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Legal Ethics

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rlet20

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To cite this article: Rutger Claassen (2023) Loyalty to client, conviction, or constitution? The moral responsibility of public professionals under illiberal state pressures, Legal Ethics, 26:1, 5-24, DOI: 10.1080/1460728x.2023.2235176

To link to this article: https://doi.org/10.1080/1460728x.2023.2235176

Published online: 05 Aug 2023.

LEGAL ETHICS
2023, VOL. 26, NO. 1, 5–24
https://doi.org/10.1080/1460728x.2023.2235176

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Loyalty to client, conviction, or constitution? The moral responsibility of public professionals under illiberal state pressures

Rutger Claassen

Professor of Political Philosophy and Economic Ethics, Department of Philosophy & Religious Studies, Utrecht University, Utrecht, Netherlands

ABSTRACT

Public professionals do not only serve their clients but also – by doing so – the public at large. The state often has a direct grip on their work, through financing, regulation or otherwise. This leads to a deeply felt conflict in contexts where authoritarian, illiberal leadership is widespread. Public professionals then face a moral dilemma: should they resist illiberal pressures by the state, or continue to obey their states? The paper's main question is how this practical dilemma for public professionals should be interpreted. First, it presents a framework to interpret the professional situation, characterising it as a fiduciary relation, which we can understand through the lens of Thomas Hobbes's theory of authorisation/representation. On this theoretical basis, the paper discusses three competing models for understanding the public professional's predicament. The teleological model revolves around loyalty to one's clients. The conscientious professional model which is about loyalty to one's own moral convictions. The constitutional model is about loyalty to constitutional principles. The paper argues in favour of the constitutional model. Standing up against illiberal pressures is best interpreted as a matter of loyalty to the principles of constitutionality that underly the fiduciary relation between citizens and their states.

KEYWORDS

Professionalism; constitutionalism; Thomas Hobbes; fiduciary relations; illiberal democracy

1. Introduction

In the 2017 film *The Post*, Katharine Graham (played by Meryl Streep) faces a dilemma, as the owner of the newspaper *The Washington Post* during the years of the Nixon administration. Her news reporters have gotten hold of a copy of the so-called Pentagon Papers, a highly confidential government-study of the Vietnam War exposing the deception of the public by previous administrations. Publication of these papers would lead to increasing pressure on the government to end the war in Vietnam. Given their relevance to the public debate, it would seem the journalist's responsibility to make this material public. On the other hand, the Nixon administration had just successfully filed charges

CONTACT Rutger Claassen r.j.g.claassen@uu.nl

against *The New York Times* (who also had a copy of the papers and had published from them) to ban further publications, as being against vital national (security) interests. Publishing the material could lead to similar charges against *The Post*. Graham could go to prison, and *The Post* could be shut-down, with all the ramifications for the lives of the employees entrusted to her. What should Katherine do?

Igor Tuleya is a judge in Poland. Since a few years, the governing conservative party in Poland, the PiS, has started major reforms of the judicial system. It has tried to send judges it deems 'oppositional' on early retirement, install new judges favourable to the regime, and intimidate those who, like Igor, speak out against this. Igor has fought for an independent judiciary in Poland by appearing in public and speaking out against the regime's actions. As a consequence, he has received anonymous powder letters and already faced disciplinary cases against him eight times.[1] He, as well as other colleagues, are regularly attacked on public media channels and in the social media, and have been missing promotions as a consequence. Recently Wojciech Laczewski, a collegue of Igor, who condemned a PiS politician for corruption and then faced numerous disciplinary cases in retaliation, decided to leave the profession.[2] Should Igor follow his example, and resign? Or should he step up his resistance?

In an article from 2013, anthropologist Brett Smith recounts the story of a colleague who one day finds a 3rd year undergraduate student knocking on his office door, asking for help on a paper. The colleague is under pressure from the Dean, who has just told the academic staff that they should focus their energies on publishing and getting grants. Hence he tells the student to sign up for a slot on the tutorial sheet down the hallway. The student objects that all slots are already taken. The colleague responds: 'Sorry, it's school and university policy to have 2 hours dedicated to tutorials per week. If the slots are filled, then there is nothing I can do. I'm just following school policy. See you'.[3] When the student leaves, the colleague feels miserable, hesitates for a moment but then decides to 'quickly turn my attention back to writing the grant and resist running down the corridor, catching up with the student, and inviting her back to talk.' Was the colleague right or wrong not to call the student back?

These three, otherwise very different stories, are all about public professionals. Professionals are persons working for clients in the specific context of a 'profession', which, as discussed later, has its own peculiar moral features. Public professionals do not only serve their clients but also – by doing so – the public at large. The state often has a direct grip on their work, through financing, regulation or otherwise. The public professionals in the examples all face pressures from what they perceive to be a state acting illiberally, i.e. not respecting – at least with respect to them – the basic principles of liberal (or constitutional) democracy.[4] This is perhaps obvious in the dramatic

[1]'Deze rechter strijdt tegen de totale verwoesting van de Poolse rechtspraak', *De Volkskrant* <https://www.volkskrant.nl/nieuws-achtergrond/deze-rechter-strijdt-tegen-de-totale-verwoesting-van-de-poolse-rechtspraak~bc2f8669/>.

[2]'Een rechter minder, een vijand erbij', *NRC* <https://www.nrc.nl/nieuws/2019/11/17/een-rechter-minder-een-vijand-erbij-a3980649>.

[3]Brett Smith, 'Artificial Persons and the Academy: A Story' in N Short (ed), *Contemporary British Autoethnography* (2013), 187.

[4]In this paper I conceive of liberal (or constitutional; the terms used as synonyms in this paper) democracy as a regime with two separate components: the liberal component refers to respect for the rule of law and human rights (constitutionalism) and the democratic component to popular procedures (general elections) for selecting the main government officials. Thus defined, the two are separate requirements, and 'illiberal democracy' is not an oxymoron. Illiberalism refers to the violation of one or more principles of 'constitutionality', or 'the rule of law', as defined in section 4 below.

examples of Katharine Graham and Igor Tuleya, whose jobs are at stake, and who perceive their states as attacking the independence of the press and the judiciary. It is however also the case in the seemingly more mundane example of Brett Smith's fictionalised academic colleague. For he – so we will presume here – judges that the neoliberal university policy imposed on him leads him to dismiss the core liberal-democratic mission of the university: to educate young people how to think critically as future citizens. One may or may not agree with this diagnosis of academic illiberalism; as one may think that US national security should have outweighed *The Post*'s journalistic mission, or that the Polish government has a legitimate claim on the composition of the judiciary. But that is the whole point of these dilemmatic situations: who is to judge?

The practical question at stake for these public professionals is: Is it my moral responsibility to resist illiberal pressures by my state? Or do I have a moral duty to obey my state, even when it acts illiberally? (the question is focused here on the level of the state; for a reflection on how it relates to the global context, see the conclusion). This is an urgent question, especially in a time where authoritarian leadership is widespread, even increasing in what once were assumed to be secure democracies. However, I am not going to resolve this practical question in one way or the other. Instead I want to raise the philosophical question of how this practical dilemma for public professionals should be interpreted. The main question of the paper will be: how should these public professionals understand themselves in the situation they are in? What I am interested in, is to find out what the relevant moral, political and legal concepts are to interpret their situation. On which basis should they make their judgments when thinking about the practical dilemmas in which they are embroiled?

This paper is meant as an essay in professional ethics, with excursions into political and legal theory. While occasionally referring back to my examples from the media, judiciary and academia, the discussion will remain focused on public professionals as a general category.[5] The paper is structured in four sections. In section 1, I present a framework to interpret the professional situation in general. This framework brings together two traditions. Using legal theory, I characterise professions as characterised by a fiduciary relation. Then I draw on Thomas Hobbes's political theory, which qualifies the same relation as one of authorisation/representation, to explain why the fiduciary framework fits the public context in which public professionals work. With this in mind, the rest of the paper discusses three competing models for understanding the public professional's predicament. The first one is a teleological model which revolves around loyalty to one's clients (section 3). The next one is a conscientious professional model which is about loyalty to one's own moral convictions (section 4). The final one is a constitutional model, which is about loyalty to constitutional principles (sections 5 and 6).

Throughout the text I will highlight the shortcomings of the teleological and the conscientious professional model, and argue in favour of the constitutional model. The constitutional model will be presented as building upon these other models, while remedying their shortcomings. Practices have a purpose, as the teleological model holds. However,

[5]There is a body of work in each of these fields. For example, for the media see CE Baker, *Media, Markets, and Democracy* (Cambridge University Press 2002); for legal ethics see David Luban and W Wendel 'Philosophical Legal Ethics: An Affectionate History' [2017] *Georgetown Journal of Legal Ethics* 30 (3) 337; for academia see Derek Bok, *Universities in the Marketplace. The Commercialization of Higher Education* (Princeton University Press 2003).

this purpose needs to be interpreted through the lens of a more general morality, as the conscientious professional model holds. This general morality, in the case of public professions, points us to the constitutional norms underlying the fiduciary relation between citizens and their states. Standing up against illiberal pressures, in the end, is best interpreted as a matter of loyalty, not to one's clients, nor to one's personal conscience; but to the principles of constitutionality that underly the fiduciary relation between citizens and their states. There is an internal incoherence in a state addressing public professionals to perform their professional tasks in an illiberal setting. Public professionals need to draw out this incoherence by criticising their states when they cross that line.

2. The double fiduciary relationship

At the heart of most definitions of professionalism is the idea that professionals offer 'expert assistance to society'.[6] They do work which is so specialised that it is 'inaccessible to those lacking the required training and expertise'.[7] Hence, relations between professionals and clients are marked by asymmetries of power and knowledge, and therefore by a vulnerability of clients to professionals' decisions. The professional's service is to satisfy a client's interest, which she herself cannot fulfil. Hence the dependence on the expertise of the professional. Further characteristics follow from these basic facts: professionals are often associated in professional communities setting standards for expertise (self-governance), training novices (socialisation), setting non-licensing requirements for practicing (gatekeeping), etc. Measured against this ideal type, some occupations are more professional-like than others. Lawyers and judges, teachers and researchers, medical experts, journalists, and others are normally seen as professionals.

To understand professional action, it is useful to draw on legal theory. The legal category apt to understand professional action is that of a fiduciary relation. Fiduciary law is a part of private law. Individuals in the private sphere can act in their own name, make contracts, hold property etc. They can also act on behalf of someone else. In the latter case, they are fiduciaries and the others are beneficiaries. A separate body of fiduciary law governs their actions. Building on existing definitions,[8] let us define a fiduciary relation as obtaining when three features hold:

(1) *discretionary power*: a fiduciary exercises discretionary power over the interests of a beneficiary
(2) *vulnerability*: the beneficiary is vulnerable to (or dependent on) the fiduciary,
(3) *trust*: the beneficiary must trust the fiduciary to act in his/her best interests.

The first two features together define the fiduciary relation from the point of view of the two parties involved. They can be seen as two sides of the same coin. The fact that the power exercised is discretionary may be grounded in *pragmatic* considerations. For

[6]Terrence Kelly, *Professional Ethics. A Trust-Based Approach* (Lexington Books 2018), 5; similarly Albert Dzur, *Democratic Professionalism. Citizen Participation and the Reconstruction of Professional Ethics, Identity and Practice* (The Pennsylvania State University Press 2008), 45–46.
[7]Eliot Freidson, *Professionalism. The Third Logic* (Polity Press 2001), 17.
[8]Tamar Frankel, *Fiduciary Law* (Oxford University Press 2011), 2; Paul Miller, 'The Fiduciary Relationship' in Andrew Gold and Paul Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014), 69; Evan Fox-Decent, *Sovereignty's Promise. The State as Fiduciary* (Oxford University Press 2011), 29.

example, I may ask someone else to represent my business interests in a negotiation with business partners in Singapore, which I cannot attend. I rely on my agent's judgments in what moves she should make during the negotiation; it is impossible to instruct her in exhaustive detail in advance. For professional relations, the need for relying on someone else often is not pragmatic, but *principled*: it lies in the asymmetry of knowledge noted earlier.[9] The client simply does not have the knowledge to perform the acts in which they have an interest (medical treatment, learning a subject, being defended in court). Where and when people lack this expertise, they call upon a professional. This renders them vulnerable, which in turn implies a functional need to trust the professional. In turn, the professional, as a fiduciary, depends on receiving this trust. She should not betray this trust, but do her best to further the interests of the beneficiary. In private law, various types of fiduciary relationship each get their own treatment, such as principal-agents, trustor-trustees, directors-shareholders and parents–children. Depending on the specifics of the relation, different interpretations of the appropriate standards of interest, benefit and loyalty are developed.

While trust underlies the relation, trust does not operate in a moral or legal vacuum. The fiduciary relationship gives rise to a web of corresponding rights and duties. In a standard situation the beneficiary authorises the fiduciary, i.e. she gives the fiduciary the right to exercise discretionary power. Corresponding to the fiduciary's right, is the beneficiary's duty to obey the fiduciary's exercise of this power; without which the fiduciary could not function.[10] On the other hand, the fiduciary has a duty of loyalty to act in the client's interests. This duty goes beyond the normal duty of care that contract partners have to each other. It is a duty which in the end courts must judge to be fulfilled or not. Corresponding to the fiduciary's duty, is the beneficiary's right to performance of this duty; after all, this performance is what the whole relationship is about.

Public professionals, like private professionals, work in professional organisations which serve an identifiable set of clients.[11] What sets them apart from private professionals is their relation to the public. I propose a distinction between strong and weak forms of publicness. *Strongly public professionals* work in an institution which (1) serves a public interest[12]; (2) is financed by the state, i.e. through taxation of the public; (3) is heavily regulated by the state, in terms of access, financial and substantive performance, accountability procedures, etc. Public universities, public media organisations (like the BBC) and judicial courts, we will assume, fulfil these criteria. *Weaker* forms of public professionalism occur where the first criterion is present, but the second and/or third criteria are absent or only present in a weaker form. For example, some privately owned media organisations (like newspapers) may occasionally get public subsidies or tax breaks, but no full financing. Also, they may be less heavily regulated, compared to public organisations which are part of the 'collective sector' at large. I will take my lead from strong forms of public professionalism in

[9]See also the distinction between contextual and juridical incapacity, in Fox-Decent (n 8) 102.

[10]This may or may not entail that the beneficiary maintains the right to perform the actions herself as well; this depends on the concrete relation.

[11]I will treat professionals and their organisations (and the management of these organisations) as one entity, ignoring the internal issues between them.

[12]I will stay agnostic here about how to identify 'true' public interests. This could be identified by economic theory, as a public good, by legal theory, as a constitutional right, by moral theory as a basic need, etc.

what follows, and assume that the results of my argument apply *mutatis mutandis* (or in a weaker form) to weakly-public professionals as well.[13]

How do public professionals fit into the fiduciary framework? We saw the fiduciary relation is described in law as a private relationship, part of private law. But here I want to use the relation to understand the work of public professionals. Can we do so?

My proposal is that public professionals should be seen as subject to a *double fiduciary relationship* (see Figure 1). On the one hand, they have a direct fiduciary relation to their clients, who have commanded their services and are subject to their power. Newspaper readers will trust the information in their newspaper to form their opinions about world affairs, and will be done damage if they are deceived by their newspaper. Litigants in court similarly are subject to the decisions of judges ruling their cases, and must trust that they make a fair and balanced judgment. However public professionals also have a fiduciary relation to the public at large, which is mediated by the state. The public is vulnerable to these professionals as well, because they provide a service from which not just the direct clients but also the public benefits. Partly this is because members of the public are potential clients, and they have an interest in an infrastructure of public service being available. But even when they never become clients themselves, members of the public profit from the positive externalities of having a functioning legal system, a vibrant academia etc. As a consequence of this double fiduciary structure, public professionals can get into a conflict situation when the public's demands (through the regulatory power of the state) differ from those of their clients. The dilemmas sketched in the introduction could be interpreted through this lens.

To interpret relationships in a public context as fiduciary relationships requires a justification, given the private law origins of fiduciary law. Recently a number of authors have argued for understanding public relations of authority as fiduciary. This has been argued with respect to the state,[14] public administration,[15] the judiciary,[16] and human

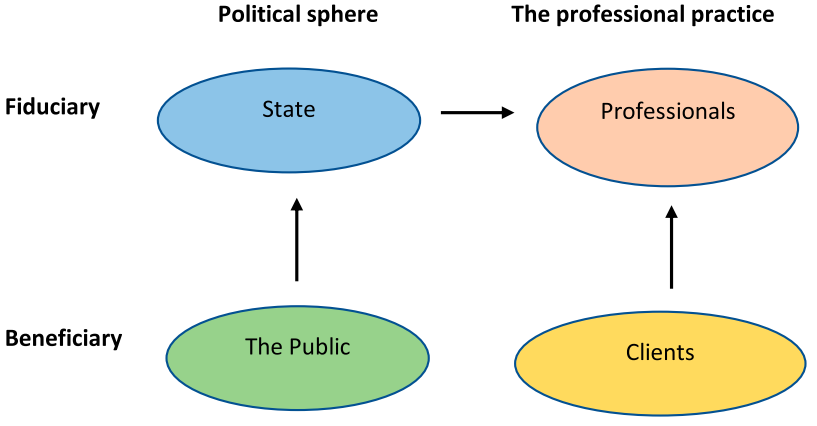

Figure 1. Public professionalism (arrows indicate a fiduciary/authorising relation).

[13]See also the typology of professional-state relations, developed in Freidson (n 7) 138.
[14]Fox-Decent (n 8).
[15]Evan Criddle, 'Fiduciary Foundations of Administrative Law' [2006] *UCLA Law Review* 54 (1) 117.
[16]Ethan Leib, David Ponet and Michael Serota, 'A Fiduciary Theory of Judging' [2013] *California Law Review* 101 (3) 699.

Table 1. Three overlapping sets of terminologies.

Theoretical context	Name of the relationship	
1. Legal Theory	*The fiduciary relation*	
General term	beneficiary	fiduciary
Trust	trustor	trustee
Principal/agent	principal	agent
Parental	child	parent
2. Political Theory	*The authorisation/representation relation*	
General term	The represented	The representative
Hobbes's terms	Author	Actor
National context	Citizens	Government officials
3. Professionalism	*The professional relation*	
General term	Client	Professional
Media	Reader/viewers	Journalist
Academia	Students	Academic
Judiciary	Litigating parties	judge

rights.[17] Like some of these authors, I think it is helpful to draw on Thomas Hobbes's theory of representation/authorisation to explain this extension of the fiduciary relationship.[18] (see Table 1 to keep track of the overlapping terminologies for what is, each time, the same relationship between two parties).

Hobbes's theory qualifies the legal fiduciary relation in terms of a political-theoretical relation. His view relies on a basic distinction between two types of action, made in the opening words of chapter 16 of the *Leviathan*: 'A person is he whose words or actions are considered either as his own, or as representing the words or actions of another man, or of any other thing to whom they are attributed, whether truly or by fiction'.[19] The basic distinction is between 'acting for oneself' and 'acting on behalf of someone else'. As the passage makes clear, this is a relation of *representation*. The person represented Hobbes calls a 'natural person', the representative is called an 'artificial person'. How can artificial persons represent others? Hobbes elaborates:

> Of persons artificial, some have their words and actions owned by those whom they represent. And then the person is the actor, and he that owneth his words and actions is the AUTHOR, in which case the actor acteth by authority. For that which in speaking of goods and possessions is called an owner (and in Latin dominus, in Greek kurios), speaking of actions is called author. And as the right of possession is called dominion, so the right of doing any action is called AUTHORITY. So that by authority is always understood a right of doing any act; and done by authority, done by commission or licence from him whose right it is.[20]

This passage introduces two thoughts. First, the relation comes about through an act of *authorisation*. This authorisation transfers authority from the author to the actor.[21] Second, the (legal and moral) responsibility for the act done by the actor remains with

[17]Evan Criddle and Evan Fox-Decent, 'The Fiduciary Constitution of Human Rights' [2009] *Legal Theory* 15, 301; See also essays collected in Evan Criddle and others (eds), *Fiduciary Government* (Cambridge University Press 2018).

[18]See Fox-Decent (n 8) 1–19) and Miller (n 8) 70–71; Paul Miller, 'Fiduciary Representation' in Evan Criddle and others (eds), *Fiduciary Government* (Cambridge University Press 2018). For use of Hobbes in the professional context, see also Elizabeth Wolgast, *Ethics of an Artificial Person. Lost Responsibility in Professions and Organizations* (Stanford University Press 1992).

[19]Thomas Hobbes, *Leviathan* (first published 1651, Cambridge University Press 1991), 111.

[20]Hobbes (n 19), 112.

[21]The passage plays upon a double meaning: 'authorship' in the creative sense of being at the origin of an act merges with 'authority', the right to perform an act.

the author. Through the analogy with ownership, Hobbes makes clear that the author really 'owns' these actions. The source of the action lies with the author, who remains responsible for what is done in his name.

This theory of authorisation/representation is used by Hobbes not just to understand the relation between two individual persons, but also between persons united in a collective person, both private (groups, corporations) and public (the state). In collective cases, three types of person are involved. When a multitude of otherwise disconnected individuals in a 'state of nature' (a set of natural persons) make an agreement amongst themselves to establish a state, they create two new persons: a fictitious person (the State), which is represented by an artificial person (the Sovereign; who can be a King or an Assembly). They transfer authority to the Sovereign, but the individuals remain themselves the author of the scheme. Whatever the Sovereign does, he does in the name of his citizens. The State itself is the symbolic unity of the individual citizens, and can neither be reduced to the citizens on the one hand, nor to the Sovereign on the other hand. He is a 'real' person in the legal/political sense, however. For example, the debts owed by the State are not owed by individual citizens, nor by the Sovereign as a natural person, but by the abstract person of the State itself. The features and implications of this part of Hobbes's political theory for contemporary debates about democracy and representation have been debated elsewhere.[22]

The Hobbesian theory helps us to substantiate the position that public professionals are in a double fiduciary relationship. For it provides us with a general interpretation of all fiduciary relations, both private and public.[23] It shows how the relation between the state and its citizens is a special case of a more general relation of authorisation which we also find in private life, between two individuals. Both are cases of 'acting on behalf of others'. Once political relations are also seen as fiduciary, the public professional is not just in a fiduciary relation with her direct client, but also with the public at large. Moreover, the latter fiduciary relationship is indirect, running via the state. The public structure in which public professionals are embedded involves a two-step process of authorisation: authorisation of the state by the public through the social contract; and then authorisation of public professionals by the state. As a result, the state is the professional's proximate principal, while the 'public' is the professional's ultimate principal. The professional hence has to position herself with respect to three parties: direct clients, the (representatives of) the state (i.e. the government), and the public at large.

Beyond this unifying explanation, the Hobbesian re-interpretation of the fiduciary relation will turn out to be useful for a further reason. This will be explained later (section 5). This section has set the terms of the debate, by introducing professionalism as a matter of fiduciary relations. With this framework in mind, the next sections will canvass the strengths and weaknesses of three models to interpret the ethics of professional judgments.

[22]Monica Vieira, *The Elements of Representation in Hobbes. Aesthetics, Theatre, Law, and Theology in the Construction of Hobbes's Theory of the State* (Brill 2009); David Runciman, 'Hobbes's Theory of Representation: Anti-Democratic or Proto-Democratic?' in Ian Shapiro and others (eds), *Political Representation* (Cambridge University Press 2010); Quentin Skinner, 'Hobbes on Persons, Authors and Representatives' in Patricia Springborg (ed), *The Cambridge Companion to Hobbes's Leviathan* (Cambridge University Press 2007).

[23]Technically, Hobbes's theory comes closest to agency law (which regulates the relations between principals and agents), which is only one specific fiduciary relation.

3. Loyalty to client: the telos of the professional activity

On the first, teleological model, professionals should make judgments on the basis of their best interpretation of the function, or aim of their professional practice. This puts centre stage a teleological interpretation of professional practices, as practices in which the service delivered to clients functions as a *telos* by which good and bad performance can be distinguished. Following this interpretation, professionals' moral judgments that they are subject to illiberal pressures by their states are to be justified by reference to a violation of the *telos* of the professional practice.

The teleological model arguably is historically the dominant model of professional ethics. It describes the role of professionals in terms of experts servicing their clients with a specialised product which requires specific institutions and roles. First, these institutions develop a particular, 'localised' morality: they set standards of good service provisioning, for example, they elaborate on the norms of 'good science', or 'good journalism'. In MacIntyre's neo-Aristotelian model of social practices, these norms embody a vision of excellent (virtuous) performance.[24] Second, this model is decidedly undemocratic: these standards are determined by professionals themselves, as only they have the knowledge and authority to understand the 'nature of the good' in question. Third, honouring these standards is the prerogative and the duty of a particular role (office), that of the professional himself. Thus, ethicists often speak of a particular 'role morality', which may conflict with the demands of 'ordinary morality'.[25] For example, a lawyer defending a client sometimes does not have to speak the truth (a demand of ordinary morality), as his duty in defending his client requires him to be silent about his clients' criminal actions, as far as these are not proven by the prosecutor (a demand of role morality).[26] The ethics of professional institutions is an ethics of loyalty: loyalty to one's role in the institution (this raises questions about the relation between role morality and ordinary morality, see next section).

Under the teleological model, we could imagine our academic arguing that the telos of university teaching is to attend to the development of each student's excellence in learning. It is up to the university teacher to judge how much time and effort this would require, and how to weigh these demands against those of other excellences associated with university practice (such as grant writing). Igor, the Polish judge, could argue that the telos of judging is to render impartial judgments upon those appearing in court; and that the meddling of the governing party with judiciary appointments represents an unjustified intrusion in that practice. Finally, Katherine, the owner of *The Post*, would argue that the telos of journalism is to 'speak truth to power' and publish sensitive material about bad government performance, even – perhaps especially – where publishing this material is actively opposed by the same government. Each of these judgments is potentially controversial, and could be disputed by fellow-professionals (in the film *The Post*, we see some heated conversations between those at the top of the newspaper, torn about whether to publish or not). However, the

[24]Alasdair MacIntyre, *After Virtue* (Duckworth 1985).
[25]Benjamin Freedman, 'A Meta-Ethics for Professional Morality' [1978] *Ethics* 89 (1), 1; Judith Andre, 'Role Morality as a Complex Instance of Ordinary Morality' [1991] *American Philosophical Quarterly* 28 (1) 73.
[26]See also the discussion of amoral lawyering by Van Domselaar and De Bock, elsewhere in this special issue.

controversy would be one *within* the profession, and *about* the right interpretation of the standards of professional performance.

Now let's bring in an imaginary state official, opposing these professionals. Such a state official could make (and many have made) three points in return.

First, they could argue that the professional's judgment is inherently controversial. It is not an eternal Truth written in the 'nature of the good', but a contingent professional community's judgment, susceptible to reasonable disagreement and changes over time. In philosophical terms, these are perfectionist judgments about value. In debates over MacIntyre's practice theory, this has been an important point. For example, David Miller argued that many practices are not self-contained and hence do not have an 'internal good' which unequivocally functions as a guiding thread for action. Instead, many practices serve wider social purposes, and it is up for debate what exactly these should be.[27] In the example of the academic, a state official could defend limiting university budgets to teaching, by arguing that there is an optimal amount to be spent on each student; after which diminishing returns set in, and other investments are better, from a dollar's value perspective (the optimum is not the maximum). Or more controversially, a state official could say: every form of teaching in history has been an indoctrination or socialisation of young people into a society's values. So why think that the liberal-democratic aim of 'critical thinking' should serve as 'the' telos of teaching … ?

Second, all these judgments are not as impenetrable from outside criticism as is often depicted by professionals themselves. There is a core set of technical issues in every professional practice which can't be judged by outsiders (think of the reliability of evidence in law, or methodology in science). But many classificatory, diagnostic and organisational aspects of professional practices are essentially open to non-expert judgment.[28] Professionals have systematically blurred this distinction between technical and non-technical aspects, so as to get maximal authority over all aspects of their practice. However, once we look properly at the matter – so the state official would argue – this proves nothing but a strategy to monopolise decision-making authority. For example, (so Polish state officials could argue), what the correct way of appointing judges is, or what the appropriate retirement age is, or what are appropriate disciplinary procedures, has nothing to do with the nature of judging. These are organisational aspects, which can be properly decided by the state. Moreover, what is true for these organisational aspects, is also true for the core purpose(s) practices should serve. These are themselves not a part of the technical expertise for which only professionals are equipped to make judgments. What if a Polish state official would say that judging cases in a political neutral way is a misguided, unrealistic view on the judiciary *telos* anyhow? What if they would say the purpose is to solve disputes, thereby ending uncertainty between the contending parties, and whichever way one solves it is always normatively, and sometimes politically non-neutral (just look at how the US Supreme Court's decisions split predictably along partisan lines …). So why couldn't states appoint partisan judges? If they can in the US, why couldn't they in Poland?

Third, our imaginary state official would say all these non-technical aspects, because of their controversial nature, *require* democratic legitimation in the case of public

[27]David Miller, *Principles of Social Justice* (Harvard University Press 1999), 116–122.
[28]Dzur (n 6) 66.

professions.[29] And this is exactly what the state offers when it regulates public professional practices, on the basis of a democratic mandate. Thus, public professional resistance against state decisions about their practices, which are based on properly executed democratic procedures, betrays a fundamentally undemocratic attitude. Public professionals revolting against the popular will, misunderstand the basis and limits of their position within the public system. Defenders of 'illiberal democracy' have made essentially this point: that their attacks on the media (think of Erdogan's measures against journalists), or the university (think of Hungary's campaign against the Central European University), or the judiciary, are democratically legitimated. If professionals would think otherwise, they need to convince others and win elections.[30]

I believe that these three critical points about the teleological model are valid.[31] There is no essentialist Truth about teaching, judging or news reporting; professional practices are about more than technical expertise; and the democratic process seems the right place to decide about these aspects. But I also believe that these three points can be easily abused by states, and that the three examples in the introduction are good examples of such abuse. Moreover, these points do not so much invalidate as call for supplementing/embedding the teleological model in a wider model. First, different practices of course have different purposes, and associated modes of good practice. To be a good teacher requires different skills and virtues from being a good journalist. The notion of purpose is not useless. However, the point and purpose of the specific set of activities at stake needs to be interpreted (i) in terms of a wider moral theory which informs what we may morally expect of the practice as a society, (ii) by a wider group of people than just professionals as experts themselves. Second, in the case of public practices, this wider moral theory may require reference to norms of democracy (as the imaginary official pointed out), but certainly also to norms of constitutionalism (as I will argue later). With this in mind let us now move to the second model.

4. Loyalty to conviction: the fiduciary's own moral judgment

If 'the professional practice' doesn't offer firm ground, an alternative would be that professionals must weigh the competing interpretations of what the practice could be like. They must test these against their own most sincere moral convictions about the morally right thing to do. In this section I want to test and reject this model of the conscientious professional.

[29]This point may be valid for certain professions normally classified as private as well (to the extent that there are important public interests at stake), but here the claim is that it certainly holds for public professions.

[30]The point can be pretty sarcastic, given many populists' own anti-democratic view of politics. For a comparison between the anti-democratic nature of populism and technocracy, see Daniele Caramani, 'Will vs. Reason: The Populist and Technocratic Forms of Political Representation and Their Critique to Party Government' [2017] *American Political Science Review* 111 (1) 54.

[31]The wider context of these points is that, since the 1960s, Western societies have witnessed a large-scale backlash against what Albert Dzur has called the 'social trustee model' of professionalism, which developed over the course of the nineteenth and twentieth century as a follow-up to the Medieval guilds under modern conditions. Professional groups were able to withstand the pressures of both capitalist markets and bureaucratic states, by providing the public a mutually favourable exchange: social status, a high reputation and convenient income for professionals, in exchange for socially valuable services. Since the 1960s many professions came under increased scrutiny, as their claims to expertise were treated with increasing skepticism. Some even speak of an 'assault on professionalism', see Freidson (n 7) 179; Rebecca Roiphe, 'The Decline of Professionalism' [2016] Georgetown Journal of Legal Ethics 29 (3), 649, 668).

In professional ethics, an important debate revolves around the 'separatist thesis'. This thesis holds that professional role morality provides a source of reasons which does not need to be checked against 'general' or 'ordinary' morality. Thus, as part of their professional role, a lawyer may infringe on the rights of clients or others, where such an infringement would normally be morally wrong.[32] Alan Gewirth has provided a convincing reply to the separatist thesis. First, professional actions take place in institutions, and these institutions must always themselves be morally justified. Thus, professional criminals working in the Mafia are not justified in violating moral rights of their 'clients'. In this sense, 'ordinary morality' is superior to role morality.[33] Nonetheless, this does not mean that any professional action which would be immoral outside of the professional context, is morally justified just because it is embedded in a morally justified institution. This needs to be checked on a case-by-case basis. The criterion for this check is whether the means of action chosen by a professional is 'internally instrumental' to the end of the practice itself.[34] For example, a judge may convict a criminal to prison (which takes away his freedom of movement; an otherwise immoral act), because such a punishment is internally connected to the aim of the practice, which is to restore the balance of rights between victim and criminal.[35]

From this perspective, every professional must test her course of action against the requirements of general morality. For example, judge Igor must decide whether he should deal with his legal cases in the mode of the ideal of the 'impartial judge' or alternatively, following the ideal of the 'judge-as-tool-of-the-PiS'. This question is to be answered – following Gewirth – by looking at whatever general morality would say about the matter. The same is true for our other examples. Each time, the professional positions herself in the situation of someone judging the justifiability of the professional practice as a whole, to determine how to deal with the concrete moral dilemma that the illiberal state imposes upon her. When addressing his dilemma, Igor is therefore stepping outside of his professional role. In a way, he acts as a legislator looking at his professional practice from the point of view of 'humanity' as such.

There are two problems, as I see it, with this conscientious professional model. The first problem relates to the substantive basis or source for making these judgments ('general morality'), the second to the authority of the professional in making the judgment ('personal conviction').

First, the public professionals' judgments in my three examples do not seem to neatly fall into the category of violations of general morality. The illiberal state does not ask public professionals to do anything that would be immoral (i.e. violating anyone's basic moral rights) outside of the context of the professional practices at stake. We are not discussing the Nazi state asking a medical professional to kill Jewish patients, or the standard professional dilemmas such as lawyers' lying in court or doctors deceiving patients for their own interest. No student has a general moral claim to get time and attention from somebody else to read their papers. No one has a general moral right that others publish certain revelations in a newspaper. That is … unless these things

[32]Freedman (n 25); Mike Martin, 'Rights and the Meta-Ethics of Professional Morality' [1981] *Ethics*, 619.
[33]For Gewirth, general morality should be formulated in terms of a set of moral rights to the basic conditions of individual agency.
[34]Alan Gewirth, 'Professional Ethics: The Separatist Thesis' [1986] *Ethics* 96 (1) 282, 295.
[35]idem 296.

are themselves part of a professional practice that is itself a necessary requirement under general morality. Lying, killing and deceiving are a-contextual universal moral wrongs, while not publishing or not giving academic attention are only potential moral wrongs. It all depends on whether the public professional's practice should serve certain ideals of liberal democracy, and in turn, whether these ideals are themselves part of general morality. For example, it may be the case that 'teaching students how to think critically' is not the eternal *telos* of teaching; but one could still argue that this interpretation of teaching would be singled out by one's theory of liberal democracy. Liberal higher education would then be justified as a necessary condition of a liberal-democratic society.

Such an argument seems to me to take the right direction. It resolves the interpretative vacuum at the heart of the teleological model, once it is recognised that there is no essence to find 'within' the practice itself. It gives precision to the notion of general morality at the heart of the conscientious professional model, by showing how, for public professionals, the principles of constitutional democracy are the relevant general morality to be interpreted. The argument situates public professionals' services as indispensable components in the larger scheme of liberal democracy. The realisation of a liberal-democratic regime does not just depend on the character and functioning of the official organs of the state, but also on the support of a larger set of social practices run by professionals, such as education, science and the media. This argumentative strategy seems to be more plausible and promising than both the teleological model and conscientious professional model. But if faces challenges of its own. In the next section we will see if and how these can be resolved.[36]

But before doing so, let's return to the conscientious professional model. It faces a second problem. For it is questionable whether public professionals should use their own convictions, when making moral judgments about the liberal-democratic credentials of their practices. For the authority to make such judgments belongs to the authorising public itself.[37] Imagine again our illiberal state official. They may invoke a standard democratic legitimation for their policies. They may argue that that the purpose of having government is to provide a legitimate (non-violent) way of resolving moral disagreements. And, they may argue, the legitimate way to select government is through democratic procedures.[38] Different citizens may have opposing moral views on many issues (economic inequality, religion, the regulation of marriage, migration, etc.), and potentially these conflicts may form a threat to social order itself. Resolving these claims, and establishing a peaceful legal order where one law for all holds, is the aim of democracy. Finally, as a factual claim, they may argue that the process of selecting government officials through which they came to power actually was flawlessly democratic. I will

[36]I see this not as a rejection, but as an extension of Gewirth's ethical universalism. It is an improvement over de-contextualized forms of universalism which judge actions right or wrong disregarding the context. His theory is attentive to context, since it is open to the possibility that certain actions which would be wrong outside of an institution, may be justified within that institution. This openness is embedded in a universalist theory since the purpose of the institution must be itself legitimate from a universalist standpoint. This now needs to be extended in that the credentials of liberal democracy need to be tested from this standpoint, before judging concrete liberal democratic professional practices.

[37]cf. the idea behind process-based review, as discussed by Davies & Henderson, elsewhere in this special issue.

[38]The first claim is accepted by Hobbes and all his successors in the social contract tradition; the second claim is introduced by Locke, Rousseau and others in the same tradition, and widely accepted today in mainstream Western political philosophy.

accept all of these claims here, for the sake of argument.[39] Against this background legitimising story, they may then argue that it is not open to public professionals to have their own moral judgments override the position taken by a democratically legitimated (but illiberally acting) government. If they accept that they are *public* professionals, they should accept the embeddedness of their profession in a democratic context. They have a duty of loyalty to the public.[40] I think these final entailments do not follow – but to show why, we need to do more work.

The discussion in this section has led to the conclusion the conscientious professional model in its pure form is insufficient. Its key notion (general morality) requires further development for public professional practices. However, we have made considerable progress. For we have identified two key desiderata for a convincing model. First, a public professional must show why her own practice is a necessary requirement of liberal democracy, and why liberal democracy is itself a part of general morality.[41] Second, she must show why she has standing *qua* public professional, to make critical judgments about the influence of the state on her practice. She must bring her claims forward not as a citizen, or as a private (natural) person; but *in one's artificial capacity, as an agent of the public*. To deliver on both of these desiderata, I will introduce and defend a third, constitutional model. Section 4 will deal with the first desideratum, section 5 with the second desideratum.

5. Loyalty to constitution: into the public's fiduciary relation with the state

The constitutional model will help us to understand how public professionals can make moral judgments, as interpretations of the fiduciary relation in which they stand to the public. To explain the model, we need to look more closely at the authorisation of the professional's work by the public. This, to remind, was a two-step process. First, the public authorises the state to act on its behalf (where the state itself is represented by a government and its officials). Second, the state authorises professionals to provide a professional service, on its behalf (hence, ultimately, on behalf of the public). The main argument in this section is that illiberal authorizations of the state by the public (i.e. in the first step) involve an inconsistency; a violation of the fiduciary nature of this relationship. This inconsistency carries over to the authorisation of professionals (in the second step), who can object to it, in the name of being at the fiduciary end in their relation to the state.

[39]Obviously, some illiberal democrats have risen to power with less-than-perfect elections, where one could argue the democratic process was distorted (from Facebook-based manipulation of discourse, to gerrymandered districts, polling stations double-counting votes, etc.). Let's assume this is not the case.

[40]This does not prevent the professional from holding on to his moral beliefs *qua* citizen, and trying to realize these beliefs in democratic processes. And indeed, the illiberal democrat will refer the revolting professional to that arena. If you believe the judiciary should be independent, try getting a majority around that proposal! Obviously this course of action is open to the professional, but his political activities are not the focus of our inquiry: we wanted to know whether professionals qua professionals have a moral responsibility to resist what they deem to be illiberal state rule of their own professional practice. It will also not help to reclassify actions of professional disobedience as political acts. For example, perhaps Katherina's decision to publish from the *Pentagon Papers* should be interpreted as an act in the political arena, not a professional one. However, I will not avail myself of that way out. Even if these acts are also political, they are always also professional acts. In that context, we are looking at them here.

[41]The first half of this sentence asks for a context-specific argument, which differs for every practice. In the following I presume these arguments are available; and focus on the general requirement, expressed in the second half of the sentence.

The authorisation of the state by the public creates a relation that has all the standard elements of a fiduciary relation (discretionary power, dependence and vulnerability), generating the rights and duties described in section 1. However, it is also a special fiduciary relation, in at least three senses. One is that it is, unlike other fiduciary relations, which each are motivated by very concrete pursuits and purposes within the boundaries of private law, the citizen-state relationship is motivated to create *lawful conditions* in the first place. If citizens are to have any other fiduciary relations, they will have to live in a legal order that secures their equal freedom to establish such relations. For that, they need to stand in a fiduciary relationship to the state, as the guarantor of legal order. A second sense in which the relation is special is that it isn't expressly authorised. Citizens have *never actually* signed a contract to authorise the state, in the same way that private parties in private law did when signing a principal-agent contract, or any other fiduciary contract. The fiduciary relation thus suffers from the fact that there is no clear instruction/mandate to work from. A third sense in which the relationship is special, is that it involves a relation between one fiduciary and *multiple* beneficiaries. Hence problems arise if these beneficiaries have conflicting interests; how should the fiduciary, who has a duty of loyalty to all of them, then act? With the large constituencies of modern states, this is bound to happen all the time.

All these themes are familiar from the social contract tradition. Permanent conflicts of interest are what motivate individuals to get out of the state of nature in the first place. Their consent to the social contract is most often taken to be hypothetical, not actual. It is what rational citizens would consent to, were they asked to do so. I will presuppose but not rehearse the familiar social-contract arguments for why and in what sense being in such a lawful relationship to other citizens is a moral requirement itself. Suffice it here to draw attention to the sense in which such arguments rely on the *incapacity* of the members of the public itself to establish such a legal order. Private parties cannot themselves implement and execute a legal order, since by definition, as private parties, if they were trying to do so they would be imposing their unilateral will on others. This would be experienced – and rightly so – as a coercive act which lacks moral validity. A public power by definition is needed, which represents the will of all, not that of a section amongst the public.[42]

The crucial step now is that the duties implied by this fiduciary relationship are the requirements of rule of law. This argument is made by Evan Fox-Decent. In his view, rule of law requirements form the minimal necessary content of the special citizen-state fiduciary relationship. In Fox-Decent's reconstruction, there are four rule of law requirements. First, the exercise of public power should always be based on expressly promulgated law. This requirement protects citizens against arbitrary exercises of power. Second, the exercise of public power should be based on laws with certain characteristics: generality, publicness, prospectivity, etc. This is meant to ensure that citizens can actually know the law, which is a precondition for being bound by such laws. Third the exercise of public power should treat all citizens fairly and reasonably (see below). Fourth, the exercise of public power should be bound by respect for the

[42]This is connected to Hobbes's insight that before the act of representation by the state (i.e. government), there is no such thing as a singular public. Hence, public power is the only way to create legal order, given each private individual's incapacity to create legal order herself. See the next section, on 'constructivism'.

human rights of all citizens.[43] Fox-Decent in his work makes a case that each of these characteristics can be explained as necessary elements inherent in the fiduciary relationship between citizens and states. Here I will only explain this, by way of illustration, for one of these requirements: that of fairness and reasonableness.

In fiduciary theory as applied in private relations, we saw that fiduciaries have a duty of loyalty. But in a public context, how can one be loyal to multiple beneficiaries at the same time? Fox-Decent argues that this duty to be loyal to each specific beneficiary is in a public context transformed into a duty to represent all beneficiaries' duties in a fair and reasonable way. This transformation also happens when there are multiple beneficiaries in a private context. For example, when a trustee is assigned the task to manage property on behalf of multiple beneficiaries:

> … in such contexts the duty of loyalty has to manifest itself as fairness and reasonableness because the fiduciary principle can authorize the use of fiduciary power only to the extent that such use respects each person's coequal status as a beneficiary of the fiduciary principle's authorization of fiduciary power. Put another way, the fiduciary principle, as a legal principle, must treat similarly situated beneficiaries as equals who possess a moral worth or dignity capable of triggering the principle's application. Call this the 'equal dignity constraint'. But for that constraint, the fiduciary principle could set arbitrarily the terms of the fiduciary's mandate to the prejudice of others who are similarly situated.[44]

This equal, symmetrical position of the beneficiary is, Fox-Decent argues, also characteristic of citizens in relation to the state. In the public context, the requirement of 'fairness and reasonableness' must be understood as one of the basic principles of the rule of law. Whatever they do, states are to treat all their subjects fairly and reasonably while doing so.

The requirements of the rule of law, then, form the moral requirements which are constitutive of the citizen-state relation. If there is a moral reason to escape from a state of nature and create public power, then given the fiduciary nature of this power, the requirements of the rule of law follow. This ends my discussion of the first desideratum identified at the end of the previous section: that the requirements of liberal democracy should be shown to be part of 'general morality'. Note however, that the justification has focused on the liberal part of 'liberal democracy', and said nothing about the democratic part. This will become our central problem in the final section.

6. The standing of public professionals in a democracy

The question that remains unresolved is whether public professionals have standing to object to illiberal pressures; especially if they would come from an – *ex hypothesi* – democratically legitimated government. Our imaginary state official may accept that constitutional principles are the right moral framework to decide what mandate public professionals should work on. She may still object the interpretation of these principles is up to the public, acting through the state; not up to the professionals. In this section I will diagnose this tension through the lens of the Hobbesian model introduced earlier, to see whether the professional has any standing to stick to her independent judgment.

[43]Fox-Decent (n 8) 25–26.
[44]idem 35.

If a professional argues that she is not bound by the orders of an illiberal state, she is making a judgment that this state itself violates the basic requirements of the relationship with its constituting public. In the first instance, this seems a professional judgment about the illiberal nature of the *state-professional mandate*. For example, a state prohibiting its judges from acting independently from the executive branch, gives its professionals in the judiciary an illiberal mandate. But the judgment that this mandate is illiberal is nothing less than a judgment that this mandate is inconsistent with the *public-state mandate* from which the state itself derives its power. The latter mandate should be governed, as we have seen, by the requirements of the rule of law. If the state orders its judges to rule in the interest of the conservative party, and punishes them if they do otherwise, it is effectively violating its own mandate; or so the public professional would argue. And this argument is a judgment that is made in one's capacity as a professional, i.e. as a fiduciary in the state-professional relationship. Given the transitivity of the double-mandate structure, we could also express this as follows. The professional judges she cannot fulfil her duties to her *ultimate* beneficiary, the public itself, given the illiberal order of the intermediate party, the state. She judges that she is being implicated in a duty-violation, against her will.

Such judgments are not merely personal convictions about morality. For most professional practices leave a lot of discretion in determining which course of action is justified; this is one of their defining features. Discretion requires interpreting what to do. However clearly professional rules are formulated, they still don't interpret themselves. In Hobbes's terms, agents can never be a mere instrument of their authors. In a representation-relation, agents (like authors), set aside their own 'natural personality' for the moment, acting as an artificial person (extension) of their authors. However, there may not be a natural person 'behind our roles' which can be clearly distinguished from our roles. We shape our roles, and in doing so bring our own personality to bear on that role. Vice versa, our roles shape us, to such an extent that there is no interesting personality (or identity) to be distinguished from them.[45] In representational terms, when agents are interpreting how to follow up on their instructions/mandates, they always *also* represent themselves, at the same time as they represent their principals. To the extent that they do so, their actions are authorised by themselves. They are, in Rawls's celebrated term, 'self-originating sources of claims'.[46] Professionals cannot avoid bringing themselves on stage, short of stopping to fulfil their professional roles. But this self-authorisation in the professional context is not about authorising ourselves to pursue our personal desires (as in a purely private moment of consumption). It is an authorisation to interpret the requirements of the situation. Following one's personal convictions here, is following one's convictions about the morally right thing to do in the fiduciary relation.

This of course doesn't help to respond to the state officials' criticisms. If anything, it makes matters worse, showing how the un-authorised natural person of the professional, hidden behind her professional mask, weighs in on the situation's interpretation. So now we have to confront the crucial question how to conceive of this conflict between the professionals' and the state's standing to interpret the situation.[47] In the following, I will

[45]Wolgast (n 18) 45–57.
[46]John Rawls, 'Kantian Constructivism in Moral Theory' [1980] *The Journal of Philosophy* 77 (9), 515, 546.
[47]See also the discussion of the judge's position and expertise, in Davies and Henderson, elsewhere in this special issue.

argue that the professional has an independent standing in this respect, since their professional practice is meant as a counterweight to the state's own power to govern.

To get to this conclusion, let's first go back to Hobbes's general model of representation. On this theory, there arises a tension between beneficiary and fiduciary, which can be captured in terms of personality or autonomy. On the one hand, representation extends the personality of the represented. For Hobbes, authorisation creates persons: a natural person by virtue of authorising somebody else creates that other (who is a natural person before) *qua* artificial person. One way of expressing this is to say that the actor when acting on behalf of the author, 'substitutes' for the author. Another way to express the same idea is that fiduciary action is an 'extension, through representation, of the personality of another'.[48] Both expressions point to a particularly close identification between what the fiduciary does and what the beneficiary would have done or wants to have done. The fiduciary is an instrument of the beneficiary, which the beneficiary uses to give a wider effect to his own personality than he can do on his own. In legal ethics, for example, the idea is that the use of a lawyer increases the autonomy of the client.[49]

On the other hand, however, one can wonder whether representations do not create, as much as they extend, the personality of the represented. Constructivists in political theory argue as much. Following Hobbes, they emphasise that there is no person of 'the people' before the act of representation by the representative. Only through representation can the people acquire personality in the first place, only through acts of representation can we see its features, its personality.[50] This point is perhaps less obvious in simple two-person relations, where one party authorises another to do something to represent her pre-given interests (say, the patient authorises the doctor to perform surgery on her body). But it is especially pertinent in the context of group agency, where we saw there are interests of multiple beneficiaries which fiduciaries must reconcile in a fair and reasonable manner. And it also bears on the public professional's relation to the extent that she co-shapes the worldview, knowledge and preferences of her beneficiary, as in a teaching setting or in a journalistic setting.

The fact that there are these two sides of the coin means that we always face a power balance between fiduciaries and beneficiaries. This power balance may privilege fiduciaries or beneficiaries, depending on the circumstances. Who has the upper hand in interpreting the mandate? Who shapes whose personality? Who has who 'on a string'?[51] All of this will depend on the circumstances. While the standard definition of fiduciary relations emphasises the vulnerability of the beneficiary, the Hobbesian theory opens

[48]Miller (n 8) 71; similarly Gerald Postema, 'Moral Responsibility in Professional Ethics' [1980] *New York University Law Review* 55 (1), 63, 77; Deborah DeMott, 'The Fiduciary Character of Agency and the Interpretation of Instructions' in Andrew Gold and Paul Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014), 322.

[49]Luban and Wendel (n 5).

[50]Thomas Fossen, 'Constructivism and the Logic of Political Representation' [2019] *American Political Science Review* 113 (3), 824.

[51]We can see basically the same problem in contemporary democratic theory, where a key debate is whether representatives ought to act as delegates for those they represent within a clear mandate, or rather as independent trustees, on an open mandate, see Hanna Pitkin, *The Concept of Representation* (The University of California Press 1967); David Runciman, 'The Paradox of Political Representation' [2007] *Journal of Political Philosophy* 15 (1), 93. In the political context, the most acute expression of this problem is the phenomenon of civil disobedience: may citizens dispute the actions of the Sovereign (and at the limit, revolt against him), on the grounds that he has overstepped or otherwise violated his mandate? Or have they irrevocably transferred the right to the decisive interpretation of the mandate to their agents? Hobbes, Locke, Rousseau, Kant and others have been divided about the issue.

up the possibility that fiduciaries may prove vulnerable, too. The situation of public professionals in illiberal-democratic countries may be a case in point. What to think of this power relation, normatively? Who *should* have the upper hand, or even the monopoly on interpreting the norms relevant to the situation? Here I would argue, the fiduciary theory leads us to accept two points.

First, the fiduciary theory doesn't itself dictate a democratic interpretation of the public-state fiduciary relation, in which final power lies with the public, not with the Sovereign. Whether or not the state-citizen relation should be democratic, is not something the fiduciary framework can decide. This was in dispute between Hobbes, Locke, Rousseau and others. Hobbes, for himself, came down on the anti-democratic side, but his authorisation/representation schema can be interpreted in a democratic fashion as well.[52] Perhaps one can find a strong argument for such a democratic interpretation, but any such argument must be located within the fiduciary framework, since democratic procedures are one possible way of organising representative relations. Hence arguments for democracy cannot deny the applicability of that framework to political relations, but must accept – if the argument in the previous section was correct – the requirements of the rule of law.[53]

Second, regardless of whether such a democratic interpretation would be more convincing than an anti-democratic interpretation, the fiduciary relation generates independent requirements of the rule of law. That it does so, was the topic of the previous section. The point here is that this gives the professional an independent mandate. The constructivist position that 'the public' does not exist before representation needs to be extended to the public professional context. In popular language, any public professional practice is a 'co-creation' between the public and the professionals. In the same way that the public's opinion in Hobbes's theory can only exist *in* the actions of the Sovereign representing the public, also the public's opinion about public professional practices can only come into existence *in* the actions of these professionals. Hence the professional's actions must give shape and content to the public's interests in having these practices. They must do so in a context in which the public professional's mandate – by virtue of the fiduciary relation – hinges on the public professional's specific place in executing the requirements of the rule of law which animate and legitimize the citizen-state relation in the first place. The media, the judiciary and the university are meant to represent points of view which inform the public, independent sources of reasons for thinking about the extent to which the state is governing impartially, non-arbitrarily, transparently, and respectful of human rights. Their mandate is, by its nature, independent from that of democratically authorised government, because their mandate is to form a counterweight to that government. In a context in which the intermediate actor (the state) puts illiberal pressure on professionals, this counterbalancing role will inevitably lead to conflict.

[52]In my view, this is convincingly argued in Runciman (n 22); The underlying question is whether individuals in a state of nature who are authorising a sovereign are giving up their natural right to govern themselves, or retain that right but merely authorise the sovereign to use (borrow) that right. See Vieira (n 22) 174.

[53]This block's objections from illiberal democrats that they don't care about the rule of law, because they are expressing 'the will of the people'. From the illiberal democrat's perspective, whatever strength specific rule-of-law principles are to have in practice, is to be decided in a democratic process. The relationship between democracy and the rule of law is itself subject to vehement debate, both in practical politics and in political theory. The illiberal democrat asserts a radical priority of democracy over the rule of law, while the fiduciary framework works from a priority of the rule of law over democracy.

If I am right, then, public professionals do not need to be loyal to their clients (the teleological model) or their convictions (the conscientious professional model). They need to be loyal to the values of constitutionalism for which the state, but also their public practices, have been created. This constitutional model informs their moral convictions, or their view of the 'telos' of their public practices, since constitutionalism is at the heart of the fiduciary relation between citizens and their states. This reasoning is not invalidated if an argument for a democratic interpretation of political fiduciary relations can be made (let's assume it can!). Rather, in that case two 'co-original' sources of authority come to stand in a relation of unavoidable tension.[54] Democratically mandated state officials and 'disobedient' professionals then each have their legitimate standing to interpret their fiduciary relation.

7. Conclusion

Professionals are often portrayed as powerful social groups, governing themselves to serve the public as they see fit. However, they can be also vulnerable, especially where states have managed to get a grip on their practices. In this paper, I have argued that public professionals have a duty to resist illiberal interpretations of their professional practices by their states. Such illiberal interpretations undercut the constitutional mandate for which states themselves have been brought into being – they make the professional complicit in a betrayal of the public's trust in government under the law. Of course, it requires courage to act in the face of reprisals – whether there is a duty to be courageous is another matter.

In the paper, I have focused on the situation of professionals within a nation-state. This remains the primary context for many public professionals, even in a globalised era, given how they are financed and regulated by the state. But the dilemma's sketched here can also apply to professionals working within international or global institutions (such as the UN or the EU). For the four key requirements of the rule of law (see section 4) are general requirements, which can also be applied to such global institutions. The questions in this context are even more complicated, since there are multiple groups of citizens at the basis of such global organisations, which can be conceived as the ultimate authorisers of the organisations' authority. The co-creation between the public and the professional (section 5) then becomes a co-creation between a global civil society and a group of professionals. But how can a global civil society participate effectively in such a co-creation, across cultures and borders; who should the professional interact with, and how? These and other questions would require further study if the framework in this paper is accepted as a basis for discussing professionals' ethical duties.

Disclosure statement

No potential conflict of interest was reported by the author(s).

ORCID

Rutger Claassen http://orcid.org/0000-0001-7314-4986

[54]The argument in this paper can hence be seen as coming to a similar conclusion as Habermas's co-originality thesis about constitutionalism and democracy.