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Stephen R. Galoob

University of Tulsa, stephen-galoob@utulsa.edu

Ethan J. Leib

Fordham University School of Law

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Motives and Fiduciary Loyalty

Stephen R. Galoob* and Ethan J. Leib**

Abstract: How, if at all, do motives matter to loyalty? We have argued that loyalty (and the duty of loyalty in fiduciary law) has a cognitive dimension. This kind of “cognitivist” account invites the counterargument that, because most commercial fiduciary relationships involve financial considerations, purity of motive cannot be central to loyalty in the fiduciary context. We contend that this counterargument depends on a flawed understanding of the significance of motive to loyalty. We defend a view of the importance of motivation to loyalty that we call the *compatibility account*. On this view, A acts loyally toward B only if A’s motives are compatible with A’s robustly assigning non-derivative significance to the interests of B. We show that the compatibility account describes the motivational structure of fiduciary loyalty and of loyalty as such. This account provides a realistic picture of motivation and helps respond to two broader criticisms of cognitivism: first, that attributing significance to motivation is paradoxical; second, that attributing significance to motive would make fiduciary law impossible to administer. We also show that the compatibility account can help explain features of ineffective assistance of counsel jurisprudence under the Sixth Amendment to the U.S. Constitution, which draws on the lawyer’s duty of loyalty toward the client.

Keywords: legal ethics, fiduciary law, Sixth Amendment

Loyalty has a cognitive dimension.¹ There are at least three aspects to this cognitive dimension. Whether you act loyally toward another depends on how you deliberate, how your deliberation connects to your actions, and the robustness of

* Stephen R. Galoob is Chapman Professor of Law at the University of Tulsa College of Law. Email: stephen-galoob@utulsa.edu.

** Ethan J. Leib is the John D. Calamari Distinguished Professor of Law at Fordham Law School. Email: ethan.leib@law.fordham.edu. For feedback, we thank audiences at the Legal Ethics and Fiduciaries Workshop at the University of Notre Dame and the Criminal Law Theory, Etc. workshop held at Harvard Law School, including Emad Atiq, Jake Bronsther, Vincent Chiao, Tim Dare, Mihailis Diamantis, Andrew Gold, John Goldberg, Bruce Green, Erin Kelly, Josh Kleinfeld, Chris Lewis, David Luban, Paul Miller, Tomo Morigiwa, Becky Roiphe, Tony Sebok, Charles Silver, Will Thomas, Julian Velasco, Brad Wendel, and Ben Zipursky. Thanks also to the editors of and reviewers for this journal, whose suggestions improved our manuscript substantially.

¹ See Stephen R. Galoob and Ethan J. Leib, “Fiduciary Loyalty, Inside and Out,” *Southern California Law Review* 92 (2018): 69–126. In earlier work, we referred to the “shaping account,” which describes the deliberative component of loyalty’s cognitive dimension. See Stephen R. Galoob and Ethan J. Leib, “Intentions, Compliance, and Fiduciary Obligations,” *Legal Theory* 20 (2014): 115–18.

your commitment.² This cognitive dimension of loyalty is freestanding because regardless of how you behave, you can fail to act loyally based on your deficient deliberation, your inappropriate motivation, or the flimsiness of your commitment. The deliberative requirement for loyalty requires you (at least) to attribute non-derivative significance in your practical deliberation to the interests or ends of the object of loyalty. This cognitive dimension applies to both ordinary loyalty as such and the notion of loyalty applicable in fiduciary law.

Arthur Laby, among others, disputes the existence of a cognitive dimension of fiduciary loyalty. He contends that it is possible to satisfy the fiduciary duty of loyalty while acting from prosaic or mixed motivations. For example, Laby argues, in most commercial contexts in which fiduciary duties apply:

[A] fiduciary agrees to act in a fiduciary capacity because she is paid for doing so. . . . [I]n many fiduciary relationships, the fiduciary takes on a fiduciary task because she is asked to do so by someone other than the principal. The fact that the fiduciary has an external motivation for assuming her fiduciary responsibilities does not detract from the purity of the fiduciary relationship. . . . An additional motivation does not diminish the ability to act consistently with fiduciary loyalty.³

Laby's argument contains or implicates several critiques. Cognitivism about fiduciary loyalty might be said to presuppose an anachronistic standard of identification between fiduciary and beneficiary, one that does not fit the alienation that routinely characterizes fiduciary relationships in our world.⁴ It also might fail to deal with the ubiquitous phenomenon of mixed motivation. Where a fiduciary's action is prompted by a range of considerations (some noble, others venal), is it possible or worthwhile to scrutinize the fiduciary's motives in a meaningful way? In light of the ubiquity of mixed motivation, perhaps the law should altogether abandon motivational scrutiny. On this argument, fiduciary loyalty should be construed as a function of what the fiduciary does, not why she does it.

Laby's challenge also suggests more powerful, normative critiques of cognitivism about fiduciary loyalty. Attributing a motivational dimension to fiduciary loyalty might be paradoxical in that one could not aim to fulfill the duty of loyalty without also violating it. If so, then the cognitive dimension of fiduciary loyalty seems conceptually confused or incapable of being reconciled with the idea

² See Ethan J. Leib and Stephen R. Galoob, "Fiduciary Political Theory: A Critique," *Yale Law Journal* 125 (2016): 1829-44; see also Simon Keller, *The Limits of Loyalty* (Cambridge: Cambridge University Press, 2007), vii: "[L]oyalty is not just a matter of how you act; it is also a matter of how you think, and how you are motivated."

³ Arthur B. Laby, "Competing Accounts of Fiduciary Obligation," in *Research Handbook on Fiduciary Law*, ed. Andrew S. Gold & D. Gordon Smith (Northampton, MA: Edward Elgar Publishing, 2018), 156.

⁴ Our own "shaping" account was originally designed to be less demanding of fiduciaries than Laby's own "adopting" account, see Arthur B. Laby, "The Fiduciary Obligation as the Adoption of Ends," *Buffalo Law Review* 56 (2008): 99-167, which requires fiduciaries to endorse and embrace beneficiaries' ends, goals, and objectives. See Galoob and Leib, "Intentions, Compliance, and Fiduciary Obligations," 118-122. We criticized alternative accounts (such as Laby's) precisely because we thought a fiduciary ought to be—and in fact is—able to attribute the requisite significance to a beneficiary's interests without taking that other's on as her own. *Ibid.*, 123-24.

of a legally-enforced duty of loyalty.⁵ Likewise, excessive focus on the motives of a fiduciary might make fiduciary law difficult or impossible to administer and add nothing valuable to the fiduciary relationship. On this critique, formulations of legal standards of loyalty should avoid the morass.

In this paper, we respond to these challenges from motivational realism as part of providing a broader defense of cognitivism about loyalty. On what we call the *compatibility account* of motivation, A acts loyally toward B only if A's motives for action are compatible with A's robustly assigning non-derivative significance to the interests or ends of B. We contend that the compatibility account describes the motivational structure of fiduciary loyalty and of ordinary loyalty as such. This account not only responds to objections from motivational realism such as Laby's, but also provides a basis for responding to several broader criticisms of cognitivism about loyalty.

Part I articulates and defends the compatibility account of motivation by contrasting it with a stronger position that we call the devotional account. The compatibility account avoids the difficulties that impede the devotional account. Part II examines ineffective assistance of counsel jurisprudence under the Sixth Amendment to the U.S. Constitution to illustrate the plausibility and descriptive adequacy of the compatibility account.

I. The Motivational Structure of Loyalty

In this part, we lay out two ways of ascribing a motivational structure to loyalty, which we call the devotional account and the compatibility account. The defects of the former illuminate the strengths of the latter.

Our discussion rests on a specific understanding of motivation. Let's define intention as an executive attitude toward a plan, which constitutes the content of the intention.⁶ A motivation should be understood as an appraisal of how an intention connects with action. To be motivated by an intention "is for it to be the case that the causal sequence initiated by the intention would culminate in the world coming to match the intention, were obstacles removed and were the agent not to change his mind."⁷ Put differently, an intention answers the question "What was she trying to do?," while a motivation answers the question "Why was she doing what she was doing?" The answers to these questions can, of course, relate to each other.

What follows also rests on a view about compliance with norms regarding loyalty. Take the notion of compliance to indicate success in living up to a norm, while the notions of breach or violation indicate failure to live up to a norm.

⁵ Nelson Potter explores these kinds of questions within Kant's moral universe where moral value seems to be implicated by mixed motives. Nelson Potter, "Kant and the Moral Worth of Actions," *Southern Journal of Philosophy* 34 (1996): 225-41. A related paradox is explored in Philip Pettit, "The Paradox of Loyalty," *American Philosophical Quarterly* 25 (1988): 163-71.

⁶ See Alfred R. Mele, *Springs of Action: Understanding Intentional Behavior* (New York: Oxford University Press, 1992); Michael E. Bratman, *Structures of Agency: Essays* (New York: Oxford University Press, 2007).

⁷ Gideon Yaffe, "Criminal Attempts," *Yale Law Journal* 124 (2014): 116.

Some norms impose only behavioral standards for compliance. Whether someone complies with these norms depends only on whether her behavior conforms to the norm's prescriptions or avoids behaving in the way(s) proscribed by the norm. Whether one fulfills contractual obligations, for example, tends to be wholly a matter of behavior. For other kinds of norms, compliance is not only a matter of behavior but also a matter of how one deliberates about or justifies an action. For these kinds of norms, there is a cognitive dimension to compliance.

On the version of cognitivism about loyalty that we defend, acting or failing to act from certain motives can constitute disloyalty regardless of how else one behaves. This contention presupposes that the more demanding modality of compliance applies to loyalty norms—in other words, that determining whether an agent has lived up to the demands of loyalty requires more than an assessment of the agent's behavior. By contrast, the position that we call "behaviorism" denies that norms of (fiduciary) loyalty impose any deliberative requirements or motivational standards for compliance. Any account of loyalty that attributes a motivational element to compliance with norms of (fiduciary) loyalty must explain why behaviorism is incorrect.

A. The Devotional Account

One strategy for specifying the motivational dimension of loyalty is to identify the types of motives that characterize loyal action. Many philosophers see devotion as a necessary condition of loyalty. Josiah Royce famously defined loyalty as "willing and practical and thoroughgoing devotion to a cause."⁸ Similarly, George Fletcher distinguishes a "minimal" notion of loyalty as non-betrayal from a "maximal" notion of loyalty that includes "an element of devotion, an affirmative feeling toward the object of loyalty."⁹ Along these lines, John Kleinig identifies a narrower sort of devotion, namely being moved to act based on the intrinsic value of the object of one's loyalty, as the motivational requirement for loyalty.¹⁰ Each of these views takes some form of devotion to be a necessary motivational condition for loyalty; a motivational structure that lacks the requisite devotion is not characteristically loyal.¹¹ From these interpretations of how

⁸ Josiah Royce, *The Philosophy of Loyalty* (New York: The Macmillan Company, 1908), 16-17, 351.

⁹ George P. Fletcher, *Loyalty: An Essay on the Morality of Relationships* (New York: Oxford University Press, 1993), 9; see also Milton Konvitz, "Loyalty," in *Dictionary of the History of Ideas*, vol. 3, ed. Philip P. Wiener (New York: Charles Scribner's Sons, 1973), 108-16 (arguing that loyalty can be directed to "anyone or anything to which one's heart can become attached or devoted").

¹⁰ John Kleinig, *On Loyalty and Loyalties: The Contours of a Problematic Virtue* (New York: Oxford University Press, 2014), 84. This idea might trace back to Royce, *The Philosophy of Loyalty*, 142.

¹¹ The argument here resembles the distinction in metaethics between *de re* and *de dicto* motivation. To borrow an example from Emad Atiq, suppose that one desires to read a novel by Virginia Woolf. This statement is ambiguous. The desire would be *de re* if one had a particular novel written by Virginia Woolf in mind, while the desire would be *de dicto* if it could be satisfied by reading any novel written by Woolf. See Emad Atiq, "Legal Obligation and its Limits," *Law*

loyalty works, it is possible to derive the following account of the connection between motive and loyalty.

Devotional Account: An action is loyal only if the actor is motivated to advance the interests or ends of a beneficiary.

Some formulations of a devotional account might further implicate emotional or affective responses. On these versions, A would not be loyal to B unless A is both devoted to B and also disposed to have certain affective responses to developments related to B.¹² In what follows, we isolate the devotional element of the devotional account and do not consider these affective variants directly.

The connection between ordinary loyalty and fiduciary loyalty is much debated. So-called “moralists” construe a deep connection between the legal and non-legal notions of loyalty, while “amoralists” deny that there is any meaningful connection between the ordinary notion of loyalty and the notion that applies to fiduciaries.¹³ Some legal theorists in the moralist vein articulate positions resembling a devotional account of fiduciary loyalty.¹⁴ It is unclear, however, whether these theorists think that a non-devotional motivation would be sufficient to ground a claim for breach of fiduciary loyalty. A devotional account might also be inferred from a literal understanding of the “proper purposes” doctrine in fiduciary law, which can find fiduciary disloyalty even without conflicts of interest or misappropriating profits, the conventional hallmarks of breach in the courts.¹⁵ Further, the devotional account is arguably implicit the legal ethics norms of “entire devotion” and

& *Philosophy* 38 (2019): 138. Michael Smith notes that there is an ambiguity in the statement that one desires to do the right thing. This statement might indicate a motivation to do what is right, whatever that happens to be. This would be motivation *de dicto*. It might also indicate motivation to do a specific thing that one believes satisfies the criteria of rightness—that is, motivation *de re*. See Michael Smith, *The Moral Problem* (Oxford: Blackwell Publishing, 1994), 75. The devotional account can be construed as an argument that (fiduciary) loyalty requires one to be motivated to advance the beneficiary’s interest *de dicto*—that is, to advance the beneficiary’s interests solely because they are the beneficiary’s interests. On this account, *de re* motivation would breach the duty of loyalty. The compatibility account that we defend below is, in essence, a contention that either *de re* and *de dicto* motivation regarding the interests of a beneficiary is consistent with acting loyally. Thanks to Emad Atiq for illuminating this connection for us.

¹² Keller, *The Limits of Loyalty*, 15 (“What it is like to be loyal” is to “feel an attachment . . . that is in part emotional.”); *ibid.*, 17 (“An emotional attachment is found whenever we look closely at our own displays of loyalty.”); *ibid.*, 140 (“[W]hether or not you are loyal is in large part a matter of your feelings and motivations; it depends upon what is going on inside your own head.”).

¹³ Galoob and Leib, “Fiduciary Loyalty, Inside and Out,” 71.

¹⁴ See, e.g., Irit Samet, “Fiduciary Loyalty as Kantian Virtue,” in *Philosophical Foundations of Fiduciary Law*, eds. Andrew S. Gold & Paul Miller (Oxford: Oxford University Press, 2014), 139 (exploring the requisite “emotional orientation” of fiduciaries to their beneficiaries); Leonard I. Rotman, *Fiduciary Law*, 314 (Toronto: Thomson Carswell, 2005), 314 (arguing that fiduciaries must be “completely devoted to the primacy of beneficiaries’ interests); Lyman Johnson, “After Enron: Remembering Loyalty Discourse in Corporate Law,” *Delaware Journal of Corporate Law* 28 (2003): 42 (emphasizing a devotional facet to loyalty); Lionel Smith, “The Motive, Not the Deed,” in *Rationalizing Property, Equity, and Trusts: Essays in Honour of Edward Burn*, ed. Joshua Getzler (Oxford: Oxford University Press, 2003), 67 (a fiduciary “must act (or not act) in what he perceives to be the best interests of the beneficiary”).

¹⁵ *Ibid.*, 71–73.

“warm zeal” that have been identified by George Sharswood¹⁶ and more recently by Monroe Freedman and Abbe Smith, among others,¹⁷ as a core aspect of the lawyer-client relationship.

There are several difficulties with the devotional account as a standard for ordinary loyalty as such. First, even if motives matter to loyalty, devotion seems to be an especially romantic articulation of the commitment loyalty requires. Devotion is the stuff of saccharine pop music, whose apotheosis is perhaps the following by Sandy about Danny in the musical *Grease*:

You know I'm just a fool who's willing
To sit around and wait for you
But baby can't you see there's nothing else for me to do. . . .
Hold on to the end, that's what I intend to do
I'm hopelessly devoted to you.¹⁸

While Sandy is at least arguably loyal to Danny, it seems implausible that this attachment is *essential* to being loyal. The lyrics to the song are meant to parody teenage entanglements, rather than to identify necessary criteria.

Beyond romanticism, the devotional account seems revisionist as a description of ordinary loyalty. Loyalty is an element of interpersonal relationships such as friendship. However, someone can be your friend without being moved to advance your interests in all of their actions. This kind of commitment is more characteristic of a sycophant or a lap dog. It also isn't obvious why devotion would even be valuable to the object of loyalty. For example, while you may want a friend to be committed to you, anyone worthy of friendship will obviously have other pursuits. Acknowledging these other commitments does not make someone any less your friend. We value friends, in part, for their interests and pursuits outside of us, so devotion might tend to thin out the commitments that make others attractive as friends in the first place. Likewise, while one might want loyalty from a significant other, one might also be disturbed to learn that one's significant other took Sandy's lyrics to heart. Finally, the devotional account

¹⁶ George Sharswood, *An Essay on Professional Ethics*, 5th ed. (Philadelphia: T. & J.W. Johnson, 1884), 78-80 (“Entire devotion to the interest of the client, warm zeal in the maintenance and defence of his rights, and the exertion of his utmost learning and ability—these are the higher points, which can only satisfy the truly conscientious practitioner.”) For a nuanced evaluation of Sharswood's vision of the lawyer as both devotional to a client and “republican guardian of the law,” see Russell G. Pearce, “Rediscovering the Republican Origins of the Legal Ethics Codes,” *Georgetown Journal of Legal Ethics* 6 (1992): 241.

¹⁷ See Monroe Freedman & Abbe Smith, *Understanding Lawyers' Ethics*, 4th ed. (San Francisco, CA: LexisNexis Group 2010), 71-72; see also Charles Fried, “The Lawyer as Friend,” *Yale Law Journal* 85 (1976): 1075 (“[T]he legal system, by instituting the role of the [lawyer as] legal friend, not only assures what it in justice must—the due liberty of each citizen before the law—but does it by creating an institution which exemplifies, at least in a unilateral sense, the ideal of personal relations of trust and personal care which (as in natural friendship) are good in themselves.”); Anita Bernstein, “The Zeal Shortage,” *Hofstra Law Review* 34 (2006): 1173 (arguing that the “duty of zealous advocacy” demands “passion,” which implicitly contains standards of “enthusiasm, energy, and benevolent effort”).

¹⁸ Olivia Newton-John, “Hopelessly Devoted to You,” on *Grease: The Original Soundtrack from the Motion Picture* (RSO, 1978).

seems overly demanding on those who would be loyal. Given a general skepticism about whether people can exercise voluntary control over their motivations, it seems unfair to require a precise and hugely demanding motivational structure of those who would be loyal.¹⁹

Aside from these problems with the devotional account as a motivational standard for ordinary loyalty, the devotional account raises at least three important concerns as a description of fiduciary loyalty in particular. The first is a problem of revisionism about fiduciary law. The devotional account seems to require motivational purity, ruling out the possibility that a loyal fiduciary could act from mixed motives. However, certain mixtures of motives routinely describe the psychological states of compliant fiduciaries. For example, as Bernard Williams argued, although professional morality might well diverge from "ordinary" or "everyday" morality, it is routine and unexceptional for this divergence to generate no significant internal conflict in members of the profession who have internalized the norms of their profession.²⁰ By denying the possibility of acting appropriately when conflicted, the devotional account seems to reach a conclusion that is at odds with legal reality. Likewise, many commentators (including, most prominently, William Simon)²¹ contend that the central challenge of legal ethics is balancing one's commitment to one's client with one's duty to promote just institutions. Yet the devotional account seems to rule out in advance the possibility that a loyal lawyer could have such a conflict. On the devotional account, a lawyer's actions would violate the duty of loyalty to the extent that the lawyer is moved at all by the goal of promoting justice. Rather than resolving this central puzzle, the devotional account denies its existence.

A second problem arises from the seemingly paradoxical nature of the duty of loyalty. In general, duties are thought to provide an appropriate basis for motivation. If you have a duty to do X, then that duty can (or, on some accounts, must) play a role in prompting your X'ing. However, combining the motivational force of duties with the devotional account invites a paradox regarding a duty of loyalty: if a fiduciary does X on behalf of her beneficiary because X'ing is required by the duty of loyalty, then the fiduciary is moved to act because of the duty rather than because X'ing will serve the interests or ends of the object of loyalty. In fulfilling the duty of loyalty, then, the fiduciary would violate the duty of loyalty, even when behaving and deliberating in exactly the way that loyalty demands. For Avihay Dorfman, the possibility of this paradox is a reason to

¹⁹ Simon Keller notes just such a problem with scenarios involving "compulsory" loyalty, such as duties of children to be loyal to their parents. For Keller, these duties of loyalty are problematic given the lack of evidence that people have "direct control over [their] feelings of loyalty." Keller, *The Limits of Loyalty*, 142. Thus, Keller concludes, any duty to be loyal to our parents "operates only within the limits of what we can control." *Ibid.*, 143.

²⁰ See Bernard Williams, "Professional Morality and Its Dispositions," in *Making Sense of Humanity and Other Philosophical Papers 1982-1993* (Cambridge: Cambridge University Press, 1995), 192-202 (highlighting notions of specific, uneasy, and non-specific professional adaptations).

²¹ See William H. Simon, *The Practice of Justice* (Cambridge: Harvard University Press, 1998).

deny the relevance of motivation to fiduciary loyalty at all: "Just like norms of politeness," he argues, "legal enforcement of sincere loyalty is contradictory, since compelled loyalty is not loyalty properly so called."²²

Finally, if fiduciary loyalty really required forms of devotion, then it would be exceptionally difficult to administer a legal regime that evaluated motivations. How might a court establish the contents of a fiduciary's heart? In the corporate law context, as Andrew Gold puts it, "[w]hen board decisions are viewed from outside the boardroom, it is not a simple matter to know what truly motivates director decisions."²³ Even if this epistemic challenge could be met, appraising which motivations constitute devotion would seem to present more profound difficulties for courts. Courts could simply avoid these intractable inquiries by focusing exclusively on the fiduciary's behavior and the results of that behavior. Such a behaviorist approach would not only relieve courts of the burdens of motivational judgment, but also have the additional advantage of focusing on the considerations that beneficiaries ultimately care about.²⁴

B. The Compatibility Account

These objections to the devotional account have led several theorists to deny that motivation has any significance to fiduciary loyalty,²⁵ or to ordinary loyalty as such.²⁶ We agree that the devotional account is too demanding, revisionist, prone to paradox, and difficult to administer. However, rather than embracing behaviorism, we offer an alternative account that captures the significance of motivations to loyalty but evades the problems with the devotional account.

In doing so, we take a different strategy than is typically used to defend the connection between motive and loyalty. Rather than specifying the specific motivation(s) that loyalty demands, we seek to identify the kinds of motivations that are inconsistent with loyalty. To illustrate our strategy, consider the following scenario:²⁷

²² Avihay Dorfman, "On Trust and Transubstantiation: Mitigating the Excesses of Ownership," in *The Philosophical Foundations of Fiduciary Law*, 347.

²³ Andrew S. Gold, "The New Concept of Loyalty in Corporate Law," *U.C. Davis Law Review* 43 (2009): 510.

²⁴ See Stephen A. Smith, "The Deed Not the Motive: Fiduciary Law Without Loyalty," in *Contract, Status, and Fiduciary Law*, ed. Andrew S. Gold & Paul Miller (Oxford: Oxford University Press, 2016), 213-39.

²⁵ See, e.g., *ibid.*; Dorfman, "On Trust and Transubstantiation: Mitigating the Excesses of Ownership"; J. E. Penner, "Is Loyalty a Virtue, and Even It Is, Does It Really Help Explain Fiduciary Liability?," in *Philosophical Foundations of Fiduciary Law*, 159-75; Kelli A. Alces, "The Fiduciary Gap," *Journal of Corporate Law* 40 (2014): 370.

²⁶ John Kleinig describes this view as the notion that "[t]he test of loyalty is conduct rather than intensity of feeling," see John Kleinig, "Loyalty," in *The Stanford Encyclopedia of Philosophy* (Winter 2017 Edition), ed., Edward N. Zalta, at <https://plato.stanford.edu/archives/win2017/entries/loyalty/>, although (as described above) Kleinig also sees a cognitive dimension to ordinary loyalty.

²⁷ This scenario is adapted from Monroe H. Freedman, "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions," *Michigan Law Review* 64 (1966): 1469-84; David Luban, *Lawyers and Justice: An Ethical Study* (Princeton, NJ: Princeton University Press, 1988); and David Luban, "Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann," *Columbia Law Review* 90 (1990): 1004-43.

Exploiting a Secret: Danny is on trial for sexually assaulting Annie, his ex-girlfriend. Danny committed the actions of which he is accused, but he does not believe that he should be criminally liable for sexual assault. Annie has a secret that, if revealed, would both humiliate her and damage her credibility. The secret is so humiliating to Annie that she would rather refuse to testify than to have it revealed. Unbeknownst to Annie, Danny has learned her secret.

Larry Lawyer is Danny's attorney in the criminal proceedings. In preparation for trial, Danny tells Larry Lawyer that he committed the actions of which he is accused, but that he does not think that these actions are sufficient to constitute the crime of sexual assault. Danny also tells Larry Lawyer about Annie's secret. Larry Lawyer raises the issue of Annie's secret in pretrial motions in order to dissuade Annie from testifying. If Annie still insists on testifying, Larry Lawyer will seek to cross-examine her based on her secret in a way that would both humiliate Annie and damage her credibility.

Among legal ethicists, there is disagreement about the status of Larry Lawyer's actions. Some would deny that Larry's conduct in this scenario is permissible, regardless of the demands of his professional role.²⁸ Others would argue that, based on his professional role, Larry could be permitted or even required to engage in this conduct.²⁹ Let's assume, for the sake of argument, that Larry's role responsibilities toward Danny make it possible to justify Larry's actions in this scenario. Our question is whether, given this potential justification, variations in Larry's motivations might bear on the assessment of his actions. Consider one description of Larry's motivations in *Exploiting a Secret*.

M1: Larry is prompted to act by his sincere belief that Danny's actions did not constitute sexual assault.

If (as we have assumed *arguendo*) the type of action described in *Exploiting a Secret* is justifiable in the abstract, then Larry's motivation in M1 seems perfectly consistent with the fiduciary duty of loyalty. Further, it seems to us that Larry's action in M1 is consistent with an ordinary understanding of loyalty. Of course, M1 is also consistent with the type of attachment called for by the devotional account.

Consider an alternative description of Larry's motivation:

M2: Larry is prompted to act because raising uncomfortable issues and harshly cross-examining truthful witnesses is something that lawyers do, and Danny has retained Larry to be his lawyer.

On this motivational structure, we argue, Larry also acts loyally toward Danny, despite Larry's lack of devotion. Larry's motivations in M2 are consistent with the norms of loyalty because these norms are encoded in the constitutive rules of legal practice. True enough, Larry is not solely focused on Danny's interests or ends for their own sake in M2. Rather, Larry's motivation to act is based on an internalization of the professional role of lawyer. Because the rules and norms of

²⁸ E.g., *ibid.*, 1026-35.

²⁹ E.g., W. Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton, NJ: Princeton University Press, 2010); Freedman, "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions."

legal practice require assigning fundamental significance to the interests or ends of one's client, Larry's motivations in M2 are consistent with his appropriately considering Danny's interests.

Unlike in M1, the source of Danny's deliberative significance to Larry is extrinsic to Danny. However, Larry's pattern of deliberation is nonetheless consistent with the standards of ordinary loyalty because the content of the rules and norms of legal practice require attention to the interests of one's client. What matters to the assessment of compliance is Larry's attribution of fundamental significance to Danny's interests or ends, rather than whether he comes to attribute this significance based on an emotional attachment to Danny or an appraisal of the intrinsic value of the Larry-Danny relationship (as different versions of the devotional account might posit).³⁰

Likewise, because the norms of legal practice prevent lawyers from abandoning clients in a range of circumstances, Larry's internalization of those norms would result in his maintaining a robust commitment to Danny. Furthermore, if Danny's interests or ends change, then, under the rules and norms of legal practice, Larry's practical commitments as a lawyer must also change in accordance.

More broadly, it seems plausible that the motivations described in M2 reflect the kind of commitment that a client might desire from a lawyer. If a true belief in one's client (as represented in M1) is a minimum for acting loyally, then the Larry of M1 risks "going native." By contrast, the Larry of M2 might maintain a laudable degree of detachment.³¹

The preceding analysis suggests that devotional accounts set the bar for loyalty too high. Contra Royce, Larry acts loyally toward Danny in M2 even though he is not entirely devoted to Danny and his action is prompted by considerations extrinsic to Danny. Contra Fletcher, Larry's internalization of the norms of the legal profession seem sufficient to render his action loyal to Danny because those norms prescribe consideration of Danny's interests and ends. And contra Kleinig, Larry can act loyally toward Danny without assigning intrinsic value to Danny (the putative object of loyalty) or to the lawyer-client relationship.

Larry's motivation in M2 also comports with the fiduciary duty of loyalty. A basic assumption of contemporary modes of lawyer regulation is that lawyers can be appropriately motivated by the goal of conforming to disciplinary rules, rather than solely based on the intrinsic commitment to one's client. While there are significant disputes about the value of the "warm zeal" that Sharswood called on the lawyer to exhibit toward the client, those who lack such zeal do not

³⁰ This is not to say that *any* motivational route by which Larry's deliberation assigns fundamental significance to Danny's interests or ends will fit with the standards of ordinary loyalty. As we discuss below, a saboteur might engage in this pattern of deliberation but would not count as loyal in the ordinary sense. Likewise, if the content of the norms that Larry internalized were different (e.g., if these norms did not require attributing fundamental significance to the interests or ends of the client), then Larry's motivational structure would not be consistent with ordinary loyalty, as we have argued. Leib and Galoob, "Fiduciary Political Theory: A Critique," 1838.

³¹ On "thin" professional identity, see Norman W. Spaulding, "Reinterpreting Professional Identity," *University of Colorado Law Review* 74 (2003): 1-104.

thereby violate the applicable rules of professional conduct.³² Thus, based on the circumstances of M2, Danny would not have a viable cause of action toward Larry for breach of fiduciary duty. Nor would Larry be subject to professional discipline in this case.

On our understanding, then, both M1 and M2 are consistent with the ordinary and legal notions of loyalty. If so, then the combination of these two motivations should also be consistent with acting loyally. Consider the following version of the scenario:

M3: Larry is prompted to act in part (a) by his sincere belief that Danny's actions did not constitute sexual assault and in part (b) because raising uncomfortable issues and harshly cross-examining truthful witnesses is something that lawyers do, and Danny is paying Larry to be his lawyer.

We see no defect in Larry's motivational structure in M3, either from the standpoint of ordinary loyalty or as a matter of fiduciary law. The co-occurrence of these two motivations in a loyal action indicates that mixed motivations are not problematic per se.

If the motivational structures described so far are consistent with loyalty, then what motivations are inconsistent with loyalty? Consider the following variant:

M4: Larry is moved solely by the pursuit of money. Larry is prompted to act on Danny's behalf only because he sees the expected value of acting on Danny's behalf to be greater than the expected value of not acting on Danny's behalf.

In M4, Larry is less a "hired gun" than a mercenary. These motivations, we think, are inconsistent with acting loyally in the ordinary sense. For one thing, Larry's motives in M4 render it impossible for him to deliberate appropriately about Danny. Danny's interests or ends have entirely derivative significance—they matter to Larry only insofar as they bear on the question of how Larry can maximize his own payoff. Likewise, these motives render Larry's commitment to Danny entirely contingent: if advancing Danny's interests or ends did not generate higher returns, then Larry would not be moved to act on his behalf.

Larry's motivational set in M4 is also inconsistent with the fiduciary duty of loyalty, although here the case is closer. What matters is not that Larry responds to financial incentives, so much as their determinative influence on his action. Why are the mercenary motivations of M4 inconsistent with acting loyally, but the "hired gun" motivations implicit in M2 are potentially consistent with acting loyally? Both M2 and M4 involve a protagonist who is motivated to act on behalf of a client based on considerations extrinsic to that client. Therefore, the best explanation of the discrepancy is not the structure of Larry's motivations. One can act loyally even though one's motives are complicated. (To deny this is to concede too much ground to the devotional model.) Rather, the significant difference between these two cases turns on the *content* of Larry's motivational

³² Ibid., 16 ("[O]nce the rich motivational structure of identification is exposed, it becomes clear that identification can be driven just as much by the lawyer's needs for (moral, emotional, intellectual, or financial) self-realization in the attorney-client relationship. The logic of identification can thus take a lawyer well past the client-centered stance that is said to define the role.").

set. In M2, Larry internalizes a code of legal ethics that itself requires a robust commitment and appropriate sensitivity to the interests of the client. By contrast, Larry's actions in M4 are the product of an avarice that, far from imposing either of these requirements, is inconsistent with both of them. We concede, however, that the question of whether Larry's motivations in M4 are consistent with fiduciary loyalty is a closer question than whether his motivations are consistent with ordinary loyalty.

Consider a possible description of Larry's motivations that is more plainly inconsistent with both ordinary and fiduciary loyalty:

M5: Larry is prompted to act because he believes that raising these issues will increase the odds of Danny being sentenced to a term of life imprisonment if he is convicted of the crime.

In M5, Larry's actions are those of a saboteur. Larry attributes no value to Danny's interests or ends. Nor does he have any commitment to advancing them. In order for his sabotage to succeed, Larry might need to feign the patterns of deliberation that characterize loyal action in order to build credibility or trust with Danny. Toward these same ends, he might also simulate the mental state of robust commitment. Yet even if Larry pulls off a pattern of appropriate deliberation about Danny and sticks with him, he is clearly not loyal in the ordinary sense in light of his motivation.

Larry's motivations in M5 also render his actions inconsistent with the fiduciary duty of loyalty. This conclusion holds regardless of whether Larry's actions actually lead to Danny receiving a sentence of life imprisonment. Indeed, the conclusion seems to hold at the moment Larry forms this motive—that is, even before he takes any substantial step toward executing it. From a fiduciary standpoint, the problem is not that the strategy of raising these issues regarding Annie is risky for Danny. Such a risk might be justified by strategic considerations—for example, if undertaking these actions marginally increased Danny's chances at receiving a life sentence while also substantially increasing the chances that Danny would be acquitted entirely. Rather, the problem is that these strategic considerations are not relevant to Larry's motivations or deliberations under the parameters of M5.

While Larry's motives in M4 seem to breach the norms of legal practice, Larry's motivations in M5 are so beyond the pale that it seems inapt to call what Larry is doing in this scenario lawyering at all. In light of this, a loyal action cannot be moved at all by sabotage, even if the actor is also moved by otherwise acceptable motives. In this sense, not all mixed motives can lead to compliance. For example:

M6: Larry is prompted to act in part (a) because raising uncomfortable issues and harshly cross-examining truthful witnesses is something that lawyers do and Danny is paying Larry to be his lawyer, and in part (b) because Larry believes that raising these issues will increase the odds of Danny being sentenced to a term of life imprisonment if he is convicted of the crime.

Larry's motivational set in M6 is inconsistent with both ordinary and fiduciary loyalty. Even if (as we argued above) one can act loyally by going through the

motions, the mere presence of the motive to undermine seems enough to sustain this conclusion.³³

* * *

These cases and permutations suggest a number of conclusions. *Pace* behaviorism, an action taken can vary in its compliance with norms of loyalty based solely on the actor's motivation. However, *contra* the devotional account, purity of motive and devotion are not necessary for a loyal action. Rather, loyal action can arise out of a range of motives. How might we specify this range of motivations? The cases suggest that the relevant criteria turn on other cognitive aspects of loyalty—namely, patterns of deliberation and robustness of commitment to the object of loyalty. In some of these cases (M4, for example), the actor's motivation indicates insensitivity of deliberation or flimsiness of commitment, which are in turn relevant to assessing whether the action is loyal. In other cases (M5, for example), the actor's motivation affects the appropriate description of the action.

Motivation, then, seems to matter less than the devotional account contends, but more than behaviorism allows. Here is an alternative account of how motivation matters to loyalty.

Compatibility Account: An action is not loyal if the actor's motivations are incompatible with robustly attributing non-derivative significance to the object's interests or ends.

The compatibility account is more a negative framing of what disloyalty entails than a positive framing of what loyalty requires. This view does not identify appropriate motivations for loyal action ("the right kinds of reasons"),³⁴ but rather delineates inappropriate motivations ("the wrong kinds of reasons").³⁵ The category of inappropriate motivations includes aims to undermine, rather than advance, the interests or ends of the putative object of loyalty; or motives that prompt an agent to assign only derivative significance in her practical deliberation to the interests or ends of the putative object; or motives that render any commitment by the agent toward the putative object flimsy or too contingent. Any motivational set that can coexist with the deliberative and robustness aspects of loyalty can generate a loyal action. Therefore, an agent need not be devoted to a putative object in order to act loyally toward that object.³⁶

³³ Thus, the prospect of sabotage invites what Andrew Verstein calls an "any motive" standard: Larry violates his fiduciary duty if he is moved to sabotage Danny's case, regardless of whether his otherwise licit motivation was sufficient to prompt him to undertake the action. Andrew Verstein, "The Jurisprudence of Mixed Motives," *Yale Law Journal* 127 (2018): 1141.

³⁴ See Wlodek Rabinowicz and Toni Ronnow-Rasmussen, "Buck-Passing and the Right Kind of Reasons," *Philosophical Quarterly* 56 (2006): 115.

³⁵ See Pamela Hieronymi, "The Wrong Kind of Reason," *Journal of Philosophy* 102 (2005): 437–57; Mark Schroeder, "Value and the Right Kind of Reason," *Oxford Studies in Metaethics* 5 (2010): 25–55; Nathaniel Sharadin, "Reasons Wrong and Right," *Pacific Philosophical Quarterly* 97 (2016): 371–99.

³⁶ The compatibility account differs further from the specific versions of the devotional account described above. For example, unlike Kleinig's account, what matters isn't whether the fiduciary is motivated by the intrinsic value of the object of loyalty. If the fiduciary can satisfy the deliberative and commitment aspects of loyalty, then she can act loyally regardless of whether she values the putative object (or her relationship with the putative object) intrinsically.

The compatibility account avoids the aforementioned problems facing the devotional account. For one thing, the compatibility account is realistic rather than romantic. A loyal action need not be done solely from noble motives, such as Kant's motive of duty. Rather, a loyal action can be done from mundane motives, so long as the explanation for why the agent acts is consistent with her deliberating and committing appropriately. Likewise, loyalty does not require purity of motive. A loyal action can spring from a divided mind. However, not all mixtures of motives will do. The very presence of certain motives (for example, sabotage or betrayal) is enough to defeat the possibility of a loyal action, regardless of whether these motives are sufficient to prompt an action. Thus, while mixed motives are not inconsistent with loyal action *per se*, some mixtures of motives cannot give rise to a loyal action.

The compatibility account also resolves some of the concerns about demandingness that ensnare the devotional account. As noted above, the devotional account requires a loyal action to be done from a specific motive. However, people generally lack voluntary control over the considerations that motivate them. If so, then it seems strange to criticize an action as disloyal based solely on an agent's motives when the agent's motives are not within their volitional control. The compatibility account evades this concern by defining the importance of motive in terms of other cognitive considerations—namely, deliberation and robustness of commitment. Even if one accepts that people generally lack volitional control over motivation, it is much more plausible to attribute volitional control over how an agent deliberates about the putative object of loyalty and the robustness of their commitment to that object. Therefore, it seems more appropriate to criticize an agent's action as disloyal if it is motivated by considerations that are inconsistent with patterns of deliberation and commitments that are under the agent's control.

The compatibility account also evades the three specific problems facing the devotional account as a description of fiduciary loyalty. In other words, even those who accept the devotional account as a description of ordinary loyalty should favor the compatibility account as a description of fiduciary loyalty in particular.³⁷ First, the compatibility account does not require wholesale revision of fiduciary law. Usually, courts applying fiduciary law do not scrutinize the motives of a fiduciary in determining whether an action complies with the duty of loyalty. However, sometimes they do. The compatibility account provides a principled explanation of this feature of fiduciary law, and the variants of the *Exploiting a Secret* case provide at least some support for the descriptive power of the compatibility account. Our discussion in Part II provides further ballast for this point.

Second, the compatibility account avoids the paradox of the duty of loyalty. Recall that the appearance of paradox arises from two propositions: first, that

³⁷ We suspect there are devotees of a devotional account of loyalty in life who embrace behaviorism as an account of fiduciary loyalty, compartmentalizing juridical loyalty as being mostly unrelated to loyal action in moral life. One further advantage of compatibilism is that it can serve to bring legal loyalty closer to ordinary loyalty—to reveal the morphological similarities of loyalty in life and in law.

duties normally exert appropriate motivational force on those to whom they apply; second, that an action is loyal if and only if it is entirely prompted by concern for the interests or ends of the putative object of loyalty. If both of these propositions are correct, then to be moved to action by the duty of loyalty is to violate that duty, since motivation from duty is inconsistent with motivation by concern for the putative object. However, the latter of these two propositions is an artifact of the devotional account. The compatibility account significantly revises this proposition: a loyal action does not require concern for the interests or ends of the putative object, so much as that all motivations be consistent with attributing fundamental significance and a robust commitment toward the putative object. The M2 case, described above, illustrates how one motivation from professional duty can nonetheless fulfill the standards of deliberation and commitment that characterize a loyal action. This compatibility is a function of the specific content of fiduciary duties (and the professional duties of lawyers in particular).³⁸

Third, the compatibility account responds to the objection from administrability. The costs of inquiring into a fiduciary's motives are not too high because most of scrutinizing a fiduciary's motivation involves inquiring into her deliberation and commitment. Therefore, a court needn't peer into the fiduciary's soul or establish normative standards for appropriate motivation that interrogate emotion or affect. However, given the relevance of motivation to loyalty and the subtleties of betrayal that humans can devise, prophylactic rules are insufficient to safeguard fiduciary loyalty. The compatibility account also shows that the benefits of inquiring into the fiduciary's motives might be considerable, since the problems associated with betrayal through faulty deliberation, flimsy commitment, or sabotage are significant.

II. Motives and Legal Ethics

In prior work, we have explored how various corners of fiduciary law reflect a cognitivist, rather than behaviorist, understanding of fiduciary loyalty.³⁹ In this part, we utilize examples from Sixth Amendment jurisprudence about ineffective assistance of counsel to establish the descriptive adequacy of the compatibility account—namely, that (*contra* the behavioral account) an attorney's motives matter to determining whether her performance is consistent with the Sixth Amendment and (*contra* the devotional account) the significance of attorney motivation is not intrinsic but rather a function of how a lawyer's motives connect to her behavior and deliberation.

³⁸ Suppose an agent were moved to act exclusively by duties that do not encode deliberative or robustness requirements toward the putative object (say, duties imposed by etiquette or one's religion). In such a scenario, the agent's action would not be loyal under the compatibility account, since the agent would not fulfill the deliberative and robustness aspects of loyalty by acting from this motivational structure. But friends or spouses who are moved to act (or to refrain from acting) by norms of friendship or marriage can still act loyally to the extent that these norms encode the relevant deliberation and robustness requirements.

³⁹ Galoob and Leib, "Fiduciary Loyalty, Inside and Out," 91-117.

The Sixth Amendment to the U.S. Constitution guarantees the effective assistance by legal counsel to criminal defendants in felony proceedings.⁴⁰ Under the test of *Strickland v. Washington*, prevailing on a claim of constitutionally ineffective assistance requires the defendant to show that trial counsel's performance was seriously deficient and that this deficiency prejudiced the defendant.⁴¹ Deficiency is assessed under an objective standard of "reasonableness under prevailing professional norms:" establishing the deficiency of counsel's performance requires showing that counsel committed "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."⁴² Whether counsel's performance is constitutionally deficient is assessed from counsel's perspective at the time of the trial, rather than in retrospect.⁴³ Courts conducting this inquiry must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."⁴⁴

The Supreme Court has also acknowledged, mostly by implication, that counsel's motives matter to Sixth Amendment assessments of counsel's effectiveness under *Strickland*. For example, a counsel's "sound strategic motive" can render non-deficient an otherwise "unusual or misguided action."⁴⁵ Specific techniques that might otherwise constitute deficient performance (such as mentioning legally irrelevant details that "hurt [the client's] position") can be deemed reasonable if "the reason counsel mentioned those details was precisely to remind the jury that they were legally irrelevant."⁴⁶ Further, the Court has invoked the constitutional relevance of counsel's motivations to the issue of deficiency as a rationale for holding that ineffective assistance claims should be litigated at the district court level.⁴⁷

However, the *Strickland* standard is not the only (or, perhaps, even the most important) legal test for assessing constitutional ineffectiveness under the Sixth Amendment.⁴⁸ Rather, the Court has adopted alternative standards for assessing prejudice in light of specific types of deficiencies. For example, the Court has stated that, under the Sixth Amendment, the fiduciary duty of loyalty is "perhaps the most basic of counsel's duties."⁴⁹ As such, in *Cuyler v. Sullivan*, the Court found that where counsel operates under an "actual conflict of interest," prejudice may be demonstrated by showing that this conflict "adversely affected [the]

⁴⁰ *Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("[T]he right to counsel is the right to the effective assistance of counsel.").

⁴¹ *Ibid.*, 687.

⁴² *Ibid.*, 688.

⁴³ *Ibid.*, 689.

⁴⁴ *Ibid.* (internal quotations omitted).

⁴⁵ *Massaro v. United States*, 538 U.S. 500, 505 (2003).

⁴⁶ *Yarborough v. Gentry*, 540 U.S. 1, 9 (2003) (per curiam).

⁴⁷ *Massaro*, 538 U.S. at 505.

⁴⁸ See Eve Brensike Primus, "Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness," *Stanford Law Review* 72 (forthcoming 2020).

⁴⁹ *Strickland*, 466 U.S. at 692.

lawyer's performance,"⁵⁰ regardless of whether this adverse effect rises to the level of prejudice required under *Strickland*. Further, in *United States v. Cronin*, the Court contended that prejudice should be presumed if the defendant is actually or constructively denied access to counsel at a critical stage of proceedings.⁵¹

With this background, consider how a specific type of attitude—counsel's animosity toward a client—might bear on a claim of ineffective assistance of counsel. The Court has held that the right to effective assistance of counsel does not guarantee "a right to counsel with whom the accused has a 'meaningful attorney-client relationship.'"⁵² Therefore, a lawyer's animosity toward a client does not, by itself, give rise to a breach of the lawyer's fiduciary duty. However, counsel's attitudes have been held to bear directly on ineffective assistance claims.

Consider the facts of *Frazer v. United States*.⁵³ After being convicted of fifteen counts of bank robbery, Frazer filed a *habeas corpus* petition to set aside his conviction on grounds that his appointed counsel had failed to provide effective assistance. Frazer alleged, *inter alia*, that his appointed counsel called him a "stupid n****r son of a bitch" and told Frazer that he would find him to be very ineffective if he insisted on going to trial.⁵⁴ The district court denied Frazer's request for relief without holding an evidentiary hearing, finding that Frazer's allegations were legally insufficient to support a claim of ineffective assistance. On appeal, the Ninth Circuit reversed and remanded the matter for an evidentiary hearing.

The *Frazer* majority argued that "a verbal assault manifesting explicit racial prejudice and threatening to compromise the client's rights" was irreconcilable with the "duty of loyalty owed a client by his attorney," not to mention the "responsibility of providing meaningful assistance."⁵⁵ In the wake of such an outburst,

all advice, assistance and guidance provided... would be fatally suspect, as would the "willingness" of a defendant to follow the attorney's lead. Such a disrespectful and inappropriate eruption would signal and be tantamount to (unless somehow cured) a "total lack of communication" far exceeding the parameters of any duty on the part of counsel to deliver to his client a "pessimistic prognosis" of his legal position.⁵⁶

The *Frazer* majority further held that counsel's alleged statements were so "extortionate" that, if true, they would not qualify as "assistance of counsel" at all under the Constitution and thus would be presumed to be prejudicial under the standard of *United States v. Cronin*.⁵⁷ The expression of counsel's attitudes in the form of an "overt, racially charged threat" would "completely destroy[] and

⁵⁰ 446 U.S. 335, 350 (1980)

⁵¹ *United States v. Cronin*, 446 U.S. 648, 659 (1984).

⁵² *Morris v. Slappy*, 461 U.S. 1, 3-4 (1983).

⁵³ 18 F.3d 778 (9th Cir. 1994).

⁵⁴ *Ibid.*, 780.

⁵⁵ *Ibid.*, 783.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, 784.

negate[] the channels of open communication needed for the [client-lawyer] relationship to function as contemplated in the Constitution.”⁵⁸

Writing in concurrence, Judge Beezer provided an alternative perspective. Whereas the *Frazer* majority analyzed counsel’s alleged racist outburst (“stupid n****r son of a bitch”) in tandem with the alleged threat (“[I]f I continue to insist on going to trial, I will find him to be very ineffective”), Judge Beezer considered these two alleged speech acts separately. Both the alleged racist outburst and the alleged threat would, if true, constitute deficient performance. The threat, though, would constitute a “conditional[] refus[al] to provide adequate legal representation” for which prejudice could be presumed under *Cronic*.⁵⁹ However, the racial slur, standing alone, would best be classified as a conflict of interest. As such, *Frazer* would need to establish that counsel’s attitude had some effect on counsel’s conduct in order to prevail under the standard of *Cuyler*.⁶⁰

The Ninth Circuit subsequently adopted the logic of Judge Beezer’s concurrence. In *Ellis v. Harrison*,⁶¹ Ellis contended that his Sixth Amendment right to effective assistance of counsel had been denied at trial. Ellis introduced voluminous evidence of the racist attitudes and behaviors of his trial counsel, Donald Ames, although he “concede[d] that he was unaware of Ames’s racism until several years after his conviction was final.”⁶² Relying on a prior case denying a *habeas* petition alleging ineffective assistance based on Ames’s racism,⁶³ the Court reasoned that Ames’s racist attitudes about Ellis would have constituted a conflict of interest if they had been conveyed. However, because these attitudes were not conveyed, Ellis had not satisfied either the deficient performance or prejudice requirements under *Strickland*.⁶⁴

Ineffective assistance jurisprudence implicates fundamental aspects of the lawyer-client relationship and the lawyer’s fiduciary duties toward the client, even though the procedural framework by which ineffective assistance claims are raised introduces complications (such as the issue of prejudice and the Supreme Court’s repeated contention that the “professional norms” inquiry under *Strickland* makes no essential reference to the actual law governing lawyers).⁶⁵ As one court put it, the connection between motive and loyalty raises “a perplexing question as to the dynamics of the attorney-client relationship and the impact of that relationship upon counsel’s ability to act in a manner designated to effectuate the best interests of his client.”⁶⁶

Based on the foregoing, there are at least three ways that motive is implicated in ineffective assistance jurisprudence that seem plausible in isolation but

⁵⁸ *Ibid.*, 784-85.

⁵⁹ *Ibid.*, 788 (Beezer, J., concurring).

⁶⁰ *Ibid.* (Beezer, J., concurring).

⁶¹ 891 F.3d 1160 (9th Cir. 2018).

⁶² *Ibid.*, 1167.

⁶³ *Ibid.*, 1166 (citing *Mayfield v. Woodford*, 270 F.3d 915, 924 (9th Cir. 2001) (en banc)).

⁶⁴ *Ibid.*, 1162.

⁶⁵ See *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (“American Bar Association standards and the like are ‘only guides’ to what reasonableness means, not its definition.”) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

⁶⁶ *Commonwealth v. Washington*, 880 A.2d 536, 545 (Pa. 2005).

puzzling when considered as a whole. First, as indicated by both the *Frazer* and *Ellis* opinions, courts often analyze counsel's attitudes and the connections between counsel's attitudes and behaviors when adjudicating whether counsel's performance was deficient. Second, courts adopt a rebuttable presumption that counsel's motivations are appropriate: "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect."⁶⁷ Third, not all inappropriate motives are equally deficient. Counsel's motive seems to matter to the classification of the type of deficiency (as reflected in the different standards regarding prejudice that apply to conflicts of interest under *Cuyler* and constructive abandonments under *Cronic*) in a particular case. Each of these features seems sensible, but providing a unified account of them is challenging.

Behaviorism is not equipped to explain any of these features. Behaviorism construes loyalty (and, by implication, effectiveness) entirely in terms of how a counsel behaves. Therefore, counsel's motives should be irrelevant to whether counsel's performance is deficient. Moreover, behaviorism would deny the wisdom of the rebuttable presumption of appropriate motivation by counsel. Rather, behaviorism would call for the jurisprudence regarding the Sixth Amendment to follow a standard more in line with that concerning officer motivation under the Fourth Amendment—namely, that the constitutional legitimacy of a particular course of action does not "depend[] on the actual motivations of the individual officers involved," as in the rule that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."⁶⁸ Behaviorism, then, offers a revisionist account of Sixth Amendment jurisprudence, one that denies that the "perplexing question" should perplex at all.

Nor could the devotional account explain all of these tenets of ineffective assistance jurisprudence. To be sure, the devotional account could easily explain why counsel's motives might bear on the effectiveness of assistance. The problem is that on the devotional account an attorney's motives matter too much, and in the wrong ways.

For example, consider again the *Frazer* and *Ellis* cases. On the devotional account, an attorney would violate the duty of loyalty for directing a racial epithet at a client and for threatening the client with unsatisfactory representation, as *Frazer*'s attorney is alleged to have done. Neither of these speech acts would be consistent with a lawyer's commitment to advance the client's best interest. Yet the devotional account would also deem the racism of *Ellis*'s attorney to violate the duty of loyalty *tout court*, regardless of whether such racist attitudes were ever conveyed to *Ellis* or connected to any specific course of action on the *Ellis*'s behalf. Recall that the definition of motive offered above, an intention that initiates a "causal sequence" that "would culminate in the world coming to match the intention, were obstacles removed and were the agent not to change his mind,"⁶⁹ requires some connection to action. If it is possible for a lawyer to

⁶⁷ *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (citing *Strickland*, 466 U.S. at 690).

⁶⁸ *Whren v. United States*, 517 U.S. 806, 813 (1996).

⁶⁹ Yaffe, "Criminal Attempts," 116.

provide ineffective assistance based solely on having a racist attitude (regardless of whether or how that attitude is connected to action), then the devotional standard is not really an assessment of motive so much as an assessment of attitude.

More importantly, the devotional account lacks the capacity to differentiate an attorney's un conveyed racism, as in *Ellis*, from conveyed racism and racist threats, as in *Frazer*. Yet the difference between these assessments is a feature of ineffective assistance law as reflected in the different outcomes in *Frazer* and *Ellis*. It also suggests a deeper truth about the lawyer-client relationship. By setting the bar for disloyalty so low, the devotional account loses the capacity to distinguish meaningfully between being a bad person and being a bad lawyer. In construing all forms of animosity as a violation of the attorney's fiduciary duty, the devotional account would convert the hard question of whether (if *Frazer's* allegations were true) his counsel was a bad lawyer into the easy question of whether his counsel was a bad person.

The compatibility account can provide a principled explanation of these three features of ineffective assistance jurisprudence and explain why the question of attorney motivation is perplexing rather than simple. The presumption of appropriate motivation reflects the idea (consistent with the compatibility account) that a wide variety of motivations are consistent with loyal action. It also serves as an epistemic limitation on discerning a lawyer's true motivation when several explanations are plausible.⁷⁰

As noted above, a lawyer's performance can be deemed constitutionally inadequate based on her motivation. In order to overcome the epistemic hurdle of presumed appropriate motivation, a claim of ineffective assistance requires clear evidence of what the lawyer's motivation is. The cases reflect two distinct ways that attorney motivation can ground a claim of ineffectiveness, both of which can be explained by the compatibility account.

The first, more direct route is that the lawyer's motivation can directly constitute a violation of the duty of loyalty. This is true for motivations, such as those discussed in *Frazer*, based on racial animosity toward the client. It also would seem to hold for actions motivated by personal antipathy toward the client⁷¹ or some flagrant lack of concern for the client's legal interests.⁷² The compatibility account provides a principled explanation of these cases. Each type of case involved a violation of the duty of loyalty because the lawyer's motivation was inconsistent with the appropriate level of concern toward the client's legal

⁷⁰ See, e.g., *Guinan v. United States*, 6 F.3d 468, 473 (7th Cir. 1993) (Easterbrook, J., concurring) ("No matter how odd or deficient trial counsel's performance may seem, that lawyer may have had a reason for acting as he did.").

⁷¹ See, e.g., *Washington*, 880 A.2d at 541 (counsel wrote in letter to psychiatrist "I'm just hoping these two guys have some redeeming qualities—Washington especially. He may epitomize the banality of evil.").

⁷² See, e.g., *Fisher v. Gibson*, 282 F.3d 1283, 1296 (10th Cir. 2002) ("Where an attorney accidentally brings out testimony that is damaging because he has failed to prepare, his conduct cannot be called a strategic choice: an event produced by the happenstance of counsel's uninformed and reckless cross-examination cannot be called a 'choice' at all.").

interests. In the Supreme Court's terminology, the lawyer's motivation in each of these cases would not be considered a "strategic" motivation.⁷³

The legal standard for showing prejudice for these claims—namely, that there was some adverse effect on the lawyer's performance—can be interpreted as a requirement to show that counsel's inappropriate attitude played the causal role that is characteristic of motivations. In other words, this standard suggests that a lawyer's animosity toward the client does not constitute disloyalty where it does not motivate. Thus, the compatibility account can explain the meaningful difference between the outcomes in *Frazer* and *Ellis*: although the attorneys in both cases allegedly had racial animus toward their clients, *Frazer* more clearly alleged that the racial animosity of his lawyer played a causal role in the lawyer's behavior, and thus provided more credible evidence of disloyalty.

The compatibility account can also explain the more pronounced notion of ineffectiveness based on constructive denial of counsel under *Cronic*—the narrow range of cases in which, although counsel is present, "the performance of counsel [is] so inadequate that, in effect, no assistance of counsel is provided."⁷⁴ This standard is met when counsel "fails to subject the [state's] case to meaningful adversarial testing" such that the trial "loses its character as a confrontation between adversaries."⁷⁵ In some cases granting relief under this standard, the court finds that the defense attorney effectively acts as "a second prosecutor"⁷⁶ or with "reckless disregard for his client's best interests and, at times, apparently with the intention to weaken his client's case."⁷⁷ In all of these cases, evidence of counsel's inappropriate motivation is relevant to establishing the deficiency of her performance. A specific course of conduct (such as silence during aspects of court proceedings) might be constitutionally effective if motivated by strategic considerations, yet ineffective if the product of neglect or animosity.⁷⁸

Yet the type of inappropriate motivation at issue in constructive denial of counsel cases under *Cronic* seems to differ in degree from the type involved in violations of the duty of loyalty under *Cuyler*. The latter might be described as a breach of the norms of lawyering: bad lawyering, but lawyering nonetheless. The former are less a breach of the norms of lawyering than what might be called, somewhat anachronistically, a defalcation—that is, a failure (appearances to the contrary) to act within the role of lawyer at all. Some defalcations invoke Bernard Williams's description of a situation in which "the context is in all ways

⁷³ See *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984) ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.").

⁷⁴ *United States v. Cronic*, 446 U.S. 648, 654 n. 11 (1984).

⁷⁵ *Ibid.*, 659.

⁷⁶ *Rickman v. Bell*, 131 F.3d 1150, 1157 (6th Cir. 1997).

⁷⁷ *United States v. Collins*, 430 F.3d 1260, 1264 (10th Cir. 2005) (citations omitted).

⁷⁸ See, e.g., *Rickman*, 131 F.3d at 1160 ("If [the attorney] had been attempting to characterize [the client] as a hapless loser, or as someone who had suffered hard knocks through life, he might arguably have been pursuing a legitimate strategy. But his own testimony makes clear that [the attorney] had no such aim in mind: he simply wished to portray his client as vicious and abnormal. This is simply not a legitimate defense.").

like the usual professional context, but the agent is only pretending to discharge a professional function, or wrongly believes himself or herself to be doing so, as with those who are impostors or have been disbarred, and so forth.”⁷⁹

This distinction between breaches and defalcations helps explain the depths of the deficiency alleged in *Frazer*. Frazer’s lawyer not only breached the duty of loyalty by allegedly using demeaning and racist language to berate him, but also by allegedly threatening him (using “extortionate language”)⁸⁰ with deficient representation in the future should Frazer insist on going to trial. This threat would, if true, straightforwardly violate ABA Model Rule 1.2.⁸¹ Yet this criticism dramatically underdescribes the problem in this case. There are a variety of ways to violate Rule 1.2 that do not involve blackmailing one’s client.

The compatibility account can explain the difference between breaches of fiduciary norms and defalcations of the fiduciary role based, in part, on the motivation of the fiduciary. A fiduciary moved to act by animus toward the beneficiary acts inappropriately, as does a fiduciary moved to act in order to sabotage the beneficiary. These two types of inappropriate motivation might coincide.⁸² However, the latter seems qualitatively different from the former. This qualitative difference is perhaps reflected in the different standards for proving prejudice based on a conflict of interest under *Cuyler* and constructive abandonment under *Cronic*.

The compatibility account, then, provides a coherent explanation of the tenets of ineffective assistance jurisprudence. It does not, however, render the question of motivation and loyalty easy to resolve. The epistemic challenge of discerning counsel’s motives (as opposed to their mere attitudes) poses obstacles to determining whether counsel acted from inappropriate motives. There also remains a normative challenge of establishing whether a counsel’s inappropriate motivations constituted a breach of the norms of lawyering serious enough to create a conflict of interest, or (beyond that) an abdication of the lawyerly role sufficient to constitute a defalcation. The compatibility account provides resources to resolve the hard problem of determining when counsel’s motivation renders their performance constitutionally effective. However, in doing so, it does not make that problem easy.

⁷⁹ Williams, “Professional Morality and Its Dispositions,” 193.

⁸⁰ *Frazer v. United States*, 18 F.3d 778, 785 (9th Cir. 1994).

⁸¹ Model Rule 1.2(a) states that an attorney shall “abide by a client’s decisions concerning the objectives of representation” and shall, in a criminal case, “abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered. . . .”

⁸² Hence, courts routinely adopt a more rigorous lens to interpret counsel’s actions under *Cronic* given evidence of animus. See, e.g., *State v. Davis*, 872 So. 2d 250, 256 (Fla. 2004) (“[T]here is . . . evidence in this record to suggest that counsel’s expressions of racial bias during voir dire affected his performance in both the guilt and penalty phases of Davis’s trial, creating an unacceptable risk that prejudice clouded counsel’s judgment and diminished the force of his advocacy.”); *Fisher v. Gibson*, 282 F.3d 1283, 1298 (10th Cir. 2002) (“An attorney’s concession of animosity [toward a client] makes it appropriate to scrutinize counsel’s performance with a somewhat more critical eye.”) (internal citations omitted).

Conclusion

On one hand, the compatibility account of loyalty we describe here emphasizes the cognitive burdens on fiduciaries, which in some respects resemble the burdens that apply to lovers and friends. These burdens are more demanding than the behaviorist picture that predominates academic discussion of fiduciary duties. However, these deliberative, motivational, and commitment aspects of loyalty are essential to describing, let alone vindicating, the law that governs fiduciaries.

On the other hand, the compatibility account of loyalty is concessive. The loyal fiduciary needn't act for morally pure reasons, and the goal of fiduciary law is not to enshrine a despotism of virtue. Rather, the compatibility account describes cognitivism without romanticism. It imposes standards of commitment that fall short of fanaticism. More broadly, the compatibility account describes a loyalty worth having in real-world relationships, a loyalty more realistic (and also, perhaps, more stable and attainable) than hopeless devotion.

