ A constructive trust may or may not arise from a fiduciary relation.³⁴ It is imposed on a fiduciary or a party that holds property which is acquired or held in violation of its fiduciary duty.³⁵ It could be acquired as a gift or given in an exchange which involved fiduciary relationship.

Part Four. What are the critics saying about fiduciary Law?

Not everyone agreed with this extension of trustworthiness under fiduciary law. One commentator suggests that some breaches of contract are “voluntary but . . . efficient,”³⁶ noting “that it is not the policy of the law to compel adherence to contracts, but only to require each party to choose between performing in accordance with the contract and compensating the other party for any injury resulting from a failure to perform.”³⁷

A situation that is analogous to an “efficient breach” is the case of a home mortgagor, whose mortgage balance is higher than the value of her home. She would benefit by not paying her mortgage debt. But such individuals may be deterred from so doing by a belief in a principle that it is morally wrong not to repay a debt.³⁸ Brett Arends, suggested that mortgagors, who owe more than the mortgaged property is worth, “walk away” from their debts. He noted that “many . . . are held back by a sense of morality,” “feel it’s wrong to abandon their obligations,” and “don’t want to be a deadbeat”; but noting that companies often file for bankruptcy and do not have to repay their debts).³⁹ Punitive damages are drawn from differences of the different weight of similar principles. They are “intended to punish the party in breach,” but are not generally allowed in contract.⁴⁰ Punitive damages are allowed in tort in some circumstances.⁴¹

³³ RESTATEMENT OF RESTITUTION § 160 (1937); see also RESTATEMENT (SECOND) OF TRUSTS § 73 cmt. b (1959); RESTATEMENT (THIRD) OF TRUSTS § 1 cmt. e (2003) (stating also that constructive trust usually subjects title holder to duty to convey property to other party).

³⁴ RESTATEMENT OF RESTITUTION § 160 cmt. a (1937).

³⁵ RESTATEMENT OF RESTITUTION § 190 (1937).

³⁶ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 119 (2007); see *id.* at 119-20 (providing examples)

³⁷ *Id.* at 119 (citing Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897)).

³⁸ *Id.*

³⁹ See Brett Arends, *When It’s OK to Walk Away from Your Home*, WSJ.COM, Feb. 26, 2010, <http://online.wsj.com/article/SB10001424052748703795004575087843144657512.html> (suggesting that mortgage holders who owe more than the property is worth “walk away” from their debts; stating that “many . . . are held back by a sense of morality,” “feel it’s wrong to abandon their obligations,” and “don’t want to be a deadbeat”; but noting that companies often file for bankruptcy and do not have to repay their debts).

⁴⁰ 3 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 12.8, at 194 (3d ed. 2004).

⁴¹ RESTATEMENT (SECOND) OF TORTS § 908(1) (1965) (stating that punitive damages may be “awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future”); *id.* § 908(2) (such damages may be awarded for conduct that is “outrageous” “because of the defendant’s evil motive or his reckless indifference to the rights of others”); see also 2 DAN

Arguments against the application of fiduciary duties are based on other areas of the law, such as classifying the relationships as implied contracts, as well as generally on freedom from regulation unless they are specific. The arguments may be based on other areas of the law which fiduciary rules seem to encroach, such as corporate law and the law regulating financial advisory services and financial brokerage services.

Legal scholars who comment on corporation law fully recognize the contractual nature of the corporation, leave behind early nineteenth century conceptions of business organization, and stop discussing corporate law issues in terms that reflect a political compromise rather than respect for private ordering.⁴² Arguments against the intrusive nature of fiduciary law can be based on laws that regulate particular behavior and on the absence of authority of regulators to impose fiduciary duties.⁴³

Professors Butler and Ribstein presented an extensive analysis of opting out of fiduciary duties. Their argument is based on the contractual nature of the corporation and on a substantial body of economic literature, as well as on a comprehensive response to prominent corporate law commentators who have argued that private ordering of corporate manager duties should be restricted. Not surprisingly their suggestion was to enforce opting out of fiduciary law obligations.⁴⁴ Judge Easterbrook has long expressed the opinion that fiduciary rules are implied contracts and contract law rules.

A subtle way of undermining fiduciary law is to make the law more opaque and less clear. Fiduciary law began and successfully introduced the description of fiduciary duty as a duty to “act in the best interests” of the client or entrustor. This expression was adopted by supporters of fiduciary law because the expression sounds benevolent and is true: After all, fiduciary law is designed for the benefit interests of the clients.

However, what does “best interests” mean? Is it a clear legal expression?

First, the expression combines the fiduciary law duty of care with the duty of loyalty. Duty of care requires the expert to use his or her expertise. Duty of loyalty requires a fiduciary to avoid conflicting interests or disclose them and receive the entrustor’s consent to these conflicts. “Best interests” covers the main problem of fiduciary law: conflicting interest of those in power. Is it ever good for me if someone gives me advice but is paid by someone who has different or conflicting interests for that advice? The

B. DOBBS, *THE LAW OF TORTS* § 381, at 1062 (2001) (stating that punitive damages are awarded for “quite serious misconduct with a bad intent or bad state of mind such as malice”).

⁴² Larry E. Ribstein *Opting out of fiduciary duties. A response to the anti-contractarians.* (1990)

⁴³ *Id.*

⁴⁴ Larry E. Ribstein, *Washington Law Review Association*; Henry N. Butler and Larry E. Ribstein (1990)

“best interest” may then enter an unclear issue of whether the fiduciary’s conflicting interests may be in the entrustor’s best interest. Your guess is as good as mine but both of us are clearly and unequivocally guessing and perhaps confused.

Part Five. The Future of Fiduciary Law

Will the need for fiduciary law continue to exist in the future? Like all answers to difficult questions, the answer is “yes” and “no.” Fiduciary relationships rise with (i) the dependence by people (entrustors) on the expertise of others (servicers) and (ii) the inability of the dependent persons to check the quality of the expertise and honesty of the servicers. If one of these conditions changes, the law is likely to reflect the change. It will increase or decrease its impact with the entrustors’ weakening self-protection of its increase.

Currently the chances are that the impact of fiduciary law will rise. The issues posed by fiduciary law are expanding. So long as inequality of knowledge and expertise exist among humans, and so long as this inequality leads to dependency and unequal power-relationships, there is a high probability that fiduciary law will not only continue to exist but continue to expand its application. The expansion and following of fiduciary law may depend on the degree to which those who rely on the experts can trust the experts, and the degree to which society benefits from this degree of trusting by expanding and exchanging knowledge and helpful services to its members.

Trust is not necessarily emotional. Nor are trusting people foolishly blind. Trust might depend on experience, memory and cost of the risk of trusting. If those, who rely on the expertise of others, are injured by faulty high-level expertise or lack of meticulous honesty of those on whom they relied, information is likely to spread, sooner or later, and trust will be substituted by suspicion. Suspicious might lead to abstention from seeking and relying on experts, or to additional rules of culture or of law, aimed at maintaining the offering of, and reliance on, the expertise of others.

Alternatively, breach of trust may result in retaliation by the injured people and the withdrawal from experts. That is likely to impoverish the mistrusting societies. Whether experts or the government can revive general trust in experts, may depend on the efforts by the government, the experts, and by their mistrusting, but needy, members of the society. The occasional stock market crashes that this country has experienced need no cited evidence.

It may well be that the success of trusted enterprises and societies, as compared to societies plagued by mistrust and suspicion, may drive to the further rise of fiduciary law. Mistrusted people, who benefit from breach of trust, can succeed only in societies, which value the success, no matter how it is achieved, and regardless how short-term it is.

Societies that impose a law, which measures and specifies the required level of trust in expert services, are likely to be less successful than societies that impose a law, which

requires experts to create and follow a culture of expert's identification with the people they serve. After all, the test of trustworthiness is not very complicated.

In the last analysis, fiduciary law should be based on one guiding test by a party that offers trusted fiduciary expert: "*Would I, the trusted person, like to be treated the way I treat those who trust me?* If I do not, then I should not treat others that way. That is, regardless of any blame I can put on them and regardless of whether they are greedy, foolish, or cruel. In addition, misbehavior by others is no justification to my misbehavior and my becoming like them. My test is whether I am abusing the trust that others put in me. This test should be self—imposed, regardless of how others view my behavior, including the law and the government and the victims. I am my own judge and my own potential victim of my own activities.

Fiduciary law has significant influence on the culture of human institutions and on the fiduciaries' behavior "Rights and other legal meanings continue to be meaningful because we can continue to recall and reflect on the experience that gave them birth. That is what it means to be human and rational. And that is the way in which law contributes to social structure and institutionalism of social meaning and change."⁴⁵

Recently, a number of advisers, who are fiduciaries, have discovered that their clients are secretly treating the advisers in ways that undermine the advisers' work. The clients divide their assets and use not only one adviser's suggestions but two or perhaps more, thus undermining the possible success of advice (and perhaps affect their fees and reputation.)⁴⁶ Lack of mistrust breeds mistrust creating a culture that later if not earlier, renders all participates poorer.

Not only individuals, but human societies learn, sooner or later, when and how they can become wealthier, healthier and flourish by following fiduciary law principles. Exchange for example, is beneficial because it involves different products, which one exchanging party does not possess while the other has too much of it. Yet, even the exchange of *products* cannot be practiced without a measure of trust. To be sure, some products can be easier to test and evaluated. But, exchange of products is insufficient to support successful and flourishing societies. Services are needed as well and sometimes even more than products. By definition, an exchange of services involves unequal knowledge. In addition, cooperation among individuals and groups has been beneficial and sometimes crucial to societies' well-being. Mistrust stands in the way of cooperation as well.

⁴⁵ Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 Pa. L. Rev. 1105, 1227 (1989).

⁴⁶ Michael Kitces, *When clients Cheat*, Published July 13 2018, 5:33pm EDT

Regardless of whether they are enforced by law, by social rules, or by cultural pressures, fiduciary rules are a condition to the long-term well-being of a human society. These rules constitute a condition to cooperate-relationships, which requires justly rewarded truthful and reliable expertise and service by humans to other humans. Those who do not wish to live in a community where fraud is admired and is practiced, and where suspicious reigns, might better remember that freedom should not include what fiduciary law prohibits. A society will be wealthiest if those, who act as fiduciaries, self--enforce and follow fiduciary law principles. The reverse is also likely to be true. A society whose fiduciaries do not feel compelled to be trustworthy, will, in the long run, be the poorest.