The Non-Domination Principle in Fiduciary Law

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Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 **Tex. L. Rev**. 993 (2017), available at SSRN.

Fiduciary law crosses many domains, but it is of particular import to the field of trusts and estates, where it lays down rules of conduct for key actors within that legal system. In *Liberty in Loyalty*, Professor Criddle presents an appealing and detailed case for why republicanism is the theoretical basis for fiduciary law. This feat is impressive because he is very much swimming against the tide; scholars and judges alike have often seen classical liberal theory as fiduciary law's guiding light. But the Article's contribution is not merely theoretical. Important questions of doctrine turn on fiduciary law's theoretical foundation, as Criddle skillfully shows. This article's discussion is essential reading for scholars in numerous areas, most notably agency law, corporate law, and trust law, but it is also a valuable read for anyone interested in how the law manages relationships between those with unequal power.

Criddle starts by giving primers on the two main contestants for the soul of fiduciary law: republicanism and classical liberalism. Criddle acknowledges that republican theory is a big tent, but boils it down to two propositions. First, the state derives its authority from the people for the express purpose of promoting individual liberty. Second, the state accomplishes this task by protecting individuals from domination. Domination, in turn, is understood as being in a state of subjection—to either arbitrary power or alien control. Even if this power is not exercised, an individual will still be dominated if there is a chance that it will be exercised. While this understanding was developed with respect to public law, Criddle believes it applies equally well to private law, where the risk of domination is still present. Thus, the governing value of republicanism is liberty, which manifests as a non-domination principle. Classical liberals also value liberty but conceptualize it a bit differently. For them, actual interference or the likelihood of actual interference in an individual's choices is the evil to be prevented. Thus, classical liberalism prizes a non-interference principle instead.

These non-domination and non-interference principles lead to distinctive methodologies for evaluating relationships. Republicans are concerned with the *capacity* for interference while classical liberals are focused on the *risk* of interference. As a result, republicans have the relatively easier task of identifying whether there is a prospect of interference in a given relationship. In fiduciary relationships, where one party entrusts another with power, this prospect is always present. Classical liberals, in contrast, must engage with empirical questions about the level of risk of interference and corresponding normative questions about whether risk levels are too high.

With this philosophical background, Criddle advances his two interrelated descriptive claims, which occupy the bulk of the Article. First, classical liberal theory is a poor match for fiduciary law. Second, republican theory is a good fit. His primary focus is the duty of loyalty, which also happens to be a major doctrinal battleground. Traditionally, this fiduciary duty has prohibited all conflicts of interest. For example, a trustee cannot benefit from trust transactions, even if those transactions might otherwise be benign. This comports with the non-domination principle of republican theory, which aims to prohibit even the possibility that a fiduciary might be acting improperly.

Many classical liberal scholars have challenged this view, noting that such a harsh rule removes from consideration a range of transactions that might be beneficial to the beneficiaries of a trust, even if they might also benefit the trustee. They have engaged in law reform efforts, with some success, to modify the traditional rule, allowing certain types of conflicted transactions so long as they are in the best interests of the beneficiaries. Criddle admits that this is the trend in American law with respect to the duty of loyalty, but he comes armed with plenty of other examples. Through a careful examination of the history and internal logic of fiduciary law, he reveals several areas, such as classifications of

fiduciary relationships and remedies for breach of fiduciary duties, in which republican theory likewise better fits this area of law.

Criddle also advances the normative claim that republican theory *should* underlie fiduciary law. His primary argument for this seems to flow from his descriptive claims: republican theory should underlie fiduciary law because it is a better fit for fiduciary law. This argument certainly throws down the gauntlet to classical liberal scholars, challenging them to demonstrate how their vision of fiduciary law is both internally consistent and faithful to fiduciary law's historical origins. It remains to be seen how classical liberal scholars might reply; their responses could range from defending classical liberalism at the level of theory to reimagining the entirety of fiduciary law to minimizing the importance of consistency and fit. However they respond, the ensuing exchange will be an interesting one. Thus, Criddle has succeeded admirably on two fronts: elaborating a robust and vibrant alternative to classical liberal conceptions of fiduciary law as well as meaningfully advancing the scholarly conversation.

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