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## Friends As Fiduciaries

Ethan J. Leib

*University of California, Hastings College of the Law*

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# FRIENDS AS FIDUCIARIES

ETHAN J. LEIB\*

*This Article argues that the law of fiduciary duties provides a good framework for friends to understand their duties to one another better, gives courts a useful set of rhetorical and analytical tools to employ when they are forced to entertain disputes that arise between close friends, and, finally, can help direct courts to furnish betrayed friends certain kinds of remedies that are most appropriate for achieving justice within that dispute context. This is not the first Article to make an effort to expand the reach of the fiduciary concept into new sorts of relationships that are not always considered within the ambit of fiduciary duty law. But the case for thinking of friends as fiduciaries is exceedingly persuasive and underappreciated, both in the law and in our lives.*

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\* Associate Professor of Law, University of California—Hastings College of the Law. Thanks to the 1066 Foundation and the Roger Traynor Scholarly Publication Award for financial support; to Kassandra Keuhl and Katherine Kao for research assistance; to Christine Hurt and the team at the Fourth Annual Conglomerate Junior Scholars Workshop for organizing a mini-symposium on the paper; to the participants in a faculty workshop at Hofstra University Law School for a wonderfully spirited conversation on the paper; and to Curtis Bridgeman, Hanoch Dagan, Deborah DeMott, Reza Dibadj, Scott FitzGibbon, Rob Flannigan, Tamar Frankel, Eric Goldman, Jeff Gordon, Brett McDonnell, Larry Mitchell, Doug Moll, Gordon Smith, and Lynn Stout for their reactions and comments on earlier drafts.

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John and David are both thirty-three years old and have been friends since college. They are not merely casual friends but stay in touch regularly and are important parts of each other’s lives. They share intimacies, secrets, confidences, and trust each other with almost everything. If asked, they would surely say that they love each other and find each other to be very close to the center of their respective circles of affection.

For some years, both have been looking for a way out of academia and a way to pay for their children’s private school tuitions. They have often imagined that they would pursue a business venture together and, given their competencies and interests, assumed that an environmentally friendly beverage company in China would suit them well. They also both believed that the venture would enrich them professionally and financially. Although they had been chatting casually about the plan for four years, neither had taken any affirmative steps to make the company a reality and neither had suggested to the other that their business idea was confidential.

Last year, David was approached by a wealthy acquaintance, Daniel, who was setting up shop in Beijing. Daniel casually knew David and John from college but knew nothing of their plan to go into business together. David, assuming that his “green” beverage company was unlikely to become a reality with John anytime soon (John was in the middle of researching his next book in South Korea and seemed, for the moment, fulfilled by the academic life), pitched Daniel on the idea. Daniel loved the plan and quickly set up Datong Drinks, a drink company that preached the unity of earth and man. Reasonable projections suggest that the company will be hugely profitable over the next five years. David was given a

consulting contract by Datong (as a finder's fee reward, of sorts) worth one million dollars.

John had been traveling in South Korea doing research over the last year and stopped in Beijing recently on his way home. He went to his favorite coffee shop in the hutongs of Beijing and asked for a drink menu. He ordered a Datong "double green" iced tea. When he read the label, he was surprised to learn that someone else had beaten him to the punch on his business idea with David: the label was explicitly environmentalist. But then he noticed that the president of the company was Daniel—someone he knew from college.

He called Daniel in Beijing and they met up over some duck and beer. Daniel told John the story of Datong and told him of David's role in the development of the idea and his one million dollar contract.

John became furious and started thinking of ways he might sue David. John knew David had betrayed their friendship in selling out their idea to Daniel. But he was not sure if he could make out a legal claim against David. He knew they had no explicit contract and did not quite think any theft claim or intellectual property claim could be sustained.

But John had just completed reading a biography of Justice Benjamin Cardozo. He remembered the famous case of *Meinhard v. Salmon*—and its most notorious pronouncement:

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.<sup>1</sup>

John wondered: Did David violate any fiduciary duties to him as his friend? Is friendship a kind of "joint adventure" such that David's actions

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1. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (citation omitted).

could be deemed usurpation of what should have been their joint opportunity? Were not the two of them in something “jointly, for better or for worse,” as Cardozo described Meinhard and Salmon’s venture?<sup>2</sup> Did David misappropriate information for his own purposes that could be deemed confidential? If so, what remedy should be available to John? Should David have to share his contract earnings from Datong? Should all profits David receives from Datong be disgorged and placed in a constructive trust for the benefit of both friends? For John exclusively? Should John be compensated from those earnings for his prorated contribution to the idea?

These queries stem neither from a real case nor from some law school exam.<sup>3</sup> But the central issue they raise—whether friends are fiduciaries for some purposes and in some contexts—is not wholly hypothetical either. Courts often need to assess whether the duties of friendship in moral life can be translated into legal duties. When and if courts do transmogrify friendship’s duties into legally cognizable ones, they tend to enforce the duties through a set of remedies often considered equitable: disgorgement, the constructive trust, restitution. In short, the body of law courts consider when presented with fact scenarios like the fictional one just sketched is the law of fiduciary duties. And John was not far off in his channeling of Cardozo’s *Meinhard* opinion. In what follows, I defend the use of fiduciary duty law to police the activities of close friends in certain contexts. Although the example of David’s behavior is illustrative of the way a fiduciary duty of friendship might be breached, I hope to provide some guidance here on other ways the law of fiduciary duties can be employed to monitor the actions of our usually trustworthy close friends or those who pose as them.

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2. *Id.* The allusion to marriage in *Meinhard* is hard to ignore. Indeed, one of the briefs in the case emphasized that Meinhard and Salmon were “on terms of social intimacy. They were warm and personal friends. In 1901 and 1902 they met each other three or four times a week, frequently dining together. In the summer of 1902, and off and on during previous summers, they roomed together.” Brief for the Plaintiff before the Appellate Division, Vol. 153 Cases and Points, Appellate Division 1928 at pp. 1467–70 (folios 675 and 672 of the record), cited in Robert B. Thompson, *The Story of Meinhard v. Salmon and Fiduciary Duty’s Punctilio*, in *CORPORATE LAW STORIES* (J. Mark Ramseyer ed., forthcoming 2009).

3. And in which course could such a question be asked anyway? Corporations? Contracts? I have stipulated that David and John manage no corporation and that they have never entered a contract. Perhaps there is an intellectual property rule (the “idea submission doctrine”) that might be applicable. See, e.g., *Desny v. Wilder*, 286 P.2d 55 (Cal. 1956); see generally Lionel S. Sobel, *The Law of Ideas, Revisited*, 1 UCLA ENT. L. REV. 9 (1994). But let us assume that doctrine does not apply here either. Thanks to Eric Goldman for the exposure to the idea submission literature.

To be sure, the fiduciary concept is still very much contested<sup>4</sup> and some famously think “there is no subject here.”<sup>5</sup> More, many will recoil from the idea that friendship, an activity deeply rooted in the private sphere, should be subject to legal standards<sup>6</sup> (though these people will at least learn that, normative arguments aside, our courts do sometimes treat friends as fiduciaries). Still, I hope to make the case here that the law of fiduciary duties provides a good framework for friends to understand their duties to one another better, gives courts a useful set of rhetorical and analytical tools to employ when they are forced to entertain disputes that arise between close friends, and, finally, can help direct courts to furnish betrayed friends certain kinds of remedies that are most appropriate for achieving justice within that dispute context. This is not the first article to make an effort to expand the reach of the fiduciary concept into new sorts of relationships that are not always considered within the ambit of fiduciary duty law.<sup>7</sup> But the case for thinking of friends as fiduciaries is

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4. Of course, a group of committed scholars from common law countries have tried to illuminate the concept over the last few decades. *See, e.g.*, LEONARD I. ROTMAN, *FIDUCIARY LAW* (2005); J.C. SHEPHERD, *THE LAW OF FIDUCIARIES* (1981); Robert C. Clark, *Agency Costs Versus Fiduciary Duties*, in *PRINCIPALS AND AGENTS* 55 (John W. Pratt & Richard J. Zeckhauser eds., 1985); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991); Kenneth B. Davis, Jr., *Judicial Review of Fiduciary Decisionmaking—Some Theoretical Perspectives*, 80 NW. U. L. REV. 1 (1985); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879; Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303 (1999); Robert Flannigan, *The Economics of Fiduciary Accountability*, 32 DEL. J. CORP. L. 393 (2007); Robert Flannigan, *The Fiduciary Obligation*, 9 OX. J. LEGAL STUD. 285 (1989) [hereinafter Flannigan, *The Fiduciary Obligation*]; Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795 (1983); Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675 (1990); Eileen A. Scallen, *Promises Broken vs. Promised Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897; L.S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69; J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 LAW Q. REV. 51 (1981); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399 (2002); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1 (1975).

5. Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 38 J.L. & ECON. 425, 438 (1993).

6. I have addressed this objection at length in Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631, 662–67 (2007), and will not revisit it here. I have also attempted to define the concept of the friend, *id.* at 638–53, so will bracket any definitional challenges here about who may count as a “close friend” for purposes of the law’s administration. I will, however, have occasion to discuss more specific objections to treating the friend as a fiduciary, *infra* Part IV.

7. *See, e.g.*, DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 103 (2004) (arguing that a fiduciary relationship should be recognized between consumers who provide personal data and the companies to which they provide them); Harold Brown, *Franchising: A Fiduciary Relationship*, 49 TEX. L. REV. 650 (1971); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006); John Burritt McArthur, *The Restatement (First) of the Oilfield Operator’s Fiduciary Duty*, 45 NAT. RESOURCES J. 587 (2005); Paul B. Miller & Charles Weijer, *Fiduciary Obligation in Clinical Research*, 34 J.L. MED. & ETHICS 424 (2006); Brett G. Scharffs & John W. Welch, *An Analytic Framework for Understanding and*

exceedingly persuasive and underappreciated, both in the law and in our lives.

The first three parts of this Article contain my affirmative argument. Part I begins with a simplified introduction to fiduciary relationships, their concomitant obligations, and the remedies breaches of fiduciary duties can be expected to trigger. Exploring these three components of fiduciary law should reveal the underlying concept of the fiduciary that helps to shape the contours of the relationships, the duties, and the common remedies courts use in policing fiduciary default. Part II aims to prove that the fiduciary concept can be usefully applied to the relationship of friendship; the proposal here to treat friends as fiduciaries is not merely metaphorical or analogical.<sup>8</sup> Part III shows that some courts do, in fact, see the relationship of friendship as triggering certain fiduciary duties. This grounding in case law helps buttress my normative argument that the law should (and can) police betrayed friendships.

Part IV countenances some objections to the proposal from within the fiduciary concept. In particular, I consider whether the presumed equality, reciprocity, and free exit attributed to close friendships render the fiduciary concept inappropriate. I also consider the possibility that thinking of the friend as a fiduciary might do damage to fiduciary law by stretching it too far. It might also facilitate the law's "crowding" out the inherent trust friendship promotes and sustains.<sup>9</sup> Part V concludes.

In short, we should accept close friendship as triggering certain fiduciary duties. Courts have already started to treat friends as fiduciaries—and there is much that can be appreciated about friendship itself when friends begin to see their relationships through the lens of the fiduciary concept.

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*Evaluating the Fiduciary Duties of Educators*, 2005 BYU EDUC. & L.J. 159; Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 633, 641 (1983); Jennifer L. White, Note, *When It's OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art To Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041 (1996).

8. Cf. Scott & Scott, *supra* note 7, at 2419 (explaining that the purpose of their article about "parents as fiduciaries" is "to push the analogy beyond rhetoric").

9. The "crowding" thesis is explored in, for example, BRUNO S. FREY, *NOT JUST FOR THE MONEY* (1997); Iris Bohnet et al., *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AM. POL. SCI. REV. 131 (2001); Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 568–71 (2001).

## I. THE FIDUCIARY

Before one can ascertain whether calling friends fiduciaries is simply a category mistake, one needs a working understanding of the fiduciary idea in the law. Given that “the prevailing view remains that fiduciary law is ‘elusive,’”<sup>10</sup> the cut at the subject here cannot help but be somewhat selective and reductive. Still, there is broadscale agreement about much having to do with fiduciaries in the law, and I focus here upon those areas of agreement. Assume that what I am describing below is the law of the last hundred years, leaving the genealogy of the modern fiduciary in the Roman “fiducia” and “fidei-commissa” and in the “trusts” of the Middle Ages to the historians.<sup>11</sup>

### A. *The Fiduciary Relationship*

There are certain categories of relationships that are virtually always treated as fiduciary in nature, and these relationships are often treated as paradigmatically fiduciary. They include attorney-client, corporate director-shareholders, trustee-beneficiary, managing partner-partner, agent-principal, employee-employer, guardian-ward, and physician-patient.<sup>12</sup> Sometimes other relationships are also deemed fiduciary—and, like the paradigmatic examples, are treated as such as a mere function of the relationship’s existence rather than upon a contextual analysis of the *quality* of the particular relationship.<sup>13</sup> The aforementioned relationships might be called “formal” fiduciary relationships.<sup>14</sup>

But relationships of status are not the only kind of relationships that are treated as fiduciary in the law. There are also “informal” fiduciary

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10. Smith, *supra* note 4, at 1400.

11. For some of this history, see generally 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* (William Franklin Fratcher ed., 4th ed. 1987); ERNEST VINTER, *A TREATISE ON THE HISTORY AND LAW OF FIDUCIARY RELATIONSHIP AND RESULTING TRUSTS* (3d ed. 1955); Jerry W. Markham, *Fiduciary Duties Under the Commodity Exchange Act*, 68 NOTRE DAME L. REV. 199 (1992).

12. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006); FitzGibbon, *supra* note 4, at 306–08 (citing authorities); Smith, *supra* note 4, at 1400. There is some debate in the corporate context about whether the fiduciary duty is owed to the shareholder or to the corporation—and whether it is the director who owes it rather than the board. See generally Darian M. Ibrahim, *Individual or Collective Liability for Corporate Directors?*, 93 IOWA L. REV. 929 (2008); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277 (1998). But let’s leave that debate aside here. For the most part, I will adopt the convention of calling the first in the dyad a “fiduciary” and the second a “beneficiary.”

13. See Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 211 (listing franchisees-franchisors and pharmacists-customers as examples).

14. See Smith, *supra* note 4, at 1412–13.

relationships, which are identified through more qualitative evaluations. These relationships are sometimes called “confidential relationships”<sup>15</sup> and are often called “fact-based.”<sup>16</sup> They are routinely identified when a court finds that a relationship of “trust” exists and that one party dominates, is superior to, or is especially vulnerable to another party.<sup>17</sup> Admittedly, vague standards for confidential relationships abound—but there is no question that courts embrace many types of relationships based on their internal qualities rather than their names. Although this imprecision can be frustrating for fiduciary typologists and those who wish the law of fiduciary duties to provide firmer guidance on the forms of relationships that are susceptible to treatment as fiduciary, no typology of the fiduciary could be complete without recognizing a few central features: the concept is self-consciously open, flexible, and adaptable to new kinds of relationships<sup>18</sup>—and those relationships trade upon high levels of trust and leave one party in a position of domination, inferiority, or vulnerability.<sup>19</sup>

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15. See *id.* Although some purists might try to exclude confidential relationships from the category of fiduciary relationships because they are often treated as somewhat less restrictive than true status-based fiduciary relationships, it would be very hard to sustain this neat separation. Indeed, courts are not especially principled in highlighting and sustaining such a distinction. See, e.g., *Fipps v. Stidham*, 50 P.2d 680, 683 (Okla. 1935) (“Confidential and fiduciary relations are in law synonymous, and exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another.”); *Rieger v. Rich*, 329 P.2d 770, 778 (Cal. Dist. Ct. App. 1958) (“Confidential or fiduciary relationship[s] . . . in law are synonymous.”); see also BLACK’S LAW DICTIONARY 318, 658, 1314–15 (8th ed. 2004) (indicating that confidential relationships are synonymous with fiduciary relationships). For more on informal fiduciary relationships in particular, see Roy Ryden Anderson, *The Wolf at the Campfire: Understanding Confidential Relationships*, 53 SMU L. REV. 315 (2000); Gregory B. Westfall, Comment, *But I Know It When I See It: A Practical Framework for Analysis and Argument of Informal Fiduciary Relationships*, 23 TEX. TECH L. REV. 835 (1992). These last two articles start thinking about friendship’s role in fiduciary law but do not get very far.

To be sure, there may be some meaningful differences in the burdens of persuasion and burdens of proof between the formal and informal fiduciary relationships—those in confidential relationships have to show actual reliance and have the burden to prove the existence of the relationship, whereas those in formal fiduciary relationships do not need to prove reliance and fiduciaries will have the burden to show their transactions were fair—but these differences are not terribly important for my purposes here. See *Burdett v. Miller*, 957 F.2d 1375, 1382 (7th Cir. 1992) (Posner, J.); Scallen, *supra* note 4, at 907.

16. See Flannigan, *The Fiduciary Obligation*, *supra* note 4, at 301 (“The question—who is a fiduciary?—is answered very simply or only after a detailed examination of the facts. It is simply answered if the relationship falls within the nominate categories deemed to be fiduciary . . . . Other relationships may exceptionally involve a trust equivalent to or stronger than even the closest relationship between, for example, a solicitor and a client . . . . These are ‘fact-based’ fiduciary relationships.”). For some of the difficulties in specifying the requisites for these relationships, see generally Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925 (2006).

17. See Smith, *supra* note 4, at 1413–14.

18. See *Harper v. Adametz*, 113 A.2d 136, 139 (Conn. 1955) (“[E]quity has carefully refrained from defining a fiduciary relationship in precise detail and in such a manner as to exclude new situations.”); John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of*

It will only be possible to get more specific about which relationships qualify for treatment as fiduciary once one has a firmer understanding of the concept of the fiduciary itself. But that effort must await more information about what is at stake in calling someone a fiduciary. For that reason, I defer further discussion about identifying fiduciary relationships until after I explore the fiduciary duties and the remedies associated with the breaches thereof.

### *B. The Fiduciary Duties*

Once a court determines that a fiduciary relationship has formed between parties, courts can be expected to scrutinize the conduct of the parties against the background of a set of duties to which fiduciaries must conform their behavior. Although the list of “true” fiduciary duties—duties that are imposed only on fiduciaries—can be quite short (depending upon whom you ask), the list of duties that tend to be associated with fiduciaries—duties that may also be imposed on other kinds of parties but tend to be discussed in the context of fiduciary relationships—is somewhat longer.<sup>20</sup> Certain fiduciary relationships implicate the majority of the mélange of duties that follow, and some trigger only consideration of a few. Ultimately, there is stunning variety, both in scope and substance, in the set of duties that apply to any given fiduciary relationship.<sup>21</sup> Capturing the set at a level of generality suffices here.

The core fiduciary duty is the *duty of loyalty*, a duty of unselfishness.<sup>22</sup> As Professor Lynn Stout puts it:

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*Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 150 (1981) (“The common law has in fact always defined [informal fiduciary relationships] with deliberate imprecision and perhaps surprising expansiveness.”).

19. See, e.g., *Higgins v. Chicago Title & Trust Co.*, 143 N.E. 482, 484 (Ill. 1924) (“[An informal fiduciary relationship] exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence is immaterial. It may be moral, social, domestic, or merely personal.”); *Hoge v. George*, 200 P. 96, 102 (Wyo. 1921) (finding confidential relationships to exist where “there [i]s confidence reposed on the one side and accepted on the other, with a resulting dependence by the one party and influence by the other”).

20. See generally Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049 (2007).

21. See Davis, *supra* note 4, at 24–25 (highlighting that duties are much more rigorous in some contexts (citing the RESTATEMENT (SECOND) OF AGENCY §§ 1, 387 (1957)) than others (citing *id.* § 190 cmt. A; MODEL BUS. CORP. ACT § 8.30(a)(1)(3) (1984)); Easterbrook & Fischel, *supra* note 5, at 432 (duties deviate substantially depending on which relationship is at issue); Scallen, *supra* note 4, at 910 n.48 (“[L]abelling someone a ‘fiduciary’ does not charge him or her with the same ‘bag of duties’ and degree of obligation imposed on all other categories of fiduciaries.”); Scallen, *supra* note 4, at 911 (“The nature of the fiduciary obligation varies depending on the particular factual context.”); Smith, *supra* note 4, at 1483–84.

22. But see Scallen, *supra* note 4, at 908 (“[T]he fiduciary obligation is not one of selflessness; it

The keystone of the duty of loyalty is the legal obligation that the fiduciary use her powers not for her own benefit but for the exclusive benefit of her beneficiary. It is highly improper—indeed proscribed—for a fiduciary to extract a personal benefit from her fiduciary position without her beneficiary’s consent, even when she can do this without harming the beneficiary.<sup>23</sup>

The fiduciary is prohibited from engaging in self-interested transactions and is saddled with the task of pursuing the interests of her beneficiary above her own.<sup>24</sup> So “inflexible” is the duty of loyalty that it requires a fiduciary to be “undivided” and “undiluted” in her fidelity,<sup>25</sup> though, of course, “[f]iduciaries are not obliged to attend to their fiduciary duties to the exclusion of other personal obligations and activities.”<sup>26</sup>

Rhetoric aside, from a practical standpoint, this restrictive duty requires fiduciaries to pursue self-dealing only after getting an informed waiver from her beneficiary and to avoid conflicts of interest, secret profits, and misappropriating benefits that should accrue to the beneficiary or the joint relationship.<sup>27</sup> Even with this most central fiduciary duty, however, the strictness with which it will be enforced varies, depending on the type and scope of the fiduciary relationship at issue.<sup>28</sup>

The second duty that is routinely discussed in connection with fiduciaries is the *duty of care*.<sup>29</sup> The duty requires fiduciaries to perform their responsibilities for their beneficiaries with reasonable diligence and prudence.<sup>30</sup> Although the duty resembles a basic requirement to avoid negligence,<sup>31</sup> the duty is flexible and can require more substantial

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imposes no duty of altruism. Even in the original fiduciary relationship, that of trustee/beneficiary, there is no black letter principle that the trustee must *always* put the beneficiary’s interest ahead of her own.”).

23. Lynn A. Stout, *On the Export of U.S.-Style Corporate Fiduciary Duties to Other Cultures: Can a Transplant Take?*, in *GLOBAL MARKETS, DOMESTIC INSTITUTIONS: CORPORATE LAW AND GOVERNMENT IN A NEW ERA OF CROSS-BORDER DEALS* 46, 55 (Curtis J. Milhaupt ed., 2003).

24. *See, e.g.*, *Bayer v. Beran*, 49 N.Y.S.2d 2, 5 (Sup. Ct. 1944) (“The concept of loyalty, of constant, unqualified fidelity, has a definite and precise meaning. The fiduciary must subordinate his individual and private interests to his duty . . . whenever the two conflict.”); *RESTATEMENT (SECOND) OF AGENCY* § 387 (1958) (describing a fiduciary’s duty “to act solely for the benefit of the principal in all matters connected with his agency”).

25. *Birnbaum v. Birnbaum*, 539 N.E.2d 574, 576 (N.Y. 1989).

26. *Scott & Scott*, *supra* note 7, at 2426; *see also* *Scallen*, *supra* note 4, at 908 (“[C]lassic fiduciary relationships are by no means divorced from self-serving considerations.”).

27. *See* *Cooter & Freedman*, *supra* note 4, at 1047, 1054–55.

28. *Smith*, *supra* note 4, at 1482.

29. *See generally* *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985); *ROBERT CHARLES CLARK, CORPORATE LAW* 123–36 (1986).

30. *See* *Scott & Scott*, *supra* note 7, at 2420.

31. Thus some claim that the duty of care is not distinctively fiduciary after all. *See* *Ribstein*,

diligence than would be required of non-fiduciaries.<sup>32</sup> In contrast to the predominantly prohibitive nature of the duty of loyalty, the duty of care has an affirmative component occasionally requiring affirmative action.<sup>33</sup> Still, in practice the duty of care is relatively weak, at least in the corporate context—and it is rare for a fiduciary to run afoul of it. This is because, unlike the duty of loyalty, the party alleging a breach must be able to show that an injury resulted from the fiduciary’s failure to meet the standard of care.<sup>34</sup> Furthermore, courts tend to give fiduciaries substantial discretion in performing their responsibilities; recklessness and gross negligence tend to be the standards as a matter of practice.<sup>35</sup>

Aside from these two central fiduciary duties—or, perhaps, growing out of them—are a set of duties that are routinely associated with fiduciaries. Fiduciaries have a *duty of utmost candor and disclosure*.<sup>36</sup> This may take the form of requiring doctors to reveal their personal financial interests to their patients (even when those interests are “unrelated to the patient’s health”)<sup>37</sup> or it may take the form of a general “accounting” requirement, necessitating accurate bookkeeping subject to inspection by the beneficiary as well as the disclosure of all relevant information pertaining to the relationship.<sup>38</sup>

The flipside of the disclosure requirement is a *duty of confidentiality*. The professional responsibilities of lawyers and doctors generally prevent them from revealing the confidences of their clients and patients, respectively. But fiduciaries commonly are required to maintain secrets and respect duties of confidentiality. Although commentators have

*supra* note 13, at 223; Smith, *supra* note 4, at 1409.

32. Bayer v. Beran, 49 N.Y.S.2d 2, 5 (Sup. Ct. 1944) (“The responsibility—that is, the care and the diligence—required of an agent or of a fiduciary, is proportioned to the occasion. It is a concept that has, and necessarily so, a wide penumbra of meaning—a concept, however, which becomes sharpened in its practical application to the given facts of a situation.”).

33. See Cooter & Freedman, *supra* note 4, at 1047, 1049 & n.8.

34. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 656 (1995).

35. See Scott & Scott, *supra* note 7, at 2423–24 (discussing the “business judgment rule,” a presumption that corporate directors exercise due diligence, their fiduciary duties notwithstanding).

36. See Libby v. L.J. Corp., 247 F.2d 78, 81 (D.C. Cir. 1957); Jordan v. Duffs & Phelps, 815 F.2d 429, 436 (7th Cir. 1987) (enforcing a fiduciary duty of disclosure); Wendt v. Fischer, 154 N.E. 303, 304 (N.Y. 1926) (Cardozo, J.) (“If dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance.”); DeMott, *supra* note 4, at 882 (fiduciaries “must be candid”); FitzGibbon, *supra* note 4, at 308 (“[The fiduciary] has an especially high duty of disclosure: He must go beyond avoiding fraud and false statements; he is obliged to ‘volunteer’ information.”).

37. Moore v. Regents of the Univ. of California, 793 P.2d 479, 483 (Cal. 1990).

38. See Rosenthal v. Rosenthal, 543 A.2d 348, 352 (Me. 1988); Herring v. Offutt, 295 A.2d 876, 879 (Md. 1972); 2A SCOTT & FRATCHEL, *supra* note 11, § 172, at 452.

distinguished between “non-fiduciary” duties of confidentiality and the fiduciary duty of loyalty that requires fiduciaries to “refrain from using the information for personal advantage,”<sup>39</sup> courts can and do discuss the duty of confidentiality as part of the general package of fiduciary duties. In *United States v. Chestman*, for example, the Second Circuit identified the duty as follows:

What has been said of an agent’s duty of confidentiality applies with equal force to other fiduciary relations: “an agent is subject to a duty to the principal not to use *or to communicate information* confidentially given him by the principal or acquired by him during the course of or on account of his agency.”<sup>40</sup>

This fiduciary duty is not only the duty not to misappropriate the information for the fiduciary’s own use, but is also a duty not to communicate the information itself.<sup>41</sup>

Perhaps a more controversial duty associated with fiduciaries is the *duty of good faith*.<sup>42</sup> It is controversial because many have a hard time distinguishing a fiduciary’s duty of good faith from a general duty of good faith that pervades all performance of contractual duties.<sup>43</sup> Moreover, many feel that the duty of good faith is simply a way of expressing duties imposed by other obligations, like the duty of disclosure, the duty of loyalty, or the duty of care.<sup>44</sup> But it is not hard to find courts expressing

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39. Smith, *supra* note 4, at 1460; *see also* SHEPHERD, *supra* note 4, at 319 (the doctrine respecting confidential information is “analogous to” and “related to” but “different from the law of fiduciaries”). *But see* Ribstein, *supra* note 13, at 221 (“The duty not to misappropriate is *not* a fiduciary duty . . .”).

40. 947 F.2d 551, 569 (2d Cir. 1991) (emphasis added) (quoting RESTATEMENT (SECOND) OF AGENCY § 395 (1958)).

41. *See* Scallen, *supra* note 4, at 910 (“A fiduciary must not use confidential information acquired in the course of his office for his own purposes, or reveal the information to a third person.”). It is worth remembering, of course, that one may owe duties of confidentiality without owing other “true” fiduciary duties.

42. *See* FitzGibbon, *supra* note 4, at 309; *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 re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 753–57 (Del. Ch. 2005) (identifying duty of good faith), *aff’d*, 906 A.2d 693 (Del. 2006).

43. The general duty of good faith in contractual relations is derived from U.C.C. § 1-304 (2008) (“Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”); *see also* 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.”).

44. *See* Ribstein, *supra* note 13, at 211, 223. In many respects, this perspective has been recently confirmed in *Stone v. Ritter*:

[A]lthough good faith may be described colloquially as part of a “triad” of fiduciary duties that includes the duties of care and loyalty, the obligation to act in good faith does not

the idea that fiduciaries owe their beneficiaries a higher standard of good faith than would be required of mere contract partners:<sup>45</sup> “Utmost” good faith is the benchmark,<sup>46</sup> and the breach of that duty in the fiduciary context can lead to much more substantial remedies for the injured.<sup>47</sup>

Thus, although some treat the duty of good faith as merely “commercially oriented” and different from the “altruism” required of the fiduciary,<sup>48</sup> the rhetoric of good faith appears with frequency in cases imposing and discussing fiduciary duties; it seems that courts have something more in mind than the mere contractual duty of good faith. Moreover, fiduciaries need not necessarily be bound by contracts controlling every aspect of their relationship, so the duty of good faith—even if it were identical to the contractual duty—could add substance to the duties of the fiduciary outside of the contractual portion of their relationship with their beneficiaries. For example, prior contractual relations do not impose a duty to *negotiate* in good faith for subsequent contracts, only to perform and enforce in good faith the contracts that already exist.<sup>49</sup> But a fiduciary relationship might trigger a duty to negotiate in good faith.<sup>50</sup>

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establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty. Only the latter two duties, where violated, may directly result in liability, whereas failure to act in good faith may do so, but indirectly.

911 A.2d 362, 370 (Del. 2006). This recent holding has already been the source of vigorous commentary, and many agree that, rhetoric notwithstanding, the good faith obligation for fiduciaries retains bite, even if it seems to be subsumed under the larger rubric of the duty of loyalty. *See, e.g.*, Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight* (UCLA Sch. of Law, Law & Econ. Research Paper Series No. 07-09), available at <http://ssrn.com/abstract=1006097> (“[T]his holding may not matter much, because the *Stone* court makes clear that acts taken in bad faith breach the duty of loyalty.”); Letter from Deborah A. DeMott to author (Sept. 12, 2007) (on file with author) (“My reading of [*Stone* and *In re Walt Disney Co. Shareholder Derivative Litig.*] is that they treat the duty of good faith as a subset of the duty of loyalty, clarifying that a director’s duty of loyalty encompasses more than the negative duty to refrain from unconsented-to self-dealing.”).

45. *See, e.g.*, *Kham & Nate’s Shoes No. 2, Inc. v. First Bank*, 908 F.2d 1351, 1357 (7th Cir. 1990) (Easterbrook, J.) (discounting contractual good faith requirement because “[p]arties to a contract are not each others’ fiduciaries”).

46. *Union Miniere, S.A. v. Parday Corp.*, 521 N.E.2d 700, 703 (Ind. Ct. App. 1988); *see also* DeMott, *supra* note 4, at 882 (fiduciary “must evince utmost good faith”).

47. *See* 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) (“[T]he disgorgement principle applies to breach of a fiduciary obligation while the expectation principle applies to a breach of contractual obligation.”).

48. *See* Mitchell, *supra* note 4, at 1727.

49. *See* JOHN EDWARD MURRAY JR., MURRAY ON CONTRACTS § 96, at 570 (4th ed. 2001) (“It is clear that, as a matter of common law or the UCC, the obligation of good faith extends only to the contract and not to its formation.”).

50. Some commentators miss this point because they insist that courts must analyze fiduciary obligations “that focus[] on the parties’ positions after their relationship has been established.” DeMott, *supra* note 4, at 893; *see also* Weinrib, *supra* note 4, at 6 (arguing that courts must look to

Finally, when a fiduciary relationship exists between parties, misrepresentations of opinion can be actionable as fraud under this specialized duty of good faith. In “mere” contractual relations, by contrast, often only misrepresentations of fact are actionable, the contractual duty of good faith notwithstanding.<sup>51</sup>

### C. *The Fiduciary Remedies*

There is a set of remedies that courts routinely impose when they find a breach of fiduciary duty. Indeed, if it were not circular and decidedly unhelpful in guiding courts, one might even be tempted to define the entire field of fiduciary law by the remedies extracted from fiduciaries.<sup>52</sup> Although, like the fiduciary duties themselves, the remedies get enforced with variable degrees of strictness depending on the relationship and the nature of the breach, there are some general commonalities in the remedies used in the fiduciary context. In sum, fiduciaries who breach their duties will likely find themselves needing to disgorge their profits, to place their earnings in a constructive trust, to reconstitute their beneficiaries, and/or to pay punitive damages.

Disgorgement often follows from the breach of the duty of loyalty: if a fiduciary has betrayed the principle of unselfishness, she will have to disgorge all of her profits.<sup>53</sup> This remedy is demanded of the defaulting fiduciary even if the self-interested transaction caused no harm to the beneficiary. For example, a trustee who self-deals with the assets of a trust beneficiary will be expected to disgorge his profits even if no damage came to the property of the beneficiary.<sup>54</sup> At least part of the rationale for

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parties' positions after, not before, agreement). This cautionary note makes sense in some cases but not others: sometimes the fiduciary relationship preexists a contract and it is precisely there that a duty of good faith could have teeth because no contractual duty of good faith has yet arisen. Further, given that the moment of formation of fiduciary relations can be fuzzy, see FitzGibbon, *supra* note 4, at 338–39, focusing only on “post-consummation” positions can be arbitrary.

51. See, e.g., *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906, 908 (Fla. Dist. Ct. App. 1968) (“It is true that generally a misrepresentation, to be actionable, must be one of fact rather than of opinion. But this rule . . . does not apply where there is a fiduciary relationship between the parties . . .”) (internal quotation and citations omitted). This rule is not universal. See RESTATEMENT (SECOND) OF TORTS §§ 539, 542, 543 (1989) (offering other examples where reliance on a statement of opinion can lead to a cause of action).

52. See Sealy, *supra* note 4, at 72–73.

53. See, e.g., *Easterbrook & Fischel*, *supra* note 5, at 441; *Ribstein*, *supra* note 13, at 223; *Scott & Scott*, *supra* note 7, at 2422; *Scallen*, *supra* note 4, at 912 (“The standard remedy for a breach of fiduciary duty is disgorgement of the profits obtained . . .”); *Smith*, *supra* note 4, at 1487.

54. See Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 112 (2005).

the disgorgement remedy (beyond a deterrence potential)<sup>55</sup> is that beneficiaries will rarely be capable of formulating precise expectations; they rely on their fiduciaries quite broadly, so measuring damages by the fiduciary's gain can make more sense than an expectancy-based remedy, common in contractual breaches.<sup>56</sup> Nevertheless, standard "loss stemming from breach" damages are also routinely available, if not especially distinctive.

The remedy of disgorgement is often accomplished through a "constructive trust" imposed by law (rather than through the intent of an individual, as in a plain vanilla trust).<sup>57</sup> Indeed, *Meinhard v. Salmon* itself is illustrative. In this case, Salmon appropriated a business opportunity that arose from his real estate venture with Meinhard. Salmon's breach of his fiduciary duties to Meinhard resulted in a constructive trust over certain assets that should have been shared: "A constructive trust is, then, the remedial device through which preference of self is made subordinate to loyalty to others."<sup>58</sup> Judge Cardozo had explained the constructive trust and its role in the menu of remedies nearly ten years earlier:

A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.<sup>59</sup>

Ultimately, although the "constructive trust originated in cases involving breaches of fiduciary obligations by errant trustees" who violated their duty of loyalty,<sup>60</sup> the constructive trust remedy can be sought against a fiduciary even when the predicate duty breached is one other than the duty of loyalty. In many American jurisdictions, for example, fiduciary and confidential relationships must be shown to qualify for the remedy of a constructive trust, but the basis of the remedy can be the breach of different duty.<sup>61</sup>

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55. HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 214 (2004).

56. See Ribstein, *supra* note 13, at 217.

57. See Scallen, *supra* note 4, at 912.

58. 164 N.E. 545, 548 (N.Y. 1928).

59. *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 380 (N.Y. 1919).

60. DAGAN, *supra* note 55, at 300.

61. See *Schwartz v. Houss*, No. 21741/04, 2005 WL 579152, at \*4 (N.Y. App. Div. Jan. 3, 2005) ("It is well settled that in order to set forth a valid cause of action to impose a constructive trust, the following four elements must be alleged: '(1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment.'"); *Cody v. Gallow*, 214 N.Y.S.2d 127 (App. Div. 1961) (imposing a constructive trust upon finding a confidential

Another variation on the theme of equitable remedies available for the breach of fiduciary duties is restitution (though disgorgement and the constructive trust can, of course, themselves be construed as restitutionary remedies). Restitutionary remedies have long been identified with the breach of fiduciary duties,<sup>62</sup> and they enable beneficiaries to extract from their fiduciaries potentially supercompensatory remedies. Even in a contract dispute between a fiduciary and her beneficiary, for example, the measure of damages might exceed mere expectancy damages and result in a payment by the fiduciary that exceeds the standard measure of compensation available in contractual relationships.<sup>63</sup>

The classic example may be *Snepp v. United States*.<sup>64</sup> Frank W. Snepp III was bound by a contractual duty not to publish a book about his activities with the Central Intelligence Agency without submitting it to the agency for prepublication review. Although no confidential information was, in fact, revealed, the courts required Snepp to pay a restitutionary rather than a compensatory remedy.<sup>65</sup> The fiduciary relationship between Snepp and the government triggered supercompensatory remediation even though breach of a contractual term usually results only in expectancy damages, not a profits-based recovery. Like disgorgement, restitution generally “is measured by the amount of the fiduciary’s gain rather than by the amount of the beneficiary’s loss.”<sup>66</sup>

Still, courts’ use of restitution to achieve equity and to reverse the effects of “unjust enrichment” need not be pursued only through a profits-

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relationship without finding a breach of a duty of loyalty); DEBORAH A. DEMOTT, FIDUCIARY OBLIGATION, AGENCY AND PARTNERSHIP: DUTIES IN ONGOING BUSINESS RELATIONSHIPS 45–46 (1991).

62. See DAGAN, *supra* note 55, at 237 (“[R]estitution for breach of fiduciary duty is so entrenched in Anglo-American law that it is rarely seriously disputed.”); SHEPHERD, *supra* note 4, at 373 (claiming that “any comprehensive and effective theory of fiduciaries can be postulated as being co-extensive with the law of restitution as a whole”); Smith, *supra* note 4, at 1408 (observing that “all commentators seem to agree that breach of fiduciary duty falls within the boundaries of the law of restitution”).

63. Of course, a restitutionary remedy can also turn out to be *less* than expectancy.

64. 444 U.S. 507 (1980).

65. *Id.* at 510. In this case, the restitutionary remedy took the form of a constructive trust. *Id.* The categories of disgorgement, constructive trust, and restitution overlap, and are not mutually exclusive remedies. But since they are all discussed and deployed in connection with the enforcement of fiduciary duties, it seems worthwhile to highlight all three. Some subtleties in the applications of these remedies have been explored by JAMES EDELMAN, GAIN-BASED DAMAGES: CONTRACT, TORT, EQUITY AND INTELLECTUAL PROPERTY 65–78 (2002); PETER JAFFEY, THE NATURE AND SCOPE OF RESTITUTION: VITIATED TRANSFERS, IMPUTED CONTRACTS AND DISGORGEMENT 136–38 (2000); Daniel Friedmann, *Restitution for Wrongs: The Measure of Recovery*, 79 TEX. L. REV. 1879, 1880–83 (2001).

66. Smith, *supra* note 4, at 1493.

based remedy. Rather, through restitution, courts may require fiduciaries to pay a fair price in an unfair transaction instead of disgorging their profits.<sup>67</sup> Restitutionary remedies can also be contribution-based: a beneficiary can be compensated in accordance with his contribution to an enterprise.<sup>68</sup> Contribution-based restitutionary remedies undo the effects of unjust enrichment in a retrospective way without focusing on profits or prospective recovery per se. Although restitution—like disgorgement and constructive trusts—is a remedy available to non-fiduciaries as well from time to time, it is routinely linked to the fiduciary context.

Finally, punitive damages may be available in a suit for breach of fiduciary duties even though they are not routinely available for breaches of contract. Thus, above and beyond disgorgement and other forms of restitution, punitive damages may be assessed as well when a breach is extreme or a product of malice or fraud.<sup>69</sup>

#### *D. The Fiduciary Concept*

With this introduction to all things fiduciary in place, I can endeavor to say something more general about the concept of the fiduciary that underlies defining the relationship, erecting the set of duties to apply to fiduciaries, and determining the appropriate remedy to exact from fiduciaries in any given context. Although I cannot aim to settle the long-standing disputes among those who seek grand unified theories of the fiduciary concept<sup>70</sup> (and those who think no such unified theory is

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67. See Stout, *supra* note 23, at 50. For an argument that fiduciaries should have to seek the “best possible price” rather than a mere “fair price,” see Lawrence E. Mitchell, *Fairness and Trust in Corporate Law*, 43 DUKE L.J. 425, 485–86 (1993).

68. For a discussion of contribution-based restitutionary remedies, see DAGAN, *supra* note 55, at 167–83.

69. See Keck v. Wacker, 413 F. Supp. 1377 (E.D. Ky. 1976); Scallen, *supra* note 4, at 912 (citing Vale v. Union Bank, 151 Cal. Rptr. 784 (Ct. App. 1979)); Hylid v. Simmons, 378 A.2d 260 (N.J. 1977); Cooter & Freedman, *supra* note 4, at 1069 (citing Schoenholtz v. Doniger, 657 F. Supp. 899, 914 (S.D.N.Y. 1987)).

70. For a sampling of this debate, see, for example, SHEPHERD, *supra* note 4 (defending an account of fiduciaries as “entrustment” leading to “encumbered power” and rejecting property-based theories, reliance-based accounts, contractarianism, unjust enrichment theories, and “power and discretion theory”); Victor Brudney, *Fiduciary Ideology in Transactions Affecting Corporate Control*, 65 MICH. L. REV. 259, 259–60 (1966) (highlighting the role of the fiduciary as a representative); Criddle, *supra* note 7, at 126 (“The starting point for all fiduciary relations is substitution . . .”); DeMott, *supra* note 16, at 926 (“[T]he law applicable to fiduciary duty can best be understood as responsive to circumstances that justify the expectation that an actor’s conduct will be loyal to the interests of another.”); Easterbrook & Fischel, *supra* note 5, at 426 (defending a “contractarian” theory in which fiduciary duties exist as default rules that result from the impossibility of writing complete contracts); Frankel, *supra* note 4, at 808–16 (defending “abuse of power” as the unifying theme of fiduciary law); Arthur J. Jacobson, *The Private Use of Public Authority: Sovereignty and Associations*

possible),<sup>71</sup> there are a few relatively uncontroversial propositions about the concept upon which almost all could agree. My aim here is not to rationalize or justify the bulk of the case law surrounding fiduciaries but only to identify some of its organizing attributes. That will enable me to assess whether the concept can be fruitfully applied to friendship.

It is common to observe that fiduciary relationships are relationships of trust, where one party trusts another more than would be true in a standard commercial transaction. This strong trust tends to result because of the fiduciary's greater expertise in the interaction at issue (like a lawyer's knowledge), greater control over assets (whether real property or information), or high degree of influence over a beneficiary's decision-making process.<sup>72</sup> For this reason, when discussing the fiduciary concept, courts often focus upon the fiduciary's "discretionary authority" or "power" over something a beneficiary owns (or over the beneficiary himself) and look for resultant dependency or vulnerability in the beneficiary.<sup>73</sup> The *degree* of control, complexity, and dominance or the broad range of the underlying relationship can also help direct courts in

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*in the Common Law*, 29 BUFF. L. REV. 599, 620 (1980) (viewing the shifting of "judgment" as central to the fiduciary concept); Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1634–40 (2001) (arguing that fiduciary duties are necessary to counteract temptations for opportunism that even strong social norms will fail to deter); Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539 (1949) (arguing that fiduciaries can be united in their voluntary undertakings); Smith, *supra* note 4 (arguing for a "critical resource theory" in which all fiduciaries have discretion to dispose of or have power over a beneficiary's critical resource).

71. See, e.g., DeMott, *supra* note 4, at 915 ("Described instrumentally, the fiduciary obligation is a device that enables the law to respond to a range of situations in which, for a variety of reasons, one person's discretion ought to be controlled because of characteristics of that person's relationship with another. This instrumental description is the only general assertion about fiduciary obligation that can be sustained.").

72. See, e.g., *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992) (Posner, J.).

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 . . . vast . . . If a person solicits another to trust him in matters in which he represents himself to be expert as well as trustworthy and the other is not expert and accepts the offer and reposes complete trust in him, a fiduciary relation is established. . . . [T]he agent has (or claims to have) expert knowledge the deployment of which the principal cannot monitor.

*Id.*; Easterbrook & Fischel, *supra* note 5, at 426.

73. See, e.g., *United States v. Chestman*, 947 F.2d 551, 569 (2d Cir. 1991) ("A fiduciary relationship involves discretionary authority and dependency. . . ."); *Landskroner v. Landskroner*, 797 N.E.2d 1002, 1013 (Ohio Ct. App. 2003) (finding fiduciary relationships to involve cases where "special confidence and trust is reposed" with resultant "superiority or influence"); DeMott, *supra* note 4, at 902 ("In many relationships in which one party is bound by a fiduciary obligation, the other party's vulnerability . . . justifies the imposition of fiduciary obligation."); Mitchell, *supra* note 4, at 1684 (focusing on power and dependency); Weinrib, *supra* note 4, at 4–5 (focusing upon a fiduciary's discretion and controlling it).

figuring out how strictly to enforce fiduciary duties and how to impose a proper remedy.<sup>74</sup> Still, the general duties and the menu of standard remedies for breach of these duties illuminate something important about the threshold of trust necessary to trigger a finding of the relationship in the first place. This is why one must know something about the duties and remedies before giving a full account of the sorts of relationships that the law finds to be fiduciary.<sup>75</sup>

So what is notable about the fiduciary duties and remedies and how do they help reveal the concept of the fiduciary that guides the finding of a fiduciary relationship, the scrutinizing of their duties and obligation, and the imposition of a remedy? Most importantly, they evidence special concern with policing opportunism and discretion in contexts where monitoring costs are very high and bonding is exceedingly important to the functioning of the relationship. The duties are relatively stringent because the fiduciary has easy access to important resources of her beneficiary, and the remedies are supercompensatory in part to deter misuse thereof and related misbehavior.<sup>76</sup> The fiduciary relationship is one especially susceptible to abuse because fiduciaries are especially difficult to monitor.<sup>77</sup>

Irrespective of one's approach to understanding the fiduciary—whether economic, moralistic, or doctrinal—most agree that the fiduciary concept is one that aims to deter and denounce certain kinds of opportunistic conduct in specialized relationships in which opportunism is relatively easy to accomplish on account of direct access by the fiduciary to assets, information, or judgment, accompanied by poor opportunities for monitoring by the beneficiary.<sup>78</sup> Because trust itself functions as the only

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74. See Scallen, *supra* note 4, at 911 (“Because the fiduciary relationship is based in part upon the concept of delegated discretion, the more discretion that must be delegated to the fiduciary, the greater the scope of the fiduciary duty.”); Scott & Scott, *supra* note 7, at 2422 (“[B]oundary of fiduciary discretion . . . varies in its strictness in different settings.”); *id.* at 2424 (“[T]he more complex and broad ranging is the fiduciary relationship, the more discretion is needed . . . .”); Smith, *supra* note 4, at 1482–84 (strictness, scope, and substance of the duty of loyalty varies with the power of the fiduciary).

75. See Davis, *supra* note 4, at 3 (emphasizing enforcement as furnishing the key to the fiduciary concept).

76. On fiduciary duties and remedies as a deterrent for opportunism, see, for example, Davis, *supra* note 4, at 4; Easterbrook & Fischel, *supra* note 5, at 441; Scallen, *supra* note 4, at 912; Scott & Scott, *supra* note 7, at 2423; Smith, *supra* note 4, at 1405–06, 1487.

77. See DAGAN, *supra* note 55, at 236 (citing EDELMAN, *supra* note 65, at 85, 216, 244) (focusing upon susceptibility for abuse in the fiduciary relationship).

78. This theme pervades the literature of fiduciary law and is highlighted in, for example, Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1754–55, 1782–83, 1785 (2001); Davis, *supra* note 4, at 4; Easterbrook & Fischel, *supra* note 5, at 441; Frankel, *supra* note 4, at 834; Lawrence E. Mitchell, *The*

real monitoring (and bonding) device in the fiduciary context,<sup>79</sup> courts attempt to protect and promote the trust—and make sure it is not betrayed too often. The remedies are one way courts signal to parties that they should not betray trust; they aim to facilitate a beneficiary’s reliance on the trustworthiness of her fiduciary.<sup>80</sup>

To be sure, in many contexts, trust accomplishes its objective and courts will try not to intrude upon the relationship excessively. For all the talk of stringency in enforcing duties in fiduciary law, courts can be notably passive and deferential to fiduciaries. But this should not be surprising: the entire point of standing in a fiduciary relation to a beneficiary is that the fiduciary is supposed to take on a special role of judgment, representation, and control.<sup>81</sup> Nevertheless, it is just as true that trust will facilitate taking advantage of the beneficiary, and accordingly, fiduciary law is sensitive to the fragility of trust.

Another notable feature of fiduciary law is its unapologetic moralism, which is revealed through the definition of the relevant relationships, the contours of the concomitant obligations, and the imposition of the remedies in any given context—apparent already in *Meinhard*. Although parties may usually freely breach their contracts without any sermonizing by the courts, breaches of fiduciary duties routinely meet with tones of explicit opprobrium and disapproval.<sup>82</sup> When considering fiduciary law, courts generally write as if they are importing moral requirements into the law through their policing of fiduciary relationships.<sup>83</sup> “[F]iduciary default

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*Importance of Being Trusted*, 81 B.U. L. REV. 591, 597 (2001) (“[W]hen all of the careful analysis [i]s said and done, it [i]s obvious that fiduciary obligation is about trust.”); Ribstein, *supra* note 13, at 217 (“[F]iduciary duties compensate for the [beneficiary’s] inability directly to observe, evaluate, and discipline the [fiduciary’s] performance.”); Scott & Scott, *supra* note 7, at 2420 (“[M]onitoring the quality of the agent’s performance may be difficult. . . . In general, the law characterizes as fiduciary those agency relationships in which the principal is particularly vulnerable and unable fully to protect and assert his own interests, thus providing the agent a peculiar opportunity and incentive either to shirk or cheat.”); Smith, *supra* note 4, at 1404–06.

79. On monitoring and bonding with agents, see Scott & Scott, *supra* note 7, at 2421–22.

80. See Frankel, *supra* note 4, at 824.

81. See, e.g., Scott & Scott, *supra* note 7, at 2419–20 (“Satisfactory [fiduciary] performance demands considerable decisionmaking discretion . . .”).

82. See Clark, *supra* note 4, at 75–76; Ribstein, *supra* note 13, at 237 (acknowledging “strong language” in fiduciary duty cases); Stout, *supra* note 23, at 65 (observing that judicial opinions offer “sermons” when applying fiduciary duty law).

83. See generally Cooter & Freedman, *supra* note 4, at 1073 (“Disloyalty brings moral condemnation. The ponderous language of moral censure in fiduciary cases can wound the defendant.”) (footnotes omitted); FitzGibbon, *supra* note 4, at 338 (“Fiduciary relationships and fiduciary duties reflect the precepts of social morality . . .”); Frankel, *supra* note 4, at 829–30; Mitchell, *supra* note 4, at 1692; Scott & Scott, *supra* note 7, at 2425 (“By establishing a standard of performance that emphasizes heightened obligations of loyalty and integrity, and by the use of

is treated as a moral violation with attendant reputational costs.”<sup>84</sup> Writing in moral terms not only leads courts to draw from the moral sphere and “use[] informal social norms to influence fiduciary behavior,”<sup>85</sup> but it also “arguably help[s] create [and sustain] extralegal norms.”<sup>86</sup> It accomplishes this latter task by framing for actors what their conduct should be and by expressing publicly and symbolically the norms of good behavior.

To be sure, Judge Frank Easterbrook and Daniel Fischel have famously argued that fiduciary duties “have no moral footing,” that moralistic language appears in plenty of judicial decisions outside the fiduciary context, and that a sound theory of the fiduciary concept must focus on what courts actually do, not what they say.<sup>87</sup> But it remains hard to ignore the courts’ own conception of what they are doing when they are reviewing claims of fiduciary default. Indeed, even if Easterbrook and Fischel are right that a grand unified theory of fiduciary law would need to take stock of the actual practices of courts first and foremost, surely rhetoric is relevant as well. If courts routinely speak in moralisms in the fiduciary context—an empirical observation Easterbrook and Fischel do not and cannot contest—that practice furnishes some insight into the legal concept under consideration.

The apparent moralism of fiduciary law is also consistent with the general concept identified here: a regime that seeks to support and promote extralegal trust to police and monitor opportunism that could and does occasionally result from easy access to beneficiary property, information, or resources. The reinforcement of social norms through moralized rhetoric and haphazard legal intrusion into the moral sphere is of a piece with the entire corpus of fiduciary law. Fiduciary law, in fact, relies on extralegal, morally altruistic behavior: “in practice [the fiduciary duty] rules are open-ended standards that are only imperfectly and incompletely enforced by legal sanctions. Nevertheless, we observe a relatively high degree of compliance with fiduciary duty rules by U.S. corporate insiders” because altruistic and morally-guided behavior is so much the background upon which fiduciaries act.<sup>88</sup> Further, the “invocation of morality may compensate partially for the ineffectiveness of market controls in [the fiduciary] context, since beneficiaries are

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hortatory moral rhetoric, the law invokes a personal sense of moral obligation in the performance of fiduciary duty.”).

84. Scott & Scott, *supra* note 7, at 2425.

85. *Id.*

86. Ribstein, *supra* note 13, at 237.

87. See Easterbrook & Fischel, *supra* note 5, at 427 & 428 n.6.

88. Stout, *supra* note 23, at 47–48.

presumed less able to protect their interests than are parties in ordinary commercial relationships.”<sup>89</sup>

It is widely known that “*Meinhard*’s dictum still seems to be applied broadly”<sup>90</sup> and that it is, as one commentator colorfully put it, “the oldest war-horse in the repertoire of . . . fiduciary duty” with a potent influence on fiduciary law.<sup>91</sup> But, against this background, does it seem sensible to apply the concept of the fiduciary to the friend?

## II. THE FRIEND AND HER LIKENESS TO THE FIDUCIARY

Some have suggested that we are living in the age of the fiduciary and that “we are witnessing the emergence of a society predominantly based on fiduciary relations.”<sup>92</sup> Indeed, some recognize the fiduciary concept to have a “colonizing sway.”<sup>93</sup> Perhaps, then, the concept is ripe for expansion into other areas of life, where it may be appropriately applied to reinforce, sustain, and even create extralegal norms. Although some courts stubbornly treat the fiduciary concept as a mere list to be applied to particular cases, Ernest Weinrib has written that the “existence of a list of nominate relations dulls the mind’s sensitivity to the purposes for which the list has evolved.”<sup>94</sup> The list is meant to be illustrative, not exhaustive. As Eileen Scallen has observed, courts have “attempted to formulate rigid definitions of fiduciary relationships and the concomitant obligations as though these concepts were uniform and unchanging. This may result in an ephemeral illusion of certainty and predictability. It also misrepresents fiduciary law.”<sup>95</sup>

Given the purposes I just highlighted in Part I, here I suggest that friends should be more routinely considered fiduciaries for each other. Certain parallels between the friend and the fiduciary are easy to see;<sup>96</sup>

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89. Scott & Scott, *supra* note 7, at 2425.

90. Ribstein, *supra* note 13, at 211.

91. Mitchell, *supra* note 4, at 1692–93.

92. Frankel, *supra* note 4, at 802; *see also* Kenneth M. Rosen, *Introduction to the Meador Lectures on Fiduciaries*, 58 ALA. L. REV. 1041, 1042 (2007) (“Notions of fiduciaries and their duties continue to permeate the law. Their importance only continues to grow.”).

93. Weinrib, *supra* note 4, at 1.

94. *Id.* at 5.

95. Scallen, *supra* note 4, at 911.

96. For example, much has been written about the fiduciary’s voluntarism—her taking upon herself obligations voluntarily rather than their arising through relationships of status. *See, e.g.*, SHEPHERD, *supra* note 4, at 100–01 (focusing upon the fiduciary’s “acceptance” of her role); Frankel, *supra* note 4, at 820–21 (noting that fiduciaries can avoid liability by avoiding the relationship in the first place); Mitchell, *supra* note 4, at 1685 n.33 (discussing “the fiduciary’s volition in entering into the relationship”); Scallen, *supra* note 4, at 906 (“Th[e] element of choice—a willing acceptance [by

others require more elaboration. In what follows, I focus upon trust, the difficulty of monitoring friends, and the possibilities for opportunism within friendships, which are all central to the fiduciary concept. Together, these parallels counsel for courts to take seriously claims by close friends that certain types of betrayals should be treated as breaches of fiduciary duties and remediated accordingly. Of course, given the variety of fiduciary relationships, duties, and remedies the law recognizes and provides—and the reality that fiduciary duties can often be imposed on an ad hoc basis<sup>97</sup>—recognizing friends as fiduciaries as a general matter will not tell us very much about how, more specifically, the fiduciary relationship of friendship should be policed. Those more specific details are deferred until Part III, where I show how the law has already started to treat friends as fiduciaries.

#### A. *Trust and Friendship*

In the first place, we tend to trust our friends especially (perhaps even more than we trust our lawyers, whom the law will treat as our fiduciaries!). They are our guardians, our counselors, our therapists, our managers, our directors, our partners. As I have suggested previously after reviewing the lengthy literature on friendship in multifarious disciplines, trust is one of the defining attributes of friendship itself:

Friends tend to be trusting of one another and develop trust through private disclosures, sincerity, loyalty, openness of self, and authenticity. “What do we tell our friends?” Andrew Sullivan asks. “We tell them everything. And we are not afraid of embarrassing ourselves or boring each other.” Yet perhaps this view is slightly inflated: According to Graham Allan, “While there is a folk belief

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the fiduciary] of office or specific obligation . . . is essential to the imposition of liability for breach of a fiduciary obligation.”); Scott, *supra* note 70, at 540 (emphasizing the fiduciary’s voluntariness). And at the center of the literature on friendship is a focus on the voluntariness of the relationship (in contradistinction to relationships of status). See, e.g., Scott Feld & William C. Carter, *Foci of Activity as Changing Contexts for Friendship*, in *PLACING FRIENDSHIP IN CONTEXT* 136, 136 (Rebecca G. Adams & Graham Allan eds., 1998) (calling friendship the “most voluntary type of personal relationship”); Allan Silver, *Friendship and Trust as Moral Ideals: An Historical Approach*, 30 *EUR. J. SOC.* 274 (1989) (emphasizing friendship’s voluntariness). Although this parallel is certainly more interesting and important than the fact that fiduciary and friend both start with the letter *f*, it is not distinctive enough to mention in the main text: contractual relations are also quintessentially voluntary and rejectable. This may mean that there are important parallels between contracts and friendships too—but I will leave that subject for a different paper, provisionally entitled “Friendship as Relational Contract.”

97. See *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992).

that total disclosure is the sign of real friendship, in reality friends rarely know everything about one another.” We often withhold matters from our friends not because we do not trust them, but because we know they are not fundamentally interested in all we could share.

Perhaps trust is better defined as follows: “Trust is a belief that another will fulfill his or her obligations and pull his or her weight in [a] relationship. Symbolic gestures and experience create and maintain trust.”<sup>98</sup>

To be sure, trust undoubtedly occurs between strangers in many transactions. Trust at some level is necessary even for arms’ length transactions between standard contracting parties (hence good faith standards that apply to all?), and “fictive” business friendships with some heightened levels of trust are common.<sup>99</sup> Indeed, one commentator has gone as far as suggesting that “[a] lawyer who deals with contracts and fails to understand the power and the limits of trust and the social sanctions flowing from ‘fictive friendships’ is incompetent.”<sup>100</sup>

Still, friendship furnishes a paradigmatic case of trust and provides an important benchmark for how trust can operate in an ideal relational context. Without that important model, all relationships of trust might be undermined. Humankind needs trust as a foundational good for societal organization and survival.<sup>101</sup> And “[t]rust is a notoriously vulnerable good, easily wounded and not at all easily healed.”<sup>102</sup> It thus behooves an area of

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98. Leib, *supra* note 6, at 643 (quoting and citing, respectively, Allan Silver, *Friendship and Sincerity*, 2003 *SOZIALERSINN* 123, 123; Dean Cocking & Jeanette Kennett, *Friendship and the Self*, 108 *ETHICS* 502 (1998); ANDREW SULLIVAN, *LOVE UNDETECTABLE: NOTES ON FRIENDSHIP, SEX, AND SURVIVAL* 216 (1998); GRAHAM ALLAN, *FRIENDSHIP: DEVELOPING A SOCIOLOGICAL PERSPECTIVE* 107 (1989); 1 STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* 230 n.3 (2d ed. LexisNexis 2003) (1995)); *see also* ARISTOTLE, *NICOMACHEAN ETHICS* 215 (Terence Irwin trans., Hackett Pub. Co. 1985) (noting that trust arises in the highest type of friendships); Silver, *supra* note 96 (focusing upon trust and friendship).

99. *See* Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 *LAW & SOC’Y REV.* 719 (1973) (arguing that “fictive friendships” support most business transactions in the United States: parties use informal modes of address, exchange favors and gifts, and act “chummy”); Smith, *supra* note 4, at 1413–14 (trust exists in standard business transactions).

100. 1 MACAULAY ET AL., *supra* note 98, at 230 n.3. *But see* ANNETTE C. BAIER, *Trust and Antitrust*, in *MORAL PREJUDICES: ESSAYS ON ETHICS* 118 (1994) (“Trust in fellow contractors is a limit case of trust, in which fewer risks are taken, for the sake of lesser goods.”).

101. *See* BAIER, *supra* note 100, at 130 (citing 1 *THE CORRESPONDENCE OF JOHN LOCKE* 123 ltr. 81 (E.S. de Beer ed., Oxford: Clarendon Press 1976)).

102. *Id.*

law that self-consciously pursues the protection and promotion of trust in society to remain sensitive to trust's paradigmatic case.

Why is trust—and protecting it—so important? Aside from deontological ethical arguments that might stress that trust should not be betrayed as a most basic moral requirement<sup>103</sup> (and an additional argument, of course, that the state must pursue what is moral in the fiduciary context), one can emphasize, along with Francis Fukuyama, that trust is one of the most important social virtues that can lead a nation toward economic development and prosperity.<sup>104</sup> If our capitalist economic system is one to which our legal system must remain committed, it would seem inadvisable to disrupt relationships of trust or fail to find a system of preserving, sustaining, and promoting them. Indeed, precisely because each economic transaction trades on trust to some degree, debasing trust in society by failing to uphold the most basic standards of trust in paradigmatic trust relationships would be counterproductive.<sup>105</sup> Of course, one can become somewhat clichéd and alarmist about this too: “Trust is the glue that binds couples, communities, and countries. Societies without a sufficient wealth of trust cannot function efficiently, sometimes cannot function at all.”<sup>106</sup> Thus, a “legal system which neglected commitments of loyalty would probably undermine” the economy and its own sustainability.<sup>107</sup> Still, these pronouncements are more than mere mantra. Indeed, Justice Harlan Stone once blamed the Depression on the failure to abide by fiduciary law:

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103. For such an argument, see Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFF. 199 (1990). In some basic way, Charles Fried's canonical argument about contract law's internal morality also puts trust at its center. See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

Without a real peer in her league, the best philosopher of trust is Annette Baier. Her work on trust is collected in BAIER, *supra* note 100, at 95–202 (containing the essays *Trust and Antitrust*; *Trust and Its Vulnerabilities*; *Sustaining Trust*; and *Trusting People*).

104. See generally FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995). A similar line of argument is pursued in Lawrence E. Mitchell, *Trust. Contract. Process.*, in PROGRESSIVE CORPORATE LAW 185 (Lawrence E. Mitchell ed., 1995).

For an important collection of essays on trust, see TRUST: MAKING AND BREAKING COOPERATIVE RELATIONSHIPS (Diego Gambetta ed., 1988). Adam Seligman actually draws a nice distinction between trust and confidence that might be relevant to the discussion here. See Adam B. Seligman, *Role Complexity, Risk, and the Emergence of Trust*, 81 B.U. L. REV. 619 (2001); see also Niklas Luhmann, *Familiarity, Confidence, Trust: Problems and Alternatives*, in TRUST: MAKING AND BREAKING COOPERATIVE RELATIONSHIPS, *supra*, at 94, 97. But it would take me too far afield to address Seligman's and Luhmann's interesting work on the subject. Finally, for some democratic theorists' takes on trust, see DEMOCRACY AND TRUST (Mark E. Warren ed., 1999).

105. I discuss the more complicated relationship among friendship, trust, and the economy in Leib, *supra* note 6, at 663–64, 666.

106. Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 517 (2004).

107. FitzGibbon, *supra* note 4, at 341.

I venture to assert that when the history of the financial era which has just drawn to a close comes to be written, most of its mistakes and its major faults will be ascribed to the failure to observe the fiduciary principle . . . . More than a century ago equity gave a hospitable reception to that principle and the common law was not slow to follow in giving it recognition. No thinking man can believe that an economy built upon a business foundation can permanently endure without some loyalty to that principle.<sup>108</sup>

In a more contemporary milieu, Larry Ribstein also identifies the promotion of trust as central to fiduciary law and a prosperous society. He highlights that the “disposition to trust is socially valuable because it reduces the need for externally enforced constraints, and therefore the costs of human interaction. Thus, a society in which trust in this sense prevails may be wealthier than one in which it is absent.”<sup>109</sup> Or consider a slightly different argument presented by Robert Gordon: “[E]ncouraging people to deal with one another as strangers progressively erodes the underlying relations of solidarity, reciprocity, and trust upon which capitalist economies essentially depend.”<sup>110</sup> Accordingly, a fiduciary duty law that ignores the exemplary trust that friends share undermining the concept of fiduciary law itself, as well as the legal and economic system it is supposed to serve and enrich.

Thus, the argument here is, at one level, simple (if not overly simplistic). Friends, as a category, are paradigmatic exemplars of trust. As Immanuel Kant wrote in his *Lectures on Ethics*, friendship is “man’s refuge in this world from his distrust of his fellows.”<sup>111</sup> And because fiduciary law aims to protect and promote trust, fiduciary law should treat friends as fiduciaries.<sup>112</sup> But a bit more can be said in favor of treating friends as fiduciaries from the standpoint of the fiduciary concept’s concern with trust.

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108. Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 8–9 (1934).

109. Ribstein, *supra* note 13, at 228.

110. Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 578–79 (citing FRED HIRSCH, *SOCIAL LIMITS TO GROWTH* 84–102 (1976); JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 121–63 (1st ed. 1942); Albert O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?*, 20 J. ECON. LITERATURE 1463 (1982)).

111. IMMANUEL KANT, *LECTURES ON ETHICS* 207 (L. Infield trans., 1963).

112. To be sure, “[t]rust is not always a good to be preserved. . . . If the enterprise is evil, a producer of poisons, then the trust that improves its workings will also be evil, and decent people will want to destroy, not protect, that form of trust.” BAIER, *supra* note 100, at 130–31. What this means for a body of law self-consciously pursuing the protection of trust is that certain exceptions need to be recognized. Those exceptions fall outside the scope of my general argument here.

Another way to think about the concern for trust in the law of fiduciary relations is to put the idea in a slightly different, but related, light. Instead of seeing the fiduciary relationship as merely a relationship of special entrustment, we might focus on the *high costs of distrust* in fiduciary relations. Thus, parties in a fiduciary relationship *require* high degrees of trust and must freely share confidences, secrets, and information for that relationship to serve its purposes well. The doctor-patient and attorney-client contexts are ones where it is obvious that the costs of distrust are very high: doctors and attorneys cannot do their jobs well if patients and clients are not forthcoming and revealing with them. And neither can husbands and wives and partners (whether of the domestic sort or the commercial kind) have very good relationships with too much distrust. If we think these relationships have social value—and that the law should contribute to helping produce and sustain that value—the law must help facilitate trust and mitigate the high costs of distrust.

One way to optimize the fiduciary relationship, then, is to allow resort to the legal sanctions associated with fiduciary duties to create a safe environment for trust to flourish.<sup>113</sup> Because the costs of distrust are too high, fiduciaries must be controlled by the law. Potentially more important, however, than the actual enforcement of strong duties to target distrust and betrayed trust directly is fiduciary law's "framing" function, as Margaret Blair and Lynn Stout have called it.<sup>114</sup> The gist of this idea is that "fiduciary duty rules, and the strong language in judicial opinions such as *Meinhard*, arguably help create extralegal norms."<sup>115</sup> In short, fiduciary law is about signaling to fiduciaries that they ought not to be self-interested in transactions with and for their beneficiaries; it is generative of trust where costs of distrust are especially high.

Friendship is clearly a setting where costs of distrust are high. For a friendship to function properly and to achieve the requisite intimacy to enable it to be the source of so much pleasure and dignity,<sup>116</sup> friends must

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113. This discussion is based on Ribstein, *supra* note 13, at 228–29.

114. See generally Blair & Stout, *supra* note 78 (explaining and elaborating upon "framing" theory).

115. Ribstein, *supra* note 13, at 237.

116. On intimacy in friendship, see Allan Silver, *Friendship in Commercial Society: Eighteenth-Century Social Theory and Modern Sociology*, 95 AM. J. SOC. 1474, 1477 (1990) ("Friendship . . . turns on intimacy—the confident revelation of one's inner self to a trusted other . . ."); see also JOSEPH EPSTEIN, *FRIENDSHIP: AN EXPOSÉ* 40 (2006) ("[O]ne of the things one looks for in a friend . . . is the possibility of easy candor in conversation."); MICHEL DE MONTAIGNE, *Of Friendship*, in *THE COMPLETE ESSAYS OF MONTAIGNE* 135, 136 (Donald M. Frame trans., 1958) ("Friendship feeds on communication."). On the dignity furnished by friendship, see Leib, *supra* note 6, at 647, 662, 678 (citing RAY PAHL, *ON FRIENDSHIP* 153–54 (2000)).

have a reliable trust between them. Friends cannot be friends at all without disclosure, authenticity, and openness. Accordingly, it would be beneficial for fiduciary duty law to signal to friends the standard of conduct appropriate to their setting. To be sure, as Ribstein warns:

[L]awmakers must carefully choose the conduct they stigmatize. The law may be ineffective if it tries to develop a norm that is too far removed from existing perceptions of good behavior. Courts squander their moral authority by condemning conduct that people widely regard as being in the ordinary course of business.<sup>117</sup>

Yet friendship is certainly a context in which a norm of “good behavior” is reasonably assumed, so stigmatizing the betrayal of close friends hardly seems likely to squander a court’s “moral authority.” Indeed, quite the reverse may be true: a court may be able to claim its moral authority only by not turning a blind eye when close friends betray one another and demean friendship itself.<sup>118</sup>

### *B. The Problems of Monitoring and Opportunism in Friendship*

As Part I revealed, the concept of the fiduciary concerns itself with something other than mere trust. Although trust clearly sits at the center of the concept, fiduciary law also has another related set of preoccupations: trying to minimize monitoring costs in contexts where it is very difficult for a beneficiary to supervise his fiduciary and policing the consequent potential for opportunism. As Kenneth Davis once helpfully put it, fiduciary law is in place to avoid having the beneficiary “looking over the fiduciary’s shoulder.”<sup>119</sup> Friendship, like the classic fiduciary relationships, presents a context where monitoring is difficult, leading to a high potential for opportunism.

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117. Ribstein, *supra* note 13, at 237.

118. See Frankel, *supra* note 4, at 830 (“Th[e] moral theme is an important part of fiduciary law. Loyalty, fidelity, faith, and honor form its basic vocabulary.”). Seana Shiffrin has recently taken issue with contract law for its divergence from moral norms and its potential for disabling moral agents from doing their moral duties. See Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007). Imagine her potential distaste for a fiduciary law that would so clearly depart from our moral norms as to ignore the moral force of our obligations that stem from friendship. She should be even more put off by a fiduciary law that fails to recognize friendship than she is by contract law. Thus, the “divergence of fiduciary law and friendship,” to play with her title, should be even more disconcerting to her because a moral agent will not be able to compartmentalize as easily (as she may sometimes be able to do in the context of contract law), given fiduciary law’s self-conscious infiltration into our moral lives and obligations.

119. Davis, *supra* note 4, at 6.

Although courts often write as if there is a clear two-part test for finding a confidential relationship—one that requires trust *and* vulnerability, dominance, or influence—a high degree of trust, such as the trust between close friends, necessarily leads to a substantial degree of vulnerability. As Annette Baier argues, “When we trust we accept vulnerability.”<sup>120</sup> Indeed, the very concept of trust carries with it some degree of vulnerability from the entrustor to the trustee. Baier goes further too, foreshadowing my argument here about the friend as a fiduciary:<sup>121</sup>

Trust is an alternative to vigilance and . . . trustworthiness is an alternative to constant watching to see what one can and cannot get away with, to recurrent calculations of costs and benefits. Trust is accepted vulnerability to another’s power to harm one, a power inseparable from the power to look after some aspect of one’s good.<sup>122</sup>

Obviously, this account of trust captures an intimate trust, not the garden variety trust necessary for parties to a contract.<sup>123</sup> The trust in Baier’s account is one that can be shared only by people who genuinely place their welfare into one another’s hand.<sup>124</sup> This kind of entrustment is paradigmatically the trust we share with our close friends. Consider this view—also Baier’s—that sounds in the tones of fiduciary law quite

120. BAIER, *supra* note 100, at 132.

121. Although much of Baier’s language is (unconsciously?) written in the rhetoric of fiduciary law, and, thus, supports some of my argument in this Article, she would likely be very circumspect about how I am using her philosophical treatment of trust for my ends. In the final analysis, I cannot quite guess what she would think about my argument because although she values trust greatly, she might find my efforts to juridify it between friends as excessively “contractarian.” *See, e.g., id.* at 117 (“It does not, then, seem at all plausible, once we think about actual moral relations in all their sad or splendid variety, to model all of them on one rather special one, the relation between promisor [and] promise. We count on all sorts of people for all sorts of vital things, without any contracts, explicit or implicit . . .”).

122. *Id.* at 133. Although she suggests that trust is an alternative to the threat of legal sanctions in this quote too, I shall take issue with the “substitutional” nature of trust (for law) in what follows. Indeed, fiduciary law is ordered to protect trust precisely by enabling legal sanction for major defections.

123. Larry Mitchell argues that contracts do not require interpersonal trust at all—only “trust in the system itself.” Mitchell, *supra* note 104, at 196. I think this goes too far. For accounts of contract that seems to rely on interpersonal trust beyond trust in “the system,” see FRIED, *supra* note 103, at 8; Daniel Markovits, *Contract and Collaboration*, 113 *YALE L.J.* 1417 (2004).

124. *See* Mitchell, *supra* note 104, at 192 (“[I]n a trust relationship, whether because of pragmatic reasons . . . or . . . partially pragmatic and partially affective reasons . . . we choose to relinquish some of” our “measure of control over the trusted person by contract, or by *constant monitoring*.”) (emphasis added) (citing Annette Baier, *Trust and Its Vulnerabilities*, in 13 *TANNER LECTURES ON HUMAN VALUES* 109, 112 (Goethe B. Peterson ed., 1997); NIKLAS LUHMANN, *TRUST AND POWER* (1979)).

directly: “[T]o trust is to give discretionary powers to the trusted, to let the trusted decide how . . . one’s welfare is best advanced, to delay the accounting for a while, to be willing to wait to see how the trusted has advanced one’s welfare.”<sup>125</sup>

What this form of trust between close friends shows—for this kind of trust is most evident between such intimates<sup>126</sup>—is that the concerns of fiduciary law with monitoring and opportunism are very much relevant between trusting friends. This is especially so because of the broadness of the delegation of discretionary authority between close friends. Baier again: “The assurance typically given (implicitly or explicitly) by the [friend] who invites our trust, unlike that typically given in that peculiar case of . . . promise or contract, is not assurance of some very specific action or set of actions, but assurance simply that the trusting’s welfare is . . . in good hands.”<sup>127</sup> In differentiating the paradigmatic case of trusting friends from the lesser form of trust between contract partners, Baier gets at the heart of why friends are our fiduciaries:

[C]ases of trust in people to do their job conscientiously and not to take the opportunity to do us harm once we put things we value into their hands are different from [cases in which we put] trust in people to keep their promises in part because of the very indefiniteness of what we are counting on them to do or not to do.<sup>128</sup>

Thus, Baier connects the core case of trust in a friendship to the concerns of fiduciary law: discretionary authority that is difficult to monitor or supervise that leads to the ability of the fiduciary to harm her beneficiary opportunistically. This difficulty of supervision and monitoring stems in some measure from the impossibility of being fully

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125. BAIER, *supra* note 100, at 136. *See also id.* at 138 (“To trust is to let another think about and take action to protect and advance something the truster cares about, to let the trusted *care* for what one cares about.”).

126. To be sure, Baier does not limit her theory of trust to trust between friends. Although her account is central to my thesis here, I am appropriating her remarks in ways they were not intended. For her, the trust of parent and child is as “standard” an example as the trust between friends. *Id.* at 147. And she is suspicious of limiting trust to trust between friends (and in families) because such a concept of trust would too neatly assume that we can police the distinction between egoistic and altruistic motivations. *Id.* at 155. For theorists who arguably put the trust between friends at the very center of the concept of trust itself, see Keith Hart, *Kinship, Contract, and Trust: The Economic Organization of Migrants in an African City Slum*, in TRUST: MAKING AND BREAKING COOPERATIVE RELATIONSHIPS, *supra* note 104, at 176, 178; Geoffrey Hawthorn, *Three Ironies in Trust*, in TRUST: MAKING AND BREAKING COOPERATIVE RELATIONSHIPS, *supra* note 104, at 111, 112–14.

127. BAIER, *supra* note 100, at 137.

128. *Id.* at 117.

clear about what set of actions a friend must take or refrain from taking in her role as a friend.

This last characterization resonates with Easterbrook and Fischel's famous depiction of fiduciary relations as domains in which it would be nearly impossible for parties to specify their obligations in a contract because the scope of the relationship is too complex and embraces too many details about which the beneficiary could not negotiate well.<sup>129</sup> Although some focus on the *expertise* fiduciaries have in many fiduciary relationships to explain why it is hard to form complete contracts with them, it is now generally well understood that expertise serves as a proxy for a more basic attribute of the relationship: that fiduciaries cultivate their discretion on a trust that cannot easily be monitored or supervised and that can lead to opportunistic abuse.<sup>130</sup>

That this dynamic is typical in friendship cannot be seriously questioned. As Baier suggests, with friends, “[w]e have no choice but to entrust them with some matters, where constant checking on performance is either impractical or undesirable.”<sup>131</sup> We cannot always ask our friends if they are betraying our confidences: asking such questions, supervising our intimates regularly, and raising the prospect of distrust does much to degrade trust and to prevent it from forming in the first place. We do not specify detailed contracts with our friends because giving them a wide berth of discretion is itself an act of friendship. Indeed, it is constitutive of friendship not to demand complete preagreement on every detail of friendly performance. But for just that reason, it is difficult to supervise them. We cannot keep too careful tabs with our friends, since that would itself betray intimacy.<sup>132</sup>

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129. See Easterbrook & Fischel, *supra* note 5, at 426, 427; see also Cooter & Freedman, *supra* note 4, at 1048 (“In fiduciary relationships . . . the parties are unable to foresee the conditions under which one act produces better results than another.”). *But see* Smith, *supra* note 4, at 1428–29 (arguing that “incomplete contracts are ubiquitous, but fiduciary duties are imposed only in a subset of those relationships.”). Smith is, of course, right that the difficulty of fully contracting cannot be the *sine qua non* of the fiduciary relationship, but it is an important factor nevertheless.

130. See *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992) (Posner, J.) (explaining that expertise often gets inappropriately emphasized instead of the invitation by the fiduciary to trust her in a domain where the beneficiary is likely to rely on and be unable to question the fiduciary's judgment or to monitor her activities).

131. BAIER, *supra* note 100, at 139.

132. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 236 (1991) (“Close friends have such a long future ahead of them that they need not worry about minor imbalances in the reciprocated favors between them. Therefore, a person who mentions that accounts have fallen a bit out of balance indicates either a lack of intimacy or some skepticism about future solidarity.”).

Of course, the mere possibility for opportunism is a thin reed upon which to hang substantial fiduciary duties with unusual remedies. And, indeed, in the case of friendship, one might think that there would be a very high degree of compliance with the norms of friendship, such that no legally enforceable duties would be necessary. Whether because of reputational harms that bad friends suffer or owing to the mere power of the norms internal to friendship and the personal guilt associated with being a bad friend, one might predict a high degree of compliance with friendship's internal morality.<sup>133</sup>

Honestly, I have not the faintest clue as to how often friends betray a counterpart, leading to a profit or loss that could plausibly be the basis of a court action. But given that the court reporters are full of such cases (a sample of which will be discussed in Part III),<sup>134</sup> compliance is surely far from perfect. More importantly, however, a high degree of "extralegal" compliance with potential fiduciary norms does not make a decisive case against the imposition of legal sanctions, especially in an environment where legal enforcement would be imperfect, even if it were available. Indeed, it is widely known that corporate fiduciaries demonstrate a high rate of compliance, notwithstanding imperfect enforcement of fiduciary duties and their inside opportunities for looting and opportunistic behavior.<sup>135</sup> Thus, there is a role for fiduciary law even in a context in which we already see compliant behavior and in which it would be hard for the law to do a great job of intervening:

[I]f we want to encourage individuals to follow imperfectly enforced . . . fiduciary duty rules, it might be extremely useful to find some person or organization that has the sort of authority . . . to "instruct" them that they ought to behave in an other-regarding fashion, and to explain exactly which "other" they ought to be serving. Interestingly, a number of corporate theorists have suggested that this is the role played by the Delaware [courts], whose judicial opinions encourage corporate insiders to serve the interests of the firm and its shareholders not primarily by threatening them with the prospect of personal liability, but by

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133. See EPSTEIN, *supra* note 116, at 69 ("Whatever else it has to do with, friendship entails obligation—sometimes ample and demanding, sometimes miniscule and subtle, but always, I believe, present.").

134. A rough measure: A search in LexisNexis's "Federal & State Combined" database for cases in which "friendship" is a "core term" produced 1,359 case results on December 26, 2007.

135. See Stout, *supra* note 23, at 48.

offering “sermons” on the proper deportment of corporate officers, directors, and controlling shareholders.<sup>136</sup>

Courts could serve the same function in the context of friendship. Admittedly, this signaling is somewhat easier to communicate to corporate directors, who probably consult lawyers somewhat more often than friends do.<sup>137</sup> But I doubt it is true that people only learn that the law controls their conduct (and, accordingly, conform their conduct to the legal norms) through lawyers or legal research. Many of us generally hope the criminal law deters crime even though an “average” criminal probably does not consult with a lawyer or law books before committing a crime.<sup>138</sup> Something about the justice system’s coercive enforcement mechanisms penetrates into society to help members control their conduct. There is nothing very mysterious about this either: information about coercion trickles down somewhat easily. So even though the signaling the Delaware courts can achieve in the corporate context is probably more efficient, there is no reason to think that signaling cannot also function properly in the friendship context. Indeed, friends probably do consult lawyers in many of the sorts of cases to which fiduciary duties would apply. When we sell our businesses or our homes to our friends, we may very well get lawyers involved. Many of the cases I cite as examples of the friendship-fiduciary contexts the law has encountered in Part III actually seem like ones in which parties would traditionally be represented by counsel. And in the hypothetical with which I begin this Article, when David sells out John to Daniel for a million dollar consulting agreement, David may very well choose to get representation. In these sorts of cases, lawyers would better know how to instruct their clients to behave if only courts would be consistent about the role of friendship in fiduciary law. Even if courts and policy makers ultimately choose not to prefer the cases I do here, some more consistent treatment would help all parties plan their transactions more reliably.

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136. *Id.* at 65 (citations omitted).

137. I thank Brett McDonnell for pushing me on this point.

138. *But see* Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004) (answering no). Even if the law does not deter, there is still the underlying ex post moral rationale for exacting punishment from those who breach their fiduciary obligations. And there is the “empirical desert” argument available as well—that it breeds general compliance with the law to police conduct that the community agrees “deserves” sanction. *See generally* Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399 (2005) (arguing that harmonizing law and social norms can help to breed compliance—and the opposite can breed noncompliance); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997) (same).

### C. *The Friend as a Moral Fiduciary*

Above, I have made my preliminary case for why the friend seems to fit comfortably within the legal concept of the fiduciary. There are certain objections, of course, which would highlight the misfit between the friend and the fiduciary and might show why even if the relationship of friendship were to come within the concept of the fiduciary, it would be a bad idea to impose fiduciary duties upon friends as a matter of law. I shall address some of these objections in Part IV. Yet to come in Part III are details about how courts already have come to appreciate the role of our friends as legal fiduciaries and more specifics about how the law could actually accomplish integration of the friend as a fiduciary.

But here I pause to make clear a different aspect of my argument about treating friends as fiduciaries. Quite apart from what the law does about our friendships,<sup>139</sup> friendships themselves stand much to gain if friends began thinking of their moral duties to one another through the lens of fiduciary obligation. Much, of course, has been written in our philosophical, literary, and cultural tradition about the relationship of friendship.<sup>140</sup> However, relatively little has been written about the special code of ethics involved in friendship.<sup>141</sup> Moreover, even when ethicists do write about the morality of friendship, it is usually to question the implications such special regard has for universalist moralities or to defend the right we have to treat our friends with special care.<sup>142</sup> The

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139. If the suggestion seems odd, see Leib, *supra* note 6, for a lengthy defense of my entire research agenda in “friendship and the law.”

140. I have cataloged and discussed much of this literature elsewhere. See *id.* at 633–35 nn.9–18, 674–80.

141. *But see* Jeanette Kennett & Steve Matthews, *What’s the Buzz? Undercover Marketing and the Corruption of Friendship*, 25 J. APPLIED PHIL. 2, 9 (2008).

142. See, e.g., LAWRENCE A. BLUM, FRIENDSHIP, ALTRUISM AND MORALITY (1980); TROY A. JOLLIMORE, FRIENDSHIP AND AGENT-RELATIVE MORALITY (2001); SHELLY KAGAN, THE LIMITS OF MORALITY 367–68 (1989); David B. Annis, *The Meaning, Value, and Duties of Friendship*, 24 AM. PHIL. Q. 349 (1987); Neera Kapur Badhwar, *Friends as Ends in Themselves*, 48 PHIL. & PHENOMENOLOGICAL RES. 1 (1987); Marcia Baron, *Impartiality and Friendship*, 101 ETHICS 836 (1991); Dean Cocking & Jeanette Kennett, *Friendship and Moral Danger*, 97 J. PHIL. 278, 286 (2000); Dean Cocking & Justin Oakley, *Indirect Consequentialism, Friendship, and the Problem of Alienation*, 106 ETHICS 86 (1995); John Cottingham, *Partiality, Favouritism, and Morality*, 36 PHIL. Q. 357 (1986); Simon Keller, *Friendship and Belief*, 33 PHIL. PAPERS 329 (2004); Niko Kolodny, *Do Associative Duties Matter?*, 10 J. POL. PHIL. 250, 250 (2002); Peter Railton, *Alienation, Consequentialism, and the Demands of Morality*, in CONSEQUENTIALISM AND ITS CRITICS 93, 98–99 (Samuel Scheffler ed., 1988); Sarah Stroud, *Epistemic Partiality in Friendship*, 116 ETHICS 498 (2006); Christopher Heath Wellman, *Friends, Compatriots and Special Political Obligations*, 29 POL. THEORY 217 (2001); William H. Wilcox, *Egoists, Consequentialists, and Their Friends*, 16 PHIL. & PUB. AFF. 73 (1987); Neera Badhwar Kapur, *Why It Is Wrong to be Always Guided by the Best*:

presumption of the ethical writing on friendship that exists is that we may be partial toward our friends, but it is rare that our ethicists expound on the nature and scope of the partiality that can be expected of our friends.

This Article—by placing fiduciary law and friendship side-by-side—suggests that we might achieve moral guidance within our friendships by taking seriously the “friend-as-fiduciary” model it defends. Consider some of the prototypical duties the law imposes upon fiduciaries, enumerated and explored in Part I: the duty of loyalty, the duty of care, the duty of utmost candor and disclosure, the duty of confidentiality, and the duty of good faith and faith dealing. These are, taken together, excellent rules of thumb in our interactions with our friends. Even if they are relatively nonspecific, they have enough content to guide us and give some contours to the nature of friends’ responsibilities to their counterparts.

We must be unselfish with our close friends, acting in ways that promote their best interests. We must affirmatively and diligently aim to serve their welfare without negligence. We must be straight with our friends and try not to obtain unreasonable advantages at their expense. We should not steal business opportunities that come from within the relationship. We should not unduly influence our friends to act in a way at odds with their interests. We must keep and respect their confidences. We must try to avoid conflicts of interest between our personal gain and our duties to our friends. And we must deal with our friends fairly, often showing them special levels of good faith beyond how we might treat strangers. These are deeply important moral guidelines—and although they are not terribly controversial, seeing friends as fiduciaries puts in clear relief the moral duties we owe our friends. Thinking about our role as friends through the lens of fiduciary duties could help us become better and more reliable friends.

Thus, even supposing the friend-as-legal-fiduciary argument fails, there is much to be gained by thinking of the friend as a moral fiduciary. As this Part has revealed, friends share a paradigmatic form of trust: trust is reposed in us as friends, resulting in tremendous vulnerability and potential for opportunism.<sup>143</sup> Understanding this exposure—an exposure

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*Consequentialism and Friendship*, 101 ETHICS 483 (1991); Andrew Mason, *Special Obligations to Compatriots*, 107 ETHICS 427 (1997); Susan Wolf, *Morality and Partiality*, 6 PHIL. PERSP. 243 (1992).

143. I explore many of the personal benefits friendship confers upon its participants in Leib, *supra* note 6, at 654–57 (highlighting friendship’s role in establishing and sustaining our identities, confirming our sense of social and moral worth, helping us avoid depression, sustaining our physical health, and inspiring creativity). It might be that we owe our friends special fiduciary-like duties not (only) for the trust reposed in us and the consequent vulnerability it produces but (also) because of all friends do for us in our lives. Still, the friend-as-fiduciary message of this Article helps expose the

fiduciary law helps illuminate—might help us be more careful with our friendships in our moral lives. This would be no small accomplishment, even if legally enforceable fiduciary duties prove too unseemly for the friendship context.

### III. THE FRIEND AS A LEGAL FIDUCIARY?

Unseemly though it may be in theory, in practice courts *have* considered friendship to trigger certain fiduciary duties. It would be dishonest, however, not to acknowledge that courts are ambivalent and inconsistent about their practices in considering friends as legal fiduciaries. In this Part, I first survey the landscape, investigating what courts have said and done about treating friends as fiduciaries. I then offer a few specific recommendations about how courts ought to analyze cases on a going-forward basis in which friends allege a breach of a fiduciary duty based upon friendship.

#### A. *The Law's Ambivalence About Friends as Fiduciaries*

It is not hard to find cases in which courts disclaim the notion that friends are fiduciaries for one another. *Wilson v. Zorb*<sup>144</sup> is as clear as any case—and makes the point well because the court went out of its way to be explicit about the parties' "close friend[ship] for many years," noting that they were "intimately associated in social activities."<sup>145</sup> The court detailed how often the parties socialized and the nature of their relationship, indicating that their personal relationship was distinct from their professional relationship (they were both doctors, "consulted" with each other, and shared patients).<sup>146</sup> Nevertheless, the court rejected the claim that the friends stood in a fiduciary relationship to each other:

Warm friendship, confidence, and an affectionate regard for each other were mutual with the parties, and yet each was self-sufficient, competent, and independent. . . . Such relationships happily are

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natural fit between a set of special responsibilities and duties to another and the nature of a trust relationship, leading to special vulnerability. *See also* Gary Chartier, *Friendship, Identity, and Solidarity. An Approach to Rights in Plant Closing Cases*, 16 *RATIO JURIS* 324, 330, 334–35 (2003) (arguing that the core of friendship is vulnerability and that vulnerability creates certain special duties, some enforceable by law); Kennett & Matthews, *supra* note 141, at 9 ("[F]riends are peculiarly vulnerable to each other, and this we suggest generates an especially strict moral requirement against using one's close friend as a mere means.").

144. 59 P.2d 593 (Cal. Dist. Ct. App. 1936).

145. *Id.* at 594.

146. *Id.* at 596.

common, but they are not confidential relationships in a legal sense. It takes something more than friendship or confidence in the professional skill and in the integrity and truthfulness of another to establish a fiduciary relationship.<sup>147</sup>

This conclusion is a common one: *Kudokas v. Balkus*<sup>148</sup> and *Vargas v. Esquire, Inc.*<sup>149</sup> are somewhat more recent cases that announce a similar principle after conceding that the parties at issue were close friends.<sup>150</sup> Perhaps a more radical statement of the principle comes from a 1993 case, *Silvia Moroder Leon y Castillo v. Keck, Mahin & Cate*: “[T]he trusting friendship between [a] [p]laintiff[] and [defendant], however strong, does not establish a fiduciary relationship.”<sup>151</sup> Or, perhaps more explicitly, from an 1881 Connecticut case, *Hemingway v. Coleman*:

We have before us a contract of sale, the parties to which are of full mental capacity; the vendor believes the vendee to be her friend, and that the friendship, dating from the time when he served her husband as a laborer, has continued unbroken during the seven years which had elapsed since that service terminated; and she believes him to be honest because of his fidelity. Although friends in fact, in law and equity they were strangers and stood at arms length in the matter of contract; for friendship is unknown to law or equity; in it neither finds any relation involving special confidence.

147. *Id.*

148. 103 Cal. Rptr. 318 (Ct. App. 1972). I discuss this case in Leib, *supra* note 6, at 688.

149. 166 F.2d 651, 653 (7th Cir. 1948). I also discuss this case in Leib, *supra* note 6, at 688.

150. See also *Bennett v. Allstate Ins. Co.*, 753 F. Supp. 299, 303 (N.D. Cal. 1990) (rejecting a longtime friendship as a confidential or fiduciary relationship); *Kuper v. Spar*, 176 B.R. 321, 329 (Bankr. S.D.N.Y. 1994) (finding no authority for the proposition that a close friendship between the parties could “transform[]” it into a fiduciary relationship for the purposes of the Bankruptcy Code); *Frantz v. Porter*, 64 P. 92, 94 (Cal. 1901) (after conceding an intimate friendship between the parties, holding that “the relation was neither more nor less than that of warm personal friendship, and there can be no presumption, under the facts in this case,” that a fiduciary relationship existed); *Butts v. Dragstrem*, 349 So. 2d 1205, 1207 (Fla. Dist. Ct. App. 1977) (“Dragstrem’s primary justification for his reliance upon Butts’ representations was . . . their close personal friendship . . . Unfortunately for Dragstrem’s position such a relationship does not create a fiduciary . . . relationship.”); *Cranwell v. Oglesby*, 12 N.E.2d 81 (Mass. 1937) (refusing to find that friendship could establish a fiduciary relationship); *Kratky v. Musil*, 969 S.W.2d 371, 377–79 (Mo. Ct. App. 1998) (rejecting claim of a “long-time” friend that the friendship established a confidential relationship); *Snyder v. Webb*, No. 97APE09-1248, 1998 Ohio App. LEXIS 2776, at \* 12 (Ohio Ct. App. June 18, 1998) (same); *Bush v. Stone*, 500 S.W.2d 885, 894 (Tex. App. 1973) (Bissett, J., dissenting) (“Friendship alone does not establish a fiduciary relationship . . .”).

151. 873 F. Supp. 12, 15 (S.D. Tex. 1993). Other courts have been just as dismissive. See *Neely v. Martin*, No. C052198, 2007 Cal. App. Unpub. LEXIS 2322, at \*10, \*11 n.3 (Cal. Ct. App. Mar. 22, 2007) (denying that a “20-year friendship” gave rise to a fiduciary relationship, although acknowledging that “a confidential relationship may arise from a friendship”).

He had not by being a friend become the guardian of her interests in any such sense as to impose upon him a legal duty to sacrifice his own to theirs.<sup>152</sup>

Often, however, courts get more specific in their refusal to recognize friendships as fiduciary relationships, rather than relying on broad pronouncements about friendship's immunity from the law. They often specify that "mere" friendship—or friendship "alone"—is insufficient to trigger a fiduciary relationship. In short, the idea is that friendships can exist among the relationships court will consider fiduciary or confidential but that the friendship itself cannot be the predicate upon which a fiduciary relationship can be established. This idea is routinely expressed by a court's looking for additional evidence of "undue influence" or "dominance" within the relationship to trigger the fiduciary duties.<sup>153</sup>

But not all courts would be uncomfortable with my attempt here to defend the idea that the friend deserves to be treated as a fiduciary. For example, *Thompson v. Thompson*, a 1928 California case, held that "[f]iduciary relations are not found solely in those legal relationships, such as guardian and ward, husband and wife, trustee and beneficiary, but are also found where in fact the relation of trust and confidence exists between trusting friends."<sup>154</sup> Other California courts have similarly recognized that "friendship, affection, and a close relationship" are sufficient to trigger

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152. 49 Conn. 390, 392 (1881). *Accord* *Worobey v. Sibieith*, 71 A.2d 80 (Conn. 1949); *Wells v. Houston*, 57 S.W. 584, 595 (Tex. Civ. App. 1900) ("Although friends in fact, in law and equity the parties were strangers, and stood at arm's length in the matter of contract. Friendship is unknown to law or equity, and in it, neither finds any relation involving special confidence.")

153. See, e.g., *Konja v. Rezai*, No. D033904, 2002 Cal. App. Unpub. LEXIS 5331, at \*43 (Cal. Ct. App. June 14, 2002) (finding plaintiff to have made up his own mind, so friendship could not be predicate for fiduciary relationship); *Schultz v. Steinberg*, 5 Cal. Rptr. 890, 893–94 (Ct. App. 1960) ("In the absence of a showing of the exercise of undue influence mere friendship does not constitute a confidential relationship."); *Hausfelder v. Security-First Nat'l Bank*, 176 P.2d 84, 87 (Cal. Dist. Ct. App. 1946) (same); *Equitex, Inc. v. Ungar*, 60 P.3d 746, 752 (Colo. Ct. App. 2002) (refusing to allow friendship to serve as a predicate for a fiduciary relationship); *Polletta v. Colucci*, No. CV-95-0125416S, 1996 Conn. Super. LEXIS 2519 (Conn. Super. Ct. Sept. 17, 1996) (same); *Kurti v. Fox Valley Radiologists, Ltd.*, 464 N.E.2d 1219, 123 (Ill. App. Ct. 1984) ("Even where a fiduciary relationship does not exist as a matter of law, it may nonetheless arise where trust and confidence, by reason of friendship, agency and experience, are reposed by one person in another so the latter gains influence and superiority over the former. However, the existence of a friendship does not of itself establish the existence of such a relationship . . .") (citation omitted); *Grow v. Ind. Retired Teachers Cmty.*, 271 N.E.2d 140, 143 (Ind. App. 1971) ("A confidential relationship may also arise because of personal friendship and when one party knows that the other is relying upon him in such a manner. It is essential that there be a dominant and a subordinate party, and . . . that the alleged subordinate party was justified in relying upon a relationship of trust and confidence."); *In re Estate of Hill*, No. 99CA2663, 2000 Ohio App. LEXIS 1201 (Ohio Ct. App. Mar. 15, 2000) (refusing to allow friendship to serve as a predicate fiduciary relationship); *Pfaff v. Petrie*, 396 Ill. 44 (1947) (same).

154. 267 P. 375, 380 (Cal. Dist. Ct. App. 1928).

fiduciary obligations.<sup>155</sup> Still another California case required of a friend that she prove her utmost good faith to her friend, a standard reserved for those in fiduciary relationships; the friendship itself served as the predicate upon which to base the fiduciary obligation.<sup>156</sup> And a California court in 1972 explicitly wrote, “we have no difficulty in finding a fiduciary relationship established . . . by virtue of the long, intimate, personal friendship of” the parties.<sup>157</sup>

California is not alone in recognizing the friend as a legal fiduciary. Courts all over the nation have embraced the idea that a friendship can trigger fiduciary obligations;<sup>158</sup> certainly, friendship is often listed among the relationships that can be considered fiduciary.<sup>159</sup> One court even clearly specified that the fiduciary duty of good faith and fair dealing requires friends to give each other a “fair price” in a transaction between friends.<sup>160</sup> Two other courts imposed constructive trusts—classic fiduciary remedies—over the property of defendants in part because the defendants stood in fiduciary relationships to their “close friends,” whose property

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155. *Rieger v. Rich*, 329 P.2d 770, 778 (Cal. Dist. Ct. App. 1958) (“Suffice it to say that the evidence clearly establishes that decedent reposed trust and confidence in the integrity and fidelity of both appellants. These are the elements of a confidential or fiduciary relationship.”); *see also* *Ventura v. Colgrove*, 75 Cal. Rptr. 495 (Ct. App. 1968) (finding friendship to establish a confidential relationship sufficient to trigger a duty to disclose); *Dalakis v. Paras*, 194 P.2d 730, 739 (Cal. Dist. Ct. App. 1948) (finding a friendship to be sufficient to show a fiduciary relationship and to trigger trustee-beneficiary duties).

156. *Cox v. Schnerr*, 156 P. 509, 512 (Cal. 1916).

157. *Carpenter Found. v. Oakes*, 103 Cal. Rptr. 368, 378 (Ct. App. 1972). However, the court ultimately furnished the injured party whose confidentiality was breached with fairly modest remedies, not a full disgorgement of the profits of the breaching party.

158. In Texas, for example, close, personal friendships are central in a court’s consideration of whether special fiduciary obligations apply. *See Horton v. Robinson*, 776 S.W.2d 260, 265 (Tex. App. 1989); *Dominguez v. Brackney Enters., Inc.*, 756 S.W.2d 788, 791 (Tex. App. 1988); *Garcia v. Fabela*, 673 S.W.2d 933, 936–37 (Tex. App. 1984); *Adickes v. Andreoli*, 600 S.W.2d 939, 945–46 (Tex. Civ. App. 1980); *Kalb v. Norsworthy*, 428 S.W.2d 701, 705 (Tex. Civ. App. 1968); *Holland v. Lesesne*, 350 S.W.2d 859, 861–62 (Tex. Civ. App. 1961). Texas courts also make a point of distinguishing intimate friendships from mere business friendships that receive no special treatment. *See Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962).

159. *See, e.g., Dawson v. Nat’l Life Ins. Co.*, 157 N.W. 929, 933 (Iowa 1916) (“The fiduciary relation may exist wherever special confidence is reposed, whether the relationship be that of blood, business, *friendship*, or association, by one person in another who are in a position to have and exercise or do have and exercise influence over each other.”) (emphasis added). Even the Restatement of Trusts acknowledges that confidential relationships are “particularly likely to arise between family members or close friends.” RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. b(1) (2003); *Brown v. Foulks*, 657 P.2d 501, 506 (Kan. 1982) (“The term ‘fiduciary relation’ has reference to any relationship of blood, business, *friendship*, or association in which one of the parties reposes special trust and confidence in the other who is in a position to have and exercise influence over the first party.”) (emphasis added).

160. *Frowen v. Blank*, 425 A.2d 412, 417–18 (Pa. 1981) (holding that an elderly plaintiff was entitled to a fair price from younger neighbors who befriended her).

they misappropriated.<sup>161</sup> And another court found a friendship to support the duty of good faith and the duty to act “with due regard to the interests of the other party.”<sup>162</sup> Although most courts will concede that a friendship *alone* cannot trigger the responsibilities of a fiduciary relation, some will still acknowledge that friendship “is often an important consideration and undoubtedly furnishes a vantage ground for one is not likely to expect a friend to deceive him into a bad bargain. As against a friend no shield is worn nor sword drawn in defense. Friendship tends to disarm.”<sup>163</sup>

These latter set of cases basically adopt the perspective of this Article: our close friends should be considered our legal fiduciaries. But one could go further in treating friends as fiduciaries: a good friend’s very *status* as a close friend could implicate her counterpart’s vulnerability, such that perhaps courts should not need to pursue too carefully a separate second-stage inquiry about dominance, superiority, or influence. Consider the *In re Estate of Long* approach, a case which gestures toward this further step:

Mere friendship can result in a fiduciary relationship. “*This position of superiority may arise by reason of friendship, agency, or experience.*” . . . Even a capable businessman may repose trust and confidence in a friend or associate. Faith and confidence may be reposed in a dominant party without entrusting much in the way of business and financial affairs to that party.<sup>164</sup>

In *Long*, the court makes explicit that “mere” friendship alone can lead to the trust and vulnerability necessary to establish a fiduciary relationship, which can, in turn, trigger all sorts of obligations and special remedies for their breach.<sup>165</sup> Although the determination of a fiduciary relationship between friends will always need to remain a fact-based inquiry<sup>166</sup> (for

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161. *Schwartz v. Houss*, No. 21741/04, 2005 WL 579152 (N.Y. Sup. Ct. Jan. 3, 2005); *Cody v. Gallow*, 214 N.Y.S.2d 127 (Sup. Ct. 1961); *see also Klein v. Shaw*, 706 P.2d 1348 (Idaho Ct. App. 1985) (imposing constructive trust to enforce fiduciary duties that were traceable, in part, to friendship).

162. *Perry v. Jordan*, 900 P.2d 335, 338 (Nev. 1995).

163. *Meginnes v. McChesney*, 160 N.W. 50, 52 (Iowa 1916); *see also Field v. Oberwortmann*, 144 N.E.2d 637, 639–40 (Ill. App. Ct. 1957) (considering friendship to be a relevant consideration in finding parties to be in a fiduciary relationship).

164. 726 N.E.2d 187, 192–93 (Ill. App. Ct. 2000) (citation omitted) (emphasis added).

165. *Id.* at 192. *But see Schaefer v. Conway*, No. 2004AP690, 2005 Wisc. App. LEXIS 937, at \*9 (Wisc. Ct. App. Oct. 26, 2005) (“Although it would be wonderful if parents, brothers, sisters, friends, and relatives were required to treat each other with the utmost respect and care, and were worthy of the trust attendant to such relationships, that is not case.”).

166. *See Carroll v. Daigle*, 463 A.2d 885, 888 (N.H. 1983) (conceding that friendships may be found to be fiduciary relationships but deferring to a fact-finder to make the determination as to

there are many types of friendships and only a few will implicate the sort of trust relationship so central to the fiduciary concept),<sup>167</sup> there is good reason that courts should not hesitate to conclude that close friendships are appropriate contexts in which to enforce fiduciary duties.<sup>168</sup> The friendship itself, as *Long* recognizes,<sup>169</sup> can be the source of the requisite “superiority.”<sup>170</sup>

Indeed, some courts, when presented with a transaction that seems to have been based in no small part on friendship, hold friends to fiduciary duties *even if* the parties involved were both sophisticated. Thus, even if it would be hard to say with a straight face that one friend “dominated” another in a given context—a traditional consideration in fiduciary duty cases—friendship itself can give rise to fiduciary duties. Consider in this regard *Gray v. Reeves*:<sup>171</sup>

A point is made that Mr. Gray was a shrewd and successful business man and ought not to have been misled by promises that, when revealed in the courtroom, seem to be unreasonable. But [this argument] overlook[s] an element which disarms caution; that is, friendship. . . . The impulse that leads men to trust those in whom they have confidence cannot be ignored by the courts. . . . Hence, when men deal as friends and the one accepts that as true which, but for the element of friendship, would put a man upon inquiry, the law will protect him in his trust as certainly as it will deny him

whether the particular friendship between the parties rose to the level of a fiduciary relationship); *Wheelen v. Robinson*, 381 A.2d 742, 745 (N.H. 1977) (same).

167. For a typology of different kinds of friendship, see Leib, *supra* note 6, at 638–52. Some may be hesitant to embrace my argument here because I do little in this Article to guide the fact-based inquiry about what sorts of friendships should “count.” I have developed a multifactor test elsewhere, and it might help courts and fact-finders grow less ad hoc in deciding whether a friendship is close enough for fiduciary treatment. *Id.* at 638–47.

168. Courts often recognize that friendship can create a “special relationship,” a prerequisite to various other fiduciary-like duties such as the duty to rescue, *see Farwell v. Keaton*, 240 N.W.2d 217, 222 (Mich. 1976) (finding that friends may owe one another duties of rescue and including them within the category of “special relationships”), and a prerequisite to preclusion of a usury defense by a borrower in a loan context, *see Hufnagel v. George*, 135 F. Supp. 2d 406, 408 (S.D.N.Y. 2001) (“[A] ‘special relationship’ is limited to a small class of relationships: attorney-client, fiduciary or trustee, or a longstanding friendship or its equivalent.”). *See also Abramovitz v. Kew Realty Equities, Inc.*, 580 N.Y.S.2d 269 (Sup. Ct. 1992) (estopping a borrower from asserting usury defense owing to friendship and special relationship that led to the loan). I discuss *Farwell* more extensively in Leib, *supra* note 6, at 685–86.

169. *Accord Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 593 (Ill. 1996) (holding that a “position of superiority may arise by reason of friendship”).

170. *But see Wells v. Houston*, 57 S.W. 584, 595 (Tex. Cir. App. 1900) (“No superiority of one person over the other can be presumed to exist from the relation of friendship.”).

171. 125 P. 162 (Wash. 1912).

relief if the personal relations of the parties are such that the dealing is at arm's length. . . . To say that a man who is moved to part with his money under such circumstances is to be held at arm's length is to deny sustenance to the very root of society; to make friendship a liability instead of an asset.<sup>172</sup>

*Bush v. Stone* is another instance of a court focusing on a friendship to create fiduciary obligations, notwithstanding a plaintiff's experience and business sophistication. The majority held the defendant to fiduciary standards because the parties "worked together, they had repeated business contacts, and were close family-type friends."<sup>173</sup> The court emphasized that "the plaintiff and defendant became close personal friends . . . and remained as such for . . . 26 years. The plaintiff trusted the defendant the same as if he were a member of his own family [and] [t]hey hunted, visited, and had repeated social contacts together."<sup>174</sup> The friendship supported certain rights for the beneficiary plaintiff, notwithstanding the plaintiff's expertise in the type of transactions at issue.

Thus, courts have embraced the friend-as-fiduciary model in certain contexts and rejected it in others. In some respects, this ambivalence should not be surprising, for there are many ways of being friends. Not all modalities of friendship raise the concerns with which fiduciary law is preoccupied, and the reality of friendship's many forms virtually requires a subtle fact-based analysis in any given friendship presented to a court. We do have casual friendships, and it would be unreasonable for the law to impose special duties upon us when we are little more than acquaintances but do not want to or have not had the occasion to disclaim friendship affirmatively. Ultimately, there will always need to be something ad hoc about a court's determination of whether a friendship

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172. *Id.* at 163. To be fair, the court does make something of the fact that one party was "an experienced mining man" and "the other, shrewd and successful in the unemotional pursuit of trade, but utterly ignorant of mines and mining." *Id.* But from the perspective of modern fiduciary law, it is notable that both were experienced businesspeople with sophistication and that the friendship was so important to the court's determination. Indeed, in later case law, Washington courts acknowledge the continuing relevance of *Gray* by merely requiring a friendship to be sufficiently close to trigger fiduciary duties of disclosure. *See, e.g., Hood v. Cline*, 212 P.2d 110, 116 (Wash. 1949) ("It is true that, in some of our cases, notably [*Gray*], we have considered that intimate friendship may, under certain circumstances, justify one in relaxing the standard of caution he would normally exercise in business dealings. But nothing in the record before us shows that the alleged friendship in this case was at all close."); *see also Hollerith v. Gardner*, No. 49505-4-I, 2002 Wash. App. LEXIS 1534, at \*9 (Wash. Ct. App. July 8, 2002) ("We conclude the relationship between Hollerith and Gardner was an arms length, professional business arrangement, not the type of friendship that 'disarms caution' and thereby creates a fiduciary relationship.") (citing *Gray*, 125 P. 162).

173. 500 S.W.2d 885, 890 (Tex. Civ. App. 1973).

174. *Id.* at 887-88.

risers to the level of a fiduciary relationship in any given context and it will always be the beneficiary's burden to put forth clear and convincing evidence of the nature of the friendship.<sup>175</sup> That is true to the flexibility of fiduciary law and to friendship's variety.

Notwithstanding the difficulty of making general pronouncements about friendship and fiduciary law and how friendship should be recognized by courts, however, there are a few more specific guidelines that are worth considering to aid courts in integrating the friend-as-fiduciary idea promulgated here into fiduciary law. As Justice Frankfurter famously wrote, "[T]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry."<sup>176</sup>

### *B. How To Treat Friends as Legal Fiduciaries*

Here I present five theses that, together, paint a fuller picture of my friends-as-fiduciaries proposal. These are mere attempts to be more concrete about how to implement the friends-as-fiduciary idea that pervades this Article; they are not exhaustive rules. The first, to which I have already alluded, is that courts should embrace the idea that close friendships should be able to trigger certain fiduciary duties without a separate showing of "dominance" or "undue influence." Second, a corollary to the "business judgment rule" (which protects corporate fiduciaries from too many suits on the basis of the duty of care) should apply in the friendship context as well. Third, the duty of loyalty should not be enforced too extremely; it should be the source of policing only serious malfeasance, not every minor conflict of interest. Fourth, friends should *not* be presumed to exercise undue influence as a matter of course; when friends gift or devise property to their counterparts, the law should erect a rebuttable presumption that with friendship comes goodwill. Fifth, and finally, the sort of restitutionary remedy that the law should enforce between friends when they breach their fiduciary duties should not always be a full disgorgement of profit. Rather, courts should be open to restitution for contribution, as they are in the context of suit between cohabitants.

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175. See, e.g., *Schrager v. N. Cmty. Bank*, 767 N.E.2d 376, 384 (Ill. App. Ct. 2002).

176. *SEC v. Chenery Corp.*, 318 U.S. 80, 85–86 (1943); see also Scallen, *supra* note 4, at 910 n.48 ("The disparate evolution of fiduciary obligations provides additional support for the claim that labeling someone a 'fiduciary' does not charge him or her with the same 'bag of duties' and degree of obligation imposed on all other categories of fiduciaries.").

### 1. *Close Friends Are Vulnerable to One Another*

As discussed above, some courts have started to appreciate the “disarming” nature of close friendship. These courts are on the right track and should be emulated. When courts understand that certain types of close friendships depend on vulnerability, they will no longer seek any additional evidence of vulnerability or inferiority in trusting friendships. Because there are many categories of friendship and types of friends, it would be implausible to create a presumption that all friends are fiduciaries for each other—but courts should be very careful before announcing, as so many do, that “mere” friendship cannot serve as a predicate for a fiduciary relationship. Courts are far from consistent on this point and the survey of the evidence here suggests that friendship *can* serve as predicate for a fiduciary relationship. Further, the normative argument here suggests that friendship of a certain kind should be able to serve as one; indeed, being true to fiduciary law may require it.<sup>177</sup>

To be sure, courts should not lose sight of what they are trying to do through their application of fiduciary law and should not thoughtlessly add a relationship to the list for rote application. But close friends should not be immune from the grip of fiduciary law; their trust in one another should be recognized as a paradigmatic form of trust that leads to vulnerability.<sup>178</sup>

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177. There is, to be sure, a risk of circularity here. Ultimately, my proposal is only that *certain kinds of close friends* should be treated as fiduciaries, not that all friends be treated as fiduciaries by the law. And I argue here that when courts see examples of these close friends, they ought not pursue any further the question of dominance and vulnerability. Yet little in this Article helps explain how courts can identify close friends—and one reasonable conclusion might be that courts need to rely on the old trust and vulnerability tests fiduciary law already uses.

Indeed, this Article does little to address this issue because from the very start it brackets how to identify and characterize friendships. See *supra* note 6. Nevertheless, I have already written a more general article about friendship and the law, which undertakes some of this ground-clearing work. See Leib, *supra* note 6, at 638–53. Utilizing the multifactor test for friendship I develop elsewhere, courts can conclude that a relationship calls for fiduciary treatment without resort to inquiries into vulnerability and dominance. And even if they continue in assessing vulnerability and dominance, I am hopeful that I have made the case here that close friendships are actually paradigmatic on that score and should not be discounted or immunized from such an analysis.

178. *But see* ARISTOTLE, *supra* note 98, at 240, 234 (observing that when close friends trust each other, the law should not intervene: “[S]ome cities do not allow legal actions . . . but think that people who have formed an arrangement on the basis of trust must put up with the outcome.”). I explore Aristotle’s discussion of the law’s relationship to friendship in Leib, *supra* note 6, at 652–53. See generally *infra* Part IV for an assessment of the “crowding thesis.”

## 2. A “Friendship Judgment Rule”

Beyond the guidance the friends-as-fiduciaries idea can offer in identifying fiduciary relationships, it can also help recommend the specific duties that should flow from the relationship. As I highlighted earlier, the panoply of fiduciary duties is implemented variously (in scope and substance) depending on the relational context.

In the corporate law context, where the enforcement of fiduciary duties is relatively lax (relative to the trustee-beneficiary context, for example), corporate fiduciaries are presumed to have performed their duties of care with due diligence.<sup>179</sup> This presumption is enshrined in “the business judgment rule,” which is “a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”<sup>180</sup> As summarized by Professors Scott, “[t]he business judgment rule represents an implicit recognition that the more complex and broad ranging is the fiduciary relationship, the more discretion is needed and the more legal norms must be selectively deployed in concert with other informal arrangements that also align the interests of the parties.”<sup>181</sup>

In enforcing a friend’s duty of care, it seems that the parallels with the corporate law context warrant an analogous “friendship judgment rule.”<sup>182</sup> Friends have extremely complex and broad-ranging relationships: the duties of friendship are always underspecified and can always shift from

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179. Fiduciary law also will presume fairness and a conflict-free transactional environment—leading to upholding interested transactions by the fiduciary—so long as the fiduciary can show certain forms of procedural fairness. See Mitchell, *supra* note 104, at 186, 189–90 (highlighting the “fairness doctrine” in the fiduciary context and arguing that it erodes trust and community). In the friendship context, however, it is quite hard to imagine what “procedural fairness” would look like. It is much more plausible to proceed case-by-case in assessing fairness, rather than using presumptions won through procedures.

180. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), cited in Scott & Scott, *supra* note 7, at 2423–24 & 2424 n.77.

181. Scott & Scott, *supra* note 7, at 2424. Mitchell concurs with this understanding of the business judgment rule in Mitchell, *supra* note 104, at 192, and also emphasizes, beyond complexity, the difficulty of assessing the “truth” about appropriate conduct in corporate enterprises. I suspect it is largely true of friendship too that the truth of proper friend behavior is elusive and difficult to ascertain with certainty.

182. Two other common rationales for the business judgment rule—that it induces risk taking and that it protects the value of centralized decision making—have no obvious application in the friendship context. In fact, they highlight the limits of the “friendship judgment rule” that I delineate here precisely because we might very well want to promote less risky behavior when it comes to our friendships and to discourage unilateral decision making. Thanks to Gordon Smith for appropriate skepticism about these issues.

under our feet. Friendships themselves are always organic, always in motion, and always responsive to shifting realities. It is impossible to be too exacting about what would count as meeting or violating a relevant duty of care; the discretion friends need recommends deferring to the judgment of friends unless departures from good behavior are manifest.

Obviously, there is a danger that the exception of a friendship judgment rule might swallow the whole range of fiduciary duties that this Article seeks to have imposed upon friends. It would be a hollow victory for my agenda here if the enforcement of fiduciary duties in the context of friendship mirrored the pattern we see in corporate law with very feeble enforcement.<sup>183</sup> But aspects of the duty of candor, the duty of confidentiality, the duty of utmost good faith and fair dealing, and the duty of loyalty would remain enforceable, a friendship-judgment rule notwithstanding. Even the duty of care could be found to be violated at the extreme. In any case, as one court memorably put it, at “the heart of a . . . fiduciary’s duty is an attitude, not a rule.”<sup>184</sup> And fiduciary law needs a reorientation of its set of attitudes to be more sensitive to the fragility of trust within friendships and to do its part to help sustain and promote trust between friends.

### 3. *Being Loyal to Friends*

The duty of loyalty can be enforced very rigorously, allowing courts to void all “interested” transactions and enabling courts to sanction any fiduciary that does not always put her beneficiary’s welfare as a first priority.<sup>185</sup> But it can be enforced more selectively too, having courts focus mainly on bad acts of the fiduciary, on whether a fiduciary has misappropriated opportunities that came to her on account of her status as a fiduciary, on egregious self-dealing without consent of the principal, and on unconsented-to competition with a principal.<sup>186</sup> This latter set of foci of enforcing the duty of loyalty makes more sense in the context of friendship.

The blurry lines within the morality of friendship that provide us with only schematic guidance about how far we have to go to pursue our friends’ best interests—must we give them all the market information we

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183. I thank Reza Dibadj for pushing me on this issue.

184. *Chiles v. Robertson*, 767 P.2d 903, 912 (Or. Ct. App. 1989).

185. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 170 (1959) (the duty of loyalty necessitates a fiduciary to act solely in the interest of the beneficiary).

186. *See generally* FRANKLIN A. GEVURTZ, CORPORATION LAW 321–74 (2000).

have at our disposal when we are competing for the same jobs?—suggest that it would be very hard to require friends to be fully altruistic.<sup>187</sup> Indeed, a “despotism of virtue”<sup>188</sup> might draw fiduciary law too far away from the moral standards of conduct that give it its authority. Accordingly, a more flexible and less stringent form of the duty of loyalty to govern friendships is probably warranted.

There is also a neat analogy between friendship and the close corporation context that counsels for less stringent enforcement of the duty of loyalty in the friendship context. As Lawrence Mitchell argues, in close corporations courts tend to employ “remedial approaches which focus on the putative fiduciary’s wrongful conduct” rather than on “prophylactic fiduciary principles to prevent or resolve intra-corporate conflicts” or on “the beneficiary’s best interests.”<sup>189</sup> The reason the application of the duty of loyalty applies with somewhat less intensity in close corporations has to do with the structure of ownership and control in that context:

The problem burdening fiduciary analysis in the law of close corporations is that those considered fiduciaries in close corporations are not, in fact, disinterested. They generally own significant, if not controlling, amounts of the corporation’s stock. Thus, the fiduciary shares with the beneficiary a legitimate claim to the “trust” property over which she has exclusive control.<sup>190</sup>

Friendships share something in common with closely held corporations. From one perspective, the “trust” property could be considered the friendship itself, in which both parties have a critical investment. Although somewhat counterintuitive, one can see that in the context of a breach of a fiduciary duty of friendship part of what has been misappropriated—the *thing* over which the friend fiduciary has discretionary control—is the substance of the friendship.

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187. In considering why friendship cannot be deemed purely altruistic, Annette Baier asks: “Is our will to sustain friendships to be decreed egoistic to the extent that our concern for our friends is for ones who are ‘second selves’ to us?” BAIER, *supra* note 100, at 156. The idea of friends as “second selves” is a dominant theme in the friendship literature. See, e.g., ARISTOTLE, *supra* note 98, at 260 (“[A] friend is another . . . self.”); DE MONTAIGNE, *supra* note 116, at 141, 143 (arguing that friends are of “one soul in two bodies,” that they maintain a “fusion of . . . wills,” and that friends are a “second self”). I discuss the potentially narcissistic elements of friendship in Leib, *supra* note 6, at 672–74.

188. The phrase is Roberto Unger’s (though he applies it to a law of fiduciaries that would force us to treat all our contract partners with heightened levels of solidarity and altruism). See Unger, *supra* note 7, at 641.

189. Mitchell, *supra* note 4, at 1676.

190. *Id.* See also Mitchell, *supra* note 104, at 190 (discussing fiduciary law in the close corporation context).

Even if this lens onto the friend-as-fiduciary model is too distorting, the parallels still work in the context of jointly formed business opportunities or business-related confidences within a friendship. Take the example with which I began: John and David's business plan, in which both had a stake, was entrusted to David, who potentially misappropriated it by selling it to Daniel without sharing proceeds with John.

Seen from these perspectives, friends stand in the same relationship to the friendship as owner-directors in closely held corporations stand to other shareholders. Accordingly, it may be appropriate, as in the closely held corporation context, to "require proof of some form of affirmative bad faith or intentional misconduct by the fiduciary."<sup>191</sup> As Mitchell writes:

By shifting the inquiry from the beneficiary's best interests to a more limited focus on the fiduciary's malfeasance, these tests provide greater latitude than do traditional fiduciary principles for . . . fiduciaries to pursue their own interests, and diminish the power of the law to inspire and enforce high standards of business ethics.<sup>192</sup>

To be sure, Mitchell sees the relaxation of the duty of loyalty in the closely held corporation context as violative of the very foundations of fiduciary duty law's desire to force corporate insiders to behave in ways different from the mere "morals of the marketplace."<sup>193</sup> But such a relaxation of the duty of loyalty in the friendship context—if it can be properly called a relaxation—should not erode any of the animating purposes of fiduciary duty law. This is so because the focus on malfeasance and bad faith in the friendship context will not be circumscribed by the "morals of the marketplace;" the standards of good faith and proper behavior will come not from the marketplace but from ethical life more generally. The background and baseline are not the marketplace but the love of friends.

#### 4. *Giving Friends Their Due*

There is at least one area in the law of fiduciaries where it seems inadvisable to treat the friend as a fiduciary: in the law of gifts and wills.

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191. Mitchell, *supra* note 4, at 1677.

192. *Id.*

193. *Id.* at 1680–82 (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)).

And, indeed, some courts have also recognized this exception to treating friends as fiduciaries.

In the law of gifts and wills, when fiduciaries are named as donees in transactional contexts in which they take part,<sup>194</sup> they are traditionally required to prove that they have not unduly influenced the donor or decedent in her choices about how to dispose of her property. The burden of proof falls immediately upon the fiduciary-donee to make a showing of utmost good faith and to prove an absence of undue influence.<sup>195</sup> If the law more broadly embraced the friend-as-fiduciary model, it would likely become much more difficult for donors to gift or bequeath property to their friends. This result may be perverse, so any more systematic effort to recognize the friend as a fiduciary should remain mindful that the fiduciary burden of proof in the gift and will context should probably not apply to friends, where good faith gift giving seems common.<sup>196</sup>

As it turns out, some courts have already recognized that preventing friends from taking under a gift or will makes little sense, fiduciary law notwithstanding. Indeed, sometimes courts will allow a friend to take a gift or bequest without a requisite showing of utmost good faith and an absence of undue influence,<sup>197</sup> *even if the donee and donor are in an established formal fiduciary relationship*. For example, consider this pronouncement of a Massachusetts appellate court in *Markell v. Sidney B. Pfeifer Foundation, Inc.*:

Not infrequently an attorney will draft a will or do estate planning work for a relative or close friend and associate; and in such a case, if the attorney or a member of his immediate family is named as a [donee], a court called upon to examine the transaction, although it may suggest that the better practice would be for an independent attorney to do such work, and although it may state that such a transaction should be viewed with great circumspection, will not apply to such a transaction the presumption of impropriety which is

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194. I avoid calling fiduciaries set to take under a will or gift “beneficiaries” for obvious reasons in this context: it might confuse readers because the relevant assumption here is that the donee (or, beneficiary of the gift or will) is a fiduciary to the donor, herself a beneficiary of the fiduciary.

195. *See, e.g., In re Estate of Long*, 726 N.E.2d 187, 191 (Ill. App. Ct. 2000); *In re Estate of Moretti*, 871 N.E.2d 493, 494 (Mass. App. Ct. 2007).

196. For the general argument about why the law ought to promote friendship (quite apart from the relationship between the friend and the fiduciary), see Ethan J. Leib, *Friends and the Law: Can Public Policy Support the Institution of Friendship?*, 145 POL’Y REV. 55 (2007).

197. *In re Wharton’s Will*, 62 N.Y.S.2d 169, 172 (App. Div. 1946) (“Gratitude, esteem or friendship which induces another to make testamentary disposition of property cannot ordinarily be considered as arising from undue influence and all these motives are allowed to have full scope without in any way affecting the validity of the act.”).

applied when dealing with one whose fiduciary status is uncomplicated by ties of . . . close friendship.<sup>198</sup>

The court even furnishes a reason for this differential treatment of those in fiduciary relationships (and double fiduciary relationships from the perspective of the friend-as-fiduciary model, to boot):

The reason for the distinction is that, in the case of an exclusively fiduciary relationship, it can reasonably be presumed that that relationship influenced the transaction; and the policy of the law is to favor the fiduciary's duty of loyalty and to discourage business or donative transactions which inure to the personal benefit of the fiduciary. But where there is also a relationship of . . . friendship, gifts or other acts of generosity are natural and to be expected; in such a setting the reason for the presumption of impropriety dissolves.<sup>199</sup>

Thus, friendship can provide a reason for generosity, such that gifts and bequests between friends should not be held to the strict standards of other attorney-fiduciaries.<sup>200</sup> These latter parties must show utmost good faith and an absence of undue influence. Otherwise, their gifts and bequests will be invalidated as a matter of law.

To be sure, not all courts agree that a close friendship in an otherwise fiduciary relationship is sufficient to shift the burden of proof of undue influence back to the contestant rather than it being laid squarely upon the fiduciary to rebut a presumption of undue influence.<sup>201</sup> Indeed, *Cleary v.*

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198. 402 N.E.2d 76, 94 (Mass. App. Ct. 1980) (internal quotation and citations omitted). The court draws from other cases in which long-standing friendships were held to immunize a formal fiduciary from inquiry into undue influence. *See id.* at 95 (citing *Slater v. Munroe*, 55 N.E.2d 15 (Mass. 1944)).

199. *Id.* (citations omitted). In *Markell*, however, the fiduciary was a "triple" fiduciary (a lawyer, a nephew, and a manager of his aunt's financial affairs) and was ultimately held to have unduly influenced the donor and taken advantage of her confidences.

200. *See In re Crissy*, 826 N.Y.S.2d 628 (App. Div. 2006) (allowing a lawyer of a testator to plead a "pre-existing friendship" to explain a bequest and avoid the scrutiny to which he might have otherwise been subject in probate); *In re Estate of Smith*, 411 P.2d 879 (Wash. 1966) (holding that friendship explained a gift in a will to an attorney-fiduciary); *In re Estate of Tank*, 503 N.Y.S.2d 495, 497 (N.Y. Sur. Ct. 1986) ("If the attorney is a relative or friend of the decedent with a long-standing relationship of friendship, the objective, rational basis of the gift is explained and the bequest allowed to stand.") (citing *Matter of Arnold*, 479 N.Y.S.2d 924 (Sur. Ct. 1983); *Matter of Annesley*, 412 N.Y.S.2d 959 (Sur. Ct. 1979)); *In re Wharton's Will*, 62 N.Y.S.2d at 172 ("[T]he burden of proof on [the issue of undue influence] does not shift but remains on the party who asserts its existence," even where the principal beneficiary was the testatrix's own attorney, who was a family friend and drafted the will).

201. *See, e.g., In re Guardianship of Chandos*, 504 P.2d 524 (Ariz. Ct. App. 1972) (holding that donees who were friends with and living with infirm donor were guardians and fiduciaries of the donor, so donor's gift deed gave rise to a presumption of constructive fraud).

*Cleary*, a more recent decision of the Supreme Judicial Court of Massachusetts, flatly rejects *Markell*, and holds that a “close relationship [of friendship] should [not] shift the burden of proof back to a contestant.”<sup>202</sup> Still, even if it remains true (in Massachusetts, anyway) that a formal fiduciary *who is also a friend* will still be subject to the traditional fiduciary burden to rebut the presumption of undue influence, the *Cleary* court simultaneously leaves open the possibility that, at least for the purposes of gifts, trusts, and wills, a “friend is not usually a fiduciary, and therefore the ordinary burden of proof applies.”<sup>203</sup>

Although it is likely that courts following *Cleary* would be required to hold the friend to the special burden of the fiduciary if the law more generally recognized the friend as a fiduciary,<sup>204</sup> one could still disaggregate the general demarcation of a fiduciary relationship in friendship and its attendant consequences. As I described earlier, calling a relationship fiduciary does not generally mean that a standard set of duties always applies. Rather, the law should allow our friends to receive gifts and bequests in transactions in which they take part without having the burden of proof to show their good faith and to rebut a presumption of undue influence.<sup>205</sup> Giving gifts is so quintessentially central to friendship<sup>206</sup> that it makes little sense to have the law look upon such gifts with any special suspicion.<sup>207</sup>

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202. 692 N.E.2d 955, 959 (Mass. 1998).

203. *Id.*

204. *Id.* at 961 (“[T]he burden of proof is on the fiduciary.”).

205. Even Massachusetts courts have expressed skepticism of *Cleary*. See *Rempelakis v. Russell*, 842 N.E.2d 970, 977 (Mass. App. Ct. 2006) (“Fiduciaries are often relatives or friends of the principal, and thus frequently are natural objects of the principal’s bounty. Indeed, it is the principal’s feelings for the fiduciary that many times result in both the choice of that individual to perform fiduciary functions and the desire to reward the fiduciary in some manner. We think it a peculiar proposition that this natural state of affairs should be presumed in all instances to be the product of sinister behavior on the part of the fiduciary unless he proves otherwise.”). Indeed, it is routine to find fiduciaries to be engaging in undue influence when they isolate donors from close friends, who are presumed to have the donor’s best interest at heart. See, e.g., *In re Estate of Moretti*, 871 N.E.2d 493, 495, 500–01, 503 (Mass. App. Ct. 2007).

206. See Leib, *supra* note 6, at 645 (citing Jack L. Carr & Janet T. Landa, *The Economics of Symbols, Clan Names, and Religion*, 12 J. LEGAL STUD. 135, 156 (1983); Janet T. Landa, *The Enigma of the Kula Ring: Gift-Exchanges and Primitive Law and Order*, 3 INT’L REV. L. & ECON. 137, 152–56 (1983); Ian R. Macneil, *Exchange Revisited: Individual Utility and Social Solidarity*, 96 ETHICS 567, 568 (1986); ELLICKSON, *supra* note 132, at 167, 176–78, 235–36; MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* (W.D. Halls trans., 1990)); see also *Schwartz v. Garrett*, 91 P.2d 535, 536 (Or. 1939) (“[I]t is a natural human instinct to reward friendship and acts of kindness.”). This view should resonate with some classic sociological and social psychological perspectives on the gift. See RICHARD M. TITMUS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* 212 (1971) (discussing gifts as “creative altruism,” helping us realize ourselves through donating to others); Barry Schwartz, *The Social Psychology of the Gift*, 73

### 5. *Restituting Friends*

Just as in cases of garden-variety breaches of fiduciary duty, there can be no singular off-the-rack remedy when it comes to remediating breaches of the fiduciary duties of friendship. “Restitution” is the broad name we give to the equitable remedies for breaches of fiduciary duties. But, as I suggested earlier, restitution comes in many forms and is not the exclusive remedy for breaches of fiduciary duties.<sup>208</sup> In some cases, a constructive trust over some property seems to be the right remedy. In other cases, a more thorough disgorgement of all profits seems more appropriate. But in some cases of fraudulent misrepresentation, the only remedy might be rescission or invalidation; and in other cases of more egregious conduct breaching fiduciary duties, punitive damages might be awarded. Sometimes simply paying a fair price might be sufficient to remedy a conflicted transaction. And in the area of securities regulation, breaches of the duty of confidentiality through misappropriation of material, nonpublic information leads to both civil and criminal penalties.<sup>209</sup> Accordingly, it

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AM. J. SOC. 1 (1967) (discussing the gift as, inter alia, a generator of identity and as a way to encourage reciprocity and behavior).

207. Indeed, until very recently California recognized a “pre-existing friendship” exemption to its custodial care provisions, CAL. PROB. CODE § 21350 (2008), which trigger the fiduciary burden of proof every time a gift or bequest is made to someone who cares for a donor or decedent. *See In re Conservatorship of Estate of McDowell*, 23 Cal. Rptr. 3d 10 (Ct. App. 2004) (friends should not need to rebut a presumption of undue influence merely because they provide custodial care); *In re Conservatorship of Estate of Davidson*, 6 Cal. Rptr. 3d 702 (Ct. App. 2003) (same). In 2006, however, California abrogated the friendship exemption and now holds that friends who care for donors or decedents will probably be subject to the fiduciary standard of proof even if they did not help to prepare the gift or bequest instrument. *See Bernard v. Foley*, 139 P.3d 1196 (Cal. 2006). For limitation on the standard in the case of attorneys, see *Rempelakis*, 842 N.E.2d at 977. For a recent analysis, see generally Leib, *supra* note 6, at 697–99; Kirsten M. Kwasneski, Comment, *The Danger of a Label: How the Legal Interpretation of “Care Custodian” Can Frustrate a Testator’s Wish to Make a Gift to Personal Friend*, 36 GOLDEN GATE U. L. REV. 269 (2006).

208. *See supra* Part I.C.

209. *See United States v. O’Hagan*, 521 U.S. 642, 652 (1997) (holding that the Securities Exchange Act of 1934 and the rules promulgated to give it effect prohibit “misappropriat[ion of] confidential information for securities trading purposes, in breach of a duty owed to the source of the information”). For an argument that friendship should routinely be held to be a confidential relationship for the purposes of misappropriation liability under the securities laws, see Ray J. Grzebielski, *Friends, Family, Fiduciaries: Personal Relationships as a Basis for Insider Trading Violations*, 51 CATH. U. L. REV. 467, 493 (2002) (concluding that “[t]he SEC should abandon any inquiry into the quality of relationships with family members and friends, and should simply conclude that they all involve relationships of trust and confidence” for the purposes of misappropriation liability); Leib, *supra* note 6, at 692–94. Obviously, the friend-as-fiduciary model has ramifications for securities law; this is not the place to explore them in detail. I should say that I have grown less enthusiastic about using the criminal law to preserve and promote friendships, at least without more formal entry mechanisms into such relationships. *See generally* Jennifer M. Collins, Ethan J. Leib, & Dan Markel, *Punishing Family Status*, 88 B.U. L. REV. (forthcoming 2008).

would not be sensible to focus on any particular remedy as *the* remedy appropriate to breaches in the context of friendship.

But there is one form of restitution that might be recommended more broadly, even if it will not fit well with every case. In particular, Hanoch Dagan's discussion about "restitution in contexts of informal intimacy" helps identify a particularly appealing form of remedy when a friend breaches her fiduciary duties to her counterpart: contribution-based restitution.<sup>210</sup> Dagan sees this as an especially useful remedy for the "legal facilitation of relationships of long-term reciprocity" characterized neither by "sheer pursuit of self-interest" nor pure "acts of good-samaritanism."<sup>211</sup> His vision links with a larger claim about the law's promotion of a "liberal vision of community," in which citizens are encouraged voluntarily to identify with people who share their values and ways of life in order to maintain self-respect and a sense of being "at ease in the world."<sup>212</sup> Because friendships fit the bill—they are voluntaristic long-term relationships of reciprocity that are neither fully altruistic nor egoistic and they are sources of solidarity and identity<sup>213</sup>—Dagan's preferred remedy may be a useful guide in remediating breaches of the fiduciary duties of friendship.

Dagan's particular form of restitutionary remedy that might be useful in adjudicating allegations of breaches in the friendship context arises most clearly in cohabitation cases, one of which also presents as a friendship case of a sort. Dagan's recounting of the tale of *Frambach v. Dunihue*<sup>214</sup> sets the stage. A widower with seven children and a couple with four children became close friends—so close, in fact, that they decide to cohabit with their families over a nineteen-year period. Eventually, one party asked the other to leave their joint home (though there is little indication in the record for why the friendship came to a sudden end). Although the trial court decided that the families and friends should share

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210. See generally DAGAN, *supra* note 55, at 164–209. Not everyone in the legal academy has been impressed with Dagan's discussion in this part of his book. See Mark P. Gergen, *A Thoroughly Modern Theory of Restitution: The Law and Ethics of Restitution*, 84 TEX. L. REV. 173, 183–89 (2005) (book review). But its normative thrust is relevant here, even if one wishes to reject Dagan's specific forms of implementing contribution-based restitution.

211. DAGAN, *supra* note 55, at 164.

212. *Id.* at 164–65. Dagan's more general claims about restitution as a remedy seem relevant as well: Restitution "facilitate[s] informal intimate relationships by protecting interpersonal relationships of reciprocity, trust, and reliance, and shielding the parties to such relationships against the lingering risks of opportunism and abuse of trust." *Id.* at 165.

213. I show how friendship meets these criteria for liberal community elsewhere. See Leib, *supra* note 6, at 642–47, 653–62.

214. 419 So.2d 1115 (Fla. Dist. Ct. App. 1982).

the property's value down the middle, the appellate court took an approach common to the cohabitation context (when there is no contract between the parties that otherwise controls asset distribution upon break-up): contribution-based restitution.<sup>215</sup> That is, the respective families were awarded a "share" of the joint home, in proportion to how much each family put into creating the value. Dagan warns us that it would be hard to see the contribution-based restitutionary remedy as the majority position—plenty of courts treat cohabitants as essentially married, splitting property down the middle, while many other courts essentially try to deter "living in sin" by refusing to make any equitable distributions.<sup>216</sup> Still, Dagan demonstrates that it is a common and desirable "middle-of-the-road" approach.<sup>217</sup>

Dagan identifies and endorses a set of normative rationales for contribution-based restitution in the cohabitation context that might apply between friends. First, he sees those engaged in informal intimacies as falling somewhere "between spouses and strangers."<sup>218</sup> Accordingly, he believes that the doctrinal structure should support that situation, affording those in informal intimacies more protection than the law would give to strangers, who receive nothing other than their contractual entitlements, and less protection than spouses, who he thinks should receive half of an estate to reflect the altruistic aspirations of marriage.<sup>219</sup> It is certainly not hard to see friendships as similarly resting between spouses and strangers, counseling for similar treatment.

Second, Dagan explains a detail about the administration of the contribution-based restitution remedy: it measures only benefits that fall outside "the ordinary give-and-take of a shared life."<sup>220</sup> This limitation enables those in long-term reciprocal relationships to avoid keeping tabs in the day-to-day services the parties provide for one another and enables courts to stay out of intimacies to some reasonable extent. The focus of contribution-based restitution, then, is upon substantial investments of time, energy, or money into a partner's business or assets.<sup>221</sup>

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215. The case—along with other contribution-based restitution cases in the cohabitation context—is discussed in DAGAN, *supra* note 55, at 165–68.

216. *Id.* at 167.

217. *Id.* at 167–68 (citing cases). Dagan discusses and cites the states that seek to deter cohabitation in *id.* at 180–83.

218. *Id.* at 171.

219. *Id.*

220. Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1400 (2001).

221. See DAGAN, *supra* note 55, at 172.

One can easily see here as well why this type of remedy might usefully guide the law of the friend-as-fiduciaries. Certainly, no one wants broken friendships to lead to litigation as a matter of course; the idea of people suing their ex-friends for the value of their ordinary services as friends sounds preposterous. Focusing on substantial benefits that can be restituted through a contribution-based remedy seems appealing to limit the number of suits courts will need to consider and to give effect to the reality that much that we do for our friends is gratuitous—and should remain so (for all the reasons gifts should be encouraged and facilitated between friends).

As Dagan helpfully puts it in defending contribution-based recovery's consonance with the values of liberal community:

On the one hand, setting the threshold at the level of [substantial] benefits rejects the strict . . . accounting that applies in other social settings, thus refusing to reduce the [intimates'] relationship to monetizable exchanges, seeking instead to preserve and inculcate their sense of mutual responsibility. On the hand, by limiting the degree of acceptable asymmetrical benefits . . . such a regime takes proper account of the limits of solidarity and the dangers of opportunism.<sup>222</sup>

Thus, to avoid commodification—certainly a potential danger if the friend is to be treated as a fiduciary with enforceable obligations—the remedy must attempt both to reinforce community and to provide a mechanism to check opportunism. This availability for “an anti-opportunistic device . . . can reassure prospective parties that they will not be abused for cooperating” and may inspire “willingness to cooperate without focusing on the grave vulnerability that such trust can engender.”<sup>223</sup> Dagan plausibly argues that contribution-based restitution is equal to the task<sup>224</sup>—and, accordingly, perhaps it should be considered more widely within the friendship context when courts are presented with breaches of attendant fiduciary duties.<sup>225</sup> To use the hypothetical with

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222. *Id.* at 173. Dagan prefers “extraordinary benefits.” My instinct is that this rhetoric gives courts too much reason to refuse recovery so I prefer to use a “substantial benefit” test.

223. *Id.* at 175.

224. Dagan also helps articulate why a “no-remedy” regime, where friends cannot sue one another for breaches of trust, is unacceptable: “While seemingly utopian, the no-remedy regime is likely to yield detrimental consequences in our non-ideal world. Long-term interpersonal relationships in liberal environments are particularly vulnerable to opportunistic behavior because of the liberal commitment to free exit, which is (correctly) perceived as a prerequisite to a self-directed life.” *Id.* at 174. Obviously, this cautionary note supports the entire argument of this Article.

225. Dagan further distinguishes between two formulas of the remedy—one that compensates the

which I began, John might sue David not for a full disgorgement of his one million dollar contract on account of his potential bad faith, potential breach of a duty of confidentiality, and a potential misappropriation of a “corporate” opportunity, but rather for a restitutionary remedy based upon his contribution to the idea and its development; the recovery would not be offset by any friendship benefits extrinsic to the idea.

Still, even if contribution-based recovery occupies an important place as a default rule of sorts for breaches of friendship’s fiduciary duties, surely sometimes it will not be a proper remedy. Even in the John and David hypothetical, it may seem undercompensatory. Indeed, precisely because John and David are so much closer to spouses than they are to strangers, a remedy closer to marriage’s presumption of “equal sharing”<sup>226</sup> may seem in order: friendship, like marriage, should be, ideally and aspirationally through the law, egalitarian. As Dagan acknowledges, “[r]eward in proportion to individual contribution or merit is incongruous with the ideal of marriage as an egalitarian liberal community.”<sup>227</sup> So sometimes it will make sense to require a friend-defendant to share earnings and award a profits-based remedy rather than a contribution-based remedy. That is a judgment call that will depend on the intensity of the friendship—and judges have the capacity to differentiate between degrees of friendship for the purpose of constructing an appropriate equitable remedy. Perhaps, however, they should presume an absence of a spouse-like friendship unless there is clear and convincing evidence otherwise.

#### IV. THE MISFITS AND THE DANGERS OF TREATING FRIENDS AS FIDUCIARIES

Before concluding, I must briefly confront some hard questions about my friends-as-fiduciaries model. Although I believe that, ultimately, our law and moral lives would be enhanced by embracing the friends-as-fiduciaries model, I must highlight ways the analogy between friends and fiduciaries may not fit quite as perfectly as I have suggested as well as a plausible “counter-vision” of the fiduciary concept that makes salient a

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reasonable value of the substantially benefiting service and one that “apportions the total net enrichment of the defendant according to the respective contributions of the parties.” *Id.* at 175. Dagan prefers the latter because it treats the parties as having been in a joint enterprise. *Id.* at 175–76. I agree and think it is the better way to calculate restitution in friendship-related contexts.

226. *Id.* at 178.

227. *Id.* at 179.

substantial set of dangers that could result from more thoroughly adopting my recommendations here.

#### A. *Misfits?*

Despite the general optimism of this Article that friendship relations can be neatly mapped onto fiduciary law, there are some ways in which the doctrines associated with fiduciary law do not make for a natural fit with friendship. I discuss some of these potential gaps here, though ultimately conclude that they do not bar broader legal treatment of friends as fiduciaries.

The first potential difficulty is that much of fiduciary law focuses upon a fiduciary's "superiority." Indeed, although I focus a great deal of attention on the trusting nature of the fiduciary relationship, all courts require something more than trust—sometimes termed ascendancy, dominance, superiority, expertise, or information asymmetry—to find a fiduciary relationship.<sup>228</sup> The particular challenge this framework poses for friendship is that most accounts of friendship put equality at its center. Graham Allan, a prominent sociologist of friendship, has observed that the "essence of friendship from a sociological perspective is that it is a tie of equality."<sup>229</sup> Elsewhere he has written: "Friendship, in whatever form it takes, is defined as a relationship between equals. That is, within friendship there is little sense of social hierarchy or status difference."<sup>230</sup> And he is not alone among those who study friendship and friendship networks.<sup>231</sup> Thus, if friendship is quintessentially about equality<sup>232</sup> and

228. See, e.g., *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992); *Landskroner v. Landskroner*, 797 N.E.2d 1002, 1013 (Ohio Ct. App. 2003); *Scott & Scott*, *supra* note 7, at 2402.

229. ALLAN, *supra* note 98, at 108.

230. GRAHAM ALLAN, *KINSHIP AND FRIENDSHIP IN MODERN BRITAIN* 89 (1996).

231. See, e.g., ROBERT BRAIN, *FRIENDS AND LOVERS* 20 (1976) ("Equality . . . is part and parcel of friendship."); MARILYN FRIEDMAN, *WHAT ARE FRIENDS FOR?* 207 (1993) (contrasting the equality of friendship with the unequal power relations in families); Pat O'Connor, *Women's Friendships in a Post-Modern World*, in *PLACING FRIENDSHIP IN CONTEXT*, *supra* note 96, at 117, 127; PAHL, *supra* note 116, at 167 (Friendship is "egalitarian" and "has no place in hierarchies or authoritarian structures."). I summarize the relationship of equality within friendship in Leib, *supra* note 6, at 646 ("As between friends, no feelings of superiority are appropriate, and social prestige should be irrelevant. Although friends are rarely equal in all ways, true friends treat one another as such. Friends give and take equally, or risk rupturing the bond of friendship.").

232. *But see* EPSTEIN, *supra* note 116, at 8:

Francis Bacon, on this point, claims that 'there is little friendship in the world, and least of all that between equals.' I take Bacon's point to be that equality between people is chiefly a spur to rivalry, which can be death on friendship. And Balzac, with that worldly cynicism one comes to expect (and enjoy) in him, backs up Bacon by remarking that 'nothing so fortifies a friendship as the belief on the part of one friend that he is superior to the other.'

fiduciary law is always focused upon relationships of inequality, they hardly seem like a good match.

Still, whatever force this argument may have as a matter of rhetoric, it lacks substance. As I have demonstrated, what fiduciary law is looking for when it uses the language of superiority has nothing to do with social prestige or a subjective feeling of superiority on the part of the fiduciary. Rather, the inquiry into dominance, ascendancy, or expertise is a proxy for the relational variable of vulnerability. Because, as I have already argued, this variable is extremely common in friendship—indeed the paradigmatic form of trust between friends displays substantial risk and vulnerability—the legal rhetoric of superiority should not occlude the possibility for fiduciaries to stand in relationships of social equality with their beneficiaries. Equality does nothing to vitiate vulnerability.<sup>233</sup>

A second potential misfit between fiduciary law and friendship is that fiduciary law traditionally regulates only one party—the fiduciary, not the beneficiary<sup>234</sup>—and friendship is quite centrally a relationship of reciprocity.<sup>235</sup> Friends would seem to owe one another duties, and those duties are reciprocal. To the extent that fiduciary law is seen as a one-way duty, the relationship of friendship does not quite fit because of a mutuality of obligation, common to contractual relations and not fiduciary ones.

This structural dissimilarity hardly substantially undermines the friend-as-fiduciary model proposed here. Even if it were true that there were no other examples of reciprocity in fiduciary law,<sup>236</sup> there seems to be nothing central to the fiduciary concept that would prevent reciprocal duties: Two people can trust each other and, in certain circumstances, leave themselves especially vulnerable to the other's predation or exploitation. Reciprocity of trust and vulnerability, such as a lawyer and an accountant who have a reciprocal relationship of representation, can be contemplated by fiduciary law, even if it is not the prototypical case. To be sure, one could reasonably make the case that dyads with mutual vulnerability should be

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233. In his commentary on this paper at The Conglomerate, Brett McDonnell suggests that partnership may also be a useful example to undermine this objection. The default rule in partnership is that partners share equally, but they also owe fiduciary duties to each other as well. See Brett McDonnell on Leib's *Friends as Fiduciaries*, July 30, 2008, <http://www.theconglomerate.org/2008/07/brett-mcdonnell.html> (citing REVISED UNIFORM PARTNERSHIP ACT § 404 (1994)).

234. See, e.g., Frankel, *supra* note 4, at 819.

235. See, e.g., ALLAN, *supra* note 98, at 22; Leib, *supra* note 6, at 644–45.

236. *But see* *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (in which Judge Cardozo suggests that partners owe one another seemingly reciprocal fiduciary duties).

treated differently from dyads where only one party is vulnerable.<sup>237</sup> But even if that were true (and it may very well be), I account for this issue by delineating the types of fiduciary duties that are appropriate in the friendship context. So although mutual reciprocity might call for a different application of the menu of fiduciary duties than a one-way vulnerability would, there is no clear reason to withhold the title of “fiduciary” from the relationships of mutual reciprocity when they otherwise fit the bill.

A final potential dissimilarity between the friend and the fiduciary has to do with the right of free exit from the relationship. To be sure, in fiduciary law, “[a]n important means of controlling misbehavior in most [fiduciary] relationships is the [beneficiary’s] right to terminate the relationship or to replace” the fiduciary.<sup>238</sup> But the fiduciary has much more limited termination rights.<sup>239</sup> Thus, one might say that the liberal ideal of free exit is substantially circumscribed in fiduciary relations; even beneficiaries have difficulties exercising their rights of termination.<sup>240</sup> Friendship, by contrast, achieves some of its value in many people’s eyes precisely because it seems to allow for free exit by both parties. Not only does the choice to enter voluntarily define the relationship (in contradistinction to many relationships of status and kinship), so does the choice to stay in it and maintain it. The background principle of free exit helps reinforce friendship’s value.<sup>241</sup>

Interesting as this seeming distinction between friendship and fiduciary relationships may be, it is hard to take seriously the idea that friends can perfectly “freely” exit their friendships without consequences (unless one is comparing it to the exit costs of marriage). As in the case of fiduciary relations, exit is hampered by substantial roadblocks. It is not easy to get out of friendships once they are formed. Moreover, whatever value may derive from a background presumption of free exit must be complicated by the reality that any act of termination comes with very weighty costs: if it is free, it probably was not a friendship of much value after all. Finally, free exit seems to be the rule in at least one central fiduciary relationship: principal-agent.<sup>242</sup>

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237. Thanks to Hanoch Dagan for pushing me hard on this issue.

238. See Scott & Scott, *supra* note 7, at 2428.

239. See FitzGibbon, *supra* note 4, at 310 (citing an attorney’s limited right of withdrawal in the Model Code of Professional Responsibility and a partner’s restrictions on withdrawal).

240. See Scott & Scott, *supra* note 7, at 2428–29.

241. I discuss voluntarism in friendship in Leib, *supra* note 6, at 642, 663–67, and *supra* note 96.

242. See RESTATEMENT (THIRD) OF AGENCY § 3.10(1) (2006) (“Notwithstanding any agreement between principal and agent, an agent’s actual authority terminates if the agent renounces it by a

I have not, of course, surveyed here every way fiduciary law and friendship might be difficult to assimilate. But I have tried to show how a few apparent dissimilarities do not stand in the way of seeing how the two helpfully illuminate one another.

### *B. The Dangers for Fiduciary Law and Friendship*

Beyond mere misfit, there are potentially significant dangers that might be associated with the friend-as-fiduciary model. Below, I address one from the perspective of fiduciary law and one from the perspective of friendship. To the extent that these dangers have already been given expression (in the work of Larry Ribstein, especially), they are overstated and do not furnish very good reasons to refuse to treat close friends as fiduciaries. Both dangers stem from the unintended consequences that can result from regulating private behavior too intensely.

#### *1. Stretching Fiduciary Law Too Far?*

Recently, Larry Ribstein has forcefully called for a narrowing of fiduciary duty law, suggesting that it cover only a small fraction of the types of cases fiduciary doctrine now clearly covers.<sup>243</sup> He wishes for fiduciary law to apply only in “paradigm broad-delegation scenarios,”<sup>244</sup> and he wishes for fiduciary law to delineate much more clearly the types of relationships to which fiduciary law will be applied. As he writes, “[r]ather than comparing costs and benefits of fiduciary duties on a case-by-case basis, or providing for a continuum of relationships that involve varying levels of duties, it is better to define a specific category of cases in which a *Meinhard*-like fiduciary duty of unselfishness applies.”<sup>245</sup> And it is not just for the sake of clarity that Ribstein justifies his desire to circumscribe fiduciary duty law: “Overuse of fiduciary duties increases litigation and contracting costs, decreases the effectiveness of owners’ governance rights, and dilutes true fiduciaries’ legal and extralegal

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manifestation to the principal or if the principal revokes the agent’s actual authority by a manifestation to the agent. A revocation or a renunciation is effective when the other party has notice of it.”). Thanks to Deborah DeMott for this point.

243. See generally Ribstein, *supra* note 13.

244. *Id.* at 213. Although Ribstein surely does not intend to have friendship included in the small list of fiduciary relationships he would recognize, friendship might come even within his cramped definition: we give broad-scale delegations to our friends with very substantial access to our emotional lives (and sometimes our capital).

245. *Id.*

incentives.”<sup>246</sup> Accordingly, Ribstein sees a substantial danger to the goals and effectiveness of fiduciary law (and unnecessary costs to parties who may decide to use contracts to avoid some of the consequences of fiduciary law)<sup>247</sup> when it gets stretched into new areas where he thinks private ordering would be preferable.

Yet, as Ribstein would have to concede, fiduciary law is just too messy for his vision to take hold in the law anytime soon. Fiduciary law’s flexibility and applicability to a broad set of relationships with a sliding scale of duties and remedies is so much a part of its fabric that Ribstein’s vision is more of a misfit with the reality of fiduciary law than any claim I make here on behalf of friendship. Indeed, as I have shown above,<sup>248</sup> many courts already recognize the very model of the fiduciary elaborated here. Friendship need not, therefore, be seen as an expansion of the fiduciary concept at all; it can be seen, rather, as an underappreciated exemplar. Moreover, as I have already discussed, Ribstein’s worry about courts squandering their moral authority by employing fiduciary rhetoric in too many circumstances rings especially hollow in the friendship context, where there need not be a substantial gap between legal and moral standards of conduct.<sup>249</sup> In fact, I made a substantial effort to tailor a law

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246. *Id.* at 251.

247. In this Article, I have decided to side-step the question of whether the fiduciary duties of friendship should be default rules that may be avoided by contract or whether they should be thought of as mandatory rules (though many of Ribstein’s arguments seem predicated on fiduciary duties being mandatory, notwithstanding his deep commitment to contractarianism). On this general debate about contractarianism and fiduciary duties, see, for example, Reza Dibadj, *The Misguided Transformation of Loyalty into Contract*, 41 TULSA L. REV. 451 (2006); Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1 (1990); Easterbrook & Fischel, *supra* note 5. I have given this question some attention in Leib, *supra* note 6, at 683–84 n.267, 706 n.423.

Although I cannot tackle this decades-long debate among scholars of fiduciary law in this context, I can make one observation relevant to the friend-as-fiduciary model elaborated here, which may have some potentially broader applications. Since many of the fiduciary duties to be applied within friendships involve certain kinds of conduct surrounding the contracting process (the duties of good faith, fair dealing, fair price, disclosure), it makes little sense to allow parties to contract out of these duties because such contracts themselves would be subject to the very same constraints fiduciary law imposes. This logical point, however, does not apply to every fiduciary duty: aspects of the duties of loyalty and confidentiality may be sensibly waived. So there may be a middle road in which some duties can be contracted around and some must remain mandatory. This is especially true within friendship, where there is no standard form. When the law approaches friendship and interposes itself into friendship, it must do so with sensitivity to friendship’s variety, some of which relevant contracts can usefully illuminate.

248. See *supra* Part III.A. To be sure, although I exposed the law’s “ambivalence” toward the idea of friends as fiduciaries, there is a much stronger doctrinal basis for the friend-as-fiduciary idea than there is for Ribstein’s view.

249. See *supra* text accompanying notes 117–18. Nevertheless, Ribstein’s point about litigation costs might remain: Are the social benefits of treating friends as fiduciaries worth the costs in terms of

of friends-as-fiduciaries so that it would not depart too far from our moral intuitions about how far the law should intervene in our private relationships.<sup>250</sup>

## 2. *Crowding Trust*

The threat posed to fiduciary law likely to result from treating friends as fiduciaries is minimal. But it may be that there are threats to friendship itself that might result from broader recognition of the friend as a fiduciary. What if exacting legally enforceable fiduciary duties from friends deters not only opportunism but friendship itself? As Ribstein writes, “Requiring fiduciaries to act unselfishly, and accept potential liability, obviously deters people from becoming fiduciaries.”<sup>251</sup> More disturbingly still, what if legal regulation of the “strong form”<sup>252</sup> trust in friendships actually served to crowd it out? If law *replaces* trust, a regime of trust enforcement actually undermines the very important brand of trust it was seeking to protect!

Ribstein’s scholarship focuses on similar questions about the many current and proposed uses of fiduciary duty law, though he has never focused his attention upon friendship. One could reasonably assume, however, given his desire to constrict the reach of fiduciary law, that he would launch a similar argument against treating friends as fiduciaries, emphasizing what fiduciary law would do to ruin the strong form of trust that friendship engenders and sustains. He would likely highlight that friendship relies on extralegal mechanisms for enforcement (like reputation and morality) and that law could rarely be said to enforce parties’ expectations meaningfully because “the parties do not necessarily

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producing more litigation, and likely more spurious litigation? One might argue that social benefits certainly accrue from joint business ventures and marriages where fiduciary duties are common but that the public benefits of friendship are much more subtle and do not easily look like they can counterbalance the costs. Lynn Stout has pressed me on this issue especially.

Subtle though they may be, the benefits are not negligible. I expend great effort in two previous articles to explain why the “cost” is worth it and just what sort of public benefits we can hope to capture by using the law to support the institution of friendship. They include public health benefits, the stimulation of new modalities of thought, the stimulation of the economy, and the saving of enforcement costs in the legal system itself. *See generally* Leib, *supra* note 6; Leib, *supra* note 196.

250. *See* Mitchell, *supra* note 104, at 205 (“In order for the law to be effective, the legal structure reinforcing trust must set forth principles which are both reasonable and ascertainable. . . . If the trust embodied in the law requires too great a level of self-sacrifice in light of our personal goals, the system either will be rejected or fall into eventual desuetude.”).

251. Ribstein, *supra* note 13, at 217.

252. This concept is developed in Jay B. Barney & Mark H. Hansen, *Trustworthiness as a Source of Competitive Advantage*, 15 STRATEGIC MGMT. J. 175, 179 (1994), and is discussed in Ribstein, *supra* note 9, at 558–68.

assume the law will back these expectations.”<sup>253</sup> Further, he would draw upon empirical evidence that law would actually undermine trust:

Experiments show that providing incentives or penalties for good or poor performance actually undermines voluntary cooperation and thereby makes such arrangements less efficient than relying on voluntary cooperation. Legal enforcement also may reduce feelings of reciprocity that enhance voluntary cooperation. Parties have been shown to be more likely to cooperate voluntarily when the incentive is a positive bonus for good behavior than when it is a negative fine for bad behavior. Thus, parties who see themselves as adversaries, or who are expected to behave selfishly, may behave accordingly. Introducing . . . fiduciary duties into close-knit relationships . . . requires the parties to negotiate over future litigation, hire lawyers, and draft formal documents, as if they were in an arms’ length relationship. This encourages them to behave in other respects as parties in such a relationship. Planning for litigation becomes a self-fulfilling prophecy.<sup>254</sup>

Assuming the validity of the experiments upon which Ribstein’s arguments are based (and their appropriate application to the trust within friendship), his arguments would seem to have apparent force here. If friendship itself—or at least its distinctive form of trust—is what we wish to promote,<sup>255</sup> legal regulation may be counterproductive and may not serve trust at all.<sup>256</sup>

There are really two separate claims embedded here. The first is about providing people with the right incentives to make friends and the degree to which a legal regime that enforced certain duties of friendship would deter people from serving as friends. (The second claim, to which I shall turn in a moment, is about the law replacing trust altogether.) Even scholars from substantially different orientations to fiduciary law concede that we need to give people proper incentives to enter fiduciary

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253. Ribstein, *supra* note 13, at 229.

254. *Id.* at 234–35 (citations omitted). The studies upon which Ribstein relies are cited *supra* note 9.

255. I have already argued in favor of using the law in the service of friendship-promotion in Leib, *supra* note 6, and Leib, *supra* note 196.

256. Although I try in what follows to provide a provisional set of responses to the crowding thesis in the particular context of fiduciary law and friendship, there are already several long articles that generally critique the crowding thesis more systematically and more comprehensively. *See, e.g.*, Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457 (2005); Claire A. Hill & Erin Ann O’Hara, *A Cognitive Theory of Trust*, 84 WASH. U. L. REV. 1717 (2006).

relationships.<sup>257</sup> But can we conclude that treating friends as fiduciaries is actually likely to deter friendship?

This particular claim is probably testable. One could test the level and intensity of friendship networks in different jurisdictions, and attempt to observe if there is any correlation between a given jurisdiction's fiduciary law (with respect to friendship) and that jurisdiction's levels and intensity of friendships. As I highlighted in Part III, many courts already embrace the friend-as-fiduciary model in some form, so it should be possible to isolate those jurisdictions to see if the law has done anything to deter friendship (though, to be fair, there are even intrajurisdictional inconsistencies in this area of the law). Until that study is done, we are left with mere conjecture.

But there is, perhaps, an important analogy that might be the basis of sound conjecture: marriage.<sup>258</sup> Marriage carries with it substantial duties that can extend very far into the future even if the marriage dissolves. Yet it would be hard to believe that these substantial duties do much to deter people from choosing to get married. Perhaps such incidental deterrence (incidental because it is clearly not the law's aim to provide incentives against marriage) functions at the margins among those who are particularly rationalistic in intimate affairs. But, generally speaking, there is reason to suppose that potential incidental deterrence at the margins is not a serious reason to prevent the law's enforcement of special duties within marriage relationships.

Friendship, like marriage, provides so many of its own incentives for entry (and it is relatively easy to exit when the costs grow too great) that it is hard to imagine legal regulations actually deterring people from establishing and developing friendships. To be fair, friendship does not carry quite as many legal perquisites as marriage does (nor is it as hard to exit),<sup>259</sup> so the analogy fails in an important way too: friendship has fewer legal advantages to counterbalance the extra duties proposed here.<sup>260</sup> Nevertheless, I think it is fair to conclude that the law will do little—through the odd enforcement of a fiduciary duty in an extreme case of

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257. See, e.g., Frankel, *supra* note 4, at 833.

258. See generally Carolyn J. Frantz & Hanoeh Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75 (2004).

259. I explore these in Leib, *supra* note 196, and Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147.

260. My view is that friendship should carry more legal perquisites, but I perfectly concede that marriage carries many more under current legal rules. See Leib, *supra* note 6; Leib, *supra* note 196.

disloyalty—to prevent people from enjoying the very real, albeit non-legal, advantages of friendship.<sup>261</sup>

However, a legal regime that does exact special duties from friends will likely result in people being much more clear with one another about their relationship's status. In this way, fiduciary duties and their potential enforcement will serve an “information-forcing” function,<sup>262</sup> helping parties organize their intimate affairs and enabling them to have a better sense of the identities of their real friends. In a world where friendship carries legal consequences, many people will try to disclaim that they are friends with the people with whom they are transacting. Sometimes, such disclaimers would be hard for courts to take seriously; other times, disclaimers would helpfully prevent someone from thinking a party is a friend when he has sent every signal to help a potential plaintiff avoid unjustifiable reliance.<sup>263</sup>

And there is nothing wrong with friendship disclaimers in the abstract: as Aristotle well understood, most tension within friendships results because people are not clear about their relational intent and tend to lead other people on.<sup>264</sup> Making people more honest about how close they feel toward the people with whom they interact would likely save many a lot of personal pain.<sup>265</sup> Thus, although certain types of fictive friendships may be

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261. Just because the law can do little to undermine the benefits of friendship does not mean that the law can do little to support the institution. I do not think saying that friendship can survive an occasional legal incursion actually undermines the idea that legal protection can usefully help friendship as an institution. Of course, it is hard to prove any of this, and it relies on one's intuitions. But family and marriage strikes me as a useful analogy here: burdening family members with special duties does not, as a general matter, make us think that trust is being crowded out. Rather, part of the reason we burden families is to protect them and to support the special vulnerability within them. Is it inconsistent to argue that the law should engage in this protection through an occasional legal burden? I see the tension, of course, but it does not seem all that hard to see how to resolve it. The burden will not crowd out the trust and may serve to protect vulnerability within. So, too, in friendship. Thanks to Curtis Bridgeman for pushing me to make this clearer.

262. Indeed, this dynamic—of fiduciary duties forcing information disclosure—is at the center of the “contractarian” view of fiduciary duty law. See, e.g., Easterbrook & Fischel, *supra* note 5, at 426, 445. As I suggested *supra* note 247, I do not take a strong view here about “contractarianism” in fiduciary duty law. But I think both “contractarians” and “non-contractarians” could embrace my friend-as-fiduciary model, notwithstanding their different approaches to whether the bulk of the fiduciary duties are default rules or mandatory ones.

263. *But see* Anderson, *supra* note 15, at 327–30 (arguing that courts seek objective evidence and discount subjective evidence in determining whether a fiduciary relationship exists); *id.* at 330 (“A contract provision denying the existence of a confidential relationship . . . when in fact such a relationship did exist, should always be invalid and unenforceable. It would, in effect, represent a disclaimer of fiduciary liability which, under the familiar rule everywhere, is void as against public policy.”); Westfall, *supra* note 15, at 857 n.142 (citing cases where Texas courts utilized objective evidence to establish that parties were, in fact, close friends).

264. See ARISTOTLE, *supra* note 98, at 233, 243.

265. See Leib, *supra* note 6, at 706 n.423.

deterred, real ones might be intensified, and parties will be able to send more credible signals about their intent to be trustworthy since legal sanctions will attach to those who betray trust.

The second claim, this one with some relevant empirical support, also seems somewhat overstated. The major concern is that law will crowd out trust and replace the important social resource of strong-form trust with a thin legal version that will not be able to perform all the functions that the strong form can. As Ribstein puts it, “[i]n short, legal coercion does not help develop norms of trustworthiness or of trust. Moreover, . . . regulation impedes development of trust norms by interfering with opportunities to be genuinely trusting or trustworthy.”<sup>266</sup>

There are two important responses to this line of argument. First, and most importantly, the argument seems predicated on the assumption that one can have either strong-form trust that operates outside the law or legally policed trust, and that in a given context they must be substitutes rather than complements. But that assumption, explicit in Ribstein’s work,<sup>267</sup> virtually guarantees the crowding conclusion. In any case, the premise is flawed. It simply is not true that “the fact that there is some reliance on the threat of sanctions mean[s] that there will be no room for trust.”<sup>268</sup> This is as true in the context of friendship as it is in our relationships with our doctors, cell phone companies, cable companies, meat producers, baby toy producers, and virtually every person with whom we contract.<sup>269</sup> We may have to resort to legal sanctions (whether stemming from contract law, tort law, property law, consumer protection law, employment law, etc.), but this never crowds out fully the need for trust and the reality of the possibility for some level of vulnerability. I know I can sue my doctor or the hospital if something untoward happens to me when I am under anesthesia. But that sort of trust in sanctions does not help me choose a doctor or hospital, nor does it enable me to develop a good relationship central to my well-being. Indeed, even the perfectly rational calculators among us know that our legal remedies will tend to be undercompensatory (when they are available at all—we might lose our remedies because of technicalities, bad lawyers, unreliable juries, statutes

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266. Ribstein, *supra* note 9, at 567.

267. *Id.* at 568 (“[L]aw must be regarded as a substitute for rather than complement of social capital because it undermines the institutions that create it.”).

268. BAIER, *supra* note 100, at 139.

269. See Mitchell, *supra* note 104, at 194 (arguing that we reasonably trust many others notwithstanding imperfect information and imperfect policing mechanisms for violating that trust); Erin A. O’Hara, *Trustworthiness and Contract*, in *MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY* (Paul J. Zak ed., 2007), available at <http://ssrn.com/abstract=929503>.

of limitations, or other unrelated legal difficulties, all of which we could anticipate as a real risk from the outset). And even if the law punishes really bad babysitters, that punishment will rarely make us feel whole when a babysitter has killed our child through her negligence. Money damages cannot always fully recompense betrayed trust. Thus, the crowding thesis, even if it is defensible at some level, leaves plenty of room for developing the important kind of trust that makes the world go round, even if the law intervenes in some cases. Indeed, as Larry Mitchell has argued, “certain preconditions, like a legal system sustaining the values of trust, are necessary for trust to flourish.”<sup>270</sup> Law makes trust possible, in part.

Again here, marriage is a helpful, if imperfect, analogy. Just because marriage is controlled by contracts, legal regulation, and a set of mandatory duties cannot render legal sanctions as substitutes for trust. There is no doubt that regulation complements and will have some interaction effects with trust. But the crowding thesis in its strong form does not make sense, whether in friendship or in marriage. The law can play a facilitative role as much as it can stand in the way.

There is yet a further reason to be skeptical of the crowding thesis. Crowding is most likely to result—and most likely to serve as a substitute rather than a complement—when there is an environment of perfect enforcement. Yet, fiduciary duty law is notable for its inability to police behavior at the micro level. Indeed, its rhetoric is as strong as it is, in part, because its standards can rarely be met and fiduciaries are so capable of getting away with their betrayals. In a legal landscape of very imperfect enforcement and regulation, trust is far from crowded out.

In the friendship context, imperfect enforcement is likely to be even more widespread: unlike the thought of suing our trustees, corporate officers, and lawyers, there is surely substantial stigma associated with suing our friends. No amount of legal regulation will remove that stigma because, for the most part, suing our friends is a way of ending a friendship. Indeed, the suit is pretty strong evidence that the friendship is beyond repair.<sup>271</sup> What this means is that the crowding phenomenon will make only small incursions into our friendships’ basis in strong-form trust; the law will help frame friends’ self-conception without intruding too heavily into the intimate sphere, where aspects of our closest friendships

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270. Mitchell, *supra* note 104, at 204.

271. There is at least one way this may be incorrect: friends might collude to collect on one of their insurance policies. *See* *Estes v. Magee*, 109 P.2d 631 (Idaho 1940) (a friend-patient sues a friend-doctor, whose insurance he believes will pay for his recovery).

will remain.<sup>272</sup> Sometimes fiduciary law merely expresses social norms without actually being a very good enforcer of them—and considering the possible validity of the crowding thesis, that may be a good thing too. Law will not likely crowd out trust in close friendships and, even if it does some, coherence and the sound legal concept of the fiduciary still recommend treating the friend as a legal fiduciary.

### V. CONCLUSIONS

The fiduciary concept recognized by our law is a flexible one. I have argued here that it is flexible enough to encompass enforcement of certain duties of friendship that we all know well from our moral lives. Friendship—of a certain sort, to be sure—is undoubtedly a relationship of trust and vulnerability, and fiduciary law is set up specifically to give effect to and frame this sort of special relationship. Even if some are ultimately persuaded that the misfit between the friend and the legal fiduciary is too severe or that recognizing the friend as a fiduciary would be too damaging to fiduciary law or the institution of friendship itself, much can be learned from putting fiduciary law and friendship side-by-side. Indeed, there are lessons of proper conduct that friends would do well to internalize even if they will never carry the force of law.

Moreover, whatever one thinks of the normative agenda presented here of trying to get more courts to appreciate the trust and vulnerability constitutive of close friendships, I have shown that the law in many jurisdictions already treats certain types of friends as fiduciaries and that many plaintiffs ask courts to treat defendant-friends (or former friends) as fiduciaries, subject to their special duties and remedial opportunities. This Article should help guide courts when they are presented with such claims, and should enable them to adjudicate these cases more systematically and with greater sophistication. Nothing I have argued for here suggests that all friends qualify for fiduciary treatment; rather, courts must not fear that there is some category mistake being made by those claiming fiduciary duties from their friends or former friends.

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272. I actually think that the entire “separate spheres” story that neatly divides the social and the legal is deeply flawed and very untrue to our experience in the worlds of the intimate and the law. *See generally* VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* (2005). But that is an argument for another day.