

## ARTICLES

### THE COMMON LAW IS NOT JUST ABOUT CONTRACTS: HOW LEGAL EDUCATION HAS BEEN SHORT- CHANGING FEMINISM

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#### I. INTRODUCTION

The contract is not the only private legal relationship woven into the fabric of our common law. There are also the agency and trust, two robust and powerful core fiduciary relationships, the former being enforceable in equity and the latter being an invention of equity. Reading Professor Martha M. Ertman's *Legal Tenderness: Feminist Perspectives on Contract Law*, I came away

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with the sense that the property branch of mainstream feminist scholarship is based on a false premise, namely that there are really only two general ways of empowering and protecting women economically: either by private contract or state regulation, or by some accommodation between the two.<sup>1</sup> Many trees have been sacrificed and much ink spilled over the extent to which our freedom to contract should be constrained by state regulation in order to accommodate perceived or actual gender-based vulnerabilities.<sup>2</sup>

Even Professor Clare Dalton's ambitious *An Essay in the Deconstruction of Contract Doctrine* embarks from this false premise.<sup>3</sup> In the entire essay, Dalton mentions the fiduciary principle only once, an oblique reference in the essay's 244th footnote.<sup>4</sup>

For whatever reason, the vast body of empowering and protective doctrine governing transactions between parties in fiduciary or confidential relationships has been reduced to a tiny blip on the feminist scholar's radar screen. One learned commentator has suggested that "[a]mong many feminists there is a suspicion, even a fear, that autonomy and choice through contract and the market are traps that will only further ensnare women in disadvantage and degradation," and that "[f]eminists struggle with the dilemma of choice, in part, because of an overarching concern about the paradigm of the 'rational economic man' and the atomistic

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1. See Martha M. Ertman, *Legal Tenderness: Feminist Perspectives on Contract Law*, 18 YALE J.L. & FEMINISM 545, 563 (2006) (book review) (referring to "systemic conflicts between classical views of the will-based theory of contract on the one hand and feminist impulses to occasionally protect women from bad deals on the other"); see also Gillian K. Hadfield, *The Dilemma of Choice: A Feminist Perspective on The Limits of Freedom of Contract*, 33 OSGOODE HALL L.J. 337, 340 (1995) (noting that in *The Limits of Freedom of Contract* Michael Trebilcock argues "that law may continue to endorse the essence of private ordering as a vindication of autonomy values while at the same time promoting welfare through regulation of contract terms, distribution policies, and government investment in human capital, communities, and the means for otherwise private delivery of social services.).

2. See, e.g., Hadfield, *supra* note 1, at 338 ("Autonomy, choice, contract, and, above all, the market, raise for feminists difficult conflicts between the drive to overcome the historical subjugation that has deprived women of autonomy and choice on the one hand, and the conviction, on the other, that the institutions of contract law and the market offer predominantly impoverished and ultimately degrading opportunities for choice by women already trapped in patriarchy.").

3. See Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1000 (1985).

4. *Id.* at 1061 n.244 (quoting *Swinton v. Whitinsville Sav. Bank*, 42 N.E.2d 808, 808 (Mass. 1942)).

conception of liberal individualism.”<sup>5</sup> That may be so, but the common law is not just about contracts.

In this article I argue that the private side of the ledger, the common law side, has been chronically under-examined by feminist scholars, particularly as a vehicle for economically empowering and protecting women. I suggest that the laws of agency and trust, as enhanced by equity and reinforced by the traditional cohort of confidential relationships, are fertile ground just waiting to be cultivated by creative feminist scholars.

The blame for this underutilization of the preexisting legal landscape I lay squarely at the doorstep of the American law school, whose core curriculum is now structured almost entirely around the simplistic and one-dimensional private contract-versus-state regulation narrative. Most feminist scholars appear to have bought into this narrative. This, in turn, has engendered some earnest but unfortunate wheel-inventing. By that I mean that what is actually being advocated in some quarters is the tweaking of certain contractual relationships into what are really fiduciary analogs. But why select an analog when the real thing is on the shelf within arm’s reach, and has been so for hundreds of years?

To support my thesis that there is a well-trodden quasi-private, quasi-public middle ground between the law of the jungle and protective incarceration, between private contract and state regulation, namely the equity-based fiduciary relationships of agency and trust, I discuss *Cleary v. Cleary*, a Massachusetts undue influence agency case involving an elderly woman;<sup>6</sup> the phenomenon of the English marriage settlement, a trust regime which, in the words of Professor Austin Wakeman Scott, “was a most remarkable piece of judicial legislation, since it effected a revolution in the economic position of married women by making it possible for a married woman to be economically independent of her husband”;<sup>7</sup> and the Massachusetts trust case of *Sullivan v. Burkin*, in which equity intervened to de-fang the revocable inter vivos trust as a post-mortem vehicle for impoverishing surviving spouses.<sup>8</sup>

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5. Hadfield, *supra* note 1, at 338.

6. 692 N.E.2d 955 (Mass. 1998).

7. 2 AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS § 146.1 (2d ed. 1956).

8. *See* 460 N.E.2d 572, 577 (Mass. 1984).

The Anglo-American fiduciary relationship, whether structured as an agency, a trust, or one of their statutory hybrids (e.g., the corporation), is far more intense and proactive than its civil law cousins in continental Europe, where equity has never gained a foothold.<sup>9</sup> Commenting on the Anglo-American trust, the great Cambridge legal scholar Frederick W. Maitland remarked that “[o]f all the exploits of Equity the largest and the most important is the invention and development of the Trust. It is an ‘institute’ of great elasticity and generality; as elastic, as general as contract.”<sup>10</sup> In his opinion, the institution of the trust has been English jurisprudence’s greatest achievement.<sup>11</sup>

This article challenges today’s feminist scholars to devise creative ways to deploy the perfectly good weapons that they already have in their arsenals and which, for some time now, have been gathering dust: namely, the fiduciary relationships of agency and trust as enhanced by equity and reinforced by the classic confidential relationships. Wheel re-inventing is wheel spinning.

This article is the third in a series of articles that considers the implications of the marginalization of the fiduciary relationship in the American legal academy. In *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, my colleague and I explained how the Investment Company Act of 1940 (the “Act”), which regulates mutual funds, tweaks the common law of agency and trusts at the margins, but otherwise leaves it undisturbed.<sup>12</sup> In other words, the Act would be gibberish without the common law. Securities lawyers take note. In *Lawyer Codes Are Just About Licensure, the Lawyer’s Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust, and Property Principles that Regulate the Lawyer-Client Fiduciary Relationship*, I questioned why instruction in the lawyer’s Model Rules of Professional Conduct is mandatory in most law schools while instruc-

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9. See Charles E. Rounds, Jr. & Andreas Dehio, *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U. J.L. & BUS. 473, 517–18 (2007).

10. F.W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 23 (John Brunyate ed., 2d ed. 1936).

11. FREDERIC WILLIAM MAITLAND, *The Unincorporate Body*, in MAITLAND: SELECTED ESSAYS 128, 129 (H.D. Hazeltine et al. eds., 1936).

12. Rounds & Dehio, *supra* note 9, at 475.

tion in the law of agency is generally not, particularly in light of the fact that the lawyer-client relationship is one of agency.<sup>13</sup>

In this article I endeavor to put the private fiduciary relationship back on the feminists' radar screen. I begin by recovering some critical common law doctrine, which the *Restatement (Second) of Contracts* does little more than incorporate by reference, almost as an afterthought.<sup>14</sup> Thus, in Part II, I explain the terms "common law" and "equity" as they are employed in this article. Part III is a brief primer on the core fiduciary relationships of agency and trust. In Part IV, I invite feminist scholars to exploit the current judicial confusion over the nature of the confidential relationship—is a trust actually a contract? In Part V, I explain why the trust is *sui generis*, why it is not a sub-category of contract. In Part VI, I discuss academia's marginalization of the fiduciary relationship. In Part VII, I offer three examples of how the common law as enhanced by equity has served as a vehicle for empowering and protecting women: the *Cleary* case, the marriage settlement phenomenon, and *Sullivan v. Burkin*. Part VIII contains a detailed critique of Professor Martha M. Ertman's *Legal Tenderness: Feminist Perspectives on Contract Law* and Professor Clare Dalton's *An Essay in the Deconstruction of Contract Doctrine*.

## II. COMMON LAW AND EQUITY DEFINED

Because the agency and the trust, not to mention equity and the Anglo-American concept of the fiduciary, are judge-made institutions, the reader will encounter numerous references to the common law in this article. The term has meant different things in different times, including the following: (1) the "law in force in

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13. Charles E. Rounds, Jr., *Lawyer Codes Are Just About Licensue, the Lawyer's Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust, and Property Principles that Regulate the Lawyer-Client Fiduciary Relationship* 60 BAYLOR L. REV. 771, 776–78 (2008).

14. See RESTATEMENT (SECOND) OF CONTRACTS § 161 (1981) ("A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist . . . where the other person is entitled to know the fact because of a relation of trust and confidence between them."); *id.* § 169, cmt. c ("In some situations a relationship of trust and confidence between the parties justifies the reliance of one on the other's opinion."); *id.* § 173 ("If a fiduciary makes a contract with his beneficiary relating to matters within the scope of the fiduciary relation, the contract is voidable by the beneficiary, unless (a) it is on fair terms, and (b) all parties beneficially interested manifest assent with full understanding of their legal rights and of all relevant facts that the fiduciary knows or should know.").

all of the Kingdom of England, as distinguished from local customary law peculiar to a limited area, such as the custom of the County of Kent” during the medieval period;<sup>15</sup> (2) “judge-made law—judicial precedents—as distinguished from statutes enacted by Parliament or some other legislature;”<sup>16</sup> (3) “the law applied by the former royal courts of King’s Bench, Common Pleas and Exchequer, as distinguished from the canon law applied by the ecclesiastical courts and the rules of equity administered by the High Court of Chancery;”<sup>17</sup> and (4) “the law of those areas which have systems of private law derived from and more or less resembling the law in force in the Kingdom of England when it merged in the Kingdom of Great Britain (1 May 1707).”<sup>18</sup> When the term common law is employed in this article, I employ it in the broad fourth sense to distinguish the agency and the trust from analogous civil law institutions<sup>19</sup> in continental Europe and elsewhere that are, for the most part, creatures of all-inclusive codification,<sup>20</sup> such as the German *stiftung*.<sup>21</sup>

This is not to say that the English and the Americans are not averse to tweaking the common law by statute: “[t]here are . . . both in England and in the United States many statutes that deal with rules of the law of trusts, but most of them deal with specific questions, such as what are proper trust investments.”<sup>22</sup> Even

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15. William F. Fratcher, *Trust*, in 6 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 11, at 5 (Frederick H. Lawson, ed. 1973).

16. *Id.*

17. *Id.*

18. *Id.* at 6. Such areas would include the British Isles (except Scotland), the United States of America (except the State of Louisiana and the Commonwealth of Puerto Rico), Canada (except the Province of Quebec), Australia, New Zealand, the Republic of Liberia, and some of the present and former British colonies and possessions in Africa, the West Indies and elsewhere. *Id.*

19. See generally CHARLES E. ROUNDS, JR. & CHARLES E. ROUNDS, III, LORING: A TRUSTEE’S HANDBOOK § 8.12.1 (2009) (discussing civil law trust analogs such as the German *treuhand*).

20. See Rounds & Dehio, *supra* note 9, at 507 (noting that civil law jurisdictions do not have a generalized body of non-statutory fiduciary law but instead rely on statutes creating fiduciary-like principles).

21. See generally ROUNDS & ROUNDS, *supra* note 19 (discussing among others, the Swiss and German *stiftung*).

22. 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 1.10 (4th ed. 1987) [hereinafter THE LAW OF TRUSTS]; see, e.g., *Allen Trust Co. v. Cowlitz Bank*, 152 P.3d 974, 977 (Or. Ct. App. 2007) (noting that Oregon statutes dealing with trusts “have not supplanted the common law and equitable principles pertaining to trusts in areas that they do not address”). “In England, there was no general legislation about trusts until the *Trustee Act of 1850*, the *Trustee Act 1893* saw a consolidation of existing enactments; and the *Trustee Act 1925* was a further general statute.” J.D. Heydon, *Does*

those fiduciary duties articulated in the federal Employee Retirement Income Security Act (ERISA) are not exhaustive, Congress having deferred to traditional principles of equity to “define the general scope of [an ERISA trustee’s] authoring and [fiduciary] responsibility.”<sup>23</sup>

It has been said that equity is not separate and apart from the common law as that term is understood in its broadest sense but is actually a gloss on or collection of appendices to the common law. For example, one commentator has written, “Equity accepts the common law ownership of the trustee, but regards it as against conscience for him to exercise that legal ownership otherwise than for the benefit of the *cestui que trust* [beneficiary], and therefore engrafts the equitable obligation upon him.”<sup>24</sup> Therefore, abuses of the legal agency relationship, as well as breaches of trust, are subject to equitable remedies.

Besides adding to Anglo-American jurisprudence the institution of the trust, equity has also added two novel and fertile remedies of specific performance and injunction.<sup>25</sup> Ultimately, however, equity will do whatever it takes to make an injured party whole, including the assessment of damages. Whereas a judgment at law declared a plaintiff’s rights, a decree in equity imposed duties on a defendant; in other words, equity acted and still acts *in personam*.<sup>26</sup>

Equity also has provided a number of detached doctrines—the so-called equity maxims—which, though critically relevant in the real world, were decades ago tossed out of the Ivory Tower.<sup>27</sup> I suggest that there are valuable nuggets hidden among these discarded doctrines just waiting to be found and exploited by the creative feminist scholar. But I leave that subject for another day.

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*Statutory Reform Stultify Trusts Law Analysis?*, 6 TR. Q. REV., at 11, 27 (2008).

23. *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1299 (3d Cir. 1993) (quoting *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985)).

24. G. W. KEETON, AN INTRODUCTION TO EQUITY 95 (6th ed. 1965).

25. MAITLAND, *supra* note 10, at 22. *But see* George L. Gretton, *Trusts Without Equity*, 49 INTER’L & COMP. L.Q. 599, 618 (2000) (“It is important that lawyers in the civil law tradition understand that the trust is not a ‘unique institution’ and has no necessary connection with equity.”).

26. 1 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 1.1, at 5 (5th ed. 2006) [hereinafter SCOTT AND ASCHER ON TRUSTS].

27. ROUNDS & ROUNDS, *supra* note 19, § 8.12 (cataloging some critical equity maxims, as well as highlighting some of their twenty-first century applications).

The judicial supervision of the administration of decedents' estates is another of equity's contributions, a topic well beyond the scope of this article.

Rights, duties, and obligations that are equitable in nature have their origins in the principles, standards, and rules developed by courts of chancery.<sup>28</sup> Thus, to truly understand equity, one needs to have some understanding of what these courts are and how they came to be. The equity saga actually began in thirteenth century England. It is a saga whose themes nonetheless should resonate with twenty-first century feminists:

[I]n the rough days of the thirteenth century, a plaintiff was often unable to obtain a remedy in the common law courts, even when they should have had one for him, owing to the strength of the defendant, who would defy the court or intimidate the jury. Either deficiency of remedy or failure to administer it was a ground for petition to the King in Council to exercise his extraordinary judicial powers. A custom developed of referring certain classes of these petitions to the Chancellor, and this custom was confirmed by an order of Edward III in 1349. The Chancellor acted at first in the name of the King in Council, but in 1474 a decree was made on his own authority, and this practice continued, so that there came to be a Court of Chancery as an institution independent of the King and his Council.<sup>29</sup>

The Lord Chancellor, usually a clergyman, was the officer responsible for keeping the Great Seal of England, and was a close adviser of the monarch.<sup>30</sup> Only in 1362, well after the Norman invasion, did the Lord Chancellor, who to this day outranks the Prime Minister in official precedence, begin addressing Parliament in English rather than in French.<sup>31</sup> The chancery scribes were responsible for the monarch's paperwork.<sup>32</sup> It is said that "[t]he genealogy of modern Standard English goes back to Chancery, not Chaucer."<sup>33</sup> As keeper of the King's (or Queen's) Conscience, the Lord Chancellor was once the chief judge of the Court

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28. See SCOTT AND ASCHER ON TRUSTS, *supra* note 26, § 1.1, at 5; THE LAW OF TRUSTS, *supra* note 22, § 1.

29. SNELL'S PRINCIPLES OF EQUITY 8 (P.V. Baker & P. St. J. Langan eds., 28th ed. 1982).

30. The Chancellor was a member of the monarch's private or "privy" council.

31. See ROUNDS & ROUNDS, *supra* note 19, § 8.15 (discussing in part the phenomenon of "law French").

32. DAVID CRYSTAL, THE CAMBRIDGE ENCYCLOPEDIA OF THE ENGLISH LANGUAGE 41 (2d ed. 2003).

33. *Id.*

of Chancery.<sup>34</sup> In England in 1873, the High Court of Chancery was merged with the common law courts, the common law judges then being given the power to administer equity.<sup>35</sup>

Now to this side of the Atlantic. After the American Revolution, the “thirteen original states adopted substantially the entire common law of England.”<sup>36</sup> This included, with little change, England’s system of equity jurisprudence of which the institution of the trust was an integral part.<sup>37</sup> Massachusetts was the last hold-out, not fully recognizing equity as a complementary part of its judicial system until 1877.<sup>38</sup> Thus, for sometime in parts of the United States, trusts were being enforced under contract principles in legal proceedings: “It is true that such actions [for breach of contract by beneficiaries against trustees] were once maintainable in Massachusetts and Pennsylvania, but that was because there was originally no equity jurisdiction in those states.”<sup>39</sup>

In most states, with the notable exception of Delaware, there are no longer separate courts of law and equity.<sup>40</sup> The consolidation, however, left intact the substantive differences between legal property interests and equitable property interests.<sup>41</sup> The consolidation also left intact the substantive differences between legal duties and equitable duties: “[a]n equitable duty is a duty enforceable in a court of chancery or in a court having the powers of a court of chancery.”<sup>42</sup> The duties of an agent with discretion or of a trustee are equitable.

It is suggested that intruding too much into equity’s domain by statute and regulation can actually do more harm than good. Fe-

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34. 1 STEWART RAPALJE & ROBERT L. LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW 193 (1888).

35. *See id.* at 194.

36. 1 GEORGE GLEASON BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 6 (2d ed. 1951).

37. *Id.*

38. Edwin H. Woodruff, *Chancery in Massachusetts*, 5 L.Q. REV. 370, 383–84 (1889); *see* SCOTT AND ASCHER ON TRUSTS, *supra* note 26, § 1.9, at 24.

39. SCOTT AND ASCHER ON TRUSTS, *supra* note 26, § 24.12.

40. *See* Joseph M. Gianola, Jr., *Changing Jurisdiction in Chancery Court*, 25 MISS. C. L. REV. 109, 116 (2005) (“As of 1995, only four states still had separate courts of equity: Mississippi, Arkansas, Delaware, and Tennessee. However, in 2001, Arkansas passed Amendment 80 to its constitution, which eliminated chancery courts throughout the state. Arkansas completely merged the two court systems . . .”) (footnotes omitted).

41. A share of stock in a corporation would be a legal property interest. A share or participation in a trustee mutual fund, e.g., a fund sponsored by Fidelity, Vanguard, or Bank of America, would be an equitable property interest.

42. RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. e (1959).

minist scholars concerned with empowering and protecting women economically should particularly take note. J.D. Heydon, the Australian jurist, explains why:

A primary goal of judicial development of the law is to achieve coherence, but to combine that goal with vitality. A system of judge-made law resting on principles of *stare decisis* has a degree of stability; but it teems with life, and is inherently capable of change in the light of experience. Doubtful problems can often be solved by applying principles operative generally in the law. The process revivifies the general principles: it enables them to be explored, understood afresh when looked at from the new angle, modified in the light of the new problem so that the general principles in turn can have slightly different applications in the future.

If the legislature adopts ad hoc solutions for particular problems (however well intentioned the reform and however convenient its results in the specific area may be), it tends to deaden and stultify the process described above, at least for a time. A question remains whether legislation can maintain that effect in the longer run. The silent waters of equity run deep—often too deep for legislation to obstruct.<sup>43</sup>

### III. MORE ABOUT THE FIDUCIARY RELATIONSHIPS OF AGENCY AND TRUST

*“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”*<sup>44</sup>

*“A trust . . . is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.”*<sup>45</sup>

As I have said, a fiduciary relationship is grounded in either an agency of the discretionary variety, a trust relationship, or one of their statutory analogs, e.g., the corporation.<sup>46</sup> The corporation is

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43. Heydon, *supra* note 22, at 27–28.

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

45. RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

46. *See id.* § 78 cmt. a.; J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 L.Q. REV. 51, 51 (1981); *see also* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1402–03 (2002) (suggesting that the allocation of discretion to a person who acts on behalf of another with respect to critical resources belonging to the other should determine whether a particular relationship should be treated as a fiduciary relationship).

essentially an agency-trust statutory hybrid. While the directors are technically not agents of the stockholders,<sup>47</sup> and the corporation itself is not technically a trustee of corporate assets,<sup>48</sup> the directors have a collective duty of loyalty that is very agency-like and trustee-like.

A fiduciary has a duty imposed by law to act solely for the benefit of another as to matters within the scope of the relation.<sup>49</sup> Parties to an insurance contract are not generally in a fiduciary relationship.<sup>50</sup> Nor are the parties to a bank account, which is also a contract.<sup>51</sup> Absent special facts, a bank that makes a commercial loan to a customer is not generally in a fiduciary relationship with that customer.<sup>52</sup> If, however, the bank were the customer's investment manager/agent, then the bank would be in such a relationship with the customer.<sup>53</sup> In the former case, the bank, as lender, would have legal contractual rights to assert against the customer. In the latter, the customer, as principal, would have equitable rights that could be asserted against the bank.

A fiduciary is generally saddled with a duty of prudence, though one need not be a fiduciary to owe someone such a duty.<sup>54</sup> By way of example, a pilot for a major airline though not in a contractual or fiduciary relationship with the passengers in the cabin, nonetheless owes them a duty of prudence that may well be more rigorous than that of a trustee.<sup>55</sup>

A fiduciary relationship in and of itself is not a contractual relationship,<sup>56</sup> although one may be incident to the other.<sup>57</sup> For example, there is likely to be a compensation contract, incident to a

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47. See ROUNDS & ROUNDS, *supra* note 19, § 9.9.8.

48. *Id.* § 9.9.7.

49. SCOTT AND ASCHER ON TRUSTS, *supra* note 26, § 2.1.5.; THE LAW OF TRUSTS, *supra* note 22, § 2.5.

50. ROUNDS & ROUNDS, *supra* note 19, § 9.9.1.

51. *Id.* § 9.9.4.

52. See *id.*

53. See THE LAW OF TRUSTS, *supra* note 22, § 8 (noting, however, that “[a]lthough an agent is in a fiduciary relationship to his principal, as a trustee is to the beneficiaries of the trust, the two relationships have a different history and different consequences flow from them”).

54. See ROUNDS, *supra* note 13, at 800.

55. *Id.* at 800–81.

56. See Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303, 305 (1999).

57. See ROUNDS, *supra* note 13, at 803–04.

lawyer-client, agent-fiduciary relationship,<sup>58</sup> while there is likely to be an agency-fiduciary relationship incident to a contract between a broker and his or her customer, provided the broker is vested with discretionary investment authority.<sup>59</sup> Investment managers and attorneys-at-law are generally fiduciaries.<sup>60</sup> An agent acting under a durable power of attorney (an attorney-in-fact) is a fiduciary as a matter of law.<sup>61</sup> “The duty of loyalty is, for trustees, particularly strict even by comparison to the standards of other fiduciary relationships.”<sup>62</sup>

A bailment, though sometimes confused with a trust,<sup>63</sup> is not a trust.<sup>64</sup> While a trustee generally takes the legal title to the subject property, a bailee generally does not.<sup>65</sup> Thus, a bailee may not transfer the property in his possession to a bona fide purchaser (“BFP”) for value.<sup>66</sup> A trustee, on the other hand, can pass good title to a BFP.<sup>67</sup> A trust is an equitable interest, while a bailment is a legal one.<sup>68</sup> There are differences related to procedure as well:

58. *Id.* at 778.

59. *See Patsos v. First Albany Corp.*, 741 N.E.2d 841, 849 (Mass. 2001) (“In determining the scope of the broker’s fiduciary obligations, courts typically look to the degree of discretion a customer entrusts to his broker.”); Smith, *supra* note 46, at 1402 (suggesting that the allocation of discretion to a person who acts on behalf of another with respect to critical resources belonging to the other should determine whether a particular relationship should be treated as a fiduciary relationship).

60. *Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951, 953 (E.D. Mich. 1978) (“Unlike the broker who handles a nondiscretionary account, the broker handling a discretionary account becomes the fiduciary of his customer in a broad sense.”); *Patsos*, 741 N.E.2d at 849 (noting that in determining the scope of the broker’s fiduciary obligations, courts typically look to the degree of discretion a customer entrusts to his broker); 12 C.F.R. § 9.2(e) (2008) (deeming a bank that possesses investment *discretion* on behalf of another to be a fiduciary); *see Deborah A. DeMott, The Lawyer as Agent*, 67 *FORDHAM L. REV.* 301, 304–05 (1998) (suggesting that even a broad grant of discretion by the client to the lawyer does not negate the client’s right under common law agency principles to be kept informed and to control the lawyer’s fiduciary activities).

61. *Archbold v. Reifenrath*, 744 N.W.2d 701, 706 (Neb. 2008) (citing *First Colony Life Ins. Co. v. Gerdes*, 676 N.W.2d 58, 63 (Neb. 2004)); *Vogt v. Warnock*, 107 S.W.3d 778, 782 (Tex. 2003) (citing *Plummer v. Estate of Plummer*, 51 S.W.3d 840, 842 (Tex. App. 2001)).

62. *RESTATEMENT (THIRD) OF TRUSTS* § 78 cmt. a (2007).

63. *See Doyle v. Burns*, 99 N.W. 195, 198 (Iowa 1904) (musing that the likes of Justices Story and Kent have failed to sort out the differences between a trust and bailment (citing 2 *JAMES KENT, COMMENTARIES ON AMERICAN LAW* 559 (D.W. Holmes, Jr. ed., Little, Brown, and Company 1896) (1826)); *JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS* § 2, at 2 (Little, Brown, & Company 1878) (1832)).

64. *THE LAW OF TRUSTS*, *supra* note 22, § 5.

65. *Id.*

66. *SCOTT AND ASCHER ON TRUSTS*, *supra* note 26, § 2.3.1.

67. *Id.* For a comparison of the BFP, a creature of equity, with the holder in due course, a creature of law, *see ROUNDS & ROUNDS*, *supra* note 19, § 8.15.68.

68. *RESTATEMENT (SECOND) OF TRUSTS* § 5 cmt. e (1959).

the remedies against a recalcitrant bailee are generally legal, unless the subject property is unique,<sup>69</sup> while those against a recalcitrant trustee are generally equitable.<sup>70</sup> Unless the bailment is coupled with an agency or trust, it is not a fiduciary relationship.<sup>71</sup> “Although a few cases outside of the United States treat bailments as fiduciary relationships, that characterization has not been adopted by U.S. Courts.”<sup>72</sup>

The priest-penitent, doctor-patient, professor-student, and parent-child relationships, in and of themselves, are confidential relationships, not fiduciary relationships.<sup>73</sup> “A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other’s interest in mind.”<sup>74</sup> A key difference between the two relationships is the reliance requirement.<sup>75</sup> For a confidential relationship to arise, there *must* be reliance on the part of the one reposing the confidence.<sup>76</sup> A fiduciary relationship, on the other hand, brings with it a duty of undivided loyalty, whether or not there has been reliance.<sup>77</sup> Accordingly, a beneficiary in an action against a trustee for breach of fiduciary duty, absent special facts, need not plead reliance. Although the trustee-beneficiary relationship is a fiduciary relationship, it can also be one of confidence, depending upon the facts and circumstances.<sup>78</sup>

Regrettably, some courts have been employing the term “informal fiduciary” relationship as a synonym for “confidential rela-

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69. THE LAW OF TRUSTS, *supra* note 22.

70. ROUNDS & ROUNDS, *supra* note 19, § 7.2.3 (discussing the types of equitable relief that are available to a trust beneficiary who has been economically harmed by the trustee’s breach of trust).

71. Smith, *supra* note 46, at 1451 n.211.

72. *Id.*

73. THE LAW OF TRUSTS, *supra* note 22, § 2.5.

74. RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. b (1959).

75. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. g (2003).

76. *Id.*

77. *Id.*; see Sarah Worthington, *Fiduciaries: When Is Self-Denial Obligatory?*, 58 CAMBRIDGE L.J. 500, 503 (1999) (“In short, fiduciary terminology should be used carefully and restrictively, so that fiduciary law operates *only* to exact loyalty; it does not concern itself with matters of contract, tort, unjust enrichment and other equitable obligations (such as breach of confidence).”).

78. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. g (2003); ROUNDS & ROUNDS, *supra* note 19, § 6.1.3.5 (discussing the practical implications of a trustee being in a confidential relationship with a beneficiary).

tionship.”<sup>79</sup> Other courts in recent years, whether out of ignorance of basic common law doctrine, because of sloppy opinion writing, or for some other reason, are further muddying the waters when it comes to sorting out the differences between the two relationships. One court, for example, in a 2006 sexual abuse case, deemed a classic relationship of confidence, the relationship of a male guidance counselor with his reliant female ward, to be a fiduciary relationship, the court citing to *Scott on Trusts*, among other authorities.<sup>80</sup> One thing is for sure: absent very special facts, an abusive sexual relationship is unlikely to implicate the law of trusts because a trust is a fiduciary relationship with respect to property. The law of agency is perhaps implicated, but not the law of trusts.

#### IV. INVITING FEMINIST SCHOLARS TO EXPLOIT CURRENT JUDICIAL CONFUSION OVER THE NATURE OF THE CONFIDENTIAL RELATIONSHIP

As noted above, the fiduciary principle has become an unruly horse that has broken out of its corral. Fiduciary relationships in the Anglo-American legal tradition were essentially limited to discretionary agency and trust, both being equity-based, or to one of their statutory hybrids (e.g., the corporation, the guardianship, or the durable power of attorney).<sup>81</sup>

Conversely, the doctor-patient contractual relationship, absent special facts, was a confidential relationship, not a fiduciary relationship.<sup>82</sup> Similarly, the gratuitous priest-penitent relationship was confidential, not fiduciary.<sup>83</sup> Finally, the teacher-student relationship was no legal relationship at all except one of confidence in certain circumstances.<sup>84</sup> The teacher was in an agency relationship with the school, which was in a contractual relationship with the student.

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79. See Smith, *supra* note 46, at 1412–13.

80. See Doe v. Harbor Sch., Inc., 843 N.E.2d 1058, 1060, 1064 (Mass. 2006).

81. See THE LAW OF TRUSTS, *supra* note 22, § 2.5.

82. *Id.*; see RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. g (2003).

83. THE LAW OF TRUSTS, *supra* note 22, § 2.5.

84. See generally RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. g (2003); THE LAW OF TRUSTS, *supra* note 22, § 2.5.

Though those of us who practice in the fiduciary area may find it inconvenient and inefficient that the boundaries between fiduciary and confidential relationships have begun to blur, this blurring should be welcome news to creative feminist scholars and lawyers. The possibilities are endless when it comes to enlisting equity in the cause of empowering and protecting women. For example, should courts broaden the definition of a fiduciary to encompass a commercial lender who intends to extract a loan guarantee from the wife of a borrower or declare a husband to be in a per se fiduciary relationship with his wife, equity could work its magic: evidentiary burdens would shift,<sup>85</sup> the duty of undivided loyalty would be implicated, the standard of informed consent would become a subjective one,<sup>86</sup> and a smorgasbord of flexible equitable remedies would become available.<sup>87</sup>

While the clever lawyer can shepherd his or her client through almost any statutory or regulatory minefield, it is quite another matter to negotiate one of equity's minefields with equity looking to the intent of the parties to a transaction rather than the attendant formalities.<sup>88</sup> Equity's body of meta-principles has infused Anglo-American jurisprudence with a certain humane and flexible determinacy that critical legal scholars have yet to address head on.<sup>89</sup> This presents a human and flexible determinacy that, upon systematic reflection, the feminist critical scholar at least should find liberating and empowering. In any case, a judicial or legislative tweaking of the definition of a fiduciary or of what qualifies as a confidential relationship would be an evolutionary rather than a revolutionary event and thus more likely to gain acceptance outside the Ivory Tower.

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85. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. f (2003).

86. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 173 (1981).

87. See ROUNDS & ROUNDS, *supra* note 19, § 7.2.3 (discussing types of equitable relief available for victims of breaches of fiduciary duty in the trust context); ROUNDS, *supra* note 13, at 796–97 (discussing types of equitable relief available for victims of breaches of fiduciary duty in the agency context).

88. See SNELL'S EQUITY ¶ 5-24 (John McGhee et al. eds., 31st ed. 2005).

89. See generally Kenneth Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 283–84 (1989) (arguing moderate indeterminacy has at most modest consequences for political legitimacy and kindred concepts).

V. THE CONTRACTARIANS AND THE ANTI-CONTRACTARIANS:  
IS THE TRUST *SUI GENERIS*?

It is a classic trust principle that, “[a]lthough the trustee by accepting the office of trustee subjects himself to the duties of administration, his duties are not contractual in nature.”<sup>90</sup> Still, the academic community is revisiting the question of whether the trust is a branch of contract law or a branch of property law.<sup>91</sup> This debate—essentially a continuation of what was begun by Frederick W. Maitland, who argued the former, and Austin W. Scott, who argued the latter—presupposes only two private fundamental legal relationships: contract and property.<sup>92</sup> Note, however, that while Professor Maitland may have come down on the side of contract, he did so with some ambivalence:

For my own part if a foreign friend asked me to tell him in one word whether the right of the English *Destinatär* (the person for whom property is held in trust) is *dinglich*[a property interest] or *obligatorisch*[a personal claim], I should be inclined to say: “No, I cannot do that. If I said *dinglich*, that would be untrue. If I said *obligatorisch*, I should suggest what is false. In ultimate analysis the right may be *obligatorisch*; but for many practical purposes of great importance it has been treated as though it were *dinglich*, and indeed people habitually speak and think of it as a kind of *Eigenthum*[property].<sup>93</sup>

The issue as framed, however, can never be resolved because the premise, I suggest, is false. In addition to the civil duties of care to the world at large incident to the law of torts, our legal system does *not* have just two private facets, contract and property.<sup>94</sup> It has four, notwithstanding what the scholars may say: agency, contract, legal property rights, and trust. There is a total of five sources of duties because five are needed. No one is suffi-

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90. RESTATEMENT (SECOND) OF TRUSTS § 169 cmt. c (1959).

91. See Gretton, *supra* note 25, at 600–01.

92. For a recent articulation of the contract argument, see SCOTT AND ASCHER ON TRUSTS, *supra* note 26, § 13.1 (coming down on the side of those who argue that a trust beneficiary has a proprietary interest in the underlying trust property, not just a chose in action or claim against the trustee, but acknowledging that “the scholarly debate continues”); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995). For a recent articulation of the property argument, see Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal Economic Analysis*, 73 N.Y.U. L. REV. 434, 437–40 (1998).

93. Frederick William Maitland, *Trust and Corporation*, in MAITLAND: SELECTED ESSAYS, *supra* note 11, at 141, 146.

94. There are also non-consensual legal duties which, when breached, can constitute torts.

ciently elastic to encompass another without turning into the other. Attempting, for example, to squeeze a trust into the third-party beneficiary contract slot inevitably leaves too much out—examples include the charitable trust and the private discretionary trust that calls for the shifting of property interests between and among generations of persons who at the time the contract is struck are unborn and unascertained. To doctor a third-party beneficiary contract into something that would be a satisfactory substitute for such high maintenance arrangements would merely transmogrify it into a trust. While a trust has attributes of a contract, of property, of agency, and even of a corporation, it is now *sui generis*, regardless of its evolutionary origins. As one learned commentator versed in the taxonomies of both the common law and the civil law has noted, “Trusts do, indeed, impinge deeply upon both the law of obligations and the law of property, but they do not belong essentially to either.”<sup>95</sup> All three, however, are facets of the single gem we loosely refer to as the common law.<sup>96</sup>

The five facets are profoundly different, yet all are profoundly interrelated. The trust exhibits agency, property, contractual, and even corporate attributes, but is *sui generis*.<sup>97</sup> Contractual rights are themselves property rights. Contractual rights may be the subject of a trust.<sup>98</sup> The equitable interest in one trust may constitute the property of another.<sup>99</sup> An agency may be gratuitous or associated with contractual obligations.<sup>100</sup> The stock in a corporation, which is internally a statutory tangle of agencies, is a legal property interest.<sup>101</sup> And when a corporation serves as a wrapper for a mutual fund, it, in equity, is actually a trust.<sup>102</sup> Certain breaches of trust are, for all intents and purposes, torts.<sup>103</sup> In the agency context, a lawyer who commits an act of malpractice

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95. Gretton, *supra* note 25, at 614.

96. For purposes of this section, the term “common law” encompasses the law of equity.

97. See *Schoneberger v. Oelze*, 96 P.3d 1078, 1082 (Ariz. Ct. App. 2004) (confirming that a trust is not a contract); Rounds & Dehio, *supra* note 9, at 476 (stating that the trust relationship is *sui generis*).

98. See, e.g., ROUNDS & ROUNDS, *supra* note 19, § 9.8.7.

99. 2 THE LAW OF TRUSTS *supra* note 22, § 83; see SCOTT AND ASCHER ON TRUSTS, *supra* note 26, § 10.4.

100. See Rounds, *supra* note 13, at 785.

101. A share of corporate stock is an item of intangible personal property.

102. See Rounds & Dehio, *supra* note 9, at 502.

103. See Smith, *supra* note 46, at 1453–54.

against his or her client is committing a tort but not necessarily a breach of fiduciary duty.<sup>104</sup> I could go on and on.

## VI. ACADEMIA'S MARGINALIZATION OF THE FIDUCIARY RELATIONSHIP

Agency, contract, duties of care incident to the law of torts, legal property interests, and trust are facets of the same gem. Each offers a perspective of the Anglo-American common law. Together, they make up the law's periodic table. Statutes either fill gaps in the common law (for example, the will and the corporation), modify the common law (for example, the durable power of attorney), or embellish the common law (for example, the tax-qualified employee benefit plan). Even the federal Investment Company Act of 1940, which regulates mutual funds, is perched on an edifice of state common law.<sup>105</sup>

Civil law jurisdictions such as France and Germany have not developed trust regimes, or at least regimes that are nearly as "protean" as the common law trust.<sup>106</sup> This occasioned Professor Maitland to muse on how an English lawyer would likely react upon first encountering the Civil Code of Germany:

"This," he would say, "seems a very admirable piece of work, worthy in every way of the high reputation of German jurists. But surely it is not a complete statement of German private law. Surely there is a large gap in it. I have looked for the Trust, but I cannot find it; and to omit the Trust is, I should have thought, almost as bad as to omit Contract."<sup>107</sup>

Although fiduciary concepts are marbled throughout the common law, the elite law schools in the early 1960s began moving the traditional discrete agency and trusts courses from the required side of their curriculums to the elective side; since then,

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104. Rounds, *supra* note 13, at 801.

105. See Rounds & Dehio, *supra* note 9, at 502–03.

106. See ROUNDS & ROUNDS, *supra* note 19, § 8.12.1; Gretton, *supra* note 25, at 599 ("[T]he slogan of modern comparative law—'compare function rather than form'—does not work for the trust. One cannot identify the function of the trust because there is no such function. The trust is functionally protean. Trusts are quasi-entails, quasi-usufructs, quasi-wills, quasi-corporations, quasi-securities over assets, schemes for collective investment, vehicles for the administration of bankruptcy, vehicles for bond issues, and so on and so forth. In software terminology, trusts are emulators.") (footnotes omitted); Rounds & Dehio, *supra* note 9, at 507–10.

107. Maitland, *supra* note 93, at 142–43.

most of the other ABA-approved law schools have followed suit.<sup>108</sup> This process of marginalizing the core fiduciary relationships in the American law school is now all but complete, notwithstanding the fact that “our society is evolving into one based predominantly on fiduciary relations.”<sup>109</sup> That the core business of a law school is to turn out agent-fiduciaries has carried little weight:

In 1908 when the American Bar Association adopted the original Canons of Professional Ethics, instruction in the core equity-based relationships of agency and trust, as well as the core law-based relationships of contract, tort, and property, was mandatory in most, if not all, the law schools. It most certainly never occurred to those who had been encouraging the bench and bar to endorse and adopt a lawyer code that by the end of the century instruction in the two private fiduciary relationships would no longer be required in most American law schools. Back then, lawyer codes presumed a bench and bar that were thoroughly grounded in the common law, as the focus of such codifications was merely on licensure, the lawyer’s relationship with the state. That is still the focus. There has been no appreciable expansion in the scope and coverage of the Canons of Professional Ethics, or its successor codifications. On the other hand, we have seen a considerable pedagogical undermining over time of the common law foundations upon which those regulatory edifices were constructed.<sup>110</sup>

## VII. THREE EXAMPLES OF HOW THE COMMON LAW AS ENHANCED BY EQUITY HAS SERVED AS A VEHICLE FOR EMPOWERING AND PROTECTING WOMEN

### A. *Cleary v. Cleary*

*Cleary v. Cleary*, a 1998 Massachusetts case, involved an agent who received collateral economic benefits incident to the agency, possibly in breach of his fiduciary duty to the principal—his elderly aunt.<sup>111</sup> The issue was an evidentiary one: whether the burden was on the agent fiduciary to prove that the self-dealing

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108. See Rounds, *supra* note 13, at 777 n.19; see also E. GORDON GEE & DONALD W. JACKSON, FOLLOWING THE LEADER? THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA 6, 14–15, 22–25, 47–48 (1975) (examining the “follow the leader” behavior of law school faculties and comparing core law school curricula in the 1950s, 1960s, and 1970s); WILLIAM B. POWERS, A.B.A., A STUDY OF CONTEMPORARY LAW SCHOOL CURRICULA 12 (1986) (providing a catalog of courses that were typically required in law schools in the 1970s, which does not include discrete courses in the agency and the trust).

109. Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 798 (1983).

110. Rounds, *supra* note 13, at 776 n.12.

111. 692 N.E.2d 955, 956 (Mass. 1998).

transaction was free of fraud, duress, and undue influence and that the principal had given her subjective informed consent to the self-dealing.<sup>112</sup> The Supreme Judicial Court of Massachusetts held that the burden of proof was on the agent fiduciary.<sup>113</sup> That being the case, I wonder whether it is really worth the time and effort of feminist scholars to deconstruct certain contractual relationships and then rearrange the pieces into quasi-fiduciary relationships, particularly if it is in fact the case that most abusive financial relationships will have a common law agency component to them. I will take up the matter of deconstructing and rearranging the elements of the classic contractual relationship later. The laws of agency, enforced in equity since time immemorial, have been more than adequate to make whole those principals who have been financially abused by their agents.<sup>114</sup> A critical examination from the feminist perspective of the intersection, or lack thereof, of the laws of contract and agency would be well worth the effort.

Human nature being what it is, the typical marriage or cohabitation is marbled with agency relationships, some formal and some informal. The durable power of attorney is an example of a formal agency. Handling the household finances by default is an example of an informal agency. In each case, the agent is a fiduciary with a duty to act solely in the interest of the principal. In *Cleary*, the self-dealing nephew was both his aunt's agent under a formal durable power of attorney and the handler of her finances.<sup>115</sup> Either agency standing alone would have been sufficient to shift the burden of proof to him as to the fairness of the self-dealing transaction.<sup>116</sup>

Let us assume, for the sake of argument, a husband is not a common law agent of his wife, and never has been. The husband abusively procures from his wife, either by gift or incident to a contract, \$1 million dollars of her own funds. In this situation, is there really any need to create any new paradigms? The confidential relationship is a pre-existing legal/equitable relationship that

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112. *Id.* at 958.

113. *Id.* at 960 ("Once a fiduciary relationship is established, however, the fiduciary who benefits in that relationship must show that he has fulfilled his duty.")

114. Rounds, *supra* note 13, at 796–97 (discussing the remedies available to a principal in equity).

115. *Cleary*, 692 N.E.2d at 956–57.

116. *See id.* at 960.

is somewhat more amorphous than the classic agency, to be sure, but still a relationship that is not without a full set of teeth.

A husband and wife would be in a confidential relationship if the husband had gained the confidence of the wife in financial matters, provided there is reliance on the part of the wife. The *Restatement of Property* then would create a presumption of undue influence, the effect of which would be “to shift to the proponent,” in this case the husband, “the burden of going forward with the evidence, but not the burden of persuasion” as to the fairness of the self-dealing transaction.<sup>117</sup> In Massachusetts, the “burden of proof” as to fairness would appear to shift only if the husband were also the wife’s agent-fiduciary.<sup>118</sup> In any case, I am merely calling this unsettled corner of the common law to the attention of feminist scholars. Opportunity often lurks in legal confusion.

Even in the absence of reliance, there is always common law fraud, duress, or undue influence, though the initial burden of proof would be on the wife. Again, most of these wheels were invented long ago. It seems one would be hard-pressed to come up with a real-world scenario involving spousal financial abuse that the common law, as enhanced by equity, would not be fully equipped to remedy cost-effectively and efficiently. My hope is that this article prompts a feminist reaction to this assertion, whether favorable or unfavorable, that squarely addresses the core common law doctrine that is threaded throughout this article.

Finally, it has long been settled that a third party who knowingly participates with an agent in a breach of the agent’s fiduciary duty—a bank or an insurance agency, for example—shares liability with the agent for any damage done to the principal’s economic interests.<sup>119</sup> At some point I hope to see a full fleshing out of whether, from the feminist perspective, an innocent participating third party should be made a constructive insurer of the fairness of a self-dealing transaction between an agent and his principal, such as in a case where a wife guarantees her husband’s bank loan.

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117. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. f (2003).

118. See *Cleary*, 692 N.E.2d at 959.

119. See Rounds, *supra* note 13, at 788.

### B. *The Marriage Settlement*

As late as 1935, it was common law in this country that a married woman had no capacity to hold legal title to chattels since they passed to her husband.<sup>120</sup> Of course, married women generally had by then been given capacity to hold and deal with property separate from their husbands by statute.<sup>121</sup> On the other hand, in equity, a married woman had long had the capacity to be the beneficiary of a trust of chattels for her separate use even in the absence of statute.<sup>122</sup> “Although the husband had rights in his wife’s equitable estates similar to those given to him in her legal estates, it was through courts of equity that married women first obtained some amelioration of the harsh rules of the common law.”<sup>123</sup> A trust of interests in land and choses in action could also be created for her separate and exclusive use.<sup>124</sup> In other words, embedded in the common law and enhanced by equity was the principle that though a *feme covert* could not own *legal* property interests, she could, nonetheless, own *equitable* property interests.<sup>125</sup>

The law owes this circumventing of the disabilities of coverture to creative English lawyers and accommodating chancellors. I am referring to the “marriage settlements” alluded to in the beginning pages of Charles Dickens’ *Bleak House*: “The old gentleman is rusty to look at, but is reputed to have made good thrift out of aristocratic marriage settlements and aristocratic wills, and to be very rich. He is surrounded by a mysterious halo of family confidences; of which he is known to be the silent depositary.”<sup>126</sup>

From the latter part of the eighteenth century until the enactment of legislation in the nineteenth century providing that a husband, upon marriage, would no longer automatically acquire an interest in his wife’s property, it was common practice in Eng-

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120. RESTATEMENT (FIRST) OF TRUSTS § 118 cmt. a (1935).

121. JESSE DUKEMINIER ET AL., PROPERTY 312 (6th ed. 2006).

122. RESTATEMENT (FIRST) OF TRUSTS § 118 cmt. a (1935).

123. CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 47 (2d ed. 1988).

124. RESTATEMENT (FIRST) OF TRUSTS § 118 cmt. a (1935); MOYNIHAN, *supra* note 123, at 47–48.

125. MOYNIHAN, *supra* note 123, at 47–48. At the instant of marriage, a woman became a *feme covert* because she moved under her husband’s protection. DUKEMINIER, *supra* note 121, at 312.

126. CHARLES DICKENS, BLEAK HOUSE, 9–10 (Macmillan & Co. Ltd. 1963) (1853).

land to create a trust upon marriage. “By the marriage settlement the parents or other relatives of the persons who [were] to marry, or those persons themselves, transfer[red] property to trustees in trust for the parties to the marriage and for their prospective issue.”<sup>127</sup> If a settlor had so provided, a wife’s equitable interest under a marriage settlement had the status of separate property.<sup>128</sup> According to Professor Scott, “[t]his was a most remarkable piece of judicial legislation, since it effected a revolution in the economic position of married women by making it possible for a married woman to be economically independent of her husband.”<sup>129</sup> The key: an equitable interest under a trust is as much property as the legal property interests that are the subject of a first-year property course.<sup>130</sup> My point is that today’s feminist scholars and lawyers would do well to take a page from the book of the rusty solicitor who, with minimal fanfare and effort, set about to make mincemeat of the coverture disability.<sup>131</sup> Equity, in all its richness and power, is very much out there in the real world and is available for exploitation by the knowledgeable and the creative, notwithstanding its banishment from the Ivory Tower.

Before moving on to *Sullivan v. Burkin*, I will make one other point that is technical and, to some extent, pedagogical. There exists, in some quarters, an earnest effort to carve out a discrete body of law that is dedicated to the fiduciary principle.<sup>132</sup> The impetus for this effort is, in part, the tendency of modern courts to blur the fiduciary and confidential relationships, a topic I have already discussed.<sup>133</sup> I suggest that from the feminist perspective any scholarly stab at bringing conceptual order out of this chaos

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127. THE LAW OF TRUSTS, *supra* note 22, § 17.

128. *See id.* § 146.1.

129. *Id.* § 17.

130. It is unfortunate that Property casebooks today give short shrift to the equitable property interest, particularly as equitable ownership plays such a critical role in today’s global financial system. A share of a trustee mutual fund, for example, is an equitable property interest. Rounds & Dehio, *supra* note 9, at 476. One popular Property casebook I perused devoted only three out of 1,171 pages to the equitable property interest. *See* JOSEPH WILLIAM SINGER, PROPERTY LAW 503–05 (4th ed. 2006).

131. *See supra* note 126 and accompanying text.

132. *See, e.g.*, Frankel, *supra* note 109, at 798 (stating that a major reason for recognizing a separate body of fiduciary law is that society is evolving into one based predominantly on fiduciary relations); Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539, 540–41 (1949) (discussing the basic nature of fiduciary law); Smith, *supra* note 46, at 1400–02 (arguing for a unified theory of fiduciary duties).

133. *See supra* text accompanying notes 82–89.

by forging a unified theory of the fiduciary would be ill-advised if it entails a conceptual decoupling of the fiduciary from the underlying core relationships of agency and trust. The marriage settlement phenomenon illustrates what I mean: yes, the trust is a fiduciary relationship, but it is also a vehicle for transforming legal property interests into equitable property interests. It was the property aspects of the trust relationship—namely that legal title to the subject property is in the trustee but the economic interest is in the beneficiary—working in tandem with the fiduciary principle that enabled the rusty solicitor to subvert the coverture disability.<sup>134</sup> The fiduciary principle alone would not have done the trick. Agency, contracts, trusts, and property are mere facets of one gem known as the common law. Each should not be looked at in isolation. Law school curriculum committees should take note.

### C. *Sullivan v. Burkin*

When it comes to enhancing the empowerment and protection of women, one would be hard-pressed to come up with a more audacious example of judicial legislation than the 1984 Massachusetts equity case of *Sullivan v. Burkin*, which prospectively circumvented the limitations of a classic post-mortem spousal election statute.<sup>135</sup> Equity certainly outdid itself in that case. As the marriage settlement phenomenon was equity's response to the disabilities of coverture that had been imposed on married women by the common law, *Sullivan v. Burkin* was equity's response to the legal limitations of the spousal election statute, a legal regime that had eclipsed the ancient English common law regime of dower.<sup>136</sup>

Thus I begin the analysis of the case with English dower, an ancient inter vivos legal property right in the nature of an inter vivos protective cloud on land title.<sup>137</sup> That right was known as inchoate dower.<sup>138</sup> "No conveyance by the husband, even to a bona fide purchaser for value, would be effective to defeat the wife's

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134. See *supra* note 126 and accompanying text.

135. 460 N.E.2d 572, 577 (Mass. 1984).

136. See Kenneth Rampino, Note, *Spousal Disinheritance in Rhode Island: Barrett v. Barrett and the (De)evolution of the Elective Share Law*, 12 ROGER WILLIAMS U. L. REV. 420, 431–32 (2007).

137. See DUKEMINIER, *supra* note 121, at 335–36.

138. MOYNIHAN, *supra* note 123, at 50.

right to dower, nor could creditors of the husband impair her right.”<sup>139</sup> Post-mortem, it afforded married women certain protections: “[t]he law gave dower to a surviving wife in all *freehold land of which her husband was seised during marriage and that was inheritable by the issue of husband and wife*.”<sup>140</sup> Common law dower generally prevailed not only in England but also in her colonies, including Massachusetts, at least as early as 1647.<sup>141</sup>

Immediately after the American Revolution, the Commonwealth of Massachusetts enacted a gender-neutral spousal election statute that allowed the surviving spouse, in lieu of taking by will, to opt for a partial life estate in all properties, real and personal, which the deceased spouse had owned at the time of his or her death.<sup>142</sup> Thus, the reach of the statute could be avoided by an inter vivos transfer of property to a third person, including a trustee.

By 1944, it had become settled law in Massachusetts that one could create a valid inter vivos trust even though one had reserved a right to revoke it and take back the subject property free of trust.<sup>143</sup> Not only had equity created a will substitute, it had also created a vehicle for circumventing the Massachusetts spousal election statute. Because the trustee took the legal title, technically anything in the trust at the settlor’s death was not owned by the settlor and thus was beyond the reach of the statute.

Fast-forwarding to 1984, the Massachusetts Supreme Judicial Court in *Sullivan v. Burkin*, for all intents and purposes, equitably rewrote the statute to encompass not only probate property but also property held in revocable inter vivos trusts.<sup>144</sup> “It is neither equitable nor logical,” reasoned the court, “to extend to a divorced spouse greater rights in the assets of an inter vivos trust created and controlled by the other spouse than are extended to a spouse who remains married until the death of his or her

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139. *Id.*

140. DUKEMINIER, *supra* note 121, at 335.

141. See THE BOOK OF THE GENERAL LAWS AND LIBERTIES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS 17 (Thomas G. Barnes ed., Castle Press 1975) (1648). See generally Kathleen M. O’Connor, Note, *Marital Property Reform in Massachusetts: A Choice for the New Millennium*, 34 NEW ENG. L. REV. 261, 272–76 (1999) (discussing the historical common law property concept of dower).

142. The modern version is codified at MASS. ANN. LAWS ch. 191, § 15 (LexisNexis 1994). The original law was codified at MASS. GEN. LAWS ch. 24, § 8 (1783).

143. See *Nat’l Shawmut Bank v. Joy*, 53 N.E.2d 113, 123–24 (Mass. 1944).

144. See *Sullivan v. Burkin*, 460 N.E.2d 572, 577 (Mass. 1984).

spouse.”<sup>145</sup> What must have been galling to the widowed and impoverished plaintiff, however, was that the rewrite was not made retroactive.<sup>146</sup> The court went on to invite the Massachusetts legislature to bring law and equity into conformance by appropriately amending the election statute.<sup>147</sup>

Now the feminist scholar may say that this is all well and good, but resorting to equity can only be a stopgap solution in a given situation. Equity is too ad hoc, too untidy. There is no substitute, the feminist scholar would argue, for all-inclusive legislation and state regulation when it comes to empowering and protecting women. But to this day, the Massachusetts legislature has been unable to figure out how to amend its spousal election statute to conform to the spirit of *Sullivan*. More than twenty-five years have passed, numerous study committees have convened and disbanded, and still the statute remains on the books pretty much in its original form as enacted in 1783.<sup>148</sup> Equity may not be a tidy creature, but it is quick and agile, and it does have teeth. Post-modern feminist scholars have yet to scratch the surface of equity’s myriad possibilities.

#### VIII. REINVENTING THE FIDUCIARY WHEEL IN THE CAUSE OF FEMINISM

Professor Dalton’s *Essay in the Deconstruction of Contract Doctrine* purports to “give an account of selected portions of contract doctrine and the themes and problems that permeate them,” and to “demonstrate how our preoccupation with questions of power and knowledge is mirrored in doctrinal structures that depend on the dualities of public and private, objective and subjective, form and substance.”<sup>149</sup> She “suggest[s] that it is these problems of power and knowledge, these doctrinal structures, which contri-

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145. *Id.*

146. *Id.* at 574.

147. *See id.* at 578.

148. *See generally* O’Connor, *supra* note 141, at 261, 268–71 (analyzing “the options available to Massachusetts as it responds to the Supreme Judicial Court’s call to the legislature, following its decision in *Sullivan v. Burkin* to reform the elective share statute in Massachusetts,” and describing the subsequent unsuccessful efforts of various interest groups to get the legislature to actually enact elective share reform legislation (citations omitted)).

149. Dalton, *supra* note 3, at 1000.

bute to the inconsistency and substantial indeterminacy of contract doctrine.”<sup>150</sup>

Well, perhaps. But what about the intersection of equity’s fiduciary principle with contract doctrine? After all, the fiduciary principle is a quasi-public, quasi-private doctrine that elevates the subjective over the objective and substance over form, a doctrine whose very purpose is to address the “power and knowledge” imbalance that can infect certain human relationships. Where does that fit into the feminist’s scheme of things? Perhaps it does not, or should not. But Professor Dalton assiduously avoids venturing across equity’s fertile plains or through its gradual mountain passes, opting rather to scale the jagged mountains of the law head on, one after the other. An opportunity was missed to get the benefit of at least one respected feminist’s perspective on the intersection of fiduciary and contract doctrine. That is not to say that Professor Dalton does not tiptoe up to the boundaries of the mysterious land of the fiduciary. But somehow she cannot bring herself to cross into it. She finds the legal doctrines of implied contract, duress, and unconscionability wanting as instruments for empowering and protecting women.<sup>151</sup> But what else is new? It has been ever thus. To mitigate such inflexibilities in the law was why equity was invented centuries ago.

I start with the quasi-contract. “A quasi contractual obligation is one that is created by the law for reasons of justice, without any expression of assent and sometimes even against a clear expression of dissent.”<sup>152</sup> Thus, if “A finds B’s house afire and his cattle starving and renders service and incurs expense in saving and feeding them,” B may be “under a quasi contractual duty of reimbursement.”<sup>153</sup> A quasi-contract is an equitable relationship analog, not a real equitable relationship. By “equitable relationship analog,” I mean that “[t]he exact terms of the promise that is ‘implied’ must frequently be determined by what equity and morality appear to require after the parties have come into conflict.”<sup>154</sup> Thus, it should come as no surprise that a quasi-contractual relationship that is not also a fiduciary relationship

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150. *Id.*

151. *See id.* at 1038–39.

152. ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 19, at 27 (One Vol. ed. 1952).

153. *Id.* § 19, at 29.

154. *Id.* § 19, at 27–28.

has profound limitations when it comes to the empowerment and protection of women:

A court can find or not find a “real” contract. It can decide that enforcement of a real contract is or is not appropriate. It can decide that while real contracts should be enforced, there is no basis for awarding quasi-contractual relief in the absence of an expressed intention to be bound. It can decide that even in the absence of real contract, the restitutionary claim of the plaintiff represents a compelling basis for quasi-contractual relief.<sup>155</sup>

A contract between parties to a fiduciary relationship, however, must be subjectively and scrupulously fair to the vulnerable party—the one to whom the fiduciary owes the affirmative duty of undivided loyalty.<sup>156</sup> It is a facts and circumstances test. The same generally goes for the parties to a confidential relationship.<sup>157</sup> Furthermore, when it comes to empowering and protecting women, equity’s tent is much larger than the law’s tent in that equity’s fiduciary principle encompasses donative transfers as well as express or implied exchanges of consideration.

To be sure, the legal doctrines of duress<sup>158</sup> and unconscionability<sup>159</sup> in the contract context have an equitable flavor to them in

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155. Dalton, *supra* note 3, at 1100.

156. RESTATEMENT (SECOND) OF CONTRACTS § 173 (1981) (“If a fiduciary makes a contract with his beneficiary relating to matters within the scope of the fiduciary relation, the contract is voidable by the beneficiary, unless (a) it is on fair terms, and (b) all parties beneficially interested manifest assent with full understanding of their legal rights and of all relevant facts that the fiduciary knows or should know.”); *cf.* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. g (2003) (discussing three types of confidential relationships that give rise to a presumption of undue influence—fiduciary, reliant, and dominant-subservient relationships).

157. *See* RESTATEMENT (SECOND) OF CONTRACTS § 161 (1981) (“A person’s non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist . . . (d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.”); *id.* § 169 cmt. c (“In some situations a relationship of trust and confidence between the parties justifies the reliance of one or the other’s opinion.”).

158. RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981) (“If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”).

159. *Id.* § 208. (“If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”) The equitable flavor of the unconscionability doctrine comes through loud and clear in comment d to section 208:

But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.

that they involve questions of power and fairness:

In order to constitute duress, the improper threat must induce the making of the contract. . . . The test is subjective and the question is, did the threat actually induce assent on the part of the person claiming to be the victim of duress. Threats that would suffice to induce assent by one person may not suffice to induce assent by another. All attendant circumstances must be considered, including such matters as the age, background and relationship of the parties. Persons of a weak or cowardly nature are the very ones that need protection; the courageous can usually protect themselves. Timid and inexperienced persons are particularly subject to threats, and it does not lie in the mouths of the unscrupulous to excuse their imposition on such persons on the ground of their victims' infirmities.<sup>160</sup>

In the words of Professor Dalton, the two doctrines “wrestle with both the difficulty of ascertaining subjective intent, and the conflict among policy commitments to subjective and objective value, individualism and altruism.”<sup>161</sup> Still, she finds that these doctrines “identify the only recognized deviations from the supposedly standard case of equal contracting partners.”<sup>162</sup> Again, I respectfully disagree. There is a vast and rich body of law dealing not only with the exchange of consideration between parties to fiduciary or confidential relationships, but also with gifting in the fiduciary and confidential contexts. Courts of equity have been wrestling with questions of power and fairness since time immemorial. Professor Dalton stops just short of advocating that the legal doctrines of duress and unconscionability be retrofitted into fiduciary analogs, being more or less satisfied to just call attention to contract law’s limitations when it comes to facilitating the empowerment and protection of women.

Professor Ertman, in *Legal Tenderness: Feminist Perspectives on Contract Law*, also skirts the vast body of law that deals with contracts between the parties to a fiduciary or confidential relationship: All this low-hanging fruit is just waiting to be plucked. Professor Ertman employs the term “agency,” but in a different sense from the way I employ it in this article. In *Legal Tenderness*, “agency” connotes the freedom to order one’s affairs contractually and otherwise.<sup>163</sup> Yet, as I have already noted, in a common

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*Id.* § 208 cmt. d.

160. RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. c (1981).

161. Dalton, *supra* note 3, at 1032.

162. *Id.* at 1107.

163. See Ertman, *supra* note 1, at 546 (defining capacity to contract, or to freely order

law agency relationship, which conceptually is on the other side of the relational scale, the agent is quite constrained as to matters within the scope of the agency. A common law agent has a duty to act solely in the interest of the principal—the vulnerable party, the one who aspires to a state of legal autonomy.<sup>164</sup>

Professor Ertman, reviewing Linda Mulcahy and Sally Wheeler's book, *Feminist Perspectives on Contract Law*,<sup>165</sup> explores “[t]o what extent do and should wives, women, and feminine persons generally receive ‘tender’ treatment by contract law.”<sup>166</sup> In the process of so doing, however, she appears to ignore a vast amount of basic common law doctrine, namely that equity's fiduciary principle long ago sanded down contract law's rough edges in a number of situations that are of concern to feminists, such as when there is an imbalance of bargaining power between a man and a woman, or when one party has a monopoly on access to critical information. What follows are examples of some of the wheel re-inventing that I, rightly or wrongly, perceive in the article and in feminist scholarship generally.

In both *Legal Tenderness* and *Feminist Perspectives*, there is much discussion of the British spousal-guarantee contract cases, which implicate the so-called “‘special tenderness’ doctrine toward married women and other cohabitants in noncommercial guarantee cases.”<sup>167</sup> In essence, a British bank that seeks a wife's guarantee of her husband's contractual obligation to the bank needs to satisfy itself that the husband is not exercising undue influence over the wife.<sup>168</sup> Professor Ertman suggests that “[t]he spousal-guarantee cases are particularly suited for classroom discussion because classical contract theory cannot quite resolve the issues they raise.”<sup>169</sup> I disagree. There is a vast body of “classic” contract law that addresses contracts between parties to a fiduciary or confidential relationship. The problem is not the law, but legal

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one's affairs, as being composed of consent and agency).

164. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006); see *id.* §§ 8.02–8.06 (2006) (illustrating how the general fiduciary principle would apply in certain situations).

165. FEMINIST PERSPECTIVES ON CONTRACT LAW (Linda Mulcahy & Sally Wheeler eds., 2005).

166. Ertman, *supra* note 1, at 551.

167. See *id.* at 548; Adam Geary, *Women Lie Back Everywhere: The Symbolic Economy of Restitution*, in FEMINIST PERSPECTIVES ON CONTRACT LAW, *supra* note 165, at 91, 97–105.

168. Ertman, *supra* note 1, at 548.

169. *Id.*

education. In the 1952 one-volume edition of *Corbin on Contracts*, there was no coverage whatsoever of such contracts,<sup>170</sup> but that was understandable and excusable. At that time, Agency and Trusts were discrete required courses in most law schools.<sup>171</sup> This is no longer the case.<sup>172</sup> And yet, the 2008 edition of one contracts casebook devotes just two pages (out of 1062) to contracts that are affected by a relationship of trust or confidence.<sup>173</sup>

There is also a vast body of pre-existing common law imposing liability on a third party who knowingly participates in a breach of fiduciary duty.<sup>174</sup> Thus, if a bank knows, or should know, that a husband is exercising undue influence on his wife to guarantee a loan that the bank intends to make to the husband and the husband is an agent of his wife pursuant to a durable power of attorney, then the bank would be liable in equity for the consequences of that participation. To be sure, if the husband's equitable relationship with his wife is merely one of confidence, then under the current state of the law, the bank's liability is more problematic because of the subjective reliance requirement. It would seem that feminist scholars could be getting more mileage for their efforts if they operated within the context of pre-existing law. They might, for example, explore the feasibility of getting the courts to impose on commercial lenders equitable liability for innocently participating in spousal breaches of fiduciary duty or confidence. Perhaps the spousal relationship should be deemed per se a fiduciary or confidential one, at least in the commercial context.

In any case, I respectfully suggest that feminist scholars first should be exploiting such pre-existing legal and equitable ambiguities, plucking the low-hanging fruit as it were, before injecting some unwieldy civil law analog into the law of a common law jurisdiction by statute, as was done in Wisconsin on January 1, 1986 with the Wisconsin Marital Property Act.<sup>175</sup> The Massachu-

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170. See generally CORBIN, *supra* note 152.

171. See *supra* note 108 and accompanying text.

172. See *id.*

173. See JAMES F. HOGG ET AL., CONTRACTS: CASES AND THEORY OF CONTRACTUAL OBLIGATION 627-29 (2008).

174. See RESTATEMENT (SECOND) OF TORTS § 875 (1979) (providing that two or more people engaged in tortious conduct are each subject to liability for the entire harm); RESTATEMENT (SECOND) OF TRUSTS § 326 (1959) (aiding and abetting a trustee in a breach of fiduciary duty); see also SCOTT AND ASCHER ON TRUSTS, *supra* note 26, § 30.6.5; 4 THE LAW OF TRUSTS, *supra* note 22, § 326.

175. WIS. STAT. ANN. § 766.01(5)(c) (West 2001).

setts legislature may well be waiting to see how the Wisconsin experiment plays out before embarking on a wholesale codification of *Sullivan v. Burkin*:

What is surprising, however, is that having had the advantage of years of case law from the other jurisdictions, the [Wisconsin] legislature did not explicitly codify rules governing some major aspects of community property law. If the legislature chose to have the courts further define the law, it may now be disappointed by the lack of development in some areas. More than two decades later, key areas of Wisconsin's marital property law remain substantially undeveloped.<sup>176</sup>

I challenge feminist scholars to explain the extent to which relational contract theory, which “critiques classical contract law for its failure to account for the lack of real agreement in contracts where terms appear in pre-printed forms and bargaining power is sufficiently unbalanced so that only one party has the power to determine those terms,”<sup>177</sup> is not subsumed in the classic fiduciary principle as reinforced by the classic confidential relationship or why the concept of “special tenderness” is not, for all intents and purposes, a fiduciary analog.

In the conclusion to *Legal Tenderness*, Professor Ertman asserts that “[f]eminism and contract have more in common than many people think.”<sup>178</sup> I would be more emphatic: contract law, as it has been tamed by the fiduciary principle, may well be a wheel that needs no reinventing when it comes to the empowerment and protection of women. Long ago the courts staked out a sensible middle ground between full autonomy and protective incarceration, somewhere in the vast expanse of the common law. Those stakes are out there still.

## IX. CONCLUSION

The contract is not the only private consensual legal relationship woven into the fabric of the common law. There are also the agency and the trust, the two robust and powerful core fiduciary relationships, the former being equity-based and the latter being

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176. David R. Knauss, Comment, *What Part of Yours Is Mine?: The Creation of a Marital Property Ownership Interest by Improving Nonmarital Property Under Wisconsin's Marital Property Law*, 2005 WIS. L. REV. 855, 860.

177. Ertman, *supra* note 1, at 549.

178. *Id.* at 570.

an actual creature of equity. Reading *Legal Tenderness* and *Deconstruction of Contract Doctrine*, I came away with the sense that the development of the property branch of feminist scholarship is being stifled by the false contextual assumption that there are really only two general ways of empowering and protecting women economically—the private contract or the state regulation. In this article I have endeavored to make the case that the private side of the ledger, the common law side, has been chronically under-examined by feminist scholars, particularly as a vehicle for empowering and protecting women economically. I suggest that the laws of agency and trust, as enhanced by equity and reinforced by the traditional cohort of confidential relationships, are fertile ground just waiting to be cultivated by creative feminist scholars.

The blame for this underutilization of the pre-existing legal landscape I lay squarely at the doorstep of the American law school, whose core curriculum is now structured around the simplistic and one-dimensional private contract versus state regulation narrative. Most feminist scholars appear to have bought into this narrative. This, in turn, has engendered some earnest but unfortunate reinventing of the wheel. By that I mean that what is actually being advocated in some quarters is the tweaking of certain contractual relationships into what are really fiduciary analogs. But why select an analog when the real thing is on the shelf within arm's reach and has been so for hundreds of years?