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# Theorizing Transnational Fiduciary Law

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*This symposium Article theorizes and assesses transnational legal ordering of fiduciary law. Fiduciary law imposes legally enforceable duties on those entrusted with discretionary authority over the interests of others. The fiduciary law of a state may apply to fiduciary relationships having a transnational (or even global) scope. Fiduciary norms themselves are transnational to the extent that they settle as governing legal norms in ways that transcend and permeate state boundaries. Curiously, however, fiduciary legal theory and transnational legal theory have yet to meet. This symposium takes the first steps towards a comprehensive theory of transnational fiduciary law. To assess transnational legal ordering of fiduciary law, one must study the extent of normative settlement across state boundaries. This can be done in terms of a meta concept of fiduciary law involving a transnational body of law, or in terms of the processes that give rise to discrete domains of fiduciary law to address particular problems as understood by relevant actors. Comparative legal analysis is critical for assessing the extent of concordance and divergence in the development and practice of fiduciary law across states. This Article introduces symposium articles that assess transnational fiduciary law as a meta concept; transnational legal ordering of fiduciary law in discrete domains; and comparative fiduciary law. Together, these articles suggest that processes of transnational legal ordering can give rise to transnational fiduciary law and the potential development of discrete transnational legal orders that transcend and permeate nation-states.*

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## INTRODUCTION

Fiduciary law is enjoying a “renaissance”<sup>1</sup> and transnational legal theory has “grown dramatically” since Philip Jessup’s foundational lectures on the subject,<sup>2</sup> but the two must meet. The transnational dimensions of fiduciary law need exploring. Private fiduciary law—the law of agency, trusts, corporations, and other dependent relationships—has transnational dimensions, both in its origins and in its contemporary applications. This symposium brings together scholars working in the common law and civil law traditions to examine private fiduciary duty law’s transnational dimensions. It does so through cross-cutting theory and discrete case studies.

Fiduciary law imposes legally enforceable duties—particularly a duty of loyalty—in the context of particular relationships of trust and vulnerability. Fiduciaries are entrusted with discretionary authority over the interests of others, and fiduciary duties are designed to protect the beneficiaries of those delegations. The fiduciary law of a state may apply to fiduciary relationships having a transnational (or even global) scope. And fiduciary norms themselves are transnational to the extent that they settle as governing legal norms in ways that transcend and permeate state boundaries.

Some transnational legal theory focuses on the functional development of a substantive body of law called “transnational law,” while another approach is to focus on the processes through which legal norms develop and flow across borders through complex processes of transnational legal ordering.<sup>3</sup> These latter processes can give rise to transnational legal orders (TLOs), a concept developed by Terence Halliday and Gregory Shaffer. The studies in this volume address both dimensions of transnational legal theory, but they focus particularly on the processes of transnational legal ordering of fiduciary law.

Halliday and Shaffer define a TLO as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.”<sup>4</sup> A TLO is “legal” insofar as it involves norms (i) that are formalized into recognizable legal texts, whether as hard law or soft law; (ii) that are produced by, or in conjunction with, bodies or networks that transcend the nation-state, whether public or private; and/or (iii) that engage bodies within multiple nation-states.<sup>5</sup> A TLO is “ordered” where it involves the “settlement” of shared norms that involve some regularity of communication, social expectation, and behavior.<sup>6</sup> A TLO is “transnational” where the norms settle across

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1. Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 516 (2015).

2. Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 ANN. REV. L. & SOC. SCI. 231, 232 (2016). See generally PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956).

3. Shaffer, *supra* note 2.

4. Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 3, 5 (Terence C. Halliday & Gregory Shaffer eds., 2015).

5. *Id.* at 12–17.

6. *Id.* at 11.

nation-state boundaries.<sup>7</sup> Thus understood, TLO theory provides tools for research into how transnational legal orders emerge or fail to emerge, or develop or decline and disappear in response to the transnational conceptualization of social problems as relevant actors construe them. It gives special attention to interactions among transnational, national, and local actors, including lawmakers, law implementers, and private parties.<sup>8</sup> TLO theory has yet to engage with fiduciary law as such. This symposium begins to fill the gap.

To assess transnational legal ordering of fiduciary law, one must study the extent of normative settlement across state boundaries. This can be done in terms of a meta concept of fiduciary law involving a transnational body of law, or in terms of the processes that give rise to discrete domains of fiduciary law to address particular problems as understood by relevant actors. Comparative legal analysis is critical for assessing the extent of concordance and divergence in the development and practice of fiduciary law across states. This symposium comprises articles that assess transnational fiduciary law as a meta concept; transnational legal ordering of fiduciary law in discrete domains; and comparative fiduciary law. Part I addresses the development of a general concept of transnational fiduciary law, as set forth in the articles by Tamar Frankel and Thilo Kuntz. Part II examines processes of transnational legal ordering of fiduciary law in two discrete domains—the law of financial intermediaries and of bond markets—as addressed by Jens-Hinrich Binder and Moritz Renner. Part III assesses the comparative dimension necessary to determine the extent of transnational settlement of legal norms in light of different legal traditions, histories, and configurations of interests and perceptions of problems, as covered by Masayuki Tamaruya and Mutsuhiko Yukioka (regarding Japan in comparison with the West), and Jennifer Hill (regarding Australia, the United Kingdom, and the United States within the common law tradition).

#### I. FIDUCIARY LAW AS A TRANSNATIONAL BODY OF LAW OR DISCRETE BODIES OF LAW?

Fiduciary relationships and fiduciary law have a long history. Even so, modern legal scholars had not sought to theorize fiduciary law as a field in its own right. As Tamar Frankel's pathbreaking work in the 1980s noted, although "[t]he various types of fiduciaries have been studied in the context of specific substantive areas of law," "[f]ew scholars have examined fiduciary legal principles separately from these specific contexts."<sup>9</sup> In recent years, scholars from across the globe have revived the field of fiduciary legal theory.<sup>10</sup> Understood broadly, fiduciary law includes not only the familiar fiduciary relationships, but also all "important social and economic interactions of *high* trust and confidence that create an *implicit* dependency and

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7. *Id.* at 20.

8. *See id.* at 38–39.

9. Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 796 (1983).

10. Miller & Gold, *supra* note 1, at 516.

*peculiar* vulnerability of the beneficiary to the fiduciary.”<sup>11</sup> Frankel’s work developed the field of fiduciary law building on the meta concept of the fiduciary. In this symposium, she applies that concept to assess the development of transnational fiduciary law.

Broadly speaking, fiduciary law addresses a generic problem. In law and economics terms, the problem is one of agency costs.<sup>12</sup> In the moralistic terms of many common law decisions, the problem is one of holding a person entrusted with authority over the interests of another to “something stricter than the morals of the marketplace.”<sup>13</sup>

This problem, Frankel argues, has transnational dimensions that fiduciary law scholars would do well to address. For example, theorists of fiduciary law have only begun to grapple with the rise of the “international trust.”<sup>14</sup> Increasingly, trusts have international—or, perhaps more accurately, “transnational”—linkages given the rise of global wealth and wealthy transnational families, and the emergence of offshore jurisdictions to hold and manage that wealth.<sup>15</sup> Rebecca Lee has argued that in the modern era, “the trust’s development has not been dominated by English law, but by various offshore jurisdictions who have achieved notable developments.”<sup>16</sup> States such as the Bahamas and the Cayman Islands have adopted England’s Trustee Act with significant modifications, while other states, such as Belize, have enacted comprehensive trust statutes, each aimed at creating an offshore market for international trust business.<sup>17</sup> Perhaps even more interesting, onshore jurisdictions have begun to adopt some of the offshore modifications, which Lionel Smith has called the “onshoring of the offshore.” Sixteen states in the United States have adopted asset protection trusts, with the first (Alaska) adopting the device from Cook Islands law.<sup>18</sup> These developments invite us to understand trust law by looking to horizontal interactions among onshore and offshore jurisdictions in the development of the international trust.

The contributors to this volume confront the transnational dimensions and possibilities of fiduciary law. The first, Tamar Frankel’s *Transnational Fiduciary Law*, shows that the fiduciary concept has deep historical roots across multiple legal systems. Fiduciary law, Frankel argues, responds to a particular social problem of

11. Leonard I. Rotman, *Fiduciary Law’s “Holy Grail”: Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 B.U. L. REV. 921, 933 (2011).

12. See, e.g., Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 624 (2004) (developing “systematic application of agency theory to the law of donative trusts”).

13. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

14. Rebecca Lee, *The Evolution of the Modern International Trust: Developments and Challenges*, 103 IOWA L. REV. 2069 (2018).

15. Jeffrey A. Schoenblum, *The Rise of the International Trust*, 32 VAND. J. TRANSNAT’L L. 519, 520–23 (1999).

16. Lee, *supra* note 14, at 2076–77.

17. David Brownhill, *The Role of Offshore Jurisdictions in the Development of the International Trust*, 32 VAND. J. TRANSNAT’L L. 953, 953 (1999).

18. Lionel Smith, *Give the People What They Want? The Onshoring of the Offshore*, 103 IOWA L. REV. 2155, 2166–67 (2018).

trust and dependence that all human societies face. Fiduciaries offer specialized expertise and services to beneficiaries, who rely upon the fiduciary's entrusted authority and who expect that fiduciary to apply it loyally and carefully. Fiduciary law encourages the formation of such socially desirable relationships. In one form or another, many societies "have adopted fiduciary rules or similar initiatives" to regulate relationships of trust and dependence.<sup>19</sup>

Frankel provides a meta account of how fiduciary law is emerging as a legal order to regulate transnational relationships of trust and dependence. Surveying the spread of fiduciary law through colonialism, the emergence of global financial centers, and the deepening of economic integration through international trade, she shows that fiduciary law addresses a problem having transnational dimensions. While fiduciary law is often considered a common law system, owing to its association with the common law trust as a device for managing assets, fiduciary principles have emerged in civil law countries as well, including Japan, China, South Korea, and Taiwan. The "transplantation"<sup>20</sup> of modern fiduciary law into civil law countries has not been seamless, however. Frankel therefore stresses the need for transnational institutions and principles to move towards a more unified approach to the problem of trust and dependence, while acknowledging that complete concordance across national legal systems is neither likely nor desirable. Such institutions may include self-regulatory bodies such as the Mitsubishi UFJ Trust and Banking Corporation (MUTB), which, Frankel finds, "has been following a unique approach to promote trust by serving its diverse client portfolio with a heightened standard of care and loyalty." Considering the MUTB as an example, Frankel acknowledges that local culture and customs play a central role in the operation of fiduciary norms of loyalty and care, which complicates the prospects for the emergence of transnational fiduciary law.

Taking up the challenge posed by Frankel, several of the symposium authors grapple with whether there is transnational normative settlement around fiduciary norms. Engaging with the theory of transnational legal orders (TLOs) developed by Halliday and Shaffer, these authors ask whether there is such a thing as a transversal understanding or practice of transnational fiduciary law or rather if it should best be assessed in discrete domains involving the development of particularized TLOs to address particular issues. Thilo Kuntz's *Transnational Fiduciary Law: Space and Elements* explores the challenge of theorizing fiduciary law and transnational law together when both concepts can prove "elusive."<sup>21</sup> Like Frankel, Kuntz sees the problem that fiduciary law seeks to solve as one that cuts across common law and civil law traditions, whether it be the English trust or the contract-based *Treuhänderverhältnisse* in German law. Thus, from a functional perspective of

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19. Tamar Frankel, *Transnational Fiduciary Law*, 5 U.C. IRVINE J. INT'L TRANSNAT'L & COMP. L. (forthcoming 2020).

20. *Id.* (manuscript at 9).

21. Thilo Kuntz, *Transnational Fiduciary Law: Spaces and Elements*, 5 U.C. IRVINE J. INT'L TRANSNAT'L & COMP. L. (forthcoming 2020) (manuscript at 1, 3) (quoting Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 79 DUKE L.J. 879 (1988)).

comparative law, there is a common “point of entry for transnational fiduciary law.”<sup>22</sup> The more difficult question, Kuntz argues, is whether a transnational body of fiduciary law is emerging as a result of domestic legal responses to that common problem of trust or through transnational processes.

To answer that question, Kuntz looks to the horizontal and vertical dimensions of transnational legal ordering. In his account, transnational fiduciary law can emerge horizontally from entanglement among national legal systems. For example, the emergence of trust law in Japan, South Korea, Taiwan, and China resulted from close ties among their legal systems. Methodologically, to trace the development of fiduciary law through these transnational ties requires an historical perspective and orientation to legal processes that conventional comparative law tends to lack. Theoretically, this example challenges a sharp distinction between the *national* and *transnational*: “If several nation-states generate, say, trust law, and this process of norm production is interdependent, because legislators and courts of each of the states look at what the other is doing, does this not also constitute *transnational* law?”<sup>23</sup> The mutual entanglement of legal systems, Kuntz adds, also challenges conceptions of what fiduciary law is and how it works by “producing a transnational version of fiduciary law” with “different shades of loyalty” when compared with the common law conception that is central to theorizing about fiduciary law.<sup>24</sup>

From the perspective of TLO theory, the vertical dimension of transnational legal ordering should be considered along with this horizontal entanglement of legal systems. Kuntz points to efforts to integrate environmental, social, and governance (ESG) issues into corporate decision-making as an example of vertical ordering of transnational fiduciary law.<sup>25</sup> Such soft law norms, which have been developed by international actors such as the United Nations and the OECD, have emerged as a body of transnational fiduciary law. The UN Environment Program’s 2015 report “Fiduciary Duty for the 21st Century,” the 2011 UN Guiding Principles on Business and Human Rights, and the G20/OECD 2015 principles on corporate governance constitute a body of soft law that “has to be reckoned with” at the national and local levels.<sup>26</sup> For example, the *loi PACTE*, a body of reforms to article 1833 of France’s *Code Civil* that establishes obligations to consider environmental and social issues in corporate decision-making, emerged from reform proposals that looked in part to the UN frameworks for ESG. Non-state actors, including some of the world’s largest investment firms, have also incorporated these transnational principles within their internal organizational working documents and practices, applying them at the local level.

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22. *Id.* (manuscript at 4).

23. *Id.* (manuscript at 8).

24. *Id.* (manuscript at 6, 31).

25. See Cynthia A. Williams, *The Global Reporting Initiative, Transnational Corporate Accountability, and Global Regulatory Counter-Currents*, 1 U.C. IRVINE J. INT’L TRANSNAT’L & COMP. L. 67, 67 (2016), for another account of ESG from the perspective of TLO theory.

26. Kuntz, *supra* note 21 (manuscript at 24).

That is not to say, however, that there is a unified body of transnational fiduciary law. To the contrary, Kuntz argues that several different TLOs involving fiduciary norms are emerging from the horizontal entanglement of national lawmakers and the vertical interactions among transnational, national, and local actors. Case studies of transnational legal ordering of fiduciary norms in different domains are thus needed.

## II. CASE STUDIES OF TRANSNATIONAL LEGAL ORDERING OF FIDUCIARY LAW IN DISCRETE DOMAINS

To assess the development of particularized TLOs based on fiduciary principles, detailed case studies are critical. Jens-Hinrich Binder examines the transnational development of legal requirements for financial intermediaries in his article *Transnational Fiduciary Law in Financial Intermediation: Are We There Yet? A Case Study in the Emergence of Transnational Legal Ordering*.<sup>27</sup> Like Kuntz, Binder begins by noting that fiduciary norms (and their functional equivalents) reflect longstanding responses to common problems across common law and civil law jurisdictions. Binder seeks to determine whether the transnational development of the norms governing the relationship between financial intermediaries and their customers represents an emerging TLO.

Financial intermediaries provide financial services ranging from holding assets on behalf of clients, transacting on their behalf, and/or providing investment or loan advice. While not all financial intermediaries are universally recognized as fiduciaries by jurists or commentators, their relationships to their customers involve aspects common to all fiduciary relationships, including trust, dependency, and vulnerability. In recent years, there has been a convergence across multiple legal systems' treatment of financial intermediaries, one in which fiduciary duties are "increasingly . . . accepted as an analytical framework."<sup>28</sup>

Has this convergence led to the emergence of a transnational legal order? On the one hand, Binder argues that we must distinguish between ex ante regulation of financial intermediaries by administrative agencies and ex post adjudication of "fiduciary duties proper" by courts.<sup>29</sup> With this distinction in mind, he shows that the convergence across regulatory regimes is not matched by a convergence in private fiduciary law. On the other hand, a "common theme" is developing across jurisdictions involving interactions and tensions among regulatory requirements and private law. In this sense, "fiduciary activities by financial intermediaries are the object of an emerging transnational legal order."<sup>30</sup>

To develop this argument, Binder focuses upon standard setting by the International Organization of Securities Commissioners (IOSCO) and regulatory

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27. Jens-Hinrich Binder, *Transnational Fiduciary Law in Financial Intermediation: Are We There Yet? A Case Study in the Emergence of Transnational Legal Ordering*, 5 U.C. IRVINE J. INT'L TRANSNAT'L & COMP. L. (forthcoming 2020).

28. *Id.* (manuscript at 3).

29. *Id.* (manuscript at 4).

30. *Id.* (manuscript at 5).



requirements developed by European lawmakers. The IOSCO principles, first published in the 1990s, reflected a convergence across legal systems around certain norms to order financial intermediaries' provision of services. These principles, in turn, influenced European lawmaking under the European Economic Community in 1993, and under the European Union (EU) in 2004 and 2014 through the Financial Instruments Directives adopted by the European Parliament. Based on this case study, Binder develops the concept of "functional fiduciary law," that is, a body of regulatory law that has fiduciary roots and fiduciary characteristics.<sup>31</sup> For example, the "conduct-of-business requirements in the IOSCO principles, with their focus on establishing 'functional fiduciary law' (a duty of care and skill in the interest of customers and on preventing or, at least, mitigating potential conflicts of interest . . .), bears parallels with . . . traditional" fiduciary principles from private law.<sup>32</sup> The concept of "functional fiduciary law" challenges the private law focus of much fiduciary legal theory by incorporating public regulatory requirements for the conduct of business into the analysis. It sheds light on the challenge of reconciling public regulation with private fiduciary law, a challenge that, Binder argues, cuts across European jurisdictions in light of EU conduct-of-business norms. In light of this challenge, and the continuing divergence of private law across jurisdictions, Binder concludes that there is an emerging process of transnational legal ordering, but so far no settled transnational legal order imposing fiduciary norms on financial intermediaries.

Moritz Renner, in his article *Transnational Fiduciary Law in Bond Markets: A Case Study*, shows how private ordering and soft law can give rise to a transnational legal order for bond markets.<sup>33</sup> Renner focuses on net short debt investing, a strategy where bondholders take a net short position in credit default swaps to profit from a bond-issuer's default. Taking the recent *Windstream v. Aurelius* case from the United States as its starting point,<sup>34</sup> Renner's article shows that net short debt investing gives rise to multiple relationships involving potential vulnerability: that between bondholders and issuers, that among bondholders, and that between the bondholder and the swap counterparty. Although these three types of relationships may be treated differently in common law versus civil law jurisdictions, it is unlikely that fiduciary duties would apply to any of them under current law. The result, Renner argues, is that market participants are especially vulnerable and without a private law remedy against a practice that violates their reasonable expectations. The normative problem—and a potential solution founded upon transnational fiduciary law—becomes apparent when one considers the transnational dimensions of net short debt investing.

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31. *Id.* (manuscript at 13).

32. *Id.* (manuscript at 14).

33. Moritz Renner, *Transnational Fiduciary Law in Bond Markets: A Case Study*, 5 U.C. IRVINE J. INT'L TRANSNAT'L & COMP. L. (forthcoming 2020).

34. U.S. Bank Nat'l Ass'n v. Windstream Servs., LLC, No. 17-CV-7857 (JMF), 2019 WL 948120 (S.D.N.Y. Feb. 15, 2019).

Drawing upon TLO theory and fiduciary legal theory, Renner argues that fiduciary law has the potential to support social norms and the reasonable expectations of participants in bond markets. He shows that global bond markets can be understood as a TLO that has emerged from private ordering, including the standardized documentation developed by the Securities Industry and Financial and Markets Association (SIFMA) and the International Capital Market Association. Bond-issuers typically rely upon these standardized provisions, which leave the contracting parties free to create a fiduciary relationship by agreement, but which do not necessarily mention fiduciary duties. Even so, bond market participants generally expect each other to follow norms not specified by hard law instruments that are necessary for market functioning. The *Windstream* case was unusual insofar as Aurelius, a hedge fund, accelerated the bond in response to a technical default, leading to the bankruptcy of Windstream. Such an action is rare in global bond markets. Market participants' expectations about bondholders' conduct can, Renner argues, be understood in fiduciary terms. Drawing upon Deborah DeMott and Paul Finn's work on "justifiable expectations of loyalty" in fiduciary relationships,<sup>35</sup> Renner argues that Aurelius had a fiduciary duty not to accelerate the bond and cause Windstream's collapse in light of the justifiable expectations of the parties in transnational bond markets. Parties, as they seem to have done in *Windstream*, may opt out of such fiduciary duty by agreement. But where parties have not done so, Renner argues that something like a fiduciary relationship exists between bond-issuers and bondholders given market participants' informal expectations about cooperation and good faith.

Renner's article thus raises questions about private ordering common to both transnational legal theory and fiduciary legal theory. Transnational legal scholars, for example, have explored how private actors may develop functional substitutes for state law. And fiduciary law scholars have contrasted state law with private ordering as mechanisms for enforcing fiduciary norms of behavior. Renner invites us to connect these bodies of work by seeing transnational fiduciary law as extending beyond formal law to customary practices that support justifiable expectations of conduct in relationships of trust and special vulnerability to self-serving behavior.

Together, these articles suggest that processes of transnational legal ordering can give rise to transnational fiduciary law and the potential development of discrete transnational legal orders that transcend and permeate nation-states. Some TLOs may be settled, while others are only beginning to emerge. Some may involve hard law, while others involve soft law, business custom, and social expectations. Much work remains to be done on the horizontal and vertical dimensions of transnational legal ordering of fiduciary law, giving rise to varying degrees of normative settlement regarding transnational businesses' fiduciary duties.

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35. See Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925 (2006); Paul Finn, *Contract and the Fiduciary Principle*, 12 U. NEW S. WALES L.J. 76 (1989).

## III. HOW TO COMPARE FIDUCIARY LAW ACROSS LEGAL SYSTEMS?

To understand the extent that legal norms settle across national jurisdictions, comparative law work is required in terms of formal law and practice. Comparative law scholars working within particular fields of fiduciary law have developed important insights into similarities and distinctions among the fiduciary law of different states. There is, for instance, a wealth of studies of comparative corporate law. But much of this work takes a static perspective, one that tells us little about interactions across jurisdictions and the transnational development of fiduciary law in terms of actual practice.

One line of inquiry of transnational fiduciary legal theory concerns what Masayuki Tamaruya has called “the global evolution of the fiduciary norm.”<sup>36</sup> With his co-author Mutushiko Yukioka, he explores this process of transnational legal ordering in *The Japanese Law of Fiduciaries from Comparative and Transnational Perspectives*.<sup>37</sup> Tamaruya and Yukioka show how the introduction of Western conceptions of loyalty interacted in complex ways with longstanding status-based conceptions of loyalty to family elders and to authority within Japan. Though these status-based conceptions have been largely absent from modern legislation, they have persisted as important norms that order behavior, including the relationship between employees and firms. As Tamaruya and Yukioka explain, Japanese styles of corporate management and the Japanese concept of the corporation as a community of employees cannot be understood simply by applying the shareholder-primacy account of corporate law used in the United States. Rather, these norms, modes, and behaviors stand in tension with hard law reforms and may be understood in part by reference to traditional, status-based conceptions of loyalty.

Thus, the development of Japanese fiduciary law has been a dynamic process in which hard and soft law institutions and norms interact. Tamaruya and Yukioka caution that the story of Japanese fiduciary law is not simply one of the “percolation of local morals into legal norms.”<sup>38</sup> Rather, in their account, a gradual erosion of traditional, status-based norms of loyalty created a gap that modern fiduciary law, much of it drawn from transnational interactions and sources, eventually filled through hard law. In the corporate law context, for example, “as the non-statutory soft-law norms published and updated by quasi-public bodies gradually become part of market practices, they receive careful approval through case law.”<sup>39</sup> Over time, this body of Japanese fiduciary law has “increasingly become reflective” of corporate governance norms from Western legal traditions.<sup>40</sup> However, as Tamaruya and Yukioka’s detailed historical account demonstrates, this process has

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36. Masayuki Tamaruya, *Japanese Law and the Global Diffusion of Trust and Fiduciary Law*, 103 IOWA L. REV. 2229, 2230 (2018).

37. Masayuki Tamaruya & Mutushiko Yukioka, *The Japanese Law of Fiduciaries from Comparative and Transnational Perspectives*, 5 U.C. IRVINE J. INT’L TRANSNAT’L & COMP. L. (forthcoming 2020).

38. *Id.* (manuscript at 28).

39. *Id.* (manuscript at 19).

40. *Id.*

“generated tensions and a heated reaction in Japan.”<sup>41</sup> In Japan, the development and use of soft law and optional regulation mediated these tensions for a time, while various domestic actors worked through lawmaking institutions, such as courts, to “harden the regulations.”<sup>42</sup> The development of Japanese fiduciary law—and Japan’s ultimate movement towards “the American duty of loyalty” —has been a complex process involving the transnational, national, and local planes of legal norm development and practice.

Thus told, the story of Japanese fiduciary law reflects the idea of transnational legal ordering as a process. Halliday and Shaffer argue that the development of transnational legal orders is dynamic and recursive involving interaction among international, transnational, national, and local actors.<sup>43</sup> Tamaruya and Yukioka’s account shows how this may be borne out in the global evolution of fiduciary norms. Their study raises important questions for fiduciary legal theory, including the complications that arise when the concept of fiduciary loyalty is implemented in a particular field. These complications include not only ones of legal infrastructure (such as how will the fiduciary norms be enforced), but also of the economic system and normative environment.

Jennifer Hill also combines comparative corporate law with a dynamic perspective in *Shifting Contours of Directors’ Fiduciary Duties and Norms in Comparative Corporate Governance*. She first shows that the broad similarities in corporate law in Australia, the United Kingdom, and the United States can mask important differences that have significant consequences for the accountability of directors and officers in practice.<sup>44</sup> These differences, Hill argues, undermine the “law matters” hypothesis in “legal origins” theory (promulgated by La Porta and other economists), which holds that legal protections for investors vary systematically between common law and civil law countries and that differences among these protections are “a strong predictor of financial development.”<sup>45</sup> In particular, Hill contends, this hypothesis “overstated the similarities within the common law world itself.”<sup>46</sup> For example, the American concept of “entire fairness,” which permits judicial invocation of “fair dealing” and “fair price,”<sup>47</sup> is not recognized in UK or Australian law. Nor are the safe harbors shielding directors from liability the same across these three common law jurisdictions.

Hill examines differences in the dynamic interaction between fiduciary law and other modes of regulating corporate governance in these jurisdictions. Much like Binder’s conception of “functional fiduciary law,” which examines the interaction

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41. *Id.* (manuscript at 10).

42. *Id.* (manuscript at 29).

43. Halliday & Shaffer, *supra* note 4, at 38–39.

44. Jennifer G. Hill, *Shifting Contours of Directors’ Fiduciary Duties and Norms in Comparative Corporate Governance*, 5 U.C. IRVINE J. INT’L TRANSNAT’L & COMP. L. (forthcoming 2020).

45. Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LT. 285, 286 (2008).

46. Hill, *supra* note 44 (manuscript at 9).

47. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

of public regulatory law with traditional fiduciary law, Hill's application of Ronald Gilson's "braided framework" metaphor examines the interaction between multiple forms of law as they bear upon the behavior of fiduciaries.<sup>48</sup> She argues that fiduciary law as such has shifted over time from serving as the primary mechanism for ordering corporate management to being one mechanism among several. She shows how the rise of corporate governance codes "epitomize" this shift.<sup>49</sup> These codes may supplement fiduciary law, but they may also be in tension with a director's common law fiduciary duties.

Differences among the corporate governance codes of Australia, the United Kingdom, and the United States reflect different origins and different alignments of domestic legal and business actors. The United States Corporate Governance Principles are a voluntary and self-regulatory framework developed by an association of large US-based asset owners and managers, including the Big Three of BlackRock, Vanguard, and State Street. These principles adopt the shareholder-primacy model. By contrast, the UK code is administered by a public regulator, while the Australian code was developed by a stock exchange. Both the UK and Australian codes, unlike the American code, adopt a more "public conception of the corporation" and corporate managers' obligations towards stakeholders and society.<sup>50</sup>

This dynamic comparison of Australian, UK, and US law illustrates the importance of theorizing transnational fiduciary law in terms of the actors producing, contesting, and implementing it. As Halliday and Shaffer theorize, transnational legal orders rise and fall through "the production and implementation" of legal norms among actors at the transnational, national, and local levels.<sup>51</sup> Actors may struggle over the diagnosis of the problem to be solved—in the corporate governance context, for instance, is it inattention to the interests of shareholders or disregard for the interests of the public? They may exploit contradictions and indeterminacies within the law. They may contest the existence or legitimacy of a transnational legal order.<sup>52</sup> Through these recursive processes, a transnational legal order may emerge through normative settlement and institutionalization, or it may not; it may develop, or it may decline and fall.

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48. Hill, *supra* note 44 (manuscript at 2) (quoting Ronald J. Gilson, *From Corporate Law to Corporate Governance*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 3, 6 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018)).

49. *Id.* (manuscript at 16).

50. *Id.* (manuscript at 20).

51. Halliday & Shaffer, *supra* note 4, at 38.

52. *See id.* at 38–40.

## CONCLUSION

The articles in this symposium illustrate the dynamics of transnational legal ordering of fiduciary law and the importance of detailed case studies regarding the role and interaction of different actors, interests, and legal traditions. Much work remains to be done to link transnational legal theory with fiduciary legal theory. The contributions to this symposium show the way. They illustrate how fiduciary law has developed in particular areas through interactions among transnational, national, and local actors. “Law can no longer be viewed through a purely national lens”<sup>53</sup>—and that includes fiduciary law.

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53. Halliday & Shaffer, *supra* note 4, at 63.