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Research Handbook on Fiduciary Law

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4. Delimiting fiduciary status

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I. INTRODUCTION

A familiar problem to scholars of fiduciary law is that of definition. Fiduciary law has been called “messy,”¹ “elusive,”² and “unusually vexing.”³ In part, this is because fiduciary law principles appear in many areas of law, but are applied differently in each. This has made the development of a unified theory difficult. Some scholars have doubted whether it is even possible;⁴ others have insisted that it is not possible.⁵ Nevertheless, scholars continue to try to bring order to the perceived chaos.⁶

Although the precise contours of fiduciary law may be unclear, one thing is certain: fiduciary law imposes demanding duties on fiduciaries and grants powerful remedies to beneficiaries.⁷ For example, the duty of loyalty proscribes conflicts of interest and is enforceable by a disgorgement remedy. As a result, fiduciary law offers very attractive possibilities for plaintiffs’ attorneys and scholars alike, who seek to invoke it under increasingly unconventional circumstances.⁸ Without a principled foundation to fiduciary law, however, courts are not equipped to respond to these calls for expansion.⁹

* I would like to thank Deborah DeMott, Arthur Laby, Amir Licht, Paul Miller, Gordon Smith, and Andrew Tuch for their thoughtful comments; Michael Abercrombie for his research assistance; and Leslie Berg for her assistance with the illustration. Of course, errors are all mine.

¹ D. Gordon Smith, *The Critical Resource Theory of Fiduciary Law*, 55 VAND. L. REV. 1397, 1400 (2002).

² Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligations*, 1988 DUKE L.J. 879, 879 (1988).

³ Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 237 (2011).

⁴ See, e.g., DeMott, *supra* note 2, at 915 (“One could justifiably conclude that the law of fiduciary obligation is in significant respects atomistic.”).

⁵ See, e.g., Frank H. Easterbrook & Daniel R. Fischer, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 438 (1993) (“Scholars ... have had trouble coming up with a unifying approach to fiduciary duties because ... [t]here is nothing special to find.”).

⁶ See, e.g., Andrew S. Gold & Paul B. Miller, *Philosophical Foundations of Fiduciary Law* (2014) [hereinafter *Philosophical Foundations*].

⁷ In this chapter, I use the term “beneficiaries” loosely to include both grantors and beneficiaries: those in relationship with the fiduciary.

⁸ See, e.g., D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671 (2013); Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 (2009); Brett G. Scharffs & John W. Welch, *An Analytic Framework for Understanding and Evaluating the Fiduciary Duties of Educators*, 2005 BYU EDUC. & L.J. 159; Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

⁹ One Canadian jurist humorously acknowledged the problem in the following terms: “All Canada is divided into three parts: those who owe fiduciary duties, those to whom fiduciary

Excessive expansion of fiduciary law presents myriad problems. Most obviously, the imposition of severe duties and extreme remedies upon unexpected and undeserving parties is problematic and unfair. A less obvious, but nevertheless important, concern is the likelihood that aggressive expansion of the scope of fiduciary law may lead to its diminution.¹⁰ When carefully cabined to the core cases, fiduciary law can remain robust. This works because fiduciary law developed for such circumstances. Once fiduciary law expands to encompass marginal or remote cases, however, it is likely to change. Strict rules that are appropriate for core cases may be inappropriate for marginal cases. Duties may be watered down and remedies weakened to fit the circumstances. Eventually, fiduciary law may come to be considered a flexible tool, and the duties may become less demanding, and the remedies less extreme, even for core cases. This would leave beneficiaries in the core cases under-protected. I maintain that, in order to preserve what is special about fiduciary law, the law must find a way to prevent its excessive expansion and corresponding dilution.

What is needed is a definition, or a theory of fiduciary law, that not only establishes what a fiduciary is, but also what it is not. Exclusion is as important as inclusion—perhaps even more so. However, developing a definition for a complex phenomenon is not a simple matter. Ideally, one would like a definition that is both intellectually coherent and descriptively accurate.¹¹ Unfortunately, these goals are often in tension with each other, and some sort of trade-off must be made. In order to develop a coherent definition, one must impose order and reject some data. Accuracy suffers as a result. In order to describe a complex phenomenon accurately, one must sacrifice simplicity. At the extremes, a perfectly coherent definition may exclude all but the most paradigmatic cases, while a perfectly descriptive definition may amount to little more than a list of examples. Neither extreme is very satisfying.

There is no correct or best way to make that trade-off in all cases.¹² Judgment is required, and the endeavor is likely to involve art as well as science. My goal in this chapter will be to sketch out the contours of a reasonably coherent theory that covers enough phenomena to have a plausible claim to descriptive accuracy while also providing objective criteria for the exclusion of marginal cases. While a simple definition would be nice, some complexity will be necessary in order to achieve this goal.

duties are owed, and judges who keep creating new fiduciary duties!” See Miller, *supra* note 3, at 238 (quoting *A.(C.) v. Critchley*, 166 DLR (4th) 475, 496 (1998)).

¹⁰ Cf. Sarah Worthington, *Fiduciaries: When is Self-Denial Obligatory?*, 58 CAMBRIDGE L.J. 500 (1999); Larry E. Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899 (2011).

¹¹ Other criteria for comparison have been suggested. For example, Brian Leiter proposes simplicity, consilience, and conservatism. See Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1239 (2009). Because the current goal is to explain a rather narrow phenomenon, the last two desiderata—consilience and conservatism—are unlikely to be very meaningful. Thus, the discussion could focus on simplicity. For present purposes, simplicity and coherence may be considered roughly analogous. According to Leiter, “[w]e prefer simpler explanations to more complex ones, *all else being equal* ...” *Id.* However, all else is not equal when descriptive accuracy is at issue.

¹² Cf. *id.* at 1240 (“There will be no simple metric showing us how to make the trade-offs and comparisons.”).

II. A METAPHOR

To develop a legal definition, we must take inventory of what we know about fiduciary relationships. Many definitions have been offered by scholars.¹³ In the past, I have used the following working definition, which I offer here solely as a starting point for analysis:

A fiduciary relationship is a legally recognized relationship in which one is given power over the interests of another, who thereby becomes vulnerable to abuse. ... In order to encourage and police such relationships, the law imposes a duty on the first party—the fiduciary—to act in the interests of the second party—the beneficiary Thus, the *raison d'être* of fiduciary duties ... is the protection of the beneficiary from abuse at the hands of the fiduciary.¹⁴

Let us consider the hallmarks of fiduciary relationships.¹⁵ Tamar Frankel, one of the pioneers and leading scholars of fiduciary law,¹⁶ has reduced the core characteristics to the following:

While the definitions of fiduciaries [in the various areas of law] are not identical, all definitions share three main elements: (1) entrustment of property or power, (2) entrustors' trust of fiduciaries, and (3) risk to the entrustors emanating from the entrustment.¹⁷

It is fair to say that power, trust, and vulnerability are the key terms used to describe fiduciary relationships generally. Other common terms include discretion, confidence, inequality, and dependence.¹⁸ While prioritizing the various hallmarks might seem to be a reasonable next step in crafting a legal definition, I suspect that it would be more controversial than helpful. Fortunately, prioritizing the various relationships that might qualify for fiduciary status is not as controversial. Whether based on intuition or case law, some relationships are more consistently and uniformly considered to be fiduciary in nature than others. It may be possible to learn something by assessing them.

For example, trustees are generally considered the paradigmatic version of fiduciaries. This is likely due, in no small part, to the fact that modern fiduciary law developed largely in this context.¹⁹ But it is also true that trusts tend to have all the hallmarks of fiduciary relationships. Trustees generally have discretionary control, and possibly even legal title, over the assets of the beneficiary. The relationship tends to be

¹³ See Julian Velasco, *Fiduciary Duties and Fiduciary Outs*, 21 GEO. MASON L. REV. 157, 161 (2013) (citing sources).

¹⁴ See *id.* at 159.

¹⁵ By the term “hallmarks,” I simply mean those characteristics that tend to describe fiduciary relationships.

¹⁶ See Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795 (1983).

¹⁷ TAMAR FRANKEL, *FIDUCIARY LAW* 4 (2011).

¹⁸ See Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 1010–11 (2013).

¹⁹ See generally 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* (William Franklin Fratcher ed., 4th ed. 1987); ERNEST VINTER, *A TREATISE ON THE HISTORY AND LAW OF FIDUCIARY RELATIONSHIP AND RESULTING TRUSTS* (3d ed. 1955); Myron T. Steel, *The Moral Underpinnings of Delaware's Modern Corporate Fiduciary Duties*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (2012).

marked by great inequality: trustees are experts, and beneficiaries are dependent upon them. Because beneficiaries repose such trust and confidence in trustees, they are especially vulnerable to abuse.

Compare friendships. Friends are, at best, marginal fiduciaries. Friends are not generally considered fiduciaries, but courts have sometimes imposed fiduciary duties.²⁰ Moreover, friendship bears only some of the hallmarks of fiduciary relationships. They have no legal power over each other, and thus are not legally vulnerable to each other. Moreover, they tend not to be marked by inequality and dependence, but rather by equality. However, friends tend to trust one another and therefore may be vulnerable to each other, at least in a colloquial sense.

Whether friendships should ever be considered fiduciary relationships is a controversial issue. However, the assertion that trustees are more clearly fiduciaries than are friends is not controversial. Thus, it may be possible to use this type of comparative analysis to develop a framework for the development and assessment of a legal definition.

With this in mind, I plan to evaluate fiduciary status by means of a metaphor. I submit that fiduciary relationships can be represented as a series of increasingly large concentric circles, or alternatively as a heat map. Relationships can be plotted based on the likelihood that courts—U.S. courts in particular—will find them to be fiduciary in nature. In the core circle, which would be colored red on a heat map, are those relationships that are always, or nearly always, considered fiduciary. As we move outward to successive circles, into the regions that would be colored orange, then yellow, then green, then blue on a heat map, we find those relationships that are less often considered fiduciary, to the point where any claim to fiduciary status is marginal, at best. Through the lens of this metaphor, I plan to assess and refine the descriptive accuracy of the definition or theory that I develop.

In the core, red area are trustees. We have already discussed trustees. That they are fiduciaries is not controversial. Any reasonable definition would have to include trustees.

In the next circle, or the orange area, are agents. The term “agent” can have different meanings, depending on the context. Here, I refer to agency in the legal sense, rather than an economic or colloquial sense.

Agency is the fiduciary relationship that arises when one person (a “principal”) manifests assent 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.²¹

As a doctrinal matter, agents are fiduciaries by definition. Nevertheless, agents are not always held to be fiduciaries. Consider employees. Under agency law, “an employee is an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work.”²² As agents, employees are fiduciaries by definition.

²⁰ See generally Leib, *supra* note 8, at 700–707.

²¹ RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

²² *Id.* § 7.07(3)(a).

However, the case law does not always find employees to be fiduciaries.²³ Moreover, the Restatement of Employment Law has taken the position that not all employees, but only those “in a position of trust and confidence with their employer,” are truly fiduciaries.²⁴ The interaction between agency law and employment law, and their respective Restatements, is a complex one.²⁵ Nevertheless, it seems fair to say that, while agents are fiduciaries, they are not quite as clearly fiduciaries as are trustees.²⁶

Trustees and agents are not mutually exclusive categories. Sometimes, agents are given discretionary power over the principal’s assets. In such cases, they are very much like trustees. Moreover, there are classes of fiduciaries who lie somewhere between the two types. Corporate directors are an example: they are neither quite trustees nor exactly agents, but are generally considered *sui generis* fiduciaries.²⁷ This should not concern us at this point. The purpose of the current exercise is not to develop an exhaustive classification of fiduciaries, but simply to outline the major types.

In the next circle, or the yellow area, lie advisers. As a descriptive matter, advisers are trickier than trustees or agents. A few classes of advisers—most notably lawyers, doctors, and investment advisers—clearly are considered fiduciaries. However, the act of giving advice is not enough to make one a fiduciary. In fact, most people who give advice are not considered fiduciaries. Thus, the category of advisers is legally complicated.

The next circle, or the green area, represents relationships of trust, without more—i.e., without control over assets, authority, or advice.²⁸ This is comprised of parties such as friends and spouses. Spouses may seem to be special cases, but ultimately are merely extreme forms of friendship, as I will explain later. As mentioned above, friendships are not generally considered to be fiduciary in nature, although courts may impose fiduciary duties under special circumstances.²⁹ Thus, friendships and other relations of mere trust are, at best, marginal fiduciaries.

²³ See, e.g., *TalentBurst, Inc. v. Collabera, Inc.*, 567 F. Supp. 2d 261, 266 (D. Mass. 2008).

²⁴ RESTATEMENT OF EMPLOYMENT LAW § 8.01 (2015). The Restatement’s position is more nuanced than binary.

²⁵ See Deborah A. DeMott, *Relationships of Trust and Confidence in the Workplace*, 100 CORNELL L. REV. 1255 (2015). It is possible to argue that not all employees are agents because agency “contemplates three parties—the principal, the agent, and the third party with whom the agent is to deal.” 1 Floyd R. Mechem, *A Treatise on the Law of Agency* § 27 (2d ed. 1914). However, the Restatement takes a different view. See RESTATEMENT (THIRD) OF AGENCY § 1.01, Cmt. c (2006) (quoting *id.*). It is also possible to argue that, for important but extrinsic policy reasons, employment law must simply override general fiduciary law principles in some respects. Weighing the merits of such arguments would be beyond the scope of this chapter.

²⁶ The issue of whether employees who do not interact with third parties are truly agents is distinct from the issue of whether discretion is a necessary element for fiduciary relationships. Thus, even if it is agreed that not all employees are agents, the issue of whether all agents are fiduciaries remains.

²⁷ See Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 438–9 (2006).

²⁸ These categories are not mutually exclusive, and it is clear that some friendships may involve power, authority, or advice. However, the green area on the heat map represents the type of friendship—i.e., friendships that do not.

²⁹ See *supra* note 20 and accompanying text.

The final circle to be considered is the blue area, comprising those relationships that are not based on any of the previous characteristics: not discretionary control over assets, not authority, not advice, and not trust. What is left? Relationships based on vulnerability, without more. It may seem difficult to imagine an example, but I suggest that everyday parenting fits the bill.³⁰ In the U.S., at least, parents generally are not considered fiduciaries of their children.³¹ Rather than having extensive fiduciary duties, parents have a constitutional right “to make decisions concerning the care, custody, and control of their children.”³² However, in some other jurisdictions, parents are considered fiduciaries; and even in the U.S., they can be under special circumstances.³³ So parenting cannot be dismissed entirely.

Analysis through the lens of the concentric circles or heat map metaphor provides a rubric by which to measure the descriptive accuracy of any definition or theory. If the goal is to be descriptively accurate, the definition must include the first two circles, the red and orange areas, consisting of trustees and agents. It must also provide an account for the yellow region—a way to include at least certain advisers. At the same time, if the goal is to exclude marginal cases (as I have admitted that mine is), the definition must exclude the outer circles, the green and blue areas, consisting of friends and parents. It must also provide an account for the yellow region—a way to exclude advisers generally. In short, the yellow region is the battleground for my definitional efforts. To be plausibly accurate, I must deal with advisers in a nuanced way.

III. A JURIDICAL MODEL

There have been many attempts to define fiduciary relationships, but none has gained general acceptance. However, there is one that I have found especially noteworthy. Paul Miller has developed what he calls the fiduciary powers theory of fiduciary law (hereafter: FPT).³⁴ What drew my attention to FPT was its grounding in juridical justification. According to Miller, “[j]uridical justificatory argument aims to reveal the justificatory structure of the settled practices and principles of liability constitutive of a given legal form of an institution or mode of interaction.”³⁵ In other words, Miller uses the formal characteristics of the fiduciary relationship to derive the legal treatment thereof—i.e., the imposition of fiduciary duties. As a result, FPT is undeniably coherent. It is also very precise: it provides a clear definition that allows us to include and exclude potential fiduciaries with relative ease. Thus, FPT is a natural starting point

³⁰ I define the term “everyday parenting” at *infra* text accompanying note 96.

³¹ See, e.g., *Economopoulos v. Kolaitis*, 528 S.E.2d 714, 718 (Va. 2000) (“A parent-child relationship, standing alone, is insufficient to create a confidential or fiduciary relationship.”).

³² *Troxel v. Granville*, 530 U.S. 57, 65–6 (2000).

³³ See, e.g., *Trunzler v. Trunzler*, 431 So.2d 1115 (Miss. 1983).

³⁴ See Paul B. Miller, *The Fiduciary Relationship*, in *PHILOSOPHICAL FOUNDATIONS*, *supra* note 6, at 63.

³⁵ Miller, *supra* note 18, at 973.

for my quest.³⁶ In light of space limitations, and in order to avoid doing an injustice to Miller's excellent work, I will not attempt a full description of FPT. Instead, I will provide a brief synopsis of his conclusions and direct the reader to Miller's original work.³⁷

FPT defines fiduciary relationships as follows: "A fiduciary relationship is one in which one party (the fiduciary) exercises discretionary power over the significant practical interests of another (the beneficiary)."³⁸ The real work in FPT is done by the word "power": "fiduciary power is distinguishable from other varieties of power by virtue of the fact that it is a form of authority ordinarily derived from the legal personality of another (natural or artificial) person."³⁹ Because of its derivative nature, fiduciary power must be devoted to the ends of the other.⁴⁰ Fiduciary duties are imposed based on that principle as well as limited by that principle. As Miller put it, "fiduciary duties ensure that fiduciary powers are exercised in a manner consistent with the beneficiary's exclusive claim relative to them;"⁴¹ in addition, "[f]iduciary duties constrain the conduct of the fiduciary within the ambit of the relationship ... , but not beyond it."⁴²

FPT puts into perspective the hallmarks of fiduciary relationships. Because of fiduciary power, the fiduciary is "in a dominant position relative to the beneficiary" and the beneficiary is "invariably dependent upon the fiduciary."⁴³ Moreover, "the vulnerability which matters for the purposes of fiduciary liability is that occasioned by and inherent in the fiduciary relationship itself," not vulnerability arising from extrinsic factors.⁴⁴

The key insight of FPT is this: "fiduciary power consists in the substitutive exercise of legal capacity."⁴⁵ As a practical matter, the fiduciary becomes, or "personates," the

³⁶ According to Miller, "[j]uridical justification implies nothing beyond the normative coherence of given bases of private liability." *Id.* at 1008. Thus, it does not take a position on extrinsic normative issues. Nevertheless, I find the theory to be normatively satisfying on many levels.

³⁷ See generally Miller, *supra* note 3; Miller, *supra* note 18; Miller, *supra* note 34.

³⁸ See Miller, *supra* note 3, at 262 (emphasis omitted).

³⁹ Miller, *supra* note 34, at 70.

⁴⁰ See *id.* at 73.

⁴¹ *Id.* at 75.

⁴² *Id.*

⁴³ *Id.* at 73.

⁴⁴ Miller, *supra* note 3, at 269. See also Frankel, *supra* note 16, at 810.

⁴⁵ Miller, *supra* note 34, at 71. Deborah DeMott prefers to use the language of "extension" of legal capacity rather than "substitution," at least for agency law purposes. See Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, in *PHILOSOPHICAL FOUNDATIONS*, *supra* note 6, at 321, 322. As I intend the term, the concept of substitution is inclusive of the concept of extension: in general, the agent serves to extend the principal's legal personhood, but in each instance or transaction she is substituting for his presence.

beneficiary⁴⁶—not so much affectively or morally, but formally for relevant legal purposes. This is why fiduciary duties are so important: if the fiduciary is to “be” the beneficiary, he must act the part.

Miller’s fiduciary power theory is very tidy. Fiduciary relationships exist for one purpose: to allow the fiduciary to act on behalf of the beneficiary. In these relationships, fiduciary duties are imposed to advance that purpose: to require the fiduciary to act for the benefit of the beneficiary. And the hallmarks of the fiduciary relationship are understood in relation to that purpose: the characteristics that matter are those that arise from the relationship itself. As a theoretical matter, FPT seems ideal in many respects. However, as a practical matter, the theory suffers from a significant shortcoming: insufficient descriptive accuracy.

IV. ASSESSMENT AND AMENDMENT

While FPT may be compelling because of its coherence, it fares less well in terms of descriptive accuracy. As I will argue, it falls short of describing existing law in some significant respects. In this section, I will attempt to modify Miller’s model to address this shortcoming. In doing so, I recognize that I will inevitably introduce shortcomings of my own. Specifically, I will have to introduce some complexity to the model. However, this is a trade-off I am willing to make to achieve greater descriptive accuracy. The hope is that I can retain most of the model’s coherence while adding enough descriptive accuracy to make the added complexity worthwhile.

A. Trustees and Agents

In order to assess FPT’s accuracy, let us consider the theory in light of the concentric circles metaphor discussed earlier. FPT easily accounts for the core, red area. Trustees clearly exercise discretionary power over the significant practical interests of the beneficiary: they control the assets held in trust. Thus, trustees as a class are fiduciaries under FPT.

FPT encounters issues in the next circle, or the orange area. Although agents are clearly fiduciaries under the law, they do not always meet the definition posited by FPT. According to Miller, fiduciary power requires that the fiduciary be able to exercise discretionary power.⁴⁷ Although agents often exercise discretion over the interests of the principal, this is not always the case. The defining characteristic of agency is the concept of authority, or “the power ... to affect the legal relations of the principal”⁴⁸—essentially, that the agent can bind the principal in contract. Discretion is not a

⁴⁶ Cf. THOMAS HOBBS, *LEVIATHAN* 217 (C.B. Macpherson ed., Penguin Classics 1985) (1651); Avihay Dorfman, *On Trust and Transubstantiation: Mitigating the Excesses of Ownership*, in *PHILOSOPHICAL FOUNDATIONS*, *supra* note 6, at 339, 356–7: “[T]he trustee does not merely act for the beneficiary or for the beneficiary’s interest, but rather ‘personates’ the beneficiary.”

⁴⁷ See *supra* note 38 and accompanying text.

⁴⁸ RESTATEMENT (SECOND) OF AGENCY § 7 (1958). See also RESTATEMENT (THIRD) OF AGENCY § 2.01, Cmt. c (2006).

requirement. To the contrary, agency is characterized by the control of the principal,⁴⁹ and the concept of control is at least in tension with the concept of discretion.

As a factual matter, discretion is usually present but not necessarily desirable in agency. Often, an agent is hired for her expertise, and the principal trusts her to do something he cannot. Often, however, an agent is not hired for her expertise.⁵⁰ She may be hired because the principal cannot do everything by himself and simply needs help. Sometimes, this helper will be a peer, whose judgment the principal trusts as much as his own. Sometimes, however, the helper will simply be a body to do a job—no judgment required.⁵¹ An extreme example would be an employee on an assembly line: if it were possible or cost-effective, the employer might replace the employee with a machine. Any judgment that may be exercised is more unavoidable than intended. The assembly line employee is not a unique situation. In a world of constant technological advances, many agency relationships are being replaced by computer and robotic automation: cashiers are being replaced by self-check-out kiosks, operators are being replaced by automated call centers, and soon even drivers likely will be replaced by driverless vehicles.⁵² The truth is that not all agency relationships, nor perhaps even most, rely on the agent's judgment. When they do not, it is difficult to say that there is a meaningful discretionary component. In short, principals have the right to complete control over agents, but not the practical ability to exercise that right. Thus, discretion may be nothing more than the unintended consequence of incomplete instructions.⁵³ In more colloquial terms, discretion sometimes may be more of a bug than a feature of

⁴⁹ See *supra* note 21 and accompanying text. See also RESTATEMENT (THIRD) OF AGENCY § 1.01, Cmt. *f*(1) (2006).

⁵⁰ Cf. Miller, *supra* note 18, at 982 (“Some, but not all, fiduciary relationships involve the engagement of an expert by a nonexpert. Expertise is not a de jure or de facto qualification of fiduciaries.”).

⁵¹ The Restatement of Agency notes that “no agent is an automaton who mindlessly but perfectly executes commands,” but this is noted “as a practical matter,” not as a legal requirement. RESTATEMENT (THIRD) OF AGENCY § 1.01, Cmt. *f*(1) (2006). This is not inconsistent with my argument.

⁵² Cf. David H. Freedman, *The War on Stupid People*, *The Atlantic* (July/Aug. 2016), available at <http://www.theatlantic.com/magazine/archive/2016/07/the-war-on-stupid-people/485618/>, last accessed Dec. 19, 2017 (“The list of manufacturing and low-level service jobs that have been taken over, or nearly so, by robots, online services, apps, kiosks, and other forms of automation grows longer daily.”).

⁵³ A related issue involves the interpretation of instructions. The Restatement notes that:

[i]f a principal states directions to an agent in general or open-ended terms, the agent will have to exercise discretion in determining the specific acts to be performed to a greater degree than if the principal's statement specifies in detail what the agent should do.

RESTATEMENT (THIRD) OF AGENCY § 2.01, Cmt. *c* (2006). However, the discretion mentioned relates to deciding how to execute an incomplete instruction, not how to interpret the instruction. An agent does not have discretion to interpret an instruction as she deems appropriate, but must interpret them “reasonably in light of the principal's wishes as the agent understands them,” DeMott, *supra* note 45, at 321. This is not discretion in the relevant sense. The more complete the instruction, the less discretion for the agent to exercise. To the extent that the instructions are complete, there is no discretion.

agency.⁵⁴ If this is correct, then many agents would not be considered fiduciaries under FPT—which is not descriptively accurate.

There are a few ways to deal with this problem. The first would be to accept Miller's conclusion and insist that agents who do not have discretionary power should not be considered fiduciaries. There is some case law to support this—for example, employees are not always considered fiduciaries⁵⁵—but I consider it unsatisfying. Agency bears the most important hallmarks of a fiduciary relationship: the principal entrusts the agent with power, and becomes vulnerable as a result. There is a need for fiduciary duties appropriate to that relationship.⁵⁶

A second option would be to stretch the meaning of the word discretion by insisting that every agent necessarily exercises at least some discretion.⁵⁷ There may very well be some truth to the assertion.⁵⁸ However, such an interpretation of the word discretion would be a potential cause of mischief because some judges would be more amenable to a broad interpretation than others. Moreover, as a matter of pure logic, the requirement of discretion would add little to nothing: it would be virtually meaningless if every agency relationship could be said to satisfy the definition.⁵⁹ Thus, this is not a satisfying solution.

A third option would be to eliminate the requirement of discretion. Instead, fiduciary power could be understood as the substitutive exercise of legal capacity, without more. If so, agents would be fiduciaries categorically. Under doctrines such as apparent authority, an agent can have the power to affect a principal's relations with others even when she does not have actual authority to exercise discretion.⁶⁰ In other words, an agent can have the power to do things, even if she does not have the right to do them. Thus, an agent has power over the practical interests of the principal, but not necessarily discretionary power.

Eliminating the requirement of discretion would surely change the definition of fiduciary relationships, but it would not upset the logical coherence or juridical justifications of FPT. According to Miller, "power is a more fundamental formal property of the fiduciary relationship than any of its other formal properties."⁶¹

⁵⁴ *But see* D. Gordon Smith & Jordan C. Lee, *Fiduciary Discretion*, 75 OHIO ST. L.J. 609, 610–11 (2014) ("We contend that the grant of discretion in fiduciary relationships is not merely an artifact of human weakness, but a crucial part of the fiduciary bargain. To borrow an expression from software design, contractual incompleteness is not a bug, it's a feature.").

⁵⁵ *See supra* notes 23–25 and accompanying text; *compare supra* note 26.

⁵⁶ To be sure, the employee is often vulnerable to the employer's economic power. However, this is a different type of vulnerability, and one that does not concern fiduciary law. It is, perhaps, the concern of employment law.

⁵⁷ *See, e.g.,* Smith & Lee, *supra* note 54, at 609 (2014) ("Discretion is an important feature of all contractual relationships.").

⁵⁸ *See supra* note 53.

⁵⁹ *Cf.* J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 L.Q. REV. 51, 68–69 (1981).

⁶⁰ *See* RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006). As to third parties, the principal is bound. This renders the principal vulnerable to the agent. However, the principal is entitled to seek relief from the agent. *See id.* § 8.01 & Cmt. *b.*

⁶¹ Miller, *supra* note 18, at 1013.

Discretionary power may be a paradigmatic form of fiduciary power, but it is difficult to see why it should be considered a necessary component.

It is the fiduciary's ability to exercise the beneficiary's legal capacity that makes the beneficiary vulnerable. Fiduciary duties are necessary to ensure that the fiduciary exercises this power as intended: not only to prevent abuse of discretion, but also to prevent prohibited acts. For example, assume that an agent is authorized to do A, B, and C, but forbidden to do D. The agent has discretion to choose among the first three options. Her fiduciary duties require her to choose the option that she thinks best serves the interests of the principal. Nevertheless, she has the power to choose an option (let us say C) that she believes will not serve the interests of the principal under the circumstances. This would be an abuse of discretion, and the principal needs protection from in such cases. However, the principal also needs protection from the agent who will be empowered but forbidden to choose D. Although the two situations can be distinguished, the harm is the same from the perspective of fiduciary law: abuse by the fiduciary of the entrusted power to exercise the beneficiary's legal capacity.

Under a different view of fiduciary law, discretion might be more appropriate. For example, Lionel Smith maintains that "[t]he diagnostic feature of fiduciary relationships is that the fiduciary owes to the beneficiary a duty to exercise judgment in what the fiduciary perceives to be the best interests of the beneficiary."⁶² Within a framework that makes the exercise of judgment central, a requirement of discretion makes perfect sense. However, under FPT, substitutive exercise of legal capacity, not judgment, is central.

To be sure, eliminating the requirement of discretion would be controversial. It has been claimed that "[d]iscretion is universally recognized as an essential aspect of fiduciary relationships."⁶³ Most courts and scholars assume discretion in their models, although there are some scholars that have argued otherwise.⁶⁴ I submit that discretion is not necessary—as a logical matter (because FPT remains perfectly coherent without it), as a normative matter (because beneficiaries are vulnerable to abuse of power, not just to abuse of discretion), and as a doctrinal matter (because agents are fiduciaries, without any requirement of discretion).

Thus, I propose that FPT's definition of fiduciary relations be modified as follows: "A fiduciary relationship is one in which one party (the fiduciary) *has power, in the form of substitutive exercise of legal capacity*, over the significant practical interests of another (the beneficiary)." This new definition allows for the inclusion of agents as a categorical matter, thereby increasing the descriptive accuracy of the model. It also does so without affecting FPT's internal coherence.

⁶² Lionel Smith, *Can We Be Obligated To Be Selfless?*, in PHILOSOPHICAL FOUNDATIONS, *supra* note 6, at 141, 148. *See also* Lionel Smith, *Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another*, 130 L.Q.R. 608 (2014).

⁶³ Smith & Lee, *supra* note 57, at 610 (citing examples). *See also* Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 7 (1975) ("[T]he hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion.").

⁶⁴ *See, e.g.*, Arthur B. Laby, *Book Review* [of PHILOSOPHICAL FOUNDATIONS, *supra* note 6], 35 LAW & PHIL. 123, 130–34 (2014); Evan Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993, 1036–7 (2017).

Interestingly, this change also moves the center of gravity in fiduciary law, from the red core to the orange area. It suggests that agency—which is grounded in authority⁶⁵—rather than trust—which is grounded in discretionary control—is the paradigmatic form of fiduciary relationship. If so, the agent should not be considered a deficient version of the trustee; rather, the trustee should be considered an enhanced version of the agent. As a result, it may be possible to consider advisers, who occupy the yellow area, to be deficient agents rather than extremely deficient trustees—in which case, it may be easier to fit them within our model without too much violence.

B. Advisers

Generally speaking, an adviser is anyone who gives advice. Some advisers, such as doctors, lawyers, and investment advisers, may be considered professional advisers. However, many people who give advice are not professional advisers, including salespeople, friends, and even strangers.

According to Miller, advisers do not fit within FPT:

Advisers are not fiduciaries as such. That is to say, advisers are not fiduciaries by virtue of giving advice. Instead, they are fiduciaries only where they exercise discretionary power over the practical interests of their clients.⁶⁶

Miller's assessment seems clearly correct under the FPT definition. It would seem to be true under my revised definition as well. Rendering advice simply does not seem to be a fiduciary act.

Arthur Laby disagrees. He argues that the act of advising is inherently fiduciary because it is naturally other-regarding.⁶⁷ While his arguments are insightful, they ultimately fail. While all fiduciary acts are other-regarding, not all other-regarding acts are fiduciary. Consider acts of charity: they are clearly other-regarding, but they do not and should not give rise to fiduciary duties for that reason.⁶⁸ Moreover, advice is not always expected to be other-regarding. Very often, advice is understood to be self-referential by the adviser: more “what I would do” than “what you should do,” strictly speaking. The fact that we generally do not expect advisers to make statements against their own interests—such as recommending us to someone who could do a better job, or the same job more cheaply—strongly suggests that we do not expect advice to be entirely altruistic. Often, we fully expect conflicted advice, and we are willing to accept it in order to get another perspective. In short, as a category, advising is not susceptible to classification as fiduciary in nature. Too many people give advice in too many circumstances to admit otherwise. Even Laby seems to concede the point

⁶⁵ Miller agrees that fiduciary power “ought to be understood as a form of *authority*,” Miller, *supra* note 18, at 1012.

⁶⁶ See Miller, *supra* note 34, at 84.

⁶⁷ See Laby, *supra* note 63, at 33–5.

⁶⁸ If other-regarding behavior were to lead to legal duties, we could expect much less of it.

when he admits that “not all individuals who advise are or should be considered fiduciaries.”⁶⁹

This puts me in a quandary. To the extent that my goal is descriptive accuracy, I must include some advisers, such as doctors, lawyers, and investment advisers. To the extent my goal is to delimit fiduciary status by excluding marginal cases, I must reject most advisers, such as salespeople, friends, and strangers. There is no obvious way to include some but not all advisers in a definitional or purely logical manner. However, it might be possible to do so by introducing some complexity to the model.

One way to include some advisers as fiduciaries is to abandon the definitional approach in favor of a status-based approach. We might conclude that certain classes of advisers should be deemed fiduciaries based on criteria extrinsic to the definition of fiduciary relationships, but perhaps based on the hallmarks thereof. On the one hand, this approach has the benefit of descriptive accuracy. The status-based approach is the dominant method of identifying fiduciary relationships employed in the law today,⁷⁰ and it allows for the inclusion of exactly those classes that the law actually deems to be fiduciary in nature. On the other hand, the status-based approach is unprincipled and likely to lead to inconsistencies of application in the long run.⁷¹

Another way to include some advisers as fiduciaries would be to extend the definition beyond de jure authority to reach instances of de facto power.⁷² If the key concept in fiduciary relationships is legal power over the practical interests of another, advisers qua advisers simply do not have it. However, some come closer than others. Some advisers are more trusted than others, and this gives them more influence over their clients. When the influence becomes strong enough, it can become effective control, which is a form of de facto power. Thus, it would not be too much of a stretch to decide that advisers who have effective control over their clients should be considered fiduciaries. This approach appears to be principled, but nevertheless can lead to the same type of inconsistency because it requires fact-specific determinations based on unspecifiable (quantitative rather than qualitative) criteria.

I propose a mixture of the two approaches for determining whether advisers should be considered fiduciaries.⁷³ In general, fiduciary status should be determined by reference to the definition, which focuses on de jure authority to exercise the legal

⁶⁹ Laby, *supra* note 63, at 35. Laby attempts to deal with the problem by cabining fiduciary status to those whose primary function is to advise others. *See id.* at 37ff.

⁷⁰ *See* Andrew S. Gold & Paul B. Miller, *Introduction*, in PHILOSOPHICAL FOUNDATIONS, *supra* note 6, at 1, 2; Miller, *supra* note 3, at 241.

⁷¹ *See* Miller, *supra* note 3, at 247.

⁷² *See, e.g.*, Criddle, *supra* note 64, at 1037. *Cf.* *Hodgkinson v. Simms*, 3 SCR 377, 466 (1994) (“[T]he distinguishing characteristic between advice *simpliciter* and advice giving rise to a fiduciary duty is the ceding by one party of effective power to the other.”); Smith, *Fiduciary Relationships*, *supra* note 62, at 618 (“If ... the nature of the relationship is such that the advisor has effective power over the advisee’s decision-making process, there is a partial transfer of autonomy just as in the case of Hohfeldian powers.”).

⁷³ I realize that, as a formal matter, this could be considered a status-based approach. However, this approach captures many of the benefits of the de facto approach, so it seems fair to consider it a mixture of the two approaches. I do not believe that anything of substance depends upon this semantic issue.

capacity of another. However, in recognition of the fact that de facto power can be as important as de jure power, the law should recognize as fiduciary certain relationships where one party has effective control over the legal capacity of another. Yet rather than making ad hoc determinations, courts should identify fiduciary relationships (in the first instance, at least⁷⁴) on the basis of class or status.

Regardless of the approach, we must determine the basis for extending fiduciary status beyond the original definition. In other words, we must answer the question of when to extend fiduciary status beyond de jure authority. For an adviser to be considered a fiduciary, she would have to be someone who generally would be given great deference by the client. Almost certainly, she would have to be an expert, and likely considered a professional.⁷⁵

There are some professional advisers, such as lawyers and doctors, who seem to present easy cases. Others are more difficult. For example, investment advisers are deemed fiduciaries by law,⁷⁶ even though they generally are not considered to be professionals in the same sense that doctors and lawyers are. Financial advisers such as investment advisers are first and foremost business people, who are understood to be self-serving rather than other-regarding. Thus, they probably do not have the kind of influence that amounts to effective control. In fact, it is not clear why a financial adviser would be a fiduciary any more than a mechanic or craftsman would: all of these people are experts, and we may very well rely on their judgment,⁷⁷ but that is insufficient to make them fiduciaries. Nevertheless, the law has long recognized investment advisers in particular as fiduciaries, and this determination ought to be respected.

Ultimately, dealing adequately with advisers is a difficult problem with no easy solutions. Prudential judgment is required. I submit that the canon of fiduciary advisers is fairly complete, and courts need not be on the lookout for new classes of fiduciary advisers.⁷⁸ Further expansion likely involves the sort of policy determinations that are best left to legislatures. Sometimes, legislatures may get it wrong as a conceptual matter, but that is their prerogative.

Thus far, we have been emphasizing a categorical approach to fiduciary relationships, adopting or rejecting entire classes of relationships rather than individual

⁷⁴ It is possible to allow for more nuanced ad hoc determinations.

⁷⁵ Defining the term “professional” would itself be a challenge. The most obvious definition would be those who have advanced training and are licensed by law. However, this would probably reach too far, as many trades must be licensed in many states. Alternatively, we could allow only those who accept the designation of fiduciary to be considered such. However, this would be unsatisfactory in that it would allow obvious professionals to disclaim the role of fiduciary. The appropriate definition of professional is beyond the scope of this chapter.

⁷⁶ See *SEC v. Capital Gains Research Bureau*, 375 U.S. 180 (1963).

⁷⁷ At the very least, I myself am utterly dependent upon my mechanic and handyman to tell me what is wrong with my car and house, and what needs to be done. I assume the same is true for many people.

⁷⁸ As Miller notes, “[c]ourts have proven highly reluctant to anoint new categories of fiduciary relationship given concerns over undue expansion of the scope of liability.” Miller, *supra* note 3, at 241. This reluctance is appropriate. Fears that this could lead the law to ossify are unfounded for three reasons. First, reluctance does not mean adamant refusal. Second, legislatures could always expand the reach of fiduciary law. Third, even without expansion, any relationship that meets the modified FPT definition would be considered a fiduciary relationship.

relationships. However, it is possible to allow fiduciary status to be determined on an ad hoc basis, involving a fact-based inquiry.⁷⁹ Thus, for example, we might consider certain advisers to be fiduciaries even though they are not lawyers (nor any type of adviser that is considered fiduciary as a class); alternatively, we might say that certain advisers are not fiduciaries even though they are lawyers (or some other type of adviser that is considered fiduciary as a class).

Because we are already operating outside the bounds of a definitional framework, it is difficult to conclude that any specific solution is logically mandated. Nevertheless, coherence can be preserved better by rejecting the lure of the ad hoc exception. Thus, I suggest that if an adviser does not fall into one of the classes of relationships that are deemed fiduciary, she ought not to be considered a fiduciary unless she qualifies under the definition thereof. In other words, she should only be considered a fiduciary to the extent that she is also acting as a categorical fiduciary—i.e., a trustee or agent.⁸⁰ Ultimately, such advisers would not be considered ad hoc fiduciaries as advisers at all, but rather would be considered categorical fiduciaries as trustees or agents.

The more difficult issue is the opposite one: the lawyer who ought not to be considered a fiduciary. At opposite extremes, we could refuse to make ad hoc exceptions in any case, rendering all lawyers fiduciaries, or we could insist that for any lawyer to be considered a fiduciary, they must in fact have influence that amounts to effective control. I propose a middle ground in the form of a strong presumption. Because advisers are considered fiduciaries when they belong to a class that has been deemed to have sufficient influence, clients likely have a reasonable expectation of fiduciary status and might justifiably rely on it.⁸¹ Thus, advisers who belong to a class that is deemed fiduciary should be presumed to be fiduciaries. In order to rebut this presumption, an adviser should have to establish that, under the circumstances, it was clear that the adviser did not have the kind of influence that amounts to effective control.

Dealing with advisers in the way I have proposed introduces complexity into an otherwise simple theory. This complexity can be represented by adding the concept of non-concentric circles (or heat spots) into my concentric circle model. The modified FPT definition of fiduciary relationship extends only to the first two concentric circles (the red and orange areas on the heat map). However, when appropriate, certain classes of relationships that lie outside those areas are pulled into fiduciary status by drawing non-concentric circles (or painting in heat spots) that extend the reach of fiduciary law. This complexity mars the elegance of the simple concentric circles model, but not too greatly, and it offers the benefit of greater descriptive accuracy in return.

⁷⁹ See *supra* note 74 and accompanying text.

⁸⁰ This is the approach adopted by Miller. See *supra* text accompanying note 66.

⁸¹ I am not suggesting that fiduciary status should be based on reasonable expectations. Cf. P.D. Finn, *The Fiduciary Principle*, in T.G. YODAN, *EQUITY, FIDUCIARIES AND TRUSTS* 6 (1989). Fiduciary status should be determined, in the first instance, based on the modified FPT definition of fiduciary relationship. I am only suggesting that exceptions should not be made because of the reasonable expectations of others. Once a class of persons is deemed to be fiduciaries by law, a reasonable expectation is created in the public that a fiduciary relationship exists. Thus, an individual member of that class should not be excused from fiduciary status too easily. This approach leaves open the possibility that the law could revoke the fiduciary status of that class, thereby destroying any expectation interest in the public.

C. Friends and Family

Moving to the next concentric circle, the green area comprises relationships that are based simply on trust—i.e., various forms of friendship. As mentioned earlier, friendships generally are not considered fiduciary relationships, although courts sometimes have imposed fiduciary duties.⁸² It is not obviously unreasonable to suggest that some friendships, and perhaps even some classes of friendships, such as marriage, ought to be considered fiduciary relationships. Nevertheless, the designation would be inappropriate.

Friendships are important and special relationships, but they are not fiduciary in nature. At first blush, one might be tempted to think they are because, like fiduciaries, friends are other-regarding—often even altruistic. However, that is an insufficient basis to invoke fiduciary law.⁸³ Friends may be generous with each other, but that does not give them the right to demand generosity in return.

Fundamentally, friendships are not like other fiduciary relationships. Friends do not have legal power over each other's interests, regardless of the intensity of the friendship. Even spouses do not have that kind of power or authority, at least in modern western cultures (although this might be different in some societies). While friends may be influential with each other, they do not have the kind of influence that amounts to effective control. Moreover, we must resist the temptation to make ad hoc exceptions because, when evaluating friendships, the exceptions are likely to swallow the rule. It would be too easy to believe that *this* friendship is a special case, when the very fact that there is litigation undermines the claims of closeness. To be sure, friends can be fiduciaries when they meet the standard definition—e.g., when they act as trustees, agents, or possibly even advisers. But this not true of the green area, or friendship qua friendship.

Ethan Leib has argued that friends ought to be considered fiduciaries because fiduciary law is all about fostering trust and “promotion of trust [is] central to fiduciary law,” and “[f]riends, as a category, are paradigmatic exemplars of trust.”⁸⁴ While fiduciary law is largely about trust, it is not about trust itself. As a quantitative matter, few would maintain that the law should encourage everyone to trust everyone else.⁸⁵ To the contrary, parents counsel their children to choose their friends wisely precisely because we ought not to trust everyone. As a qualitative matter, the trust that concerns fiduciary law is the entrusting of another with fiduciary power. Other forms of trust are irrelevant. Although the friend's interest may deserve some protection, there are other areas of law to address it. If a friend's expectation of reciprocity is the concern, then perhaps contract law is the solution. If harm is the concern, then torts may be more appropriate. However, fiduciary law does not fit.⁸⁶

⁸² See *supra* note 20 and accompanying text.

⁸³ See *supra* notes 67–68 and accompanying text.

⁸⁴ See Leib, *supra* note 8, at 690.

⁸⁵ See generally Sissela Bok, *Trust and Antitrust*, in ANNETTE C. BAIER, *MORAL PREJUDICES* 95 (1994).

⁸⁶ Leib also argues that friends should be considered fiduciaries because of the problems of monitoring and opportunism, which play a large role in fiduciary law. He admits, however, that “the mere possibility for opportunism is a thin reed upon which to hang substantial fiduciary duties with unusual remedies.” Leib, *supra* note 8, at 696. I would add that many areas of law deal with monitoring and opportunism.

Fiduciary law imposes legal duties the enforcement of which would be entirely unreasonable in the context of friendship.⁸⁷ For example, the duty of loyalty would require friends to pursue the interests of each other in all matters related to the friendship.⁸⁸ At the very least, the duty of loyalty proscribes conflicts of interest and conflicts of duty. But friends are often confronted with conflicts, and we would not expect that “thought of self [i]s to be renounced, however hard the abnegation.”⁸⁹ We may be pleased when friends make sacrifices for us, but we cannot demand it—and certainly not in a legally enforceable way.⁹⁰

An inherent problem is the breadth of the relationship. Other fiduciary relationships are limited in scope. Thus, although fiduciary duties are very demanding, they are commensurately contained.⁹¹ However, there are no limits to the scope of many friendships. If fiduciary duties were imposed, they would be commensurately unlimited.⁹² Leib seems to recognize this problem and proposes solutions to water down the strength of fiduciary law in the context of friendship.⁹³ However, it seems pointless to invoke fiduciary law only to reject the consequences that follow. The fact that fiduciary duties are too strong to implement indicates that fiduciary law is inappropriate for friendship.⁹⁴

What Leib seems to want most is the moral authority that comes from fiduciary principles.⁹⁵ Although extending fiduciary law may help friendship, it would do violence to fiduciary principles. This is exactly what I seek to prevent.⁹⁶ Moreover, fiduciary status seems unlikely to make much difference, because most people know very little about arcane legal minutiae. They would first have to learn fiduciary law, only to have it pretty much confirm what they already know intuitively about friendship and loyalty.

⁸⁷ Leib believes otherwise. See Leib, *supra* note 8, at 699.

⁸⁸ For a discussion of the possible standards of pursuing the interests of another, see John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 *YALE L.J.* 929 (2005).

⁸⁹ *Meinhard v. Salmon*, 164 N.E. 545, 548 (N.Y. 1928).

⁹⁰ To be fair, friends could be considered to be like partners, and this might seem an especially apt analogy for spouses. However, the problem remains: partners are not allowed to prefer their interests to each other's, while friends and even spouses must be able to. For a discussion of some problems with considering partners to be fiduciaries, see Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 *U. ILL. L. REV.* 209.

⁹¹ See *supra* text at note 42.

⁹² Miller argues that fiduciary power must be specific. See Miller, *supra* note 18, at 1013, 1018; Miller, *supra* note 3, at 275.

⁹³ Leib, *supra* note 8, at 707.

⁹⁴ Leib also mentions the duty of care and duty of candor. A duty of care would be almost unimaginable in the context of friendship: how could one avoid negligence for the interests of all of one's friends? A duty of candor seems equally unrealistic. It would seem excessive to require candor of friends at all times as a legal matter.

⁹⁵ See Leib, *supra* note 8, at 684–6.

⁹⁶ See *supra* note 10 and accompanying text. Leib discounts this possibility. See Leib, *supra* note 8, at 724–26. His argument is based on the premise that friendship serves as an exemplar of fiduciary relationships. See *id.* at 725. Although friendship may be a paradigmatic example of trust, see *id.* at 688, it is not a paradigmatic example of fiduciary relationships.

In short, friendships are important relationships, but they are not fiduciary relationships.

In the final concentric circle, or the blue area, are relationships based on vulnerability, without more. I suggested that the paradigmatic example is everyday parenting, but I did not explain what I mean by that term.⁹⁷ By “everyday parenting,” I mean to include the normal business of parents educating, disciplining, and investing their time and money on their children, but not situations in which parents are acting as trustees, agents, advisers, or even friends. It seems undeniable that parents have real power over their children, and that children are vulnerable to abuse of that power. Nevertheless, everyday parenting should not be considered a fiduciary relationship.

Most fundamentally, everyday parenting does not involve the type of power that concerns fiduciary law—i.e., substitutive exercise of legal capacity. Although it could in many instances, parenting generally does not involve legally representing or “personating” the child. Something very different is going on, although it may be difficult and controversial to specify what exactly that is. However, everyday parenting involves the use of the parent’s own resources and legal capacity, not the children’s. And while that may raise issues that are equally important or even more important, it does not raise fiduciary law issues. Other areas of law are better suited to deal with abuses of parental power—including, in extreme cases, criminal law.

Moreover, like friendships, the parenting relationship is simply too broad to be subject to extensive fiduciary duties on an everyday basis.⁹⁸ Despite the rhetoric of “the best interests of the child,” parenting is not as selfless as might easily be imagined. Parents make many sacrifices for their children, but they also refuse to make many others. The law could not be expected to require selflessness at all times. Ultimately, parents should not make decisions based on the best interests of the child. Rather, they should make decisions based on the perceived interests of the entire family, which often works to a child’s benefit but sometimes works to his detriment.⁹⁹ And parents must do this even though they are invariably conflicted. This makes fiduciary law principles especially inapt. The duty of loyalty is unrelenting in its demand that the interests of the fiduciary yield to the interests of the beneficiary. This standard simply could not be applied to everyday parenting.

Of course, when parents act as fiduciaries—e.g., as trustees of the child’s property—then they could be held to fiduciary standards.¹⁰⁰ But we should not for that reason say that parents are fiduciaries. Rather, we should say that trustees are fiduciaries, and that when parents act as trustees they may be considered fiduciaries. However, parenting is not a fiduciary act, and parents qua parents should not be considered fiduciaries.

⁹⁷ *Supra* note 30.

⁹⁸ *See supra* notes 90–93 and accompanying text.

⁹⁹ *Cf. Reno v. Flores*, 507 U.S. 292, 303–05 (1993).

¹⁰⁰ There might be reasons to exclude parenting from fiduciary law altogether. *See, e.g., supra* note 32 and accompanying text. I do not mean to take any position on the issue in this chapter.

V. CONCLUSION

As I stated at the outset, my overriding goal was to find a way to delimit fiduciary status so as to prevent the dilution that would result from excessive expansion. I sought a definition that would be as coherent as possible while remaining plausibly accurate as a descriptive matter. By evaluating Paul Miller’s fiduciary powers theory through the lens of a concentric circles or heat map metaphor, I was able to sketch the contours of a definition of fiduciary relationships that satisfies those criteria.

A theory that defines a fiduciary relationship as “one in which one party (the fiduciary) has power, in the form of substitutive exercise of legal capacity, over the significant practical interests of another (the beneficiary),” *plus* certain advisory relationships in which the adviser’s influence amounts to effective control, performs reasonably well in terms of both coherence and descriptive accuracy. Trustees and agents are categorically fiduciaries; advisers are fiduciaries only if they belong to established classes of fiduciary advisers; and other relationships are not fiduciary except when they meet the criteria for fiduciary relationships. These clear and (for the most part) coherent rules would allow jurists to identify fiduciary relationships with relative ease, and confidently reject expansion that could lead to the dilution of fiduciary law principles.

Clearly, much work remains to be done. The rough contours of my proposal would need to be fleshed out in detail and the consequences that flow from it would have to be addressed before it could be called a complete theory. Nevertheless, fiduciary status is a core problem facing fiduciary law. Until that problem is solved, fiduciary law likely will continue to develop in an ad hoc or atomistic manner. However, if the reach of fiduciary law can be constrained to the core cases, then it becomes possible for fiduciary law principles in the various areas of law to converge rather than diverge. If so, we can hold out the hope for one day achieving a unified body of fiduciary law.

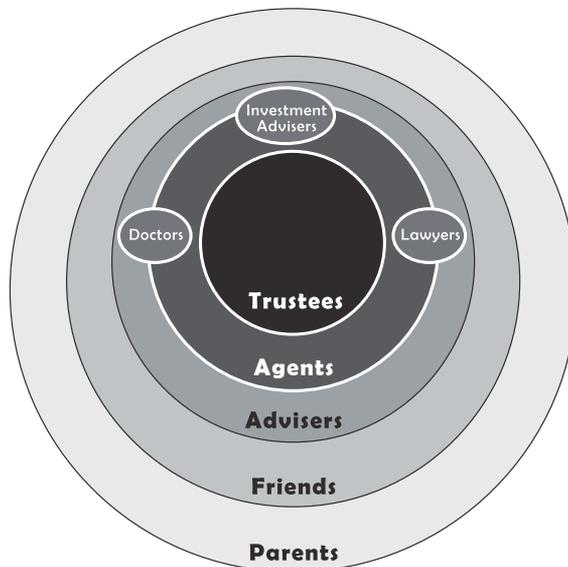


Figure 4.1 *Concentric circles model*