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Abstract

The legal concept of fiduciary, from the Latin *fīdūcia* meaning trust, plays a fundamental role in all financial and business organisations: it acts as a moral safeguard of the relationship between trustee and beneficiary, ensuring that the beneficiaries' best interests are met. It is often referred to as a duty of care. This paper focuses on the ethics of the fiduciary, but from a unique and historical perspective, going back to the original formulation of the fiduciary within a familial context, to reveal not only why care plays a central role in the fiduciary, but to also uncover key foundational presuppositions regarding agential capabilities embedded in the trustee-beneficiary relationship. In doing so, the paper uncovers ethical issues of an *epistemological kind* at the core of the fiduciary. By using Miranda Fricker's theory of pre-emptive testimonial injustice, the analysis helps shed light on shareholder activism and explains limited engagement to date.

JEL Codes:

B54 Feminist Economics
G11 Portfolio Choice • Investment Decisions
G30 Corporate Governance & Finance
G32: Financing Policy • Financial Risk and Risk Management • Capital and Ownership Structure • Value of Firms • Goodwill
K13 Tort Law

Keywords: Fiduciary duty, Epistemic Injustice, Ethics of Care, Shareholder Activism, Power, Gender, Beneficiary, Trustee

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Background

The legal concept of fiduciary, from the Latin *fīdūcia* meaning trust, plays a fundamental role in all financial and business organisations, as well as governing other professional relationships including medical care. Fiduciary acts as a safeguard of the relationship between trustee and beneficiary, ensuring that the beneficiaries' best interests are met. There are a number of ongoing debates regarding the fiduciary, including whether the fiduciary includes ethical and/or legal aspects (Laby 2005), and, specifically within an investment context, whether the fiduciary can accommodate socially responsible or ethical investment decisions being made by trustees on behalf of beneficiaries (Sandberg 2011 & 2013, Richardson 2011). This paper also focuses on the ethical aspect, but does so from a unique and historical perspective, going back to the original formulation of the fiduciary within a familial context to reveal not only why a duty of care plays a central role in the fiduciary, but to also uncover key foundational presuppositions regarding agential capabilities embedded in the trustee-beneficiary relationship. In doing so, the paper uncovers ethical issues of an *epistemological kind* at the core of the fiduciary.

The paper builds on existing work on the power relationship implicit in the fiduciary and its historical origins in gender relations (Richardson 2011, Mussell 2018) by using philosopher Miranda Fricker's theory of epistemic injustice (2009) to explicate the position of the beneficiary. By applying Fricker's theory of pre-emptive testimonial injustice to the position of the silenced beneficiary - whereby an agent's testimony is not only *discredited* due to implicit or explicit bias against their identity, but their testimony is not even *sought* because of their identity - the paper confronts the foundations of the dyadic relationship at the core of the legal concept. The application of pre-emptive testimonial injustice to the role of the beneficiary is also shown to help elucidate the increasing yet still relatively low levels of shareholder activism and engagement, or active ownership, of shareholders demanding their voices be heard. By theorising their silencing as pre-emptive testimonial injustice, the paper highlights how shareholder activism is in fact rooted in issues concerning epistemic injustice. In light of this angle of the argument, the paper makes a contribution not only to the literature focussing on fiduciary, corporate governance, and ethics (Gold & Milller 2014, Goldstone et al 2013, Miller 2014, 2018, Richardson 2011), but also to the body of work investigating shareholder activism (Fairfax, 2019, Goodman & Arenas 2015, Cundill et al 2018, Coskun et al 2018). The paper concludes by considering what the identified challenge of shareholder activism and engagement entails for a future-fit fiduciary relationship.

Structure

Recognising the increasing debates surrounding whether fiduciary contains an ethical aspect, whilst also identifying cross-cutting observations highlighting how these debates are driven by specific economic theory and associated ideology, the first section of the paper opens by outlining Arthur Laby's argument for why fiduciary is both legal and ethical. Whilst noting Laby's useful contribution, the focus then turns to critiquing his approach and highlighting its limitations, laying the way forward for wider discussions regarding why Laby's use of Kantian ethics to explicate care in the fiduciary falls short.

The second section underscores the importance of undertaking an historical investigation into the foundations of the fiduciary in order to develop a solid narrative of its ethical development. Introducing an alternative ethical framework known as the Ethics of Care, via which the ethical aspect of care in the fiduciary can be explicated, this section of the paper considers classifications of fiduciary as a duty or relationship, and considers how the distinction may have arisen. Relatedly, the agential presuppositions implicit in the roles of trustee and beneficiary, and the resultant power imbalance between the two positions are discussed.

The third section engages with the position of the silenced beneficiary and further unpacks the before mentioned agential presuppositions. Miranda Fricker's theory of epistemic injustice and pre-emptive testimonial injustice are introduced, and their suitability for explicating the role of the beneficiary is highlighted. The implications and consequences of the epistemic exclusion or silencing of an epistemic agent are discussed.

The fourth and final section brings fiduciary back into a contemporary context by considering current examples of silenced beneficiary backlash. Focussing on shareholder activism and active ownership, the argument is advanced that one reason for such activism is push-back rooted in issues concerning epistemic injustice. The case is made that a future-fit fiduciary requires a realist rethink of agential capabilities, a re-emphasis on fiduciary as a relationship, and a revisit to the good care ethics central to fiduciary.

1 The Fiduciary's Judicial and Ethical Aspects

Erosion of fiduciary ethics

Whilst the identification of the existence of fiduciary relationships for juridical purposes is widely accepted to be notoriously difficult (Laby 2005 & Miller 2014, 2018), it is however possible to identify core features or aspects of the fiduciary to hone down the subject matter for precise scholarly enquiry.

Concerned with delivering an ethical framework with which to explain the fiduciary, Laby (2005) seeks to make a distinction between the juridical and ethical aspects of fiduciary, in order to locate the presence of ethics in the fiduciary. As we shall come to see, he identifies ethics in both aspects. But firstly worth highlighting is the wider context in which he delivers this differentiation, recognising the need to shore up the argument that fiduciary does indeed involve ethics. He does so in light of the recognition of differing opinions regarding whether fiduciary does or does not have a moral or ethical aspect to it, and noting the increasing momentum behind the amoral argument writes that:

> 'Over the past twenty years, law and economics scholars have argued that fiduciary duties can best be explained through the lens of contract. The fiduciary relationship is contractual, the argument goes, characterized by high costs of specification and monitoring. Duties of loyalty and care are the same sorts of obligations as other contractual undertakings. They simply fill in unstated terms to which the parties would have agreed if they had only had the time to dicker over terms. The structures in which fiduciaries predominate, such as corporations and trusts, have been described and explained in contractual terms.'
>
> (Laby, 2005:1)

The above statement by Laby is of particular interest for two reasons. Firstly, it delivers a helpful differential definition and seeks to argue for the ethical aspect of fiduciary. Secondly, his observation of the twenty year timeframe in which certain scholars have sought to erode the ethical aspect of fiduciary, or at least limit the ethical function, aligns precisely with the observations made by Steve Lydenberg (2014) regarding constraining interpretations of the fiduciary. As has been explained elsewhere (Mussell 2018), Lydenberg's paper *Reason, Rationality & Fiduciary Duty* (2014) addresses the way in which interpretations of the practice of fiduciary have become limited via use of specific economic theory, namely Modern Portfolio Theory (MPT). MPT is widely used in investment management and draws heavily on neoclassical economic theory 'which

presupposes agents whose behavior is deemed to be predictable and consistent, characterized by pure rational self-interest, and who seek only to maximize their economic gain, remaining unaffected by relations to other entities' (Mussell 2018: 7). Lydenberg, commenting on the effect of MPT on fiduciary writes that:

> '…since the last decades of the 20th century the discipline of modern finance, under the influence of Modern Portfolio Theory, has directed fiduciaries to act rationally – that is, in the sole financial interests of their funds – downplaying the effects of their investments on others. This approach has deemphasized a previous interpretation of fiduciary duty that drew on a conception of prudence characterized by wisdom, discretion and intelligence – one that accounted to a greater degree for *the relationship between one's investments and their effects on others in the world*. As an increasing number of institutional investors have adopted the self-interested, rational approach, its limitations and inadequacies have become increasingly apparent. In particular, *the rational investor does not possess the capabilities of reason to assess the objective well-being of beneficiaries*, recognize fundamental sources of investment reward in the real economy, or fulfil the fiduciary obligation to allocate benefits impartially between current and future generations.'
>
> (Lydenberg, 2014: 2–3; *emphasis added*)

Adding later that '[a]cademic economists with a mathematical bent, rather than legal scholars or financial professionals, laid the groundwork for MPT' (*Ibid.* 7).

The alignment between the observations of these scholars is of great importance for highlighting the plight of the ethical aspect of the fiduciary which is arguably being eroded, the increasingly problematic implications of which will be discussed throughout the following paper. However, having highlighted the importance of shoring up the ethical aspect, it is crucial to examine next how Laby delivers this differentiation between the judicial and the ethical within the fiduciary, and the ethical framework he proposes.

Limits of Laby's Kantian distinction

Turning to Kantian moral philosophy, specifically Kant's discussion in the *Metaphysics of Morals*[1] of the duty of virtue in relation to juridical and ethical laws, Laby claims that Kant's duty of virtue can help explain the fiduciary. Laby writes:

> 'the twin duties that compose what is commonly called the fiduciary duty - the duty of loyalty and the duty of care - include what is fundamentally a duty of virtue, or an ethical duty, but one that courts enforce as a legal duty […] A legal duty according to Kant, is not merely a legal duty as many use the term today, it is a moral duty that may be enforced by law because it can be externally coerced.'
>
> (Laby 2005:3)

Laby's use of Kant is of particular interest here for three reasons, the second and third of which identify some limits to Laby's Kantian distinction. Firstly, and on a more complimentary note, Laby's use of Kant's duty of virtue to locate the mutual ethical element of *both* the juridical and ethical aspects of fiduciary, and by doing so develop the argument as to how *both* aspects carry an ethical duty, supports the argument against claims that fiduciary is purely contractual. This helps avoid the previously highlighted trend that may result in the juridical duty of loyalty being claimed as amoral. Whilst Laby is quite clear in distinguishing the juridical from the ethical on a number of points, specifically noting that 'Juridical duties are those that can be externally coerced; ethical duties cannot be externally coerced, they are performed for the sake of duty' (Laby 2005:10), and continuing his differentiation by noting that 'The duty of loyalty can be enforced by an external lawgiver and is, therefore, a juridical duty, and a perfect duty' (Laby, 2005:11) whilst 'The duty of care requires a measure of effort on the part of the fiduciary, but the amount of effort to be expended can be neither quantified nor coerced…The duty of care, in this regard, can be considered an imperfect duty' (Laby, 2005:13), his application of the duty of virtue to *both* fiduciary components importantly safeguards against the juridical being stripped of all ethical content.

The second reason why Laby's use of Kant is of interest comes through his drawing attention to historical developments and changing contemporary contexts, i.e. highlighting that a Kantian legal duty 'is not merely a legal duty as many use the term today'. This mirrors an important line of enquiry into the fiduciary to be expanded upon below - namely that the historical context in which the fiduciary was first developed has a crucial role to play in understanding the

ethical aspect of fiduciary. The point to be developed, and which will become apparent, is that Laby's omission in taking into account the historical development of fiduciary within a familial context, results in his overlooking the ethical foundations of the fiduciary, foundations which expose the limits of his Kantian distinction.

The third and final reason why Laby's use of Kantian ethics to explicate the fiduciary duty of care is of particular interest, particularly in light of the historical limitations highlighted in Laby's analysis, concerns critiques levelled against Kantian ethics by contemporary ethicists of Ethics of Care. It is to these last two reasons that the focus now turns.

2 Going back to go further

To reiterate, Laby's project is admirable in its objective to underscore the ethical aspects of fiduciary, and in doing so reveal the depth of sophistication of this relationship beyond legal contracts. And Laby's insistence in highlighting that 'A legal duty according to Kant, is not merely a legal duty as many use the term today, it is a moral duty that may be enforced by law' is an important distinction being made in a contemporary context. It underscores that the enforcement of fiduciary as a legal duty does not necessitate its exemption from having an ethical component. But if we are to stem the erosion of the ethical component of the fiduciary, and fully understand why the duty of care is so integral to the fiduciary relationship, the depth of investigation must go further. A deeper examination of the history of the development of this legal concept is needed, including why fiduciary relationships originally came into existence. This is needed in order to shine a light on why the terminology of a duty of *care* is most appropriate in this context. And such an examination must include an investigation into the presupposed agential capabilities and statuses afforded to both trustees and beneficiaries in the dyadic relationship, to reveal the increasingly complex ethical dimensions that need unpacking, and to build a more comprehensive understanding of the development of fiduciary ethics.

To be clear, whilst Laby's project of underscoring the ethical aspect of fiduciary is admirable, and his differentiation of the juridical from the ethical aspect as a means of doing so is helpful, his project omits a deeper investigation into the nature of the ethical origins of the fiduciary and ensuing implications. Such an omission results in the failure to fully articulate why it is *care* (which in Laby's project is articulated as a duty of virtue) that plays such a central role in fiduciary, as opposed to say the virtues of courage or respect. Whilst Laby is clear to highlight that a trustee should make the beneficiaries *needs* their own ends, he does not fully flesh out or connect *why* the beneficiary is not, cannot, or is deemed unable to attend to their own needs, thus apparently requiring the assistance of

another - the trustee. In short, and as per the position defended elsewhere (see Mussell 2018), an historical investigation into the development and evolution of the fiduciary, with particular attention paid to the implicit power mechanism embedded into the relationship and its gendered origins, reveals a great deal regarding the ethical narrative that flows through this legal concept, pointing towards why *care* (notwithstanding wide interpretations thereof) is fundamental to the fiduciary relationship. And such an investigation also starts to bring to the fore why the contemporary ethical framework known as the Ethic of Care potentially offers significant benefits in explicating and effectively 'practicing' the future of fiduciary in relation to its ethical aspect.

Investigating fiduciary origins to understand ethical development

The fiduciary was originally formulated within English common (familial) law as a means to protect property put into Trust while the rightful (male) owner of the property[2]was absent, for example fighting Crusades. Beneficiaries were women and children, allocated passive and subordinated roles, and as the lawyer Benjamin Richardson writes;

> 'Historically, trusts arose in England primarily to protect family wealth and to provide for the wife and children, who were socially constructed as passive and dependent. Modern investment law transplanted these arrangements for the private trust into a very different context'
>
> (Richardson, 2011: 6)

The appointed male trustee was required, in the absence of the owner, to manage the Estate put into Trust on the mutual understanding it was to be returned to its rightful owner upon their return, *and* that the beneficiaries of the Trust's best interests were met. It is this original *in absentia* in the context of Trusts and associated formulation of the fiduciary that starts to bring to the fore why, in Laby's words;

> 'The duty of care requires the fiduciary [trustee] to make the principal's [beneficiaries] needs the fiduciary's priority. The fiduciary must act for the principal's benefit. The *Restatement of Agency* provides that the agreement to act on behalf of the principal causes the agent to be a fiduciary - a person having a duty to act for the benefit of another as to the matters within the scope of their relationship.'
>
> (Laby, 2005:14)

With this historical context in mind, and with the trustee positioned as such, the fiduciary arrangement can be seen to have been devised as a substitute for a familial relationship, one supposedly underpinned by care, and taking place within the private sphere. In this way, the fiduciary, and its associated body of fiduciary law, constituting part of tort law, can be said to be concerned with managing this substitute relationship, in all its complexity. This is a point also made by Paul Miller who notes that; 'Fiduciary law, more than any other field, undergirds the increasingly complex fabric of relationships of interdependence in and through which people come to rely on one another in the pursuit of valued interests' (Miller, 2018:1).

The care aspect of fiduciary, which to deploy Laby's differentiation predominantly constitutes its ethical aspect, has then an important originating context and history which is entirely absent from Laby's analysis, but which is arguably crucial for understanding the fiduciary's full ethical narrative and development. Whilst appreciating Laby's project is not concerned with historical legal theory, the point still holds that when advancing an ethical framework, investigating *why* 'The duty of care requires the fiduciary [trustee] to make the principal's needs the fiduciary's priority', and indeed *why* the principal/beneficiary is apparently unable or not permitted to do so for themselves, should still be a matter of concern and interest.

Relatedly, Laby's use of Kant to provide an ethical framework for fiduciary is of particular interest here when taking into account a number of its aspects, namely: the familial origins of fiduciary; the nature of the fiduciary relationship; the presupposed agential capabilities of the trustee and beneficiary; and the related discussions of care. The discussion now turns to explaining why these aspects are of interest, alongside laying-out an alternative ethical framework with which to explain the ethical aspect of the fiduciary relationship.

*Duty of care as ethics of care - a framework for explaining the fiduciary***.**

As has been previously outlined elsewhere (Held 2006, 2014, Tronto 1993, 2013, Mussell 2018, 2020), the Ethics of Care is a contemporary body of ethical theory originating from the work of Carol Gilligan. Gilligan's work was initially undertaken within the discipline of moral developmental psychology, but later developed within philosophy and political science. Responding to the work of her supervisor Lawrence Kohlberg, who's Kantian influenced theory of moral development suggested that females appeared to 'stall' at the level of 'conventional morality' (characterised by Kohlberg as being hampered by a preoccupation with the maintenance of relationships and social order, rather than considering and using universal principles and rights in the reasoning process), Gilligan sought to redress what she deemed to be a study biased by the value-laden theory underpinning it, i.e. Piagetian and Kantian thinking. Kohlberg's

study involved a predominantly male sample and was used to essentially test the pre-designed stages of moral development which Kohlberg was extending from Piaget's earlier work, work which in turn had been influenced by interpretations of Kant. Alongside this design bias came Kohlberg's interpretation that the apparent female preoccupation and prioritisation of the maintenance of relationships (involving addressing individual needs) *over* the pursuit of universal principles, justice and rights (as demonstrated *by* the male sample), indicated that females were only capable of the less well developed stage of morality (Level II: Conventional Morality). Males however, Kohlberg concluded, had the capabilities to reach the upper level (Level III: Post-Conventional Morality).

Gilligan's approach of redress was to replicate Kohlberg's study, but with some key changes. Whilst she has received similar criticism for her own biased experimental design (her study used an unvaried sample of all female college students), her objective was to see if the use of *different* moral dilemmas (replicating Kohlberg's original experimental method) to initiate decision making and discussion (through which moral reasoning and justification were analysed to assess moral development), brought about different results. Whilst Kohlberg used the hypothetical 'Heinz Dilemma', asking interviewees to decide whether a drug should be stolen to save a life, Gilligan chose a less abstract approach, deciding to initiate discussions with women who were deciding whether or not to have an abortion. Gilligan concluded that instead of identifying moral reasoning which appeared to 'stall' at the level of 'conventional morality' - she instead identified a *different* moral orientation, expressed via a *different voice,* resulting in the publication of her book *In a Different Voice* (1982). Summarising the process of moral reasoning she identified, Gilligan notes:

> 'In this conception, the moral problem arises from *conflicting responsibilities rather than from competing rights* and requires for its resolution a mode of thinking that is *contextual and narrative rather than formal and abstract*. This conception of morality as concerned with the activity of care centers moral development around the understanding of *responsibility and relationships*, just as the conception of morality as fairness ties moral development to the understanding of rights and rules.'
>
> (Gilligan, 2003, p. 19, *emphasis added*)

Gilligan's work was celebrated for its identification and validation of a moral perspective which has always been in existence, but which had become lost behind a history of Western ethical theory valuing individualist, rights, and principle centred ethics (i.e. certain interpretations of Kant) - theory which had influenced Kohlberg's work. Gilligan's work was noted for its *other-regarding* focus, highlighting interdependency and inter-connection, and for clearly being

explicitly underpinned by a relational ontology, a point summarised by Tove Pettersen:

> 'Regarding the ontology of the ethics of care . . . the moral agents are envisioned as *related, interconnected, mutually dependent,* and *often unequal in power and resources* – as opposed to the conventional portrayal of the agent as *independent, equal and self-sufficient*. With regard to the moral epistemology, the ethics of care relies not merely on deduction and abstract reasoning, rational calculations or rule following. The moral epistemology of care includes *taking experiences into account, exercising self-reflections and sensitive judgments where contextual differences are attended to.'*
>
> (Pettersen, 2011: 54–5; *emphasis added*)

What arguably comes to the fore when thinking through the historical ethical development of the fiduciary using an Ethics of Care framework, is not only that the trustee and beneficiary are clearly positioned within an interconnected relationship, but that they are also bound to each other by the pursuit of the beneficiaries best interests and needs; needs which Laby insists the trustee should make their own ends. That these best interests and needs are *particular* to the beneficiary, and that the trustee must be self-reflective and vigilant in ensuring they themselves do not benefit from decisions made in the beneficiaries best interests, appears to be a clear example of the sort of moral epistemology of care Pettersen outlines. Indeed, the explicit development of this sort of moral epistemology in relation to the fiduciary has also been encouraged by other scholars interested in evolving the nature of fiduciary, albeit not articulated using an Ethics of Care framework. Goldstone, McLennan & Whitaker in their paper *The Moral Core of Trusteeship: How to develop fiduciary character* (2013) directly suggest that:

> 'The trustee must develop a settled habit of choosing well with regard to taking and not taking for herself. Further, the tradition points to the importance of the passion of care. *The trustee has to develop a settled habit of caring well, both for the grantor (or her wishes) and for the beneficiary.* Only by developing this active condition can a trustee hope to avoid the twofold pitfall of paternalism and infantilization.'
>
> (Goldstone, McLennan & Whitaker, 2013, p. 51, *emphasis added*)

There does then appear to be a number of ways in which an Ethics of Care can explain the ethical aspect of the fiduciary, specifically in light of its historical development, its core emphasis on the trustee's appreciation and prioritisation of

the beneficiaries' best interests and needs, and through the clear fact that the trustee and beneficiary are positioned in a relationship premised on asymmetrical power. Consequently, Laby's omission to consider the Ethics of Care as a contender framework for explaining the fiduciary, and to instead focus on Kantian ethics against which the Ethics of Care is contrasted for the numerous reasons outlined above, reveals a weakness in his argument, particularly with regards to the ontology and moral epistemology seemingly underpinning the fiduciary.

Fiduciary: relationship or duty?

One central issue brought to the fore by deploying the Ethics of Care as a framework instead of the Kantian Duty of Virtue, is the potential to reframe and reinterpret the fiduciary as a *relationship*, and not just as a *duty*. For as has been outlined above, the Ethics of Care draws on an ontology and epistemology with interconnectedness and interdependence at its core: it is inherently a relational ethics.

Speculating on why fiduciary has come to be known as a duty, despite its historical origins as a substitute familial connection as outlined above, Richardson highlights the role that the beneficiaries' subordination has played in this transformation from relationship to duty. He writes:

> 'The idea that there is a relationship between the parties has been obscured because traditionally trust law cast beneficiaries into a passive role. They are entitled to be informed about the administration of the trust assets, but they traditionally have not enjoyed unqualified rights to be consulted or to instruct trustees on how they should undertake their responsibilities in the absence of legislative provisions.'
>
> (Richardson, 2011:6)

This is an important observation and claim. It points directly at the causal role that presuppositions regarding the trustee and beneficiaries' agential capabilities, and the ensuing silencing of the beneficiary, has played in eroding the connection and relationship between the two fiduciary parties. Put differently, Richardson is claiming that the subordination of beneficiaries and the resultant power mechanism inherent in the fiduciary has not only undermined the fiduciary as a relationship, but has led to its evolution as being conceptualised as a disconnected duty. The positive implications of reframing the fiduciary as a relationship is a point to be returned to later in the paper, specifically in light of highlighted contemporary developments in fiduciary related activity.

Fiduciary, power & relationship - Agential presuppositions

Before moving on to outline how Miranda Fricker's theory of epistemic injustice can be of use in the context of fiduciary, the final logical step in this section is to explain *why* beneficiaries were cast into a passive, subordinated and silenced role, and to relatedly explain why there is an asymmetrical power dynamic inherent in the fiduciary.

As detailed elsewhere (Mussell 2020), the presuppositions regarding agential capabilities embedded in the fiduciary are founded in false gender stereotypes that damage both males and females. These are stereotypes which often fall back onto trite dichotomies, constructing gendered identities along the now well recognised erroneous lines of reason/emotion, rational/irrational, male/female, and so on, with an inherent hierarchy embedded in each dichotomy favouring the male associated trait. As has already been argued:

> 'The fiduciary is premised on a fiction regarding the (ir)rationality and limited decision making capabilities of the (female) beneficiary. This is clearly a false gender stereotype, steeped in assumptions about the supposed *nature* of females and their agency. And what is more, there is another damaging gender stereotype also playing a part in the fiduciary, this time steeped in assumptions about (male) trustees having rational and self-interested natures, mirroring the fallacious claims made regarding rational economic man, also known as *homoeconomicus,* who is, by contrast to the supposedly selfless and emotional beneficiary, a self-interested rational agent. It is of course this supposedly self-interested nature which must be fettered via the fiduciary, to ensure against abuse of the position of trust the trustee is placed in. In summary then, the fiduciary is premised on a number of gendered stereotypes which rely on warped caricatures of the supposed natures of males and females, stereotypes which have been shown to be erroneous and outright damaging - and neither males nor females emerge from the portrayals in a particularly pleasant or desirable light.'
>
> (Mussell 2020)

As we have seen, and as Richardson has claimed, the result of these agential presuppositions and their inherent hierarchy in the context of fiduciary has been an asymmetrical power dynamic embedded in the fiduciary relationship. Beneficiaries have not only had decision making capacity removed, but they have also been rendered voiceless. They have been silenced within the fiduciary relationship. Trustees are not obliged to consult with beneficiaries to enquire of their needs or best interests, and as such their testimony is not only deemed

extraneous to the decision making process, but their testimony is not even sought. It is to the task of considering the ethics of this silenced and excluded situation that we now turn.

3 The silenced and unsought

As has been acknowledged in sections one and two, Laby's project is admirable for shoring up the ethical aspects of the fiduciary, successfully arguing that the remit of fiduciary reaches beyond the purely contractual and judicial. And whilst his use of a Kantian ethical framework, specifically that of a Duty of Virtue, has been shown to fall-short of the ontology and moral epistemology of fiduciary - as revealed through a deeper historical investigation of its ethical development - his contribution is still useful. Indeed, his argument that both the duty of loyalty and the duty of care carry an ethical component - irrespective of the former's enforcement via judicial activity - provides solid ground on which to lay-out the second section introducing the Ethics of Care. We can clearly see how sections one and two work together in advancing contemporary discussions surrounding fiduciary ethics. That said, there is however another crucial line of ethical enquiry entirely absent from Laby's analysis that does require highlighting. By omitting to go deeper and question *why* the beneficiary was even deemed to be in need of a trustee, Laby's ethical project fails to build in an account of *why* the beneficiary is essentially silenced and rendered voiceless, or in Richardson's terms, why beneficiaries 'have not enjoyed unqualified rights to be consulted'. These sorts of ethical questions, and the highlighted ensuing implications, sit squarely within the domain of epistemology. These are questions concerning the sort of knowledge individuals are presupposed to have, how and why they have such knowledge, the status afforded to knowledge, and whose opinion or testimony is sought as a result. And intersecting these lines of epistemological enquiry and the answers they evoke are ethical considerations. As a result, and in order to further investigate the outlined power dynamic inherent in the trustee-beneficiary relationship - particularly in light of the historical and gendered readings of its development - the work of the philosopher Miranda Fricker, specifically her book *Epistemic Injustice: Power & the Ethics of Knowing* (2009) is particularly useful in this context.

Fricker's epistemic injustice: hermeneutical injustice

Fricker's work in the area of epistemology and ethics, which draws together epistemology and conceptualisations of justice, addresses a previous lacuna in the literature connecting the two fields. As Fricker notes in her introduction, 'Ideas with a politicizing portent for how we think about our epistemic relations - ideas such as that epistemic trust might have an irrepressible connection with social power, or that social disadvantage can produce unjust epistemic disadvantage - tend not to feature in the context of Anglo-American epistemology' (Fricker, 2009:2). Fricker's project does just that, directly laying out two central ideas of how social power and social disadvantage can result in epistemic injustice. One of these ideas Fricker terms as *hermeneutical injustice* - an ethical issue that arises when neither the epistemic agent (teller) nor the listener (receiver) are equipped with the necessary concepts to understand the situation or communication. The helpful example Fricker provides is that of the experience of sexual harassment *before* it was conceptualized in the form in which we recognise it today. Helpfully summarising, she writes, 'I explain this sort of epistemic injustice as stemming from a gap in collective hermeneutical resources' (*Ibid.,*6). The second idea Fricker outlines in her book is that of *testimonial injustice.* It is this theory which will now be used to analyse the social power embedded in the original familial and subsequent contemporary fiduciary relationship between trustee and beneficiary.

Method of application

Before however moving on to outline Fricker's theory, a word regarding the method by which it will be applied would be beneficial, to further underscore the theory's suitability in this context. As already highlighted, Fricker's work helped address a lacuna in the ethics-epistemology literature, connecting the two fields via considerations of social power. But this does not mean that a spotlight had not previously been shone on the social power interplay affecting epistemologies and positions of knowing. Indeed, Fricker is clear in pointing out that 'A crucial attraction of postmodernist philosophical thought was that it placed reason and knowledge firmly in the context of social power' (Fricker, 2009:2). However, and as Fricker notes, rather than continuing to direct analysis at understanding how reason had come to be wielded as a weapon of power by the powerful, postmodernist thought instead continued down the track of critiquing reason itself. For Fricker, it is this choice of direction that has left an all-important gap in the knowledge of the degree to which reason has come to be used as a weapon, a gap which she calls to be filled:

> 'But we must not allow there to be mere silence where there was once a postmodernist buzz, for we can surely find other, better ways of

> discussing reason's entanglements with social power. What form, we might ask, should such discussion take? One answer to this question is that it should take the form of *asking first-order ethical questions in the context of socially situated accounts of our epistemic practices. A socially situated account of a human practice is an account such that the participants are conceived not in abstraction from relations of social power (as they are in traditional epistemology, including most social epistemology) but as operating as social types who stand in relations of power to one another.* This socially situated conception makes questions of power and its sometimes rational, sometimes counter-rational rhythms arise naturally as we try to account for the epistemic practice itself.'
>
> (Fricker, 2009: 3, *emphasis added*)

The analysis being undertaken here of the silencing of the beneficiary in both historical and contemporary fiduciary relationships is arguably doing just as Fricker suggests. It is filling the recognised knowledge gap by *asking first-order ethical questions in the context of socially situated accounts of our epistemic practices*, directly looking at *social types who stand in relations of power to one another,* social types who are individuals socially positioned into gender roles with associated gender stereotypes. This is a line of questioning that Laby omitted in his ethical analysis, and it is a line of ethical questioning which sits at the very core of understanding the fiduciary relationship and its embedded social power.

Fricker's epistemic injustice

In the introduction to her text, Fricker is quite clear to underscore the extent of the importance of the epistemic theory she is about to introduce her readers to, noting that 'the wrong of testimonial injustice cuts conceptually deeper than anything we had so far envisaged: a matter of exclusion from the very practice that constitutes the practical core of what it is to know' (Fricker, 2009: 6). By extension, and as shall soon become clear, I would add that this exclusion from the very practice of giving testimony *and* being sought to give testimony, also entails exclusion from decision making, and relatedly from the social power it affords.

Carefully laying the conceptual groundwork of her project, Fricker launches her explanation of testimonial injustice with an initial discussion surrounding the definition of social power that her project draws on. The conception she uses is particularly useful to include here for two reasons. Not only does it provide a richer explanation of Fricker's theory, but it also serves to deliver the conceptual work of explaining the social power embedded in the relational infrastructure of the fiduciary. Summarising the concept she will put to work, Fricker defines social power as:

> 'a practically socially situated capacity to control others' actions, where this capacity may be experienced (actively or passively) by particular social agents, or alternatively, it may operate purely structurally.'
>
> (Fricker, 2009:13)

In light of the fact that the fiduciary is premised on the arrangement that the trustee should act in the best interest of the beneficiary without the need for their prior consultation, and the fact that trustees are charged with making decisions on the beneficiaries behalf, we can see how Fricker's concept of social power is at play in the fiduciary relationship. But the extent of this social power becomes all the more apparent when we also consider the first social context in which Fricker puts the social power concept to work - in *identity power.*

Choosing gender as one example of identity criteria, Fricker highlights how 'An exercise of gender identity power is active when, for instance, a man makes (possibly unintended) use of his identity as a man to influence a woman's actions - for example, to make her defer to his word' (Fricker, 2009: 14). This role that identity plays in activating social power in the context of the fiduciary contains significant weight when we consider, as has already been highlighted, that original trustees were male, thereby clearly exercising their identity power. But it holds additional weight when we also consider how contemporary judiciary decide if a fiduciary duty was ever present, as for example in times of dispute. In his paper in which he attempts to layout some guiding principles for identifying fiduciary relationships, Miller notes the predominant use of two methods of identification - status-based and fact-based reasoning - outlining how the former tends to be the 'default' position. He writes:

> 'The prevalence of status reasoning is reflected in conventional wisdom about fiduciary law: *one tends to think of fiduciary principles as attaching to persons by virtue of the legal or social role or position they occupy*. Thus, we say that trustees, directors, agents, lawyers, and doctors are fiduciaries, and so too, by implication, we attach a fiduciary characterization to the relationships in which these persons perform

> their roles. We - and by "we" I mean here to include lawmakers - usually say these things unreflectively. As we will see, *habitual reliance on status is encouraged by black letter law.* Over time, fiduciary laws come to encompass an increasing number of kinds of relationship to which authoritative attributions of fiduciary status have been made. One searching for a principle of growth - i.e., clear public justification for the extension of status - will find it elusive.'
>
> (Miller, 2018:7-8, *emphasis added*)

What Miller is arguably alluding to here is the social power implicitly afforded by judiciary to certain individuals by way of the legal or social roles they occupy, based on the social status such roles supposedly convey. And as has been highlighted elsewhere (Mussell 2020), it is roles which are deemed to hold reason as a central tenet which are afforded the social status Miller describes. This is both Fricker's identity power and 'reason's entanglements with social power' in action. When we consider the asymmetrical power embedded in the fiduciary relationship - where beneficiaries are left un-consulted - we can start to see how social power accumulates. But what Miller is also arguably alluding to is the *credibility* that these social roles carry. It is this (arguably reason-based) credibility - afforded to individuals by way of their identity power from occupying certain social roles - which ties back into Fricker's main theory of testimonial injustice. I will now explain how.

Fricker's Testimonial Injustice

Having introduced identity power into her argument, Fricker then moves on to explaining its importance in the context of testimonial injustice, as well as highlighting the central role that stereotype plays in identity power. She is clear to note why identity power is an important and helpful epistemic device, allowing hearers to 'use social stereotypes as heuristics in their spontaneous assessments of their interlocutor's credibility' (Fricker, 2009: 16-17) and acknowledges that the use of stereotypes may in fact be proper and need not be detrimental. But Fricker's project is concerned with *injustice,* and as such she draws attention to the effect and impact that a stereotype working against the speaker can have. When such prejudice is at play, she notes 'then two things follow: there is an epistemic dysfunction in the exchange - the hearer makes an unduly deflated judgement of the speaker's credibility…and the hearer does something ethically bad - the speaker is wrongfully undermined in her capacity as a knower' (Fricker, 2009: 17).

We have already seen, as per Miller, how identity power can work in an agents favour and produce what Fricker terms as a *credibility excess.* The status-based

reasoning used by judiciary to identify fiduciary relationships is an example of this. And Millers observation that a 'habitual reliance on status is encouraged by black letter law' is a clear working example of the judiciaries 'use [of] social stereotypes as heuristics' in their fiduciary assessments and wider legal practice. But as is Fricker's concern, so the focus in this paper is on the *credibility deficit* which occurs as a result of an 'unduly deflated judgement of the speaker's credibility', the testimonial injustice it leads to, and the wider implications for the epistemic agent violated as a result.

Bringing this back to the context of the beneficiary, it is helpful to remind ourselves of the social roles or positions that the original familial beneficiaries - women and children - were afforded, and to consider the identity power and credibility excesses or deficits associated with those roles. To recall Richardson's observation, 'trusts arose in England primarily to protect family wealth and to provide for the wife and children, who were socially constructed as passive and dependent'. As such, the beneficiaries of these trusts were women and children, and their social construction as passive and dependent was reinforced through the social roles and associated status the roles afforded. Specifically with regards to beneficiary wives, their dependency was premised on erroneous gender stereotypes simultaneously set within and arguably reinforced by a judicial system in which the legal doctrine of coverture existed - whereby a woman's legal right to own certain property was rescinded once she married (see Combs, 2005 & Erickson 2005). Coverture requires highlighting in this context of identifying epistemic injustice in the fiduciary - including identity power and credibility deficit - for a number of reasons. Not only because of the role it played in defining married women's rights to property ownership, thereby reinforcing dependency and positioning them as beneficiaries, but also because of the fallacious stereotypes it exposes when we note how *Feme Sole*, or unmarried women, *were* legally entitled to own both personal and real property, and considered capable to make their own investment and financial decisions in its regard.

With this fallacious and inconsistent gender stereotype in the original fiduciary helpfully exposed, and the effect this has on ensuing identity power and credibility deficit highlighted, we can now move nearer towards identifying the specific sort of epistemic injustice embedded in the original fiduciary relationship as a sort of *testimonial injustice* - 'a kind of injustice in which someone is *wronged specifically in her capacity as a knower*' (Fricker, 2009, 20). This is a helpful honing of the subject matter. We are now starting to narrow down *why* an epistemic agent is discredited (due to identity power and associated credibility deficit) and *what*, epistemically speaking, is being discredited (their capacity as a knower). If we then contextualize this 'capacity as knower' into the context of the fiduciary, and take into account Miller's point that trustees are often identified by judiciary using status-based reasoning and the social roles judged as indicating

the presence of a fiduciary relationship are deemed as involving high levels of reasoning capability, then the extension of this argument is that beneficiaries supposedly have less of this reasoning capacity, and so are in need of the trustees to act on their behalf. Going a step further by taking into account the now much maligned gender stereotypes of male-reason/female-emotion, alongside the well-established critiques of the construction of reason such as Genevieve Lloyd's *The Man of Reason* (1984), which argued that reason has been developed as an ideal constructed through the image of maleness, and we start to see how female beneficiaries' credibility deficit specifically pertained to a perceived lack of reasoning capacity. And this of course takes us back to Fricker's earlier point of 'asking first-order ethical questions in the context of socially situated accounts of our epistemic practices' in order to investigate and expose 'reason's entanglements with social power'.

But the analysis does not stop here. Because to recall, within the fiduciary relationship the trustee is not required to consult with the beneficiary, and despite the trustee being tasked with acting in the beneficiaries best interests, an articulation of their best interests is not requested. In short, the beneficiaries' testimony is not sought.

Fricker's pre-emptive testimonial injustice

Whist the core of Fricker's project is to deliver the theory of testimonial injustice, and less so hermeneutical injustice, she also introduces readers to what she terms pre-emptive testimonial injustice. It is this branch of testimonial injustice which is arguably best placed to explain the epistemic injustice of the silenced beneficiary within the fiduciary relationship.

Connecting with the previous point that testimonial injustice refers to an epistemic agent wronged specifically in her capacity as a *knower,* Fricker uses the work of Edward Craig - explicitly *Knowledge and the State of Nature* (1990) in which he seeks to elucidate why we have the concept of knowledge - to focus on the construct of the knower, or specifically the 'good informant'. For Craig, 'the explanation of why we have the concept of knowledge is that it arises from our fundamental need to distinguish good informants: originally, knowledge is what good informants can be relied on to share with us' (Fricker, 20009: 130). Taking this a step further, Craig outlines the three different aspects which constitute a good informant as someone who can be relied on to share their knowledge, and Fricker helpfully summarises these as follows:

> 'someone who (1) is likely enough in the context to be right about what you want to know, (2) is communicatively open (principally, sincere)

> in what he tells you, and (3) bears indicator properties so that you can recognize that (1) and (2) are satisfied.'
>
> (Fricker, 2009: 130)

It this third aspect of indicator properties which is of interest here, specifically in light of the previous discussions surrounding identity power and the credibility deficits associated with certain social identities and roles. As we have seen, gender is a well-known example of identity power. And as has been shown, women were (and clearly still are in certain contexts) socially positioned in passive and subordinated roles, and subject to credibility deficits. Taking these two aspects together, alongside noting that within the fiduciary relationship the trustee need not consult with the beneficiary or ask their opinion, we can conclude that the beneficiary is silenced and subjected to a related but different form of testimonial injustice. As Fricker writes:

> '…those social groups who are subject to identity prejudice and are thereby susceptible to unjust credibility deficit will, by the same token, also *tend simply not to be asked to share their thoughts, their judgements, their opinions…This kind of testimonial injustice takes place in silence*. It occurs when hearer prejudice does its work in advance of a potential informational exchange: it pre-empts any such exchange. Let us call it *pre-emptive testimonial injustice*. The credibility of such a person on a given subject matter is already sufficiently in prejudicial deficit that their potential *testimony is never solicited; so the speaker is silenced* by the identity prejudice that undermines her credibility in advance. Thus purely structural operations of identity power can control whose would-be contributions become public, and whose do not'
>
> (Fricker, 2009: 130, *emphasis added*)

To be clear, by not consulting with the beneficiary, who within the setting of the original familial fiduciary were women (and children), the beneficiaries' *testimony is never solicited; so the speaker is silenced*, and this takes place as a result of their identity and perceived credibility deficit. Indeed, by applying Fricker's pre-emptive testimonial injustice in this way to such a real world example, we start to reveal the fiduciary's embedded relations of social power in action:

> 'If we turn our imagination to the real social world and place the phenomenon of pre-emptive testimonial injustice in relations of social power, we readily see how it could *function as a mechanism of*

> *silencing: not being asked is one way in which powerless social groups might be deprived of opportunities to contribute their points of view* to the pool of collective understanding…Testimonial injustice, then, can silence you by prejudicially pre-empting your word'
>
> Fricker, 2009: 131 *emphasis added*)

The implications of thinking through this *mechanism of silence* in the context of the fiduciary carries even more weight when we consider how the construction of the fiduciary relationship is *premised* on such silencing: it is embedded in the fundamental structure of the relationship and delivers the asymmetrical power in the fiduciary which has been discussed elsewhere (Mussell 2020). But the implication of this structural mechanism of silence as an epistemic injustice becomes all the more significant when we take into account its systematic nature (repeated and ongoing), and then also consider the resultant cumulative effects of this systematic use of the mechanism. Put differently, what are the long-term effects of deploying a mechanism of silence, of systematically silencing, and of being systematically silenced?

Consequences of pre-emptive testimonial injustice

With consideration to such implications, Fricker offers some helpful reflections in this regard:

> 'No wonder, then, that even relatively inconsequential testimonial injustices can carry a symbolic weight to the effect that the speaker is less than a full epistemic subject: *the injustice sends the message that they are not fit for participation in the practice that originally generates the very idea of a knower*'
>
> (Fricker, 2009: 145, *emphasis added*)

Whilst Fricker's above reflection is certainly helpful in starting to think through the consequences of testimonial injustice for an epistemic agent more generally, what she is not doing is focussing on the specific consequences of pre-emptive testimonial injustice, or indeed on the consequences of its systematic use and therefore cumulative effects. This is an important distinction to make when we consider the context of the fiduciary relationship being explicated here, which, as we have already seen, arguably has systematic pre-emptive testimonial injustice as a mechanism of silence embedded into its structure. However, in the absence of a more specific consideration from Fricker regarding the consequences of (cumulative) pre-emptive testimonial injustice on epistemic agents, her more

general statement above will be briefly developed below and then applied for the purposes of the fiduciary context.

Fricker' first point worth noting is that *even relatively inconsequential testimonial injustices can carry a symbolic weight to the effect that the speaker is less than a full epistemic subject*. What this invites us to do in the context of the fiduciary, is evaluate whether the silencing of the beneficiary is indeed *relatively inconsequential* or if it in fact has more far-reaching consequences, and so carries more than the symbolic weight suggested. Considering the fiduciary relationship exists in order to ensure the beneficiaries' best interests are met, it is safe to conclude that the pre-emptive testimonial injustice identified in the fiduciary does indeed have more far-reaching consequences (the beneficiaries own welfare), and so does in fact carry more than a symbolic weight regarding the beneficiary being less than a full epistemic subject. The outcome of this, as Fricker indicates, is the *message that they [beneficiaries] are not fit for participation in the practice that originally generates the very idea of a knower*, and in the case of pre-emptive testimonial injustice in the fiduciary, this clearly reflects the actual non-participatory and passive role in which the beneficiary is indeed permanently placed.

To summarise, whilst Fricker has helpfully engaged in considering the consequences of general testimonial injustice - which have been briefly developed above to consider the consequences of pre-emptive testimonial injustice - Fricker does not however comment on the possible long-term effects of cumulative pre-emptive testimonial injustice, of being systematically silenced. As indicated above, we can deduce the effects of pre-emptive testimonial injustice by assuming the same outcomes Fricker lays out for general testimonial injustice as described above, but in the case of cumulative injustice, we must arguably exacerbate the extent of outcome due to extended circumstances. By doing so, we arrive at the position that silenced beneficiaries receive the repeated message, over a sustained period of time, that they are *not fit to participate in the practice that originally generates the very idea of a knower practice*, and that they are not therefore a knower in this context. When we consider this cumulative effect of pre-emptive testimonial injustice in the original familial context, where women were beneficiaries, we start to develop an interesting insight into wider social practice at play, including how the repeated message of *not being fit to participate* still pervades present day practice. This is particularly enlightening when we consider the contemporary focus on why there is such a dearth of participation of women in senior leadership positions in organisations (i.e. in senior management teams or on Boards where such roles position them as trustees with shareholders as beneficiaries). It is also elucidates why the finance sector continues to be male dominated, with particular roles such as investment managers[3] and trustees of small trusts - both of which have fiduciary duties at

their core - having so few women in position (O'Sullivan, 2019)[4] - a point returned to later.

In addition, the consequence of pre-emptive testimonial injustice delivering a reinforced and exacerbated message to beneficiaries that they are *not fit for participation in the practice that originally generates the very idea of a knower* provides a helpful analytical angle on another issue. This time it illuminates a relatively new phenomenon within the fiduciary's more contemporary corporate context where beneficiaries are shareholders. This phenomenon is that of increasing amounts of shareholder activism, or active ownership, also referred to as shareholder engagement. It is to this issue, and how Fricker's outlined theory can help us interpret this increasing activity, that we now turn.

4 Shareholder engagement: pre-emptive testimonial pushback

Another brief recap would be helpful at this point, to draw together the previous three sections and trace how they combine to help investigate ethical aspects embedded in the fiduciary - with a particular focus on epistemic injustice. To recall, Laby's project was first introduced to help shore up the argument that the fiduciary does indeed contain an ethical dimension. This was an important initial step to make in light of the increasing arguments made to the contrary, with some parties instead arguing that the fiduciary is reducible to being purely contractual. Despite Laby's project containing identified helpful elements, his advancement of a Kantian framework with which to explicate fiduciary ethics was shown to be wanting. His omission to consider the historical development of the fiduciary, including questioning why the fiduciary was first devised, resulted in overlooking the power dynamic embedded in the relationship between trustees and beneficiaries, one rooted in gender politics and identity power. Whilst Laby emphasised that the ethical aspect of the fiduciary was predominantly (although not exclusively) contained within the duty of care, he did not consider the possibility of utilising an Ethics of Care as an ethical framework for the fiduciary. By introducing this ethical framework and highlighting how its relational ontology and epistemology align well with the fiduciary as a relationship, this paper remedies the issue. In addition, by explicitly (re)framing the fiduciary as an ethical relationship - one unarguably premised on a power asymmetry in which the trustee makes decisions on behalf of the beneficiary without need for their prior consultation - this helps focus an investigation into the identities and epistemic agency of the trustee and beneficiary. It raises a new line of questioning - of who gets to decide for whom, of who is silenced and why - and subsequently brings another ethical line of questioning to the fore, that of *epistemic injustice*, or more specifically, *pre-emptive testimonial injustice* embedded in the fiduciary relationship.

Updating to the contemporary context

Just as it has been shown to be fruitful to return to the historical foundations of the fiduciary in order to explicate the original power mechanism and related agential presuppositions embedded in the fiduciary relationship, so it is now also beneficial to explore how the fiduciary plays-out in contemporary contexts. Of specific interest is investigating how the pre-emptive testimonial injustice identified as existing in the fiduciary affects present-day trustee-beneficiary relationships, and to identify any arising consequences or challenges.

As highlighted in the previous section, one consequence of pre-emptive testimonial injustice is that the epistemic agent receives a message that they are *not fit to participate in the practice that originally generates the very idea of a knower practice*. And if we consider the cumulative consequence of systematically receiving that message, then the result is that they *come to consider themselves* not fit to participate - the message affects their agency. Put differently, they are repeatedly *disengaged* from the decision making process and as a result become apathetic and are *disempowered*. As an epistemic agent whose thoughts, opinions or judgements are systematically not sought, and whose testimony is not seen as requisite or necessary for consultation, then any capability or capacity to influence - any power to determine decision making - is removed. And, as a result of their exclusion from the decision making process over a sustained period of time, the epistemic agent arguably comes to assume that they are, as Fricker notes, not fit to *participate in the practice,* and are in fact not a knower.

Looking to contemporary contexts for evidence of where this sort of repeated and reinforced disengagement may exist, for examples of how beneficiaries have become cumulatively disempowered due to their testimonies not being sought along with the long-term consequences of this exclusion, we can indeed find some interesting examples. A number of these have already been highlighted in the previous section. These include the weak representation of women both in senior level roles in organisations where fiduciary duty is a core responsibility, and in the finance industry, again particularly in positions such as investment fund management where being a trustee is central to the role. There is however another example of where the cumulative consequences of silencing the beneficiary are playing out rather differently, and in fact there are signs of increasing discontent at the disempowerment being imposed. This is, as was noted at the end of the last section, the phenomenon of shareholder activism, or active ownership, also referred to as shareholder engagement.

Shareholder activism and active ownership

Shareholder activism or active ownership takes many forms. It can involve a solo shareholder with a significant amount of shares working alone to try to influence decision making within the organisation they partly own, or it can involve a group of shareholders working together to likewise influence trustees[5]. Shareholder activism can also take place via a third party, i.e. a trustee such as a pension fund manager, who is acting on their beneficiaries' behalf. In addition, the format the activism takes varies, with some engagement taking place via private meetings (Coskun et al (2018), whilst other activity is public, executed at shareholder meetings. Although the agent configurations and format may vary, as indeed does the shareholders' motivation for pursuing activism (i.e. financially motivated, or non-financially motivated, also known as social shareholder engagement (SSE) with the objective to advance social and/or environmental issues, (see Goodman & Arenas 2015, Cundill et al 2017), the fundamental issue remains the same: the objective of shareholder activism is to ensure the beneficiaries' voice is heard. It is to demand that their thoughts, judgements and opinions are un-silenced. It commands their consultation. It transitions the beneficiary from the passive and subordinated position highlighted by Richardson to one of engaged agent, the implications of which are only now becoming clear. As Lisa Fairfax writes:

> 'The shift away from shareholder apathy reflects a radical departure from the traditional corporate governance norm of shareholder passivity. While many corporate governance experts have conceded the descriptive shift away from shareholder apathy (at least temporarily), few have acknowledged the normative shift and its related significance'
>
> (Fairfax, 2019: 1301)

This development in shareholder activism - both financial and non-financially motivated - is particularly interesting in light of the application of Fricker's theory to the fiduciary, in which the beneficiaries silencing is theorised as pre-emptive testimonial injustice. Indeed, by utilising this application we can see how shareholder activism can be read as shareholder push-back, rooted in issues concerning epistemic injustice. The objective of the activism - irrespective of its motivation - is to engage, to influence, and to empower beneficiaries. To move from testimonial exclusion to inclusion, from injustice to justice.

It is particularly worth highlighting at this point, in the context of giving voice to the previously voiceless, that the amount of shareholder activism varies according to motivation, and this differential commands comment. Financially motivated shareholder activism is more commonplace with a longer history, has propensity to take place via private meetings, and has been studied more widely (Cundill et

al, 2018). SSE by comparison is a relatively new phenomenon, has relatedly been subject to less investigation, and takes place with less frequency. Its motivation also often stands in contrast to that of financially motivated shareholder activism, a point highlighted by Goodman & Arenas:

> 'The shareholder primacy orientation of traditional agency theory assumes shareholders will maximise their individual utility (Jensen & Meckling, 1976). Social shareholder engagement (SSE) poses a challenge to this approach, as shareholders bring the concerns of often voiceless and marginalised stakeholders, such as victims of human rights abuses and environmental degradation, to the heart of corporate decision making'
>
> (Goodman & Arenas, 2015:163)

That it has taken time for SSE to gather ground should be of no surprise. Firstly, and as Goodman & Arenas note, SSE poses a challenge to orthodox economic theory that insists economic agents (caricatured in ideal types such as *homoeconomicus*) will seek utility maximization. As such, SSE sets out a similar contest to that of socially responsible investments (SRI), in questioning these orthodox premises, a challenge which has been commented on elsewhere (see Mussell 2018). Secondly, as such economic premises have become embedded in widely held beliefs, it has only been through relatively recent enquiry, including the Freshfields Bruckhaus Deringer report (2005), that the legal possibility of trustees being able to take into account non-financial criteria in their fiduciary duty has become possible. It is a considerable achievement that only fourteen years after the publication of the Freshfields report, regulations came into effect on 1st October 2019 in the UK requiring pension fund trustees to have a policy on how their investments take into account environmental, social and governance (ESG) issues, including climate change[6]. And thirdly, the extent of shareholder ownership disconnect arguably plays a central role in the 'shareholder apathy' coined by Fairfax. The majority of shareholders with institutional investments via pension funds *do not know* which companies or industries their money is invested in. They have been, and still are, repeatedly disengaged from that information, precluded from consultation. And one reason why they *do not know*, nor seek to become knowers, is arguably because they have repeatedly received the message that they are *not fit to participate in the practice that originally generates the very idea of a knower practice.*

Shareholder activism: refreshing the fiduciary

What then, in light of the application of Fricker's theory of pre-emptive testimonial injustice to the position of the silenced beneficiary, are the implications of increased shareholder activism on the fiduciary relationship? What are the consequences of this increased level of engagement, of this command to be consulted, on the asymmetrical power dynamic embedded in the fiduciary? And how does this command to be consulted disrupt the original presuppositions regarding beneficiary capabilities upon which the fiduciary was originally premised?

As has previously been discussed, the effect of cumulative pre-emptive testimonial injustice on an epistemic agent is the repeated delivery of the message that they are *not fit to participate in the practice that originally generates the very idea of a knower practice.* The consequence of that repeated delivery is to *normalise* the message. That this has indeed been the outcome in the context of the beneficiary is illustrated by Fairfax who writes:

> 'Historically, governance experts pointed to the fact that shareholders were not active as clear evidence that shareholders did not believe that they ought to be active. In this respect, shareholder apathy itself served as the compelling evidence that shareholders had a normative preference for apathy.'
>
> (Fairfax, 2019:1322)

Adding later that:

> 'Some suggested that one reason for this continued embrace of apathy was shareholders' continued belief that activism was not normatively appropriate. *This means that the apathy norm was so powerful that shareholders continued to embrace it even when such embrace may not have been in their best interests.'*
>
> (Fairfax, 2019:1323 emphasis added)

This observation in the context of shareholder activism is quite remarkable. It clearly demonstrates the deep-reach of pre-emptive testimonial injustice on the beneficiary. This example also provides a valuable insight into the long-term effects of systematic epistemic injustice on epistemic agents and the degree to which this becomes embedded and normalised in behaviour. With this in mind, the fact that shareholder activism is now gaining momentum carries even more weight, and to recall Fairfax's words 'few have acknowledged the normative shift

and its related significance' - particularly when we can now read it as pre-emptive testimonial push-back.

When we add this observation to the earlier revelation regarding presuppositions of the beneficiaries agential capabilities embedded in the fiduciary, we start to see a more realist reassessment of those capabilities and a fundamental shift in the power dynamic of the fiduciary relationship. Indeed, Fairfax's article delivers the conclusion that;

> 'Shareholders and directors have come to accept the propriety of shareholder voice and influence. They have come to believe that shareholders can *and should* play a role in holding directors accountable and shaping corporate practices'
>
> (Fairfax, 2019: 1345)

This inclusive approach, which appears to reject the previously outlined assumptions of a beneficiaries' credibility deficit, clearly marks a considerable change to the original beliefs on which the familial fiduciary was premised, and starts to remedy the epistemic injustice identified as embedded in its original architecture. It suggests a refresh of the fiduciary is in process, and a challenge to the power dynamic of the trustee over the beneficiary is gaining increasing momentum. And with this is mind, it also makes way for a fiduciary in which the trustee and beneficiary are situated in a more active and consultative relationship, one which moves away from the obscurity caused by beneficiaries being cast in a passive role, and instead towards one which is more conducive for the relational ethic of caring well.

Conclusion

This article has fundamentally delivered an ethical project - one focussing on the ethics in the fiduciary, and more specifically on the epistemic injustice embedded in the fiduciary relationship. It has highlighted an implication of long-term pre-emptive testimonial injustice, and has demonstrated the far-reaching effect this has had on limiting the agency of beneficiaries. By doing so, the project has been able to shed light on why beneficiaries have been reticent in being active shareholders, why shareholder engagement has been weak, and why many shareholders remain voiceless.

As one generation uses and appropriates concepts from its predecessors, so the history of the development of those concepts is forgotten. The socio-economic contexts which helped shape the concepts development become embedded,

rendered implicit, as more contemporary applications of the concept take centre-stage. The objective of analysing the concept of the fiduciary with Fricker's work has been to rediscover and reinterpret its ethical narrative, to show how fiduciary's power dynamic, originally built on a dubious gender stereotypes and epistemic injustice, is increasingly coming under challenge to refresh and develop into a future-fit fiduciary.

Notes

1 As Laby helpfully notes 'The *Metaphysics of Morals* comprises two books -- the Doctrine of Right and the Doctrine of Virtue -- the first discussing legal rights and duties, the second ethical ones' (Laby, 2005:3)

2 It should be noted that coverture (colloquially known as 'civil death') prevented English women from ownership of *personal* property upon marriage (personal property included money, stocks, furniture, jewellery, livestock etc.), and also placed the control of their *real* property (housing and land), including rights to income earnt from its lease, into their husbands control (although the husband could not sell the property as the wife retained legal ownership). Coverture was law from circa twelfth century until 1870, when the Married Women's Property Act was passed. It should be noted that, in contrast, *Feme sole* were legally permitted to own and control their own personal and real property.

3 See Alpha Female Citywire 2018 report indicating of 16,084 fund managers in its database, only 1,662/10.3 per cent were female (https://citywire.co.uk/Publications/WEB_Resources/Creative/Global/Alpha-Female-2018.pdf)

4 Regarding Trustee diversity - see Shareaction/David O'Sullivan's letter to Mark Potter (Regulatory Policy Directorate) dated 24th September 2019 regarding feedback on the Consultation on future of trusteeship and governance: 'The finance sector remains male-dominated across the board; for example a study of small trusts in the UK found 84% of trustees are male*. The disconnect between trustee board priorities and the wider membership base is not surprising' (*references the following article: Smith, I. (14 November 2014). 'Pensions Trust reflects on trustee election after diversity move,' Pensions Expert. Available online at: https://www.pensions-expert.com/DB-Derisking/Pensions-Trust-reflects-on-trustee-election-afterdiversity-move?ct=true

5 For an example of such group activity see the recent activity of Amazon employees who recently used their company-issued shares to propose a resolution asking the company to report on its plans to help tackle climate change https://www.wired.com/story/amazon-employees-try-new-activism-shareholders/ [accessed 20/10/19]

6 See Shareaction press release on fiduciary duty https://shareaction.org/responsible-investment-regulations-come-into-force/ [accessed 20/10/19]

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