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# Reinterpreting the Status-Contract Divide: The Case of Fiduciaries

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## REINTERPRETING THE STATUS-CONTRACT DIVIDE: THE CASE OF FIDUCIARIES

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The distinction between status and contract permeates legal analyses of categories of cooperative interpersonal interactions in which one party has particular obligations to the other. But the current binary understanding of the distinction has facilitated its use as a foil and thus undermined its conceptual and normative significance. This predicament is understandable given that the innate, comprehensive and inalienable status as well as the wholly open-ended contract anticipated by commentators are corner – rather than core – alternatives in a liberal polity. Hence, to clarify these normative debates we introduce two further, intermediate conceptions: office and contract type. Like the innate status, an office, such as our example of parenthood, is often subject to immutable legal rules and its core obligations not fully assignable; by contrast, a contract type, such as our example of financial fiduciaries law, is mostly subject to default rules that can be rejected or adjusted by the parties and even core tasks can be delegated. These differences derive from and properly reflect the divergent relationships to which offices and contract types apply – identitarian or instrumental – as well from the salience of the asymmetrical vulnerability of one of the parties.

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## REINTERPRETING THE STATUS-CONTRACT DIVIDE: THE CASE OF FIDUCIARIES

### I. INTRODUCTION

This Essay uses a perplexing puzzle in the emerging theoretical literature on fiduciary law in order to rethink and indeed reconstruct the status *vs.* contract conceptual framework. The puzzle springs from the seemingly confusing hybrid nature of fiduciary law. “Many, perhaps most, fiduciary relationships are established on the footing of contract,” and contract has “an important, if complex, bearing on the content and enforcement of fiduciary duties.” But most fiduciary relationships “are considered in law to be presumptively fiduciary as a matter of status, given the incidents of the relationship or the role occupied by the fiduciary,” and this status seems to also significantly affect the fiduciary duties’ content and enforcement.<sup>1</sup> So does this dichotomy create too simplistic a taxonomy?

Instead of addressing these questions directly, we begin, in Part II, with a conceptual inquiry that questions the traditional uses (and abuses) of the status-contract divide, which permeates legal analyses of categories of cooperative interpersonal interactions in which one party has particular obligations to the other. We elucidate the extreme interpretations of status as innate, comprehensive, and inalienable and of contract as a wholly open-ended framework, which have been used as foils in some scholarly debates. While neither is wrong, they are both, we argue, usually unhelpful because neither presents core cases of interpersonal relationships in a liberal polity. We therefore highlight (in Part III) two intermediate stations along the spectrum the runs between these two polar extremes: offices and contract types.

Like status, an office also typically implicates the parties’ – or at least one of the parties’ – personal identity, and its features are also largely non-negotiable; at times it is also inalienable. But it is less comprehensive and, most importantly, it is not necessarily innate. By the same token, alongside the open-ended contract, a liberal private law offers people a rich menu of contract types and property institutions from which they can choose in shaping and reshaping their interpersonal interactions. Unlike the idea of an open-ended contract – and similarly to offices – each contract type is shaped by an animating principle, so that (most of) its rules can be understood and justified by reference to such functional or normative “DNA.”<sup>2</sup> Unlike with offices, however, contract types are more instrumental

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<sup>1</sup> [Miller & Gold’s synopsis].

<sup>2</sup> Thus, although most of the rules of our case study of contract type – the law of financial fiduciaries – are defaults, this doctrine nicely responds to its autonomy-enhancing role of allowing people to safely delegate to experts the task of money management. *See infra* Section IV.C.

so the bulk of these rules are negotiable; they offer defaults which can be rejected or adjusted by the pertinent actors to fit to their own goals and preferences.

Introducing the alternatives of offices and contract types enriches our understanding of the status to contract framework vis-à-vis the innate status vs. open-ended contracting binarism. Furthermore, our use (in Part IV) of two core examples of fiduciaries – parents and financial fiduciaries – as typical examples of offices and contract types (respectively), facilitates a preliminary account of the main implications of this choice and the most important considerations that should inform it. We hope that our expanded taxonomy will help ensure that fiduciary scholars avoid the highly artificial dichotomy that affected the legal fields where the status-contract divide has been most extensively invoked, namely: family law and employment law, and that our account of offices and contract types can refine some of the immediate concerns and debates of fiduciary scholarship. This account may also have broader implications, because in liberal law innate status and open-ended contracting are marginal cases, and most of the drama occurs between offices and contract types.

## II. BETWEEN INNATE STATUS AND OPEN-ENDED CONTRACT

“The movement of the progressive societies has been uniform in one respect,” announced Sir Henry Maine more than one hundred and fifty years ago: it has been “a movement *from Status to Contract*.”<sup>3</sup> Whereas this famous dichotomy of status and contract plays a significant role in numerous debates in family law, labor law, and fiduciary law (among others), its key concepts – status and contract – are oftentimes not sufficiently elucidated. Contract seems the easier, or at least more familiar, concept, so we begin with status, remembering John Austin’s dictum that “[t]o determine precisely what a *status* is, is in my opinion the most difficult problem in the whole science of jurisprudence.”<sup>4</sup>

Maine seemed to have understood status along the lines we mentioned earlier, namely: as innate (based on fixed characteristics) and thus also both comprehensive and inalienable. This explains his strong proposition that by and large statuses – like “the Slave,” “the Female under Tutelage,” or “the Son [of full age] under Power” – have “no true place in the law of modern European societies.”<sup>5</sup> The remaining cases, such as “[t]he child before years of discretion, the orphan under guardianship, the adjudged lunatic,” are thus for Maine “exceptions . . . which illustrate the rule,” because they are all “subject to extrinsic control on the single ground that they do not possess the faculty of forming a judgment on

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<sup>3</sup> HENRY SUMNER MAINE, *ANCIENT LAW* 99-100 (J.M. Dent & Sons Ltd. 1917) (1861).

<sup>4</sup> JOHN AUSTIN, *LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW* 401 (Robert Campbell ed., 3<sup>rd</sup> ed. 1896).

<sup>5</sup> MAINE, *supra* note 3, at 99-100.

their own interests; in other words, that they are wanting in the first essential of an engagement by Contract.”<sup>6</sup>

Maine’s conception of status is extremely narrow; status, in his view, is not only innate, comprehensive, and inalienable, but also “purely a matter of *incapacity*.”<sup>7</sup> It arises out of “accidents of birth” or “circumstances which lie beyond the control and choice of the individual,” and it depends solely on “defect of judgment.”<sup>8</sup> The equation of status with incapacity is rare,<sup>9</sup> but Maine’s caste-like understanding of status isn’t. As an ideal-type, a status-based society is said to be one in which individuals are “rigidly bound into a hierarchic group” and their rights and obligations derive from such involuntary associations.<sup>10</sup> Status, in this view, “connotes an element of social and legal differentiation between categories of persons,” because it stands for “the sum total of the powers and disabilities, the rights and obligations, which society confers or imposes upon individuals irrespective of their own volition.”<sup>11</sup>

Neither Maine nor other scholars who followed his discussion of the status to contract narrative denied that all legal orders have some elements of status; in contemporary societies citizenship may be the least disputed example.<sup>12</sup> But with this caste-like understanding of status as a foil, many join Maine in both documenting “the rise of contractualization” and celebrating it “as a triumph of individual freedom and equality.”<sup>13</sup> This celebration is especially understandable given the unhappy legacy of “the attribution of status” in the common law, which signified “not normality but abnormality,”<sup>14</sup> so that “[w]omen, lunatics, blacks, Indians, and others have been limited from time to time in their legal rights and capacities simply by reason of their sex, color, ethnic background, or mental abilities.”<sup>15</sup> Indeed, if a “universe based on status” denotes that “rights and duties are set at birth [and] viewed as inexorable because they attend relationships understood as

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<sup>6</sup> *Id.*, at 100.

<sup>7</sup> Carleton Kemp Allen, *Status and Capacity*, 46 L. Q. REV. 277, 286 (1930).

<sup>8</sup> *Id.*, at 283, 286.

<sup>9</sup> Indeed, many cases of incapacity – notably our case study of parenthood – are now governed by what we are calling office, rather than status. *See infra* text accompanying note 50.

<sup>10</sup> Manfred Rehbinder, *Status, Contract, and the Welfare State*, 23 STAN. L. REV. 941, 942 (1971).

<sup>11</sup> O. Kahn-Freund, *A Note on Status and Contract in British Labour Law*, 30 MOD. L. REV. 635, 636 (1967).

<sup>12</sup> *See, e.g.*, Kahn-Freund, *supra* note 11, at 686, 689; *but see* AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009).

<sup>13</sup> Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 834 (2004).

<sup>14</sup> R.H. GRAVESON, *STATUS IN THE COMMON LAW* 5 (1953).

<sup>15</sup> Howard O. Hunter, *An Essay on Contract and Status: Race, Marriage, and the Meretricious Spouse*, 64 VA. L. REV. 1039, 1043 (1978).

natural” or “follow the perceived natural order of things,”<sup>16</sup> liberalism’s basic tenets imply a preference for “the world of contract,” in which in theory “nothing is inevitable” because “individuals are putatively equal and, as such, can design or at least negotiate the terms of their own interactions.”<sup>17</sup> This is exactly why if law subscribes to liberalism’s injunctions against the reliance on illegitimate factors, such as those just mentioned, status becomes a very narrow category.

But Maine’s observation that society tends to shift from status to contract and that this shift is properly deemed progress is of course highly disputed.<sup>18</sup> While the historical debate is far beyond the scope of this Essay, it is important for our purposes to identify the conception of contract on which this strong dissent relies. These critics, who particularly dispute the contractual understanding of employment and marriage, challenge the idea that these relationships are appropriately understood to be purely self-interested exchanges based on equal bargaining power. Their (explicit, or more frequently implicit) conception of contract is of a wholly open-ended, empty framework.<sup>19</sup> Some critics then point to “a counter-narrative of the persistence of status rules denying individuals choice about the structure of their relationships.”<sup>20</sup> Thus, it has been argued that “[o]nly for a relatively short period of history was the employment relationship treated as purely contractual,” so that “[t]he rights and responsibilities of the parties were left to contractual determination.”<sup>21</sup> But this “concept of the employment relationship as a purely contractual exchange of services for wages” declined with a “new regulation of the employment relationship [which] has been described as a return to status, although a status of a new kind.”<sup>22</sup> Though the set of familiar immutable rules in employment law is not “as strict and all-comprehensive as those of the master and servant regulation,” it seems sufficiently removed from the open-ended contract to lead commentators to conclude that “[f]or typical

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<sup>16</sup> Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 BUFF. L. REV. 516, 517 (1990).

<sup>17</sup> Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1526 (1994).

<sup>18</sup> See, e.g., GRAVESON, *supra* note 14, at 50; Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 558 (1933). But see, e.g., E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 581–82 (1969).

<sup>19</sup> See, e.g., MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 1-2 (1993).

<sup>20</sup> Hasday, *supra* note 13, at 834.

<sup>21</sup> Frances Raday, *Status and Contract in the Employment Relationship*, 23 ISR. L. REV. 77, 77-78 (1989).

<sup>22</sup> *Id.*, at 78.

employment, trends definitely point in the direction of a status type relationship,” thus indicating “a movement ‘from status to contract and back.’”<sup>23</sup>

Resisting contract as the organizing conception of employment or marriage is understandable if, but only if, contract is conceptualized as an open-ended framework, which is indifferent to *systemic* inequality between the parties and to the identitarian nature of their relationships. Thus, it has been argued that when based on a “rhetoric of universal free will,” contract cannot “account adequately” for the inequality of employers and employees.<sup>24</sup> While courts “characterize the unfavorable circumstances that many employees face as the product of unequal bargaining power . . . bargaining power disparity does not capture the moral problem raised by inequality in the employment relation,” which “encompasses one’s level of economic resources, leisure, and discretion,” and is thus best understood “in terms of status.”<sup>25</sup> Marriage, even equal marriage, can also hardly fit in. Although contractual to an extent, marriage – the union of equals defined by mutual care, obligation, and self-identification – cannot be easily accommodated within the open-ended conception of contract.<sup>26</sup>

The failure of this conception of contract, however, is not limited to the contexts of employment and marriage, but rather applies much more broadly.<sup>27</sup> Understanding contract solely as an open-ended framework is hardly autonomy-enhancing, given the transaction (and other) costs that parties would face if they were to design from scratch their reciprocal undertakings;<sup>28</sup> further, and just as important, it improperly dismisses the identitarian significance of certain long-term voluntary relationships.<sup>29</sup> Indeed, while the option of open-ended contracting is a significant feature of liberal law, the implication that this conception lies at the conceptual core of contract law is both descriptively wrong and normatively disappointing.

A liberal contract law can, and in fact by and large does, perform its core role as one of society’s main autonomy-enhancing devices by providing – in addition to its respect to

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<sup>23</sup> Reinhold Fahlbeck, *Flexibility: Potentials and Challenges for Labor Law*, 19 COMP. LAB. L. & POL’Y J. 515, 527-28 (1998). See also, e.g., Gillian Demeyere, *Human Rights as Contract Rights: Rethinking the Employer’s Duty to Accommodate*, 36 QUEEN’S L.J. 299 (2010).

<sup>24</sup> Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 579, 602 (2009).

<sup>25</sup> *Id.*, at 579-80.

<sup>26</sup> See generally REGAN, *supra* note 19.

<sup>27</sup> See also Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34, 47 (1917) (“There is . . . much to be gained by the further standardizing of the relations in which society has an interest, in order to remove them from the control of the accident of power in individual bargaining”).

<sup>28</sup> See Reh binder, *supra* note 10, at 955.

<sup>29</sup> See REGAN, *supra* note 19, at 89, 94, 117.



parties' open-ended agreements – a divergent repertoire of contract types for people to choose from. Indeed, given the diversity of acceptable human goods from which autonomous people should be able to choose and their distinct constitutive values, the state must recognize a sufficiently diverse set of robust frameworks for people to organize their life. This liberal commitment to personal autonomy by fostering diversity and multiplicity is relevant to private law because given the endemic difficulties of both transactions costs and “obstacles of the imagination,” many of these frameworks cannot be realistically actualized without the support of viable legal institutions. The liberal state should thus enable individuals to pursue valid conceptions of the good by *proactively* providing a multiplicity of options. A structurally pluralist private law – our private law – follows suit by including diverse categories of property institutions and contract types, each incorporating a different value or different balance of values.<sup>30</sup>

### III. ON OFFICES AND CONTRACT TYPES

One may criticize the way friends of contract and of status use the corner cases of innate status and open-ended contracts (respectively) as foils that artificially boast their positions.<sup>31</sup> But these moves are not sheer rhetorical excesses. After all, while the legitimate scope of the universe of status is certainly disputable, even perfectly liberal societies must ascribe to some people (say: babies) a status understood as innate, comprehensive and inalienable. By the same token, while a liberal contract law must take seriously the task of forming a sufficiently diverse repertoire of contract types, it should not fall back to the pre-liberal understanding of contract in which the state only supports its own favored forms of interaction; quite the contrary, as we have just noted, although the residual category of open-ended contracting does not exhaust or even properly represent the core of contract, it is indispensable to liberal contract law because it allows people to reject the state's suggestions and decide for themselves how to mold their interpersonal interactions.<sup>32</sup>

Thus, neither innate status nor open-ended contracts is a caricature. But at least in a liberal private law neither presents a core case, which may explain why they can hardly be

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<sup>30</sup> See generally HANOCH DAGAN & MICHAEL A. HELLER, *THE CHOICE THEORY OF CONTRACTS* (forthcoming 2016); Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1436 (2012). See also JOSEPH RAZ, *THE MORALITY OF FREEDOM* 133, 162, 265, 372, 395, 398 (1986). Nothing in the emphasis on contract types (or property institutions) implies that contract (or property) is not a viable category. See Hanoch Dagan, *Doctrinal Categories, Legal Realism, and the Rule of Law*, 164 U. Pa. L. Rev. 1889 (2015).

<sup>31</sup> By the same token, one may criticize the way Maine's work figures out in these debates. See J. Russell VerSteeg, *From Status to Contract: A Contextual Analysis of Maine's Famous Dictum*, 10 WHITTIER L. REV. 669, 669–72 (1988).

<sup>32</sup> See DAGAN & HELLER, *supra* note 30, at \*.

used as ideal types that offer viable alternatives to choose from. For the status/contract apparatus to properly serve the analytical role it seems to play in fields like family, employment, and fiduciary law, it must include further categories that fall short of innate status and are yet not as empty as the open-ended contract.<sup>33</sup> In this Part we attempt to introduce such categories – office and contract type – and broadly articulate their main features; the next Part puts these constructs to work in the context of fiduciary law.

The need for something along the lines of the concept of office as we understand it emerges from many attempts to define status that find its restricted understanding too narrow since it excludes categories which “are matters of choice.”<sup>34</sup> Because “a ‘contract’ may lead to the assumption of a socially imposed status rather than to one that is the creation of the contracting parties,”<sup>35</sup> some authors suggested to “see status as an institution, entered into voluntarily, but without individualized redefinition of the institution.”<sup>36</sup> This approach indeed underlies two of the classical definitions of status as “the condition of belonging to a particular class of persons to whom the law assigns certain capacities or incapacities or both,”<sup>37</sup> and as “a special condition of a continuous and institutional nature, differing from the legal position of the normal person, which is conferred by law and not purely by the act of the parties, whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents are a matter of sufficient social or public concern.”<sup>38</sup>

These broader definitions are in many ways innocuous. But they might have contributed to “the conceptual confusion between two phenomena as different as the imposition of rights and duties irrespective of the volition of the person concerned” on the one hand, and the shaping of the parties’ relationships by “mandatory norms which cannot be contracted out” into which he or she can freely enter, on the other hand.<sup>39</sup> This confusion is consequential in ways that we have already noted, because “it may be one explanation

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<sup>33</sup> Cf. Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 UTAH. L. REV. 687.

<sup>34</sup> Allen, *supra* note 7, at 284. See also, e.g., GRAVESON, *supra* note 14, at 34, 36, 38.

<sup>35</sup> See Hunter, *supra* note 15, at 1044. See also, e.g., LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT* xix–xxi (1981); Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 GEO. L.J. 95, 97-98 (1991); Orly Lobel, *The Slipperyness of Stability: Contracting for Flexible and Triangular Employment Relationships in the New Economy*, 10 TEX. WESLEYAN L. REV. 109, 127-29 (2003).

<sup>36</sup> Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 115 (1998).

<sup>37</sup> Allen, *supra* note 7, at 288.

<sup>38</sup> GRAVESON, *supra* note 14, at 2.

<sup>39</sup> Kahn-Freund, *supra* note 11, at 640.

for the . . . tendentious inclination to link [every manifestation of the latter] phenomenon with ‘status,’ that hall-mark of a ‘non-progressive’ society.”<sup>40</sup>

In order to avoid this confusion, and because status in its narrower understanding is not an empty category, a different term is needed. Office seems to fit well partly because of its legacy and partly because it was recently used for identifying the “anti-contractarian” position in the theoretical debate as to the nature of fiduciaries. The idea of an office, Joshua Getzler noted, “comes from the classical Roman concept of an *officium*, a standard set of primary duties pertaining to a person with recognized responsibilities. The nature of that office will then accent and shape all the relevant duties of the officeholder, both positive and negative”; it will “color, intensify, and constrain all dealings, simply by virtue of the position or personality of the actors.”<sup>41</sup> Office seems to capture what critics of Maine want to highlight when they point out to status-like features that typify certain quarters of modern law, while avoiding the implication of them being necessarily hereditary or hierarchic.

In an important attempt to escape the conceptual confusion noted above (but one that unfortunately has not greatly influenced the literature), Manfred Rehbinder used the term role, which he borrowed from sociology, for similar – but not identical – purposes. Role is “the sum of all rules of conduct imposed by society on the holder of certain social position,” which define “a model of conduct” that prescribes “what characteristics one must have” and “what kind of conduct is expected of him.”<sup>42</sup> Rehbinder acknowledges that, unlike the innate status, individuals voluntarily undertake roles, but he insists that “[f]reedom of the individual today consists less in a freedom of role creation than in a freedom” to “choose among positions and behavioral standards, created and safeguarded by the state.”<sup>43</sup> And once a role has been chosen, its “role expectations” affect the choosing individual “through two means: first, through the psychological act of internalization of its behavioral expectations, which are then considered right and just; second, through a system of positive or negative sanctions.”<sup>44</sup>

We endorse Rehbinder’s proposition as to the significance of this broad spectrum between innate status and open-ended contract in liberal private law, and our analysis of these cases will also assume the complex interaction of incentives and internalized cultural expectations he observed. But Rehbinder’s proposed category is still overbroad as it

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<sup>40</sup> *Id.*, at 642.

<sup>41</sup> Joshua Getzler, *Ascribing and Limiting Fiduciary Obligations*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 39, 42-43 (Andrew S. Gold & Paul B. Miller eds., 2014).

<sup>42</sup> Rehbinder, *supra* note 10, at 951-52.

<sup>43</sup> *Id.*, at 955. As he notes, other commentators discussed this phenomenon by distinguishing between “ascribed status and achieved status.” *Id.*, at 954.

<sup>44</sup> *Id.*, at 953.

includes not only “‘must’-expectations” and “‘should’-expectations,” but also “‘may’-expectations,” thus encompassing also “the law of sales,” which “regulate[s] the roles of the buyer and the seller.”<sup>45</sup> We thus offer a more fine-grained taxonomy, which subdivides Reh binder’s capacious understanding of “roles” into offices and contract types. As we hope to (begin to) demonstrate in the remainder of this Essay, offices and contract types are not fortuitous packages of possible configurations of the different sticks that distinguish the innate status from the freestanding contract, but rather coherent structures with distinct integrities.

Offices, as we have already mentioned, typically implicate individuals’ identities and often involve asymmetrical vulnerability given the parties’ asymmetrical capacity for autonomous choice.<sup>46</sup> They are thus by and large neither negotiable nor assignable, giving rise to duties with “a depth or intensity that would not be owed by a shopkeeper or a plumber on whom a customer relies for goods and services.”<sup>47</sup> By contrast, contract types – a term coined by one of us in a co-authored work with Michael Heller on contract theory – accounts for Reh binder’s claim that even categories of voluntary interactions, like sales (or suretyship, bailment, insurance, etc.), which are largely instrumental and typically adjustable by the parties, nonetheless embody a set of state created and safeguarded expectations.

Indeed, unlike its Willistonian conceptualization, contract law is not a simple, unified body of doctrine. Rather, alongside the normatively important but practically marginal category of open-ended contracting, contract law is a loose umbrella covering a rather diverse set of contract types. Contract law actively empowers people to form collaborative voluntary arrangements – both discrete and impersonal as well as long-term and relational – by providing a broad menu of divergent background regimes for such risky undertakings in the various relevant spheres of contracting: home, intimacy, work, and commerce. Each such contract type is guided by a robust animating principle that reflects a specific balance of the possible utilitarian and/or communitarian goods people can gain from contractual activity in this specific contractual sphere. Such a structurally pluralist contract law, as we

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<sup>45</sup> *Id.* There are further aspects in which we do not subscribe to Reh binder’s discussion. Notably, we are not committed to the view that each office and contract type reflects a “role-based morality” at least not in the way he conceived of this term. Each, to be sure, has its animating principle that colors its rules and gives it its unique character. But that regulative principle is not necessarily derivative of a socially defined role and at least some of these (notably regarding contract types) may be (at least to an extent) functional.

<sup>46</sup> Our characterization of office admittedly implies that offices may be affected by the status of one of the parties. This observation, however, does not undermine the significance of distinguishing office from status; quite the contrary, it shows that this distinction can be analytically helpful by suggesting that we may think differently about (for example) the powers of a parent that derive from the child’s status (and its attendant incapacities) and those that do not.

<sup>47</sup> Getzler, *supra* note 41, at 43.

have typified it above, follows liberalism’s ultimate commitment to people’s autonomy in two ways: it presumptively subscribes to the familiar freedom of contract prescription, which sanctions bargaining for terms *within* a contract (this presumption may be rebutted in cases of asymmetrical vulnerability, but even in these cases, a liberal contract law usually prefers sticky defaults over mandatory rules); *and* it also follows the “freedom of contracts” injunction: the freedom to choose from *among* a range of normatively-attractive, already-existing contract types.<sup>48</sup>

Many of the existing debates as to the status vs. contract – descriptive or normative – classification of marital or employment positions can be reformulated as addressing the choice between office and contract type, or more precisely among the range of more refined permutations that lies in between these two ideal types. This reformulation is helpful because, at least typically, neither side to these debates supports innate status or open-ended contract, so that arguing against either of these foils cannot do any real work.<sup>49</sup> But the significance of introducing our fine-grained continuum as an alternative to the familiar status-contract binarism is not only in setting aside irrelevant arguments. Rather, its more important contribution is in focusing our attention on the choice between office and contract type (or, again, among the various options along their continuum), which is the real choice for many of our current practices. This focus is important because (as the discussion above implies and our extended treatment of the fiduciaries case study further demonstrates) it helps refine what is at stake: what are the main implications of our choice – the question of immutability and the possibility of outsourcing – and what are its most important justifications, which turn largely on both the identitarian-instrumental divide (alluded earlier) and the significance and salience of concerns of asymmetrical vulnerability.

Before we turn to fiduciary law, it may be helpful to return to the category of incapacity, which was originally emphasized by Maine,<sup>50</sup> and can now be properly appreciated. Categories of cases of incapacity inevitably involve the identity of the incapacitated party and are thus “naturally” governed under the office category,<sup>51</sup> rather

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<sup>48</sup> See DAGAN & HELLER, *supra* note 30.

<sup>49</sup> It is also helpful because it provides a satisfying way for sidestepping the seemingly unavoidable but radically unsatisfying alternative of “deconstruct[ing] the status/contract distinction, replacing it . . . with the idea of a ‘marriage system’ that is irretrievably ambivalent as between status and contract.” Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 4 (2010).

<sup>50</sup> See *supra* text accompanying notes 7-9.

<sup>51</sup> In other words, what makes these cases typical examples of an office is both the characteristics of the beneficiary (being incapable) and the position assumed by the fiduciary.

than the contract-type one.<sup>52</sup> The question of whether there are other categories of cases that should be similarly governed – think of both employees or of spouses – depends upon our conceptualization of these putative categories along the identitarian-instrumental continuum. In a liberal society, which insists that even our identities should be to some extent chosen, it is unsurprising that identitarian categories that do not involve incapacity are situated in-between office and contract type, with some degree of immutability and non-assignability that is more than what we find in contract-types but less than what typifies offices.<sup>53</sup>

#### IV. VARIETIES OF FIDUCIARY RELATIONSHIPS

##### *A. The Monistic Positions*

Fiduciary law, to which we (finally) turn, provides a rich case study for our theoretical observations. To be sure, while no one (to the best of our knowledge) argues that fiduciaries fit into the category of innate status,<sup>54</sup> the other pole of the status to contract spectrum did surface in the theoretical analyses of fiduciary law. Some lawyer economists, notably Frank Easterbrook and Daniel Fischel, argued along these lines that fiduciary is simply the term law attaches to “some contractual relations” when “transaction costs reach a particularly high level,” so that fiduciary relations do not raise any “distinctive and interesting questions” and “[f]iduciary duties are not special duties.”<sup>55</sup> But this position has been severely criticized,<sup>56</sup> and is rarely defended in contemporary debates as to the nature of fiduciary law,<sup>57</sup> which should not be surprising given that even a view that

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<sup>52</sup> Cf. Paul B. Miller, *The Idea of Status in Fiduciary Law* (in this volume) (Kantians are correct to argue that incapacity is a ground of a need of fiduciary representation, but wrong to limit fiduciary law to relationships featuring incapacity).

<sup>53</sup> For the same reason, a liberal polity may be obligated to facilitate more forms of identitarian categories – such as non-conjugal aspiring families (e.g., multigenerational groups and voluntary kin groups) – that offer more options, and thus choice. See Elizabeth S. Scott & Robert E. Scott, *From Contract To Status: Collaboration and The Evolution Of Novel Family Relationships*, 115 *Colum. L. Rev.* 293, 369-73 (2015).

<sup>54</sup> Indeed, once status is limited along the lines of our discussion in the previous Parts of this Essay, it becomes, as Lionel Smith argues, “part of the law of persons,” and thus irrelevant to fiduciary law. Lionel Smith, *Contract, Consent, and Fiduciary Relationships* (in this volume).

<sup>55</sup> Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 *J.L. & ECON.* 425, 427, 438 (1993). See also, e.g., John Langbein, *The Contractarian Basis of the Law of Trusts*, 105 *YALE L.J.* 625 (1995).

<sup>56</sup> See, e.g., Hanoch Dagan & Sharon Hannes, *Managing Our Money: The Law of Financial Fiduciaries as a Private Law Institution*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW*, *supra* note 41, at 91, 101-02.

<sup>57</sup> Thus, in his recent restatement of the economic theory of fiduciary law Robert Sitkoff acknowledges that fiduciary duties have distinctive features. See Robert H. Sitkoff, *An Economic*

disputes or dismisses any office-like features of fiduciary law would likely understand fiduciary law as a contract type, and not an open-ended contract.

Indeed, the real action lies elsewhere, in the choice between office and contract type.<sup>58</sup> Lionel Smith and Daniel Markovits may represent the former position.<sup>59</sup> Although the parties “voluntarily assume the fiduciary role,” their obligations, Smith argues, “are determined by the law,” rather than by “the particular undertaking that was given by a particular party.”<sup>60</sup> Thus, “while entering the relationship is voluntary and consensual, the consent of those who enter the relationship is not what determines the content of the obligations.”<sup>61</sup> This characterization nicely fits that of Markovits who insists that “fiduciary relations are not merely creatures of the parties’ intentions but instead establish and reflect status-like orders.”<sup>62</sup> These orders – one example Markovits uses is of guardianship, which he describes as a “jointly but asymmetrically pursued project of . . . constituting the ward’s self-conception,” which “can become one of the great sources of meaning in the lives of both guardian and ward” – are far removed from “the model of contract,” because they are not only “means for serving antecedent ends,” but are also valuable “in themselves.”<sup>63</sup>

James Edelman, by contrast, supports a conception of fiduciaries which squarely falls into our category of contract types. “Fiduciary duties,” he argues, “are not duties which are imposed by law nor are they necessarily referable to a relationship or status”; rather,

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*Theory of Fiduciary Law*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 41, at 197.

<sup>58</sup> For another position, which conceptualizes fiduciary law as “a well-designed union of penalty default and standard efficient default rules,” see Getzler, *supra* note 41, at 61.

<sup>59</sup> See also, e.g., Paul Miller, *The Fiduciary Relationships*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 41, at 63, 67, who argues that “the kind-status of a relationship . . . determines whether fiduciary duties applies to it.” For a detailed analysis and critique of Miller’s position which indeed unduly typifies fiduciary law as a whole based on an account of office-like cases of fiduciaries, see Dagan & Hannes, *supra* note 56, at 95-99.

<sup>60</sup> Lionel Smith, *Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another*, 130 L. Q. REV. 608, 613 (2014).

<sup>61</sup> *Id.* As Smith notes, “[t]his is not unusual; . . . when the law attaches features to a legal relationship, parties may have a choice as to whether or not they enter the relationship, but they do not necessarily have the ability to vary its features.” *Id.*, at 614.

<sup>62</sup> Daniel Markovits, *Sharing Ex Ante and Sharing Ex Post: The Non-Contractual Basis of Fiduciary Relationships*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 41, at 209, 224.

<sup>63</sup> *Id.*, at 223-24. As an aside, we do not share Markovits’s account of the guardian-ward relationship as identity-shaping, at least when it is freestanding (as opposed to cases in which the guardian is the parent, but then the identitarian category is parenthood). It is thus not surprising to us that, unlike parents, appointed guardians can be more readily substituted.

they “arise in the same manner as any other express or implied term: by construction of the scope of voluntary undertakings.”<sup>64</sup> Fiduciary duties are “based upon consent,” and can therefore be contractually “modified” and “moulded,” and “cannot be superimposed upon a contract to alter its intended operation.”<sup>65</sup> This view, which on its face resembles Easterbrook and Fischel’s, in fact reflects the contract type conception of fiduciaries, because, as Edelman recently clarified, “the relationship [] provides crucial context for the construction” of fiduciary undertakings, which both “serves as a basis from which an implication can be drawn in [the fiduciary’s] undertaking” and “shapes the understanding that a reasonable person will have of their conduct.”<sup>66</sup>

Both positions are coherent and both can point to ample evidence in fiduciary law to support their descriptive power.<sup>67</sup> But neither deserves a hegemony throughout the vast terrain of fiduciary law.<sup>68</sup> In fact, fiduciary law as we understand it presents a microcosmos of the office-to-contract type divide. Within fiduciary law we can find both offices and contract types, as well as intermediate configurations between these ideal types.<sup>69</sup> In order to illustrate this claim we use two typical examples: parenting for office and financial fiduciaries for contract type. The following discussion of these important categories heavily draws on prior works we have separately published, co-authored with Robert Scott

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<sup>64</sup> James Edelman, *When Do Fiduciary Duties Arise?* 126 L.Q. REV. 302, 302 (2010).

<sup>65</sup> *Id.*, at 302-03.

<sup>66</sup> James Edelman, *The Role of Status in the Law of Obligations*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 41, at 21, 34. For this reason, a court may assume, in this view, “as a heuristic of private law that parties will *expect* to incorporate as implied or imputed terms those regular duties ascribed by general law or practice or the custom of a trade.” Getzler, *supra* note 41, at 49.

<sup>67</sup> To be sure, as the text which follows implies, although we think that Edelman’s account captures an important subset of fiduciary law, we do not subscribe to his restricted view of fiduciary law as encompassing only voluntary types of fiduciaries and as excluding any statutory-based fiduciaries.

<sup>68</sup> *Cf.* Andrew S. Gold, *The Loyalties of Fiduciary Law*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 41, at 176. *But see* Avihay Dorfman, *On Trust and Transubstantiation*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *id.*, at 339, 341 (acknowledging the pluralism of trust law but insisting on its unified formal structure).

<sup>69</sup> Marriage is a particularly interesting case. Its strong identitarian dimension makes it closer to the office category, but the general availability of unilateral no-fault divorce implies that this dimension may not be as strong as with parenthood. Concern about asymmetrical vulnerability is also surely significant, but is again weaker, and the law is committed to the parties’ equal authority: even in the most traditional couples, there is no issue of incapacity. This characterization seems to be reflected in modern marital property law and particularly the freedom of parties to execute premarital agreements limiting the sharing of property on termination. Here the law is typified by the combination of general mutability with a relatively rigorous unconscionability scrutiny and some limits on opt-outs (such as the impossibility of setting up temporary marriage).



and Sharon Hannes, respectively.<sup>70</sup> Thus, it does not purport to provide a comprehensive account of either doctrine, but can focus on the task at hand: gaining a more robust understanding of the different options presented by offices and contract types.

### *B. Parents*

Law's traditional understanding of the parent-child relationship was premised on the "natural" rights of parents.<sup>71</sup> Parents, particularly fathers as heads of household, had extensive legal authority over the lives of their children.<sup>72</sup> This was of course a classic example of hereditary and hierarchic status (no coincidence that it was the one on which Maine focused): the authority of biological parents was not dependent on behavior that promoted the child's interest and was lost only by abandonment or unfitness.<sup>73</sup> The law has long discarded this conception, as inconsistent with modern views of parenthood, and as normatively unacceptable.<sup>74</sup> The conception is outdated because contemporary law recognizes not only biological parents, but also de facto parents not biologically-related to the child.<sup>75</sup> Even more importantly, the status-based conception of parenthood is normatively problematic, because it "accords unwarranted legal protection to biological parents in ways that are both directly harmful and symbolically corrosive to the interests of their children."<sup>76</sup>

Conceptualizing parents as fiduciaries offers a much more attractive model of the parent-child relationship than did traditional family law, and represents a typical instance of the fiduciary role as an office. This understanding of parenthood is grounded not in

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<sup>70</sup> See respectively Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995); Dagan & Hannes, *supra* note 56.

<sup>71</sup> See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 887-90 (1984).

<sup>72</sup> See Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992).

<sup>73</sup> See Scott & Scott, *supra* note 70, at 2407.

<sup>74</sup> Notice that our analysis is limited to the *legal* understanding of parenthood. We do not deny that there is a social understanding of parenthood which is rooted in biology and is notably reflected in the rights of adopted children to learn the identity of their biological parents. Notice, however, that this is a much narrower understanding of a parent as an ancestor, which is focused on the child's right and does not entail – neither in law nor in our social norms – any authority of the biological parent.

<sup>75</sup> See Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 637 (2002).

<sup>76</sup> Scott & Scott, *supra* note 70, at 2406.

parents' rights, but rather in parents' *obligation* to serve the child best interest.<sup>77</sup> It understands parenthood as a fiduciary category, by viewing parents as *entrusted*<sup>78</sup> with the duty to raise their children to adulthood and provide for their physical and psychological needs. Satisfactory performance of these tasks places substantial demands on the time, energy and resources of parents. Parenthood shares many of the structural features of other types of fiduciary relationships: Parents make an extensive range of decisions and perform many tasks that significantly affect the welfare and successful development of their children, and because of the complexity of their role, they require a considerable amount of discretion. But parents fulfill their obligations under conditions of information and control asymmetries and significant vulnerability, given the inability of children to protect and assert their own interests. This raises daunting concerns that the parents may be inclined to pursue their own potentially conflicting interests. Further, although individuals are assumed to have a choice about whether to become parents, children do not have a choice about undertaking this family relationship. In short, the parent-child relationship clearly falls outside the contract type conception of fiduciaries.<sup>79</sup> Rather, it seems to epitomize Markovits' understanding of identitarian fiduciary relationships, bonds that are both broad in scope and have intrinsic value that extends beyond successful performance of caretaking tasks. Parenthood, in our taxonomy, is an office. The value of the relationship between the particular parent and specific child implies that parents are not

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<sup>77</sup> For our purposes we need not unpack the specific content of the child's interest. For an illuminating account of the main alternatives – self-determination and self-fulfillment – and the way they both avoid the seemingly unavoidable paradox insofar as children are concerned, see Joel Feinberg, *The Child's Right to an Open Future, in* WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124, 145 (William Aiken & Hugh LaFollette, eds., 1980).

<sup>78</sup> We deliberately use here the passive voice, so as not to imply that this trust relationship, which typifies (or at least should typify) parenthood, is necessarily dependent upon some positive act of authorization by the state or that children are the state's to allocate. The state is surely *not* analogous to the settlor of a trust; quite the contrary: part of the point of analyzing parenthood as a fiduciary relationship is that this conceptualization entails important *instructions to the state* as to how parenthood is to be (legitimately) regulated.

<sup>79</sup> There are many indicia for this difference, including the nature of benefits from parenthood, the type of sanctions from breach of parents' duty of loyalty, and the social – and often also legal – disapproval of attempts of parental withdrawal. *But cf.* Margaret F. Brinig, *Parents: Trusted but not Trustees Or (Foster) Parents as Fiduciaries*, 91 B.U.L. REV. 1231 (2011) (criticizing the fiduciary understanding of parenthood based on these distinctions from the contract type conception).

fungible child-rearers<sup>80</sup>; their substitution can be accomplished only at considerable cost to the child's psychological health.<sup>81</sup>

The upshot is that, although the prominence of parental rights may seem to echo the status-based understanding of parenthood, contemporary law largely conforms to the conception of parenthood as an office. In contrast to traditional notions of parental rights, parental authority is allocated as a means of promoting the child's interests; indeed, "fiduciary constraints are a necessary condition of [the legitimacy of] parental authority."<sup>82</sup> To be sure, this allocation is usually governed by a process of self-identification at the child's birth, based on a willingness and capacity of biological or adoptive parents to undertake parental responsibilities. But where contests over parental identity and authority arise, often in cases involving unmarried biological fathers or de facto parents, legal protection is based on investment in and fulfillment of parental responsibilities. In this way, nontraditional (and non-biological) caregivers may be identified as additional or alternative parents.<sup>83</sup>

Properly understood then, parental rights are not based on a notion of entitlement, but are aimed – in line with the fiduciary understanding – at serving the child's interest in receiving good care from her parents. Parental rights are not a license to engage in selfish behavior, but a mechanism for aligning conflicting interests by rewarding good parenting and encouraging commitment and investment in children's welfare.<sup>84</sup> In short, parental rights function as a *quid pro quo* – constituting both incentive and reward for satisfactory parental performance. The legal deference to parents' judgment is premised on an assumption that the "bonds between parents and children together with informal social norms... encourage parents to identify their interests with those of their children and to approach their performance as parents with a sense of moral obligation." On this view,

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<sup>80</sup> As the text implies, our use of the term office does not imply the independence of offices from their various occupants (as is the case with respect to public offices, such as the President, but neither with parents nor with other types of fiduciary relationships, such as general partnerships). *But cf.* Christopher Essert, *The Office of Ownership*, 63 U. TORONTO L.J. 418, 430-35 (2013); Dennis Klimchuk, *Equity and the Rule of Law*, in PRIVATE LAW AND THE RULE OF LAW 247 (Lisa Austin & Dennis Klimchuk eds., 2014).

<sup>81</sup> See Scott & Scott, *supra* note 70, at 2402, 2415-20, 2431, 2445, 2452.

<sup>82</sup> Evan Fox-Decent, *Fiduciary Authority and the Service Conception*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 41, at 363, 377.

<sup>83</sup> See Buss, *supra* note 75, at 650-54, 657-66; Scott & Scott, *supra* note 70, at 2434-35, 2456-62.

<sup>84</sup> See Scott & Scott, *supra* note 70, at 2404, 2440, 2463, 2476. *Cf.* Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U.L. REV. 144, 173-75, 203 (2003).

good parenting can be expected to yield “social approval and self-fulfillment,” whereas deficient performance will result in “guilt and social opprobrium.”<sup>85</sup>

In this fiduciary regime, the state plays a limited but critically important role. The state has limited capacity to oversee parents’ day-to-day childrearing (only few observers hold that children’s welfare would be promoted by active intervention in parents’ routine decisions).<sup>86</sup> Thus, potential conflicts of interest between parents and children are ameliorated largely through reliance on parents’ psychological bonds with their children and on informal social norms. But monitoring arrangements play an important role in detecting and sanctioning serious defaults on parental obligations.<sup>87</sup> This realm of legally-imposed restrictions is limited in scope, but it is largely mandatory. This elaborate scheme of immutable regulation comfortably fits our characterization of parents-as-fiduciaries as a clear example of an office given the identitarian nature of parenthood and the profound vulnerability of children.<sup>88</sup> In fact, it seems to be the prominent example of an office given that there are few – if any – other categories in which both of these features fully apply.

Even in the intact family setting, where bonding can be relied upon to do much of the work of promoting responsible parental behavior, monitoring plays an important role. A series of preemptive rules – notably child labor laws and compulsory school attendance requirements – prescribe the boundaries of parental discretion to define their children’s interests. Moreover, parents whose children are found to be abused or neglected are subject to formal state supervision until the deficient behavior is remedied; their children may be removed from their custody and, if their default is judged to be irremediable, their parental rights can be terminated, followed by placement with substitute adoptive parents.<sup>89</sup>

Whereas state supervision of intact families is limited to preemptive rules and intervention for serious parental defaults, the need for oversight is more critical when parents do not live together. This is so, first, because self-interested behavior by non-custodial parents is more prevalent and, second, because the potential for conflict between parents as joint fiduciaries is far greater when they separate (or have never lived together).

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<sup>85</sup> Scott & Scott, *supra* note 70, at 2433. It is furthermore premised on the significant effect of parents’ satisfaction and enthusiasm for their role to their children’s welfare. *See id.*, at 2430.

<sup>86</sup> *See* Buss, *supra* note 75, at 647-49. *Cf.* MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS? Ch. 2 (2005).

<sup>87</sup> *See* Scott & Scott, *supra* note 70, at 2403-04, 2421, 2438-39, 2441, 2452, 2474-75.

<sup>88</sup> We do not claim, of course, that family law perfectly tracks the prescriptions of the conceptualization of parents as office-type fiduciaries. *See* Scott & Scott, *supra* note 70, at 2463-70. As with any interpretive account of the law, the gaps between the doctrine’s implicit normative promise and its explicit details can, and indeed should, serve as the basis for (internal) critique and reform.

<sup>89</sup> *See* Scott & Scott, *supra* note 70, at 2238-39, 2242, 2252-53, 2255. *See also id.*, at 2447-48, 2453-54 (discussing the monitoring function of foster care plans).

Non-custodial parents may sometimes defect on obligations that they would have fulfilled before divorce, for example, because their children's significance to their identity has diminished or because the rewards of parenthood have diminished; contact likely is less frequent, and, in some cases, accompanied by disputes with the former spouse over how best to promote children's interests. In order to address these difficulties the law provides an elaborate set of rules aimed at encouraging the continued fulfillment of parental obligations after divorce, either through shared custody or through continued authority and access for the non-custodial parent. Moreover, modern law sanctions uncooperative parents. Thus, to assure that non-custodial parents fulfill their financial duty to their children, the law prescribes immutable rules with increasingly tough sanctions for non-compliance with child support orders.<sup>90</sup>

Finally, not only are parents' core obligations largely immutable, they are also not fully assignable. To be sure, like other officeholders, parents can, and often do, outsource menial tasks and even delegate more substantial tasks and decisions, by putting the child in day care, hiring babysitters, and the like.<sup>91</sup> But beyond these limited forms of outsourcing, broader delegations of parental responsibilities to others may be quite consequential. Thus, a parent who leaves the child with a third party (such as a grandparent) for an extended period (years) could lose parental rights.<sup>92</sup> In general, the recognition of custodial rights in "de facto parents" in recent years coheres with the substitution of the status-based conception of parental rights with an office-type fiduciary model, which grounds parental rights in parental responsibilities, while still understanding parenting in identitarian, rather than merely instrumental terms.

### *C. Financial Fiduciaries*

Whereas parents present the ultimate identitarian category of fiduciary relationship and thus an obvious example for our category of an office, money managers are probably the ultimate instrumental fiduciaries, so we turn to the case of these financial fiduciaries, which we analyze as a contract type.

The instrumental nature of financial fiduciaries is straightforward. These fiduciaries – typically professional profit-making firms – manage (enormous amounts of) money: they

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<sup>90</sup> See Scott & Scott, *supra* note 70, at 2246-52, 2455.

<sup>91</sup> Such delegations are properly subject to a negligence standard, which may entail liability when parents leave their children with a caretaker, who they have reason to know (or should know) poses a threat to the child or will be unable to provide adequate care. See, e.g., *State v. Goff*, 686 P.2d 1023 (Ore. 1984).

<sup>92</sup> See *Price v. Howard*, 484 S.E.2d 528 (N.C. 1998). Another manifestation of the "minimum core of parental responsibility" is that parents can be liable in neglect for "failure to supervise," which includes leaving a child alone or placing the child in the care of a person that the parent should know may pose risk to the child. See *State v. Goff*, 675 P.2d 1093 (1984).

are responsible for people's savings, pensions, and bequeathable fortunes. Indeed, in sharp contrast to the role of the parent-fiduciary in the child-beneficiary's life, the beneficiaries (and their benefactors, in appropriate cases) of these trustees find no intrinsic good in their relationship with their money managers. Rather, they resort to money managers as a means to an end: this contract type is instrumental to their autonomy because it allows them to enlist the superior skills, knowledge, and experience (and thus, arguably, judgment) of others for an important task that impacts significant aspects of their purely welfarist interests. Enabling such a delegation is autonomy-enhancing also because the alternative seems daunting given the resources – in time and expertise – that money management nowadays requires. The ability to safely delegate this task to others removes these burdens so that individuals can focus on intrinsically valuable projects.<sup>93</sup>

If we were to pigeonhole financial fiduciaries in the innate status/open-ended contract binarism discussed in Part I, we would thus probably have opted for the latter alternative.<sup>94</sup> But this would lead to error. In fact, we believe that John Langbein erred on this basis when he advocated the substitution of a best interest rule for the traditional sole interest rule. Langbein correctly demonstrated that the sole interest standard and its attendant “no further inquiry” rule give way to a long list of exclusions and categorical exceptions. A transaction that is in the best interest of the beneficiary, but tainted by a benefit bestowed upon the trustee, is deemed acceptable where the trustee obtains the settlor's authorization, the beneficiary's informed consent, or the court's prior approval. Likewise, courts and legislatures have exempted classes of transactions that implicate the trustee's self-interest, granting special prerogatives to institutional trustees in the financial-services industry, such as the authority to deposit trust funds in a financial institution affiliated with the trustee's intrafamilial transactions. Given the existing array of exclusions and exceptions, Langbein argued, a best interest rule that requires the trustee to prove the fairness of a given transaction would make trust law both more transparent and more clearly refined at incentivizing transactions that best promote beneficiaries' interests.<sup>95</sup>

A financial fiduciaries law aimed at serving the welfare interests of beneficiaries properly responds to the parties' welfarist goals and the divergent consequences likely to arise in the different legal regimes given the distinct incentives they generate. Thus, it should indeed favorably carve out, as trust law does, exceptions to the sole interest rule to cover categories of cases in which optimizing beneficiaries' interests requires allowing fiduciaries some incidental benefits.<sup>96</sup> But by dismissing, indeed discarding, the normative

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<sup>93</sup> See Dagan & Hannes, *supra* note 56, at 91, 103-05, 118, 121.

<sup>94</sup> Cf. Stephen A. Smith, *The Deal, Not the Motive: Fiduciary Law Without Loyalty* (in this volume).

<sup>95</sup> See John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929 (2005).

<sup>96</sup> See Dagan & Hannes, *supra* note 56, at 101, 105, 109.

core of financial fiduciary law – its signature principle of loyalty – Langbein’s radical suggestion would have dismantled the cultural and social expectations that typifies this contract type, which helpfully inform the parties’ behavior. As Melanie Leslie argues, stripping fiduciary duties of their moral content might dilute the stigma of money managers’ opportunism. This unfortunate expressive consequence may, in turn, have detrimental implications on the material front as well, given the typical weakness of other means of guarding against abuse by financial fiduciaries (such as exit, monitoring, or market discipline).<sup>97</sup> In contrast, the unique development of the duty of loyalty in trust law subtly, if unintentionally, utilizes the gap between law’s material effects and its expressive function.<sup>98</sup> Because financial fiduciaries law typically targets sophisticated professionals who have access to ample legal advice, most doctrinal details are likely to be translated into incentives and to generate corresponding behavioral outcomes. But doctrinal details – unlike more fundamental legal concepts and institutions – rarely produce broad cultural consequences and, thus, rarely impact broader social norms. Accordingly, in entrenching the conception of the trustee as a person who is morally obligated to serve the beneficiary alone, trust law reinforces a socially popular perception of their role, and one that is instrumental in facilitating the safe delegation of welfarist interests to trustees.<sup>99</sup>

To function as a contract type financial fiduciary law must preserve this character so that the option it offers people remains distinctive and viable. But unlike offices, contract types are understood as a repertoire of *alternative* frameworks for voluntary arrangements available to people in pursuing their projects and ends of choice. This means, as noted in Part II, that contract types function best where they offer people more than one such framework for each major contracting activity. It also means that where no third-party negative externalities are at stake, their rules are by and large not immutable, but rather adjustable to the specific goals of the parties at hand. Both features typify the law of financial fiduciaries.

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<sup>97</sup> See Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 90 (2005); Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 WM. & MARY L. REV. 541, 555-63 (2005). Needless to add that financial fiduciaries law also cannot rely on the intrinsic value of the fiduciary relationship which underlies the legal deference to parents’ judgment.

<sup>98</sup> As in the case of parents, we do not claim that financial fiduciaries law perfectly achieves this task. One important pitfall relates to its traditional treatment of fiduciary pay as exogenous to the duty of loyalty. See Dagan & Hannes, *supra* note 56, at 118-21.

<sup>99</sup> See Dagan & Hannes, *supra* note 56, at 106-07, 109-10. Another benefit to the unique structure of trust law, which might also be at risk under Langbein’s proposed reform, is that conceptualizing deviations from the sole interest rule as exceptions serves as a reminder of the need to scrutinize the justifiability of these exceptions, an inquiry which is particularly important given the prospect of abuse. *Id.*, at 110-11.

Thus, financial fiduciary law is one of two major frameworks our law offers for the task of managing money. When people resort to financial fiduciaries they expect them to follow the investment policy they would have adopted had they had the expertise to manage their own passive investments, hence trust law's prescription of diversification, which mimics what a prudent investor normally does with her own portfolio.<sup>100</sup> Corporate managers, by contrast, are expected to take a very different approach: they are required to stick to a single area of expertise and take on risky ventures consonant with the risk preferences of shareholders. This difference – as well as the availability of alternative means for securing loyalty in the corporate context (notably, the prospect of shareholder exit and shareholders' ability to replace the managerial team) – account for the difference between the relatively harsh duty of care of financial fiduciaries and the much more lenient duty to which corporate managers are subject.<sup>101</sup> So individuals seeking financial services can choose not only the contract type offered by financial fiduciary law, but also another contract type (the one offered by an investment in a corporation).<sup>102</sup> Having a real choice between two distinct frameworks for the same activity is indeed one of the most important features that distinguish a contract type from an office.

Financial fiduciary law, again in line with its characterization as a contract type, by and large rejects immutability. Indeed, it is hard to see why any of its specific rules should be forced against the express preferences of the parties. After all, significant welfare interests of the beneficiaries are on the line, and while it is true that private parties suffer from cognitive-behavioral biases, limited willpower, and many other imperfections that may well justify stickiness, public officials are not necessarily immune from these either or, for that matter, other similar biases. Accordingly, financial fiduciaries law is comprised of a set of sticky default rules wrapped in two standards – the duty of loyalty and the duty of care – which can be similarly derogated, but not completely set aside. These standards serve, as noted, an expressive function, which is especially important in an environment that increasingly requires the carving-out of exceptions and exemptions. Opt outs are allowed, but are generally (although probably not sufficiently) scrutinized in order to guarantee that they reflect people's informed choice, notwithstanding the structural problems of information asymmetry and cognitive biases that typify even this type of

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<sup>100</sup> This rule is relatively new, to be sure, and by now controversial. Addressing this complex controversy is beyond the scope of this Essay. For our purposes it is enough to say that insofar as it is problematic, its difficulties derive from the detrimental impact of the traditional way trustees (and trust advisers) are compensated. See Dagan & Hanes, *supra* note 56, at 113-14.

<sup>101</sup> See Dagan & Hanes, *supra* note 56, at 99, 108, 111-12.

<sup>102</sup> Adam Hofri-Winogradow has recently claimed that “trust law and practice [tends to converge with] the law and practice of corporations.” See Adam Hofri-Winogradow, *Contract, Trust and Corporation: From Contrast to Convergence* (unpublished manuscript). Insofar as this is indeed the trend, we find it – for the reason mentioned in the text – unfortunate.



fiduciary relationships and given the fact that a significant subset of the universe of these money managers' beneficiaries includes weak and unsophisticated individuals.<sup>103</sup>

Finally, financial fiduciaries can delegate the core of their tasks: the judgment as per investments.<sup>104</sup> This possibility – which is now (as per the Uniform Prudent Investor Act) the default rule – is justified because, unlike parents, the task of financial fiduciaries is indeed instrumental, rather than identitarian. (This does not imply, to be sure, that we further endorse that rule's limitation of possible liability of such trustees to cases of negligent selection of the investment advisor. Quite the contrary: in order to ensure that they fully internalize the consequences of an inadequate delegation, these financial fiduciaries should also be liable if the delegation was to an entity or person who lacked the financial resources or insurance that could meet potential liability.<sup>105</sup>)

## V. CONCLUDING REMARKS

The status vs. contract is a core distinction in important sections of our private law, but its current understanding in binaric terms facilitated its use as a foil and thus undermined its conceptual and normative significance. In order to clarify normative debates and facilitate the conceptual contribution of Maine's seminal work, four, rather than merely two, ideal types are needed: innate status, office, contract type, and open-ended contract. Once the distinct meanings of these categories are clarified, we can see that in a liberal society most of our choices are between office and contract type. Focusing the analysis on *this* choice helps clarify its most important considerations, namely: the nature – identitarian or instrumental – of the relationships at hand and the significance and salience of asymmetrical vulnerability, as well as its major doctrinal implications: the question of immutability and the possibility of assignability. In this Essay we used parents and financial fiduciaries as examples for office and contract type, but we believe that other classes of fiduciaries can also be helpfully analyzed in similar terms.<sup>106</sup> We also hope that our new taxonomy will be proved beneficial for other segments of the law which were hitherto subject to the constraining binarism of the conventional status to contract framework.

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<sup>103</sup> See Dagan & Hanes, *supra* note 56, at 115-18.

<sup>104</sup> See UNIFORM PRUDENT INVESTOR ACT §9 (1994).

<sup>105</sup> See Dagan & Hanes, *supra* note 56, at 116 n.137.

<sup>106</sup> A particularly interesting application arises in the context of *ad hoc* fiduciaries. This category of cases seems to come about in contexts of peculiar vulnerabilities or – and sometimes and – idiosyncratic identitarian relationships. In other words, in our taxonomy it stands for what can be termed as “functional offices.”