

Toward Universal Fiduciary Principles

*Tamar Frankel**

Fiduciary relationships play an important role in civil law and common law jurisdictions. While both legal systems offer similar outcomes in upholding fiduciary law principles, the way they achieve these ends is fundamentally different. In common law jurisdictions, fiduciary law is rooted in the law of property. By contrast, in civil law jurisdictions, fiduciary principles find their source in contract law. This article seeks to reconcile these differences, by identifying universal principles that apply to both systems. The author describes the sources of fiduciary law in the common law and the civil law, then highlights underlying differences between the two systems and identifies common principles. Ultimately, she argues for the adoption of a hybrid system of fiduciary law, built upon broad unifying principles that could apply in both common law and civil law jurisdictions.

* Professor of Law, Michaels Faculty Research Scholar, Boston University School of Law. I am grateful for the wonderful comments of my colleagues Professors Andrew Kull and Gary Lawson, and Professor Cully Jordan.

Introduction

I. The Nature and Objectives of Fiduciary Relationships

A. Relying on Others: Benefits and Risks

B. Fiduciary Rules in Common Law and Civil Law: Same Purpose, Different Routes

II. Fiduciary Rules in the Common Law and Civil Law

A. The Common Law Foundation of Fiduciary Law: Property Law and Principles of Equity

B. The Civil Law Rejects Bifurcation of Property Rights

C. The Civil Law Regulates Fiduciary Relationship by Contract and Statute

D. The Common Law Rejects the Contract Model as the Basis for Fiduciary Law

E. The Theme of Morality

F. The Importance of the Distinctions Outlined Above

III. What Can Be Done to Unify Fiduciary Law?

A. What Can We Learn from the Attempts to “Transplant” Common Law into Civil Law Systems?

(i) The Experience of Japan

(ii) The Experience of China

(iii) The Experiences of South Korea and Taiwan

(iv) The Movement to Broader Codification in Civil Law Systems and a Degree of Codification in Common Law

B. What Can We Learn from the Attempts to Unify Languages?

(i) The Effort to Create a Global Language

(ii) Can the Common Law Syntax of Fiduciary Duties Change from Property to Contract?

C. Should the Markets Decide?

D. Choosing a Dual System

(i) The Secrets of an Effective Dual System

(ii) The Benefits and Costs of Creating Hybrids

(iii) Establishing a Set of Principles

(iv) Embodying the Same Principles in Different Legal Systems

(v) Providing a Structure for the Choice of Law

(vi) Establishing an Implementing Court

Conclusion

Introduction

Fiduciary relationships play an important role in societies around the globe. No group of individuals can survive, let alone prosper, unless its members rely on each other to some extent. In every civilization, a few members specialize in services that many need. Other members must rely on these experts to avoid wasteful duplication of effort, to tell the truth,

to keep their promises, to devote their services to those who trust them and to provide the promised services in a proficient way.¹

Yet reliance and trust pose risks for the trusting and dependent persons. “Trusted persons” might not tell the truth, might not fulfill their promises, might misappropriate entrusted property or misuse their expertise for their own benefit. They might fail to perform their services as proficiently as they represented they would. When the risks of trust and reliance are high, persons might take steps to verify the truth and reliability of those whom they must trust, or avoid the use of fiduciaries by attempting to acquire the expertise and perform the services themselves. When members of society choose any of these alternatives, their costs and the costs to society are likely to rise.² To be sure, the service givers might offer guarantees of their trustworthiness that reduce the risks for the users. But they may do so only so long as the costs of these guarantees that they incur do not exceed the benefits that they gain from providing the services. There comes a point when “trusting persons” would choose to refrain from seeking trusted services from others, and trusted persons would cease to offer their services. These are the situations in which law enters the scene.

Law plays a crucial role in facilitating reliance among members in society by reducing the risks for entrusting members and increasing the incentives of trusted persons to act in a trustworthy and expert manner. The cost to trusting people are reduced by prohibiting fiduciaries’ abuse of trust and negligent services, and the cost to fiduciaries is reduced by legal guarantees of their trustworthiness.³

Fiduciary relationships exist around the globe in both common law and civil law jurisdictions. Both legal systems aim to facilitate trusting relationships and to encourage members of society to interact and avoid

1. See Tamar Frankel, *Trust and Honesty: America’s Business Culture at a Crossroad* (New York: Oxford University Press, 2006) at 59–77 [Frankel, *Trust and Honesty*].

2. See Tamar Frankel, *Fiduciary Law* (Oxford: Oxford University Press, 2011) at 30 [Frankel, *Fiduciary Law*]. See also a definition based on the parties’ inequality in Paul B Miller, “A Theory of Fiduciary Liability” (2011) 56:2 McGill LJ 235 at 253–56. For a variety of views on fiduciary law, see “Symposium: The Role of Fiduciary Law and Trust in the Twenty-First Century: A Conference Inspired by the Work of Tamar Frankel” (2011) 91:3 BUL Review 833.

3. See Frankel, *Trust and Honesty*, *supra* note 1 at 58 (social pressures can substitute for legal regulation).

costly duplication. Both systems herald moral, honest and fair behaviour among the parties. Even though they share the same goals, the common law and civil law systems seek to reach them by different routes. These differences produce rights, judicial approaches and detailed rules that are poles apart.

Indeed, there were periods in which the two systems intersected. In the seventeenth century, the common law drew upon Roman law,⁴ and even today it includes Latin words in some contexts.⁵ However, the current regulation of trusted persons differs in each system, drawing on a fundamentally distinct structure, culture and judicial enforcement process. The common law draws the regulation of fiduciaries mainly from property law, while in the civil law it is based on contract.⁶ In the common law the judicial process is managed more actively by the parties in an adversarial mode as compared to the more passive parties and more “hands-on” judges in the civil law.⁷

Initially, this article was not designed to offer an overview of the differences between the common law and civil law systems. I had hoped to limit the discussion to particular situations and specific source rules, but once I began the research, I could not avoid a broader view of the structure, approach and history of the two systems. This discussion is nonetheless restricted to the two legal categories that demonstrate the main differences between the common law and civil law regulation of fiduciary relationships. Notwithstanding the variations within each system, these categories—and the differences they represent—are fundamental and deeply rooted in the history, culture and enforcement of the two legal systems. This article and its inquiry were driven by a practical problem

4. See CH van Rhee, “Trusts, Trust-Like Concepts and *Ius Commune*” (2000) 8:3 ERPL 453 at 455.

5. See e.g. Paul S Gilles, “Latin in Vermont Law: *Omnis Gallia est Divisa in Tres Partes. Julius Caesar, De Gallico Bello*” (2002) 28:4 Vt BJ 15 (“[L]atin words are placeholders for concepts, but the elegant phrases of the English common law are chains of words making so perfect an exposition of a legal principle that they resisted translation all those years” at 16).

6. See Part I, below.

7. See Frankel, *Fiduciary Law*, *supra* note 2 at 79–99. See also Tamar Frankel, *Fiduciary Law: Analysis Definitions, Relationships, Duties, Remedies over History and Cultures* (Anchorage: Fathom Publishing Company, 2008) at 7–23; Dominik Lengeling, *Common Law and Civil Law: Differences, Reciprocal Influences and Points of Intersection* (Toronto: Patrick Schindler/Schleifenbaum & Adler, 2008).

that is begging for a solution. There is no attempt to offer an authoritative statement on fiduciary law, as a treatise would.⁸ Rather, this article aims at a far less ambitious purpose: to state the problem, to underscore the reasons for its existence and to suggest a possible solution for consideration.

I have been teaching fiduciary law for some time, and have had among my students lawyers who were educated in civil law systems. I have watched them struggle to understand the common law and “thinking the common law way”. They invariably sought the *rule* on which they could base a particular transaction or draw an argument. In contrast, every first year student in the United States starts the study of law by focusing on the facts of each case and the intention of the parties. This gives rise to arguments, which lead to searching for the generalities—the rules. The source of the rules may be in the dictionary definition of words, in other cases dealing with similar (but not necessarily identical) facts, in legislation and similar publications, such as those of the American Law Institute. Thus, although both civil law and common law systems seek solutions to similar problems, they lead the searcher to different starting points, and toward different sources, which may culminate in different interpretations.

As international trade is expanding and relationships are being built among strangers, common law and civil law scholars and practitioners would benefit from adjusting agreements and rules toward a more unified approach.⁹ In the context of global commerce and finance, and amid rising costs of verifying honest and moral behaviour, laws designed to strengthen trust relationships have become crucial. A unified legal language, or a helpful dictionary for translation, even with various accents and intonations, could lead to shared values, a better understanding among the actors and stronger trusting relationships.

To encourage smooth and reliable fiduciary interactions, this article examines and highlights two relevant and (I believe) fundamental differences between the two systems, and then proposes principles of fiduciary law to which both systems may be dedicated. With time and practice, these principles will hopefully shape more specific, unified rules

8. See e.g. Tamar Frankel & Ann Taylor Schwing, *The Regulation of Money Managers: Mutual Funds and Advisers*, 2d ed (New York: Aspen Publishers, 2000).

9. See Mathias Reimann, “Parochialism in American Conflicts Law” (2001) 49:3 Am J Comp L 369.

for select relationships in the form of a dual and varied, yet universal, fiduciary law.

This article is organized as follows: Part I outlines the benefits offered and the risks posed by trusting relationships for the parties and for society. It notes the shared objective of the civil law and common law in encouraging trusting relationships, and the different approach that each system adopts to reach the same goals. Part II explores the differences between the common law and civil law relating to fiduciary relationships, and demonstrates the effect of these differences in reaching the shared objectives. Part III examines possible approaches to the unification of fiduciary law within the two systems and recommends a process that might lead to a dual system of fiduciary law.

A word about terminology: in this article, trusting persons are called *entrustors* and trusted persons are called *fiduciaries*. Fiduciaries have been around for thousands of years. The Code of Hammurabi regulated agents as fiduciaries. There were property managers in Bible stories. There were trustees in England in the seventeenth century and the *Wakf*—the trust in Muslim countries—existed long before that. Today there are directors, officers and money managers all of whom can be named fiduciaries. The entrusting parties in various types of fiduciary relationships do not, however, have a single name. They are called “beneficiaries” of the trust, “principals” of the agents, “clients” of lawyers, and “investors” and “corporations” in their relationship to corporate managers and money managers. One reason for the absence of a general name for the trusting parties who deal with fiduciaries may be that the law focuses on the *duties* of fiduciaries and only secondarily on the *rights* of entrustors. Another reason may be that fiduciary law is open to fiduciary newcomers. Because this article deals with parties that trust fiduciaries in various relationships, all of the parties to fiduciaries are called *entrustors*.¹⁰

10. See Frankel, *Fiduciary Law*, *supra* note 2 at 4–6.

I. The Nature and Objectives of Fiduciary Relationships

A. Relying on Others: Benefits and Risks

In most if not all societies, members rely on each others' services. Some services require expertise—the acquisition of knowledge—at a significant investment of time and cost. Other services relieve members from performing some tasks. To avoid the duplication of expert services and to encourage specialization, society has an interest in inducing entrustors to seek experts' services.

It should be noted that fiduciary law does not cover the entire range of trusting relationships. In separating the relationships that are protected by fiduciary law from those that are not, the starting point is not solely trust and reliance. Fiduciary relationships involve the *kind* of trust and reliance that society is interested in nurturing. This is the first element required for the law to impose on one party—the fiduciary—duties of honesty and trustworthiness.

The second element of a fiduciary relationship is the entrusting of property or power. Entrusted property and power initially belong to the entrustors, and should be used, at least in part, for their benefit. Without entrustment, the fiduciaries cannot perform their services. For example, investment managers and corporate managers cannot carry out their functions if investors' property is not entrusted to them. Similarly, clients must give their lawyers the power to represent them in court, without which lawyers cannot perform their services. The inherent weakness of an entrustor, as compared to the fiduciary (for example, a child's vulnerability relative to an adult), may raise issues of legal protection for the weaker party.

A third feature of the fiduciary relationship is that controlling fiduciaries in the performance of their services and in the use of entrusted assets may undermine the very usefulness of those services. In changing environments, the long-term services to be provided by fiduciaries cannot be specified in advance, but may depend on changing circumstances, and fiduciaries have the expertise to make those adjustments. For example, an investor cannot closely control a money manager's decisions, which

must depend on the manager's assessment of future changes in market conditions.

In the case of some expert services, controlling the service providers is impossible. A patient in surgery cannot control the surgeon's performance. A client who attempts to interfere in his lawyer's cross-examination is very likely to hurt his own case. Control is also costly in terms of time and attention and undermines the benefit of reliance. Nor can all entrustors choose their fiduciaries. For example, a child beneficiary cannot choose or remove a trustee. Even though the trustee was chosen by the trustor, the trustee controls and invests the child's property.

Entrustment, the inability to control fiduciaries' performance, and the difficulty of evaluating the quality of fiduciaries' expertise, all pose risks for entrustors. The entrusted fiduciaries might be tempted to misuse entrusted power and property, or to shirk their obligations. Ideally, fiduciaries will act in a moral, self-limiting and honest way. When they have duties to two conflicting entrustors they should know precisely what to do; their conscience will guide them to the right solution. However, ideal scenarios do not always present themselves. The entrustors may have to personally enforce the fiduciaries' duties, and may find it very hard to do.

In the common law, fiduciary duties are usually limited to situations in which the other party *cannot but* trust the fiduciary. The fiduciary is entrusted with property or power *for the benefit of the entrustor* who cannot control the fiduciary's use of that property or power without undermining the very usefulness of the fiduciary's services. In the common law, in situations where entrustors can either avoid entrustment or reasonably control its use, fiduciary law is less likely to be applied. Another branch of the law, such as contract, might apply in the case of a breach of promise. In the civil law, as we will later see, a different choice of legal branch might be imposed.

Risks to entrustors can also pose risks to society. The dangers of loss from entrustment might deter entrustors from resorting to fiduciaries' services. When the costs of fiduciaries' guarantees of trustworthiness rise, fiduciaries might cease to offer their services. As a result, the parties are not likely to interact, and society may suffer damage. In these circumstances, fiduciary law interferes in the relationship.

Thus, as one author has suggested, a fiduciary relationship is treated as a distinct kind of legal relationship “in which one person (the fiduciary) wields discretionary power over the practical interests of another (the beneficiary)”, and “fiduciary duties are explicable solely in terms of normatively salient qualities of the fiduciary relationship”.¹¹ Those duties reflect the nature of the relationship.

B. Fiduciary Rules in Common Law and Civil Law: Same Purpose, Different Routes

The common law and the civil law systems aim at achieving the same purposes in this area. Both systems address the risk to the entrustor from fiduciary relationships. However, the two systems reach the desired result in different ways.

The common law addresses entrustors’ risks by protecting their entitlement to the entrusted property or power, and by balancing the extent of the legal protection with the entrustors’ own ability to protect their interest in the relationship. This model of fiduciary law reflects the property model.¹² The focus in the common law is on protecting *entrusted property or power*; it imposes duties on fiduciaries to prevent the misappropriation of entrusted property and the misuse of entrusted power, because they do not belong to the fiduciaries.¹³ Even though fiduciaries have legal ownership of the property or the legal right to exercise power, beneficial ownership of the property or power belongs to

11. Miller, *supra* note 2 at 235.

12. To be sure, there are scholars of both traditions, especially in the law and economics group, who argue for fiduciary law as default rules of contract law. And there are some that accept the law and economics view but add another value to trust law. See e.g. Henry Hansmann & Ugo Mattei, “The Function of Trust Law: A Comparative Legal and Economic Analysis” (1998) 73:2 NYUL Rev 434.

13. Frankel, *Fiduciary Law*, *supra* note 2 at 108.

the entrustors,¹⁴ so fiduciaries must not act carelessly or in conflict with their entrustors' interests.¹⁵

The civil law rejects the common law approach of bifurcating property ownership. In the civil law, once an owner, always an owner (at least before bankruptcy). A transfer of ownership must be complete. In most civil law jurisdictions, a transfer to a trustee shifts full ownership without exception. There is a good reason for this rule: it facilitates market transactions. There are few questions about who the owner truly is. A buyer from an ostensible owner gains full ownership—there are no “ifs, ands or buts”. The common law system opens the door to questions about a purported owner's true extent of ownership and allows the real beneficiaries and sometimes the true decision makers to be hidden (e.g., in a voting trust).

In contrast to the common law, the basis of civil law's regulation of fiduciary relationships is contract law. The civil law addresses the entrustors' risks by focusing on the terms of the agreement among the fiduciaries and entrustors, the fairness of these terms and the circumstances that led to the parties' agreement. To be sure, in both systems, the law alone does not ensure trusting and trustworthy behaviour. But the law plays a role in enticing trusting and trustworthy people to interact.¹⁶ When the pendulum swings and scandals demonstrate that there is a high risk to trusting, stricter rules and sanctions are enacted to persuade people to trust and entrust, as well as to induce trusted persons to mend their ways.¹⁷

14. Roman law had a similar idea. It imposed a duty on a slave's true owner to abide by the slave's contracts with third parties. It also imposed a duty upon those who received slaves under a will to free the slaves according to the request of the trustor. In these cases, the reason for recognizing a fiduciary relationship was that the law did not recognize a slave's obligation (being property) nor the trustor's directive to act (rather than merely receive property under the will). These rules allowed for deviations from the law, without explicitly changing the law. See Frankel, *Fiduciary Law*, *supra* note 2 at 90–91.

15. The law offers an escape route to the fiduciaries by allowing them to avoid the prohibition on misuse of entrustment after disclosing the facts to the entrustors and receiving their consent. See *ibid* at ch 4.

16. See Tamar Frankel, “Fiduciary Law” (1983) 71:3 Cal L Rev 795 [Frankel, “Fiduciary Law”] (“[t]he law should . . . protect the entrustor by regulating the fiduciary to promote the relations” at 816).

17. It should be noted that the law's deterrence and punishment mechanisms could undermine the moral behaviour and self-limitation aspects of trustworthiness. See Frankel,

The different emphasis on morality in the two systems is not drastic, yet it is noteworthy. American courts have mentioned morality in relation to breach of fiduciary duties for decades. As one court noted a century ago, the equity applicable to a fiduciary relationship is “based on the highest morality”.¹⁸ A claim against an attorney for breach of a fiduciary duty must involve immoral behaviour.¹⁹ Fiduciary duties have been said to raise “the highest and truest principles of morality”,²⁰ and courts have recognized a “need for enforcement of commercial morality in fiduciary relationships”.²¹ The common law emphasizes an attachment to misappropriation and misuse of entrustment. In contrast, the civil law focuses on the contractual terms of the relationship.

II. Fiduciary Rules in the Common Law and Civil Law

A. The Common Law Foundation of Fiduciary Law: Property Law and Principles of Equity

Under the common law, fiduciary law follows the property law model and the principles of equity. The common law protects entrustors by viewing fiduciary relationships as involving a legal transfer of property or power from entrustors to their fiduciaries. The transfer is designed to facilitate the performance of fiduciary services. The beneficial owners are entitled to enforce their rights against the fiduciary who becomes the legal owner of the property or power. The remedies of the common law demonstrate that even though the fiduciary legally holds the entrusted property and power, the benefits from the entrusted property and power belong to the entrustor.

Fiduciary Law, *supra* note 2 at 243–70.

18. *Alcorn v Alcorn*, 194 F 275 at 278 (ND Miss 1911).

19. *JST Dev Corp v Vitrano*, No CV030521186S, 2004 Conn Super LEXIS 2136 (Conn Supp 22 June 2004); *In re Franke*, 345 NW 2d 224 (Minn 1984); *Burton v Slaughter*, 67 Va (26 Gratt) 914 (1875).

20. *Sokoloff v Harriman Estates Dev Corp*, 96 NY 2d 409 at 416, 754 NE 2d 184, 729 NYS 2d 425 (Ct App 2001). See also KM Sharma, “From ‘Sanctity’ to ‘Fairness’: An Uneasy Transition in the Law of Contracts?” (1999) 18:2 NYL Sch J Int’l & Comp L 95.

21. *Kilbarr Corp v Business Sys Inc*, 679 F Supp 422 (DNJ 1988).

Several aspects of property law are important to the common law's approach to fiduciary law. First, the property-based approach to fiduciary law does not prevent fiduciaries from dealing with entrusted assets or exercising their power as owners. In fact, property relations in the common law must be transferable.²² Common law courts are hostile to limits that the parties impose on transferability, judging such limits to be against public policy.²³

Second, the common law limits the parties' freedom to design and vary the terms of their relationship with respect to property transactions. In contrast to contract rules, the courts reject custom-made rights to property, and reserve themselves a broader discretion with respect to property rights.²⁴ Property relationships that may involve market transactions fall into a fairly limited and standardized number of legal categories.²⁵ While the courts exercise restraint in reviewing contract terms, property relationships are usually governed not only by the parties' own terms but also by judicial or statutory rules that factor in the requirements of markets. Property relationship rules seem to contemplate and encourage impersonal transactions, including transactions through intermediaries, whether the parties know each other or are strangers. Presumably, the public policy of reducing the information costs of market transactions trumps conflicting intentions of the parties.

To be sure, there are common law scholars who see fiduciary law as consisting of implied rules that the parties would have agreed upon had they known the circumstances that would arise in the future.²⁶ Fiduciary rules can be watered down, for example, when the parties choose a hybrid

22. See Tamar Frankel, "The Legal Infrastructure of Markets: The Role of Contract and Property Law" (1993) 73:3 BUL Rev 389 at 391 (property rights are transferable).

23. See Roger A Cunningham, William B Stoebe & Dale A Whitman, *The Law of Property*, Student ed (Saint Paul, Minn: West Publishing, 1984) at 35, 155.

24. See Thomas W Merrill & Henry E Smith, "Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle" (2000) 110:1 Yale LJ 1 at 32 (customized property rights create risk and uncertainty).

25. See Francesco Parisi, "Entropy in Property" (2002) 50:3 Am J Comp L 595 at 605 (property rights are usually restricted to standardized categories).

26. See e.g. Robert H Sitkoff, "The Economic Structure of Fiduciary Law" (2011) 91:3 BUL Rev 1039 at 1044.

of a contract and a corporate or partnership structure, although the rules covering such entities are far from clear.²⁷

Third, in the common law, property rights can be bifurcated. The fiduciary—the service provider—holds the “legal title” to entrusted property and power. The entrustor—the true owner—holds the “beneficial ownership” of the property and power. The courts protect the beneficial owner from violations by the fiduciary. As noted below, the common law treats the misuse of entrusted property, such as stealing and embezzlement, as being morally more reprehensible than the breach of contractual promises.²⁸

Fourth, common law remedies for breach of fiduciary duties are far more extensive and serious than those for breach of contract, and include those that are awarded for breach of property rights.²⁹ The whiff of a tort-wrong exists in common law fiduciary law as well. The remedy for misappropriation is repayment to the entrustors of what the fiduciaries have misappropriated, as well as an accounting for illicit profits and sometimes punishment for egregious wrongful acts.³⁰ “The entrustor can enforce the prohibition against abuse of power directly against the fiduciary

27. See Mariana Pargendler, “Modes of Gap Filling: Good Faith and Fiduciary Duties Reconsidered” (2008) 82:4 Tul L Rev 1315 (“[t]he rules seeking to preserve a minimal core of fiduciary duties can be best understood as intent-implementing or contract-enforcing” at 1323); Larry A DiMatteo, “Policing Limited Liability Companies Under Contract Law” (2009) 46:2 Am Bus LJ 279 (“[i]f the elimination and indemnification clauses in an operating agreement are considered boilerplate terms, then the standard form analogy can be drawn” at 299; “[j]ust as the doctrine of unconscionability prevents grossly one-sided contracts, core fiduciary duties will prevent overreaching by a member-manager” at 301; “[t]his is a middle ground between applying the full corporate and partnership-like duties found in most states and the elimination of all fiduciary duties allowed under the Delaware Act” at 305–07).

28. See Michael Edmund O’Neill, “Private Vengeance and the Public Good” (2010) 12:3 U Pa J Const L 659 (“criminal acts have long been recognized as ‘wrongs’ in both common law and civil law jurisdictions” at 663). Historically, embezzlement was distinguished from stealing because the owner of the property handed it over to the embezzler, whereas the definition of stealing involves the element of taking property without the consent of the owner. See John B Kirkwood & Robert H Lande, “The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency” (2008) 84:1 Notre Dame L Rev 191 (stealing “constitutes a taking of property without consent” at 200).

29. See Frankel, *Fiduciary Law*, *supra* note 2 at 248–51.

30. See *ibid* at 248–60.

by strong remedies available to an owner of property.”³¹ These remedies reflect the very negative image of embezzlement. Not only damages, but also accounting for profits, specific performance and injunctions may be awarded by the courts upon breach of fiduciary duties.³²

Fifth, underlying fiduciary law is a theme of morality. It is recognized that the parties to a fiduciary relationship do not have equal bargaining power once entrustment takes place. Therefore, they cannot set all of the terms of their relationship; fairness must play a significant role in determining the full meaning and impact of the relationship.

Common law courts regulate fiduciary relationships by “imposing a high standard of morality upon them. This moral theme is an important part of fiduciary law. Loyalty, fidelity, faith, and honor form its basic vocabulary.”³³ For instance, embezzlement is stealing by a trusted person; it is seriously immoral.³⁴ It has been suggested that altruism is the basis of this morality—that at common law, fiduciaries are to serve members of society, contribute to society and channel their self-interest in a way that benefits others. The behaviour is voluntary and self-enforcing, reducing risk to the other parties in the relationship. However, in fiduciary law, the obligation to act for the benefit of another applies only to the extent that there has been entrustment. There is no duty to serve as a fiduciary. “On this point, fiduciary law is as individualistic as contract.”³⁵ Nonetheless, the law may be seen to encourage altruistic and moral behaviour by giving the fiduciary a choice between avoiding conflicts of interest and refraining from acting at all. The law thereby places fiduciaries in the role of moral persons and pressures them to behave in a selfless fashion. While the courts will consider the parties’ expectations and professional standards in determining the exact standard of morality, in the last analysis the standard is set by the courts.³⁶

31. Frankel, “Fiduciary Law”, *supra* note 16 at 828.

32. See Frankel, *Fiduciary Law*, *supra* note 2 at 248–60.

33. Frankel, “Fiduciary Law”, *supra* note 16 at 829–30.

34. See *Moore v United States*, 160 US 268 (1895) (embezzlement is “the fraudulent appropriation of property by a person to whom such property has been entrusted” at 269).

35. Frankel, “Fiduciary Law”, *supra* note 16 at 830.

36. See *ibid* at 830–31 [footnotes omitted].

B. The Civil Law Rejects Bifurcation of Property Rights

The civil law does not recognize or accept bifurcation of property rights. Once a transfer has been effected, the transferor, whether a fiduciary or a buyer, owns the property in full. If a trustee who receives ownership of trust property is unfaithful, it is contract law that will be used to punish that trustee. In other words, in the civil law, contract law covers the property relationships of the common law.

The civilian jurists' rejection of fiduciary relationships as part of property rights may not always have been as engrained and fundamental as it is today. As one scholar has noted:

Where *fiducia cum creditore* [sale with a right of redemption] was concerned, the creditor was the titleholder, whereas the debtor retained his interest in reconveyance. It is not my intention to suggest, of course, that in the case of *fiducia* there was a divided title as known in modern trust law. After all, the depositor/debtor in case of *fiducia* only had access to an *actio in personam*. Nevertheless, the similarities are striking. As regards the similarities between the trust and *fiducia cum amico* [a trust-like device resulting in a transfer of rights to a trustee via contractual terms], for example, it may be pointed out that use-like constructions were employed in England during the times of the Crusades, when people left their motherland on perilous expeditions to the Holy Land. They placed their property in the hands of a third party.³⁷

Today, however, this rejection of splitting the concept of ownership seems fairly strong. A civil law scholar made that clear in a blind review of this article. Speaking about the common law approach to trusts, he said: "Your thesis will not be accepted. We will never agree to bifurcating property rights." Some explain the resistance to property bifurcation by resorting to history. During the French Revolution, bifurcated ownership was seen as a symbol of feudalism. Hence the Napoleonic Code established that there is one unit of ownership and only one—equal for every owner.³⁸ This reasoning is rejected by others. In fact, there are some exceptions where property is bifurcated in the civil law, dating back to Roman law. In addition, the events of the French Revolution and the advent of the Napoleonic Code may not be a sufficient basis for characterizing the resistance to such bifurcation as part of the "civil

37. van Rhee, *supra* note 4 at 456 [footnotes omitted].

38. See Hansmann & Mattei, *supra* note 12 at 441–42.

law tradition”.³⁹ Arguably, the rejection of the separation of legal and beneficial ownership did not weaken the development of institutions that recognize the splitting of property into legal and beneficial claims.

No legal system is without exceptions. In fact, a legal system may thrive on exceptions. They help it adjust to changing environments and pressures to accommodate (if not adapt) to other legal systems. Today, however, the rejection of property bifurcation in the civil law still stands. This difference between the civil and common laws may not be razor sharp, but it is sufficiently clear to create a different starting point for the analysis in each system. Also, the common law’s recognition of property bifurcation may be just as historically rooted and just as vulnerable to exceptions as the civil law’s refusal to accept it.⁴⁰

I do not view legal categories as pure and their boundaries as carved in granite. We humans categorize information items in order to arrange them efficiently for the purposes of memory. The more we use particular items of information, the more likely we are to pool them into a category.⁴¹ In the common law, that category is property law. It is true that in the common law, fiduciary law also draws upon and resembles tort law (wrongful actions) and criminal law (the embezzlement of entrusted

39. One blind reviewer argued that, like the common law in different countries that have adopted it, the civil law is also not uniform in all countries that follow it:

Not all civil law countries participated in the codification movement to the same degree, and not all stand in the French tradition. The civil law tradition is often traced to the “reception” of Roman law beginning in the late middle ages, resulting in the Continental European *ius commune*. The Napoleonic codifications were not even the first ones (it is preceded by Bavarian Codex Maximilianeus, the Prussian ALR, and the West Galician Code in parts if the Habsburg realm).

The reviewer continued:

The claim can be questioned by demonstrating that the current Austrian Civil Code was enacted in 1811, but feudalism was abolished only in 1848. The code therefore distinguished between “upper” and “lower” ownership (§ 357) and had a section on various types of “inherited leases” in §§ 1122–50, which were not formally abolished until 2006, but no longer had any sphere of application after 1848.

40. See David J Seipp, “Trust and Fiduciary Duty in Early Common Law” (2011) 91:3 BUL Rev 1011.

41. See Tamar Frankel, *Legal Duties of Fiduciaries: Definitions, Duties and Remedies, A Teaching Book* (Anchorage: Fathom Publishing, 2008) at ch 6.

property), as well as the law on consensual relationships (this is true of relationships between entrustors and fiduciaries, but is not entirely true of those between beneficiaries and trustees). However, I argue that common law fiduciary law is grounded in property law concepts, and that is where the resolution of problems is anchored.

In addition, the common law category of fiduciary law is split into subcategories such as those governing lawyers, trustees, spouses (especially before divorce proceedings), agents, bailees, judges, and public officials, including senators (with respect to entrusted information). In the common law, fiduciary law is an open category that accepts new members: when analogous problems appear in a relationship, they are appropriately dealt with by fiduciary principles (e.g., a priest who abuses children entrusted to priestly care).⁴²

Those who believe in “pure” categories of law must reject this article’s approach. Like law in general, fiduciary law is not a pure category. It is messy. We can view it as a category only if we focus on two main issues that it is designed to address, issues that arise in many societies and in varied situations. They involve services that require *entrustment of property or power*, and that *cannot be controlled by the entrustor without undermining the very utility of the service*. If a service is important to society, and if it necessarily involves trust (lack of control), society is likely to enforce trustworthiness through fiduciary law principles. The entrustment can be ensured by property law or contract. Notwithstanding various exceptions in various situations and countries, contract is insufficient in the common law to protect the entrustor, while it seems to be sufficient for that purpose in the civil law. This, in a nut shell, is the explanation of the differences.

C. The Civil Law Regulates Fiduciary Relationship by Contract and Statute

In some respects, contract rules in the civil law are similar to property rights in the common law. Both intrude into the parties’ terms of agreement, and both focus on the fairness of the terms of their relationship. And so, in contrast to the common law, civil law contract law is suitable for covering fiduciary relationships. That is because contract law in civil

42. For a more detailed discussion of the source of fiduciary law, both in terms of categories and in history, see Frankel, *Fiduciary Law*, *supra* note 2.

systems focuses on, and directs, the *substance* of agreements. Rather than give effect to just any bargain of the parties (as long as it is not illegal), the civil law courts approach all contracts with a view to ensuring fairness and moral behaviour. In addition, the civil law does not distinguish between contract and property law in the same way as the common law. For instance, civil law contract rules carry a high degree of morality. Breach of contract by trusted parties is considered highly immoral. And like fiduciary law under the common law, the civil law does not require consideration to make a contract binding.⁴³

In civil law, actual rules of contract do not seem fundamentally different from those of the common law.⁴⁴ What differs between the two systems is the perception of the source of contract rights. In the civil law these rights are derived from the particular statutes which are organized in various ways, imposing duties on the parties and conferring rights on them.⁴⁵ To be sure, these statutes are broad and permissive, but they remain the starting point of the analysis and affirmation of the parties' contract. Whatever is not expressly permitted is ineffective. The parties' contract rights, and some of the terms of their agreements, are drawn not only (and perhaps not even mostly) from what they have consented to, but from the statutes and the statutory rules.

In dealing with contracts, the civil law and its courts draw on general principles of morality and justice as guided by codes.⁴⁶ The Code is viewed as the measuring stick, against which the fairness of the parties' arrangement is assessed; further, "Courts in civilian legal systems routinely grant specific performance by ordering parties to perform their

43. See Vivian Grosswald Curran, "Cultural Immersion, Difference and Categories in U.S. Comparative Law" (1998) 46:1 Am J Comp L 43 at 81, n 130, 82.

44. See e.g. Joel R Reidenberg, "Setting Standards for Fair Information Practice in the U.S. Private Sector" (1995) 80:3 Iowa L Rev 497 ("traditional contract doctrine of privity in some European common- and civil-law jurisdictions" at 546). See also Mack E Barham, "Redhibition: A Comparative Comment" (1975) 49:2 Tul L Rev 376 at 380 (noting *stipulation pour autrui* (third-party beneficiary) exception to civil law privity requirement); La Civ Code Ann ("[a] contracting party may stipulate a benefit for a third person called a third party beneficiary", art 1978; "[a]n obligor and a third person may agree to an assumption by the latter of an obligation of the former", art 1821).

45. See e.g. *ibid*, arts 1756–1905 (obligations in general); arts 1906–2282 (conventional obligations or contracts).

46. See Curran, *supra* note 43 at 81–83 (civil law emphasizes morality).

contracts.”⁴⁷ One could say that the civil law regulates both the legal source of the right to contract, and the substantive fairness of contract terms.

This approach to the source of contract rights grounds a number of fundamental differences between the civil and common law. These differences affect fiduciary duties and the attitude of the law toward the parties’ power to determine the substance of their agreement.

The Civil Code determines the type of contract that the parties adopt, and seems to avoid the kind of variability that the common law permits by allowing parties the freedom to design their own terms. It may well be that because the statutory source of contract in the civil law limited variations in property relationship and standardized contracts, property relationships could remain governed by contract law.⁴⁸

The issue of the voting trust is another demonstration of the problems posed by trustees that seem to be the owners but who are not the owners. The civil law does not pose such problems. The entrustors may bring action only against the trustee—the ostensible owner. The status of a trust as a legal entity begs questions as well.⁴⁹ In sum, the resistance to any bifurcation of ownership is deeply embedded in the civil law tradition and may be as difficult to overcome as the resistance of the common law judges to engage in judging fairness and morality of contracts.

Civil law contracts seem to have evolved in more than one mode. Historically, only Roman citizens could take advantage of Roman law, while foreigners’ contracts were regulated by other rules. Thus, different laws regulated similar transactions depending on the identity of the

47. E Allan Farnsworth, “A Common Lawyer’s View of His Civilian Colleagues” (1996) 57:1 La L Rev 227 at 235.

48. See *Restatement (Second) of Trusts* § 284(1) (1959). The civil law has avoided bifurcating property rights (into legal and beneficial rights), and thus it avoided some of the corresponding problems of such bifurcation. For example, if the fiduciary, who is the ostensible owner, sells the property in violation of his fiduciary duties, the entrustor may follow the property to the buyer, under certain conditions. Because such a rule can undermine market trading, the common law protects third party buyers who paid full value for the property and did not have notice of the trustee’s violations.

49. On “take it or leave it” mass contracts, see e.g. W David Slawson, “Mass Contracts: Lawful Fraud in California” (1974) 48:1 S Cal L Rev 1.

parties, resulting in different rules for the same contract terms.⁵⁰ In fact, a similar phenomenon has emerged under the common law; at one time, the common law courts were open only to parties who had purchased a writ, which granted them a remedy for a particular wrong they claimed to have suffered.⁵¹

In the civil law system, the substance of a contract is linked to a statutory form of contract, which entitles parties to legal remedies. Thus, in contrast to the common law, one can theoretically distinguish between rights and remedies that derive from the terms of the parties' agreements, and rights and remedies that derive from statutory terms. Further, the civil law gives judges more latitude to interpret the substance of a contract, to decide its meaning, to determine its effectiveness and to order remedies for its breach. Civil law courts can consider the fairness and morality of the terms and consequences of a contract.⁵² This leeway is not afforded to, or exercised by, judges in the common law system.

Civil law can achieve results similar to those in the common law by resorting to a statutory source without necessarily distinguishing between contract and other branches of law. With respect to property law, the civil law has developed forms of property relationships that are unknown to the common law system.⁵³ More importantly, because the root of the civil law contract is in statutory codes, the classification of contract is more

50. See Jonathan Turley, "Dualistic Values in the Age of International Legisprudence" (1993) 44:2 Hastings LJ 185 (noting that Rome "creat[ed] a special law [*ius gentium*] for disputes between foreigners or between a foreigner and a Roman citizen" at 197); Richard A Epstein, "Reflections on the Historical Origins and Economic Structure of the Law Merchant" (2004) 5:1 Chicago J Int'l L 1 ("the basic distinction between *ius civile* and *ius gentium* is that matters of formality and enforcement may well depend on the nature of the underlying obligation and the social setting and material circumstances that surround the formation of the agreement" at 6).

51. See John P Sullivan, "*Twombly* and *Iqbal*: The Latest Retreat from Notice Pleading" (2009) 43:1 Suffolk UL Rev 1 (noting that a writ system had developed in England by the thirteenth century; later, specific writs developed "[their] own procedural, factual, and evidentiary requirements and . . . remedies" at 8).

52. See e.g. Larry A DiMatteo "Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law" (1999) 33:1 New Eng L Rev 265 ("[i]n the civil law, fairness analysis is theoretically to be applied in every contract enforcement decision" at 290).

53. See e.g. Dante Figueroa, "Civil Law Trusts in Latin America: Is the Lack of Trusts an Impediment for Expanding Business Opportunities in Latin America?" (2007) 24:3 Ariz J Int'l & Comp L 701 at 734.

limited. At least theoretically, civil law contracts are more standardized, falling under a limited number of headings—similar to the headings in the common law of property.

When property rights are derived from statute, rather than from the agreement of the parties, those rights can be fashioned more effectively to meet market requirements, and the courts can interpret them to reflect social needs and mores rather than the needs and moral beliefs of the particular contracting parties. Just as crucially, because the courts interpret contract rights as being derived from statute, a breach of contract can be deemed to be highly morally reprehensible. In contrast to the common law, civil law rules of property and contract pose different expected moral standards. Therefore, the civil law contract category can better serve as a property law category.

There are disagreements over the proper characterization of contract law. Some argue that the principle of freedom of contract applies in civil law countries as well as common law countries. On this view, civil codes provide rules for specific types of contracts, but they are only default rules; if the parties write a contract that does not neatly fit into any of the established categories, the courts will take the most appropriate rules from the established categories and apply them analogously.

I beg to differ. Codes and case law are two distinct sources of law. Case law is fact specific. It varies from court to court, even in the application of a particular rule. Therefore, it is less uniform than legislation, and more flexible. A code is more rule governing, even if it sets out specific examples. It is a more uniform, and more stationary source of law than court decisions. These differences in the sources of the law systemically affect the outcomes.

Unlike civil law, case law rarely involves default rules. It draws on case-based facts. It derives its generalities from other cases with similar facts and similar rule interpretations where judges see two cases as being applicable. In contrast, civil law has statutory default rules which the parties can change. The parties do not start by setting the terms of their agreement. Instead, they change the terms of the agreements which they receive. In civil law today, the default rules may have shrunk and the freedom of the parties to decide the terms of their agreements may have expanded, but only as a matter of degree. Tradition and long-term practice

do not vanish quickly. The civil law and common law are noticeably different, both in system and structure.⁵⁴

D. The Common Law Rejects the Contract Model as the Basis for Fiduciary Law

Common law contract law is not suitable for addressing the problems that arise in fiduciary relationships. Common law contract law assumes that the parties can fend for themselves and have equal bargaining power. This is contrary to the basic and necessary condition in a fiduciary relationship that the parties are not equal with respect to entrustment. And while the parties to a contract can set the terms that assure the performance of their obligations, the parties' agreement is not sufficient for enforcing fiduciary duties, which are hard to specify in detail. Therefore, common law contract rules are not appropriate to protect entrustors.

Furthermore, the remedies in common law contract law for breach of promise do not carry the mark of moral turpitude, which is a desirable pressure to exert on fiduciaries to dissuade them from abuse of entrustment. This does not mean that common law courts approve of illegal contracts or contracts against public policy—they will refuse to enforce such contracts for public policy reasons. There are other cases, however, in which a contract's terms are unfair but not against public policy. Although courts may refuse to uphold contracts of that sort, the rationale for this refusal is not based on a judgment about the contract's terms, but on the assumption that the vulnerable party who agreed to them did not have the capacity to enter into the agreement. In such cases, courts evaluate the party's ability to fend for itself, rather than determine that a contract's terms were unfair. Thus, in most cases, the focus remains on the parties' ability to fend for themselves.

Several further factors reinforce this point. First, unlike property law, contract law gives only weak rights to third parties. Fiduciary law recognizes the rights of a third party, such as a beneficiary, in a relationship between two other parties (e.g., trustor and trustee). Those who are not parties to a contract have no rights or liabilities under that contract except

54. Interestingly, past arguments among the civil law and common law scholars regarding the *United Nations Convention on Contracts for the International Sale of Goods* reflect similar current arguments. See Farnsworth, *supra* note 47 at 233–36.

where it is clear that the contracting parties intended to benefit the non-parties.⁵⁵ Even those who debate the issue agree that a contract's terms can regulate the transferability of the parties' rights. Barring agreement, a binding transfer may depend on whether the transfer affects the other parties' interests. For example, in the past, the identity of the creditor was very important to the debtor because creditors had the right to demand that delinquent debtors be imprisoned.⁵⁶ When creditors lost that right, debts became assignable by creditors even without explicit consent of the debtor, unless the debt agreement prohibited such an assignment. On the other hand, debtors' obligations are not transferable because the debtor's ability to pay is relevant to the creditor. For similar reasons, contracts for personal services are not transferable.⁵⁷ Yet, if a contract provides for non-transferability, courts will in all likelihood enforce that provision.

Second, in common law contract law, the parties are deemed to have equal bargaining power. With few exceptions, contract rules are based on an assumption that the parties have exercised independent judgment and could fend for themselves. "Contract law relies on the premise that parties, rather than laws, create (or decline to create) a relationship. The parties do so by exercising personal choices."⁵⁸ Therefore, contract rules focus on non-volitional situations in which courts refuse to enforce certain agreements, such as agreements made by parties who lack the capacity to contract⁵⁹ or are under undue influence⁶⁰ or duress,⁶¹ or those tainted by

55. See *Restatement (Second) of Contracts* (1981) ("[a] promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty", § 304). There is a distinction between intended and incidental beneficiaries. *Ibid.*, § 302.

56. See Stanley J Bailey, "Assignments of Debts in England from the Twelfth to the Twentieth Century" (1932) 48:4 *Law Q Rev* 517 at 549–50.

57. See *Restatement (Second) of Contracts*, *supra* note 55 ("[u]nless otherwise agreed, a promise requires performance by a particular person only to the extent that the obligee has a substantial interest in having that person perform or control the acts promised", § 318(2); "[d]elegation of performance is a normal and permissible incident of many types of contract. . . . The principal exceptions relate to contracts for personal services and to contracts for the exercise of personal skill or discretion" at comment c).

58. Raymond T Nimmer, "Breaking Barriers: The Relation Between Contract and Intellectual Property Law" (1998) 13:3 *Berkeley Tech LJ* 827 at 846.

59. See *Restatement (Second) of Contracts*, *supra* note 55, § 12.

60. See *ibid.*, § 177.

61. See *ibid.*, §§ 174–76.

fraud⁶² or mistake.⁶³ But if a party made a mistake in judgment and lost as a result, and the other party noticed the mistake but said nothing, each party is taken to have reaped the fruits of its judgment and the courts will not step in.⁶⁴

Third, a prominent feature of contractual relationships is that their terms are mostly determined by the parties.⁶⁵ Because common law contract law assumes that the parties have equal bargaining power, the courts aim at determining and enforcing the intent and terms of the parties' agreement. The courts' intrusion on the terms of the agreement is very limited. Apart from agreements that involve substantive illegality, the task of the common law courts is to *give legal effect to the parties' intentions, as expressed in their contracts*.⁶⁶

Fourth, while common law judges may refuse to enforce immoral contracts and contracts against public policy, they seldom do so. As one US court noted: "We do not deny the role of morality—of equity in the broad sense—in contract law as in all law."⁶⁷ Yet unfairness of terms and immorality of behaviour play little part in the courts' determination of a contract dispute, unless they reach the level of fraud. Daniela Caruso has noted that in relation to the contraction of the welfare state in the US, "many courts partake of the prevailing ideological shift away from socially sensitive adjudication and towards market mechanisms of private autonomy".⁶⁸ With few exceptions, the courts will not seek to determine

62. See *ibid.*, §§ 159–72 (misrepresentation).

63. See *ibid.*, §§ 151–58.

64. See *ibid.* ("[a] party bears the risk of a mistake when . . . he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient", § 154(b)). That party generally bears risk of "most supervening changes in circumstances" and "many mistakes as to existing circumstances". *Ibid.*

65. See Nimmer, *supra* note 58 at 846.

66. See *ibid.*

67. *Okaw Drainage District v National Distillers & Chemical Corp*, 882 F (2d) 1241 at 1245 (7th Cir 1989).

68. Daniela Caruso, "Contract Law and Distribution in the Age of Welfare Reform" (2007) 49:3 *Ariz L Rev* 665 at 665.

or enforce the fairness of the contract terms.⁶⁹ The parties have made their bed and must sleep in it.

This approach is taken to an extreme by law and economics scholars who are proponents of the “efficient breach” theory, under which a breach of contract is permissible and even desirable if the promisor can get a price higher than the contract price and the promisee is free to buy or sell the same item in the market at the contract price (and thus is not harmed). Under this theory, nothing but the financial benefit to the parties matters. The morality or lack of morality in breaching a contract is not a significant factor. Arguably, “efficient breach” may undermine the reliability of a contractual promise in the long term. The sole test is short-term “efficiency”.

Fifth, common law remedies for breach of contract fit the view and design of contract law. Perhaps because it is assumed that contracting parties have equal bargaining power, a breach of contract usually results in the payment of damages.⁷⁰ “[C]ourts in common law systems, for reasons that are largely historical, regard specific performance as an ‘extraordinary’ remedy, to be granted only when an award of damages would not be ‘adequate’”.⁷¹

In contrast to contract law, common law property law rules are calibrated to reflect both inequality among the parties and the risk that the entrustor takes when entrusting the fiduciary with property or power. Property rules are more suitable than contract law for addressing problems that arise in fiduciary relationships. Limits on transferability,

69. See e.g. *Leverso v Southtrust Bank*, 18 F (3d) 1527 (11th Cir 1994) (“[i]t is well settled that a court cannot rewrite the terms of a contract in an attempt to make otherwise valid contract terms more reasonable for a party or to fix an apparent improvident bargain” at 1534).

70. See *Fletcher International, Ltd v ION Geophysical Co*, CA No 5109-VCS (Del Ch Mar 29, 2011) (because the preferred stock holders in a Delaware corporation had the right to vote only against certain acquisitions of the corporation’s stock but not against acquisitions of the holding company’s stock, the Court rejected the preferred stockholders’ complaint, even though the acquisition in the one case had the same effect as the acquisition in the other).

71. Farnsworth, *supra* note 47 at 235. See also E Allan Farnsworth, *Farnsworth on Contracts*, vol 3 (Boston: Little, Brown and Company, 1990) at 159–61.

for example, are far more important in fiduciary law than in contract law.⁷²

A breach of fiduciary obligations involves a vision of prohibited and morally pernicious misappropriation. Consequently, the remedies for such a breach include not only compensatory damages but also an accounting for profits, punitive damages and specific performance. The stigma of treachery is attached to the violation of fiduciary duties.

A more consistent application of and reference to morality and the public interest appears in property law. According to one court, a lessor, lessee and supplier “had a business relationship with one another that led to [a] written lease agreement” which “gave rise to a duty of cooperation by the parties and implied good faith and fair dealing”.⁷³ The Court noted that the remedy of equitable estoppel “does not arise out of contract but is based upon concepts of morality and justice”.⁷⁴

E. The Theme of Morality

As I have explained in an earlier article, the common law subjects fiduciaries to a high standard of morality.

This moral theme is an important part of fiduciary law. Loyalty, fidelity, faith, and honor form its basic vocabulary. Two aspects of moral behavior are important to understanding the moral dimensions of fiduciary law. First, moral behavior is altruistic. The moral person serves other members of the society and contributes to society generally. He treats his own interests in a way that benefits others, and he prefers the community to the self. Second, moral behavior is voluntary. Thus, the more self-enforcing the altruistic behavior is, the more it is considered moral. Self-enforcement reduces risk and uncertainty in human relations, avoids enforcement costs and the need for a strong enforcement organization, precludes deception, and allays the fear that the actor will succumb to temptation.

72. To be sure, fiduciary services may be deemed to be personal services that cannot be transferred under contract law. However, fiduciary law prohibits such transfers far more strictly. In contrast, beneficiaries have greater freedom to transfer their rights to another. See *Restatement (Third) of Trusts* (2003) (providing that a “beneficiary of a trust can transfer his or her beneficial interest during life to the same extent as a similar legal interest” unless there is a valid restriction on transfer, § 51). See also *Restatement (Second) of Trusts* (1959), § 132.

73. *Toshiba Master Lease Ltd v Ottawa University*, 927 P (2d) 967 at 972 (Kan CA 1996).

74. *Ibid.*

The moral theme in fiduciary law contrasts with the role of morality in contract law. Today the law of contract has departed from the observation of Justice Holmes's that a party may break his contract upon payment of damages. In fact, some scholars have asserted a moral duty to perform a contract. Nevertheless, contract law does not go beyond the morals of the marketplace. Each party may follow its interests and act for its own benefit. In the world of contract, self-interest is the norm, and restraint on this self interest must be imposed by others. In contrast, the altruistic posture of fiduciary law requires that once an individual undertakes to act as a fiduciary, he should act to further the interests of another in preference to his own.⁷⁵

Generally the common law does not oblige any person to act as a fiduciary. A person may agree or refuse to serve as a fiduciary for purely selfish reasons. On this point, fiduciary law is as individualistic as contract law. Yet, because the law offers a fiduciary the choice between avoiding conflicts of interest with his entrustor or refraining from serving, the law may be viewed as encouraging altruistic and moral behavior. Thus, once a person becomes a fiduciary, the law places this person in the role of a moral person and pressures him to behave in a selfless fashion, to think and act altruistically. In addition, courts do not leave the moral standard to the fiduciary or to custom. The courts consider the parties' expectations and professional customs; but, in the last analysis, the courts determine the moral standards.

Judges have incorporated morality into fiduciary law for a number of reasons. First, authority over fiduciaries historically fell to the ecclesiastical and equity courts, which imposed sanctions on the basis of religion and morality.⁷⁶

Second, the law's concern for morality exerts pressure on fiduciaries to fulfill their obligations once they have agreed to enter into the relationship. Morality becomes an adjunct to law in that a sense of moral obligation may present a disguised threat to the fiduciary as well as a positive inducement.

75. Frankel, "Fiduciary Law", *supra* note 16 at 830-32.

76. See e.g. RH Helmholz, "The Early Enforcement of Uses" (1979) 79:8 Colum L Rev 1503 (noting that "use", which was considered similar to agency, was originally enforced by ecclesiastical courts in accordance with canon law). One could speculate that this bifurcation of judicial power may have contributed to the property bifurcation. I doubt this speculation. It is more likely that the bifurcation was derived from the social structure and the need of the property owners to have trustworthy estate managers, imposed with duty of loyalty.

Third, an emphasis on morality can elevate the purpose for which the fiduciary's power is granted to a position of priority over other purposes which may guide the fiduciary. For example, the corporate director's primary duty is to help render the corporation profitable for the benefit of the shareholders; the lawyer's duty is to represent the client's interests; and the physician's duty is to heal and to prolong the patient's life. The duties assume a greater moral stature than other conflicting moral values. Thus, a physician's duty to prolong life may take precedence over mitigating the patient's suffering or taking account of the family's impoverishment. Because fiduciaries must use the power entrusted to them for one purpose only—to perform their services to the entrustor—ascribing the highest moral value to that purpose encourages the fiduciary's voluntary adherence to it. To be sure, emphasizing the moral purpose of the relationship is not free from difficulties as evidenced, for example, by arguments that corporations have a responsibility to society as well as to their shareholders and that lawyers have a duty to encourage the enforcement of the law as well as to protect the interests of their clients.

A fourth reason for viewing a fiduciary as a moral actor is that entrustors may refrain from entering into fiduciary relations unless they perceive fiduciaries to serve the entrustor's interests. By characterizing the fiduciary as altruistic, the courts are reassuring the entrustor that the fiduciary will act in the entrustor's interest.⁷⁷

Fifth, the moral obligations on fiduciaries are related to the vulnerability of the entrustor. It is wrong to injure anyone, but it is more reprehensible to injure those who cannot protect themselves, as is presumed to be true of entrustors. The extent of the fiduciary's moral obligation is positively related to the extent of the entrustor's vulnerability.⁷⁸

Finally, the moral thrust of fiduciary law forms a bridge between altruism and individualism by focusing on the objectives for which the fiduciary must aim, which include not merely the interests of entrustors, but also the collective good. "To the extent that the law induces fiduciaries to work for the collective good, the law helps shape desirable social trends."⁷⁹

77. See Frankel, "Fiduciary Law", *supra* note 16 at 830–32.

78. See *ibid.*

79. *Ibid.*

Another avenue for the common law courts to regulate fiduciary-like relationships is pointed out in this passage from the judgement of a federal district court in Ohio:

New York case law establishes an implied contractual duty to disclose in business negotiations. Such a duty may arise where 1) a party has superior knowledge of certain information; 2) that information is not readily available to the other party; and 3) the first party knows that the second party is acting on the basis of mistaken knowledge Even though a fiduciary duty may not exist between the parties, this duty to disclose can arise independently because of superior knowledge.⁸⁰

This type of relationship is very close to a fiduciary one.

Yet, in the common law, contract is said not to go beyond the morals of the marketplace. Each party is assumed to act in its own self-interest and seek its own benefits. Each party must scrutinize the conduct of the other. Civil law, in contrast, expands its contract regulation to cover fiduciary principles and to offer fiduciary rules on right and wrong behaviour, while the common law focuses mostly on the parties' agreed terms. In the words of one writer:

The concept of good faith plays a major role in civilian contract law. The most remarkable example is Article 242 of the German Civil Code, which requires parties to observe *Treu und Glauben* [good faith]—a few words that have spawned a vast outpouring of case law. To the civilian mind, good faith is a broad reaching concept that covers far more territory than the comparable provision of Uniform Commercial Code 1-203 [now 1-304], which requires good faith in the performance of contracts.⁸¹

Thus, the civil law anchors its fiduciary law in its species of contract.

To judge the terms of a contract, the civil law courts draw on general principles of morality and justice. In doing so, they are guided by codes,⁸² which are seen as the basis for measuring the fairness of the parties'

80. *Procter & Gamble Co v Bankers Trust Co*, 925 F Supp 1270 at 1290 (SD Ohio 1996).

81. Farnsworth, *supra* note 47 ("English law, at the opposite extreme from the civilians, adamantly refuses to recognize any such duty of good faith whatsoever" at 235). The Uniform Commercial Code is an instrument prepared by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. Although it is not binding in itself, it has been adopted in varying forms by the legislatures of most US jurisdictions. See also La Civ Code Ann, *supra* note 44 ("[g]ood faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation", art 1759).

82. See Curran, *supra* note 43 (civil law emphasizes morality).

arrangements. One could state that the civil law regulates contract both with respect to the legal source of the right to contract and the substantive level of fairness of a contract's terms.

Because civil law can attach the stigma of immorality to contract terms, the need for significant differences between contract and property law does not exist to the same extent as in the common law. Contract under civil law can better meet the needs of the market than contract under common law.⁸³

F. The Importance of the Distinctions Outlined Above

As the above discussion indicates, the property law umbrella seems better suited to the regulation of fiduciary relationships in the common law system, while the contract law umbrella seems better suited to that end in the civil law system. Common law courts will enforce contracts between independent parties and give effect to the substance of their agreement. The civil law courts will seek authority from the Code for the validity of a contract made by the parties, and will also consider the fairness and morality of the terms of the contract, taking into consideration their independence and ability to fend for themselves.

These distinctions, between a contract based on the parties' negotiated terms and a contract derived from a Code provision, are fundamental and have consequences for the source of the law and the role of the judges in interpreting contracts. The existence of bifurcated property rights—as compared to contractual promises—has serious consequences for both

83. See Peter A. Alces, "Unintelligent Design in Contract" (2008) 28:2 U Ill L Rev 505 at 543–46. See also Dennis J. Callahan, "Medieval Church Norms and Fiduciary Duties in Partnership" (2004–2005) 26:1 Cardozo L Rev 215.

The secularization of the venue in which morality trumped law prompted changes in nomenclature, if not in the substance of rulings. Instead of appeals to God's will, faith and salvation, the focal point of rulings shifted to the individual and the human conscience. This sixteenth century transition "was an important stage in English legal thought, not because it was new but because it linked the medieval world and the modern." Though the state, not the Church, would be the final arbiter of disputes in the marketplace, the prevailing view was that "the jurisdiction of Chancery was a moral necessity based upon the duty of government to give not merely law but justice to its subjects".

Ibid at 246–47 [footnotes omitted].

systems as well. Habits and cultures are hard to change, as is shown by the effort of Professor Louis Loss—the creator of securities regulation as an area of law—to combine the various securities statutes into a code which he hoped would be adopted by Congress and used by the members of the Bar. The American Law Institute and a group of expert members worked on the Code, which contained over three thousand sections and sought to balance directives and smooth out contradictions. Although the Securities and Exchange Commission absorbed certain innovative provision into its regulations,⁸⁴ the code itself did not become law.⁸⁵ When I asked why the code was not adopted and why it lost the support of the Bar, I was struck by an answer that pointed to the cost to practitioners of learning the new section numbers. “Everyone understands when you say section 5 violation of the 1933 Act and section 17(a) of the 1940 Act,” answered one renowned securities lawyer. “But in the code these are designated by entirely different numbers. No one wishes to learn new numbers now.”⁸⁶ As the 1984 *Hague Convention on the Law Applicable to Trusts and Their Recognition* concludes: “[T]he mainstream in the Civil Law characterization of the trust . . . emphasizes its flexibility and sees it as a contract-like institution’ In Europe, contract does the work of trust.”⁸⁷

When the building blocks of a legal system do not fit together, there is only a slim chance of ever changing them. It is no wonder that the current literature on the interaction between the common law and civil law is riddled with disagreement and uncertainty.

Nevertheless, the common law and civil law do share a common goal. History demonstrates that both systems strive to overcome rigid rules,

84. See Jeffery D Bauman, “Loss and Seligman on Securities Regulation: An Essay for Don Schwartz”, Book Review of *Securities Regulation* by Louis Loss & Joel Seligman, (1990) 78:5 Geo LJ 1753 at 1780 (noting the impact of the *Federal Securities Code* on the Securities Exchange Commission). See also *Federal Securities Code* § 401–06, 1704(g) (1978).

85. Bauman, *supra* note 84 at 1776.

86. From author’s conversation with a securities lawyer.

87. John H Langbein, “The Contractarian Basis of the Law of Trusts” (1995) 105:3 Yale LJ 625 at 670 (citing *Harrison v Credit Suisse*, 29 January 1970, ATF II, 96 Entscheidungen des Schweizerischen Bundesgerichts 79 (Switz)) [footnotes omitted]. FH Lawson writes, “[T]he three-cornered relation of settlor, trustee, and [beneficiary] . . . is easily explained in the modern law in terms of a contract for the benefit of a third party.” FH Lawson, *The Thomas M Cooley Lectures: A Common Lawyer Looks at Civil Law*, 5th series (Ann Arbor, Michigan: University of Michigan Law School, 1953) at 200.

and they both search for justice and fair treatment of the parties.⁸⁸ It has been noted that, “Roman, Canon and Germanic law (sources of the European *Ius-Commune* tradition) have provided elements of the [English] law of trust.”⁸⁹ More broadly, Roman law had a substantial impact on the common law. William Blackstone, for example, used Roman categories to classify English law, and even today parts of that law are often expressed in terminology borrowed from Roman law.⁹⁰ England’s equity law did not arise in an orderly fashion. The Court of Chancery may have had its roots as an administrative entity that administrated the King’s justice,⁹¹ and the overall objective of the English legal system was to achieve justice in the name of the sovereign. At this high level, the civil law and common law meet. There are those who believe as follows:

Civil and common law seem to converge into a larger and more comprehensive Western liberal democratic family of legal systems, where some common values about law and democracy, as well as general legal principles in the area of public, administrative, criminal and private laws are shared by the legal traditions. Although a general sub-distinction between common law and civil law still persists, the major distinctions between them . . . have been greatly diluted in a continuous convergence between the two legal traditions clearly evident from the current harmonization initiatives taken within the European legal community.⁹²

In my view, this passage overstates the actual degree of convergence between the two systems, but it may point to what will happen in the future.

The foundational principles of the common law and civil law may indicate a road to uniformity. For example, while one system may view law as limiting the actors’ freedom, another system may stress the law as

88. The two systems aim at the same result. See Frankel, “Fiduciary Law”, *supra* note 16 at 829–32 (discussing moral theme in fiduciary law); Frankel, *Fiduciary Law*, *supra* note 2 (discussing morality as self-limitation; i.e., moral people impose rules of morality on themselves and act accordingly “even if there are no police around” at 106); George A Zaphiriou, “Introduction to Civil Law Systems” in Richard A Danner & Marie-Louise H Bernal, eds, *Introduction to Foreign Legal Systems* (New York: Oceana, 1994) 47 at 51–52.

89. van Rhee, *supra* note 4 at 454.

90. See *ibid* at 455.

91. See Timothy S Haskett, “The Medieval English Court of Chancery” (1996) 14:2 LHR 245.

92. Salvatore Mancuso, “The New African Law: Beyond the Difference Between Common Law and Civil Law” (2008) 14:1 Ann Surv Int’l & Comp L 39 at 45.

the source of legal rights. Both can be adapted to view law as a source of the rights of victims against those who abuse them. That is particularly true of fiduciary obligations. Similarly, while the bifurcation of property can be seen as an echo of feudalism of the past—where the more powerful party held its power by force and by law—today the seemingly more powerful party in a fiduciary relationship is the servant that has been endowed with power by the other party. In this light, property bifurcation is a tool for protecting those who are the true owners, but who are also the weaker parties, against the more powerful servants on whom they must depend, in situations where such dependence is socially desirable.

Unifying the law of fiduciary obligations has many advantages. It would help to establish trusting relationships across state boundaries, and to reduce the cost of agreement among the parties. Just as a Babel of languages is costly, so can be a Babel of legal rules. Unification would bring the different ideas of trust and faithfulness closer together, and would bring a better understanding of the role of morality. It would encourage compromise rather than a fight to win at all costs. Finally, it would avoid the need for a third party to arbitrate between the two systems and the need to find compromises between those systems.

III. What Can Be Done to Unify Fiduciary Law?

A. What Can We Learn from the Attempts to “Transplant” Common Law into Civil Law Systems?

Among the ways that have been suggested for unifying the civil and common law of fiduciaries is simply to transplant the common law into civil law systems. There have been a few attempts to do this.

(i) The Experience of Japan

In Japan, the duty of loyalty was transplanted into the civil law system in 1950. Japan’s experience in this regard demonstrates how a legal transplant may become part of the system, dressed in traditional garb over time, as the legal infrastructure and political economy change and affect the motivation of the legal professionals who interpret and enforce the transplant. In fact, to this very day Japan’s courts view a director’s duty of

care as including the duty of loyalty. Their approach may be influenced in part by the fact that, in Japan, corporate directors are generally corporate officers who are deemed to be responsible for what happens at all levels of the organization below them. Therefore, the scope of duty of care in Japan includes not only what the common law duty includes, but far more.⁹³ However, the substance of the duty is very similar in both systems.

(ii) The Experience of China

On October 1, 2001, the Trust Law of the People's Republic of China was passed "to provide a legal foundation for the regulation of financial trust services and charitable activities".⁹⁴ In Charles Zhen Qu's words: "How well these legislative objectives are achieved will depend on how the common law principles are embodied in the Trust Law in China China's legal system, although still being developed, is basically a civil law system."⁹⁵ That author has suggested that the trust law "will not be of much practical value if it cannot be interpreted in light of the civil law principles. Civil lawyers cannot viably approach their own trust law with common law principles."⁹⁶ In this vein, Chinese scholars have sought specific rules to govern legal trusts. As an American writer has noted, they

point out that even if beneficiaries are aware [of the existence of a trust], rules that promote secrecy of trusts may make it impossible for beneficiaries to fulfill the role American trust law assigns them as enforcer of trusts. Because no record exists of an invisible trust's purpose, property, parties, or fiduciary rights and duties, beneficiaries lack the information they need to monitor a trustee and hold that trustee accountable for any misconduct. Indeed, secrecy of trusts may effectively deny beneficiaries any claim whatsoever to trust property. As Zhong Ruidong and Chen Xiangcong observed, "if the trust is not established

93. Compare *In re Caremark International Inc Derivative Litigation*, 698 A (2d) 959 (Del Ch 1996). Compare *Nishimura v Abekawa*, 1573 Shoji homu 3 (Osaka Dist Ct 2000).

94. Charles Zhen Qu, "The Doctrinal Basis of the Trust Principles in China's Trust Law" (2003–2004) 38:2 Real Prop Prob & Tr J 345 at 347 [footnotes omitted]. See also Frances H Foster, "American Trust Law in a Chinese Mirror" (2009–2010) 94 Minn L Rev 602.

95. Zhen Qu, *supra* note 95 at 347 [footnotes omitted].

96. *Ibid.* Asserting that "[a] relationship analysis helps answer the questions because the Trust Law was made to regulate trust relationships. The roles of each party to a trust are determined by how the concept of trust is defined, how a trust is created, and when a trust is constituted under the Trust Law." *Ibid.*

in writing, after a considerable period of time, when the beneficiary asserts his beneficial rights, no evidence [of those rights] will exist.” To Chinese authors, the inevitable result is conflict and uncertainty.⁹⁷

This may be due to the fact that the judiciary does not play as central a role in China as in common law systems.

(iii) The Experiences of South Korea and Taiwan

Taiwan provides another model for active attempts to merge the civil law and common law systems. Taiwan has imported the duty of loyalty by copying Article 254–3 of the *Commercial Code of Japan*.⁹⁸ Like Japan, it was suggested that the fiduciaries’ duty of loyalty is poised to play a role in corporate governance because the two countries have similar legal and politico-economic environments. It may take years (as it did in Japan) for other countries to adopt the duty of loyalty, and these countries may develop substitutes.⁹⁹ Yet, whatever the names, the essence of the duty of loyalty is similar.

One lesson from these legal transplants is that of sliding toward convergence. If the status quo is maintained, we can expect that, with usage, either common law, civil law or a hybrid system will emerge. Scholars have observed that while civil law judges have begun to pay far more attention to precedent, common law judges have been paying far more attention to the written law and to the provisions of codes. Perhaps this form of “skidding” happens more readily in fiduciary law because the category of fiduciaries is open-ended. Even though fiduciary relationships are many and varied, their fundamental objectives are the same or very similar in different jurisdictions and require the same or very similar

97. Foster, *supra* note 94 at 645–46 [footnotes omitted]. See also Adair Dyer, “International Recognition and Adaption of Trusts: The Influence of the Hague Convention” (1999) 32:4 Vand J Transnat’l L 989 (“[t]he process of bringing English-style trusts into systems that do not have a similar device is fraught with difficulties” at 1019).

98. See Christopher C Chen, “Transplantation of Fiduciary Duties into Civil Law Jurisdiction: Experiences from Taiwan” (2011) [unpublished, HKU-NUS-SMU working paper series], online: Social Science Research Network <<http://ssrn.com/abstract=1878204>>.

99. See Hideki Kanda & Curtis J Milhaupt, “Re-examining Legal Transplants: The Director’s Fiduciary Duty in Japanese Corporate Law” (2003) 51:4 Am J Comp L 887 at 900–01.

treatment by law. Nonetheless, there are those who, like Kanda and Milhaupt, make this argument:

[C]ontrary to the approach of most scholars to date, it is virtually impossible to discuss the “success” or “failure” of wholesale transplants of entire bodies of law (such as Japan’s transplantation of codes in the European Civil Law tradition in the late 19th century), or to extrapolate meaningfully from a single rule to the feasibility of legal transplants in general. Each legal rule or institution must be examined individually, and assessment of the overall feasibility of legal transplants as a form of legal change requires a more rigorous theoretical base than existing literature has provided.¹⁰⁰

As Eric J. Pan has added, “By no means will these barriers be easy to overcome, even though the benefits of creating a single securities market are tremendously high.”¹⁰¹

(iv) The Movement to Broader Codification in Civil Law Systems and a Degree of Codification in Common Law

Some civil law jurisdictions have seen a move toward codes characterized by more open and general rules, which enable courts to develop rules that are more focused and specific. For example, the Dutch Civil Code of 1992 has abandoned even the “traditional hierarchy among the different sources of law”.¹⁰² Similarly, Article 1261 of the Quebec Civil Code declares that the trust patrimony (the property transferred in trust) is distinct from that of the trustee or beneficiary and is a “patrimony by appropriation” (*patrimoine d’affectation*).

The law of obligations in the civil law system is divided into particular rules on obligations and a more general part, which is not itemized. Through these latter, more general obligations, a trust, similar to the common law trust, can be established. In contrast, when the Supreme Court of Canada imposed duties on the Crown stemming from assertions that the Crown made before a contract was signed, the Crown was held to be a fiduciary even though it was not a trustee in the strict sense of the

100. *Ibid* at 901.

101. Eric J Pan, “Harmonization of U.S.-EU Securities Regulation: The Case for a Single European Securities Regulator” (2003) 34:2 Law & Pol’y Int’l Bus 499 at 536.

102. Mancuso, *supra* note 92 at 44.

word. It was deemed a fiduciary in the sense of its power relationship with the Indian band with which it had made the contract.¹⁰³

At the same time, the common law system has been moving in the direction of the civil law. As the number of court cases becomes increasingly difficult and costly to manage, the common law may be moving toward a more central role for written rules. For instance, Salvatore Mancuso has described the UK Parliament's new Civil Procedure Rules as being "strongly influenced by the civil law pattern".¹⁰⁴ The same author notes that while the American legal system "is historically less linked to the classical pattern represented by English common law, the American system incorporates the fundamental elements of such a legal tradition," and now may also incorporate civil law elements.¹⁰⁵ On the whole, then, the common law and civil law systems are slowly moving toward each other.

B. What Can We Learn from the Attempts to Unify Languages?

(i) The Effort to Create a Global Language

Attempts to create a universal or worldwide language may help to understand the movement toward a more unified fiduciary law.¹⁰⁶ There are hundreds of proposed universal languages that have failed. Esperanto, for example, is well known; yet it is not a living language—only a few enthusiasts use it. A more successful model is represented by languages imposed through political power: Latin, French and English, for example. The hegemony of those languages eroded with the waning of the political power on whose coattails they rode.

Another language example worth noting is Yiddish, the language of Ashkenazi Jews in Europe. It has retained the syntax of old German but has absorbed particular words from the languages of the countries in which the users happened to live. Yiddish teaches us that the most difficult part of a language to change is the syntax, but if the syntax remains unchanged, specific new words (which are easier to learn) can be absorbed into it even

103. See *Osoyoos Indian Band v Oliver (Town of)*, 2001 SCC 85, [2001] 3 SCR 746.

104. Mancuso, *supra* note 92 at 44.

105. *Ibid.*

106. See Frederick Bodmer, *The Loom of Language: A Guide to Foreign Languages for the Home Student* (London: George Allen & Unwin, 1944) ch XII.

when they are of alien origin. Russian Yiddish and English Yiddish are basically the same, yet they differ in that way. “*Sie ist beautiful*” and “*Sie ist krasavitska*” retain the “*Sie ist*”—“She is”—and add the words “beautiful” in English and Russian. Similarly, English has absorbed many words from other languages (e.g., “cherubim” and “seraphim” from Hebrew).

These experiences with languages teach us that legal integration should retain one basic structure, while adopting specific differences that fit the local population and its culture. To a great extent, federal systems follow that pattern. They elevate general principles and structures, as well as key governmental rules, to the central level and leave matters of detail to the more local level. Over time, certain subject areas demand more uniform regulation while others can remain more diverse.

The problem in the case of fiduciary law is that the differences between the common law and civil law systems are at the “syntactic” or structural level. Their objectives and guiding principles are similar. However, changes to the detailed rules would require changes in structural legal categories and the underlying principles on which they rest—in other words, changes in syntax. Simply imposing one system on the other is hardly an option. If the situations or documents before the parties and the decision makers are written in another legal language, how should they determine which system to apply? How should lawyers draft documents for transactions between parties who are under different systems, in circumstances in which it is not known when, how and where problems might arise, and how particular judges or legislators will rule?

(ii) Can the Common Law Syntax of Fiduciary Duties Change from Property to Contract?

As John Langbein has pointed out, a leading jurist suggested that the United States should move its fiduciary law from property to contract. “We are accustomed to think of the trust as a branch of property law This exposure of the trustee’s capital informs the modern trust deal, effectively insuring the beneficiary against much potential harm and forming part of what the settlor buys when selecting a corporate fiduciary.”¹⁰⁷ Another

107. *Supra* note 87 at 639.

concern of grounding fiduciary law in property law is precisely the one that the civil lawyers were expressing.¹⁰⁸

The call for a contract-based approach to fiduciary law in the common law is not likely to bring the common law closer to the civil law. Those who preach for fiduciary law as contract law do not recommend imposing on fiduciaries the civil law *constraints* on contract, nor do they suggest empowering the courts to impose on trusted persons the civil law *strict fairness duties* under contract. The purpose of the “contractarians” seems to be to free fiduciaries from strict conflict of interest rules and other legal limitations and remedies, yet keep common law contract law intact, free from judicial regulation imposing high levels of moral behaviour on the parties.¹⁰⁹ Having tasted the bitter fruit of abused trust in 2008, the common law is unlikely to move the contractarian way.

Furthermore, moving to a contractual basis for fiduciary law would not be meaningful unless the common law provided the same remedies for breaches of contract that it provides for breach of fiduciary duties—disgorgement damages, accounting for profits and sometimes punitive damages. It is true that from a move toward similar remedies, a more uniform global system of fiduciary duties could emerge. Unfair treatment, as understood in the civil law, would be accompanied by the same remedies imposed by the common law on breaches of those duties. Any court, whether in the United States, Europe or elsewhere, that agrees to impose this system, could both follow and create such a hybrid system,

108.

[Austin] Scott was concerned that a contractarian account could undermine the integrity of the trust in the dawning procedural system that was emerging from the fusion of law and equity In the case in which the trustee transferred trust property to an outsider who did not supply value, the Chancellor would enforce the beneficiary’s claim to compel the transferee to return the asset to the trust even though that transferee was not a party to the trust deal between settlor and trustee I turn from the strengths of the contractarian analysis of the trust in accounting for trust fiduciary law to the weak point of contractarian analysis: the law of trustee insolvency, which governs the rights of outsiders to the trust deal.

Ibid at 646–47, 669.

109. Fiduciaries’ organizations and their followers have been arguing against tightening regulations of fiduciaries. The cost of regulation, they maintain, is enormous. For a strong argument against tightening the fiduciary duties of those who service pension funds under ERISA, see “The Borzi Savings Bomb”, *The Wall Street Journal* (12 August 2011) A14, online: The Wall Street Journal <<http://www.wsj.com>>.

making it more robust as time goes on. However, such a new system ought to be imposed on the parties if, and only if, they chose to adopt it.

Many difficult issues would have to be answered by those who adopt this proposal. First, should there be a uniform code that governs the global legal system? If so, are there organizations of lawyers in different countries who could draft such a code? Second, would common law and civil law courts adopt the system? That might depend on adaptations to the law in each jurisdiction.

Although this approach would be complex, it would not necessarily be impossible to achieve. If model documents were developed and used, the rules might follow the parties' expectations and end as uniform codes of behaviour.¹¹⁰ If laws come to recognize the forms prepared by practitioners, then those forms might result in the development of general practices. Custom, it should be remembered, is a source of law.¹¹¹

C. Should the Markets Decide?

There is a body of law dealing with transnational transactions that grants the parties freedom to determine which laws should apply to their transactions. It allows corporate entities to register in particular jurisdictions, thereby choosing the legal regimes that apply to them. However, United States law has not allowed the parties to *classify their relationship*, especially in fiduciary law.¹¹² The ultimate legal classification of a relationship is within the authority of the courts and legislatures. This is necessary to achieve uniformity and to ensure that the law has at least minimal coherence.

One way in which a court can approach a foreign system is demonstrated by how one Swiss court dealt with a common law trust.

"As there exists in Swiss law no legal institution which corresponds in all its elements to the legal relationship created by the . . . [attempted trust], it is necessary to examine which legal institutions of Swiss law . . . [have] the closest resemblance." Applying this method, the court determined that the trust had "certain elements of a contract of mandate, of

110. See Tamar Frankel, "The Law of Cross-Border Securitization: *Lex Juris*" (2002) 12:2 Duke J Comp & Int'l L 475.

111. See JH Dalhuisen, "Custom and Its Revival in Transnational Private Law" (2008) 18:2 Duke J Comp & Int'l L 339 at 339.

112. Frankel, *Fiduciary Law*, *supra* note 2 at 69.

a fiduciary transfer of property, of donation and of a contract for the benefit of a third party.”¹¹³

Thus, rather than trying to apply a governing rule, the Court sought a mode of analysis that would resolve the *different results among the rules*. In some respects this is a very fruitful route for the courts, as they often search for solutions among different rules that aim more or less at the same result.

The focus of this article has been on fiduciary law and its history. However, one should not ignore the importance that the particular culture and structure of a community have in shaping that law. For example, John Cioffi has noted the different common law and civil law approaches to labour-management relationships in corporate governance regimes. There are problems in each approach. While the civil law (e.g., Germany) resorts to structured arbitration in an attempt to resolve differences among the parties in those regimes, the common law often leads to the courts for the resolution of such differences. Structured arbitration, in Cioffi’s words, “cannot fashion coherent and determinate fiduciary duties privileging shareholder or managerial interests over those of employees in the internal governance of the firm”.¹¹⁴ American fiduciary law, in contrast, is litigious after the fact. The business judgment rule in common law systems “reveals the impracticability of structuring corporate governance through formal rights and judicial enforcement”.¹¹⁵ In Cioffi’s opinion, fiduciary law is an inherently flawed foundation for regulating corporate governance. The form distinction “indicates that civil law systems will encounter substantial, perhaps insuperable, problems in fashioning and enforcing a law of fiduciary duties along Anglo-American lines”.¹¹⁶ Hence, corporate governance regimes reflect the politics of institutional mechanisms. Existing institutional structures control and shape the political conflicts.¹¹⁷

113. Langbein, *supra* note 87 at 670 [footnotes omitted].

114. John W Cioffi, “State of the Art: A Review Essay on Comparative Corporate Governance: The State of the Art and Emerging Research” (2000) 48:3 Am J Comp L 501 at 524.

115. *Ibid.*

116. *Ibid.*

117. *Ibid.*

The differences between the common law and civil law approaches to corporate governance reveal the inherent difficulties in crafting a universal approach to fiduciary law. In Germany, conflicts “are adjusted within legally constructed bargaining fora and through the careful calibration of the parties’ bargaining power within them”.¹¹⁸ This affects the efficacy of the results. “American fiduciary law . . . describes the structure of much *ex post* common law adjudication and judge made law” and “differs sharply” from “the *ex ante* codified specificity” of the civil law.¹¹⁹ The differences make the imposition of the common law on civil law in this subject very difficult; judges cannot structure and manage a business, as the business judgment rule recognizes.¹²⁰ Not all is quiet on the common law front either. In trust law, there are serious arguments among common law scholars on the virtues of the settlors’ grip on trustees’ exercise of power, especially when the settlors have been dead for years and the trustees have no power to change the settlors’ directives.¹²¹ Free market controls have their own weaknesses. A balance is hard to reach and maintain even in one regime, let alone in two.

D. Choosing a Dual System

(i) The Secrets of an Effective Dual System

Arguably no comparison, distinction or explanation is perfect. But that should not dissuade attempts to communicate and compare. Different legal cultures preclude perfect interpretations, complete explanations and exact parallels. The process of translation from one system to another facilitates “a guided imaginative act, to start to penetrate the other legal culture”.¹²²

To translate or compare two systems, one must fully understand them both and must search for shared commonalities. Highlighting differences may also highlight similarities. As Vivian Grosswald Curran has emphasized, an

118. *Ibid* at 523.

119. *Ibid*.

120. See *Ibid* at 524.

121. See Rob Atkinson, “Obedience as the Foundation of Fiduciary Duty” (2008) 34:1 Iowa J Corp L 43.

122. Curran, *supra* note 43 at 90.

immersion approach rejects the absolutist mentality. It contemplates a slow pushing against cultural barriers towards an ideal of mutual comprehension, a striving to approach comprehension, and a recognition that some distances will remain. Rather than failure, it implies the need to accept that others have different truths.¹²³

Gaining insights and understanding of foreign “cultures, . . . habits, history, language, preoccupations and social circumstances” helps bridge the differences, as does learning a foreign legal system.¹²⁴ In Curran’s opinion, it is important to try to “understand foreign legal cultures in an untranslated form; i.e., through the prisms that shape perceptions in the target legal culture The immersion approach travels from the inside of a foreign legal culture’s many sources, from its rich, inchoate depths, to the outer, manifest level of the law.”¹²⁵

Presumably, the more one learns about another system, the easier it is to find common denominators with one’s own system. It does not matter whether the inquiry is driven by the desire to discover their similarities or their differences, so long as one seeks to learn and understand both systems. Neither civil law nor the common law is identical as between all countries that have adopted either system. The law and its enforcement are affected by the cultures and environments of different countries that share the same system.¹²⁶

(ii) The Benefits and Costs of Creating Hybrids

Creating hybrids is difficult, but may be worth it. The United States is fertile ground for hybrids. For example, the relatively new limited liability company constitutes a hybrid of contract, corporate entity, and fiduciary relationships.

[T]he rules seeking to preserve a minimal core of fiduciary duties can be best understood as intent-implementing or contract-enforcing Just as the doctrine of unconscionability prevents grossly one-sided contracts, core fiduciary duties will prevent overreaching by a member-manager This is a middle ground between applying the full corporate and partnership-like duties found in most states and the elimination of all fiduciary duties allowed under the Delaware Act. The middle-ground approach includes the recognition of

123. *Ibid* at 91.

124. *Ibid*.

125. *Ibid* at 57–60.

126. See Figueroa, *supra* note 53.

a minimum core of fiduciary duties and the use of good faith to prevent the repetitive use of manager-member contract rights to oppress minority interests.¹²⁷

The same idea was put forward by a scholar who saw the issue of unification of law as a conflict of laws issue. “American conflicts law,” he noted, “must pay more attention to international sources”.¹²⁸

(iii) Establishing a Set of Principles

Both common law and civil law systems espouse similar moral and ethical principles in similar situations. If we articulated those principles while ignoring their source, we could agree on a set of principles that each system follows today and may undertake to follow in the future.

There are good reasons for creating a platform of uniform international principles for certain types of fiduciaries, such as corporate management and directors, trustees or partners. The choice of a particular type of fiduciary should respond to particular needs and circumstances. If, for example, trusts are used in the process of securitization and that process is worldwide, there may be a significant need to unify the rules that govern the trustees who hold such positions. Unifying the law governing directors or partners could provide fruitful lessons for unification in other contexts. Yet the more detailed the rules are, the more disadvantages a system will likely have. The more general the guiding principles are, the better the chance that they will be followed. Perhaps, if the number of actors is relatively small, the chosen fiduciary relationships are the least complicated, and the existing rules are the least diverse, uniform rules may take hold.

(iv) Embodying the Same Principles in Different Legal Systems

Like any legal system, a multi-system need not be carved in granite and may be amenable to unification. There are benefits in a diversity of approaches to solving the same or similar problems. As much as diversity results in additional confusion and costs, it may offer valuable field experiments of different solutions. That process may produce, perhaps

127. Pargendler, *supra* note 27 at 1323–24.

128. Reimann, *supra* note 9 at 387.

decades from now, a more unified system, or one that is fractured but nonetheless well understood.

There is reason for optimism in the fact that the problems leading to the different laws are shared, and the chance that those problems will go away is very slim. As people in different societies continuously interact, they might learn to speak each other's legal language or might create a combined, and somewhat new, language. I would conclude that a multi-system is not only more feasible but also more desirable.

Furthermore, even though we have been considering two paramount legal systems in this article, there is no great uniformity within either of them. Even a small community is governed by general rules that give way to more specific, somewhat different rules in sub-groups within the community, such as families. Every system contains methods for accommodating and exploring diverse sets of rules.

The rules on the conflict of laws in the United States provide an example.¹²⁹ Those rules are governed by general principles, which apply to all of them, and are enforced by the same type of mechanism. Beneath those general principles is a layer of federal law that applies to all, and beneath that layer are state laws, municipal laws, and the laws of other smaller communities. Each layer offers choices to citizens. In some cases, the same entity may be governed by different legal systems. To take another example, in the United States, corporations choose their state of incorporation, and the rules of that state govern their internal affairs, but the operations of a corporation are governed by the law of the state where the operations are performed.¹³⁰

(v) Providing a Structure for the Choice of Law

The legal pyramid in the United States includes a constitution that determines the areas in which Congress may superimpose its rules and pre-empt state law. However, there are many statutes that allow federal and state laws to operate together.¹³¹ In such cases, the courts determine the extent to which state law may apply notwithstanding the imposition

129. See *Restatement (Second) of Conflict of Laws* (1971), § 8(2) (listing choice-of-law principles for determining which local law should be applied).

130. See Frederick Tung, "Before Competition: Origins of the Internal Affairs Doctrine" (2006) 32:1 J Corp L 33; *Novich v Rojzman*, 5 Misc (2d) 1029 (Sup Ct 1957).

131. See *Investment Company Act of 1940*, 15 USC § 80a.1–64. But see *ibid* § 80.35(b).

of federal law.¹³² It may well be that instead of the international unification of fiduciary law, rules could be adopted that function in a similar way to how the Constitution, conflict of laws and corporate law rules function in the United States, especially where the values and outcomes in different jurisdictions are similar.

Greater uniformity is necessary for transactions that require predictability, as is the case of instruments such as promissory notes and bills of exchange that involve everyday transfers of funds. For instance, Rodolfo Sacco has argued that the European Parliament should favour the eventual adoption of “a common civil code for all of Europe”. In his words:

If the 19th century and the first half of the 20th century celebrated the inherently national character of law, the second part of the 20th century evinces an awareness of the inherent unity of law, and the inherent value of uniform legal rules There can be no doubt that conflicts of law are interfering with trade. Uniform law means cultural unity, and thus the elimination of misunderstandings and difficulties between different civilizations that must get on together.¹³³

Therefore, uniformity of specific rules may be desirable and even necessary.¹³⁴ To be sure, strong desires and beliefs may hinder uniformity, especially if uniformity is not strongly needed (e.g., wills are harder to unify because the drafter needs to be able to change their terms and shield them from publicity).

Numerous examples of dual systems are described in a wonderful paper by Tony Honoré, entitled “On Fitting Trusts into Civil Law Jurisdictions”.¹³⁵ Hong Kong’s constitution recognizes “one country and two systems”, although, unlike the United States Constitution, it does not provide for separate administration of the two systems. It is not new

132. See e.g. *Burkes v Lasker*, 422 US 471 (1979).

133. Rodolfo Sacco, “Diversity and Uniformity in the Law” (2001) 49:2 Am J Comp L 171 at 171–72 [footnotes omitted]. See also Rodolfo Sacco, “Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods” (1984) 97:8 Harv L Rev 1984.

134. See Frances H Foster, “Privacy and the Elusive Quest for Uniformity in the Law of Trusts” (2006) 38:3 Ariz St LJ 713 at 766–67 [footnotes omitted].

135. Tony Honoré, “On Fitting Trusts into Civil Law Jurisdictions” (2008) [unpublished, University of Oxford Legal Research Paper Series 27] at 1, online: Social Science Research Network <<http://ssrn.com/abstract=1270179>>.

or unusual, in Honoré's words, for a country to have "two systems that belong to different legal families".¹³⁶ This is true in the UK (Scotland), in Canada (Quebec), in the US (Louisiana), and in Hong Kong. The variations tend to be greater in private than public law, and one system tends to be prevalent, reflecting particular political realities. As Honoré notes, in Scotland, Quebec and Louisiana, civil or partly civil law systems "prevail . . . in a common law environment[;] Hong Kong is a common law system in a civil or partly civil law environment".¹³⁷

A closer look at the United Kingdom can provide a useful example of how a dual system can operate within one country. Both England, Wales and Northern Ireland have common law legal systems that vary only in detail. Scotland, on the other hand, is governed by a mixed civil law and common law system. It has separate courts and a separate legal literature that reflect its former independence and present distinctiveness. It imposes a separate system in private and criminal law, but less so in public law. Although this mix may reflect a political reality, it is not based on a particular constitutional structure. Nonetheless, Honoré suggests a minority system's survival depends on the acceptance of a constitutional convention or at least on respect for the applicability of the minority system.

Dual systems involve disadvantages. They are imprecise, sometimes inefficient, often costly, and they invite litigation. However, these disadvantages are mitigated by evolving technology, which facilitates the application of rules to particular activities and allows some disagreements to be mediated online. In addition, if a sufficient number of people and institutions follow each of the systems within the dual structure, a habit or custom may develop. The longer that custom lasts, the harder it will be to change, and the lower the cost of enforcing it.

(vi) Establishing an Implementing Court

If a process implementing a dual or hybrid system is adopted, it must be accompanied by, and will indeed depend on, an implementing judiciary. An international court of fiduciary law could be established, modelled on the international court of justice and the international court

136. *Ibid* at 137.

137. *Ibid* at 1.

of arbitration. If the judges of this court represented both systems, they could use the common law system of individual reasoned judgements to reach decisions appropriate to a hybrid legal system.

The importance and value of such a court is its weakness. The fact that all other courts would be backed by strong governments and that no strong government will accept the decision of another strong government may lead to implementation of the law by a weaker court. This implementing court would be sensitive to the trends and strong convictions of those who appointed it and would mediate among the more powerful members that have an interest in the resolution.

The evolution of the Internet Corporation for Assigned Names and Numbers (ICANN) offers an instructive example. Internet names embody not only the address but the very existence of any person in the internet world. The power to establish and grant internet names and numbers is very valuable, both politically and financially. Initially, the American government helped develop the internet and controlled the management of the names and numbers. As the internet expanded, the US government sought to move this power to another entity, while retaining some control over that entity. “The [Internet Engineering Task Force (IETF)]’s ‘requests for comments’ (‘RFCs’), which outline key functions of the internet, are now firmly asserted as copyrighted by the internet Society.”¹³⁸ The conflicting demands of various countries to control the names and numbers on the internet resulted in the establishment of ICANN—a corporation that did not have much power as compared to the governments that were interested in acquiring that power. It was

138. See Jonathan Zittrain, “What’s In a Name?”, Book Review of *Ruling the Root* by Milton L. Mueller, (2002) 55:1 Fed Comm LJ 153 at 163 [footnotes omitted]. As stated by Zittrain,

The copyright is deployed as a flavor of “copyleft,” meaning that it is used for the purpose of ensuring the widespread availability of the standards, preventing their proprietization by any particular party. The intellectual property behind RFCs is thus held in trust by the Internet Society—the IETF umbrella group which still retains some influence over ICANN, and which . . . has been tentatively selected by ICANN to run the .org registry, providing an anticipated needed infusion of cash to the organization. In other words, there is no doubt that the Internet Society “owns” its RFCs, and thus no battle is to be waged over who will rule them. There is only the question of whether the world at large will pay heed to them as they are published—since an RFC is not self-enforcing.

created because no country was willing to agree that any other country would have the power to control internet addresses. In other words, ICANN's power was granted by default; the countries that set it up did not want one of them to hold it, and the power in question could not be exercised by all.

Legal change in the common law and civil law differs somewhat from the ICANN experience in that the courts in each system are the source of slow and incremental change. However, a court of fiduciary law could help establish the law in a way that is similar to the ICANN experience.

Conclusion

If the public policy objectives that different legal systems are designed to protect and enforce are related, and if those systems seek to eliminate similar immoral activities, then laws can be made more uniform by focusing on those objectives. Misappropriation of entrusted property under the common law and breach of a promise under the civil law are covered, even if not in an entirely similar way, by rules that condemn these actions. Unfaithful contract parties, and misleading promises which entice a party to enter into a deficient contract, are not fundamentally different from abusive fiduciaries. To be sure, there are grey areas where civil law and common law outcomes would differ. However, a shared system would allow the different approaches, cultures, and values of the common law and civil law to be maintained while imposing similar remedies on similar wrongful behaviours in order to achieve the mutual objectives. If important joint principles were enunciated and publicized, those principles might evolve into more detailed rules capable of enforcement by both common law and civil law courts.

Ibid at 163. See also Tamar Frankel, "Governing by Negotiation: The Internet Naming System" (2004) 12:2 Cardozo J Int'l & Comp L 449; Tamar Frankel, *Report to the Markle Foundation on Corporate Governance* (2002) [unpublished, working paper no 02-15, available at The Boston University School of Law Working Paper Series Index], online: Boston University <http://www.bu.edu/law/faculty/scholarship/workingpapers/abstracts/2002/pdf_files/FrankelT092402.pdf>.

