

THE CASE FOR A RETURN TO MANDATORY
INSTRUCTION IN THE FIDUCIARY ASPECTS OF
AGENCY AND TRUSTS IN THE AMERICAN LAW
SCHOOL, TOGETHER WITH A MODEL FIDUCIARY
RELATIONS COURSE SYLLABUS

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Of all the exploits of Equity the largest and the most important is the invention and development of the Trust.¹

If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea.²

[The Trust] is an 'institute' of great elasticity and generality; as elastic, as general as contract.³

I. INTRODUCTION

A fiduciary has a duty imposed by law to act solely for the benefit of another as to matters within the scope of the relation.⁴ "Fiduciary relationships are children of the forced marriage of agency law and trust law, being respectively common law and equity ideas."⁵ The Anglo-American common law concept of a fiduciary bears little, if any, resemblance to the Roman or civil law concept of a fiduciary.⁶ In fact, Dr. Joanna Benjamin, a member of the Bank of England's Financial Markets Law Committee, has opined that a "major challenge in achieving a single financial market in Europe is the lack of a domestic law of trusts in the

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¹ F.W. MAITLAND, EQUITY: A COURSE OF LECTURES 23 (A.H. Chaytor & W.J. Whittaker eds., 2d ed. 1936).

² F.W. MAITLAND, SELECTED ESSAYS 129 (1936).

³ MAITLAND, *supra* note 1.

⁴ The priest-penitent, doctor-patient, professor-student, and parent-child relationship, in and of themselves, are mere confidential relationships, not fiduciary relationships.

⁵ J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 L.Q. REV. 51, 51 (1981).

⁶ See Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 443 (1998) (noting, for example, that the civil law *fiducia*, unlike the common law trust, will not afford the beneficiary the protections of asset segregation, the *fiducia* having many of the attributes of a third party beneficiary contract).

civil jurisdictions making up all of Europe other than England and Ireland.”⁷

In 1940, formal instruction in the law of agency and the law of trusts was a requirement in most, if not all, American law schools. At one law school, for example, “Agency” was allocated three semester hours and “Equity and Trusts,”⁸ a single course, was allocated six semester hours.⁹ Today, of the 180 or so law schools accredited by the American Bar Association, fewer than twenty still require courses in agency and trusts.

In this article, I endeavor to make the case that a decision we law professors made in the 1960s, namely to marginalize the fiduciary relationship in the American law school curriculum, was misguided, and that the chickens are now coming home to roost. The Enron debacle, the Ovitz severance package, Spitzer’s action against the Canary Capital Partners hedge fund, and the accounting firm scandals—all breach of fiduciary duty cases—are only the tip of the iceberg.¹⁰ The fiduciary relationship is not an invention of the Securities and Exchange Commission (SEC). It has been imbedded in the common law for centuries. Perhaps the American law school curriculum has something to do with the absence of collective outrage on the part of the legal profession.

I advocate mandatory instruction in the fiduciary aspects of agency and trusts, not because law students are studying to become agent-fiduciaries, not because agency and trusts are bar examination subjects, not because the durable power of attorney (an agency)¹¹ and the trust are now the components of most estate plans, and not because a Fidelity mutual fund is a tangle of agency, trust, and contractual relationships. I do so because the agency and the trust are two of the five elements of the periodic table of common law private relationships, the platform upon

⁷ Steven L. Schwarcz, *Commercial Trusts as Business Organizations: An Invitation to Comparatists*, 13 DUKE J. COMP. & INT’L L. 321, 323 n.15 (2003).

⁸ Sometime after 1940, trusts became linked with wills in the American law school curriculum. This linkage is inappropriate. The will is a creature of statute. The trust, a fundamental common law legal/equitable relationship, is a creature of case law.

⁹ See Suffolk University Law School 1940 Course Catalogue (on file with author).

¹⁰ See, e.g., Class Action Complaint Breach of Fiduciary Duty and Violation of ERISA, Severed Enron Employees Coal. v. N. Trust Co., No. H-02-0267, 2002 WL 32150523 (S.D. Tex. Jan. 24, 2002).

¹¹ “Unlike corporate law and limited partnership law that provide statutory modifications to the common law of fiduciary duty, there is no statutory provision that alters the common law fiduciary duty of loyalty owed by an attorney-in-fact under a durable power of attorney.” *Schock v. Nash*, 732 A.2d 217, 225 (Del. 1999) (footnotes omitted).

which most legislation is based. The other three elements are the contract, the tort, and the legal interest in property.

II. THE CASE

The agency, the contract, the legal property interest, the tort, and the trust are interrelated. None can be understood in isolation. Knowledge of one requires knowledge of the other four.

Compare, for example, a “money market” deposit account at a bank with a share of a mutual fund. The former is a contract; the latter is an equitable interest in a trust.¹² The contractual right and the equitable interest are both items of intangible personal property. Each itself may be made the subject of a trust.

Because the depositor is in a creditor-debtor contractual relationship with the bank, not in a fiduciary relationship, the depositor is generally limited to an action at law for damages in the event the bank breaches the contract. The mutual fund investor, being in a fiduciary relationship with the mutual fund trustees, however, would have a vast array of equitable remedies available in the event of a breach of fiduciary duty, e.g., tracing, specific performance, damages, injunction, removal, and the appointment of a receiver. Another practical difference between the two relationships is that in the case of the depositor, there may be recourse to Federal Deposit Insurance Corporation (FDIC) insurance.

Law students, some lawyers, and most members of the public confuse the five fundamental legal relationships. Over the years I have asked thousands of students at the beginning of the second year of law school to explain what relationship is established when one deposits money in a bank. Most respond by saying that the account evidences an agency, a bailment, or a trust. Few answer correctly that the relationship is contractual.

When asked what a standard life insurance policy is, they generally respond that it is a trust. It is not a trust. Few appreciate that the policy is a third party beneficiary contract under which the insurance company has no fiduciary duties to the insured or to the third party while the insured is alive. There is no segregation of the premium as would be the case were the premium the subject of a trust.

This muddled understanding of common law fundamentals on the part of students is not the fault of those who teach contracts and property. It is simply that a student cannot have a complete and working understanding of a contract or bailment until the student understands

¹² All of Fidelity’s mutual funds are trusteeed. The law of trusts also applies to mutual funds structured as corporations, i.e., investment companies.

all of the alternatives, until the student has become familiar with all the elements of the common law periodic table.

In the financial world, one is generally either a principal, e.g., an investment banker or an agent, e.g., a broker-dealer:

[B]roker-dealers ordinarily do not owe their clients duties of loyalty that would require them to make up-front disclosure of each and every conflict. But, when a broker has a relationship of trust and confidence with his customer—and this depends on the facts and circumstances of each individual case—the broker does owe his customer a fiduciary duty to put the customer’s interest first.¹³

Powers of attorney are agencies. The corporation and its officers are in an agency relationship, as are a partnership and its general partners.¹⁴ The employer-employee relationship is an agency relationship. Those who control charitable corporations are fiduciaries subject to the law of trusts. Most law schools are charities subject to the law of trusts.

The lawyer is simultaneously an agent of the client, a party to a compensation contract with the client, and often a trustee of the client’s property.¹⁵ Two of the three relationships are fiduciary in nature. The third, the contractual relationship, is quasi-fiduciary because it is incident to an agency.

The law professor is an agent of, and in a fiduciary relationship with, his or her employer, the university. The law professor is not in a fiduciary relationship with his or her students. Even law professors have been known to confuse the confidential teacher-student relationship with the common law principal-agent relationship.

In recent years we have begun to see “property” juxtaposed against “contract” in law reviews in ways that suggest that they are two distinct concepts. They usually are not. While land is real property, a corporate bond, being a bundle of contractual rights, is intangible personal property. No one with formal exposure to the law of the trust, a fiduciary relationship with respect to property, would make such a mistake.

¹³ Cynthia A. Glassman, SEC Comm’r, Remarks Before the Open Meeting Regarding the IA/BD Rule (Apr. 6, 2005), <http://www.sec.gov/news/speech/spch040605cag-2.htm>. See also *Patsos v. First Albany Corp.*, 741 N.E.2d 841, 848-50 (Mass. 2001).

¹⁴ RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (Tentative Draft No. 2, 2001) [hereinafter RESTATEMENT].

¹⁵ See generally Diane L. Karpman, *In the Beginning: A Review of Legal Malpractice Book Review*, 17 GEO. J. LEGAL ETHICS 349, 358-59 (2004) (book review) (noting that a lawyer’s “[b]reach of the standard of care sounds in tort, whereas the standard of conduct [applicable to lawyers] is a combination of contractual, agency, and equitable principles”).

A prerequisite to competently practicing in any specialized area of the law is a thorough grounding in all five common law legal relationships, not just one of them. One could not, for example, practice in the specialties of taxation,¹⁶ Employee Retirement Income Security Act (ERISA),¹⁷ personal injury litigation,¹⁸ corporate mis-governance litigation,¹⁹ bankruptcy,²⁰ or the condominium form of ownership,²¹ to name only a few, without such a thorough grounding. Title to the underlying condominium property is in a trustee. Although a trust is involved, the trustee is likely to be held to a business judgment standard of conduct, not a prudent person standard. An analysis of how condominium law differs from trust law presupposes an elemental understanding of the background common law.

We ought not allow any law student to pass through an American law school having received formal instruction in some, but not all, of the fundamental common law legal relationships, or in some, but not all, of the elements of the common law periodic table. We hold ourselves out as producing lawyers capable of diagnosing legal problems. Our warranty ought not be sacrificed on the altar of student autonomy.

We cannot expect a law student who has not been exposed to the fiduciary relationship to appreciate why such exposure is critical. Every layman knows what a will does. A layman—and by layman I mean a law student—however, cannot be expected to know where the abstract legal concept of a fiduciary relationship fits into the scheme of things before being exposed to it in an academic context. A student must master the fiduciary relationship to appreciate why he or she needed to master it, and why mastering it is critical to being a complete lawyer. Several credits allocated to a required course in the fiduciary aspects of agency and the property and fiduciary aspects of trusts is a small price to pay for closing the common law loop.

III. REBUTTING THE CASE AGAINST MANDATORY FIDUCIARY RELATIONS

Over the years, we academics have put forth many reasons why instruction in the fiduciary aspects of agency and the property and fiduciary aspects of trusts should not, or need not, be mandatory. I have

¹⁶ See, e.g., *Comm'r v. Estate of Bosch*, 387 U.S. 456 (1967).

¹⁷ See CHARLES E. ROUNDS, JR., *LORING: A TRUSTEE'S HANDBOOK* § 9.5.1 (2005 ed.).

¹⁸ See, e.g., *Gorton v. Doty*, 69 P.2d 136 (Idaho 1937).

¹⁹ See, e.g., *Class Action Complaint Breach of Fiduciary Duty and Violation of ERISA, Severed Enron Employees Coal. v. N. Trust Co.*, No. H-02-0267, 2002 WL 32150523 (S.D. Tex. Jan. 24, 2002).

²⁰ See ROUNDS, *supra* note 17, § 9.11.

²¹ See *id.* § 9.12.

endeavored above to make the case that giving a law student a choice of taking a course in the fiduciary aspects of agency and the property and fiduciary aspects of trusts or taking a course in, say, evidence, is as pedagogically unsound as giving a medical student a choice of taking anatomy or surgery. What follows is a rebuttal of some of the arguments against mandatory instructions in the fiduciary relationship that have been expressed to me over the years:

A. The fiduciary aspects of agency and trusts can be covered in the required professional responsibility course.

The Code of Professional Conduct (Code) relates to the lawyer's license to practice law, i.e., the lawyer's relationship with the state. The common law of agency, contract, tort, and trusts governs the lawyer's fiduciary relationship with his or her client, and it is well settled that partners in a law firm owe each other a common law "fiduciary duty of 'the utmost good faith and loyalty.'"²² These simultaneous and sometimes conflicting fiduciary duties that an attorney owes to clients and partners were recently the subject of litigation in Massachusetts.²³ In any case, agency's common law proscriptions are more expansive and pervasive than the Code's proscriptions because the Code's focus is regulatory. Diane L. Karpman, a well-known specialist in legal ethics, speculated on why academia has said little regarding the fiduciary relationship:

Some ethicists maintain that breach of fiduciary duty is not part of the jurisprudence of legal ethics. That is a possible explanation for the paucity of academic attention being directed to teaching future lawyers these theories. However, if fiduciary obligations are inherent in what it means to be a lawyer, with loyalty and confidentiality "acknowledged by every American jurisdiction," then we are failing to teach the future members of the profession the bedrock concepts of these ethical duties.²⁴

²² *Meehan v. Shaughnessy*, 535 N.E.2d 1255, 1263 (Mass. 1989) (quoting *Cardullo v. Landau*, 105 N.E.2d 843, 845 (Mass. 1952)).

²³ *See Lampert, Hausler & Rodman, P.C. v. Gallant*, No. 031977BLS, 2005 WL 1009522 (Mass. Super. Ct. Apr. 4, 2005).

²⁴ Karpman, *supra* note 15, at 358 (footnotes omitted).

B. ERISA has preempted the common law of trusts.

The fiduciary duties articulated in ERISA are not exhaustive. “Congress relied on the common law of trusts to ‘define the general scope of [the ERISA trustee’s] authority and responsibility.’”²⁵

C. Only rich people need concern themselves with trusts.

The trustees of the 75 largest mutual funds alone hold title to \$2.9 trillion of U.S. equities. That is 20% of the \$14.4 trillion market capitalization of the stock market at the beginning of 2001. Add to that the trillions held in trustee employee benefit plans, and one can see that title to almost half of corporate America is now in the hands of a relatively few trustees who are administering for a vast segment of the American population. One commentator has labeled this phenomenon “fiduciary capitalism,” although “fiduciary socialism” might better reflect this diffusion of wealth into the population. The Enron debacle has focused the nation’s attention on the passivity of these institutional trustees—all of whom are fiduciaries, particularly as it relates to proxy voting. Note also that in a number of Supreme Court cases, the United States has been found to be a trustee of real and personal property belonging to Native Americans and occupying the status of a fiduciary.²⁶ Bottom line: The small investor, the worker, and the Native American are also trust beneficiaries.

D. The trust is a creature of equity, and equity is passé.

At all levels, the equitable remedy is taking center stage.²⁷ Few complaints nowadays are filed in this country without at least one prayer for some kind of equitable relief. Consider the development of the concept of equitable division in the divorce context. At the federal level, section 4 of the Sherman Act and section 15 of the Clayton Act direct the U.S. government “to institute proceedings in equity to prevent and restrain [antitrust] violations.”²⁸ Even on the local administrative level, equitable principles are taking center stage. The relief that the Massachusetts Commission Against Discrimination (MCAD) may grant,

²⁵ Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1299 (3d Cir. 1993) (quoting Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985)).

²⁶ See United States v. Mitchell, 463 U.S. 206, 225 (1983).

²⁷ In 1934, a Massachusetts divorce court could not award a wife’s property to the husband on the basis of equitable principles. See Topor v. Topor, 192 N.E. 52, 52-53 (Mass. 1934). Now it can. See MASS. ANN. LAWS ch. 208, § 34 (LexisNexis 2003).

²⁸ Clayton Act § 15, 15 U.S.C. § 25 (2000); Sherman Act § 4, 15 U.S.C. § 4 (2000).

for example, is equitable in nature.²⁹ Now that law schools, for whatever reason, have chosen to no longer require that a student take Equity, it falls to a course in the fiduciary aspects of agency and trusts to afford the student some exposure to the panoply of equitable remedies that may be available to the victim of a breach of fiduciary duty.

E. Trusts are passé.

We have touched on the growing phenomenon in the United States of “fiduciary capitalism” or “fiduciary socialism.” Title to more and more of corporate America is concentrating, for good or for ill, in fewer and fewer individuals. The last time we saw this phenomenon was in the years leading up to enactment of the antitrust laws over a century ago. The trust is an Anglo-American common law invention. Although there are some primitive civil law trust analogs, e.g., the usufruct, the common law trust until recently has not been recognized in the civil law jurisprudence of the Continental jurisdictions, a jurisprudence that has been heavily influenced by Roman Law and the Napoleonic Code. Why? Because imbedded in these two classic bodies of law is the principle that property is indivisible. In other words, no more than one person can have real rights with regard to the same object. The common law trust violates that principle in spades. Be that as it may, when powerful economic engines such as the United States, England, and Australia employ the trust as an instrument of commerce, others have no choice but to take heed. Italy, the Netherlands, and Malta, for example, have ratified The Hague Convention on the Law Applicable to Trusts and on Their Recognition.³⁰ It is expected that Switzerland will follow suit. The law schools on the Continent are now offering courses on the common law trust. They do not consider the trust to be passé. Nor do our trading partners on the other side of the Pacific. Mainland China only recently introduced trust law into its jurisprudence by statute through the Trust Law of the People's Republic of China, effective October 1, 2001.³¹

²⁹ See *Lavelle v. Mass. Comm'n Against Discrimination*, 688 N.E.2d 1331, 1335 (Mass. 1997), *overruled by* *Stonehill College v. Mass. Comm'n Against Discrimination*, 808 N.E.2d 205 (Mass. 2004).

³⁰ ROUNDS, *supra* note 17, § 8.12.2.

³¹ Trust Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 28, 2001, effective Oct. 1, 2001), ch. 7, art. 74, http://en.ec.com.cn/pubnews/2004_03_29/200863/1005110.jsp.

F. Equitable property rights, e.g., mutual fund participation, and donative transfers to trustees, e.g., the personal inter vivos trust, can be taught in the first year property course.

In my view, our property colleagues have enough on their plates without the added burden of explaining what an equitable property interest under a trust is, how it can arise as a result of a donative transfer to a trustee, powers of appointment, equitable remedies, and what the fiduciary relationship is all about. A bailment is not an agency. “A bailee’s freedom from control by the bailor establishes that the bailee is not the bailor’s agent.”³² Nor is a simple bailment an equitable or fiduciary relationship. It is a legal relationship, although some very good text-writers have confused the bailment with the trust.³³ A bailee’s remedies are generally legal, whereas the beneficiary’s remedies are equitable. A “bailee” with fiduciary duties is either an agent or a trustee. Ultimately, it is a question of intent. “Although a few cases outside of the United States treat bailments as fiduciary relationships, that characterization has not been adopted by U.S. courts.”³⁴

G. One can master agency and trust concepts, together with the fiduciary relationship, in an afternoon at the library perusing the restatements.

In 1940, law schools assigned as many as nine credit hours to the fiduciary relationship. I am of the opinion that only a genius could achieve a working knowledge of the fiduciary aspects of agency and trusts in an afternoon. This opinion is based on twenty plus years of experience teaching the fiduciary relationship. In any case, both the Restatement of Agency and the Restatement of Trusts are currently under revision; the laws of agency and trusts are no longer as “settled” as they were a generation ago.

H. A course in the fiduciary aspects of agency and trusts should be replaced by a writing course.

One who has a firm grasp of the five fundamental common law relationships has a better chance of generating a coherent piece of legal writing than one who is familiar with only some of them. One’s writing improves when one has something rational and coherent to say. Ten writing courses will not help the student who is unable to connect the

³² RESTATEMENT, *supra* note 14, § 1.01 cmt. f(1).

³³ JOHN C. DEVEREUX, *THE MOST MATERIAL PARTS OF KENT’S COMMENTARIES* 202 (New York, Baker, Voorhis & Co. 1881); JOSEPH STORY, *COMMENTARIES ON THE LAW OF BAILMENTS* ch. 1, § 2 (6th ed. Boston, Little, Brown & Co. 1856).

³⁴ D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 *VAND. L. REV.* 1399, 1451 n.211 (2002).

dots because he or she, for whatever reason, does not know where all the dots are.

I. It is our job as law school academics to teach our students how to think, not the black letter law.

Teaching the student the common law, all five facets of it—not *some* aspects of the common law, not *about* the common law—is critical. Any less instruction in the “black letter law” means we must share some of the blame when our students and graduates generate memoranda, briefs, and decisions that are incoherent, incomplete, and, dare one say, “half-baked.” Every day we see judges, regulators, and lawyers (especially the litigators) missing the fiduciary issues, or failing to see the common law issue lurking behind some thicket of government regulation. Courses on the black letter common law and courses on “how to think like a lawyer” complement one another.

J. My career has been a success, even though I have had no formal instruction in the fiduciary aspects of agency and trusts.

Whether or not an isolated individual has in his or her own eyes been a professional success is not relevant to the issue of whether there should be mandatory instruction in the fiduciary aspects of agency and trusts in America’s law schools.

K. Only a few law schools require agency and trusts.

The number of law schools that require agency and trusts is not relevant to the issue of whether they *should* be doing so. Forty years ago, most did. Now, most do not. Just as little thought was given to the conceptually inappropriate linkage in a single course of the trust, a creature of case law, with the will (or estate), a creature of statute, so also little thought has been given to the consequences of jettisoning the fiduciary relationship from the required curriculum. There is no virtue in running with the lemmings.

L. The fiduciary concept can be adequately imparted in a corporations course.

Scholars have traced the origins of the trust to before the Norman Conquest.³⁵ Business corporations were uncommon before 1800, particularly in the United States. A trust is a fundamental common law legal relationship.

³⁵ See, e.g., Monica M. Gaudiosi, Comment, *The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College*, 136 U. PA. L. REV. 1231, 1243 (1988).

A corporation is a creature of statute. While one can draft a trust to do all that a corporation can do (to include affording the players limited liability), there are transactional efficiencies in employing the standardized corporate form, particularly for operating enterprises.³⁶ A corporation, on the other hand, is not a complete trust-substitute.³⁷ On its own, for example, it cannot bestow property rights on unborn and unascertained individuals. Functionally, it acts like a trusteeship that has been standardized by statute.³⁸

While a corporation is neither a trust nor an agency, the law of corporations has borrowed the fiduciary concept from the common law of agency and tweaked it to suit its purposes.³⁹ “Initially, . . . [for example,] . . . the law of corporations applied the trust law sole interest rule to a corporate transaction with a director, and hence the transaction was voidable at the option of the corporation.”⁴⁰

In the corporate context, the duty of loyalty has transmogrified into the duty of “fair dealing.” Elements of common law agency are present in the relationships between a corporation and its officers and between the corporation and its agent-fiduciary independent contractors.⁴¹ At common law, directors also were agents of the corporation.⁴² The law in the United States has changed in this regard: “Although a corporation’s shareholders elect its directors and may have the right to remove

³⁶ “The trust is functionally protean. Trusts are quasi-entails, quasi-usufructs, quasi-wills, quasi-corporations, quasi-securities over assets, schemes for collective investment, vehicles for the administration of bankruptcy, vehicles for bond issues, and so on and so forth. In software terminology, trusts are emulators.” George L. Gretton, *Trusts Without Equity*, 49 INT’L & COMP. L.Q. 599, 599 (2000) (footnotes omitted).

³⁷ Hansmann & Mattei, *supra* note 6, at 472.

³⁸ *Id.* at 476.

³⁹ See *Schock v. Nash*, 732 A.2d 217, 225 (Del. 1999).

⁴⁰ John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 958-59 (2005).

⁴¹ See RESTATEMENT, *supra* note 14, § 1.01 cmt. c.

The relationship between the foreman and the laborers is not an agency relationship despite the foreman’s full control, nor is their relationship one of subagency The foreman and laborers are co-agents of a common employer who occupy different strata within the organizational hierarchy; the foreman’s role of direction, defined by the organization, does not make the laborers the foreman’s own agents. The laborers act on behalf of the common employer, not the foreman. Likewise, the captain of a ship and its crew are co-agents, hierarchically stratified, who have consented to act on behalf of their common principal, the ship’s owner.

Id. at § 1.01 cmt. g.

⁴² For a historical background on the categorization of directors as trustees or agents, see PAUL L. DAVIES, *GOWER’S PRINCIPLES OF MODERN COMPANY LAW* 598 (6th ed. 1997).

directors once elected, the directors are neither the shareholders' nor the corporation's agents . . . given the treatment of directors within contemporary corporation law in the United States."⁴³

If corporate directors are neither agents of the corporation nor agents of the shareholders, who then is the principal? One learned commentator has suggested that the state is the principal.⁴⁴ The point is that the concept of the fiduciary is not a creature of the law of corporations but of common law. In the corporate context, only at the margins has there been statutory modification of the common law of fiduciary duties.⁴⁵ It would then seem extraordinarily inefficient, misleading, and pedagogically incoherent to introduce a student to the common law fiduciary concept in a course on the corporation, a statutory construct of relatively recent origin. Moreover, powers of appointment and equitable property interests in unborn and unascertained individuals, a uniquely Anglo-American contribution to global jurisprudence, would inevitably fall by the wayside.

Finally, the trust has a way of taking control of the corporation. The Sherman Antitrust Act was a reaction to initiatives by Standard Oil Company to induce stockholders in various enterprises to assign their stock to a board of trustees and to receive dividend-bearing trust certificates in return.⁴⁶ Today, it is through the mutual fund, the employee benefit plan, and the charity that the trust seeks to control the corporation.

At minimum, some exposure to the fundamentals of agency and trust law ought to be a prerequisite to enrolling in any Corporations course. If it is generally the case that those who teach Corporations do not agree with this assessment, then Curriculum Committees may want to have in their files written explanations of why there is disagreement.

M. I am not against instruction in the fundamentals of agency and trust law, it just should not be mandatory.

A course in the fundamentals of agency and trust law should not be elective for the same reasons that courses in the fundamentals of contracts, property, and torts should not be elective. All five fundamental common law legal relationships should have equal status in the law school curriculum because they are interrelated and

⁴³ RESTATEMENT, *supra* note 14, § 1.01 cmt. f(2).

⁴⁴ See ROBERT CHARLES CLARK, CORPORATE LAW 22 (1986).

⁴⁵ See *Schock v. Nash*, 732 A.2d 217, 225 (Del. 1999).

⁴⁶ See 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 10-12 (Earl W. Kintner ed., 1978); see also Franklin D. Jones, *Historical Development of the Law of Business Competition*, 36 YALE L.J. 207, 217-18 (1926).

codependent. Moreover, together they create the context in which most legislation is crafted. It has been suggested that most students would elect Agency and Trusts in any case. Why would they do so, one might ask? If the institution does not signal an appreciation of the interrelationships of the core common law concepts through the design and hierarchical structure of its required curriculum, it is asking a lot to expect the students to gain such an appreciation left to their own devices. And to make instruction in the fiduciary aspects of agency and the property and fiduciary aspects of trusts mandatory only for marginal students or students in academic difficulty strikes one, to put it mildly, as not in the interest of the profession. A course whose primary focus is the two core common law fiduciary relationships, the agency and trust, ultimately is a values course that is politically and ideologically neutral. Judge Cardozo said it best in what essentially was an agency case:

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.⁴⁷

IV. CONCLUSION

I have endeavored to make the case that it is conceptually incoherent for a law school to have a required curriculum which does not include a course whose primary focus is the common law fiduciary relationship. I leave it to others to make the practical case for mandatory instruction in the fiduciary relationship, e.g., that agency and trusts are both tested on the bar examination, that agencies and trusts are components of most estate plans, or that a Fidelity mutual fund is a tangle of agency, trust, and contractual relationships. For me, it is not that a student unfamiliar with the fiduciary relationship will leave the law school unable to write a decent estate plan or understand how a Fidelity mutual fund is legally structured; rather, it is that he or she will enter the real world ill-equipped to make legal and ethical diagnoses. That is bad for the student, bad for society, and bad for the law.

⁴⁷ *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (citing *Wendt v. Fischer*, 154 N.E. 303, 304 (N.Y. 1926)).

APPENDIX

A MODEL FIDUCIARY RELATIONS COURSE SYLLABUS

(Assumption: 2 credits: (14 classes, 100 minutes each))

5 Classes

Topics: The legal structures of the agency and the trust, the parents of the Anglo-American fiduciary concept, which would include a discussion of the distinctions between these fiduciary relationships and non-fiduciary legal relationships, such as the third party beneficiary contract and the bailment.

Author's Comments: The nuances of a particular fiduciary relationship cannot be taught in a vacuum. The student needs some understanding of the elements of the agency or trust to which the relationship is incident. Thus, the first five classes would be devoted to sorting out the parties to the agency and trust relationships, how these relationships can arise, and how property rights are created or altered by their creation. A third party beneficiary contract, such as a life insurance policy, generally imposes no fiduciary duties on any of the parties to it. An investment management agency agreement or a trustee mutual fund, however, does. Sorting out the rights, duties, and obligations of the parties to the agency and trust has the added benefit of providing a foundation for the later study of agency-trust statutory hybrids, such as the corporation.

A trust (unlike the agency, where title to the subject property, with some exceptions, remains with the principal) creates vested or contingent equitable property rights. In the case of the mutual fund, vested interests are created in the investor. In the case of an ERISA-qualified defined benefit plan, the employee's equitable interest in the associated trust may be both vested and contingent. One's equitable interest in a private discretionary trust is fully contingent. The type of equitable property interest created pursuant to the terms of a particular trust will determine the nature and scope of the trustee's fiduciary duties.

On the other hand, it should not be absolutely necessary in a pure fiduciary relations course to cover the rule against perpetuities as it applies to equitable property interests and non-fiduciary powers of appointment, each being pure property concepts that happen to be spin-

offs from the trust concept.⁴⁸ That being said, serious consideration should be given to mandating their coverage in the first-year Property course. Apart from bar-passage considerations, the rule against perpetuities is the tried and true pedagogical vehicle for affording students a context in which to efficiently sort out contingent and vested legal and equitable property interests; and the power of appointment, which is covered in the Restatement of Property, is “the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out.”⁴⁹

“[D]irect ownership of stocks by American households has declined from 91% in 1950 to just 32% today.”⁵⁰ As we progress into the twenty-first century, 58% of all stocks are now held in trust or arrangements governed by the law of trusts (such as the investment company and the charitable corporation).⁵¹ Academia’s failure to keep abreast of these astounding developments is rendering aspects of the core curriculum provincial, obsolete, and in some cases even irrelevant. In the direct ownership society of the 1960’s, it may not have been critical that a law student be trained to distinguish between a contingent property interest and a vested property interest in the equitable context, and between a fiduciary and non-fiduciary power of appointment, or to understand that a trust is not a bailment, or that a trust can arise either gratuitously or incident to a contract. In the indirect ownership (or intermediation) society of the twenty-first century, it is. The ongoing battle over the future of Sweden’s Skandia is a good illustration of why this is the case. A trustee of a trust has the title to the underlying assets. If the underlying assets are stock, he, she, or it has a power and a fiduciary duty to vote the stock in furtherance of the interests of the trust beneficiaries, i.e., those with the equitable interests. Collectively, the trustees of a number of Fidelity’s mutual funds have title to 9% of Skandia.⁵² A majority of Skandia’s board members oppose a 44.9 billion Swedish kroner bid (\$5.9 billion) by London’s Old Mutual PLC to acquire Skandia.⁵³ Skandia’s Chairman, who favors the acquisition by Old Mutual, has felt obliged to resign.⁵⁴ Fidelity, which effectively controls

⁴⁸ It should be noted that the owner of a share in a nominee trust generally possesses a non-fiduciary *inter vivos* power of appointment while the owner of a mutual fund share generally does not.

⁴⁹ W. Barton Leach, *Powers of Appointment*, 24 A.B.A. J. 807, 807 (1938).

⁵⁰ John C. Bogle, *Individual Stockholder, R.I.P.*, WALL ST. J., Oct. 3, 2005, at A16.

⁵¹ *See id.*

⁵² *Skandia Chairman to Resign*, WALL ST. J., Oct. 8, 2005, at B6.

⁵³ *Id.*

⁵⁴ *See id.*

Skandia through its mutual funds, is reported to be considering replacing some of Skandia's board members before the offer by Old Mutual expires.⁵⁵ It feels it may have a fiduciary duty to its investors to take this action. This is a clear example of how the trust can trump, and is trumping, the corporation. The source of control is where the action is. In this case, the source of control is in Boston, of all places, not London or Stockholm. The aggregation of large chunks of corporate America in the hands of a few trustees at the end of the nineteenth century—a phenomenon that sparked the antitrust legislation that is still with us today—is yet another illustration of how voracious is the appetite of the trust.

4 Classes

Topics: Fiduciary Duties.

- Core Duties
 - Loyalty (self dealing / conflicting fiduciary functions)
 - Duty of Prudence (generally, and in investment matters)
- Specific Duties Incident to the General Duties of Loyalty and Prudence
 - Full Disclosure (no *caveat emptor*)
 - Duty of Confidentiality
 - Duty of Segregation (no unauthorized commingling)
 - Duty of Personal Attention (no unauthorized delegation)
 - Duty to Give Account
 - Duty not to Exceed Authority

Author's comments: “Two grand principles underlie much of the Anglo-American law of trusts: the trustee's duties of loyalty and of prudence.”⁵⁶ They underlie, as well, the law governing agent-fiduciaries. Neither duty, however, is imposed on a party to a simple contract, unless incident to an associated agency relationship.⁵⁷ An insurance company, for example, is not a fiduciary in its capacity as a party to one of its life insurance contracts. The other fiduciary duties above-listed are incident to the duty of loyalty or the duty to be prudent, or both.

⁵⁵ *Id.*

⁵⁶ JOHN A. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 678 (3d ed. 2000) (emphasis omitted).

⁵⁷ The lawyer-client contract for compensation is incident to the lawyer-client agency relationship.

1 Class

Topics: Equitable remedies for breaches of fiduciary duty.

- Damages
- Tracing and imposition of constructive trust
- Accounting for profits
- Injunction
- Specific performance
- Removal from fiduciary position
- Reduction or denial of compensation
- Appointment of special fiduciary or receiver
- Punitive or exemplary damages (generally not available in equity)

Author's comments: In the litigation context, the consequences of a breach of fiduciary duty are [generally] different from the consequences of a breach of a nonfiduciary duty, *e.g.*, failing to carry out one's obligations under a sales contract. In the case of a breach of fiduciary duty, there are [generally] more remedy options available to the party to whom the duty is owed [tracing, for example], burdens of proof are likely to fall more heavily on the fiduciary [a presumption of undue influence, for example], and periods in which actions must be brought will tend to run from the time when actual notice of the breach is received by the party to whom the duty is owed [implicating the availability of the equitable defense of laches, for example]. This is generally the case whether the fiduciary relationship is incident to a trust or an agency.⁵⁸

1 Class

Topics: Historical, conceptual, and jurisprudential contexts.

Author's comments: "In the twelfth and thirteenth centuries and in the early part of the fourteenth century the common-law courts exercised powers which we now call equitable. . . . Gradually, however, the common-law courts became more rigid and their equity jurisdiction disappeared."⁵⁹ In time, the Court of Chancery took up the equity mantle. This set in motion a chain of events that culminated in the Anglo-American trust, an institution that essentially evolved from an

⁵⁸ ROUNDS, *supra* note 17, § 7.2 (footnotes omitted).

⁵⁹ AUSTIN WAKEMAN SCOTT, LAW OF TRUSTS § 1.1 (1939).

equitable remedy. While an agent is in a fiduciary relation with his principal as a trustee is with the beneficiaries of the trust, the two relationships have a different history and different consequences flow from them, even though "in the middle ages the germ of agency [was virtually indistinguishable] from the germ of what ultimately became the use or trust."⁶⁰ Over time, the notion of trust and that of agency came to be differentiated in the following areas: title, control, liability, consent, termination, actions against third persons, and disposition upon death. The following resemble fiduciary relationships but are not: bailment, mortgage, pledge, lien, equitable charge, condition, debt, contract to convey land, third party beneficiary contract, and assignment of a chose in action.

It was once thought that the trust had its origins in Roman law. Today there is a school of thought that traces the origin of the Anglo-American trust to the Islamic *waqf*.⁶¹ It is suggested that the *waqf* was introduced into England by Franciscan friars returning from the thirteenth century crusades.⁶² The theory that generally holds sway today is that uses and trusts have their roots in ancient German law.⁶³ Modern Germany, however, does not recognize the trust. Nor does France, including those areas on the Continent that were once Norman. Until recently, that included the Channel Islands. It was in England that the use evolved into the modern trust.

The concept of the *fiducia* can be traced to Roman law. Its modern counterpart is the French *prete nom* and the German or Swiss *treuhand*. Like a common law trust, the *fiducia* involves a transfer of property to someone (the *fiduciarius*) who must administer it for the benefit of another. Unlike a trustee, however, the *fiduciarius* has both the legal and the equitable interest. The consequence is that the *fiduciarius* can get at the property and the beneficiary has no equitable property right. The beneficiary has only a personal claim against the *fiduciarius* in the event of an unauthorized transfer of the property to a third person. However, in several jurisdictions, a level of protection has been introduced by legislatively imposing Anglo-American agency-like fiduciary duties on the transferee. Other Roman and civil law agency and trust analogs include the following: *special parsimony*, *usufruct*,

⁶⁰ *Id.* at § 8.

⁶¹ *See, e.g.,* Gaudiosi, *supra* note 35, at 1244-47. The *waqf* is "an Islamic charitable trust created by an owner to assure that private property generates a permanent source of income for the public good and the donor's family." 4 ENCYCLOPEDIA OF THE MODERN MIDDLE EAST 1875 (Reeva S. Simon et al. eds., 1996).

⁶² *Id.* at 1244-45.

⁶³ For a discussion of the origin of the English trust, see ROUNDS, *supra* note 17, § 8.37.

fideicommissum, *emphyteusis*, power of attorney (civil law), foundation (civil law), *stiftung*, and *anstalt*. It is the Roman concept of *special parsimony* that comes closest to resembling the Anglo-American trust.

3 Classes

Topics: Applications of the fiduciary concept.

- Agency
 - Lawyer-client
 - Employee-employer
 - Real estate agent
 - Investment management (agencies)
 - Power of attorney (durable and otherwise)
 - Health care proxy (statutory)
 - Guardianship (statutory)
 - Financial planner
 - Non-trustee ERISA fiduciaries

- Trust
 - Mutual funds (trusteed and corporate, including REITs)
 - Charities⁶⁴ (trusts and corporations)
 - Employee benefit trusts
 - Trustees for bondholders (corporate trust functions under Trust Indenture Act)
 - Asset “securitization”⁶⁵ trusts (mortgage, credit card, automobile, student loan debt)
 - Nominee trusts (effecting divisibility and transferability of real estate)
 - Executorships (statutory trust variants)

- Agency and/or trust statutory hybrids
 - Corporations
 - Partnerships

- Partnership, corporate, agency, and trust vehicles associated with financial and estate planning

⁶⁴ Many American universities are public charitable trusts.

⁶⁵ By securitization, we mean using the trust device to convert legal property interests in a bundle of assets, e.g., student loan obligations, into equitable interests in the fund or bundle that may be represented by certificates that resemble shares of stock.

Author's comments: The fiduciary relationship is not a professional "specialty." It is an ubiquitous, all-pervasive relationship incident to the agency and the trust, and to their statutory progeny, such as the corporation. At any given time, a layman, a lawyer, or a law professor is likely to be party to numerous fiduciary relationships, whether as an employee or an employer; as a consumer of the services of a lawyer, real estate agent, investment manager, or certified financial planner; as the owner of shares of a mutual fund or shares in a corporation; as a participant in an employee benefit plan; as either an agent or principal under a power of attorney, durable or otherwise; as someone's business partner; as executor of someone's estate; as trustee of someone's personal trust; as a trustee or beneficiary of a trust incident to a divorce property settlement, etc. A license to practice law is a license to be a type of agent-fiduciary. A law school's *raison d'être* is to churn out agent-fiduciaries. Accordingly, a bare bones course in the fiduciary aspects of agency and trusts should be mandatory in the American law school; and every member of the bar, and certainly every member of a law faculty, should be more than qualified to teach it with little or no advance preparation. If that is not the case, then the legal profession (and society) has a big problem. Too many law schools have made the mistake of marginalizing the fiduciary relationship by relegating it to the domain of the estate planner. Is the next step in the "reform" of the American law school curriculum to relegate formal instruction in contract principles to an elective course in insurance law? Let us hope not. It is high time that this trend get reversed, that we get back to the basics, all the basics. The law of agency is not a "specialty." Trust law is no more a "specialty" than is contract law. And neither is the law of the fiduciary relationship a "specialty." It is a relationship that pervades, cuts across, and has application in all aspects of the law, including all the actual legal specialties and sub-specialties.