Journal of Business Ethics (2023) 186:293–307
https://doi.org/10.1007/s10551-022-05235-6

ORIGINAL PAPER

Theorising the Fiduciary: Ontology and Ethics

Helen J. Mussell[1,2]

Received: 17 January 2022 / Accepted: 19 August 2022 / Published online: 7 September 2022

Abstract
Despite the omnipresence of the fiduciary in business organisations, there is an omission of theorisations of this legal concept within business ethics literature. This is surprising considering its widespread and embedded use, but even more so given that the presence of ethics within the fiduciary is increasingly contested ground. This article addresses both issues by theorising the fiduciary using an ontological analysis—one which subsequently helps identify a suitable ethical framework. The article argues on two grounds that the ontology of the fiduciary is inherently relational; it renders the fiduciary's implicit ontology explicit. Firstly, the fiduciary is shown to be process-oriented, indicating 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 in the fiduciary. The article concludes with a discussion outlining how this ontological theorisation offers utility in steering future practice of the fiduciary.

Keywords Fiduciary · Ontology · Ethics of care

Opening Remarks, Working Definitions

The concept of the fiduciary, from the Latin *fīdūcia* meaning "trust," plays a central role in a wide range of financial and non-financial organisational contexts, including medical and social care (Kutchins, 1991), education, charities, finance, and business. It is infamous for being a difficult concept, both as a subject for scholarly investigations and for judicial purposes, when identification of existence and evidence of the fiduciary is required (Miller, 2018). According to the Oxford Dictionary of Law,[1] the fiduciary carries two definitions, one referring to fiduciary in noun form as an individual; "A person, such as a trustee, who holds a position of trust or confidence with respect to someone else and who is therefore obliged to act solely for that person's benefit", and the other as an adjective, specifically referring to fiduciary relations; "in a position of trust or confidence. Fiduciary relationships include those between trustees and their beneficiaries, company promoters and directors and their shareholders, solicitors and their clients, and guardians and their wards". It is this latter adjective definition, which is of interest here, focussing on the relations between the two parties, which are variably referred to as trustees/fiduciaries and beneficiaries/principals, depending upon the legal context.[2] For the argument to be outlined here, the two parties will be referred to generally as fiduciaries and beneficiaries, unless referred in a specific context that demands otherwise,

✉ Helen J. Mussell
mussellh@cardiff.ac.uk; hjm47@cam.ac.uk

[1] Cardiff Business School, Cardiff University, Aberconway Building, Colum Drive, Cardiff CF10 3EU, UK

[2] Centre for Business Research, Cambridge Judge Business School, University of Cambridge, Trumpington Street, Cambridge CB2 1AG, UK

[1] Dictionary of Law, 8th Edition, (Ed—Jonathan Law).

[2] In her recent article, in which she revisits the seminal work of Len Sealy in the 1960s whose series of papers are viewed as groundbreaking in fiduciary research, Sarah Worthington confirms the dominant and firmly embedded understanding of the fiduciary relationship as that of the trustee-beneficiary relationship as follows—'The paradigm case of a fiduciary relationship is that between trustees and beneficiaries'. Importantly in the context of defining the fiduciary (noun), she also adds that "Sealy maintained a distinction between fiduciaries and trustees, seeing fiduciaries, defined precisely, as individuals who were not trustees, although their roles were similar in certain important respects: Sealy, "Fiduciary Relationships", 72. We are unlikely to ignore differences in the two roles when considering property, but the usual prescriptive duties imposed on trustees will not necessarily be replicated in individual fiduciary relations". (Worthington, 2021, s155).

i.e. when referring to Trusts, where the legal term Trustee is appropriate.

At its most basic, whilst emphasising its highly contextual nature, the fiduciary is a legal device, a legal protection and safeguard put in place to ensure that *a* fiduciary acts in the best interests of a beneficiary when they have been appointed to do so, either directly by the beneficiary, or by a third party. It is often referred to as a fiduciary duty. The fiduciary duty is widely recognised (although as we will come to see often disputed) to be constituted of two duties (or obligations) that a fiduciary is held accountable for. These are the duties of loyalty—to act in the best interests of another (i.e. the beneficiary), and of care—the obligation to act with skill and diligence. Both of these duties will be discussed in greater detail throughout the paper.

Moving on to working examples, in the medical context fiduciary relations include the doctor and patient dynamic, with the doctor obliged to hold the patient's interests as paramount and advise them accordingly. In the context of charities, those individuals responsible for the administration of donated funds are trustees, with fund recipients being beneficiaries. And in the finance and business context, the roles that fiduciaries (also acting as trustees) and beneficiaries hold, and the fiduciary relations between them, are numerous. They include those of CEO's and Boards of Directors entrusted with organisational capital (shareholders capital) but with a fiduciary duty to the company (as opposed to the shareholders themselves), and investment and pension fund managers, entrusted with investors' funds. Arguably the most common and widespread context is that of public and private pension funds, with pension fund managers acting as trustees, and pension holders as beneficiaries. These sorts of 'fiduciary institutions' now constitute the largest concentration of US shareholder ownership (Hawley & Williams, 2000), indicating the extent of power wielded by fiduciary trustees working in such investor institutions.

Current Debates, the Literature

There are several contemporary debates regarding the fiduciary spanning multiple disciplines including law, philosophy (specifically philosophy of finance and jurisprudence), and economics, alongside contributions in the business ethics literature. Predominant debates in the latter focus on how fiduciary duty affects stakeholder and shareholder relations (Hawley & Williams, 2000; Heath, 2006; Kaufman, 2002), how it guides the principal-agent relationship and ethical decision making (Marens & Wicks, 1999; Young, 2007), and how the fiduciary is used to validate shareholder value maximisation (Sollars & Tuluca, 2018), but there is little focus on directly theorising the fiduciary as a concept, although some authors have offered helpful historical analyses of conceptual development (Avini, 1995; Graziadei, 2014; Young, 2007).

Other current debates which are particularly pertinent to the discussions here include arguments regarding whether the fiduciary duty of care is in fact extraneous and outmoded. Proponents arguing for this position (Bruner, 2013) point towards discrepancies in jurisdictional enforcement to claim a noninevitability of the duty of care as fiduciary. Particular attention is paid to contrasting the UK, Australia, and Canada with the US, where in the case of the latter the duty of care has been upheld in courts as fiduciary in nature. Concerns are also raised via the business judgement rule (BJR) that enforcement of the duty of care deters corporate risk taking, which is widely accepted to be essential to the corporate function and entrepreneurial activity. Countering this claim, proponents for the duty of care to be upheld as a fiduciary duty (Velasco, 2015) note that what is most important in the context of the fiduciary is that a fiduciary does a good *skilful* job. As Velasco notes, "Of primary importance is that the fiduciary does a good job—exercising all their skill with the appropriate diligence. This is the domain of the duty of care, which protects beneficiaries from fiduciary shirking. The possibility of a conflict of interests is very often only a secondary or theoretical concern for the beneficiary" (Velasco, 2015, p. 69). It is then the process, and not necessarily the outcome or result, that becomes the focus. This should not then deter corporate actors from taking risks—so long as the outcome can be shown to have been underpinned by a well thought-through (skilful) decision making process: *the risk is located in poor process, not the outcome itself.* Velasco also counters empirical claims that unenforcement of the duty of care in the courts (manifesting as very low numbers of raised and successful cases) renders it redundant, noting that this is more likely due to the structure of corporate law than with the duty of care itself.[3] As before, having sight of this current debate is crucial for the following discussion. It is returned to in further detail shortly when engaging with Getzler's work in relation to the process orientation of the fiduciary.

Moving onto discussions in the aforementioned legal studies and philosophy, these include the recognition that identifying the existence of fiduciary relationships for juridical purposes is notoriously difficult (Laby, 2005; Miller, 2014, 2018), alongside work in the philosophy of

[3] Velasco argues that the small number of successfully enforced cases of (failure of) duty of care may in fact be due to a divergence in corporate law between standards of conduct (as rules for actors) and standards of review (specifying how actions should be judged), whilst in other areas of law—including tort law—they converge. He also notes the long-term cumulative effect of the above situation, noting that limited success in enforced cases will lead to less attempts to bring a case on similar grounds.

finance focussing on the legal position of trustees making socially responsible investment decisions on beneficiaries' behalf, i.e. via environmental, social and governance (ESG) screened investments (Mussell, 2018; Martin, 2009; Richardson, 2011; Sandberg, 2011, 2013). Other areas of research include an increasing body of work concerned with advancing a suitable ethical framework for the fiduciary (Mussell, 2020, 2021; Laby, 2005), along with critical discussions concerning how the dominant application of neoclassical informed economic and legal theories to fiduciary practice results in the position that the fiduciary is values-free and reducible to contract law (Getzler, 2014; Hawley et al., 2011; Lydenberg, 2014). It is these latter economic and legal discussions which frame the following theorisation from an ontological angle, and subsequently help identify a suitable ethical framework for the fiduciary.

Structure

The article is structured as follows. 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 theorising the fiduciary's ontology and rendering it explicit, by examining how numerous process-oriented features point towards its inherent relational ontology, and how attempts to apply economic and legal theories underpinned by an atomistic ontology 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—one between that of a fiduciary and beneficiary, as previously described. An historical account of the development of the fiduciary is detailed—revealing the inherently other-regarding nature of the relationship. 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 under analysis.

Having delivered a relational ontological theorisation, 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 theorisation. Routes for praxis include bringing a process-focussed as opposed to outcome-oriented relationship between a fiduciary 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 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 (i.e. its structures, processes, agential capabilities, etc.) at the heart of the inquiry. These beliefs are often *implicit* in the concept and known as presuppositions, with an ontological analysis bringing them to the fore. The importance of this approach for an organisational context sits in recognising how presuppositions embedded in utilised theory affect organisational decision making, along with subsequent implications and potential limitations.

Several comprehensive social ontologies have been developed to under-labour for the social sciences[4] (see Lawson, 1997, 2003; Searle, 1996, 2010). 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—in order to demonstrate how it is the former that underpins the fiduciary. As detailed elsewhere (see Mussell, 2018), 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" (Mussell, 2018, pp. 2–3). As such, a relational ontology can be said to be *process-oriented*. By contrast, an atomistic ontology is characterised 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 critiqued as fallacious and misrepresenting social reality (Mussell, 2017; Bigo, 2008; Lawson, 2003; Pratten, 2015) with arguments

[4] One such group of researchers undertaking this kind of work is the Cambridge Social Ontology Group (Mussell, 2016, 2018; Bigo, 2008; Faulkner and Runde, 2009; Lawson, 2003; Pratten, 2015). 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). Other groups include the Berkeley Social Ontology Group, following the work of John Searle (1996, 2010).

not only highlighting the theoretical/academic error at play, but also the damage that this atomistic ontological orientation can wreak when embedded in widely used theory. But where did the ideas of social reality as a predictable and controllable closed system originate? A brief summary will be helpful to explain how these ontological presuppositions have become embedded in certain theory.

The relationship between science and maths is the crucial link 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 deductive 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 for this article. 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 features of the fiduciary that—as will become apparent—indicate its relational (and ethical) orientation. The second shortcoming are the ontological commitments of order and predictability underpinning positivism which fail to accommodate a process orientation—which, as again will become apparent—poses another problem for the fiduciary. This stability, order, and prediction are of course a requirement for deductive reasoning, whereby general rules are used to explain or predict more particular events. It is deductive reasoning which is used extensively in certain economic theory as mathematical-deductivism, where dependency on the idea of event regularity is crucial to make sense of mathematical modelling in the first place. And it is this economic theory—elaborated on further below—which has become increasingly applied to fiduciary practice, thereby importing its ontological presuppositions into organisational and managerial decision making.

Mapping Atomistic Ontology to Mainstream Neoclassical Economic Theory

The point of providing this detail regarding the history of scientific thought is to explain 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 theories have been applied will be analysed in the following section, but before moving on a final step is required to map the atomistic ontological orientation to neoclassical economic theory, to understand how the application of these neoclassical informed theories have affected the fiduciary.

Broadly speaking, the mainstream neoclassical school of economics (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 the math going, and relatedly as highlighted above, to deploy deductive reasoning. 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 (Bronk, 2011). 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 maximisation. 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, and to recall from earlier, the ontological commitments of positivism and deductivism which mainstream economics has uncritically borrowed are then borrowed again by other disciplines (i.e. law) when they take on-board these economic theories. Consequently, the implicit ontological presuppositions of positivism and deductivism become consistently reproduced throughout both the academe and wider society. It is crucially important to consider the effects—normative and otherwise—of the application of mainstream neoclassical economic theories on economic understanding and on interpretations and practice of the fiduciary—detailed examples of which follow. This is a point picked up by Lyman Johnson in the specific context of the reach of rational choice theory on dismissing the very possibility of other-regarding behaviour in economic contexts. As Johnson writes, "The tenacious normative commitment to an exclusively self-serving account of human behaviour 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, p. 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.

Theorising the Fiduciary's Ontology

Having introduced the two contrasting ontological orientations, the article now turns to a theorisation of the fiduciary's ontology—of its ontological orientation. Before doing so, a brief note acknowledging existing work on the ontologies of law (Supiot, 2002) and the evolution of legal form (Deakin, 2015) would be prudent, to explicitly recognise that legal concepts are constantly evolving, that 'Legal concepts are anything but fixed' (Deakin, 2015, p. 174). This point regarding recognition of non-fixity needs to be emphasised. It is particularly important in light of the above argument that a relational ontology is emergent and constantly in flux—so therefore are the concepts developing within it.

Moving on, the following ontological analysis is undertaken by analysing two process-oriented features of the fiduciary—which according to the ontologies outlined above indicates a relational ontology at work. The theorisation is stress tested by showing how the application of theories and practices informed by neoclassical economics clearly result in problematic outcomes for the fiduciary, indicating an ontological misfit at play. The suggestion is not that the fiduciary's future ontological orientation is fixed, but rather that analysis of historical and current core fiduciary characteristics demonstrably indicates a relational orientation is ontologically aligned.

Process-Oriented Fiduciary and the Pitfalls of Contract Law

The first example focuses on how the efficacy of successful fiduciary practice is gauged. This has already been alluded to in the earlier comments from Velasco (defending the position that the duty of care is genuinely fiduciary and should be retained), noting that it is more important a fiduciary does a good job with skill and diligence, with conflicts of interests arguably being a secondary concern. This focus on *doing* a good job with skill (i.e. conduct of process) is also an issue raised by Getzler (2014) examining reasons behind the decline of fiduciary law more generally. 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, pp. 199–200—*italics added*).

There are three points to highlight in this statement—each italicised. The first concerns how the assessment of a fiduciary's performance is *process* and not *outcome* focussed. The actions of a fiduciary (defined by Getzler as the process of decision making) matters more than the end result. This maps onto the characteristics of relational ontology which conceptualises social reality as process-oriented and in flux. The second point of interest is the 'ethical criteria' against which a fiduciary's process-focussed performance 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 aligns with the relational ontology outlined earlier, where we saw the problems that such unobservable, unfixed, and unquantifiable values pose for positivism and its atomistic ontology. The rub that these ethical aspects of the fiduciary deliver (to be returned to in detail in section three) is a point picked up again by Johnson who notes attempts to sanitise such historical ethical 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, p. 1490, *emphasis added*). This connects with and mirrors the third of Getzler's points—namely that the use of contract law to reduce or capture the fiduciary falls short on the grounds of its process orientation which cannot authentically be reduced to verifiable end terms. 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 theorisation 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, p. 201), 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 (Langbein & Posner, 1976) but to fiduciaries generally (Easterbrook & 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, p. 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.

Relational Contract Theory

It should be noted that there is a body of work within the field of contract law known as contract relations theory which argues for the recognition of a differentiation between transactional contracts and relational ones, with the former being the more 'traditional' view of contract law outlined above. There are two points worth noting within the context of this analysis regarding the development of relations contract theory and how it is contrasted with existing 'traditional' contract theory. Firstly, key thinkers in this field (see for example Macneil, 2000) expressly note the resistance and cool reception towards their argument that contracts can be theorised as being relational, as opposed to having purely specific outcomes. Macneil writes 'Experience has shown that the very idea of contract as relations in which exchange occurs—rather than as specific transactions, specific agreements, specific promises, specific exchanges, and the like is extremely difficult for many people to grasp' (Macneil, 2000, p. 878). This observation of the determination that contracts *are and must be* characterised by a defined outcome (closed system ontology of fixity) nicely illustrates the atomistic ontology of the sort of outlined above when describing 'traditional' contract law, and as referred to by Brown, Getzler and Johnson.

A second point highlighting how relational contract theory differs from 'traditional' contract theory concerns the explicit recognition of how rational choice theory is individualistically as opposed to relationally oriented. Again, Macneil writes 'rational choice theory remains transactionally based, and individually, rather than relationally, oriented' (*Ibid,* p. 883). This suggests that, as per the outline of atomistic ontology outlined earlier, relational contract theory adheres to a more relational and processual ontology as opposed to an atomistic one, including acknowledging presuppositions regarding human behaviour otherwise often embedded and overlooked in legal and economic theory.

In summary, this alternative theorisation of contracts as relational could *potentially* be of use in the context of fiduciary relations under discussion—albeit that its use does not fully reconcile with Getzler's call for additional regulation as opposed to reliance on separate contracts. Although a much deeper analysis is required, the theory appears to be differentiated in its ontological commitments to that of traditional contract theory, with key thinkers such as Macneil instead focussing on the processual and ongoing aspects of relational contracts. There is also a clear recognition of how the use of rational choice theory omits the sort of relational aspect on which the theory draws. To be clear, this is not to claim that relational contract theory does not make use of rational choice theory, but is does openly acknowledge its limitations and ontological bias. Again, such recognition signals a clear departure from the underpinnings of traditional (transactional) contract theory against which it is set. And finally, and as we will come to see, relational contract theory—if deemed to be *sufficiently ontologically differentiated* from more traditional transactional contract theory—would not necessarily be at odds with the use of relational ethics *by which to* practise such relational contracts. Indeed, the two theories used in conjunction could in fact present a

complementary and comprehensive solution for practice of future fiduciary relations. This is a point returned to later.

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 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, p. 7 *emphasis added*). This account presented by Hawley et al. again indicates that the *dynamic* in flux standards that the fiduciary commands fiduciaries 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 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, p. 365 *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

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 methodology of positivism—helps explain 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 been stress tested by presenting two examples of how the use of economic and legal theory (contract law and MPT) influenced by neoclassical thinking have encumbered the fiduciary and resulted in an ontological mismatch. There is however another 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, within the context of this paper, as that between

a fiduciary and a beneficiary. It is to this point that we now turn.

Fiduciary History and Relationship

Fiduciary is often referred to as a duty and this term of referent 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 be said to deflect from the central fact that the fiduciary is *a sort of relationship*—one between a fiduciary and a beneficiary—and the terminology of duty carries deontological assumptions, a point to be discussed in detail shortly. To investigate the nature of the relationship a deeper examination of the evolution of the fiduciary is beneficial. This reveals why the fiduciary was first devised as a legal tool, the nature of the interdependency between a fiduciary and a beneficiary, and the asymmetrical power differential between the two parties. All of this helps shore up a central argument of the article—that the fiduciary is 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 exact origin of fiduciary law is disputed ground. Numerous theories abound, including evolution from Roman *fideicommissum* honour law (Avini, 1995; Graziadei, 2014), from the *waqf* in Islamic law (Avini, 1995), and from the Germanic *Salmannus* (Avini, 1995), all of which, broadly speaking, involves a legal mechanism whereby property is placed under the administration of a fiduciary, by a grantor, for the eventual use by a beneficiary, indicating a nexus of relationships evident in all three possible points of origin. Whichever theory is correct, fiduciary was subsequently adapted for use in English 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 a fiduciary (in this context known as a trustee), for the benefit of a beneficiary, whilst not conferring ownership per se of the property to the fiduciary (trustee). This was done for several reasons. In feudal England 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 property[5] 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, p. 6). The appointed male fiduciary (trustee) was required, in the absence of the owner, to manage the Estate put into Trust on the mutual understanding it would 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 a fiduciary (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 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, p. 1 *emphasis added*). What is clearly being recognised here is the fundamental feature of the fiduciary *as a* relationship. An interdependent relationship designed to benefit the beneficiary in which a fiduciary must—recalling Getzler—show *care, skill and loyalty in serving*. A relationship which will—as relationships undoubtedly are—be emergent and in flux, and so 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, p. 6). Whilst not enjoying unqualified rights to be consulted is a point discussed in detail elsewhere as an ethical issue of epistemic injustice (see Mussell, 2021), it is the long-term normative implications of

[5] 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.

this epistemic exclusion that warrants attention here from an ontological perspective, i.e. it is important to consider the role that this long-term epistemic silencing has played in the attempted reorientation of the fiduciary from a relational to an atomistic ontology.

The epistemic exclusion of beneficiaries arguably 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 behaviour". Keeping beneficiaries 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 beneficiary's 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, p. 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*, p. 1323 *emphasis added*)

What if those beneficiaries' best interests rubbed up against the assumptions embedded in rational choice theory, seeking more than utility maximisation and short-term returns driven by self-interest? What if those best interests, when consulted, openly contested "The tenacious normative commitment to an exclusively self-serving account of human behaviour", as socially responsible investments have been shown to do? (Mussell, 2018). In short, the structure of fiduciary relations under analysis here, premised upon the silencing of the beneficiary, has been an exceptionally useful tool in promulgating the successful uptake of rational choice theory, but this success has arguably been achieved through the silencing of potentially competing claims. With this in mind, *and from an ontological perspective*, we start to see how the identified epistemic injustice embedded in the fiduciary has contributed towards and facilitated its atomistic (re)orientation: *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 should be delivered with trust, care, and loyalty) *with* the neoclassical inspired deregulation, we see how the increasing dissolution of the fiduciary *as relationship* to formulation *as contract* has helped steer this ontological reorientation.

Theorising the Fiduciary's Ethics

The preceding sections of this article have outlined how the fiduciary has a relational ontology, one which has been subject to attempted ontological reorientation. As part of that reorientation 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 theorising the relational ontology of fiduciary via its process-focus, and by examining the historical development of its core interdependent relationship structure, the groundwork has been laid for a discussion regarding a suitable ethical framework with which to explain the ethics that *is* at work in the fiduciary *relationship*.

Fiduciary ethics is not an entirely unvisited area of ethical interest, but the small extent to which such a project has been undertaken considering the extensive use of the fiduciary in finance and business—and the implications such a project could deliver for theory and praxis—is 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, p. 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 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 has been recognised as garnering limited theoretical attention, an observation made by Gold and Miller when they note that "Notwithstanding its importance, fiduciary law has been woefully under-analysed by legal theorists." (Gold & Miller, 2014, p. 1) 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 (Mussell, 2021) 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 an opportunity to address the omission with strong arguments for how fiduciary does have a clear moral basis and warrants an explanatory framework of the sort outlined here.

Fiduciary Ethics to Date: A Kantian Framework for the Fiduciary

A summary of existing work in the field of fiduciary ethics is required before outlining why the Ethics of Care is best suited to the fiduciary's relational ontological orientation. 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, a Kantian deontological framework has been predominantly advanced as a suitable framework, including Laby's own contribution. Scholars proposing such an explicit Kantian approach (Laby, 2005; 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 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 20 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, characterised 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, p. 1) This observation clearly mirrors the work of Getzler and Johnson outlined earlier. It underscores the very real threat to fiduciary ethics that Laby seeks 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—and arguably because the fiduciary has been ontologically undertheorised—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*[6] 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, p. 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 support 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, p. 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, i.e. a familial and substitute care context. However, whilst Laby underscores the importance of considering 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

[6] 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, p. 3).

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 considering 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

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 a fiduciary to make the beneficiary's needs the their 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 and relationship focussed context in mind, a more suitable ethical framework for explicating the fiduciary would be the Ethics of Care. As outlined elsewhere (Mussell, 2020, 2021; Held, 2006, 2014; Tronto, 1993, Tronto, 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, 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 centres 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*)

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, p. 54–55 *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 a fiduciary 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 a fiduciary and beneficiary are clearly positioned within an interconnected relationship, but that they are also bound to each other by the pursuit of the beneficiary's best interests and needs. That these best interests and needs are *particular* to the beneficiary, and that a fiduciary must be self-reflective and vigilant in ensuring they themselves do not benefit from decisions made in the beneficiary's 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, p. 51 *emphasis added*)

There are then several ways in which an Ethics of Care can explain the ethical aspect of the fiduciary, specifically considering its historical development, its core emphasis on the fiduciary's appreciation and prioritisation of the beneficiary's best interests and needs, and the fact that the fiduciary and beneficiary are positioned in a relationship premised on asymmetrical power (Mussell, 2020). 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, reveals a weakness in his argument. The theorisation 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 not been fully fleshed out, a point also made by R.J Wallace 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 behaviour that is morally impermissible, and proceed to reflect on the implications of being treated in this way for the attitudes and behaviour 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, p. 4 *emphasis added*) In addition to highlighting this need for further relational theorising in moral philosophy, Wallace is clear in differentiating the broad interpersonal morality that requires the relational model 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 by Wallace amongst the influential traditions requiring the sort of relational model that he recognises and motivates a need for, as it focusses squarely on the negotiation of familiar and existing relationships. In short, the relational ethic proposed here—the Ethics of Care—is clearly differentiated from other influential moral theories because the ontology and epistemology it conveys is (already) *explicitly relational*.

Discussion and Implications for Praxis

This article theorises the ontology of the legal concept of the fiduciary using both its process-oriented focus and 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 economics and law 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 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. The theorisation outlined here also holds clear potential for managerial praxis in several ways, offering scope in helping 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. Relatedly, when articulated and enacted through narrative practice (Lawrence & Maitlis, 2012), the Ethic of Care can develop caring relationships in organisational team contexts, setting good precedent for how such narrative practice could also develop external fiduciary–beneficiary relations. Secondly, the Ethics of Care's focus on responsibilities within the context of the relationship offers normative guidance for both a fiduciary and beneficiary. It invites both parties to reconsider their responsibilities, not only to each other, but to also take responsibility for the impact of their investments on the wider world and society—a consideration that has been overlooked by the use of hyper-rational MPT (and its atomistic ontology) (Lydenberg, 2014). Relatedly, the normative guidance offered by the Ethics of Care and its relational ontology also addresses 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 amongst investment professionals, the steady increase in socially responsible investing and the challenges this poses to the ontological presuppositions underpinning MPT (Mussell, 2018) is indicative of a shift in thinking. And to return to an earlier point regarding the potential use of relational contracts—if shown to be sufficiently ontologically differentiated and aligned to a relational ontology—the normative guidance offered by the Ethics of Care could also provide a framework for developing and maintaining such relationships. In addition, the work of Jeanne Liedtka (1996) on the practicalities of applying the Ethics of Care to business practice, particularly in relation to stakeholder theory and responsibilities, could guide thinking around accommodating 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 would 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 Mussell, 2020). The crucial issue 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 therefore 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. 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, p. 281) that have been responsible for the increasingly narrow interpretations and practice of this widely embedded legal concept.

Acknowledgements Acknowledgements are due to the anonymous peer-reviewers whose suggestions on the manuscript were both helpful for this piece and inspirational for future work. I would also like to acknowledge the support and generosity of the Centre for Business Research, Judge Business School, University of Cambridge, which awarded an earlier version of the paper the Gavin C Reid Best Paper prize (2022).

Funding The author did not receive support from any organisation for the submitted work. The author has no relevant financial or non-financial interests to disclose.

Declarations

Conflict of interest The author has no competing interests to declare that are relevant to the content of this article.

Research Involving Human and Animal Participants The research is non-empirical, did not involve human or animal participants, and as such no informed consent was sought.

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