Must Salmon Love Meinhard?

Agape and Partnership Fiduciary Duties

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Abstract: Jeffrie Murphy has noted that "John Rawls claimed that justice is the first virtue of social institutions," but Murphy then went on to ask "what if we considered agape to be the first virtue? What would law then be like?" When I was asked to contribute a paper on business organization law to a conference organized around Murphy's question, the conference call immediately brought to mind then-Judge Benjamin Cardozo's opinion in *Meinhard v. Salmon*, which famously held that a managing partner "put himself in a position in which thought of self was to be renounced, however hard the abnegation." The parallels between Cardozo's framing of the partner's duties and a standard definition of *agape,* which holds that it is a "self-renouncing love," are obvious and striking.

What then would partnership fiduciary duty law be like if it were organized around the value of agape? This essay concludes that partners need not love one another, at least as a matter of legal obligation. *Agape* is simultaneously too indeterminate and too demanding a standard to be suitable for business relationships. On the other hand, however, I conclude that partners ought to love one another. An analysis of Cardozo's rhetoric and the intent behind it suggests that *agape* has great instrumental value. Partners who love one another can trust one another. In turn, partners who trust one another will expend considerably less time and effort—and thus incur much lower costs—monitoring one another. *Agape* thus should not be the law, but the law should promote *agape* as best practice.

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In a 2004 lecture, Jeffrie Murphy noted that "John Rawls claimed that justice is the first virtue of social institutions," but Murphy went on to ask "what if we considered *agape* to be the first virtue? What would law then be like?"[1] When I was asked to contribute a paper on business organization law to a conference organized around Murphy's question, the conference call immediately brought to mind then-Judge Benjamin Cardozo's opinion in *Meinhard v. Salmon*,[2] which famously held that a managing partner "put himself in a position in which thought of self was to be renounced, however hard the abnegation."[3] The parallels between Cardozo's framing of the partner's duties and, to cite but one example, Kierkegaard's formulation of *agape*, which avers that "[l]ove of one's neighbor … is self-renouncing love,"[4] are obvious and striking.

What then would partnership fiduciary duty law be like if it were organized around the value of *agape*?[5] Part I of this essay briefly outlines Cardozo's opinion, with an emphasis on the rhetorical framing he gave fiduciary duties. Part II summarizes the nature and requirements of *agape*. Part III begins by speculating whether Cardozo might have intended to equate fiduciary duties to *agapic* love. After tentatively concluding that Cardozo did not intend to do so, at least on anything more than an aspirational level, Part III goes on to explain that subsequent legal developments have implicitly rejected *agape* as the relevant legal standard. Thought of self, in fact, need not be renounced. Part IV argues that the law should not attempt to require partners to love one another—in the *agapic* sense of the word—but proposes that the law uphold *agapic* love as an aspirational ideal.

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[1] Jeffrie G. Murphy, *Law Like Love*, 55 SYRACUSE L. REV. 15, 18 (2004).

[2] 164 N.E. 545 (N.Y. 1928).

[3] Id. at 548.

[4] SØOREN KIERKEGAARD, WORKS OF LOVE 67 (Howard Hong & Edna Hong trans. 1962).

[5] This question is a variant on the motivating question for the Law and Love Conference, to be held at Pepperdine University School of Law, on February 7-8, 2014, at which this article will be presented. As propounded by the convokers, the question read "What would law be like if we organized it around the value of Christian love [*agape*]? What would be the implications for the substance and the practice of law?"

I. The Opinion

Meinhard and Salmon formed a joint venture to lease an office building. Shortly before expiration of the lease, Salmon began secret negotiations with the lessor, as a result of which Salmon's real estate corporation was able to lease the building and several adjoining lots. Salmon planned to eventually replace the existing building with a new and considerably more profitable facility. Meinhard did not learn of Salmon's new arrangement until after the new lease was finalized. At that time he demanded that the new lease be held in trust for the joint venture. Salmon refused and the lawsuit ensued.[6]

In affirming the lower court's holding in favor of Meinhard, Cardozo cloaked the fiduciary principle in rhetorical finery:

> Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.[7]

Somewhat later in the opinion, Cardozo observed that Salmon "was much more than a coadventurer. He was a managing coadventurer."[8] Salmon was "in control" of the enterprise "with exclusive powers of direction."[9] In that capacity, Salmon owed Meinhard an even higher duty than the one already articulated for equal partners. "Salmon had put himself in a position in which thought of self was to be renounced, however hard the abnegation."[10]

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[6] For interesting analyses of the principal case, both of which include details on the personal relationship between Meinhard and Salmon, see Geoffrey P. Miller, *A Glimpse of Society via a Case and Cardozo:* Meinhard v. Salmon, in THE ICONIC CASES IN CORPORATE LAW 12 (Jonathan R. Macey ed., 2008); Robert B. Thompson, *The Story of* Meinhard v. Salmon: *Fiduciary Duty's Punctilio*, in CORPORATE LAW STORIES 105 (J. Mark Ramseyer ed., 2009).

[7] *Meinhard*, 164 N.E. at 546.

[8] *Id.* at 548.

[9] *Id.*

[10] *Id.*

II. *Agape*

An oft-cited teaching by Christ on *agape* is found in Luke 10:25-37, which recounts a discussion between Jesus and a lawyer about how one gains eternal life. Jesus observed that the lawyer already knew the answer to his own question, because the basic principle of Jewish law is that "thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy strength, and with all thy mind; and thy neighbor as thyself."[11] As Martin Luther King Jr. explained, *agape* thus "is a 'disinterested love' in the sense that 'it is a love in which the individual seeks not his own good, but the good of his neighbor' …"[12]

Agape is often described in ways that strikingly resemble Cardozo's description of a fiduciary's duties. *Agape*, for example, is said to be the "'perfect love,' which seeks the good of the beloved beyond thought of self."[13] It is "a devotion that gives whatever is best for others without thought of self-gain."[14] Agape thus "is the willingness to let the self be destroyed rather than that the other cease to be; it is the commitment of the self by self-binding will to make the other great."[15] All of which sounds remarkably like Cardozo's articulation of the "punctilio principle," as being "a loyalty that pricks one's own possible rationalizations of self-interest with the sharp point of selflessness."[16]

Another parallel is found in Cardozo's observation that Salmon had appropriated the opportunity for "himself in secrecy and silence. … The trouble about his conduct is that he excluded his co-adventurer from any chance to compete, from any chance to enjoy the opportunity for benefit that had come to him alone by virtue of his agency."[17] *Agape* likewise demands that the lover be proactive. The *agapic* lover "must account for the neighbor's needs and be directed toward the neighbor's well-being," even where the neighbor does not recognize that those needs exist.[18]

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[11] Murphy, *supra* note 1, at 20. We are thus concerned here with the form of *agapic* love sometimes referred to as "neighbor-love," rather than man's love for God or God's love for man. *See, e.g.,* GENE OUTKA, *AGAPE*: AN ETHICAL ANALYSIS 8 (1972) (noting the distinction between "neighbor-love" and "love for God").

[12] ROBERT K. VISCHER, MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE: LESSONS IN LOVE AND JUSTICE 84 (2013) (quoting Dr. King).

[13] Michael J. Dodds, Thomas Aquinas, Human Suffering, and the Unchanging God of Love, 52 Theological Stud. 330, 332 (1991).

[14] JAMES P. GILLIS, LOVE: FULFILLING THE ULTIMATE QUEST 11 (2007). In interpersonal relationships, *agapic* love thus requires a sacrificial commitment to the best interests of the other, without thought of the cost to oneself. *Id*. at 12-13.

[15] OUTKA, *supra* note 11, at 10 (quoting Richard Neibuhr).

[16] Thompson, *supra* note 6 at 124.

[17] *Meinhard*, 164 N.E. at 547.

[18] VISCHER, *supra* note 12, at 89.

A final connection between Cardozo's framing and the value of *agape* is suggested by the contrast theologians and philosophers draw between *agape* and *phileo*. "*Agape* is the term used in the Bible to denote sacrificial love, in contrast to *phileo*, which focuses more on the lover's feelings for another, rather than on how the lover can meet the other's needs."[19] Accordingly, "'when we love on the *agape* level we love men not because we like them, not because their attitudes and ways appeal to us, but because God loves them.'"[20] We know that Meinhard and Salmon once were close friends, who fell out over a combination of business disputes and petty personal squabbles over such trivia as travel plans.[21] *Meinhard*'s backstory thus illustrates why *phileo* is fundamentally flawed from the standpoint of *agape*. Friendship is self-regarding, not self-sacrificial, because the friend values the other party solely as a form of private enjoyment.[22] If *agape* begins when friendship ceases, Salmon's failing was that once his friendship with Meinhard broke down he failed to allow *agapic* love to fill the gap and thus Salmon ceased to have regard for Meinhard. Put another way, because Salmon lacked *agapic* love for Meinhard, once their friendship failed, Salmon inevitably put his self-interest ahead of Meinhard's interests.

III. Did Cardozo Intend the Analogy?

Geoffrey Miller observes that *Meinhard* is replete with religious imagery:

> Cardozo remarks that Salmon had "put himself in a position in which thought of self was to be renounced, however hard the abnegation." The "rule of undivided loyalty" imposed in such a situation is "relentless and supreme." Conduct short of that standard, Cardozo observes, would not receive from equity a "healing benediction." The image is one of religion, transcendence and mysticism. The connotation is that when it comes to dealings with co-partners, a person must behave with monastic purity, placing always the other's interests above his own.[23]

Oddly, however, the imagery is predominately Christian. Cardozo was a Sephardic Jew who, after his bar mitzvah at age 13, remained a member of Congregation Shearith Israel but ceased regular religious observation.[24] In later life, Cardozo referred to himself as a "heathen"[25] and, at "a commencement address delivered at the Jewish Institute of Religion on his 61st birthday, Cardozo acknowledged that he was unable to claim that the

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[19] *Id.* at 83.

[20] *Id.* at 84 (quoting Martin Luther King Jr.).

[21] Thompson, *supra* note 6, at 110-12.

[22] *See* OUTKA, *supra* note 11, at 209 (discussing Karl Barth's treatment of the difference between friendship and agape).

[23] Miller, *supra* note 6, at 24.

[24] ANDREW L. KAUFMAN, CARDOZO 24-25 (1998).

[25] *Id.* at 24.

beliefs of the students there assembled were 'wholly [his]' or 'that the devastating years have not obliterated youthful faiths.'"[26]

Given that "Cardozo was only nominally Jewish, attended synagogue irregularly, and was careful not to let the religion of his birth be seen as influencing his judicial decisions,"[27] the use of any religious imagery in *Meinhard* is quite surprising. The use of Christian imagery simply compounds the puzzle. One is therefore tempted to dismiss the analogy between Cardozo's framing of fiduciary duty and *agape* as mere accident.

It is at least plausible, however, that Cardozo encountered the concept of *agape* in his early life. Cardozo's college studies included philosophy, for example,[28] and he had received sufficient religious training to celebrate his bar mitzvah.[29] In addition, as Judge Posner notes, many of Cardozo's opinions reflect "the moralistic streak in Cardozo," among which Posner includes *Meinhard*.[30] Cardozo's choice of religious imagery thus may not have been mere coincidence.

If the analogy were deliberate, however, Cardozo clearly did not intend to press it to its logical conclusion. Despite Cardozo's rhetorical flourishes, the articulated legal rule—to the extent one can be extracted from the vague language—seems limited to a mere duty to give the other partner notice of the opportunity. Cardozo explained that "only through disclosure could opportunity be equalized."[31] Likewise, Cardozo opined that Salmon had a "duty of disclosure, since only through disclosure could opportunity be equalized."[32] Cardozo also observed that, without disclosure, Salmon "might steal a march on his comrade under cover of the darkness, and then hold the captured ground."[33]

To be sure, Cardozo was careful not to foreclose an obligation to do more than simply provide notice, as when he opined that "we do not need to say" whether liability would still ensue if Salmon had given notice. Likewise, Cardozo carefully circumscribed the holding by noting Salmon had a duty, "if nothing more," to disclose the opportunity.[34]

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[26] Judith S. Kaye, *Benjamin Nathan Cardozo (1870-1938),* 6 JUD. NOTICE 3, 5 (2009).

[27] Brady Coleman, *Lord Denning & Justice Cardozo: The Judge as Poet-Philosopher,* 32 RUTGERS L.J. 485, 487 n.6 (2001).

[28] RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 2 (1990).

[29] KAUFMAN, *supra* note 24, at 24.

[30] POSNER, *supra* note 28, at 104

[31] *Meinhard*, 164 N.E. at 547.

[32] *Id.*

[33] *Id.*

[34] *Id.*

But even with those qualifications nothing in the substance of what Cardozo required of Salmon rises to the level of self-sacrifice required by *agapic* love.[35]

If Cardozo did not intend agapic love to be the legal standard to which partners are held, why did he opt for such "florid," albeit "memorable words"?[36] Cardozo's rhetoric had three useful functions. First, it was a teaching tool, by which Cardozo made "the difference between an arm's length relationship and a fiduciary relationship vivid, unforgettable."[37] Edward Rock observes of Delaware corporate law that:

> Contrasting narratives of saints and sinners, parables, inspirational and cautionary tales, are all classic means of establishing standards, of shaping conduct. … In the long and rich narratives that form a very large part of every opinion, the Delaware courts can best be understood as providing us with contrasting tales of good and bad behavior, and as providing, by means of these illustrative accounts, fundamental pieces of the job descriptions of corporate directors, managers, and counsel. Fortunately, the Delaware courts usually tell the stories well: in reading and teaching the cases, I can almost always remember the stories, even when I have difficulty distilling the principles of law.[38]

I agree that Delaware courts are the leading modern exponents of this approach to adjudication, but surely no one has ever done it better than Cardozo did in *Meinhard*.

Second, when the law is set out as a bright-line rule, people know exactly what they can get away with, which inevitably tempts them to go right up to the line. Cardozo's rhetoric obscures the actual parameters of the law, depriving market actors of the guidance that a bright-line rule would offer. By fudging the line, and by imposing severe consequences on those who skate across it, Cardozo likely sought to deter cheating.

In any case, even if Cardozo intended that the black letter law of the case match his highflying rhetoric, partnership law subsequently has chosen to impose a less demanding standard than that of *agapic* love. The UPA (1997), for example, provides that while the partnership agreement may not "eliminate the duty of loyalty," the "agreement may

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[35] The opinion's rhetorical demand for *agape*-like self-sacrifice is further undercut by Cardozo's admission that, if the lessor had offered Salmon "a proposition to lease a building at a location far removed, [Salmon] might have held for himself the privilege thus acquired, or so we shall assume." *Meinhard*, 164 N.E. at 548. In contrast, *agape* is not limited by either physical or emotional distance from its object. When the lawyer of Luke Chapter 10 asked Jesus, "who is my neighbor," Christ responded by recounting the parable of the Good Samaritan. *See* Murphy, *supra* note 1, at 18 (recounting the Biblical record of the encounter). As Karl Barth argued, *agape* therefore must reach out "toward neighbors that are distant, as well as those we find nearby." David Clough, *Love*, in THE WESTMINSTER HANDBOOK TO KARL BARTH 144, 145 (2013).

[36] POSNER, *supra* note 28, at 105.

[37] *Id.*

[38] Edward B. Rock, *Preaching to Managers*, 17 J. CORP. L. 605, 610-11 (1992).

identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable."[39] It further provides that a transaction otherwise violating the duty of loyalty may authorized by a vote of the partners.[40] The clearest departure from Carodozo's rhetorical framing of the fiduciary duty comes in UPA (1997) § 404(e), which provides expressly that "[a] partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner's conduct furthers the partner's own interest."[41] In the commentary to that section, moreover, the drafters reject Cardozo's analogy between the duties of a partner and those of a fiduciary:

> A partner as such is not a trustee and is not held to the same standards as a trustee. Subsection (e) makes clear that a partner's conduct is not deemed to be improper merely because it serves the partner's own individual interest. … It underscores the partner's rights as an owner and principal in the enterprise, which must always be balanced against his duties and obligations as an agent and fiduciary. For example, a partner who, with consent, owns a shopping center may, under subsection (e), legitimately vote against a proposal by the partnership to open a competing shopping center.[42]

So much for renouncing thought of self.

IV. If Salmon Need Not Love Meinhard, Why Not?

Despite its attractiveness as a rhetorical device, *agapic* love is unsuitable as a legal standard. This is true even if one sets aside such standard objections as the purported inadmissibility of religious norms in making civil law for a secular society.

First, *agape* is too indeterminate a standard. In discussing the problem with a broad conception of fiduciary duty, under which the fiduciary has "a duty to act in the best interests of the beneficiary," Lionel Smith explains that "the indeterminacy of such a duty is such that any lawyer would agree that this cannot be its correct formulation."[43] When

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[39] UNIF. PARTNERSHIP ACT § 103(b)(3)(i) (1997)

[40] *Id.* § 103(b)(3)(ii).

[41] *Id.* § 404(e).

[42] *Id.* § 404 cmt 5. The UPA (1997)'s drafters purportedly intended the statute to end the "galloping Meinhardism" of the case law. *See* Karen E. Boxx, *Too Many Tiaras: Conflicting Fiduciary Duties in the Family-Owned Business Context*, 49 HOUS. L. REV. 233, 251 (2012) (noting that the relevant statutory provisions were a "response to concerns about 'galloping Meinhardism'").

[43] Lionel Smith, *Can We Be Obliged To Be Selfless?* 4 (2013) (unpublished manuscript on file with the author).

one adds an *agape*-based duty to renounce thought of self to Smith's standard, the duty becomes less rather than more determinate.[44]

Second, *agapic* love is too high of a standard. To see why, suppose we could put the question back to Cardozo by asking whether it is possible for the law to elevate the behavior of the market to some moral pinnacle. As Robert Thompson commented in discussing the law's failure to embrace Cardozo's rhetoric, "[r]enouncing of self does not fit as well with the modern psyche as it may have in 1928."[45]

> It is usual to praise a pagan or Christian virtue and then complain how much we moderns lack it. Shamefully we bourgeois are neither saints nor heroes. The age is one of mere iron—or aluminum or plastic—not pagan gold or Christian silver.[46]

No realistic social order can assume "heroic or even consistently virtuous behavior" by its citizens.[47] Everybody puts love of self ahead of love of neighbor at least some of the time. As C.S. Lewis observed, "[t]he total and secure transformation of a natural love into a mode of Charity is a work so difficult that perhaps no fallen man has ever come within sight of doing it perfectly."[48]

As Martin Luther King Jr. recognized in a profound commentary, obligations such as *agapic* love thus are "beyond the reach of the laws of society. They concern inner attitudes, genuine person-to-person relations, and expressions of compassion which law books cannot regulate and jails cannot rectify. Such obligations are met by one's commitment to an inner law, written on the heart."[49]

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[44] *See* Donald J. Weidner, *RUPA and Fiduciary Duty: The Texture of Relationship*, 58-SPG L. & CONTEMP. PROBS. 81, 104 n.94 (1995) ("Judge Cardozo's own opinion in *Meinhard* suggested that the law of fiduciary obligation was too indeterminate to offer much guidance: "Little profit will come from a dissection of the precedents." …. His opinion did not add greater determinacy.").

[45] Thompson, *supra* note 6, at 132.

[46] Donald McCloskey, *Bourgeois Virtue*, AM. SCHOLAR, Spr. 1994, at 177, 178.

[47] MICHAEL NOVAK, TOWARD A THEOLOGY OF THE CORPORATION 28 (2d ed. 1990).

[48] C.S. LEWIS, THE FOUR LOVES 134 (1960). This will be especially true as we move from the two-person partnership to more complex business organizations. This is so because "[p]racticing agape in the context of a face-to-face relationship with a real human being is challenging enough; practicing agape in the context of representing a corporate entity made up of far-flung and often anonymous stakeholders seems more difficult by an order of magnitude." VISCHER, *supra* note 12, at 101.

[49] Michael K. Young, Legal Scholarship and Membership in the Church of Jesus Christ of Latter-Day Saints: Have They Buried Both an Honest Man and a Law Professor in the Same Grave?, 2003 B.Y.U. L. Rev. 1069, 1091.

What then can the law do? Dr. King famously extended his argument by observing that "the law could not make people love their neighbors, but it could stop their lynching them."[50] What law does is to provide a "coercive backstop", as William Bratton observed: "Doubts about the prevalence of honor in the population can be mitigated by a backstop regime of legal protection that enforces honor."[51] If we substitute *agape* for honor, the incongruity of Cardozo's rhetoric becomes obvious. Bringing to bear the state's monopoly on the use of coercive force on those who fall short of the legal standard is the very antithesis of *agape*.[52]

But while the law therefore should not mandate *agape*, the law can point to it as an aspirational ideal. In the related context of corporate law, the Delaware courts have long recognized that:

> Aspirational ideals of good corporate governance practices for boards of directors that go beyond the minimal legal requirements of the corporation law are highly desirable, often tend to benefit stockholders, sometimes reduce litigation and can usually help directors avoid liability. But they are not required by the corporation law and do not define standards of liability.[53]

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[50] John Roach, *War of Words on Abortion*, 20 ORIGINS 88, 89 (1990).

[51] William W. Bratton, *Game Theory and the Restoration of Honor to Corporate Law's Duty of Loyalty*, in PROGRESSIVE CORPORATE LAW 139, 160 (Lawrence E. Mitchell ed. 1995).

[52] *See* DANIEL A. DOMBROWSKI, RAWLS AND RELIGION: THE CASE FOR POLITICAL LIBERALISM 21 (2001) (arguing that "if *agape* requires a respect for the otherness of the beloved and an unwillingness to violate his integrity, then such efforts [to persuade all citizens to adopt more self-sacrificial and less materialistic ends] will have to remain persuasive rather than coercive").

[53] Brehm v. Eisner, 746 A.2d 244, 256 (Del. 2000) (en banc). Interestingly, Murphy notes that "[t]hose motivated by *agape*—as a basic principle—will (subject no doubt to some major side-constraints of a prudential nature) seek to design legal practices and institutions with a view to the moral and spiritual improvement in virtue of affected citizens." Murphy, *supra* note 1, at 22. Accordingly, those motivated by *agapic* love will seek to promote it as best practice even in commercial settings, not just for the instrumental reasons discussed below, but also because encouraging market actors to aspire to *agape* will promote the "the moral and spiritual improvement" of those actors. In hits way, a best practice focused on *agape* will help keep the morals of the marketplace above the level trodden by the crowd, just as Cardozo hoped his opinion would do.

This insight is at least a partial solution to an otherwise troubling problem raised by this interpretation of *Meinhard*. The analysis below assigns an instrumental value for what is generally perceived as a non-instrumental virtue. In other words, if I demonstrate *agapic* love towards my partner and thus build trust between us, I benefit from what is purportedly a selfless love. Query whether that makes the entire exercise meaningless. In other words, can one truly have selfless love that has an instrumental value? In any case, that is a question beyond the scope of this paper.

In other words, if we understand Cardozo's rhetoric as having a teaching function, we see that what he is really teaching is not the law but morals. To be sure, despite Cardozo's rhetoric, "punctilio of an honor the most sensitive" is not in fact the legal standard.[54] Instead, *Meinhard* is best understood as an example of how courts influence best practice.[55]

If so, what makes *agape* an appropriate aspirational ideal? An answer is to be found in the common observation that those who engage each other in *agapic* love inevitably come to trust each other.[56] This is so because *agape* promotes and preserves community. As Martin Luther King Jr. argued, *agapic* love seeks "to preserve and create community. It is insistence on community even when one seeks to break it. *Agape* is a willingness to go to any length to restore community."[57] If one partner knows that his fellow partner will go to such lengths, trust inevitably follows.

This insight is critical because trust has considerable instrumental value in business settings, since it can significantly lower transaction costs. Just as friction reduces the efficiency of a machine, transaction costs are a dead weight loss making transacting less efficient.[58] Trust lubricates business relationships and thus reduces transaction costs, especially those known as agency costs.[59]

As but a single example, consider how the risk of opportunism can make partnerships less efficient. If partners can withhold new information—such as the discovery of a new business opportunity—from each other, then each has an incentive to drive the other out so as to take full advantage of the information. As each incurs costs to exclude the other, or to take precautions against being excluded, the value of the firm

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[54] *See supra* text accompanying note 7 (quoting *Meinhard).*

[55] *See generally* Edward B. *Rock, Saints and Sinners: How Does Delaware Corporate Law Work?,* 44 UCLA L. REV. 1009, 1016 (1997) (explaining that Delaware courts often give "sermons" without imposing liability as a way to define and promote corporate best practices).

[56] See, e.g., PHILIP M. VAN AUKEN, THE WELL-MANAGED MINISTRY 238 (1989) ("People who share a common vision, who personalize the work process , and who accept one another in agape love come to trust one another"); VISCHER, *supra* note 12, at 107 (discussing relationship between agape and trust).

[57] VISCHER, *supra* note 12, at 89 (quoting Martin Luther King Jr.).

[58] OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 1-2 (1985).

[59] "Trust is an important lubricant of a social system. It is extremely efficient; it saves a lot of trouble to have a fair degree of reliance on other people's word." KENNETH J. ARROW, THE LIMITS OF ORGANIZATION 23 (1974).). *See also* William A. Klein, *Economic Organization in the Construction Industry: A Case Study of Collaborative Production Under High Uncertainty*, 1 BERKELEY BUS. L.J. 137, 156-57 (2004) (discussing role of trust in business relationships).

declines. If that risk can be minimized, however, the parties' transaction costs will decline and the firm will be more profitable.[60]

Contracts are a useful, but ultimately imperfect, device for minimizing opportunism and other transaction costs.[61] Accordingly, parties frequently rely on noncontractual social norms to minimize transaction costs.[62] Trust's role as a social lubricant is especially important in this context.[63] If I trust you to refrain from opportunistic behavior, I will not invest as many resources in ex ante contracting. "Whoever can be trusted with very little can also be trusted with much ...."[64] If you prove trustworthy, I will not need to incur ex post enforcement costs. Trust thus is not only honorable; it is socially useful. In turn, by promoting trust, *agape* as an aspirational ideal therefore has considerable social value.

V. Conclusion

Must Salmon love Meinhard? Despite Cardozo's inspiring rhetoric, the law clearly has said "no.". *Agape* is simultaneously too indeterminate and too demanding a standard to be suitable for business relationships.

Should Salmon love Meinhard? Yes and vice-vice versa, because an analysis of Cardozo's rhetoric and the intent behind it suggests that *agape* has great instrumental value. Partners who love one another can trust one another. In turn, partners who trust one another will expend considerable less time and effort—and thus incur much lower costs—monitoring one another. *Agape* thus should not be the law, but the law should promote *agape* as best practice.

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[60] Michael P. Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1, 64-66 (1980).

[61] *See* OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES 23 (1975) (explaining that, under conditions of uncertainty and complexity, it becomes "very costly, perhaps impossible, to describe the complete decision tree"); *see generally* WILLIAMSON, *supra* note 58, at 30-32, 45-46 (defining bounded rationality and describing its deleterious effects on the contracting process).

[62] The classical example is Stewart Macaulay's study of social norms in Wisconsin business firms, see Stewart Macauley, *Non-contractual Relations in Business*, 28 AM. SOC. REV. 55 (1963) (finding that norms of fair dealing are a significant constraint on business behavior).

[63] *See generally* FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 27 (1995) ("If people who have to work together in an enterprise trust one another because they are all operating according to a common set of ethical norms, doing business costs less."); DAVID LIMERICK & BERT CUNNINGTON, MANAGING THE NEW ORGANIZATION 96 (1993) ("Trust lubricates the smooth, harmonious functioning of the organization by eliminating friction and minimizing the need for bureaucratic structures that specify the behavior of participants who do not trust each other.").

[64] Luke 16:10.