EDUCATIONAL JUSTICE AND THE RECOGNITION OF MARRIAGE

By Scott FitzGibbon

I. INTRODUCTION

This article develops an original account of the ethical basis of the fiduciary relationship. It considers and rejects instrumentalist accounts based on contract and tort and develops, instead, a virtue-based approach, founded upon the good of faithfulness, beneficence, clarity of thought, and dedication to the truth.

This article proposes that the relationship between teacher and student is fiduciary. It develops the thesis, in other words, that the teacher in a primary or secondary school has especially high duties to the student: obligations – resembling those of a guardian, a trustee, an executor, and an attorney – of fidelity, zealous devotion to the well-being of the other party, and full disclosure. This article does not endorse this approach for the positive law. It is not here proposed that teacher be held legally liable for violations of those obligations. The thesis is, rather, about ethics. The teacher, it is here proposed, is morally a fiduciary.

Teachers in primary and secondary schools are, ethically, fiduciaries because they exercise, exemplify and transmit fiduciary virtues. Not that they specially model and transmit all the excellences of which the human character is capable. Preeminently, they exercise, exemplify, and foster the intellectual virtues.

This article sketches a few implications of virtue-based fiduciary ethics. It proposes that they commend a policy of ample, open-ended beneficence. It develops and commends the practice, here introduced and defined, of “fiduciary recognition.” It sketches some likely implications for teachers, especially as regards the recognition of marriage.

II. THE FIDUCIARY RELATIONSHIP IN LAW AND LEGAL THEORY

A. Legal Doctrines.

A trustee is a fiduciary for the beneficiaries, a guardian for the ward, an attorney for a client, an executor for the heirs, a corporate director or officer for the corporation or...
its shareholders, an agent for the principal, a partner for the other partners, and, in class action lawsuits, the representative of a class for its members. According to some authorities, a physician or a psychiatrist may be a fiduciary for a patient and a priest for a penitent.  

A fiduciary must be beneficent and zealous to serve the well-being of the beneficiary. He has an especially strong duty of good faith. He has an especially high duty of disclosure, requiring him to go beyond avoiding fraud and false statements: to be candid: to offer additional information beyond what is specifically requested. He must respect beneficiary confidences. The importance of his obligations has been strongly emphasized by the New York Court of Appeals: “[I]t is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. This is a sensitive and ‘inflexible’ rule of fidelity, . . . requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty. . . . [A] fiduciary . . . is bound to single-mindedly pursue the interests of those to whom a duty of loyalty is owed . . . .”

A classic statement of fiduciary principle is set forth in Justice Cardozo’s opinion in Meinhard v. Salmon:  

“Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular


5 164 N.E. 545, 546 (N.Y. 1928). See Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992)(Posner, J.) (“[a] fiduciary duty is the duty of an agent to treat his principal with the utmost candor, rectitude, care, loyalty, and good faith--in fact to treat the principal as well as the agent would treat himself.”)(citations omitted). Other general statements are contained in Pepper v. Litton, 308 U.S. 295 (1939) and Committee on Children's Television, Inc. v. General Foods Corp., 673 P.2d 660, 675-76 (Cal. 1983) ; Libby v. L.J. Corp., 247 F.2d 78, 81 (D.C. Cir. 1957) (Burger, J.) (“The duty imposed [upon joint adventurers] is essentially one of good faith, fair and open dealing and the utmost of candor and disclosure to all concerned.”).
exceptions. . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court. . . Salmon had put himself in a position in which thought of self was to be renounced, however hard the abnegation.”

B. Legal Theories.  

Some scholars explain the law’s imposition of fiduciary duty as penumbral to contract or tort: as a device for making tort law and contract law work in relationships which impede the functioning of normal doctrines in such as way as to suggest the need for supplementary ones. Guardian-ward relationships afford a clear example. The guardian may breach his promises but elude detection because the ward lacks capacity. Attorney-client relationships supply another example: an attorney may fail to perform up to the promised standard but avoid liability (either for breach of contract or for committing the tort of malpractice) because the client lacks the expertise to detect poor lawyering. By making guardians and attorneys fiduciaries, the law seeks to plug the gap. For example, by imposing the duty of loyalty and thus precluding conflicts of interest, the law diminishes one form of temptation which might lead to delicalut conduct on the part of the fiduciary. By requiring fulsome disclosure, the law makes detection

---


7 Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992)(Posner, J.) (“The common law imposes [a fiduciary] duty when the disparity between the parties in knowledge or power relevant to the performance of an undertaking is so vast that it is a reasonable inference that had the parties in advance negotiated expressly over the issue they would have agreed that the agent owed the principal the high duty that we have described, because otherwise the principal would be placing himself at the agent's mercy. An example is the relation between a guardian and his minor ward, or a lawyer and his client. The ward, the client, is in no position to supervise or control the actions of his principal on his behalf; he must take those actions on trust; the fiduciary principle is designed to prevent that trust from being misplaced.”). In Pohl v. National Benefits Consultants, Inc., 956 F.2d 126, 129 (7th Cir. 1992), Judge Posner, in dicta, elaborated on this idea:

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

8 A similar approach notes that many classic fiduciaries are in a position to do the beneficiary irreparable harm: the sort of harm that cannot be detected until it is in one way or another too late and which cannot be sufficiently remedied by an award of damages. Thus a lawyer who mishandles a criminal defense may escape detection until after his client has been convicted, and the convicted client victim may reasonably feel that no award of monetary damages can compensate him for his time in prison.
somewhat more likely. By affording very generous remedies, the law deters with special strength.

These accounts found fiduciary duties on the obligation to perform contractual undertakings and to avoid torts. As to ethics, they suggest that the moral basis of the fiduciary relationship is similar to the moral bases of contract or tort. They suggest that whether one ought or need not consider oneself a fiduciary towards someone else, and act with the special degree of loyalty and zeal and disclosure and candor towards him that is required of fiduciaries generally, is a question that should be answered based on contract or tort morality. They understand fiduciary duties to be instrumental goods.

Thus, those who propose that contract and tort doctrines promote efficiency will likely find that fiduciary doctrines do so as well. A similar reduction might be attempted by those who understand the good of contract and tort as having much to do with the prohibition and remedy of harm. Fiduciary duties plainly serve this good when they protect the vulnerable from damage by the strong.

C. Teachers.

Teachers are not generally subject to fiduciary duties as a matter of law. This might seem incongruous, as they are in a position to violate contractual duties and to do harm through bad teaching, and neither their violations of promise nor the duty to avoid harm is readily susceptible to remedy by those in their charge. However, the law’s omission to subject them to fiduciary duties can be explained by institutional considerations. This is so, because teachers are – most of them – civil servants, subject to supervision and control independent of the civil law in the form of school administrators, school boards, other elected officials; and they are also in close touch with and to some extent subject to suasion and even supervision by parents. Furthermore, teachers provide a service which unlike those of most other fiduciaries can take effect only with the active participation of the beneficiary; so that especially in the higher grades any allegation of inadequate learning would reasonably be answered with a reference to the fact that learning cannot take place without the competent cooperation of the student.

Doubtless other such reasons can be adduced; but the key insight here is that these reasons are institutional: they relate to doubts about whether the evidentiary and other competencies of the judicial system apply well to the assessment of teaching and whether other systems of promoting educational excellence might be preferable. They do not go to the moral core or the legal-theoretical basis.

\[9 \text{ Compare D. Gordon Smith, The Critical Resource Theory of Fiduciary Duty, 55 VAND. L. REV. 1399, 1403 (2002)}\text{("What distinguishes a fiduciary from many other contracting parties … is that a fiduciary exercises discretion with respect to a critical resource belonging to the beneficiary."}).

\[10 \text{ See generally Kent Weeks & Rich Haglund, Fiduciary Duties of College and University Faculty and Administrators, 29 J. COLLEGE & U. L. 153 (2002).}\]
III. THE BASIC ETHICS OF THE FIDUCIARY RELATIONSHIP

Here the analysis parts company from legal doctrine and theory and attempts basic ethics.

A. What We Are Looking For.

The aim will not, of course, be to justify the law of fiduciaries as a whole; some relationships which the law deems fiduciary may not stand on the proposed basis; others which the law does not may be founded there. The aim may reasonably be, however, to “get the idea” from the law: to “get the picture” and bear it in mind of a certain category of association which bears and elicits a high level of devotion and merits a considerable degree of zeal and diligence.

We may also “get the picture” from social practice and general opinion, which generally acknowledge that a category of associations arises which elicits dedication, and sometime a considerable level of self-definition and long-term commitment from those who participate, and which rightly calls upon the social order for recognition and support. Further, we may discern dimensions of this sort of relationship by considering the opinions of those involved, who will often attest that certain affiliations and roles elicit special dedication, and that they define and express the personality and shape, in some cases, the entire civil identity of the person in a way that would not be the case with contractual or relationships or casual encounters. The fiduciary role displays a personalist dimension, and engages the character.

What sort of associations merit, and for what basic reasons, the application of ethical principles of these sorts?

B. Beyond Contract-and-Tort Instrumentalism.

If contract instrumentalism and tort instrumentalism were the whole story one might reasonably limit action upon the fiduciary virtues, and curtail the performance of fiduciary-like duties, beyond the point at which they fulfilled their instrumental ends. You might have no reason to be zealous about your obligations beyond the amount of zeal needed to support performance of what you promised, for example. Many of the standard fiduciary obligations, it seems, could be jettisoned altogether in favor of chillier motives. ¹¹

¹¹ Another reason to hesitate about this sort of instrumentalist analysis for the purpose of the present article is that it seems to offer a theory about how the law should address the fiduciary rather than about the ethics he should embrace for himself. It may make sense for the legal system to say “I’m prohibiting you from forming conflicting interests, and I am mandating a strict regime of disclosure, as an extra defense against misconduct, in order to secure my primary
Furthermore, if these forms of instrumentalism were the entire story it seems that zeal, loyalty, diligence and other virtues could be eschewed beyond the point at which performance of contract and tort obligation was itself valuable or good. An economic analyst of contract, for example, would see no reason for even minimal diligence in both parties’ performing an inefficient contract.

This difficulty will arise with any purely instrumentalist account, because it is a feature of any project or institution whose purpose is merely to serve some other end that it can reasonably jettisoned when the end is achieved, or when the end can be better pursued in some other way. This can be called the “dispensability” feature of instrumental goods. If fiduciary-style obligations are in fact defensible on any ethical basis it will, it seems, have to be on some basis beyond the purely instrumental. If there are sorts of relationship within which a party should zealously do as much as possible for the other, and should act in a fulsome and self-sacrificial way, it would seem to be because the goods involved in that sort of relationship themselves merit bestowal to a maximum degree.

If contract-and-tort instrumentalism were the whole story it would be difficult to explain or justify the self-defining character-based, “personalist” dimension of fiduciary relationship identified above. Certainly it would be difficult to explain the self-extending, fulfilling, generous quality of the fiduciary persona. Scrooge fully performed his contracts. Perhaps his virtues were sufficient to that end.

C. A Virtue-Based Account.

A better account can be based on the good of the fiduciary virtues: their goodness “in themselves,” noninstrumentally. This subsection proposes a foundation which rests on the proposition that the fiduciary values are good in themselves, quite apart from the instrumental goods they serve. It is a good thing to be capable of loyalty; good to be honorable and trustworthy; good to be capable of service; good to be candid. It is good, above all those things, to be clear headed, insightful and wise. The mind and its excellences, the Aristotelean teaching persuades us, is “the best thing in us.”


“If happiness [eudaemonia: the final good for man] is activity in accord with virtue, it is reasonable for it to accord with the supreme virtue, which will be the virtue of the best thing. The best is understanding . . . and to understand what is fine and divine, by being itself either divine or the most divine element in us. Hence complete happiness will be its activity in accord with its proper virtue and . . . this activity is the activity of study.”

aim, which is making sure you keep your promises.” It makes very little sense for the guardian or attorney to speak or think that way about himself.
These propositions rest on the ethical tradition which was at the core of the Christian moral theology to which the medieval Chancellors subscribed. Space and time do not present the opportunity for a fundamental development of this ethic here. It must be commended simply as a matter of common sense. Who would choose to be shifty, untrustworthy, selfish, muddle-headed and foolish, though he had all the other goods?

Furthermore the ethical foundation described here rests on the insight that the excellences of character proposed in fiduciary thought are best when not only possessed but also exercised. Action brings to fruition the deliberations and dispositions of the acting person. Good action expresses and deploys the actor’s understanding of the good. This might be illustrated by the example of a sculptor: it is good for him to have a sculptor’s talent and training; good to develop it through study and observation; but good in yet a further way actually to practice his art. The actions of a good person extend his goodness and, so to speak, “realize” it and fulfill it.

Taking all of these points together, we can propose, as the ethical basis for fiduciary relationship, the promotion and exercise of the fiduciary virtues. Furthermore, if the possession and exercise of the fiduciary virtues is a good, then it is likely also a good and an exercise of benevolence to transmit these virtues to others, for example by teaching them or modeling them. “Fiduciary good” is present in an especially rich way, we can surmise, in the fiduciary teacher.

This virtue-based, virtue-exercising, virtue-transmission account provides a firm basis for the fiduciary requirements of loyalty and zeal – requirements which seemed inexplicable when proposed on the instrumentalist grounds discussed above. Whereas, as there objected, it seems implausible that contracting parties should endorse an ethic of self-sacrifice and zealous mutual service – implausible that there is a reason to give a co-contractor more than the agreement fairly implies – one can see the point of zeal once this new basis is identified. Doing more and giving more is almost always a good when the “more” is virtue.

“Study” is a translation of a cognate of theorein. Irwin explains: “In Aristotle’s most specialized use, theorein refers to the contemplative study that he identifies as HAPPINESS, or with a part of it. This is study in the sense in which I ‘study’ a face or a scene that I already have in full view . . . .” Terence Irwin, “Glossary,” in id.


D. Further Elements?

Some projects which display and transmit the fiduciary virtues may not give rise to full-scale fiduciary duties. Solitary projects however faithfully pursued may perhaps not bear such duties; the fiduciary obligation seems always to arise within a relationship. *Ad libitum* projects – that is, ones pursued without grave cause -- are questionably bearers of fiduciary duties. Perhaps the clerk of Oxenford in the Canterbury Tales, who “gladly would … learn and gladly teach,” was under no special duty to the people he chanced to meet and discourse with. Fiduciary relationships involve a firm traction on the parties; actions under the guidance of the fiduciary virtues is not superogatory. They reflect desiderata which have been “perfected.”

A valuable discussion might here be presented as to what “perfects” an obligation, Obvious candidates are promise, and the call of reciprocity (where the beneficiary has himself conferred like benefits, for example). A second likely situation for perfect obligation arises where a party has been appointed to perform the service, by law or the social order, as for example in the instance of a lifeguard. A third promising situation for recognizing perfect obligation arises where one person can confer a much needed benefit without much cost or hardship to himself, and where the prospective recipient greatly needs it and cannot obtain it elsewhere.

Further discussion is probably unnecessary, however. Professional teachers, it can readily be seen, are bearers of perfected obligations, as almost all the elements of perfection referenced above are present in the teacher-student relationship.

E. Summary Definition of the Ethically Fiduciary Relationship.

A fiduciary relationship is one in which at least one of the associates endorses, appropriately, his exercise of the virtues of loyalty, diligence, zeal, and the intellectual virtues such as discernment, clarity, candor and wisdom, and especially where his exercise of those virtues within the association manifests and transmits them to other parties, and where the good involved in his doing these things is ”perfected’ and thus obligatory.

---


16 Signaled by this adverb “appropriately” are two fairly important dimensions which are not pursued here (largely because they seldom bear on the problematics of the teacher). One dimension concerns the eligibility of the relationship in question as a field for the exercise of the virtues in question. The other dimension concerns the possibility that the association involves wrongdoing. We would not identify members of a robber gang as fiduciaries to one another.
IV. SOME IMPLICATIONS

A. Some General Implications.

Echoing observations from an earlier section, we can identify some responses to and policies towards a relationship which is ethically fiduciary:

First, such an association can reasonably be fulsomely endorsed and “taken to heart” by the fiduciary himself, as it is a part of his own good to be one and live accordingly.

Second, it can reasonably be taken as a model by other people, including on many occasions the nonfiduciary party to (the beneficiary in) a relationship.

Third, it deserves the recognition and support of the social order and the state; and perhaps also – in view of the personalistic character of the fiduciary relationship – it merits a considerable degree of deference as to its appropriate conduct. (No doubt it also merits especially severe condemnation when it is abused.).

B. The Implications of Open-Ended Loyalty and Benevolence.

A further implication relates to the extent and scope of the fiduciary’s activities. Whereas an instrumentalist good is exhausted when its object has been achieved, so that, for example, the pertinacity which may be serviceable to contract need not be endorsed beyond the time of performance or intensified beyond the demands of the project, no such limits appear for final goods such as loyalty and benevolence. Therefore it is often reasonable for a fiduciary to exercise those virtues to the full extent permitted by the circumstances.

C. The Implication as to Fiduciary Knowledge.

A final point relies on the insight that, whereas for instrumental purposes fiduciary conduct might be entirely satisfactory though performed for any reason or no good reason by the fiduciary, and bestowed on the beneficiary without his knowledge or understanding, the same cannot be said once the noninstrumental, final purposes of the fiduciary relationship are brought into the picture. The virtues are only fully virtuous when they are endorsed and accepted as such by the person who exercises them;\(^\text{17}\)

\(^{17}\) As Aristotle says, “in order to be good one must be in a certain state when one does the several acts, i.e. one must do them as a result of choice and for the sake of the acts themselves.” NICOMACHEAN ETHICS 1144a 18-20 in II THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 1729 at 1807 (Jonathan Barnes, ed., W. D. Ross, trans. (rev. by J.O. Urmson), 1984). “The agent . . . must be in a certain condition when he does them; in the first place he must have knowledge, secondly, he must choose the acts, and choose them for their own sakes, and thirdly his action must proceed from a firm and unchangeable character.” Id. 1105a 30 –
they successfully model virtue only to the observer who understands what they are and why they are good.

Thus a key implication of the virtue-based account of the fiduciary relationship is that it makes knowledge and understanding central, including knowledge and understanding of fiduciary relationships themselves.

Teachers, and other mentoring fiduciaries (parents, for example) are thus paradigmatic, central cases of the fiduciary relationship.

D. The Implication of Fiduciary Recognition.

One of the ways in which a fiduciary establishes his own knowledge of the fiduciary virtues, and in which he commends them to others, is through the recognition and appraisal of the relationships of others. Mutual recognition by authentic and well-performing fiduciaries, though in different fiduciary categories, confirms and strengthens their understanding.

It is therefore a special strength of the teacher as fiduciary to identify and compare himself with a parent (a comparison reflected in the identification of the teacher as in loco parentis). Virtue-based fiduciary teaching has much to learn from parents, and virtue-based parenting can be, in a sense, the father of good teaching.

V. A WORRISOME PATHOLOGY

Fiduciary recognition would miscarry if it portrayed other relationships of service in ways which distorted or occluded the fiduciary-like elements. Teachers would damage their own fiduciary mission if they ignored or deplored the duty-bearing, fiduciary-like aspect of the parent-child relationship. Teachers might, for example be misled by some contemporary social-science writing which proposes that parents act out of a “need for belongingness” or a “dyadic intention toward a … dependent growing out of a feeling of belongingness”\(^\text{18}\) or a “dyadic intention toward a … dependent growing out of a feeling of belongingness”\(^\text{18}\).

---

\(^{1105b\, 1}\) (page 1746 in the Ross translation). He should deliberate carefully and understand the good of what he does, since choice involves “consideration and deliberation.” ARISTOTLE, EUDEMIAN ETHICS 1226b-8, in II THE COMPLETE WORKS OF ARISTOTLE 1922 at 1942 (J. Barnes, ed., J. Solomon, trans., 1984).

\(^{18}\) See Catrin Finkenauer & Wim Meeus, \textit{How (Pro-)Social Is the Caring Motive?,} 11 PSYCHOLOGICAL INQUIRY 100, 101 (2000)(available on jstor)(An “important motive for caregiving may be found in the human need for belongingness . . . . People . . . . go to great lengths to feel they belong and to avoid feeling lonely.”). For references to authorities which account for attachments based on needs, see David C. Bell & Alan J. Richard, Caregiving: The Forgotten Element in Attachment, 11 PSYCHOLOGICAL INQUIRY 69, 76 (2000)(available on jstor).
toward that dependent,”19 conforming to a theory from the social sciences which proposes that “[w]hat the parent does is to feel.”20 Fiduciary recognition would similarly miscarry if it adopted a similarly emotionalist understanding of marriage, as it might do if it adopted the view of one fairly prominent scholar, who writes: “marriage today is a home for the heart: entering, furnishing, and exiting that home is your business alone. Today’s marriage – from whatever angle you look – is justified by the happiness of the pair.”21


“[T]he parent looks into the child’s eyes. What the parent does is to feel . . . . * * * [T]his is not a thinking moment. It is a feeling moment. This moment and all the lifetime of moments following when I love her and try to understand her and try to meet her needs with my limited resources are feeling moments. Cognitions will be important in all these moments . . . . But these cognitions are not what motivate the parent’s actions – emotions are . . . .”.
