Autonomy, Paternalism, and the Moral Foundations of the Fiduciary Relationship

Austin Horn, The University of Western Ontario

Supervisor: McLeod, Carolyn, The University of Western Ontario

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Abstract

The fiduciary relationship is a legal relationship that describes those interactions in which one party is entrusted to exercise discretionary power on behalf of another’s significant practical interests. Over the past several decades, as bioethicists have begun to use the fiduciary relationship in their ethical analyses, it has proven to be a powerful tool for providing clarity to complex ethical issues. But the exciting promise of the fiduciary relationship as a framework for bioethical analysis is threatened by at least two major conceptual problems: moral-legal equivocation and paternalism. Legal-moral equivocation refers to the problem of assuming the normative demands of a legal relationship are also normatively demanding in a moral relationship. Put simply, it assumes the legal “ought” is also a moral “ought.” The cogent use of the fiduciary relationship in ethical analysis therefore requires some justification as to why the fiduciary obligation should be considered a moral obligation. Paternalism refers to the worry that the fiduciary relationship is paternalistic and therefore an inappropriate model for the healthcare professional-patient relationship, with its ethos centred on promoting patient autonomy. Chapter 1 addresses the problem of equivocation by arguing that the fiduciary relationship is a moral relationship. By tracing the history of the fiduciary obligation, I argue that it is a moral obligation that fosters social harmony by enabling individuals to trust or depend on one another in those interactions where one undertakes to act on another’s behalf. Chapter 2 addresses the problem of paternalism, arguing that the fiduciary relationship is essential to promoting autonomy. I adopt Matthew Harding’s analysis of Equity’s role in promoting autonomy (by maintaining socially important institutions) and apply it to the fiduciary relationship. However, I also go beyond Harding’s analysis, adopting a relational theory of autonomy I argue that fiduciary power is “relational capacity” that makes certain autonomous ends possible. Finally, in Chapter 3, I illustrate the practical utility of the fiduciary relationship by using it as framework for conceptualizing and addressing the ethical issues in a recent controversy about a complex clinical trial involving preterm infants, called the SUPPORT trial.
Keywords

Fiduciary Relationship, Bioethics, Healthcare Ethics, Physician-Patient Relationship, Research Ethics, Ethics, Moral Philosophy, Clinical Trials, Pragmatic Clinical Trials, Law of Equity.
Summary for Lay Audience

The fiduciary relationship is a legal relationship that describes those interactions in which one party is entrusted to exercise discretionary power on behalf of another’s interests. In recent years, the fiduciary relationship proven to be a powerful tool for providing clarity to complex bioethical issues. But the exciting promise of the fiduciary relationship for bioethical analysis is threatened by at least two conceptual problems: moral-legal equivocation and paternalism. Legal-moral equivocation refers to the problem of assuming that the normative demands of a legal relationship are also morally normative. The cogent use of the fiduciary relationship in bioethical analysis requires some justification as to why the fiduciary obligation is a moral obligation. Paternalism refers to the worry that the fiduciary relationship is paternalistic and thus an inappropriate model for the healthcare professional-patient relationship, with its ethos of promoting patient autonomy. Chapter 1 addresses the problem of equivocation by arguing that the fiduciary relationship is a moral relationship, fostering social harmony by enabling individuals to trust or depend on one another in those interactions where one undertakes to act on another’s behalf. Chapter 2 addresses the problem of paternalism, arguing that the fiduciary relationship is essentially autonomy promoting; adopting a relational theory of autonomy, I argue that fiduciary power is “relational capacity” that makes certain autonomous ends possible. In Chapter 3, I illustrate the practical utility of the fiduciary relationship by using it as framework for conceptualizing and addressing the ethical issues in a controversial clinical trial, known as the SUPPORT trial.
Co-Authorship Statement

Chapter 3 of this dissertation has been adapted and expanded from a previously published co-authored article.¹

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Introduction

The divorce between legal concepts and their philosophical foundations renders the former susceptible to manipulation and misuse as they lose their connection to their philosophical and doctrinal foundations and subsequently become more and more unintelligible.²

— Leonard I. Rotman

In the Nichomachean Ethics Aristotle famously states that human flourishing (eudaimonia) requires “self-sufficiency.” Nevertheless, Aristotle recognized that self-sufficiency requires more than the philosopher’s solitary exercise of reason.³ He clarifies that by self-sufficient “we do not mean that which is sufficient for a man [sic] by himself.”⁴ Self-sufficiency, in other words, does not mean complete independence from the support, guidance, or influence of others. Rather, self-sufficiency, and thus human flourishing, also requires various external goods. The most important of these external goods are human relationships, such as those with family, friends, and even various professionals. As Aristotle himself poignantly puts it:

[N]o one would choose the whole world on condition of being alone, since man is a political creature and one whose nature is to live with others. Therefore even the happy man lives with others; for he has the things that are by nature good […] Therefore the happy man needs friends.⁵

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⁴ Aristotle, The Complete Aristotle, 3031 (emphasis added). Please assume a “sic” throughout, wherever the inappropriate use of gendered (particularly male) pronouns are used within quotations. In my own writing, I will make mixed use of gendered (he/she) and nongendered (they/them) pronouns throughout.

⁵ Ibid., 3292–94.
Aristotle recognized 2500 years earlier the essential role that our *relationships* play in the quest for self-sufficiency—or rather, for “self-governance” or *autonomy*. Put simply, relationships, on the Aristotelian account, are *essential* for autonomy.

Aristotle’s insights about the relational requirements of human autonomy and human flourishing (*eudaimonia*) are as true today as they were then. We depend upon others in myriad different ways. Members of human societies have always depended on certain foundational social relationships, such as those between parents and children, spouses and families, friends and allies, healers and the sick, leaders and followers. However, as our societies become more complex and technologically advanced, various forms of knowledge, skill, and expertise have become increasingly compartmentalized. Obtaining even the most basic goods depends on a complex web of human interactions, each stage involving a specialized set of knowledge or skills. To be sure, there is unlikely that any facet of our lives is left untouched by the support, care, and guidance—or lack thereof—of others. It is upon this elaborate system of social and economic cooperation, and corresponding mutual dependence, that complex modern societies are built.

Arguably, among the most important of these social and economic relationships are those that have been characterized as “*fiduciary*.” A fiduciary relationship is a legal relationship defined broadly as those interactions in which one party (the fiduciary) is entrusted or undertakes to exercise discretionary power on behalf of another’s (the beneficiary’s) best interests. The fiduciary relationship is characterized by a “structural inequality” between the *power* of the fiduciary to affect the beneficiaries interests and the *dependence* of the beneficiary on that power. The inequality inherent to the fiduciary relationship renders the beneficiary *vulnerable* to the fiduciary’s potential misuse, abuse, or neglect of her

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6 The etymology of “autonomy” is derived from the Greek “autonomia”—“auto” and “nomos”—which literally means “self-law.” In other words, to be self-ruling, to be one’s own lawmaker, or to “self-govern.”


8 Miller, “A Theory of Fiduciary Liability.”
discretionary powers. Hence, as a “prophylactic” against any potential exploitation, the law demands of the fiduciary a strict duty of *loyalty* to promote her beneficiary’s best interests—among other duties such as confidentiality, candor, and care. The legal fiduciary obligation of loyalty is quite exacting. For instance, it prohibits the fiduciary from entering into even *potentially* conflicting relationships or from profiting from their privileged capacity qua fiduciary. Legal remedies for the violation of this duty are also comparatively unforgiving. The demanding nature of the fiduciary obligation, along with the severe penalties for its violation, speaks to the importance the law places in the continued integrity, or viability, of this important legal relationship. Examples of fiduciary relationships include those between parent and child, physician and patient, lawyer and client, chief executive officer and shareholder (or stakeholder), and many others. Some have even argued that the state is a fiduciary to its citizenry.

The fiduciary relationship has enjoyed increased philosophical and jurisprudential attention over the past several decades. As the legal contours of this relationship have become more well-defined through fiduciary jurisprudence and academic debate, a greater number of persons and entities have been found by both legal scholarship and the courts to owe fiduciary obligations. The courts have thus had to consider whether all of these

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9 Although the exact number and type of fiduciary duties is contested.

10 It is standard practice in jurisprudence to use the term “law” to refer specifically to the common law, as distinct from Equity. However, unless other stated, I will use “law” more broadly to refer to legal institutions generally, as contrasted with morality. Where I specifically mean the common law, as distinct from Equity, I will use the phrase “common law.”

11 For example, the disgorgement of ill-gotten profits and the creation of a constructive Trust, among others. Note that I will capitalize “Trust” when referring to the legal relationship, or institution, created by (at least in the common law tradition) English Equity. I will reserve lower case “trust” for broad moral and philosophical ideas about a particular way in which individuals relate to one another (i.e., in *trust* relationships).

12 Not all common law jurisdictions recognize the same relationships as fiduciary. Australia, in particular, is quite restrictive and does not consider the physician-patient relationship to be fiduciary.

relationships are in fact “fiduciary.” In recent decades, questions about the nature and application of the fiduciary relationship have given rise to a rich debate among jurists, philosophers, and other legal scholars in the growing jurisprudence on fiduciary law. These questions include those about the meaning, scope, obligations, and legal taxonomy (e.g., its relation to other areas of the law, such contract or tort) of the fiduciary relationship, to name just a few.

Concurrent with the rise of fiduciary jurisprudence in the law has been the increased interest in, and application of, the fiduciary relationship to the ethical problems of research and medical ethics. Many bioethicists have taken seriously the finding by (most) common law courts that the physician-patient relationship, in particular, is fiduciary. In other words, an increasing number of bioethicists have found in the fiduciary relationship a useful framework for conceptualizing the kinds of ethical issues that arise between healthcare professionals and their patients. By “framework” here I simply mean that the fiduciary relationship denotes a unique mode of human interaction whose express purpose is to enable one individual to trust or depend on another to act on behalf of their interests, and to remain loyal to those interests in doing so. This mode of interaction, or relationship, has a certain structure (i.e., inequality between power and dependence), which gives rise to other features (e.g., a vulnerability to exploitation), and ultimately to various rules and obligations (e.g., loyalty, candor, care, etc.) which function to protect or maintain the viability of the fiduciary relationship itself. As a framework, the fiduciary relationship has proven promising for clarifying a number of seemingly intractable ethical debates, such as those about commercial surrogacy, conscientious objection, and the ethical conduct of innovative research methodologies.

In the law, such considerations usually involve whether there are any overriding “policy” considerations (i.e., beyond mere application of legal theory or tests) for recognizing a particular relationship as fiduciary. For example, in recognizing a strict fiduciary obligation of the state to the general citizenry would likely overwhelm the courts with legal actions claiming breach of the state’s duty of loyalty.

I will flesh this idea out in more detail in Chapter 1.

For example, Charles Fried (a jurist) was among the first to recognize and apply the fiduciary relationship to the interaction between physician and patient, from which he drew important legal as well as ethical implications for conducting research with patient populations. In particular, Fried reconceptualized the perennial problem of randomization in clinical trials through a fiduciary lens. Using a fiduciary framework, Fried argued that the ethical problem posed by randomization, an essential component of a subset of clinical trial design, is that it conflicts with a physician’s fiduciary obligation to use their discretionary judgment in pursuit of patients’ best interests. Reframing and reclarifying the problem posed by randomization in this way also paved the way for an ethical resolution to this problem that is still influential today: namely, the suggestion that enrolling patients in a randomized clinical trial is consistent with a physician’s fiduciary obligation to promote the patient’s best interests, so long as the therapeutic merits of all arms of the trial are in a state of “clinical equipoise,” or uncertainty. In other words, so long as the body of professional knowledge from which physicians’ (qua professionals) discretionary judgment is derived is in a state of uncertainty as to the preferred treatment, the physician does not violate her fiduciary obligation by recommending the patient enroll in the trial. Since Fried’s seminal analysis, many bioethicists have found in the fiduciary relationship a useful ethical framework that provides much-needed clarity to a wide array of bioethical conundrums, such as those previously mentioned. The application of the fiduciary relationship to these and other ethical issues implies that it is also a moral and not simply legal relationship.

University, 2017), Electronic Thesis and Dissertation Repository 4728, https://ir.lib.uwo.ca/etd/4728, respectively; and Chapter 3 of this dissertation.


18 The history and contemporary application of equipoise will be discussed in greater detail in Chapter 2 of this dissertation. For more on the history, nature, and contemporary application of clinical equipoise see Austin R. Horn and Charles Weijer, “Clinical Equipoise,” Encyclopedia of Global Bioethics 1 (2015): 1–11.

19 Assuming there are no other contraindications that would disqualify the patient from enrollment in the trial.
This dissertation is motivated by the promise of the fiduciary relationship to address complex bioethical issues, particularly in the realms of medical and research ethics. However, in order to provide a firm conceptual foundation for the widespread application of the fiduciary relationship as a tool of bioethical analysis, I explore and address reasons why bioethicists might be skeptical about fully embracing the fiduciary relationship as an ethical framework for the physician-patient relationship. The reasons I identify are twofold.

The first problem is what I call the problem legal-moral *equivocation*. Generally speaking, “equivocation” refers to the misleading exploitation of the ambiguity of a concept to draw certain conclusions (which are, as a result, often invalid). A classic example involves equivocation between legal “laws” and the so-called “laws” of nature, which can be found in the following fallacious argument: “[L]aws imply lawgivers. There are laws in nature. Therefore, there must be a cosmic lawgiver.” The conclusion is invalid because it turns on two different meanings of “law” in this case. The equivocation to which I am referring vis-à-vis the fiduciary relationship turns on the ambiguity between the different meanings of “normative”—or perhaps more accurately, the two different *domains* in which the concept “normative” operates. On the one hand, the law *normatively* prescribes certain behaviour for *legal* reasons (e.g., the threat of punishment). Morality, on the other hand, also *normatively* prescribes certain behaviour, based on *moral* reasons (such as the desire to do, or be, “good”). Legal-moral equivocation, then, turns on the ambiguity of “normative” insofar as it assumes—without argument or justification—that the sense of “normative” in the legal sphere can be straightforwardly applied to, or has implications for the “normative” of the moral or ethical sphere. Put simply, it supposes that the normative prescriptions derived from a *legal relationship* are also normatively prescriptive for a *moral relationship*.

Yet surely just because one has, as a matter of legal fact, a certain obligation in law, one does not (necessarily) also have a *moral* obligation as well. As an example, I may have a

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legal obligation to do my taxes, but it does not necessarily follow that I also have a moral obligation to do so. At the very least, more needs to be said to motivate the specifically moral “ought” in this case, such as having a moral obligation to contribute to the common good that is served by paying my taxes. Accordingly, more needs to be said to motivate the claim that the normative prescriptions of the fiduciary relationship, at least qua legal relationship, ought also to apply to and guide ethical practice. Indeed, Miller (a legal scholar) is careful to define the fiduciary relationship as “a distinctive type of legal relationship.” Clearly aware of this type fallacious reasoning, Miller couches his arguments concerning fiduciary duties and remedies purely in “juridical” terms, explicitly disavowing moral or ethical justifications.

The question therefore arises, if the fiduciary relationship is purely a construct of the law, why think that its prescriptions ought to have any bearing whatsoever on the ethical problems of bioethics? Why think that the fiduciary relationship, qua legal institution, is (also) a moral relationship? Indeed, the law has a number of “legal fictions,” so called as they are created to solve technical or policy problems in law. For example, treating corporations as legal “persons,” is a legal fiction. The fiction involves that idea that the corporation exists separately from those of its individual members. Granting corporations many of the legal rights and duties of human persons is (ostensibly) practical and expedient in commercial transactions (e.g., by enabling corporations to enter into contacts) and also protects its individual members from some legal and financial liabilities. However, corporations are clearly not real persons. The worry, then, is that the fiduciary relationship is simply a creation of the law, like a legal fiction, and its application (without justification) to the ethical problems of bioethics is therefore unfounded.

21 Miller, “Fiduciary Liability,” 235 (emphasis added).


Some bioethicists do indeed appear hesitant to explicitly name the fiduciary relationship in their ethical analyses, preferring instead to use related or overlapping ethical concepts such as trust, loyalty, and promise. There are of course different possible reasons for this apparent reluctancy to use the language of “fiduciaries,” beyond worries about equivocation. Perhaps, these bioethicists simply do not want to presume knowledge of a technical legal term among their readers, for instance. Still, their hesitancy could—and perhaps ought—to be owing, in part or in whole, to worries about legal-moral equivocation.

To illustrate, consider that it is not uncommon in some bioethical analyses to conflate the trust relationship with the fiduciary relationship, when it is clearly the latter that is being invoked. The reason for mentioning trust may be that the fiduciary relationship often involves trust, and the trust relationship is one that falls squarely within the ethical domain. The following is a salient example of this type of trust-fiduciary conflation:

[T]he truster (in this case, the patient) trusts the trustee (the physician) to protect and promote a significant practical interest (the patient’s health). The truster cedes control of the significant practical interest, and as a result, the trustee has discretionary power over the interest at stake.24

Here the authors unmistakably describe a fiduciary relationship—yet they use the language of “trust.” In fact, this definition that purports to be of a trust relationship is taken almost verbatim from Paul Miller’s own influential definition of the fiduciary relationship, albeit with the words “truster” and “trustee” in place of beneficiary and fiduciary, respectively.25 As Miller defines it, the fiduciary relationship is “one in which one party (the fiduciary) enjoys discretionary power over the significant practical interests of another (the beneficiary).”26 And yet the authors of the above quotation—who include Miller himself!—profess to describe a trust relationship. Why? One plausible answer is concerns about legal-moral equivocation (of which Miller himself is clearly cognizant).


26 Miller, “Fiduciary Liability,” 262.
Conflating the fiduciary relationship with other moral relationships does not alleviate the problem of legal-moral equivocation, it merely obfuscates it. The trust relationship, for one, is clearly not synonymous with the fiduciary relationship, as the following three reasons make plain. First, a trust relationship need not involve an imbalance (structural or otherwise) of power between the truster and the trustee. Trust can doubtless occur (and may even be easier) in positions of relative *equality*. Second, trust relationships do not require the truster to entrust a “significant practical interest” to the trusted. While trust *can* involve important interests of this kind, trust can clearly involve more trivial interests as well. For example, I might trust my partner to pick up a (nonessential!) ingredient for our dinner on the way home from work. Finally, and relatedly, nor does trust *necessarily* involve substantial “discretionary power.” While Annette Baier, in her seminal paper on trust, argues that trust *does* require discretionary power, other philosophers have since questioned how meaningfully “discretionary” many forms of trust actually are.\(^{27}\) This insight is perhaps most relevant to relationships that are entirely *agentive*. For example, I might entrust you to mail a letter for me according to clearly specified parameters, leaving you no room for meaningful “discretionary power,” and thus merely trusting *that* you will do so (while not forcing you to do it or knowing that you are somehow forced). The latitude for judgement or discretion in such cases is severely curtailed, rendering any remaining discretion somewhat trivial. Of course, trust will often be present in healthy fiduciary relationships, and many, if not most, trust relationships will involve a significant degree of authorized discretionary power. But this does not imply that the two relationships are synonymous or, for that matter, interchangeable. In the case above where they are used interchangeably, there is in fact a conflation going on, one that could be motivated by a worry about legal-moral equivocation. At any rate, equivocation *ought* to be a worry among bioethicists and others who intend to use the fiduciary relationship as an *ethical* framework, since it is, as Miller notes, “a distinctive type of legal relationship.” Extra-legal application of the fiduciary relationship requires justification and therefore remains a conceptual hurdle to its widespread use.

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\(^{27}\) See Karen Jones, “Trust as an Affective Attitude,” *Ethics* 107, no. 1 (October, 1996), 8 note 3.
The second problem is about *paternalism*. Specifically, the worry that the fiduciary relationship is paternalistic. Like the fiduciary relationship, paternalism involves acting on behalf, and in the presumed interests, of another. Medical paternalism, for example, is based on the rationale that the physician “knows best” because of his or her professional knowledge or expertise. On this model, the physician holds all the power and is justified in making *unilateral decisions* concerning the patient’s medical interests, even contrary to the patient’s expressed wishes. The history of professional medical ethics describes a series of troubling (and often tragic) abuses of patient welfare and autonomy based on this “doctor knows best” rationale. The infamous Tuskegee Syphilis is just one of many such examples.28 In response to the abuses perpetrated against patients based on the paternalistic model of the physician-patient relationship, contemporary bioethics has since moved toward a “patient-centred” model to healthcare decision-making. This alternative is intended to empower patients to take an active role in the pursuit of their healthcare interests and thereby promote patient autonomy.

The worry, in short, is that the fiduciary relationship is *paternalistic* and therefore is an inappropriate model for the physician-patient interaction. Indeed, the fiduciary relationship does appear to share many of the hallmarks of paternalism. Fiduciaries use their knowledge, skill, or expertise to act in the interests, and on behalf of, their beneficiaries. The fiduciary relationship is characterized by a structural inequality between the power of the fiduciary to affect the beneficiary’s interests and the dependence of the beneficiary on that power. Hence, insofar as the fiduciary relationship shares these fundamental characteristics with paternalism, its use as an ethical framework for the relationship

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28 Allan M. Brandt, “Racism and Research: The Case of the Tuskegee Syphilis Study,” *The Hastings Center Report* 8, no. 6 (December 1, 1978): 21–29. Subjects were taken from a socially and economically vulnerable (viz., poor and uneducated) community in Macon County, Alabama. The U.S. Public Health Service (USPHS) followed the 400 syphilitic men, and 200 non-syphilitic controls, for almost 40 years (1936 to 1972). During routine data collection subjects were told (falsely) that they were receiving treatment for their syphilis. When penicillin became widely available in the 1950s as the preferred treatment for syphilis, the men did not receive—and, in fact, researchers actively withheld—treatment. Only after public outrage, following coverage of the study in the national press, was the study finally put to an end, in 1972. By then only 74 subjects were still alive and likely more than 100 died as direct result of syphilitic lesions.
between healthcare professionals and their patients would—rightly—appear wrongheaded to contemporary bioethicists concerned to protect patient autonomy. At the very least, these characteristics ought to give bioethicists pause when considering the fiduciary relationship as a candidate ethical model, or framework, for conceptualizing ethical issues arising in medical or research ethics.

As of yet no one, to my knowledge, has effectively addressed these two conceptual hurdles to applying the fiduciary framework to ethical problems of bioethics. While some bioethicists have argued (along with many common law courts) that the physician-patient relationship is in fact fiduciary, none have provided sustained theoretical and specifically moral justification for applying this apparently legal relationship to the ethical domain. Similarly, while some bioethicists have argued that the fiduciary relationship is not paternalistic, none have made the stronger claim that the fiduciary relationship is essential to promoting autonomy. This stronger stance, which I take in this dissertation, responds to the threat of paternalism most effectively by saying that the fiduciary relationship is essentially the opposite of a paternalistic relationship: it is critical to autonomy.

This dissertation aims to alleviate these concerns about equivocation and paternalism by first uncovering the moral history of the fiduciary relationship (antecedent to its status as a legal institution) and second, by providing a theoretical moral grounding for the fiduciary relationship in its role in promoting autonomy. In this way, I hope to remove two conceptual hurdles to applying the fiduciary framework to ethical problems of bioethics.

29 I describe the problems of equivocation and paternalism as “conceptual” throughout. However, these problems are not “conceptual” in the sense there it they are issues of mere terminology. Rather, by “conceptual” I mean to refer the more substantive problems that arise when fiduciary relationship, as a concept that refers to a substantive mode of human interaction, is adopted and applied to the bioethical domain. Thanks to Anthony Skelton for drawing my attention to this point of clarification.

30 See, for example, McLeod, Conscience in Reproductive Healthcare, and Ryman, “Commercial Surrogacy.”

conceptual hurdles to the widespread application of the fiduciary relationship to the ethical problems of bioethics, and thereby foster greater clarity to ethical issues that arise in the context of the healthcare professional-patient relationship.

There are three chapters to this dissertation all of which are loosely related to the others and together comprise an overarching narrative. Chapters 1 and 2 provide mutually reinforcing arguments and therefore can be considered companion pieces. As explained below, Chapter 1 addresses the problem of equivocation through a historical lens, while Chapter 2 builds upon and reinforces the argument of Chapter 1, though concerns itself primarily with the problem of paternalism by locating the moral purpose of the fiduciary relationship in promoting autonomy. Chapter 3 applies the theory laid out in the preceding two chapters to an important contemporary problem in research ethics. Nevertheless, each of the three chapters can be read independently of the others, as each encompasses its own self-contained argument.

Chapter 1 takes up the problem of equivocation. It provides a moral ground for the fiduciary relationship by tracing its historical origins to a moral obligation; namely, the obligation that when one undertakes to act on behalf of another’s interests, one must do so with utmost fidelity, or loyalty, to that other’s interests. I illustrate how this moral obligation has enjoyed a roughly 3000-year history, existing across both time and cultures as (variously) a moral norm, religious command, and legal rule. I suggest that, in each historical instance, the fiduciary obligation effectively enables individuals to trust or depend on one another in the context of socially and economically important relationships in which one undertakes to act on behalf of another, thereby fostering greater cooperation and social harmony. I then describe how the fiduciary obligation entered English medieval law through the courts of Equity. In doing so I suggest that English Equity’s interest in, and institutionalization of, the fiduciary relationship is merely the latest instance of more or less continuous attempts by diverse societies throughout history to protect this important moral relationship.32 This historical analysis of the fiduciary relationship mitigates concerns

32 Throughout this dissertation I will capitalize “Equity” when referring to that legal jurisdiction that was, before the Judicature Acts of the 1870s, considered a separate jurisdiction from the common law. By doing
about legal-moral equivocation by suggesting that the fiduciary relationship is in fact a moral relationship.

Chapter 2 takes of the problem of paternalism by arguing that the fiduciary relationship is essentially autonomy promoting. I begin by drawing from Matthew Harding’s account of Equity’s interest in governing and maintaining “institutions,” or what he calls frameworks for human action. Harding argues that Equity is “normatively justified” in maintaining socially and economically important institutions insofar as doing so is consistent with the law’s liberal “facilitative project” aimed at promoting autonomy. Harding argues that Equity promotes autonomy by individuating and maintaining institutions as distinct “options” from which individuals can choose in the process of self-determination. I apply Harding’s analysis to the fiduciary relationship, arguing that the fiduciary relationship is one such institution that Equity has taken an interest in governing and maintaining, providing further theoretical support to the historical analysis provided in Chapter 1. However, I argue that Harding’s (Razian) conception of autonomy does not account for the ways in which autonomy is fundamentally relational; that is, how relationships with others both foster and impede our ability to self-govern and thus to be autonomous. I therefore go beyond Harding’s account by arguing that the fiduciary relationship is essentially autonomy promoting; that is, beyond its mere role as a distinct “option” from which individuals can choose in the pursuit of their self-directed plans. I argue that when we adopt a relational theory of autonomy, it becomes clear that the fiduciary relationship is critical to both the development of “autonomy skills” (as in the parent-child relationship) as well as to the ongoing exercise of autonomy. Finally, I employ Paul Miller’s influential account of the fiduciary relationship to argue that “fiduciary power” is a relational capacity through which individuals are able to exercise their will. Moreover, that this relational capacity is often essential to meaningful self-governance. In this way, I respond to the problem of paternalism by arguing that the fiduciary relationship is essential to the promotion of autonomy and, thereby, not paternalistic. Moreover, building on the thesis of Chapter 1, I

so, I intend to disambiguate this legal jurisdiction from lower case “equity,” which I reserve for broad moral and philosophical ideas about equality and fairness (and which the courts of Equity ostensibly took as their subject matter).
argue that way in which the fiduciary relationship fosters social harmony in coextensive with the way in which it promotes autonomy, which becomes clear when we adopt a relational theory of autonomy. To the extent that the fiduciary relationship is often essential to autonomy, worries about paternalism ought to be alleviated.

Finally, in Chapter 3, I illustrate the utility of the fiduciary relationship for providing ethical clarity to a recent controversy in research ethics. The SUPPORT trial was a pragmatic comparative effectiveness randomized clinical trial (ceRCT), an innovative research methodology designed to be conducted under real-world clinical conditions. The SUPPORT trial compared two “standard of care” oxygen saturation ranges on preterm infants on outcomes of blindness and death. Infants were randomized to either “low” or “high” saturation ranges, both of which (purportedly) fell within the full standard of care range. The outcome of the trial showed that for every case of blindness prevented (for infants in the low oxygen arm) there were two infant deaths. Controversy erupted when it was discovered that neither blindness nor death—the primary study outcomes—were disclosed as “research risks” to the study participants. Debate about the SUPPORT trial was highly polarized, yet (as I point out) largely ad hoc. I demonstrate how applying a fiduciary analysis can be a powerful tool for systematically identifying and appropriately conceptualizing the ethical issues that arise in the SUPPORT trial, and perhaps in pragmatic trials generally, offering much-need clarity to a difficult and emotionally charged debate.

In summary, in this dissertation I identify and aim to mitigate two important conceptual hurdles to the widespread application of the fiduciary relationship in bioethical analysis: viz., equivocation and paternalism. I do so, first, by uncovering the moral history of the fiduciary obligation prior to its legal instantiation, suggesting that concerns about legal-moral equivocation are misplaced. Secondly, I respond to the problem of paternalism by arguing that the fiduciary relationship is often essential to promoting autonomy. Moreover, I suggest that the essential role the fiduciary relationship plays in promoting autonomy provides it with a firm foundation in morality. Finally, by applying a fiduciary analysis to a complex and controversial contemporary bioethical case study, I illustrate the utility of the fiduciary relationship as a framework for thinking clearly and systematically about the
relevant ethical issues that may arise between healthcare professionals and their patients. However, insofar as there are other philosophical issues with applying a fiduciary analysis to bioethical problems (beyond equivocation and paternalism) this dissertation does not address every obstacle to its ethical application. Nevertheless, by addressing two such major issues, proposing a foundation for the fiduciary relationship in morality, and demonstrating its utility for ethical analysis, I hope to aid in laying the theoretical foundation for future work in this exciting new area of bioethics.
Chapter 1

1 A Moral and Legal History of the Fiduciary Relationship

In this chapter, my aim is to address the problem of legal-moral equivocation. I do so by tracing the history of the fiduciary relationship from its origins in ancient moral, religious, and legal thought to its adoption by the Medieval English courts of Chancery, and later English Equity—from which we gain our modern understanding of the fiduciary relationship qua legal relationship. I suggest that the fiduciary relationship is defined by an underlying fiduciary obligation: namely, the normative demand that when one undertakes to act on behalf of another’s significant practical interests, one must do so with utmost fidelity, or loyalty, to that other’s interests. Moreover, I argue that the fiduciary obligation arose and developed alongside increasingly complex human civilizations, responding to a problem “etched in human nature”: viz., how to trust, or at least reliably depend upon, others who undertake to act on behalf of our interests? By way of this historical analysis, I intend to argue that the fiduciary relationship is, first and foremost, a moral relationship. By “moral” here I simply mean that widespread social adherence to the normative demands of the fiduciary obligation is essential to human cooperation and, ultimately, social harmony. Uncovering the history of the fiduciary relationship reveals the important moral role the fiduciary obligation, and thus the fiduciary relationship, has played in fostering social harmony since the emergence of complex human societies. Insofar as the fiduciary relationship is in fact a moral relationship (indeed, one that grounds the legal relationship) worries about legal-moral equivocation simply dissolve. Applying the fiduciary relationship to the ethical problems of bioethics therefore need not raise concerns about the illicit or unjustified importation of normative obligations from the legal into the moral domain. The fiduciary relationship is a moral relationship and thus its application to ethical

33 As mentioned in the Introduction, I will capitalize “Equity” when I mean to refer the English equitable jurisdiction (at least prior to the Judicature Acts) that evolved out of Chancery, and as disambiguated from the moral sense of “equity” (i.e., with connotations of equality or fairness).

issues that arise between healthcare professionals and their patients, in particular, is justified.

I am not the first to recognize the moral dimension of the fiduciary relationship. A number of other scholars have identified various moral corollaries of the fiduciary obligation throughout the course of human civilizations. In section 1.1, I briefly outline some of these views and suggest a unifying theme among them. As just alluded to above, I suggest that in each historical instance in which evidence of the fiduciary obligation can be found, it is invoked in an effort to address a specific problem inherent to human action: again, how can one trust or at least reliably depend upon another to act on behalf of one’s interests? By synthesizing these disparate accounts, I suggest that the fiduciary relationship, and specifically its defining obligation, functions as a moral obligation insofar as it fosters broadscale human cooperation, greater social harmony and, ultimately, individual human flourishing. In other words, without the kinds of social and economic cooperation that the fiduciary relationship makes possible, individuals would be simply incapable of engaging in many kinds of human interactions that make a worthwhile life possible.\(^{35}\)

In section 1.2, I illustrate how the fiduciary obligation has been present throughout the course of human civilizations, from the Code of Hammurabi to its eventual birth in Medieval English law, to which we owe our contemporary understanding. The historical account provided in section 1.2 is broken into two subsections: sections 1.2.1 and 1.2.2. Section 1.2.1 traces the fiduciary obligation from Ancient Mesopotamia to the age of the Roman Empire. I highlight evidence of the fiduciary obligation in moral, religious, and legal thought, including in: the Ancient Babylonian laws of agency, bailment, and negligence; Ancient Chinese law and philosophy; the religious edicts of the Old and New Testaments; provisions in Islamic and Jewish law; and, finally, in Roman law. Against this background, section 1.2.2 illustrates how the fiduciary obligation became an equitable principle of the courts of Chancery, an early court of English Equity. In this section, I

\(^{35}\) Filling out this idea is the subject of Chapter 2, wherein I argue that the fiduciary relationship is essential to meaningful self-governance, or autonomy.
provide a brief historical account of how Equity arose in tandem with the legal Trust, out of which evolved our modern understanding of the fiduciary relationship (i.e., as an institution of Equity). I describe how Chancery came to view itself as serving an equitable jurisdiction in supplement (and superior) to the Common Law. This history is intended to suggest that the fiduciary obligation’s eventual entry into English law through the courts of Equity is merely contemporary Western society’s latest attempt to protect and enforce this important moral obligation, which has existed across cultures for millennia, always with the aim of promoting greater social and economic cooperation and thus social harmony. I also suggest that it is perhaps unsurprising that the fiduciary obligation should gain a foothold in the law—qua equitable principle—through Chancery. Given the moral purpose the fiduciary relationship serves, it seems appropriate that a jurisdiction, which came to view itself as responsible for exercising principles of fairness and equality, became the eventual vehicle by which the fiduciary obligation entered our modern legal system.

Finally, in section 1.3 I raise and respond to two objections. The first objection concerns the nature of the historical narrative I will have provided. It is a matter of debate among jurists and legal philosophers as to whether the courts of Equity in fact occupy a unique jurisdiction vis-à-vis the Common Law, whether procedurally or substantively. To the extent that my argument depends on the claim that Equity plays a unique role as an equitable supplement to the Common Law, I am vulnerable to the criticisms of those who claim otherwise. Accordingly, I outline one such view and discuss its implications for my thesis. Second, I respond to a criticism that might be put forward by bioethicists, in particular. Bioethicists critical of the fiduciary relationship as a framework for the healthcare professional-patient interaction might ask the following: if the fiduciary obligation is as important as I make it out to be, morally speaking, then why has it not received more attention by moral philosophers? The critique suggests that if the fiduciary obligation were in fact an important moral obligation, then moral philosophers would have paid more attention to it. I respond to this objection by pointing out that the fiduciary obligation has received more attention from moral philosophers than might immediately be evident. Finally, I conclude this chapter by summarizing the implications of the history and arguments I have presented for the problem of legal-moral equivocation.
1.1 A Problem “Etched in Human Nature”

As defined in the Introduction, the fiduciary relationship refers to those interactions in which one party (the fiduciary) is entrusted to exercise discretionary power on behalf of another’s (the beneficiary’s) best interests. The fiduciary interaction is defined by the fiduciary’s obligation to use the discretionary power with which she has been entrusted with utmost fidelity, or loyalty, to the beneficiary’s interests. As also mentioned in the Introduction, both common and civil law jurisdictions recognize numerous relationships as fiduciary. These include relationships between parent and child, physician and patient, lawyer and client, financial advisor and advisee, chief executive officer and shareholder, among many others. The fiduciary relationship is characterized by the “structural inequality” between the power of the fiduciary to affect the beneficiaries interests and the dependence of the beneficiary on that power. This structural inequality renders the beneficiary vulnerable to exploitation through the fiduciary’s misuse, abuse, neglect, or exploitation of her discretionary power. Many jurists and legal philosophers agree that it is in response to the beneficiary’s inherent vulnerability that fiduciary duties arise. Fiduciary duties, along with the corresponding remedies for their violation, are sometimes said to serve a “prophylactic” function. Fiduciary duties and liabilities guide and deter fiduciaries from taking advantage of their privileged capacity qua fiduciary, or from simply failing to perform their fiduciary mandate, through the imposition of certain obligations (together with the threat of harsh punishments for failing to live up to the demands of those

36 Miller, “Fiduciary Liability.”

37 However, not Common Law jurisdictions recognize the same relationships as fiduciary. Australia is a notable exception, as it remained resistant expanding the fiduciary relationship outside of the Trust and few other relationships.

38 Miller, “Fiduciary Liability.”

39 Ibid.

40 See, for example, Miller, “Justifying Fiduciary Duties.”

Among the most important of these obligations is the fiduciary’s duty of strict loyalty to promote her beneficiary’s interests. Indeed, some jurists and legal philosophers argue that the duty of loyalty is constitutive of, or synonymous with, the fiduciary relationship itself.\footnote{See Lionel D. Smith, “Deterrence, Prophylaxis and Punishment in Fiduciary Obligations,” \textit{Journal of Equity} 7 (November 8, 2013): 87–104.}

Today the fiduciary relationship is largely understood to be a legal relationship, which is to say, a creature of English Equity, or of legal systems descended therefrom.\footnote{For instance, Miller (supra n 38, at 235) says “the fiduciary relationship is treated as a distinctive kind of legal relationship.”} As such, its duties and liabilities are thought to be correspondingly legal in nature. The fiduciary obligation of loyalty has been quite exacting, requiring of fiduciaries an unusual degree of selflessness in the pursuit of their beneficiaries’ best interests. But the norms and values inherent to the fiduciary relationship—selflessness, loyalty, trust, and others—have obvious moral connotations. Perhaps unsurprisingly then, a growing minority of jurists and philosophers have argued that we ought to consider the moral dimensions and corollaries of the fiduciary obligation. Accordingly, in this section I provide a brief survey of some of these views. I argue that a unifying thread can be found in the way the fiduciary obligation appears serve an important moral function in each; namely, by enabling individuals to trust or depend on one another, promoting mutual cooperation and fostering greater social harmony.

Among the first to recognize the broader applicability of the fiduciary relationship, beyond the law of Trusts (from which the contemporary fiduciary relationship has its roots), was jurist Austin Scott.\footnote{Austin W. Scott, “The Fiduciary Principle,” \textit{California Law Review} 37, no. 4 (December 1, 1949): 539–555. As we will see below, as an institution of English Equity, the fiduciary relationship originated in the Trust. A Trust is a legal relationship whereby a settlor, or testator, entrusts a Trustee to hold or manage Trust assets (e.g., property, finances, etc.) for the sole purpose of furthering the best interests (vis-à-vis the specific Trust assets in question) of a named beneficiary of that Trust.} Scott defined a “fiduciary” as “a person who undertakes to act in the
interests of another person.”  

Employing this broad definition, Scott identified numerous fiduciary relationships, some of which were atypical at the time of his writing. However, beyond simply expanding the legal scope of the fiduciary relationship, Scott went further by recognizing the fiduciary obligation in certain moral relationships as well. For instance, Scott identifies the fiduciary obligation in a moral-religious context in his analysis of the New Testament’s sixteenth chapter of the Gospel according to Saint Luke, known colloquially as the “Unjust Steward”:

There was a certain rich man, which had a steward; and the same was accused unto him that he had wasted his goods.
And he called him, and said unto him, How is it that I hear this of thee? give an account of thy stewardship; for thou mayest be no longer steward.
Then the steward said within himself, What shall I do? for my lord taketh away from me the stewardship: I cannot dig; to beg I am ashamed.
I am resolved what to do, that, when I am put out of the stewardship, they may receive me into their houses.
So he called every one of his lord's debtors unto him, and said unto the first, How much owest thou unto my lord?
And he said, An hundred measures of oil. And he said unto him, Take thy bill, and sit down quickly, and write fifty.
Then said he to another, And how much owest thou? And he said, An hundred measures of wheat.
And he said unto him, Take thy bill, and write fourscore. And the lord commended the unjust steward, because he had done wisely: for the children of this world are in their generation wiser than the children of light.

Upon learning of his master’s intention to fire him (apparently owing to an earlier failing) the titular Unjust Steward exploits his capacity as his master’s steward to confer a favour upon himself with his master’s debtors by relieving them of large portions of their debts. Scott argues that the Steward is a fiduciary to his master: he undertakes to act on behalf of

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46 Scott identifies the following fiduciary relationships: “the trustee and beneficiary, guardian and ward, agent and principal, attorney and client, executor or administrator and legatees and next of the kin of the decedent. The directors and officers of a corporation are in a fiduciary relation to the corporation, and to some extent at least to the shareholders. In a partnership each partner is in a fiduciary relation to the others, since, although he has his own interests to look after, he also has the power and duty to look after the interests of the others.” Ibid., 539.

his master’s interests. As Scott says, “it was his duty in dealing with this master’s affairs to act solely in the interest of his master.” Accordingly, the Steward owes a duty of loyalty to his master’s interests in discharging his role as fiduciary, in this case, in securing debts owed to his master. Instead, the Steward uses his privileged capacity as his master’s fiduciary, or steward, to secure his own interests. It is precisely the violation of his fiduciary obligation to his master that renders the Steward “unjust” in this case. The “injustice” in this case is clearly not (or at least not only) the violation of a legal law, but as the context of this biblical passage suggests, it is (also) a violation of a moral-religious law. Hence, Scott suggests that in contravening the normative demands of the fiduciary obligation, the Steward also violates a moral obligation.

Scott is not the only one to identify the moral dimensions of the fiduciary relationship. As briefly mentioned, Frankel begins by noting the striking parallels between the Ancient corollaries of the fiduciary obligation, along with various norms and rules that give life to it, with those of today’s fiduciary duties and rules. Frankel says that these parallels are unsurprising, given that the fiduciary obligation was, and remains, an important moral obligation that guides a critical mode of human interaction: namely, where one undertakes to act on behalf of another’s interests.

[O]verlaying all [fiduciary] rules is a theme of morality and fairness—protection of entrustors from serious injury from the relationship. And while law may have been rigid, strict and specific, the roots of ancient and religious laws have permeated fiduciary law, and have not relinquished their hold even today.

Frankel suggests that the fiduciary obligation serves a moral function by enabling individuals to engage in a certain type of relationship of trust and dependence, which underpins ancient and modern fiduciary laws alike, while also accounting for the remarkable similarity between the two. The similarity exists because the moral problem,

\begin{itemize}
\item \textsuperscript{48} Scott, “The Fiduciary Principle,” 540.
\item \textsuperscript{49} Frankel, \textit{Fiduciary law}.
\item \textsuperscript{50} Ibid., 98.
\end{itemize}
in response to which the fiduciary obligation arises, is as relevant today as it was 3000 years ago. The problem, again, concerns how to trust or depend on another who undertakes to act on our behalf. Our manifest interdependence leaves us vulnerable to exploitation at the hands of others in whom we have placed our trust, or upon whom we depend. Given that countless important social and economic interactions require entrusting others to act on our behalf, how can we reliably trust or depend on those others to act in our interests? As Frankel points out, this problem is not unique to modern societies; rather, “it seems that throughout the centuries the problems that these [fiduciary] laws were designed to solve are eternal, etched in human nature, derived from human needs, and built into human activities.”51 The fiduciary obligation mitigates this problem by prescribing a strict duty of loyalty to the beneficiary’s interests. The societal importance of adhering to this obligation is reflected, as we will see, in moral, religious, and legal thought throughout the history of human civilizations.

It is worth noting here that the fiduciary duty of loyalty does not imply that a fiduciary must act entirely selflessly vis-à-vis all of her beneficiary’s interests. In Chapter 2, I discuss in detail the unique nature of fiduciary power which, according to Miller’s influential account, is (among other things) specific. Specificity implies that the fiduciary exercise her powers of discretion on behalf of her beneficiary’s significant practical interests, which includes matters of personality, welfare, and right. Without belaboring the point too much here, the fiduciary’s obligation to her beneficiary is delimited to a specific subset of interests. For example, a parent (qua legal and, as I argue, moral fiduciary) would not be in violation of her fiduciary duty to act on behalf of her child’s “best interests,” should she decide to coach her child’s opposing hockey team. While coaching the opposing team is clearly not in her child’s “best interests,” broadly construed, it is nevertheless compatible with the parent’s specific fiduciary mandate to act on behalf of her child’s significant practical interests. In this case, the child’s welfare interests include basic physical necessities such as food, clothing, and shelter, as well as psychological needs like a sense

51 Ibid., 79 (emphasis added).
of security, love, and emotional support. Personality interests might include fostering the relevant cognitive and emotional skills necessary for a sense of agency or self-actualization in adulthood, such as self-awareness, confidence, and empathy. Indeed, one can imagine, for the sake of argument, that in coaching the opposing hockey team, the parent-fiduciary both remains involved in and supportive of her child’s welfare and personality interests, say, by providing space for her child to gain a sense of independence and perhaps empathy as well (i.e., let us suppose, by humanizing—as opposed to “othering”—the opposing team). Nevertheless, even circumscribed in this way, the fiduciary obligation is quite demanding. But it is precisely the exacting nature of the fiduciary obligation that makes it possible for individuals to trust or reliably depend on one another in the context of this unique mode of human interaction and commensurate with it immense social and economic importance.

Legal scholar, Leonard Rotman, agrees. Rotman argues that the purpose of the fiduciary obligation is to protect “important social and economic interactions of high trust and confidence that create an implicit dependency and peculiar vulnerability of beneficiaries to their fiduciaries.” Societies characterized by a high degree of specialization of knowledge, skill, and expertise require involved systems of cooperation, and thus make interdependence foundational to its structure and functioning. According to Rotman,

[f]iduciary interactions rank among the most valuable in society by enhancing productivity and knowledge, facilitating specialization, and creating fiscal and informational wealth. To protect them, fiduciary law subordinates individual interests to its broader social and economic goals. Relationships, rather than individuals, are the primary concern of the fiduciary concept.

52 Thank you to Andrew Botterell for the example and to Carolyn McLeod for helping me to clarify my thinking on this point.
53 Rotman, “Understanding Fiduciary Duties.”
54 Ibid., 988.
55 Ibid., 989. While some argue that fiduciary duties exists to protect vulnerable beneficiaries from exploitation by their fiduciaries, Rotman argues that this effect is merely incidental: “while it may appear that the fiduciary concept exists to protect beneficiaries’ interests, that effect is merely ancillary to its
According to Rotman, the fiduciary obligation therefore prescribes “other-regarding behaviour [and thereby] allows certain individuals to trust that their interests will be cared for by others in various forms of fiduciary associations.” Rotman therefore echoes the view that the fiduciary obligation enables individuals to trust and depend on one another when one undertakes to act on behalf of another.

Taken together, Scott, Frankel, and Rotman suggest that the moral dimension, or purpose, of the fiduciary obligation is to enable individuals to reliably trust or depend upon one another in those modes of interaction that we have come to call “fiduciary.” In the next section, I provide historical support this theoretical claim. By tracing the fiduciary obligation throughout history, I suggest that for thousands of years, it has served to bolster trust and preserve the integrity of a mode of human interaction that today we recognize as the fiduciary relationship. The obligation thus mitigates that problem “etched in human nature” by allowing for greater cooperation and social harmony.

1.2 The Fiduciary Obligation from Ancient Thought to English Equity

A brief history of the fiduciary obligation provides some support for the contention that it existed first as a moral principle. Again, the idea of “moral” I have in mind here is the extent to which adherence to the normative demands of the fiduciary relationship is critical to fostering social harmony. The fiduciary relationship promotes social harmony by making trust, cooperation, and mutual dependence possible in that important subset of human interactions: namely, those relationships in which one undertakes to act on behalf of another’s interests. The history that follows therefore attempts to illustrate that in each historical instance in which evidence of the fiduciary relationship can be found, it is

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protection of fiduciary relationships” (988). As we will see in chapter two, Matthew Harding adopts a similar view.

56 Ibid., 987.

57 Moreover, as I argue in Chapter 2, such relationships are essential to individual self-governance or autonomy and, thereby, human flourishing.
employed to achieve these manifestly moral ends: to foster trust and dependence in this unique and essential mode of human interaction and, thereby, foster greater social cooperation, harmony and, ultimately, individual human flourishing.

Since Scott’s preliminary analysis, other scholars across a range of disciplines have identified evidence of the fiduciary obligation dating back millennia. What follows is a cursory glance at a few of the many historical examples of the fiduciary obligation (and its corollaries) throughout history, from its presence in Ancient thought to its eventual adoption into English law. Through this whirlwind tour through history, I hope merely to illustrate that long before the fiduciary relationship became the legal institution that we recognize today, it enjoyed a prior life over thousands of years as a moral principle underlying and informing moral, religious, and legal thought. In doing so, I hope to provide historical support to my thesis that the fiduciary obligation is a moral principle that predates its genesis in English law.

1.2.1 The Fiduciary Obligation from Hammurabi’s Code to Roman Law

Some of the earliest known examples of the fiduciary obligation are evident in the Babylonian Code of Hammurabi (c. 1700 BCE). Hammurabi, the sixth king of Babylon and the first king of the Babylonian empire, was responsible for the Code, which is among

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58 It perhaps goes without saying that it is (unfortunately) beyond the scope of this Chapter (and, indeed, this dissertation) to provide a truly comprehensive history of the fiduciary obligation; such an undertaking would clearly require its own dissertation (and probably much more than that). It is, however, sufficient for my purposes here to provide a cursory illustration of how what we would today recognize as the fiduciary obligation has informed moral, religious, and legal thought at various times and in various cultures throughout history. Moreover, I am simply unable to delve into how something like the fiduciary obligation might be evident in all cultures or world views including those of Indigenous peoples (making it a truly universal moral principle). While Indigenous world views are no doubt markedly heterogenous (there simply is no pan-indigenous law), it is perhaps fair to say many of them are grounded in principles of relationality, such as respect, dignity, loyalty, and mutuality between the human, natural, and spirit domains. Hence, I suspect that a corollary to the fiduciary obligation might also found there as well. It would be exciting and interesting to discover, for example, a fiduciary relationship between certain Indigenous people and the land, the former having various fiduciary responsibilities, such as a duty of care, to the latter—not unlike broad Judeo-Christian mission to serve as fiduciary to God (discussed below).
the earliest known examples of formal (written) law. At the end of Hammurabi’s reign (c. 1750 BCE) the 282 laws were collected and inscribed on a diorite stela (a stone slab) in the temple of Marduk, the national god of Babylon. The Code of Hammurabi was used to settle matters of crime (assault, theft), family (marriage and divorce), and economic matters (property, tariffs, trade and commerce) in the Babylonian courts. The laws themselves have a clear moral-religious basis. Derived from the commandments of the Babylonian deities, they prescribe appropriate conduct within various social and economic interactions, with an aim to fostering social harmony. As Frankel explains:

Hammurabi’s Code’s introduction or preamble refers to the Gods in the Babylonian pantheon and recognizes the notions of good and evil; right and wrong. The Code reflects a desire to protect the weak and the oppressed, and the mission “to further the welfare of the people.”

The Babylonian legal code was derived directly from moral-religious doctrines about how individuals ought to behave, understood in terms of good and bad, right and wrong—that is, morally. Frankel explains that moral “themes of fairness, prohibition of corruption, ethical behavior, and consideration of the common good reverberate in this ancient fiduciary law.”

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60 “Code of Hammurabi.”

61 Ibid.

62 Frankel, *Fiduciary Law*, 89.

63 Ibid., 89.
Hammurabi’s laws governing the behaviour of agents entrusted with property provide the first clear evidence of the fiduciary obligation.64 The agency laws of the Code of Hammurabi evolved in tandem with growing trade and commerce in Ancient Mesopotamia.65 With increasingly complex social and economic relationships came normative principles governing correct behaviour in the context of those relationships. For instance, a tamarkum, or principal merchant, would entrust goods or money for trading with a samallum, or agent. The vital economic importance of trade made the integrity of such relationships worth protecting. The tamarkum’s vulnerability to exploitation was therefore mitigated by the Code’s imposition of heavy responsibilities on the agent, akin to those of fiduciaries.

Also embodying the fiduciary obligation was the Code’s inclusion of laws regulating bailment, or “when an owner of personal property (the bailor) temporarily transfers the property to another person (bailee).”66 Hammurabi’s laws placed strict liabilities, similar to today’s fiduciary liabilities, on bailees in cases of fault or negligence. For example, a bailee who negligently caused the death of the bailor’s animal was required to replace it; or in the event that the animal was injured the bailee would be required to pay (often harsh) damages.67 Moreover, Hammurabi’s Code contains negligence rules similar to modern negligence laws. If a sailor, for example, entrusted with sailing a boat full of goods to a destination was to negligently damage the boat or the goods, he would be required to compensate for the lost or damaged goods.68

65 Frankel, Fiduciary Law, 80.
66 Ibid., 80.
67 Ibid., 81.
68 Ibid., 82.
The fiduciary’s duty of *loyalty* has ancient origins as well, evident in early Trust law. Indeed, Hammurabi’s laws imposed draconian punishments for the violation of a Trustee’s duty of loyalty:

[Hammurabi’s laws] provided that a man’s hand will be cut off if the man was hired to manage another person’s farm and stole seed grain or fodder. […] If a herdsman, hired to take care of cattle or sheep, falsely accounted for the natural growth of the herd or fraudulently sold the newborn cattle or sheep, the herdsman had to pay the owner ten times the owner’s loss of the newborns.  

Again, these seemingly harsh liabilities and their remedies resemble (at least in force or intent) those of contemporary fiduciaries, such as disgorgement and constructive trust remedies. The onerous nature of fiduciary liabilities appears to be commensurate with the societal importance placed on these types of interactions—namely, where one undertakes to act on behalf of another’s significant practical interests. It would therefore seem that even in ancient Mesopotamia, as today, harsh penalties serve a “prophylactic” function, disincentivizing the violation of fiduciary duties and thus protecting the integrity of the fiduciary interaction.

This narrative is given further support by the contemporaneous and (likely) independent evolution of the fiduciary obligation in the Ancient East. Evidence of the fiduciary principle can be seen, for example, in the Ancient Chinese law of the Qing Dynasty (1644–1911 BCE). Chinese rulers were deemed to have a moral fiduciary responsibility to maintain harmony between the human and natural worlds. Moreover, in the Ancient Chinese teachings of Confucius (500 BCE) one of the three basic questions of self-examination asks whether one has lived up to the moral demands of the fiduciary obligation: “In acting on behalf of others, have I always been loyal to their interests?”

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69 Ibid., 82.

70 See Lionel D. Smith, “Deterrence, Prophylaxis and Punishment.”

71 Johnson, “Natural Law and Fiduciary Duties,” 281.
The fiduciary obligation is still recognized in Chinese law today. Although the fiduciary relationship is today thought to be derived from English law, evidence of the fiduciary obligation outside of Western thought, and the Western legal tradition in particular, provides further support for the idea that the interpersonal and societal problems it serves to mitigate are truly pan-cultural, perhaps lending it a semblance of the universality traditionally associated with other moral rules or principles. As Rotman argues, the *raison d’être* or purpose of the fiduciary obligation is to enable individuals to engage in relationships of “high trust and confidence”—and the need to do so is clearly not one required only by Western societies.

As we saw above in Scott’s New Testament analysis of the Unjust steward, traces of the fiduciary obligation can also be found in the moral-religious commands present in biblical writings. Beginning with the Old Testament, “the Lord told Moses that it is a sin not to restore that which is delivered unto a man to keep safely, and penalties must be paid for the violation (Leviticus 6: 2–5).” In other words, it is a moral-religious violation (i.e., a *sin*), with corresponding penalties, to fail to appropriately care for another’s property. This divine command has clear similarities with the obligations of Trustees, and thus fiduciaries, as well; namely, that when a fiduciary-Trustee undertakes to hold, manage, or dispense Trust assets (such as property), she must do so with strict loyalty to the beneficiary’s significant practical interests with respect to those assets.

The New Testament has other illustrations of the fiduciary obligation as well. St. Luke, for instance, refers to it most clearly in the following decree: “No servant can serve two masters” (Luke 16:13). Indeed, the commandment that “no man can serve two masters” has often been cited as the moral-religious underpinnings of the fiduciary obligation by the

72 Ibid., 281.


74 Johnson, “Natural Law and Fiduciary Duties,” 280.

75 Ibid. See also Matthew 6:24: “No man can serve two masters.”
English courts of law since the seventeenth century.\textsuperscript{76} As Joseph Johnson notes, this biblical precept has been invoked by English courts particularly when one of those two masters is \textit{oneself}, stressing the importance of the selfless, other-regarding demands of the fiduciary obligation.\textsuperscript{77} Moreover, Frankel goes as far as to suggest that the moral-religious roots of the fiduciary obligation are illustrated in the broad Judeo-Christian mission to serve as \textit{fiduciary to God}, or as steward to God. The moral agent is seen as acting on behalf of God and (presumably) in God’s interests. Frankel argues that, “within this creative-redemptive-consummative framework, business people in the Bible have fiduciary duties to God and others…. In Christian theology, Christ is the perfect fiduciary. He is the selfless steward who lays down his life for others.”\textsuperscript{78} Of course, as mentioned, the fiduciary mandate is often delimited to \textit{specific} interests (among other caveats), and thus does not require fiduciaries to be \textit{completely} selfless, as Christ appears to have been. (However, in this example, it might be argued that \textit{complete} selflessness was part of Christ’s unique fiduciary mandate).

Mary Szto unearths similar examples of the fiduciary obligation in Jewish law:

Fiduciary duties in the biblical tradition begin in the Genesis creation account. The human mission on earth is to be a fiduciary, a steward of God’s and other’s property. Israel is a fiduciary. So is Jesus Christ … [A]fter creating the world, God appoints man and woman as agents. They steward the world, exercise dominion, and are fruitful.\textsuperscript{79}


\textsuperscript{77} Johnson, “Natural Law and Fiduciary Duties,” 281.

\textsuperscript{78} Frankel, \textit{Fiduciary Law}, 89.

In Leviticus 19:14 the bible also states that, “You shall not curse the deaf nor place a stumbling block before the blind; you shall fear your God—I am your Lord.” In his analysis of this passage, Hershey Friedman says that,

[t]he blind was interpreted to include [the] ignorant and unknowing…. Thus, one should not advise another party that it is in his interest to sell his field in order to buy a donkey, when his true intention is to buy the field for himself. By concealing the ulterior motive of his advice, he has violated the principle.

According to Jewish law then, an advisor has a fiduciary obligation of loyalty to her advisee’s interests; if the advisor misleads the advisee, she may be liable to pay remedies for breach of fiduciary duty.

As another example taken from (middle) Eastern thought, the Sharia, or Islamic law, also recognizes and regulates fiduciary relationships. Similar to the moral-religious underpinnings of the Babylonian Code, the Sharia is derived from “Divine Islamic Law,” taken from the Koran. The fiduciary obligation can be seen again in the Sharia’s laws governing agency. If an agent is “careless about looking after the property” to which she has been made Trustee, or “treated in a manner which was different from the one allowed by the principle,” then the agent is responsible for it. Yet again we see fiduciary liabilities that parallel those of contemporary jurisprudence: if an agent uses the property for her own benefit, violating her fiduciary duty of loyalty (trespass), she will be liable to pay strict remedies that reflect her failed responsibility. Similarly, the Trust (waqf) is also an important institution in Islamic law, even serving as an alternative to corporations.

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80 Qtd. in Frankel, Fiduciary Law, 87.
82 Frankel, Fiduciary Law, 88.
83 Ibid., 84.
84 Ibid., 85.
85 Ibid.
Frankel suggests that Muslims may have chosen the Trust over the corporation because it better accords with Islam’s communal vision: “the ancient origin of the institution of [T]rust, [stems from] its positive commitment to God and community.”  

Again, this seems to echo the Judeo-Christian conception of an individual’s mission as fiduciary, or steward, to God.

Finally, the Islamic Trust, or *waqf*, was actually adapted from the Roman Law of the Twelve Tables (448 BCE), from which evidence of the fiduciary obligation can also be found.  

Frankel explains that Roman Law, required thieves to make restitution payments to their victims starting at double the value of the stolen goods. The value of the payment due would increase depending on the circumstance in which such stolen goods were found or confiscated. In England, prior to the Middle Ages, elaborate and detailed systems of victim compensation were developed by the Anglo-Saxons, placing the victim’s right to compensation at the forefront of punishment considerations.

Here we see again the strict liabilities to which agents and Trustees are held in the event that they breach their fiduciary obligation. Evidence that Roman jurists incorporated the specifically *moral* dimensions of fiduciary obligation into law is illustrated most notably in the *mandatum*. The *mandatum* was a relationship that involved an undertaking by the *mandatory* (agent) to act for the benefit of the *mandator* (principal).  

Cicero hints towards the link between the *moral* aspect of a breach of Trust and the *legal* consequences:

> In private business, if a man showed even the slightest carelessness in his execution of trust [*mandatum*]—I say nothing about culpable mismanagement for his own interest or profit—our ancestors considered that he had behaved very *dishonorably* indeed. In such cases a trial for breach of trust was held, and conviction on such a

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86 Ibid.
87 Ibid. 83.
88 Ibid.
89 Johnson, “Natural Law and Fiduciary Duties,” 281.
charge was believed to be every bit as shameful as conviction for an offense such as theft.\textsuperscript{90}

The idea that the violation of the fiduciary obligation is “dishonourable” and “shameful” has clear moral connotations. Further still, Cicero says that one who betrays the Trust, “is undermining the entire basis of our social system.”\textsuperscript{91} In other words, adherence to the moral demands of the fiduciary obligation, like other moral obligations, is necessary for social cooperation and harmony. Accordingly, the violation of the fiduciary obligation—understood here as a moral obligation—invites social disapprobation and subsequent moral denunciations, such as “dishonourable” and “shameful.” While one might also experience various forms of social disapproval or ostracism for breaking purely legal rules (e.g., a bylaw against smoking in certain public spaces), such violations tend not to attract the same kind of moral disgust, and we would therefore not (at least not accurately) attach moral epithets such as “dishonourable” and “shameful” to those who are (mere) rule-breakers.

By way of summary, we have seen in this section that the fiduciary obligation has a long history in ancient moral, religious, and legal thought. By briefly surveying various illustrations of the fiduciary obligation throughout history, I have attempted to show that in each historical instance in which evidence of the fiduciary obligation can be found, it appears to be invoked as a response to that problem “etched in human nature”: namely, how to trust or depend on another who undertakes to act on one’s behalf. Insofar as the fiduciary obligation enjoys near omnipresence across times and cultures, and has as its “raison d’etre” the promotion of greater social cooperation and harmony, I argue that it is a moral demand, albeit variously enforced and protected by societal norms, religious commands, and legal rules.\textsuperscript{92}


\textsuperscript{91} Johnson, “Natural Law and Fiduciary Duties,” 281.

\textsuperscript{92} As mentioned, in Chapter 2 I further flesh out the moral ground of the fiduciary relationship.
1.2.2 The Fiduciary Obligation and the Principles of Equity

With this background laid, we are now in a position to visit the historical circumstances that led to the fiduciary obligation’s entrance into Medieval English law (through Chancery) from which we (in the West and legal systems derived therefrom) gain our contemporary understanding of the fiduciary relationship. Providing this more recent legal history is important for my overall thesis because it describes the circumstances in which the fiduciary obligation (as a moral obligation) entered English law and thus influenced how we (in the West) understand it today. In other words, with the background laid in the previous section, we can now appreciate that the adoption of the fiduciary obligation by English law (and the legal systems derived from it) is just another historical illustration, or instance, of Western’s society’s enforcement and protection of this important moral obligation. To reiterate, the moral and societal importance of the fiduciary obligation is owed to the way in which it mitigates the problem of trust and dependence inherent to an essential mode of human interaction. The fiduciary relationship is a moral relationship because it promotes greater social cooperation and harmony by enabling individuals to trust and depend on one another in this type of relationship. This is important for responding to the problem of legal-moral equivocation as it makes clear that the fiduciary relationship is in fact a moral relationship; accordingly, there is no such equivocation involved in using the fiduciary relationship as a framework for conceptualizing the ethical issues that arise in medical and research ethics.

The fiduciary relationship, as we know it today, is an institution of English Equity and comes from the modern Trust. A Trust is a legal relationship whereby a settlor (the individual who establishes the Trust) entrusts a Trustee to hold or manage Trust assets (e.g., property, financial assets, etc.) for the sole purpose of furthering the best interests (vis-à-vis the specific Trust assets in question) of a named beneficiary of that Trust. As there are a number of different types of legal Trust, including express, constructive, or resulting Trusts. However, (as far as I am aware) the broad structure of the Trust remains the same across the various types (i.e., one holding and/or managing property or assets on behalf of another), and so it is somewhat immaterial for my purposes what specific Trust one has in mind. For instance, whether the settlor of the
we briefly saw in the introduction to this chapter, more recent (legal) histories of the fiduciary relationship describe how the fiduciary obligation began in the Trust and was later expanded to other relationships, such as the physician-patient relationship. However, the history of the English Trust is intricately bound up with the development of English Equity itself. Hence, to understand how the fiduciary obligation arose and became an institution of Equity (through the Trust), one must also understand the historical evolution of Equity. This section therefore describes the circumstances by which the fiduciary obligation became a principle of Equity and thus became the legal institution that we recognize today.

The English Trust had an early medieval predecessor in a device of known as the “Use.” As a framework or mode of interaction in which one undertakes to act on behalf of another, evidence of the fiduciary obligation can also be found in the Use. The Use was devised under English feudalism, whereby vassals (tenants) were granted Use of a lord or noble’s property, known as the “feif.” Under the Use, “a feoffor gave legal title to property to a ‘feoffee of uses,’ for the benefit of the feoffor or a third party (the ‘cestui que use’).” In fact, before a lord could grant Use of his property to another, the prospective tenant had to officially become a “vassal” through a formal ceremony, during which the would-be vassal paid “homage” (i.e., reverence and submission) to his lord through an act of fealty. Interestingly, the etymology of “fealty” comes from the Latin fidelitas, from which we derive fidelity, or loyalty, such as that owed by a vassal to his feudal lord. As mentioned, fidelitas is also the root of the word fiduciary, with its defining obligation in loyalty, or fidelity, to the beneficiary’s interests. As the progenitor of the Trust, then, it is perhaps unsurprising to see evidence of the fiduciary obligation in this early feudal arrangement.

Trust is the courts (as in an Equitable constructive Trust remedy) or a private individual (such as in an express Trust), the broad structure remains the same.

94 As already mentioned above, the Australian courts are a notable exception.

95 Ibid., 281 (emphasis added).

Indeed, the Use was itself influenced by the canon law doctrine *utilitas ecclesiae*, dating back to the ninth century. As Frankel explains:

The term “*ad opus*” in 9th century England “referred to a fiduciary relationship in favor of a beneficiary with no legal enforcement.” The term “[U]se” was drawn from Gallic “*al os*” and “*ues*” in the Laws of William the Conqueror and the Domesday Book and became “use.” In addition, the French term “*cestui a qui oes le feffement fut fait*” became “*cestui que use*,” a term for a beneficiary. Thus, the [U]se was drawn from secular sources (Roman and Salic law) and religious sources (including the Franciscans, who popularized it).97

Hence, both the secular and religious sources of the Use appear to also include reference to the fiduciary obligation. The sixth century Salic law concerning the “reliable” or “trusted person,” for instance, stipulated that, “a trusted person (*Salman* or *Treuhand*) could become a [T]rustee by receiving ‘property from a grantor on behalf of beneficiaries.’”98 The fiduciary obligation that underlies the English Use and, as we will see shortly, the modern Trust, therefore may have originated as early as the sixth century in Salic law.99

Regardless, by the ninth century onward the fiduciary principle became integral to feudal vassal-lord relations, based as they were on mutual trust and loyalty.100 Like the ancient norms and rules that operationalized the fiduciary obligation before it, such as those in Hammurabi’s Code or the Roman Law of Twelve Tables, the Use evolved in England during the Middle Ages in response to specific problems:

For example, vows of poverty prohibited Franciscan Friars from owning land. Therefore, charitable persons transferred houses to trusted persons for the use of the Friars. The trusted persons were bound by *good conscience* to devote the houses they legally owned, to the exclusive use of the beneficiaries ... Church doctrine of

97 Frankel, *Fiduciary Law*, 95.
98 Ibid., 95.
99 Of course, I have in the forgoing attempted to illustrate that the moral underpinnings of the fiduciary principle, perhaps along with the Trust, go back at least to the Code of Hammurabi (c. 1700 BCE).
100 Johnson, “Natural Law and Fiduciary Duties,” 281. In fact, the feudal contract was based on “faith” or “fealty” (*fidelitas*), from which term “fiduciary” has its root.
utilitas ecclesiae allowed clerics to possess stewardship or beneficial ownership of church property for personal use...\textsuperscript{101}

The Use was also important during the Crusades between the eleventh and thirteenth centuries. Crusaders would often entrust “use” of their property to a feoffee of uses while away at war, with the expectation that it would be given back to them upon their return (or given to an appointed “beneficiary” in the event of their death). The Use’s underlying fiduciary obligation was therefore adopted to solve the same perennial problem that arises when one person entrusts another to act on behalf of her interests: namely, the problem of trust and dependence.\textsuperscript{102}

But the Use eventually came to be employed as a means to evade certain legal obligations, such as feudal taxes, services, and private debt. For example, lords and tenants alike could avoid paying feudal dues or services by transferring the legal title for another’s “use.”\textsuperscript{103}

Upon a tenant’s death the law stated that a landlord was entitled to certain property taxes before the land passed to an heir. Moreover, in the event that no heir existed the immediate landlord was entitled to the property under the doctrine of escheat. Escheat is an Equitable doctrine that requires lands to revert back to the lord following the death of a tenant without an heir or if the tenant is otherwise required to forfeit their lands.\textsuperscript{104} The doctrine of escheat was therefore a mechanism by which the Crown, being the supreme feudal lord,

\textsuperscript{101} Frankel, \textit{Fiduciary Law}, 95–6 (emphasis added).

\textsuperscript{102} Again, filling out the moral foundation of the fiduciary relationship is the subject matter of Chapter 2. In this Chapter I simply suggest that the fiduciary principle is “moral” insofar as it is an important normative obligation that enables broad social cooperation, mutual dependence and, ultimately, social harmony. Its importance in this respect, as I hope to illustrate in this Chapter, is evidenced by its various independent incarnations (in moral, religious, and legal thought) throughout history and across cultures. In Chapter 2, I provide a more theoretical moral foundation for the fiduciary relationship; I argue, specifically, that such a foundation lies in its inherently autonomy promoting function. As we will see, when we adopt a “relational” theory of autonomy, these two conceptions of what make the fiduciary relationship moral—viz., (i) promoting trust and dependence, and (ii) autonomy—are not incompatible, but rather they are mutually reinforcing.

\textsuperscript{103} Ibid., 96.

consolidated lands. However, tenants could avoid the doctrine of escheat by entrusting their lands for another’s use. The result was that the Crown was no longer able to consolidate lands, as assigning a feoffee of uses prevented the land from reverting back up the chain of lords and tenants to the Crown (i.e., following the death or forfeiture of tenant lands). By transferring title to another individual, or group of individuals for common use, tenants could therefore effectively evade both feudal taxes and the doctrine of escheat (e.g., by ensuring there was always an heir). Debtors could do the same and thereby avoid repaying their debts. Recognizing the Use was responsible for a significant loss of Crown revenue and property, King Henry VIII abolished the Use in 1535 under the Statute of Uses, effectively converting all Uses into legal estates. As a result, the original owners lost the legal title to their property. This prompted the former feoffors, or the “true” owners of the entrusted property, to seek rectification for this perceived unfairness, or inequity, by petitioning the King or Queen (when the Sovereign was a Queen) to override this Common Law ruling. But understanding why feoffors were able to seek rectification by making an appeal to the King—that is, outside of the Common Law—for these perceived injustices, requires some understanding the origins of Equity itself.

After the creation of the Common Law courts (i.e., the courts of Common Pleas, King’s Bench, and Exchequer of Pleas) between the eleventh and twelfth centuries, the King nevertheless retained “residuary power” to do “equal and right justice and discretion in mercy and truth” to his subjects wherever the Common Law proved “deficient,” or contrary to equity. Initially, the exercise of the King’s residuary power was expected only in rare

105 Ibid., 96.
107 For the sake of simplicity I will use “King” throughout, though with the recognition that at various points throughout history the sovereign was a Queen.
108 Baker, English Legal History, 105. In Medieval England, from the passing of the Magna Carta in 1215 onwards, a series of statutes were passed that guaranteed that no man should be “deprived of life, liberty, or property save by due process of law” (Baker, 105). It thus became every Englishman’s right to be subject to the “due process” of the Common Law, as opposed to any other jurisdiction, including the King’s” (Baker, 105). These statutes were also restraints on the power of the Crown to erect new jurisdictions and legal institutions. But it was difficult to see how the King could have exhausted his judicative powers by creating
or extenuating circumstances, but by the end of the thirteenth century many petitions, or “bills,” were being presented to the king, “asking for his grace to be shown in respect of some complaint,” such as those eventually put forward by feoffors who had lost title to their lands under the Common Law’s Status of Uses. As we will see shortly, these petitions foreshadowed the rise of the courts of Equity as a jurisdiction separate from, and ultimately superior to, the Common Law.

Petitions seeking redress outside the Common Law were precipitated in part by various “technical failures” or “mischiefs in the law,” to which the early Common Law was especially susceptible. The Common Law court procedures were circumscribed by the writ system, as well as “the forms of pleading, the rules of evidence, the varying reliability of sheriffs, and the uncertainties of jury trial.” The restrictive nature of the early writ system of the Common Law, in particular, made pursuing certain forms of complaint, or

109 Ibid., 106.

110 Ibid.

111 Ibid.

112 Ibid. Early in the Common Law “original” writs were issued in order to more or less address each individual complainant’s unique situation. But, these “original” writs had a tendency to become fixed in the law, serving as precedent for all future similar cases. A plaintiff seeking remedy at Common Law would therefore either have to “find a known formulae to fit his case” or “apply for a new one to be invented,” which would then be available to others. However, by the mid-thirteenth century the unrestrained invention of new writs had become a problem. Because a plaintiff’s right to a certain form of action was delimited by the writs available, issuing an original writ was akin to issuing new rights. The unchecked creation of new writs therefore came to be seen as a form of extra-parliamentary legislation. Accordingly, the issuance of original or “novel” writs (i.e., those without Parliamentary approval) were eventually prohibited by the Provision of Oxford in 1258, which ensured that “royal jurisdiction could not be extended without legislative and judicial sanction” (Baker, 62). As a result, the writs available at Common Law became more or less fixed.
obtaining specific remedies under that system, quite limited.\textsuperscript{113} This gave rise to an increasing number of petitions to the King directly, in hopes that he would exercise his \textit{residuary power} by hearing their cases and deliver justice according to the dictates of “good conscience”—that is, according to principles of fairness, or \textit{equity}. It was in this capacity that \textit{feoffors} petitioned the King to rectify the alleged misappropriation of their lands.

But it was actually one of the King’s representatives, the Lord Chancellor, who eventually came to oversee the majority of these petitions.\textsuperscript{114} The court of the Lord Chancellor (or simply \textit{Chancery}, as it came to be known) was tasked with exercising on the King’s behalf his residuary power to do “equal and right justice” to his subjects wherever the Common Law yielded, or was expected to yield, an alleged “inequity.”\textsuperscript{115} At the outset, Chancery

\textsuperscript{113} If a plaintiff could find no single writ applicable to her case, she would find herself without legal remedy (at least outside of the old system of local justice). A famous example refers to a debtor who gave his creditor a sealed bond but failed to obtain (or simply lost) a written receipt when the debt was paid; as a consequence, the debtor was made to pay the debt twice (Baker, 110). At the time, if an oral contract was made where the Common Law required a written one, then the complainant would find him or herself without remedy. This was because it was held at Common Law that “it was in the interest of certainty that deeds [i.e., written documentation] should prevail over mere words” (Baker, 110). The rationale for the unbending application of the Common Law was that it is, “better to suffer a mischief than an inconvenience [in law]” (Baker, 110). The Common Law also failed to protect against such technical failures or “mischiefs” in the law because it considered them to be the product of one’s own foolishness, “and the law did not bend to protect fools” (Baker, 110).

\textsuperscript{114} Early in the thirteenth century most such petitions were deferred to the Common Law courts. By the fourteenth century, however, petitioning the King by bill had become so common that they were reserved for a special session in Parliament. However, these sessions only addressed petitions with widespread applicability, and thus sought a “general or permanent change to the law or procedure” (Baker, 106). If assented to, such bills became statutes. Private suits, on the other hand, were more often addressed by individual Councillors, including the Lord Chancellor, Lord High Admiral, or Lord High Constable (Baker, 106). As this became common practice, petitioners began addressing the relevant Councillor directly.

\textsuperscript{115} As a member of the King’s Council, the Lord Chancellor also served an advisory role. Before the mid-sixteenth century, the chancellor was often a bishop or other high-ranking religious figure. The chancellor was therefore appropriately referred to as the “Keeper of the King’s Conscience.” The chancellor was also the custodian of the Great Seal of England, which was used to authenticate all royal documents prepared by his clerks. This included all, “royal grants of property, privilege, dignity or office and all writs and commissions in the king’s name had to ‘pass the seal’ in Chancery” (Baker, 107). The original legal writs of the Common Law were no exception. Accordingly, it was actually through the chancellor’s role as custodian of the Great Seal, and thus authenticator of Common Law writs, that Chancery was first associated with the regular administration justice (Baker, 107).
was not a separate court of law but rather a department of the King’s Council. The Chancellor’s function was not to adjudicate or deliver justice himself, “but rather to facilitate its achievement in other [Common Law] courts, to serve as a convenient clearing-house for all kinds of business transacted elsewhere.” The jurisdiction thus remained that of the King’s Council. It was only through a “kind of fiction” that the Chancellor was deemed to represent, “the king and his council in Chancery.” As John Baker explains:

The chancellor received no patent or commission defining his authority, he held office at the king’s pleasure, and he took no part in the ordinary administration of justice as an assize judge. His powers derived from his custody of the great seal and from his pre-eminent position in the King’s Council.

Initially, then, the Chancellor was “an officer of the state and a minister of the Crown.” Irrespective of this initial “fiction,” however, as petitioning the King through the Chancellor became common practice, complainants increasingly requested a specific remedy from the Chancellor directly, whether or not the case was pending in the Common Law courts. Eventually, instead of acting as a “clearing-house,” redirecting cases to the relevant Common Law courts, the Chancellor began to grant “decrees,” which were binding only to the relevant parties; that is, unlike judgments at Common Law, decrees were not “judgments of record” and thus did not (at least initially) serve as precedent for

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116 Baker, *English Legal History*, 107. This department descended from the Anglo-Saxon scriptorium where royal writs and charters were drawn and sealed.

117 Ibid., 109.

118 Ibid., 109.

119 Ibid., 107

120 Ibid., 107.
future cases. At first, these decrees were issued in the name of the King’s Council, but by the 15th century the Chancellor was issuing decrees of his own authority.

In delivering its decrees, Chancery was not beholden to the language of the Common Law and instead rendered judgments in the name of “good conscience,” as informed by broad principles of equality or fairness—that is, of “equity.” For a creditor, promisee, or Trustee to take unfair advantage of strict Common Law rules was a matter of equity. In such cases, complainants would appeal to what would become Chancery’s professed equitable jurisdiction. As Baker again explains:

The Chancery approached matters differently [than the Common Law]. In exercising his informal jurisdiction the chancellor was free from the rigid procedures under which inconveniences and injustices sheltered, because he was free to delve into the facts at large. His court was a court of conscience, in which defendants could be coerced into doing whatever good conscience required, given

121 Judicial activity in the Chancery first began in connection with specialized administrative work, particularly relating to the Crown’s property rights. For example, after the death of a tenant in chief Chancery would issue a writ commanding a local official to hold an inquisition to discover what lands he held, who his heirs were (etcetera), which would enable the recovery of whatever was due to the king as feudal lord (Baker, 108). These inquisitions were often contested by interested parties, thus raising legal disputes that had to be heard in court. Such proceedings were heard on the Petty Bag side of Chancery, also known as the “Latin side,” as the language of record was in that language (along with the other central courts) (Baker, 109). On this side, the court of Chancery was essentially an agent of the king—and a member of Council—and thus proceedings closely followed that of the King’s Bench. Unique to the court of Chancery, however, were petitions seeking redress against the Crown itself (Baker, 109) The king could not be sued by his own writ in the other courts, hence without a court to hear them, addressing these “petitions of right” against the Crown fell within the king’s residuary jurisdiction to do justice to his subjects. It was therefore “in their procedural aspect only, [that] petitions of right foreshadowed the growth of the new kind of bill procedure which brought the Court of Chancery into prominence.” This is because the petition of right was raised primarily to defend property rights and the judgment was “one of record” (Baker, 109). But it was actually the bill procedure on the “English side” of Chancery that ultimately gave rise to Chancery’s unique equitable jurisdiction. On the English side, “Chancery was not tied to the forms or language of the Common Law and was not a court of record” (Baker, 109). In other words, Chancery had more latitude to exercise equitable principles of “good conscience” with respect to each case because it was not beholden to precedent or the language of the Common Law.

122 Baker, English Legal History. Nevertheless, “the chancellors did not take themselves to be administering a system of law different from the Law of England. They were reinforcing the law by making sure that justice was done in cases where shortcomings in the regular procedure, or human failings, were hindering its attainment by due process. They came not to destroy the law, but to fulfil it” (Baker 110). Therefore, even as Chancery took on its own judicial function and separate jurisdiction, it still viewed itself as fulfilling a role that fell squarely within the traditional legal framework: namely, the king’s obligation to do right and equal justice to his subjects in those cases where the due process of Common Law was deficient.
all the circumstances of the case. Such a court obviously proceeded in a very different fashion from the Common Pleas.\textsuperscript{123}

It was for this reason that Chancery would often receive petitions when a Common Law ruling yielded or was expected to yield an inequity, or when no cause for action or remedy existed at all.\textsuperscript{124} The paradigm example of such “mischiefs in the law” is the debtor who was made to repay his debt twice because he lost or simply failed to obtain a written receipt where the Common Law required written proof of payment.\textsuperscript{125} In such cases, complainants had no recourse to justice in Common Law, but could appeal to Chancery where parties could be made to do “whatever good conscience required.” Hence, it was as the King’s representative, tasked with exercising the King’s residuary power to do equal and right justice to his subjects according to principles of equity that Chancery gradually evolved into its own court of Equity.

Following the Statute of Uses in the sixteenth century, the court of Chancery tended to issue its decrees in favour of the “feoffors” in their petitions to the King (through Chancery). As Frankel puts it, “[t]he trusted persons’ duties constituted a social practice, which the equity courts enforced on the grounds of trust and confidence related to good conscience.”\textsuperscript{126} Over time, recognition of such claims created one of the first principles of

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\item[123] Baker, \textit{English Legal History}, 107.
\item[124] To say that Chancery issued decrees with an eye to fairness or equity does not mean that it was always successful in doing so. In fact, Chancery was notoriously unpredictable in delivering its decrees. As seventeenth-century jurist John Selden famously wrote:

> Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience (see Frederick Pollock, “Table Talk of John Selden,” \textit{Selden Society}, London 43 (1927), 43).

Baker says that Chancery was especially capricious before the sixteenth century when chancellors, as so-called “Keepers of the King’s Conscience,” were often religious figures with no formal legal training and thus little concern for precedent or the application of the general rules or procedures of the Common Law (Baker 2019).

\item[125] Baker, \textit{English Legal History}.
\item[126] Frankel, \textit{Fiduciary Law}, 95–6.
\end{enumerate}
\end{footnotesize}
Equity, along with its corresponding institution: namely, the Trust. Chancery considered it a principle of equity, as determined by good conscience, that when one party undertakes to hold or manage property for the benefit of another, she must do so with utmost good faith, confidence, and fidelity to that other’s interests. Along with the Trust came the *fiduciary obligation*, which governs all those interactions where one party undertakes to act on behalf of another’s interests. It would appear then that together with the Trust, the fiduciary obligation was among the first principles, if not the first principle, of Equity. Indeed, it is for this reason that Rotman calls the fiduciary obligation the “most doctrinally pure expression of [E]quity.”

Echoing this sentiment, Johnson says in the following passage:

As the medieval use developed into the modern law of trusts, the ancient rule encompassed in the fiduciary principle that no man can serve two masters was enforced by courts of equity in England and later in the United States.

Hence, it was through the modern Trust, as an institution of English Equity, that the fiduciary obligation became enshrined into modern English law, and out of which the fiduciary relationship evolved into the legal institution we (in the West and legal systems derived therefrom) recognize today.

In summary, the fiduciary obligation long pre-dated its adoption by Chancery and its institutionalization in English Equity. The fiduciary obligation existed for thousands of years as a moral obligation that appears to arise in response to a perennial problem inherent to an important type of human interaction: namely, how to trust or reliably depend on another who undertakes to act on behalf of our interests. Along the way, we have seen that the fiduciary obligation has informed ancient religious edicts and legal rules which endeavour to mitigate that same problem. The fiduciary obligation eventually gained a foothold in modern English law through the courts of Chancery. Following the creation of the Common Law courts the King retained an obligation to do “equal and right justice” to his subjects. Claimants took advantage of this “residuary power” by petitioning the King.

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127 Rotman, “Understanding Fiduciary Duties,” 985.
to oversee their cases when Common Law remedies were deemed unfair or simply nonexistent. The restrictive nature of the writs available in the early Common Law made such petitions more and more frequent. Eventually overwhelmed with petitions, the King delegated this task to his councilors. The Lord Chancellor and his clerks in Chancery came to oversee the majority of these claims. Notably, before the mid-sixteenth century, the Chancellor was often a Bishop or other high-ranking religious figure and, in his advisory role to the King, was known as the “Keeper of the King’s Conscience.” Chancery thus sought to deliver justice according to “good conscience,” as informed by equitable principles. With its long history in ancient moral, religious and legal thought, the fiduciary obligation comprised part of the Chancellor’s “good conscience.” It was through its decrees, specifically to those that eventually gave rise to the Trust, that Chancery adopted the fiduciary obligation as a principle of equity.

The upshot of the historical narrative I have sketched here is that the fiduciary relationship, as informed by its defining obligation, existed prior to its entry into English law as a moral relationship. The fiduciary obligation has seemingly existed wherever complex human societies have developed, serving to mitigate a problem inherent to a specific type of human interaction: namely, the problem created by both the need to reliably trust or depend on others to act in our interests and the vulnerability that arises from such dependence. The fiduciary obligation mitigates this problem by prescribing certain other-regarding behavior (e.g., utmost loyalty) in the context of such relationships. The fiduciary principle, like other moral principles, is therefore a requirement of morality, and has been understood as such.

1.3 Two Objections and Replies

In this section, I raise and respond to two possible objections. The first objection concerns the historical account I have provided, specifically about the role and nature of Equity. It is a matter of heated debate among jurists and legal philosophers as to whether Equity in fact occupies a unique role or jurisdiction vis-à-vis the Common Law. To the extent that the historical account I have provided commits me to one side of this debate, I am susceptible to its criticisms. The implication of this criticism for my purposes is that it is not really clear that the fiduciary obligation, as an apparent innovation of Equity, entered
the law as a *moral* supplement to the Common Law. In other words, critics argue that Equity was never tasked with providing a moralizing role on the Common Law; or as Rotman puts it, critics reject that the application of situation-specific equitable principles “humanizes and contextualizes the law’s otherwise antiseptic nature, which makes the law more just.”

This claim therefore undermines the historical claim I made about how the fiduciary obligation entered English law, namely, via Equity’s supplementary *moralizing* function vis-à-vis the Common Law. In other words, the objection casts doubt on the suggestion that Equity, tasked with exercising broad equitable principles, adopted the fiduciary obligation as a *pre-existing* moral principle. Notwithstanding the moral corollaries of the fiduciary obligation in Ancient and Medieval thought, it remains plausible that the fiduciary obligation (at least as articulated by Western legal traditions) is in fact a creature of the law. If the fiduciary relationship as we understand it today (in the West) is a legal construct, then worries about equivocation concerning its application to the ethical domain remain unresolved.

I begin by briefly outlining this debate. I then discuss the implications of this objection for my argument. I argue that the success of my historical argument that the fiduciary obligation is a moral obligation that existed antecedent to its birth in English law, does not critically depend on which English legal jurisdiction (Equity or Common Law) adopted that moral principle and subsequently enshrined it in legal doctrine. Put simply, I argue that the success of my historical argument does not hinge on the outcome of the fusion debate about the nature of Equity and the Common Law. Although this discussion may be of interest primarily to jurists and legal philosophers interested in Equity and fiduciary relationships, to the extent that the purpose my historical argument is to locate the foundations of the fiduciary relationship in morality, it ought to be of interest to moral philosophers and bioethicists as well.

The second objection falls squarely within the domain of moral philosophy and bioethics. It runs as follows: if the fiduciary relationship is such an important moral relationship, then

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why has it received so little attention by moral philosophers, until recently? The implication here is that the fiduciary relationship is not in fact a moral relationship; if it were, it would long since have been analyzed by moral philosophers. I respond to this objection, twice: first, by showing that its central claim is somewhat mistaken; and, second, by conceding the point somewhat, and offering an explanation as to why the fiduciary relationship may appear, at first glance, to have received short shrift by moral philosophers.

1.3.1 First Objection

As briefly mentioned, the first objection takes issue with the role or purpose I have assigned to Equity. I have suggested that the early courts of Chancery, through the exercise of equitable principles, have (at least historically) functioned as a kind of moral supplement to, or constraint on, the Common Law. I have suggested that Equity contextualizes the Common Law in those cases where it would yield an injustice, or unfairness, in a particular case. For example, while the Common Law would require the debtor who failed to obtain a written receipt after the original payment (where the Common Law requires written proof of payment) to pay the debt twice, Equity would look to the facts of the case and do whatever “good conscience” (equity or fairness) requires. But the idea that Equity came to play this constraining, supplementary, or contextualizing role on the strict application of laws is the subject of an ongoing debate. Modern jurists and legal philosophers debate about whether there is any substantive distinction between Equity and the Common Law.130 Insofar as I subscribe to the view that Equity occupies a unique equitable jurisdiction, whose express purpose is to be a moral constraint on the law, then I have made myself vulnerable to the criticisms of those who claim, as Justice Maitland famously did, that Equity is simply, 

130 The Common Law courts and Equity were “fused” under the same “Supreme Court of Judicature” following the passing of the Judicature Acts of 1873 and 1875. However, debate continues as whether this fusion was merely procedural or in fact substantive.
that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as Courts of Equity.\textsuperscript{131}

In other words, the jurisdictional separation between Equity and the Common Law is merely a historical accident and thus there is nothing inherent to Equity, procedurally or substantively, that could not be (or is not already) done by the Common Law courts; and this includes the exercise of so-called \textit{equitable} principles.

For my purposes, the objection discredits an important link in the chain of historical events I have presented here. I have argued that the fiduciary obligation’s entry into English law is merely its most recent actualization in a system or body of norms and rules in a long history of similar such attempts to operationalize this important moral obligation. Specifically, I argued that it was through the exercise equitable principles that Equity acted as a \textit{moral} constraint on the Common Law, making it the appropriate vehicle by which the fiduciary obligation, qua moral obligation, entered the law. The claim that Equity does not, in fact, serve this function therefore undermines the coherence of this narrative, if only minimally, by casting doubt on the mechanism (i.e., Equity) by which the fiduciary obligation entered the law.

Fortunately, the debate about Equity and that Common Law does not, as far as I can tell, present a serious difficulty for my claim that the fiduciary relationship is a \textit{moral} relationship that gained a foothold in the law through the exercise of equitable principles. At bottom, the success or failure of this argument does not rest on \textit{which} jurisdiction exercised those principles or performed equity’s substantive role (if any). Indeed, I argued that it is a matter of historical contingency that the fiduciary relationship is a \textit{legal} (and not simply moral) relationship \textit{at all}, regardless of the jurisdictional avenue by which its underlying moral obligation was introduced into English law. If the fiduciary relationship had never become an institution of English law and had simply remained a moral obligation

(governed variously by certain nonlegal norms and rules), then it would not be necessary
to show that the fiduciary relationship is not a purely legal relationship. The problem of
legal-moral equivocation would not even arise. I do think, however, that Equity was the
predictable avenue for the fiduciary obligation to enter the law, given its historical role
(however contingent) as an equitable, and sometimes moral, supplement or constraint on
the law. But for my purposes it is immaterial which legal jurisdiction—Equity versus the
Common Law—performed this important equitable function. Apart from creating the
positive law, had the Common Law also made use of equitable principles to constrain,
supplement, or reform the law, the details of the historical narrative I have told might be
slightly different, but the upshot of my argument would remain the same: the fiduciary
relationship is a moral relationship that long predates its origins in English law.

Indeed, regardless of whether there is any substantive role uniquely performed by Equity
(e.g., as a moral constraint on the positive law) there appears to be a need for some vehicle
or mechanism by which the law is judged to be just or unjust, right or wrong, and where
necessary amended to bring it into alignment with objective morality. As Jurist Sheldon
Amos puts it:

> The method of supplementing the prevalent legal system by a subsidiary system of
> less rigidity, and of greater capacity for fine moral discrimination, is almost
> universal and indeed necessary in all advanced countries if law is in any measure
to carry out the dictates of justice.\(^{132}\)

Dennis Klimchuk appears to agree:

> On my reconstruction, it is a claim of Aristotle’s account of equity that a legal
> system cannot get by only with a set of rules that specify the rights and duties
> persons hold and bear. It will also need a set of rules that constrain the manner in
> which and the ends for the sake of which persons exercise their rights.\(^{133}\)

Finally, commenting on the fiduciary relationship, Rotman says that,

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\(^{133}\) Klimchuk, “Aristotle at the Foundations Equity,” 50 (emphasis added).
[a]s an instrument designed to facilitate the inclusion of social mores into law, the fiduciary concept occupies a role that has been fulfilled by different vehicles throughout history. It is [...] one means by which law transmits its ethical resolve to the spectrum of human interaction.134

Nevertheless, discussing the history of the fiduciary obligation’s entry into English law through Equity is still important for alleviating the problem of legal-moral equivocation. Most histories of the fiduciary relationship begin in Medieval English Equity, attributing its creation (as a legal institution) to that legal jurisdiction. What I have attempted to do here is provide a more comprehensive historical analysis of the fiduciary obligation, one that predates its origins in English law. By drawing attention to its various manifestations leading up to its entry into English law I have attempted to illustrate that the fiduciary relationship is not merely a creature of Equity. Moreover, understanding the role that Equity came to play (however historically contingent) as a moral supplement to the law is an important part of the fiduciary obligation’s moral history. Just as previous societies have attempted to operationalize and enforce the moral demands of the fiduciary obligation—through moral, religious, and legal norms and rules—so too has ours, through the specific role that Equity has come to play in introducing moral norms and other societal values into law.

1.3.2 Second Objection

The second objection also questions the underlying moral nature of the fiduciary relationship, but it does so in a different way. It asks, if the fiduciary relationship is such an important moral relationship, why then has it not received more attention in moral philosophy? Surely if the fiduciary relationship was in fact a moral relationship, it would have been identified and received substantial ethical analysis long before now. Moral philosophy has long recognized other moral relationships, such as parenthood, friendship, business, professional and political relationships. Moral philosophy has also given much attention to relationships that tend to overlap with the fiduciary one, such as relationships

134 Rotman, Fiduciary Law, 153.
that involve trust, loyalty, or promises.\textsuperscript{135} But there is very little sustained ethical reflection on the fiduciary relationship itself. So, doesn’t this show that there is something wrong with the claim that, at bottom, the fiduciary relationship is moral in nature?

In response, one might try to suggest that moral philosophers have analyzed the fiduciary relationship by analyzing relationships that overlap with it substantially, such as those of trust and loyalty. Yet, as mentioned, the fiduciary relationship is not reducible to these other relationships. For instance, fiduciary relationships often involve trust. But while trust may be an important and desirable feature in most fiduciary relationships, it is not therefore identical with it. As discussed in the Introduction, trust relationships do not necessarily contain certain defining features of the fiduciary relationship, such as a structural imbalance of power and dependence, the pursuit of significant practical interests, or (arguably) the exercise of meaningful discretionary power. Indeed, the fiduciary relationship can arguably persist in the complete absence of trust. For example, a patient might fail to trust her physician, but nonetheless remain the physician’s beneficiary, which means that the physician’s fiduciary obligation to her patient’s best medical interests does not simply dissolve when the patient fails to trust her physician.\textsuperscript{136} Conversely, one might fundamentally distrust the fiduciary relationship, as an institution, and merely be forced to rely or depend on it (say, for lack of options). Loyalty, too, is perhaps a constant feature of fiduciary relationships, but is clearly not reducible to it. Many loyalty relationships plainly lack other essential features inherent to the fiduciary relationship. For example, I might be loyal to my favourite sports team, but this does not imply that I am therefore a fiduciary to that team; that is, I am not, by virtue of my loyalty, in a relationship that requires me to exercise my discretion on behalf of the team’s significant practical interests. Nor do


\textsuperscript{136} See Ryman, “Fiduciary Duties and Commercial Surrogacy.”
relationships of loyalty necessarily share the same structural features of the fiduciary relationship, such as the inherent inequality of power and dependence.

If the fiduciary relationship is not reducible to any of these similar or overlapping moral concepts, and it is (as I claim) a moral relationship, why then has it not received its own substantial ethical analysis before now? In response to this criticism, I want to point out first that the fiduciary relationship has been the subject of some ethical analysis, and not only recently. In fact, the fiduciary relationship has received considerable attention by moral philosophers and others, albeit perhaps not always by that name.

As we saw above, historically, many moral or religious thinkers pondered relationships that were essentially fiduciary. Many societies recognized the vital social and economic importance of the fiduciary relationship and sought to formalize certain duties intended to ensure the continued integrity, or ongoing viability, of this relationship. From the laws concerning agency and bailment in Hammurabi’s Code, to the Old Testament’s religious command that “no man shall serve two masters,” to the moral teachings of Confucius, and finally to today’s fiduciary laws and the burgeoning ethical discourse in bioethics, we see that the fiduciary relationship has received considerable attention. Indeed, the fiduciary relationship’s status as arguably one of the most important social and economic relationships in complex interconnected societies is precisely what explains the persistent attention it has received over the course of modern human history.

Secondly, the fiduciary relationship has in fact received sustained ethical analysis within moral philosophy and applied ethics, sometimes under the guise of other ethical concepts or relationships and often with a focus on a particular kind of fiduciary relationship (e.g., between parent and child). Perhaps the most prominent examples exist in parenthood ethics, professional and business ethics, and healthcare ethics.

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137 See, for example, McLeod, Conscience in Reproductive Health Care; also, Ryman, “Fiduciary Duties and Commercial Surrogacy”; Horn et al., “An Ethical Analysis of the SUPPORT Trial.”
In parenthood ethics, ethicists often discuss the fiduciary obligation in terms of parental responsibility, such as the responsibility of parents to promote the “best interests” of their child. Parental ethical responsibilities are often said to involve the same selfless and other-regarding norms and rules, such as the loyalty and care characteristic of the fiduciary obligation. Parents are also clearly tasked with exercising a significant degree of “discretionary power” in pursuit of their child’s best interests. Subsequently, the parent-child relationship is understood to share the same structure as the fiduciary relationship, by virtue of the inequality between parental (fiduciary) discretionary power and the dependence of the child (beneficiary) on that power. For example, Brighouse and Swift provide a fiduciary analysis of the parent-child relationship:

The parent is charged with responsibility for both the immediate well-being of the child and the development of the child’s capabilities. This is the fiduciary relationship emphasized by the child-centered argument for parental power. The child has immediate interests in being kept safe, enjoying herself, being sheltered and well nourished, having loving relationships with others, and so on. She has future interests in many of these same things, but also in becoming the kind of person who is not entirely dependent on others for having her interests met and the kind of person who can judge well and act on her interests. The parent’s fiduciary obligations are to guarantee the child’s immediate well-being and to oversee and ensure her cognitive, emotional, physical, and moral development.  

Similarly, in professional ethics, Michael Bayles defines the professional as fundamentally a “fiduciary.” Bayles argues that professionals are often “knowledge workers” with extensive training in a specific skillset or expertise and thereby entrusted with exercising their professional judgment or discretion (based on that knowledge) on behalf of their client’s interest. Michael Bayles also discusses fiduciary obligations of professionals to

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their clients, such as confidentiality, loyalty, and care.\textsuperscript{140} Lastly, William May has claimed that the professionals owe fiduciary-like obligations to the public.\textsuperscript{141}

Relatedly, in business ethics the duties of chief executive officers (CEOs) to remain loyal to the interests of their shareholders (and perhaps to “stakeholders” as the debate goes) are a central theme. In fact, in a seminal paper, famed economist Milton Friedman argued against corporate social responsibility based on the claim that CEOs have an overriding “fiduciary” and ethical obligation to increase profits for their shareholders.\textsuperscript{142} Employees are also sometimes said to have fiduciary ethical (as well as legal) obligations of loyalty, qua agents of their employers—especially when it comes to protection of intellectual property rights or other trade secrets.\textsuperscript{143}

In healthcare ethics, Carolyn McLeod has argued that physicians are fiduciaries to both the public and their patients. In the former case, physicians act as gatekeepers to the access of health-related public goods, such as abortion and medical assisted death. In the latter case, the physician-patient relationship bears all the hallmarks of a fiduciary relationship and is, therefore, fiduciary.\textsuperscript{144} Similarly, Chalmers C. Clark has grounded the physician’s “duty to treat” in emergency situations (such as bioterrorist attacks, HIV infections, and pandemics) in a duty of loyalty to public health interests.\textsuperscript{145} For instance, Clark argues that

\begin{thebibliography}{99}
\bibitem{Bayles} Bayles, “Professional power and self-regulation.”
\bibitem{Friedman} Milton Friedman, “The social responsibility of business is to increase its profits.” In \textit{Corporate ethics and corporate governance}, 173–178, (Springer, Berlin, Heidelberg, 2007). While Friedman is clearly not an ethicist, his work and ideas has been become seminal in business ethics.
\bibitem{Bodie} See Matthew T. Bodie, “Employment as fiduciary relationship,” \textit{Georgetown Law Journal} 105 (2016): 819. Of course, there are important ethical caveats to employees’ duty of loyalty to their employers, such as when business practices threaten public goods or interests (such as privacy rights or public health); in such cases “whistleblowing” may be ethically justified (if all internal avenues have been exhausted).
\bibitem{McLeod} See McLeod, \textit{Conscience in Reproductive Health Care}.
\end{thebibliography}
a “broad conception of a fiduciary duty to treat survives within an implicit social contract that exchanges professional trust for the social bequest of professional autonomy.”

It is clear, then, that the fiduciary obligation has received considerable attention and ethical analysis before now. As we have now seen, not only can evidence of the fiduciary obligation be found in moral, religious, and legal discourse of the past few millennia, it has also become the subject of more recent ethical discourse, especially in the so-called “applied” areas of professional, business, and healthcare ethics. One might ask why scholarly interest in the fiduciary relationship, as a moral relationship, has been confined largely to applied ethics? One reason might be that philosophers who do normative ethics (and are primarily concerned with universal moral principles) have little reason to home in on fiduciary relationships, because they are narrower in scope than other moral relationships, such as trust. Others perhaps, like some applied ethicists, may write about fiduciary relationships but elect not to use the term “fiduciary” in their analyses. As mentioned in the Introduction, some bioethicists in medical and research ethics do not invoke the “fiduciary relationship” by name, possibly because they assume that such a relationship is, as Miller argues, “purely legal in nature.” Philosophers and ethicists therefore may prefer to couch their ethical analyses in more familiar moral vernacular, such as loyalty, trust, promising and the like. But by revealing the fiduciary obligation to be a moral obligation that protects those socially and economically important interactions in which people undertake to act on behalf of one another, I hope to have removed this barrier to discussing fiduciary relationships openly in ethics and to applying the fiduciary framework specifically to pressing problems in bioethics.


147 But it is worth noting here that the amount of scholarly attention the fiduciary relationship has received by moral philosophers or ethicists is not determinative of its status as a moral relationship. Nevertheless, given the fiduciary relationship’s long history, we might expect it to have received at least some recent scholarly attention, which indeed it has.
1.4 Conclusion

This chapter focused on the problem of legal-moral equivocation: viz., the worry that the fiduciary relationship is a purely legal relationship (i.e., an artifact or construction of law), and therefore the normativity of this relationship is relevant only in the legal domain. I suggested in the Introduction that the problem of legal-moral equivocation is a conceptual threat to the widespread adoption and application of the fiduciary relationship in bioethics, along with its attendant benefits for ethical analysis. I have therefore sought to mitigate this worry by illustrating that the fiduciary relationship is, in fact, a moral relationship. I have argued the fiduciary relationship is moral insofar as its defining obligation is essential to social harmony. By serving as an obligation that regulates human behaviour in those modes of interaction in which people undertake to act on behalf of others’ significant practical interests, the fiduciary relationship makes it possible for individuals to trust, or at least reliably depend, on one another in those contexts. This ability is crucial to social and economic cooperation in complex human societies characterized by the compartmentalization of knowledge, skill, and expertise. I traced the fiduciary obligation through history in an effort to illustrate that where historical evidence of the fiduciary obligation can be found, the obligation has been invoked to solve the problem of trust and dependence, and thereby promote greater social cooperation. With this background laid, I then described the events that led to the fiduciary obligation becoming a principle of English Equity, from which we gain our modern (Western) understanding of this important relationship. I argued that these events can be understood as Western society’s most recent attempt to operationalize the moral demands of the fiduciary obligation, as has been done for millennia before. I also suggested that given the moral nature of the fiduciary relationship, it is perhaps appropriate or expected that it should gain entry into English law via Equity, given the latter’s historical role as one important mechanism by which moral and social norms enter the law.
Chapter 2

2 Paternalism, Autonomy, and the Fiduciary Relationship

This dissertation aims to address two important impediments to the widespread adoption and application of the fiduciary relationship in bioethical analysis: namely, legal-moral equivocation and paternalism. The previous chapter sought to address the former problem. By tracing the history of the fiduciary obligation, I sought to illustrate not only that fiduciary relationship long predates its origins in Medieval English law, but that it has been a constant feature of human civilizations. Its presence across time and cultures, I argued, is attributable to the way in which it responds to the problem of trust and dependence that arises when one individual undertakes to act on behalf of another’s significant practical interests. More specifically, by enabling mutual dependence and cooperation across a diversity of human interactions within complex societies characterized by the compartmentalization of knowledge, skills, and expertise, the fiduciary obligation is an important moral obligation that serves to promote social harmony. As a moral obligation that governs a socially and economically important type of relationship, I showed how the fiduciary obligation has been present in moral, religious, and legal rules throughout history. Finally, I suggested that the fiduciary obligation’s status as a legal institution in contemporary Western English law is merely the latest attempt in a long line of such efforts to operationalize and enforce the demands of the fiduciary obligation, given its social importance.

This chapter takes up the problem of paternalism, or more specifically, the worry that the fiduciary relationship is paternalistic and therefore a discredited ethical framework for healthcare professionals and their patients. But by building on the historical argument of the previous chapter, I argue that the fiduciary relationship is essentially autonomy promoting. To the extent that I show the fiduciary relationship to be essentially autonomy promoting, worries about paternalism dissolve. I argue that when we understand autonomy as fundamentally relational—namely, that our ability to pursue our chosen plans, projects, or causes is inextricably bound up with, and dependent upon, our relationships with others—how the fiduciary relationship promotes autonomy becomes clear. Given, again, the interconnectedness of complex societies through the ever-increasing
compartmentalization of knowledge, skill, and expertise, fiduciary relationships are important social and economic relationships that make possible the pursuit of interests necessary for meaningful self-governance.

In Chapter 1, I argued that the fiduciary relationship is moral because of the essential role it plays in fostering social harmony. Chapter 2 essentially builds upon and further fleshes out this argument by suggesting that being able to trust and depend on fiduciaries is essential to an individual’s ability to be self-governing. Therefore, by making trust and dependence possible, the fiduciary relationship not only fosters social harmony through promoting societal cooperation, it also does so by allowing for the pursuit of self-directed ends that are critical to autonomy. Together, then, Chapters 1 and 2 provide a full account of the moral foundation of the relationship: namely, the fiduciary relationship is an important moral relationship insofar as it fosters social harmony by ensuring that the necessary “background conditions”—i.e., certain important relationships—are secured for the exercise of meaningful autonomy. In this way, Chapter 2 may be viewed as a companion piece to Chapter 1, as it builds upon and reinforces arguments presented in that chapter. However, the arguments proffered here also stand alone, and can therefore be read independently of Chapter 1.

In arguing that the fiduciary relationship is essentially autonomy promoting, and thus not paternalistic, I engage with Matthew Harding as my main interlocutor. Harding argues that among the primary roles of Equity is to take an interest in maintaining socially important “institutions,” or simply, relationships. Specifically, Harding argues that through judicial governance, Equity maintains various institutions as distinct “options” from which individuals can choose in ordering their interactions with one another. By governing institutions, and thus maintaining options of choice, Harding says that Equity thereby

148 As in the previous chapter, I will capitalize “Equity” when referring to that legal jurisdiction often distinguished from the Common Law. I will reserve lower case “equity” to refer to moral philosophical ideas about equality and fairness. Similarly, I will usually use the terms “law” and “legal” broadly to encompass both the Common Law and Equity, and in contrast to the morality. I will use “Common Law” when specifically referring to that jurisdiction of law that was historical separate from Equity (and arguably remains so in its doctrines and principles).
promotes autonomy. I begin, first, by applying Harding’s analysis of the way Equity promotes autonomy through its governance of socially important institutions, to the *fiduciary relationship*. As we saw in Chapter 1, the fiduciary relationship is one such institution that Equity has taken an interest in governing and maintaining. Harding’s analysis thus provides some support for the argument in Chapter 1 that the fiduciary relationship is an important moral relationship, which English law (through Equity) subsequently sought to protect and operationalize through its governance. However, more importantly for my purposes in this chapter, applying Harding’s analysis to the fiduciary relationship suggests that this relationship is *not* paternalistic insofar as it serves a distinct “option” among various frameworks, or “modes of human action,” from which individuals can choose in the process of self-governance.

However, I argue that the fiduciary relationship promotes autonomy beyond its role as a mere “option” that people can choose in governing their interactions or in the pursuit their autonomous ends. Instead, I suggest that the fiduciary relationship is *essential* to promotion and realization of autonomy promoting. In making this argument, I go beyond Harding’s analysis by invoking a *relational* theory of autonomy, which is different from the (Razian) conception of autonomy adopted by Harding. I argue that when we use such a theory (a relational one), the essential role that fiduciary relationships serve in promoting autonomy becomes clear. Finally, drawing from Paul Miller’s specific account of the fiduciary relationship, I suggest that *fiduciary power* (the exercise of which the fiduciary relationship makes possible) is a *relational means* by which the beneficiary exercises her autonomy. Fiduciary relationships are a critical means by which individuals exercise their capacity to govern themselves. Moreover, the nature of our relational web *constitutes* the conditions under which we both develop autonomy skills at the outset (i.e., in childhood) and through which we continue to set and pursue our chosen ends as full-fledged autonomous agents.

In short, by arguing that the fiduciary relationship is essentially autonomy promoting, in a *relational sense*, I aim to both mitigate the problem of paternalism and further flesh out the moral nature of the fiduciary relationship. I claim that this relationship is *moral* not only because it fosters broad societal cooperation—and thus social harmony—but also because
it makes possible the very conditions in which autonomous agents can pursue their self-directed ends.

### 2.1 Harding on Equity and Institutions

All societies, from the simplest to the most complex, require varying degrees of cooperation and corresponding mutual dependence. As mentioned, with increased complexity comes increased compartmentalization of knowledge, skill, and expertise, requiring individuals to rely on others in myriad different ways. Particularly in complex modern societies, we find ourselves inextricably bound up with, and thus dependent upon, others for the unique, specific, and often vital role they perform in society. Recognizing the importance of our assorted interactions, Matthew Harding argues that Equity has taken on the role of governing and maintaining socially and economically important institutions in order to ensure their continued viability as distinct “options” from which individuals can choose in directing their lives. Institutions, as Harding defines them, are “arrangements or frameworks for human action that have some distinctive normative identity and are oriented to some purpose or goal.”\(^{149}\) Harding says that an institution’s “normative identity,” in turn, is constituted by an “irreducible core” of norms or principles and is what individuates one institution (i.e., a “mode” or “framework” for human interaction) from another.\(^{150}\) Institutions are thus a subset of relationships that are defined by the purposes or ends they serve, together with the norms and principles that govern behaviour in the achievement of those ends, giving each relationship its unique “normative identity.”\(^{151}\) Harding says the

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\(^{150}\) Ibid., 2.

\(^{151}\) Of course, “institution,” in a broader or lay sense encompasses more than simply relationships. Financial, legal, and political “institutions,” to name a few, may certainly involve relationships, but it hardly seems correct to say that they are relationships themselves. TD Canada Trust, for instance, is a financial “institution” (in the broad sense of the term), but is clearly not a relationship (although, again, it certainly involves relationships). Nor does TD Canada Trust qualify as an “institution” in Harding’s narrower sense; that is to say, it is an abstract entity (i.e., a corporation), not a framework for human action (although it may facilitate certain types of interaction). Therefore, Harding’s stipulated definition of “institution” is narrower in scope. Again, he uses institutions to refer specifically to “frameworks of human
Purpose of an institution also helps to define its normative identity by delimiting the kinds of norms likely to protect or maintain the integrity, or continued viability, of the institution. In other words, an institution’s underlying principle both defines its purpose and gives rise to certain norms and rules that function to protect the continued viability of the institution itself.

For example, we saw in the previous chapter that the fiduciary obligation underlies the legal Trust. The fiduciary obligation informs both the purpose of the Trust and the norms and rules that serve to protect it. The fiduciary obligation states that when one undertakes to act on behalf of another, one must do so with utmost fidelity to that other’s best interests. The purpose of the Trust involves holding or managing Trust assets (e.g., property, finances, etc.) for the sole purpose of furthering the best interests (with respect to the specific Trust assets in question) of the beneficiary of that Trust. The purpose of the Trust, in turn, gives rise to various norms and rules—or, in this case, legal duties—meant to protect the integrity of the Trust relationship as a distinct “mode” or “framework” for human action. Trustees, for example, have a strict duty of loyalty to the beneficiary of the Trust. To illustrate, consider Keech v Sandford, a seminal case for both Trust and fiduciary law, describing the nature of fiduciary loyalty. An infant (Keech) had inherited a lease in an estate, which was entrusted to Sandford as Trustee until Keech came of age.

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Action,” which are directed toward some purpose or goal, and made up of a body of norms or principles. Examples of institutions in this sense include the legal Trust (as will be discussed below) and contracts. Each of these is a body of norms, rules, and principles that govern and thus serve as frameworks for human action (specifically, interactions). For example, the purpose of contracts are to enable agents to engage in often mutually beneficial cooperative behaviour toward some purpose or goal. Conduct within a contractual relationship is governed not only by the terms of the contract, but various norms and principles (such as relative equality in bargaining, full information, good faith, etc.). Marriage too may qualify as an “institution” in Harding’s narrow sense (although marriage is also a contractual relationship, it evidently involves many other norms that guide human action outside of those specific to the contractual relationship). Yet another example might be parenting, especially as it relates to the fiduciary relationship (as we will see below). Hence, “institutions” in this sense excludes financial and political “institutions” in the broader (lay) sense of the term. It is for this reason that I suggest that institutions, in Harding’s narrow sense, are relationships, or at least a subset of relationships. Thanks to Andrew Botterell for the TD Canada Trust example and for helping me to clarify my thinking here.

152 I will similarly capitalize “Trust” when referring to that legal institution of Equity, reserving the lower case “trust” for the moral philosophical relationship.

153 Keech v Sandford, (1726) 25 ER 223.
However, the lease expired before Keech reached the age of majority. When Sandford attempted to renew the lease, the lessor refused (on grounds that he did not want to lease to a minor). Sandford subsequently renewed the lease for himself. The court held that the lease acquired by Sandford be given to Keech and, furthermore, that Sandford account for any profits (i.e., that any profits acquired as a result of Sandford’s acquiring the lease be transferred to Keech). The judge, Lord King LC, explained that unless the Trustees be held to a strict duty of loyalty to their beneficiary’s interests, “few trust estates would be renewed to cestui que use [i.e., the trust beneficiary].”\(^{154}\) A Trustee’s fiduciary duty of loyalty is intended to ensure that she respect the purpose of the Trust relationship—to further the specific interests of the Trust beneficiary—which helps to ensure the continued viability of the relationship itself as a unique mode or framework for human action.

It is for this reason that Harding argues that Equity’s “interest” in institutions is to ensure that “institutions are formed, well-governed and viable.”\(^{155}\) More generally, Harding says that it “is an interest in ensuring that institutions flourish as arrangements or frameworks for human action.”\(^{156}\) Equity plays an important role in protecting, maintaining, and (where necessary) reforming important social and economic relationships, or institutions, so that they remain viable “modes” or “frameworks” through which individuals are able to interact. In other words, Equity is concerned to protect the viability of certain relationships of social or economic importance, and (as we will see shortly) Equity is “normatively justified” in doing so to the extent that the maintenance of such relationships promotes autonomy.

As an example of Equity’s interest in institutions, Harding focuses on the charitable Trust. The judges of Equity (or rather, judges employing the doctrines and principles of Equity) continue to exercise control over the boundaries of charitable Trusts. In doing so, “they

\(^{154}\) Ibid.

\(^{155}\) Harding, “Equity and Institutions,” 2.

\(^{156}\) Ibid., 2.
maintain an institutional type as a defined and demarcated object of choice for those who seek to utilise the law’s facilities in planning and ordering their affairs.”\textsuperscript{157} The charitable Trust is therefore not available as a framework for human action for the attainment of goals or purposes that do not count as “charitable.” As mentioned, the defining purpose of the Trust is the duty of the trustee to apply Trust assets for the benefit of the trust beneficiaries.\textsuperscript{158} Harding says that the purpose of the Trust gives rise to norms that give it a distinctive normative identity, and thus make it a unique “institutional type.” These norms, Harding suggests, include norms of stewardship, trustee accountability, and fiduciary responsibilities, “at least in cases where trustees exercise discretionary powers.”\textsuperscript{159} Harding explains that

\begin{quote}
[u]nderpinning the [T]rust’s irreducible core, along with norms of stewardship, trustee accountability and fiduciary responsibility, is a distinctive sort of purpose, which helps to lend unity to the trust as an institutional type: the purpose of holding, managing and applying assets for the benefit of others.\textsuperscript{160}
\end{quote}

In short, the “normative identity” of the Trust is made up of the purposes, norms, and principles that together constitute its irreducible core.

**How Does Equity Govern Institutions?**

But how exactly does Equity govern institutions? Alternatively, how does Equity maintain institutional types? One way that Equity governs and maintains institutions is indirectly. Harding says that Equity governs institutions by imposing duties on those who are responsible for managing and directing those institutions. In the context of the Trust, this would include the duties and liabilities placed on Trustees as the “managers” of the Trust

\begin{thebibliography}{9}
\bibitem{157} Ibid., 5 (emphasis added).
\bibitem{158} Ibid., 10.
\bibitem{159} Ibid., 10.
\bibitem{160} Ibid., 10 (emphasis added).
\end{thebibliography}
relationship. Equity’s adjudication of institutional claims is therefore not primarily directed at the individual beneficiary but is instead concerned to ensure the continued viability of the institution, or relationship, itself. To illustrate, when a Trustee is found to be in breach of her fiduciary responsibilities, Harding says that the liabilities imposed by the judges of Equity are “not to meet the claim of any particular beneficiary; rather, it is a liability to preserve the integrity of the institutional structure within which beneficiary claims fail to be considered and dealt with.”161 This is not to say that Equity is indifferent to the claims of individual beneficiaries. As Harding himself points out, such a view would be incoherent given that the whole point of the institution of the Trust is to provide beneficiaries with

161 Ibid., 15. (Emphasis added). Leonard Rotman echoes this view; namely, that (specifically) fiduciary duties are aimed at protecting the “integrity” of the fiduciary relationship (and not primarily the individual beneficiary) when he says that, “while it may appear that the fiduciary concept exists to protect beneficiaries’ interests, that effect is merely ancillary to its protection of fiduciary relationships” (Rotman, Fiduciary Law, 988). Rotman goes on:

Fiduciary interactions rank among the most valuable in society by enhancing productivity and knowledge, facilitating specialization, and creating fiscal and informational wealth. To protect them, fiduciary law subordinates individual interests to its broader social and economic goals. Relationships, rather than individuals, are the primary concern of the fiduciary concept (989, emphasis added).

Lionel Smith agrees. Smith says that the fiduciary’s liability to account for profits (i.e., the “no-profit” rule) is better understood as institutionally directed, rather than in terms of remedial justice for an individual beneficiary (See Smith, “Deterrence, Prophylaxis and Punishment”). Harding says that if Smith is correct, a fiduciary’s liability to account for profits is not dependent on any wrongdoing but is instead a species of primary liability entailed in the sphere of fiduciary management, then that liability, just like the trustee’s liability to the common account, seems to have as its primary concern institutional integrity and not remedial justice.

The rules of accountability of Trustees and fiduciaries are examples of “[E]quity taking an indirect interest in institutional governance through imposing rules that are designed to preserve the integrity and viability of institutional structures” (Harding, “Equity and Institutions,” 17–8).

See also Paul D. Finn, “Contract and the Fiduciary Principle,” University of New South Wales Law Journal 12, no. 1 (January 1, 1989): 76–97 (emphasis added); Finn says that,

[the true nature of the fiduciary principle is revealed in this. It originates, self-evidently, in public policy. To maintain the integrity and utility of relationships in which the (or a) role of one party is perceived to be the service of the interests of the other, it insists upon a fine loyalty in that service. The fiduciary is not to use his position or the power or opportunity it gives him to serve an interest other than his beneficiary’s—be this his own or a third party’s (at 84).

See also Robert Flannigan, “The Fiduciary Obligation,” Oxford Journal of Legal Studies 9, no. 3 (October 1, 1989): 285–322; Flannigan says, “the vital policy in this area is that the integrity of trusting relationships be protected” (at 297).
recourse to such claims. He nevertheless maintains that “[E]quity’s interest in beneficiary claims is via rules that have as their primary concern the structure of the [T]rust itself.”\textsuperscript{162}

Another way that Equity governs institutions is by looking to their \textit{purposes}, which themselves give rise to managerial duties. As we saw above, the purpose of the Trust is to apply the Trust assets for the benefit of Trust beneficiaries.\textsuperscript{163} By governing institutions in light of their purposes, “[E]quity exhibits a concern that governance be faithful to institutional settings within which it takes place.”\textsuperscript{164} When instances of an institution are at odds with moral, social, or political norms, Equity can look to the \textit{purposes} of those institutions to facilitate institutional change. The continued viability of institutions over time requires that they remain relevant to changing societal norms.\textsuperscript{165}

The \textit{cy-près} doctrine for charitable Trusts is an example of the way in which Equity amends institutions to remain consonant with social values. The \textit{cy-près} doctrine allows courts to apply Trust assets to purposes other than those for which the Trust was originally intended by the settlor. In order to invoke the \textit{cy-près} doctrine, the settlor’s (suspect) charitable purpose must be “impossible, impracticable, or illegal” to carry out. In such cases, the courts have sometimes not only gone beyond the settlor’s original purposes, but even put Trust assets to purposes ostensibly at odds with the original purposes, where those original purposes fail to conform to prevailing social, moral, and political norms.

For example, in re Dominion Students’ Hall Trust, Evershed J approved a scheme permitting the trustees of a racially discriminatory charitable trust to administer that trust on a non-discriminatory basis; in doing so, he noted that social understandings of racial discrimination had changed since the trust was first settled.\textsuperscript{166}

\begin{flushleft}
\textsuperscript{162} Harding, “Equity and Institutions,” 15.
\textsuperscript{163} Ibid., 10.
\textsuperscript{164} Ibid., 18.
\textsuperscript{165} Ibid., 19.
\textsuperscript{166} Ibid., 24.
\end{flushleft}
The purpose of the charitable Trust is to further some public or social good. It goes without saying that a charitable Trust that is racially discriminatory is inimical to the public or social good. The cy-près doctrine therefore allows Equity to *directly* intervene in order to maintain the purposes of the charitable Trust qua institutional type.

**Justifying Equity’s Interest in Institutions**

It is perhaps now clear that Equity has been tasked in part with maintaining and, where necessary, reforming certain institutions. A related question thus arises concerning Equity’s *justification* for doing so. What justifies Equity in interfering in the ways in which capable and freely consenting individuals choose to interact with one another? For instance, in recent years there has been increased settlor demand for bespoke Trust arrangements, tailored to such a degree that many of the Trust’s core norms—including stewardship, trustee accountability, fiduciary responsibility—are minimized or eliminated altogether. At what point do bespoke Trust arrangements cease to resemble the original institutional type itself? In these instances, questions arise concerning whether Equity ought to intervene to maintain the Trust (defined by its irreducible core) as a unique institutional type and, furthermore, whether it is justified in doing so. As Harding points out, these questions become especially salient if we consider that the recrafting of institutions in this way actually appears to be in keeping with the law’s more general “facilitative project”: a liberal conception of law based on the facilitation of, or removal of impediments to, individual freedom. On this view, why not allow bespoke Trust or other institutional arrangements, in which core norms and purposes are jettisoned completely, if they serve the relevant individuals’ aims? Alternatively, why think the loss of certain institutions is a problem in which Equity is justified in intervening?

According to Harding, the answer to these questions lies in Equity’s role in *promoting autonomy*. Harding takes as his starting point law’s foundation in a “particular version of liberalism,” which also informs its more general facilitative project.\(^\text{167}\) Harding says that

\(^{167}\) Ibid., 26.
from a liberal point of view the justification for any state action, “lies in the contribution of that state action to an overall social, economic and political order in which people are able to live autonomous lives.” 168 Hence, Harding argues that Equity, as an arm of the state, is justified in governing institutions insofar as it enables people to live autonomous lives. Aside from remedial justice, then, Equity also has a normative justification in facilitating and promoting (a liberal sense of) autonomy. Without Equity’s supervision and guidance (i.e., by governing, maintaining, and reforming institutions) Harding argues that such relationships would be diminished or eliminated altogether, ostensibly diminishing autonomy as a result. Hence, in order to facilitate relationships and thus promote autonomy, Equity is justified in governing institutions so that they remain “viable and succeed.” 169

**Razian Autonomy**

But why suppose that certain institutions in particular are important for autonomy? On what conception of autonomy do institutions play a meaningful role in its promotion? To make this connection between institutions and autonomy, Harding adopts Joseph Raz’s conception of autonomy. Raz’s starting point, like Harding’s, is a version of “liberalism centred on the political ideal of autonomy.” 170 Raz’s conception of liberalism is based on moral pluralism, which in turn grounds his conception of autonomy. 171 Moral pluralism,

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168 Ibid., 26.
169 Ibid., 13.
170 Harding, “Equity and Institutions,” 32.
171 Raz’s views about autonomy are couched in debate with Rawls and Nozick about the nature of liberalism and the role of the liberal state. Raz rejects both Rawls’ and Nozick’s liberalism, which he dubs the “politics of neutral concern.” The politics of neutral concern is the view that with respect to political action the state ought to remain neutral between its citizens, especially regarding conceptions of “the good life.” Raz says that the plausibility of the doctrine of neutral concern is derived from a conception of the good that values autonomy; that is, the state remains neutral with respect to conceptions of the good life so that individuals can be free to choose a conception of the good and govern their lives accordingly. It is in this way that Rawls (in particular) seeks to justify the politics of neutral concern. Rawls argues that because of the plurality of competing moralities in society, the state, in its facilitative role in helping individuals to realize their own conception of the good, ought to remain neutral vis-à-vis their respective ideals of the good. This is also what Rawls calls the “social role of justice,” namely, to “enable all members of society to make mutually acceptable to one another their shared institutions and basic arrangements, by citing what are publicly recognized sufficient reasons” (Raz, “Liberalism, Autonomy, and Politics,” 115). But, Raz
according to Raz, is “the view that there are many worthwhile and valuable relationships, commitments, and plans of life which are mutually incompatible, so that autonomous people can and should choose between them.”\textsuperscript{172} Given the multiplicity of morally worthwhile conceptions of the good, self-determination, and thus choice, is central to autonomy for Raz. As well, he says it is not enough for autonomy to have one’s choices dictated by one’s basic needs. Rather, autonomy requires “a range of meaningful options” from which one is able to choose in the process of self-governance. Among those meaningful options ought to be the ability to “develop relationships” and to commit to “projects, plans, and causes.”\textsuperscript{173} The measure of one’s autonomy depends on the degree to which those relationships and projects are chosen, or self-determined, by the autonomous individual. To have a “significant” degree of autonomy, then, one must have a choice among morally worthwhile possibilities, and not simply among basic needs. Importantly, Harding says this “requires that the state should make worthwhile options available and accessible to individuals.”\textsuperscript{174} Therein lies the connection between institutions and autonomy.

Quoting Raz in \textit{The Morality of Freedom}, Harding claims that autonomous persons must:

possess and develop certain capacities and dispositions such as literacy, numeracy, and the cognitive ability to think about the choices that they make […] autonomous people must be free to some sufficient degree of coercion and manipulation in

\footnotesize{points out that political neutrality does not follow from the recognition that individuals have their own conceptions of the good. Rather, Raz argues that moral pluralism is equally compatible with the social role of justice, albeit by yielding “imperfect” (yet equally valid) principles of justice. Raz ultimately argues that imperfect principles of justice are preferable, practically speaking, to Rawls’ idealized principles of justice. Raz argues that Rawls principles are derived from a conception of the individual (behind the veil of ignorance) completely abstracted from all features that give an individual identity (e.g., moral, political, and religious views, as well as “natural endowments”), rendering the principles of justice derived therefrom an impossibility (or at least impracticable), if not simply meaningless. It is, however, beyond the scope of this chapter to discuss Raz’s argument in detail. See Joseph Raz, “Liberalism, Autonomy, and the Politics of Neutral Concern,” \textit{Midwest Studies In Philosophy} 7, no. 1 (1982).

\textsuperscript{172} Raz, “Liberalism, Autonomy, and the Politics,” 115.

\textsuperscript{173} Ibid.

\textsuperscript{174} Ibid., 116(emphasis added).}
deliberating about their options and choosing among them [...] [and] people must have available to them a sufficient range of options from which to choose in realising a self-determining path in life.¹⁷⁵

With Raz, Harding argues that one of the roles of the state (through Equity, in this case) is to promote a significant degree of autonomy by individuating and maintaining institutions as distinct “options” from which individuals can choose. It is through various institutional types, like the charitable Trust, that individuals are able to pursue certain relationships, projects, plans, or ends. Insofar as these specific institutions make possible the fulfillment of particular ends or purposes, they remain important as “options” of autonomous choice in the general process of self-governance.

We have now seen how this particular version of liberalism—namely, a Razian liberalism—justifies the state’s interest in governing and maintaining institutions. The state is justified in governing institutions insofar as it is founded on a version of liberalism concerned to promote autonomy through principles of moral pluralism. The state, through its governance of institutions, maintains meaningful “options” that are necessary for individuals to exercise their autonomy by choosing between morally worthwhile relationships, projects, plans or causes. This understanding of autonomy necessitates that options be individuated and maintained so that they remain distinct objects of choice; insofar as the (roughly Razian) liberal state is grounded upon a concern to promote autonomy in this sense, it is “normatively justified” in governing socially and economically important institutions.

The Trust is just one example of an institutional “option” that Equity maintains in order to promote autonomy, by making possible certain forms of human action. We have seen how Trusts enable individuals to interact with respect to specific purposes, namely, those involving the management or application of Trust assets for the benefit of Trust beneficiaries. As a further example, Harding says the institution of private property has

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value “insofar as it reflects the distinctive ways of valuing and regulating relations with the resources of the world.” Furthermore, Harding says that the law of contract, “may also have value insofar as it establishes distinct contract types that appeal and are available to differently situated people depending on their purposes and goals.” Insofar as equitable doctrines continue to guide the development or maintenance of these institutions, Equity plays a role in promoting autonomy by providing individuals with distinct options from which they may choose to relate to one another, or as the means to pursuing important projects, plans, or causes. As Harding puts it, Equity has an important function in “constituting, maintaining and refining options and in individuating those options so that

176 Harding says that options can be individuated in at least three ways: (i) on the basis of the values and normative commitments that underpin them; (ii) on the basis of the purposes or goals that they might enable people to realize; (iii) on the basis of modes of interaction that they reflect and promote. Once individuated in these ways, people can make autonomous “choices based on their sense of the values and commitments with which they wish to engage, the purposes and goals that they wish to pursue, and the modes of interaction that they seek to participate in” (Raz 1982, 28). Of course, some “options” might cut across multiple categories of individuation.

177 Harding, “Equity and Institutions,” 32.

178 For example, the institution of contract has changed significantly over the past 400 years to accommodate changing business and economic practices. Before Stilk v Myrick (1809), 2 Camp. 317, 170 E.R. 1168 early English courts, relying in part on equitable principles, would generally enforce (or not enforce, as the case may be) contractual promises based on moral “consideration,” such as fairness. With the nascent market economy of the early nineteenth century, however, came a new formalism in the law of contracts. This formalism was in part a response to the needs of commercial actors to have more certainty in their contractual relations with one another. Through Stilk v Myrick the courts developed the formal doctrine of consideration, defining “consideration” (i.e., the legal basis upon which contracts are enforceable) as the requirement that a promisee undergo a “legal detriment” (i.e., to do something they are not legally obligated to do). Interestingly, after almost 200 years of formalism in which the doctrine of consideration reigned, the institution of contract appears to again be changing in response to greater complexity in both global and local business practices (at least in Common Law jurisdictions). The strict formalism of Stilk v Myrick appears ill-suited for modern business relations, which often involve both legally unsophisticated actors and those with greater legal sophistication and resources (who are sometimes able to use the law to their unfair advantage). In the landmark Canadian case Greater Fredericton Airport Authority Inc. v Nav Canada (2008), 290 D.L.R. (4th) 405 (N.B. C.A.) the New Brunswick Court of Appeal affirmed the English judgment in Williams v Roffey Bros & Nichols (Contractors) Ltd, [1989] ELR 23 which all but entirely jettisons the doctrine of consideration (understood as requirement that the promisee undergo a legal detriment). The court found that so long as both parties receive some “practical benefit,” and there is no “economic duress,” a contract is prima facie valid and thus enforceable. In other words, the courts have begun to look at the “intentions” of parties to a promise (or contract), enforcing or not enforcing promises as “good conscience” requires. These alterations and additions to the law of contract are clear examples of the courts maintaining an institutional type in response to changing societal norms in order to enable individuals to pursue their associated projects, plans, or ends. (In conversation with Professor Joel Bakan).
people may choose among them in self-determining ways.”\(^{179}\) Moreover, Harding says that,

by taking an interest in the development, governance and reform of institutions, [E]quity contributes to the development and maintenance of individuated options that might be the subject of autonomous choice, whether these options be distinguished by their underpinning [i] values and commitments, [ii] the purposes and goals that they facilitate, or [iii] the modes of interaction that they enable and embody. And finally, to the extent that [E]quity makes that contribution, [E]quity, like the whole body of facilitative private law, seems appealing when measured against fundamental liberal commitments, at least from the perspective of a liberalism centred on the political ideal of autonomy.\(^{180}\)

In sum, from a liberal point of view centred on *autonomy*, there are reasons to maintain the distinctiveness of institutional types, which in turn justifies Equity’s critical role in serving that end—especially in the face of interests or forces that would render those institutions unrecognizable or otherwise blur the lines between them, undermining an important mechanism by which individuals are able to achieve their autonomous ends.

### 2.2 Equity, Autonomy, and the Fiduciary Relationship

From what has been said, it is perhaps already clear that the *fiduciary relationship* is an institution that Equity has individuated, maintains, and continues to govern.\(^{181}\) Indeed, Equity’s historical interest in the fiduciary relationship—and, specifically, the fiduciary

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\(^{179}\) Ibid. (emphasis added). It is not just the creation or individuation of a particular institution that promotes autonomy through the creation of a greater range of options for self-determining action. Once individuated as a distinct option, individuals are then able to interact or make use of the newly demarcated institution in various different ways, leading to still further options. For example, creating the Trust as a distinct option separate from other options, such as agent-principle or arms-length contracting relationships, not only creates a unique option in itself, but also allows individuals to use the Trust in a plethora of different ways (e.g., for charitable purposes, to bequeath property or other assets to family or a designated heir, for financial investments, etc.).

\(^{180}\) Ibid., 31–32.

\(^{181}\) Recall that Harding defines an “institution” as “arrangements or frameworks for human action that have some distinctive normative identity and are oriented to some purpose or goal” (Harding, “Equity and Institutions”). Elsewhere he says institutions are “modes” or “frameworks” of human action. For this reason, I have suggested that institutions, as Harding defines them, comprise different types of *relationships*. For example, the Trust, as an institution, is a framework whose purposes, norms, and duties guide (and govern) human behaviour in the context that *type* of human interaction, or *relationship*. 
obligation—was a central theme of Chapter 1. Yet, beyond merely mentioning the fiduciary obligation as one (among other) core “norms” of the legal Trust, Harding does not discuss the fiduciary relationship as an “institution” itself. In fact, Harding’s identification of the fiduciary obligation as a “norm” of the Trust seems to suggest that he may not have considered the possibility that the fiduciary relationship is an institution in its own right. In my view this is an important oversight, because, as argued in the previous chapter, the fiduciary relationship is an important mode or framework of human action that makes possible the furtherance of a plethora of different purposes, projects, and ends critical to meaningful self-governance.

In the second part of this chapter, then, I first extend Harding’s own analysis of Equity’s interest in institutions to the fiduciary relationship. I illustrate how Chapter 1 provides historical support for the claim that Equity has taken an interest in governing and maintaining the fiduciary relationship. In turn, Harding’s analysis mutually reinforces the central thesis of Chapter 1 by providing a theoretical rationale as to why the fiduciary relationship may have been taken up by early Chancery. I argue that the fiduciary relationship is clearly an “institution” (indeed, a paradigmatic one) that Equity has taken an interest in preserving and protecting. The history of how Equity came to recognize and eventually govern the fiduciary relationship provides a case example of Harding’s analysis of Equity’s interest in institutions. Harding’s argument suggests that the social and economic importance of the fiduciary relationship is what accounts for Equity’s interest in maintaining it as an institutional type, or distinct “option,” through which self-governing agents achieve meaningful purposes or ends. In this way, the fiduciary relationship promotes autonomy.

Accordingly, extending Harding’s analysis to the fiduciary relationship has preliminary implications for both the problem of legal-moral equivocation and the problem of paternalism. First, by suggesting that Equity only intervenes to preserve and protect socially and economically important relationships, this analysis provides some support for Chapter 1’s argument that the fiduciary relationship is informed by an underlying moral obligation whose own importance is evidenced by its enforcement through moral, religious, and legal norms throughout history. Extending Harding’s analysis to the fiduciary relationship
relationship therefore ought to help further alleviate concerns about legal-moral equivocation. Second, extending Harding’s analysis to the fiduciary relationship suggests that the latter plays a role in promoting autonomy, which mitigates the concern that the fiduciary relationship is paternalistic; viz., insofar as the fiduciary relationship is autonomy promoting, it is not paternalistic. I begin by briefly describing the problem of paternalism as it relates to the fiduciary relationship. I then go on to illustrate how Harding’s account of the way in which institutions promote autonomy may alleviate the concern that the fiduciary relationship is paternalistic.

Extending Harding’s analysis to the fiduciary relationship does appear to mitigate the problem of paternalism; insofar as the fiduciary relationship promotes autonomy by serving as an option from which agents can choose to frame and govern their interactions with one another in the pursuit of their autonomous ends, this relationship is not paternalistic. Nevertheless, while I agree with Harding that the fiduciary relationship promotes autonomy in this way, his analysis fails to account for the way in which the fiduciary relationship is essentially autonomy promoting. By “essential” here I mean that fiduciary relationships play an important and often critical role in promoting autonomy, though perhaps not in every instance.\(^{182}\) I therefore do not claim that fiduciary relationships are necessary for autonomy in every case; however, I do think that, practically speaking, the multifarious fiduciary relationships in one’s life will be “essential,” or crucial, to the meaningful exercise of autonomy. In order to appreciate the essential role that fiduciary relationships play in promoting autonomy, we must go beyond Harding’s analysis generally, and his conception of autonomy in particular. We must think harder about the way fiduciary relationships themselves promote autonomy. I argue that Harding’s Razian conception of autonomy does not account for the ways in which our myriad relationships are essential to both the development of “autonomy skills” (as in the parent-child relationship) and the ongoing ability to govern ourselves. By adopting a more plausible

\(^{182}\) As we will see below (and in the next chapter), where beneficiaries lack autonomy (such as children and those with certain cognitive impairments), while still important, the fiduciary relationship may not be essentially autonomy promoting in the way I describe below (i.e., as a “relational capacity” of the beneficiary).
relational theory of autonomy, I argue that the fiduciary relationship is among the most important kinds of relationship that constitute the very “conditions” that make meaningful autonomy possible.

First, by juxtaposing Razian autonomy with relational autonomy, I highlight how the former fails to explain how our various relationships play a crucial role in the development and ongoing exercise of our autonomy. I argue that when we recognize the relationality of autonomy, the essential role that the fiduciary relationship plays in enabling individuals to will (that is, to set and pursue certain projects, plans, or causes) becomes manifest. In making this argument, I employ Paul Miller’s influential “fiduciary powers” theory of the fiduciary relationship. I argue that fiduciary power is a relational capacity through which individuals exercise their will.

I conclude by emphasizing that the fiduciary relationship is a moral relationship, grounded in its essential role in promoting autonomy. In this way, I take the forgoing two chapters to have mitigated both the problems of equivocation and paternalism.

2.2.1 Equity’s Interest in the Fiduciary Relationship

Recall, again, that institutions according to Harding are “arrangements or frameworks for human action that have some distinctive normative identity and are oriented to some purpose or goal.” An institution’s “normative identity” is constituted by an “irreducible core,” comprising moral norms, principles, and a defining purpose. An institution’s underlying moral principle often helps to define its purpose as well as the moral norms that, in turn, serve to protect and maintain that purpose and thus the integrity of the institution itself. Equity’s particular interest in these important social and economic institutions, or relationships, involves ensuring that institutions are “formed, well-governed and viable.” As we saw in the previous section, outside of remedial justice, Equity also has a “normative justification” in taking an interest in institutions to maintain their integrity.

183 Harding, “Equity and Institutions,” 2 (emphasis added).
184 Ibid., 2.
or viability. This normative justification is based in the law’s general facilitative project, grounded in a particular form of liberalism that seeks to promote autonomy. To facilitate autonomy, Equity governs institutions by individuating, maintaining, and (where necessary) reforming them so that they remain “viable and succeed” as distinct options through which autonomous agents can structure their interactions and ultimately achieve their autonomously chosen ends.

As we saw in the previous chapter, the fiduciary obligation first gained entry into the law as a principle or norm of the legal Trust. However, the fiduciary relationship has since become an Equitable institution in its own right, enshrined through legal duties and liabilities. Indeed, the fiduciary relationship has arguably become the quintessential equitable institution, rivalled perhaps only by the Trust. But the fiduciary relationship has broader applicability, encompassing the Trust itself and cutting across other important institutions and thereby defying classic legal taxonomy in the process (to the dismay of some jurists). Questions concerning the scope, meaning, and demands of the fiduciary relationship in the context of these and other disparate interactions (e.g., from parents to Chief Executive Officers) have therefore often been left to the equitable domain.

Extending Harding’s analysis of Equity’s interest in institutions to the fiduciary relationship makes it clear that the fiduciary relationship is indeed an “institution” and thus plays a role in promoting autonomy. To begin, the fiduciary relationship has a unique “normative identity,” oriented toward some purpose or goal, and made up of an “irreducible core” norms, values, and principles. As described in Chapter 1, the fiduciary relationship’s central moral obligation, or principle, is something like the following: in undertaking to act on behalf of another’s interests, a fiduciary ought to do so with strict fidelity, or loyalty, to the relevant interests of the beneficiary. From the fiduciary obligation, we get both the purpose of the fiduciary relationship and the norms and rules that function to protect it.

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The *purpose* of the fiduciary relationship, according to Miller’s influential account, is to authorize “the exercise of discretionary power by the fiduciary over the *practical interests* of the beneficiary.” 186 In other words, the *purpose* of the fiduciary relationship is to authorize another to exercise their discretion on behalf of one’s “significant practical interests.” According to Miller, a beneficiary’s interests are significantly “practical” where they implicate matters of *personality, welfare, or right*. 187 Matters of personality refer to interests significant to one’s *identity*, such as the determination of one’s ends; matters of *welfare* include decisions bearing on one’s physical, psychological, or economic *well-being*, such as health, paternal or financial care; and matters of *right* include decisions bearing one’s moral or legal *rights*, such as to be free from violence or coercion. 188 The purpose of the fiduciary relationship is to enable another to exercise their (often professional) discretionary power to act on behalf and in the best interests of matters concerning one’s personality, welfare, or right.

Fiduciary *norms* and *rules*, in turn, demand that the purpose of the fiduciary relationship be upheld. As we will see below, fiduciary duties ensure the proper exercise of *fiduciary power*, which in turn ensures the continued integrity, or viability, of the fiduciary relationship as a specific mode of human action. 189 Miller argues that fiduciary norms and rules arise out of the fiduciary relationship’s “structural properties.” The structure of the fiduciary relationship is characterized by *inequality, dependence, and vulnerability*. 190 Miller says that “[w]henever one person enjoys fiduciary [discretionary] power over another, their relationship will be *asymmetrical* in respect of the power itself.” 191

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186 Miller, “Justifying Fiduciary Duties,” 1016.
187 Ibid.
188 Ibid., 1014.
189 Ibid., 1016. As mentioned, I will discuss Miller’s view in detail below.
190 Ibid., 1014.
191 Ibid., 1014 (emphasis added).
words, the structure of the fiduciary relationship is asymmetrical vis-à-vis the exercise of discretionary power. *Inequality* reflects the structural asymmetry between power and the dependence. *Dependence* thus refers to the way in which the beneficiary relies upon the fiduciary’s appropriate exercise of her discretionary power. And *vulnerability* refers to the risk that the beneficiary takes in authorizing the exercise of fiduciary power: namely, the risk that the fiduciary will abuse, misuse, neglect, or otherwise exploit that power. Vulnerability follows from the risk that the fiduciary “will fail to meet the demands of fiduciary [discretionary] power.”192 These structural properties give rise to the *norms* and *rules* meant to protect the integrity of the fiduciary relationship. The inequality, dependence, and vulnerability that are built into the structure of the fiduciary relationship are therefore also what generate fiduciary *duties*. Equity’s “interest” in the fiduciary relationship may therefore be seen as an attempt to maintain the integrity, or continued viability, of this important mode of human action by enforcing the very norms and values that define and guide appropriate conduct within it. As we saw above, Equity often governs institutions indirectly, by imposing duties on those who are responsible for *managing* and directing those institutions. Fiduciary norms and values such as trust, confidence, care, loyalty, good faith, and responsibility give rise to duties or obligations intended to maintain the integrity of the fiduciary relationship *qua* institution or as a unique framework for human action through which individuals can pursue their significant practical interests.

It would seem, then, that the fiduciary relationship is an “institution” as Harding defines it. But why think that the fiduciary relationship is among the institutions that *Equity* has taken an interest in governing? What evidence is there that Equity governs and maintains the fiduciary relationship?

First, recall that Equity governs institutions both *indirectly* and *directly*. As just mentioned, it does so *indirectly* through the duties and obligations imposed upon the *managers* of those institutions. For example, a Trustee is the manager of the Trust, the assets of which the Trustee manages for the beneficiary’s benefit. In the fiduciary relationship the managers

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192 Ibid., 1014.
are the *fiduciaries* themselves, such as parents, physicians, lawyers, financial advisors, etcetera. The obligations that Equity imposes on fiduciaries are those required to ensure the purpose of the fiduciary relationship—i.e., securing the beneficiary’s interests—is upheld. With the exception of loyalty, the type and number of fiduciary duties are somewhat contested, but often include the duties care and candour. Loyalty, for instance, demands that fiduciaries exercise their discretionary power with complete fidelity to their beneficiaries’ interests—or at least those “significant practical interests” specified as within the fiduciary mandate. This prevents fiduciaries not only from exploiting individual beneficiaries, but also from undermining the purpose, and thus integrity, of the fiduciary institution itself. Similarly, in the law there are also certain *rules*, such as the no-profit and no-conflict rules, that (some argue) serve a “prophylactic” function, prohibiting and deterring fiduciaries from profiting from their privileged capacity as *fiduciaries* and thus from undermining the purpose, and thus “viability,” of the fiduciary interaction itself.¹⁹³

Equity maintains the fiduciary relationship *indirectly*, then, by identifying and enforcing fiduciary norms and rules intended to protect its normative identity—the underlying principle, purpose, norms and values—of the fiduciary interaction, which includes ensuring that fiduciaries act in accordance with their obligations as fiduciaries.

Equity also governs the fiduciary relationship *directly* through fiduciary jurisprudence. By looking to the fiduciary principle, the courts of Equity ensure that the fiduciary relationship, as an institution, remains faithful to its *purpose* while its animating norms and rules cohere with moral norms and social values. Part of Equity’s role in maintaining institutions is to ensure that their defining purposes—as informed by underlying principles—are not undermined, blurred, or otherwise rendered unrecognizable, ostensibly so that these institutions, or relationships, remain meaningful options from which autonomous agents can choose in governing their lives. Hence, in demarcating the fiduciary relationship from other institutions, such as contract, Equity maintains the fiduciary relationship as a distinct

¹⁹³ See Smith, ‘Deterrence, Prophylaxis and Punishment.”
“option” from which autonomous agents might choose to interact in an effort to pursue valuable relationships, meaningful projects, or other ends important to self-governance.

The case law is rich with examples of Equity maintaining the boundaries of the fiduciary relationship. For instance, there have been numerous attempts to “contract-out” fiduciary norms and duties, including the quintessential fiduciary duty of loyalty. As we might expect, in light of Harding’s account, the courts of Equity have so far been unamenable to such efforts, opting instead to maintain the defining purpose of the fiduciary relationship along with the norms and rules that protect that purpose. In the seminal case, *Meinhard v. Salmon*, Equity can be seen as governing the fiduciary institution. In that case, Justice Cardozo, writing for the majority, famously stated:

> Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm’s length are forbidden to those bound by fiduciary ties. *A trustee [i.e., fiduciary] is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.* As to this there has developed a tradition that is unbending and inveterate. *Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.* *It will not consciously be lowered by any judgment of this court.*

Justice Cardozo maintains the fiduciary institution by looking to its purpose along with the norms and rules intended to maintain it. He was unwilling to jettison one of the defining norms of the fiduciary relationship, namely, the fiduciary’s duty of “finest loyalty” to the beneficiary’s interests. Moreover, Cardozo demarcates the fiduciary relationship from, specifically, the institution of contract. Fiduciaries, he says, are not merely agents to a contract, “acting at arm’s length,” they are, rather, “held to something stricter than the morals of the market place.” Even honesty alone, an important norm in contractual relationships, is insufficient in the context of the fiduciary relationship. Instead,

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195 Insofar as dishonest or misleading contracts are unconscionable.
fiduciaries must display “the punctilio of an honor the most sensitive.” Justice Cardozo also gestures toward Equity’s “tradition” of maintaining the fiduciary relationship; he notes that Equity has exercised an attitude of “uncompromising rigidity” toward similar attempts to undermine fiduciary norms and purposes through a process of “disintegrating erosion” of exceptions. Equity can thus be seen here maintaining the fiduciary principle, along with its animating purpose, by ensuring that fiduciary norms and values remain “at a higher level than that trodden by the crowd.”

The application of Harding’s analysis to the fiduciary relationship and the arguments laid out in Chapter 1 mutually reinforce one another. On the one hand, Harding’s account of Equity’s interest in institutions provides theoretical support for the historical account provided in Chapter 1. It does so by providing a theoretical explanation for Equity’s historical role in governing the fiduciary relationship as we understand it today. The social and economic importance of the fiduciary relationship makes it a prime candidate for legal protection through Equity’s governance. By extending Harding’s analysis, we can view English Equity’s interest in the fiduciary relationship as the most recent attempt to enforce the demands of the fiduciary obligation and thus protect the integrity of the fiduciary interaction. On the other hand, Chapter 1 provides historical support for Harding’s theoretical analysis of Equity’s interest in institutions. Chapter 1 described the presence of the fiduciary relationship across times and cultures, operationalized through moral prescriptions, religious commands, and legal rules. This narrative conveys the societal importance of the fiduciary relationship and may now be understood, on Harding’s account, as providing the reason for Equity’s historical interest in it. In other words, on Harding’s view, the clear social importance of the fiduciary relationship accounts for Equity’s interest in individuating and maintaining it as a distinct “option” through which self-governing agents can choose to pursue valuable relationships, plans, projects, or other ends. Indeed, Harding himself notes that how exactly institutions become identified and individuated by Equity at the outset is a complex process that involves both “historical and

196 Meinhard v. Salmon.
cultural factors.”¹⁹⁷ The historical account provided in Chapter 1 may therefore be viewed as an attempt to elucidate some of the historical factors that led to the identification and individuation of the fiduciary relationship.

2.2.2 Implications for Equivocation and Paternalism

Extending Harding’s analysis of Equity’s interest in institutions to the fiduciary relationship has implications for both the problems of equivocation and paternalism. First, as we just saw above, it helps to mitigate the problem of equivocation by supporting the argument made in Chapter 1 that the fiduciary relationship is a moral relationship that existed long before Equity’s interest in it. Chapter 1 outlines the history of the fiduciary obligation as a moral obligation that responds to the problem of trust and dependence in those interactions where one undertakes to act on behalf of another’s interests and does so in a way that fosters greater social cooperation and harmony. Harding’s analysis of Equity’s interest in institutions suggests that it was the evident social and economic importance of the pre-existing fiduciary relationship that led to Equity’s eventual interest in ensuring its continued viability through its governance and protection. Put simply, the fiduciary relationship is not a creation of English Equity. Accordingly, the normative prescriptions of the fiduciary obligation are not purely legal in nature (at least in their foundation); rather, they are also moral prescriptions. This understanding of the fiduciary relationship ought to go some way toward mitigating the worry that applying the normative prescriptions of the fiduciary relationship to the ethical problems of bioethics involves an illicit equivocation between the normative “ought” of the law and that of morality.

Harding’s analysis also has implications for the problem of paternalism. Before explaining why, let me review this problem as it pertains to bioethics specifically. As mentioned in the Introduction, the paternalistic model of the physician-patient relationship refers to a discredited model in which the physician makes unilateral, and even overriding, decisions

¹⁹⁷ Harding, “Equity and Institutions.”
on the patient’s behalf. It assumes that the physician, with her professional knowledge and expertise, knows what is in the patient’s best medical interests—irrespective of the patient’s expressed values, preferences, or beliefs. The history of medical and research ethics is rife with examples of ethical violations perpetrated and justified according to the “doctor knows best” rationale. Contemporary medical and research ethics has evolved out of, and largely in response to, the abuses, neglect, and exploitation that occurred under the paternalistic model. Accordingly, today medical ethics employs a patient-centred model of care that aims to foster patient autonomy in healthcare decision-making and other health-related patient interests. Focused on patient autonomy, patient-centred care advocates for “deliberation” between healthcare professionals and their patients; deliberation involves not only providing patients with the information relevant to their situation, but also engaging in a dialogue whereby the healthcare professional can come to learn a patient’s values, preferences, and beliefs and thus better understand how she can most effectively realize her patient’s healthcare goals (and understand in the first place what those goals are). To be clear, on this model it is not the healthcare professional who chooses the best medical treatment for her patient based on the patient’s values, goals, etcetera; rather, the dialogue between the healthcare professional and her patient enables the professional to better understand her patient’s choices, and to act accordingly. Of course, the healthcare professional brings her professional knowledge and expertise to bear on this dialogue so that the patient can make informed choices about their health interests—but it is ultimately the patient, not the professional, who decides. This patient-centred care model is reflected in recent strategic funding priorities by the Canadian Institute of Health


199 Emanuel and Emanuel, “Four Models.” Only in rare circumstances is paternalism deemed permissible in healthcare ethics (with important caveats); such as in emergency care settings wherein it is often impossible to engage in meaningful dialogue with otherwise competent patients (e.g., where they are unconscious or otherwise incapacitated), and where doing so would in some cases actually undermine the patient’s assumed medical interests in survival.
The problem of paternalism refers to the worry that the fiduciary relationship is a paternalistic framework for the relationship between healthcare professionals and their patients and is therefore something that most bioethicists would and should reject. However, the description above of the patient-centred model reveals that physicians can be fiduciaries without in fact being paternalistic. They can use their discretionary authority to guide their patients in making health care choices that serve their health care interests and also use it to effectuate those choices through the health care they provide. Fiduciaries who use their discretionary power in this way are not acting paternalistically. Harding’s analysis takes us further in implying that the fiduciary relationship is autonomy promoting. It suggests that institutions, like the fiduciary relationship, serve as “options” among various frameworks of action through which individuals can achieve their self-directed ends. In the healthcare setting, the healthcare professional-patient relationship makes it possible for patients to realize their health-related interests. It does so by suggesting that discretionary authority exercised by the fiduciary is an essential means by which the beneficiary is able to pursue her autonomously chosen ends. Through dialogue and joint deliberation, the fiduciary is better able to understand the beneficiary’s chosen plans or goals. The fiduciary can then use her (often) professional knowledge, skill, or expertise to effectuate those ends. Carrying out the beneficiary’s autonomously chosen plan of action will invariably require the fiduciary to exercise her discretion, but this fact does not thereby render the relationship paternalistic; indeed, it is precisely owing to the fiduciary’s specific ambit of discretionary power (e.g., over medical, legal, or financial interests) that the beneficiary can pursue her autonomously chosen ends.

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201 See McLeod, *Conscience in Reproductive Healthcare*; Ryman, “Fiduciary Duties and Commercial Surrogacy” (2017); and Horn et al., “An Ethical Analysis of the Support Trial.”
beneficiary solicits a particular type of fiduciary to facilitate the realization of her self-directed plans, projects, or causes.

In the end, therefore, Harding’s account is helpful in mitigating the problems of both equivocation and paternalism. Nevertheless, I argue that it fails to account for the full extent to which the fiduciary relationship promotes autonomy. On Harding’s account the fiduciary relationship is rendered a mere means to autonomy via its role as an “option,” among many others, through which individuals can pursue their chosen ends. It is therefore not the fiduciary relationship per se that promotes autonomy; rather, it does so through its role as an option among a range of other options that promotes autonomy. This analysis is based on a Razian theory of autonomy, which, I argue, does not pay due attention to the essential role that relationships play in constituting the very conditions that make both the development and ongoing exercise of autonomy possible. By adopting a relational theory of autonomy, which places relationships at the centre of any understanding of autonomy, I argue that fiduciary relationship is not merely instrumentally autonomy promoting, but it is essentially so.

2.3 Beyond Razian Autonomy

We saw briefly above that Harding draws his understanding of autonomy from Raz. According to Raz, the liberal state plays a role in promoting autonomy by creating “options” that enable individuals to choose and pursue the life they have embarked upon. Raz begins from the assumption that self-governance requires more than meeting one’s “personal needs.” Personal needs are the conditions necessary to enable a person to live the life they have. Choices are dictated by personal needs “if all but one nontrivial option will sacrifice a personal need and will make impossible the continuation of the life the agent has.”²⁰² Personal needs are not only the basic needs of survival but include the need to have a “morally worthwhile life.” The idea that autonomy requires more than the fulfillment of basic needs seems to be based on the intuitive idea that a “morally worthwhile

life” involves more than mere subsistence. If one’s only “option” is between survival or death one’s autonomy is effectively meaningless; such a “choice” is more akin to duress or coercion, as if one is forced to “choose” with a gun to the head—only the “gun” in this case is, say, starvation. However, Raz suggests that one need not be facing a decision between life or death for one’s autonomy to be severely undermined. For example, he says that a pianist may lose the life she has embarked upon, if her fingers are irreparably broken. For the pianist, the “choice” between continuing her life as pianist or not, may be practically equivalent to a life-or-death decision; one can imagine that, for her, living a life without playing the piano—the life the pianist has embarked upon—is simply not worth living.

But perhaps for these reasons, Raz says that autonomy is a matter of degree: one can be more or less autonomous. It is then perhaps fair to say that the concert pianist who can no longer play the piano nevertheless has more autonomy than someone whose sole occupation is to secure their next meal. Again, Raz says that to have a “significant degree” of autonomy requires more than the satisfaction of personal needs; significantly autonomous persons are those who “shape their life and determine its course.”203 In other words, to have significant autonomy requires having a range of meaningful options that enable one to be the self-determining author of their own lives. The liberal state thus promotes autonomy by creating and maintaining “options” that enable individuals to pursue a life that, for them, is worthwhile. In Raz’s own words:

autonomous persons are not merely rational agents who can choose between options after evaluating relevant information, but agents who can in addition adopt personal projects, develop relationships, and accept commitments to causes, through which their personal integrity and sense of dignity and self-respect are made concrete. In a word, significantly autonomous agents are part creators of their own moral world. Persons who are part creators of their own moral world have a commitment to projects, relationships, and causes which affects the kind of life that is for them worth living. It is not that they may not sacrifice projects or causes they are committed to for good reasons, but rather that there are certain kinds of actions vis à vis their commitments which amount to betrayal, compromise their integrity,

sacrifice their self-respect, and in extreme cases render their life, i.e., the life they made for themselves, worthless or even impossible (in a moral sense).\textsuperscript{204}

Raz identifies at least three aspects of autonomy. The first is the (classic) capacity to form “informed and effective judgments.”\textsuperscript{205} This seems to imply more than having mere “capacity” to be held responsible for one’s choices, but to have the ability to undergo a process of higher-order critical reflection. The second is “relational,” by which he means that autonomous persons “are not subjected to the will of another.”\textsuperscript{206} Finally, the third aspect concerns the quality of the options open to the agent; specifically, “their choices must not be dictated by personal needs.”\textsuperscript{207} Related to the first, Raz says this in part requires that “[o]ne is a part author of one’s world only if in creating it one is not merely serving the will of another.”\textsuperscript{208} So a person who coerces another violates that person’s autonomy by forcing them to conform to their will. The coercer succeeds in forcing others by “restricting their options.”\textsuperscript{209} For this reason, Raz says that the more the third condition of autonomy is undermined (such as through coercion), the more one’s choices will be dictated by personal needs, and thus the less autonomous one will become. For Raz, to facilitate autonomy through moral pluralism, the liberal state plays a critical role in individuating and maintaining options that make a morally worthwhile life possible.

Harding therefore appears to be correct in interpreting Raz as saying that the defining feature of Razian autonomy is having a choice among a range of “options.” Only by being free to choose among a meaningful array of options—enabling the pursuit of projects,

\textsuperscript{204} Raz, “Liberalism, Autonomy, and Politics,” 112.
\textsuperscript{205} Ibid.
\textsuperscript{206} Ibid.
\textsuperscript{207} Ibid.
\textsuperscript{208} Ibid.
\textsuperscript{209} Ibid.
relationships, and causes that constitute one’s “moral world”—and thus to act beyond the mere satisfaction of personal needs, does one acquire a “significant” degree of autonomy.

On Raz’s account, the fiduciary relationship is made a mere means to autonomy. It becomes an “option” that autonomous agents can choose (or not, presumably) in the authorship of their lives. However, as I will now argue, this theory of autonomy does not account for the vital role fiduciary relationships play in constituting the conditions that make meaningful autonomy possible. In this way, fiduciary relationships are not “optional”; rather, they are essential for the development and ongoing exercise of autonomy. The Razian conception of autonomy fails to acknowledge this critical feature of autonomy: namely, the way in which our various relationships constitute the very “background conditions” that make significant autonomy possible.

2.3.1 Relational Autonomy

“Relational” theories of autonomy are grounded in the recognition that relationships shape or create one’s ability to be a “self-governing” agent. Relational theories were first developed by feminist philosophers keenly aware of the oppressive effects that relationships can have on the autonomy of women and other subjugated members of a white supremacist patriarchal society. As Natalie Stoljar puts it, these theories began as an attempt “to answer the question of how internalized oppression and oppressive social conditions undermine or erode autonomy.” Relational autonomy emphasizes the importance of the “conditions” in which autonomy develops and is realized. These conditions include our various relationships with others, which have the potential not only to damage our autonomy, but to be supportive of it.

212 See again Stoljar, “Feminist Perspectives on Autonomy.”
213 Indeed, there is also an overwhelming body of empirical evidence in experimental psychology that suggests that our relationships, especially those with our early childhood caregivers, are critical to the
Relational autonomy theorists begin their analyses in the same way that most moral philosophers do: namely, by defining autonomy as “self-governance.”\(^{214}\) However, feminist philosophers point out that self-governance is not the same as having complete control over our lives.\(^{215}\) Rather, self-governance involves acting on “reasons, values, or ends of our own.”\(^{216}\) These reasons, values, and ends can, and inevitably do, encourage us to depend on others. For example, in valuing love one chooses to depend on family, friends, or partners to secure this important need. Alternatively, one might also value financial stability, and so choose to depend on the advice, knowledge, or skill of a financial advisor for the best chances of achieving this particular end. The same is true of numerous other personal and professional relationships. McLeod and Ryman express this point well:

> So long as we rely on others for these things, however, we do not control what happens to us, not completely anyway. Rather, some of this control lies with other people: those who will shape how much we are able to flourish. It follows that autonomy is not about controlling things in our lives; autonomy and control are not identical.\(^{217}\)

Relational theorists thus reject the individualistic view of autonomy that assumes self-governance requires near complete independence from the influence of others. Feminist philosophers have long been sceptical of this “atomistic” and naively idealistic (not to mention masculinist) understanding of autonomy: that is, the dubious understanding of the autonomous agent as completely self-sufficient, whose judgment and actions are unadulterated by others—as if it were possible to operate in a social vacuum. Feminist

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\(^{214}\) Recall that the etymology of “autonomy” is derived from the Greek “autonomia”—or “auto” and “nomos”—which literally means “self-law.” In other words, to be self-ruling, or to be one’s own lawmaker, to self-govern.


\(^{216}\) Stoljar, “Feminist Perspectives on Autonomy.”

\(^{217}\) McLeod and Ryman, “Trust, Autonomy, Fiduciary Relationship,” 7.
philosophers have challenged this atomistic understanding of autonomy, arguing that “articulating the [social] conditions of autonomy is essential to understanding gender oppression and related concepts such as objectification.”

There are a number of different theories of relational autonomy. Broadly, relational theories of autonomy can be classified as (i) procedural or substantive, and (ii) causal or constitutive. Procedural theories parallel the literature on autonomy more generally, by focusing on the capacity to reflect on one’s motivations, values, and beliefs and make decisions based on those reflections. Procedural theories of autonomy are “content neutral” insofar as they are concerned with the process by which one comes to a decision, rather than the content of the decision itself. On this view, the choices of an individual of sound mind are autonomous, however oppressive in outward appearance (i.e., in content) those choices might be. Conversely, substantive theories are not content neutral, rather they are “value laden.” In other words, they subject the content of one’s decisions to normative constraints. There are both strong and weak substantive theories of autonomy. Strong substantive theories subject the contents of one’s decisions to direct normative constraints. For example, the preference to be enslaved cannot be autonomous on a strong substantive view, as (it goes without saying) slavery is normatively and morally repugnant. Weak substantive theories, on the other hand, “build in normative content, but do not place direct normative constraints on the content of agents’ preferences.”

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218 Stoljar, “Feminist Perspectives on Autonomy.”

219 Theories of relational autonomy can be made up of any combination between these two classes (e.g., procedural causal, substantive constitutive, etcetera). Although certain combinations are more common (such as procedural-constitutive).

220 Ibid.

221 Ibid.

222 Ibid.
self-worth.\textsuperscript{223} So long as they meet these constraints, they are considered “autonomous” on the weak substantive view.

Causal relational theories of autonomy acknowledge the influence of social relationships and socio-historical circumstances on autonomy.\textsuperscript{224} Causal views take into consideration the vital role that relationships play in enabling and fostering autonomy. In other words, they emphasize that our relationships play a causal role in the development of our autonomy. Our relationships with parents, teachers, friends and loved ones can either support or undermine our autonomy as we grow into fully developed adults. In this way, social and historical conditions can promote or impede autonomy. It is important to emphasize that on the causal view of autonomy, our relationships and socio-historical circumstances affect the degree to which we develop into autonomous agents. Importantly, however, such relationships are not the focus of our ongoing exercise of autonomy.

Constitutive relational accounts, by contrast, provide an analysis of autonomy in terms of how our interpersonal and socio-historical circumstances constitute the “defining conditions” of autonomy. In other words, these theories recognize the importance of social and economic relationships to the continued or ongoing exercise of autonomy—not just the development of autonomy (as in the causal view). For instance, bell hooks (among many others) points out that “white supremacist patriarchal society” systematically undermines the autonomy of women and people of color by severely constraining access to “external goods”—including social goods, such as affordable housing, quality education, employment, and healthcare—required for autonomous choice and action.\textsuperscript{225} Limiting access to these external goods is incompatible with autonomy on some constitutive views. Stoljar explains that this is because autonomy is a “global” condition of moral agents, requiring that they have “de facto power and authority over choices and

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\bibitem{223} Carolyn McLeod, \textit{Self-Trust and Reproductive Autonomy} (Massachusetts: MIT Press, 2002).
\bibitem{224} Stoljar, “Feminist Perspectives on Autonomy.”
\bibitem{225} Bell Hooks, “Killing rage: Ending racism.”
\end{thebibliography}
actions significant to the direction of [their lives].”226 Severely constraining the external conditions of autonomy—such as critical social and professional relationships—removes the de facto power required for autonomy.227 However, other constitutive theorists focus more on “local” conditions of autonomy: namely, those conditions required for “choices, preferences, or desires at particular times to count as autonomous.”228 Still, what makes a relational theory constitutive is the claim that no matter how robust an agent’s psychological capacities are, if the relevant external conditions do not obtain at a given time, an individual’s choices will not be autonomous.229 The constitutive view therefore rejects the classic moral philosophical view that merely having the capacity for (or simply undergoing the process of) rational reflection, as in the procedural view, is sufficient for autonomy.

While all theories of relational autonomy emphasize the critical role that our relationships play in autonomy, the theory I will adopt here is a procedural-constitutive theory: namely, one according to which being autonomous involves having both the capacity to undergo critical reflection on one’s motivations, beliefs, and values, and to have access to the “external conditions” that make possible the exercise of “de facto power and authority” for meaningful self-governance. It is beyond the scope of this chapter to engage in any substantive debate about the preferred or most plausible theory of relational autonomy; suffice to say, that I adopt the procedural-constitutive theory because I believe it is basically correct: not only does it account for the classical (and arguably intuitive) idea that autonomy requires certain mental capacities and processes of rational and critical reflection, but it also accounts for the ways in which our relationships are both causally formative for our autonomy and (as I argue below) essential for the ongoing “global”

227 Stoljar, “Feminist Perspectives on Autonomy.”
228 Stoljar, “Feminist Perspectives on Autonomy.”
229 Stoljar, “Feminist Perspectives on Autonomy.”
exercise of autonomy. I will therefore use this theory to show why the fiduciary relationship is essentially autonomy promoting.²³⁰

2.4 A Moral Ground for the Fiduciary Relationship

I propose that when we understand autonomy relationally, together with the recognition of the crucial role that fiduciary relationships play in the satisfaction of important human needs and interests, then the way in which fiduciary relationships are essentially autonomy promoting becomes evident. All societies are made up of a web social, political, and economic relationships. Modern societies, in particular, are increasingly complex. With increased technological advancements and global interconnectedness comes increased compartmentalization of knowledge, skills, and expertise. As global citizens we trust and depend on others in a multiplicity of different ways, from securing the food we purchase at the grocery to the surgeons who perform our operations. The modern global world is made possible only through social cooperation and consequent mutual dependence at an immense scale. To “self-govern,” then, we simply must be able to trust or reliably depend on others.

The fiduciary relationship, in particular, is an essential “mode of human action” by which we become, and continue to function as, autonomous agents. In the other words, fiduciary relationships are essential not only for developing the procedural capacity for autonomy, but also for its ongoing exercise. The parent- (or caregiver-) child relationship, for instance, is amongst the most important of fiduciary relationships for developing the capacities, or “skills,” necessary for autonomy. Parents, teachers, and other authority figures in a child’s life are responsible for helping children to develop the capacity for rational self-reflection required for procedural autonomy. Diana Meyers, who takes a procedural view, argues

²³⁰ Accordingly, I must also concede that, to the extent that the success of my argument rests on my admittedly assumed procedural-constitutive theory of autonomy, I will be vulnerable to criticisms and arguments against that view. However, owing to the space and time constraints of this dissertation, a meaningful reply to these objections will have to be reserved for future work.
that what she calls “autonomy competence” requires certain “agentic” or “autonomy skills.”

Meyers says that,

Autonomous people exercise a repertoire of skills to engage in self-discovery, self-definition and self-direction, and [...] the authentic self is the evolving collocation of attributes that emerges in this ongoing process of reflection, deliberation and action.

Meyers suggests that, at a minimum, the “repertoire of skills” required for self-definition and self-reflection include the following: introspective skills, imaginative skills, memory skills, communication skills, analytical and reasoning skills, volitional skills, and interpersonal skills. Moreover, Meyers emphasizes the importance of critical thinking for autonomy competence:

[O]ne must command critical thinking skills. Not only must one be alert for errors of fact and fallacies in reasoning, but one must also register emotional cues that signal confusion or danger. Still, extracting what is worthwhile from newly

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233 Meyer describes the full meaning of each of the autonomy skills as follows:

1. Introspective skills … sensitize individuals to their own feelings and desires, that enable them to interpret their subjective experience, and that help them judge how good a likeness a self-portrait is

2. Imaginative skills … enable individuals to envisage a range of self-concepts they might adopt

3. Memory skills that enable individuals to recall relevant experiences not only from their own lives but also experiences that associates have recounted or that they have encountered in literature or other artforms

4. Communication skills that enable individuals to get the benefit of others' perceptions, background knowledge, insights, advice, and support

5. Analytical and reasoning skills that enable individuals to compare different self-concepts and to assess the relative merits of these alternatives

6. Volitional skills that enable individuals to resist pressure from others to embrace a conventional self-concept and that enable them to maintain their commitment to the self-portrait that they consider genuinely their own, that is, authentic

encountered material is the key to enriching one's self-knowledge and to redefining oneself. Thus, one must be able to identify such ideas, incorporate them into one's own cognitive and emotional viewpoint, and apply them as one defines oneself.234

Meyers says that, “[b]y exercising autonomy skills, such as the ones I enumerated previously, people gain authenticity or autonomy.”235 The parental (or guardian) relationship is critical to the development of these skills and thus of the child into a self-governing and authentic individual.236 Moreover, parents are fiduciaries: they undertake—indeed, are obliged both morally and legally—to act in the best interests of their children. They are tasked, in part, with helping their children develop the procedural capacity and skills to be autonomous. Performed well, their role is essential to the development of a child’s future autonomy.

Fiduciary relationships are also necessary for the continued exercise of autonomy. As mentioned, the interconnectedness of complex societies has led to the compartmentalization of knowledge, skills, and expertise such that one must trust and depend on innumerable individuals to secure not only basic needs (such as food, clothing, education, and healthcare) but also the realization of life projects, plans, causes, and other autonomous ends. Many of these relationships are also fiduciary. Healthcare professionals, lawyers, financial advisors, chief executive officers, and perhaps even the state itself are fiduciaries tasked with exercising their judgment (usually based on a unique set of knowledge, skills, and expertise) on behalf of others.237 As was made clear in the previous

234 Ibid., 167.


236 Meyers bases her conception of “authenticity” on the ideas implicit in the following two idioms:

"Now I know what I really want" and "Be true to yourself." The former expression distinguishes desires that one happens to have from one's real or genuine desires—that is, the desires of the authentic self. The latter voices the conviction that it is good for people to act on their authentic desires and so presumes that doing so falls within the bounds of social acceptability—that is, that one's authentic desires are morally creditable. One's authentic self points to a way of living that is both distinctively one's own and socially decent” (Meyers 2000, 158).

237 For argument that the state is fiduciary, see Evan Fox-Decent, Sovereignty's Promise: The State as Fiduciary (Oxford: Oxford University Press, 2011).
chapter, the presence of the fiduciary relationship throughout history and across cultures speaks to its profound social and economic importance. Societies throughout history have had a stake in protecting, governing, and maintaining the fiduciary relationship. Without access to at least some fiduciary relationships, and the ends they make possible, individuals would be unable to meaningfully guide the direction of their lives. For example, without parents (or guardians) acting in a fiduciary capacity—loyal to the best interests of their child(ren)—the development of skills and processes essential for self-governance would be severely curtailed. The same is true for some fiduciary relationships in adulthood. Healthcare professionals and lawyers, for instance, make possible the pursuit of one’s chosen health or legal plans or goals, respectively. Without the professional knowledge and expertise of these individuals, along with the reliable expectation that these individuals can be trusted or depended upon to exercise their professional discretion on behalf of our best interests, it would be exceedingly difficult (if not practically impossible) to secure certain of these interests.\(^{238}\) Needless to say, without access to healthcare or legal justice, we would simply lack some of the most crucial relationships for the meaningful exercise of our autonomy.

Razian autonomy does not appear to account for the ways in which relationships of any kind are essential to autonomy. Raz’s brief reference to the “relational” aspects of autonomy is entirely negative; he refers to the potential of our relationships to undermine our autonomy by coercively subjecting our will to that of another. True, Raz mentions the importance of pursuing “relationships” insofar as relationships constitute options in the authorship of one’s moral life. However, Raz does not mention the ways in which relationships can themselves be constitutive of our autonomy, in a positive and affirmative sense. Again, the constitutive view stresses the importance of having certain relationships for the ongoing exercise of autonomy. On this view, our various social and professional

\(^{238}\) It seems to me that without a fiduciary obligation one could not be reasonably certain that the advice these professionals might offer would truly be in one’s best interests. This could lead, for example, to doctors prescribing unnecessary and expensive treatments because it serves their own financial interests, those of the hospital, or a third party’s interests (such as a pharmaceutical company or provider of medical equipment).
relationships—from (as we saw above) parents, to lawyers, to healthcare professionals—are among the “external goods” that constitute the (positive) conditions necessary to be a self-governing agent. Relationships are a “global” condition of autonomy, in that they are necessary for the exercise of “de facto power and authority over choices and actions significant to the direction of [our lives].”

Raz does recognize, however, that certain “natural conditions” can force people to make choices on the basis of personal needs, thus undermining their autonomy. It is here that Raz comes closest to acknowledging what relational theorists call the “conditions” that are constitutive of autonomy:

The ideal of the perfect existentialist with no fixed biological and social nature who creates himself as he goes along is an incoherent dream. An autonomous personality can only flourish against a background of biological and social constraints which fix some of its human needs. Some choices are inevitably determined by those needs. Yet, harsh natural conditions can reduce the degree of autonomy of a person to a bare minimum just as effectively as systematic coercive intervention. Moreover, noncoercive interferences with a person’s life and fortunes may also reduce his or her autonomy in the same way as coercive interventions do. The only differences are that all coercive interventions invade autonomy and they do so intentionally, whereas only some noncoercive interventions do so and usually as a by-product of their intended results. They are not direct assaults on the autonomy of persons.

Still, Raz’s framing of relationships here is entirely negative; namely, he seems to acknowledge only the way in which relationships can be deleterious to autonomy. Moreover, he seems to shrug off this apparent autonomy-eroding effect of relationships by pointing out, again, that autonomy is a matter of degree. Raz suggests that no one is completely autonomous, because it is impossible to be entirely free from the dependence on, or influence of, others. Therefore, because relationships appear to equally undermine the maximum degree to which individuals can be autonomous, Raz concedes that not all

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239 Oshana, Personal Autonomy in Society, 2.

relationships are “regrettable.” Again, however, we see that Raz views relationships as entirely autonomy eroding, not promoting.

Even putting aside the fact that Raz does not acknowledge the way in which relationships can function as positive mechanisms of self-governance, it seems to me that it would be anachronistic to suggest that Raz has in mind here the idea that our relationships constitute the conditions for autonomy, in the sense proffered by relational theorists. By the phrase, “background of biological and social constraints,” Raz is referring to “human needs,” and the way in which we are bound by those needs. Raz says that biological and social human needs (such as food, shelter, clothing, social connection, etc.) are the “natural conditions” that constrain or undermine autonomy, just as the coercive actions of some individuals can. Again, Raz does not appear to account for the ways in which human relationships are constitutive of autonomy, as some relational theorists do. To suggest that Razian autonomy accounts for the ways in which autonomy is relational by referring to his discussion of “human needs” and the way in which “natural conditions” can undermine autonomy would, I think, be an abuse of the principle of charity.

However, Raz does go on to say that “inasmuch as the liberal concern to limit coercion is a concern for the autonomy of persons, the liberal will also be anxious to secure natural and social conditions which enable individuals to develop an autonomous life.”241 It might be argued, then, that to the extent that the “social conditions” of autonomy include relationships that can impede or promote autonomy, it is fair to say that Razian autonomy is compatible with relational theories of autonomy. But while the Razian account of autonomy may leave room for the conceptual work laid down by relational theorists, it clearly does not do the work of relational theorists. Raz does not acknowledge, identify, or discuss the many ways in which relationships are fundamental to the development of autonomy, as well as the social conditions under which autonomy can flourish.

241 Ibid., 112 (emphasis added).
As a Razian on autonomy, it is therefore doubtful that Harding recognizes the full importance that our relationships have as constituting the “conditions” of autonomy. Relationships are more than merely individuated “options” from which sovereign individuals might choose in curating an authentic self. Our interpersonal relationships make up the “external conditions” that constitute our autonomy itself; without these relationships, we would lack the conditions necessary for meaningful self-governance, and would thus simply fail to be autonomous. As will become clear in a moment, fiduciary relationships, in particular, along with the interests and ends they make possible are essential to autonomy. Only when we understand autonomy as both procedurally and constitutively relational does it truly become clear how fiduciary relationships promote our autonomy.

2.4.1 The Fiduciary Relationship as Relational Capacity

To understand how the fiduciary relationship is essentially autonomy promoting it will first help to get clearer on what exactly its defining features are. What does it really mean to say that a fiduciary is “authorized” to exercise “discretionary power” over the “significant practical interests” of the beneficiary? Drawing again from Miller’s influential analysis of the fiduciary relationship, I argue that part of the answer to this question lies in the nature and purpose of fiduciary power: namely, the fiduciary relationship makes possible the exercise of fiduciary power as a means—or capacity—by which the beneficiary is able to pursue, set, or determine her autonomous ends.²⁴² Fiduciary power is therefore what I call a “relational capacity,” one that enables individuals (beneficiaries) to meet important needs and pursue meaningful projects and interests. Fiduciary power, and by extension the fiduciary relationship, enables individuals to pursue and procure important interests, without which they would simply fail to lead autonomous lives.

We have already seen that the purpose of the fiduciary relationship is to enable interactions in which one party (the fiduciary) is authorized to exercise discretionary power over the

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²⁴² Miller, “Justifying Fiduciary Duties.”
significant practical interests of another (the beneficiary). It is the fiduciary’s authority to exercise discretionary power that is peculiar to the fiduciary relationship. Fiduciary power is exercised on behalf of the beneficiary’s “significant practical interests.” Recall that a beneficiary’s interests are “practical” where they implicate matters of personality, welfare, or right. Personality refers to interests significant to one’s identity, such as the determination of one’s ends; welfare includes decisions bearing on one’s physical, psychological, or economic well-being, and right concerns decisions about one’s moral or legal rights. Clearly, practical interests comprise many of those interests that are central to self-determination and autonomous action.

These “practical interests” are united in the following way. It is only through the authorization of the bearer of those interests (the beneficiary) that the fiduciary obtains the capacity to exercise discretionary power in relation to these specific interests. For this reason, Miller notes that fiduciary power is by nature authorized, relational, and specific. Let me elaborate.

First, as an autonomous agent with the capacity to will and set ends for herself, the beneficiary grants the fiduciary the authority to use her discretionary power to further her (the beneficiary’s) interests. Unlike unauthorized and thus coercive uses of power, the

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243 Ibid.
244 Ibid.
245 Ibid., 1014.
246 Miller, “Justifying Fiduciary Duties.”
247 As previously mentioned, I assume for the sake of simplicity the paradigm case in which the beneficiary in a fiduciary relationship is autonomous and thus has the capacity to authorize fiduciary power. I recognize that some beneficiaries in a fiduciary relationship (such as children and those with certain cognitive impairments) may lack the requisite autonomy or capacity to authorize fiduciary power. By way of brief response, Carolyn McLeod suggests (in conversation) that, in the case of children, it might be argued that the fiduciary exercises their fiduciary power on behalf of the child’s future autonomy. With respect to those lacking the capacity to authorize fiduciary power due to cognitive impairments, this raises interesting questions about whether such relationships are in fact fiduciary (or, rather, straightforwardly paternalistic). One reason why we might nevertheless call such relationships (e.g., between a caregiver and a patient with cognitive impairments) fiduciary is precisely because of the way in which they enable such individuals to set and pursue certain (ideally) self-determined ends. But, as Anthony Skelton cannily points
beneficiary’s authorization “legitimates conduct that would otherwise be illegitimate or positively wrongful.” Miller says that fiduciary power thus “alters the normative conditions under which people interact,” insofar as it “legitimates the subjection of the beneficiary’s capacity to set and pursue certain significant practical interests for herself to the will of the fiduciary.” In other words, the authorization of fiduciary power renders otherwise wrongful conduct—i.e., the subjection of one’s moral or legal capacity to another—permissible.

Second, fiduciary power is relational insofar as it is exercised on behalf of the beneficiary. Miller says the relationality of fiduciary power is “substitutive.” In acting on behalf of the beneficiary’s interests the fiduciary “stands in substitution for that person within the ambit of the power” specified by the fiduciary mandate. The authorization of fiduciary power “legitimates a limited form of substitution of legal [and moral] personality.” It is the discretionary nature of fiduciary power, in particular, that has this substitutive effect out, autonomy interests are not the only interests parent-fiduciaries are tasked with promoting; rather, there are a range of goods involved in the fiduciary relationship between parents and children, to which an exclusive focus on autonomy does not do adequate justice. Nor does an exclusive focus on autonomy do full justice to the complexity involved in parenting, which involves balancing these various goods at, and across, times. Unfortunately, it is beyond the scope of this chapter to explore these fascinating questions in more detail.

248 Ibid., 1016.

249 Ibid., 1016 (emphasis added). It is not quite accurate to say that it is the fiduciary’s will to which the beneficiary’s own is subjected. In fact, Miller seems to directly contradict himself shortly after this statement by saying fiduciary power is a means of effectuating the beneficiary’s will. It is perhaps more accurate to say (as I do shortly) that the beneficiary authorizes the fiduciary to execute her will. The nature of fiduciary’s ambit over significant practical interests suggests that such execution will involve a substantial amount of discretion, but the exercise of discretion is not straightforwardly at odds with carrying out another’s will.

250 Miller, “Justifying Fiduciary Duties.”

251 Ibid., 1017.

252 Ibid., 1017. I include “moral” here as well, even though Miller’s argument is limited to a “juridical” justification of fiduciary liabilities. It is hopefully clear from what has been said already that the fiduciary relationship is a moral as well as legal relationship. The fiduciary therefore acts not only in “substitution” of the beneficiary’s legal capacity, but also her moral capacity as an autonomous agent. Indeed, Miller seems to at least implicitly endorse such a view when he suggests that the authorization of fiduciary power changes the “normative conditions” of the interaction.
according to Miller. The fiduciary’s ambit for discretionary power means that she is not “a mere proxy.” Agents, with no or severely limited discretionary powers, act for their principals—not on their behalf. Conversely, fiduciaries literally act on behalf of their beneficiaries. The fiduciary acts in the beneficiary’s capacity by effectuating her will. In other words, at least within the scope of vested authority, the fiduciary “exercise[s] judgment in determining whether, when, and how it [i.e., fiduciary authority] is to be acted upon.”

Third, specificity reveals that the substitutive nature of fiduciary power is ultimately limited. The fiduciary does not, after all, “overtake the personality” of the beneficiary. Rather the fiduciary’s power is usually circumscribed to a specific mandate, capacity, interest, or end. Fiduciary power thus remains a means by which the beneficiary effectuates her will. Hence, it is not entirely accurate to say that it is the fiduciary’s will to which the beneficiary subjects her own. Instead, the beneficiary authorizes the fiduciary in a limited capacity to execute her own will. As McLeod and Ryman point out, fiduciary discretion is not only exercised on behalf of the beneficiary’s will but also informed by discussions about the beneficiary’s values, beliefs, and interests. As we saw above, it is through dialogue and joint deliberation that the fiduciary is able to learn the beneficiary’s choice—or will—and use her (often professional) fiduciary power to carry out that decision and effectuate her will. Put simply, it is in relation to the beneficiary’s will that the fiduciary exercises her fiduciary powers. It is in this way that the fiduciary can be seen as a “relational capacity” through which the beneficiary carries out her will.

In sum, these features of fiduciary power—authority, specificity, and relationality—reveal the purpose for which the power is held, and thus the purpose of the fiduciary relationship itself: to serve as a relational means by which the beneficiary pursues her autonomous will. As Miller puts it, “fiduciary power, and by extension the fiduciary relationship, thus

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253 Ibid., 1018.
254 McLeod and Ryman, “Trust, Autonomy, and the Fiduciary Relationship.”
enables one person to act purposively on behalf of another.” Furthermore, Miller says that fiduciary power is derived from the “capacities constitutive of the legal [and moral] personality of another person, [and therefore] cannot but be understood as an extension of that other person’s personality.” Again we see that, as an extension of beneficiary’s personality, fiduciary power is a relational capacity through which she pursues her self-directed projects, plans, or causes.

When the nature and purpose of fiduciary power is considered in light of a relational constitutive theory of autonomy, the essentially autonomy-promoting function of the fiduciary relationship becomes clear. On a constitutive view of relational autonomy, certain relationships constitute the “defining conditions” of autonomy. We require access to myriad relationships to pursue important plans, projects, and causes essential to meaningful self-governance. Self-governance requires of autonomous agents that they have “de facto power and authority over choices and actions significant to the direction of [their lives].” Given the nature of complex, interconnected global societies, this power requires that they have access to a variety of fiduciary relationships, from healthcare professionals who enable them to act upon health-related decisions, to governments who are tasked with effectuating their interests in liberty and security. Conversely, severely constraining these external conditions—i.e., relationships—undermines the de facto power required for autonomy. Without the aid and support of fiduciary relationships, in particular, we would simply lack some of the conditions necessary to secure important needs or to pursue identity-conferring projects. Fiduciary relationships are essential to enabling individuals, through the use fiduciary power, to maintain de facto power and authority over their significant practical interests by authorizing others, often with a specific set of skills or

255 Ibid., 1019. (Emphasis added).
256 Ibid., 1019 (emphasis added). As previously mentioned, Miller confines his argument to the law, and thus speaks merely in terms of one’s “legal personality.” However, this argument can be extended to the moral domain.
257 Oshana, Personal Autonomy in Society.
258 Stoljar, “Autonomy.”
knowledge, to carry out their autonomous decisions. Lastly, this vital purpose—of promoting autonomy—gives the fiduciary relationship a foundation in morality.

2.5 Conclusion

In this chapter, I have argued that the fiduciary relationship is not only not paternalistic, it is essential to our autonomy. I began by outlining and then applying Harding’s analysis of Equity’s interest in governing institutions to the fiduciary relationship. I argued that the fiduciary relationship is in fact an “institution” as Harding defines it. I suggested furthermore that Chapter 1 provides historical support for the claim that Equity has taken an “interest” in the fiduciary relationship. I also argued that Harding’s claim that Equity only takes an interest in governing socially important institutions provides reciprocal theoretical support to the historical argument in Chapter 1 that the fiduciary relationship predated, or existed prior to, its entry into English law through Chancery.

Next, I applied Harding’s analysis to the fiduciary relationship, arguing that this relationship is not paternalistic. Adopting a Razian theory of autonomy, Harding argues that Equity promotes autonomy by individuating, maintaining, and reforming institutions so that they remain “viable and succeed” as distinct options through which self-governing agents can pursue their chosen projects, plans, or causes. Self-determination, according to Raz, requires agents to have meaningful choices among a “range of options” that enable one to embark upon, or continue to live, a “morally worthwhile life.” This requires choices among options beyond those allowing for the mere satisfaction of basic needs. Harding argues that Equity (as an arm of the liberal state) promotes autonomy by ensuring the continued viability of various institutions that function as “modes of human action” through which autonomous agents can achieve their ends. Having illustrated that the fiduciary relationship is in fact one such institution, I argued that—according to Harding’s own account—the fiduciary relationship is autonomy promoting, rather than paternalistic.

Nevertheless, I went on to argue that Harding’s analysis does not go far enough in recognizing the full extent to which the fiduciary relationship promotes autonomy. I stated that this relationship is essential to autonomy, beyond its function simply as an “option,” among a range other options, from which individuals can choose in the satisfaction of their
ends. To make this stronger claim, I suggested that we reject Razian autonomy and adopt an (arguably) more plausible *relational* theory of autonomy. I argued that Razian autonomy fails to account for the essential role that relationships play in constituting the “conditions” that make autonomous action possible. Here, I endorsed a *procedural-constitutive* theory of relational autonomy. A *procedural* theory of autonomy accounts for the classical idea that autonomy requires certain cognitive capacities and rational processes. A *constitutive* theory of autonomy accounts for both the essential role that relationships play in the *development* of autonomy (in childhood) and the *ongoing* of exercise of autonomy (in adulthood). On a procedural-constitutive theory of autonomy, relationships *constitute* the “background conditions” that make self-governance possible. In other words, without various relationships (such as those with parents and professionals) our autonomy would be severely curtailed.

It is therefore with a procedural-constitutive theory of autonomy in mind that I proposed we understand the autonomy-promoting function of the fiduciary relationship. I argued that fiduciary relationships comprise some of the most important relationships in the relational web that constitute conditions that make meaningful self-governance possible. Fiduciary relationships encompass a wide array of social and professional relationships without which we would simply be unable to be meaningfully self-governing. Parents (or guardians), as fiduciaries, are essential to enabling children to develop critical autonomy skills and capacities in adulthood. Even in adulthood, however, we continue to rely on a multitude of relationships to secure our ends and pursue meaningful projects, plans, or causes. In complex modern societies characterized by the compartmentalization of knowledge, skill, and expertise, many of these important fiduciary relationships are *professional* in nature; teachers, doctors, lawyers, financial advisors, and other professionals make possible the pursuit and satisfaction of our autonomous ends. Adopting Miller’s “fiduciary powers” theory, I argued that fiduciary relationships can be helpfully understood as a *relational capacity* through which individuals carry out their autonomous wills. Through dialogue and joint deliberation, the fiduciary comes to learn not only the beneficiary’s beliefs, values, and preferences, but also the beneficiary’s *choices*. In a word, the fiduciary uses the power conferred on her by the beneficiary in determining how best
to carry out the beneficiary’s will; by making it possible for the beneficiary to pursue her self-directed ends, the fiduciary relationship thereby promotes her autonomy.

As mentioned, an important implication of this argument is that the fiduciary relationship is not paternalistic. Rather, to the extent that it is the very function, or raison d’être,\(^{259}\) of the fiduciary to be a relational capacity by which autonomous agents (beneficiaries) are able to pursue their freely chosen ends, the fiduciary relationship is essentially autonomy promoting. Another implication of this argument is that, insofar as the fiduciary relationship is essential to autonomy, it is a moral relationship. In Chapter 1, I argued that the moral nature of the fiduciary relationship is grounded in the critical role it plays in fostering social harmony, by enabling individuals to trust or reliably depend on one another. The argument in this chapter could be viewed as fleshing out the argument of Chapter 1. The fiduciary relationship fosters broad societal cooperation, and thus ultimately social harmony, by making possible the conditions in which autonomy can flourish. When autonomy is understood relationally, it becomes clear that autonomy and social cooperation are inextricably linked, where one mutually reinforces the other. It is the nature and quality of our relationships that determines the degree to which we are both autonomous and are able to cooperate in harmony together. A society founded on cooperative relationships that enable individuals to pursue their self-directed ends, and to live an authentic and “morally worthwhile” life, will likely also be one in which individuals live in relative harmony. Jointly, Chapters 1 and 2 show that the moral grounding of the fiduciary relationship lies in the essential role it plays in promoting relational autonomy.

This understanding of the fiduciary relationship helps to mitigate the problems of both legal-moral equivocation and paternalism. The worry about applying the normative prescriptions of the fiduciary relationship to the ethical problems of medical and research ethics is diminished once we recognize that this relationship is moral in nature. The worry that the fiduciary relationship is paternalistic, and therefore represents an inappropriate ethical model for the relationship between healthcare professionals and their patients, is

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\(^{259}\) See Rotman, *Fiduciary Law.*
alleviated once we see the moral role that the fiduciary relationship plays in fostering autonomy. By mitigating these two problems, I hope to have removed two important conceptual hurdles to the widespread application of the fiduciary framework to the ethical problems of bioethics. In the next chapter, I illustrate the practical utility of this framework for clarifying a complex ethical issue in research ethics.
Chapter 3

3 An Ethical Analysis of the SUPPORT Trial: Addressing Challenges Posed by a Pragmatic Comparative Effectiveness Randomized Controlled Trial

In the forgoing two chapters, I argued that the fiduciary relationship is an important moral relationship, informed by an underlying moral obligation and grounded in the essential role that the relationship plays in promoting autonomy. I argued that when we understand that autonomy is fundamentally relational, the indispensable role that specifically fiduciary relationships play in enabling individuals to plan, set, and pursue their self-directed ends becomes plain.

As societies increase in complexity, so too does the compartmentalization of knowledge, skill, and expertise, leading to profound interdependence and requiring involved systems and institutions of social and economic cooperation. It is an inescapable feature of human experience that we exist in relation to, and with, others. Indeed, on the procedural-constitutive theory of relational autonomy I endorsed in the previous chapter, our relationships comprise the very background conditions that constitute autonomy itself. In other words, our autonomy is inextricably bound up with, and fundamentally dependent upon, our relationships with others. Without the care and guidance of parents, teachers, and caregivers in childhood, the “skills” and capacities necessary for autonomy would fail to develop properly, or even at all. In adulthood, our countless relationships, with family, friends, colleagues, professionals, and even with the state makes possible the ongoing pursuit and achievement of our self-directed ends.

In modern complex societies, in particular, the relationality of autonomy has arguably taken on even greater significance, requiring us to trust or depend upon others with very specific areas of expertise or skillsets. These individuals, often professionals, act as

Recall from the Introduction that not all beneficiaries trust their fiduciaries. I pointed out that trust is a desirable, but not necessary feature of fiduciary relationships. However, with its defining obligation in the loyalty to the beneficiary’s interests, the fiduciary relationship makes it possible for beneficiary to at least reliably depend on their fiduciaries.
gatekeepers to important needs and interests essential to meaningful self-governance. Moreover, many of these individuals are fiduciaries: we authorize these individuals to act on behalf of, and in relation to, our specific “significant practical interests.” But the scope of this fiduciary power is delimited precisely in this way; namely, by its being authorized, relational, and specific. It is for this reason that I argued fiduciary power is a “relational capacity” by which a beneficiary is able to effectuate her will and pursue her significant practical interests. “Practical interests,” in turn, implicate interests crucial to autonomy, including interests in personality (e.g., identity), welfare (e.g., basic needs), and right (e.g., to equality). The role that fiduciaries play as both gatekeepers to those “significant practical interests” necessary for meaningful self-governance, and the way in which they function as a relational capacity by which individuals are able to pursue those interests, makes the fiduciary relationship essential to meaningful self-governance, or autonomy. Furthermore, by enabling individuals to trust or reliably depend on one another in the context of a specific mode of human action, fiduciary relationships also play an important role in fostering social harmony. I noted in the previous chapter that when we understand autonomy as relational it becomes clear that enabling individuals to trust and depend on one another in the pursuit of their self-directed ends, simultaneously fosters both social harmony and individual autonomy. Together, these functions provide a foundation for the fiduciary relationship in morality.

Recall from the Introduction that this dissertation is motivated by the promise of the fiduciary relationship to provide conceptual clarity to the difficult ethical issues that arise between healthcare professionals and their patients. The fiduciary relationship has already proven auspicious in providing clarity to longstanding and sometimes heated bioethical debates, such as those pertaining to commercial surrogacy, conscientious objection, and an important ethical concept in research ethics known as “clinical equipoise.” Given the promise of the fiduciary relationship, this dissertation is also motivated to address two

apparent obstacles to its widespread acceptance and application within bioethics: namely, *legal-moral equivocation* and *paternalism*. I pointed out that equivocation and paternalism present two substantial conceptual hurdles to the cogent use of the fiduciary relationship as an *ethical* framework—specifically as applied to ethical issues that arise between healthcare professionals and their patients. I sought to address these problems in the previous two chapters by arguing, ultimately, that the fiduciary relationship is a *moral* relationship grounded in its essential role in promoting autonomy.

In this chapter, I intend to put the fiduciary relationship to use in my own bioethical analysis. Specifically, my goals in this chapter are twofold. First, by applying a fiduciary analysis to a real-world debate about an ethically divisive randomized clinical trial (RCT), known as the SUPPORT trial, I intend to provide a meaningful contribution to a particular issue in research ethics. Second, in so doing, I aim to illustrate the *practical utility* of the fiduciary relationship for clarifying ethical problems that arise in the context of healthcare professional-patient relationships. I therefore hope to show how the fiduciary relationship can be used for thinking *clearly* and *systematically* about the different ethical roles and duties physicians and researchers have with respect to their patients and participants, respectively. For instance, when we identify an individual as a “fiduciary,” they are held to the demands of the fiduciary obligation, which, in turn, have their own ethical implications (such as the kind of behaviour that is either prescribed, or proscribed, with respect to the beneficiary’s interests). Alternatively, it can be equally helpful for systematic ethical analysis to determine who is *not* a fiduciary, and thus not subject to the demands of the fiduciary obligation. Accordingly, in this chapter, I argue that the ethical crux at the centre of the debate about the SUPPORT trial concerns the question of *who is a fiduciary, who is not a fiduciary*, and ultimately what that means for conceptualizing various aspects of the SUPPORT study protocol.

Furthermore, as we will see shortly, the SUPPORT trial concerns not only parents or guardians, but also their (nonautonomous) premature infants as potential beneficiaries, and therefore constitutes a “hard case” for the application the fiduciary analysis I developed in the previous two chapters. I briefly noted in the previous chapter that, for the sake of simplicity, I would concern my analysis primarily with *paradigm* fiduciary relationships...
in which the beneficiary is autonomous. In other words, my argument that the fiduciary relationship serves as *relational capacity* through which the beneficiary is able to pursue her autonomous ends requires that, at the outset, the beneficiary has the requisite *capacity* to *authorize* the fiduciary to wield her fiduciary power in the pursuit of the beneficiary’s self-directed ends. Infants, however, clearly lack the capacity to authorize the exercise of fiduciary power on their own behalf (although some children, not infants, may be said to have the capacity to *deny* or *withdraw* consent for certain treatments). Moreover, lacking autonomy, it is not clear that infants and children can even have “self-directed” ends. It would therefore appear that where the beneficiary lacks the necessary autonomy “skills” or capacities, the fiduciary relationship cannot be seen as an *extension* of the beneficiary’s will. Accordingly, I discuss the implications of this “hard case” for my analysis of the fiduciary relationship in this chapter.

The bulk of the remainder of this chapter is taken from a previously published co-authored article, albeit with substantial updates and revisions to appropriately apply the analysis developed in the previous two chapters.\(^{262}\) Section 3.7, in particular, has been substantially updated and should therefore be understood as reflecting only my own views and analysis, not those of my co-authors. To signal that shift, in section 3.7 I abandon the first-person plural pronoun “we” (which I use throughout, save for this introduction) and adopt instead the first-person singular pronoun “I”.

Section 3.1 begins by explaining the ethical problem posed by an innovative research methodology, known as the pragmatic comparative effectiveness randomized controlled trial (ceRCT), of which the SUPPORT trial is (purportedly) a token example. Section 3.2 provides important background information including the motivation for conducting the SUPPORT trial, and the relevant details of the trial itself. Section 3.3 describes the ethical debate that followed the publication of the results of the trial, bifurcating the various

\(^{262}\) Horn et al. “An ethical analysis of the SUPPORT trial.” As first author to this publication, my responsibilities included all the background research and all the writing of, and revisions to, its many drafts. This includes responses and revisions to peer-reviewers and the final editorial revisions for journal submission. Co-authors provided written and/or oral feedback on drafts and, in some cases, contributed intellectually to the arguments contained in the article.
arguments into “defenders” and “critics” of SUPPORT. In section 3.4, we explain how the
debate fails to identify the central ethical issue raised by SUPPORT. We argue that the
central issue is whether we ought to conceptualize the SUPPORT trial interventions as clinical research or medical practice. Accordingly, in section 3.5, we provide a brief primer on the “research-practice” distinction and, specifically, the important role that the fiduciary relationship plays in demarcating clinical research from medical practice. With this groundwork laid, section 3.6 entertains the view that the SUPPORT trial interventions ought to be conceptualized as practice. However, in section 3.7, I reject this view and argue—using a fiduciary analysis—that the SUPPORT trial interventions ought to be conceptualized as research. We conclude, in section 3.8, by considering the implications of this analysis for similar ethical problems and by emphasizing the utility of the fiduciary relationship for providing conceptual clarity to complex bioethical issues, such as those posed by the SUPPORT trial.

3.1 Pragmatic Comparative Effective Trials

Pragmatic comparative effectiveness randomized controlled trials (ceRCTs) evaluate the
effectiveness of one (or more) interventions under real-world clinical conditions. The results of ceRCTs are often directly generalizable to everyday clinical practice, providing information critical to decision-making by patients, clinicians, and healthcare policymakers. The PRECIS-2 framework identifies nine domains that serve to score a trial on a continuum between very explanatory to very pragmatic. According to the framework, pragmatic trials may have one or more of the following features: there are fewer eligibility criteria for participants, in an effort to mirror the target patient population; the implementation of study interventions occurs in real-world clinical settings; the


intervention and its delivery do not require specialized training for clinicians or staff, and thus allow for flexibility in how the interventions are delivered; there is no special strategy for monitoring protocol compliance; patient monitoring and follow-up occur as in routine clinical practice; outcomes are clinically meaningful and patient-oriented; and all randomized patients are included in the analysis.265

The pragmatism movement in medical research has gained momentum in recent years owing to a multitude of factors, including: increased attention to waste in medical research; pervasive and persistent unexplained variability in clinical practice; high rates of inappropriate care; and increased healthcare expenditures.266 Historically, the majority of RCTs have been explanatory in design. Explanatory trials are often conducted under tightly controlled conditions—such as with strict recruitment and monitoring practices—in order to determine the efficacy of an intervention under ideal conditions. But treatments found to be efficacious in explanatory settings do not always prove effective in the real world. Accordingly, explanatory trials may fail to provide results that support decision-making by patients, healthcare providers, research funders, and policymakers and they may, thereby, merely contribute to research waste. Recently, there has been increasing recognition that the need for evidence to inform healthcare decision-making requires a shift to pragmatic ceRCTs. Reflecting this insight, ceRCTs have been identified as strategic funding priorities by the Canadian Institute of Health Research’s Strategy for Patient-Oriented Research, and the U.S. Patient-Centered Outcomes Research Institute.267

265 Louden et al., “The PRECIS-2 Tool.”


Of particular importance for healthcare decision-making are pragmatic ceRCTs that involve *usual care* interventions. Pragmatic ceRCTs of usual care interventions are a *type* of comparative effectiveness trial that evaluate the effectiveness of one or more interventions used routinely in medical practice, head-to-head. Usual care interventions, or medically recognized standards of care, “are treatments or procedures that have been accepted by medical experts as appropriate treatments or procedures for a given type of disease or condition, and are commonly used by healthcare professionals.” Comparative effectiveness RCTs involving usual care interventions offer an opportunity to improve healthcare by answering clinically relevant questions about the comparative effectiveness of treatments (or policies) used routinely in clinical practice. Through integration with cost-effectiveness analyses, usual care ceRCTs can also inform decision-makers about treatment costs in the real world. Comparative effectiveness RCTs involving usual care interventions can therefore help to reduce variations in care, improve uptake of evidence-based practice, reduce treatment costs, and improve patient outcomes.

All research involving human participants must conform to high scientific and ethical standards. Contemporary research ethics is founded upon four internationally accepted ethical principles: respect for persons, beneficence, justice, and respect for communities. These principles serve as the ethical foundation for global guidance documents and national regulatory frameworks. The principles aim, first and foremost, to protect the

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The concept “standard of care” is derived from the legal lexicon, and the use of the concept commonly fails to disambiguate between its normative and descriptive meanings. On the one hand, “standard of care” might refer to what healthcare providers *ought* to do, given the best available evidence (the normative meaning); on the other hand, it might refer to what healthcare providers *in fact* do in clinical practice (the descriptive meaning). For the purposes of this paper, we have in mind a *descriptive* meaning of the term “standard of care.” We use language such as “usual care” and “routinely used in practice” to highlight this descriptive meaning.

Internationally accepted ethical principles are articulated in several documents, including: the Council for International Organizations of Medical Sciences (CIOMS) *International Ethical Guidelines for Health-
liberty and welfare interests of individual patients. (Protections for communities are a recent innovation.) But the existing ethical and regulatory frameworks were developed with explanatory trials in mind. The traditional ethical framework assumes a clear distinction between research and clinical practice; the tightly controlled conditions under which explanatory trials are designed make the demarcation of the research components from practice components of the trial relatively straightforward. This is because the traditional research–practice distinction assumes the domain of clinical practice is largely autonomous and self-regulated; hence, not only is third-party review not necessary, but the norms of the physician–patient relationship prohibit such outside interference. Conversely, third-party review is both justified and necessary in the research domain.

But with the move towards pragmatic ceRCTs, traditional ethical guidance is more difficult to interpret. Pragmatic ceRCTs intermingle interventions routinely used in clinical practice with research, and this belies a straightforward distinction between research and practice. The lack of guidance on interpreting internationally accepted research ethics principles in the context of ceRCTs of usual care interventions has left researchers and research ethics committees without a unified and systematic method of ethical analysis for these critically important trials. As a result, research participants are left vulnerable to the unavoidably capricious judgments of individual researchers and research ethics committees. This has, in turn, led to controversies in the wake of a few ceRCTs, resulting in unnecessary and costly delays. The absence of clear ethical guidance for ceRCTs therefore poses a practical threat to the conduct of this socially valuable research.

3.2 The SUPPORT Trial

The Surfactant, Positive pressure, and Pulse Oximetry Randomized Trial (SUPPORT) provides a timely and poignant example of the kinds of ethical controversies to which cRCTs give rise. Premature infants are at a substantial risk of mortality and morbidity, including retinopathy of prematurity—an important cause of blindness—and neurological impairment.\(^\text{270}\) Due to the incomplete development of their lungs, premature infants commonly receive supplemental oxygen. The historical use of supplemental oxygen in neonatology dates back to the early 1940s.\(^\text{271}\) In those early years, unrestricted or “liberal” use of supplemental oxygen (up to 100% inspired oxygen) resulted in drastic reductions in rates of mortality; however, underdevelopment of the lungs and eyes renders oxygen uniquely toxic to preterm infants. Unrestricted oxygen use has since been associated with various morbidities, such as retinopathy, neurological impairment, and lung toxicity.\(^\text{272}\)

Over the past seven decades, numerous studies—both randomized and nonrandomized—have been conducted in an effort to determine the optimal oxygen saturation range that reduces both mortality and morbidity. On the one hand, some studies suggest that the incidence of retinopathy may be lower in preterm infants exposed to reduced levels of oxygenation than in those exposed to higher levels of oxygenation.\(^\text{273}\) On the other hand, studies have also indicated that reduced levels of oxygenation may lead to increased rates


\(^{272}\) Lisa M. Askie, David J. Henderson-Smart, and Henry Ko, “Restricted Versus Liberal Oxygen Exposure for Preventing Morbidity and Mortality in Preterm or Low Birth Weight Infants,” *The Cochrane Library* 1, no. CD001077 (2009), DOI: 10.1002/14651858.CD001077.pub2.

of mortality. A 2009 Cochrane Review concluded that “the question of what is the optimal target range for maintaining blood oxygen levels remains unclear, [and thus] further research should be undertaken to resolve this important clinical question.” The range of oxygen saturation used routinely in neonatology intensive care units at the outset and during the course of the SUPPORT trial fell within a range between 85% to 95%. Nonetheless, as justification for their study design, the SUPPORT trial authors say that it was “becoming common practice to use lower target ranges of oxygen saturation with the goal of reducing the risk of retinopathy of prematurity.”

Owing to this uncertainty, and the purported trend in clinical practice at the time, the SUPPORT trial sought to determine the optimal saturation target levels of supplemental oxygen in preterm infants for minimizing retinopathy without increasing adverse outcomes, including death. The SUPPORT investigators conducted a multi-centre randomized controlled trial, with a 2-by-2 factorial design, comparing two target levels of oxygen saturation, and two ventilation approaches. The oxygen saturation component of the trial compared a lower target range of oxygen saturation, 85% to 89%, with a higher target range, 91% to 95%, on a composite primary outcome measure—a combination of multiple study endpoints—of severe retinopathy of prematurity or death.


275 Askie et al., “Restricted Versus Liberal Oxygen Exposure,” 381.


278 Ibid.

279 Ibid. This paper focuses entirely on the component of the SUPPORT trial that compared the two target levels of oxygen saturation. However, others take issue with the aspect of the trial that compared two different ventilation approaches, continuous positive airway pressure and surfactant (see Carome, Wolfe, and Macklin 2013; Macklin and Shepherd 2013).
Eligible infants included those born between 24 weeks and 28 weeks of gestation for whom a decision to provide full resuscitation had been made. A total of 1316 infants were randomized. The study was reviewed and approved by 22 research ethics committees (the precise number of study sites is unclear), and written informed consent was obtained from the parent or guardian of each child before delivery. To be clear, while parents or guardians provided consent for trial participation, it was their premature infants who received the study interventions (supplemental oxygen) and were therefore the study participants.

Investigators ensured that blinding, or masking, was maintained with the use of electronically altered-pulse oximeters. A pulse oximeter is a noninvasive device that enables clinicians to continuously monitor the level of oxygen saturation in the patient’s bloodstream. The altered-pulse oximeters showed saturation levels between 88% to 92% for both low and high target oxygen saturations arms, with a maximum variation of 3%. For instance, a reading of 90% corresponded to actual levels of 87% in the low-oxygen (85% to 89%) saturation arm, and 93% in the high-oxygen saturation arm (91% to 95%) of the trial. Clinicians were therefore told to maintain oxygen saturation levels between 88% and 92% with the use of the altered-pulse oximeters, ensuring that they were unaware to which study intervention the individual patient had been randomized. In an effort to ensure that infants were not inadvertently exposed to oxygen saturation levels beyond the range usual care (85% to 95%), the algorithm used for the altered-pulse oximeters gradually reverted back to actual (non-altered) values when readings were less than 84%, or higher than 96%, in both treatment groups. As an additional safeguard, an alarm was

280 Ibid., 1961.
281 Ibid., 1960.
282 SUPPORT, “Oxygen Saturation in Preterm Infants.”
283 Ibid.
triggered when actual oxygen saturation levels reached 85% or lower, and 95% or higher.284

The results of the trial showed no significant difference in the rate of the composite primary outcome (severe retinopathy or death before discharge) between the low- and high-oxygen saturation arms (28.3% and 32.1%, respectively; relative risk with lower oxygen saturation, 0.90; 95% confidence interval, 0.76 to 1.06; \( P = 0.21 \)). However, a prospective analysis revealed that infants in the low-oxygen saturation arm were subject to an increased risk of death, while survivors experienced reduced rates of severe retinopathy.285 In other words, while instances of severe retinopathy were significantly lower in infants administered low target oxygen saturation (8.6% versus 17.9%; relative risk, 0.52; 95% CI, 0.37 to 0.73; \( P < 0.001 \); number needed to treat, 11), mortality was significantly higher in the low target oxygen saturation intervention, when compared with the high target oxygen saturation intervention (19.9% versus 16.2% relative risk, 1.27; 95% CI, 1.01 to 1.60; \( P = 0.04 \); number needed to harm, 27).286

Given the purported trend in clinical practice toward lower target ranges of oxygen saturation in order reduce the risk of retinopathy of prematurity, the evidence from SUPPORT “adds to the concern that oxygen restriction may increase the rate of death among preterm infants.”287 Indeed, the results of the trial suggest that there is one additional death for each two cases of severe retinopathy prevented. The investigators thus concluded by urging that “caution should be exercised regarding a strategy of targeting levels of oxygen saturation in the low range for preterm infants, since it may lead to increased mortality.”288

284 Ibid.
285 Ibid.
286 Ibid.
287 Ibid., 1967.
288 Ibid.
Following the publication of the trial in the *New England Journal of Medicine* in 2010, an anonymous complaint was filed against the SUPPORT trial investigators, regarding what it claimed were egregious inadequacies in the content of the informed consent documents. In response, the U.S. Office for Human Research Protections launched a formal investigation into the SUPPORT trial. They sought to “evaluate allegations of noncompliance with the Department of Health and Human Services (HHS) regulations for the protection of human research subjects (45 CFR part 46).”²⁸⁹ In conformity with a section of U.S. regulations, known as the *Common Rule*, researchers are required to provide research-participants with “a description of any reasonably foreseeable risks and discomforts” (45 CFR 46.116(a)(2)). However, only two of the 22 approved informed consent documents included blindness as a risk of participation in the trial, while none of the informed consent documents disclosed death as a reasonably foreseeable risk of study participation.

The investigators appear to have elected not to inform parents or guardians of these risks according to the rationale that “all of the treatments proposed in the study are standard of care, [and therefore] there is no predictable increase in risk for your baby.”²⁹⁰ The only risk investigators disclosed in the “possible risks” section of the 20 informed consent documents—those that did not list either blindness or death as research risks related to the use of the pulse oximeter—was “the possible risk of skin breakdown at the site.”²⁹¹

Upon investigation, the U.S. Office for Human Research Protections concluded that “the anticipated risks and potential benefits of being in the study were not the same as the risks and potential benefits of receiving standard of care.”²⁹² They argued that, “for the infants


²⁹¹ SUPPORT Trial Consent Forms, 4.

assigned to the upper range [. . .] the risk of ROP [retinopathy of prematurity] was greater, while for the infants assigned to the lower range the risk of ROP was lower,” and therefore the risks should have been disclosed to the parents or guardians of participating infants.293 The Office for Human Research Protections therefore determined “that the conduct of this study was in violation of the regulatory requirements for informed consent, stemming from the failure to describe the reasonably foreseeable risks of blindness, neurological damage and death.”294

3.3 The Debate on the SUPPORT Trial

The U.S. Office for Human Research Protections determination incited considerable debate in the literature. While the determination focused on the alleged inadequacies in the content of the informed consent documents, the debate on the SUPPORT trial has focused primarily on whether infants were in fact exposed to increased risk as a result of trial participation. On the one hand, critics of the SUPPORT trial argue that various features of the study posed an a priori (as opposed to post hoc) increase in risk to enrolled infants, when compared with infants not so enrolled; that is, critics argue that the risks associated with low range oxygen supplementation in preterm infants was known before the onset of the trial, based on the previously mentioned preliminary data. On the other hand, defenders of the SUPPORT trial argue that participation in the trial did not pose an a priori increase in risk to enrolled infants compared to those infants treated in clinical practice as the study inventions were standard care.

3.3.1 Critics of the SUPPORT Trial

The SUPPORT trial has garnered much criticism.295 Broadly speaking, critics of the SUPPORT trial raise three substantive objections. First, some critics invoke the fiduciary

293 Ibid.

294 Ibid., 2.

relationship (or at least some of its duties), arguing that certain features of the study compromised the fiduciary duties the physician owes to her patient. They argue that aspects of the study design and implementation violate the physician’s duty to exercise her personal judgment in the best interests of the individual patient. George J. Annas and Catherine L. Annas, for instance, argue that “in treatment a patient has a physician who is bound by a fiduciary duty to act in the patient’s best interests.” These critics argue that the lack of physician judgment exposed enrolled infants to increased risk compared to patients who are not part of a research study; as fiduciaries, physicians are required to exercise their professional judgment, and discretion, when acting on behalf of their patient’s medical interests. Randomization to treatment protocols undermines physician discretion and, ostensibly, increases risk to enrolled infants. Annas and Annas thus conclude that, “the primary argument [that] . . . no new risks were introduced to the patient is explicitly rejected by this court.”

Second, some critics argue that the study was not appropriately designed to answer the primary study question. For instance, Charles Natanson argues that in cases in which a given standard of care is specified across a range, randomizing patients to the extremes of

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296 George J. Annas and Catherine L. Annas, “Legally Blind: The Therapeutic Illusion in the SUPPORT Trial of Extremely Premature Infants,” *Journal of Contemporary Health Law and Policy* 30, no. 1 (2013): 1–36; Michael A. Carome and Sidney M. Wolfe, “Letter to Secretary of Health and Human Services: Re The Surfactant, Positive Pressure, and Oxygenation Randomized Trial (SUPPORT),” 2013, accessed February 9 2016, http://www.citizen.org/documents/2111.pdf. Retrieved February 9, 2016; Vera Sharav, 2013, “HHS public meeting, August 2013,” accessed February 9, 2016, https://www.youtube.com/watch?v=IAfBkgYmxtg&list=PLrt7E8KABz1Gc_ndt9grGg8O_jE5G1RNC&index=8. As mentioned in the previous chapters, bioethicists have (and continue to) invoke the fiduciary relationship in their analyses of bioethical issues. However, as discussed in the introduction, the problems of equivocation and paternalism which motivate this dissertation are two obstacles that stand in the way of justifying such applications of the fiduciary relationship to bioethical issues. Moreover, the particular analysis of the fiduciary relationship provided in the previous chapters, as an inherently autonomy promoting relational capacity of the beneficiary, will have specific implications when applied to some bioethical problems.


298 Ibid., 25.

that range no longer constitutes the medical standard of care. He argues that this creates “practice misalignments which carry risks and do not represent usual care.” This concern was also echoed in the U.S. Office for Human Research Protections determination. They argued that enrolled infants had a greater chance of receiving an oxygen saturation at the low, or high, extremes of the range (i.e., 85% or 95%, respectively) that comprised the (then-current) standard of care:

[Participating in the study] would have significantly increased the chance of an infant being assigned to oxygen levels at both the very low (85% to 88%) and the very high ends (92% to 95%), as opposed to the level they would have received [88% to 92%], had they not been in the study. (OHRP 2013, 4)

As a result, the U.S. Office for Human Research Protections argued that it was “much more likely that they [i.e., enrolled infants] would be within the range in which there were significant concerns about increased mortality,” when compared with infants treated in clinical practice. In other words, Natanson argues that the low and high oxygen saturation range interventions do not reflect usual care, and therefore the SUPPORT trial does not compare one or more “usual care” ranges.

Third, and finally, some authors claim that particular features of the study design exposed infants to additional risk over that of routine clinical practice. They argue, variously, that randomization, treatment by protocol, and the use of altered-pulse oximeters ultimately exposed infants enrolled in the SUPPORT trial to increased risks of retinopathy, neurological damage, and death, when compared with infants not so enrolled.

300 Natanson, “Testimony at HHS.”
301 Ibid.
303 We discuss and draw implications from this observation below.
304 See again, Natanson, “Testimony at HHS”; Carome and Wolf, “Letter to the Secretary of HHS.”
3.3.2 Defenders of the SUPPORT Trial

John Lantos, who is among the most prolific and forceful defenders of the SUPPORT trial, disagrees with the above objections. Lantos argues that infants enrolled in the SUPPORT trial were not exposed to increased risk when compared with those infants treated within clinical practice. Lantos claims that there are ethically relevant differences between ceRCTs of usual care interventions and randomized trials who compare a novel intervention with a control; accordingly, he argues that new regulations are needed for ceRCTs.

First, Lantos claims that the purpose of so-called “innovative therapy research”—i.e., a clinical trial with a novel intervention—is different from that of ceRCTs of usual care interventions. In the former, Lantos says the risks and benefits are “truly unknown,” and thus the aim is to “better characterize the safety and efficacy profile of the new treatment.” In ceRCTs of usual care interventions, by contrast, he says that “both therapies are in widespread use and can be considered standard”; consequently, “much is known about them,” including knowledge about their potential harms and benefits. Second, Lantos notes that the therapy patients receive within a ceRCT is not appreciably different from the therapy they would receive outside of the study. In other words, if a patient chose not to enroll in a ceRCT comparing usual care interventions, they would nonetheless “get the exact same treatment,” namely, the existing standard of care.


307 Ibid. 39.

308 Ibid.

309 Ibid.
argues that this is unlike a scenario in which a patient opts out of a randomized controlled trial with a novel intervention, or, as he calls it, “innovative therapy research”; this is because patients that opt out of a trial with a novel intervention would no longer be exposed to the “innovative therapy” but would instead receive the existing standard of care. Finally, Lantos argues that ceRCTs involving usual care interventions do not pose an increased risk to study participants because the treatment arms are not appreciably different from routine clinical practice.

Lantos therefore disagrees with critics who claim that the SUPPORT trial exposed infants to increased risk. To those critics who argue that features of the design undermine the physician’s fiduciary duties to her patient, Lantos responds by pointing out that “these criticisms of SUPPORT [. . .] can be generalized as criticisms of any prospective randomized clinical trial.” Accordingly, he suggests that we ought to consider how these apparently ethically problematic aspects of the design of randomized controlled trials have been addressed in the past.

Furthermore, Lantos suggests that concerns about treatment by protocol and the use of altered-pulse oximeters are similarly misplaced. For instance, in their determination letter the U.S. Office for Human Research Protections argued that

[w]hen there is a range of oxygen levels within the standard of care, clinicians (and their institutions) often do, in fact, make their own determinations regarding which oxygen levels within that range to employ in treating their patients. Some physicians, recognizing the particular concerns about risks near the low (85%) and high (95%) ends of that range, might choose to avoid one or both of those regions.

However, citing neonatologist Keith Barrington, Lantos claims that neonatologists do not, in fact, make “decisions about oxygen saturation targets for each patient based on the

310 Ibid., 32.
patient’s particular clinical situation and their clinical judgment about whether a lower or higher oxygen saturation should be targeted”; rather, “neonatologists always treat babies by protocol.” Lantos thus concludes that the argument that infants were exposed to increased risk as a result of the physician’s inability to exercise her personal judgment on behalf of her patient, due to various features of the study design, “are particularly irrelevant to the SUPPORT controversy.”

Finally, Lantos rejects Natanson’s and the U.S. Office for Human Research Protection’s claim that practice misalignments posed increased risk to enrolled infants. He says that the standard of care does not fall neatly within the 85% to 95% range, and so, rather than imagining that the conventional treatment at the time was to target 85[%] to 95[%], a more accurate statement would be that, in each NICU, there was a different target and that most of those targets were within the range 85[%] to 95[%].

Furthermore, insofar as Natanson’s argument suggests that usual care involves the use of a physician’s judgment on behalf of the best interests of her individual patient, Lantos simply reiterates that the administration of oxygen for preterm infants in neonatal intensive care units is “provided by a predetermined protocol,” precluding the need for clinician discretion.

Lantos concludes that concerns about the design and implementation of the SUPPORT trial do not show that enrolled infants were exposed to increased risk. On the contrary, he argues that the risks and benefits associated with enrollment in the trial were not appreciably different from those associated with routine clinical practice. Indeed, Lantos says, “the primary difference is that, outside of [ceRCTs] [. . .] the choice of a treatment is [made] by idiosyncratic practice variation,” whereas in a ceRCT, “the treatment a patient receives is

313 Lantos and Feudtner, “SUPPORT and the Ethics of Study Implementation,” 33.
314 Ibid.
315 Ibid., 37 (emphasis added).
316 Ibid., 37.
What is needed, according to Lantos, are regulations that “acknowledge the distinctiveness” of ceRCTs involving usual care interventions. He says that the aforementioned aspects of the design and implementation of the SUPPORT trial make it “a paradigmatic case upon which to develop [such] regulatory policy for similar studies in the future.”

3.4 The Central Ethical Issue Raised by the SUPPORT Trial

The debate on the SUPPORT trial has been preoccupied with interpreting U.S. regulation. This brief overview of the overarching arguments in the debate demonstrates that proponents and critics alike are predominantly focused on determining whether the SUPPORT trial presented “reasonably foreseeable risks” to enrolled infants, pursuant to a section of U.S. regulation on human participants research, known as the Common Rule (45 CFR 46.116(a)(2)). However, insofar as pragmatic ceRCTs are a global phenomenon, the manifest preoccupation with U.S. regulation has made this debate largely irrelevant to an international audience. This is because proponents and critics alike have failed to ground the debate in internationally accepted ethical principles. As a result, the debate on the SUPPORT trial has been largely ad hoc, in that it identifies a loosely related—and not necessarily comprehensive—set of issues and fails to trace them to a central ethical principle. As a further consequence, this debate has predictably failed to provide a systematic analysis applicable to a broader class of pragmatic ceRCTs, based on the relevant underlying ethical principles.

Our diagnosis is that the central ethical issue, or question, raised by the SUPPORT trial is the following: should the SUPPORT trial interventions be conceptualized as practice, or research? As we will see below, determining whether the trial interventions are practice or research turns critically on whether the fiduciary obligation of healthcare professionals responsible for treating enrolled infants is threatened or potentially undermined. To be

317 Ibid., 31.
318 Ibid., 39.
clear, while it is uncontroverted that the SUPPORT trial as a whole is research, the novel question posed by pragmatic ceRCTs involving one or more usual care interventions is whether the usual care intervention(s) should be conceptualized as practice, or research. The answer to this question will have important implications for the ethical analysis of ceRCTs. Indeed, how these study interventions are conceptualized will have implications for various downstream ethical requirements, including whether the usual care interventions in pragmatic ceRCTs (i) fall under the purview of research ethics, (ii) undergo harm–benefit analysis, and (iii) are included in informed consent procedures.

Determining whether the usual care interventions in pragmatic ceRCTs that compare one or more usual care interventions constitute medical practice or clinical research is therefore antecedent to questions pertaining to research ethics review, analysis of study benefits and harms, and the content of informed consent procedures. In other words, questions concerning whether the study interventions in the SUPPORT trial posed additional risk to premature infants are subordinate to determining how the interventions ought to be conceptualized. Determining how the usual care interventions in pragmatic ceRCTs of usual care interventions ought to be conceptualized will therefore enable us to provide a systematic analysis of the SUPPORT trial, grounded in the relevant foundational ethical principles.

### 3.5 The Research-Practice Distinction

Broadly speaking, research “refers to a class of activities designed to develop or contribute to generalizable knowledge,” while medical practice “refers to a class of activities designed solely to enhance the well-being of an individual patient or client.” Contemporary research ethics, and corresponding research regulation, have evolved in response to the historical abuses perpetrated by researchers against research participants—including the German wartime experiments on prisoners, the infamous Tuskegee Study, and the Jewish

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Chronic Disease Case—in the name of furthering *generalizable knowledge*. Research therefore often involves the pursuit of interests that potentially undermine those of the individual patient: namely, the research-related interests of investigators who seek to “develop or contribute to generalizable knowledge,” and thereby also the interests of future patients, and society in general. Specifically, these competing interests have the potential to undermine the physician’s [*fiduciary*](https://en.wikipedia.org/wiki/Fiduciary) obligation to remain loyal to her patient’s best interests, and thereby warrants prospective, and ongoing, third-party review and oversight.

According to Fried’s seminal work in research ethics (discussed in the Introduction), the fiduciary relationship forms the primary basis upon which the medical *practice* and clinical *research* are bifurcated into distinct ethical and regulatory domains. As we explain below, distinguishing practice from research is the foundation upon which the current research ethics framework is built, and from which numerous national and international research ethics guidelines and regulations are derived.\(^{321}\)

In medical *practice*, the physician—qua fiduciary—is expected to exercise their professional knowledge, skill, and expertise, as determined by their professional judgment and ongoing discretion, on behalf of the patient’s best medical interests. As we have seen, the exercise of this “fiduciary power” is delimited by its being authorized, relational, and specific, and may therefore be understood as a *relational capacity* of the autonomous patient.\(^{322}\) Accordingly, the planning and administration of the patient’s care must involve

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\(^{322}\) I have in mind here the “paradigm” case in which the beneficiary has the requisite capacity to authorize the exercise of fiduciary power on their behalf. I discuss below how my view might apply to cases where the beneficiary lacks autonomy, and thus cannot authorized fiduciary power, such as with infants and children.
a *dialogue* about the patient’s *will*, or ends, vis-à-vis her medical interests; such a dialogue might concern patient values (e.g., religious, cultural, or spiritual), preferences (e.g., concerning treatment options or methods of delivery), medical history (e.g., contraindications), and any other relevant patient interests (e.g., a past trauma). The presumption that the physician is bound by the fiduciary obligation thereby obviates the need for *prospective* ethical (or legal) oversight and review of the physician-patient interaction. In this way, the domain of medical practice is effectively self-regulated and autonomous: “patient consent to care and professional autonomy are intended to ensure that the intervention in question is the product of joint deliberation and agreement between patient and doctor” (Freedman, Fuks, and Weijer 1992, 653). In other words, the presumption is that the medical intervention serves the patient’s interests, rather than the doctor’s interests. Furthermore, it is the physician’s *fiduciary* obligation to remain loyal to the patient’s interests, which protects the patient from the vulnerability inherent to the structure of the physician-patient relationship. Hence, it is the *fiduciary* nature of the physician-patient relationship that confers upon it its privileged (i.e., private and confidential) status, prohibiting any prospective third-party interference. While the physician-patient interaction may be reviewed *retrospectively* by a hospital, a council of peers, an administrative tribunal, or the courts (such as in a negligence or battery suit), the fiduciary relationship between physician and patient prohibits prior (or concurrent) review or oversight by third parties.

By contrast, in clinical *research* the physician’s fidelity to her patient’s medical interests is (at least) potentially undermined by competing *research-related* interests, such as those that aim to contribute to scientific or other generalizable knowledge, the welfare of future patients, public health, private or institutional research agendas, and corporate affiliations or influence. For example, research often includes numerous interventions, or other aspects of a study protocol, that are performed purely for the sake of scientific validity—and thus in the interests of “generalizable knowledge”—such as randomization, blinding, and

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323 I discuss in detail below how my analysis of the fiduciary relationship as a framework for the physician-patient relations applies to non-autonomous beneficiaries, such as infants and children.
invasive or noninvasive forms of data collection (e.g., a blood draw or questionnaire). Hence, in the research context, there is a presumption that the physician cannot be relied upon to exercise her *fiduciary power* solely on behalf of the patient’s best medical interests. When the physician can no longer be entrusted or reliably depended upon to adhere to the demands of the fiduciary obligation, the fiduciary relationship itself dissolves, and other prophylactic ethical precautions are necessary and justified to protect patient-participants. It is the presumption that the demands of the fiduciary relationship can no longer be relied upon that gives rise to the separate ethical norms and rules in the context of research. The ethical norms and rules of research include precisely the kind of third-party oversight and review of physician-patient relationship that is prohibited in the medical practice context, such as review by RECs, ongoing oversight by data and safety monitoring committees, and other research specific regulations. In a word, the fiduciary relationship demarcates medical practical from clinical research. It is thus widely accepted that regulation, review, and oversight are needed in research, because the medical interests of the patient are no longer the sole interests at stake. Third-party review by research ethics committees, and research regulations, are put into place in an effort to ensure that the interests of patient-participants are protected in the face of competing interests and in light of the consequent dissolution of the fiduciary relationship.

However, the distinction between research and practice is often understood as applying to whether whole study protocols ought to be considered research or practice, and, consequently, whether they ought to be subject to review and oversight by third parties. But pragmatic ceRCTs that compare one or more usual care interventions introduce a new wrinkle on this historical problem, because they comprise elements of both practice and research. Indeed, as briefly mentioned above, no one denies that the SUPPORT trial as a whole is research, and thus ought to be subject to research review and regulation. Additionally, it is uncontroversial that the various features of the study design, such as randomization, the use of masking (or blinding) with altered-pulse oximeters, and data collection (except when using solely anonymized routinely collected data) are plainly and unabashedly research interventions. Rather, the point of contention—and the uniqueness of the question posed by ceRCTs, if any—is whether the *usual care intervention(s)* in pragmatic ceRCTs constitute practice or research, and, accordingly, whether the usual care
interventions ought to be regulated by the ethical norms and principles of medical practice, or those of clinical research.

3.6 Conceptualizing the SUPPORT Trial Interventions as Practice

What arguments might be proffered in favor of conceptualizing the SUPPORT trial interventions as *practice*? To begin, both the low- and high-oxygen saturation interventions in the SUPPORT trial fell within the range recognized as “standard of care” for the treatment of extremely preterm infants.324 Recall that a standard of care is a routine or prevailing practice pattern within a given medical community.325 Insofar as the study interventions in the SUPPORT trial comported with the then-current range routinely used in neonatal intensive care units, they appear to constitute clinical practice.

As we saw above, clinical practice is largely self-regulated, and thus enjoys a degree of professional autonomy that precludes prospective third-party review by research ethics committees. Again, no one disputes the contention that the study *as a whole* is research, or that other features of the study protocol—such as randomization, the use of masking with altered-pulse oximeters, and data collection—are research interventions, and therefore ought to be conceptualized as such in the ethical analysis. Rather, the claim is that the SUPPORT trial *interventions* are usual care, and therefore ought to be conceived of as *practice*. It follows straightforwardly, according to this view, that both the low- and high-oxygen saturation arms in the SUPPORT trial ought to be conceptualized as practice and thus governed by the rules and norms of the fiduciary relationship between physician and patient.

This is not an implausible view. Indeed, it is evident that Lantos, the SUPPORT trial investigators, and the 22 research ethics committees that approved the trial, appear to have conceptualized the low- and high-oxygen saturation interventions in precisely this way,

324 Askie et al., “Restricted Versus Liberal Oxygen Exposure.”

325 Levine, *Ethics and Regulation of Clinical Research*. 
that is to say, as clinical practice. At the very least, they may be reasonably understood—for the sake of ethical coherency—as being committed to such a view. This interpretation is supported by the fact that the investigators elected not to disclose risks of mortality, retinopathy of prematurity (at least in 20 of the 22 informed consent documents), and neurological damage as risks of study enrollment, ostensibly because these are risks of routine clinical practice.  

Indeed, the investigators appear to adopt just this rationale when they state in the template used for the informed consent documents that “all of the treatments proposed in the study are standard of care, [and therefore] there is no predictable increase in risk for your baby.” In fact, with the aforementioned exception of two study sites, the only risks investigators elected to disclose in the “possible risks” section of the informed consent documents relate to the use of the pulse oximeter, namely, “the possible risk of skin breakdown at the site.” Furthermore, it appears that all of the participating research ethics committees endorsed this rationale as well, at least tacitly, given that they approved the trial along with the informed consent documents that expound this reasoning. This also includes the two sites that did include blindness as a possible risk of study participation, as they nonetheless elected not to disclose death or neurological damage as risks of study participation, again ostensibly reasoning that such risks are inherent to clinical practice. This framework makes it plain that Lantos may also be more clearly, and productively, understood as arguing that the low- and high-oxygen saturation interventions in the SUPPORT trial ought to be considered clinical practice, and therefore ought to be exempt from third-party review and research regulation.

326 While these risks would not need to be disclosed, according to this view, as part of clinical research, presumably they would nevertheless be disclosed to parents or guardians of enrolled (and non-enrolled) infants (acting as proxy’s for their child) as part of the process of joint deliberation and decision-making required in the context of medical practice. More on this below.

327 SUPPORT trial Consent Forms, 211.

328 Ibid., 4.
Several implications follow from the contention that the SUPPORT study interventions ought to be conceptualized as clinical practice, and not research. First, because the administration of low and high supplemental oxygen in preterm infants is governed by the norms of the fiduciary relationship—that is, of medical practice—these components of the trial are appropriately exempt from research ethics committee review. Second, the SUPPORT study interventions do not require a systematic harm-benefit analysis. Harm-benefit analysis is compulsory for all research protocols; if the study interventions are practice, and not research, then they do not enter a research ethics committee’s deliberation on study benefits and harms. All that remains for the research ethics committee to determine, then, is that the risks of the research interventions are minimized consistent with sound scientific design, and that they are reasonable in relation to the scientific knowledge to be gained. Third, and finally, no information about the low- or high-oxygen saturation interventions need be disclosed to research participants. These interventions fall within the norms of the physician–patient relationship, and, as a result, neither the nature of the interventions, nor their benefits and harms—including retinopathy, neurological damage, lung toxicity, or death—need be disclosed as part of the research informed consent procedures (of course, any “material risks” would need to be disclosed as part of the clinical informed consent process).

### 3.7 Conceptualizing the SUPPORT Trial Interventions as Research

Nevertheless, I argue here that the above view is not the correct way to conceptualize the SUPPORT study interventions. By applying the fiduciary analysis developed in the previous two chapters, I argue that the SUPPORT trial interventions are not practice, rather they are research interventions. I begin by first discussing how the fiduciary framework

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330 As mentioned in the introduction to this chapter, I use the pronoun “I” (as opposed to “we”) in this section to reflect the substantive changes I have made with an aim to applying the fiduciary framework I developed in the previous two chapters (with the result that the arguments contained herein may not be representative of my original co-authors’ views).
developed in the previous chapters applies to “hard cases,” like SUPPORT, in which the beneficiaries are not autonomous. In the next three subsections I provide three independent reasons to believe that the low- and high-oxygen saturation arms in the SUPPORT trial ought to be conceptualized as research, and not practice. In each case, I argue that aspects of the study protocol (or the interventions themselves) suggest the fiduciary relationship between the treating neonatologist and enrolled infants is undermined. The first two reasons may be applicable to a broader class of ceRCTs involving one or more usual care interventions, whereas the third, and final, reason is likely specific to a particular type of ceRCT, of which the SUPPORT trial is an exemplar. However, we leave open for future inquiry any substantive answer to the question regarding the utility of our analysis of the SUPPORT trial for conceptualizing other pragmatic ceRCTs.

3.7.1 A “Hard Case”: Infants as Nonautonomous Beneficiaries?

The SUPPORT trial presents a “hard case” for the application of fiduciary framework developed in the previous two chapters. This is because I argued that the fiduciary relationship is essentially promoting autonomy, insofar as it functions as a relational capacity of the beneficiary’s autonomous will. The question then arises, how can the fiduciary relationship be a relational capacity that serves to effectuate the will, or self-directed ends, of beneficiaries who cannot effectively will anything for themselves? Infants, children, and others lacking the “procedural” capacities often thought to be necessary for autonomous choice or action (and thus for responsibility for those decisions or actions), cannot be said to authorize the exercise of fiduciary power on their own behalf. This raises questions about what implications these hard cases have for the previous chapter’s argument that the fiduciary relationship is essential to promoting autonomy. If some beneficiaries lack the capacity to will anything for themselves, how is it that the fiduciary relationship can function as a relational capacity that effectuates the will, and thus autonomy, of nonautonomous beneficiaries?

Recall that on a procedural-constitutive theory of relational autonomy the fiduciary relationship is essential for both the development of “autonomy skills” (during childhood, in particular) and for the ongoing exercise of autonomy into adulthood, as relationships continue to constitute the background conditions against which the pursuit of autonomous
ends is possible. In Chapter 2 we saw that Diana Meyers, who takes a procedural view of relational autonomy, argues that “autonomy competence” requires certain “agentic” or “autonomy skills.” At a minimum the “repertoire of skills” required for self-determination include introspective skills, imaginative skills, memory skills, communication skills, analytical and reasoning skills, volitional skills, and interpersonal skills. Meyers also stresses the importance of “critical thinking” skills in particular. With this in mind, and in beginning to answer the question posed above, it is perhaps fair to say that on a procedural-constitutive theory of relational autonomy the fiduciary mandate of parents or guardians is to foster the development of these and other important autonomy skills in their child-beneficiaries (I will discuss infants, in particular, below). In other words, parent-fiduciaries are tasked with promoting their child’s future autonomy interests.

While children are unable to authorize the exercise of their parents’ or guardians’ fiduciary power, as they lack the requisite autonomy to do so, the parent-child relationship nevertheless is (or ought to be) ultimately autonomy promoting; that is, the parent-child relationship is such that the parent enables and facilitates the child to foster the requisite autonomy skills and capacities in order to become autonomous. If the parent-fiduciary is successful, the child-beneficiary will develop into an adult with the capacities necessary to set and pursue their own practical interests (with or without the aid of other fiduciaries).

Indeed, this idea is given some support by the fact that, in law, where parents or guardians fail to perform their fiduciary obligation (e.g., as a result of abuse or neglect), when the child comes of age, they may have cause to bring legal action against their parent(s) or guardian(s) for breach of fiduciary duty. In other words, once the child-beneficiary becomes an autonomous adult, they are in a position to do a post hoc assessment to determine whether their autonomy interests were promoted by their parent-fiduciaries. Alternatively, through child welfare services, the state (acting as fiduciary to the child),

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331 Meyers, “Personal autonomy and the paradox of feminine socialization”

332 Meyers, “Intersectional identity and the authentic self?”

333 Of course, action can be brought for breach of fiduciary duty on behalf of the child before they come of age, such as by child welfare services (acting as an arm of the state); arguably, the state’s fiduciary obligation can be seen as superseding that of the parental fiduciary obligation in such cases.
may intervene to protect and promote the child’s “best interests.” In this way, parents or guardians (including the state) may be said to serve as a kind of proxy for the child’s future autonomy interests; that is, until the child develops a minimum level of the requisite skills and capacities to set, determine, and pursue their own self-directed ends.

However, while this may be true of the parent- or guardian-child relationship, it is likely not entirely true of the parent-infant relationship—which is of particular relevance to the SUPPORT trial. Infants are simply too young for parents or guardians to begin to develop the repertoire of skills important to the exercise of their future autonomy. How, then, can parent-fiduciaries be said to promote their infant-beneficiaries’ autonomy through the exercise of their fiduciary power? As fiduciaries, parents or guardians are clearly still obligated to remain loyal to their infant-beneficiary’s best interests. As with child-beneficiaries, this will no doubt include infant-beneficiaries’ future autonomy interests. Parent-fiduciaries foster the child-beneficiaries future autonomy interests by developing important autonomy skills. With infant-beneficiaries, however, parent-fiduciaries promote their autonomy by making decisions for them in a way that keeps their future open to their own autonomous decision making.³³⁴ In this way, parent-fiduciaries are still proxy decision makers for infant-beneficiaries in much the same way they are for child-beneficiaries. The difference is that the relevant interests of the infant-beneficiaries over which parent-fiduciaries exercise their fiduciary power are broader than those of child-beneficiaries. These will likely include many of those decisions relating to post-natal (and perhaps even pre- and peri-natal) care that have a foreseeable and/or appreciable impact on infants’ physical and psychological development and may therefore be said to materially affect (positively or negatively) infants’ future ability make important decisions relating to identity formation and other aspects of self-determination.³³⁵

³³⁴ I’m grateful to Carolyn McLeod for pointing out this important distinction to me, as well as for suggesting what interests might be at stake in parent-infant fiduciary relationships.

³³⁵ It is, unfortunately, beyond the scope of this chapter to launch into a discussion of the scope or degree of parents or guardians’ positive (or negative) duties to their infant- (or child-) beneficiaries. I will say, however, that it is unlikely that parents have an obligation to attempt to provide for their children a future that affords them the maximum number of possible decisions over which they might exercise their autonomy. Nor, it seems to me, would parents be obligated to even attempt to develop their child’s
While other fiduciaries in an infant or child’s life, such as caregivers, teachers, and healthcare professionals, no doubt also play a role in promoting the child’s future autonomy interests, parent- or guardian-fiduciaries appear to play a unique role as proxy to their infant- or child-beneficiary’s interests across all other of their fiduciary relationships. Namely, while the healthcare professional is no doubt a fiduciary to the infant or child themselves (i.e., tasked with acting on behalf of their best medical interests) as proxy to the child’s future autonomy interests the parent- or guardian fiduciary is tasked with engaging in dialogue and joint-deliberation with the healthcare professional in the infant or child’s stead (and on their behalf). The exercise of the parent or guardian’s fiduciary power is therefore more substitutive than those of other of the infant or child’s fiduciary relationships. As we saw in the previous chapter, fiduciary power is always substitutive—to a degree. The substitutive nature of fiduciary power is delimited by its being authorized, relational, and specific. Recall also that it is the delimited nature of fiduciary power that ultimately renders the exercise of that power a means, or relational capacity, of the beneficiary’s autonomous will. The problem, again, is that infant and children (and other nonautonomous individuals) lack the capacity to authorize the fiduciary’s substitutive power. Nevertheless, the substitutive nature of fiduciary power arguably remains delimited in this case in both its relationality (i.e., it’s being exercised on behalf of the beneficiary) and its specificity (i.e., its being exercised with respect to specific interests), albeit less so than with autonomous beneficiaries. Accordingly, the substitutive nature of fiduciary autonomy skills to the maximum degree possible. Aside from practical constraints, such as time, economic, emotional and other resources, it seems to me that attempting to maximize autonomy in this way bumps up against parents’ or guardians’ own autonomy interests, and it’s not clear to what extent a parent-fiduciary might be required to “sacrifice” their own autonomy for that of their child-beneficiary. I imagine that the positive duties of parents in this regard will be context dependent, taking into account factors like time and resources, as well as the parent’s own degree of autonomy. It’s possible that there will be different “standards of care” parent-fiduciaries will be required to meet that correspond to these differing contextual factors. This, of course, also raises difficult and controversial questions about parents’ own subjective views about how, and to what extent, they ought to intervene to promote a child’s future autonomy interests. For example, some parents may believe (e.g., for religious or societal reasons) that male or female circumcision (sometimes called genital mutilation) serves their child’s future autonomy interests (e.g., by making them a more desirable spouse as informed by certain socio-cultural or religious beliefs). Other examples include decisions over whether to vaccinate, or to seek traditional versus “Western” forms of medical care for one’s infant or child. For the purposes of this chapter, however, I bracket these controversial issues.
power appears to be of a greater degree in the parent-infant (and child) relationship. In brief, as proxy to the infant- or child-beneficiary’s future autonomy interests, parent-fiduciaries exercise their greater substitutive capacity, to authorize fiduciary power in the context of all other fiduciary relationships that the infant or child may enter into, on their behalf. In other words, as proxies, parent-fiduciaries consent to the exercise of fiduciary power on behalf of their infant child-beneficiaries’ future autonomy interests.

This analysis suggests that the complexity of the SUPPORT trial controversy is in part attributable to the tripartite fiduciary relationship at play: namely, that between (i) physician and biological mother (qua patient); (ii) physician and infant (qua patient) and parent or guardian (qua proxy); and (iii) parent or guardian and infant (qua proxy and fiduciary). It was parents (or guardians) who were approached and solicited for study enrolment by their physicians. Nevertheless, it was on behalf of their infants that consent for trial participation was sought, and it was the infants who ultimately received the study interventions (i.e., low or high saturations of supplemental oxygen). Finally, it was the treating neonatalists, as fiduciaries, that carried out the study interventions on enrolled infants. Ethical analysis of the SUPPORT trial therefore must consider each of these relationships and the implications of each for conceptualizing elements of the study protocol, including the trial interventions. However, as the infants are, ultimately, the research-participants of the SUPPORT trial the bulk of the ethical analysis will concern the relationship between physician (in this case, the treating neonatologist) and enrolled infants. The fiduciary relationship between physician and parent (e.g., during the biological mother’s pre- and post-natal care) and between parent(s) or guardian(s) and infant appears to remain largely unchanged by the SUPPORT trial protocol—save for the way in which the physician solicits the parent(s) or guardian(s) consent for trial participation on behalf of the infant.

As proxy to the infant, it appears that parental or guardian consent to participate in the trial will largely depend on how the trial interventions are presented by the enrolling physician. How the risks of enrollment in the SUPPORT trial are portrayed to parents or guardians will no doubt affect how they choose to act on behalf of their babies, such as whether to provide their proxy consent. As we just saw above, the parent(s) or guardian(s) proxy
decision will aim to promote the infant’s autonomy by attempting to ensure that the future remains open for his or her decision making. In this case, the proxy decision that parents or guardians are being asked to make on behalf of their babies concerns a trade-off between the possibility of blindness or death—needless to say, both of these options clearly affect the future of prospectively enrolled infants' future autonomy.

But, as we saw above, whether or not risks of blindness or death are disclosed as risks of research to parents or guardians as proxy decision makers will depend on whether study interventions are conceptualized as practice, or research. If the trial interventions are conceptualized as practice, the physician will not disclose the risks of blindness and death as risks of trial of participation. Alternatively, if the interventions are conceptualized as research, risks of blindness and death must be disclosed to parents or guardians as possible risks of trial participation. As we also saw, whether the interventions are conceptualized as research or practice depends in turn on the integrity of the fiduciary relationship between healthcare professional and patient; namely, whether the fiduciary’s obligation to remain loyal to the beneficiary’s best interests is potentially undermined by other research-related interests. As the relationship between physician and biological mother, and parent or guardian and baby, remains largely unchanged by the SUPPORT trial, the answer to this question must look at the way in which the SUPPORT trial does, or does not, undermine the treating neonatologist’s fiduciary obligation of loyalty to enrolled infants. Accordingly, in the next three sections, I identity three independent reasons that suggest the SUPPORT trial interventions should be conceptualized as research.

3.7.2 The First Reason: Randomization Interferes with the Discretionary Judgment of the Physician

The interventions in the SUPPORT trial ought to be conceptualized as research because, contra Lantos, the enrolled infants are deprived of the benefit and protection of the discretionary judgment of their physician. In the neonatal intensive care unit, very premature infants are prescribed oxygen therapy by their treating neonatologist who, as demanded by the fiduciary obligation, must rely upon her professional judgment, or discretionary power, to prescribe the best treatment for the child. Professional judgment, derived (as it is) from professional knowledge, skill, or expertise, is a portmanteau
comprising a multiplicity of considerations, including: an individual infant’s diagnosis and prognosis; the medical history of the infant’s biological parents; the values or preferences articulated by the infant’s parent(s), or guardian(s); the oxygen saturation range routinely used in the neonatal intensive care unit; the state of evidence in the literature on the benefits and harms of oxygen treatment; and past experience—including the experience of colleagues—in the treatment of similar infants. It is worth emphasizing here that, pace Lantos, neonatologists do—and, indeed, must—exercise their professional judgment whether or not that judgment is constrained by a defined protocol. As just illustrated, the range of oxygen saturation routinely used in a neonatal intensive care unit is but one of many factors that neonatologists must consider when treating extremely premature infants. Therefore, even if neonatologists did follow a prescribed protocol for supplemental oxygen blindly, this would not thereby alleviate them from their fiduciary obligation to exercise their discretionary judgment over other relevant aspects of their patient’s care. Furthermore, even within a protocolized range, neonatologists must still use their discretion to determine what subset of that defined range is appropriate for a given infant, again in light of all other relevant considerations. This argument is expounded in more detail below.

As we saw in the previous chapter, in paradigm fiduciary relationships, it is through a process of joint deliberation and dialogue with the beneficiary that the fiduciary comes to learn the beneficiary’s beliefs, values, goals, and preferences and, ultimately, the beneficiary’s choice. It is important to emphasize that the fiduciary exercises their knowledge, skill, or expertise in pursuit of those ends chosen by the beneficiary. During this dialogue the fiduciary also provides the beneficiary with any information necessary or relevant that might aid the beneficiary in coming to an informed decision about how best to achieve their chosen ends or pursue their interests. In this way the fiduciary functions as a relational capacity through which the beneficiary effectuates their own will—it is in this way that the fiduciary relationship promotes autonomy. Of course, as discussed above, in the case of SUPPORT—where the patient-beneficiaries are nonautonomous—this dialogue will occur between the physician and the parent or guardian who acts simultaneously as both fiduciary and proxy for their baby. Again, how the SUPPORT trial interventions are portrayed, and thus the manner in which consent is sought, will depend on whether the low and high oxygen saturation arms are considered practice or research. How the study
interventions are conceptualized will, in turn, depend on how infants (as the study participants) come to receive treatment in the context of the SUPPORT trial. Specifically, the physician’s fiduciary obligation to exercise their discretionary power on behalf of the best medical interests of a premature infant under their care ought to be guided by joint deliberation and dialogue with the parents or guardians (as proxies) of the infant patient. This is what it means for the physician-fiduciary to be loyal to the medical interests of any patient-beneficiary.

Applying this analysis to the SUPPORT trial, it becomes clear that very premature infants come to receive treatment differently than they do in usual medical practice. Infants enrolled in the study do not come to receive supplemental oxygen by means of the discretionary judgment of their treating physician. Rather, infants are allocated randomly to either of the low- or high-oxygen saturation arms of the trial. Indeed, one of the primary purposes of randomization is to prevent a physician from exercising her discretionary judgment—and thus fiduciary obligation—on behalf of the patient. Randomization is a feature of the study protocol designed to prevent the bias that physician judgment introduces, and thereby enhance the validity of the study. It therefore promotes the interests of research—viz., the promotion of, or contribution to, generalizable knowledge—but at the expense of individualized care for the patient afforded by physician discretion.

To illustrate, suppose that the SUPPORT trial was a non-randomized study, thereby allowing neonatologists to exercise their discretionary judgment when assigning premature infants to either low- or high-oxygen saturation arms of the trial. Neonatologists are (or ought to be) aware of the body of research that suggests that a lower target range of oxygen saturation may reduce incidences of retinopathy but may also be associated with increased mortality. How then, on the basis of such knowledge, would a neonatologist make treatment allocation decisions for her various infant patients? Faced with an infant with a


substantial chance of mortality, it is likely that the clinician will assign this infant to the high-oxygen saturation arm of the trial to maximize her chances of survival—again, based on the best available evidence. Conversely, faced with an infant with a relatively good prognosis, it is likely that the clinician will assign her to the low-oxygen saturation arm, in an effort to reduce the risk of retinopathy. As this non-randomized trial progresses, it is evident that the sickest infants will comprise a disproportionate number of the high-oxygen saturation arm, and the healthier infants will comprise a disproportionate number of the low-oxygen saturation arm. But what can be inferred about the low- and high-oxygen saturation interventions at the conclusion of this non-randomized trial? The answer, of course, is nothing. Physician judgment completely confounds the study interventions with respect to the study outcome. Individual physician discretionary judgment compromises the internal validity of the trial, and randomization is therefore necessary to allow valid inferences to be drawn.

The SUPPORT study interventions therefore ought to be conceptualized as research because the “dose” of oxygen therapy is determined by means of randomization, not by the physician’s professional discretionary judgment, as required of her as a fiduciary to her infant patient. Randomization is a feature of the trial employed to promote internal scientific validity, and thus further the interests of research (i.e., to contribute to generalizable knowledge). The introduction of this competing interest undermines the physician’s duty to exercise her discretionary judgment in the interests of her patient; that is, to remain loyal in the exercise of her fiduciary power to her patient’s best medical interests.

The introduction of this competing interest in the pursuit of scientific knowledge undermines physician judgement, the very knowledge, skill, or expertise that patient-beneficiary’s employ healthcare professionals to further their chosen medical ends. The otherwise privileged relationship between physician and patient—indeed, whose very privilege is afforded by the norms and duties of the fiduciary relationship—is undermined by the pursuit of research related interests which aim promote generalizable knowledge and ultimately the interests of future patients. Thus, the physician can no longer be trusted or reliably depended upon to remain loyal to the best medical interests of their patient—to
effectuate the patient’s *will*. Indeed, we saw above that it is precisely for this reason that *research*, as a moral domain separate from that of medical *practice*, is governed by its own norms and rules. When the physician, *qua* fiduciary, can no longer be entrusted to exercise their discretionary judgment on behalf of the best medical interests of the patient, “strangers at the bedside”—in the form of research ethics committees, data and safety monitoring boards, and research regulations—are both warranted and necessary to protect the autonomy and welfare interests of those patients participating in research.  

Accompanying the SUPPORT study interventions must be considered research, rather than practice.

### 3.7.3 The Second Reason: Masking in the SUPPORT Trial Impairs the Ability of Physicians to Exercise Discretion on Behalf of their Patients

The second reason, related to the first, that the SUPPORT trial interventions ought to be conceptualized as research is because the physician’s ability to continuously monitor, reassess, and adjust the prescribed oxygen therapy administered to a premature infant is compromised by altered-pulse oximeters. Again, in the context of medical practice, the fiduciary’s obligation to remain loyal to the beneficiary’s best interests protects against the abuse, misuse, neglect, or exploitation of the beneficiary. Neglect, in particular, implicates the discretionary element of fiduciary power. It demands, among other things, that the fiduciary remain *vigilant* in the performance of their duties. Hence, in this section I suggest that the use of altered-pulse oximeters in the SUPPORT trial undermines—or at the very least, threatens—the physician’s ability to actively and *continuously* exercise discretion on behalf of the best medical interests of the infant patients entrusted to their care.

In clinical practice, extremely premature infants are prescribed oxygen therapy by means of the treating neonatologist’s exercise of their professional judgment (in consultation with parents or guardians as proxy decision makers), which, as we saw above, takes into

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consideration a multitude of factors. However, the neonatologist is not thereby relieved of her fiduciary obligations to the premature infant under her care simply through this one-time exercise of professional judgment. In other words, a neonatologist entrusted with the care of a premature infant does not simply set the oxygen saturation at a certain level and “forget it.” Rather, the neonatologist must *continue* to employ their discretion as they care for a premature infant. In practice, the neonatologist will continuously and closely monitor the medical condition of a premature infant under her care. For instance, an infant may begin to have trouble breathing, or display other signs of respiratory distress, in which case the neonatologist will likely increase the level of oxygen saturation. Conversely, aware of the evidence that a higher range of oxygen therapy may be correlated with increased risk of retinopathy, the neonatologist might decrease the level of the oxygen saturation for an infant that appears to be doing particularly well. In fact, extremely premature infants will often require weeks, or even months, of such discretionary monitoring on the part the treating clinician.

The fiduciary obligation requires *ongoing* clinician judgment—or the exercise of discretion—on behalf of the beneficiary’s best interests. Again, the discretionary element of fiduciary power demands of the treating physician that she be vigilant in the pursuit of the patient’s medical interests; this, in turn, requires of them to use discretion as they continuously assess and reassess the patient’s condition. By entrusting the pursuit of their medical ends to the physician, the patient is left vulnerable to the risk that the physician will neglect their interests by simply failing to exercise her (the physician’s) professional judgment, either in whole or in part. It is the patient’s *vulnerability* to neglect, abuse, misuse, or exploitation of fiduciary power that gives rise to the uniquely demanding fiduciary duty of loyalty to the patient’s medical interests.339 In other words, in carrying out the patient’s autonomously chosen ends (in this case, as decided by a proxy parent or guardian) the physician-fiduciary is obligated use their *ongoing discretion* in wielding their

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fiduciary power on behalf of—and in their role as relational capacity of—the patient. The ongoing exercise of discretion, as demanded by the fiduciary obligation, prohibits the physician from utterly neglecting the patient’s interests, delegating their discretionary authority to another, or from otherwise fettering away their discretion in any way. In other words, the fiduciary obligation requires of the physician that she actively and continually exercise her discretionary powers.

In the SUPPORT trial, by contrast, the study interventions are administered to extremely premature infants in a way that deprives them of the benefit and protection of the treating physician’s ongoing discretion. Masking with altered-pulse oximeters was employed to ensure that physicians were unaware of the actual oxygen saturation levels being administered to premature infants in the SUPPORT trial. In other words, the pulse oximeters were altered to impair the physician’s ability to accurately monitor, assess, and reassess an infant’s medical condition. Importantly, this was—yet again—done to promote the internal validity of the trial by seeking to ensure a clear separation between low- and high-oxygen saturation interventions. Indeed, a clear separation between the study interventions is crucial to any “good experiment.” Without masking it would have been extremely difficult to achieve a separation between the treatment arms. Had masking not been used, physicians may have tended to increase the dose of oxygen for infants in the low-oxygen saturation arm, with the effect of making infants’ oxygen saturation levels similar (Cortés-Puch et al. 2016).

In fact, the SUPPORT trial investigators encountered precisely this problem during the early enrolment phases of the trial:

> When 247 infants had been enrolled, enrollment was temporarily suspended on the basis of the recommendation of the data and safety monitoring committee and the decision of the director of the National Institute of Child Health and Human Development because of concern that readings of levels of oxygen saturation often exceeded the target levels. (SUPPORT Study Group 2010, 1964)

Altered-pulse oximeters were employed to ensure that infants enrolled in the SUPPORT trial received the treatment mandated by the study protocol, not physician discretion, by hindering neonatologists from adjusting the oxygen infants received based on continuing
assessments of their condition. Evidently, this feature of the SUPPORT trial serves the interests of research. But it does so by depriving enrolled infants of the benefit and protection of the clinician’s ongoing professional judgement and discretion, as she continues to care for, and promote, the medical best interests of her patients. The use of masking in the SUPPORT trial therefore also introduces a competing interest—namely, the promotion of reliable generalizable knowledge—that undermines the physician’s duty to exercise her discretion. Again, insofar as the fiduciary norms of clinical practice have been violated in this way, there is strong justification for conceptualizing the SUPPORT trial interventions as research.

3.7.4 The Third Reason: Low- and High-Oxygen Saturation Interventions Are Not Usual Care

The third, and final, reason that the low- and high-oxygen saturation arms in the SUPPORT trial ought to be conceptualized as research, and not practice, is that one or both of the study interventions are not in fact usual care. Recall that this reason is specific to a particular type of pragmatic ceRCT involving one or more usual care interventions, of which the SUPPORT trial is a token example: namely, in those cases where the usual care treatment is characterized by a range, or continuum, the bifurcation and subsequent randomization of research participants to protocolized subsets of that range, no longer constitutes usual care. Usual care for the administration of supplemental oxygen in preterm infants is a range between 85% and 95%. However, the interventions in the SUPPORT trial did not comprise this full range; rather, enrolled infants were delegated to

340 As a point of clarification, it is worth emphasizing that we nonetheless maintain that the SUPPORT trial is a pragmatic ceRCT, as it compares two interventions head-to-head under real-world clinical conditions. Nonetheless, it is an implication of this third argument that the SUPPORT trial may not be a specific type of pragmatic ceRCT, namely, one that compares one or more usual care interventions. The contention that the low- and high-oxygen saturation interventions are not usual care therefore provides direct, and independent, support for our thesis that the SUPPORT trial interventions ought to be conceptualized as research, not practice. Of course, as previously mentioned, we acknowledge that there is a separate question regarding the utility of our analysis of the SUPPORT trial for pragmatic ceRCTs more broadly; a thorough investigation into this further question is, however, beyond the scope of this paper.

341 Askie et al., “Restricted Versus Liberal Oxygen Exposure”; AAP ACOG, Guidelines for Perinatal Care.
subsets (i.e., 85% to 89% and 91% to 95%) of that range. The bifurcation of the range of supplemental oxygen routinely used in neonatal intensive care units to low and high subsets of that range constitutes a meaningful deviation from, or alteration to, medical practice for the ends of research. Indeed, this is true even if a neonatal intensive care unit follows a protocol that is equivalent to one of the SUPPORT trial interventions (e.g., 85% to 89%), as the unit of randomization is the patient, not the centre. Consequently, even if a centre’s protocolized range of oxygen therapy for preterm infants corresponds with one of the study arms, the infants in that centre would be randomized to both ranges, and thus be exposed to a range that is not usual care for that centre. In their Draft Guidance on Disclosing Reasonably Foreseeable Risks in Research Evaluating Standards of Care (2014), the U.S. Office for Human Research Protections makes a similar point.

When a research study assigns the specific version of the accepted standards of care to be used, it is almost certain that at least some of the subjects will receive a different standard of care than they would have received if not participating in the research. Indeed, in the common study design where subjects are randomized equally between two treatments, approximately half of the subjects will be assigned to a treatment different from what they would have otherwise received. Insofar as these are alterations to clinical practice for the sake of contributing to generalizable knowledge—a competing interest—third-party review and regulatory oversight, separate from that of clinical practice, is both warranted and required.

The bifurcation of the standard of care range of supplemental oxygen introduces potential risks and benefits distinct from those inherent to routine clinical practice. In this case, the risks and benefits of receiving the low-oxygen saturation arm are manifestly different from the risks and benefits of receiving high-oxygen saturation—as over seven decades of preliminary data portend (albeit evidence not strong enough to change clinical practice). In their determination letter, the U.S. Office for Human Research Protections pointed out that concerns in the research and clinical community about the differential risks and benefits of the low and high target ranges of supplemental oxygen on preterm infants was a “core
reason why the study was conducted.” Moreover, they stated that it was clear that the SUPPORT trial investigators were aware of such concerns, having “identified the important need for a large randomized study with sufficient power to detect differences in mortality rates of 5% or greater.” As previously mentioned, Charles Natanson provides a similar argument. It is clear that the risks and benefits of both the low- and the high-oxygen saturation arms in the SUPPORT trial differ from the risks and benefits of the full range, or the de facto usual care range. This is because in routine clinical practice neonatologists are able to employ the full range (85% to 95%) of supplemental oxygen, again, subject to their professional judgment and ongoing discretion in response to the medical needs of each individual infant (as illustrated by Cortés-Puch and colleagues, below).

To illustrate this important point, the U.S. Office for Human Research Protections provides a salient example:

It is known that treatment using surgery and radiation has a high likelihood of curing a particular form of childhood cancer, but that the radiation produces a significant risk of other cancers developing later in the child’s life. Consequently, some doctors treating children with this cancer use a smaller amount of radiation. Both amounts of radiation are consistent with clinical care guidelines and considered to be within the standard of care. There is little evidence available comparing the outcomes of the two treatments in terms of their cure rates or the development of later cancers. A randomized clinical trial is proposed with subjects to be assigned to treatment with the higher or lower amount of radiation to compare the effectiveness of the two treatments in curing the current cancer and how often later cancers occur.

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343 Ibid., 2.
344 Natanson, “Testimony at HHS.”
It is plain that the different ranges of treatment routinely used for childhood cancer in this hypothetical example carry differential risks. Moreover, it is precisely the purpose of the study to empirically validate those risks. In other words, participants are exposed to risks that they may not otherwise have been exposed to outside of the study, precisely for the sake of contributing to generalizable knowledge. The Office for Human Research Protections agrees, stating that the “particular risks that the subjects will be exposed to because of being assigned to a specific standard of care are risks the subjects will be exposed to for the sake of the research.”

Recall that Lantos claims “neonatologists always treat babies by protocol,” which is assigned by each neonatal intensive care unit, “based on their assessment of the evidence about the harms and benefits of oxygen levels that are too high or too low.” Accordingly, Lantos claims a neonatologist does not in fact exercise her professional judgment over the medical interests of the infant over whose care she is presiding. He thus concludes that the risks and benefits of protocolization to either the low- or high-oxygen saturation arms in the SUPPORT trial are not appreciably different from risks and benefits inherent to clinical practice.

Firstly, Lantos’s argument is simply orthogonal to the concern that allocating infants to low and high target ranges carries differential risks. While it may indeed be true that neonatologists treat infants according to a predefined protocol, this does not alleviate the concern that the bifurcation of the usual care range of supplemental oxygen into discrete (low and high) subsets of that range carries differential risks to enrolled infants, when compared to those infants not so enrolled. In other words, it may indeed be a fact that neonatologists treat infants according to a defined protocol, but no particular neonatal intensive care unit protocolizes infants to both low and high extremes of the usual care range in order to achieve a quasi-random distribution.

346 Ibid.
Secondly, and more importantly, it does not follow from the claim that neonatologists treat infants in neonatal intensive care units according to protocol that they consequently do not exercise their professional judgment, or that they therefore follow the protocol without exception or mindlessly. On the contrary, even if neonatologists treat infants according to predetermined parameters, this nonetheless does not exclude the exercise of professional judgment and ongoing discretion. The neonatologist’s fiduciary obligation to exercise her professional judgment on behalf of the medical interests of the premature infants under her care obviously persists within the constraints of a predefined protocol. Moreover, where the evidence base is weak, nonexistent, or even at odds with a centre’s standard of care, physicians must consider whether they ought to observe the prescriptions of the protocol at all. The physician’s fiduciary obligation to exercise her professional judgment on behalf of her patient’s best interests demands that her discretion is informed by the domain of “professional knowledge” and by virtue of which she is a fiduciary. Indeed, this specialized knowledge, skill, or expertise is the very reason for which her services are sought, and which help to define the scope of her fiduciary mandate.

To illustrate, suppose a neonatal intensive care unit has mandated that neonatologists prescribe a range of oxygen therapy for extremely premature infants between 85% and 89%. Suppose, further, that a neonatologist finds herself entrusted with the care of a baby with a particularly poor prognosis. Aware of the most recent evidence in the literature that suggests an association between low-oxygen saturation treatment and mortality, the neonatologist may reasonably judge that a higher range of oxygen saturation—outside of the protocolized range mandated by his neonatal intensive care unit—is appropriate in this case. The duty to provide individualized care—based on discretionary judgment—to her patient not only permits the neonatologist to act on such a judgment, it obliges her to. This is especially true when the state of evidence with respect to those ranges is one of “equipoise,” or uncertainty. It is perhaps an unhappy reality of clinical practice that physicians are required to make clinical decisions in the face of such uncertainty (albeit in collaboration with, and with consent from, their patients). Fried recognized this feature of medical practice, arguing that “the doctor must be given considerable latitude as he [sic]
works in the presumed interests of his patient.” As we saw above, medical practice requires physicians to exercise their professional discretionary judgment; this obligation extends even to treatments that carry substantial risk, so long as the treatments in question fall within the accepted standard of care, as well as the body of professional knowledge that defines both the scope and content of a physician’s knowledge, skill, or expertise *qua* professional. The claim that individualized physician judgment and discretion are somehow obviated, or negated, by the protocolization of a treatment is clearly false.

Finally, a study by Cortés-Puch and colleagues found that the low target oxygen saturation arm in the SUPPORT trial (85% to 89%) was not in fact consistent with usual care. Cortés-Puch and colleagues “sought to determine whether each oxygen target as studied in SUPPORT and four similar randomized controlled trials (RCTs) was consistent with usual care.” They conducted a literature review to establish the range that constituted usual care concurrent to these five clinical trials. This review uncovered a prospective, observational study, known as the AVIOx study. The AVIOx study collected robust data on oxygen exposure in extremely premature infants, who, importantly, would have satisfied the primary enrollment criteria for the SUPPORT trial (Hagadorn et al. 2006). The study enrolled 84 infants across 14 neonatal intensive care units in the U.S., U.K., and New Zealand; eligible infants included those who were born at less than 28 weeks gestation, and for whom oxygen therapy was required.

The comparison of low and high target ranges of supplemental oxygen in the SUPPORT trial with those used in the AVIOx study revealed that while the high target range (91% to 95%) was consistent with usual care, the low target range (85% to 89%) was “lower and

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350 Ibid., 1. The four other trials included the Benefits of Oxygen Saturation Targeting trials (BOOST II)—in Australia, New Zealand, and the U.K.—and the Canadian Oxygen Trial (COT).

351 Cortés-Puch et al., “Usual Care in Clinical Trials.”
narrower than those applied during usual care” (Cortés-Puch et al. 2016, 4). The upper limit of the low target range used in the SUPPORT trial was 89%, while the AVIOx study showed that the upper limit of usual care was between 92% and 98%. Moreover, the low target range in the SUPPORT trial was narrower than comparably low target ranges used in clinical practice (e.g., 85%); this is because, in clinical practice low target ranges are always coupled with higher target ranges (e.g., 98%) than the upper limit of the low-oxygen saturation intervention in the SUPPORT trial allowed (i.e., 89%):

During usual care, similar lower limits (< 88%) were universally paired with higher upper limits (≥ 92%) and providers skewed achieved oxygen saturations toward the upper-end of these intended ranges.\footnote{Ibid., 6.}

In other words, the wider range characteristic of usual care results in achieved (i.e., median) values of supplemental oxygen that was higher than the upper limit of the low intervention arm in the SUPPORT trial. The authors conclude that, “the low range (85 to 89%) was not used outside of the SUPPORT trial,” and therefore was not consistent with usual care.\footnote{Ibid., 1.}

The implication of this finding is that the SUPPORT trial was not, in fact, a comparison of two usual care interventions, but rather it involved one (or more) novel interventions. We argued above that the bifurcation of a usual care range no longer constitutes usual care, as the benefits and harms associated with each subset of that range differ from the full range. Indeed, the purpose of the SUPPORT trial was to evaluate the benefits and harms associated with low and high ranges of supplemental oxygen. This challenges the very idea that the SUPPORT trial involved the comparison of any usual care interventions: rather, it compared two novel interventions. This analysis may apply to other pragmatic ceRCTs that compare subsets of a usual care treatment, characterized by a range. Moreover, regardless of whether one agrees with our contention that the bifurcation of a usual care range no longer constitutes usual care, Cortés-Puch and colleagues make it clear that the low-oxygen saturation arm was not, in fact, routine medical practice. We therefore
conclude that the SUPPORT trial interventions ought to be conceptualized as research, not practice.

3.7.5 Implications of Conceptualizing the SUPPORT Trial Interventions as Research

Several implications follow straightforwardly from the determination that low- and high-oxygen saturation arms in the SUPPORT trial ought to be conceptualized as research. First, both the low- and high-oxygen saturation interventions require third-party review and regulatory oversight by research ethics committees. There is consensus among national and international research ethics guidelines that human participants in research be submitted to, and approved by, a research ethics committee. Research ethics committee review safeguards the autonomy and welfare interests of research participants and ensures that national and international ethics standards are upheld. As the SUPPORT study interventions clearly fall within the domain of research, a research ethics committee ought to review and approve them.

Second, the study interventions must undergo harm–benefit analysis. The need for harm–benefit analysis is grounded in the ethical principal of beneficence, which requires that the welfare interests of human research participants are protected, and, where possible, promoted. Benefit–harm analysis requires that the low- and high-oxygen saturation interventions satisfy clinical equipoise. Clinical equipoise is an ethical precondition for enrolling patients in a randomized clinical trial; it states that there must exist “an honest, professional disagreement among expert clinicians about the preferred treatment.” As discussed above, the optimal oxygen saturation range for the treatment of extremely premature infants is unknown, and a Cochrane review of the evidence base concluded that

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354 Horn and Weijer, “Clinical Equipoise.”
“further research should be undertaken to resolve this important question.”

The empirical evidence available before or at the start of the SUPPORT trial therefore suggests that the study interventions fulfill the ethical requirement of clinical equipoise. In other words, as far as the domain of professional knowledge is concerned—based in large part on the availability and robustness of empirical evidence—physicians (as professionals) would be uncertain as to the most effective treatment, thereby satisfying the ethical precondition for soliciting enrollment of patients in a clinical trial.

Third, the details of the study interventions must be disclosed in the informed consent process. The principle of respect for persons underlies the doctrine of informed consent, and ensures that the autonomy rights of human research participants are respected: that is to say, patients or their substitute decision makers must be afforded the opportunity to make free and informed choices as to whether participation in a trial is consistent with their chosen ends. Disclosure of the SUPPORT trial interventions therefore must include details of the study procedures, any associated benefits and risks of harm, including retinopathy of prematurity, neurological damage, lung toxicity, and mortality.

It is also clear from this analysis that questions concerning whether enrolled infants were exposed to additional risk when compared with infants not so enrolled are not central to, or determinative of, the substantive ethical issues to which the SUPPORT trial gives rise. The answers to questions about risk, disclosure, and consent are secondary to—and flow from—an antecedent determination as to whether the usual care interventions ought to be conceptualized as practice or research. In turn, inquiring into whether the demands of the fiduciary obligation can be upheld is the fulcrum upon which at determination is made as to whether an intervention falls within the ethical domain of medical practice or clinical research, and directs us toward systematically identifying and considering the various downstream ethical implications of each.

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3.8 Conclusion

The debate surrounding the SUPPORT trial has focused on determining whether the low- and high-oxygen saturation interventions posed “reasonably foreseeable risks” to study participants. This manifest preoccupation with U.S. regulation has not only made this debate inapplicable to an international audience, it has also resulted in the failure to identify and engage the SUPPORT trial’s central ethical issue.

The central ethical issue raised by the SUPPORT trial is the following: should the SUPPORT trial interventions be conceptualized as practice, or research? To address this question, we have attempted to provide a systematic analysis of the SUPPORT trial. In so doing, we have reframed the debate about the SUPPORT trial in a way that is both historically informed and ethically relevant. We have provided three reasons, largely grounded in a fiduciary analysis, for conceptualizing the low- and high-oxygen saturation arms in the SUPPORT trial as research, and not practice. First, the enrolled infants are deprived of the benefit and protection of the individualized judgment of their physician. Second, the physician’s ability to use her discretionary power to continuously monitor, reassess, and adjust the prescribed oxygen therapy administered to a premature infant is compromised by altered-pulse oximeters. Third, in those cases where a usual care treatment is characterized by a range, or continuum, the bifurcation and ensuing randomization of research participants to protocolized subsets of that range may no longer constitute usual care. An important implication of the third argument is that while the SUPPORT trial is a pragmatic ceRCT—as it compares two interventions, head-to-head, under real-world conditions—it is not a ceRCT that compares two usual care interventions. We propose that the first two reasons why the trial constitutes research are likely applicable to a broader class of pragmatic ceRCTs involving one or more usual care interventions, whereas the third reason is likely applicable to those ceRCTs where the treatment used routinely in clinical practice is characterized by a range; however, we leave questions regarding the applicability of our analysis for the broader class of pragmatic ceRCTs open for future inquiry. Finally, we have demonstrated that how we conceptualize these interventions has implications for which components of a study protocol fall within the purview of research.
ethics committees, undergo benefit–harm analysis, and are appropriately disclosed in informed consent procedures.

Nevertheless, with Lantos, we “acknowledge the distinctiveness” of pragmatic ceRCTs involving one or more usual care interventions, and thus recognize that important questions remain regarding how these socially important and, broadly speaking, low-risk studies ought to be regulated. For instance: should those pragmatic ceRCTs that are deemed low risk undergo an expedited review process, proportionate to the risks and benefits involved? With low-risk trials that seek to answer clinically important questions, yet would be infeasible if standard research informed consent procedures were required, ought there to be modifications to the informed consent process? Addressing these and other difficult questions, and the ethical challenges they give rise to, requires further investigation.

Our fiduciary analysis makes it clear, however, that any proposed solution to these important questions must proceed in a clear and systematic fashion. The aim of this chapter was to provide insight into the ethical controversy on the SUPPORT trial and, in doing so, illustrate how the fiduciary relationship can be used to offer conceptual clarity to a complex bioethical issue. As a moral relationship, the norms and duties of the fiduciary relationship ethically prescribe, or prohibit, certain behaviours within the context of that relationship. The fiduciary obligation is what enables individuals to trust or depend on fiduciaries within the context of that inherently vulnerable mode of interaction, and in the pursuit of their autonomous ends. Specifically, the obligation that fiduciaries remain *loyal* to their beneficiaries’ interests, who have vested in them the authority to act on their behalf, is what protects against the exploitation of fiduciary power. As we saw in the previous chapters, the integrity, or continued viability, of the fiduciary relationship requires that the norms, values, and rules that make up its “irreducible core” are upheld. The relationship between healthcare professionals and their patients is fiduciary. Therefore, it is paramount that the fiduciary norms and obligations that define this socially and economically important relationship are respected and maintained. Indeed, as we saw above, it is precisely the presumption that fiduciary norms govern the physician-patient relationship that justifies its privileged and largely self-regulated status. In those relationships where the fiduciary obligation is threatened or undermined, the presumption that beneficiaries’ interests are
protected by a duty of loyalty simply dissolves, along with the fiduciary relationship itself. In the context of research, which introduces research-related interests that compete with and potentially undermine the physician-fiduciary’s strict duty of loyalty to her patient-beneficiary’s interests, extra protections in the form of third-party oversight and research regulations are warranted and required. As we saw above, the norms and duties of the fiduciary relationship can therefore be used as the fulcrum against which research interventions are demarcated from those of practice. Where features of a study protocol function to potentially undermine the physician’s fiduciary duty of loyalty to her patient’s medical interests, that aspect of the physician-patient interaction is no longer protected by the norms and duties of the fiduciary relationship. Consequently, those aspects of the study protocol are properly conceptualized as research interventions and must thereby be afforded research protections.

The analysis provided in this chapter therefore helps to clear a critical conceptual hurdle for pragmatic ceRCTs involving usual care interventions: namely, by asking how we ought to conceptualize study interventions involving treatments used routinely in medical practice and by using a fiduciary analysis to answer that question. Moreover, this analysis illustrates the power and utility of the fiduciary relationship for thinking clearly and systematically about the ethical issues that arise between healthcare professionals and their patients. As mentioned, the SUPPORT trial presents a “hard case” for the fiduciary framework developed in this dissertation. This is because, where the beneficiaries to a fiduciary relationship lack autonomy (such as in the case of infants and children), it remains to be shown how the fiduciary relationship functions to promote their autonomy. I have argued that the fiduciary relationship promotes the autonomy of infants and children by having their parents or guardians serve as proxies for their future autonomy interests (and subject to their post hoc autonomous review). As part of the procedural-constitutive theory of autonomy adopted in my fiduciary analysis, parents, guardians, and caregivers play an essential role in fostering the development of various skills and capacities necessary for autonomy. In the case of infant-beneficiaries, parent-fiduciary’s also function as proxies as they make decisions for the infants under their care and protection in a way that keeps their future open to their own future autonomous decision making. In this way, the argument that the fiduciary relationship is essential to promoting autonomy may apply to at least
some non-autonomous beneficiaries, such as children. To the extent that the analysis of the SUPPORT trial presented in this chapter is successful, it ought to be considered a virtue of the theory of fiduciary relationships developed throughout this dissertation that it can be used to tackle hard cases, not just easy ones. Ultimately, however, I hope to have illustrated how a fiduciary analysis can provide clear and systematic guidance to complex bioethical issues.
Conclusion

The fiduciary relationship is a powerful tool that holds much promise for conceptualizing and offering clarity to the kinds of ethical issues that arise between healthcare professionals and their patients. As we saw in Chapter 3, when we recognize that the physician-patient relationship is fiduciary a number of things follow. The structure of the fiduciary relationship between power and dependence renders the patient vulnerable to the physician’s misuse, abuse, or neglect of her fiduciary power. From this vulnerability arises fiduciary duties that function to protect not only the individual patient, but also the integrity of the physician-patient relationship (qua fiduciary relationship) itself. As one of the most important social and economic relationships, touching on all facets of human experience, societies have an interest in maintaining the integrity, or continued viability, of this type of interaction. From the vital importance of the fiduciary relationship, and its inherent vulnerability to exploitation, we get the defining fiduciary obligation: namely, when one undertakes to act on behalf of another’s significant practical interests, one must do so with utmost loyalty to those same interests. In the case of physicians, they owe a duty of undivided loyalty to the best medical interests of their patients. The duty of loyalty prohibits physicians from entering into conflicts of interest that could potentially undermine their duty to remain loyal to their patients’ best medical interests. As we also saw in Chapter 3, the fiduciary relationship can serve as an ethical framework that prescribes certain conduct to ensure the continued viability of physician-patient relationship, and to make possible the pursuit of interests or ends important for meaningful self-governance.

I argued that the widespread application of the fiduciary relationship in bioethical analysis is threatened by at least two conceptual problems: namely, equivocation and paternalism. Worries about equivocation stem from the belief that the fiduciary relationship is a construct of the law, and thus applying its normative prescriptions to the ethical domain involves a specious kind of legal-moral equivocation. To address this problem, in Chapter 1, I traced the history of the fiduciary obligation, illustrating that it has been a constant feature of human societies for the past 3000 years. The social and economic importance of relationships of this type have given societies throughout history good reason to
operationalize and enforce the normative demands of the fiduciary obligation, including (variously) as a moral norm, religious edict, and legal rule. I suggested that the fiduciary obligation responds to a specific problem “etched in human nature”: namely, how to trust or reliably depend on others who undertake on our behalf. Accordingly, I argued that the fiduciary obligation is a moral obligation that fosters social harmony by enabling broadscale societal cooperation. I then described the context in which the fiduciary obligation entered the English common law tradition, namely, as an equitable principle in early Chancery, and from which we gain our contemporary understanding of the fiduciary relationship as a legal relationship. I argued that, as a pre-existing moral principle, the fiduciary obligation’s operationalization through English Equity is merely the latest attempt by contemporary (Western) societies to protect and maintain the fiduciary relationship. By arguing that the fiduciary relationship is first and foremost a moral relationship, I therefore hope to have mitigated the problem of equivocation by pointing out that there simply is no such equivocation: applying the fiduciary relationship, as a moral principle, to the ethical issues of bioethics is sound.

In Chapter 2, I tackled the problem of paternalism. Worries about paternalism relate to the concern that the fiduciary relationship is paternalistic and is therefore an inappropriate model for the physician-patient relationship, given the healthcare ethics ethos of patient-centred care and the promotion of patient autonomy. I argued that the fiduciary relationship is not only not paternalistic, it is essential to autonomy. The critical role the fiduciary relationship plays in promoting autonomy also fleshes out the moral ground provided in Chapter 1. I made this argument by first adopting and then going beyond Matthew Harding’s account of Equity’s interest in governing institutions, or modes of human action. Harding argues that Equity’s interest in maintaining institutions is normatively justified by the law’s general facilitative project in promoting a liberal sense of autonomy. Harding argued that Equity promotes a Razian sense of autonomy by maintaining various modes of human interaction as distinct “options” from which individuals can choose in the pursuit of their self-directed plans, projects, or causes. Drawing from the historical narrative of the fiduciary relationship in Chapter 1, I argued that the fiduciary relationship is clearly one such institution that Equity has taken an interest in governing and maintaining. In this way, on Harding’s analysis, the fiduciary relationship plays a role in promoting autonomy in its
role as an “option” of choice in the process of individual self-governance. However, I argued that Harding’s professedly Razian theory of autonomy fails to account for the ways in which autonomy is fundamentally relational. As a result, I argued the Harding’s account of the way in which fiduciary relationship in particular promotes autonomy does not go far enough. By adopting a relational theory of autonomy, I went beyond Harding’s account, arguing that the fiduciary relationship is essentially autonomy promoting. I argued that on a procedural-constitutive theory of relational autonomy, the fiduciary relationship is among the most important modes of human action that together constitutes the very background conditions that make the development and continued exercise of autonomy possible. I adopted Paul Miller’s influential account of fiduciary power, arguing that the fiduciary relationship functions as a “relational capacity” by which an individual can pursue their autonomous will. Finally, I argued that the essential role the fiduciary relationship plays in promoting autonomy simultaneously gives it a foundation in morality and mitigates concerns about both equivocation and paternalism. When we understand autonomy relationally it becomes clear that the ways in which the fiduciary relationship fosters social harmony and promotes autonomy are coextensive: the fiduciary relationship enables individuals to trust and depend on one another, making possible the pursuit of certain autonomously chosen ends and leading to greater social cooperation.

In Chapter 3, I illustrated the utility of the fiduciary relationship for providing clarity to complex ethical issues involving healthcare professionals and their patients. I showed how a fiduciary analysis can offer conceptual clarity to the ethical issues that arise in pragmatic comparative effectiveness randomized controlled trials (ceRCT)—an innovative research methodology designed to be conducted under real-world clinical conditions, and often comparing one or more “standard of care” interventions. The SUPPORT trial was a controversial ceRCT that compared two concentrations (low and high) of supplemental oxygen (both of which allegedly fell within the full “standard of care” range) on preterm infants on outcomes of blindness and death. The results of the trial showed that for every case of blindness prevented (for those infants in the low oxygen saturation arm) there were two infant deaths. Controversy erupted following the conclusion of the trial when it was discovered that blindness and death, the primary study outcomes, were not disclosed to study participants. Debate about the SUPPORT was largely preoccupied with domestic
research regulations, as opposed to ethical principles, which were not developed with ceRCTs in mind. By applying a fiduciary analysis to the SUPPORT trial controversy, I illustrated how the fiduciary relationship can be used to provide a systematic method of both identifying and investigating the relevant ethical issues to which the SUPPORT trial gives rise. I argued that ethical issue raised by SUPPORT is whether the (purportedly) standard of care oxygen saturation interventions ought to be conceptualized as medical practice or clinical research. The fiduciary relationship is critical to demarcating practice from research, as each comprises an ethical domain with its own norms, rules, and regulations. I argued that the various features of the study protocol—such as randomization, masking with pulse oximeters, and the bifurcation of a usual care range into two subsets of that range—serve to undermine the treating neonatologists fiduciary obligation to exercise her professional judgment on behalf of the best medical interests of the premature infants under her care. Accordingly, as the norms and principles of the fiduciary relationship can no longer be relied upon, I argued that the SUPPORT trial interventions ought to be conceptualized as research. Conceptualizing the interventions as research has various “downstream” ethical implications, such as the requirement that they be subject to research ethics committee review, undergo a systematic benefit-harm analysis, and are disclosed during informed consent procedures. I thus hope to have illustrated how a fiduciary analysis can provide systematic guidance and ethical clarity on difficult bioethical issues, such those posed by innovative research methodologies, like the SUPPORT trial. I hope also to have contributed to an important ethical issue in research ethics concerning the ethical design and conduct of novel or innovative research methodologies, such as pragmatic ceRCTs.

By offering a moral foundation for the fiduciary relationship in its essential role in promoting a relational autonomy, I hope to have helped alleviate both the problems of equivocation and paternalism. With these conceptual hurdles diminished, the path ought to be slightly clearer for future work in both medical and research ethics to make use of a fiduciary analysis when thinking about those ethical issues involving relationships where one undertakes act on behalf of another’s best interests. To the extent that I have been successful, this dissertation provides the beginnings of a moral philosophical foundation upon which future ethical applications and analyses of the fiduciary relationship can draw.
Of course, this is just a *beginning*. Future inquiries, aside from exploring alternatives to the moral foundation I have provided here, might look at how (specifically) *moral* duties arise in the context of the fiduciary relationship. Drawing from Miller and others, I have merely assumed that fiduciary duties arise in response to the beneficiary’s *vulnerability* to exploitation. But questions remain about how precisely these duties are generated and specified in this way (or perhaps others) and what they actually demand of fiduciaries, practically speaking. Questions also remain as to whether fiduciary duties are universal across *all* fiduciary relationships, or whether there are certain vulnerabilities that are unique to a specific type of fiduciary relationship, and thus generate unique duties. For instance, perhaps there are a “core set” of fiduciary duties as well as a series of “bespoke” or tailored duties that address vulnerabilities specific to certain relationships. Another important area of inquiry concerns the nature of the duty of loyalty itself. Moral philosophical investigations into the nature of loyalty are limited in number, and *fiduciary* loyalty in particular appears under-theorized.\(^{357}\) For example, the fiduciary duty of loyalty is said to prohibit fiduciaries from entering into or maintaining conflicting interests, or so-called “divided loyalties.” But presumably some such conflicts are unavoidable, such as those between a physician’s loyalty to her patients and her loyalty to the medical profession, the institution in which she practices, her colleagues, her family, her own mental and physical health and wellbeing, and to the public health at large. Future ethical inquiries into the fiduciary relationship therefore ought to consider how much conflict or division between loyalties is too much.

The fiduciary relationship is an important and exciting avenue for current and future bioethical research, one that some bioethicists have recently taken.\(^ {358}\) In this dissertation, I hope to have contributed in some small way to this burgeoning new literature. More importantly, however, I hope the conceptual tools provided here serve to further the justice,


\(^{358}\) See McLeod, *Conscience in Reproductive Healthcare*. 
welfare, and autonomy interests of current and future patients and research participants. In the diverse relationships that together constitute the web of human interactions that give meaning to our lives, while enabling the satisfaction of our needs and desires—and through which we aid in the fulfillment of the needs and desires of others—many of us are simultaneously fiduciaries and beneficiaries. I therefore propose that thinking seriously about the fiduciary obligations we owe to one another, including the role that such relationships play in empowering each of us to be both authors of our own lives and critical supports to the autonomy of others, will promote greater human flourishing and a more just society.
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**Curriculum Vitae**

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<td>University of Victoria</td>
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<td>2009–2014 M.A., Philosophy</td>
<td>Victoria, British Columbia, Canada</td>
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<td>2015–2021 Ph.D., Philosophy</td>
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Selected Publications:

Refereed Journal Articles

Horn, Austin R., Charles Weijer, Spencer Phillips Hey, Jamie Brehaut, Dean A Fergusson, Cory E. Goldstein, Jeremy Grimshaw, Monica Taljaard (Published, 2018). “Thinking clearly about the FIRST trial: Using the Ottawa Statement to address paradigmatic ethical challenges in cluster randomized trials.” Journal of Medical Ethics. 44: 593-598.


Book Chapters


Selected Conferences

Invited Sessions

Society for Clinical Trials (SCT). Montreal, QC (May 2016)

Oral Presentations

American Society for Bioethics and Humanities. Washington, DC (October 2016).

International Association of Bioethics (IAB). Edinburgh, UK (June 2016).

Canadian Bioethics Society (CBS). Toronto, ON (May 2016).

Poster Presentations

International Neuroethics Society (INS). Chicago, IL (October 2015)

Canadian Association for Neuroscience (CAN). Vancouver, BC (May 2015)