

# Brigham Young University Education and Law Journal

---

Volume 2011

Issue 2 Symposium: *The Impact of Same-Sex Marriage  
on Education*

Article 6

---

Fall 3-2-2011

## Educational Justice and the Recognition of Marriage

Scott FitzGibbon

Follow this and additional works at: <http://digitalcommons.law.byu.edu/elj>



Part of the [Education Law Commons](#), and the [Family Law Commons](#)

---

### Recommended Citation

Scott FitzGibbon, *Educational Justice and the Recognition of Marriage*, 2011 BYU Educ. & L.J. 263 (2011)

Available at: <http://digitalcommons.law.byu.edu/elj/vol2011/iss2/6>

.

This Symposium Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Education and Law Journal by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

# EDUCATIONAL JUSTICE AND THE RECOGNITION OF MARRIAGE

*Scott FitzGibbon\**

## I. INTRODUCTION

This article describes a fundamental dimension, ignored in the literature, of the ethical basis of the fiduciary relationship. It considers and rejects an account of the fiduciary relationship based on contract. It develops, instead, a virtue-based approach to the fiduciary relationship founded upon the goods 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 that a primary or secondary school teacher 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 teachers be held legally liable for violations of those obligations. The topic of this article, rather, is ethics. The teacher, it is here proposed, is morally a fiduciary.

Teachers in primary and secondary schools are ethically fiduciaries in a special way because they exercise, exemplify, and transmit fiduciary virtues and, preeminently, the intellectual virtues.

This Article sketches a few implications of virtue-based fiduciary ethics and proposes some implications for teachers pertinent to the recognition of marriage.

---

\* Scott FitzGibbon—J.D., Harvard; B.C.L., Oxford—is a Professor at the Boston College Law School. He is a member of the Massachusetts bar. Copyright 2011 by Scott FitzGibbon.

## II. THE FIDUCIARY RELATIONSHIP IN LAW AND LEGAL THEORY

### A. *Legal Doctrines and Principles*

A fiduciary is a trustee for the beneficiaries,<sup>1</sup> a guardian for the ward,<sup>2</sup> an attorney for a client,<sup>3</sup> an executor for the heirs,<sup>4</sup> a corporate director (or officer) for the corporation or its shareholders,<sup>5</sup> and an agent for the principal.<sup>6</sup> According to some authorities, a physician or a psychiatrist may be a fiduciary for a patient,<sup>7</sup> and a partner may be a fiduciary for a partner.<sup>8</sup>

1. See GEORGE GLEASON BOGERT ET AL., *BOGERT'S TRUSTS AND TRUSTEES* § 1 (3d ed. 2010) ("A trust may be defined as a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another."); *RESTATEMENT (SECOND) OF TRUSTS* § 2 (1959) ("A trust . . . is a fiduciary relationship with respect to the property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person . . ."). See generally John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 *YALE L.J.* 929 (2005).

2. See *In re Estate of Swiecicki*, 477 N.E.2d 488, 490 (Ill. 1985); Michael D. Casasanto et al., *A Model Code of Ethics for Guardians*, 11 *WHITTIER L. REV.* 543, 550 (1989) ("[T]he guardian is required to exercise the highest degree of trust, loyalty and fidelity in making decisions on behalf of the ward."); *id.* at 555 ("The relationship between a guardian and ward is fiduciary in nature."); Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, *DUKE LAW SCHOOL FACULTY SCHOLARSHIP SERIES*, Paper 47, 14 (Aug. 1, 2006), available at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1047&context=duke\\_fs](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1047&context=duke_fs); Lawrence Frolik, *Is a Guardian the Alter Ego of the Ward?*, 37 *STETSON L. REV.* 53, 54 (2007) (stating that the guardian has a fiduciary duty "of care and loyalty to the ward").

3. *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 16 cmt. b (2000) ("A lawyer is a fiduciary.").

4. See John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 *YALE L.J.* 929, 931 n.15 (2005).

5. See *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006) (presenting a thorough exposition of several aspects of the director's and officer's fiduciary duty).

6. *RESTATEMENT (THIRD) OF AGENCY* § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."). See *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992) (discussing an agent's fiduciary duty to "treat the principal as well as the agent would treat himself"); Deborah A. DeMott, *Disloyal Agents*, 58 *AIA L. REV.* 1049 (2007).

7. Thomas L. Hafemeister & Selina Spinos, *Lean on Me: A Physician's Fiduciary Duty to Disclose Medical Risk to the Patient*, 86 *WASH. U. L. REV.* 1167 (2009).

8. The Uniform Partnership Act (1997) provides that "[t]he only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care . . ." The Comment states:

Arguably, the term 'fiduciary' is inappropriate when used to describe the duties of a partner because a partner may legitimately pursue self-interest . . . and not solely the interest of the partnership and the other partners, as must a true

A fiduciary must display “a true faithfulness and devotion” to the beneficiary,<sup>9</sup> treating him “as well as [he] would treat himself.”<sup>10</sup> He must, in many circumstances, follow the beneficiary’s instructions, and not only those communicated when the relationship was formed but also those given during the course of the relationship. He must consider the implicit as well as the express instructions of the beneficiary, “so as to infer, in a reasonable manner, what the [beneficiary] would wish the [fiduciary] to do in light of the facts of which the [fiduciary] has notice at the time of acting.”<sup>11</sup>

As this implies, the fiduciary must attend closely to the beneficiary’s purposes. A recent article proposes that a fiduciary “must appropriate the objectives, goals, or ends of another and then act on the basis of what the fiduciary believes will accomplish them—a happy marriage of the [beneficiary’s] ends and the fiduciary’s expertise.”<sup>12</sup>

The fiduciary has an especially high duty of disclosure. More is required than that he avoid fraud and false statements: he must be candid, and offer additional information beyond what is specifically requested.<sup>13</sup> He must also respect beneficiary confidences.

trustee. Nevertheless, partners have long been characterized as fiduciaries. . . . Indeed, the law of partnership reflects the broader law of principal and agent, under which every agent is a fiduciary.

UNIFORM PARTNERSHIP ACT § 404 cmt. 1 (1997).

9. *In re Walt Disney*, 906 A.2d at 67 (quoting with approval the statement in one of the opinions of the trial court in the case that “[t]he good faith required of a corporate fiduciary includes . . . a true faithfulness and devotion to the interests of the corporation and its shareholders”).

10. *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).

11. RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. g (2006).

12. Arthur B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFF. L. REV. 99, 135 (2008).

13. *See 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.”); *Casasanto et al.*, *supra* note 2, at 557 (“Inherent in the guardian’s obligation to exhibit the highest degree of trust, loyalty and fidelity in relation to the ward is the requirement that the guardian share pertinent information with the ward about his or her condition and financial status as well as any decisions the guardian is contemplating or may have actually made. To the extent the ward is able to participate, there exists an affirmative duty on the part of the guardian to share relevant information with the ward and thus aim toward the goal of joint decision making.”).

A fiduciary's duties must not be diluted by self-interest. The New York Court of Appeals has stated: "it is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect . . . . [A] fiduciary . . . is bound to single-mindedly pursue the interests of those to whom a duty of loyalty is owed . . . ." <sup>14</sup> Justice Cardozo's opinion in *Meinhard v. Salmon* states:

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions . . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court . . . . Salmon had put himself in a position in which thought of self was to be renounced, however hard the abnegation. <sup>15</sup>

### B. Legal Theories<sup>16</sup>

Leading scholars explain fiduciary duty as penumbral to a contract.<sup>17</sup> They explain it as a device for making contract law work under difficult circumstances: under conditions, that is, where normal contract doctrines may not achieve their

---

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

15. *Meinhard v. Salmon*, 164 N.E. 545, 546, 548 (N.Y. 1928). See *Pepper v. Litton*, 308 U.S. 295 (1939); *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660, 675-76 (Cal. 1983).

16. See generally Deborah DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 934 n.46 (2006) (compiling references to many of the classic accounts of fiduciary duties); Langbein, *supra* note 1; Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 (2009).

17. Similar approaches, not discussed here, understand fiduciary duty as penumbral to tort or property law. See, e.g., D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1403 (2002) ("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 . . .").

purposes.<sup>18</sup> Guardian-ward relationships afford an example. The guardian may breach his promises but avoid contract liability because the ward is a child and therefore unable supervise, detect breaches, complain, or seek relief.<sup>19</sup> Attorney-client relationships supply another example. An attorney may fail to perform as promised but avoid liability because the client lacks the expertise to detect poor lawyering.<sup>20</sup> According to this analysis, the law imposes fiduciary duties in order to strengthen contract rights. By forbidding conflicts of interest, the law diminishes the fiduciary's temptation to violate his promises. By requiring fulsome disclosure, the law facilitates detection of misconduct. By affording unusually generous remedies, the law deters wrongdoing in an especially strong way.<sup>21</sup>

---

18. See Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209 (2005) *passim* and especially at 218 n.38 (discussing how "fiduciary duties are a standard term that the law provides in order to minimize the parties' contracting cost").

19. *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992) ("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."); *Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126, 129 (7th Cir. 1992) ("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.").

20. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16, cmt. b (2000) ("A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary. Assurances of the lawyer's competence, diligence, and loyalty are therefore vital. Lawyers often deal with matters most confidential and vital to the client. A lawyer's work is sometimes complex and technical, often is performed in the client's absence, and often cannot properly be evaluated simply by observing the results. Special safeguards are therefore necessary."). Another circumstance which may impede the functioning of contract doctrine is the conferral of broad discretion by one party upon another. This is emphasized as a rationale for the recognition of fiduciary duties in Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795 (1983).

21. See generally DeMott, *supra* note 6, at 1056–57 (2007) ("The remedies available to a principal do not map neatly onto the contours of either contract law or tort law principles and remedies. For example, remedies that have the consequence of

This account understands fiduciary duties to be instrumental goods. It explains them as means for achieving the performance of contract and implies that the moral bases of the fiduciary relationship are similar to the moral bases of contract. This understanding is criticized in the next section of this Article.

The contract-instrumentalist approach implies that whether a relationship is fiduciary or not ought to depend on the presence or absence of circumstances which impede the functioning of contract.

### *C. Teachers*

Teachers are generally not subject to fiduciary duties as a matter of law.<sup>22</sup> This might seem incongruous, as they are in a position to violate contractual duties and to do harm through bad teaching, and their violations are not readily susceptible to remedy by those in their charge.

The law's omission to subject teachers to fiduciary duties can be explained in part by institutional considerations. Most teachers are civil servants, subject to supervision by school administrators, school boards, and other elected officials. Teachers are also, to some extent, subject to supervision by parents. Perhaps these supplementary sources of direction and control are sufficient to remedy the incapacity and lack of experience of the students.

---

stripping profit or benefit from the agent do not necessarily approximate the amount of harm that a principal either has suffered or would be able to prove or the benefit that the principal expected to realize through the transaction conducted by the agent. As a consequence, fiduciary doctrine as a whole is often characterized as prophylactic, geared to discourage breach by persons subject to fiduciary duties. Thus, a breach of a duty of loyalty triggers remedies and other consequences, distinct from whether the person protected by the duty can establish that the breach in fact led to injury or in fact stemmed from disloyal motives on the part of the fiduciary. It's no defense to a fiduciary who self-deals or otherwise breaches a duty of loyalty that the beneficiary of the duty in some sense benefited through the fiduciary's conduct. Fiduciary doctrine's stringency reflects pragmatic concerns. These include the difficulties inherent in judicial second-guessing of decisions that are often discretionary, as well as the ease with which a disloyal fiduciary may often conceal misconduct.”)

22. See generally Kent Weeks & Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153 (2002). *But cf.* Michael Plaut, *Boundary Issues in Teacher-Student Relationships*, 19 J. SEX & MARITAL THERAPY 210 (1993) (suggesting that a fiduciary relationship exists between college teachers and their students).

Doubtless other reasons can be adduced,<sup>23</sup> but a key insight here is that these reasons are, in a broad sense, procedural. They do not go to the moral core.

### III. THE BASIC ETHICS OF THE FIDUCIARY RELATIONSHIP

This section aims to discover basic dimensions of the ethics underlying fiduciary relationships. It rejects contract-instrumentalism as insufficient and proposes a different basis.

#### A. *What We Are Looking For*

The aim of this article is not to justify the law. Some relationships which the law deems fiduciary may not stand on the same ethical basis as do most others; and some relationships which the law relegates to nonfiduciary categories may be “ethically fiduciary.” Perhaps, however, the law will prove suggestive. So also may social practice and social morality.

#### B. *The Insufficiency of Contract Instrumentalism*<sup>24</sup>

The contract-instrumentalist approach implies a chilly approach to fiduciary commitments. Consider the limits:

First, contract instrumentalism implies that there would be no fiduciary relationship where there was no contract. If contract and contract ethics are founded mainly on the morality of promise, as many assert, then they afford little warrant for extension to instances where there has been no promise.<sup>25</sup> Where there has been no clear offer or no

---

23. For example: teachers provide a service which, unlike those of most fiduciaries, takes effect only with the active participation of the beneficiary; so that, especially in the higher grades, any allegation of bad teaching might be rebutted by indicia of bad studying.

24. See Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303 (1999).

25. Similarly, contract instrumentalism affords little or no basis for recognizing fiduciary duties in instances in which the contract has been fully performed (little basis, therefore, for establishing an attorney's duties to a former client for whom he has performed all his promises). See DeMott, *supra* note 6, at 1057–58 (“A possible generalization is that duties of loyalty play an exclusively subsidiary function, which is to assist in securing the performance of other duties. More specifically, duties of loyalty perform an insulation role that attaches adverse legal consequences to conduct by an agent or other fiduciary who undertakes a distracting interest or influence. Although this generalization helps explain much about the consequences that follow breaches of duties of loyalty, its explanatory force has limits. For example, it is not a defense to an



acceptance, where the parties are not in privity, contract instrumentalism supplies no firm basis for fiduciary doctrine. Such circumstances are endemic to connections deemed fiduciary both by law and social morality, and therefore we may suspect that contract instrumentalism misses the mark. Attorneys, for example, frequently form relationships with clients through communications which are too generally phrased to amount to contractual offers; trustees in large organizations and directors in corporations are doubtfully in privity with those whom they serve.

Second, contract instrumentalism implies that fiduciary duties should be closely bound to the contract terms, leaving little scope for obligations far removed from express undertakings. It supplies little support for the fiduciary's obligation zealously to serve the purposes of the beneficiary.

Third, contract instrumentalism implies that fiduciary duties may be dispensed with when the good of contract can more efficiently be served in other ways. If protection against breach of contract can more efficiently be afforded by institutional safeguards, for example, the fiduciary approach ought to be eschewed. As indicated above, this may be the case with teachers.

A final point notes the disparity between the social morality of contract and the ethics which fiduciaries themselves often embrace and which society endorses. Contract morality has a chilly feel, incongruous with the self-extending, fulfilling, generous quality of the fiduciary persona. Few lenders are zealous to serve the borrower. Scrooge performed his contracts; perhaps his virtues were sufficient to that end. His were the "morals of the market place" and imposed no requirement for the renunciation of "thought of self."

### *C. A Virtue-Based Dimension*

The true foundation for fiduciary ethics is the noninstrumental good of the fiduciary virtues. It is a good thing to be capable of loyalty, good to be honorable and trustworthy,

---

agent who breaches a duty of loyalty that the agent can establish that other duties owed the principal were performed with good outcomes for the principal. That is, if duties of loyalty have purely subsidiary functions, it's odd that the common law consistently denies the agent an affirmative defense of establishing due performance of the agent's duties of performance." (notes omitted)).

good to be capable of service, good to be candid. It is good to be clear-headed, insightful, and wise: the mind with its excellences, Aristotle persuades us, is “the best thing in us.”<sup>26</sup> To be sure, such character traits are often good because of what they help to achieve—they may be helpful in securing wealth or prestige, for example—but they are worth having and exercising in themselves, quite apart from what other things they may lead to. These propositions invoke Aristotelean ethics. They are among the core doctrines of the virtue-based ethical theory which was developed in classical antiquity, which was embraced Thomas Aquinas and the Scholastics, and which thence laid the foundations of English equity. Classical virtue-based ethics thus guided the Chancellors who created fiduciary principles.

Space and time do not present the opportunity for a fundamental development of this ethic here. It must be commended by an appeal to common sense. Who would choose to be shifty, untrustworthy, selfish, muddle-headed, and foolish, though he had all the other goods? Who would not seek instead to be steady, faithful, loyal, reliable, clear-headed, and wise (even in those unusual circumstances where no profit or further advantage could be secured through the exercise of those virtues)? Who would not seek, not only to possess, but also to act on these excellences of character? Action brings to fruition the deliberations and dispositions of the acting person. Good action expresses and deploys the actor’s understanding of the good.<sup>27</sup> (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

26. See Aristotle, *NICHOMACHEAN ETHICS* 163 (Terence Irwin trans., 2d ed., 1999), which reads:

If happiness [*eudaimonia*: 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.

“Study” is a translation of a cognate of “*theōrein*.” Irwin explains: “In Aristotle’s most specialized use, *theōrein* refers to the contemplative study that he identifies with 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 . . .” *Id.* at 349.

27. See John Paul H, *Veritatis Splendor* ¶ 71.2 (Encyclical Letter of August 6, 1993, 85 AAS 1133), in *THE ENCYCLICALS OF JOHN PAUL II* 674, 732 (J. Michael Miller, C.S.B., ed., Vatican Press trans., 1996) (“Human acts . . . *express* and determine the goodness or evil of the individual who performs them.” (emphasis added)).

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.<sup>28</sup>)

This virtue-based ethic provides a firm foundation for the fiduciary requirements of loyalty and zeal. Self-sacrifice and zealous service, even when they do not fulfill a promise, exercise a set of important virtues. The virtue-based ethic exhorts the fiduciary to look within himself, finding his guide to action in his own nobler dispositions.

#### *D. What Constitutes an Ethically Fiduciary Relationship*

The virtue-based ethic suggests elements which, when they concur, establish a fiduciary relationship. The first element, and the most obvious, is the presence of a potential beneficiary and of an eligible bestower of fiduciary benefits. A fiduciary relationship makes sense when circumstances present someone (a “suitable beneficiary”) who needs or would benefit by the steady and consistent exercise of the loyalties of a steadfast affiliate, and someone (a “qualified bestower of benefits”) who possesses the skills and attributes needed to exercise the fiduciary virtues in ways which supply those needs and confer benefits suited to the circumstances and projects of the “suitable beneficiary.”

The second element is a relationship between the suitable beneficiary and the qualified bestower: an accord or accession between them (not necessarily contractual) which deploys the bestower to exercise zeal and loyalty and thereby to confer the appropriate benefits, and which disposes the beneficiary to receive them. A common project goes a long way towards supplying this second element, especially when the project requires, for its completion, a focused and sustained effort. *Ad libitem* projects—that is, ones pursued without grave cause, under transient conditions—seldom evoke the fiduciary qualities. Perhaps the clerk of Oxenford in the *Canterbury Tales*,<sup>29</sup> who “gladly would . . . learn and gladly teach,” was under no special duty to the people he chanced to meet.

---

28. See Karol Wojtyła, *The Person: Subject and Community*, in *PERSON AND COMMUNITY: SELECTED ESSAYS* 219, 235 (Theresa Sandok trans., 1993) (“In fulfilling an action, I fulfill myself in it.”).

29. GEOFFREY CHAUCER, *THE CANTERBURY TALES* 30 (General Prologue, line 310) (Peter Beidler trans., 2006).

A third element, not requisite but in many ways helpful, is that of social recognition. Fiduciaries are often holders of “social offices,” identified (as are lawyers, physicians and teachers) as accredited bearers of expertise and exemplars of commendable ways of life. Social norms about social offices confer a special firmness and clarity of definition. Some societies may project a culture of individualism and competition into certain relationships—stockholder-stockholder for example—which other cultures would imbue with a spirit of trust. Fiduciary ethics appropriately respond to inherited cultural understandings.

### *E. Why It Matters*

Of course under any reasonable ethic, the fiduciary aims at the good of the beneficiary. How, then, has the virtue-based ethic any distinctive implications?

Obviously, one major distinction looks to the type and range of benefits, since as discussed above the contact-instrumentalist ethic is chilly and warrants little more than that degree of beneficent action required by the terms of an agreement. Virtue-based fiduciary ethics warrant more generous principles of fiduciary service.

A second line of distinction concerns the fiduciary’s self-understanding. The virtue-based ethic proposes an account which the fiduciary can take to heart and weave into his reflections upon himself. The fiduciary understands better and participates more fully in the goods of beneficence and loyalty if he understands that his role as fiduciary is based on those virtues, and on an ethic which endorses them as noninstrumental goods.<sup>30</sup> *He* is better off.

---

30. See generally Aristotle, *Nicomachean Ethics Book VI*, in II THE COMPLETE WORKS OF ARISTOTLE 1729, 1807 (§ 1144a, lines 18–20) (Jonathan Barnes ed., W. D. Ross trans. (rev. by J.O. Urmson), 1984) (“[I]n 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.”); *id.* at 1746 (§§ 1105a-30 to 1105b-1) (“[t]he 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.”). He should deliberate carefully and understand the good of what he does, since choice involves “consideration and deliberation.” Aristotle, *Eudemian Ethics*, in II THE COMPLETE WORKS OF ARISTOTLE 1922, 1942 (§ 1226b-8) (Jonathan. Barnes ed., J. Solomon, trans., 1984).

A third point notes that the self-understanding of the fiduciary, in certain sorts of relationship, is of special importance to the beneficiary. This “reflexive” dimension will be referred to in the next section of this Article.

#### IV. TEACHERS AS FIDUCIARIES OF A SPECIAL SORT: KNOWLEDGE FIDUCIARIES; MODELING FIDUCIARIES

It should be clear from the elements proposed in Section III D that, ethically, teachers are fiduciaries.

##### A. *Special Dimensions of the Teacher-Student Relationship*

Three features of the teacher-student relationship add special fiduciary dimensions.

First, unlike many other fiduciary associations, the “matter” of the relationship—the “stuff” which is transferred—is *knowledge*. (So basic to the structure of a relationship is this aspect that it is appropriate to suggest a special subcategory: “knowledge fiduciaries.”) More fundamentally, the matter of the teacher-student relationship is the craft and skill and set of virtues which enable a person to apprehend, appreciate, and use knowledge: to learn, to consider and reconsider, and in general, throughout life, to recognize, interpret, understand, and deepen understanding. (It is appropriate to suggest the term “wisdom fiduciaries.”) From our teachers we learn to learn. We acquire the virtues needed to become, as to live a worthwhile life we must indeed become, teachers of ourselves.

Second, a special sector of the knowledge and wisdom conferred in the student-teacher relationship consists in the understanding and practice of affiliation, human relations, and the fiduciary attributes themselves. Many school systems expressly aim to teach students about the civic order (in a Massachusetts formulation: the nature, of “government, politics, and civic life”).<sup>31</sup> They seek to prepare students for effective integration into society.<sup>32</sup> Massachusetts licensure

31. MASSACHUSETTS DEPARTMENT OF EDUCATION, MASSACHUSETTS HISTORY AND SOCIAL SCIENCE CURRICULUM FRAMEWORK 86 (2003), available at <http://www.doe.mass.edu/framework/hss/final/pdf> (identifying the goals of a twelfth-grade elective).

32. See National Education Association, *Code of Ethics of the Education Profession* (1975), reprinted in KENNETH A. STRIKE & JONAS H. SOLTIS, *THE ETHICS OF TEACHING* viii, ix (5th ed. 2009) (“The educator strives to help each student realize his

standards require that a teacher “[h]elps all students to understand American civic culture, its underlying ideals, founding political principles and political institutions, and to see themselves as members of a local, state, national, and international civic community.”<sup>33</sup> This suggests that loyalty and beneficence are also the “matter” of the teacher-student relationship. (We can posit another subcategory: “affiliational fiduciary.”)

The third feature looks not only to what is transferred from teacher to student but to the medium of transfer. Teaching is personal in a way that most fiduciary roles are not. Teaching and the achievements of teaching possess a “personalist” dimension. Teachers impart wisdom and the affiliation virtues by modeling them to their students. Modeling is recognized by psychologists as a foundation for moral development in children,<sup>34</sup> and there seems to be no reason to deny its efficacy among young adults as well. It is appropriate to identify teachers as “modeling fiduciaries.”

### B. *Why It Matters*

If, then, teachers are knowledge fiduciaries, wisdom fiduciaries, affiliational fiduciaries, and modeling fiduciaries, it follows that the wisdom and knowledge about *affiliations* are

or her potential as a worthy and effective member of society.”).

33. Regulations for Educator Licensure and Preparation Program Approval, 603 MASS. CODE REGS. § 7.08(d)(4) (2011), *available at* <http://www.doe.mass.edu/lawsregs/603CMR7.html?section=08>.

34. See Gareth B. Matthews, *Concept Formation and Moral Development*, in PHILOSOPHICAL PERSPECTIVES ON DEVELOPMENTAL PSYCHOLOGY 175, 185 (James Russell ed., 1987):

A young child is able to latch onto the moral kind, bravery, or lying, by grasping central paradigms of that kind . . . . Moral development is . . . something much more complicated than simple concept displacement. It is: enlarging the stock of paradigms . . . ; developing better and better definitions of whatever it is that these paradigms exemplify; appreciating better the relation between straightforward instances of the kind and close relatives; and learning to adjudicate competing claims from different moral kinds . . . .

See generally A. Bandura, *Social Cognitive Theory: An Agentic Perspective*, 52 ANN. REV. PSYCHOL. 1 (2001); Lawrence J. Walker et al., *Parent and Peer Contexts for Children's Moral Reasoning Development*, 71 CHILD DEVELOPMENT 1033, 1033 (2000) (“Psychoanalytic theory emphasizes early parent/child relationships in the development of conscience through the mechanism of identification and consequent internalization of values. Social-learning theory . . . emphasizes the power of models and so has also focused on parents' role in displaying and reinforcing appropriate behaviors. Cognitive development theory . . . holds that interactions with peers are more potent . . . .”).

central to his office. It follows that the *modeling* of good relationships is a vital part of his vocation. Excellence in teaching entails possession of the social virtues—justice, fidelity, beneficence, and sensitive perceptivity in human relationships.

It further follows that excellence in teaching involves the *exercise* of the social virtues. Solidarity with his colleagues, excellence in his relationships with students, and a respectful recognition of the relationships which his students have with their families, are all crucial elements in the fiduciary excellence of the teacher. It follows that central to his mission as a teacher are his understanding of the elements of marriage and his presentation, in word and in deed, of the fundamental elements which make marriage what it is.

#### V. WORRISOME PATHOLOGIES

Fiduciary recognition miscarries, as does affiliational modeling, when a teacher embraces the contract-instrumentalist understanding of his professional role, presenting to his students a chilly, “I just do what I’ve promised and I do it for the money,” attitude. He fails to fulfill himself as he might as a teacher, and he deprives his students of an appropriate fiduciary model. He invites them to a teacher-student relationship which likely implies a similarly self-involved attitude and a similar minimalism of commitment.<sup>35</sup>

A teacher, as a fiduciary whose ethic is founded on the modeling of affiliational knowledge, violates his trust in a fundamental way when he ignores, deplores or misunderstands the committed affiliational modalities of his students’ lives and

---

35. See generally Pope Benedict XVI, Address to the Bishops Gathered for the 61st General Assembly of the Italian Episcopal Conference: Take Upon Yourselves Without Hesitation the Commitment to Educate (May 27, 2010), *reprinted in* L’OSSERVATORE ROMANO, June 2, 2010, at 1, 3 (English edition) (“One essential root [of a contemporary “emergency” in education] I think consists in a false concept of man’s autonomy: man should develop on his own, without interference from others, who could assist his self-development but should not enter into this development. In reality, the essential fact is that the human person becomes himself only with the other. The “I” become itself only from the “thou” and from the “you”. It is created for dialogue, for synchronic and diachronic communion. It is only the encounter with the “you” and with the “we” that the “I” opens to itself. Thus, the so-called antiauthoritarian education is not education but the rejection of education; thus what we are bound to impart to others is not imparted, meaning this “you” and “we” in which the “I” opens to itself.”).

of the social order to which they belong.<sup>36</sup>

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 mainly out of a “need for belongingness”<sup>37</sup> or a “dyadic intention toward a . . . dependent growing out of a feeling toward that dependent,”<sup>38</sup> maintaining that “[w]hat the parent does is to feel . . . . [C]ognitions are not what motives a parent’s actions—emotions are . . . .”<sup>39</sup>

Fiduciary recognition would miscarry if it adopted a similarly emotionalist understanding of marriage. So might a teacher do who 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.”<sup>40</sup> Fiduciary recognition by a teacher would miscarry if the teacher adopted a contract-instrumentalist account of the relationship between married couples, equating husbands and wives to the cohabitators whose attitudes are described in a fairly recent study:<sup>41</sup>

36. See National Education Association, *supra* note 32, at ix (“[T]he educator . . . [s]hall not deliberately suppress or distort subject matter relevant to the student’s progress.”).

37. See Catrin Finkenauer & Wim Mecus, *How (Pro-)Social Is the Caring Motive?*, 11 PSYCHOL. INQUIRY 100, 101 (2000) (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 PSYCHOL. INQUIRY 69, 76 (2000).

38. Bell & Richard, *supra* note 37, at 79. See generally David C. Bell & Alan J. Richard, *Authors’ Response: The Search for a Caregiving Motivation*, 11 PSYCHOL. INQUIRY 124 (2000).

39. Bell & Richard, *supra* note 37, at 75 (“[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 . . . .”).

40. E. J. GRAFF, WHAT IS MARRIAGE FOR? THE STRANGE SOCIAL HISTORY OF OUR MOST INTIMATE INSTITUTION 251 (2004).

41. Joanna M. Reed, *Not Crossing the “Extra Line”: How Cohabitators with Children View Their Unions*, 68 J. MARRIAGE & FAMILY 1117 (2006), available at



I find that most cohabiting parents begin cohabiting in response to a pregnancy but do not believe they should stay in a relationship because of shared children. They view cohabitation as a practical response to parenthood that allows them to coparent and share expenses yet avoid the greater expectations of commitment, relationship quality, and more traditional and scripted family roles they associate with marriage.