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The Problem of the Faithless Principal: Fiduciary Theory and the Capacities of Clients

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The Problem of the Faithless Principal: Fiduciary Theory and the Capacities of Clients

W. Bradley Wendel*

ABSTRACT

Philosophers sometimes criticize the lawyer-client relationship for rendering the lawyer “at best systematically amoral.” Legal ethics theorists typically analyze the lawyer-client relationship in terms of role-differentiation or a separation of public and private moralities. But if we concentrate instead on the allocation of responsibility for decisionmaking within a fiduciary relationship, the idea of differentiation or separation of moral spheres falls away somewhat. This Article considers two issues raised by the allocation of moral responsibility within the lawyer-client relationship. First, why should the agency structure of the lawyer-client relationship, with its associated fiduciary duties, do anything to affect the moral situation of the lawyer? There must be a bridge between the legal concepts of agency and fiduciary duties and the moral notions of authority, obligation, accountability, dignity, equality, and respect. That connection is provided by an insight of fiduciary theory, that lawyers substitutively exercise their clients’ capacities. In the context of the lawyer-client relationship, the critical capacity is that for giving reasons in response to a demand for accountability. Second, what happens when the client fails to satisfy standards of reasonableness? There may be occasions when the client is behaving capriciously or otherwise not exhibiting the capacity essential to moral agency. If true, then the earlier concern resurfaces: The

*Professor of Law, Cornell Law School. Earlier versions of this paper were presented at the Australia-New Zealand Legal Ethics Colloquium (ANZLEC), at the University of Auckland, at the Sixth Annual Fiduciary Law Workshop, at Washington University – St. Louis, and at a faculty workshop at Cornell. I am grateful to workshop participants and owe special thanks for detailed comments to Deborah DeMott, Evan Fox-Decent, Andrew Gold, Sheri Johnson, Paul Miller, Jeff Rachlinski, Teddy Rave, Steve Shiffrin, and Nelson Tebbe. The author gratefully acknowledges the research funding provided by the Judge Albert Conway Memorial Fund for Legal Research, established by the William C. and Joyce C. O’Neil Charitable Trust to honor the memory of Judge Conway, Chief Judge of the New York State Court of Appeals from 1954 to 1959, and his son, Hewitt A. Conway, a member of the Cornell Law School Class of 1949.

lawyer-client relationship would in fact be an amoral domain, as opposed to a moral division of labor, if the client has not acted as a responsible moral agent in determining the objectives of the professional representation. In these situations, the lawyer may be called upon to assume greater responsibility for providing reasons in response to a demand by others for accountability.

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I. INTRODUCTION

The lawyer-client relationship establishes a normative division of labor. The client determines the objectives of the representation and makes decisions about the impact of a proposed course of action on third parties and the public interest in general. The lawyer's role is then to use reasonable skill and diligence to carry out the client's lawful objectives. As a result of this allocation of authority, lawyers stand apart from their clients and their clients' objectives. In general, lawyers do not rightly bear moral responsibility for having nasty clients who do nasty things. But why should this be the case? Lawyers remain moral agents, even when acting in a professional capacity. One who assists another in harmful activity is ordinarily blameworthy for providing assistance, even if acting at the direction of the other. On the principal-agent structure of the lawyer-client relationship, this is a real puzzle. However, considering the fiduciary nature of the lawyer-client relationship both explains the moral non-accountability of lawyers and suggests contexts in which lawyers may have to assume additional responsibility for their clients' actions. Fiduciary theory shows that lawyers substitutively exercise their clients' capacities. The relevant client capacity is that of all moral agents, namely, giving reasons in response to another's demand for accountability. Additionally, the client's capacity must be understood politically, in the context of the norms regulating relationships among citizens of a pluralistic community.

The law in general, and the legal relations of lawyer-client-third party, are best explained and justified as recognition of the dignity of free

and equal citizens of a political community who require a means to facilitate peaceful coexistence, cooperation on mutually beneficial projects, and some degree of social solidarity against a background of fundamental disagreement about goods, values, and rights.¹ Accordingly, there is a form of reciprocal respect built into giving legal reasons for one's actions. This mutual recognition of others as free and rational agents is what distinguishes the law, which makes purportedly legitimate demands, from the exercise of raw power.² Lawyers permit clients to exercise a distinctive type of capacity, which is giving *legal* reasons to justify actions that are permitted or required by the community's legal entitlements. The lawyer accordingly provides expert skill and knowledge with respect to the client's legal rights and duties but leaves the client free to make all-things-considered decisions, including those pertaining to the demands for justification by those affected by the actions of clients.

This Article considers two issues raised by the allocation of moral responsibility within the lawyer-client relationship. First, why should the agency structure of the lawyer-client relationship, with its associated fiduciary duties, do anything to affect the *moral* situation of the lawyer? There needs to be a bridge between the legal concepts of agency and fiduciary duties and the moral notions of authority, obligation, accountability, dignity, equality, and respect. The knee-jerk invocation by lawyers of the principle of "zealous advocacy within the bounds of the law"³ is question-begging on its own terms. The answer is elaborated in Section II. Philosophers sometimes criticize the lawyer-client relationship for rendering the lawyer "at best systematically amoral."⁴ Legal ethics theorists generally analyze the lawyer-client relationship in terms of role-

1. See generally SCOTT SHAPIRO, *LEGALITY* (2011); W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010); Jeremy Waldron, *The Concept and the Rule of Law*, 43 *GA. L. REV.* 1 (2008). The terminology of free and equal citizens is from the later work of Rawls. See JOHN RAWLS, *POLITICAL LIBERALISM* 49–50, 77–78, 85 (1993). Rainer Forst calls this a conception of ourselves as *moral* persons, to be contrasted with *ethical* identities rooted in conceptions of the good. See RAINER FORST, *CONTEXTS OF JUSTICE: POLITICAL PHILOSOPHY BEYOND LIBERALISM AND COMMUNITARIANISM* 35–36, 181–83 (John M.M. Farrell trans., 2002). The fiduciary conception of legal ethics defended here begins with a conception of persons as moral agents, not with a political conception of persons as citizens, but it ends up with Rawls in understanding reasonableness as a "political ideal of democratic citizenship." RAWLS, *supra*, at 62.

2. See STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT* 21–22 (2006); W. Bradley Wendel, *The Rule of Law and Legal -Process Reasons in Attorney Advising*, 99 *B.U. L. REV.* 107 (2019). Compare Daniel Markovits's distinction between brute demands and assertions of right. See DANIEL MARKOVITS, *A MODERN LEGAL ETHICS* 188–89 (2008).

3. See, e.g., Micheal E. Tigar, *Litigators' Ethics*, 67 *TENN. L. REV.* 409 (2000) (discussing zealous advocacy as a principle of litigation ethics).

4. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *Hum. Rts.* 1 (1975).

differentiation or a separation of public and private moralities.⁵ But the idea of differentiation or separation of moral spheres falls away somewhat if we concentrate instead on the allocation of responsibility for decision-making within a fiduciary relationship. The lawyer's moral perspective is not limited or "amoral," but rather is the *client's* moral perspective, at least with regard to the objectives of the representation. Understanding the lawyer-client relationship as deeply connected with liberal political theory clarifies some of the issues in dispute among theorists of the fiduciary responsibilities of lawyers.

The second question, addressed in Section III, concerns the implications for the fiduciary relationship of the client's incapacity to act on reasons. Responsibility may fall through the cracks if neither the client nor the lawyer exercises the capacity to provide a justification that is responsive to the interests of those rights-holders who can demand accountability. In contrast to the familiar problem of the faithless agent,⁶ the problem here involves a principal who fails to satisfy standards of reasonableness. The law is fundamentally a reason-giving practice and the social role of the lawyer is intelligible only on that understanding of the function of law. It is therefore a conceptual, and not only a pragmatic, point that the lawyer-client relationship presupposes a client with the capacity to exercise moral agency. The centrality of client capacity is apparent in the law governing lawyers, which struggles to define the duties of a lawyer representing a client with diminished capacity to make decisions in connection with the representation.⁷ Nevertheless, in some contexts (such as the representation of organizational clients) lawyers sometimes overlook the importance of client capacity. Corporate and agency law create a chain of command which structure the representation of entity clients in most cases. Rules respecting the representation of entity clients presume a formal hierarchy of control. If the usual decision-making process breaks down to the point that it is no longer *reasoned*, a lawyer may face the possibility of unclear or conflicting duties.⁸ Similarly,

5. See, e.g., Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980).

6. See *infra* notes 25-30, and accompanying text.

7. See MODEL RULES OF PROF'L CONDUCT, r. 1.14 (AM. BAR ASS'N 2012); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 (AM. LAW INST. 2000); see generally *Indiana v. Edwards*, 554 U.S. 164 (2008) (positing a "gray area" of client competency between competence to stand trial and the capacity to exercise the right of self-representation).

8. A similar problem may exist for lawyers representing classes or parties in non-class aggregated claims. See generally John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997); Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287 (2003); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE

lawyers for the government ordinarily defer to an agency head or the President for instructions, but the current President's capriciousness has occasionally challenged this default model. Finally, this section will briefly consider some of the potential disruption threatened by automated systems intended to replace lawyers as providers of professional services. The issue, in that case, is whether artificial intelligence systems have the ability to provide the reasons that are responsive to a third-party demand for accountability.

II. LEGAL ETHICS AND FIDUCIARY THEORY.

Moral agency is the competence, responsibility, and capacity for the mutual recognition of claims and reasons.⁹ An ordinary, natural-person client of a lawyer can be assumed to be a moral agent. As a moral agent, the client is accountable to others who are affected by his or her actions and must be prepared to answer (at least hypothetically) a demand for justification from others. A lawyer representing that client has a set of powers and duties that are "a form of *authority* ordinarily derived from the *legal personality*" of the client.¹⁰ The lawyer's authority is the "substitutive exercise" of the client's legal capacity.¹¹ It should, therefore, follow that the lawyer's moral situation vis-à-vis others who are affected by the client's actions is identical to the client's. However, lawyers claim that they should not be judged according to the moral status of their clients' objectives; nor are they accountable for the moral costs of the lawful means they use to assist their clients in carrying out those projects.¹² Lawyers may substitutively exercise their clients' capacities, but somehow they manage to escape moral criticism for the choices made by their clients and the consequences of those decisions. This so-called principle of non-accountability is a significant problem for philosophical legal ethics.

DAME L. REV. 913 (1998). To take the simpler case of class actions, if the class is viewed as an entity in itself, and conflicts arise among its members regarding the objectives of the class, the lawyer may be caught between competing interests with no ready way of ascertaining the interests of the client. The result may be a significant increase in the unaccountable power of lawyers for the class. *See generally* Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129 (2001).

9. *See* DARWALL, *supra* note 2, at 21; T.M. SCANLON, WHAT WE OWE TO EACH OTHER 23 (1998) (defining a moral agent as a creature that has the "capacity to recognize, assess, and be moved by reasons").

10. Paul B. Miller, *The Fiduciary Relationship*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 63, 70 (Andrew S. Gold & Paul B. Miller eds., 2014) (emphasis in original).

11. *Id.* at 71, 79 (observing that the authority of agents "takes the form of specific legal capacities that are presumptively personal capacities of the principal").

12. *See generally* TIM DARE, THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE 75 (2009); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669 (1978).

Lawyers strongly believe the principle holds, but it appears inconsistent with the moral agency of both clients and lawyers, and the fiduciary role of lawyers.

Two competing paradigms frame much of the debate in legal ethics.¹³ The first assumes a weak client dominated by a strong lawyer.¹⁴ Think of the type of vulnerability experienced by an unsophisticated one-time consumer of legal services, such as a matrimonial or personal-injury client. Owing to the opacity of professional expertise, the client is unable to monitor the work performed by the lawyer; the client is left to take it on trust that the lawyer will exercise the required level of competence and diligence, and refrain from self-dealing.¹⁵ This is the familiar “faithless agent” problem, common to many fiduciary relationships.¹⁶ The general principal-agent problem arises when one party, the agent, has the power to affect the interests of the principal. The agent may be motivated to act in her own interests and not the interests of the principal, and the principal lacks the ability to continuously monitor the agent to ensure the agent is always acting in the principal’s interests.¹⁷ The principal-agent problem occurs in a wide range of situations, including the trustee-beneficiary relationship and the governance of corporations by officers and directors for the benefit of shareholders. On this assumption, fiduciary duties are necessary to redress the imbalance of power in the relationship.¹⁸ The fiduciary owes duties of undivided loyalty to the beneficiary and will be liable for any instance of self-dealing or exploiting the advantages inherent in a relationship of inequality and vulnerability.

The second paradigm assumes a weak lawyer dominated by a strong client. Here the risk is that the lawyer will not be able to prevent the client from committing acts that harm specific third parties (such as investors)

13. See Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 718–19 (1987); see generally Stephen L. Pepper, *Three Dichotomies in Lawyers’ Ethics (With Particular Attention to the Corporation as Client)*, 28 GEO. J. LEGAL ETHICS 1069 (2015).

14. See generally David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454 (1981); Wasserstrom, *supra* note 4.

15. See DARE, *supra* note 12, at 89–92; see generally Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707 (1998); Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965 (1997); Richard A. Epstein, *The Legal Regulation of Lawyers’ Conflicts Of Interest*, 60 FORDHAM L. REV. 579 (1992).

16. See, e.g., Tamar Frankel, *Toward Universal Fiduciary Principles*, 39 QUEEN’S L.J. 391 (2014).

17. See generally Sanford J. Grossman & Oliver D. Hart, *An Analysis of the Principal-Agent Problem*, 51 ECONOMETRICA 7 (1983); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Stephen A. Ross, *The Economic Theory of Agency: The Principal’s Problem*, 63 AM. ECON. REV. 134 (1973).

18. See, e.g., Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 234, 254 (2011) (citing *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, 289 (Can.)).

or are contrary to the public interest. The concern motivating this strand of legal ethics theory is that the lawyer's role provides no meaningful constraint on anti-social behavior. The law is malleable enough to permit a lawyer to conclude that the client's proposed course of action, no matter how nasty, is lawful. The concern with self-dealing under this paradigm is that clients will act according only to their private interests, with no institutional mechanism in place to act with due concern for the public good or general welfare of society.¹⁹ It is less obvious why the power imbalance in this class of cases calls for the deployment of fiduciary norms, which in their core application are intended to reinforce duties to the principal. However, scholars who have considered the law governing lawyers through the lens of fiduciary theory have shown it to be a complex blend of private and public law norms.²⁰ The principal-agent problem takes on a particularly interesting dimension in the context of the lawyer-client relationship, however, due to the frequency with which moral issues, not just matters of self-interest, arise in the course of the representation of clients by lawyers. The lawyer-client relationship, to a much greater extent than most fiduciary associations, is largely aimed at facilitating the principal's dealings with others, including addressing moral questions concerning the permissibility of the client's actions. It involves a complex set of relational obligations, in which the client can demand accountability from the lawyer, but the lawyer can also establish relationships of authority in which third parties are accountable to the client, with all of these relationships constituted and enforced by state law.

Consider a simplified example that has long been a staple of the normative legal ethics literature.²¹ A merchant, Bassanio, needs a loan to get through a temporary downturn in his business. He borrows \$5,000 from his friend, Antonio, executing a promissory note memorializing his agreement to repay the money with interest beginning on a specified date. Bassanio, the borrower, now has a moral and legal obligation to repay Antonio, the lender. By the time the obligation was due, however, the fortunes of the two parties had reversed. Bassanio's business is flourishing while Antonio has fallen upon hard times. When Antonio asks for repayment, Bassanio temporizes, saying "I can't pay you right now – maybe later." At this point in time, most readers would agree that Bassanio

19. See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 14–15 (1988) (discussing THE FEDERALIST NO. 35 (Alexander Hamilton)).

20. See Alice Woolley, *The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations*, 65 U. TORONTO L.J. 285, 289 (2015).

21. See, e.g., DARE, *supra* note 12, at 2–3; WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 29 (2000); DAVID LUBAN, *LAWYERS AND JUSTICE* 9–10 (1988); Postema, *supra* note 5, at 66; Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1065 (1976). The original case is *Zabella v. Pakel*. See generally *Zabella v. Pakel*, 242 F.2d 452 (7th Cir. 1957).

has an ethical obligation to repay Antonio. A deal's a deal, and anyway, Bassanio has the money to repay the debt.²² But now suppose Antonio waits for a couple of years before resorting to legal action to collect his debt. By the time he files a lawsuit on the promissory note, the statute of limitations has run. Now enter the character of Bassanio's lawyer, Portia. She advises Bassanio that whatever moral obligation he may have to repay Antonio, he has no enforceable legal obligation. If he so directed, Portia says, she will file a motion to dismiss the claim for untimeliness. As David Luban observes, the reaction of most students to this case is that "the wealthy defendant is acting badly, [but] they do not see that that is the lawyer's problem."²³ Portia is not morally accountable to Antonio for interposing the statute of limitations defense, which serves to defeat his demand for repayment.

Bassanio's capacity includes understanding himself and Antonio as equal. He is thus accountable to Antonio and under an obligation to him:

In seeing ourselves as mutually accountable, we accord one another the standing to demand certain conduct of each other as equal members of the moral community Our dignity includes the standing to hold one another to our moral obligations toward each other . . .²⁴

The same is presumably true of the relationship between Portia and Antonio. One remains a responsible moral agent even when acting within a social role such as that of a lawyer. Granted, the presupposition of fiduciary theory is that the lawyer is exercising the client's capacities. Bassanio may decide to be a jerk and not repay Antonio. That is his choice and he has no legal obligation to repay the debt. But it is less clear why Portia should be exempt from moral accountability for pleading the statute of limitations on behalf Bassanio, although it is his legal right. There appears to be some alchemical process at work within the lawyer-client relationship. Delving into the nature of fiduciary relationships and their associated duties can explain why lawyers are legal agents for their clients and remain moral agents while acting in a professional capacity yet are not morally accountable for their clients' actions.²⁵

22. As the Seventh Circuit put it, "the defendant who was then in a position of some affluence . . . should feel obligated to pay an honest debt to his old friend . . . and countryman." *Zabella*, 242 F.2d at 455.

23. LUBAN, *supra* note 21, at 9. My experience teaching this case is very much in line with Luban's. I find it difficult to get students to see that the lawyer's conduct raises even a *prima facie* evaluation of wrongdoing, requiring some justification linked to the lawyer's role within the legal system. In other words, students have so internalized the standard conception that they do not see it is anomalous within moral theory more generally conceived.

24. DARWALL, *supra* note 2, at 119.

25. The terminology of *moral* agency may create confusion when introduced into a discussion of relationships governed by the *law* of agency, so I will try to talk instead about

Paul Miller contends that the essence of the fiduciary relationship is the exercise of discretionary power by the agent over significant practical interests of the principal.²⁶ Discretionary power, according to Miller, is “a form of authority [that] implies the freedom to engage in conduct, and more specifically to make decisions, not otherwise open to its bearer.”²⁷ Lawyers are sometimes disparaged by being called tools, but in contrast with a literal tool, with no will and freedom of its own, an agent has the freedom to make decisions about how to act, coupled with the power to change the normative situation of the principal. The actions of agents bind principals to contracts, dispositions of property, disclosure of information that would otherwise be confidential, and decisions in litigated matters such as what claims to assert against adverse parties. In pursuit of the client’s objectives, which the client defines after consultation with the lawyer, the lawyer has considerable discretion in choosing the means by which the client’s objectives are to be pursued.²⁸ Discretionary power is therefore a distinctive form of power, in that it extends the legal personality of one party (the principal) but does so by engaging the legal personality of another party (the agent). In light of the opacity of professional expertise, the importance of the interests at stake, and frequently the vulnerability of the client to exploitation,²⁹ it is of utmost importance that lawyers exercise their discretionary power responsibly. Rules of professional conduct, the possibility of civil liability to clients for negligence and breach of fiduciary duty, and the reputational interests of lawyers are all means to safeguard against self-dealing and shirking by lawyers.³⁰

Alice Woolley, responding to Miller and others who characterize fiduciary relationships in terms of the power of the agent, contends that Miller has it backwards. Lawyers should provide technical assistance to facilitate the exercise of discretionary power by *clients*:

The normative structure of the lawyer-client relationship requires lawyers to facilitate or enable client exercises of discretion, not to exercise discretion on their clients’ behalf. To the extent that lawyers exercise discretionary authority it is an incidental (and sometimes ethically problematic) feature of the lawyer-client relationship rather than its essential or defining quality. The central moral feature of the

standards of rationality and responsibility, but occasional reference to the moral agency of clients and lawyers is inevitable.

26. Miller, *supra* note 18, at 262.

27. *Id.* at 71.

28. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 16, 21, 26 (AM. LAW INST. 2000).

29. DARE, *supra* note 12, at 89–93; Miller, *supra* note 18, at 73.

30. See generally Ribstein, *supra* note 15.

lawyer's role is that a lawyer enables and protects a client's participation in the legal system and, in particular, facilitates a client's ability to make decisions about what to do in relation to what the law permits, proscribes, or enables.³¹

Exercising discretionary power over the interests of a client would represent the kind of impermissible paternalism that the standard conception of legal ethics is keen to mitigate. Fiduciary duties owed by lawyers within the context of the professional relationship should be oriented toward empowering clients to make decisions for themselves—to act on their capacity as moral agents—and not usurp that authority.³² The lawyer does not really have discretionary power because of the constraint supplied by (i) the client's instructions to the lawyer and (ii) the law applicable to the client's proposed course of action. If anything, Woolley argues, the exercise of discretionary power over the client's interests would constitute a violation of the law governing lawyers.³³

One aspect of the Woolley versus Miller disagreement is empirical. It concerns the extent to which lawyers actually have discretionary power over their clients' interests. In some aspects of the relationship, a lawyer plainly does have incentives to do things that benefit her, to the client's detriment, and has the capability to act on her own self-interest. For example, a lawyer representing a plaintiff on a contingency fee contract is, in effect, a joint owner with the client of the claim.³⁴ The lawyer may want to accept an early, but relatively low, settlement offer where the client would rather go to trial in hopes of receiving a higher payout. Although enforcement may be imperfect, rules of professional conduct and duties under tort and agency law requiring the lawyer to inform the client of any settlement offer, and to defer to the client's decisions regarding settlement, mitigate the risk of the lawyer taking advantage of an early settlement offer and foregoing the opportunity to press on for a better settlement or a more favorable judgment at trial.³⁵ In other cases, clients (often with in-house legal departments) have sufficient expertise and leverage over their retained counsel to significantly limit the discretion of lawyers. As Deborah DeMott rightly notes, “[a]n aggressive general counsel of a corporation . . . may retain outside law firms and subsequently keep them on the tightest of leashes.”³⁶ Fiduciary law often looks at relationships at a

31. Woolley, *supra* note 20, at 288.

32. *Id.* at 306.

33. *Id.* at 311–14.

34. See generally Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987).

35. See MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2012); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22(1) (AM. LAW INST. 2000).

36. Deborah A. DeMott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301, 304 (1998).

high level of generality, considering lawyer-client relationships as all relevantly similar, no matter what the balance of power in a particular professional relationship. This is the approach of the Supreme Court of Canada,³⁷ and American courts and scholars have traditionally maintained that the lawyer-client relationship is inherently a fiduciary one.³⁸

There is also a deeper theoretical issue between Woolley and Miller. This issue pertains to the impact of public-law duties on what would otherwise be a relationship constituted by private-law norms. As DeMott recognizes in her article on lawyers as agents, lawyers are more than mere agents owing to their traditional status as officers of the court and their regulation by court-administered (and to some extent professionally-defined) standards of conduct.³⁹ The lawyer-client relationship is constituted in part by the contract between the parties, specifying the scope of the representation, the objectives of the relationship, and any limitations on the lawyer's power. But it is also constituted by the content of the client's legal entitlements. Duties, therefore, arise within the lawyer-client

37. See Miller, *supra* note 18, at 267.

38. See Susan R. Martyn, *Back to the Future: Fiduciary Duty Then and Now*, in A CENTURY OF LEGAL ETHICS: TRIAL LAWYERS AND THE ABA CANONS OF PROFESSIONAL ETHICS 3 (Lawrence J. Fox et al. eds., 2009). One might question whether the analysis in this paper depends on lawyers being fiduciaries for their clients, or whether it is sufficient to observe that they are agents. The Restatement of Agency observes that “[i]t is open to question whether an agent’s unconflicted exercise of discretion as to how to best carry out the agent’s undertaking implicates fiduciary doctrines.” RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e (AM. LAW INST. 2006). However, the Restatement goes on to suggest that fiduciary doctrine performs an important gap-filling role:

An agent’s fiduciary position requires the agent to interpret the principal’s statement of authority, as well as any interim instructions received from the principal, in a reasonable manner to further purposes of the principal that the agent knows or should know, in light of facts that the agent knows or should know at the time of acting. An agent thus is not free to exploit gaps or arguable ambiguities in the principal’s instructions to further the agent’s self-interest, or the interest of another, when the agent’s interpretation does not serve the principal’s purposes or interests known to the agent.

RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e (AM. LAW INST. 2006). The emphasis in this paper on the connection between capacity and the ideal of rational deliberation, responsibility, moral agency, and accountability, inclines toward reliance on fiduciary doctrine in particular, which states heightened duties over and above agency doctrine in general. Fiduciary theory does better than agency law in dealing with the background assumptions about morality that motivate much of modern liberal political theory and jurisprudence, including the status of citizens as free and equal, and the foundation of moral obligation in relationships of authority and accountability.

39. DeMott, *supra* note 36, at 305–06. Lawyers in the U.S. are not truly self-regulating. The rules of professional conduct under which lawyers practice in their state of admission are adopted by the state’s highest court (or, in New York, by the four Appellate Divisions of the Supreme (trial) Court). The organized bar does have a role in defining the content of the rules, but only in an advisory capacity. See Bruce A. Green, *Lawyers’ Professional Independence: Overrated or Undervalued*, 46 AKRON L. REV. 599, 603–07 (2013).

relationship that are grounded in the relationship between the client and the state, and with other citizens, which are established by the positive law of the political community.⁴⁰ Fiduciary theory should therefore explain how the power of lawyers as agents is both constituted and limited by the capacities of their clients. Reliance on the principal's discretionary power will not produce the kind of explanation we require of the lawyer-client fiduciary relationship.

Perhaps in a sense one might understand the lawyer's public-law duties by maintaining that the lawyer is entrusted with an obligation of guardianship with respect to the public interest. That way of speaking is in the neighborhood of the Nineteenth Century theories of social control that allocated a significant role to professionals to ensure that the social order embodied shared values or the common good of society.⁴¹ Lawyers on this conception of professionalism were obligated not to seek the advantage of their clients, but instead bring to bear their expertise in "understanding complex facts" and "us[ing] those facts to envision a new and better community."⁴² Like Rousseau, who distinguished between private interests and the general will, lawyers understood their role as pursuing the private interests of clients within the constraints of the public good.⁴³ Lawyers today, however, are unlikely to refer to the common good of society or the general will when working out the content of the duties they owe to clients and others. For reasons well summarized elsewhere,⁴⁴ we live in a time of skepticism regarding shared values. Thus, the public ends

40. Woolley, *supra* note 20, at 289.

41. *See generally* PAUL D. CARRINGTON, *STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION* (1999); ANTHONY T. KRONMAN, *THE LOST LAWYER* (1993); SAMUEL HABER, *THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS 1750–1900* (1991).

42. *See* Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 14 (1934).

43. Kronman refers to the capacity of a good lawyer to view the situation of a client with both sympathy and detachment, an attitude that combines perception, imagination, and independence. *See* KRONMAN, *supra* note 41, at 66–74.

44. *See* Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649, 661 (2016). One source of this skepticism is the criticism by public choice theorists of any non-aggregative concept of the public good. *See generally* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 572 (5th ed. 1998) (summarizing public-choice position and citing foundational works); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 13 (1962); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, (1988); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983). Another source is the liberal political position discussed above, relying on the objective pluralism and incommensurability of human goods and values. *See, e.g.*, JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); JOHN RAWLS, *POLITICAL LIBERALISM* (1993); ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* (Henry Hardy ed. 1990); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); STUART HAMPSHIRE, *MORALITY AND CONFLICT* (1983); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

of the lawyer-client relationship are provided not by a conception of the common good of society, but by the positive law enacted by the political institutions of the society.⁴⁵

Moral pluralists comprising the so-called Second Wave of philosophical legal ethics have given a political-moral justification for the lawyer's role obligations. They rely on the function of the legal system to resolve conflict and thereby establish a framework for coexistence and cooperation.⁴⁶ This analysis begins with a Kantian assumption about the status of human beings as free and equal bearers of dignity. As such, individuals enter into relationships of authority and accountability. What Stephen Darwall calls second-person authority, which is an essential aspect of moral obligation, is a form of mutual respect; it allows us to address others with a demand for sufficient reasons.⁴⁷ The justifying reason, in turn, must be one that is allowed by a set of principles for the regulation of the interactions among persons that no one could reasonably reject.⁴⁸ However, as John Rawls observes in *Political Liberalism*, a basic fact of modern life is *reasonable* disagreement. This disagreement arises from conflicts among basic values, the irreducibly different perspectives from which people view the world and understand the nature and end of human existence, about the weight and priority of various competing values and empirical uncertainty.⁴⁹ We, therefore, appear to be in a predicament. We owe reasons to those who are affected by our actions, but there is such a diversity of reasons that it seems impossible to give a justification that others cannot reasonably reject. Enter the law.

As Scott Shapiro has argued, positive law has a moral aim. A community faces a moral problem when its members desire to engage in cooperation, private ordering, and other modes of planning but are prevented from doing so by pluralism and disagreement, as well as the complexity of the issues that need to be addressed. To put it in the terms of the preceding paragraph, members of a community acknowledge the obligation of mutual respect but find it difficult to give reasons that others can accept. Some means are therefore required not only to coordinate disagreement (that is a very thin basis for mutual respect) but to serve as a

45. Woolley, *supra* note 20, at 327.

46. See David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 GEO. J. LEGAL ETHICS 337, 352–55 (2017) (describing characteristics of Second Wave legal ethics theory).

47. See Darwall, *supra* note 2, at 21–22, 74–77; see also Evan Fox-Decent, *The Fiduciary Nature of State Authority*, 31 QUEEN'S L.J. 259, 262 (2005) (arguing that the fiduciary relationship fundamentally arises from the rights-bearing nature of the subject of authority).

48. See SCANLON, *supra* note 9, at 153–55; see also ONORA O'NEILL, *CONSTRUCTING AUTHORITIES: REASON, POLITICS AND INTERPRETATION IN KANT'S PHILOSOPHY* 13, 28 (2015) (arguing that justified actions are based on reasons we can share).

49. See RAWLS, *supra* note 44, at 55–57.

means of acknowledging others' second-personal claims of authority. The law has the moral aim of rectifying the moral deficiencies of a community beset with uncertainty and disagreement. It does so by providing the resources that enable citizens of a community to make and enforce binding commitments to one another. To provide leverage out of the "circumstance of legality,"⁵⁰ the law must settle normative controversy by guiding conduct through authoritative norms, in the name of the community as a whole, the content of which can be determined without going back to the considerations about which people disagreed in the first place.⁵¹ It follows from this functional account of the moral attractiveness of a democratic legal system and the rule of law that lawyers should not undermine the "strategy by which we secure community between people profoundly divided by reasonable but incompatible views of the good."⁵²

Importantly, the law aims not only to resolve conflict, settle disputes, and provide a social plan,⁵³ but to do so in a way that respects the capacity of those subject to the law for understanding and rational self-governance. Woolley follows Jeremy Waldron in contending that "governance through law, as opposed to governance by command or fiat, necessarily and essentially incorporates an attitude of respect for the dignity, rationality, and autonomy of those to whom it applies."⁵⁴ As Waldron has argued, the opposite of legality is not only tyranny but also capriciousness. What connects the ideal of the rule of law with ethical conceptions of human dignity is the assumption that we are all rational agents who can understand and act upon reasons.⁵⁵ This implies that anyone who acts in a way that interferes with our interests owes us a reason. If this sounds familiar, it is because Waldron is working with the same deeply Kantian insight as Darwall, Scanlon, Korsgaard, and other moral philosophers who ground moral duties in mutual recognition of rational agency. Woolley locates the core of the lawyer's ethical role in the way in which the fiduciary relationship empowers clients to act as autonomous moral agents in the context of a technically complex, legalized public order:

The lawyer's authority in relation to the client is the authority of enablement, of offering the knowledge, expertise, judgment, and skill

50. SHAPIRO, *supra* note 1, at 170–73.

51. *Id.* at 201–03, 398 (“[T]he logic of planning is respected only when the process of legal interpretation does not unsettle those questions that the law aims to settle.”).

52. DARE, *supra* note 12, at 74.

53. See generally SHAPIRO, *supra* note 1.

54. Woolley, *supra* note 20, at 328–29 (discussing Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 5, 55–56 (2008)).

55. Waldron, *supra* note 1, at 27–28.

needed to permit the client to decide how to proceed and how to execute her decision.⁵⁶

I think this is right and would differ only in emphasis. Not only does the lawyer facilitate the client's exercise of autonomous moral agency in making decisions about what to do; the lawyer also participates in giving the types of reasons that will suffice to justify the lawyer's actions that have an impact on the interests of others. The law is a reason-giving practice, just like the kind of second-personal moral accountability envisioned by Darwall.⁵⁷ The difference is that the law creates the possibility of a distinctive type of justification offered by the client, in which the lawyer's services are generally necessary to enable the client to exercise the capacity of giving the relevant reasons.

The specifically fiduciary element of this conception of legal ethics relies on anti-paternalism considerations.⁵⁸ It is anti-paternalist in its rejection of the Nineteenth Century conception of professions as guardians of the public interest, and thus lawyers are entitled to refuse to assist their clients in undertakings that are contrary to the public interest. If it is the case that people may disagree reasonably about the weight and priority of competing values, then the lawyer has no greater claim than the client to moral rectitude. The lawyer may disagree with her client's objectives but, leaving aside the cases of "Nazis and nutters" (to quote Tim Dare),⁵⁹ a great deal of disagreement is likely to be in good faith. A lawyer is always free to attempt to sway the client to her own point of view, provided that she does not coerce or deceive the client in the process. When all is said and done, however, if competing views about the right course of action remain, one party's view must prevail. The agency structure of the lawyer-client relationship, where the lawyer's role is to provide competent, technical assistance in pursuit of the client's chosen objectives, entails that the client's view must have priority. The traditional Nineteenth Century conception of professionalism held that the legal profession must serve as a repository of civic virtue in order to avoid a collapse into a kind of war of all against all, with all members of society limiting the aggressive pursuit of their self-interest only to the extent the state is able to stop them through the use of force.⁶⁰ The standard conception of legal ethics

56. Woolley, *supra* note 20, at 329.

57. See DARWALL, *supra* note 2.

58. See Luban, *supra* note 14, at 454.

59. DARE, *supra* note 12, at 60.

60. See generally KRONMAN, *supra* note 41 ; Robert W. Gordon, *Why Lawyers Can't Just Be Hired Guns*, in ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 46 (Deborah L. Rhode ed., 2000); Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381 (2001); Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319 (1987); ALEXIS DE

assumes, by contrast, that the requirements of civic virtue are themselves contestable and that lawyers are no better positioned than their clients to determine what is in the public interest.⁶¹

The principle of non-accountability is thus shown to be derivable from the structure of the fiduciary relationship between lawyer and client, which in turn is derived from liberal political premises. An important aspect of the client's capacity is to deliberate and act on reasons. Some of those reasons may involve technical questions related to the legal permissibility of a proposed course of action or, retroactively, something that the client has already done. The assistance of a trained expert is often necessary to facilitate the client's capacity to include legal considerations in deliberation. When it comes to moral matters, however, including the effect of a lawful course of conduct on the interests of third parties, lawyers generally have no greater expertise than the client. They do not facilitate the client's capacity for deliberation by acting on their own views about rights, values, or justice. In a sense, the lawyer-client fiduciary relationship disaggregates the client's capacity for making fully-informed judgments and assigns responsibility to the lawyer to apply specialized professional knowledge related to the legal status of the client's actions. It leaves ultimate responsibility for the all-things-considered moral judgment where it belongs: with the client.

The lawyer's non-accountability is not puzzling if it is understood as an implication of the design of a political system that allocates rights and duties under positive law, which requires expert assistance to understand and apply, but which also recognizes as a side-constraint the aim of not interfering with the autonomy of those subject to state authority.⁶² A lawyer does owe reasons to those affected by her client's actions. The scope of those reasons, however, are restricted under the assumptions of liberal political theory. A liberal account would maintain that the assistance of lawyers is necessary so that clients may exercise responsible moral agency against the background of normative and empirical controversy. The role of the legal profession must be understood in relationship to the framework of legal rights and obligations that have been established by a political process. The process, in turn, must be understood

TOCQUEVILLE, *DEMOCRACY IN AMERICA* 263-68 (J.P. Mayer ed., George Lawrence trans., Doubleday 1969) (1835); CHARLES-LOUIS DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS* § 4.5 (Thomas Nugent trans., Hafner Press 1949) (1748).

61. See, e.g., Roiphe, *supra* note 44, at 649, 665, 668, 672-75 (arguing that one significant cause of the decline of the Nineteenth Century conception of professionalism is a broader societal loss of faith in the existence or knowability of the common good, the public interest, or the general will, to which lawyers as professionals have privileged access).

62. See generally Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

as having the function of settling disagreement and establishing a scheme of norms which citizens can employ to account for themselves when affecting the interests of others. Non-accountability is also supported by the fiduciary structure of the lawyer-client relationship. The lawyer as agent for the client substitutively exercises the client's capacity. That means in part being as much as possible a pass-through for the reasons the client would offer in justification of her actions, if she had the expertise to do so.⁶³ If the lawyer did more than this—if the lawyer offered her own reasons to the affected third party—then the lawyer would be overstepping the bounds of her authority, understood in terms of the client's exercise of her capacities.⁶⁴

By exempting lawyers from the demand that they offer reasons to those who are affected by the actions of their clients, the principle of non-accountability helps ensure that lawyers will not refrain from providing assistance to clients with whom they disagree about matters of morality. Clients are owed competent professional advice when they contemplate a course of action that is lawful, but which raises moral concerns about which reasonable people may disagree. The lawyer should not override the client's responsibility to deliberate about what must be done, all things considered. The legal permissibility of a course of action is one factor the client may take into account in deliberation, but it is not dispositive. There is still the question of whether the client ought, morally, to do or refrain from doing something. The lawyer may give moral advice and guidance to the client if requested, but should not interfere with autonomous, responsible decision-making by the client. If that means the lawyer is not to second-guess the client's resolution of a moral question on which people may reasonably disagree, then this is as it should be.⁶⁵ A lawyer who has such strong personal objections to her client's objectives may withdraw from the representation,⁶⁶ but by longstanding professional tradition, the lawyer's representation of a client should not be understood as "an

63. See MARKOVITS, *supra* note 2, at 92–98 (defending the lawyerly virtue of fidelity, understood here as expressing their clients' point of view and not introducing their own opinions about their clients' actions).

64. There is an interesting example in a comment to the Third Restatement of Agency, involving a corporate manager who believes that it is socially desirable that fewer, rather than more, people smoke cigarettes. As it happens, however, the manager works for a tobacco company. (Maybe it's time for the manager to dust off her resume . . .) The manager exploits an ambiguity in the instructions of a corporate superior to redirect advertising expenditures in a way that will lessen overall demand for cigarettes. The Restatement concludes (rightly, in my view) that the manager breached her fiduciary duty to the corporation. See RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e, illus. 1 (AM. LAW INST. 2006).

65. DARE, *supra* note 12, at 75.

66. MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(4) (AM. BAR ASS'N 1980).

endorsement of the client's political, economic, social, or moral views."⁶⁷ The argument of the preceding section shows why this aspect of professional tradition is consistent with the agency and fiduciary structure of the lawyer-client relationship.

In most cases, a lawyer can assume that the client has exercised his, her, or its (for organizational clients) capacity to engage in reasoning. If the lawyer then acts in a way that facilitates the client's capacity, by advising the client on the requirements of the law and offering reasons that refer to the client's legal entitlements to those affected by the client's actions, the lawyer is not morally accountable for anything the client does that harms others. There may be occasions, however, when the client is behaving capriciously or otherwise not exhibiting the capacity essential to moral agency. If that is the case, then the earlier concern resurfaces. The lawyer-client relationship would in fact be an amoral domain, as opposed to a moral division of labor, if the client has not acted as a responsible moral agent in determining the objectives of the professional representation. The following section considers what happens when this assumption does not hold.

III. DYSFUNCTION IN THE MORAL DIVISION OF LABOR

A. *Lawyers for a Badly-Run Corporation*

Lawyers representing organizational clients may encounter a situation in which the client—acting through its directors and officers—seems bent on moral, but not legal, wrongdoing. For the time being, I would like to bracket the issue of whether corporations may be treated as moral agents, on which there is a voluminous literature.⁶⁸ Rather, the analysis here will proceed on the assumptions of basic corporate law,

67. *Id.* at r. 1.2(b).

68. See generally Ian Ashley & Diana Winstanley, *For or Against Corporate Identity? Personification and the Problem of Moral Agency*, 76 J. BUS. ETHICS 83 (2007); Matthew C. Altman, *The Decomposition of the Corporate Body: What Kant Cannot Contribute to Business Ethics*, 74 J. BUS. ETHICS 253 (2007); Manuel Velasquez, *Debunking Corporate Moral Responsibility*, 13 BUS. ETHICS Q. 531 (2003); Raymond S. Pfeiffer, *The Central Distinction in the Theory of Corporate Moral Personhood*, 9 J. BUS. ETHICS 473 (1990); Kenneth E. Goodpaster & John B. Matthews, Jr., *Can a Corporation Have a Conscience?*, HARV. BUS. REV., Jan. 1982, at 132; John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981); Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207 (1979). I am also not considering the different, and extremely interesting, issue of whether autonomous systems can function as entities, particularly using an LLC form, and thus be the clients of human (or machine) lawyers. See generally Lynn M. LoPuckii, *Algorithmic Entities*, 95 WASH. U. L. REV. 1 (2018); Shawn Bayern, *The Implications of Modern Business-Entity Law for the Regulation of Autonomous Systems*, 19 STAN. TECH. L. REV. 93 (2015). Thanks to James Grimmelman for alerting me to this development in technology.

namely that shareholders elect directors who have a fiduciary duty to shareholders and to the corporate entity; that officers manage the day-to-day affairs of the corporation and similarly have fiduciary duties to the corporate entity. The ethical analysis does not depend on the corporation having an identity analogous to that of a human moral agent, with the capacity to give reasons and issue demands for accountability. It is instead, by analogy, a kind of moral nexus-of-contracts idea in which the corporation is simply an abstract way of talking about the duties owed by human beings to each other, albeit in virtue of other obligations and expectations created by others acting with reference to the abstract idea of the corporation. In this moral nexus-of-contracts way of looking at the representation of corporate clients the ethical issue facing lawyers is what they owe, as moral agents, both to their client and to third parties who may be affected by their client's actions.

In their book on legal ethics in Australia, Christine Parker and Adrian Evans give an example, called "Lawyers, Gunns and Protest,"⁶⁹ involving Gunns Ltd., a timber company facing protests from environmental activists opposed to its clearcutting of old-growth forests.⁷⁰ Modifying their example slightly, imagine that some officers of the corporation have suggested taking legal action against environmental groups engaging in actions such as disrupting logging operations, attempting to persuade consumers to avoid Gunns's products, and pressuring institutional shareholders to vote for board members who would restrict clearcutting. Some of the legal actions, particularly those targeted at activists engaged in disruption, could impose significant costs on critics of the company. Imagine a decision-making process in which corporate officers, in-house lawyers, and outside (retained) law firms were involved. There is nothing preventing lawyers from raising objections on ethical grounds (or any other grounds, such as public relations) to the company proceeding against the environmental activists.⁷¹ Parker and Evans suggest raising considerations such as the identity of interested stakeholders, the interests and values at stake, and how those interests and values may conflict.⁷² The corporate officers empowered to make a final decision on behalf of Gunns may agree with the advice and seek a more cooperative relationship with critics of the company. Or, they may decide to fight like hell. Parker and Evans imagine the executive chairman stating that he is "sick and tired of

69. Appreciation for the Warren Zevon allusion.

70. See CHRISTINE PARKER & ADRIAN EVANS, *INSIDE LAWYERS' ETHICS* 7–14 (2007).

71. Under the U.S. law governing lawyers, there is an express permission for lawyers to refer to "moral, economic, social and political factors" that may bear on the client's decision, when rendering advice. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2003).

72. PARKER & EVANS, *supra* note 70, at 10.

the misleading information being peddled about our industry and our state” and demanding assistance to put a stop to “unauthorised entry to private property and damage to equipment owned by Gunns Limited.”⁷³ If that is a decision reached by a responsible (legal) agent for the corporation, then the lawyer, also an agent for the corporation, must accept that instruction from the client as long as there is a sufficient basis in law and fact for doing so.

I want to suggest, however, that underlying this normative division of labor is an assumption that *someone*—whether high-ranking officers of the company, its board of directors, or corporate officers and directors consulting with lawyers and other professional advisors—has conducted something approximating the holistic moral evaluation recommended by Parker and Evans. Although they do not use this terminology, Parker and Evans have set out the prerequisites for regarding any client as a moral agent. A lawyer who elects to accept instructions from the company’s management to use legal processes to push back against the environmental activists might reason as follows: “[r]easonable people can disagree about the issues posed by my client’s activities. Clearcutting old-growth forests may seem irresponsible, but from the forestry-management point of view there are some things to be said in favor of the practice. It allows more sunlight to reach new seedlings that require sunny conditions to thrive. It is also quite a bit less expensive than other harvesting methods. On the other hand, clearcuts look ugly and disrupt the habitat of forest wildlife. The environmental activists have some good points, but so does my client. And while it’s true that the company’s critics should be allowed to protest peacefully, their rights to free expression do not entitle them to destroy my client’s property or inflict unjustified economic harms. The law provides a mechanism for balancing the environmental issues related to clearcutting practices as well as the rights implicated by the protests.”

This inner monologue may be fanciful and a bit romanticized, but the point should be clear: If reasonable people could reach differing conclusions about a moral issue, and there are legal processes available for settling and reaching a social position on what is to be done in the face of this disagreement, then lawyers participate in a morally valuable social practice when they act as (legal) agents on behalf of clients. This structure of authority and accountability for lawyers presupposes, however, that the client has settled on a course of action that is adequately supported by reasons of the right sort.

Consider a real-life example of corporate decision-making that differs from the idealized reasoning in the Gunns example. As detailed in

73. *Id.*

a report by an outside law firm,⁷⁴ management and inside counsel for General Motors (G.M.) badly bungled the investigation of a significant risk to public safety. As extensively reported, a faulty ignition switch used in several G.M. cars, including the Chevrolet Cobalt and Saturn Ion, would sometimes fail in a way that both shut off the engine and disabled the car's airbags.⁷⁵ The switch departed from its intended design in a crucial respect—the torque was less than specified so that if a driver inadvertently bumped into it, or if the keys hanging from the ignition switch were too heavy, the electrical system might change from “run” to “accessory” mode. As early as 2005, G.M. started to receive reports of crashes in which the car's airbags failed to deploy. At first, they did not suspect a problem, as there were other factors that might have caused the airbags to fail to deploy. It was also hard to track down the problem because the engineer who had approved the original, faulty switch also approved a change to the switch design that solved the problem, but did so in a way that obscured the original risk.⁷⁶ But, by about 2007, it was becoming clear that there might be a defect in the electrical system of certain car lines. Finally, in early 2014, G.M. publicly disclosed the defect, began recalling as many as 2.6 million cars, and established a compensation fund for the victims of switch-related accidents.

What happened between 2007 and 2014? The long and short of it is, evidence of a possible defect was fed into the machinery of a cumbersome, bureaucratic process that churned on and on without moving toward a resolution. G.M. had a byzantine structure of review programs, tracking systems, and cross-disciplinary committees that was created precisely to detect and rectify issues like the ignition switch defect.⁷⁷ Customer satisfaction issues, which came to the attention of G.M. personnel involved in marketing, were supposed to get directed to engineers for improvement, coded for whether the problems were a mere annoyance or a possible

74. ANTON R. VALUKAS, JENNER & BLOCK, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS (2014), <https://bit.ly/3194mK3> [hereinafter *VALUKAS REPORT*]. But see BEN W. HEINEMAN, JR., THE INSIDE COUNSEL REVOLUTION 96–99 (2016) (criticizing the Valukas Report for failing to ascribe responsibility to top executives).

75. See Hilary Stout, *After a G.M. Recall, a Fiery Crash and a Payout*, N.Y. TIMES (Sept. 25, 2014), <https://nyti.ms/2M33LpG>; Hilary Stout et al., *For a Decade, G.M. Response to a Fatal Flaw Was to Shrug*, N.Y. TIMES (June 5, 2014), <https://nyti.ms/2K4Uxqx>; Rebecca R. Ruiz et al., *13 Deaths, Untold Heartache, From G.M. Defect*, N.Y. TIMES (May 26, 2014), <https://nyti.ms/2QoX9k8>.

76. See *VALUKAS REPORT*, *supra* note 74, at 53 (describing design release engineer Raymond DiGiorgio's decision to approve the original switch), 98–101 (recounting DiGiorgio's change to switch without making change to the part number, which G.M. CEO Mary Barra characterized as a violation of “Engineering 101” standards).

77. *Id.* app. B at 282–91 (summarizing systems maintained in connection with G.M. engineering and product development process, internal investigation, and products liability claims).

safety concern.⁷⁸ Managers from divisions of products, systems, and safety engineering periodically met with business managers to work on solutions to safety problems and overcome roadblocks.⁷⁹ Additional committees dealt with problems manifesting themselves in the field and had contact with representatives from engineering, marketing, business, and legal teams.⁸⁰ Reading the description of these procedures and protocols, one comes away with the impression of a company that takes its obligations to customers quite seriously. In reality, however, the redundancy and ambiguity inherent in the structure sapped the energy from the company's response. With multiple committees dealing with various aspects of the same problem, no person or centralized team had responsibility for making sure something got done. CEO Mary Barra memorably testified before Congress about the "G.M. nod," when everyone in the room agrees with a proposed plan of action, but no one does anything to make it happen, and the "G.M. salute," which consists of crossed arms with fingers pointing toward others, to whom responsibility is being punted.⁸¹ The human cost of this dithering can be measured in the injuries and deaths that would have been prevented if prompt corrective action had been taken.⁸²

Revelations of corporate wrongdoing are inevitably followed by the question, memorably asked by a federal judge surveying the wreckage of the savings and loan industry in the late 1980s, "where were the lawyers?" Judge Stanley Sporkin demanded to know, "[w]here were these professionals . . . when these clearly improper transactions were being consummated?"⁸³ Although the nature of G.M.'s wrongdoing was negligence and inaction, as opposed to willful frauds, Judge Sporkin's question is still the right one to ask. The answer turns out to be that lawyers were involved in the process of responding to reports of defects in the ignition switch, but they did not do enough. After the dust settled, many of those lawyers were fired for their inaction.⁸⁴

78. *Id.* app. B at 283 (describing Product Resolution Tracking System).

79. *Id.* app. B at 286 (describing Vehicle and Process Integration Review).

80. *Id.* app. B at 289–90 (describing Field Performance Evaluation and Product Investigation processes).

81. See Peter J. Henning, *How G.M.'s Lawyers Failed in Their Duties*, N.Y. TIMES (June 9, 2014), <https://nyti.ms/2weJBOL>. Barra's candid testimony about the dysfunctions within the G.M. organization is an ironic counterexample to Max Weber's theory of bureaucratic organizations, which emphasizes their capacity for carrying out complex tasks with "[p]recision, speed, unambiguity, . . . continuity, discretion, unity, strict subordination, [and] reduction of friction and of material and personal costs." See MAX WEBER, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 214 (H. H. Gerth & C. Wright Mills eds. & trans., 1946).

82. See HEINEMAN, *supra* note 75, at 96 (citing report by Kenneth Feinberg, concluding that 124 people had died in connection with the ignition switch defect).

83. *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990).

84. See Sue Reisinger, *GM In-house Lawyers 'Removed' in Ignition-Switch Purge*, CORPORATE COUNSEL (June 9, 2014; 3:40 P.M.), <https://bit.ly/2HN2GwL>.

Significantly, the Valukas report did not conclude that the in-house lawyers were assisting in a cover-up. Attorneys familiar with products liability cases pending against G.M. asked why the company had not ordered a recall and were told that the engineering department was “acutely aware” of the issue and was doing everything they could.⁸⁵ Yet CEO Barra said that the lawyers “didn’t take responsibility; didn’t act with any sense of urgency.”⁸⁶ In particular, the company’s lawyers dealt with the ignition switch problems as “business as usual,” without alerting G.M. general counsel. One might object that it is unfair to blame the lawyers for what is, after all, a not uncommon problem of organizational dysfunction. While not exonerating individual decision-makers, many after-the-fact reports on corporate wrongdoing focus on structural explanations such as diffusion of responsibility, groupthink, and pluralistic ignorance.⁸⁷ Unlike the players in many of these cases, however, the lawyers for G.M. were not relatively powerless underlings, dependent for their professional survival on a “Godfather” or protector higher in the corporate chain of command.⁸⁸ They were highly experienced, trusted by senior management, and in some cases in charge of the committees that made decisions about product recalls. These lawyers were in as good a position as lawyers can be to participate in deliberation about how the company ought to proceed. Instead, however, they in effect surrendered to the bureaucratic imperatives of a reporting structure that left no one in charge. That was a professional failing, not least of all in terms of the duties they owed to their client, the corporation, to protect it against the monetary and reputational costs of a fiasco such as the one that occurred at G.M.

What does this have to do with fiduciary theory? Again, I am not trying to make the point that it is appropriate to treat corporations on par with natural-person moral agents for purposes of ascribing responsibility and blame. Perhaps some association of human beings can be treated as metaphysical persons, but the claim here does not depend on the interdependence of metaphysical and ethical personhood.⁸⁹ Cases such as *Burwell v. Hobby Lobby Store, Inc.*⁹⁰ and *Citizens United v. Federal Election Commission*⁹¹ show that, for some juridical purposes, it is

85. VALUKAS REPORT, *supra* note 75, at 184.

86. Reisinger, *supra* note 84.

87. See generally, MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT’S RIGHT AND WHAT TO DO ABOUT IT (2011); DIANA VAUGHAN, THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE, AND DEVIANCE AT NASA (1996).

88. Compare the stories of ethical decision-making by middle managers in ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS (1988).

89. See French, *supra* note 68.

90. See generally *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

91. See generally *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

appropriate to treat a corporation as a person. As a matter of corporate and agency law, a corporation is an entity to which fiduciary duties are owed, by natural-person agents, including officers and lawyers.⁹² The important point, however, is that treating a corporation as a person can be understood as nothing more than protecting the legal rights of the natural persons who have legal relationships, through the corporation, with other persons or the state.⁹³ (That is what is meant by the “moral nexus-of-contracts” view alluded to, above.) Nothing turns on the equivalence of natural-person capacity and artificial-person capacity. The relevant capacities here are those of human moral agents, understood along Kantian lines, as being able to respond and comply with reasonable demands including the demands of others for accountability.⁹⁴

The important thing from the standpoint of ethical theory is that, in order for a corporation to serve as a vehicle for the realization of human capacities, it must respond to them or embody them in appropriate ways. The plaintiffs in the *Hobby Lobby* case asserted that they believed themselves to be under an obligation to run their businesses in accordance with their religious commitments.⁹⁵ If compliance with that directive had somehow broken down in the course of day-to-day operations, the corporate form would have failed to facilitate the capacity of the human owners of the business to exercise their religious beliefs. This could occur through intentional subversion by lower-level employees or some unintentional failure to communicate a policy to employees tasked with

92. See RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c, e (AM. LAW INST. 2006) (alluding to the importance of fiduciary doctrines in simplifying the process of making and communicating decisions for organizational principals).

93. The Supreme Court in the *Hobby Lobby* case understood the purpose of the legal fiction of corporate personhood as protecting the rights—in this case, the religious liberty interests—of humans who interact with others through the vehicle of a legally constitute entity:

[I]t is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.

Burwell, 573 U.S. at 706–07. Justice Ginsburg, in dissent, contends that the exercise of religion is characteristic of natural persons, not juridical entities. *See id.* at 794 (Ginsburg, J., dissenting). That is true as far as it goes, but not responsive to the majority’s argument that natural persons can exercise their human capacities through associations, including for-profit corporations. In other words, the moral nexus-of-contracts view adopted here may be a sufficient response to Justice Ginsburg.

94. See DARWALL, *supra* note 2, at 115–17.

95. *Burwell*, 134 S. Ct. at 2764–66.

complying with it.⁹⁶ In a large corporation like G.M., the risk to the core value of product safety could arise from the operation of many of the basic functional units of the business, “from finance to sales to marketing to manufacturing to technology development to sourcing.”⁹⁷ It is unrealistic to expect that the product of the management and decision-making systems of a complex organization will resemble the directive of a single natural-person agent. Many corporate and other organizational scandals, including the G.M. ignition switch failure, the *Deepwater Horizon* oil rig explosion and environmental disaster,⁹⁸ the space shuttle *Challenger* launch decision,⁹⁹ and the cheating by Volkswagen on emissions testing,¹⁰⁰ involve exceedingly complicated cultural and organizational failures, the significance of which is sometimes apparent only in hindsight.

The response to this observation should not be to deny that corporate principals have capacity that their agents may exercise. In most cases, a lawyer can assume that instructions from a corporate client represent the conclusion of a rational decision-making process. However, there may be circumstances that raise red flags, suggesting a fundamental failure of the organizational form to express the capacities of the humans who act through the legal entity. The G.M. ignition switch case is a good example because it should have been clear to lawyers for the corporation that something had gone deeply wrong with regard to a central value of the corporation.

[A communication breakdown] is surely no defense for the General Counsel when the legal function is right at the core of the problem – with responsibility to determine if there is real liability due to design or manufacturing defects; to confront ethical issues about when the company should act to protect people, even though liability questions are not fully resolved; to push the organization to understand open technical issues; and to resolve them with all deliberate speed.¹⁰¹

In extraordinary cases of a breakdown in rational decision-making within a corporation, a lawyer may be obligated to take more direct responsibility for the client’s compliance with legal and ethical responsibilities. Remember that the lawyer’s usual lack of accountability

96. Picking up on the facts of a case underlying the result in *Hobby Lobby*, imagine a manager’s failure to understand that the owner’s instruction to close the business on the Sabbath meant the *Jewish Sabbath*, Saturday. See *Braunfeld v. Brown*, 366 U.S. 599 (1961).

97. HEINEMAN, *supra* note 75, at 145.

98. See generally EARL BOEBERT & JAMES M. BLOSSOM, *DEEPWATER HORIZON: A SYSTEMS ANALYSIS OF THE MACONDO DISASTER* (2016).

99. VAUGHAN, *supra* note 83.

100. E.g., Roger Parloff, *How VW Paid \$25 Billion for “Dieselgate” – and Got Off Easy*, *FORTUNE* (Feb. 6, 2018), <https://bit.ly/2SgrUHn>.

101. HEINEMAN, *supra* note 75, at 98.

is premised on a normative division of labor between the lawyer and the client. This division of labor presupposes reasonableness on the part of the client. Lawyers should not be too quick to second-guess their clients' decisions or to label them as unreasonable, but if the facts warrant a reasonable belief on the part of the lawyer that the client is not acting to make reasonable decisions, the lawyer cannot rely on the usual allocation of decision-making authority. To be clear, the ethical failing here harmed G.M. first and foremost. Its lawyers were primarily obligated to protect it from the liability and reputational damage the company incurred. To the extent G.M. as a corporate person was also bound to act with due regard for the interests of others, however, the lawyers' failing also caused harm to customers. The lawyers' greater responsibility was primarily to the client, but derivatively to those with whom the client stood in a relationship of accountability.

Legal profession scholar David Wilkins has argued that the agency model is not the best description of the relationship between large, sophisticated corporate clients and their outside counsel; the relationship would be better understood as a kind of partnership or strategic alliance.¹⁰² The key difference between the agency model criticized by Wilkins and the idea of a partnership or strategic alliance is that neither party in the latter form of relationship has sufficient power to dominate the other. The result is the emergence of a new "logic of embeddedness," which emphasizes trust and reciprocity in an ongoing relationship.¹⁰³ Doctrinally, the logic of embeddedness is consistent with the duties of partners as mutual agents for one another.¹⁰⁴ However, it seems to fit uneasily with the American law of lawyering, as well as Woolley's account of lawyers as fiduciaries, both of which emphasize a kind one-way transmittal of instructions from client to lawyer.¹⁰⁵ The lawyer's legal duty is to act competently and diligently, in a manner reasonably calculated to advance the client's lawful objectives, as the client defines them.¹⁰⁶ As Wilkins points out, however, the logic of embeddedness may only reorient the dynamics of the lawyer-client relationship, rather than altering its fundamental character.¹⁰⁷ In particular, a long-term strategic partnership gives both parties an incentive to look out for each other's health and

102. David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 *FORDHAM L. REV.* 2067, 2070 (2010).

103. *Id.* at 2071.

104. *See, e.g.*, WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* 271 (3d ed. 2001).

105. *See supra* notes 31–38, and accompanying text.

106. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1)–(2) (AM. LAW INST. 2000).

107. *See Wilkins, supra* note 102, at 2114.

viability.¹⁰⁸ This means that the role of outside lawyers may include maintaining a corporate client's core values.¹⁰⁹

Corporate officers may welcome a lawyer's advice concerning the corporation's core values. State rules of professional conduct permit lawyers to offer non-legal advice,¹¹⁰ and there is a longstanding professional tradition of outside lawyers acting as "wise counselor[s]" to their clients.¹¹¹ One should not get carried away with the idea of a strategic partnership between lawyers and clients, because the ultimate responsibility to take care of the corporation's core values belongs to its directors and officers.¹¹² In most cases, lawyers can rely on those authorized constituents to discern and articulate the organization's values and objectives. Where there is a clear failure of intra-organization decision-making processes, however, lawyers may have a role to play in ensuring that the corporate structure does not interfere with the relationship of accountability that lies behind the legal duties owed by the corporation to others.

B. Government Lawyers for a Capricious Executive

The argument in this section begins with a hypothetical. Imagine that you are a career lawyer in the Department of Justice ("DOJ") Antitrust Division, at a fairly senior level, reporting to the politically appointed head of the Division. The Division head instructs you to explore legal theories for opposing the pending merger between AT&T and Time Warner. You are surprised, given a long history of a fairly deferential approach by the Justice Department toward so-called "vertical mergers" among "upstream" suppliers of a product and "downstream" distributors.¹¹³ A good bit of established law supports the position that vertical mergers can actually increase competition among firms – creating efficiencies by cutting sales and distribution costs and enhancing the flow of information. AT&T and Time Warner argue that their merger will help the new company compete more effectively against Netflix, Amazon, Apple, and Google, who are making substantial investments in video content and distribution. This is not necessarily a decisive argument, and the Justice Department has occasionally opposed vertical mergers. But you think there must be something else going on.

108. *Id.* at 2115.

109. *Id.* at 2117.

110. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2003).

111. See Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 424 n. 30 (1985).

112. MODEL RULES OF PROF'L CONDUCT r. 1.13(a) (AM. BAR ASS'N 2003).

113. See, e.g., John Salett, *The Interesting Case of the Vertical Merger*, U.S. DEP'T JUSTICE (Nov. 17, 2016), <https://bit.ly/2EUiBJ5>.

You realize that Time Warner owns CNN, which has been a frequent target of Trump's tweets alleging it is a purveyor of fake news.¹¹⁴ As reported in *Politico*, Justice Department lawyers had warned the companies that the government would seek to prevent the merger unless Time Warner sold CNN.¹¹⁵ The current head of DOJ-Antitrust, Makan Delrahim, said in 2016 that he did not see any major obstacles to the merger . . . before he assumed his current position.¹¹⁶ And Republican presidents have typically been very accommodating toward large corporate mergers, particularly those among companies that do not compete directly with each other. Considering that President Trump has also periodically threatened some unspecified antitrust or tax enforcement action against Amazon, because its owner, Jeff Bezos, also owns the *Washington Post*,¹¹⁷ it's hard to believe that President Trump's longstanding feud with CNN did not play some role in his administration's decision to oppose the merger. You have a nagging suspicion that your legal work will be used to further President Trump's vendetta against CNN, rather than assisting with an impartial analysis of whether the merger is in the public interest. What do you do?

114. As an example, Trump said he was "forced" to watch CNN while in the Philippines and "again realized how bad, and FAKE, it is. Loser!" See, e.g., John Bowden, *Trump, back from Asia, knocks "loser,"* THE HILL (Nov. 15, 2017, 7:18 AM), <https://bit.ly/2EmmUN0>.

115. Steven Overly & Josh Gerstein, *Trump administration sues to block AT&T-Time Warner merger*, POLITICO (Nov. 20, 2017, 3:51 PM), <https://politi.co/2zUHbYU>.

116. See, e.g., Celia Kang, *AT&T deal puts Trump's antitrust cop at center of a political storm*, N.Y. TIMES (Nov. 9, 2017), <https://nyti.ms/2zvWqoz>.

117. Paul Farhi, *'Not an appropriate way for a presidential candidate to behave': Bezos fires back at Donald Trump*, WASH. POST (May 18, 2016), <https://wapo.st/2whyJ2s>. Trump continued to refer to the paper as the "Amazon Washington Post" months after taking office. See, e.g., Dana Milbank, *This Column Brought to You by the "Amazon Washington Post,"* WASH. POST (July 25, 2017), <https://wapo.st/2ESAsAe>. Some administration officials have stated that Trump's attacks on Amazon often are in response to negative coverage in the *Washington Post*. See Damian Paletta & Josh Dawsey, *Trump personally pushed postmaster general to double rates on Amazon, other firms*, WASH. POST (May 18, 2018), <https://wapo.st/2Jys2SD>. During the presidential election campaign Trump threatened unspecified "problems" for Amazon and owner Jeff Bezos if he became President:

"He owns Amazon," Mr. Trump said in February. "He wants political influence so Amazon will benefit from it. That's not right. And believe me, if I become president, oh do they have problems. They're going to have such problems." Adam Liptak, *Donald Trump Could Threaten U.S. Rule of Law, Scholars Say*, N.Y. TIMES (June 3, 2016), <https://nyti.ms/2QjDFNv>. In May 2018 it was reported that Trump instructed U.S. Postmaster General Megan Brennan to double the rate it charges Amazon for "last mile" package deliveries, notwithstanding a contractual agreement between Amazon and the Postal Service. See Emily Stewart, *Trump's trying to fight Amazon and Jeff Bezos from the White House*, VOX (May 21, 2018; 11:06 AM), <https://bit.ly/2wW51Cb>.

It is sometimes asserted that government lawyers, unlike lawyers for private clients, have an obligation to serve the common good or pursue the public interest:

It is an uncontroversial proposition in mainstream American legal thought that government lawyers have greater responsibilities to pursue the common good or the public interest than their counterparts in private practice, who represent non-governmental persons and entities.¹¹⁸

However, in an influential article, Geoffrey Miller argues that government lawyers should not act on their own conception of the public interest, because the Constitution establishes a procedure for approximating the content of this ideal, through elections, political appointment of agency heads, and so on.¹¹⁹ Are vertical mergers, such as AT&T and Time Warner, in the public interest? The answer to that question relies to some degree on economics, on whether increased efficiencies will enhance Time Warner's ability to compete against Netflix in the market for video content. One might expect variation in the views of political appointees in the DOJ Antitrust Division with respect to large corporate mergers, and for these variations to correspond to the president's beliefs about social and economic policy. Some presidents might distrust the concentration of wealth and increased inequality that a large-scale merger might bring about or might oppose these mergers on the ground of their impact on workers and consumers. Other presidents might believe these concerns are outside the scope of antitrust policy or may believe mergers are beneficial to consumers in the long run.¹²⁰ Resolving these sorts of disagreements is exactly, as Miller argued, what elections are for. To put Miller's argument in terms of the analysis in this paper, democratic procedures are intended to establish a position that government officials advance, but the capacities in question are those of the polity as a whole, not the individual officials charged with giving effect to the results of the political process. Nevertheless, the result is to establish a normative division of labor between lawyers and clients, just as in the case of representing a corporation.

118. Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 789 (2000).

119. See generally Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987).

120. See, e.g., Robert H. Bork & Ward S. Bowman, Jr., *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363, 369–70 (1965) (“It is simply not accurate to say that Congress ever squarely decided to prefer the preservation of small business to the preservation of a free market in which the forces of competition were dominant. There was much oratory in Congress about the virtues of small business but no clear indication that antitrust should create shelters for the inefficient. . . . It would be hard to demonstrate that the independent druggist or groceryman is any more solid and virtuous a citizen than the local manager of a chain operation.”).

The hypothetical is structured around a lawyer serving in an advisory capacity, not taking a position in litigation on behalf of the government. One reason for this is to avoid the debate over Executive Branch constitutionalism – whether “judicial supremacy” or “departmentalism” is the best conception of the constitutional obligations of government officials.¹²¹ Features of the American Constitution suggest political branch interpretivism. For example, Article II, Section 3 states that the President “shall take Care that the Laws be faithfully executed” (the Take Care Clause). Further, Article II Section 1, Clause 8 provides that the President shall take the following oath: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.” Former Clinton and Obama Administration lawyer (now Dean of NYU Law School), Trevor Morrison, quotes John Marshall as recognizing that “a variety of legal questions must present themselves in the performance of every part of executive duty, but these questions are not therefore to be decided in court.”¹²² There are zones of non-justiciability and also areas in which courts defer to the practices and understandings of the political branches. This is not a license for political officials to ignore the law, but rather it places responsibility on them to “go further and confront the Constitution themselves.”¹²³ It is the province and duty of the political branches to say what the law of the Constitution is.¹²⁴ Because government lawyers do not have an obligation to incorporate considerations of public interest in the advice they give to clients, and because courts defer to the political branches, it is particularly important that the prerequisites for a normative division of labor in the lawyer-client relationship be satisfied here.

The issue in the hypothetical is what a lawyer should do when it appears that the President’s stated reasons—in this case, for opposing the

121. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 172 (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359–60 (1997); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 373–74 (1994); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 43 (1993); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POLITICS 401 (1986).

122. Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1695 (2011).

123. *Id.* at 1696.

124. *Id.* at 1697.

AT&T and Time Warner merger—are not the actual reasons for the directive. It bears emphasizing that the answer is not that the lawyer should pursue her own conception of the common good or the public interest. The lawyer’s disagreement with the President’s policy objectives, or even her sincere beliefs that they are contrary to the public interest, is not a sufficient reason to refuse to assist the President (acting through political appointees) in accomplishing his objectives. But the President’s actions must be supportable by reasons, and given the notorious capriciousness of the current President,¹²⁵ a government lawyer has a heightened duty to ensure that internal decision-making processes work properly. Democratic accountability and the rule of law are protected not only by the familiar separation of powers between the executive, legislative, and judicial branches, but also by intra-branch structures that ensure a robust process of contestation preceding official policy-making.¹²⁶ Our hypothetical lawyer at the DOJ Antitrust Division, therefore, has a duty of loyalty to ensure that the client engages in a reasoned process of deliberation.¹²⁷ It

125. As another example, consider Trump’s inconsistency regarding the so-called DREAMers – undocumented aliens brought to the United States as children. Trump ended the Obama Administration’s Deferred Action for Childhood Arrivals (DACA) program, creating a crisis for DREAMers. He then claimed he would support legislation to fix what he said were problems with the program, but then balked at the necessary compromises. He then threatened a veto of a bipartisan approach hammered out by Senate negotiators. See Ezra Klein, *Saving DREAMers is only this hard because Donald Trump has made it this hard*, VOX (Feb. 14, 2018; 8:40 AM), <https://bit.ly/2EqALSK>.

126. See, e.g., Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 229 (2016); see generally Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 423–25 (2009); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L.J. 1297 (2006); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

127. I have argued elsewhere, including in connection with the ethical obligations of government lawyers, that the rule of law is “a regulative ideal for an *activity*,” not a standard that makes reference to the content of a conclusion of law. See W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275, 340 (2017) (emphasis added). This insight is due ultimately to Lon Fuller, and to the way Fuller’s position has recently been developed by David Luban and Jeremy Waldron. See generally David Luban, *Natural Law as Professional Ethics: A Reading of Fuller*, in LEGAL ETHICS AND HUMAN DIGNITY 99, 103 (Gerald Postema ed., 2007) (“Fuller characterizes natural law as a way of conducting a practical activity . . . rather than as a philosophical thesis about the truth conditions of a proposition of law”); WALDRON, *supra* note 44, at 6 (“Law is an exceedingly demanding discipline intellectually, and the idea that it could consist in the thoughtless administration of a set of operationalized rules with determinate meanings and clear fields of application is of course a travesty.”). There are comparable duties within other areas of law, such as corporate law, which “look not only

may be that the government's opposition to the merger is supportable by adequate reasons.

Here, it is difficult to escape the effect of hindsight bias. The district court considering the government's lawsuit to block the merger found, after a lengthy trial, that the government had not met its burden to demonstrate that the transaction is likely to lessen competition substantially.¹²⁸ Vertical mergers, such as this one, are widely believed to create efficiencies and therefore be "procompetitive."¹²⁹ The DOJ Antitrust Division had not brought a lawsuit to block a vertical merger in over forty years.¹³⁰ The government, however, had plausible theories for the anti-competitive effect of the merger, including the increasing leverage that ownership of Turner networks (including CNN) would give AT&T over rival content providers who wished to use AT&T's distribution network.¹³¹

The problem for the lawyer is that there appears to be a disconnect between the President's *motivation* for ordering the Justice Department to oppose the merger and the sufficiency of the reasons that could be marshaled in opposition to the merger.¹³² The district court denied discovery into communications between the White House and the head of the DOJ Antitrust Division, Delrahim, which were intended to show that the lawsuit was motivated by President Trump's antipathy toward CNN.¹³³ For the purposes of this paper, the question is whether the lawyer's role as a fiduciary of the client, understood as furthering the client's capacities, is undermined by a mismatch between the client's motives and reasons. Are reasons distinct from motives? In the case of lawyers as fiduciaries, the

to fairness of 'price,' an inquiry into the agreed financial terms, but to fairness of 'dealing.'" Andrew F. Tuch, *Self-Dealing Revisited* 10 (unpublished manuscript) at 10.

128. See *United States v. AT & T, Inc.*, 310 F. Supp. 3d 161, 165 (D.D.C. 2018).

129. *Id.* at 197–98.

130. Jake Walter-Warner & William F. Cavanaugh, Jr., *The Last Time DOJ Sued to Block a Vertical Merger was Over Forty Years Ago . . . And It Lost*, PATTERSON BELKNAP (Jan. 8, 2018), <https://bit.ly/2y2bXx7>.

131. *AT & T, Inc.*, 310 F. Supp. 3d at 198–200.

132. At the risk of going off on a bit of a tangent, there is an analogy with the issue in ethical theory regarding the relationship of internal and external reasons. Internal reasons relate to an agent's subjective motivation set, including not only the agent's desires, but also "dispositions of evaluation, patterns of emotional reaction, personal loyalties, and various projects . . . embodying commitments of the agent." BERNARD WILLIAMS, *Internal and External Reasons*, in *MORAL LUCK: PHILOSOPHICAL PAPERS* 101, 105 (1981). One issue is whether one can rightfully say that an agent has a reason to do something in the absence of a motive to do that thing, and another, related issue is what deficiency one can charge an agent with, who refuses to do something that is apparently supported by (external) reasons – is the agent irrational, or merely deficient in another way, such as being cruel or selfish? See SCANLON, *supra* note 9, at 363–73. Thanks to Evan Fox-Decent for pressing me to clarify the distinction between motivating reasons and a sufficient justification for an action.

133. See *AT&T*, 2018 WL 2930849 at *19.

answer is yes, due to the authority relationship established by the law with its subjects. The law creates reasons that are objective and external to the motivations of citizens.¹³⁴ Someone who does not care at all about the law still has a *reason* to comply with the law, notwithstanding her lack of motivation to do so. What is true of duties is also true of a Hohfeldian power such as the government's capacity to seek to block the merger. The relevant legal entitlement exists without regard to a good or bad motive for exercising it, subject only to fairly narrow limitations on the selective enforcement of antitrust laws. Support for this view about the legal authority of government officials and the implications for the fiduciary duties of government lawyers also comes from the litigation over the Administration's efforts to enact a ban on entry into the United States from nationals of certain, mostly majority Muslim, countries.

Reaction by courts to the Trump Administration's travel ban orders initially suggested that courts may not readily defer to the reasoning of the Executive with respect to fidelity to constitutional norms if they believe the President has not exercised his capacity of engaging, in good faith, in reasoning about the requirements of law. The deference traditionally accorded to the President by the other two branches of government rests on the assumption that the President will comply with his constitutionally-prescribed oath to faithfully execute his office.¹³⁵ When a reviewing court has reason to doubt that the President's stated reasons are his real reasons, it is permitted (or even required) by the Constitution to engage in more

134. See Wendel, *supra* note 127.

135. Quinta Jurecic, *A New Jurisprudence for an Oathless Presidency*, LAWFARE (June 2, 2017, 11:25 AM), <https://bit.ly/2VIn5x2>; Dawn Johnsen, *Judicial Deference to President Trump*, TAKE CARE (May 8, 2017), <https://bit.ly/2VloZxq>; Benjamin Wittes & Quinta Jurecic, *The Revolt of the Judges: What Happens When the Judiciary Doesn't Trust the President's Oath*, LAWFARE (Mar. 16, 2017, 9:24 PM), <https://bit.ly/2JL6lxS>; Benjamin Wittes & Quinta Jurecic, *What Happens When We Don't Believe the President's Oath?*, LAWFARE (Mar. 3, 2017, 12:30 PM), <https://bit.ly/2n3pD34>. As discussed below, the Supreme Court upheld the third version of Trump's executive order. See *infra* notes 144–57, and accompanying text. In a concurring opinion, Justice Kennedy gently reminded the President of his oath of office:

The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.

Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring). That passage makes one wonder whether Justice Kennedy is acquainted with the current occupant of the White House. Indeed, Trump's reaction to the Supreme Court's decision was notably triumphalist; he characterized it as "a moment of profound vindication following months of hysterical commentary from the media and Democratic politicians who refuse to do what it takes to secure our border and our country." See Philip Rucker, *Trump Claims Victory and Vindication After Supreme Court Upholds Travel Ban*, WASH. POST (June 26, 2018), <https://wapo.st/2HwYjWA>.

searching review. The Fourth Circuit's decision on the Administration's second travel ban order accepted the deferential approach ordinarily followed when assessing the President's actions regarding the entry of non-citizens into the United States, particularly where there is an asserted national security justification.¹³⁶ The President enjoys broad statutory authority to bar entry of non-citizens if he finds that doing so will be in the interests of the United States and reviewing courts are instructed to defer to a facially legitimate and bona fide reason for the President's action.¹³⁷ The second travel ban order includes a recitation of facts supposedly justifying restrictions on entry from several countries, identified as state sponsors of terrorism.¹³⁸ On their face, these reasons would justify the denial of permission to enter the United States; the court conceded that the asserted national security interests are facially legitimate.¹³⁹ Nevertheless, the Fourth Circuit reached the truly startling conclusion that the President had not offered the national security justification in good faith.¹⁴⁰ It included a lengthy and detailed compilation of statements made by President Trump, both as a candidate and after taking office, tending to show that he had always intended to enact a "Muslim ban," regardless of whether there was a bona fide national security justification for doing so.¹⁴¹ The President's stated reasons were not his real reasons, the court suggested. The upshot of this is that reviewing courts need to pay the same respect to the President's decision as they ordinarily would to a fully-reasoned conclusion regarding immigration and national security policy.

136. See *International Refugee Assistance Program v. Trump*, 857 F.3d 554 (4th Cir. 2017), *vacated and remanded*, 138 S. Ct. 353 (Oct. 10, 2017). The Supreme Court order vacating the Fourth Circuit's decision was based on the expiration of the Executive Order on September 24, 2017. *Id.*

137. See 8 U.S.C. § 1182(f) (granting the President power to suspend or restrict "the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States"); *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (stating that courts should not look behind a "facially legitimate and bona fide" reason for denying entry into the country); *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring) (emphasizing that the deferential standard of review in *Kleindienst* applies with particular force in cases involving national security). A reviewing court may evaluate any government action for invidious discrimination, based upon the impact of the official action, whether there has been a clear pattern unexplainable on other grounds besides discrimination, the historical background of the decision, the specific sequence of events leading up to the challenged decision, and departures from the normal procedural sequence. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264–65 (1977). Even in applying this analysis, however, reviewing courts generally decline to engage in "judicial psychoanalysis" to root out evidence of discriminatory intent. *McCreary County v. ACLU*, 545 U.S. 844, 862 (2005).

138. See *International Refugee Assistance Program*, 857 F.3d at 573–74.

139. *Id.* at 591.

140. *Id.* at 592.

141. *Id.* at 575–77.

Building on a suggestion by Evan Fox-Decent, the lawyer's duty when advising the President on a proposal to enact a "Muslim ban" is to ensure that standards of fairness and reasonableness are met in the decision-making process.¹⁴² As it happens, one of the major problems with the first travel ban order (referred to as EO-1 in subsequent litigation) was the slapdash way in which it was prepared, with none of the inter-agency vetting and consultation with counsel that ordinarily precedes such a major decision.¹⁴³ Government lawyers can be faulted for failing to hold the Executive to minimally adequate standards of care and consistency in reasoning about the direction of official policy. EO-1 was enjoined almost immediately, on the grounds of being astonishingly overbroad and infringing on the rights of lawful permanent residents, leading to a new version, EO-2, that was considered by the Fourth and Ninth Circuits. The third version, EO-3, which replaced EO-2 and was the order considered by the Supreme Court,¹⁴⁴ was adopted after a much more thorough process, involving consultation with the Department of Homeland Security ("DHS"), the State Department, and the Director of National Intelligence ("DNI"), aimed at determining whether foreign governments provide adequate security screening for nationals of that country.¹⁴⁵ The President then issued the order after consultation with multiple Cabinet secretaries based on foreign governments' "capacity, ability, and willingness to cooperate with our identity-management and information-sharing policies and each country's risk factors," and American "foreign policy, national security, and counterterrorism goals."¹⁴⁶ The process preceding the issuance of EO-3 reflects the lessons learned from the litigation over prior versions of the order.

Judicial skepticism about a government official's "real" reasons may only go so far, and by the time EO-3 made it to the Supreme Court,¹⁴⁷ the administration had fortified the record with factual findings to support the President's directive. Chief Justice Roberts, writing for the majority, described in detail the factfinding process led by the DHS,¹⁴⁸ and

142. See Fox-Decent, *supra* note 47, at 264–65 (arguing that fairness and reasonableness simply are the content of the fiduciary duty of loyalty when an agent owes conflicting duties to beneficiaries with conflicting interests).

143. See Benjamin Wittes, *Malevolence Tempered by Incompetence: Trump's Horrifying Executive Order on Refugees and Visas*, LAWFARE (Jan. 28, 2017, 10:58 PM), <https://bit.ly/2k4AVUd>.

144. See *generally* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

145. See Petition for Writ of Certiorari in Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017).

146. *Id.* at 9.

147. See Trump v. Hawaii, 138 S. Ct. at 2392.

148. *Id.* at 2405.

continued to refer to it as a “worldwide, multi-agency review.”¹⁴⁹ Referring to the statutory language permitting the President to deny entry to a class of aliens if he *finds* that entry would be detrimental to national security, Chief Justice Roberts again mentioned the “comprehensive evaluation” by DHS and other agencies of the vetting process employed by foreign governments to determine the risk presented by their nationals, and described the 12-page Proclamation of EO-3 as more detailed than any prior President had issued under that provision of the Immigration and Nationality Act.¹⁵⁰ One of the plaintiffs’ arguments in the litigation, of course, was that President Trump himself did not believe a word of the Proclamation or care about the findings of the DHS evaluation, and was motivated instead by anti-Muslim bias (or the desire to appeal to his supporters’ anti-Muslim bias).¹⁵¹ The “facially legitimate and bona fide” standard of review established by *Kleindienst*¹⁵² is ambiguous with respect to the requirement of sincerity or, to put it differently, to the possibility that a facially legitimate reason is merely a pretext.¹⁵³ “Facially legitimate” suggests that a reason is legally sufficient even if it is not the motivation for the government official’s action, whereas “bona fide” could be read to require that the official’s asserted reason is the actual reason for the action. The majority did accept the invitation of the plaintiffs to look beyond the President’s asserted justification, and considered some extrinsic evidence of his motivation, but it employed only deferential rational-basis review.¹⁵⁴ As the majority understood this standard of review, as long as the travel ban had some (objective) relationship to legitimate state interests, it should be upheld.¹⁵⁵

The key passage in the analysis comes near the end of Chief Justice Roberts’s opinion, where he responds to the invocation by Justice Sotomayor’s dissent to the Court’s approval of the internment of Japanese-Americans during World War II:

149. *Id.* at 2409; *see also id.* at 2408 (again referring to “a worldwide review process undertaken by multiple Cabinet officials and their agencies”).

150. *Id.* at 2408.

151. *Id.* at 2417. Justice Sotomayor’s dissent uses Trump’s own words to make a powerful case that “a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government’s asserted national-security justifications.” *Id.* at 2438 (2018) (Sotomayor, J., dissenting).

152. *Kleindienst v. Mandel*, 408 U. S. 753, 770 (1972).

153. Sincerity, or saying what one believes, is one of the virtues supporting the value of truthfulness; it supports flourishing practices of trust and reciprocity. *See* BERNARD WILLIAMS, *TRUTH & TRUTHFULNESS: AN ESSAY IN GENEALOGY* 11, 119 (2002). In the terms of Williams’s political ethics in *Truth & Truthfulness*, the question is whether a legal standard requiring only a facially neutral justification provides a sufficient degree of trustworthiness to support the assertion of legitimate (that is, rightful) authority by the state.

154. *Trump v. Hawaii*, at 2420.

155. *Id.* at 2420–21.

[T]he dissent invokes *Korematsu v. United States*, 323 U. S. 214 (1944). Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case The entry suspension is an act that is well within executive authority and could have been taken by any other President – the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.¹⁵⁶

The comparison between the lawful authority of “any other President” and the actions of “this particular President” clearly indicates that the majority of the Court believes there are objective, external criteria for determining when the President is acting in good faith. If any other President *could* have reached the conclusion that the listed countries were providing inadequate security, then the travel ban is constitutional, notwithstanding President Trump’s clearly and repeated expressed anti-Muslim bias and desire to enact a Muslim ban. Justice Sotomayor calls this a “blinker” approach to deference,¹⁵⁷ but the majority’s position can also be understood not as ignorance, but as indifference. What matters for the majority is the hypothetical justifiability of the government’s position, not what motivated the travel ban order. Even if all of the Justices’ opinions share “the strong suspicion that the process was engineered to justify a preexisting outcome that had its roots in incompetent and bigoted demagoguery,”¹⁵⁸ the majority refuses to consider the possibility that what might otherwise be a justifiable exercise of power may cease to be lawful if the President does not himself internalize and act upon minimal standards of consistency and sincerity.

The travel ban litigation thus illustrates an important limitation on the extent to which fiduciary theory modifies the standard conception of legal ethics. A lawyer’s ethical role is still to facilitate the exercise of the client’s capacities. Importantly, however, the client’s capacities are to a significant extent defined by the applicable law. If the law permits an action based on objectively sufficient reasons, then the fact that the client’s actual motives are at variance with those reasons is not necessarily a reason to believe the action will be unlawful. In the hypothetical involving the AT&T and Time Warner merger, if there is a factually and legally sufficient basis for the government to object to the merger, a DOJ Antitrust Division lawyer’s fiduciary obligation is ultimately to assist the government in opposing the

156. *Id.* at 2423.

157. *Id.* at 2438 n.3, 2448 (Sotomayor, J., dissenting) (“By blindly accepting the Government’s misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one ‘gravely wrong’ decision with another.”).

158. Benjamin Wittes, *Reflections on the Travel Ban Case and the Constitutional Status of Pretext*, LAWFARE (July 6, 2018), <http://bit.ly/2YLr7BH>.

merger. The lawyer's belief that the President's motivation differs from the factual and legal grounds for the objection is irrelevant to the lawyer's professional duty of loyalty. The ethical prescription would change, however, if the law were different. If the Supreme Court had come out differently in the travel ban case and permitted a showing that there was a discriminatory purpose lying behind the facially neutral government action,¹⁵⁹ then a government lawyer as a fiduciary would have been permitted, or even required, to refuse to assist the relevant agencies (DHS, etc.) in implementing the President's proposal. This section will conclude by briefly considering the source and content of this duty.

Lawyers may not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."¹⁶⁰ By some kind of *expressio unius est exclusio alterius* logic, however, many lawyers read this rule as negating any professional obligation to refrain from counseling or assisting unlawful client conduct that is not a crime or fraud. For example, after a conclusion by the Justice Department's Office of Professional Responsibility that lawyers in the Office of Legal Counsel had engaged in professional misconduct by drafting badly reasoned memos purportedly permitting torture, Deputy Attorney General David Margolis took an extremely formalistic view of the lawyers' duties.¹⁶¹ He refused to find a violation of applicable legal standards, although he said it was a close question.¹⁶² I have argued that the Margolis Memo must be read in light of the sympathy a DOJ lawyer would have for other lawyers in the Department working in the immediate aftermath of the September 11, 2001, terrorist attacks, subject to enormous political pressure to unshackle the national-security apparatus.¹⁶³ It should not be understood, however, as warranting the conclusion that there is no professional duty to ensure that a government official's or agency's conduct complies with applicable legal requirements. That duty is not stated in a single rule of professional conduct, but rather is a summary of much of the law

159. See *International Refugee Assistance Project v. Trump*, 857 F.3d 554, 559 (2017) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977)). Interestingly, the dissenting opinions in the Supreme Court's opinion in *Trump v. Hawaii* did not employ the *Arlington Heights* test, relying instead on First Amendment religious-freedom cases such as *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520 (1993), and *McCreary County v. American Civil Liberties Union of Ky.*, 545 U. S. 844 (2005). See *Trump v. Hawaii*, 138 S. Ct. at 2429, 2434. The upshot is the same, however; if the plaintiffs had proven that the President had acted out of hostility toward Islam and Muslims and not for his stated national-security purposes, the travel ban would have been unconstitutional.

160. MODEL RULES OF PROFESSIONAL CONDUCT r. 1.2 (AM. BAR ASS'N 1983).

161. Memorandum from the Assoc. Deputy Attorney Gen. to the Attorney Gen. (Jan. 5, 2010) [hereinafter *Margolis Memo*].

162. *Id.* at 12, 67.

163. Wendel, *supra* note 127, at 313–14.

governing lawyers, which includes rule-based and common-law duties of competence, diligence, independence, loyalty, honesty, and communication.¹⁶⁴ What distinguishes lawyers from other agents is their obligation to carry out the *lawful* instructions of the principal, as defined by the client after consultation,¹⁶⁵ and the lawyer's inherent (non-waivable) authority to refuse to assist in conduct that the lawyer believes to be unlawful.¹⁶⁶

In terms of fiduciary theory, lawyers do exercise some aspect of the client's capacity substitutively, but the client's *legal* capacity, which is what lawyer-agents exercise, is limited to the powers that are conferred on the client by law. If the law prohibits some action, like banning all Muslims from entering the United States, a lawyer may not assist the President in performing it. The Supreme Court's travel ban decision does not alter this aspect of the lawyer's ethical role; it merely concludes that, objectively speaking, there were sufficient grounds for the President's actions. In a different case, however, lawyers should not assume that their role as fiduciaries somehow limits their obligation to ensure their client's compliance with the law.

C. *Artificial Intelligence and Reason-Giving by Lawyers*

Many of the tasks traditionally performed by lawyers involve dealing with large volumes of information, and computers are very good at executing instructions for the processing of information.¹⁶⁷ Computers already out-perform human experts at many tasks.¹⁶⁸ We have all heard accounts of IBM Deep Blue technology beating Garry Kasparov at chess, the company's Watson system winning at Jeopardy; less familiar (but to experts, more impressive) is the story of Google's DeepMind AlphaGo computer beating top-ranked human players at the game of Go.¹⁶⁹ It would,

164. *Id.* at 312–13.

165. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) (AM. LAW INST. 2000).

166. *Id.* § 23(1).

167. Dana Remus & Frank Levy, *Can Robots Be Lawyers: Computers, Lawyers, and the Practice of Law*, 30 GEO. J. LEGAL ETHICS 501, 508 (2017).

168. See RICHARD SUSSKIND & DANIEL SUSSKIND, *THE FUTURE OF THE PROFESSIONS: HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS* 45 (2015).

169. See, e.g., Darrell Etherington, *Google's AlphaGo AI Beats the World's Best Human Go Player*, TECHCRUNCH, <https://tcrn.ch/2LVd1fH>; David Z. Morris, *Google's Go Computer Beats Top-Ranked Human*, FORTUNE (Mar. 12, 2016), <http://bit.ly/2LWmfVv>. Go is a significantly greater programming challenge than chess, because there are so many possible combinations of moves that a computer cannot simply calculate the best strategy by brute force. The real leap forward for Google's Go computer is moving from being trained on a massive database of human-played games to a self-teaching algorithm that worked from the rules of the game toward previously unknown strategies. See Matthew Hutson, *This Computer Program Can Beat Humans at Go – With No Human Instruction*, SCIENCE (Oct. 18, 2017), <http://bit.ly/2WStuC9>.

therefore, appear to be only a matter of time before improving information technology systems prove themselves superior to human lawyers. Predictive coding systems have already greatly reduced the donkey work involved in privilege reviews preceding a document production and the review of the adversary's production for relevant documents.¹⁷⁰ Artificial intelligence (AI) provides similar advantages for transactional due diligence. Decision-support software in widespread use for litigation strategy purposes reveals patterns from past litigation showing judicial attitudes toward certain types of motions and arguments, and the advantage of specific venues. Going beyond rudimentary applications like LegalZoom and Rocket Lawyer, contract drafting software supported by machine learning and deep-learning techniques may enable the rapid, inexpensive development of bespoke contracts covering a wide variety of contingencies, based on relative parsimonious user input of key terms and conditions.¹⁷¹ Applications like Lex Machina reveal patterns in case outcomes associated with specific law firms, allowing in-house lawyers to make better-informed decisions regarding the employment of outside counsel. At least so far, AI is used to assist lawyers and make them more efficient.

One does not have to be a Luddite, however, to fear that increasingly powerful AI may lead, in the not-so-distant future, to the complete replacement of human lawyers. If a client can turn to an online legal guidance application to determine the risks associated with standard International Swaps and Derivatives Association transactions (for sophisticated clients), or obtain information about legal issues related to healthcare services (for individual clients),¹⁷² then lawyers may find themselves “disrupted” and “disintermediated”—to use two very *au courant* terms—out of employment. After all, taxi medallion owners and the Eastman Kodak Co. once thought they had very secure business models.

Some of the traditional functions of lawyers are more resistant than others to encroachments by AI-based systems. For the foreseeable future, it seems extremely unlikely that computers will replace lawyers at tasks such as: (1) fact investigation, including making a judgment about the relevant avenues of investigation, determining where relevant documents are likely to be located, and interviewing witnesses¹⁷³; (2) negotiation over

170. Dana A. Remus, *The Uncertain Promise of Predictive Coding*, 99 IOWA L. REV. 1691 (2014).

171. See, e.g., RICHARD SUSSKIND, *THE END OF LAWYERS? : RETHINKING THE NATURE OF LEGAL SERVICES* 100–05 (2008); Beverly Rich, *How AI Is Changing Contracts*, HARV. BUS. REV. (Feb. 12, 2018), <http://bit.ly/2QfvcLA>.

172. SUSSKIND, *supra* note 171, at 122–23.

173. Remus & Levy, *supra* note 167, at 527.

issues such as the terms on which to settle a case or provisions in a transaction¹⁷⁴; (3) the type of client counseling requiring emotional intelligence, such as listening empathetically to a client in a matrimonial dispute to determine the client's goals, and then providing advice about what options are legally available¹⁷⁵; (4) in-court appearances on behalf of clients, at a trial, evidentiary hearing, or oral argument on a motion or an appeal.¹⁷⁶ One might therefore ask, what is it about these functions that makes them more resistant to automation? Although space permits only the beginning of a response here, I believe the answer turns on the function of law and lawyers of facilitating the human capacity for connection, relationships of recognition and accountability, and maintenance of a political community which presupposes that its citizens are free and equal.

Law is a human artifact, intended to serve human needs. (The same is true of corporations – hence the “moral nexus-of-contracts” view discussed in Section III.A.) I have been assuming a Kantian account of morality very much like that defended by Stephen Darwall:

[M]oral norms regulate a community of equal, morally accountable, free and rational agents as such, and moral obligations are the demands such agents have standing to address to one another and with which they are mutually accountable for complying.¹⁷⁷

Add to this a premise about the objective pluralism of values¹⁷⁸ and the need within a political community for a means to guide and coordinate conduct,¹⁷⁹ and a functional theory emerges about the relationship between

174. *Id.* at 527–29 (discussing a company called Modria that offers technology for handling relatively small disputes. It uses software that identifies areas of agreement and disagreement, and makes suggestions for resolving the dispute. There is a significant gap, however, between the abilities of Modria's current system and what would be required to negotiate larger, more complex disputes).

175. See AUSTIN SARAT & WILLIAM L.F. FELSTEINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 53–63 (1995) (describing the fluidity of client goals, objectives, and expectations, and the counseling required to match up the client's conception of his or her interest with what is “realistic” or legally possible).

176. Online Dispute Resolution (ODR) platforms such as Modria facilitate the settlement of relatively simple claims, using automated processes. See SUSSKIND & SUSSKIND, *supra* note 168, at 70. However, this is a far cry from presenting witnesses and evidence, and dealing with fact finding and credibility issues.

177. DARWALL, *supra* note 2, at 101. I have written about political morality, and legal obligation, proceeding from the first-person plural standpoint. See WENDEL, *supra* note 1, at 13. I was unaware that Gerald Postema had made much the same point, using the same terminology. See Gerald J. Postema, *Morality in the First Person Plural*, 14 L. & PHIL. 35 (1995).

178. ISAAH BERLIN, *Two Concepts of Liberty*, *THE PROPER STUDY OF MANKIND* 191, 239 (Henry Hardy & Roger Hausheer eds., 1998).

179. SHAPIRO, *supra* note 1, at 170–72 (setting out the Moral Aim Thesis, which is that “the law is first and foremost a social planning mechanism whose aim is to rectify the moral deficiencies of the circumstances of legality,” which in turn is defined as a

law and morality. The law can be seen as a technology for giving the types of reasons that human moral agents owe to one another, in response to others' demands for accountability. A contract is the memorialization of the parties' duties assumed toward each other, in light of their mutual expectations regarding responsibilities for certain contingencies. Other mechanisms for private ordering, such as wills and business entities, are available to facilitate planning and coordination. The law regarding involuntarily assumed obligations—primarily tort and criminal law—embodies societal expectations for minimally respectful conduct when the interests of others are implicated. Regulatory law embodies complex policy tradeoffs between risks, harms, and the costs of prevention. And public law governs the relationship between citizens and the state, protecting individual rights and establishing procedures that confine and regularize the power of the state.

Underlying all of these specific manifestations of law is something more general pertaining to the relationship between legal obligation and authority and the pre-legal moral and other reasons individuals would otherwise have. Moral accountability requires sufficient reasons for actions that affect the rights of others. It is perfectly conceivable that AI-based software and a massive database of legal decisions could summarize the results of legal disputes. Presumably machine-learning and deep-learning technology would also permit the software to improve at the process of responding in the right way to the reasons underlying those conclusions of law. If it did, then AI could produce results that a human observer would recognize as equivalent to a legal judgment.¹⁸⁰ If a computer can beat the world's top-ranked player of Go, it seems feasible that AI could be adapted to determine how something like a tort dispute would be resolved. From that conclusion, a human decision-maker could presumably conclude that she would not be held liable for not taking a particular safety precaution or making a design change to a product.

community having “numerous and serious moral problems whose solutions are complex, contentious, or arbitrary”).

180. In the realm of ethical decision making, machine-learning systems have been developed that make judgments about the application of general principles to specific cases, using inductive logic to infer rules that human experts have apparently followed (even if unconsciously) in deciding prior cases. See WENDELL WALLACH & COLIN ALLEN, *MORAL MACHINES: TEACHING ROBOTS RIGHT FROM WRONG* 27–28, 127–29 (2009) (describing MedEthEx); see also Colin Allen et al., *Prolegomena to Any Future Artificial Moral Agent*, 12 *J. EXPERIMENTAL & THEORETICAL A.I.* 251, 258 (2000) (arguing that an alternative to programming an AI system to use rules or principles would be attempting “to produce agents which happen to make morally proper decisions by modeling the moral behavior of humans”). For example, a system called MedEthEx, developed by a computer scientist and a bioethicist, is aimed at helping clinicians determine the best course of action when a situation presents conflicts of values such as autonomy and beneficence. *Id.* The system “discovers” or makes explicit the decision principles underlying the prior cases. *Id.*

Human lawyers already use online databases like Westlaw and Lexis to conduct legal research. What, if anything, would be lost by further “disintermediating” human lawyers by permitting a client to consult a Watson or Google DeepMind-based platform to determine whether the law permits or requires some conduct?

Take an extremely simple example. Trendy Eyewear, Inc., markets a line of sunglasses that is popular with professional baseball players. Not surprisingly, Little League, high school, and college baseball players buy many of these sunglasses. After reading reports of an accident in which a Little League player was hit in the face with a baseball, shattering his sunglasses and causing an eye laceration, Trendy wonders whether it should include a warning on its product, stating that the sunglasses are not shatter resistant and not intended to provide protection from impact. Trendy further wants to know if it does add a warning, whether the warning should be on the package, in the form of a removable sticker on the sunglasses themselves, or perhaps only in the instructions that come with the sunglasses. The most current statement by the American Law Institute on the duty of a manufacturer to warn of a risk provides as follows:

A product . . . is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller . . . and the omission of the instructions or warnings renders the product not reasonably safe.¹⁸¹

A comment to that section summarizes the well-established principle that a product seller does not have to warn of dangers that “should be obvious to, or generally known by, foreseeable product users.”¹⁸²

A human lawyer would immediately notice the issues calling for the exercise of judgment. What risks are generally known? Would a reasonable consumer expect baseball sunglasses to be more shatter-resistant than ordinary sunglasses? Is there something about the marketing of the product to athletes that carries an implied representation of safety when used in connection with that sport? Does it matter that the product is marketed to, or used by, a youthful population that may not be as well-informed about the relevant risks? Would the sunglasses not be reasonable safe unless they were accompanied by a warning? What language would be adequate to warn the user of the risk? Is there a risk of over-warning or warnings clutter if the sunglasses are accompanied by a warning of a risk that ordinary consumers are well aware of? Even if liability considerations cut slightly in favor of including the warning, would the manufacturer look

181. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(c) (AM. LAW INST. 1998).

182. *Id.* at cmt. j.

a bit ridiculous for doing so, given its brand identity as an aggressive and edgy accessory for people who want to look cool?

There are, of course, a zillion cases dealing with a manufacturer's liability for failure to warn. The difficulty is that they deal with an almost limitless range of situations in which people are exposed to different types of risks. A purchaser of baby oil would presumably know it is not a good idea to drink it, but may not be aware that babies and young children who aspirate it into their lungs may suffocate and suffer brain damage or death.¹⁸³ But a purchaser of spray-on hair and body oil might be held to knowledge that inhaling the spray could cause injury or death.¹⁸⁴ If the hair oil case is summarized as standing for the principle that "knowledge of a lesser risk includes appreciation of a greater risk," then how should a reasoner (whether a human lawyer or an AI system) deal with a case holding that a user's understanding that an elastic exercise band can snap back and hit you in the eye did not appreciate the risk of a resulting retinal detachment?¹⁸⁵ Maybe that case is just an outlier but there are other, similar cases such as one holding that the general knowledge of the risks of drinking alcohol did not include knowledge of the risk of fatal pancreatitis resulting from moderate alcohol consumption.¹⁸⁶ On the issue of the adequacy of warnings, there is similar uncertainty. For example, one notorious decision held that a warning of "risk of blood clotting leading to paralysis or death" on a prescription medication did not adequately inform the consumer of the risk of a stroke, even though blood clotting causing paralysis or death is the same thing as a stroke, the plaintiff contended that the warning given lacked the emotive impact of the word "stroke."¹⁸⁷

Even with a gigantic database of decided cases, the exercise of judgment is required to determine which cases are outliers and which follow the underlying rule. Judgment is also required to determine relevant similarities among cases. As H.L.A. Hart observed, "[p]articular fact-situations do not await us already marked off from each other, and labeled as instances of the general rule."¹⁸⁸ Proponents of AI might respond that pattern-recognition is one of the core competencies of expert Go players, and yet deep-learning technology enabled a computer to beat the very best Go masters. At least in principle there seems to be no reason to believe that a computer could not do similarly well at discerning patterns in decided cases. A deeper problem, however, is the combination of the

183. *See generally* Ayers v. Johnson & Johnson Baby Prods. Co., 797 P.2d 527 (Wash. Ct. App. 1990).

184. *See generally* Greene v. A.P. Prods., Ltd., 717 N.W.2d 855 (Mich. 2006).

185. *See generally* Jamieson v. Woodward & Lothrop, 247 F.2d 23 (D.C. Cir. 1957).

186. *See generally* Hon v. Stroh Brewery Co., 835 F.2d 510 (3d Cir. 1987).

187. *See generally* MacDonald v. Ortho Pharm. Corp., 475 N.E.2d 65 (Mass. 1985).

188. H.L.A. HART, THE CONCEPT OF LAW 126 (2d ed. 1994).

indeterminacy of the values underlying the results in particular cases and the law's openness to resolving the balance of values differently in cases that might arise in the future.¹⁸⁹ A lawyer might perceive a new situation as falling within the core of an existing rule, as being on the margin between two rules (or a rule and its exceptions), or as being governed by no existing rule at all. In all of those cases the lawyer must make a judgment based on her best understanding of the policies and values that underlie the relevant area of law. And of course, those policies and values are likely to be in tension. The law of products liability seeks to protect consumers from the risk of defective products, but also to avoid imposing onerous and unjustified liability costs on manufacturers, which would have the negative consequence of reducing the availability of useful products and the choices available to consumers. Not only are legal rules indeterminate, but the policies underlying them are indeterminate as well.

Notwithstanding this complexity, AI that is currently available, or will be available in the near future, may be able to handle the task of predicting the outcome of a hypothetical failure-to-warn claim regarding the sunglasses. That is to say, it mimics the result of the exercise of judgment by a human decision-maker. The result of this computation, however, is still only a prediction. It lacks the essential feature of a conclusion of law. Law is not just a prediction, from an external point of view, of what will occur under specified conditions. Being able to predict the application of legal rules to particular fact situations is one aspect of being a lawyer, but it is important not to confuse the competent use of a thing with the thing itself. Law is fundamentally a reason that permits or requires an action and is therefore an answer to a demand for accountability. The demand for moral accountability presupposes mutual recognition of both parties as free and equal, and as bearers of dignity. A sophisticated algorithm and a comprehensive database only get us so far. It may predict that a judge or a jury in the failure-to-warn case would, let's say, exonerate the manufacturer from liability. What it cannot do, however, is express the relationship of accountability that is involved in a moral justification. Imagine a conversation between an injured baseball player and a high-level officer of the manufacturer, in which the player asks, "why didn't you do more to protect me, by warning me of the risk?" The answer would be that the warning was not required, because of a balance struck by the law among competing policies such as consumer protection and avoiding the cost of unnecessary (and perhaps patronizing) warnings. The ethical quality of the reasons given by the manufacturer's officer depends on the mutual recognition of the officer and the consumer as equally deserving of respect. Respect for human dignity is manifested,

189. *Id.* at 130–36.

in a large-scale, decentralized, complex community in part through respect for law. At bottom, however, the authority and obligatory force of the law depends on its service of human moral ends.¹⁹⁰

A computer may assist lawyers in finding governing statutes and cases, predicting judicial decisions, and structuring agreements that embody the intentions of the parties. What it cannot do, by its nature, is do anything more than serve as a means to the moral end of expressing mutual recognition and respect. Whether it makes sense to think of a human principal and a computer agent as standing in a fiduciary relationship depends on whether the computer adequately furthers the principal's capacity of exercising moral agency in responding to a demand for accountability. Fulfilling fiduciary duties generally requires a (human) lawyer to engage with a human client's reasons and values in order to enable the client to express them through the medium of law in the client's dealings with others. A computer can no more be a fiduciary—and thus a substitute for a human lawyer—than a typewriter can.

IV. CONCLUSION

To a greater extent than any other fiduciary context, the lawyer-client relationship involves a principal-agent relationship of trust and confidence with a fundamentally moral end. The client's capacity, which the lawyer as fiduciary helps exercise, is that of assuming a relationship of mutual respect and accountability with others. In a well-functioning relationship, the result is a normative division of labor, with the client having moral responsibility for the impact of the representation on others. The situations considered in this paper involve a breakdown in the principal's capacity to fulfill the capacity of offering a reasoned justification to affected third parties. In those cases, the lawyer's ordinary privilege of moral non-accountability no longer holds. The lawyer's professional role changes in important ways, in the direction of taking greater personal responsibility for the morality of the client's actions. Fiduciary theory thus suggests a refinement on the standard conception of ethics bring it more into line, in these special cases, with the views of some of its critics.

190. See RAZ, *supra* note 44, at 56–59 (setting out the service conception of authorities, which holds that authorities are justified insofar as they improve the capability of people at complying with practical and moral principles).