CONTESTING PUBLIC SERVICE FIDUCIARY ACCOUNTABILITY

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I INTRODUCTION

Every public service function attracts fiduciary accountability. The public/private distinction does not imply any variation in the application of the conventional proscription on opportunism. I have explained that elsewhere.[1] Here I situate my analysis by contrasting the views that other writers recently have advanced.[2] The approach usually employed by those commentators is to consider whether it is tenable or useful to extend 'private' fiduciary accountability to the 'public' sphere. The difficulty with several of the contributions is that they assert distorted conceptions of the conventional regulation. I will explain the main analytical departures in each case. I conclude that none of the contributions transcends the conventional formulation.

II REGULATING OPPORTUNISM

Undertaking to act in the interest of another invariably involves gaining access to the value of the assets (e.g. equipment, information, authority) that are directly or incidentally associated with performance. There is a significant risk that the acquired access will be exploited for personal ends. Recognizing that latent mischief, we (the community) impose a default proscription on unauthorized conflicts and benefits. We label that proscription fiduciary duty. That regulation is functionally distinct from the nominate regulation that simultaneously is triggered by the animating undertaking. Thus, as one example, a trustee has a nominate duty to act in the best interest of a beneficiary pursuant to the terms of the particular trust, and a separate parallel duty to avoid unauthorized conflicts or benefits that may surface in the course of performance.

No aspect of the justification for fiduciary accountability is altered because an undertaking has a public dimension. Communities are coalitions of individuals unified by constitutions that usually specify mechanisms for direct democracy (citizen votes) or indirect democracy (legislatures), or both. Each mechanism involves designated persons assuming the function of determining (or implementing) the will of the community. Defining the will of the community manifestly is an other-regarding function. That function would be compromised by personal conflicts or benefits. We therefore impose fiduciary accountability. In principle that regulation applies to all persons who perform public functions, including voters, legislators, political parties and public employees.[3]

Because the mischief of opportunism does not transform across the indistinct border between public and private, the conventional accountability applies seamlessly. Other writers addressing the matter, however, do not find it that straightforward. I

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1 Robert Flannigan, 'Fiduciary Accountability for Public Service Opportunism (forthcoming).

2 I confine my analysis to the literature. In an earlier article I reviewed the law of the English Commonwealth. See Robert Flannigan, 'Fiduciary Control of Political Corruption' (2002) 26 *Advocates' Quarterly* 252.

3 While the access of each may vary in accordance with their role and their particular engagement, their access uniformly is limited to serving the community. See generally Flannigan, above n 1.

select a number of their analyses to illustrate the differences. First however it is necessary briefly to identify a few works that have informed the recent scholarship.

III THE PRIOR LITERATURE

Writing in 1690, John Locke built on a developing consensus that the function of civil government was to pursue the good of the community, and that representatives serve exclusively to advance that function.[4] He used the term 'fiduciary power' in describing the authority of a legislature:

> Though in a constituted commonwealth, standing upon its own basis, and acting according to its own nature, that is, acting for the preservation of the community, there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative when they find the legislative act contrary to the trust reposed in them; for all power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it who may place it anew where they shall think best for their safety and security. And thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of any body, even of their legislators whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject.[5]

According to Locke the legislature acquires access to its authority 'for the preservation of the community'. It therefore is in a limited access arrangement with the people, its authority being 'given with trust for the attaining an end, being limited by that end'. It was confusing however for Locke to describe the authority of the legislature as 'only a fiduciary power to act for certain ends'. The legislature has a *nominate* (legislator) duty to act in the best interest of the community and a parallel *fiduciary* duty to do so without personal conflicts or benefits (on the part of itself or its members). Locke appears to conflate those duties. Consider a state power to expropriate property. That authority is constrained by both nominate and fiduciary regulation. The nominate regulation may include requirements of public necessity and due compensation. The parallel fiduciary regulation is that the nominate function of expropriating property for public necessity must not be compromised by unauthorized conflicts or benefits (e.g. instituting an expropriation to favour a nearby government (or party) project). Those are different *kinds* of regulation, and need to be distinguished from each other.[6] It must

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4 John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government* (reprinted in *Of Civil Government: Second Essay*) (1947) §123.

5 Ibid §149. See also the observations of Locke at §87.

6 The conflation of nominate and fiduciary accountability usually proceeds as a conceptual transformation of nominate regulation into 'fiduciary' regulation. Those who conflate tend to see the nominate legal idiosyncrasy of the relation as idiosyncratic fiduciary accountability. They conclude that aspects of nominate performance are fiduciary duties, or even *the* fiduciary duty (e.g. the duty to exercise a discretion). Because they conclude that idiosyncrasy, and context generally, ought to matter, they may decry or ignore the strict character of the conventional regulation. Consider parenthetically that the strict character of the accountability differs significantly from other forms of accountability. See Robert Flannigan, 'The Strict Character of Fiduciary Liability' [2006] *New Zealand Law Review* 209. Motive, in particular, is not relevant.

be understood that public servants have nominate duties and fiduciary duties, and they may breach one without breaching the other.

Moving forward to the twentieth century, five commentaries deserve mention. The first is the 1950 book of essays by John Gough on Locke's political philosophy,[7] particularly his essay on political trusteeship,[8] where (referencing Maitland) he described the political trust as 'only metaphorically a trust'.[9] The second is the 1975 article by Mabry Rogers and Stephen Young, who concluded that fiduciary accountability regulates the self-dealing of public servants, including members of the legislature and the executive.[10] The third, fourth, and fifth pieces are 1992,[11] 1994[12] and 1995[13] essays by Paul Finn, who takes the same view, rejecting the argument that government trusteeship 'is but a metaphor'.[14] These five contributions are significant in that, in addition to being themselves modern treatments, the recent scholarship draws on them to support arguments. I now turn to the scholarship of the twenty-first century.

Contrast the eccentric assertion of Lionel Smith that the 'justiciability of motive' is the essence of fiduciary accountability. See Lionel Smith, 'The Motive, Not the Deed', in Getzler (ed), *Rationalizing Property, Equity and Trusts* (2003) ch 4. Then see Robert Flannigan, 'The Core Nature of Fiduciary Accountability' [2009] *New Zealand Law Review* 375, 411-415. Smith also rejects (again eccentrically) the conventional view that fiduciary accountability is designed to *deter* opportunism. See Lionel Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (2013) 7 *Journal of Equity* 87. Smith has the support of a number of flawed arguments in the 2012 doctoral thesis of his then student Remus Valsan. See Remus Valsan, *Understanding Fiduciary Duties: Conflict of Interest and Proper Exercise of Judgment in Private Law*, McGill University, 2012, 2.4.3-2.4.4. Valsan summarized his (and Smith's) arguments in a recent piece (a revised version of his thesis) in which he defends the strict character of fiduciary accountability, but radically (and without plausible justification) proposes extending that strictness to the exercise of discretion generally, rather than just potentially opportunistic exercises of discretion. See Remus Valsan, 'Fiduciary Duties, Conflict of Interest, and Proper Exercise of Judgment' (2016) 62 *McGill Law Journal* 1, 12-13. Valsan asks that we replace the 'dominant' conventional position with his view that the 'core fiduciary duty' is to 'identify and assess relevant considerations in the decision-making process' (at 33-34).

Smith has since contributed to the discussion of the fiduciary accountability of politicians. See Lionel Smith, 'Loyalty and Politics: From Case Law to Statute Law' (2015) 9 *Journal of Equity* 130. He argues (at 131) that there is no evidence that courts in the United Kingdom or Canada are willing to apply fiduciary principles to elected members of 'governments with sovereign powers (as opposed to the delegated powers of municipalities)'. He proceeds to ask whether different principles are applicable to the higher-level legislators. Although his subsequent analysis is problematic in certain respects, he rightly concludes that fiduciary accountability ought to apply to all legislators.

7 J W Gough, *John Locke's Political Philosophy* (1950).

8 The essay originally was published at J W Gough, 'Political Trusteeship' (1939) 4 *Politica* 220.

9 Gough, above n 7, 138, 168.

10 E Mabry Rogers and Stephen Young, 'Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard' (1975) 63 *Georgetown Law Journal* 1025.

11 Paul Finn, 'Integrity in Government' (1992) 3 *Public Law Review* 243.

12 Paul Finn, 'Public Trust and Public Accountability' (1994) 3 *Griffith Law Review* 224.

13 Paul Finn, 'The Forgotten "Trust": The People and the State' in Malcolm Cope (ed), *Equity: Issues and Trends* (1995), ch 5.

14 Ibid 151. The relevance of the metaphor dispute evaporates once it is understood that the mischief is opportunism, that the prospect of opportunism does not vary across nominate categories, and that the regulation properly is generic or constant. It is enough to conclude that institutions and persons that exercise governance authority receive their authority from the people on a limited access basis.

IV NATELSON

Robert Natelson made the common mistake[15] of conflating fiduciary regulation with the nominate regulation that superintends public servants.[16] Apparently believing that there was 'no general fiduciary obligation imposed on elected or higher appointed officials',[17] Natelson insisted that in fact it was feasible to apply 'fiduciary standards to higher government functionaries'.[18] In his view, that feasibility had been demonstrated by the Roman emperor Trajan, who, because he 'labored unceasingly for his people and thought only of their welfare', personified the 'ruler as fiduciary'.[19] The difficulty here is that Natelson has characterized an undertaking to pursue the welfare of others as *the* fiduciary duty, when in conventional terms that *nominate* undertaking simply activates the separate parallel application of fiduciary accountability.[20] Natelson compounded his error when he went on to define the content of his fiduciary duty (using, according to him, 'the term fiduciary in the sense applied to trusts')[21] to include 'four central trust obligations: (1) the duty to follow instructions, (2) the duty of loyalty, (3) the duty of impartiality, and (4) the duty of reasonable care'.[22] The conventional position, properly understood, is that the duty of loyalty alone constitutes fiduciary accountability.[23] The duties to act with authority and care are separate

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15 See Flannigan, above n 2, 253-263. It is today common in legal education for instructors, aided by casebooks and textbooks that frequently contain deficient fiduciary analysis, to inform students that the duty of a fiduciary is to act in the best interest of the beneficiary. That is seriously misleading. The legal regulation of a particular nominate status includes the terms negotiated by the particular parties and any unvaried default terms that may apply to that status. The best interest duty is an element of the applicable idiosyncratic nominate regulation. It is the legal expression of the standard of idiosyncratic performance expected of one who negotiates or assumes to serve another in some respect. Fiduciary accountability, in contrast, does not seek to define the general contours of what constitutes affirmative performance. Rather, it is a narrow default regulation designed to deter the opportunism that is latent in every limited access arrangement. Appreciate generally that 'fiduciaries' are a *class* of actor only in the standard sense that contracting parties or tortfeasors are a class. In each case the actor (fiduciary, contracting party, tortfeasor) is within the class because they are subject to specified forms of regulation (fiduciary law, contract law, tort law). Thus 'trustees' are regulated by trust law and concurrently by fiduciary law, contract law, and tort law. It is in that sense that we may properly refer to a person as a 'fiduciary'. In many instances persons are best described by their nominate status (as trustee, agent, director) as that will identify the default idiosyncratic regulation (trust law, agency law, corporate law) that governs their performance. It will only be analytically useful to identify a person as a fiduciary where the purpose for the identification, or the issue or discussion, involves the legal regulation of the opportunism mischief.

16 Robert Natelson, 'The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan' (2001) 35 *University of Richmond Law Review* 191.

17 Ibid 193. That broad unqualified statement plainly is inaccurate. The more careful proposition would have been that the jurisprudence is in some respects undeveloped.

18 Ibid 194.

19 Ibid 205.

20 See generally Robert Flannigan, 'The Core Nature of Fiduciary Accountability' [2009] *New Zealand Law Review* 375.

21 Natelson, above n 16, 211.

22 Ibid.

23 Natelson recognized that conventional position in one of his earlier articles. See Robert Natelson, 'Keeping Faith: Fiduciary Obligations in Property Owners Associations' (1986) 11 *Vermont Law Review* 421, 422, fn 3: Fiduciary duties 'are limited to the duty of loyalty and the responsibilities fairly inferable from the duty of loyalty […]. However, it is quite common to add the duties of reasonable care and good faith to the list of 'fiduciary' duties'.

obligations of general legal application that address distinct mischiefs.[24] The duty of impartiality is also a distinct principle that has general application to other-regarding undertakings that involve multiple beneficiaries.[25]

Natelson sought to reinforce his analysis in a 2004 article.[26] He first compiled several historical quotes that describe government officials (including representatives and executive officers) as 'trustees' (or bound by a trust),[27] or (less commonly) as guardians, agents or servants.[28] His view was that such terminology was 'fiduciary language'.[29] He clearly equated 'trustee' status with fiduciary status. Again that was to conflate the distinct nominate and fiduciary duties that simultaneously arise when a person enters into a limited access arrangement. He went on to expand the content of his duty by adding a 'duty to account' as a fifth fiduciary standard 'potentially relevant

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[24] It is not clear why some continue to insist on a 'care' element for 'fiduciary' accountability, other than perhaps because, though mistaken, it is a *sunk* intellectual position from which retreat might be difficult or awkward (involving for example the restatement of important parts of the American jurisprudence). There has been no credible justification for the 'fiduciary' labelling of the two obviously distinct mischiefs (negligence and opportunism). Compare Christopher Bruner, 'Is the Corporate Director's Duty of Care a "Fiduciary" Duty? Does it Matter?' (2013) 48 *Wake Forest Law Review* 1027; Julian Velasco, 'A Defense of the Corporate Law Duty of Care' (2015) 40 *Journal of Corporation Law* 647. I have elsewhere explained that the actions of fiduciaries most commonly are subjected to claims of a want of authority, care, or loyalty. See Robert Flannigan, 'The Judicial Disqualification of Solicitors with Client Conflicts' (2014) 130 *Law Quarterly Review* 498, 498-501. If those mischiefs are not present, there is little left in terms of objectionable conduct. The nominate duty of a trustee to act in the best interest of a beneficiary, for example, will be largely offset by the established principle that judges will not second guess trustee decisions properly authorized and not tainted by negligence or opportunism. See *Brophy v Bellamy* (1873) LR 8 Ch App 798; *Gisborne v Gisborne* (1877) 2 AC 300; *Tempest v Lord Camoys* (1882) 21 Ch D 571 (CA); *Edge v Pensions Ombudsman* [2000] Ch 602 (CA). Commentators list other duties, but often those additional duties are just further manifestations of authorization, care, or loyalty. Some other duties however may have a residual independent operation, for example, duties to engage only relevant considerations and not act capriciously (irrationally, perversely). That is, it is conceivable that a fiduciary may make a decision with authority, carefully, and loyally, yet the decision might still be defective in some other way. Those circumstances do not involve 'fiduciary' accountability.

[25] Decades ago I made the same mistake of characterizing impartiality as an element of fiduciary accountability. See Robert Flannigan, 'The Fiduciary Obligation' (1989) 9 *Oxford Journal of Legal Studies* 285. I corrected myself at Robert Flannigan, 'The Boundaries of Fiduciary Accountability' (2004) 83 *Canadian Bar Review* 35, 40, fn 8. Partiality is not to be automatically equated with opportunism. There are many circumstances where it is the specific purpose of an other-regarding undertaking to be 'partial' in the general sense of that term. A guardian of two children for example, may be authorized to advance one child over another in different respects given their needs and prospects. Or directors may pay different dividends on different classes of shares. Partiality, unlike self-dealing, is not objectionable *per se*. It is only objectionable if potentially opportunistic (that is, where there are unauthorized conflicts or benefits).

[26] Robert Natelson, 'The Constitution and the Public Trust' (2004) 52 *Buffalo Law Review* 1077.

[27] As noted in Flannigan, above n 1, a trust characterization of the creation of the state has nominate substance. The founders of a community (the trust settlors) craft a constitution (the trust deed) that delegates authority (settles a trust) to legislative, executive, and judicial bodies (trustees) to apply in the best interest of the community (the beneficiary of the trust).

[28] Natelson, above n 26, 1083-1087. For a conventional analysis it is not necessary to find a particular status (trustee, servant) before concluding that a fiduciary relation exists. It is only necessary to find that the access gained to community assets (authorities, taxes, etc.) was limited or other-regarding.

[29] Ibid 1083. The language is 'fiduciary' in the sense that the identified relations are nominate categories that attract status fiduciary accountability. The labels actually identify the idiosyncrasy of the respective nominate functions.

to government officials'.[30] He appears in that respect to carve out remedial dimensions from the other duties he earlier had identified, fractionating in particular the duty of loyalty.[31]

Those who exercise delegated governance authority essentially serve as servants (elected servants, like corporate directors)[32] to their communities.[33] Their nominate function is to govern in the interest of the people as a unit. That nominate function, because it defines or represents only a limited access to public assets, immediately attracts a distinct singular duty to perform the governance function free of potentially compromising impulses. That fiduciary duty is not concerned *per se* with the merits of the decisions that public servants are authorized to make. It is not concerned with the adjustment or balancing of the conflicting demands of citizens, unless of course the complaint respecting the merits of a decision is grounded in a risk of opportunism on the part of those making the decisions. It is not concerned with a want of authority or care, or other distinct mischief unless, again, the perceived distinct mischief actually is a manifestation of the opportunism mischief.[34]

V FOX-DECENT AND CRIDDLE

Evan Fox-Decent and Evan Criddle have collaborated to produce a 'fiduciary theory' that they believe is broadly applicable to issues of public authority. They started out separately with individual contributions in 2005[35] and 2006,[36] then joined to produce two articles in 2009, arguing respectively that *jus cogens* norms[37] and human rights norms[38] were best understood in terms of their theory.[39] They published two more articles in 2012, applying the theory to public emergencies[40] and interest

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30 Ibid 1088. His view was that there were 'at least' those 'five broad fiduciary obligations'.

31 In 2007 Natelson repeated his characterization and content arguments, and added a sixth duty (the 'duty to exercise personal discretion') to what he regarded as the general content that regulated all fiduciaries. See Robert Natelson, 'Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders' (2007) 11 *Texas Review of Law & Politics* 239, 260. See also Gary Lawson, Guy Seidman, and Robert Natelson, 'The Fiduciary Foundations of Federal Equal Protection' (2014) 94 *Boston University Law Review* 415, 435.

32 See Robert Flannigan, 'The Employee Status of Directors' (2014) 25 *Kings Law Journal* 370.

33 Members of legislatures are properly functionally characterized as employees, rather than agents, because their primary deliberation function does not involve representing or binding their employer (the community as a unit) to third parties. They may incidentally, like other employees, have agency authority. On the comparable deliberation function of directors, see ibid.

34 Actors with a limited access may exceed their authority or neglect to exercise care because of a personal conflict or benefit. In that event there would concurrently be a breach of their fiduciary duty.

35 Evan Fox-Decent, 'The Fiduciary Nature of State Legal Authority' (2005) 31 *Queen's Law Journal* 259.

36 Evan Criddle, 'Fiduciary Foundations of Administrative Law' (2006) 54 *UCLA Law Review* 117.

37 Evan Criddle and Evan Fox-Decent, 'A Fiduciary Theory of Jus Cogens' (2009) 34 *Yale Journal of International Law* 331.

38 Evan Fox-Decent and Evan Criddle, 'The Fiduciary Constitution of Human Rights' (2009) 15 *Legal Theory* 301.

39 See also their conference presentation at Evan Criddle and Evan Fox-Decent, 'New Voices: Rethinking the Sources of International Law' (2009) 103 *American Society of International Law Proceedings* 71.

40 Evan Criddle and Evan Fox-Decent, 'Human Rights, Emergencies, and the Rule of Law' (2012) 34 *Human Rights Quarterly* 39.

balancing in national security law.[41] In the interim, in 2011, Fox-Decent published a book expanding his 2005 analysis.[42] Then later, in 2014, he added another piece addressing the significance of the theory for Joseph Raz's service conception.[43] In 2016, Criddle and Fox-Decent co-authored a book.[44]

A preliminary concern with the Fox-Decent and Criddle analysis is their use of the term 'state'. Although it is not always clear, they appear to use the term to denote an authority unit or figure that is distinct from the people as a polity or governance unit. While that may be a linguistic convenience in casual conversation (and a common lay perception), it obscures the application of fiduciary accountability to political governance. The state or community *is* 'the people'. The state consists of all those who associate together to constitute a social unit of self-governance. The absence of *state* fiduciary accountability hinges on that fact.[45] The people as a governance unit are not fiduciaries to themselves as a social unit (the units are identical in composition and function). Rather, when the people form their community by creating bodies or institutions to perform the governance function, those bodies (and their members, agents and employees) become fiduciaries to the people as a community. The state itself (the people) has no default status fiduciary accountability to anyone. Specifically, it has no fiduciary accountability to individual members of the community, unless it assumes a recognized status (e.g. trustee, partner) or fact-based accountability. The access it has to the assets of residents is not a limited access. The community receives autonomy (and taxes) from its members for *its* purposes. The original individual autonomy of citizens, which becomes the collective autonomy of the community, is then delegated to the bodies that the community creates to perform its own work of governing itself. Thus, the state is not a status fiduciary. Rather, the institutions created by the community are fiduciaries *to the community* (to the people).

Turning now to their 'fiduciary theory', it is first necessary to make certain observations about the 2005 article and the 2011 book produced separately by Fox-Decent, as those pieces appear to define the skeletal structure of the theory.[46] As I will

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41 Evan Fox-Decent and Evan Criddle, 'Interest-Balancing vs. Fiduciary Duty: Two Models for National Security Law' (2012) 13 *German Law Journal* 542.

42 Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (2011). See the review of the book by Andrew Gold, 'Reflections on the State as Fiduciary' (2013) 63 *University of Toronto Law Journal* 655. Gold's own understanding of fiduciary accountability is misinformed. He makes (at 655) the unsupported assertion that: 'Fiduciary law offers an incredibly rich set of principles for addressing legal questions'. Fiduciary accountability is a *narrow* accountability applying a *singular* proscription to *one* 'legal question' or mischief (the specific, but widespread, mischief of opportunism). Gold, like Fox-Decent, conflates nominate and fiduciary accountability. He agrees (at 657) with Fox-Decent that private and public law may cross-fertilize each other with useful insights. That wrongly assumes that different considerations initially inform the private and public application of fiduciary accountability. Gold later suggests that the main concern is indeterminacy. He states (at 658) that: 'Duties of loyalty are read differently across the various private law relationships, with varying levels of stringency'. That is incorrect. While there has been some variation across relations, invariably that variation is the result of misinformed analysis. In his conclusion (at 670), Gold declares that: 'The context-sensitivity of fiduciary law is clearly one of its strengths'. That wholly misconceives the nature and operation of fiduciary accountability. Context (whether nominate idiosyncrasy or factual matrix) does not vary the accountability.

43 Evan Fox-Decent, 'The Fiduciary Authority and the Service Conception' in Andrew Gold and Paul Miller (eds), *Philosophical Foundations of Fiduciary Law* (2014) ch 18.

44 Evan Criddle and Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (2016).

45 See Flannigan, above n 1.

46 While Fox-Decent was building his theory, Criddle was 'exploring the thematic and doctrinal parallels between administrative law's regulation of agency discretion and the legal constraints

show, his analysis rests on foundational propositions that are unnecessary or inadequate from a conventional perspective. Further, his view of the content of the duty of the state cannot be supported in conventional terms.

It is a grand role that Fox-Decent assigns to fiduciary accountability in the public context. His view is that it explains both the authority of the state to govern its subjects and the duty of those subjects to obey the law. The conventional role of fiduciary accountability, however, is rather less ambitious. It is designed to address only the risk of opportunism that is latent in limited access arrangements. It is only one of a number of duties that constrain the performance of limited access undertakings (whether private or public). It does not purport to broadly animate our governance. It lacks the functional intent to serve as a theory of the state.

As Fox-Decent explains it, 'the justification for imposing a fiduciary duty relies on the beneficiary having a right to the duty'.[47] He looks to Kant to provide a moral basis for such a right apart from (or in combination with) trust in the state. He accepts the idea of an 'innate' right that belongs to everyone *by nature*. Kant's 'right of humanity' is 'the right to as much freedom as can coexist with the freedom of everyone else'.[48] Fox-Decent purports to build on Kant's analysis of the parent-child relation to develop his 'innate' right:

> The idea that the fiduciary principle entrusts the state with legal powers on behalf of the legal subject is only supported by the prospect that automatic and unconscious trust in the state may be imputed to its members. The existence of such trust provides a further and direct moral reason to suppose

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on fiduciaries in private legal relations such as trust, agency, partnership, guardianship, and corporation'. See Criddle, above n 36, 120. He thought the 'metaphorical fiduciary foundations' of administrative law were more than mere rhetoric. His argument (at 121) was that a 'fiduciary model of entrustment, residual control, and fiduciary duty offers a lucid lens for examining the role of agency discretion in contemporary administrative law because it deftly interweaves the law's disparate thematic strands — delegation, discretion, fidelity, rationality, impartiality, and accountability — into a coherent and intelligible whole'. He concluded (at 183) that 'the fiduciary model does not pin its hopes for agency fidelity on any single facet of the law, whether it be expertise, legislative delegation, executive control, interest representation, or procedural rationality'. Rather, as he saw it, 'the fiduciary model incorporates each and every one of these elements as mutually reinforcing supports in the administrative state's open-textured legal architecture'. I will not here critique the coherence of this initial contribution from Criddle other than to say that he departed from the conventional position by conflating nominate and fiduciary regulation (as well as loyalty and care), as the forgoing quoted material indicates. Criddle subsequently applied his 'fiduciary model' to the issue of popular representation in administrative agencies. See Evan Criddle, 'Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking' (2010) 88 *Texas Law Review* 441. His dilated claim (at 448) is that the adoption of a fiduciary model of popular representation would require that administrative agencies 'exercise their rulemaking powers in a manner that satisfies six core principles: purposefulness, integrity, solicitude, fairness, reasonableness, and transparency'. He stated that those principles 'obligate federal agencies to act deliberately (not reflexively) and deliberatively (not arbitrarily or unilaterally) when considering potential rulemaking actions, taking appropriate care to investigate reasonable alternatives and to provide rational explanations for their decisions on the public record'. He later stated (at 488) that those 'principles of fiduciary representation circumscribe the outer limits of administrative discretion in agency rulemaking, underscoring the fiduciary responsibilities that the public entrusts to their elected and appointed representatives throughout the administrative state'. That analysis, purporting to specify fiduciary content, is whimsical invention. See also Evan Criddle, 'A Sacred Trust of Civilization' in Andrew Gold and Paul Miller (eds), *Philosophical Foundations of Fiduciary Law* (2014) ch 20.

47 Fox-Decent, above n 35, 276.

48 Ibid 277.

> that the fiduciary principle must operate as a control on entrusted power. However, for clarity, I think that ultimately the legal obligation-generating work must be done by a fiduciary principle informed by Kant's idea of our innate right of humanity. In some cases the state may exercise power over people who do not belong to the state and who may previously have been wholly unconnected with it (for example, decisions on who is to be allowed to become a citizen and decisions to go to war). In these circumstances it strains even the concept of automatic trust to say that the people affected have a sense of trust in the relevant state. Nonetheless, I would contend that such exercises of state power are subject to fiduciary constraints that arise from the innate right of humanity of the people touched by that power.[49]

Fox-Decent reproduced his 2005 analysis in his 2011 book.[50] The quoted material above was replaced in part by the following:

> Arguably, our innate right of humanity alone requires the state to act subject to fiduciary constraints regardless of whether we are citizens or strangers. Trust provides an argument for state authority in addition to this Kantian account because, as the case of public trust suggests, the state is required to act on the basis of our trust (and so within fiduciary limits) even if we happen to distrust the state intensely, and even if we have never consented to the authority the state claims over us. The two arguments, however, are best read as one: they both speak to the idea that human beings possess a dignity capable of placing the state under obligation as a consequence of the irresistible administrative power the state exercises over them.[51]

That analysis is unhelpful, first because it is unnecessary (and thus likely to confuse), and secondly because the initial premise has no foundation.

The trust analysis is unnecessary because no notion of implied automatic trust is required to establish either state sovereignty or state fiduciary accountability. There is no legal regulation of any sort in the absence of a community.[52] Communities establish legal rights and duties out of jointly surrendered autonomy, and make it clear to all that citizenship or residence (or presence) requires submission to the applicable collective will of the community. The sovereignty of the community is confirmed when individuals thereafter associate themselves with that community in a relevant way. That sovereignty includes the authority of the community to set, through its legislative, executive and judicial institutions, the default terms on which residents interact with each other. Thus, when individuals create trusts, agencies, partnerships or other limited access arrangements, they become subject to the default nominate and fiduciary regulation that their communities have decreed will govern those relations. None of that involves implied trust other than in the general sense (as for all forms of legal regulation) that one is entitled to trust (rely on) the various rights and duties that a community establishes.

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49 Ibid 305.

50 Fox-Decent, above n 42, particularly ch 4.

51 Ibid 109.

52 See Locke, above n 4, §87 ('Those who are united into one body, and have a common established law and judicature to appeal to, with authority to decide controversies between them and punish offenders, are in civil society one with another; but those who have no such common appeal — I mean on earth — are still in the state of nature, each being, where there is no other, judge for himself and executioner, which is, as I have before shown it, the perfect state of nature').

Fox-Decent spends a great deal of time arguing that trust is superior to consent as an explanation for the duty of subjects to obey the state.[53] For him consent is not a satisfactory explanation because there is no true consent in many instances. It will be appreciated however that the people authorize coercive exclusion of persons from the community when they create their community. The reality is that communities exist because they take and maintain control of a territory or population on the terms of a defined governance.[54] Everyone (or everyone deemed acceptable) is invited to associate themselves with that community on those governance terms. Accordingly, association in a defined or permitted way *is consent* to whatever communal regulation is produced by the governance apparatus fashioned by the community. That is, the coercive assertion of territorial or population governance is the foundation for actual consent by association. The people create bodies to pronounce the will of the community on specific matters. Those will determinations then bind members of the community individually. The duty to obey legislative, executive and judicial regulation is grounded in the original and continuing consent of the people to a collective governance.

Consider next Fox-Decent's premise that there is an innate right of humanity. There is no foundation for that premise. It is fantasy to declare that any right is innate. As noted above, there are no rights whatsoever in the absence of a community. Rights and duties exist only when communities create and enforce them (through institutions and processes also created by the community). Rights and duties are just human constructions that humans constantly reshape. The assertion of an 'innate' character for any given right or duty is a deontological claim (that a principle exists naturally or by nature), and as such amounts to no more than a *want* supported by a raw assertion of discarnate rational governance. Some citizens may think of certain rights as 'innate', but our own historical experience demonstrates that nothing is immutable or necessarily innate even in the sense that it is recognized by all communities at all times. Before attaining the status of law, the assertion of innate character for a right or duty is always a political claim calculated to advance a political agenda. Rights and duties are innate only to the extent that we define them to be innate. It is only a combination of philosophical aspiration, and a self-suppression of our common accountability for our own affairs, that gives oxygen to deontological claims.[55] We must recognize that we alone create the rights and duties that govern us; that we alone are responsible for our current and future social and legal condition, taking into account the influencing forces of the imperatives of our social and physical environments. We must find justification for rights and duties in our own understanding, informed by our shared experience and the logic (or seduction) of competing arguments (including deontological arguments), of the actual incentives and consequences produced by our choices. In particular, it is clear on the historical record that we created fiduciary accountability because it served our purposes to control a pernicious mischief that is corrosive of community. Judges did not appeal to Kantian

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53 The consent foundation for general power is explicit in the *United States Declaration of Independence* (1776) ('Governments are instituted among Men, deriving their just Powers from the consent of the governed'). See also the preamble of the *United States Constitution*.

54 The original architects of a community set the terms of association for all who follow. It is the same for any combination or coalition that is intended to have a continuing existence.

55 Fox-Decent essentially recognizes the weakness of his deontological claim in a later paper. See Fox-Decent, above n 43, 374. While he still finds 'the Kantian theory attractive', he noted that 'others may doubt the existence, nature, or significance of Kant's innate right of humanity, while others still may doubt that we need to call on it to explain fiduciary relations in terms of the law's internal point of view'. He proceeds to offer an 'alternative [Razian] fiduciary account of parental authority […] [that] makes no reference to the innate right of humanity, and explains parental authority as a moral power that is constituted and regulated by parental duty'.

principle or any other deontological assertion. They openly grounded their regulation in their perception of the notorious social consensus censuring opportunism in limited access arrangements.

As for the content of the Fox-Decent theory of state duty, it is enough to observe that it bears little resemblance to the conventional content (the proscription on unauthorized conflicts or benefits). His content is that public authorities must conform to the 'rule of law'. The only specific content he identifies in his 2005 piece, however, and only tentatively so, are duties of 'fairness' and 'reasonableness'.[56] As he puts it: 'While it is beyond the scope of this paper to argue that public law duties of fairness and reasonableness are also public fiduciary duties, I wish simply to lend this idea, and the larger idea of the state as fiduciary, a measure of plausibility by suggesting that fairness and reasonableness are simply what loyalty is in cases where there are multiple beneficiaries with conflicting interests'.[57] He described those duties, which have a yet more specific content that reflects the 'interests of the public at large', as 'the duty of procedural fairness (the duty to let the individual subject to an administrative body's authority reply to the case against her) and the duty of reasonableness (the duty of decision-makers to base their determinations on grounds capable of justifying them)'.[58] It should be evident that those duties are not confined to issues of opportunism and consequently cannot be justified as manifestations of the conventional accountability. In the present case of multiple beneficiaries with conflicting interests (political governance), the very function of the authority units created by the community is to make choices *about* conflicting wants. That is the nominate function for which fiduciary liability does not accrue, unless the choice was animated by an unauthorized conflict or benefit.

The forgoing indicates that the Fox-Decent conception of fiduciary regulation is far removed from the conventional view. His conception is *sui generis* in the fashion that, in some jurisdictions, the fiduciary accountability of the government to the aboriginal community is *sui generis*.[59] That will only further confuse the application of 'fiduciary' regulation.[60] The proper approach is to confine 'fiduciary' terminology to the crucial function of controlling the opportunism of those who undertake to serve others. Different mischiefs that trouble the governance of a community (incompetence, exceeding authority, misjudging best interest) require separate regulation.

Turning next to the joint work of Fox-Decent and Criddle, there is a relatively concise description of their theory in one of their 2012 pieces.[61] They introduced their

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56 While Fox-Decent does concede in his 2011 book (above n 42, 28) that the 'proponents of fairness have yet to articulate a sufficiently general but structured legal relationship in which to situate it', he attempts to 'bridge the gap'. Assertions of 'fairness', it must be pointed out, have long hobbled the proper comprehension of fiduciary accountability. See the discussion of fairness at Robert Flannigan, 'Presumed Undue Influence: The False Partition from Fiduciary Accountability' (2015) 34 *University of Queensland Law Journal* 171, especially 184-197. Further, there is no 'reasonableness' standard in the conventional assessment of either accountability or liability. See Robert Flannigan, 'Access or Expectation: The Test for Fiduciary Accountability' (2010) 89 *Canadian Bar Review* 1.

57 Fox-Decent, above n 35, 264-265.

58 Ibid 264.

59 Consider his views on that subject at Evan Fox-Decent, 'Fashioning Legal Authority from Power: The Crown-Native Fiduciary Relationship' (2006) 4 *New Zealand Journal of Public and International Law* 91.

60 See the assessment by Robert Flannigan, 'The Boundaries of Fiduciary Accountability' (2004) 83 *Canadian Bar Review* 35, 61-67.

61 Fox-Decent and Criddle, above n 41. Subsequently, in their 2016 book (above n 44, 22-23), they expressed their views of other formulations of the nature of fiduciary accountability: 'Each of these [other] theories of fiduciary obligation suffers from descriptive and normative shortcomings, which have been well documented elsewhere'. They did not themselves provide

description by saying that in their previous writings they 'relied on Kant's account of parent-child relations to explain how fiduciary duties arise, and why they are owed by the state'.[62] They argued that 'parental fiduciary duties arise by operation of the fiduciary principle to set legal limits on the parents' discretionary authority over the child […] [b]ecause the child cannot consent to the parent-child relationship'.[63] That analysis is off the mark. Fiduciary accountability does not depend on whether or not a beneficiary consents to the relation (as opposed to consenting to a conflict or benefit). Many trusts illustrate that conclusion. Fiduciary accountability instead depends on the assumption of a limited access to the assets of a beneficiary. That is why parents are fiduciaries to their children, and why public servants are fiduciaries to their communities. Parents are fiduciaries because the community explicitly requires, without the aid of deontological justification, that they suppress their immediate personal interest (as opposed to their reflected interest as a parent in a healthy family) when performing their parental function. Thus, individuals who choose (or risk) parent status, simultaneously choose (or risk) the regulation the community applies to that status. It is the consent of the parent, not the consent of the child, that is relevant to the initial imposition of fiduciary accountability. Parents consent to (assume) their status, and that status comes with conditions imposed as the will of the community.

The choice to build on an analysis of the parent-child relation, it must be evident, is problematic on its face.[64] How might an analysis of immaturity explain the social (governance) arrangements of mature actors with sharp individual, group, and collective agendas? The people as a social unit are masters to their public servants, and their collective position is not at all comparable to immature beings.[65] The people do not lack capacity in the way that children do.[66] In his book Fox-Decent stated that 'simply being the parent of a child does not explain parental authority'.[67] But that is not correct. Communities affirmatively attach nominate duty to parent status. That duty constitutes authority. Every parent is required to direct and discipline their children for the advancement and safety of both the children and the community. Their parallel duty is to do so without selective personal gain.

Fox-Decent and Criddle proceeded to describe their understanding of the general nature of private fiduciary accountability:

> More generally, fiduciary relations arise from circumstances in which one party (the fiduciary) holds discretionary power of an administrative nature over the legal or practical interests of another party (the beneficiary), and the beneficiary is vulnerable to the fiduciary's power in that he is unable, either as a matter of fact or law, to exercise the entrusted power. Discretionary power of an administrative nature is other-regarding, purposive, and institutional. It is other-regarding in the strictly factual sense that another person is involved.

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that documentation. They instead relied on Paul Miller to explain the ostensible shortcomings. Miller, however, does not come even remotely close to 'refuting' the conventional position.

62 Ibid 555.

63 Ibid.

64 Consider the criticisms of Gold, above n 42, 661-665 and Davis, below n 126, 1158-1160. Fox-Decent and Criddle subsequently have maintained their argument, above n 44, 25.

65 The community has concluded that children are not fully responsible actors. Full contractual capacity is withheld from them. Their diet is restricted (alcohol, cigarettes). Their criminal responsibility is limited. And apart from all other aspects of their treatment, they are subject to direction (by their parents) again simply on the basis of their status.

66 Fox-Decent notes the point (above n 43, 378), but argues for an agency of necessity 'with a view to loosening the grip of this objection'. On his agency claim, consider the criticisms of Gold, above n 42.

67 Fox-Decent, above n 42, 121-122.

> The fiduciary's power is purposive in that it is held for limited purposes, such as an agent's power to contract on behalf of her principal. Lastly, the power is institutional in that it must be situated within a legally permissible institution, such as the family or the corporation, but not…a kidnapping ring.[68]

That cannot pass as a general description of fiduciary accountability. First, it is too narrow. The holding of 'discretionary power of an administrative nature' hardly exhausts the range of the jurisdiction. Trustees, solicitors, partners, agents, and employees will not, in many instances, hold discretionary power. They nevertheless will be accountable for unauthorized conflicts and benefits they entertain in the course of performing their undertakings. They will be accountable because they assumed a limited access. It is clear law moreover that fiduciaries must not compete with their beneficiaries, exploit confidential information, take opportunities or apply undue influence. None of those instances of accountability are tied to the fiduciary possessing or exercising discretion. Secondly, fiduciary accountability does not depend on the beneficiary being 'unable, either as a matter of fact or law, to exercise the entrusted power'. Employers, for example, generally are able to exercise the powers delegated to their agents and employees. Thirdly, the attributes that Fox-Decent and Criddle attached to discretionary power can be reduced to one. Their other-regarding attribute is subsumed by their purposive attribute. And the 'institutional' attribute amounts to an unsupported assertion of a policy exception to the initial principled application of fiduciary accountability. On principle, criminals may be fiduciaries to one another, but

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[68] Fox-Decent and Criddle, above n 41, 556. In their 2016 book (above n 44) they summarize their view of the content of 'private' fiduciary duty. Though they understand fiduciary accountability too narrowly in limiting it to discretion, they understand it too broadly when they assign it unconventional ends or functions. They rightly accept (at 20) the no-conflict and no-profit rules, but then pass beyond the conventional boundary. They wrongly assert that, where the interests of multiple classes of beneficiaries are involved, the content of the duty expands beyond self-dealing to include 'an obligation of fairness or even-handedness as between the different classes of beneficiaries, as well as an obligation of reasonableness in the sense that the fiduciary must accord due regard to the respective interests of each beneficiary class'. They also assert a fiduciary duty of care, though they do concede that others reject that fiduciary characterization. Significantly, while employing care language, they appear to equate 'fiduciary' care with a 'solicitude' for the 'best interests' of beneficiaries. In their view (at 21): 'Whether or not there exists a distinctive fiduciary duty of care, the key point is that in fiduciary cases, the duty of care requires the fiduciary to take affirmative steps to exercise her discretionary power in a manner that is calculated to advance the beneficiary's legal and practical interests'. That is, they conflate the nominate best interest duty, the duty of care and fiduciary accountability. Generally, throughout their book, they make broad vague assertions about fiduciary duty content that have no foundation in the conventional jurisprudence. Early on, for example (at 3) (also 18, 23), they assert that fiduciary accountability requires that, at 'a general level, states must provide the people subject to their powers a regime of secure and equal freedom'. From that general obligation, according to them (at 3-4), there emanates 'prohibitions against genocide and torture; civil and political rights of due process, freedom of expression, freedom of religion, and legal equality; progressively implemented socioeconomic rights to food, housing, education, and health care; and obligations to provide refuge to foreign nationals fleeing persecution'. That is all invention. There is no such 'fiduciary' accountability. They proceed (at 4) to state that the 'fiduciary model of sovereignty developed in this book is both a conceptual and normative theory of the philosophical foundations of state authority and a positive or interpretive theory of the juridical structure that already exists under international law of the relationship between the state and each person subject to its jurisdiction'. That is further invention. Contrary to their assertion (at 4), fiduciary accountability does not have the 'conceptual and normative resources' (the conceptual capacity) to 'enable a constructive critique of various aspects of international law'. It is their own conceptual and normative resources that they are attempting to inject into fiduciary accountability.

we may choose to suspend principle where a transaction or relation is illegal. That only affirms the initial application of the accountability.

Having set out their understanding of fiduciary accountability, Fox-Decent and Criddle explained, in their view, 'how the state and its institutions stand in a fiduciary relationship to their people'.[69]

> The state's legislative, judicial, and executive branches all assume discretionary power of an administrative nature over the citizens and noncitizens affected by their power. The legislative, executive, and judicial powers entailed by sovereignty, in their own familiar ways, are institutional, purpose-laden, and other-regarding. Furthermore, legal subjects, as private parties, are not entitled to exercise public powers. For this reason, legal subjects are peculiarly vulnerable to public authority, notwithstanding their ability within democracies to participate in democratic processes. It follows that the state's assumption of sovereign powers—public powers that private parties are not entitled to exercise—places it in a fiduciary relationship with its people.[70]

Note first that Fox-Decent and Criddle described the institutions of the state, not the state (as they see it), as assuming discretionary power. Yet at the end they declare that it follows that 'the state's assumption of sovereign powers […] places it in a fiduciary relationship with its people'. That does not follow. As discussed elsewhere, the people collectively are not fiduciaries to themselves collectively or individually.[71] The governance institutions that the people create (and to which the people delegate their collective authority) are fiduciaries to the people as a polity. Secondly, no evident advance in clarity is achieved by saying that the powers of state institutions are 'in their own familiar ways', institutional, purpose-laden, and other-regarding. What are the familiar ways? Thirdly, the reason that private parties are 'not entitled to exercise public powers' is that they voluntarily associated themselves (and their children) with communities that assigned collective authority to governance bodies. At the same time it will be appreciated that 'private parties', as masters of the governance apparatus (as voters), actually do have the collective authority to enable themselves to 'exercise public powers' should they find that to be an efficient or desirable arrangement. Fourthly, it is of no import to say that 'legal subjects are peculiarly vulnerable to public authority'. All legal subjects are 'vulnerable' to the *legitimate* exercise of governance power. The 'vulnerability' that is addressed by fiduciary accountability is narrower, and citizens do not have a 'peculiar vulnerability' to opportunism (relative to, for example, trust beneficiaries or children).

The Fox-Decent and Criddle analysis is problematic. Ultimately it is unnecessary. The fiduciary accountability of the state itself (the people) is clear without their distorting notions. There is no status accountability to anyone. The status fiduciary accountability of state institutions is equally clear. They (and their members and workers) are accountable. They must not take personal advantage of the access they have to our governance authority.

It is of further interest to note that Fox-Decent and Criddle have used their theory to explain the enforceability of human rights. They see human rights as part of the content of the fiduciary duty of the state:

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69 Ibid.

70 Ibid.

71 See Flannigan, above n 1.

> The state's overarching fiduciary duty to citizens and noncitizens is to establish a regime of secure and equal freedom under the rule of law. Human rights provide the blueprint or structure of this regime. They supply the conditions under which individuals can live free from both public and private forms of instrumentalization and domination. To sum up, the fiduciary principle authorizes the state to secure legal order, but subject to fiduciary constraints that include human rights.
>
> Because the fiduciary principle authorizes state power on behalf of everyone subject to it, the state cannot use its coercive powers in a way that victimizes some for the sake of others. Where a particular action or policy would necessarily do so, the state is peremptorily barred from pursuing it. Such actions or policies are anathema to a regime of secure and equal freedom. Torture and the killing of innocent life fall within this narrow category. Thus, the state is peremptorily barred from engaging in such acts. Put another way, the state owes a fiduciary duty to its people to respect absolutely their human rights to innocent life and security from torture. It cannot weigh the interests protected by these rights and sacrifice them during a time of crisis.[72]

That is radical proclamation. There is no overarching *fiduciary* duty to 'establish a regime of secure and equal freedom under the rule of law'. The political bargain the people of a community make with each other is found in the formal/informal constitution that gives structure to their association. To the extent a constitution delegates authority to particular bodies, it is those bodies that formulate individual rights and duties beyond those specifically articulated in the constitution. Performing that function is not *per se* a matter of fiduciary accountability. There is only an issue of fiduciary accountability if the complaint is opportunism. It is not opportunism to prefer the formulation of certain rights and duties over other rights and duties. That is just politics — just our representatives crafting political compromises. It is *not* the case, if it were not obvious, that the '[*fiduciary principle*] authorizes the state to secure legal order'. The *people* (rather than the 'fiduciary principle') choose legal order over a state of nature, and they create the bodies that arrange that legal order.

The autonomy of the people may be illustrated by addressing the examples of torture and killing innocent life. Fox-Decent and Criddle argue that the state 'cannot use its coercive powers in a way that victimizes some for the sake of others'. That is the Kantian principle that persons must not be used as means. That principle, brief reflection will indicate, is not generally compatible with the past or present practices of communities. Conscription, progressive taxation, tax expenditure policy, monetary and fiscal policy, and swaths of workplace and social interaction demonstrate that there are broad accepted departures from the principle. We constantly use each other as means. And communities frequently openly arrange that usage. They authorize authority units to use human and artificial persons as means to advance community objectives, the purpose being to achieve the ends of direct benefit to some (regulation, redistribution) and a general reflected benefit for the population *as a community* (maintaining a stable communal equilibrium). As for the Fox-Decent and Criddle examples, their view is that 'the state owes a fiduciary duty to its people to respect absolutely their human rights to innocent life and security from torture'. There is no such 'fiduciary' duty. Torture and killing innocents are practices on a continuum of practices where there are no sharp conceptual or 'innate' distinctions. Communities choose to approve or disapprove of practices according to their sense of what is required to protect themselves as *communities*, which obviously also includes consideration of the consequences for *individual* safety and liberty (leading to recognition of individual

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72 Fox-Decent and Criddle, above n 41, 556.

'human rights'). Torture may be approved in certain instances.[73] Capital punishment, with its intended mental torture, is official policy in many jurisdictions. Killing innocents is also authorized. Abortion, terminating 'vegetative' life, and assisted suicide are examples. The debates over those practices illustrate the absence of 'innate' character for any one position. The point is that community institutions are authorized by the people to fashion a legal order that suits the particular community. No right is a human right (or even a right) until so declared in accordance with the processes of the collective governance machinery. The process of rights definition or protection does not involve fiduciary accountability except to constrain the personal opportunism of those who fashion or implement community authority. Again, there is only a fiduciary issue if the governance function potentially is compromised by personal conflicts or benefits.

Overall the Fox-Decent and Criddle project seems to be an attempt to attach the rhetorical freight of fiduciary accountability to their views on the merits of various public issues. However it is clear that they have articulated a novel conception of the accountability that cannot be justified in conventional terms.[74] The arguments they

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[73] It is conceivable that a policy of torture could have a constitutional basis (an express provision crafted by the community). If it does, there is no possibility of fiduciary breach domestically. The issue would be whether the particular policy was a breach of international law. That could not itself be a 'fiduciary' breach because the offending state did not in that respect undertake to act in the interest of those injured. The very objective of the policy ostensibly is to threaten or cause injury to achieve some distinct public end. Where there is no clear constitutional basis, a policy of torture fashioned by legislative or executive fiat may be vulnerable to a claim of want of authority given the content of the international law on point.

[74] Criddle recently appeared to shift closer to the conventional position. See Evan Criddle, 'Liberty in Loyalty: A Republican Theory of Fiduciary Law' (2017) 95 *Texas Law Review* 993. He accepts (at 997-998) that it is widely understood that the proscription on conflicts or benefits is a 'prophylactic measure to deter harmful opportunism and compensate for courts' inability to discern whether particular conflicted transactions undermine beneficiaries' interests'. He regards that understanding as predicated on classical liberal theory in the sense of liberty as freedom from interference. He believes however that the supposed classical liberal lens is deficient. Republican legal theory, in his view, offers a superior lens. He states (at 995) that the 'central message of republican legal theory is that legal norms and institutions are necessary to safeguard individuals from "domination", understood as subjection to another's alien control'. His argument is that fiduciary accountability 'combats domination'. As he explains it (at 1000), his republican theory 'frames the fiduciary duty of loyalty as a liberty-enhancing safeguard that denies fiduciaries the formal legal capacity to exercise arbitrary power'. He asserts that fiduciary accountability arises 'whenever a party has been entrusted with power over another's legal or practical interests'. Importantly, Criddle states (at 1001) that his analysis 'does not set out to prove that [judges] have deliberately drawn upon republican principles as they have developed contemporary fiduciary law'. Rather, the object of his essay is to argue that 'the traditional fiduciary duty of loyalty addresses republican concerns about arbitrary power, and it aims to persuade the reader that fiduciary jurisprudence could achieve greater coherence through deeper engagement with the republican ideal of liberty as freedom from domination'. While there is much in Criddle's analysis to prompt challenge (especially the characterization of the mischief as 'domination'), I will confine myself to the general observation that his analysis lacks any evident conceptual utility. Judges expressing the conventional position have never appealed explicitly to either classical liberal or republican political or legal theory. They have always anchored their analysis directly in the specific instrumental public policy of controlling opportunism in limited access arrangements. They have not thought it necessary to seek collateral justification in broader abstract conceptions of *liberty*. Further, notwithstanding the various arguments Criddle advances, the capacious notions of freedom from interference and freedom from domination do not actually contemplate a distinction of substance that would affect the application of fiduciary accountability. Subsequently, in a blog ('The Method in Fiduciary Law's Mixed Messages', Oxford Business Law Blog, 13 April 2017) accompanied by a draft book chapter (Fiduciary Law's Mixed Messages), Criddle argues that 'republican theory'

dress up as fiduciary arguments largely are directed at issues of care, procedural integrity or substantive merit. They need to confront their issues directly, without the false lever of a regulation designed for a specific purpose. Accepting their analysis would involve a fundamental distortion of that purpose.

VI RAVE

If the parent-child relation is not an apt reference relation, might there be utility in seeking guidance from fiduciary duties in corporate law? Theodore Rave made that argument in support of his analysis of political gerrymandering.[75] Rave initially described the use of fiduciary accountability to control agency costs both generally and in the corporate context.[76] He then stated that 'the structure of the agency problem in the political process looks remarkably similar to the agency problem in public corporations'.[77] That is not a surprise, of course, because the one identical (rather than merely 'similar') mischief in both cases is opportunism.

Rave's first step is to show that characterizing politicians as fiduciaries is consistent with both 'history and political theory'.[78] He follows Natelson in listing historical references to the government being a trustee to the people. It is clearer in his review (compared to Natelson) that the *people*, through their constitutional arrangements, delegate authority to *the government* (the governance institutions). His second step is to argue the utility of referencing corporate law.

His analysis is compelling in an important respect — his recognition of one of the insights required for a proper comprehension of fiduciary accountability. He clearly identifies the control of self-dealing as the accepted function of the duty of loyalty. He thereby avoids the confusions others have introduced by their assertion of divergent conceptions of function. On the other hand, his appeal to corporate law is less compelling because the jurisprudence of many jurisdictions currently unjustifiably

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better explains the mixed messages supposedly sent by the conventional jurisprudence. The mixed messages, as he sees it, are that while courts consistently affirm a strict standard for fiduciaries, they 'rarely set aside fiduciary decisions in the absence of an unauthorized conflict of interest or other flagrant abuse of power'. It should be apparent however that there is no mixed message. The accountability properly only applies to unauthorized conflicts or benefits. Courts rarely set aside fiduciary decisions that are not potentially compromised by opportunism, or are not defective for a want of care or authority. Where decisions are made loyally, carefully, and with authority, the remaining separate issue is whether the action was in the best interest of the beneficiary. That issue often will be resolved in favour of the fiduciary because courts defer, for obvious reasons, to untainted exercises of discretion. Criddle, who extends 'fiduciary' accountability to issues of care and nominate performance, would radically further complicate the analysis by applying different *levels* of judicial deference depending on whether 'the fiduciary or the judiciary is in a better position to evaluate whether the fiduciary's conduct' was proper. See also Fox-Decent's forthcoming chapter, 'Challenges to Public Fiduciary Theory: An Assessment' in Andrew Gold and Gordon Smith (eds), *Research Handbook on Fiduciary Law*, where he continues to conflate nominate and fiduciary accountability while responding to a number of critics.

75 D Theodore Rave, 'Politicians as Fiduciaries' (2013) 126 *Harvard Law Review* 672.

76 He accepted two established, but defective, features of the American jurisprudence: the notion (1) that corporate agents owe *fiduciary* duties of both loyalty *and care* (at 694) and (2) that their duty of loyalty 'translates into a duty to the common stockholders to maximize the value of their shares' (at 699). See Robert Flannigan, 'The Political Imposture of Passive Capital' (2009) 9 *Journal of Corporate Law Studies* 139.

77 Rave, above n 75, 706. On the agency problem see Robert Flannigan, 'The Economics of Fiduciary Accountability' (2007) 32 *Delaware Journal of Corporate Law* 393.

78 Ibid 708.

departs from the conventional accountability in a number of respects.[79] There was no need for Rave to appeal to a problematic corporate law to make his point about the applicability of fiduciary accountability to politicians. Parenthetically in that regard, it may be noted that Rave quite properly concluded with respect to the analysis of Fox-Decent that it was not necessary to craft 'such an expansive view of state fiduciary obligation to accept that democratically elected representatives in our constitutional system stand in a fiduciary capacity to the people they represent'.[80]

VII LIEB, PONET AND SEROTA

Rave's analysis was challenged by Ethan Leib, David Ponet and Michael Serota ('LPS').[81] Earlier, two of those co-authors (Leib and Ponet), had published articles arguing for a *fiduciary* duty of 'deliberative engagement' on the part of public officers in favour of constituents[82] and children.[83] Apparently they were hoping a fiduciary account could provide a defensible theoretical basis for their assertion in even earlier

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[79] See Flannigan, above n 1. See also Robert Flannigan, 'Shareholder Fiduciary Accountability' [2014] *Journal of Business Law* 1; Robert Flannigan, 'Fiduciary Accountability Transformed' (2009) 35 *Advocates' Quarterly* 334.

[80] Rave, above n 74, 713. Rave subsequently has doubted that fiduciary accountability applies to direct democracy mechanisms. See D Theodore Rave, 'Fiduciary Voters?' (2016) 66 *Duke Law Journal* 331. Rave wrongly believes that there is no agency cost problem with direct democracy. The problem is absent from direct democracy, in his view, because direct democracy voters vote as principals, rather than agents (i.e. not as representatives). He believes the true problem with direct democracy is the 'tyranny of the majority'. Rave's premises, however, are flawed. Direct democracy voters make decisions for the whole community, including those not able or entitled to vote. Their function as an authority unit is representative. Rave casually dismisses that reality (at 340-341) with the single opaque statement that the 'idea seems quite close to discarded notions of virtual representation (that is, that white male property owners acted on behalf of nonvoting women, slaves, and tenants)'. That is not a cogent rebuttal. Rave is also wrong to regard minority oppression as a distinct governance problem (distinct from the opportunism problem). The oppression of the minority doctrine is just a misconstructed manifestation of the conventional fiduciary accountability of shareholders. See Flannigan, 'Shareholder Fiduciary Accountability', ibid. More generally, while Rave does recognise that voter opportunism is a concern, he does not clearly indicate how it ought to be regulated.
In another piece ('Institutional Competence in Fiduciary Governance,' forthcoming in Andrew Gold and Gordon Smith (eds) *Research Handbook on Fiduciary Law*) Rave asks 'whether the courts have the institutional competence to police the relationship between elected officials and the electorate.' He observes that 'judges lack expertise in many of the policy matters that confront the elected branches.' His thesis is that guidance may be taken from the treatment of the supposed problem in corporate law. The competence problem he perceives, however, only arises if 'fiduciary governance' by judges is (wrongly) extended to the assessment of the merits of actions. If fiduciary regulation is properly confined to controlling opportunism in public service functions, the competence of judges is not different than for 'private' service functions. Judges clearly are competent (when they properly inform themselves about the law) to identify fiduciary status and unauthorized conflicts and benefits. They need not personally possess special expertise in the particular nominate function involved. And they have the same fact-finding mechanisms that they have for other civil claims (they evaluate the evidence collected and presented by the parties). See Flannigan, above n 2, 262-263.

[81] Ethan Leib, David Pone, and Michael Serota, 'Translating Fiduciary Principles into Public Law' (2013) 126 *Harvard Law Review Forum* 91.

[82] David Ponet and Ethan Leib, 'Fiduciary Law's Lessons for Deliberative Democracy' (2011) 91 *Boston University Law Review* 1249.

[83] Ethan Leib and David Ponet, 'Fiduciary Representation and Deliberative Engagement with Children' (2012) 20 *Journal of Political Philosophy* 178.

articles of such a duty (where they had not asserted a fiduciary basis).[84] It was their thesis that a duty of deliberative engagement could be derived from six 'fiduciary' duties they identified as loyalty, care, candor, disclosure, confidentiality, and utmost good faith.[85] The duty they extracted from those duties was that 'the fiduciary representative must authentically engage constituents to assess their interests and preferences'.[86] It should be evident however that, quite apart from their misinformed identification of six 'fiduciary' duties (where their analysis largely goes to consent), their new duty plainly is of the nominate kind (were it to be recognized). In particular, with respect to children, they say the duty is intended to meet 'the need for political representation of children in democracies'.[87] The duty quite clearly does not track the conventional accountability. It therefore was somewhat ironic for LPS to argue that Rave did not properly comprehend fiduciary accountability.

LPS took issue with, as they put it, 'Rave's views that the analogy between private and public fiduciaries is not only tight but also that identical duties and immunities should accrue to corporate and political fiduciaries'.[88] They argued that: 'Rave's straightforward application of private law fiduciary duties to acts of political representation…overlooks the relational dimensions of the fiduciary principle'.[89] Their relational view was that:

> Fiduciary law is not unitary in how it identifies relationships and imposes duties — a fact not made clear by Rave's too-direct transplantation of private law concepts into the redistricting domain. The private law controlling fiduciaries struggles mightily to calibrate the way it enforces the duties it imposes to the three indicia constitutive of the fiduciary relationship: the fiduciary's discretionary power over the beneficiary's assets or interests, the trust reposed in the fiduciary, and the beneficiary's vulnerability. Private law establishes first that the indicia are met and then develops relationship-specific duty applications that make sense within the relevant relational environments.[90]

That is not an accurate description of fiduciary accountability (which *is* unitary). The three indicia they describe lack definition, and no authority is cited for them.[91] Secondly, there is no 'relational' calibration in a conventional analysis. Fiduciary accountability arises *only*, and *always*, when one gains access to the assets of another to serve the interest of that other. The duty is singular — the undertaking must not be compromised (or potentially compromised) by opportunism. Contrary to the later assertions of LPS, it *is* a 'one-size-fits-all approach', and there is no calibration 'in a manner sensitive to the type of relationship at issue'.[92] The baggage of individual relations is of no significance in a conventional analysis.

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84 Ethan Leib and David Ponet, 'Representation in America' (2007) 16 The Good Society 3; Ethan Leib, 'Can Direct Democracy Be Made Deliberative?' (2006) 54 *Buffalo Law Review* 903. See also Ethan Leib, *Deliberative Democracy in America: A Proposal for a Popular Branch of Government* (2004).

85 Leib and Ponet, above n 83, 188.

86 Ibid 191.

87 Ibid 196.

88 Leib, Ponet, and Serota, above n 81, 92.

89 Ibid.

90 Ibid 92-93.

91 Their first reference to these indicia apparently is in the 2012 piece by Leib and Ponet, above n 83, 184.

92 Leib, Ponet, and Serota, above n 81, 93.

LPS asserted that 'fiduciary relationships in the political sphere' are *sui generis*.[93] They pointed to what they saw as a difficulty with defining the beneficiary of the duty of political representatives, asking whether the duty is owed to constituents or to the nation. But there is no difficulty. Representatives owe their fiduciary duty to the community that delegated will definition authority to the legislature.[94] LPS also thought that there was distinction to be found in the involvement of political parties: 'At the very least, the fact that political parties may be intervening causes interrupts an easy application of private fiduciary principles to legislators, unless the parties are also fiduciaries and owe something to beneficiaries — an unlikely conclusion, and not one for which Rave argues'.[95] As discussed elsewhere however,[96] the idea that a political party may be characterized as a fiduciary is not at all inconsistent with conventional principle. Further, while the application of fiduciary accountability to a political party may 'interrupt' (in a *proper* way), it does not displace the accountability of legislators.

At the same time LPS were challenging Rave, they were applying their analysis to judges[97] and juries.[98] They concluded that both were accountable as fiduciaries. On conventional principle there is no doubt that judges occupy a fiduciary office, whether they are appointed or elected. The authority they exercise is conferred on them by the people through the institutions the people establish to govern themselves as a community. Because their function is other-regarding, judges may not entertain unauthorized conflicts or benefits. They are accountable as fiduciaries in the same way that every other person with a public function is accountable. LPS come to that conclusion, but with unnecessary complication and controversy. They stated that their three indicia (discretion, vulnerability, trust) 'mark the fiduciary relationship'.[99] Immediately however they conceded that discretion and vulnerability 'are, arguably, flip sides of the same coin'.[100] They further conceded that 'trust is also tied to vulnerability'.[101] While that might appear to ultimately represent the conventional position that a limited access is the basis for fiduciary accountability, they go on to wrongly insist that 'the stringency of obligations imposed on fiduciaries shifts as these indicia register at different intensities across the varied landscape of private fiduciary law'.[102] The conventional accountability does not in principle vary with the nature of the nominate relation.[103]

After applying their indicia to the judicial role, LPS concluded that 'judges qualify as fiduciaries'[104] and that they owe their duty to 'the people'.[105] Those are

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93 Ibid 94.

94 Flannigan, above n 1.

95 Leib, Ponet, and Serota, above n 81, 99.

96 Flannigan, above n 1.

97 Ethan Leib, David Ponet, and Michael Serota, 'A Fiduciary Theory of Judging' (2013) 101 *California Law Review* 699.

98 Ethan Leib, Michael Serota, and David Ponet, 'Fiduciary Principles and the Jury' (2014) 55 *William & Mary Law Review* 1109.

99 Leib, Ponet, and Serota, above n 97, 706. They assert (at 719) that the three indicia constitute a 'solid philosophical footing' for fiduciary accountability. Note separately that earlier (at 702) they had asserted that the application of fiduciary accountability to 'state actors in public law is well grounded theoretically'. That is true, but not on the views of the commentators they reference (themselves, Fox-Decent, Criddle).

100 Ibid.

101 Ibid 707.

102 Ibid.

103 On the 'stringency' of the accountability, see Robert Flannigan, 'The Strict Character of Fiduciary Liability' [2006] *New Zealand Law Review* 209.

104 Leib, Ponet, and Serota, above n 97, 717. Fiduciary accountability, it should be obvious, does not impair judicial independence. Rather, it defines *one* of the conditions for valid judicial engagement.

unremarkable conclusions from the conventional perspective. What is problematic, however, is the content LPS assigned to their duty. They proceeded to apply to judges what they wrongly described as 'the basic fiduciary duties […] of loyalty, care, and a cluster of duties including candor, disclosure, and accounting'.[106] Notably, albeit without useful discussion, they put to one side the duty of good faith they had included on their earlier list.[107] That, at least in the abstract, is a move in the right direction. The duty of loyalty is the sole duty contemplated by fiduciary accountability. The more concerning matter of content is their effort to 'explore' the application to judges of their duty of deliberative engagement.[108] Even though they derived that duty from their list of *private law* duties, they considered that it is 'particular to those in public office'.[109] The duty to engage in dialogue, as they framed it, 'requires an authentic effort to uncover preferences rather than a mere hypothetical projection of what beneficiaries might want'.[110] What followed thereafter, as they applied that duty to judges, need not be rehearsed here. It is enough to say that their novel analysis has little to do with regulating the potential opportunism of judges.[111]

In a more recent collaboration, LPS insist that 'fiduciary political theorists have neglected to explore sufficiently the difficulty of mapping fiduciary-beneficiary relationships to the public sphere'.[112] The task they set for themselves was to explore fiduciary accountability in corporate law in order 'to help translate fiduciary principles into public law configurations'.[113] The problem they have, as for Rave, is the modern distortion of corporate law. Given that, it can only be by accident that they come to any sturdy conclusions. Not surprisingly, their analysis continues to lean on their three indicia of discretion, vulnerability and trust. But those indicia, predictably, do not produce sharp distinctions for them. They also continued vaguely to press their argument for relational sensitivity. When finished, they began their conclusion with the statement that they 'demonstrated how probing the shifting identities of fiduciary and beneficiary in the private law may help other public law theorists work through some of the most fundamental — and complex — issues in fiduciary political theory'.[114] It is doubtful however that probing a defective corporate law will yield robust insight. They ended their conclusion with the assertions that people are 'vulnerable [to the exercise of power] in different ways' and that the 'fiduciary principle is attractive for its ability to scale to context'.[115] Their first assertion misleads. It only matters that beneficiaries in limited access arrangements are vulnerable to *opportunism*. Their second assertion is a misconception. There is no calibration, sensitivity, or scaling applied to regulating the risk of opportunism where an access is limited.

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105 Ibid 720.
106 Ibid 730.
107 Ibid fn 155.
108 In their article on juries, above n 98, 1140-1141, they use language that wrongly reads as if the duty is an established component of the law ('Private and public fiduciaries share the duties of loyalty and care we have just explored. But public fiduciaries also have what we have elsewhere called a duty of deliberative engagement').
109 Leib, Ponet, and Serota, above n 97, 730.
110 Ibid 741.
111 They apply essentially the same analysis to juries and jury members, although they employ only three of the six 'fiduciary' duties (loyalty, care, deliberative engagement) they originally catalogued. Again, from a conventional perspective it is not controversial that jurors are accountable as fiduciaries. Jurors are not free to have conflicts of interest or duty, or to take benefits for acting on covert instructions.
112 Ethan Leib, David Ponet, and Michael Serota, 'Mapping Public Fiduciary Relationships' in Andrew Gold and Paul Miller (eds), *Philosophical Foundations of Fiduciary Law* (2014) ch 19.
113 Ibid 389.
114 Ibid 402.
115 Ibid 403.

VIII LIEB AND GALOOB

Leib began a collaboration with Stephen Galoob in 2014. In their first article they sought to establish that the 'intentional dimension' of fiduciary accountability distinguished it from contractual accountability.[116] In contract, in their view, it was sufficient to conform to the terms of the contract, even if that occurred only accidentally. For the duty of loyalty, however, accidental compliance was not sufficient. Linking to the LPS assertion of a 'deliberative engagement' content requirement, Leib and Galoob argued that actual deliberation respecting the interests of the beneficiary is required.[117]

As with the deliberative engagement requirement, however, no established authority for their assertion was identified. Further, it is clear from their discussion and examples that they were not generally addressing the opportunism mischief. In one paragraph there is a suggestion of opportunistic exploitation, but that mischief does not otherwise appear in their analysis. The paragraph itself misstates the conventional law:

> Why must loyalty shape a fiduciary's deliberation? We think the answer lies in a variety of aspects of paradigmatic fiduciary relationships. Fiduciary relationships characteristically involve discretionary powers and high levels of entrustment. Given imbalances of expertise and power, these relationships also make it difficult for the beneficiary to monitor the fiduciary's actions. As a result, the beneficiary in a fiduciary relationship is subject to the predation of her fiduciary in a way that people generally are not. Each of these aspects (discretion, trust, vulnerability, difficulties of monitoring and accountability) contributes to the explanation of why loyalty has an intentional component. Given a beneficiary's vulnerability to the fiduciary, the beneficiary can be expected to be concerned with not only the fiduciary's behavior but also her faithfulness. Ensuring that the beneficiary's interests shape the fiduciary's deliberation in a certain way is essential to ensuring that the beneficiary will not be exploited or have unnecessary risks imposed upon her.[118]

Discretion, as I have noted multiple times, does not exhaust the means through which fiduciaries may exploit their access, and it patently is not an exclusive test for fiduciary accountability. Further, 'high levels of entrustment' are not required. Accountability does not depend on 'imbalances of expertise and power'. The ability to monitor is irrelevant. And whether deliberation occurred or was adequate is not a conventional consideration. The liability is strict. If there is an unauthorized conflict or benefit, there is a breach. That is what the judges have long concluded. Leib and Galoob, however, say they are examining 'the underlying normative phenomenon', and they sideline the judges. In their words: 'What loyalty is and whether someone has acted loyally seem to have answers that are independent of judicial determinations'.[119] That will surprise most judges.

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[116] Stephen Galoob and Ethan Leib, 'Intentions, Compliance, and Fiduciary Obligations' (2014) 20 *Legal Theory* 106.
[117] Ibid 114-116.
[118] Ibid 117-118.
[119] Ibid 131.

In their second article Leib and Galoob endeavour to provide 'a framework for analyzing the usefulness and limitations of fiduciary political theory'.[120] They argue that fiduciary principles usefully apply to some domains of public law but not others. Immediately, however, their analysis is compromised. To achieve their analytical ends, they 'highlight[ed] three features of fiduciary norms that differentiate them from norms of contract, tort, and criminal law'.[121] They described those 'features' as follows:

> First, fiduciary norms impose deliberative requirements: they make specific types of demands on an agent's deliberation in addition to her behavior. Second, complying with fiduciary norms requires a special conscientiousness. Living up to a fiduciary obligation depends not only on how an agent behaves and deliberates, but also on whether she does so for the right reasons. Third, fiduciary norms impose what Philip Pettit calls 'robust' demands, which require the fiduciary to seek out and respond appropriately to new information about the interests of her beneficiaries.[122]

They added that: 'Fiduciary political theory is not viable in public-law domains where any of these core features of fiduciary norms are inapposite'.[123]

Their analysis is compromised by these assertions because their 'features' are not actually elements of a fiduciary analysis. It appears that Leib and Galoob, like others, simply invented their criteria. Accordingly, their application of those features cannot demonstrate how established fiduciary accountability operates in the public domain.

They nevertheless went on to conclude that the 'fiduciary theory of judging' (that Leib formulated with Ponet and Serota) was compatible with their framework, but that the 'fiduciary theory of administrative governance' of Criddle and the 'fiduciary theory of international law' of Fox-Decent were not (or not likely) compatible.[124] There is no need here to recount the analysis that led them to their conclusions. It is clear that their discussion is not grounded in the established jurisprudence.[125]

IX DAVIS

Fiduciary government has only false promise for Seth Davis.[126] He concluded that politicians 'are not like private fiduciaries' in important respects.[127] His analysis, however, is oddly supportive of the conventional accountability. That is because he critiqued what are modern misconceptions, while at the same time appearing to accept that self-dealing was the relevant mischief. In that, he appears to properly concede the utility of the narrow conventional function of controlling opportunism.

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120 Ethan Leib and Stephen Galoob, 'Fiduciary Political Theory: A Critique' (2016) 125 *Yale Law Journal* 1820, 1823.

121 Ibid 1824.

122 Ibid.

123 Ibid.

124 Ibid 1877.

125 Criddle and Fox-Decent responded to the Leib and Galoob analysis and demonstrated how in specific respects that analysis was inconsistent with standard fiduciary principles. See Evan Criddle and Evan Fox-Decent, 'Keeping the Promise of Public Fiduciary Theory: A Reply to Leib and Galoob' (2016) 126 *Yale Law Journal Forum* 192.

126 Seth Davis, 'The False Promise of Fiduciary Government' (2014) 89 *Notre Dame Law Review* 1145. The use of the term 'fiduciary government' signals conflation. Fiduciary accountability is not concerned with the mechanisms or merits of 'governing' *per se*. It is concerned solely with regulating the opportunism that potentially compromises the governance function.

127 Ibid 1206.

It is first useful to assess how Davis understands fiduciary accountability. He initially wrongly accepted that there are *fiduciary* duties of both loyalty and *care*.[128] That actually matters for his analysis because his arguments sometimes are distortive care arguments. Davis also asserted that fiduciary law 'is explicitly altruistic, not individualistic'.[129] That is not helpful. Fiduciaries *agree* to be 'altruistic'. They do so for self-interested reasons, and normally for compensation. Fiduciaries agree in an individualistic (self-interested) way to *be altruistic* (to serve another). The *law* only holds them, on a default basis, to their undertaking of service. Davis also declared that the duties of loyalty and care (requiring 'fealty' and 'some modicum of competence' respectively) 'hardly prescribe decision rules for specific issues'.[130] That critique is valid with respect to the 'reasonable expectation' and 'fairness' misconceptions, but not for conventional fiduciary regulation, where the one decision rule is clear (no unauthorized conflicts or benefits for those with limited access).

Davis continued on to assert that fiduciary accountability is animated by two principles that he believed were problematic from a public perspective:

> Two principles animate fiduciary law. First, private fiduciaries owe a single beneficiary or a discrete class of beneficiaries a duty of undivided loyalty. It is difficult, however, to specify how politicians and bureaucrats are fiduciaries for a discrete class of beneficiaries. Second, in discharging her duties, the fiduciary must pursue one or a set of agreed-upon ends, which are measured by a specific set of doctrinal maximands. By contrast, in public law there is no agreement upon specific maximands. This distinction is significant because the existence of a rough consensus on specific ends mediates between the general, indeterminate concepts of 'loyalty' and 'care' and the outcomes that courts reach in fiduciary litigation.[131]

The supposed difficulty with the first 'principle' is illusory. As discussed above, those who undertake public service are accountable to the people.[132] The supposed difficulty with the second 'principle' also is illusory. Fiduciary accountability has only one 'end' and one 'maximand' – a limited access must not be compromised by unauthorized conflicts or benefits. And there *is* agreement on that maximand in public law.

The appeals made by other writers by way of analogy to trustees, parents and corporate managers are not convincing to Davis. He rightly rejects the utility of the parent-child relation, but he unnecessarily adds that it is not an established fiduciary relation.[133] His rejection of the trustee analogy also is problematic. He wrongly states that 'a simple duty of undivided loyalty is incoherent whenever a trustee serves more than one beneficiary'[134] He gives as an example the conflict between the interest of an income beneficiary in maximizing income and the interest of a capital beneficiary in maximizing capital. There is no 'incoherence' here. It is the primary idiosyncratic function (the nominate task) of his trustee to exercise judgement with respect to the

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[128] See above n 24.
[129] Davis, above n 126, 1152.
[130] Ibid 1157.
[131] Ibid 1158.
[132] See also Flannigan, above n 1. The concern vaguely expressed by Davis may instead be that politicians face a conflict of conflicting wants. I addressed that earlier. It is implicit in the authorization of a fiduciary to act in the interests of differently-situated beneficiaries that the necessity of differentiation through the exercise of judgment is contemplated (i.e. there is authority).
[133] Davis, above n 126, 1160. It clearly is a status fiduciary relation in some jurisdictions. See *M.(K.) v M.(H)* [1992] 3 SCR 6.
[134] Davis, above n 126, 1161.

balancing of interests in income and capital maximization. Fiduciary accountability only applies as a parallel regulation that proscribes entertaining personal conflicts or benefits that might compromise the exercise of that judgement.

Consider also the analogy to corporate managers. It is not the nominate character of a status relation that provides the content of the analogy. Rather, it is the *common exposure* to opportunism that calls for the *common response* of generic accountability. As noted earlier, however, the corporate law of many jurisdictions has departed from the conventional accountability without principled justification and cannot without proper qualification be used as an analytical input. Davis found the analogy secondarily interesting in that corporate fiduciary duties supposedly are seen by some to be 'in decline' because 'first, they are subject to partial contractual override and, second, courts have narrowed them' to specific and limited misbehavior.[135] He declared that both developments 'call the theory of fiduciary government into question'.[136] It should be obvious however that no such conclusion may properly be reached with respect to the application of the conventional accountability to public service. Fiduciary duty generally is default duty. It may be displaced by fully informed consent. Accordingly, when actors choose to override its default operation, there is no implication of any sort for anybody beyond the specific variation. Further, courts that see the accountability as narrowly concerned with a specific misbehavior get it right when they identify the misbehavior as opportunism or self-dealing.

After rejecting the various analogies, Davis concluded that fiduciary status for politicians and bureaucrats would have to be considered a *sui generis* status.[137] He came to that conclusion because there was no fit with what he claimed were the three 'key features' common to all established status relations: (1) a 'discrete class' of beneficiaries, (2) a 'rough consensus about the ends' of the relation and (3) a definitive 'specific maximand and a discernible set of decision rules'.[138] His conclusion is defective however because his premises (the key features) at best are indefinite. He gains no support from LPS, whom he cited in support, because their analysis also rests on an infirm foundation.

After doubting that 'fiduciary government was a background understanding' originally for *legal* rights,[139] Davis considered areas 'where federal lawmakers have experimented with it'.[140] He pointed to prosecutions under the honest services legislation as 'the one context where federal courts frequently describe government in fiduciary terms'.[141] He observed that the prosecutions usually addressed what he labelled 'naked self-dealing', which, in his view, 'seems largely unobjectionable'.[142] That was not particularly significant for him, however, because he thought the regulation of corruption could easily be justified on other grounds. He ended his discussion of honest services regulation by noting that an attempt by the Department of Justice to broaden the application of the statute had received a critical reception, which reception included the argument that political patronage was not really in conflict with the common morality of the American population.[143] His following discussion of the

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135 Ibid 1167.
136 Ibid.
137 Ibid 1170.
138 Ibid. His view was that: "None of these features obtains when we treat public officials as fiduciaries".
139 Ibid 1171.
140 Ibid 1182.
141 Ibid.
142 Ibid.
143 Ibid 1183. For many citizens the term 'political patronage' includes a range of benefits that extend beyond personal gain to public servants. Political patronage may for example be thought to include the capture of additional resources for constituents obtained by vote trading. Thus,

statutory regulation of the insider trading of public servants was to the same effect. He thought it was narrow and 'not a model for the broad fiduciary theory of government'.[144] All of that, it will be appreciated, ultimately supports the conventional understanding of fiduciary accountability (that it regulates only the mischief of opportunism), and its application to public servants.

Near the end of his analysis Davis stated that 'translating' between rights in private and public law 'depends upon connecting the values of one doctrinal area with another'.[145] A first response is to observe that there seems to be an assumption by Davis (and other recent contributors) that fiduciary accountability requires 'translation' because it is recognized with little controversy in private law but only controversially (by some) in relation to public law. In reality, courts in all jurisdictions have long recognized the application of fiduciary accountability in the public sphere, if not with the scope that some might prefer. The second response is to confirm that reality on the terms set by Davis. As noted above, there is a common 'value' for both the private and public application of fiduciary accountability. It is the universal consensus that a limited access not be compromised by opportunism. That common value necessitates a common regulation. Davis nevertheless insisted that fiduciary accountability makes 'too little out of the reality of political self-interest'.[146] He seemed to think, using his example, that 'responsiveness to special interests' would be objectionable, even though beneficial from an informational perspective.[147] He thought that the accountability 'elides the potential benefits of special interest inputs into the legislative process'.[148] That is a false concern. There is no 'fiduciary' objection to lobbying *per se*. Rather, the 'fiduciary' objection is to personal conflicts and benefits influencing the actions of those who are lobbied. There is no credible 'positive benefits' objection to the regulation of opportunism in either the public or private sphere.

X MILLER AND GOLD

Passing beyond earlier individual views, Paul Miller[149] and Andrew Gold[150] jointly argued in a 2015 article that fiduciary accountability would be better understood

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describing the mischief as political patronage rather than opportunism misidentifies the proper scope of the conventional regulation.

144 Ibid 1184.

145 Ibid 1203.

146 Ibid.

147 Ibid.

148 Ibid 1203-1204.

149 In a chapter in a 2014 book co-edited with Gold, Miller described his 'fiduciary powers theory'. See Paul Miller, 'The Fiduciary Relationship' in Andrew Gold and Paul Miller (eds), *Philosophical Foundations of Fiduciary Law* (2014) ch 3. Miller began (at 65) by asserting that the 'dominant academic view [as opposed to the views of judges] is that the fiduciary relationship is indefinable'. However, quite apart from his cherry picking of academics, there is no evident basis for that assertion. Moreover his assertion actually did not accurately reflect the substance of the views of each of his selected academics. He went on to define 'fiduciary power' (which, on his description, is a form of authority ordinarily derived from the legal personality or capacity of another person), wrongly concluding (at 72) that it must be discretionary. He also claimed (at 73) that fiduciary power is relational in that 'it founds a *relationship* in which one acts for the purpose of advancing the ends of another'. That would be accurate if he means that a limited access or other-regarding undertaking attracts fiduciary accountability. He then unnecessarily weaves in misleading 'structural formal properties' of inequality, dependence and vulnerability. He proceeds to claim that judges have given a confusing pat answer to the question of when fiduciary duties arise. He argues (at 74) that his theory offers the following clarity: 'Fiduciary duties arise where one person receives or undertakes discretionary power over the

if we recognized that fiduciary mandates consist of both 'service mandates' and 'governance mandates'.[151] Service mandates are the interpersonal arrangements that 'exist for the benefit of determinate persons'.[152] Miller and Gold believed that most modern accounts of fiduciary accountability assume service mandates. They thought that oversimplified the law because a 'subset of fiduciary mandates involves governance rather than service'.[153] As they explained it, a 'governance mandate' is one 'in which the fiduciary is engaged to determine or advance certain *abstract purposes*'.[154] They stated that: 'The powers of the fiduciary, and the objects for which he acts, are specifiable entirely with reference to one or more abstract purposes without it being necessary to identify a beneficiary, much less the particular interests or

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significant practical interests of another'. He spent the remainder of his time trying to explain that clarity. Generally he fails to clearly identify the mischief intended to be addressed and he conflates nominate accountability with fiduciary accountability. Further, his theory does little actual analytical work. He simply makes legal and factual assertions and links them without development to the attributes he previously associated with his theory. He does not derive clear content from clear mischief. Further, many of his specific assertions are amiss. For example, he wrongly adopts (at 77) the misguided view that bare trustees are not fiduciaries, he makes (at 80) the incorrect assertion that 'virtually all agents have *discretion* in the exercise of powers', he appears to believe (at 82) that the powers of directors are 'bestowed by the state' and he wrongly concludes in a page of thin analysis (at 84-85) that the acceptance of confidential information does not attract fiduciary accountability. Miller ends his essay by asking whether public officials may be fiduciaries. He distinguishes (at 87) 'two ways in which public officials may be thought to be fiduciaries:' in the ordinary way and as 'a *sui generis* fiduciary of the public'. He concedes the former but declines to explore the latter. He does say however (at 89) that the difficulty in the latter case is that the 'personality of the state is *sui generis*' and that it matters that the state is 'possessed of powers of a fundamentally different character'. That is to make the mistake of allowing the nominate idiosyncrasy of a relation to define the regulation of the generic mischief.

150 In the same book Gold argued that the duty of loyalty has no essential content. See Andrew Gold, 'The Loyalties of Fiduciary Law' in Andrew Gold and Paul Miller (eds), *Philosophical Foundations of Fiduciary Law* (2014) ch 8. Gold reviewed what he described (at 178) as 'several leading conceptions of loyalty that are significant to fiduciary law'. However, only the first conception he listed (his 'anti-conflicts rule') may fairly be described as 'leading'. The others do not have a remotely comparable presence in the jurisprudence. Gold went on to find deficiencies with each conception. His solution was to embrace the indeterminacy he perceived. For him (at 190) that allowed 'for a core minimum — the duty must be a loyalty duty — even if it tells us little about what kind of loyalty is at stake'. That would mean that 'the core content of fiduciary loyalty itself would remain under-determined'. He spent the remainder of his essay trying to justify that argument.

151 Paul Miller and Andrew Gold, 'Fiduciary Governance' (2015) 57 *William and Mary Law Review* 513.

152 Ibid 516. They state (at 520-521) that 'we do not mean to imply that provision of services in the colloquial sense is always or even ordinarily fiduciary'. They make no effort to justify that statement other than to say (in their fn 15) that their understanding 'is contrary to the suggestion of some that many service providers, including mechanics, electricians, plumbers, and other tradespeople, should be considered fiduciaries'. It must be understood that tradespeople serve as employees, agents or independent contractors and that they attract accountability to the extent of their limited access. For example it would be a breach for a plumber who installed gold fixtures, or became aware of other valuables in a house, to provide that information to a break and enter associate. It would also be a breach for a plumber to instruct a homeowner to acquire plumbing supplies from a specific vendor without knowledge of a kickback paid to the plumber. See Robert Flannigan, 'Fiduciary Mechanics' (2008) 14 *Canadian Labour and Employment Law Journal* 25 and Robert Flannigan, 'Employee Fiduciary Accountability' [2015] *Journal of Business Law* 189.

153 Ibid 517.

154 Ibid.

preferences of that beneficiary'.[155] They distinguished governance mandates as follows:

> Many, perhaps most, fiduciary mandates are service mandates. However, others entail fiduciary administration for purposes rather than persons. These are governance mandates. All fiduciary mandates imply purposes inasmuch as the fiduciary's discretion is to be oriented to the achievement of certain objectives. However, purposes are distinctive in governance mandates insofar as they are not identified with determinate persons and their practical interests; they are, in this sense, abstract. The purposes that underlie fiduciary governance mandates reflect goals or commitments defined in relation to groups, associations, or communities and are so tied to the interests of the group, community, or association that the interests of individuals cannot be disaggregated from those of the collectivity without undermining either the collectivity or the integrity of the purpose(s) posited for it.[156]

It is clear that Miller and Gold, like many others, conflate nominate and fiduciary accountability. That is, they fail to make the key distinction that defines the scope of fiduciary accountability. Actors undertake to serve others in many ways. They may act, for example, in the nominate capacities of trustee, director or employee. The performance of those nominate functions are regulated by the idiosyncratic rules and principles of trust law, corporate law and employment law. Fiduciary accountability is a parallel regulation that constrains those actors in only one way: they must not allow their nominate functions to be compromised by opportunistic impulse. The asserted distinction between service and governance is of no relevance to that regulation.

Their conflation of nominate and fiduciary accountability is evident throughout their discussion. They state that: 'The fiduciary is critical to the collectivity achieving its purpose(s) inasmuch as his mandate enables coordination of effort and investment in the association through centralized decision making'.[157] That appears to be nominate performance. Later, with reference to Miller's separate articulation of a 'fiduciary powers theory', they argue that:

> The investiture of power in a fiduciary alters the normative basis upon which fiduciaries, beneficiaries, and benefactors interact amongst themselves and with third parties. The fiduciary, by virtue of her mandate, enjoys standing (authority) to make discretionary decisions for or on behalf of her beneficiary or benefactor that she would not otherwise have the standing to make.[158]

Here again making decisions may be read as a 'fiduciary' characterization of nominate performance. It is the same for their subsequent statement that: 'Fiduciary duties ensure that fiduciaries are accountable to beneficiaries for the way in which they execute their mandate'.[159] Conflation is also evident in their statement that the content of fiduciary accountability includes, in addition to a duty of care, both proscriptive rules (no profit, no conflict) and prescriptive rules (including fairness, demonstrable partiality, and best interest standards).

It appears that it is their conflation of nominate and fiduciary accountability that led Miller and Gold to conclude that their distinction between service and governance

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[155] Ibid 517-518.
[156] Ibid 523-524.
[157] Ibid 527.
[158] Ibid 540.
[159] Ibid 546.

mandates had conceptual utility. The utility is illusory however because the application of fiduciary accountability does not involve the assessment of the nature, scope or performance of the nominate function, except to determine whether an access is qualified by a limited or other-regarding purpose. Fiduciary liability is concerned only with the more specific assessment of whether there are unauthorized conflicts or benefits that might compromise the nominate function. Both service and governance mandates are other-regarding undertakings that involve access to the assets of others for a defined or limited purpose. That is all that is required for the application of the singular content of fiduciary accountability.

Eventually Miller and Gold came to discuss 'public' fiduciary accountability. They asserted that 'certain features of public law institutions generate problems for public fiduciary theory because theorists work from the perspective of service-type fiduciary relationships'.[160] They began with the judicial branch, where the problem they saw was the identification of the beneficiary of the fiduciary accountability of judges. They suggested that it is preferable to identify purposes rather than beneficiaries, arguing that 'judges are fiduciaries with a mandate to serve purposes essential to our shared aspirations to conditions of legality and justice — purposes which, amongst other things, require judges to maintain the integrity of the common law'.[161] If that were done, in their view, the 'problem of identifying beneficiaries of judicial offices then falls away and is replaced by the more tractable, and arguably more interesting, challenge of determining what abstract public purposes may be ascribed to judging'.[162] That was the extent of their development of their thesis for the judicial function.

When they turned to the legislative branch, they again perceived difficulties with the attempts of other commentators to identify the beneficiaries of the fiduciary accountability of legislators. They concluded that their own approach was illuminating:

> In our view, debate over the fiduciary character of legislative offices and institutions would benefit from reinterpretation in terms of fiduciary governance. The focus of debate ought not to be solely on identifying who should be considered first in line to benefit from the actions of legislators but also on the fiduciary character of purposes pursued by legislators and legislative bodies, the source(s) of those purposes and processes through which they are defined and varied, and the ways in which legislators can or should be held accountable on the basis of their fidelity to the public purposes with which they have been entrusted.[163]

Again that was the extent of their development of the supposed insight to be realized from their focus on purposes. It amounts to an invitation to discard the conventional regulation, but without guidance. Nothing is illuminated. It is 'reinterpretation' at large.[164]

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[160] Ibid 566.
[161] Ibid 570.
[162] Ibid.
[163] Ibid 575.
[164] Ibid 547-548. Subsequently Miller alone sought to identify differences and similarities between public and private accountability. See Paul Miller, 'Principles of Public Fiduciary Administration' in Tsvi Kahana and Anat Scolnicov (eds), *Boundaries of State, Boundaries of Rights* (2016) ch 12. Again he conflated fiduciary and nominate accountability. He described (at 252-253) fiduciary *authority* as a kind of agency authority that 'consists in the standing to make decisions for or on behalf of another'. He stated that 'fiduciary principles are properly to be understood as a constraint upon but not a basis of fiduciary authority'. It appears from those statements and his essay as a whole that his 'fiduciary authority' is the authority to perform the

The failure of Miller and Gold to develop the utility of their distinction was predictable. Fiduciary accountability has no capacity or content to define or regulate nominate performance (i.e. define the 'abstract public purposes' of judging, or define 'the fiduciary character of purposes pursued by legislators'). It is singularly focused on regulating the risk of opportunism in limited access arrangements. It does apply in the public sphere, but it does so in exactly the same way it does in the private sphere, and that is because there is no difference between the private or public exploitation of a private or public limited access. Miller and Gold do not concede or perhaps understand that. They believe their distinction produces an improved conceptual construction for fiduciary accountability and they see an exciting future for it: 'Contentious questions, of course, still remain to be resolved; we might, for example, wonder how abstract purposes are to be validly decided upon or how their content may be settled when disputed. But to our minds, these are exciting new questions'.[165] For others, however, the 'excitement' (the burden) generated by an actual adoption of their views would come from seeking to limit the attendant confusion in the public sphere, and the potential distortion of the general fiduciary jurisprudence. A concluding observation has to do with the final words of Miller and Gold. They deprecate 'the assumption that all fiduciary relationships are of a like kind'.[166] That is where they went wrong. While the nominate regulation of limited access arrangements may vary, the fiduciary regulation is constant or of a *like kind* because the mischief is of a *like kind*.

XI CONCLUSION

The access to community assets that is acquired in the course of an authorization to serve the public must not be exploited for personal advantage. The opportunism mischief does not have a different expression across limited access arrangements,

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nominate function. Many will take that description of the nominate authority as fiduciary to imply that fiduciary accountability is concerned generally with regulating the merits of the performance of a particular nominate undertaking. A second observation, noted earlier, is that it is wrong to confine fiduciary accountability to an authority 'to make decisions' (exercise discretion). Fiduciary accountability applies to every other-regarding undertaking, whether or not discretion is involved. Third, it also is wrong to describe fiduciary accountability as a form of agency authority. That reverses the connection. Agency is but one of a number of status relations that attract fiduciary accountability. In the remainder of his essay Miller initially (at 253-254) rightly critiqued the Fox-Decent and Criddle assertion that the existence of the fiduciary constraint can legitimate a claim to possession of fiduciary authority. Thereafter however his analysis progressively departs from a conventional analysis even though he gives prominence to 'loyalty norms' and conflict rules. For example, he fails to establish how the regulation of opportunism ought to be defined or informed by the 'public' character of state authority, the asserted sui generis legal personality of the state, the availability of judicial review and the asserted preference for criminal accountability. He also wrongly claims (at 264-265) that *prescriptive* standards are 'attached to certain fiduciary duties'. He references duties of care and disclosure. Those however are not fiduciary duties. The supposed care duties he describes are the negligence standard or the nominate best interest duty. And his duty of disclosure is a nominate duty that is distinct from the option to validate consent by giving full disclosure of a conflict or benefit. On the option to fully disclose, see Robert Flannigan, 'Presumed Undue Influence: The False Partition from Fiduciary Accountability' (2015) 34 *University of Queensland Law Journal* 171, 172-174. Lastly, he described four principles that he believed were common to public and private fiduciary administration: fidelity, prudence, transparency and consensualism. Most of that discussion is novel invention or rests on confusions that differentially infect the jurisprudence (relating to the supposed fiduciary character of duties of good faith, care, best interest, etc.).

165 Ibid 586.

166 Ibid.

whether of a public, private or mixed character. If an arrangement is one of limited access, the risk of opportunism is latent in the same way and requires the same regulation. Public service does not involve unique considerations at any position or level of service that would suggest that public servants ought to be excused from the accountability that governs everyone else who assumes a limited access.

Recognizing that the accepted policy basis for fiduciary accountability applies fully to public service means that there is no need to cast about for a new general theory or specific analogy (parent, corporation) to justify the application of fiduciary accountability in the 'public' sphere. That is important because most of the proposals reviewed above are easily critiqued and thus easily discounted by those who would deny that public servants are accountable as fiduciaries. The proposals are broadly defective because, apart from their shallow reviews of actual case law, they fail to specifically define the mischief they seek to regulate, they fail to conceptually accommodate the strict quality of the liability, they conflate nominate and fiduciary accountability, they fail to recognize that fiduciary accountability has no conceptual capacity to resolve the issues they vaguely describe, and they generally invent content. The proposals also diverge from each other, indicating that there is divisive speculation rather than mutually supportive consensus amongst the contributors. On the other hand, none of the contributors deny that fiduciary accountability seeks to control opportunism. Though most do not speak of opportunism per se, it is contemplated by the language used. What is not clear in most of the proposals is what mischief beyond opportunism is to be regulated. Ultimately only the conventional accountability enjoys universal approbation. We clearly are right (and it is *our* decision) to require our public servants to forgo conflicts and benefits that might compromise their function. That is the primary constraint we must apply to ensure that our governance is less corrupt. Ends other than the control of opportunism require their own appropriately shaped regulation. We cannot afford to confuse our expression and application of fiduciary accountability with analysis that fails to identify, validate or credibly displace established elemental policy.