Should Lawyers Be Loyal To Clients, the Law, or Both?

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Abstract: Loyalty is a central ideal in both legal ethics and fiduciary law, but recent theoretical approaches to legal ethics also emphasize the connection between the legal profession and the rule of law or democratic self-government. In order for lawyers to perform the role of securing relationships of mutual respect among citizens of a political community, the requirement of single-minded, partisan loyalty to clients may need to be relaxed. Fidelity to law may be in tension with fidelity to clients. This paper considers Daniel Markovits’s strong conception of loyalty and his argument that it follows from necessary conditions for democratic legitimacy. Markovits contends that partisan advocacy is necessary to transform the attitudes of citizens in a way that causes them to internalize the community’s scheme of legal rights and duties as the product of collective authorship by all affected citizens. In that sense, citizens can be said to internalize the requirements of the community’s law. The paper then defends a more modest internalist approach to legal legitimacy and authority, in which giving a legal justification for some action necessarily means committing oneself to a practical stance toward the law that assumes one’s membership in a political community and accepts the community’s laws as reasons for action.

Keywords: Legal ethics, fiduciary law, rule of law

I. Introduction

Daniel Markovits is the leading modern defender of loyalty in legal ethics. In his 2010 book, A Modern Legal Ethics,1 and in a more concise contribution to the Nomos volume on loyalty, entitled “Lawyerly Fidelity,”2 Markovits sets out a distinctive conception of the duty of loyalty within the lawyer-client relationship. His argument for lawyerly loyalty turns on what he takes to be the necessity of

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transforming the practical identity of members of a political community from individual, atomized disputants to co-sovereigns—joint authors of the answers to questions of how the law should apply to particular situations. This transformation through the process of engagement in the resolution of disputes through adversarial litigation requires that lawyers serve as absolutely passive, non-judgmental communicators of client interests. This may be the strongest conception of loyalty in all of fiduciary law and theory, but if Markovits is correct, then lawyers who temper their advocacy (or counseling of clients—a subject about which Markovits has very little to say) are subject to criticism for undermining a vital mechanism for securing the practical legitimacy of law.

Of particular interest for a gathering of scholars interested in fiduciary theory and legal ethics is his ambitious claim that loyal, partisan lawyers are necessary to the legitimacy and normativity of the law. Loyalty derives its value from the importance of special ties and relationships, and thus weighs against impartial considerations such as justice and equality. Loyalty therefore explains why lawyers are permitted to be partisan, that is, to seek to promote the interests of their clients even where these interests are difficult to square with social justice. In addition, because loyalty means making a particular relationship or commitment into part of one's motivational set—the things one cares specially about—loyalty to a person, profession, or institution can be a reason for action even in the absence of a background universal or impartial moral obligations.

Although I will be critical of many aspects of Markovits's account of lawyerly loyalty, I do believe legal ethics is a promising location, within liberal political theory more broadly, for normative work that can counteract the modern tendency to see the legal system as something alien, to be resisted or worked around, as opposed to a means for securing mutual respect among free and equal members of a political community. Understood correctly, lawyerly loyalty is an important mechanism for reconciling individual and social interests using legal norms and procedures of the legal system. But this position may sit uneasily with conventional fiduciary theory, which emphasizes that a faithful agent will have only one object of devotion, the principal, with obligations to the law or third parties serving at most as side-constraints on the agent's permissible actions. This paper is therefore an argument for a distinctive conception of the fiduciary duties of lawyers, whose role is to interpret the law faithfully while also faithfully representing clients.

After setting out Markovits's argument and its application to a hypothetical case, I will turn to the critical and constructive portions of this paper. I challenge Markovits's assumption that a transformation in the attitudes, practical identity, or subjective motivation set of the subjects of law is necessary for legitimacy. However, this is not only an inside-baseball argument against an idiosyncratic conception of loyalty. One of the deepest problems in philosophical legal ethics

3 MLE, 180.

is connecting legal normativity—the reasons (if any) that the subjects of law
have to comply with its demands—with the ethical duties and permissions that
characterize the distinctive role morality of lawyers. The connection, I believe, is
that the law aspires to be a practice of reason-giving in a political community
comprised of free and equal members. Citizens who are law’s subjects are not
only guided by law when they act, but also may want to offer legal rights and
duties as a justification to others who are affected by their actions. Markovits
would agree with this, but makes the stronger claims that legal reasons must be
internal in the specific sense of being part of an agent’s psychological makeup,
and that it is the subjects of law who must have a sense of co-authorship of legal
outcomes. The alternative position I will defend here focuses on lawyers, not
citizens, and requires only that lawyers advise clients (and represent them in litig-
ation, if necessary) from a point of view that accepts the law as providing genu-
ine reasons for the client to do, or refrain from doing, something.

II. Markovits on Lawyers, Loyalty, and Legitimacy

Loyalty in the philosophical literature is generally offered as an alternative to
universal or impartial morality. Impartial moral considerations are detached
from the connections, relationships, or commitments of particular agents. Loyalty emerges from a particular historically-rooted self, with its characteristic
relationships and attachments. To be loyal to some other—a friend or family
member, a client, a member of one’s local or national community, a principle,
cause, ideal, or even something relatively less important like a sports team—is to
treat the relationship with the other as a constitutive part of one’s identity.
Responding ethically to considerations of loyalty entails giving some priority (al-
though not absolute) to the interests of those to whom the agent is attached as a
result of actual lived history. This contrasts with taking up the point of view of

5 John Kleinig, On Loyalty and Loyalties (Oxford: Oxford University Press, 2014); Simon
Keller, The Limits of Loyalty (Cambridge: Cambridge University Press, 2007); George P. Fletcher,
6 Keller, 182-83.
7 Fletcher, 23-24.
8 Kleinig, 38-39, 104-07.
be more prominent in a discussion of loyalty in the attorney-client relationship. Fried contends
that friendship carves out a space for an individual to prefer his or her own interests, connections,
and commitments to the interests of humanity as a whole. Ibid., 1069-70. A lawyer’s client is like
a friend, in that the relationship is partially constitutive of the lawyer’s own identity, and is therefore
entitled to as much special care and concern as anyone is permitted to reserve for themselves,
again as against the demands of universal morality. Ibid., 1071. The reason not to talk here about
Fried is that Fried actually does not rely on the friendship analogy to justify the role obligations
of lawyers. He recognizes that the “special purpose” friendship involved in the lawyer-client relation-
sip is at best a loose analogy with natural friendships that can be seen as intimately related
with one’s historical self. Compare Fletcher, 16-20. Fried therefore relocates the value of the
lawyer-client relationship to different normative terrain by making the characteristic loyalty of the
lawyer-client instrumental to the political value of autonomy. “[T]he law must leave us a measure
of autonomy, whether or not it is in the social interest to do so. Individuals have rights over and
impartial morality, in which one rationally applies a universal principle to determine what should be done in the circumstances. From the impartial moral point of view, anything that is special or particular in the situation is morally relevant only where it can be treated as a universal feature of any similar situation. Loyalty, by contrast, involves "taking the side" of the object of loyalty, through characteristic patterns of conduct, and preferring the object of one's loyalty to similarly situated others.

Markovits not surprisingly contends that the duty of loyalty means being a partisan for clients, which he sees as an implication of the structural separation between the parties and the tribunal in an adversarial system of adjudication. Partisanship means that lawyers should not be concerned with the justice or moral rightness of their clients' causes, but should instead promote the objectives that their clients have set. They must prefer their clients' points of view about what is true, right, or fair to the point of view of others, including their own. This is a position in line with the law of agency, which requires the agent (the lawyer) to interpret the instructions of the principal (the client) reasonably in accordance with the agent's understanding of the principal's wishes. The agent therefore functions as an extension of the principal's personality or capacities. What is distinctive about Markovits's defense of lawyerly loyalty, however, is the connection he draws between the duty as a matter of legal ethics and the more general value of political legitimacy. It therefore suggests a connection between fiduciary theory and political theory more generally.

Like Tim Dare and myself, Markovits locates legal ethics within liberal political theory, particularly the value pluralism emphasized by Isaiah Berlin, Joseph Raz, and the later John Rawls. Members of a political community reasonably disagree about matters such as what rights people should have, what are the demands of justice, and what constitutes a well-lived human life. These disagreements can be the result of empirical uncertainty, conflicts among incommensurable basic values or conceptions of human flourishing, and bounded against the collectivity. . . . It is because the law must respect the rights of individuals that the law must also create and support the specific role of legal friend." Ibid., 1073. Fried's reliance on the client's autonomy as the normative linchpin in the lawyer-client relationship makes irrelevant the connection between the client and lawyer's historical self; what matters for Fried is that lawyers have a duty, imposed by law and deriving from the value of autonomy in a liberal political community, to support the rights allocated to clients by the law.

12 Kleinig, 23-25.
13 Nomos, 61.
14 Nomos, 67.
15 Nomos, 72-73.
Community members appreciate the deficiencies of using power or trickery to resolve disputes, or perhaps (more idealistically) recognize others as free and equal and thus worthy of being treated with respect. Thus, they seek some means of dealing with one another against a background of first-order normative and empirical uncertainty. Hobbes and Raz have both noticed the analogy with two parties to a dispute who seek a resolution from an arbitrator. Just as the arbitrator considers the reasons the parties bring to the dispute, and issues a decision that relies upon, but replaces the parties’ reasons, the legal system takes into account but supersedes the considerations about which members of the political community disagree. The parties to the arbitration, or members of a political community, now have a shared reason or scheme of reasons, going forward, which they can offer to one another in response to a demand for accountability.

The functional account of legal legitimacy as a solution to the moral problems besetting a political community characterized by pluralism and disagreement yields an understanding of law as follows: The legal system, through legislation, administrative rulemaking, and adjudication, generates substantive and procedural entitlements. These entitlements function as reasons that can be asserted by their holders against a demand for accountability brought by either the state or another private party. If A’s neighbor B complains about A’s stinky pig farm, A may have a legally sufficient answer to give to B, built up out of local zoning ordinances and common-law nuisance principles, which permit A to operate a pig farm in the location in question. A’s reasons, given in response to B’s demand for accountability (i.e. to either cease operation of the pig farm or mitigate the smell) when A intrudes on an interest of B’s, are legal reasons, established in the name of the political community as a whole. On the assumption that the procedures of the political and legal system are tolerably fair in taking account of the relevant underlying considerations, A and B cannot reasonably reject the reasons established by the legal system that establish the rights and duties they owe to each other.

Markovits is more or less on board with this account of political legitimacy, but he believes it to be deficient, and departs from liberalism in a crucial respect. He believes that the Rawlsian approach of seeking freestanding political

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18 Rawls refers to these circumstances as the burdens of judgment. Rawls, 55-57.
22 One may of course disagree about how fair the political and legal system must be in order to create reasons that stand in for the reasons the parties brought to the dispute. Maybe the agricultural lobby in a particular state is powerful, and has successfully obtained legislative exemptions from what would otherwise be common-law nuisance principles requiring expensive odor-reducing technologies to be employed by pig farms. Is this unfair to non-agricultural landowners, or is something like that result inevitable in any system in which interest groups compete to obtain favorable legal treatment?
principles which all citizens can endorse, notwithstanding intractable first-order
disagreement, is inadequate.\textsuperscript{23} The liberal universalist (or at least political-
community-wide) standpoint from which the Rawlsian effort at legitimation
proceeds fails at practical legitimation, from the point of view of the subjects of
legal authority. Theoretical legitimacy is a matter of assent to abstract proposi-
tions about the justification of the exercise of state power, and members of the
political community may disagree reasonably about those justifications. Practical
legitimacy, on the other hand, is a matter of the subjects of law taking ownership
of the right and duties assigned to them by law, through a process of engagement
with the legal system.\textsuperscript{24}

This is where lawyers come in. Lawyers provide a crucial connection between
the law and its subjects by providing an opportunity for participation. Lawyerly
loyalty reassures clients that their views on the matter are given fair consider-
ation. Loyalty, for Markovits, is a kind of extreme (or even caricatured) version
of the standard picture of a principal-agent relationship. By following the princi-
pal’s instructions, the agent functions as an extension of the principal,\textsuperscript{25} allowing
the principal to exercise fully her various capacities, which she is unable to exer-
cise due to lack of time, expertise, or some other impediment (such as minority
or disability).\textsuperscript{26} Markovits argues that lawyers should aim to achieve the kind of
“negative capability” associated poets who efface themselves to allow a mute sub-
ject to speak through them.\textsuperscript{27} Lawyers are urged to “make up one’s mind about
nothing—to leg the mind be a thoroughfare for all thoughts.”\textsuperscript{28} Many lawyers
resist the description of themselves as tools or mouthpieces for their clients, but
Markovits argues that this self-effacement and non-interference with the voices
of clients is necessary to bringing political legitimacy down from the “wholesale”
to the “retail” level.\textsuperscript{29}

Notice, however, that the virtue of negative capability is relative only to the
voice (or position, or interests) of the client. Nowhere does Markovits recom-
pend that lawyers be negatively capable with respect to the law, allowing their
minds to be a thoroughfare for the law to connect with its subjects, the lawyers’
clients. Other than a couple of fairly minimal obligations—one, to avoid assist-
ing in client conduct that the lawyer knows is a crime or fraud under applicable
law, and two, to avoid making knowingly false statements of fact to a tribunal or
a third party\textsuperscript{30}—Markovits does not derive a robust obligation of fidelity to law
from the American law of lawyering. Rather, the law on Markovits’s reading sup-
ports his obligation of highly client-centered fidelity, a distinctive type of loyalty
that requires stringent self-effacement and neutrality by lawyers.\textsuperscript{31}

\textsuperscript{23} Nomos, 78.
\textsuperscript{24} Nomos, 83.
\textsuperscript{25} DeMott, 322.
\textsuperscript{26} Paul B. Miller, “The Fiduciary Relationship,” in Gold & Miller, 71-72.
\textsuperscript{27} MLE, 93-94.
\textsuperscript{28} Ibid., 94.
\textsuperscript{29} Ibid., 165, 185.
\textsuperscript{30} Ibid., 46 (citing American Bar Association, \textit{Model Rules of Professional Conduct}, Rules 1.2(d),
3.3(a), 4.1).
\textsuperscript{31} Ibid., 90.
Markovits’s position is offered as a critique of the usual way of justifying the lawyer’s duty of loyalty (or partiality) to the client. As he sees it, arguments within the discipline of legal ethics proceed only from an impartial point of view, and give insufficient weight—if they give any at all—to the perspective of the subjects of legal authority. As noted above, there is a Hobbesian version of the liberal case for political legitimacy. However, Hobbes is perfectly willing to admit that the subjects of legal authority have no reason other than the fear of punishment to comply with law’s demands. Rawls’s modern contractarian account of legitimacy emphasizes, instead of fear, the political/ethical ideal of reasonableness, in which we regard other members of a political community as free and equal. But one might still wonder what reason community members have to be reasonable. If it is possible to get more for oneself by being obstreperous and disagreeable, what is the motivational significance of the ideal of reasonableness? This is the opening Markovits needs to offer his account of retail-level legitimation of the law as a contribution to the ethics of lawyers. His answer to the question, “Why be reasonable?,” is that members of a political community do not necessarily have an internal reason to be reasonable, unless their relationship with the community and its laws has been transformed through a process of engagement with the law in application. A community member starts with a preference or interest, which can be asserted as a brute demand (“I want to operate this pig farm!”). Only by participation in the democratic process, however, can this naked assertion of a desire for something be transformed into an assertion of right.

From the point of view of the rights-holder this transformation may not make a difference, other than to create a warm sense of self-satisfaction that one is asserting a right and not a brute demand. However, from the point of view of other members of the community, who are affected by the right-holders actions, it matters a great deal that the desire to operate a pig farm has been transformed into a right. An important piece of the argument, whether one agrees with Markovits’s emphasis on transformation or not, is the Hohfeldian correlation between the assertion of right and the situation in which other parties are thereby placed. The assertion of a right to operate a pig farm is correlate with a no-right on the part of neighbors who must endure the stink. It is therefore the neighbor’s perspective that must be transformed. As Markovits puts it (borrowing from Lon Fuller), the parties’ shared perception of their relationship is reoriented, and is accompanied by new attitudes and dispositions toward one another. In order for the law to be legitimate on Markovits’s account, B’s

32 Hobbes, Ch. XV, at 89 (arguing that compliance with the social contract is motivated only by “the terror of some punishment greater than the benefit that [parties] expect by the breach of their covenant”).
33 Rawls, 101.
34 Nomos, 82-84.
37 MLE, 189; Nomos, 84.
attitude must be transformed from one of resentment at A's intrusion on the “quiet enjoyment” of his land to one of at least grudging acceptance of being a fellow citizen with A and joint author of political outcomes. B’s attitude may be summed up as something like, “I can’t stand his damned pig farm, but I understand that there are winners and losers in any political process, and A has the right, fair and square, to do what he’s doing.”

Markovits offers lawyerly loyalty as the key to securing the legitimacy of law. Legitimacy is, as many political philosophers contend, “a notion that should arouse apprehension,” as it runs counter to the Enlightenment ideal that we are all self-determining rational agents, entitled to be free from the rule and domination of others. The entitlements allocated to members of the political community by the law enable them to share in the right of the state to rule by prescribing what others must do or refrain from doing. If A did not have a right, established by common-law principles, local land-use ordinances, and the like, to operate a pig farm, then B would be able to invoke the coercive power of the state by obtaining an injunction and enforcing it by having the sheriff come and haul away A’s pigs. On the other side of the Hohfeldian correlative, if A does have a right, then A can use coercive state force to present B from interfering with the operation of the pig farm. As moral agents, A and B are responsible to determine what, on the balance of relevant considerations, should be done in situations in which the interests of others are affected by their actions. In the Kantian tradition, moral agents are self-legislating; each person is the sole judge of what ought to be done, given the constraints of morality. Law, however, presents itself as telling A and B what they may or must do. The puzzle of legitimacy (or authority) is therefore how the law is able to alter the balance of reasons as determined by A or B after deliberation on the considerations that bear on what they owe to each other.

If duties of loyalty are intended to secure political legitimacy, Markovits may be looking in the wrong place by examining the lawyer-client relationship. On one plausible conception of loyalty, it involves associational identification. Loyalty has a first-personal aspect—my friend, my team, my country. The object of loyalty is part of the agent’s commitments that are central to the agent’s self-understanding and integrity. There is thus a superficial appeal to orienting legal ethics around a lawyer’s recognition, “this is my client.” The lawyer then has reasons relating to her own attachments and commitments, including reasons for wanting to become a lawyer in the first place, to favor the client’s interests. But in the transformation that Markovits believes is necessary for legitimacy, it is


39 Wolff, 26.

40 Kleinig, 19-20.

41 Philip Pettit, “The Paradox of Loyalty,” American Philosophical Quarterly 25 (1988): 166 (noting that loyalties involve egocentric descriptions of someone who is to be given special treatment – my neighbor, my client, etc.).
the client who must come to say, of the opposing party in a dispute, or of others whose actions affect the client’s interests, “this is my neighbor [or fellow citizen or partner in a common venture].” The client must come to acquire a new associational identification, and it must be particularized. Rather than simply giving assent to the proposition that citizens ought to respect the rights and duties allocated by the law to members of a political community, B must come to acknowledge A’s claims of right because they are asserted by B’s neighbor, or co-venturer, and the particularity of that relationship matters to B.

Markovits contends that this can occur only through the process of adversarial adjudication, in which both sides are represented by loyal, negatively capable lawyers who refrain from judging their clients’ projects. The disputing parties thus engage as directly as possible with each other and, through some magic of the adversarial process, are transformed from disputants to co-venturers in a common project. I say “some magic” not to be snarky, but because legal ethics, for Markovits, is mostly about getting lawyers out of the way of the process by which the parties become differently oriented with respect to each other. The negative argument is clear – i.e. that too much pre-judgment by lawyers can make clients mistrustful and unwilling to be open and unguarded about their interests. The positive argument, for why direct engagement with other parties to a dispute will lead to the necessary transformation, is rather underspecified.

Engagement with the legal system is supposed to effect a kind of transvaluation of values, from interests to rights, and from disputants to equally self-governing citizens. Lawyers are charged with responsibility for sustaining the legitimacy of the legal order at “retail,” as Markovits puts it—that is, between the actual parties to the dispute and not in the abstract, at the level of the community’s laws of general applicability. Lawyers have access to information about their clients’ preferences or antecedent demands, and also to the knowledge and expertise necessary to interpret the decisional, statutory, regulatory, and unwritten law of the political community to determine what legal entitlements their clients have. Their ethical duty is then to represent their clients in such a way that clients come to see themselves as authors of the outcomes of the process. For our disputing neighbors, A and B, it is not enough for B to say “I can’t stand A’s pig farm but I lost fair and square, so I guess I have to either deal with it or move.” Rather, B must now affirm a proposition such as, “I endorse, as my own exercise of autonomy as a self-governing moral agent, A’s interest as if

42 The latter description, “partner in a common venture,” is from Fletcher, 21. I find it a helpful way to understand the attitude that members of a political community should have toward one another.
43 Compare Keller, 18-19 (arguing that if you are an Australian patriot, then you are motivated not only by Australia being a great country, but also by the fact it is your country).
44 Markovits alludes occasionally to the necessity of an affective engagement with the legal process. See, e.g., MLE, 180-81 (arguing that an “affective engagement with the democratic process sustains [a] sense of ownership” of outcomes of the democratic process); ibid., 183 (referring to “feelings of authorship”). As discussed in Section 3, below, it may be more useful to understand the transformation in terms of motivational internalism.
45 MLE, 188-89.
46 Ibid., 193-95.
it were my own. So it’s as if it is also my pig farm.” B is no longer subject to domination by the law, but is engaged in an exercise of self-governance when he accepts the legitimacy of A’s claim of right. That is retail-level legitimacy, which Markovits believes is necessary, along with wholesale legitimacy, to prevent A’s claim from being nothing more than a brute demand or an effort to subjugate B.

To put it mildly, this seems like a heavy lift for lawyers. Clients may go all the way through with fully-engaged participation in the process of adversarial adjudication and continue to feel vehement opposition to the outcome, even if it was arrived at using fair procedures. More generally, many people resent legal prohibitions and duties, and look to lawyers to find loopholes or work-arounds that permit them to do what they want to do, while minimizing the likelihood of state interference in their affairs. Some legal scholars therefore follow John Austin in believing that the practical authority of law cannot be disentangled from the threat of coercive state force that ultimately lies behind any legal obligation.47 H.L.A. Hart famously responded to Austin that any theory of law is defective if it cannot explain how it is that some of the subjects of law regard it as creating genuine obligations, not merely roundabout ways of saying “if you don’t do X, some bad thing will happen to you.” Hart argued that some people regard the law from the internal point of view, as imposing obligations, albeit not necessarily moral obligations.48 But of course many do not, and remain in a stance of resistance to, resentment of, or at best grudging acquiescence in the demands of the law. The legal system and the results it prescribes may nevertheless be legitimate, even if its subjects have not been transformed in their attitudes toward one another. That is to say, it may be that legitimacy is secured if the claims of legal authority are in fact justified, regardless of whether the subjects of authority believe themselves to have reasons to do what the law requires. Markovits is relying on a different and stronger conception of internal reasons than Hart proposed.

In other work I have argued that giving a legal justification for some action necessarily means committing oneself to a practical stance toward the law that assumes one’s membership in a political community and accepts the community’s laws as reasons for action.49 However, it is not necessary for legitimacy that clients be transformed so that they seem themselves as having new and distinctive loyalty-like attitudes toward others. Some type of internalism regarding reasons may be required for legitimacy. A version of this position inspired by Hart would hold that the relevant practical attitude is a distinctive pattern of

48 H.L.A. Hart, The Concept of Law, 2d ed. (Oxford: Oxford University Press, 1994), 89-91. Hart conceded that the subjects of law may obey "for any motive whatsoever," including the desire merely to avoid sanctions. Ibid., 116. His critique of Austin was only that Austin’s theory does not have the conceptual resources to account for the possibility of regarding the law from the internal point of view. See generally Benjamin C. Zipursky, "Legal Obligations and the Internal Aspect of Rules," Fordham Law Review 75, (2006): 1229-53.
justification that requires reasons to be offered from a standpoint that is shared by other members of the political community. For Hart, to take the internal point of view with respect to an observed regularity of behavior is to accept that what people are doing is following a standard that applies to members of the relevant group (such as a political community) and following it because it makes legitimate demands on them. The practical attitude of rule-acceptance requires that members of the community regard the community’s laws as basis for obligation—they use characteristically normative terminology such as “ought” and “must” when referring to what they have reason to do—and also accept criticism on the basis of non-compliance with the law as well-grounded.

The following section begins by distinguishing (1) the type of internalism contemplated by Markovits, in which the motivations of clients are altered to include a sentiment of fellow-feeling toward the opposing party in litigated disputes, from (2) the Hartian internal point of view that I contend is central to the ethics of lawyers. In keeping with the subject of this symposium, most of the discussion will focus on the duty of loyalty that is required for lawyers, as a matter of the ethics of the professional role. The question is whether the type of loyalty required of lawyers should be understood as Markovits’s self-effacing fidelity to clients, or whether it is a different kind of Janus-faced duty owed to both clients and the legal system. My claim is that if legitimacy requires that members of the political community regard others as free and equal when they offer justifications dependent upon the community’s law, then what lawyers must offer clients is not negative capability but deep expertise in understanding and applying the law that the political community has constructed as a way of mediating relationships among community members. This is a distinctive kind of lawyerly loyalty with two objects—the client and the law. It may fit uneasily within the law of fiduciary relationships more generally, which emphasizes the avoidance of entanglements that would tend to complicate compliance with duties of loyalty owed to one party. However, a properly specified duty of loyalty—not Markovitsian negative capability, but something closer to Nineteenth Century conceptions of lawyers as quasi-public actors who connect citizens with the governmental institutions of the state—is justified by the contribution it makes to securing the legitimacy of law in a liberal community. Legitimacy in this case, however, does not require a transformation in the attitudes of community members. It requires, instead, good faith interpretation of the community’s legal norms.


51 Shapiro, “What is the Internal Point of View,” 1162; see also Hart, Postscript to The Concept of Law, 255 (the distinct normative attitude of acceptance consists in “the standing disposition of individuals to take such patterns of conduct both as guides to their own future conduct and as standards of criticism which may legitimate demands and various forms of pressure for conformity”).
III. Varieties of Internalism: Williams and Hart

Critics of impartial morality note that the reliance on universal considerations leaves obscure the relationship between these considerations and those things the agent cares about. The place of loyalty, and thus of fiduciary duties in general, in ethics is often taken to be making room for particular ties and attachments, which coexist alongside or possibly even supersede the requirements of universal or impartial morality. Markovits offers his theory of legitimacy, and the account of legal ethics it entails, alongside a critique of impartial morality more generally. He writes that “living an ethical life involves more than responding impartially to the claims of others. . . . Instead, persons also have a deep and distinctively ethical interest in living a life that can be seen, from the inside, as an appealing whole and, moreover, a whole that is authored by the person who lives it.” It is unsurprising, therefore, that he is attracted to fidelity as the central value in legal ethics, because it gives pride of place to considerations of personal integrity, authorship, and the historical self. To put it differently, particular connections, relationships, groups, etc.—the sorts of things to which one may be loyal—may provide particular reasons that are not reducible to the demands of impartial morality, even if they do not override impartial moral demands.

One influential conception of reasons for action, associated with Davidson, holds that a reason is something that explains action. This way of understanding reasons for action is the basis for the argument by Bernard Williams that the only genuine reasons are internal—that is, related to something that the agent takes to be a reason for acting. Williams gives two well-known illustrations. One is the absurdity of someone presented with the opportunity to save only one person—a stranger or his wife—who stops to consider what moral principle justified saving his wife rather than the stranger. The motivating thought, “This is my wife,” should also be a sufficient justification on its own, without having to give impartial moral significance to this deep attachment. Without some psychological link to the agent’s subjective motivation set, an impartial consideration cannot be a reason for the agent to do anything. Another example is the story of Owen Wingrave, whose father tries to convince him to join the army, because it is the honorable thing to do. Owen, however, loathes everything about military life and has no desire whatsoever to join the army.

52 Kleinig, 87-107.
53 MLE, 134.
54 Fletcher, 61 (“Loyalties invariably entail commitments that cannot be grounded in reasons others share.”).
57 Williams, “Persons, Character, and Morality,” 18.
58 Williams, “Internal and External,” 107-11.
The father’s arguments may be good ones, but they are false as versions of the statement “Owen has a reason to do X.” Now it may happen that Owen deliberates and realizes that he cares about his family’s long tradition of military service. In that event he acquires a new internal reason for joining the army. But only an internal reason of this sort can serve as an explanation.59 If Owen joins the army, it is not merely because it is the honorable thing to do, but because Owen has come to realize that he would not like to be the kind of person who brushes aside a tradition that is important to his family.

Loyalties can function as internal reasons that are part of the subjective motivation set of agents.60 Loyalties are identity-conferring commitments.61 To fail to support the object of one’s loyalty in the appropriate way is a failure in respect of one’s personal integrity. We express ourselves in part through our loyalties. In Williams’s first example, loyalty to one’s wife is a sufficient reason to prefer her welfare to that of a stranger. To deliberate before deciding to rescue one’s wife should be literally unthinkable, because the agent’s relationship with his wife is equivalent to his own self-regard as a reason for acting. It is more natural to act on the basis of loyalty, with its affective dimension and connection with one’s sense of identity and integrity, as opposed to acting out of obligation to a highly abstract moral principle that is rationally binding but otherwise does not bear much of a connection to one’s self-understanding as someone leading a meaningful life. In the second example, Owen does not feel a sense of loyalty to his family’s tradition of military service (or, he does not feel the right kind of loyalty toward his family, which would include supporting its traditions); thus, he has no reason to join the army. Whatever impartial considerations his family can marshal, making reference to ideals of honor or service, make no claim on Owen, whose understanding of a meaningful life notably excludes parade drills and obstacle courses. The considerations cited by his father fail to gain any grip on Owen because he lacks the motivation that would be characteristic of someone for whom these ideals matter. The particularism of loyalties and their connection with the personal history of the agent therefore provide the link between the object of loyalty and the agent’s reasons for action. In many cases loyalty may be a sufficient reason to act in a particular way, and lack of loyalty may explain an agent’s failure to do something that other, similarly situated agents would have done.

Even if this is so, however, we are still a significant distance from Williams’s claim that only internal reasons really exist, because external reasons—which lack a connection to the set of the things the agent finds motivating or convincing—cannot be used to explain why the agent acted. The Davidsonian conception of reasons maintains only that an explanation must be given in terms of considerations that the agent takes to be reasons for acting—i.e., that are part of the agent’s subjective motivation set. It does not follow that a consideration cannot be a normative reason even though the agent does not take it to be a reason for

59 Ibid., 111.
60 Keller, 19-20.
61 Kleinig, 39.
acting. This may be due to familiar shortcomings such as incapacity, weakness of will, selfishness, temptation, laziness, and the like. Or the agent’s social circumstances or personal history may make it difficult for him or her to appreciate the force of justifying reasons. Reasons may not always succeed in motivating us. Loyalty serves as both an explanation and a justification for the decision to save one’s spouse, not a stranger. However, considerations of loyalty failed to motivate Owen Wingrave to join the army. That does not mean there were not good reasons for him to take up a military career—the fact that all of his male ancestors were soldiers, the importance of family honor, etc. His father did not succeed in persuading him that these reasons had greater weight than Owen’s aversion to army life. This failure may stem from Owen’s cowardice, laziness, or indifference to the feelings of his father, in which case it would be appropriate to criticize him. Or, Owen may be on to something, and his father’s obsession with family honor is an embarrassing anachronism, in which case what he actually has a reason to do lines up nicely with his subjective motivation set.

Williams is correct that in either case simply pounding the table and emphasizing that something is an obligation is pretty hopeless as an effort at persuasion. It does not follow, however, that something may not actually be an obligation—that is, a normative reason for an agent not under a shortcoming such as selfishness or greed—even if the agent does not choose to act on it. We would justifiably criticize the agent for not acting, probably citing his selfishness or laziness in the explanation of why we believed the agent failed to do the right thing. We believe agents are answerable to standards or norms when they act or fail to act. Owen may not be irrational, but he may nevertheless be mistaken, and in a moral register his mistake may be criticized as selfish, lazy, cowardly, and so on. A related problem is that even if the lack of some connection to the agent’s subjective motivation set is a good explanation of why the agent did or failed to do something, the account may be lacking from the agent’s own point of view. Owen Wingrave is presumably looking for a reason not to join the army that does better than laziness or cowardice at justifying his decision. A commitment to pacifism, for example, would be a better explanation to offer than others, as compared with not wanting to subject himself to the physical and psychological rigors of military life. When we justify ourselves to others, we aspire to do so in terms that others can accept, and which are responsive to an express or tacit demand for accountability. Owen’s reasons for not following his family's tradition

62 For the distinction between explanatory and normative adequacy with regard to moral considerations, see Christine M. Korsgaard, The Sources of Normativity (Cambridge: Cambridge University Press, 1996), 12-13.
63 Christine M. Korsgaard, “Skepticism About Practical Reason,” Journal of Philosophy 83 (1986): 13-14. See also Bernard Williams, Ethics and the Limits of Philosophy (Cambridge, MA: Harvard University Press, 1985), 192 (“We recognize ... that there are many different ways in which people can fail to be what we would ethically like them to be. . . . [T]here are people with various weaknesses of vices, people who are malicious, selfish, brutal, inconsiderate, self-indulgent, lazy, greedy.”).
64 T.M. Scanlon, What We Owe to Each Other (Cambridge, MA: Harvard University Press, 1998), 26-29.
65 Korsgaard, Sources of Normativity, 14.
of military service are, at least hypothetically, offered in response to his family’s demand that he explain himself. That explanation must be given in terms of justifying reasons that are intelligible to, and can be endorsed by, the people to whom it is addressed.

Hart’s version of internalism begins with the problem of how social facts about what legislatures and courts have done in the past can create obligations. The puzzle of legal normativity is one of the central preoccupations of jurisprudence. Recent scholarship has tended to locate the normativity of law in background morality—that is, obligations that would exist anyway, without there being a legal norm specifying that some action is permitted or required. Saying that the law permits or requires such-and-such is really just an indirect way of saying that a person has a reason, all things considered, for the action, where some of the considerations supporting that conclusion may include the impact of legal institutions and procedures on what people otherwise have a reason to do. Go back to our feuding neighbors, A and B, who are trying to figure out what to do about their disagreement over the impact of A’s pig farm on B’s quiet enjoyment of land. Each for his own part runs through the options: They have already talked and tried to reach an agreed resolution, based on background moral considerations related to what they owe each other as neighbors. However, that has proved fruitless for reasons Rawls refers to as the burdens of judgment—disagreement about the weight and priority of competing values, empirical uncertainty, and departures from high standards of moral reasonableness, such as stubbornness and self-interest. Another option would be literally going to war, but that would be costly and each might lose more than he gains. What is left? Fortunately there is a mechanism for determining their political community’s position on landowners whose activities affect the interests of others. Without legal training, the neighbors are not in a position to find out for themselves their respective rights and duties. Thus, they turn to lawyers to determine what the procedures of the legal system have worked out over the years as the right balance of interests, from the social point of view, between agricultural uses and quiet enjoyment of land.

Why should the neighbors regard the institutions and procedures of the legal system as affecting the reasons they otherwise would have? Here is where Markovits’s position is too strong. He contends that B must come to regard himself as a co-author of the decision permitting A to operate a pig farm; otherwise the applicable land-use regulations and common law nuisance principles are alien to him. Without this transformation, Markovits wants to say that the subjects of the law have no reason to do what the law requires. He does not invoke the specter of the Holmesian bad man, but it does seem that he believes people who are engaged enough with a legal issue to care about its resolution must have compliance as part of their subjective motivation set. Moreover, given his

66 See Shapiro, Legality, 40-50.
68 Greenberg, 1341-42.
insistence on retail-level legitimation, it would also appear that the subjective motivation set of the parties must include belief in the co-authorship of the resolution of a particular dispute. Whatever one thinks about the plausibility of this account of legitimacy, the connection between lawyerly loyalty and the normativity of law is clear. The law is a reason for those citizens who regard it as a reason, and it is a major aspect of the lawyer’s ethical role to represent clients in such a way that facilitates the transformation of their subjective motivation set to include a sense of ownership of legal outcomes.

I believe it is enough that the parties in the dispute wish to deal straightforwardly and openly with each other. Hiring lawyers to figure out what the law permits and requires is a way of treating each other as free and equal—not necessarily co-authors of political decisions, but at least not as someone to be subjugated, tricked, or ignored. The requirement that members of a political community offer legal reasons to one another in justification of their actions does place a significant normative constraint on what lawyers may do, however. Even the fairly minimal presupposition that appealing to the legal system is different in kind from some type of exercise of raw power such as violence or deception sets conditions on what counts as a legal reason. A legal reason is one that makes reference to rights and duties that the law has actually established. It is not enough to avoid violating clear legal prohibitions. Rather, a reason given in justification for some course of action must accord with the entitlements that the law has allocated to citizens in the relevant circumstances. As agents of their clients, lawyers are limited to exercising their clients’ lawful authority. Clients, in turn, have lawful authority only where the legal system has in fact established a right to do something. The lawyer’s legal responsibility is aptly summarized as follows: “[A] lawyer must, in matters within the scope of the representation, proceed in a manner reasonably calculated to advance a client’s lawful objectives, as defined by the client after consultation.” Ethically that means the lawyer’s fiduciary obligation is not to push as far as the client wants to go without crossing some clearly demarcated legal line. Rather, it is to limit one’s representation, whether in litigation, counseling, transactional planning, or any other professional engagement, to acting on the basis of what the political community has actually allocated to the client as his, her, or its entitlements.

Consider an example from a provocative article by Paul Tremblay on lawyers providing assistance in unlawful conduct. A lawyer is representing a small startup company that, as is typical for entrepreneurial entities, is strapped for cash. The company’s president asks the lawyer to prepare independent-contractor agreements for two software engineers. The lawyer recognizes that, given the terms of the relationship, including the hours worked and the control exercised by the company, the engineers are employees, not independent contractors, under federal and state law. That means the company is required to provide

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workers’ compensation and unemployment insurance, and to pay a portion of the engineers’ FICA taxes. The company could afford the cost of treating the engineers as employees, but it would put a crimp on its cash flow. The president therefore tells the lawyer that she really, really wants to structure the relationship as one involving independent contractors. A negatively capable lawyer, exercising Markovits-style loyalty, would presumably want to do anything possible to permit the president’s view of the matter to prevail. The trouble with that conception of loyalty is that it gives no weight to the law’s view on the matter. Lawyers are not merely mouthpieces, but agents to the extent clients have a legal entitlement to do something.

In Hohfeldian terms, the president’s objective can be understood as seeking a legal privilege to pay the workers without withholding FICA taxes or providing unemployment and workers’ compensation insurance protection, which is correlated not with a claim that the state has no-right to interfere with the arrangement. The lawyer’s representation of the startup company purports to establish a juridical relationship among the company, the workers, and the federal and state agencies responsible for enforcing fair labor standards. The trouble is, the law does not support the assertion of no-right on the part of the government, so what the lawyer would be asserting is just smoke and mirrors. As I have argued in response to this example, anyone can write words on a piece of paper. What constitutes the professional role of lawyer is the capacity to write words with legal import, that establish juridical relationships. Drafting the independent-contractor agreement when the lawyer knows the workers should be treated as employees under applicable law is the normative equivalent of crossing one’s fingers while telling a lie. It does nothing to create authority, where there was none previously, to pay the engineers without treating them as employees. The Hartian internal point of view, understood as a practical attitude of norm acceptance, is nothing more than this understanding of the lawyer’s professional role. What distinguishes lawyers from other sorts of advisors, from Varys in Game of Thrones to Tom Hagen in The Godfather, is that lawyers may assert only the powers that their clients actually have. Whether one sees lawyers as having constrained fiduciary duties, or instead as having duties to both the client and the law, the obligation of fidelity to law, as well as fidelity to clients, is fundamental to the lawyer’s ethical role.

IV. The Peculiar Loyalty of Lawyers

The conception of lawyerly loyalty as negative capability, which Markovits refers to as fidelity, is difficult to square with the law of agency and fiduciary duty as it applies to lawyers. Markovits reads the law governing lawyers as consisting of

71 Matthew Kramer, "On No-Rights and No Rights."
72 Hohfeld, 723-24.
73 Postema, 99.
three principles: (i) the lawyer’s obligation to act with reasonable competence and diligence to pursue the client’s objectives; (ii) the client’s right to control the objectives of the representation – that is, a client-centered, rather than a justice-centered conception of the duties of lawyers; and (iii) immunity from liability or other forms of sanctions for pursing claims as long as they are not frivolous. He further boils down these principles into the ideal of self-effacement, refraining from judgment, and serving as a close-to-literal mouthpiece to permit clients to speak their mind without restriction.

There are a number of somewhat technical objections that might be raised to Markovits’s conception of fidelity to clients. For example, it only holds for clients who possess the capacity to make adequately considered decisions in connection with the representation. Clients whose capacity to make such decisions is diminished by developmental disabilities, mental illness, or other impairments, but who instruct lawyers to take actions that are harmful to their interests (as understood from an objective point of view) present serious problems for lawyers. The rules of professional conduct provide very little guidance beyond the unhelpful directive to maintain a normal client-lawyer relationship to the extent possible. The ideal of lawyerly fidelity, a la Markovits, is also difficult to adapt to the representation of organizational clients. As a matter of agency law, the client of a lawyer representing a corporation or other entity is the organization itself, acting through such natural-person constituents as are authorized to act for the organization by the underlying law of corporations, partnerships, etc. Markovits’s emphasis on individuals coming to feel a sense of ownership of political outcomes sits uneasily with the reality of entity representation. It is the client, the organization, who is transformed into a fellow sovereign with other citizens, yet it is odd to speak of an organization as having sentiments, a sense of itself as anything or, for that matter, internal reasons. If attention is shifted to the sentiments or subjective motivation set of constituents of entity clients, however, it would put lawyers in the difficult position of attending to the interests of natural person agents of the lawyer’s client, the organization. The potential for really nasty conflicts of interest would keep law firm general counsels up at night.

More generally, very little in the landscape of contemporary law practice resembles the defense of a voiceless, friendless criminal defendant against the awesome machinery of the state, or the uphill battle waged by civil litigators to establish new rights for disempowered clients. Even criminal defense lawyers spend a tremendous amount of energy on plea bargaining, which often requires attempting to persuade a client that the best course of action is to avoid presenting a defense at trial. All litigators employ considerable skill and discretion to

75 MLE, 27-34.
76 MLE, 92-95.
77 ABA Model Rules of Professional Conduct, Rule 1.14(a).
78 ABA Model Rules of Professional Conduct, Rule 1.13(a).
79 This is ironic given that the clients who can define their goals and express them clearly to their lawyers tend to be corporations with in-house legal counsel. See Lynn Mather, “Lawyerly Fidelity: An Ethical and Empirical Critique,” in Levinson et al., 116-24.
translate the client’s uncertain, possibly contradictory statements about his or her interests and objectives into arguments that judges and juries will find persuasive. Lawyers representing clients in transactional matters, or advising them on compliance with law, must ensure that their clients’ activities comply with applicable legal requirements. Carrying out these professional obligations requires anything but “being in uncertainties, mysteries, doubts, without any irritable reaching after fact & reason . . . remaining content with half knowledge.” The ideal lawyer mindset, even in litigation, is not negative capability but what Anthony Kronman referred to in *The Lost Lawyer* as the paired virtues of sympathy and detachment.

If not as negative capability advocated by Markovits, what is the right way to understand the loyalty expected of lawyers in a common-law, adversarial system? If the critique of Markovits offered in this paper is sound, any conception of the lawyer’s duty of loyalty must be able to explain how a loyal agent functions as something other than a mouthpiece for the principal. Fiduciary law scholars have suggested two possible templates that can serve as resources for understanding the ethical obligations of lawyers: (1) the dual commission model of Evan Criddle and Evan Fox-Decent, and (2) Andrew Gold’s account of a duty of loyalty containing its own, internal, limits.

As applied to lawyers, the dual commission account combines private-law and public-law duties. The lawyer as agent is empowered by two principals—the client, who sets the objectives of the representation, and the law, which establishes duties to restrain the client in certain ways where the client’s actions affect the interests of others. A lawyer must exercise competence and diligence to assist the client in pursuing the client’s objectives, but also must temper or guide the client’s objectives to be consistent with the public purposes of the law. This approach has a great deal in common with Nineteenth Century sociological theories of professionalism which emphasized the capacity, and indeed the necessity, of professionals serving the public interest who act as a check on the rapacious self-interest of capitalists. Criddle and Fox-Decent posit two sets of duties, first- and second-order, suggesting a hierarchy or at least lexical priority among duties. When first-order duties of loyalty to clients conflict with second-order duties as officers of the court to promote justice, the latter must prevail. Lawyers therefore have fiduciary duties not only to clients but to the public as a whole.

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81 Mather, 115-16.
82 MLE, 94 (quoting John Keats, “Letter to George and Tom Keats”).
While this is a theoretically plausible way of understanding lawyers’ duties, it comes up short on descriptive accuracy, at least with respect to the American law of lawyering. Lawyers have some second-order duties, but they are few in number and tightly circumscribed in scope. Lawyers do have an obligation to avoid knowingly presenting false evidence. In the case of criminal defense, however, that duty is limited considerably by judicial decisions holding defense lawyers constitutionally ineffective for taking remedial measures without an extremely high level of knowledge of falsity. Even in civil litigation, the duty does not require the lawyer to refrain from taking a position that is contrary to the public interest. Litigators have an obligation to certify that the positions they take on behalf of their clients are sufficiently well grounded in both law and fact, but courts have been fairly reluctant to impose sanctions under the rule, preferring to let the adversary process sort things out. Lawyers in counseling and transactional planning roles must ensure that their clients’ activities are consistent with the requirements of law, but this aspect of the professional role may be better understood as an internal limitation on the duty of loyalty, not a separate public commission generating second-order duties.

Gold’s story about the fiduciary duty of loyalty would proceed as follows: As a matter of agency law, a lawyer has the authority to do on the client’s behalf only what the client is legally authorized to do. The lawyer’s duty is to use care and effort to get for the client all that it is entitled to under the law—no more, no less. Let’s go back to the example of the lawyer representing the start-up company. The president asks the lawyer to prepare an agreement under which two employees would be deemed independent contractors. As an agent and a fiduciary of the corporation (though not the president), the lawyer has a duty to use skill and judgment in an effort to find a way to minimize the company’s expenses. However, the lawyer’s exertions on behalf of the client must always be consistent with what the law actually entitles the client to do. The law is not best understood as setting constraints on what a lawyer is presumptively empowered to do as an agent of the client. Rather, it is the source of the client’s power to act and therefore, of the lawyer’s authority as an agent of the client. I am not claiming that no one may act without specific legal authorization to do so. In many contexts there is a presumption that one is free to do something in the absence of a legal prohibition. The cases I am interested in, however, involve a demand for accountability—the neighbors disputing over the pig farm, or the tacit demand for accountability to federal and state taxing authorities in the example of the startup company. In these cases, the lawyer’s client is asserting a legal entitlement to do what it wishes, and in cases like these, it is misleading to think of the law as a constraint rather than a source of authorization. Or, to the extent

87 American Bar Association, Model Rules of Professional Conduct, Rule 3.3(a).
88 See, e.g., State v. McDowell, 681 N.W.2d 500 (Wis. 2004).
there is a constraint, it functions in the way Gold believes it does, as a limitation that is internal to the concept itself, rather than arising from a second-order commission.

V. Conclusion

This paper is a preliminary exploration of fiduciary theory as applied to legal ethics, and more work is required before one can say that the dual commission or the internal limitation approach is the best way to think about lawyers’ duties of loyalty. Either one of those approaches, however, builds in considerably more complexity than Markovits’s model of negative capability. The loyalty required of lawyers is more subtle than simply emptying oneself to become an empty vessel for the client’s interests, or otherwise exhibiting single-minded devotion to the client. Markovits is correct to think that the fiduciary duties of lawyers is related to the value of political legitimacy. In connection with legitimacy, however, the function of lawyerly loyalty is not to transform the attitudes of clients toward their adversaries. What matters is that lawyers regard the law as creating reasons for their clients to act, or refrain from acting, in particular ways. Lawyers assist clients in establishing and maintaining juridical relationships with other private citizens or the state. Legal rights, duties, powers, immunities, and so on, function between the parties to these juridical relationships but they are also established in the name of the political community as a whole, pursuant to the procedures of a legal system. Lawyers support a socially valuable practice that should be understood not as giving voice to the voiceless, but bringing relationships within the scheme of ordered liberty established by the legal system in a liberal community. This way of looking at legal ethics has a bit of a public-law quality, lending support to the dual commission approach. On the other hand, it is grounded in the agency-law idea that the power of the principal limits what agents are authorized to do. In that sense it is closer to the internal limitation conception of loyalty. These possibilities should open up a fruitful ongoing conversation between scholars of legal ethics and fiduciary law.