

RECLAIMING THE
RELATIONAL ONTOLOGY OF
THE FIDUCIARY AND
EXPLORING RELATIONAL
ETHICS

Helen Mussell

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AND EXPLORING RELATIONAL ETHICS**

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Dr Helen Mussell
Cardiff University and University of Cambridge
mussellh@cardiff.ac.uk and hjm47@cam.ac.uk

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Abstract

Despite the omnipresence of the fiduciary in organisations, there is an omission of contemporary theorizations of this legal concept within the organisational theory literature. This is particularly surprising given the situation that the presence of ethics within the fiduciary is increasingly contested ground, with clear implications for managerial practice. This article addresses the lacuna by theorizing the fiduciary using an original ontological analysis, alongside identifying a suitable ethical framework. It argues on two grounds that the ontology of the fiduciary is inherently relational. The fiduciary's process-oriented focus is shown to indicate an open, emergent, and relational ontology at work. Secondly, historical investigation of the development of the fiduciary highlights its core relationship structure, and the interdependency and power dynamic embedded in the fiduciary are revealed. The argument is advanced that by bringing this inherent relational ontology to the fore, we can see how a relational ethical framework - the Ethics of Care - is best placed to explicate the ethics at work. The article concludes with a discussion outlining how the ontological theorization offers utility in steering future practice of the fiduciary.

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BACKGROUND

The legal concept of the fiduciary is used extensively in financial and business organisations. As a legal device, fiduciary sits within civil tort law, with a tort being a civil wrong. The term originates from the Latin *fiducia* meaning trust. Fiduciary acts as a safeguard in the relationship between the trustee and beneficiary, where the trustee is legally obliged to act on the beneficiaries' behalf and in their best interests. It is often referred to as a fiduciary duty.

There are a number of contemporary ongoing debates regarding the fiduciary spanning the disciplines of law, philosophy, economics, and organisational theory. These include, amongst others, the wide acceptance that identifying the existence of fiduciary relationships for juridical purposes is notoriously difficult (Laby, 2005; Miller 2014, 2018). There are also discussions in the field of philosophy of finance concerning the legal position regarding trustees making socially responsible investment decisions on beneficiaries' behalf, i.e. via environmental, social and governance (ESG) screened investments (Author, c; Richardson, 2011; Sandberg, 2013). Within the organisational literature work has focussed on the fiduciary duty of trustees to deliver shareholder value (Glac and Brehmer 2014), alongside numerous contributions examining trust, but with less direct focus on the concept of the fiduciary itself (Hosmer, 1995; Mayer, Davis and Schoorman, 1995; Sheppard and Sherman 1998). Other areas of research include critical discussions concerning the dominant application since the 1970's of neoclassical economic theories to fiduciary practice, resulting in the position that the fiduciary is values-free and reducible to contract law (Author, c; Getzler 2014; Hawley, Johnson and Waitzer, 2011). Finally, and relatedly in defence of fiduciary ethics - there is also an increasing body of work concerned with advancing a suitable ethical framework for the fiduciary (Author, d, e; Laby, 2005), a project of particular importance in light of the sustained efforts to erode the ethical aspect from the fiduciary - an issue to be outlined in detail in this article. It is these last two debates - approaching the fiduciary from economic and ethical angles - which are of specific interest here, forming the core of the following discussion in assisting in theorizing the fiduciary from an ontological angle.

PURPOSE OF THE ARTICLE

Noting that an ontological theorization of the fiduciary is absent from organisational literature, whilst also recognising that the ethical aspect of the fiduciary is under threat, the article delivers an original ontological analysis with practical utility (Corley and Gioia, 2011), laying the theoretical groundwork for the use of a normative ethical framework - the ethics of care - with which to practice the fiduciary.

A brief introduction to ontology and ontological orientations, and the difference between relational and atomistic formulations are outlined. Having set out this distinction, the focus turns to theorizing the fiduciary's ontology, examining how numerous process-oriented features of the fiduciary point towards its inherent relational ontology, and how attempts to apply theories underpinned by an atomistic ontology onto the fiduciary ultimately fall short.

A second argument then shores up the claim of fiduciary's relational ontology by highlighting the central structure of the fiduciary *as* a relationship - between that of trustee and beneficiary. An historical account of the development of the fiduciary is detailed - revealing the inherently other-regarding nature of the relationship, with the trustee tasked with ensuring the best interests of the beneficiary are met. This historical narrative of the development of the fiduciary relationship also uncovers its core *ethical nature*, shining further light on the fiduciary's moral language of care, loyalty and trust - elements previously shown to be highly processual and indicative of the relational ontology of the fiduciary.

Having delivered an ontological theorization of the fiduciary's relational orientation, the article argues that not only is an ethical framework required to safeguard the moral aspects identified as under attack, but the ethical framework used to do this must, by extension, be inherently relational. An Ethic of Care is introduced as the best contender for this work, premised, as it is, on a clear relational ontology and epistemology. The possibilities that this ethical framework holds for steering future management fiduciary practice is discussed, emphasising the utility of the ontological theorization. Routes for praxis include bringing the ethical relationship between trustee and beneficiary back into the fiduciary's foreground, to encourage increased and responsible beneficiary engagement.

ONTOLOGICAL ORIENTATIONS: RELATIONAL AND ATOMISTIC

Ontology is the study of what exists, and also as a part of that inquiry, how it exists - it is concerned with an area of philosophy known as metaphysics. Relatedly, an ontological analysis of an existent such as a concept (i.e. the fiduciary) places an investigation into basic beliefs held about how the world is - which are often *implicit* in the concept and known as ontological presuppositions - at the heart of the inquiry. Assumptions made about how the world works are explicitly brought to the fore for the purposes of philosophical scrutiny.

A considerable amount of work has been undertaken to develop and elucidate various comprehensive social ontologies to under-labour for the social sciences. These ontologies include theories concerning the structures, processes, and social

existents that constitute social reality. The objective here is not to detail individual theories, but to instead outline the differences between two widely accepted contrasting ontologies - the relational and atomistic approaches. As detailed elsewhere (see Author, c), a relational ontology assumes “a conception of social reality as an open system, highly interdependent, and interactive, characterized by emergent social structures that are in constant transformational process” (Author c: 2-3). As such, a relational ontology can be said to be *process-oriented*. By contrast, an atomistic ontology is characterized by the belief in closed systems, of predictable, regular, and controllable events, and beset with isolationist tendencies. An atomistic ontology can be said to be *outcome-oriented*, rather than processual, with the onus on fixity rather than flux. This latter conception of social reality has been widely critiqued as fallacious and misrepresenting social reality (Author, b; Bigo, 2008; Lawson, 2003; Pratten, 2015) with arguments not only highlighting the theoretical/academic error at play, but also the damage that this atomistic ontological orientation can wreak when embedded in economic and associated legal theory of the sort used to interpret the fiduciary. But where did the ideas of social reality as a predictable and controllable closed system originate? What is the thinking behind this atomistic conception? It would be helpful to briefly outline this development of thought in order to better understand why and how the atomistic ontology implicit in economic and legal theories used to interpret and practice the fiduciary have attempted to dissolve its moral discourse and - as will become apparent - steer a course of ontological reorientation.

The relationship between science and maths is the crucial link to be explored here, and this can be explained as the rise of positivism in the history of the philosophy of science. Positivism, broadly defined, is the belief that the natural and social world can be best studied through our experience of it via the collection of positive facts or data, data obtained by measurement, weighing, observing, etc. These facts, often referred to as empirical evidence, can then be used, through a process of mathematical logic or reasoning, to provide explanations of the studied subject. According to positivism, this is how we should come to understand our world. There are two central issues and shortcomings regarding positivism to note which are of interest here. The first is its clear inability to be able to account for directly unobservable phenomena, such as values, trust, loyalty and care, etc., posing a problem for those features of the fiduciary that - as will become clear - indicate its relational orientation. The second shortcoming to note is the ontological commitment underpinning positivism, a situation which Vinca Bigo highlights, writing that “Fundamental to this development [the historical rise of positivism] was the notion that the universe was ordered and predictable” (Bigo, 2008: 535). This stability, order and prediction, are of course a requirement for deductivism, for deductive reasoning, which is also known as the top-down approach, whereby general rules are used to explain or predict more particular

events. It is deductive reasoning which is extensively used in economics in mathematical-deductivism, where a dependency on the idea of event regularity is crucial, in order to make sense of mathematical modelling in the first place.

Mapping ontologies to schools of economic thought

The point of providing all of the above detail regarding the history of scientific thought is so we can see how the rise of positivism as the central scientific system - along with its core philosophical tenets - has led to the development of an atomistic ontology, one which underpins certain economic and associated legal theories which have played a central role in interpretations and practice of the fiduciary. Specific examples of how such theory has been applied will be analysed in the following section, but before moving on to do so, the final step is required to map the two ontological orientations on to different schools of economic theory.

Atomistic ontology and mainstream Neoclassical economics.

Broadly speaking, the neoclassical school (of which the Chicago School of Economics was and is a dominant influence) is characterised by its use of econometrics and mathematical modelling as a central methodology, and the use of this approach necessitates an atomistic ontology. The representation of social entities by numerical indicators in models is predicated on an isolationist approach - there is an embedded assumption that entities are separable and representable outside of a relational context. This is required for the math to work. Math cannot accommodate an entity changing, shifting, or being affected by relations to another entity mid-model. Math requires fixity, isolation, and permanence; this is required to get math going. To underscore, it is the use of math to represent (and thereby isolate and atomise) social entities in modelling, and the presuppositions that this use incurs, that presents an ontological problem, not the math itself.

Note then that such a mathematical methodological approach also entails supporting theories about how social entities must consistently and predictably behave. This of course is the role that Rational Choice Theory plays, in which it is assumed that an economic actor (characterised as homo economicus or economic man) consistently makes decisions informed by rational self-interest, and driven by utility maximization. This theory of human economic behaviour pivots on the same conception of atomism and detachment whilst also delivering a fixed theory of economic agency that can supposedly be embedded in modelling and account for economic decision making.

But how does all of this affect the fiduciary? In short, the ontological commitments of positivism and deductivism which mainstream economics has uncritically borrowed, are then *borrowed again*, including by other disciplines, i.e. law, when it takes on-board economic theories, and then also by the wider business community. Consequently, the implicit ontological presuppositions of positivism and deductivism become consistently reproduced throughout both the academe and wider society. And it is crucially important to consider the effects - normative and otherwise - of the application of these mainstream neoclassical economic theories on interpretations and practice of the fiduciary - detailed examples of which follow shortly. This is a point helpfully made by Lyman Johnson in the specific context of the reach of rational choice theory on dismissing the possibility of other-regarding behaviour in economic contexts. As Johnson writes, “The tenacious normative commitment to an exclusively self-serving account of human behavior dismisses the morally and socially responsible dimension of economic activity (and the tenor of fiduciary discourse) by insisting that action supposedly taken out of normative commitment to others’ welfare inevitably is rooted in self-interest.” (Johnson, 2002: 1491) This issue of tenacious normativity and how the relationship structure of the fiduciary has been used to deliver it is a point to be returned to shortly.

Relational ontology and heterodox economics.

Just as there are two contrasting ontological orientations, so the relational ontology, crudely speaking, can be said to map onto schools of economic thought. Two are worth highlighting here, both of which can be argued to fall under the broad term of heterodox - or non-mainstream - economics. The first of these is the work carried out by critical realists (and associated scholars) working in economics (Author, c; Bigo, 2008; Lawson, 2003; Pratten, 2015) who, by drawing on the metaphysical philosophy of Roy Bhaskar *explicitly* place ontological considerations at the core of research endeavours, including, for example, investigating the nature of concepts, or other social entities. One such group of researchers undertaking work of this kind is the Cambridge Social Ontology Group. A core part of their project is to develop a comprehensive account of social reality - a social ontology - that accurately represents social reality as relational, as opposed to the positivist scientific approach that has taken such a stronghold in economics (and other disciplines). It is this developed account of social realities structures and processes (referred to social philosophical ontology) that can then be used to under-labour for the sorts of conceptual investigative projects mentioned above (which are referred to as social scientific ontology), with this article being one such example. In contrast to the mathematical deductivism used in traditional positivist enquiry as a method through which to ascertain how our social world works, the method used by the Cambridge group instead follows an ongoing dialectic process (thesis-antithesis-

synthesis), whereby theories of aspects of social ontology (including both social philosophical and social scientific) are continuously debated and evolved. There is also a clear contrast in the goals of the two different approaches, a point highlighted by Tony Lawson, who has played a central role in the group's formulation and development. Lawson claims that "Whereas *the most* that supporters of the traditional, positivistic, constant-conjunction view of science can sustain with any consistency is the goal of *control* along with the *amelioration* of events and states of affairs, the critical realist perspective instead offers the real possibility of human *emancipation* through *structural transformation*." (Lawson, 1997: 277) Critical realists argue that if the nature of social reality drives the investigation - if we place ontology explicitly at the centre of study - then our understanding of social reality will be improved. By maintaining vigilance of social reality as open, unfixed, and emergent, as inherently interconnected and interrelated, and by accepting that not all of social reality is observable or available to experience, *and* that events are not predictable, then new ways of social reasoning and theorising, of understanding our world, start to become available to us. By moving away from attempting to control and forecast regular events, there is a shift in focus instead towards identifying and explaining the causal mechanisms which bring about observable social events. By turning away from the use of mathematical deductivism, the atomistic ontology it necessitates stops preventing fruitful social enquiry.

The second body of heterodox economics explicitly drawing on a relational ontology is that of feminist economics. This school draws closely from a thought tradition in both economics and philosophy known as process thought, one which has a recent history of being dismissed for featuring a number of characteristics that clearly contrast with the positivist agenda. The feminist economist Julie Nelson presents a helpful paper confronting what she calls the science/value or reductionist/process split in economics, in which she summarises a number of the key differences between the two positions. Nelson notes how "The reductionist worldview has been characterised as tough, hard-nosed, realistic and leading towards clarity, precision, certainty and real objective knowledge and control, while the process, pragmatist and institutionalist views were dismissed as, by comparison, soft, sentimental, sullied by the acknowledgement of interests, muddy, contingent and ineffective" (Nelson, 2003: 55). The claim is that the reductionist view is aligned with characteristics deemed to be masculine whilst the dismissed process view is aligned with the feminine. What we can see here is how the reductionist drive for positivist precision and certainty evident in mainstream neoclassical economics is underpinned by an atomistic ontology, and how this clearly contrasts with the process thinking of highlighted heterodox schools and their relational ontology.

Theorising the fiduciary's ontology

Having introduced the two contrasting ontological orientations, including how and why they map onto different schools of economic thought, the article now turns to a theorization of the ontology of the fiduciary. This is undertaken by analysing two process-oriented features of the fiduciary - which according to the different ontologies outlined above indicates a relational ontology at work. The theorization is stress tested by showing how the incongruous application of theories and practices informed by neoclassical economics clearly result in problematic outcomes for the fiduciary, indicating an ontological misfit at play.

1. Process-oriented fiduciary and the pitfalls of contract law.

The first example to draw on here of how the fiduciary is process-oriented (and so arguably underpinned by a relational ontology) focuses on how fiduciary efficacy is gauged. This is an issue raised by Getzler (2014) in a paper examining reasons behind the decline of fiduciary law. Getzler's comment on this point is worthy of full citation:

“What is being sought from the fiduciary is a decent process of decision making rather than a defined or prescriptive result. We tolerate a poor end result where a financier has shown care, skill and loyalty in serving us, yet events turn out badly; but we do not tolerate a bad process involving conflicts of duty and interest, even where there is no unavoidable harm inflicted and even where the illegal profits taken may not have been available to the beneficiary. This process-oriented accountability helps explain why fiduciary law is not obviously reducible to contract, which typically sets out the bargained exchange of services and performances as a set of verifiable terms. The uncertainty and lack of verifiability of fiduciary performances defeat such attempts at specific or complete contracting”

(Getzler, 2014: 7-8 - italics added)

There are three points to highlight in this statement - each italicised in the quote. The first concerns how the assessment of the trustee's performance is in fact *process* and not *outcome* focussed - the actions of the Trustee (defined by Getzler as the process of decision making) matter more than the end result itself. This clearly maps onto the characteristics of relational ontology as introduced in the preceding section, which conceptualises social reality as process-oriented and in flux. The second point of interest is the 'ethical criteria' against which the trustees' process-focussed performance under scrutiny is assessed - i.e., “We tolerate a poor end result where a *financier has shown care, skill and loyalty in serving us*”. Again, this observation is of clear interest in light of the relational ontology outlined earlier, where we saw the problems that such unobservable,

unfixed, and unquantifiable values pose for positivism, its atomistic ontology, and for those thinkers in disciplines who adopt this philosophy of science and its associated methodologies. The rub that these ethical aspects of the fiduciary pose (which will be returned to in detail in section three) is a point picked up by Johnson who notes attempts to sanitise such historical terms. He writes that: “The historic deployment within corporate law doctrine of a moral-sounding vocabulary suggests a widespread belief, at least at one time, that a moral subject matter was involved. One can hardly imagine richer, more evocative, social-moral notions than “care”, “loyalty” and “good faith”. In spite of recent contractarian efforts to “translate” these deep-rooted terms into a finance/economic dialect, the project must acknowledge a fundamental tension: unlike the theoretical underpinnings of the contractarian model, these core doctrinal notions are inescapably “*other-regarding*”, *not self-interested in orientation*” (Johnson, 2002: 1490, *emphasis added*). This connects with and mirrors the third of Getzler’s points - namely that the use of contract law to capture or translate the fiduciary falls short. However, whilst Getzler and Johnson both critique the limitations of the use of contract law in the context of the fiduciary - and to different extents both indicate the role that economic theoretical influence has had in this regard - neither isolates the incompatibility as an ontological misfit. Johnson alludes to a tension between the other-regarding doctrinal notions of the fiduciary and the theoretical underpinnings of the contractarian model, but does not go further. This is arguably because a theorization of the fiduciary’s ontology of the sort advanced in this article has been absent.

To help isolate the ontological incompatibility alluded to by both authors, a brief account of how contract law has increased in use within the context of fiduciary would be beneficial. This will also explicitly connect this increase with the concurrent application of neoclassical economic theory to interpretations of the fiduciary. The move to a focus on contract law as opposed to support for wider regulation via specific fiduciary law is an issue again raised by Getzler. Noting “a shift in the intellectual commitments of the legal caste, which came to see classical fiduciary law as an archaic hangover” (Getzler, 2014: 8), Getzler directly connects this shift with an upsurge in economic ideology emanating from influential thinkers based at the Chicago School of Economics - in particular that of Ronald H. Coase. The ideology in question is “the belief that unconstrained financial markets would be guided by rational self-interest and informational efficiencies to reach optimal results without the heavy guiding hand of prescriptive legal rules” (*Ibid*), noting that this “reasoning came to be applied not only to the law of investment management (Posner and Langbein, 1976) but to fiduciaries generally (Easterbrook and Fischel, 1993)” (*Ibid*).

As outlined earlier, the dominant use of econometric modelling by the Chicago School of Neoclassical economic theory necessitates an atomistic ontology, one which not only presupposes a closed system and outcome focussed orientation (a fixed controllable result), but which also assumes economic agents are guided by rational self-interest. Consequently, the use of contract law inspired by the ideology (and subsequent ontology) of neoclassical economic thinking to capture fiduciary arrangements focuses on a *fixed outcome* and not the process, indicating an ontological mismatch at play. Put differently, when “The aim of contracts is complete and certain planning” (Brown, 1996: 14), the processual and open system nature of the fiduciary - including its moral aspects - are fallaciously forced into an atomistic ideology, one where the conception of reality consisting of closed systems and fixed contracts between rational economic actors reigns strong. The upshot is that the true ontological characteristics of the relational fiduciary - as processual, open, and emergent - are at best side-lined, or at worst denied.

2. Process-oriented fiduciary and the pitfalls of Modern Portfolio Theory.

Getzler is not alone in highlighting the process-orientation of the fiduciary, or in outlining the constraining implications of using particular economic-legal theory for conceptual interpretation. Similar observations have been made by Hawley et al. (2011), who rather than highlighting the issues raised by the use of contract law, instead focus on the way in which the extensive uptake of Modern Portfolio Theory (MPT) (again originating from the work of another Chicago economist Harry Markowitz) as an investment theory has limited the process-orientation of the fiduciary. Hawley et al. write that “Fiduciary duty is a process-oriented standard which guides rather than dictates investment decisions. However, a generation of investment professionals have spent entire careers in a legal environment shaped by MPT. This has encouraged the view that fiduciary duty mandates a single approach to making investment decisions. Absent a broadly accepted prescriptive alternative, there remains strong cognitive resistance to a *dynamic understanding of the legal standards*”

(Hawley et al., 2011: 7 *emphasis added*). This account presented by Hawley et al again indicates that the *dynamic* in flux standards that the fiduciary commands trustees exercise (care, loyalty and trust) rubs up against an investment theory (MPT) underpinned by an atomistic ontology that demands the fixity, certainty and control that a closed system purports to deliver. The ‘cognitive resistance’ they refer to is an ideological square peg resisting the reality of a round hole, of the fiduciary’s relational ontology as incompatible with the atomistic economic theory being applied. But this is not the only way in which the use of MPT has limited the relational ontology of the fiduciary, which to recall, includes the conception of social reality as interconnected and interdependent. In his paper

Reason, Rationality & Fiduciary Duty (2014), Steve Lydenberg addresses a number of ways in which the fiduciary has been changed and limited via the use of MPT. He sets out to directly contrast two positions of practice - the reasonable and rational - highlighting the implications of each on the fiduciary:

“...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*)

Lydenberg’s observation of the numerous limitations wrought on the interpretation of the fiduciary via the use of (mathematically driven) MPT draws together the two central strands of the atomistic orientation outlined earlier: namely of a closed system ontology with isolationist tendencies along with its requisite twinned theory of economic agency (rational choice theory) emphasising self-interest. His explicit reference to the way in which the previous interpretation of the fiduciary emphasised ‘*the **relationship** between one’s investments and their **effects** on others in the world*’ has been replaced by one ‘*that has directed fiduciaries to act rationally – that is, in the sole financial interests of their funds – **downplaying the effects of their investments on others***’ neatly contrasts the two ontological orientations in action, providing a clear example of the recognisable ontological shift and mismatch being argued for in this article

Ontological mismatch and attempted atomistic reorientation

To recap, this section has outlined two ontological orientations - a relational ontology and the contrasting atomistic ontology. The outline of the historical development of the latter, with its roots in the scientific method of positivism, helped elucidate mainstream neoclassical economics dominant uptake of mathematical modelling, which necessitates an atomistic ontological orientation. Having introduced the two distinct ontologies, a theorisation of the fiduciary's ontology has been outlined using examples of how the fiduciary is clearly process-oriented, indicating a relational ontological orientation. This theorisation has also been stress tested by presenting two examples of how the use of economic and legal theory (MPT and contract law) influenced by neoclassical thinking have encumbered the fiduciary and resulted in an ontological mismatch. There is however another clear example to be drawn on to shore up the central argument that the fiduciary is underpinned by a relational ontology, and this lies in the very structure of the fiduciary as *being a relationship* - one between the trustee and the beneficiary. It is to this point that we now turn.

FIDUCIARY HISTORY AND RELATIONSHIP

Fiduciary is often referred to as a duty - the fiduciary duty - and this term of referent also extends to the way in which the ethical aspects of fiduciary are classified - the duty of care, duty of loyalty etc. Whilst this may appear innocuous enough, the terminology of duty can however be said to deflect from the central fact that the fiduciary is also *a sort of relationship* - one between the trustee and beneficiary - and the terminology of duty, as will be discussed further, also carries deontological assumptions. To investigate the nature of the relationship, a deeper examination of the history of the development of the fiduciary is beneficial. This helps reveal why the fiduciary was first devised as a legal tool, the nature of the interdependency between the trustee and beneficiary, the asymmetrical power differential between the two parties, and the evolution and emergence of this legal concept. And all of this helps shore up the central argument of the article - that the fiduciary is indeed underpinned by relational ontology, and not the atomistic ontology being forced upon it via the use of neoclassical informed economic and legal theory.

Fiduciary origins

The fiduciary was originally formulated within English common (familial) law as a means to protect property put into Trust - it is a way of transferring the legal title of estate/property into the trust of the Trustee, for the benefit of a beneficiary, whilst not conferring ownership per se of the property to the Trustee. This was done for a number of reasons. In feudal Britain there were associated costs of

holding legal titles of land, and the fiduciary circumvented this (Avini, 1995). The fiduciary was also widely adopted to facilitate rightful (male) owners of property¹ to be absent from their estates, for example fighting Crusades, and beneficiaries were women and children, allocated passive and subordinated roles. 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. With this historical context in mind, and with the trustee positioned as such, the fiduciary arrangement can be seen to have been used 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 made by 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 *emphasis added*). What we are clearly seeing recognised here is the fundamental feature of the fiduciary *as a relationship*. A relationship designed to benefit the beneficiary in which the Trustee must - recalling Getzler - have *shown care, skill and loyalty in serving*, and a relationship of interdependence. A relationship which will - as relationships are - be emergent and in flux, and ultimately underpinned by a relational ontology.

Speculating on why the fiduciary as a relationship has become increasingly lost, Richardson highlights the role that the beneficiaries’ subordination has played in this transformation. He writes that “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) Whilst not enjoying unqualified rights to be consulted is a point discussed in detail elsewhere as an ethical issue of epistemic injustice (see Author e), it is the long-term normative implications of this epistemic exclusion that warrants attention here from an ontological perspective - i.e. the contribution that this long-term epistemic silencing has had on the attempted reorientation of the fiduciary from a relational to an atomistic ontology. The epistemic exclusion of beneficiaries creates the voiceless void which can instead be conveniently filled

- recalling Johnson - with the sound of “The tenacious normative commitment to an exclusively self-serving account of human behavior”. Keeping the beneficiaries (i.e. shareholders) silent via non-consultation has served the atomistic account of economic agency well - it helps facilitate the neoclassical assumptions regarding rational choice agency. By not consulting to investigate the beneficiaries other possible choices or enquire about their best interests, the possibility of learning about contrary positions is circumvented, thereby continuing to deliver the neoclassical normative account of economic agency. The long term normative effects of such epistemic exclusion have been noted by Fairfax who writes that “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.*”(Ibid: 1323 *emphasis added*)

What if those beneficiaries best interests rubbed against the assumptions embedded in rational choice theory? What if those best interests openly contested “The tenacious normative commitment to an exclusively self-serving account of human behavior”, as socially responsible investments have been shown to do? (Author, c). It is here that we can start to clearly see how the identified epistemic injustice embedded in the fiduciary contributes towards and facilitates the atomistic (re)orientation of the fiduciary: the normalised apathy assists the ontological (re)orientation. In addition, when we recognise and temporally tally the removal of fiduciary law regulations (which guide how the fiduciary relationship should be delivered with trust, care, and loyalty - as per Getzler) *with* the neoclassical inspired deregulation, we see how the increasing dissolution of the fiduciary *as* relationship to instead being formulated *as* contract has helped steer this ontological reorientation - the process and implications of which are elaborated on further below.

Relationship → duty → contract: Normative ontological reorientation

One issue brought to the fore by recognising the central importance of the relationship structure is to also question why fiduciary has been termed as a duty. As will become clearer, this framing of the fiduciary may be the result of the wide use of deontology as an ethical framework in legal studies, and more specifically, of a Kantian Duty of Virtue in legal fiduciary studies. The extent to which the recognised relational ontology and epistemology of the fiduciary can be fully accommodated by deontology is a point to be discussed shortly, where the

proposition that the fiduciary can be best explicated using a relational ethics - the Ethics of Care - comes under discussion.

Before moving on however, it is beneficial to take the analysis of the shifting focus from fiduciary as ethical relationship to fiduciary as contract one step deeper - in order to draw out further implications of the presuppositions implicit in contracts regarding economic agency. This is a point considered in much wider terms by Johnson, whose project is concerned with encouraging law professors to acknowledge it is *their* social responsibility to raise the issue of corporate social responsibility with their students. Johnson helpfully suggests that in order to do this, the fiduciary can successfully be deployed as an educational inroad to broach the subject. He does however importantly raise a note of caution regarding the wide but limiting use of contractarian theory, noting that “Once a corporation is theoretically conceived of as a nexus of contracts, corporate governance goes on to concern itself with one central relationship in particular, the shareholder-manager strand” (Johnson, 2002: 1485). The shareholder-manager strand is of course the trustee-beneficiary ‘contract’ - the fiduciary. The up-shot then of the dissolution of the fiduciary as a relationship, and the turn to the dominance of contract theory with its neoclassical influenced atomistic ontology (including presuppositions regarding economic agency) is to side-line other crucial stakeholder relationships. This is made all the more concerning when taking into account the implications outlined earlier of how the non-consultation of the beneficiary circumvents any discussion of best interests that may rub against the presuppositions of rational choice theory. In short, with the silenced and unsought beneficiary’s relationship with the Trustee being reduced to that of contract, other stakeholders are excluded and silenced too. The response of Johnson to the inadequacy of reductionist contract theory to capture the richness of corporate relationships is to challenge teachers to contest the use of this theory with their students, asking them to pose “the question of whether the bonds between and among corporate participants, and those whose lives are significantly moulded by corporate activity, are fully captured in the “nexus-of-contracts” (or bargain) model of corporate relationships” (*Ibid*: 1486). To this it should be added that students are also invited to consider the extent to which it is the atomistic ontology of contract theory that fails to align with the relational ontology of the fiduciary that is purports to capture.

This section of the article has sought to shore up the central argument that relational ontology underpins the fiduciary. By adding the historical context and the structure of the fiduciary *as* a relationship to the preceding section examining fiduciary’s process-orientation, a strong picture emerges of a legal concept rooted in a relational ontological orientation, not the atomistic orientation underpinning much of the contemporary economic and legal theory being used to interpret and practice the fiduciary. Having successfully demonstrated the relational

characteristics of the fiduciary, we now turn to considerations of a suitable ethical framework to further emphasise the relational ontological orientation at play.

THEORIZING THE FIDUCIARY: RELATIONAL ETHICS

We have seen in the first two sections of the article that the relational ontology of the fiduciary has been subject to ontological reorientation. As part of that process, there has been a concurrent erosion of the ethical aspects of the fiduciary - of trust, loyalty, and care - aspects that pose a significant problem for the use of economic and legal theory which draws from a positivist position underpinned by an atomistic ontology.

By theorizing the relational ontology of fiduciary via its process-focus, and by examining the historical development of its core interdependent relationship structure, the groundwork is laid for a discussion regarding a suitable ethical framework with which to explain the ethics that *is* at work in the fiduciary *relationship*. Whilst this is not an entirely unvisited area of ethical interest, the small degree to which such a project has been considered in light of the extensive use of the fiduciary in finance and business, and the ensuing implications that the success of any such project could deliver for theory and praxis, is however surprising. Recognition of this limited focus is a point shared by Arthur Laby (2005), who notes that “little attempt has been made to explain why ethics, as opposed to economics or any other discipline, explains legal rules governing fiduciaries. The lack of an ethical framework to explain fiduciary duties leaves those espousing moral language vulnerable to attack by those who say that fiduciary duties are not special at all and have no moral basis” (Laby, 2005: 2) Why such little attempt or interest has been shown by philosophers working in applied philosophy, or by organisational and business ethicists, is an interesting avenue of enquiry in and of itself, particularly when we take into account the extent to which interpretations of the fiduciary arguably affect decision making and organisational practices. When we consider Laby’s comment alongside Johnson’s reflection of earlier - “One can hardly imagine richer, more evocative, social-moral notions than “care”, “loyalty” and “good faith” - we would do well to question why this lacuna exists when fiduciary terminology is so ethically explicit. One explanation could be the related extent to which fiduciary law in general (ethical aspects or potential frameworks aside) is also recognised to have garnered limited theoretical attention, an observation made by Gold and Miller when they note that “Notwithstanding its importance, fiduciary law has been woefully under-analyzed by legal theorists.” (Gold & Miller, 2014: 1) This legal and ethical lacuna is quite remarkable when we consider the recognised breadth and depth of the reach of the fiduciary. One possible explanation for this oversight or woeful under-analysis may be due to the degree to which fiduciary has become deeply embedded into our financial and business architecture, rendering it

indiscernible. This is a point made elsewhere (Author, e) where it is highlighted how even the honed analytical eye seeking out evidence of the gendered structure of global finance overlooks any explicit analysis of the concept. However, what this observation of a legal and ethical analytical lacuna does present is a clear opportunity to address this omission, and, as Laby highlights, forge ahead with outlining strong arguments for why fiduciary does have a clear moral basis of the kind presented here.

Fiduciary ethics to date: A Kantian framework for the fiduciary

Before outlining why and how the relational Ethics of Care is best suited to the fiduciary's ontological orientation, a brief summary of other work in the field of fiduciary ethics is required. As previously highlighted, fiduciary is widely referred to as fiduciary duty, with the fiduciary's ethical aspects also referred to as a duty of care and duty of loyalty. Couched in this terminology of duty, a Kantian deontological framework has been predominantly used, including Laby's own contribution. Scholars proposing such an explicit Kantian approach (, Laby, 2005 and Samet, 2014) focus on Kant's work concerning the duty of virtue, and their discussions include debates regarding whether the fiduciary duties of loyalty and care can be regarded as virtues. Concerned with delivering an ethical framework, and in order to precisely locate and argue for the presence of ethics in the fiduciary, Laby makes a clear distinction between its juridical and ethical aspects. As we shall see, he identifies ethics in both. But firstly worth highlighting is the wider motivational context in which he delivers this important differentiation and motivates for an ethical framework. Noting the increasing momentum behind the amoral argument eroding fiduciary ethics he 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) This observation clearly mirrors the work of Getzler, Johnson et al outlined earlier. It underscores the very real threat to fiduciary ethics that Laby is seeking to address by proposing an ethical framework to reduce the recognised vulnerability of those espousing moral language. It also directly connects the erosion of fiduciary ethics to the uptake of contract law, which as we have seen is premised on an atomistic ontology at odds with the relational ontology of the fiduciary. The drive behind outlining a suitable ethical framework for the fiduciary is then a project of both ethical and ontological reclamation, although

as will become apparent - arguably because the fiduciary has been ontologically undertheorized - Laby's project falls short of any ontological aspect.

Laby turns to Kant's discussion of what constitutes a duty of virtue in the *Metaphysics of Morals*² to explicate the ethical dimension of the fiduciary, specifically in relation to juridical and ethical laws. Laby writes that "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) His use of Kant is of interest here for three reasons, the second and third of which identify limitations to this Kantian distinction. Firstly, and on a more complimentary note, Laby's use of Kant's duty of virtue to locate ethics (virtue) in *both* the juridical and ethical aspects of fiduciary supports the argument against claims that fiduciary is purely contractual. This helps correct the trend of fiduciary decline 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, 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), his application of the duty of virtue to *both* fiduciary components importantly safeguards against the juridical being stripped of all ethical content and reduced to contract. The second reason why Laby's use of Kant is of interest comes through his drawing attention to the importance of recognising historical developments and changing contemporary contexts, i.e. by 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 expanded upon previously - namely that the historical context in which the fiduciary was first developed plays a crucial role in understanding the ethical aspect of fiduciary. However, whilst Laby underscores the importance of taking into account the changing context of how an externally coerced moral duty is also a legal duty according to Kant's account, he omits to apply the same level of historical analysis to the development of the fiduciary. In doing so he overlooks the historical development of fiduciary within a familial context - along with a critical analysis of the power differential embedded in the relationship structure - and thereby bypasses a clear steer on the development of care as a core ethical narrative and foundation of the fiduciary. The third reason why Laby's use of Kantian ethics to explicate the fiduciary duty of care is of interest - particularly in light of the historical limitations highlighted in Laby's analysis - concerns critiques and contrasts between Kantian ethics and the contemporary relational framework of Ethics of Care. It is to this last point that we now turn.

Duty of Care as Ethics of Care - a relational ethical framework for the fiduciary

As previously outlined, the care aspect of fiduciary has an important originating context 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 trustee to make the beneficiary's needs the trustee's priority, and relatedly *why* the beneficiary is apparently unable (or not permitted) to act for themselves, should still be a matter of concern and interest.

With the historical, originally familial, and relationship focussed context in mind, a more suitable ethical framework for explicating the fiduciary would be the Ethics of Care. As outlined elsewhere (Author d, e; Held, 2006 and 2014; Tronto, 1993 and 2013), 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 through her investigations of female subjects presented with moral dilemmas, Gilligan emphasised that she had located a different moral conflict at play, noting that “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: 19 *emphasis added*)

A different voice - a different ontology.

Whilst initially critiqued with concerns of essentialism, 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 different 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*). This identified conception of ontology clearly aligns with a relational ontology identified as underpinning the fiduciary, particularly when taking into account the relationship dynamic in the fiduciary where the trustee and beneficiary are clearly *unequal in power and resources*.

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. 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. Goldstone, McLennan and 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 et al., 2013: 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 fact that the trustee and beneficiary are positioned in a relationship premised on asymmetrical power (Author, d). 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. Put differently, the theorization of the fiduciary’s relational ontology - via an examination of its process-orientation and core relationship structure - clearly shows how the likewise Ethic of Care’s relational ontology and moral epistemology align more appropriately than that promised by a deontological approach.

Relational ethics: A final note of clarification and ground clearance.

Before turning to concluding remarks, a final note is required regarding precise use of the terminology ‘relational ethics’, specifically in consideration of the contrast highlighted above between Kantian deontology and the Ethics of Care. Some moral philosophers may take issue with this terminology, pointing out that frameworks other than the Ethics of Care are also relational, with moral agents having obligations directed at each other. Whilst this conception of the relational may indeed be implicit in moral theory, it has arguably not been fully fleshed out, a point also made by R.J Wallace who makes this his project in his book *The Moral Nexus*. Wallace notes that “Writers on moral philosophy frequently fall

into a relational idiom when they talk about particular normative and philosophical issues. They assume, for instance, that individuals are typically wronged by behavior that is morally impermissible, and proceed to reflect on the implications of being treated in this way for the attitudes and behavior of the person who is wronged. *But the relational interpretation, even when it comes naturally to us, is also philosophically distinctive; it is fundamentally opposed by some of the most influential traditions of reflection about morality, which treat moral requirements in individualistic rather than relational terms.* There is a need for an overview of the relational approach to the moral that highlights its distinctive features, so that we may better appreciate both the philosophical and normative advantages of understanding morality in these terms and the obstacles that stand in the way of such an interpretation.” (Wallace, 2019: 4 *emphasis added*) In addition to highlighting this need for relational theorizing in moral philosophy, Wallace is quite clear in differentiating the broad interpersonal morality that requires the relational model that he is defending *from* interpersonal relationships, in which moral agents may be known to each other in more familiar terms, adding that “Interpersonal morality, on my account, is the domain of what we owe to each other just insofar as we are each persons, not insofar as we are friends, relatives, lovers, fellow-citizens, and so on” (*Ibid*: 235 n6). Clearly then, the Ethics of Care is not included amongst the *influential traditions* requiring the sort of relational model that Wallace recognises and motivates a need for, focussing instead, as it does, on the negotiation of familiar and existing relationships, and because, as we have seen via Pettersen, in “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.*”. To be clear then, the relational ethic proposed here - as per the Ethics of Care - is differentiated from other influential theories because the ontology and epistemology it conveys is (*already*) *explicitly relational*.

DISCUSSION AND IMPLICATIONS FOR PRAXIS

This article theorizes the ontology of the legal concept of the fiduciary using both its process-oriented focus and central relationship structure as ontological evidence. The objective is to demonstrate that the fiduciary is underpinned by relational ontology, one which consequently calls for a complementary relational ethical framework to explicate the sort of ethics at work. Relatedly, the article exposes the attempted reorientation of the fiduciary from its relational ontology towards an atomistic one, a reorientation driven by the use of positivist informed theory in both economics and legal theory that has subsequently been applied to the practice of the fiduciary - i.e. use of MPT and contract law. But the objective of arguing for a relational ethical framework (specifically that of the Ethics of Care) to explicate the fiduciary is more than just a theoretical exercise, and as

important as it is, it also reaches beyond Laby's admirable call for an ethical framework to reduce the vulnerability of attack that those espousing ethical aspects of the fiduciary are currently exposed to. It also holds clear potential for managerial praxis in a number of ways, offering scope in helping to think through a future-fit fiduciary, one that importantly authentically aligns with its relational ontology.

Firstly, and as has already been highlighted, the Ethics of Care places emphasis on relationships - it is inherently other-regarding. As such, this ethical approach invites a return to reframing the fiduciary from that of duty to relationship. In doing so it addresses Richardson's call (2011) to rebuild the trustee-beneficiary relationship that has become lost through increasing degrees of disjuncture and beneficiary silencing. Secondly, the Ethics of Care's focus on responsibilities within the context of the relationship offers normative guidance for both the trustee and beneficiary. It invites both parties to reconsider their responsibilities, not only to each other, but also in regards of the affect that a central outcome of the relationship i.e. investments have on the wider world - a consideration that has been overlooked according to Lydenberg by the use of hyper-rational MPT (and its atomistic ontology). Relatedly, the normative guidance offered by the Ethics of Care and its relational ontology could also potentially start to address the theoretical lacuna identified by Hawley et al, i.e. that "Absent a broadly accepted prescriptive alternative, there remains strong cognitive resistance to a *dynamic understanding of the legal standards*". Whilst the strong cognitive resistance is undoubtedly still dominant, the steady increase in socially responsible investing and the challenges this poses to the ontological presuppositions underpinning MPT (see Author c) is indicative of a slow shift, and the work of Jeanne Liedtka (1996) on the practicalities of applying the Ethics of Care to business practice - and in particular to stakeholder theory - could also be an initial guide to thinking through prioritisation of stakeholders in investment strategies. Thirdly, the Ethics of Care also offers normative guidance in relation to caring well, helping to reemphasise the process-orientation of the fiduciary, where to recall from Getzler "We tolerate a poor end result *where a financier has shown care, skill and loyalty in serving us*". It may also assist with addressing the claim from Goldstone et al that "*The trustee has to develop a settled habit of caring well*" - a point made in detail elsewhere (see Author d). The crucial issue to identify here is that individuals need to *learn* to care well - both for themselves and for others, in order to avoid falling back onto the dichotomous thinking of 'self *versus* other', and to avoid the problematic association of caring with issues of paternalism (Held, 2014).

The implications of utilising the Ethics of Care as a relational ethics for fiduciary praxis are then numerous. It resets the fiduciary as an ethical relationship, one focussed on the ongoing and emergent processual nature of being in the relationship, which is practised and maintained according to specific ethical criteria, not on a prescribed or contracted outcome. An Ethics of Care also provides a necessary normative framework to steer and assess these processual aspects, assisting practitioners with navigating the relationship by caring well. And finally, by utilising the Ethics of Care as a relational ethical framework for the fiduciary, an authentic ontological alignment is achieved, thereby removing the “blinkers of positivism” (Lawson, 1997: 281) that have been responsible for the increasingly narrow interpretations and practice of this widely embedded legal concept.

Notes

1. 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 earned 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.
2. 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)

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