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Keeping the Promise of Public Fiduciary Theory: A Reply to Leib and Galoob

Evan J. Criddle & Evan Fox-Decent

INTRODUCTION

For centuries, prominent jurists and political theorists have looked to private fiduciary relationships such as trusteeship, agency, and guardianship to explain and justify the authority of public officials and public institutions.¹ This tradition has attracted increasing interest over the past decade, as legal

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1. See, e.g., *Stone v. Mississippi*, 101 U.S. 814, 820 (1879) (“[T]he power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights.”); *Trist v. Child*, 88 U.S. (21 Wall.) 441, 450 (1874) (“The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good.”); CICERO, *Moral Goodness*, in *DE OFFICIIS* I.XXV 85, 87 (Walter Miller trans., 1928) (“For the administration of the government, like the office of a trustee, must be conducted for the benefit of those entrusted to one’s care, not of those to whom it is entrusted.”); HUGO GROTIUS, *DE MARE LIBERUM* ch. V, 29 (Ralph Deman Magoffin trans., 1916) (“[O]ne of the first gifts of Justice is the use of common property for common benefit.”); THOMAS HOBBS, *LEVIATHAN* 227 (C.B. Macpherson ed., Penguin Books 1968) (“The only way to erect such a Common Power . . . is to confer all their power and strength upon one Man, or upon one Assembly of men, to beare their person”); JOHN LOCKE, *An Essay Concerning the True Original, Extent and End of Civil Government* (1690), in *SOCIAL CONTRACT* 4 (Sir Ernest Barker ed., Oxford University Press 1948) (arguing that “the power of a magistrate over a subject may be distinguished from that of a father over his children, a master over his servant, a husband over his wife, and a lord over his slave”); *THE FEDERALIST* No. 46, at 243 (James Madison) (“The federal and state governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes.”).

scholars have used fiduciary concepts to elucidate important features of public law, from the nature and design of constitutional government,² to the legal obligations that attend public offices such as judge and legislator.³ We have contributed to this revival of public fiduciary theory by showing that fiduciary principles can explain and justify the structure and content of administrative law⁴ and international law.⁵ The great promise of public fiduciary theory, we have argued, lies in its powerful “criterion of legitimacy,” which links the legal authority of public officers and institutions to the principle that “state action must always be interpretable as action taken in the name of or on behalf of every agent subject to the state’s power.”⁶

In an essay published recently in the *Yale Law Journal*, Professors Ethan Leib and Stephen Galoob argue that public fiduciary theory applies to some domains of public law but not others because these other domains “are incompatible with the basic structure of fiduciary norms.”⁷ In defending this claim, Leib and Galoob draw on and develop a revisionist theory of fiduciary law that is grounded in ethical and deliberative norms traditionally associated with

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2. See, e.g., Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006) (arguing that “the origins of judicial review lie in corporate law”); Gary Lawson, Gary I. Seidman & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415 (2014) (describing the Constitution as a fiduciary document in which equal protection is inherent).
 3. See, e.g., Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845 (2013) (arguing that judges are fiduciaries under federal insider trading laws); Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699 (2013) (providing historical arguments for treating judges as fiduciaries); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671 (2013) (arguing that political representatives are fiduciaries “subject to a duty of loyalty”).
 4. See EVAN FOX-DECENT, SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY 151-233 (2011); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rule-making*, 88 TEXAS L. REV. 441 (2010) [hereinafter Criddle, *Fiduciary Administration*]; Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006); Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. 1271 (2010); Evan Fox-Decent, *Democratizing Common Law Constitutionalism*, 55 MCGILL L.J. 511 (2010).
 5. See EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY (2016) [hereinafter CRIDDLE & FOX-DECENT, FIDUCIARIES OF HUMANITY]; Evan J. Criddle, *Standing for Human Rights Abroad*, 100 CORNELL L. REV. 269 (2015); Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 331 (2009); Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301 (2009).
 6. CRIDDLE & FOX-DECENT, FIDUCIARIES OF HUMANITY, *supra* note 5, at 3, 99.
 7. Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1821 (2016) [hereinafter Leib & Galoob, *Fiduciary Political Theory*].

affective relationships such as friendship.⁸ Based on this theory, they contend that public fiduciary theory applies only to relationships in which one party (the fiduciary) bears robust deliberative obligations, including a freestanding motivational requirement to attribute “nonderivative significance” to the interests of another party (the beneficiary).⁹ The deliberative obligation is “freestanding” in the sense that “[s]pecific patterns of deliberation can violate fiduciary norms regardless of how (or whether) they are connected with behavior.”¹⁰ Leib and Galoob believe that these alleged deliberative characteristics of fiduciary relationships cast doubt on our thesis that administrative law reflects public fiduciary theory,¹¹ and they categorically rule out our arguments

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8. See Stephen R. Galoob & Ethan J. Leib, *Intentions, Compliance, and Fiduciary Duty*, 20 LEGAL THEORY 106 (2014) [hereinafter Galoob & Leib, *Intentions*] (developing their “shaping” account of fiduciary loyalty in which a loyal fiduciary must deliberate as follows: “in deliberating, a loyal fiduciary robustly attributes nonderivative significance to her beneficiary’s interests,” *id.* at 115); Leib & Galoob, *Fiduciary Political Theory*, *supra* note 7, at 1839 (drawing on Ethan Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 (2009)).
 9. *Id.* at 1829; see also *id.* at 1836–38 (discussing considerations that “might move a fiduciary to behave or deliberate in the way that fiduciary norms call for” but that “[d]espite their motivational efficacy, these are nonetheless the wrong kinds of reasons”); *id.* at 1849–52 (arguing that prophylactic rules against judicial conflicts of interest and ex parte contacts reflect fiduciary norms’ purported concern with ensuring untainted fiduciary motivations); *id.* at 1873 (alleging that “any way of conforming to [human rights] norms, however motivated, counts as compliance”); *id.* at 1874 (claiming that “a state whose behavior conforms to the requirements of human rights norms but whose motivations are inappropriate would nonetheless breach [deliberative fiduciary] norms”).
 10. *Id.* at 1834; see also *id.* at 1830, 1832 n.48, 1859, 1871–73, 1873 n.232 (affirming that fiduciary norms impose deliberative obligations or requirements that are freestanding in the sense that they are independent of behavior or outcomes).
 11. See *id.* at 1854–68. Leib and Galoob tentatively endorse our argument that administrative law is amenable to fiduciary theory, see *id.* at 1868, and they offer support for our view that the fiduciary theory of administrative law is normatively superior to Adrian Vermeule’s public-choice theory, see *id.* at 1865 (asserting that Vermeule’s theory is “inconsistent with core democratic values”). Ultimately, however, they conclude that fiduciary theory’s viability as a positive theory of administrative law “is an open question,” *id.* at 1825, because public-choice theory “can explain many of the same results that the fiduciary model explains,” *id.* at 1868. The problem with this critique is that it does not give sufficient weight to administrative law’s internal point of view—in particular, the norms that courts use to explain and justify their own practices. See H.L.A. HART, *THE CONCEPT OF LAW* 89–91 (3d ed. 2012) (distinguishing positivist theories that are based on internal and external points of view). Although Leib and Galoob observe that Vermeule’s public choice theory can explain some norms and outcomes (the external point of view), they emphasize repeatedly that Vermeule’s theory is inconsistent with legal norms that judges routinely affirm and apply in administrative law cases (the internal point of view). See, e.g., Leib & Galoob, *Fiduciary Political Theory*, *supra* note 7, at 1860 (noting the inconsistency between Vermeule’s claim that “‘hard look’ review is illusory” and the ample “rhetorical evidence [in judicial opinions] to the contrary”); *id.* at 1862–64 (arguing that public-choice theory is inconsistent with the Supreme Court’s scrutiny of administrative agencies’ deliberative processes). Because fiduciary theory is capable of

for using public fiduciary theory to explain and justify existing international law and its institutions.¹²

In this Reply, we explain why the Leib-Galoob critique of public fiduciary theory misses the mark. Part I shows that their critique is based on a theory of fiduciary relations that is in tension with well-established features of private fiduciary law. Because their theory of fiduciary relations cannot explain core aspects of fiduciary law, it fails as a theory of fiduciary law. Part II defends our fiduciary theory of public international law against the Leib-Galoob critique. Their critique applies their theory of fiduciary relations to international law, but because that theory is unpersuasive as a theory of fiduciary law, it cannot serve as a benchmark for assessing whether various fields of public law—including public international law—are amenable to fiduciary theorizing. Having said that, and to give our critics the benefit of the doubt, we consider whether international law and its institutions are as insensitive to deliberation as Leib and Galoob claim. There are significant aspects of international legal order—international adjudication and global administrative law—with national analogues that Leib and Galoob endorse as fruitful sites for public fiduciary theorizing. We similarly suggest that other features of international law, such as its dominant model for review of human rights violations, are also highly

explaining administrative law's formal requirements from both the internal and external points of view, it offers a more robust positive theory than Vermeule's public-choice alternative. The one place Leib and Galoob think fiduciary political theory applies without qualification is the practice of judging, a topic on which one of them has previously written. See Leib, Ponet & Serota, *supra* note 3. Unlike the case of administrative law, however, the existence of an alternative, outcome-centred view of judging (i.e., the theory of Judge Richard Posner, which they discuss at length) curiously does not lead them to conclude that the "viability" of a fiduciary theory of judging is an "open question." Leib & Galoob, *Fiduciary Political Theory*, *supra* note 7, at 1825.

12. Leib & Galoob, *Fiduciary Political Theory*, *supra* note 7, at 1825 ("Fiduciary norms are structurally incompatible with the domain of international law . . ."); see also *id.* at 1876 ("[F]iduciary norms are structurally incompatible with the extant norms of international law."). See generally *id.* at 1868-77 (presenting several arguments for the discordance of fiduciary norms and international law). They are prepared to grant that "even if Fox-Decent and Criddle's fiduciary theory does not describe how extant international law actually operates, the justificatory culture it envisions might be a worthy standard to which the international legal order should aspire," *id.* at 1877 n.242, and that "[i]t is possible to imagine a version of international legal order that enshrines a robust 'culture of justification' like the one Criddle sees at the core of administrative law," but they immediately add that "there are good reasons why (given our existing institutions) international-law norms do not police deliberation or impose standards for compliance or robustness," *id.* at 1876. In short, although they acknowledge that an international legal order consistent with a "culture of justification" and their view of fiduciary norms is conceptually possible, and that the "justificatory culture" envisioned by our view of international law might offer a normatively attractive aspirational standard, they nonetheless conclude that the present international legal order is "structurally incompatible" with fiduciary theorizing, given their view of the structure of fiduciary norms.

deliberation-sensitive—sensitive, that is, to public justification rather than to the decision-maker’s personal motives for decision, which are irrelevant. Part III challenges Leib and Galoob’s methodological approach to public fiduciary theory, which draws on abstract moral philosophy to deduce ethical norms that (they claim) operate as legal constraints on a fiduciary’s internal mental states and processes.¹³ We explain why we—like most other public fiduciary theorists—have rejected this methodology in favor of an interpretivist approach that takes extant legal norms, institutions, and practices seriously as the starting point for critical analysis.

I. IDENTIFYING FIDUCIARY NORMS

The Leib and Galoob essay is motivated by an important question: what is the proper methodology for using fiduciary concepts to analyze aspects of public law? Leib and Galoob answer this question by arguing that fiduciary relationships are constituted by fiduciary norms, and that there are certain implicit structural features of these norms that distinguish them from non-fiduciary norms.¹⁴ Although Leib and Galoob do not offer a clear account of the relationships between “fiduciary norms” and fiduciary duties,¹⁵ they appear to understand fiduciary norms as imposing “standards of compliance” that inform how courts define and apply the duties of loyalty and care.¹⁶

In particular, Leib and Galoob argue that legal norms do not qualify as “fiduciary” unless they impose on agents requirements of deliberativeness, conscientiousness, and robustness.¹⁷ A norm is “deliberative,” in the sense important to Leib and Galoob, if it places “demands on an agent’s deliberation in addition to her behavior.”¹⁸ A norm entails “conscientiousness” if it requires an

13. See *id.* at 1831-32.

14. See, e.g., *id.* at 1828 n.28.

15. Leib and Galoob claim that “fiduciary norms are constituted by fiduciary principles” and that these principles “are usually, but not necessarily, stated in the form of requirements applicable to the fiduciary.” *Id.* at 1824 n.11. The most obvious candidates for such requirements would seem to be fiduciary duties. However, they also claim that “fiduciary duties are established and entailed by fiduciary norms and principles.” *Id.* They further characterize fiduciary norms as fiduciary principles plus a “socio-empirical element” that denotes the acceptance of fiduciary principles “within the domains (generally those in private law) over which fiduciary laws apply.” *Id.* As we shall see, however, Leib and Galoob’s proposed structural features of fiduciary norms fail to live up to their own socio-empirical criterion for norms, since those features are not generally present (much less accepted) in fiduciary law in the private law context.

16. *Id.* at 1836.

17. *Id.* at 1824.

18. *Id.*

agent to act “for the right reasons”¹⁹—specifically, based on a “commitment to the fate of the purpose or person” over whom the agent exercises power.²⁰ And a fiduciary norm is “robust” if it “require[s] the fiduciary to seek out and respond appropriately to new information about the interests of her beneficiaries.”²¹ Fiduciary norms are said to be “unique in being simultaneously characterized by all three [structural features].”²² And perhaps more provocatively still, Leib and Galoob claim that these structural features imply that all fiduciary norms impose “freestanding deliberative requirements”; i.e., requirements that exist wholly independently of the fiduciary’s conduct or the outcome such conduct might produce.²³ According to Leib and Galoob, a public law regime cannot properly be understood as “fiduciary” unless its structure plausibly reflects norms with the features they specify, and these norms operate as freestanding deliberative requirements.²⁴ Leib and Galoob acknowledge that their three alleged structural features “are only rarely made explicit in fiduciary law,” but they assert nonetheless that these features “are implicit in fiduciary norms.”²⁵

Curiously, Leib and Galoob assert that “almost all” fiduciary theorists should be able to accept their structural features of deliberation, conscientiousness, and robustness, regardless of their differing views on the substance of particular fiduciary norms.²⁶ This is a significant overstatement. Many—perhaps most—fiduciary theorists today do not accept the idea that the legal norm of fiduciary loyalty “impose[s] freestanding deliberative requirements.”²⁷ Consider, for example, the economic theory of fiduciary law, which currently dominates American corporate law and trust law scholarship.²⁸ Practitioners of

19. *Id.*

20. *Id.* at 1836 (quoting Paul B. Miller, *Principles of Public Fiduciary Administration*, in BOUNDARIES OF STATE, BOUNDARIES OF RIGHTS (Anat Scolnicov & Tsvi Kahana eds., forthcoming 2016) (manuscript at 23-24)).

21. *Id.* at 1824 (citing PHILIP PETTIT, *THE ROBUST DEMANDS OF THE GOOD: ETHICS WITH ATTACHMENT, VIRTUE, AND RESPECT* (2015)).

22. *Id.* at 1828.

23. *Id.* at 1832 & n.48; see, e.g., *id.* at 1830 (describing tort-law norms and default contractual norms as deliberation-insensitive, while criminal norms and fiduciary norms are deliberation-sensitive).

24. *Id.* at 1828.

25. *Id.* at 1828 n.28.

26. *Id.* at 1827-28.

27. *Id.* at 1832 n.48.

28. See, e.g., Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to Anti-Contractarians*, 65 WASH. L. REV. 1, 29 (1990); Brian R. Cheffins, *Law, Economics and Morality: Contracting Out of Corporate Law Fiduciary Duties*, 19 CANADIAN BUS. L.J. 28, 30-32

law and economics have argued for decades that fiduciary duties are best understood as contractual default rules that protect beneficiaries from harmful opportunism.²⁹ In their view, fiduciary legal norms are formally indifferent to a fiduciary's internal mental processes; fiduciary law simply seeks to guarantee outcomes in which beneficiaries do not suffer harm from a fiduciary's self-dealing or profligacy. Another influential theory, articulated most extensively by Matthew Conaglen, asserts that fiduciary law is designed to remove distractions that could interfere with a fiduciary's performance of her contractual or other non-fiduciary duties.³⁰ Like the economic theory, this account of fiduciary law conceives of fiduciary norms in instrumentalist terms as concerning themselves exclusively with achieving *ends*, not with policing a fiduciary's internal mental processes.³¹ Stephen Smith similarly argues that fiduciary law is not concerned with loyalty or a fiduciary's motives, but with the outcome of the fiduciary's actions.³² And this is as it should be, he argues, because loyalty can arise only after a period of time (there is no such thing as "instant" loyalty), and in the context of an affective relationship, whereas law sometimes imposes fiduciary duties instantly and between strangers.³³ Significantly, all of these theories of fiduciary law reject the idea that fiduciary legal norms address the quality of a fiduciary's deliberations.

Other theorists have critiqued Leib and Galoob's account directly. Andrew Gold, for example, claims that there is a tension between the Leib-Galoob view that the beneficiary's interests must matter to the fiduciary "*solely* because they are the interests of the beneficiary" and the standard view of the duty to obey

(1991); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1045-47 (1991); Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1045-46 (2011). In previous work, Leib and Galoob have engaged with this literature directly. See Galoob & Leib, *Intentions*, *supra* note 8, at 125-29.

29. See, e.g., Butler & Ribstein, *supra* note 28, at 29-30; Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993); see also *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 436 (7th Cir. 1987) (Easterbrook, J.) (characterizing the fiduciary duty of loyalty as "a standby or off-the-rack guess about what parties would agree to if they dickered about the subject explicitly").
30. See, e.g., MATTHEW CONAGLEN, *FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES* 4 (2010); J.E. Penner, *Is Loyalty a Virtue, and Even if It Is, Does It Really Help Explain Fiduciary Liability?*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 159, 166-68 (Andrew S. Gold & Paul B. Miller eds., 2014) [hereinafter *PHILOSOPHICAL FOUNDATIONS*].
31. See CONAGLEN, *supra* note 30, at 107-09.
32. Stephen A. Smith, *The Deed, Not the Motive: Fiduciary Law Without Loyalty*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* 53 (Paul B. Miller & Andrew Gold eds., forthcoming 2016) (manuscript at 8) (on file with authors).
33. *Id.* (manuscript at 2-4).

the law under which one has the duty to obey just because the law says so.³⁴ As Gold puts it, “[i]n following the law because the law says so, the loyal individual will be taking the beneficiary’s interests into account for the wrong reasons.”³⁵ And Paul Miller objects, as do we, that Leib and Galoob “can fairly be said to mistake a (rather demanding) moral conception of loyalty for the legal conception.”³⁶ The deliberative features that Leib and Galoob elaborate are therefore not ones that “almost all” fiduciary theorists would recognize as positive criteria, let alone accept as prescriptive criteria, for identifying fiduciary norms.

The fact that many fiduciary theorists do not accept the idea that fiduciary law subjects fiduciaries to deliberative legal requirements does not necessarily mean, of course, that Leib and Galoob are wrong. In previous work, we too have argued that fiduciary law is concerned with the processes of fiduciary decision-making. We have defended this idea by showing how fiduciary rules and remedies in the United States and Canada reflect the republican principle of non-domination and the Kantian principle of non-instrumentalization.³⁷ “Fiduciary relations possess the [legal] form that relations of non-domination must assume whenever one party holds power over another,” we have explained, insofar “as they require the power-holder to act with due regard for the best interests of the beneficiary, taking into account his views and opinions.”³⁸ Accordingly, “to avoid domination, the law directs that a fiduciary must be prepared to explain how her actions are reasonably calculated to promote her beneficiaries’ welfare.”³⁹ Moreover, the duty of care requires a fiduciary to “exercise her . . . discretion through a deliberative process, which includes, at a minimum, clarifying the nature of the problem or opportunity, discerning the range of permissible actions, evaluating the pros and cons of each alternative, and developing an objectively reasonable rationale for the action taken.”⁴⁰ Fiduciary law therefore requires fiduciaries to act deliberatively, with due solicitude

34. Andrew Gold, *Accommodating Loyalty*, in *CONTRACT, STATUS, AND FIDUCIARY LAW*, *supra* note 32 (manuscript at 32) (quoting Galoob & Leib, *Intentions*, *supra* note 8, at 117 (emphasis added by Gold)).

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

36. Paul B. Miller, *Dimensions of Fiduciary Loyalty*, in *RESEARCH HANDBOOK ON FIDUCIARY LAW* (Andrew S. Gold & D. Gordon Smith eds., forthcoming 2017) (manuscript at 18 n.43) (on file with authors).

37. See CRIDDLE & FOX-DECENT, *FIDUCIARIES OF HUMANITY*, *supra* note 5, at 103-04.

38. *Id.* at 103.

39. Criddle, *Fiduciary Administration*, *supra* note 4, at 471; *see also id.* at 448 (arguing that a fiduciary’s duty of loyalty entails an obligation to “act deliberately (not reflexively) and deliberatively (not arbitrarily or unilaterally)”).

40. *Id.* at 471.

to the terms and purposes of their mandate and the best interests of their beneficiaries.⁴¹

Although fiduciary law does impose deliberative requirements on fiduciaries, Leib and Galoob lose their way when they conclude that all fiduciary norms entail freestanding deliberative requirements. Indeed, it is precisely this freestanding aspect that they take to be both distinctive and definitive of fiduciary norms. Although criminal law too has a deliberative requirement—*mens rea*—this requirement, Leib and Galoob say, is always tied to the behavior of the legal subject.⁴² Leib and Galoob claim that criminal law norms thus possess “a *manifestation requirement*: mental states (e.g., how an agent deliberates, what she intends, what she disregards) and their absence matter to criminal liability only insofar as they are connected with an agent’s behavior.”⁴³ Fiduciary norms, on the other hand, are said to “reject the manifestation requirement” because “[d]isloyalty or carelessness can constitute a violation of these norms, regardless of whether or how these mental states are revealed in behavior.”⁴⁴ Ethically robust and freestanding deliberative requirements thus figure as necessary and structural features of fiduciary norms under Leib and Galoob’s “shaping account” of loyalty. These features, however, are simply not present in core doctrines of private fiduciary law.

Consider, for example, the duty of loyalty’s strict requirements that a fiduciary refrain from engaging in self-interested transactions without her beneficiary’s consent (the “no-conflict rule”) and the requirement that a fiduciary relinquish any unauthorized profits to her beneficiary (the “no-profit rule”).⁴⁵ The no-conflict and no-profit rules are core elements of fiduciary law, but entirely indifferent to the fiduciary’s motives or reasons for action. Even if a fiduciary could show that an exercise of power was deliberative, conscientious, and robust in precisely the way that Leib and Galoob intend, she would still breach her duty to the beneficiary were she to violate either rule. No amount of inter-

41. See CRIDDLE & FOX-DECENT, *FIDUCIARIES OF HUMANITY*, *supra* note 5, at 20.

42. See Leib & Galoob, *Fiduciary Political Theory*, *supra* note 7, at 1830 (“In judging whether someone has lived up to a criminal norm, behavior is a threshold issue. An agent’s deliberation is relevant only insofar as her behavior does not conform to that prescribed by the norm; deliberation is not relevant independently of behavior.”).

43. *Id.* at 1831.

44. *Id.* at 1832.

45. See *Bray v. Ford* [1896] AC 44, 51 (appeal taken from Eng.) (“It is an inflexible rule of a Court of Equity that a person in a fiduciary position . . . is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.”).

nal good will can undo this external wrong;⁴⁶ a fiduciary may breach the no-conflict rule “with perfect good faith.”⁴⁷ Accordingly, at least some fiduciary norms do not entail freestanding deliberative requirements, or at least it is not obvious that they do. Where unauthorized conflicts of interest are concerned, fiduciary law appears to regulate a fiduciary’s behavior without inquiring into the deliberativeness, conscientiousness, or robustness of the fiduciary’s decision-making process.

In prior work, Galoob and Leib acknowledge this disconnect, claiming that “a fiduciary could meet the ‘no conflict’ and ‘no profit’ rules without acting loyally,” since one can comply with these rules accidentally, or without otherwise having the right mental state.⁴⁸ As a “real-world example” they offer a hypothetical case of a hedge fund operation that relies on a software program to make investment decisions. The managers could comply with the no-conflict and no-profit rules, they say, but “would seem to run afoul of their requirement of loyalty” and so their commissions “would seem to be susceptible to disgorgement, the standard remedy for a breach of the legal duty of loyalty.”⁴⁹ Galoob and Leib do not offer an actual case with facts like these, and to the best of our knowledge none exists, though the use of software algorithms for high frequency trading is a well-established practice. In our view, their “real-world example” shows simply that their conception of loyalty does not track the conception that inheres in fiduciary law.

The fact that Galoob and Leib characterize the no-conflict and no-profit rules as “prophylactic” suggests that they appreciate that these rules do not actually entail freestanding legal requirements of deliberation, conscientiousness, or robustness.⁵⁰ Leib and Galoob could suggest that requirements of deliberation, conscientiousness, and robustness are implicit in these rules, because a fiduciary who violated these rules could never claim to have exercised her power in a manner that was duly deliberative and conscientious.⁵¹ To the extent that they believe such prophylactic rules are consistent with their theory of fiduciary

46. *Boardman v. Phipps* [1966] 2 AC 46, 47 (appeal taken from Eng.) (holding fiduciaries liable for using information obtained as a result of their fiduciary role to make a profit on a stock transaction); *Regal (Hastings) Ltd. v. Gulliver* [1967] 2 AC 134, 137 (appeal taken from Eng.) (holding fiduciaries liable for using knowledge they obtained through their official duties to make a profit and noting that “their liability . . . does not depend upon proof of mala fides”).

47. *Bray*, [1896] AC at 48.

48. Galoob & Leib, *Intentions*, *supra* note 8, at 130.

49. *Id.*

50. Leib & Galoob, *Fiduciary Political Theory*, *supra* note 7, at 1834.

51. *See id.* (arguing that the “prophylactic” character of the no-conflict rule “coheres with . . . structural features of fiduciary norms”).

norms without inviting case-by-case consideration of a fiduciary's internal deliberative process, however, it is curious that they do not entertain the possibility that legal requirements governing behavior in other contexts might serve a similar function.

A more basic flaw in the framework Leib and Galoob propose for identifying fiduciary norms is their reiterated assertion that fiduciary norms impose constraints on a fiduciary's motivations. Specifically, their proposed norm of "conscientiousness" requires that fiduciaries not act for "the wrong kinds of reasons,"⁵² and in their discussion of several cases they make it clear that acting for "the wrong kinds of reasons" means being *motivated* to act by the wrong reasons.⁵³ In their discussion of an administrative law case, for example, they claim that the U.S. Supreme Court invokes "the wrong kinds of reasons" framework, and they interpret its judgment to affirm that "the reasons that *motivated* the EPA to promulgate the regulation diverged from the reasons that justified (or could have justified) its action, and this divergence ultimately compromised the legitimacy of the action."⁵⁴ In their examination of international law and human rights, they discuss a state "whose *motivations* are inappropriate."⁵⁵ These statements are consistent with a previous collaboration in which they more fully articulate their "shaping" account of loyalty, explicitly stating that their account "allows for the possibility that someone's motives could bear on whether she acts loyally."⁵⁶

In their essay in this *Journal*, Leib and Galoob present a hypothetical fiduciary whose loyal behavior is motivated by the fact that her beneficiary is a member of the same religion, rather than by the beneficiary's status as a beneficiary *tout court*. In their view, it is not enough that the co-religionist fiduciary "think about and act in a way that happens to advance the beneficiary's interests or ends" and publicly justify her actions in terms that are consistent with fidelity to her beneficiary's interests.⁵⁷ Instead, they argue that to satisfy the principle of conscientiousness, the reasons that motivate the co-religionist fiduciary's ac-

52. *Id.* at 1837.

53. *Id.* at 1835-38.

54. *Id.* at 1863 (emphasis added).

55. *Id.* at 1874 (emphasis added).

56. Galoob & Leib, *Intentions*, *supra* note 8, at 124 n.61. In a forthcoming piece, they claim once again that the principle of conscientiousness is concerned with "monitor[ing] whether motivating reasons diverge from justifying reasons." Stephen R. Galoob & Ethan J. Leib, *The Core of Fiduciary Political Theory*, in RESEARCH HANDBOOK ON FIDUCIARY LAW (D. Gordon Smith & Andrew S. Gold eds., forthcoming 2016) (manuscript at 11) (on file with authors).

57. Leib & Galoob, *Fiduciary Political Theory*, *supra* note 7, at 1838.

tions must reflect her single-minded “commitment to the fate of the purpose or person” entrusted to her care.⁵⁸

Contrary to the assertions of Leib and Galoob, however, a fiduciary’s motivations for action are irrelevant as a matter of positive law.⁵⁹ As long as a fiduciary performs her entrusted duties with due regard for her principal’s instructions and her beneficiaries’ best interests, the law does not care whether the reasons motivating her actions are based on co-religionist solidarity, fear of legal sanction, or a desire to secure her future place in heaven. As long as the co-religionist fiduciary does not assert the prerogative to wield entrusted power in a manner that is indifferent to her beneficiaries’ interests, she does not subject her beneficiary to instrumentalization or domination, and she does not violate any norm of fiduciary law.⁶⁰ Indeed, as we will discuss in Part III, a significant hurdle faced by the Leib/Galoob approach is that legal fiduciaries are always subject to the law’s external threat of coercion. If genuine fiduciary loyalty, as Leib and Galoob understand it, must always arise from within so as to satisfy a “standard of compliance” alleged to govern a mental state, how can it ever be the proper object of law’s coercive force?

In sum, the theory of fiduciary norms that Leib and Galoob propose would require significant revision to serve as a plausible explanatory “framework for analyzing the usefulness and limitations of fiduciary political theory.”⁶¹ To be sure, fiduciaries are legally required to exercise their discretionary powers in a deliberative manner, manifesting solicitude toward their principals’ instructions and their beneficiaries’ best interests. In many contexts, the fiduciary duty of loyalty is also “robustly demanding” in the sense that a fiduciary must take into account how changing circumstances would impact her beneficiaries’ best

58. *Id.* at 1836 (quoting Miller, *supra* note 20, at 23-24); *see also id.* at 1874 (arguing that human rights are not fiduciary norms because they do not require that a state’s “motivation for protecting the human rights of its population is . . . connected to the justification for human rights”).

59. *See Bray v Ford* [1896] AC 48 (appeal taken from Eng.) (explaining that a fiduciary may violate the no-conflict rule in “good faith”); Daniel Markovits, *Sharing Ex Ante and Sharing Ex Post: The Non-Contractual Basis of Fiduciary Relations*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 208, 220 (Andrew S. Gold & Paul B. Miller eds., 2014) (“Legal obligations – both contractual and fiduciary – turn on intentions not motivations.”).

60. Leib and Galoob cite two cases in which the Delaware Supreme Court held that a fiduciary violates her duties if she “intentionally acts with a purpose other than that of advancing the best interests of [her beneficiary].” Leib & Galoob, *supra* note 7, at 1836 n.65 (quoting *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006); *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006)). In neither of these cases, however, did the court suggest that it would be appropriate to question a fiduciary’s motivations. The relevant question, instead, was simply whether the fiduciary acted on the good faith belief that her actions would advance her beneficiary’s best interests.

61. Leib & Galoob, *Fiduciary Political Theory*, *supra* note 7, at 1823.

interests.⁶² Nonetheless, it does not follow, as Leib and Galoob appear to conclude in their essay, that just because some fiduciaries are subject to some deliberative obligations under fiduciary law, then *all* fiduciary norms necessarily entail or possess freestanding deliberative requirements. As we have seen, the categorical no-conflict and no-profit rules appear to neither entail nor possess any such requirements, as Leib and Galoob seem to recognize. Moreover, purely as a matter of interpretive theory, there is no good reason to accept Leib and Galoob's suggestion that a legal regime must embrace their structural features of deliberation, conscientiousness, and robustness to qualify as "fiduciary."⁶³ Nor is there merit to their argument that fiduciary norms require "that the reasons motivating a state's action are congruent with the reasons that legally justify its action."⁶⁴ Under well-established private law, a fiduciary's motivations are irrelevant. Accordingly, even when fiduciary norms call for scrutiny of a fiduciary's deliberative process, this scrutiny focuses on whether a fiduciary has discharged her mandate carefully and in good faith, not whether her actions were ethically compromised by her reliance on the "wrong" motivating reasons.

II. APPLYING FIDUCIARY THEORY TO INTERNATIONAL LAW

As noted, Leib and Galoob categorically reject the idea that existing international law is amenable to fiduciary theorizing because, in their view, "fiduciary norms are structurally incompatible with the extant norms of international law."⁶⁵ In this Part we discuss why their critique is misconceived.

In our book, *Fiduciaries of Humanity: How International Law Constitutes Authority*, we discuss a variety of contexts in which international law itself explicitly draws on fiduciary or trusteeship norms.⁶⁶ These include cases of international territorial administration, such as occurred in East Timor and Kosovo, and cases of belligerent occupation, where the belligerent occupier is viewed as

62. *Id.* at 1839. This is plainly not the case, however, for some fiduciary relationships, such as charitable and testamentary trusts, which task a fiduciary with carrying out a discrete mandate without regard to her beneficiaries' idiosyncratic interests and ends.

63. For example, no one questions the fact that Australia has a well-developed body of fiduciary law, but Australian courts have firmly rejected the idea that fiduciary duties entail prescriptive requirements of deliberation, solicitude, or robustness. See *Pilmer v Duke Grp. Ltd.* (2001) 207 CLR 165, 198; *Breen v Williams* (1996) 186 CLR 71, 113.

64. Leib & Galoob, *Fiduciary Political Theory*, *supra* note 7, at 1874.

65. *Id.* at 1870.

66. CRIDDLE & FOX-DECENT, *FIDUCIARIES OF HUMANITY*, *supra* note 5. It should be noted the Leib and Galoob had only an incomplete draft manuscript of the book when they wrote their essay, and that most of their essay draws on an earlier article, Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 *LEGAL THEORY* 301 (2009).

a trustee of the occupied people.⁶⁷ There is also a lively debate in international relations scholarship over whether international courts are best viewed as agents of the states that create them or trustees of the law that they administer.⁶⁸ Both sides of the controversy agree, however, that international judges are fiduciaries, because both agents and trustees are fiduciaries. Leib and Galoob do not address this debate, nor do they consider cases such as territorial administration and belligerent occupation where international law expressly deploys fiduciary norms.

Indeed, Leib and Galoob do not refer to a single judicial institution or judicial decision of international law. While their critique focuses on a single human right of international law – the right to be free from torture – they generalize from this critique that “[t]he fiduciary theory of international law thus does not provide an accurate picture of human rights law, or *international law more generally*.”⁶⁹ As our book observes, international legal order now has some twenty-four permanent and functioning international courts that have handed down over 37,000 legal judgments.⁷⁰ Like domestic judges, international judges apply law to the facts and parties before them. Leib and Galoob’s failure to make any mention of international adjudication is an extraordinary omission, since their essay lionizes judging as the public law context *par excellence* to which fiduciary norms unqualifiedly apply. Having neglected international courts, Leib and Galoob offer no reason to think that international judging is any less susceptible to fiduciary theorizing than domestic judging.

Nor do Leib and Galoob engage with our discussion of global administrative law.⁷¹ As its name suggests, global administrative law takes its cues from domestic administrative law, including the idea that persons subject to public authority ought to enjoy various participatory rights and be given reasons for decisions adverse to their interests. While global administrative law advances a normative point, legal scholars have shown that the practices of transnational entities support the insight that law in this domain does, in fact, aspire to a cul-

67. CRIDDLE & FOX-DECENT, FIDUCIARIES OF HUMANITY, *supra* note 5, at 300-10; see also RALPH WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION: HOW TRUSTEESHIP AND THE CIVILIZING MISSION NEVER WENT AWAY (2008) (exploring how international territorial administration continues to reflect trusteeship principles).

68. CRIDDLE & FOX-DECENT, FIDUCIARIES OF HUMANITY, *supra* note 5, at 298-99.

69. Leib & Galoob, *Fiduciary Political Theory*, *supra* note 7, at 1876 (emphasis added).

70. See CRIDDLE & FOX-DECENT, FIDUCIARIES OF HUMANITY, *supra* note 5, at 296-300 (citing KAREN ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2014)).

71. *Id.* at 331-36 (discussing the interface of global administrative law and fiduciary theory).

ture of justification in much the same way as domestic administrative law.⁷² If Leib and Galoob accept that a culture-of-justification view of administrative law is consistent with fiduciary norms in the domestic context, they ought to take the same view of global administrative law.

Having neglected the topics sketched above, Leib and Galoob focus their fire on international human rights law (IHRL). However, the target, as they present it, is a crude caricature of IHRL. They claim this body of law is indifferent to deliberative processes and concerned (almost) solely with outcomes.⁷³ This is certainly not how we understand IHRL, nor is it understood this way by leading human rights theorists such as Allen Buchanan,⁷⁴ Rainer Forst,⁷⁵ and Amartya Sen.⁷⁶ Building on the contributions of these scholars, our book characterizes and develops “a deliberative conception” of human rights that is rooted in well-established IHRL norms and institutions.⁷⁷ We suggest that a “state that facilitates inclusive public deliberation over human rights, soliciting public input and providing reasoned justifications for laws and policies, demonstrates an appropriate solicitude for the legitimate interests of citizens and noncitizens,”⁷⁸ while “a state that does not support or engage in public deliberation . . . fails to take seriously the dignity of legal subjects.”⁷⁹

These deliberative features of IHRL are not merely the wishful thinking of legal theorists, as Leib and Galoob suggest.⁸⁰ Our book demonstrates that IHRL itself expressly requires transparent and public justification in the over-

72. See, e.g., Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15, 17-23 (2005).

73. Leib & Galoob, *Fiduciary Political Theory*, *supra* note 7, at 1825 (“[C]ompliance with international-law norms is a function of how states behave, rather than how they deliberate or why they behave as they do.”); *id.* at 1871 (asserting that human rights “govern state behavior” but “do not, in general, impose freestanding requirements regarding how a state must deliberate”). They claim that international human rights law is plainly inconsistent with deliberativeness and conscientiousness, and ultimately inconsistent with robustness because any deliberation in this regard is always tied to an outcome.

74. See Allen Buchanan, *Human Rights and the Legitimacy of the International Order*, 14 *LEGAL THEORY* 39, 40-41 (2008).

75. See RAINER FORST, *THE RIGHT TO JUSTIFICATION: ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE* (2011).

76. See Amartya Sen, *Elements of a Theory of Human Rights*, 32 *PHIL. & PUB. AFF.* 315 (2004).

77. CRIDDLE & FOX-DECENT, *FIDUCIARIES OF HUMANITY*, *supra* note 5, at 105-06.

78. *Id.* at 105.

79. *Id.*

80. See Leib & Galoob, *Fiduciary Political Theory*, *supra* note 7, at 1877 (“Perhaps the world would be a better place if [a] rigorous culture of justification applied to the international legal realm. But that is not the world we live in . . .”).

whelming majority of cases involving international human rights.⁸¹ In most contexts, human rights treaties permit a state party to restrict, limit, or derogate from human rights norms, but only if the state provides an adequate justification based on public-regarding considerations tied to a principle of proportionality.⁸² The general structure of an inquiry into a violation of an international human right is a two-stage process. The first stage is to determine whether state action infringes the right. The second stage asks after whether the infringement is justified as a proportionate means to a public end, with the burden on the state to show that it has taken appropriate measures to minimize the effect of the infringement.⁸³ This structure, in other words, calls on states to justify publicly that they have acted with deliberativeness and robustness, taking due and conscientious regard of the interests of those adversely affected.

Furthermore, when international courts review state action, they generally do not concern themselves with whether the state produced the correct or even legally best outcome. Instead, courts review whether the state's justification of its action discloses a reasonable and proportionate use of state authority, taking into account both the public interest and the interests of those directly affected. States are allowed a "margin of appreciation" in which the focus is not a specific outcome, but rather the justification offered for the state's chosen policy.⁸⁴ If the justification relies on improper purposes or irrelevant considerations, then the decision on which it is based will be set aside, just as the decision would be set aside under ordinary principles of administrative law in the United States and commonwealth jurisdictions.⁸⁵ Leib and Galoob ignore the state's obligation to render an account publicly, which is a general feature of IHRL.

81. We discuss these requirements in considerable detail in chapters devoted to human rights, emergencies, and international institutions. See CRIDDLE & FOX-DECENT, *FIDUCIARIES OF HUMANITY*, *supra* note 5, chs. 3, 4 & 8.

82. See, e.g., Charter of Fundamental Rights of the European Union, art. 52, 2000 O.J. (C 364) 1 (permitting states to limit human rights only "[s]ubject to the principle of proportionality" and as "necessary [to] genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others"); *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) at 56 (1961) (holding that states must provide reasoned public justifications for derogating from human rights norms). Under international law, rights to freedom of expression, movement, and assembly, for example, may all be limited in times of crisis or when the public interest so warrants. See, e.g., International Covenant on Civil and Political Rights, art. 4, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

83. See CRIDDLE & FOX-DECENT, *FIDUCIARIES OF HUMANITY*, *supra* note 5, at 132.

84. See *Murray v. United Kingdom*, App. No. 14310/88, 19 Eur. H.R. Rep. 193, ¶ 90 (1994) ("A certain margin of appreciation in deciding what measures to take both in general and in particular cases should be left to the national authorities.").

85. See CRIDDLE & FOX-DECENT, *FIDUCIARIES OF HUMANITY*, *supra* note 5, at 151-52.

As noted in Part I, there is a narrow body of international norms—peremptory norms—that do not conform to the two-stage structure described above, since they do not admit of restriction, limitation, or derogation. The prohibitions against arbitrary killing, genocide, apartheid, and torture belong to this category.⁸⁶ In our view, these norms of international law are roughly akin to the strict proscriptive norms of private fiduciary law, such as the no-conflict and no-profit rules. As with the no-conflict and no-profit rules, it is not necessary to scrutinize a state’s deliberative process on a case-by-case basis when peremptory norms are at stake. By definition, arbitrary killing, genocide, apartheid, and torture entail intentional or reckless disregard for human rights, such that no state that violated the norms proscribing these actions could claim to have acted with due regard for its victims.⁸⁷

Leib and Galoob base their argument against fiduciary theorizing of international law on a hypothetical scenario in which State *A* declines to extradite people to State *B* to curry favor with State *C*. Unbeknownst to State *A*, State *B* tortures those in its custody. Leib and Galoob assert that “State *A*’s policy has the effect of protecting the human rights of those within its territory.”⁸⁸ State *A* would comply with international law, on their view, but it would breach fiduciary norms because the decision not to deport would be taken for the wrong reasons. This, they infer, shows that IHRL generally does not impose delibera-

86. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 102 cmt. k, § 702 cmts. d-i, (AM. LAW INST. 1987).

87. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (defining genocide to require an “*intent* to destroy, in whole or in part, a national, ethnical, racial or religious group, as such” (emphasis added)); ICCPR, *supra* note 82, art. 6.1 (“No one shall be *arbitrarily* deprived of his life.” (emphasis added)). Elsewhere, one of us has argued that violations of the no-conflict and no-profit rules are likewise never consistent with fiduciary loyalty. See Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. (forthcoming 2017). However, even if one views the no-conflict and no-profit rules as over-inclusive prophylactic rules, see Leib & Galoob, *Fiduciary Political Theory*, *supra* note 7, at 1834 (endorsing this view), the parallels between these rules and peremptory human rights norms are compelling.

88. Leib & Galoob, *Fiduciary Political Theory*, *supra* note 7, at 1870. It is misleading, under international human rights law, to suggest that State *A*’s non-deportation policy “protected” the human rights of those within its territory. In the standard case, to protect human rights means to take deliberate action to prevent third parties from interfering with them. One could concoct a fanciful scenario under which building roads might incidentally have the effect of preventing human rights abuses, but it would not count as protecting human rights in the way “protection of human rights” is understood under international law.

tive requirements on states, since on their view states can comply with international law for any reason without breaching its norms.⁸⁹

In fact, State *A*'s refusal to deport people to curry favor with State *C* is simply irrelevant to its human rights obligations. Its obligation under the Convention Against Torture is to refuse to send "a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."⁹⁰ Having, by hypothesis, no grounds to believe that deportation would lead to torture, State *A* is not under an obligation to refuse extraditing people to State *B*, and would not violate its obligations under the Convention if it did. It is only if State *A* knowingly deported someone to face a serious risk of torture in State *B* that State *A* would violate its international obligation not to so deport. As we discuss momentarily, State *A* would breach its extant international obligation *whether or not the deportee is actually tortured in State B*. This implies that, *contra* Leib and Galoob, outcomes in this context are in principle irrelevant to the determination of liability for breach of the international norm against deportation to torture.⁹¹ An adverse outcome following deportation may help a complainant meet her evidentiary burden against the deporting state, but it is not a necessary element of that state's liability.

In practice, courts adjudicating cases where it is possible that deportation will lead to torture pay great attention to the deliberative process of the state party. In *Suresh v. Canada (Minister of Citizenship & Immigration)*,⁹² for example, the Supreme Court of Canada upheld a request for relief from deportation from an individual who claimed he would face a serious risk of torture if returned to his home state. The Court held that the government violated the petitioner's rights under domestic and international law by failing to adequately disclose its case to the individual so that he might respond in a timely manner.⁹³ Similarly, in *Agiza v. Sweden*,⁹⁴ the U.N. Committee Against Torture affirmed that a state's deliberative process is so important in cases under the

89. *Id.* at 1870 (concluding for this reason that international law is "structurally incompatible" with fiduciary theory). See generally *id.* at 1868-76 (rejecting fiduciary theory as inapposite to the realities of international law).

90. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, 114; S. Treaty Doc. No. 100-20 (1988).

91. See Leib & Galoob, *Fiduciary Political Theory*, *supra* note 7, at 1872 (arguing that "the most central goods secured by international law"—including freedom from torture—"seem capable of being achieved solely through the realization of outcomes").

92. [2002] SCR 3 (Can.).

93. *Id.* ¶¶ 122-30. The Court took account of international law explicitly, *id.* at ¶¶ 59-75, 119, when it turned to imposing procedural guarantees that were not explicit in either the statute or the *Canadian Charter of Rights and Freedoms*.

94. *Agiza v. Sweden*, U.N. Doc. CAT/C/34/D/233/2003 (2005).

Convention Against Torture that a state may violate its substantive obligations under the Convention, even if the individual deported is never subjected to torture.⁹⁵ The Committee held that, in the deportation context, the prohibition against torture is concerned with a state's reckless disregard for a serious threat, not the actual infliction of torture per se. To use the terminology of Leib and Galoob, what matters is the quality of the deporting state's deliberative process—its conscientious regard for the interests of those who may be affected by its actions—rather than the ultimate outcome for the individual. Thus, both *Suresh* and *Agiza* affirm that IHRL regulates the deliberative process by which a state makes deportation decisions, not merely the mistreatment that individuals actually suffer upon deportation.

To sum up, there is little merit to Leib and Galoob's argument that international law cannot accommodate fiduciary theorizing. International law has drawn expressly on fiduciary principles and norms since its inception,⁹⁶ and these principles and norms remain deeply embedded in international legal institutions today. Public fiduciary theory is committed to a form of deliberative decision-making that reflects due regard for the dynamic interests of all those who are subject to state power, and this commitment is the very lodestar of IHRL. Properly understood, therefore, there can be little question that international human rights and many other international legal norms are good candidates for explanation and justification under fiduciary theory.

III. METHODOLOGY IN PUBLIC FIDUCIARY THEORY

Another way in which Leib and Galoob misconstrue our theory relates to our methodology. They claim that for us “the case for a fiduciary theory of international law arises out of the conjunction of two abstract principles of political morality”—namely, the republican principle of non-domination, which eschews arbitrary power, and the Kantian principle of non-instrumentalization, which eschews treating persons as mere means of others.⁹⁷ In fact, our methodology is one of inference to the best explanation; the principles of non-

95. *Id.* ¶¶ 13.1-13.5. Even the lone dissenting opinion in the case concurred that “the time of removal” was the “key point” for consideration, such that evidence that “relates to events transpiring after expulsion” (i.e., alleged torture) “can have little relevance.” *Id.* ¶ 1 (Separate Opinion of Committee Member Mr. Alexander Yakovlev).

96. See CRIDDLE & FOX-DECENT, FIDUCIARIES OF HUMANITY, *supra* note 5, at 15-17; Evan J. Criddle, *A Sacred Trust of Civilization: Fiduciary Foundations of International Law*, in PHILOSOPHICAL FOUNDATIONS, *supra* note 30, at 404.

97. Leib & Galoob, *Fiduciary Political Theory*, *supra* note 7, at 1869; see also *id.* at 1876 (suggesting incorrectly that our theory seeks to “straightforwardly derive the fundamentals of international law from the principles of nondomination and noninstrumentalization”).

domination and non-instrumentalization emerge from the core features of international law and legal institutions, and only once inferred provisionally do they supply a basis for downstream critique.⁹⁸

Leib and Galoob's methodology, we contend in this Part, is to proceed on the basis of abstract moral philosophizing within a virtue ethics framework attuned to the demands of close personal relations, such as friendship. The challenge this framework faces is that it is both more demanding than law actually is and more demanding than, arguably, it is possible for law to be. There are, in other words, empirical and conceptual tensions between Leib and Galoob's virtue ethics theory of fiduciary norms and the legal domains it purports to explain. In this Part we explore some of these tensions.

Virtue ethicists challenge agent-neutral moral theories on the grounds that these impersonal theories cannot account for the special commitments and dispositions of friendship.⁹⁹ In relation to utilitarianism, for example, the problem can be put this way: how can utilitarians account for the special moral attachment and loyalty we have for our friends when, in the utilitarian calculus, our friends are not to have any greater moral significance for us than the moral significance we attribute to strangers?¹⁰⁰ Leib and Galoob adopt a substantive view and methodological approach that closely resembles the virtue ethics assault on generalist moral theories.¹⁰¹

98. See CRIDDLE & FOX-DECENT, *FIDUCIARIES OF HUMANITY*, *supra* note 5, at 4 (drawing upon the concept of "reflective equilibrium" in JOHN RAWLS, *A THEORY OF JUSTICE* 20 (1971)).

99. See, e.g., J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973) (arguing that utilitarianism is too demanding, giving short shrift to moral goods that matter); Neera Badhwar Kapur, *Why It Is Wrong To Be Always Guided by the Best: Consequentialism and Friendship*, 101 *ETHICS* 483, 488 (1991) (arguing for "a 'commonsense' morality that justifies friendship"); Michael Stocker, *The Schizophrenia of Modern Ethical Theories*, 73 *J. PHIL.* 453 (1976) (arguing that friends must act from particularist motives rather than general moral duty).

100. See, e.g., Peter Railton, *Alienation, Consequentialism, and the Demands of Morality*, in *CONSEQUENTIALISM AND ITS CRITICS* 93 (Samuel Scheffler ed., 1988) (discussing the implications of alienation on consequentialist moral theories). Indirect consequentialism holds that one can, and should, develop special attachments and relations because, as an empirical matter, it is only by doing so that one can reasonably expect to do the best. The consequentialist good is thus achieved indirectly, in part, through the cultivation of friendships.

101. Indeed, in a recent collaboration, they begin the defense of their "shaping" account of loyalty with one of Bernard Williams's famous arguments against utilitarianism:

After a shipwreck, a number of people are drowning, including an agent's spouse. Various impartial moral schemes might justify the husband's saving his wife rather than a stranger . . . Yet it is difficult to say that the husband has acted loyally . . . The husband would have, in Williams's memorable phrase, "one thought too many," since "it might have been hoped by someone (for instance, by his wife) that his motivating thought, fully spelled out, would be the thought that it was his wife, not that it was his wife and that in situations of this kind it is permissible

Leib and Galoob make no serious attempt, however, to use their theory to explain fiduciary law as fiduciary law presents itself, citing just five judicial decisions in their discussion of the structure of fiduciary norms.¹⁰² They identify deliberative norms of virtue ethics that are very much at home in relations of friendship, but which they errantly believe are necessarily present across all private law fiduciary relations. And they compound their error by then holding public law regimes to that standard. For the reasons Smith gives,¹⁰³ we do not think that dispositional norms of friendship are especially helpful to the task of understanding private relations governed by private law. It follows that we do not think that public law regimes need to meet this standard to count as fiduciary in nature.

Roughly, we are hewing to the distinction between law and ethics made famous by Kant more than two hundred years ago.¹⁰⁴ Kant held that the domain of right or law concerns itself solely with external and reciprocal limits to which all are subject so that “the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.”¹⁰⁵ The sphere of ethics or virtue, on the other hand, cannot be subject to coercion because the will is free and internal to the agent. Law governs our external relations with others, whereas ethics governs our internal relation to self-legislated maxims that make virtue possible. What is distinctive of ethics, for Kant, is that “one is to perform [ethical] actions just because they are duties and to make the principle of duty itself . . . the sufficient incentive for choice.”¹⁰⁶ Thus, while others can enlist the state to force one to act in accordance with the principles of right, others cannot force one to act ethically, because the only possible ground of

to save one’s wife.” Likewise, on the shaping account, loyalty requires not only that the beneficiary’s interests matter, but also that these interests matter because of their connection with the beneficiary and not in virtue of some other consideration.

Galoob & Leib, *Intentions*, *supra* note 8, at 116 (quoting and citing BERNARD WILLIAMS, MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980 18 (1981)). This is the foundational article for their “shaping” account, the content of which is drawn much more from the insights of moral philosophers—Bernard Gert, Simon Keller, David Owens, Philip Pettit, T.M. Scanlon, Michael Stocker, and Bernard Williams—than judicial decisions or other legal materials. There is, of course, nothing per se objectionable to any of this, but it does help explain their apparent preference for hypothetical examples over actual cases, as well as the virtue ethics quality of their theory.

102. See *supra* Part I.

103. Smith, *supra* note 32, at 2-12.

104. IMMANUEL KANT, THE METAPHYSICS OF MORALS 42, 45-47 (Mary Gregor transl., 1991) (1797).

105. *Id.* at 56 (internal quotations omitted).

106. *Id.* at 47.

ethical action is internal to the agent. Kant's law/ethics distinction tracks and explains other familiar distinctions, such as the distinction between the ethical duty of beneficence, which is owed to no one in particular, and the legal duty to perform a contract, which is owed to only the other contracting party who has an enforceable right to performance. Notably, Leib and Galoob explicitly affirm that their "shaping" account of loyalty "is inconsistent with the Kantian framework [of right and virtue] because it sees loyalty as a duty of right (in that loyalty is both directed and legally enforceable) yet allows for the possibility that someone's motives could bear directly on whether she acts loyally."¹⁰⁷

While acting for wrong or wicked reasons can still be the subject of legal inquiry, as in the case of the *mens rea* inquiry of criminal law, the wrongful intention must somehow be connected to a wrong against another person, such as an illicit act or decision that leaves another with less than her due. The idea that private law governs thoughts and intentions independently of some connection to a wrong implies the existence of a category of "thought-wrongs" that does not exist in private law. The notion that a legal fiduciary could breach her duty to the beneficiary by failing to have the right internal motivation, while nonetheless acting in a manner consistent with her mandate and the ordinary duties of her office, is to extend the norms of virtue into the legal realm where they have no place. Virtue cannot be coerced.¹⁰⁸

There are contexts, of course, in which the kinds of internal commitments and dispositions to which Leib and Galoob refer are particularly important: close personal relationships such as friendship. It makes perfect sense to think that one cannot act as a true friend or loyal spouse except for the right reasons, and with special care and concern. Leib has previously written a thought-provoking piece suggesting that "friends should be more routinely considered as fiduciaries for each other," by which he means that friends should more routinely be viewed as *legal* fiduciaries subject to *legal* obligations.¹⁰⁹ Whatever the merits of subjecting friends to legal fiduciary standards, it is quite another mat-

107. Galoob & Leib, *Intentions*, *supra* note 8, at 124 n.61.

108. The intractable difficulty of attempts to coerce virtue is visible in another context. In cases where parties seek redress for historical wrongs, they often seek an apology. On most construals, however, apologies must come from within, and must be based on the wrongdoer freely owning up to the wrong inflicted. There is a sense in which a court-ordered apology would corrupt the practice and deny both the wrongdoer and the victim the possibility of the fullest possible moral reconciliation. This is not to deny the expressive value of a court-ordered apology, but it is an expressive value that, when judged from a moral perspective, is arguably second-best. Such would be the fate of judicial attempts to coerce the kind of loyalty that helps make friendship meaningful.

109. Leib & Galoob, *Fiduciary Political Theory*, *supra* note 7, at 1839, n.76 (citing Leib, *supra* note 8, at 686, as "developing an account of friendship by exploring fiduciary concepts – and *vice-versa*" (emphasis added)).

ter to suppose, as Leib and Galoob seem to do, that the norms of friendship apply structurally and invariably to all fiduciary relations known to law. While the norms of virtue ethics are appropriate to friendship, they are ill-suited to inform legal theory because legal obligations are coercively enforceable whereas, generally speaking, having or not having the right reasons for action is not something that can be coerced.

In our view, courts can coerce a kind of loyalty and solicitude, but it is not the interpersonal loyalty typical of friendship. Instead, in the legal fiduciary context, it is the loyalty or commitment one expects of a person who assumes an office, private or public, and its responsibilities. It does not matter whether the office-holder acts with the purest of motives so long as she acts in a manner consistent with the charge she has undertaken, and with due regard for those subject to her discretion. In the domestic and international public law spheres, the office-holder does so in part by disclosing transparently the reasons for her decision, and allowing those reasons to be tested by independent review. In this public and external sense, fiduciary decision-makers are subject to free-standing deliberative requirements.

For public law regimes to count as fiduciary, they need to exhibit the constitutive structural features of private law fiduciary relations. In our book and in other writings, we have made the case that all of the regimes discussed by Leib and Galoob have these structural features, making allowance of course for the distinctive standing of public authorities. The fruitful challenge the theorist then faces is determining the content of the obligations that can be said to follow from the nature of the various public fiduciary relations in which public authorities find themselves vis-à-vis the people over whom they hold authority.

CONCLUSION

Leib and Galoob have done a great service by drawing attention to the astonishing range of public settings to which theorists have brought fiduciary principles to bear. They are also to be credited for advancing our understanding of the deliberative requirements of loyalty and care in the domain of ethics—in particular, where loving relations and friendship are in play. Their theory of fiduciary norms, however, is plainly inconsistent with core features of fiduciary law in the private law setting, including the law's thoroughgoing aversion to coercing virtue. Were their theory true, no substantive body of law—not just administrative law and international law—would ever count as unqualifiedly fiduciary, including the most focal cases of private law, such as those involving trustees, agents, and corporate directors. Their attack on public fiduciary theory, then, is really an attack on all theorizing that seeks to explain the law of fiduciaries as it presents itself.

When Leib and Galoob train their sights on international law specifically, their critique proves unpersuasive. They neglect those parts of international law we discuss that explicitly adopt a fiduciary framework. They neglect international judicial institutions, notwithstanding having concluded earlier in their essay that judging is unqualifiedly apt for fiduciary theorizing. They neglect global administrative law, notwithstanding having conceded the viability in principle of a fiduciary understanding of domestic administrative law. And they neglect the most fundamental and widespread structure of judicial review under IHRL, a global paradigm for rights review, which itself contains an expressly deliberative aspect. Instead, they base their critique on a hypothetical torture case, but they miss that in this context, too, international law imposes freestanding—but public—deliberative requirements. Thus, in their eagerness to impose on law a virtue ethics framework derived from abstract moral philosophy, Leib and Galoob lose sight of law itself.

We believe that the future of public fiduciary theory lies elsewhere. Rather than look to virtue ethics as a guide for public law, fiduciary theorists would be wise to adopt Rawls's methodology of reflective equilibrium, distilling the normative structure of public fiduciary relationships from examination of well-established legal norms and institutions. This is the approach we have taken in our previous writings on public fiduciary theory, and we are confident that it will be the dominant methodology among fiduciary law scholars for years to come. Proceeding with this method, public fiduciary theory will be best positioned to realize its promise.

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