REIMAGINING THE LAWYER'S DUTY TO UPHOLD THE RULE OF LAW

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The legal profession has long embraced the view that lawyers have an obligation to uphold the rule of law. Upon close examination, however, it seems clear that lawyers are not expected to do much to promote it. If we take the bar's pronouncements seriously, we see that, for the most part, so long as lawyers zealously protect and pursue their clients' interests within the bounds of the law, they are in fact fully discharging their obligation to uphold the rule of law. This Article argues that this conventional view—that mere compliance with formal legality satisfies the lawyer's duty to uphold the rule of law—is problematic. First, this view makes the duty to uphold the rule of law superfluous, because lawyers are already obligated under the ethical rules not to violate the law. Second, this view assumes—almost as an empirical matter—that compliance with the positive law is sufficient to maintain a society that lives under the rule of law. Yet, a growing body of scholarship on "legalistic autocracies" casts doubts on that assumption. What these legalistic autocracies seem to demonstrate is that it may be possible to observe formal legality without the rule of law.

This Article offers a wider, alternative account of the lawyer's rule-of-law obligations that better comports with our strong, albeit vague, intuition that the rule of law demands far more than bare compliance with legal norms and is far more complex than what is conventionally assumed. This alternative view is grounded in the realization that "the rule of law" is a

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teleological notion—in other words, to be understood in terms of its point: we seek the rule of law for purposes; we enjoy it for reasons. Because of the inherent teleological character of the rule of law, no check-the-box criterion—such as compliance with formal legality—will guarantee the valued state of affairs in which law actually rules. This Article argues that the substantive value, or telos, that lies at the heart of the rule of law is the restraint of the arbitrary exercise of power, a concept that comes from the republican intellectual tradition. By taking this substantive value seriously and constructing a thicker, more substantive understanding of the rule of law around this value, we better appreciate the myriad ways in which our society falls short of that ideal, and we can better see why and how the conventional view of the lawyer's duty to uphold the law, grounded in legalism, falls short of respecting and nurturing the rule of law.

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> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and the capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.
>
> Washington State Bar Ass'n,
> Fundamental Principles of Prof'l Conduct
> Preamble (2006)

I. INTRODUCTION

One of the most alarming revelations about former President Donald Trump's final weeks in office involves John C. Eastman, a lawyer, member of the California State Bar, constitutional law expert, and former dean of the Chapman University Dale E. Fowler School of Law.[1] According to news reports, Trump first invited Eastman to the White House in 2019 to discuss how to limit birthright citizenship[2] and then leaned on him after the November 2020 presidential election to cling to power despite his decisive loss.[3] While acting as a legal adviser to Trump, Eastman authored two key legal memoranda—a two-paged memo and another expanded six-paged one.[4] Both memos laid out the steps that Vice President Mike Pence could take on January 6, 2021, to block or delay the certification of the election for Biden and, directly or indirectly, throw the election to Trump.[5] According to journalists Bob Woodward and Robert Costa, Eastman was in the room when Trump used the longer memo to pressure Pence to obstruct the certification of the election.[6] Thankfully, Pence stood fast and defied Trump's wishes, even in the wake of violence in the Capitol.[7]

Eastman has since distanced himself from those memos and has denied ever having counseled Pence to block the certification of the election for Biden.[8] Skeptical of these denials, members of the California State Bar have called for prosecutorial scrutiny into Eastman's professional conduct.[9] Some complaints

1. Michael Schmidt & Maggie Haberman, *The Lawyer Behind the Memo on How Trump Could Stay in Office*, N.Y. TIMES (Oct. 13, 2022), https://www.nytimes.com/2021/10/02/us/politics/john-eastman-trump-memo.html [https://perma.cc/SF7F-L8QB].

2. *Id.*

3. *Id.* Joe Biden won the 2020 presidential election with 306 electoral votes, defeating Donald Trump, who won 232 electoral votes.

4. *Id.*

5. *Id.*

6. BOB WOODWARD & ROBERT COSTA, PERIL 226 (2021).

7. Schmidt & Haberman, *supra* note 1.

8. *See infra* notes 323–27 and accompanying text.

9. Letter from Norman Eisen, Founder and Executive Chair, States United Democracy Ctr., et al., to George S. Cardona, Off. of Chief Trial Couns., The State Bar of Cal. (Oct. 4, 2021) (on file with author); Scott

have cited Eastman's repetition of groundless factual claims as the potential basis for professional discipline.[10] More seriously, some have accused Eastman of helping to "stage a coup" or "overthrow the government."[11] Such charges imply that Eastman may not only have violated the ethical rule against counseling a criminal or fraudulent act[12] but also may have committed sedition.

One of the more intriguing accusations is that Eastman violated his duty to *uphold the rule of law*. For example, in an op-ed published in *Slate*, Scott Cummings reproached Eastman for "wriggling out of his responsibility as a lawyer sworn to uphold the *rule of law* to provide legal advice in accordance with professional standards of rigor, honesty, and justice—standards enforced by the state bar."[13] Similarly, in a letter urging the California State Bar to investigate Eastman's conduct, Norman Eisen urged the bar to "protect[] the *rule of law* by holding those who are sworn to defend it accountable under professional standards."[14] That letter proclaims that "lawyers also serve as the guardians of the *rule of law*."[15]

Statements of this ilk appeal to the oft-touted principle that lawyers have some obligation to uphold the rule of law, a principle that has long been embraced by the organized legal profession. The preamble to the American Bar Association's ("ABA") Model Rules of Professional Conduct (the "Model Rules") specifically provides that "a lawyer should further the public's understanding of and confidence in *the rule of law* and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."[16] This language has been adopted by thirty-three states as an established tenet of professional responsibility.

Promoting the rule of law has also been part of the ABA's international agenda for three decades. In 1990, the ABA added the goal of "advanc[ing] the rule of law in the world" to its mission statement.[17] Under the umbrella of the ABA Rule of Law Initiative, the ABA has established offices and devoted

Cummings, *The Lawyer Behind Trump's Infamous Jan. 6 Memo Has a Galling New Defense*, SLATE (Oct. 20, 2021, 4:25 PM), https://slate.com/news-and-politics/2021/10/eastman-jan-6-trump-memo-defense.html [https://perma.cc/LRE8-38E4]; Erwin Chemerinsky, *Eastman Tried to Help Trump Subvert US Democracy. He Should Be Shunned.*, SACRAMENTO BEE (Sept. 30, 2021), https://www.sacbee.com/opinion/op-ed/article254564607.html [https://perma.cc/CJ3V-LW6V].

10. Under the California Code of Professional Conduct, the knowing recitation of false claims constitutes "conduct involving dishonesty, fraud, deceit or misrepresentation" and subjects the speaker to professional discipline. CAL. RULES OF PRO. CONDUCT, Rule 8.4(c).

11. Chemerinsky, *supra* note 9.

12. MODEL RULES OF PRO. CONDUCT, r. 1.2 (d) (AM. BAR ASS'N 2021) (emphasis added).

13. Cummings, *supra* note 9 (emphasis added).

14. Eisen, *supra* note 9 (emphasis added).

15. *Id.*

16. *See* MODEL RULES OF PRO. CONDUCT, Preamble, para. 6 (AM. BAR ASS'N 2021) (emphasis added).

17. *International Rule of Law, Overview*, ABA, https://americanbar.org/advocacy/governmental_legislative_work/priorities_policy/promoting_international_rule_law/ (last visited Feb. 8, 2023) [https://perma.cc/NJF4-HKC8]; *see also* Jennifer Rasmussen, *A Short History of the American Bar Association Rule of Law Initiative's Technical Assistance Approach*, 31 WIS. INT'L L.J. 776, 776–79 (2013). Currently, the ABA has four goals, including Goal IV: Advance the Rule of Law. *ABA Mission and Goals*, A.B.A., https://www.americanbar.org/about_the_aba/aba-mission-goals/ (last visited Feb. 8, 2023) [https://perma.cc/DU6W-TPT8].

funding to "promot[ing] justice, economic opportunity and human dignity through *the rule of law*" in the post-Communist and developing world.[18]

Despite these official paeans to the rule of law, lawyers in private practice are not expected to do much to promote it. True, lawyers are encouraged to help secure the poor's access to justice to support the rule of law.[19] Lawyers are also periodically exhorted—in the name of protecting the rule of law—to resist certain types of governmental regulation of the legal profession.[20] But lawyers are not required to provide pro bono legal services;[21] they are not urged to resist the influence of powerful private interests; they can largely ignore potential consequences or harms to third parties when providing legal services to clients;[22] they are free to provide purely technical legal advice if that's what the client wants;[23] and they are free not even to urge compliance with the laws.[24] For the most part, lawyers comfortably fall asleep at night, telling themselves that "zealously . . . protect[ing] and pursu[ing] a client's legitimate interests, within the bounds of the law"[25] fully discharges their rule-of-law obligations. In other words, the conventional view is that *mere compliance with formal legality* defines the sum and substance of lawyers' duty to uphold the rule of law.

There are at least two problems with this conventional view. First, this view makes the duty to uphold the rule of law superfluous. After all, lawyers are already obligated under the ethical rules to withdraw from representation if "the representation will result in violation of . . . other law,"[26] to refrain from assisting in crimes or frauds,[27] to refrain from crimes "that reflect[] adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects,"[28] and to refrain from engaging in dishonest, fraudulent, or deceitful conduct[29] (much of such conduct being unlawful). If the duty to uphold the rule of law basically requires lawyers not to break the law and not to help their clients break the law,[30] then the duty adds almost nothing to the lawyer's existing professional obligations. By that same logic, Eastman's efforts to throw the American presidential

18. *Our Origins & Principles*, ABA, https://www.americanbar.org/advocacy/rule_of_law/about/origin_principles/ (last visited Feb. 8, 2023) [https://perma.cc/YA6K-HR7E] (emphasis added); Robert W. Gordon, *Portrait of a Profession in Paralysis*, 54 STAN. L. REV. 1427, 1444 (2002).

19. *See* MODEL RULES OF PRO. CONDUCT, Preamble, para. 6 (AM. BAR. ASS'N 2021).

20. *See, e.g.*, Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73, 94 (2010); *see also* MODEL RULES OF PRO. CONDUCT, Preamble, para. 11 (AM. BAR. ASS'N 2021).

21. MODEL RULES OF PRO. CONDUCT, r. 6.1 (AM. BAR ASS'N 2021).

22. *See id.* at r. 1.2 cmt. 2 ("[L]awyers usually defer to the client regarding such questions as . . . concern for third persons who might be adversely affected.").

23. *Id.* at r. 1.2 cmt. 3 ("A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value.").

24. Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 279 (1990) (observing that lawyers "have no positive duty to urge compliance").

25. MODEL RULES OF PRO. CONDUCT, Preamble, para 9 (AM. BAR ASS'N 2021).

26. *Id.* at r. 1.16(a)(1).

27. *Id.* at r. 1.2(d).

28. *Id.* at r. 8.4(b).

29. *Id.* at r. 8.4(c).

30. It should be noted that there is no express prohibition for assisting certain civil violations, such as breaches of contract. *Id.* at r. 1.2(d).

succession into crisis amounted to little more than the sin of law-breaking or—perhaps—overly zealous lawyering. And yet, there is a nagging sense that Eastman's transgression against the rule of law was far graver.

Second, the conventional view assumes—almost as an empirical matter—that compliance with the positive law is sufficient to maintain a society that lives under the rule of law. Yet, a growing body of scholarship casts doubts on that assumption. Comparative constitutional law scholars in the U.S. and abroad have sounded the alarm about the proliferation of so-called "legalistic autocracies" that have emerged as part of a global pattern of "democratic recession."[31] The Stockholm-based International Institute for Democracy and Electoral Assistance recently found that "more than a quarter of the world's population now lives in democratically backsliding countries"—democracies that have suffered gradual but significant erosion in the power of those crucial institutions that check the executive branch (*e.g.*, parliament, judiciary, media) and of civil liberties.[32] In many of these backsliding countries, charismatic leaders have gained power by promising to fix democracy's dysfunctions of partisanship, gridlock, and bureaucracy.[33] Armed with a fawning popularity and assisted by a brigade of lawyers, these strong men have enacted legal "reforms" that "remove the checks on executive power, limit the challenges to their rules, and undermine the crucial accountability institutions of a democratic state."[34] What's more, these legal maneuvers have often been accomplished with almost punctilious attention to form and process.[35] In short, these emerging autocracies demonstrate how one can observe formal legality *without* the rule of law.

This Article challenges this conventional view as trading on narrow accounts of the rule of law, which tend to conflate the measurable conditions believed necessary to sustain the rule of law with the rule of law itself. These narrow accounts typically set forth laundry lists of formal and procedural criteria, such as the public promulgation of legal norms, an independent and impartial judiciary, an adjudicative hearing of evidence and legal argument, and the right to legal counsel, deemed essential for securing a legal order that lives under the rule of law.[36] As such, these accounts tend to have few, if any, implications for the moral content of legal norms, substantive human rights, and whether and which citizens' voices matter in the making of laws that govern all citizens. While formal or procedural criteria for legal systems are good and important, they are still compatible with a regime of malevolent and oppressive laws and in

31. *See, e.g.*, Larry Diamond, *Facing Up to the Democratic Recession*, *in* DEMOCRACY IN DECLINE? 141, 144 (Larry Diamond & Marc F. Plattner eds., 2015); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 548 (2018); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 78 (2018); STEVE LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 5 (2018).

32. INT'L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, THE GLOBAL STATE OF DEMOCRACY 2021: BUILDING RESILIENCE IN A PANDEMIC ERA, vii, x, 28 (2021) [hereinafter, THE GLOBAL STATE OF DEMOCRACY 2021].

33. Scheppele, *supra* note 31, at 545–46.

34. *Id*. at 545, 547.

35. *Cf. id*. at 547–48.

36. *See infra* Sections II.A, II.B.

themselves will not safeguard the regime from significant incursions on the rule of law.

In my view, what is missing from these narrow accounts of the rule of law is the identification of the core aim, the immanent end, or primordial purpose of the entire system of laws. Why do we have laws and legal institutions in the first place? What is the ultimate purpose of the legal order? As Martin Krygier has explained, the rule of law is a "*teleological* notion, in other words, to be understood in terms of its point . . . [.] We seek the rule of law for purposes, enjoy it for reasons."[37] Because of this inherent teleological character, no set of formal or procedural criteria—important as they are—will guarantee the valued state of affairs in which *law actually rules*: "[Y]ou might have law, but in such cases it doesn't rule."[38]

This Article offers an alternative, more muscular account of lawyers' rule-of-law obligations that better comports with our strong, albeit vague, intuition that the rule of law demands far more than bare compliance with legal norms and is far more complex than those formal/procedural conditions presumed to protect the rule of law. This alternative account gives due prominence to the *telos* of the rule as a substantive value that explains why we hold the rule of law so dear but also why the rule of law can be so elusive in nations with seemingly perfect written constitutions. This alternative understanding requires lawyers to broaden their analysis from the letter of individual laws to the broader system of laws and its overarching purpose. This Article contends that the substantive value that lies at the heart of the rule of law is the *restraint of the arbitrary exercise of power.*

We can trace the lineage of this concept to the republican intellectual tradition, which was influential to Thomas Jefferson and James Madison but later came to be supplanted in the later eighteenth century by classical liberalism. Republicans, including those in the founding generation, referred to the rule of law as the "empire of laws" and characteristically understood its meaning in oppositional terms—as a contrast to its antithesis—"an empire of men."[39] According to republican wisdom, to live under the rule of men is to be devoid of law's protection and thus incurably vulnerable to the arbitrary exercise of power.[40] In contrast, to live under the rule of law is to live in a shared political system where citizens are free and equal in the sense of not being dominated—that is, they are *secure* in their protection *by law* against the arbitrary exercise of power.[41] In other words, to live under the rule of law means that law—the legal system responsible for articulating, applying and enforcing legal norms—will restrain all arbitrary exercises of power in the polity.[42]

37. Martin Krygier, *Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?*, *in* GETTING TO THE RULE OF LAW 64, 68 (James Fleming ed., 2011).

38. *Id.*

39. *See e.g.*, JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776) (noting that "there is no good government but that which is republican" and that "the very definition of a republic is an empire of laws and not of men"); Mortimer Newlin Stead Sellers, *The Rule of Law in the United States of America*, 70 AM. J. COMP. L. 26 (2022).

40. *See infra* Section III.A.

41. *Id.*

42. *Id.*

Of course, such a utopia—where law restrains *all* arbitrary exercises of power in the polity—is impossible to attain. But that is precisely why we need a teleological conception of the rule of law: it enables us to better appreciate the myriad ways in which our society falls short of that ideal and provides a useful benchmark that makes demands on all citizens to strive toward that ideal. With this more substantive, thicker understanding of the rule of law, we can also see why and how the conventional view of the lawyer's duty to uphold the law, defined by legalism, falls short of respecting and nurturing the rule of law.

The meaning of the lawyer's duty to uphold the rule of law is more important now than at any time in recent decades. John Eastman was not the sole lawyer whose actions may have denigrated the rule of the law. News reports have highlighted how Jeffrey Clark, a former Justice Department official;[43] Rudy Giuliani, former counsel for Donald Trump;[44] Sidney Powell, former counsel for Donald Trump;[45] and Lin Wood, former associate of Powell who litigated lawsuits on Trump's behalf,[46] among many others, took actions that weakened the rule of law far beyond conducting shoddy legal analysis. All of this has not been lost on the world. In 2021, the International Institute for Democracy and Electoral Assistance identified the United States as a backsliding democracy for the first time since 1800.[47]

Part II discusses and critiques the prevailing, narrower accounts of the rule of law from "rule by edict" to formal and procedural legality to an account that relies on a theory of democratic legitimacy. It argues for the need for a teleological conception of the rule of law and considers whether the value of dignity can usefully serve as the *telos* of the rule of law.

Part III constructs an alternative, wider account of the rule of law that foregrounds the substantive value that explains why we desire the rule of law, rather than the measurable conditions believed necessary to maintain it. Drawing from the republican intellectual tradition, this Part argues that the *telos* of the rule of law is the *restraint of the arbitrary exercise of power*. It discusses the principles underlying the republican conception of the rule of law and then turns to the

43. *See* Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. TIMES (Jan. 22, 2021), https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html [https://perma.cc/8L9Y-7GV2].

44. Nicole Hong, William K. Rashbaum, & Ben Protess, *Court Suspends Giuliani's Law License, Citing Trump Election Lies*, N.Y. TIMES (June 24, 2021), https://www.nytimes.com/2021/06/24/nyregion/giuliani-law-license-suspended-trump.html [https://perma.cc/C5FQ-YB56].

45. *See* Barton Gellman, *Trump's Next Coup Has Already Begun*, ATLANTIC (Dec. 6, 2021), https://www.theatlantic.com/magazine/archive/2022/01/january-6-insurrection-trump-coup-2024-election/620843/ [https://perma.cc/CU5D-7EMG]; Alan Feuer, *Judge Orders Sanctions Against Pro-Trump Lawyers over Election Lawsuit*, N.Y. TIMES (Aug. 25, 2021), https://www.nytimes.com/2021/08/25/us/politics/sidney-powell-election-sanctions.html?searchResultPosition=19 [https://perma.cc/R83V-EYVS].

46. *See, e.g.*, Alan Judd, *Amid Personal Turmoil, Libel Lawyer Lin Wood Goes on the Attack for Trump*, ATLANTA J.-CONST. (Dec. 18, 2020), https://www.ajc.com/news/amid-personal-turmoil-libel-lawyer-lin-wood-goes-on-the-attack-for-trump/UBHBVKB65NGE7PU3RO5YYGTHXE/ [https://perma.cc/TA6G-9K6F].

47. THE GLOBAL STATE OF DEMOCRACY 2021, *supra* note 32, at 8; Miriam Berger, *U.S. Listed as a 'Backsliding' Democracy for First Time in Report by European Think Tank*, WASH. POST. (Nov. 22, 2021, 11:18 AM), https://www.washingtonpost.com/world/2021/11/22/united-states-backsliding-democracies-list-first-time/ [https://perma.cc/C3H3-YYCP].

republican solution to the problem of arbitrary power—the formal and informal networks of reciprocal accountability designed to protect the rule of law.

Part IV explores the implications of a republican conception of the rule of law for the legal profession. It rejects the conventional view of the lawyer's duty to uphold the rule of law and embraces an alternative, broader formulation of the duty that foregrounds the *telos* of the rule of law as the *restraint of the arbitrary exercise of power*. It explains why it makes sense to impose on lawyers specially tailored duties to uphold the rule of law in a manner that is faithful to its *telos*. It then proposes a framework of rule-of-law duties designed to express fidelity not only to the law itself but also to the *telos* of the rule of law. Finally, it answers the objection that granting permission to lawyers to refuse to assist their clients' projects on rule-of-law grounds would impermissibly transfer power from clients to lawyers and lead to "the rule of lawyers."

Part V conducts a case study. It applies the framework of duties proposed in Part IV to evaluate the conduct of John Eastman, a particularly egregious example of a lawyer who flouted his rule-of-law obligation. It concludes that Eastman's support of the Trump campaign's efforts to overturn the 2020 presidential election was not only unlawful but also, and more importantly, constituted complicity in his client's arbitrary exercise of power—in violation of his duty to uphold the rule of law in light of its *telos*.

II. LEADING ACCOUNTS OF THE RULE OF LAW

In this Part, I discuss the prevailing, narrower accounts of the rule of law, from "rule by edict" to formal and procedural legality to an account that relies on a theory of democratic legitimacy. I critique these narrower accounts for being tautological, for having no implications for substantive human rights, for being compatible with a regime of malevolent and oppressive laws, or for saying nothing about whether and which citizens' voices matter in the making of the laws. In arguing for the need for a teleological conception of the rule of law, I consider and ultimately reject the value of dignity as the preferred articulation of the *telos* of the rule of law.

A. Rule by Edict and Formal Legality

The narrowest understanding of the rule of law is the purely instrumental notion that law—in the thin, positivist sense of sovereign command—is the means by which the state conducts its affairs and governs its people. Because there is no requirement as to the form or manner in which governmental commands are to be promulgated, all utterances of the sovereign could conceivably be classified as "law"; the rule of law, then, simply collapses into the notion of rule by government edict and fails to carry any distinctive meaning.[48] As Brian Tamanaha has noted, this minimalist conception of the rule of law is more of an

48. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, AND THEORY 92 (2004).

empty tautology, rather than a political ideal.[49] Nevertheless, some modern governments, particularly in Asia, are reported to prefer this understanding of the rule of law.[50]

For many legal theorists, however, "formal legality" remains the dominant liberal understanding of the rule of law.[51] This conception imposes requirements as to the form that legal norms must take in order to be properly regarded as law and for the system to be properly regarded as a legal system. For example, in his earlier works, Friedrich Hayek argued that the rule of law required that "government in all its actions" be "bound by rules fixed and announced beforehand,"[52] that citizens know the laws and their meaning so as to behave in accordance with them,[53] and that the laws apply to all persons equally.[54]

Lon Fuller famously expanded on Hayek's criteria by identifying eight principles of "legality"—the minimal formal requirements of law: generality, public promulgation, prospectivity, intelligibility, consistency, performability, stability, and congruence between the declared rules and their application by public officials.[55] According to Fuller, these principles represented the law's internal morality,[56] and adherence to them enabled (i) subjects to conform their actions to legal commands and (ii) the legal order to be minimally efficacious in pursuit of its goals. Further, a "total failure" to observe these eight principles would result in something "not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract."[57] Accordingly, "there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted."[58]

These elements of formal legality are morally good insofar as they enhance the certainty and predictability in people's lives. Legal constraints are necessary in modern life, but a degree of "freedom is possible nevertheless if people know in advance how the law will operate and how they have to act if they are to avoid its application."[59] Also, these elements "give law a measure of moral authority by enabling it to function as law properly understood as such, rather than merely as a set of rules backed by force."[60] Without reference to these elements, it would

49. *Id.*

50. *Id.* at 92–93.

51. *Id.* at 93–94, 111, 119.

52. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72 (1944).

53. FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 208 (1960).

54. *Id.* at 209. Although Hayek's early works seem to endorse a mostly formal conception of the rule of law, his later works evinced a more complex view. *See* Todd J. Zywicki & Anthony B. Sanders, *Posner, Hayek, and the Economic Analysis of Law*, 93 IOWA L. REV. 559, 588 (2008).

55. *See* LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1969). Jeremy Waldron classifies the last requirement (congruence) as "procedural," rather than "formal." Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, *in* GETTING TO THE RULE OF LAW 3, 8 (James Fleming ed., 2011).

56. FULLER, *supra* note 55, at 47.

57. *Id.* at 39.

58. *Id.*

59. Waldron, *supra* note 55, at 21.

60. Evan Fox-Decent, *Is the Rule of Law Really Indifferent to Human Rights*?, 27 LAW & PHIL. 533, 540 (2008).

be difficult to distinguish law from managerial directives or, for that matter, the commands of gangsters. Yet, without more, an account of the rule of law that is defined *solely* by formal legality seems impoverished for two related reasons.

First, formal guarantees are still compatible with a mostly instrumental conception of law in that such guarantees can enhance the efficaciousness of the laws while remaining agnostic about the ends that a legal system ought to pursue. (Indeed, formal legality's neutrality as to ends is seen as a virtue by international development agencies, because it renders the rule of law amenable to application in diverse political systems.[61]) By failing to explicitly tether the rule of law to substantive values on which substantive human rights are justified, this still narrow account of the rule of law can coexist with any number of odious but efficient authoritarian regimes, such as the legalistic South African apartheid regime, Communist East Germany,[62] and colonial India.[63] Fuller himself acknowledged that the law's "internal morality . . . over a wide range of issues, [is] indifferent toward the substantive aims of law."[64] But he also believed that oppression was rendered far more difficult if a legal order respected the eight principles of legality.[65]

Second, the kind of freedom that is enabled by formal legality alone seems anemic. It is the power to act that would be enhanced or diminished by the degree to which one's environment is predictable.[66] By contrast, most understandings of *political* freedom usually entail a cluster of constitutionally guaranteed human rights. While formal legality may be necessary to protect personal freedom, it is far from sufficient. As Joseph Raz observed, formal legality "has no bearing on the existence of spheres of activity free from governmental interference and is compatible with gross violations of human rights."[67]

B. Proceduralism

Perhaps out of an acknowledgment of the impoverishedness of a mostly formal conception of the rule of law, theorists have offered additional desiderata deemed essential to a legal system. Albert V. Dicey, a leading British constitutional scholar of the nineteenth century, identified the rule of law as a distinguishing feature of the English Constitution. Dicey observed:

> When we say that the supremacy or the rule of law is a characteristic of the English constitution, we . . . mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct

61. *See* TAMANAHA, *supra* note 48, at 94.

62. *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 87 (2d ed. 1999); Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1314 (2001).

63. *See* Moeen H. Cheema, *The Politics of the Rule of Law*, 24 MICH. ST. INT'L L. REV. 449, 466 (2016).

64. FULLER, *supra* note 55, at 153.

65. *See id.* at 157–62.

66. Joseph Raz, *The Rule of Law and Its Virtue*, 93 LAW Q. REV. 195, 204 (1977).

67. *Id.* at 204.

> breach of law established in the ordinary legal manner before the ordinary Courts of the land.[68]

Thus, on Dicey's influential account, a society that abides by the rule of law must be one that possesses judicial institutions and judicial process: an individual must not be made to suffer unless there has been adjudication by ordinary courts arrived at in the ordinary manner observing ordinary legal process.[69] Other commentators, such as Joseph Raz, Robert Summers, and Jeremy Waldron, have helpfully introduced a litany of more specific procedural guarantees to their understandings of the rule of law, such as an independent and impartial judiciary, a hearing where evidence can be presented and arguments can be made, and the right to legal representation.[70] As the bells and whistles of most modern Western legal systems, these procedural guarantees flesh out the character of a legal order that more plausibly upholds the rule of law.[71]

The addition of these important procedural guarantees is a welcomed step in developing a meaningful and intuitively attractive conception of the rule of law. Procedural guarantees afford a minimum threshold of due process and, hence, can impart a degree of moral legitimacy to a regime such that a regime's exercises of authority could be distinguishable from mere exercises of power. Moral legitimacy serves as the currency with which effective governments govern and as the reason why citizens respect and are willing to submit voluntarily to the laws.[72]

But, in my view, it would be a mistake to conflate the ideal of the rule of law with the observance of certain procedural legal norms and formal legality. After all, formal and procedural legality, without more, say nothing about the nature of substantive human rights or, for that matter, whether and which citizens' voices matter when making laws that govern all citizens. Can we comfortably endorse a conception of the rule of law that, for example, may be indifferent to the fact that the United States—prior to the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965—tolerated de jure racial segregation and discrimination and disenfranchised its Black citizens in large swathes of its territory?[73]

68. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 110 (8th ed. 1982).

69. *Id.*

70. *See* Raz, *supra* note 66, at 200–02; Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 RATIO JURIS 127, 129–30 (1993); Waldron, *supra* note 55, at 6.

71. *See* Raz, *supra* note 66, at 200-02; Summers, *supra* note 70, at 129–30 (1993); Waldron, *supra* note 55, at 6.

72. To be sure, there are minimalist theories of legitimacy that contend that a regime's mere competence in maintaining order or preventing mass starvation is sufficient to confer moral authority on the grounds that any alternatives are likely worse. *See* TAMANAHA, *supra* note 48, at 96. Without denying that mere operational competence could impart a degree of sociological legitimacy for states emerging from war or sweeping poverty, that type of legitimacy, without more, will likely be anemic and short-lived. Indeed, the experience of the governments of Communist Eastern Europe, the former Soviet Union, and East Germany would seem to confirm this assessment. *See, e.g.*, Mark Kramer, *The Collapse of East European Communism and the Repercussions within the Soviet Union (Part 1)*, 5 J. COLD WAR STUD. 178, 179 (2003).

73. *See, e.g.*, Rosenfeld, *supra* note 62, at 1314; *Jim Crow Laws*, PBS (Oct. 18, 2022), https://www.pbs.org/wgbh/americanexperience/features/freedom-riders-jim-crow-laws/ [https://perma.cc/E43U-QFE6].

C. Democratic Legitimacy

Perhaps out of a realization that formal legality and procedural norms are insufficient in themselves to lend moral legitimacy to a regime sufficient to elicit voluntary compliance with the law, legal theorists have contended that *democracy* is what "imbues legal rules and processes with legitimacy in pluralistic polities where disagreement on fundamental values is pervasive."[74] As noted by Jürgen Habermas, "the modern legal order can draw its legitimacy only from the idea of self-determination: citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees."[75] Hence, on this view, the principal source of legitimacy for governing legal institutions and their publicly promulgated norms is the *consent of the governed*.

Popular consent has a long pedigree, dating from the ancient Greeks but revived under social contract theory, as articulated variously by Hobbes, Locke, Rousseau, Kant, and, more recently, Rawls. Contractarians believed that consent to a legal contract between the parties legitimizes the subsequent enforcement of the contract against a party who has come to regret his original agreement. Analogously, the consent of the governed is believed to legitimize the coercion of the state when it enforces its laws to the frustration of those who violate or disagree with those particular laws.[76] The notion of consent continues to hold purchase as an intuitively appealing basis for legitimacy for pluralistic societies characterized by heterogeneous values and interests—all Western democracies and most contemporary nation-states.[77] Helpfully, the notion of consent also tells us whether citizens' voices matter in the making of the laws that govern all citizens. (The answer is a resounding yes.)

Yet, grounding the legitimacy of the state, its laws, and its institutions on the consent of the governed has always been problematic. There is, for example, the issue of what threshold of consent is sufficient to confer legitimacy. Unanimous agreement is impossible for any polity other than a small direct democracy. Moreover, unanimity carries the obvious pitfall of giving too much power to a single member to hold everyone else hostage by blocking initiatives that would benefit the collective, a problem that was frequently identified by the Founders.[78]

There is also the separate problem of the nature of consent. As Evan Fox-Decent has pointed out, *explicit* consent, even in the "most liberal, just and democratic state" is rare and, for peoples of occupied territories, nonexistent.[79] Arguments based on *hypothetical* consent do not really concern consent; they tend to collapse into arguments about what political and moral conditions of an

74. Cheema, *supra* note 65, at 456.

75. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 449 (William Rehg trans., 1996).

76. *See* Rosenfeld, *supra* note 62, at 1311–12.

77. *See id.* at 1311.

78. *See, e.g.*, THE FEDERALIST NO. 22 (Alexander Hamilton) (criticizing the unanimity rule); *see also* Sung Hui Kim, "*We (the Supermajority of the) People": The Development of a Rationale for Written Higher Law in North American Constitutions*, 137 PROC. AM. PHIL. SOC'Y 364, 383 (1993).

79. Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEEN'S L.J. 259, 288 (2005).

imagined state would be worthy of garnering a reasonable person's consent.[80] Those conditions and their underlying moral and prudential values, rather than the notion of consent, seem to drive the analysis. And *tacit* consent, inferred from an individual's continuing residence within the state and her failure to disclaim consent, seems fictional, especially for those without the financial resources to emigrate.[81] The notion of tacit consent assumes, quite unrealistically, that people can freely opt out of a state's legal jurisdiction.[82] As a result, it is not clear that tacit consent carries sufficient moral force to support legitimacy.

More fundamentally, democracy remains a procedural mode of legitimation, having nothing to say about the substantive content of legal norms but rather specifying only how to determine the content of legal norms. Accordingly, democracy is vulnerable to the same sorts of limitations as formal legality and procedural guarantees.[83] Even if we accept some form of representative democracy plus some version of majority rule as a tenable proxy for consent, we must recognize that popular consent is still compatible with a regime of malevolent and oppressive laws.

James Madison appreciated how a well-functioning democracy could come to oppress its citizens one day. During the Virginia ratifying convention in the debates over the federal constitution, Madison warned that "there [were] more instances of the abridgement of the freedom of the people, by gradual and silent encroachments of those in power, than by violent and sudden usurpations . . . ."[84] He observed that "on a candid examination of history, . . . the majority trampling on the rights of the minority have produced factions and commotions, which, in republics, have more frequently than any other cause, produced despotism."[85]

Recent developments seem to confirm Madison's warning about the vulnerabilities of democracies to incursions on the rule of law. In Hungary, Poland, Ecuador, Venezuela, Brazil, Philippines, and Turkey, among others, charismatic strong men have been swept into power by popular majorities disillusioned with the status quo and the characteristic dysfunctions of democracy—partisanship, gridlock, and bureaucracy.[86] Once in power, these leaders, assisted by a phalanx of lawyers, "use their democratic mandates to launch legal reforms that remove the checks on executive power, limit the challenges to their rule, and undermine the crucial accountability institutions of a democratic state."[87] Through incremental legal maneuverings, state institutions are repurposed to entrench

80. *Id.* at 289.

81. *See id.* at 291.

82. *See id.* at 292.

83. TAMANAHA, *supra* note 48 , at 99.

84. James Madison, *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 413 (Jonathan Elliot ed., 1836–45).

85. *Id.*; *see also* Kim, *supra* note 78, at 385. This sentiment was also expressed in *The Federalist Papers*. THE FEDERALIST NO. 10 (James Madison).

86. *See* Scheppele, *supra* note 31, at 545–56; Roberto Stefan Foa, *Why Strongmen Win in Weak States*, 32 J. DEMOCRACY 52, 52 (2021).

87. Scheppele, *supra* note 31, at 547.

executive power, opposition political parties are weakened, political opponents are economically and socially harassed, the liberal core of their constitutions is eviscerated, and elections are rigged to ensure the strong men's continued reign.[88] At the end of this transformation, these nations have effectively given up their right to self-determination, apparently trading the rule of law for the rule of men. What's more, those ends were accomplished through close attention to democratic form and legal process.[89]

The global phenomenon of democratic recession and legalistic autocracies suggests the importance of sharply distinguishing the ideal of the rule of law from the readily measurable conditions (including any formal and procedural guarantees) believed necessary to maintain it. We may, after all, retain much of the formal or procedural apparatus that supposedly guarantees the rule of law but still live in a society in which the law doesn't actually rule. To this end, we need a thicker, teleological conception of the rule of law that foregrounds its *telos*—the substantive value or purpose that explains why the complex system of laws and legal institutions that constitute "the law" is so valuable to us. Because this substantive value is normatively prior to and independent of any of the enumerated conditions commonly associated with the rule of law, those conditions alone will be insufficient to ensure that the outcome of any procedures won't violate the rule of law's *telos* or, for that matter, to promote a society in which law actually rules.[90]

D. Dignity

Referring to law as a "purposeful enterprise"[91] and his principles as part of a "morality of aspiration," Fuller seems to have acknowledged the need for a teleological conception of the rule of law.[92] But focused, as he was at the time, on the more narrow issue of the nature of legality,[93] he failed to identify an overarching purpose that, in my view, captures the reasons why we value the rule of law.[94] Fuller, however, was correct to point out that his principles of legality implicitly expressed a respect for human *dignity*:

> To embark on the enterprise of subjecting human conduct to the governance of rules involves . . . a commitment to the view that man is . . . a responsible agent, capable of understanding and following rules . . . . Every departure from the principles of law's inner morality is an affront to man's

88. *Id.* at 571–81.

89. *Id.* at 581.

90. *See* Corey L. Brettschneider, *A Substantive Conception of the Rule of Law: Non-Arbitrary Treatment and the Limits of Procedure*, *in* GETTING TO THE RULE OF LAW 52, 55 (James Fleming ed., 2011).

91. FULLER, *supra* note 55, at 145.

92. *Id.* at 183. These statements seem to acknowledge the presence of an end to which lawmakers ought to aspire.

93. Fuller's project was to explore the (modestly) moral nature of legality as a counterpoint to legal positivism's emphasis on the formal sources of authority. He was interrogating the character of law as a tool of governance, not the character of "good laws." *Id.* at 155–57.

94. Fuller's understanding of the purpose of law—"subjecting human conduct to the guidance and control of general rules" will be too modest for our purposes. *Id.* at 146.

> dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey . . . your indifference to his powers of self-determination.[95]

Similarly, Jeremy Waldron has persuasively argued that *dignity* is the moral foundation for all legal systems and the justification for the inclusion of critical procedural guarantees, such as a hearing before an impartial tribunal, the right to make arguments about how evidence bears on applicable legal norms, the right to counsel and a meaningful opportunity to prepare one's case, and the right to hear the tribunal's reasons that are responsive to the point of view of those subject to the arm of the law.[96] These and other procedural guarantees reflect respect for the dignity of individuals as "active centers of intelligence."[97] He writes:

> Applying a norm to a human individual . . . involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such, it embodies a crucial dignitarian idea—respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves.[98]

Waldron is surely correct in identifying dignity as a core value underlying the rule of law and insisting that the rule of law must confer on citizens the right to influence a decision that impacts them personally and directly.[99] But justifying procedures that ensure an individual's right of participation on the basis of dignity raises all sorts of thorny questions. Does dignity, for example, suggest that criminal defendants are further entitled to participate in jury deliberations in deciding their own fates?[100] Does dignity entitle civil or criminal defendants the right to gag their lawyers when they make perjurious statements or offer false evidence to a court or jury?[101] Does dignity accord criminal defendants the right to represent themselves pro se in a capital case?[102] What if the case is eligible for the death penalty and the defendant is innocent? For those of us worried about a potentially unbounded right of participation, referring to the vague value of dignity remains troublesome.

Also, dignity may be too protean of a concept to serve as the *telos* of the rule of law. In the 15th century, Pico della Mirandola in his *Oration on the Dignity of Man* identified dignity with freedom of choice. Imagining God to be addressing Adam, he wrote:

> The nature of all other beings is limited and constrained within the bounds of laws prescribed by Us. Thou [Adam], constrained by no limits, in

95. *Id.* at 162.

96. *See* Waldron, *supra* note 55, at 15.

97. *Id.* at 21–22.

98. *Id.* at 16.

99. *See id.* at 26.

100. *See* Brettschneider, *supra* note 90, at 57–58.

101. *Compare* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 170 (3d ed. 2004) (maintaining that lawyers should argue their clients' perjurious testimony to the jury), *with* Alan Donagan, *Justifying Legal Practice in the Adversary System*, *in* THE GOOD LAWYER: LAWYERS' ROLE AND LAWYERS' ETHICS 123, 146 (David Luban ed., 1984) (arguing that clients have a right not to incriminate themselves but no moral right to require lawyers to argue their perjurious testimony).

102. *Cf.* Brettschneider, *supra* note 90, at 57–58.

> accordance with thine own free will . . . shalt ordain for thyself the limits of thy nature . . . with freedom of choice and with honor . . . thou mayest fashion thyself in whatever shape thou shalt prefer.[103]

Thus, on Mirandola's account, dignity entails the honoring of an individual's will—as represented by his choices—by casting off any external restraints to his choosing—*i.e.*, allowing that person to do whatever he fancies. This notion of dignity is essentially the *negative liberty* embraced by Isaiah Berlin and strongly associated with the classical and modern liberal traditions.[104]

While Mirandola's identification of dignity with freedom of choice is now in vogue,[105] it seems too restrictive. Does it, for example, offend a billionaire's dignity to require him to pay his fair share of taxes? What about requiring a property owner to comply with local building standards and to obtain a building permit before building a house? What about requiring a driver to wear a seatbelt when driving? For those of us untroubled by many restraints on choice calculated to advance the common interests of the citizenry, Mirandola's association of dignity with negative liberty seems misplaced.

Another common understanding of dignity comes from the writings of Immanuel Kant in the 18th century. Kant believed that dignity was a property possessed by all persons by virtue of their being free rational beings.[106] All rational beings have a distinctive worth or value that is not relative to, conditional on, or derived from their usefulness to others or their life accomplishments.[107] Rather, their intrinsic worth comes from their humanity[108]—generally understood as their capacity for rational autonomy and moral agency.[109] Accordingly, all persons possess dignity and ought to be treated with respect—as ends in themselves and not merely as means—*i.e.*, not as if their only value derives from their utility to others.[110]

Kant's notion of dignity is intuitively attractive but also exceedingly vague. It remains unclear, for example, what limits Kantian dignity would place on our ability to intervene in an individual's decisions when her actions put her own autonomy at risk.[111] The uncertainty about the boundaries of this conception of dignity makes it a difficult candidate as the *telos* of the rule of law. What is

103. Pico D. Mirandola, *Oration on the Dignity of Man*, *in* THE RENAISSANCE PHILOSOPHY OF MAN 223, 225 (Ernst Cassirer, Paul O. Kristeller, & John H. Randall, Jr. eds., Elizabeth L. Forbes trans., 1948).

104. *See* ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 122 (1969).

105. Lawrence Friedman has referred to modern Americans as "the Republic of Choice." *See* LAWRENCE M. FRIEDMAN, THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE 61 (1990).

106. *See* JAMES RACHELS, *Kantian Theory: The Idea of Human Dignity*, *in* THE ELEMENTS OF MORAL PHILOSOPHY 114, 115 (1986).

107. *See id.*

108. *See* IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS 46 (Thomas K. Abbott trans., 1925); Robin S. Dillon, *Respect*, STANFORD ENCYCLOPEDIA PHIL. ARCHIVE: SUMMER 2021 EDITION (Feb. 18, 2018), https://plato.stanford.edu/archives/sum2021/entries/respect/ [https://perma.cc/A2X2-8TSM].

109. Commentators generally identify humanity with the "capacity to set ends and the capacity to be autonomous, both of which are capacities to be a moral agent . . . ." *Id.*; *see also* ALLEN W. WOOD, KANT'S ETHICAL THOUGHT 117 (1999).

110. *See supra* notes 106–07 and accompanying text.

111. *See* Wood, *supra* note 109, at 156.

needed, instead, is an intermediate substantive value—one that springs from dignity but is more bounded and slightly more determinate than dignity—to ground a meaningful but more tractable conception of the rule of law. While that alternative value is unlikely to provide clear-cut answers to all of the foregoing questions raised, that alternative value ideally has something to say about substantive human rights, malevolent and oppressive laws, and whether and whose voices matter in the making of laws that govern citizens.[112] For that alternative value, this Article looks to the republican intellectual tradition.

III. THE *TELOS* OF THE RULE OF LAW: THE RESTRAINT OF THE ARBITRARY EXERCISE OF POWER

In this Part, I construct an alternative, wider account of the rule of law that foregrounds the substantive value that explains why we desire the rule of law, rather than the measurable conditions believed necessary to maintain it. Drawing from the republican intellectual tradition, I argue that the *telos* of the rule of law is the *restraint of the arbitrary exercise of power*. I discuss the principles underlying the republican conception of the rule of law and then turn to the republican solution to the problem of arbitrary power—the formal and informal networks of reciprocal accountability designed to protect the rule of law. In my exposition of republican thought, I rely heavily on the account of the republican conception of freedom that has been articulated by Philip Pettit and the account of the republican understanding of the rule of law articulated by Gerald Postema.

A. The Republican Understanding of the Rule of Law

In recent decades, there has been a resurgence of interest in the republican intellectual tradition—specifically, the older, Italian-Atlantic tradition that venerated classical Rome and thus is also identified as the "neo-Roman" tradition.[113] This republican tradition flourished during the Renaissance in the northern Italian republics and became influential in the English Republic of the mid-seventeenth century, and the American and French Revolutions, among many others.[114] Its most famous exponents were Machiavelli; the English republicans Milton, Harrington, and Sidney; Montesquieu and Blackstone; and Jefferson and

112. *See infra* Section III.A.

113. *See* Quentin Skinner, *Freedom as the Absence of Arbitrary Power*, *in* REPUBLICANISM AND POLITICAL THEORY 83, 83–84 (Cécile Laborde & John Maynor eds., 2008). This brand of republicanism should not be confused with the later-derived, Continental and more communitarian form of republicanism advanced by Rousseau. *See* PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 12–18 (2012) [hereinafter PETTIT, ON THE PEOPLE'S TERMS] (noting distinctions between Italian-Atlantic and Continental republicanism and emphasizing the latter's communitarian character). Republicanism should also not be confused with classical liberalism, which supplanted republicanism's influence in the later eighteenth century and eventually gave rise to left-leaning and right-leaning variants of liberalism, such as constitutional liberalism and libertarianism. *See id.* at 8–11 (noting distinctions between republicanism and liberalism); PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 9 (1997) [hereinafter PETTIT, REPUBLICANISM].

114. *See* Jack M. Balkin, *Which Republican Constitution*, 32 CONST. COMMENT. 31, 34 (2017) (discussing the egalitarian strand of republicanism).

Madison.[115] More recently, historians, legal scholars, political scientists, and philosophers have resuscitated this republican tradition, adapting and revising its ideas to develop a neorepublican research program applicable to contemporary settings.[116]

Early modern republicans of the sixteenth and seventeenth centuries were concerned about the impermanence of governments, and they looked to models of political organization from ancient Rome and Greece, as well as their supposed modern counterparts, such as Venice, to develop their ideas about government.[117] They believed that there were three pure forms of government—monarchy, aristocracy, and democracy—and that these forms would invariably degenerate into their corrupt and unstable counterparts—tyranny, oligarchy and anarchy—cyclically progressing from one state into another.[118] A balanced government that embodied principles from each of the pure forms in virtual equipoise might achieve an equilibrium that could stave off degeneration: "The one, the few, and the many would act as effective checks on one another."[119] Republicans believed that certain Roman institutions, such as the dispersion of power among different bodies ("checks and balances"), the representation of different social classes in different forms, the limitation on tenure in office, the rotation of offices among different citizens, and the requirement of supermajority voting in some cases,[120] should be revised and incorporated into governments for the purpose of securing the stability, health and longevity of a regime.

One leading proponent of these Roman institutions and a central figure in republican intellectual thought was seventeenth-century English republican James Harrington. Harrington exerted a profound influence on the governments of the proprietary colonies of Carolinas, New Jersey, and Pennsylvania and enjoyed among American revolutionaries a reputation second only to that of John Locke.[121] Harrington and other republicans characteristically understood the meaning of an "empire of laws" in oppositional terms—as a contrast to its antithesis—"an empire of men."[122] Harrington extolled the virtues of a *commonwealth*—a society modeled after the "ancient prudence" of Rome and designed to advance the common good.[123] He contended that a "civil society of men . . .

115. *See id.* at 44–45, 53.

116. *See* Frank Lovett & Philip Pettit, *Neorepublicanism: A Normative and Institutional Research Program*, 12 ANN. REV. POL. SCI. 11, 12 (2009). For works on republicanism and legal ethics, see Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 242 (1992); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 32–33 (1993); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 14 (1988); Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 384 (2001).

117. ZERA S. FINK, THE CLASSICAL REPUBLICANS: AN ESSAY IN THE RECOVERY OF A PATTERN OF THOUGHT IN SEVENTEENTH CENTURY ENGLAND 28 (John W. Spargo ed., 1945).

118. *Id.*

119. *Id.* at 2.

120. *See* PETTIT, REPUBLICANISM, *supra* note 113, at 172–83; *see also* Kim, *supra* note 78, at 388–89.

121. Kim, *supra* note 78, at 371–72.

122. *See* JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS 8–9 (J. G. A. Pocock ed. & trans., Cambridge Univ. Press 1992) (1656).

123. *See id.* at 8.

instituted and preserved upon the foundation of *common right or interest* . . . is the *empire of laws and not of men*."[124]

On the other side, a society modeled after the "modern prudence" of the barbarian kingdoms in which "some man, or some few men, subject a city or a nation, and rule it according unto his or their *private interest* . . . may be said to be the *empire of men and not of laws*."[125] Hence, a state that only takes into account the interest of a single man (*e.g.*, a monarch) or of "some few families"[126] (*e.g.*, a faction) was one that was subject to the rule of men. By privileging the interests of the one or the few over the many, the corrupt state fails to manifest an equal degree of concern for each citizen. In doing so, that state violates a central tenet of republican political theory—the principle of equal citizenship—that all citizens are accorded free and equal social and political status.[127]

Law, understood in the broad sense as a mode of governance,[128] played a key role in sustaining the health of a republican regime and guaranteeing the free and equal status of citizens. And the foundation of the law was *reason*.[129] Like Rousseau and Kant, who believed that reason was the "post-metaphysical base for legal and political orders,"[130] republicans believed that *reason* was indispensable to a freedom-enhancing commonwealth.[131] Harrington maintained that a "republic of equals" required institutional frameworks designed to draw "perfect reason" and virtue out of imperfectly rational and corruptible persons.[132] The proper frameworks would help induce officials to act disinterestedly toward the public good and away from private interests, the latter of which was associated with "passion."[133] Thus, Harrington believed that a polity carefully constructed to be guided by reason, as opposed to passion,[134] would preserve the "liberty of a commonwealth" and protect citizens from the "lust of tyrants."[135]

Thus, based on Harrington's writings, we get some sense of the characteristics of a society that lives under the rule of law (an "empire of laws"). Such a society is a commonwealth guided by reason (the law) devoted to the *res*

124. *Id.* (emphasis added).

125. *See id.* at 9 (emphasis added).

126. *Id.*

127. *See* PETTIT, REPUBLICANISM, *supra* note 113, at 78.

128. To classical republicans, who were devoted to the task of intricate constitutional design, law was a mode of governance that relied on the "disciplined giving and taking and assessing of reasons," and not merely positive legal commands. Gerald J. Postema, *Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law*, *in* BENTHAM'S THEORY OF LAW AND PUBLIC OPINION 12, 13 (Xiaobo Zhai & Michael Quinn eds., 2014).

129. *Id.*

130. Jürgen Habermas, *Between Facts and Norms: An Author's Reflections*, 76 DENV. U. L. REV. 937, 940 (1999).

131. *See supra* note 128 and accompanying text.

132. *See* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 324 (2016).

133. *See id*.

134. HARRINGTON, *supra* note 122, at 10 ("Wherefore, as reason and passion are two things, so government by reason is one thing and the corruption of government by passion is another thing . . . .").

135. *Id.* at 19–20 ("Again, if the liberty of a man consist in the empire of his reason, the absence whereof would betray him unto the bondage of his passions; then the liberty of a commonwealth consisteth in the empire of her laws, the absence whereof would betray her unto the lusts of tyrants . . . .").

publica—the common interests of all citizens.[136] By contrast, a society that lives under the rule of men (an "empire of men") is a corrupt state guided by passion in the service of one or the few (and not the many). Importantly, the main substantive constraint on the empire of laws is the Roman principle of free and equal citizenship. Stated otherwise, the common interests of all citizens, whatever that turns out to be, must not undermine the free and equal status of citizens. But what is meant by "free and equal" citizenship?

Republicans had a distinctive understanding of freedom or liberty—one that was tightly linked to their understanding of equality and far more robust in many respects than the received wisdom of classical liberalism. While classical liberals emphasized the freedom of an individual's particular choices, republicans concentrated on the freedom of the *person*—a status-based freedom defined as a function of the individual's freedom over only a *common range* of critical choices and activities, secured on the basis of common norms and laws.[137]

Republicans characteristically understood freedom "in terms of the opposition between *liber* and *servus*, citizen and slave."[138] Slavery, the quintessence of unfreedom, is a status that arises from *dominium,* or domination.[139] A slave is one who lives *in potestate domini*—in the power of a master—that is, someone who is exposed to the power of another where such power can be exercised *arbitrarily*—that is, where such power can be exercised freely and without impunity according to another's "will or pleasure."[140] Importantly, the condition of domination comes about precisely because the slave lacks the law's protection of his freedom vis-à-vis a common core of critical choices and activities. The opposite of a slave is a *liber*—a person who is free in the sense that she is not dominated—that is, she is securely protected through citizenship *by law* against another's arbitrary exercise of power—at least with respect to those choices and activities deemed fundamental to that society.[141] In short, republicans understood freedom as the *absence of domination*.[142] And *law*, by protecting citizens from and providing recourse against arbitrary exercises of power, was seen as indispensable for securing this freedom.

Republicans recognized that there was always some gap between the formal ideal of freedom and the reality that a citizen was free only insofar as she enjoyed equal status in the society. Accordingly, the republican notion of equality was not formalistic; it was sensitive to the empirical reality of material conditions and common awareness. To understand this point, we turn to the republican image of the *liber*—the free citizen, who walks tall and looks others in the eye. As explained by Pettit:

136. *See* HARRINGTON, *supra* note 122, at 8.
137. PETTIT, ON THE PEOPLE'S TERMS, *supra* note 113, at 26.
138. PETTIT, REPUBLICANISM, *supra* note 113, at 31.
139. *See id.*
140. *Arbitrary*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).
141. Lovett & Pettit, *supra* note 116, at 17.
142. *Id.*

> In the received republican image, free persons can walk tall, and look others in the eye. They do not depend on anyone's grace or favour for being able to choose their mode of life. And they relate to one another in a shared, mutually reinforcing consciousness of enjoying this independence. Thus, in the established terms of republican denigration, they do not have to bow or scrape, toady or kowtow, fawn or flatter; they do not have to placate any others with beguiling smiles or mincing steps. In short, they do not have to live on their wits, whether out of fear or deference. They are their own men and women, and however deeply they bind themselves to one another, as in love or friendship or trust, they do so freely, reaching out to one another from positions of relatively equal strength.[143]

In contrast to the foregoing archetype of republican dignity, the dominated *servus* cannot walk tall, look others in the eye, or freely speak his mind. The slave cannot be free because he lacks the law's protection from the arbitrary exercise of his master's power. Moreover, his denigrated status would be a matter of public awareness and would impede his ability to live with equal dignity.[144]

What can we infer from this image of the *liber*? Space constraints prevent us from sketching out all its implications. Suffice it to say that free and equal citizenship entails both (i) the public acknowledgment of each citizen's equal moral worth in the polity, as expressed by the law, and (ii) the material and legal conditions sufficient to enable the *liber* to live with equal dignity—to walk tall and look others in the eye. The first condition imposes a substantive constraint on the content and purpose of legal norms (*i.e.*, they must not advance sectarian purposes or prefer the interests of the one or the few over the many) and entitles citizens not only to equal rights under the law but also equal rights to shape the law[145]—equality *before* and equality *over* the law.[146] (Only if citizens have equal rights to shape the law will they be free from *imperium*—domination by the state.[147]) Therefore, the republican notion of free and equal citizenship embraces the view that all citizens' voices matter and matter equally in the making of the laws.

The second condition requires the state to take affirmative measures to provide a legal and material environment designed to entrench citizens' "fundamental liberties"—those liberties critical to their equal status in the polity.[148] "[F]ree persons are free in virtue of being secured in the exercise of a specific class of choices, not in making just any old choices."[149] Those protected choices will *not* include the choice to appropriate as much land as possible, to exploit one's

143. PETTIT, ON THE PEOPLE'S TERMS, *supra* note 113, at 82.

144. *See id.* at 83.

145. Roman law gave citizens the power to form, enact and administer the law through mutually checking, popularly representative bodies and officials, often referred to as a "mixed constitution," which accorded power to all free sectors of society. PHILIP PETTIT, JUST FREEDOM: A MORAL COMPASS FOR A COMPLEX WORLD 6 (2014).

146. *Id.*

147. *See id.*

148. PETTIT, ON THE PEOPLE'S TERMS, *supra* note 113, at 83.

149. *Id.*

workers, or to launch an aircraft into outer space.[150] Rather, those choices will relate only to those domains deemed essential for citizens to live with equal dignity—such the right to vote, the right to express one's thoughts, the right to education, the right to practice one's religion, the right to safe housing, the right to earn a living in a safe workplace, the right to have a family, etc. Therefore, the republican notion of free and equal citizenship requires the state to take affirmative measures to protect a cluster of substantive human rights.

To be sure, republicans in earlier times did not embrace the more capacious sense of equality on which modern democracies are founded. Republicans understood citizenship as entailing civic responsibilities and did not regard every member of society as suitable for discharging those high-minded responsibilities.[151] In their view, liberty derived from personal autonomy, which was made possible through the secure possession of landed property.[152] "The citizen had to be free to make moral choices in the public arena. Anyone, such as women, slaves, or minors, whose will depended on the choices of another could not be a responsible citizen."[153] Accordingly, only propertied, male heads of households were traditionally seen as eligible for citizenship.[154] But there is no reason why we need to confine ourselves to this obsolete notion of equality. Modern neorepublicans have adapted the classical republican notion of equal status by embracing the extension of equal citizenship rights to all adult, able-minded, more or less permanent residents of society.[155]

We now have a fuller understanding of the republican conception of the rule of law as contrasted from the rule of men. To live under the rule of men is to subsist under the condition of domination; it is to be vulnerable to the arbitrary exercise of power. In contrast, to live under the rule of law is to live in a shared political system where citizens are free and equal in the sense of being nondominated—*i.e.*, by virtue of law's various protections vis-à-vis fundamental choices, citizens are not exposed to the arbitrary exercise of power. In other words, to live under the rule of law means that law will restrain all arbitrary exercises of power in the polity. Tamanaha aptly captures the point of the rule of law:

> [T]o live under the rule of law is not to be subject to the unpredictable vagaries of other individuals—whether monarchs, judges, government officials, or fellow citizens. It is to be shielded from the familiar human weaknesses of bias, passion, prejudice, error, ignorance, cupidity, or whim . . . . It reflects a choice, which extends as far back as Aristotle, to prefer rule by law to unrestrained rule by another, even by a wise person, out of concern for the potential abuse that inheres in the power to rule.[156]

150. *See id*.
151. John M. Murrin, *Gordon S. Wood and the Search for Liberal America*, 44 WM. & MARY Q. 597, 599 (1987).
152. *Id.*
153. *Id.*
154. Lovett & Pettit, *supra* note 116, at 17.
155. *See, e.g.*, *id.*; PETTIT, ON THE PEOPLE'S TERMS, *supra* note 113, at 87.
156. TAMANAHA, *supra* note 48, at 122.

Accordingly, we can say that the *telos* of the republican conception of the rule of law is the *restraint of the arbitrary exercise of power*.[157] As suggested in the foregoing exposition, this *telos* has implications for the moral content of legal norms (they must not advance sectarian purposes or prefer the interests of the one or the few over the many), substantive human rights (the state must entrench those domains that are critical for maintaining equal status), and whether and which citizens' voices matter in the making of laws (all citizens' voices matter and matter equally in the making of the laws).[158]

B. Principles Underlying the Republican Understanding of the Rule of Law

In light of this *telos*, there are several additional implications worth emphasizing in a more systematic fashion. First, *all* abuses of power, and not just the specific abuses inflicted by the law, reside within the rule of law's scope of concern. As Postema has explained, the rule of law "sets its face against all abuses of power in the polity[,]" including *political* power, which is wielded by all governments and in democracies by the governed, and *social power*, which is wielded by individuals, groups, and organizations, including corporations.[159] This broader interpretation of the rule of law's scope of concern contrasts with the position held by Joseph Raz, who argues that the rule of law only addresses abuses of power created by the law itself.[160] The broader interpretation also conflicts with the "public law presumption"[161]—the view that the rule of law is a public law doctrine—*i.e.*, one that only requires *public* officials to operate within a limiting framework of the law.[162]

Republicans worried about the perils of private power and understood that both private and public sources of domination could undermine freedom. For example, republicans of the founding generation feared the rise of an oligarchy that could control markets and exert disproportionate political power; hence, they insisted that the state had a duty to cultivate a political economy that inhibited agglomerations of economic power and vast inequalities of wealth.[163] Harrington himself favored laws designed to ensure a balanced division of property to avoid political power being concentrated into the hands of the few.[164] And contemporary neorepublicans have highlighted certain categories of private relationships,

157. Postema, *supra* note 128, at 14; Krygier, *supra* note 37, at 75; Brettschneider, *supra* note 90, at 57.

158. *See supra* Section III.A.

159. Postema, *supra* note 128, at 12–13.

160. *See* JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 214 (1979). By contrast, Waldron has argued that the rule of law aims to correct abuses of *political* power. Waldron, *supra* note 55, at 11.

161. Lisa M. Austin & Dennis Klimchuk, *Introduction*, *in* PRIVATE LAW AND THE RULE OF LAW 1 (Lisa M. Austin & Dennis Klimchuk eds., 2014) (discussing the "public law presumption").

162. *See* TAMANAHA, *supra* note 48, at 114–19. Incidentally, this public law presumption seems to be embraced by the organized bar, which has long insisted that self-regulation of the legal profession is essential to guard against *government* domination, while often remaining silent about private abuses of power.

163. *See* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1779-1815 8 (2009); Balkin, *supra* note 114, at 53.

164. POCOCK, *supra* note 132, at 387–88; HARRINGTON, *supra* note 122, at 12–13.

commonly characterized by power asymmetries, as salient sources of domination—such as those of wife and husband, employee and employer, and debtor and creditor, and thus warranting the attention and efforts of republican reformers.[165] By contrast, classical liberals were largely unperturbed by disparities in privately accumulated wealth and embraced a mostly unfettered free market where private property could be put to its highest valued use.[166]

Second, the central trait that makes an exercise of power morally objectionable is its *arbitrariness*. Regrettably, a precise definition of arbitrariness remains elusive, and there is no modern neorepublican consensus on this crucial question.[167] I make no attempt in this Article to offer and defend the best definition of arbitrariness. Rather, I merely refer to one definition of arbitrariness that has roots in Roman law.[168]

In my view, power is arbitrarily exercised if it is exercised according to the powerholder's will or pleasure, without consideration of the relevant perspectives and interests of those affected by such power.[169] In other words, the problem with arbitrary power is not that it is "unreasoned, or unpredictable, or even in a strict sense unruly."[170] (Indeed, a wise, sweet-tempered master can still exercise arbitrary power over his slaves.[171]) The problem is that arbitrary power ignores the perspectives and interests of those affected by such power. By wholly disregarding those perspectives and interests, the powerholder fails to see those affected as persons of equal moral worth. This failure expresses a strong form of disrespect that is demeaning.[172] Therefore, *at minimum*, for power to be exercised in a nonarbitrary manner, it must give due consideration to the perspectives and interests of those affected by such power.

165. *See* PETTIT, ON THE PEOPLE'S TERMS, *supra* note 113, at 114.

166. Brian Z. Tamanaha, *The Dark Side of the Relationship Between the Rule of Law and Liberalism*, 3 N.Y.U. J.L. & LIBERTY 516, 521 (2008).

167. For different definitions of arbitrariness, see, for example, PETTIT, REPUBLICANISM, *supra* note 113, at 55 ("When we say that an act of interference is perpetrated on an arbitrary basis, then, we imply that . . . it is chosen or not chosen at the agent's pleasure . . . we imply that it is chosen or rejected without reference to the interests, or the opinions, of those affected. The choice is not forced to track what the interests of those others require according to their own judgements."); Philip Pettit, *The Determinacy of Republican Policy: A Reply to McMahon*, 34 PHIL. & PUB. AFFS. 275, 280 (2006) (defining a *public* act of interference as nonarbitrary "so far as it is forced to track the common avowal-ready interests of the citizenry"; defining a *private* act of interference as nonarbitrary so far as "it is forced to track the avowal-ready interests" of the interferee); FRANK LOVETT, A GENERAL THEORY OF DOMINATION AND JUSTICE 96 (2010) ("[L]et us define social power as arbitrary to the extent that its potential exercise is not externally constrained by effective rules, procedures, or goals that are common knowledge to all persons or groups concerned.").

168. *See* Postema, *supra* note 128, at 12 (noting the medieval Roman law origins of this definition of arbitrariness).

169. *Cf.* PETTIT, REPUBLICANISM, *supra* note 113, at 55 ("[A]ny arbitrary act . . . . is chosen or rejected without reference to the interests, or the opinions, of those affected. The choice is not forced to track what the interests of those others require according to their own judgements.").

170. Postema, *supra* note 128, at 12.

171. *See* Lovett & Pettit, *supra* note 116, at 14 ("Even when the master leaves his slaves alone, the fact remains that they live under his supervision and control, and he is able to impose his will actively whenever he wishes.").

172. *See* Deborah Hellman, *Equal Protection in the Key of Respect*, 123 YALE L.J. 3036, 3058–59 (2014).

Third, the *law* serves as the principal instrument by which the arbitrary exercise of power is restrained. After all, law cannot rule if law does not occupy a prominent place in checking arbitrary power exercised over the fundamental liberties of citizens. In other words, the governing legal framework is the preferred *remedy* for the problem of the arbitrary exercise of power.[173] The legal system performs this function ex ante by deterring arbitrary exercises of power and ex post by affording citizens recourse against arbitrary exercises of power.[174] Importantly, the legal system cannot guarantee that arbitrary exercises of power won't ever happen, but it can reduce the frequency of their occurrence by holding public and private powerholders accountable to the perspectives and interests of those affected their power—by compelling the due consideration of those perspectives and interests.

Fourth, the law *itself* must live up to the *telos*—that is, the legal system must not itself reflect or exacerbate the arbitrary exercise of power. The law cannot legitimately serve as the proper remedy to the problem of the arbitrary exercise of power if the law reinscribes the problem by dominating its own citizens. Therefore, in order to live up to the *telos* of the rule of law, citizens must have an equal voice in the making of the laws and the legal system must be designed and reinforced to account for, and must actually account for, the common interests of all citizens, consistent with their free and equal status. This principle also suggests that malevolent or oppressive laws designed to advance sectarian purposes are inconsistent with the rule of law.

C. Formal and Informal Networks of Reciprocal Accountability

Republicans recognized, however, a persistent problem with the notion that law, and not man, should fetter the arbitrary exercise of power. Harrington noted:

> But seeing they that make the laws in commonwealths are but men, the main question seems to be how a commonwealth comes to be an empire of laws and not of men? [O]r how the debate or result of a commonwealth is so sure to be according unto reason, seeing they who debate and they who resolve be but men. And 'as often as reason is against a man, so often will a man be against reason.'[175]

Similarly, Tamanaha observed, "[t]he idea of 'the rule of law, not man' has been forever dogged by the fact that laws are not self-interpreting or self-applying. The operation of law cannot be sequestered from human participation."[176] Indeed, a skeptic of the rule of law would insist that "laws *cannot* . . . rule, only *people* rule."[177]

173. *See* Postema, *supra* note 128, at 13.

174. *Id.*

175. HARRINGTON, *supra* note 122, at 20–21.

176. Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, 2012 SING. J. LEGAL STUD. 232, 244 (2012).

177. Gerald J. Postema, *Fidelity, Accountability and Trust: Tensions at the Heart of the Rule of Law*, *in* PHILOSOPHY OF LAW AS AN INTEGRAL PART OF PHILOSOPHY: ESSAYS ON JURISPRUDENCE OF GERALD J. POSTEMA 33, 38 (Thomas Bustamante & Thiago Decat, eds., 2018).

The republican answer to this conundrum was to design and implement *formal* networks of reciprocal or mutual accountability.[178] At its most basic level, a network of reciprocal accountability can be modeled after the children's game of rock-paper-scissors: scissors cut paper, paper covers rock, rock blunts scissors.[179] The republican formal network of accountability would disperse the power to articulate, administer and enforce the law among various institutions in such a way as to "deny control over the law to any one individual or body."[180] Here, we come full circle with those Roman institutions that have long preoccupied republicans. For example, Harrington proposed that lawmaking be divided between a "reflective senate," which would debate alternative courses of action, and a popular assembly, which would decide between the proposals by casting ballots in silence without ever debating.[181] Building on and adapting these insights, the framers of the U.S. Constitution devised a formal network of accountability reflected in a mixed constitutional order, characterized by a bicameral legislature, an independent judiciary, and an executive.[182]

Republicans also recognized that in order for power to be properly restrained and for freedom to be properly secured, formal networks of accountability must be actively supported and actively checked by *informal* networks of accountability that operate in the realm of civil society.[183] Today, those informal networks may include the media, nongovernmental and nonprofit institutions, universities, professional associations, business organizations, trade unions, watchdog groups, and social movements.[184] As scholars have increasingly recognized, citizens also play a special role not only formally at the ballot box but also informally through expressed or anticipated public reaction to official action in both shaping interpretations of the law and in holding officials accountable to the rule of law.[185] In public remarks on January 6, 2022, President Joe Biden highlighted the informal yet crucial role of citizens vis-a-vis the rule of law when he urged, "It's up to all of us, to we the people, to stand for the rule of law . . . ."[186]

Also, republicans believed that both formal and informal networks must be vigorous—that is, these networks must be sustained by habits of civic virtue and notions of good citizenship—what Postema refers to as the requisite *ethos*—a widely shared cultural commitment among citizens to restrain the arbitrary

178. *See id.* at 13.

179. Postema, *supra* note 128, at 29.

180. PETTIT, ON THE PEOPLE'S TERMS, *supra* note 113, at 5.

181. HARRINGTON, *supra* note 122, at xxii; POCOCK, *supra* note 132, at 394.

182. U.S. CONST. art. 1 § 1; *id.* art. 2 § 1; *id.* art. 3, § 1.

183. Postema, *supra* note 177, at 54–57.

184. *See id.* at 30, 35.

185. *See, e.g.*, LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 232 (2004); Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 551 (2018).

186. Philip Bump, *America's Living Presidents—Save One—Warn About the Danger Our Democracy Faces*, WASH. POST. (Jan. 6, 2022, 10:48 AM), https://www.washingtonpost.com/politics/2022/01/06/americas-living-presidents-save-one-warn-about-danger-our-democracy-faces/ [https://perma.cc/5T35-P6JN].

exercise of power, notwithstanding significant disagreement and division.[187] Recall the famous republican maxim that the price of liberty is eternal vigilance.[188] Machiavelli believed that "just as good morals, if they are to be maintained, have need of the laws, so the laws, if they are to be observed, have need of good morals."[189]

Without this ethos—this widely shared cultural commitment to restrain the arbitrary exercise of power, legal institutions are just buildings, officials who administer the laws are just bureaucrats, and constitutions and legal rules are just pieces of paper.[190] If this ethos is not pervasive, the rule of law will be weak. Indeed, it is the failure of this ethos that most credibly explains the proliferation of the legalistic autocracies of the twenty-first century.

If the *telos* of the rule of law is to *restrain arbitrary exercises of power*, what are the implications for lawyers?

IV. IMPLICATIONS FOR THE LEGAL PROFESSION

In this Part, I explore the implications of the republican conception of the rule of law for the legal profession. I explain why it makes sense to impose on lawyers specially tailored duties to uphold the rule of law in a manner that is faithful to its *telos*. I then propose a framework of rule-of-law duties designed to express fidelity not only to the law itself but also to the *telos* of the rule of law. Finally, I answer the objection that granting permission to lawyers to refuse to assist their clients' projects on rule-of-law grounds would impermissibly transfer power from clients to lawyers and lead to "the rule of lawyers."

Importantly, the comments in this Part are confined to those societies that may be considered "tolerably free"—that is, the U.S. and other democracies in which citizens maintain, through their elected representatives—effective control over the law—*i.e.*, citizens are *generally* not subject to the arbitrary exercise of power by the state, and control over the law is apportioned more or less on an equal basis. Of course, no society, including ours, is entirely free in this sense; societies are more or less free. As a result, the strength of the duties described in this Part may depend on the degree to which the society is free.

187. Gerald J. Postema, *Law's Ethos: Reflections on a Public Practice of Illegality*, 90 B.U. L. REV. 1847, 1857–59 (2010).

188. PETTIT, REPUBLICANISM, *supra* note 113, at 250.

189. *See* Niccolò di Bernardo del Machiavelli, *Discourses on the First Decade of Titus Livius*, *in* MACHIAVELLI: THE CHIEF WORKS AND OTHERS 241 (Allan Gilbert trans., 1965); PETTIT, *supra* note 145, at 59. This is one area in which republicans disagreed. While Machiavelli believed that government corruption was caused in part by the loss of moral virtues, Harrington emphasized the maldistribution of property as causing the maldistribution of political authority. *See* POCOCK, *supra* note 132, at 387.

190. *Cf.* JANE STROMSETH, DAVID WIPPMAN, & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 76 (2006).

A. Fidelity to the Legal System

As explained above, according to the republican tradition, formal and informal networks of reciprocal or mutual accountability are essential to protecting the rule of law.[191] As judges, prosecutors, and government legal counsel, lawyers occupy key positions in the *formal* networks of accountability vested with the authority to articulate, administer and enforce laws. In those roles, lawyers have a general obligation to ensure that arbitrary exercises of power are prevented and remedied by law and that law itself does not reflect or exacerbate the arbitrary exercise of power.

Lawyers in the private sector also serve as crucial nodes in the more *informal* networks of accountability that republicans believed were so important to safeguarding freedom and the rule of law. As members of the citizenry, lawyers share a civic obligation to actively support and actively check both formal and informal networks of accountability in their day-to-day practices to ensure a reasonable prospect of accountability for all.

But lawyers—whether in public service or in private practice—are not ordinary citizens.[192] Without lawyers, it would be extremely difficult for publicly promulgated general norms to govern behavior and for arbitrary exercises of power to be remedied by the legal system. As Waldron has argued, all systems that can be properly described as *legal* systems have a distinctive character: they operate through the "responsible agency of ordinary human individuals."[193] While legal systems must resort to physical coercion in certain circumstances, they "strain[] as far as possible to look for ways of enabling voluntary application of its general norms and many of its particular decrees."[194] As Waldron further explained:

> Ruling by law is quite different from herding cows with a cattle prod or directing a flock of sheep with a dog. It is also quite different from eliciting a reflex recoil with a scream of command. The publicity and generality of law look to what Henry Hart and Albert Sacks called "self application," that is, to people's capacities for practical understanding, for self-control, and for the self-monitoring and modulation of their own behavior, in relation to norms they can grasp and understand.[195]

By identifying and explaining legal norms to anyone willing to pay, private lawyers make those norms accessible and comprehensible to the public, in turn enabling citizens to self-apply those norms.[196] Indeed, legal norms are "frequently indeterminate until interpreted and applied to particular circumstances by . . . a lawyer advising a client."[197] Also, as David Luban has observed, "lawyers are trained to debate and interpret law by looking at its possible rational

191. *See supra* Section III.C.
192. *See, e.g.*, Gordon, *supra* note 116, at 14.
193. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 26 (2008).
194. *Id.* at 27.
195. *Id.* at 26–27.
196. Lawyers in public service perform a similar role for government policymakers.
197. Dana A. Remus, *Reconstructing Professionalism*, 51 GA. L. REV. 807, 865 (2017).

purposes, and this form of discourse . . . helps blunt the edges of oppression."[198] The practice and expertise of lawyers in translating norms to the public and subjecting norms to rigorous rational scrutiny facilitate citizens' voluntary compliance with the laws and enables the legal system to function in a manner that respects both human agency and reason—values that are inherent in the rule of law and integral to a society that cherishes the restraint of arbitrary power.

In addition, lawyers are crucial participants in the development of the infrastructure of civil society, which stands as an important counterweight not only to state power but also to concentrated private power.[199] Fuller recognized that lawyers act as the "architect[s] of social structure," not only "where great affairs of state are involved and constitutions or international treaties are being brought into existence, but in the most commonplace arrangements," such as when lawyer draft contracts, incorporate businesses, or write bylaws for organizations.[200] The critical positioning of lawyers in the formal and informal networks of accountability, coupled with their unique ability to inculcate (or derogate) rule-of-law values, justifies imposing on lawyers a layer of demanding and specially tailored duties to uphold the rule of law in a manner that is faithful to its *telos*.

The view that professional communities are specially situated to transcend self-interest and foster civic responsibility is not novel. In the 1830s, David Hoffman portrayed the lawyer's responsibilities as putting the public good above all else and counseled lawyers to keep their "conscience" distinct from their clients.[201] During the same period, Alexis de Tocqueville observed how American lawyers "stepped forward to fill the vacuum of public leadership"[202] and described the legal profession as the "only aristocratic body which can check the irregularities of the people."[203] In the late 19th and early 20th centuries amidst a crisis of professionalism,[204] Emile Durkheim identified the professions as crucial actors in maintaining social order and nurturing common values in the midst of the social and economic upheaval of the Industrial Revolution.[205] Durkheim implored that "sufficiently cohesive self-regulating occupations, which teach their members to look away from their own self-interest, and rather, toward the whole community, and thus develop the general disinterestedness on which moral

198. DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 5 (2007).

199. *Cf. id.* at 5–6 ("[L]awyers . . . contribute to the flourishing of civil society institutions that are themselves counterweights to oppressive state authority.").

200. Lon L. Fuller, *The Lawyer as an Architect of Social Structure*, *in* THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 285, 285 (Kenneth I. Winston ed., 2001).

201. Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 389 (2001).

202. Robert W. Gordon, *The Citizen-Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1183 (2009).

203. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 285 (Henry Reeve trans., 3rd ed. 1835).

204. In the late nineteenth century, there was an "extraordinary outpouring of rhetoric . . . on the theme of the [legal] profession's 'decline from a profession to a business.'" *See* Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870–1910*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 61, 61 (Gerard W. Gawalt ed., 1984); *see also* Russell G. Pearce & Pam Jenoff, *Nothing New Under the Sun: How the Legal Profession's Twenty-First Century Challenges Resemble Those of the Turn of the Twentieth Century* 40 FORDHAM URB. L.J. 481, 484 (2012).

205. *See* Remus, *supra* note 197, at 835–37.

activity is based" must monitor ethics.[206] In the 1950s, Talcott Parsons described the lawyers' role in society as an "interstitial" one—*i.e.*, *dependent* on the state for its monopolistic prerogative[207] to interpret the law[208] but also *independent* from the state insofar as lawyers earn their living primarily by representing private individuals and groups.[209] Given this interstitial role, Parsons urged that lawyers serve as *trustees* of the legal tradition with a "fiduciary responsibility" to maintain, develop and implement it, including a responsibility for its "integrity."[210] Also, Parsons called on lawyers to act as "a kind of buffer between the illegitimate desires of [their] clients and the social interest."[211]

More recently, legal scholars have revived Talcott's notion of *fiduciary*, a concept rooted in the Roman law of guardianship,[212] to advocate for a more public-spirited notion of professionalism.[213] Evan Criddle and Evan Fox-Decent have argued that lawyers should be understood as fiduciaries with *dual public and private commissions*, as evidenced by the normative structure of their duties.[214] They maintain that lawyers as fiduciaries not only owe various "first-order" duties that specify how lawyers should act in their clients' best interests, but also wider "second-order" duties to the broader public that go beyond strictly refraining from facilitating unlawful conduct.[215] These duties impose affirmative obligations on lawyers to safeguard the integrity of the legal system in ways that would be inconceivable for ordinary citizens.

These second-order duties include, for example, an obligation to report another lawyer's violation of the professional code that raises "a substantial question" as to that lawyer's fitness for practice,[216] an obligation to disclose to the tribunal controlling precedent that is adverse to one's own client (if opposing

206. Christine Parker & Tanina Rostain, *Law Firms, Global Capital, and the Sociological Imagination*, 80 FORDHAM L. REV. 2347, 2356 (2012) (paraphrasing Durkheim).

207. Talcott Parsons, *A Sociologist Looks at the Legal Profession*, *in* ESSAYS IN SOCIOLOGICAL THEORY 370, 374–75 (revised ed., 1954).

208. Furthermore, some public offices are reserved exclusively for lawyers, such as the judiciary. *Id.* at 374, 378.

209. *Id.* at 374.

210. *Id.* at 374–75, 381, 384.

211. *Id.* at 384. Erwin Smigel described the self-conception of Wall Street lawyers as "guardians of the law" with a higher commitment to the public good. *See generally* ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? (1964).

212. *See* Daniel Lee, *"The State Is a Minor": Fiduciary Concepts of Government in the Roman Law of Guardianship*, *in* FIDUCIARY GOVERNMENT 119, 121 (Evan J. Criddle, Evan Fox-Decent, Andrew S. Gold, Sung Hui Kim & Paul B. Miller eds., 2018).

213. *See, e.g.*, Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1319 (2006) (citing "lawyers' role as . . . fiduciaries for the legal system"); Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1200 (2003) ("[L]awyers are not simply agents of clients—they are also licensed fiduciaries of the legal system."); *cf.* W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1178 (2005) (referring to lawyers as "custodians of the law").

214. Evan J. Criddle & Evan Fox-Decent, *Guardians of Legal Order: The Dual Commissions of Public Fiduciaries*, *in* FIDUCIARY GOVERNMENT (Evan J. Criddle, Evan Fox-Decent, Andrew S. Gold, Sung Hui Kim & Paul B. Miller eds., 2018).

215. *Id.*

216. MODEL RULES OF PRO. CONDUCT r. 8.3 (a) (AM. BAR ASS'N 2021).

counsel has neglected to cite it),[217] an obligation to avoid knowingly presenting false evidence and to take remedial measures to rectify perjury before a tribunal,[218] and an overarching obligation to "exercise independent professional judgment and render candid advice."[219] These obligations not only reinforce the lawyers' traditional role as "officers of the court" but are crucial for maintaining the rule of law.[220] These second-order duties both condition and trump first-order duties to ensure that the lawyer's discharge of first-order duties does not compromise the integrity of the legal system.[221]

Adopting Criddle and Fox-Decent's taxonomy, we can recognize the lawyer's duty to uphold the rule of law in light of its *telos* as an important second-order duty that may trump the first-order duty to clients, including the duties of competence, confidentiality and loyalty. Moreover, this duty can be articulated as a fiduciary or fiduciary-like expression of fidelity to the legal system, which at the most basic level requires lawyers to exercise independent judgment when advising clients or advocating before tribunals. Finally, if the duty is to perform a meaningful role in ensuring that a society lives under the rule of law, the content of the duty must not be rigidly moored to formal legality but, rather, responsive to the core aspiration of the rule of law—the restraint of the arbitrary exercise of power.

By referring to lawyers as "fiduciaries" of the legal system, I do not mean to suggest that lawyers in private practice are quasi-public officials or to disclaim the civic nature of the duties that will be proposed. The republican tradition understood *all* citizens, public or private, as having special responsibilities to the polity.[222] A duty can stem from an individual's role as a citizen but nonetheless still recognize that citizen's special relationship with a particular network of accountability crucial to promoting the rule of law. For example, the preamble to the ABA Model Rules acknowledges both the lawyer's position as citizen and its special responsibility to the legal system when it notes that a "lawyer is . . . a public *citizen* having special responsibility for the quality of justice."[223] Also, whether lawyers should be formally labeled as fiduciaries or whether that label is intended as metaphor is not important to this project. Duties imposed on fiduciaries can vary considerably, depending on the type of fiduciary—for example, trustees' duties are considerably more demanding than corporate directors.[224] Suffice it to say that we need not formally classify lawyers as fiduciaries of the

217. *Id.* at r. 3.3 (a)(2).

218. *Id.* at r. 3.3(a)–(b).

219. *Id.* at r. 2.1.

220. Rhode, *supra* note 213, at 1319.

221. *See* Criddle & Fox-Decent, *supra* note 214, at 67, 68–76, 80–83. For a critique, see W. Bradley Wendel, *Should Lawyers Be Loyal to Clients, the Law or Both?*, 65 AM. J. JURIS. 19, 38 (2020).

222. *See supra* Section III.A.

223. MODEL RULES OF PRO. CONDUCT, Preamble, para. 1, 6 (AM. BAR ASS'N 2021).

224. Adam S. Hofri-Winogradow, *Contract, Trust, and Corporation: From Contrast to Convergence*, 102 IOWA L. REV. 1691, 1692 (2017).

legal system in order to assign second-order duties to uphold the rule of law in light of its *telos*.[225]

Also, by referring to the general duty to uphold the rule of law in light of its *telos* as a "duty,"[226] I am not suggesting that this duty and its constituent obligations (proposed in the next section) should be enforced through professional discipline. No set of rules, after all, can effectively mandate the *ethos* needed to ensure that our legal system restrains the arbitrary exercise of power. Rather, the proposed obligations should be understood as presumptively strong political-moral[227] obligations, grounded in republican values. Accordingly, these obligations and their further specification should not be regarded as mere matters of individual moral conscience but should be considered by the profession's leadership as a call to work towards a society in which arbitrary power is restrained and law actually rules.

B. The Lawyer's Duty to Uphold the Rule of Law in Light of its Telos

There are two constituent obligations or elements of the lawyer's duty to uphold the rule of law. The first element obliges lawyers to express fidelity to the law, which translates into a prima facie obligation to respect the positive laws.[228] The second element obliges lawyers to express fidelity to the *telos* of the rule of law, which obliges lawyers (i) to accord greater respect to those laws that restrain the arbitrary exercise of power, (ii) to resist laws that reinscribe or exacerbate the arbitrary exercise of power, and (iii) to refrain from being complicit in the arbitrary exercise of power, even where there is no formal violation of law.[229]

1. Fidelity to the Law

The duty to uphold the rule of law should express fidelity to law's place as the principal means by which arbitrary power is restrained. Hence, some prima facie obligation to respect promulgated legal norms—the output of those norm-generating and norm-applying institutions that are part of the formal networks of accountability—seems reasonable. Generally, lawyers can express respect for the law by holding themselves and their clients accountable to the law. Practically, this duty of respect translates into a presumption that lawyers should

225. A full defense to classifying lawyers as "fiduciaries" would require a lengthy discussion on how courts have determined fiduciary status, which is beyond the scope of this Article. Suffice it to say that recognizing lawyers as fiduciaries of the legal system seems to be consistent with the primary object of fiduciary law, which, as I have argued elsewhere, is "to protect and promote those socially valuable relations that ordinarily require a high level of trust to serve the purposes of the relation." *See* Sung Hui Kim, *The Supreme Court's Fiduciary Duty to Forgo Gifts*, *in* FIDUCIARY GOVERNMENT 205, 217–19 (Evan J. Criddle, Evan Fox-Decent, Paul B. Miller, Andrew Gold, Sung Hui Kim eds., 2018) (describing the purpose of fiduciary law).

226. Although some philosophers distinguish between "duty" and "obligation," I use the terms "duty," "obligation," and "responsibility" interchangeably. *See* A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 11–16 (1979).

227. For one take on the meaning of political morality as relevant to legal ethics, see W. Bradley Wendel, *Legal Ethics as Political Moralism or the Morality of Politics*, 93 CORNELL L. REV. 1413, 1415 (2008).

228. *See infra* Subsection IV.B.1.

229. *See infra* Subsection IV.B.2.

comply and urge their clients to comply with legal commands. Discharging these responsibilities requires an attitude of forbearance and conscious self-restraint about one's own and one's clients' self-interest, as well as an acknowledgment that others have standing to judge one's fidelity within an accountability network.[230] Importantly, the presumption is not absolute but can be rebutted if the law in question reinscribes or exacerbates the arbitrary exercise of power, which will be discussed below.[231] By contrast, the presumption will generally not be rebutted for nonarbitrary laws.

To some extent, the profession's ethical rules already acknowledge some obligation to respect at least the letter of the positive laws. For example, the ABA Model Rules, which recommends rules for adoption by the states,[232] provides that lawyers are required to refrain from assisting criminal or fraudulent conduct,[233] regardless of whether such conduct would advance the client's goals, and lawyers are required to cease representing a client where their representation would result in a law violation.[234]

But more could be done to support compliance with the laws. For example, the profession could do more to discourage illegal tax dodging, a criminal activity that usually requires substantial assistance from lawyers.[235] The leak of the so-called "Panama Papers" in 2016 suggested that numerous U.S.-based law firms, among others, either acted as intermediaries for or may have referred clients to Mossack Fonseca ("MF"), the subsequently shuttered Panamanian law firm reputed to have been the fourth largest provider of offshore tax planning services.[236] In light of Panama's reputation as a tax haven for foreigners seeking to shield their identities as owners of large amounts of assets,[237] it must be the case that at least some of those law firms suspected that MF had been engaged in structuring abusive tax shelters.[238]

Yet intermediating or referring business to law firms reputed to engage in unlawful tax planning, without more, has rarely, if ever, been the target of professional discipline.[239] That outcome may be practically impossible to remedy,

230. Fallon, *supra* note 185, at 543.

231. There may be other independent moral reasons for rebutting the presumption. Those other reasons are beyond the scope of this Article.

232. Although the professional conduct of lawyers is governed by the rules promulgated and enforced by the highest court in the state where the lawyer practices, most state ethics codes adopt provisions of the Model Rules. *See generally* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2021).

233. *See id.* at r. 1.2(d), 1.16(a)(1).

234. *See id.* at r. 1.16(a)(1).

235. Heather M. Field, *Offshoring Tax Ethics: The Panama Papers, Seeking Refuge from Tax, and Tax Lawyer Referrals*, 62 ST. LOUIS U. L.J. 35, 40–41 (2017).

236. *Id.* at 37–38, 40–41; Nicola Slawson and agencies, *Mossack Fonseca Law Firm to Shut Down After Panama Papers Tax Scandal*, GUARDIAN (Mar. 14, 2018, 5:35 PM), https://www.theguardian.com/world/2018/mar/14/mossack-fonseca-shut-down-panama-papers [https://perma.cc/6AZ3-4JQP].

237. *See* Guilbert Gates, *How Mossack Fonseca Helped Clients Skirt or Break U.S. Tax Laws with Offshore Accounts*, N.Y. TIMES (June 5, 2016), https://www.nytimes.com/interactive/2016/06/05/world/americas/panama-papers-us-taxes.html [https://perma.cc/E7B9-7QEV].

238. To be clear, MF has denied any wrongdoing. *See id.*

239. Even if the intermediating or referring lawyer *knows* that the client intends to engage in criminal tax fraud or evasion, the lawyer is unlikely to be deemed, without more, to be providing prohibited "assistance" in a

given the high burden of proof ordinarily required to demonstrate the culpable mental state for professional violations and the profession's narrow understanding of what constitutes prohibited "assistance."[240] But the ABA could send a strong message by promulgating an official comment to the Model Rules that expressly condemns the knowing provision of a referral to a firm likely to engage in unlawful tax planning. More generally, bar associations should vociferously discourage the marketing of abusive tax shelters. After all, the tax laws are designed to ensure that our government has the financial resources to operate in the common interests of all citizens, and abusive tax shelters undermine this purpose by exploiting unintended loopholes in the intricate regulations of the Internal Revenue Code.[241] Further, tax shelters generally damage the rule of law by eroding public perception of the fairness in the administration of tax laws.[242]

An example of the profession taking a step in the right direction occurred in the aftermath of the Enron scandal. After heated debate, the ABA amended its Model Rules in 2003 to expand the lawyer's discretion to disclose confidential client information about a client's crime or fraud under very narrow circumstances.[243] Though modest, this measure was significant because it departed from the bar's longstanding position that client confidences may never be breached to prevent gross financial harm to third parties or the public at large.[244] By retreating, even slightly, from its prior rigid stance about client confidentiality, the profession demonstrated respect for the laws proscribing crime and fraud.

Lawyers' commitment to legality, however, cannot be confined to mere compliance with the *letter* of the positive laws. All legal rules are characterized by a "core of certainty"—where the application of the rule is clear—and a "penumbra of doubt"—where the rule's application is uncertain.[245] Lawyers are known to manipulate this inherent structure and the inherent imprecision of language by exploiting gaps, vagueness, ambiguities, technicalities, and loopholes and advancing highly implausible but not obviously frivolous interpretations of laws or facts. When they do, they are endorsing and broadcasting to their clients an instrumental conception of the law—an interpretive attitude that regards legal norms as mere obstacles to be circumvented in the course of fulfilling their

crime or fraud under Rule 1.2(d). *See* Field, *Offshoring Tax Ethics*, *supra* note 235, at 42–43; Heather M. Field, *Complicity by Referral*, 31 GEO. J. LEGAL ETHICS 77, 89–90 (2018).

240. Field, *supra* note 235, at 92.

241. At the height of the *corporate* tax shelter boom in the 1990s, the federal government estimated that an annual $10 billion in tax revenue has been lost to corporate tax shelters alone. Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77, 83 (2006). Certain segments of the tax bar have supported the rule of law by advocating for reforms to curb the market for abusive tax shelters, while other segments have facilitated the marketing of abusive tax shelters, helping to undermine the rule of law. *See also* TANINA ROSTAIN & MILTON C. REGAN, JR., CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS AND THE TAX SHELTER INDUSTRY 6, 51 (2014).

242. ROSTAIN & REGAN, *supra* note 241, at 76.

243. *See* Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1038–40 (2005) (summarizing amendments); *see also* MODEL RULES OF PRO. CONDUCT r. 1.6(b)(2), (3), 1.13 (AM. BAR ASS'N 2021).

244. *See, e.g.*, Rebecca Aviel, *The Boundary Claim's Caveat: Lawyers and Confidentiality Exceptionalism*, 86 TUL. L. REV. 1055, 1077–79 (2012); Kim, *supra* note 20, at 87.

245. *See* H.L.A. HART, THE CONCEPT OF LAW 123 (2d ed. 1994); BIX, *supra* note 62, at 41.

clients' objectives.[246] This attitude licenses the corruption and infinite manipulation of laws for partisan advantage.

When these types of practices come to dominate and laws come to mean whatever well-endowed clients can pay lawyers to plausibly say they mean, then the indeterminacy of legal norms is exacerbated.[247] Most of client counseling, after all, happens in the privacy of a lawyer's office, and enforcement agencies are chronically underfunded such that they are often unable to enforce the most reasonable interpretation of the laws.[248] All of this undermines the stability, intelligibility and equal administration of the laws—important rule-of-law values. These practices also enable the legal system to be hijacked by sectarian forces whose lawyers are paid to bend the law to their will and, as a result, erode the law's ability to restrain the arbitrary exercise of power. These practices also erode public faith in the impartial administration of the laws and, in turn, law's legitimacy. An instrumental approach to the law risks displacing the "rule of law" with the "rule of men."

To avoid this state of affairs, lawyers, as the principal interpreters of the law and as fiduciaries of the legal system, must manifest an alternative, more respectful attitude—a recognition that "the law is legitimate—that is, worthy of being taken seriously, interpreted in good faith with due regard to its meaning, and not simply seen as an obstacle standing in the way of the client's goals."[249] Lawyers must "respect the substantive meaning standing behind the formal expression of legal norms" and interpret legal norms in accordance with the "practices and conventions that make legal analysis" more and not less determinate and "in light of the purposes or social functions that the law is designed to serve."[250]

2. Fidelity to the Telos

But fidelity to the law does not mean that all legal norms warrant the same degree of respect. If we accept that the *telos* of the rule of law is to restrain the arbitrary exercise of power, then those laws that *squarely target the arbitrary exercise of power* deserve greater respect. Take, for example, the laws that protect the right of workers to be free of racial, gender and disability discrimination, to be free of sexual harassment, to be free of lie-detector tests and retaliation for whistleblowing, and to be paid a fair wage and work in a safe and healthful workplace, among others. Not only are these rights constitutive of civil society, but the laws vindicating these rights deter and remedy the arbitrary exercise of power by employers against their employees. These laws safeguard the equal dignity

246. This attitude is referred to as the Holmesian bad man approach. *See* Wendel, *supra* note 213, at 1176.

247. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 477 (1990).

248. *Id.* at 513.

249. Wendel, *supra* note 213, at 1169.

250. David B. Wilkins, *In Defense of Law* and *Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269, 284 (1996). For a defense of the Purposivist approach to lawyering, see William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30, 39 (1978).

and status of citizens with respect to the nonelective activity of earning a living and are absolutely critical for securing employees' freedom from domination by their employers.

Yet lawyers have played a central role in undermining the purpose and effect of these freedom-enhancing laws. They have done so (lawfully!) by assisting their employer-clients in promulgating pre-dispute mandatory arbitration agreements imposed as a condition of new or continuing employment.[251] While these agreements were originally designed to eliminate employers' risk of bad publicity or staggering legal liability that could arise from employment-related claims, they take the dramatic step of requiring "employees to waive their right to file all statutory and common-law employment-related claims *in court* even before they have or know they have claims."[252] As of 2017, these agreements cover more than sixty million employees, or over 56% of the nonunion private sector workforce.[253]

As a large body of scholarship has shown, these agreements have the practical effect of divesting employees of their workplace rights under these laws. Due to a complex set of factors that make arbitration a more hostile venue for employees than in litigation, expected recoveries for employee-plaintiffs in arbitration are dramatically lower than in litigation.[254] Indeed, employees are much less likely to prevail and recover anything in arbitration.[255] Consequently, plaintiffs' attorneys, most of whom accept cases only on a contingency fee basis, are significantly less willing to represent employee claims that are destined for arbitration rather than for litigation.[256] Hence, mandatory arbitration agreements operate to foreclose employees' access to lawyers, frustrating their ability to redress violations of their statutory and common law workplace rights. As Cynthia Estlund has concluded in her empirical analysis of the impact of these agreements, "the presence of a mandatory arbitration provision dramatically reduces an employee's chance of securing legal representation, as well as her chance of any kind of recovery, any kind of hearing, or any formal complaint being filed on her behalf."[257]

Undeterred and unconstrained by laws that protect citizens' basic liberties to be free from discrimination, harassment, and retaliation in the workplace, employers are more or less free to exercise arbitrary power over their employees—*i.e.*, they are free to do as they please with their employees. The negation of employees' legal protections places them in a state of domination, undermining their free and equal status in the polity. And corporate lawyers in their quasi-

251. This discussion draws heavily from prior work examining the lawyer's role in promulgating mandatory arbitration agreements. *See* Sung Hui Kim, *Economic Inequality, Access to Law, and Mandatory Arbitration Agreements: A Comment on the Standard Conception of the Lawyer's Role*, 88 FORDHAM L. REV. 1665, 1666 (2020).

252. *Id.* (emphasis added).

253. *Id.* at 1674.

254. *Id.* at 1678.

255. *Id.*

256. *Id.*

257. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 703 (2018).

legislative capacity have facilitated this acute vulnerability.[258] By recommending, drafting, and promulgating mandatory arbitration agreements for their clients, lawyers have enacted a form of private contractual law—one that is expected to be upheld by courts and that has historically been impervious to state intrusion.[259] Bar associations must take a stand against the proliferation of these agreements and advocate for meaningful legal reforms to make arbitration a more impartial and less partisan forum for the resolution of employment disputes.[260]

To be sure, practicing lawyers are not solely responsible for this state of affairs. The steady diffusion of mandatory arbitration agreements and their impact would not have taken place but for the U.S. Supreme Court's efforts. Over the last three decades, in a series of key opinions, the Supreme Court adopted novel interpretations of the Federal Arbitration Act ("FAA")[261] that eliminated the obstacles to the enforcement of these agreements in the employment context.[262] These opinions effectively rolled back workers' legal protections won over the past half-century, ostensibly to advance the FAA's stated goal of providing an alternative forum for dispute resolution.[263] By extending the FAA's application to non-union employment settings in unprecedented ways, the Court failed to give proper weight to the intrinsic content[264] of the employment laws and failed to interrogate the impact of their holdings on the fundamental right of employees to work in a safe and healthful workplace.[265] By failing to give due consideration to these aspects, the Court failed to accord due respect to the fact that those laws squarely target the arbitrary exercise of power. Lawyers, too, failed to express due respect for those laws, the very purpose of which is to secure freedom as nondomination.

Of course, the law may fail to live up to the *telos* of the rule of law by either reflecting or exacerbating the arbitrary exercise of power. This failure can happen if legal institutions are hijacked by sectarian interests and promulgate norms and interpretations of norms that disregard the common interests of citizens, including their free and equal status, perhaps under the pretext of a facially neutral and seemingly unobjectionable policy. Harrington acknowledged the problem of tainted laws. He observed that in corrupt polities, "the laws . . . are made according to the interest of a man or of some few families."[266] Even in tolerably free

258. Kim, *supra* note 251, at 1679.

259. *Id.* at 1679–80.

260. *See id.*

261. 9 U.S.C. §§ 1–16.

262. *See e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018); Circuit City Stores, Inc., v. Adams, 532 U.S. 105, 123 (2001).

263. *Epic Win: Supreme Court Saves Employment Arbitration as We Know It*, FISHER PHILLIPS (May 21, 2018), https://www.fisherphillips.com/news-insights/epic-win-supreme-court-saves-employment-arbitration-as-we-know-it.html [https://perma.cc/83RN-C3YY].

264. *See* William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 248 (1996) (urging lawyers to go beyond looking at a legal norm's pedigree in terms of jurisdictional content to interrogate the intrinsic content of the norm).

265. *See Epic Sys. Corp.*, 138 S. Ct. at 1633 (Ginsburg, J., dissenting).

266. HARRINGTON, *supra* note 122, at 9.

societies, there may be ill-conceived laws, the very purpose of which is to expose individuals or a group to the arbitrary exercise of power.

Take, for example, Jim Crow laws that were in effect in the American South until 1965.[267] These laws enforced racial segregation, excluding Blacks from critical resources and opportunities and blocking their efforts to hold their political representatives accountable by restricting their access to the ballot box.[268] Driven by sectarian interests in defiance of the principle of free and equal citizenship, those laws sought to further expose Blacks to the arbitrary exercise of social and political power. Today, controversial voter identification and voter suppression laws appear to have similar, sectarian goals in derogation of the free and equal status of citizens.[269]

To the extent that a legal norm betrays the rule of law's *telos* and countenances the domination of individuals or groups, the presumption in favor of complying with the norm must be abandoned.[270] Instead, where the intention or effect of a legal norm is to abet, rather than restrain, the arbitrary exercise of power, lawyers should resist the law's implementation and enforcement by engaging in, and assisting others who engage in, civil disobedience. But, given their special position vis-à-vis the legal system, lawyers must be careful not to resist legal norms in ways that undermine respect for the law generally. After all, in tolerably free societies, legal norms are the output of a cooperative scheme (directly or indirectly) controlled by citizens that ought to have continuing significance for lawyers, even when they choose to disobey on rule-of-law grounds.[271] Therefore, lawyers have an ethical obligation to engage in respectful resistance.

Ordinarily, respectful resistance means that lawyers should uphold the values of candor and publicity in their resistance.[272] They can do so by avoiding dishonest conduct, such as refraining from suborning perjury, even where clients are being unjustly prosecuted; by publicly pressing for legal reform; or by highlighting the law's deficiencies so that others can try to change them.[273] By resisting and spotlighting malevolent laws, lawyers help to hold the *law* (including legal institutions) accountable to the rule of law's *telos*. They also help to

267. For purposes of this discussion, I am setting aside an analysis of whether pre-1965 United States was a "tolerably free" society. In light of the fact that Black citizens were effectively disenfranchised in the South, it is reasonable to conclude that it was not. *See* Melvin I. Urofsky, *Jim Crow Law*, BRITANNICA (Sept. 9, 2022), https://www.britannica.com/event/Jim-Crow-law [https://perma.cc/694D-E4UU].

268. *Id.*

269. For example, the North Dakota Voter ID law, though facially neutral, seems targeted at the disenfranchisement of Native Americans, by requiring residential addresses, even though residents of Native American reservations do not always have residential addresses. Disenfranchised citizens are necessarily exposed to the arbitrary exercise of political power, because political representatives are not required by law to consider the perspectives of the disenfranchised in order to assume or stay in office. *See* Maggie Astor, *A Look at Where North Dakota's Voter ID Controversy Stands*, N.Y. TIMES (Oct. 19, 2018), https://www.nytimes.com/2018/10/19/us/politics/north-dakota-voter-identification-registration.html [https://perma.cc/W2GD-V4Z7].

270. For a similar argument, see Simon, *supra* note 250, at 248.

271. David Luban, *Legal Ideals and Moral Obligations: A Comment on Simon*, 38 WM. & MARY L. REV. 255, 258 (1996).

272. For societies that are not "tolerably free," the moral obligations of candor and publicity may be weaker but there may be prudential reasons to observe such values.

273. *See* Wilkins, *supra* note 250, at 277.

preserve the legitimacy of the law by severing the link between law and the arbitrary exercise of power.

But the legal profession's fidelity to the *telos* should not be confined to resisting malevolent laws or respecting benevolent ones. Although the rule of law seeks to restrain abuses of power *through the instrument of law*, including its arsenal of law-making, law-applying and law-enforcing institutions, as a practical matter, not all arbitrary exercises of power are readily remediable by the law. As a result, the law can fail to live up to its *telos* simply by doing nothing.

Perhaps legal institutions, including those institutions responsible for regulating the ethical conduct of lawyers, are too weak and underfunded, or too corrupted by sectarian forces, to form the necessary political will to even begin to address sources of domination that have come to light. Think, for example, of how the problem of the increasing concentration of wealth has been known for decades[274] and yet, lawmakers haven't been able to address this potent source of domination.[275] Or maybe the voting electorate writ large is slow in coming to a consensus about the moral intolerability of particular condition or conduct. It wasn't, after all, until 1968, with the passage of the Fair Housing Act, that racially restrictive covenants were rendered illegal in real estate transactions in the U.S.[276] Or perhaps effective legal solutions are elusive, because the specific abuse of power may be too complex and diversely manifested to define with any degree of precision and determinacy to avoid legal vagueness or overinclusiveness challenges. Or perhaps prohibiting the particular conduct may be too difficult to enforce because adequate detection would be too socially costly. Also, as a practical matter, legislatures cannot anticipate and draft around all possible contingencies and consequences.

The fact that some abuses of power cannot readily be remedied by conventional legal remedies should not mean that lawyers are absolved from their rule-of-law responsibilities. At minimum, lawyers should strive to hold their own behavior and the behavior of others (including their clients) accountable to the *telos* of the rule of law. They can do so by not engaging in, and discouraging others from engaging in, conduct that promotes or exacerbates the arbitrary exercise of power, whether or not such conduct implicates the positive laws. Fidelity to the *telos* means that lawyers must refrain from being complicit in the arbitrary exercise of power—even where there is no formal violation of law.

One well-meaning, but perhaps ill-fated, attempt to take a stand against arbitrary exercises of power beyond that which is prohibited by legal norms deserves attention. After twenty-two years of failed efforts to promulgate a rule forbidding harassment and discrimination among lawyers, the ABA House of

274. *See, e.g.*, EDWARD NATHAN WOLFF, TOP HEAVY: A STUDY OF THE INCREASING INEQUALITY OF WEALTH IN AMERICA 1 (1995).

275. *See id.* at 51.

276. Fair Housing Act, 42 U.S.C. §§ 3601–19, 3631.

Delegates finally approved Model Rule 8.4(g) in August 2016.[277] The rule broadly proscribes and authorizes the punishment of a broader range of conduct than that which is formally proscribed by current laws.

For example, it prohibits not just physical conduct but verbal conduct that "manifests bias or prejudice," as well as "derogatory or demeaning verbal or physical conduct" as to people in certain protected categories.[278] In addition, the prohibition applies not only to conduct occurring in the employment context or in connection with legal representation but also to any "conduct *related to* the practice of law[,]" including inter alia "participating in bar association, business or social activities in connection with the practice of law."[279] Presumably, "conduct related to the practice of law" would include "law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm."[280] If we adopt the reasonable interpretation that "verbal conduct" denotes "speech," then the rule appears to restrict speech that may be constitutionally protected.[281] So, for example, a lawyer who openly expressed opposition to gay marriage at a continuing legal education event might theoretically be subject to professional discipline in a jurisdiction that has adopted Rule 8.4(g).

The expansive wording of the rule has led some commentators to conclude that the rule is unconstitutionally overbroad.[282] The controversy over the rule's constitutionality has diverted attention from the rule's purpose and has elicited hesitancy by several states to adopt it in its proposed form.[283] Of course, a rule that is not widely adopted cannot be effective in reaching its goals. At the same time, critics argue that the proposed rule does not go far enough in addressing the legal profession's history of subordinating certain demographic groups, because it fails to address covert or more subtle forms of discrimination, such as structural discrimination and implicit bias.[284]

Notwithstanding these significant concerns and criticisms, Rule 8.4(g) represents one rare attempt by the legal profession to address arbitrary exercises of social power that do not necessarily involve formal violations of law. While the bar's relatively bold attempt to reckon with its exclusionary history may have

277. Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 196 (2017); AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES REVISED RESOLUTION 1 (2016).

278. MODEL RULES OF PRO. CONDUCT r. 8.4(g), cmt. 3 (AM. BAR ASS'N 2021) (emphasis added).

279. *Id.* at r. 8.4(g), cmt. 4 (emphasis added).

280. Keith Swisher & Eugene Volokh, *Point-Counterpoint: A Speech Code for Lawyers?*, 101 JUDICATURE 70, 72 (2017).

281. MARGARET TARKINGTON, VOICE OF JUSTICE: RECLAIMING THE FIRST AMENDMENT RIGHTS OF LAWYERS 249 (2018).

282. *See, e.g.*, *id.* at 243–78; Swisher & Volokh, *supra* note 280, at 70, 74. *But see* Gillers, *supra* note 277, at 234–36 (defending the constitutionality of the rule); Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 41–50 (2018).

283. Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 831–32 (2019).

284. *See, e.g.*, *id.* at 813.

been counterproductive in the end, it represents a rare departure from the conventional view, the symbolic importance of which should not be discounted.[285]

The position embraced here—that lawyers should refrain from conduct that promotes or exacerbates the arbitrary exercise of power, whether or not such conduct violates the positive laws—will strike some readers as radical. This position is arguably in tension with the general proposition that the lawyer is obligated to "zealously . . . protect and pursue a client's legitimate interests, within the bounds of the law,"[286] which has been interpreted by some commentators to mean that lawyers *must* facilitate for their clients *all that the law allows*.[287] My position is grounded in the recognition that compliance with formal legality alone will not prevent lawyers from facilitating domination—to recall an earlier example, millions of employees being divested of their civil rights in the employment context by virtue of mandatory arbitration agreements.[288] Hence, if the legal profession is to remain faithful to the *telos* of the rule of law, then the legal profession must take a stand against arbitrary exercises of power, whether or not there is a formal law violation. With respect to the specific problem of mandatory arbitration agreements, bar associations should take public positions discouraging the use of mandatory arbitration agreements in their prevailing forms on the ground that these agreements expose employees to the arbitrary exercise of power by effectively divesting employees of the legal protections designed to protect them from domination by their employers. Additionally, bar associations can advocate for meaningful legal reforms to make arbitration a more impartial and transparent forum for the resolution of employment disputes such that plaintiffs' lawyers will find these cases worth taking on. Such public overtures would be a meaningful expression of fidelity to the *telos* of the rule of law, even where no formal violation of law is implicated.[289]

In sum, to the extent that the law in question is nonarbitrary and does not offend the rule of law's *telos*, there should be a presumption that lawyers hold themselves and their clients accountable to the law. To the extent that the law in question squarely targets the arbitrary exercise of power, lawyers have a greater obligation to hold themselves and their clients accountable to that law. To the extent that the law reflects or exacerbates the arbitrary exercise of power, lawyers should strive to hold the law accountable to the *telos* by engaging in respectful

285. *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2028 (1996).

286. MODEL RULES OF PRO. CONDUCT, Preamble, para. 9 (AM. BAR ASS'N 2021).

287. *See* Daniel Markovits, *Lawyerly Fidelity*, *in* LOYALTY: NOMOS LIV 55, 73 (Sanford Levinson, Joel Parker & Paul Woodruff eds., 2013) (urging lawyers to exhibit the virtue of "negativity capability" by effacing and muting their own beliefs and judgments so that they can serve as better "mouthpiece[s]" for their clients); Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. BAR FOUND. RSCH. J. 657, 659 (supporting an enforceable disciplinary rule preventing lawyers from opting out of their clients' immoral but legally permissible plans). *But see* Stephen L. Pepper, *Integrating Morality and Law in Legal Practice: A Reply to Professor Simon*, 23 GEO. J. LEGAL ETHICS 1011, 1018 (2010).

288. *See supra* notes 253–54 and accompanying text.

289. This recommendation is not as outlandish as it may sound. In 2018, three elite law firms announced that they would be ending the use of mandatory arbitration agreements for their own employees. Angela Morris, *Why 3 BigLaw Firms Ended Use of Mandatory Arbitration Clauses*, ABA J. (June 1, 2018, 12:15 AM), https://www.abajournal.com/magazine/article/biglaw_mandatory_arbitration_clauses [https://perma.cc/6KZW-D42F].

resistance. And to the extent that the law simply fails to live up to its *telos* and fails to restrain the arbitrary exercise of power, lawyers should strive to hold their own behavior and the behavior of others accountable to the *telos* of the rule of law, even where there is no formal violation of law.

C. Objection: The Rule of Lawyers

Readers are likely to lodge numerous objections to my proposed framework. Regrettably, due to strict space constraints, I can briefly address only one. One might object that the rule-of-law obligation to refrain from being complicit in the arbitrary exercise of power, even in the absence of a formal law violation, goes too far. As the objection might go, if lawyers decline to assist their clients' projects on anything other than legal grounds, then power would be transferred from clients to lawyers and lead to "the rule of lawyers."

Let me first note at the outset that the fear underlying the objection that a multitude of lawyers would withhold legal services from clients on any moral or political-moral ground is overblown. After all, lawyers are already permitted under most state ethics codes to withdraw if they find their clients' aims to be repugnant or otherwise have a fundamental disagreement with their clients,[290] and lawyers do not seem to be firing their bill-paying clients *en masse*. Sociological evidence has long confirmed that lawyers come to identify with their clients' views on matters of policy.[291] Also, even if lawyers refuse to assist clients' morally objectionable plans, clients are free to seek other counsel willing to assist them. There is, after all, no rule that prohibits lawyers from providing morally unrestricted legal services. In fact, the Model Rules insist that representing clients does not constitute an endorsement of the clients' views or activities[292] and that lawyers are free to offer clients "purely technical advice," devoid of any discussion of moral considerations.[293]

Second, in the unlikely scenario that significant numbers of lawyers will heed my call and refrain from practices that facilitate the arbitrary exercise of power, I am not bothered by the "existence of informal filters of people's legally permissible projects."[294] I agree with Luban that "[f]ar from seeing these [informal filters] as a threat to the rule of law, I regard them as essential to its very existence."[295] Informal filters are socially valuable precisely because the law cannot proscribe all morally intolerable conduct. As I have recounted above, there are myriad reasons why the law might leave the choice to private citizens

290. MODEL RULES OF PRO. CONDUCT r. 1.16(b)(4) (AM. BAR ASS'N 2021).

291. *See, e.g.*, Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 504–05 (1985).

292. MODEL RULES OF PRO. CONDUCT r. 1.2(b) (AM. BAR ASS'N 2021) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

293. *Id.* at r. 2.1, cmt. 3 ("A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value.").

294. *See* David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. BAR FOUND. RES. J. 637, 641 (1987).

295. *See id.*

whether to engage in certain conduct that have nothing to do with the moral reprehensibility of the conduct.[296] Although informal social pressures can go too far and, in their more coercive manifestations, may not always be justified,[297] they generally fill an important gap by deterring and reducing the frequency of morally problematic conduct.[298] Conduct that exposes citizens to the arbitrary exercise of power, for example, by divesting them of fundamental legal protections that secure their free and equal status in the polity, is morally intolerable.

Third, the objection seems to presume that lawyers commit a moral wrong when they decline to go along with their clients' morally problematic plans. But if we accept the proposition that placing others in a state of domination is morally wrong, then it is tough to see how refusal to facilitate domination is itself a moral wrong.[299] Stated otherwise, if helping others do bad things is bad, then refusing to help others do bad things is good.

Fourth, the objection presumes that clients have a sufficiently robust moral claim to having their legally permissible goals realized by a lawyer of their choosing such that this moral claim trumps both (i) that lawyer's moral entitlement to lead an ethical life or to act consistently with her professed values and (ii) the moral entitlement of third persons to be free from the arbitrary exercise of power. I have examined this argument in detail elsewhere[300] and cannot fully explore it here. Suffice it to say that whatever moral value that comes from enhancing clients' autonomy by helping the clients fulfill their goals cannot be divorced from the broader context. Specifically, that moral value must be weighed against the moral value of the goals themselves and the means by which those goals are reached, including the foreseeable consequences. To ignore this complication is to ignore the fact that some actions that are freely chosen can be morally wrong. It thus conflates the moral desirability of acting autonomously—of not being coerced by others—with the moral desirability of the act itself.[301]

V. THE CASE OF JOHN EASTMAN

Now that we have an alternative general framework for lawyers' rule-of-law obligations, we can apply this framework to one example. In this Part, I evaluate John Eastman, the lawyer who advised his private client, Donald Trump, that Vice President Pence had the unreviewable legal authority to determine the validity of electoral votes on January 6, 2021. News reports have now

296. *See* discussion *supra* Subsection IV.B.2.

297. One must distinguish between the issue of the truth or correctness of a moral opinion and the issue of the rightness or wrongness of *expressing* that moral opinion, or otherwise engaging in acts of moral condemnation. More plainly stated, just because something is true doesn't mean it's always morally right to say it. *See* Jeremy Waldron, *A Right to Do Wrong*, 92 ETHICS 21, 30 (1981).

298. *See* Luban, *supra* note 294, at 641.

299. Refusing to help clients dominate third persons does not itself amount to the domination of clients. To think that it does is to confuse the meaning of domination. *See* Sung Hui Kim, *Legal Ethics After #MeToo: Autonomy, Domination, and Nondisclosure Agreements*, DUKE L.J. (forthcoming 2023) (Section VI.A) (draft on file with author).

300. *See id.*

301. *See* Luban, *supra* note 294, at 639.

contextualized Eastman's role as part of a concerted effort—starting as early as two weeks after Election Day—by multiple lawyers working with the Trump campaign to create alternate slates of electors for the express purpose of overturning the election results.[302]

A. Eastman's Legal Advice

As noted in Part I, Eastman drafted two legal memoranda relating to Congress's certification of the election on January 6, 2021. Eastman's shorter undated memo posits a hypothetical scenario in which seven states "transmitted dual slates of electors to the President of the Senate" (the Vice President) on January 6.[303] After briefly asserting that the Electoral Count Act, which lays out the procedures for certifying the election on January 6, is unconstitutional,[304] the memo then proposes that Pence, presiding over Congress on January 6, decline to count the electoral votes from states where there are "ongoing disputes."[305] If Pence excludes all of the electoral votes from those seven (disputed) states, then Trump would prevail with 232 electoral votes over Biden's 222 electoral votes—at which point "Pence then gavels President Trump as re-elected."[306] There would be "[h]owls, of course, from Democrats."[307] Therefore, the memo advises, Pence should punt the election to the House of Representatives, where—because Republicans hold the majority of state delegations—Trump again wins.[308] In short, Eastman's strategy was to "[e]ither have Pence declare Trump the winner, or make sure it is thrown to the House where Trump is guaranteed to win."[309]

Crucially, Eastman's memo expressly embraces the dubious position that the Vice President, as President of the Senate, is vested with the unilateral and unreviewable legal authority to determine the winner of the presidential and vice-presidential elections.[310] Indeed, the memo opens with the brazen assertion that

302. Alan Feuer, Maggie Haberman & Luke Broadwater, *Memos Show Roots of Trump's Focus on Jan. 6 and Alternate Electors*, N.Y. TIMES (Feb. 2, 2022), https://www.nytimes.com/2022/02/02/us/politics/trump-jan-6-memos.html [https://perma.cc/E4LG-EJHS].

303. Memorandum by John Eastman 1 (undated) (on file with author). Contrary to the memo's hypothetical scenario, no state official submitted a slate of electors that conflicted with the governor's certification. Trump allies in various states did hold themselves as "alternate electors" but such self-certifications have no legal significance. *See* WOODWARD & COSTA, *supra* note 6, at 209; Matthew Seligman, *The Vice President's Non-Existent Unilateral Power to Reject Electoral Votes*, SSRN, https://ssrn.com/abstract=3939020 (last visited Feb. 8, 2023) [https://perma.cc/X9UM-YFXL].

304. The memo advances three reasons for why the Electoral Count Act, specifically 3 U.S.C. § 15, is unconstitutional. (1) The Act allows each chamber of Congress to participate in the count separately, as opposed to the count being performed in a joint session; (2) the Act provides that in case the two chambers disagree about which slate of electors offered by a given state is valid, the slate "certified by the executive of the State" shall be counted; and (3) the Act impermissibly allows Congress, and not the President of the Senate, to determine the validity of the electoral votes. To understand why these reasons are not persuasive, see Seligman, *supra* note 303, at 9–31.

305. Memorandum by John Eastman 2 (undated) (on file with author).

306. *Id.*

307. *Id.*

308. *Id.*

309. WOODWARD & COSTA, *supra* note 6, at 212.

310. *See* Memorandum by John Eastman 1 (undated) (on file with author).

"[t]here is very solid legal authority, and historical precedent, for the view that the President of the Senate does the counting, including the resolution of disputed electoral votes . . . , and all the Members of Congress can do is watch."[311] This position is reiterated at the end of the memo:

> The main thing here is that Pence *should* do this without asking for permission—either from a vote of the joint session or from the Court. . . . The fact is that the Constitution assigns this power to the Vice President as the ultimate arbiter. We should take all of our actions with that in mind.[312]

The longer memo, which was shown to Vice President Pence on January 4 in a meeting with Trump and Eastman,[313] opens with unsubstantiated allegations of "outright fraud (both traditional ballot stuffing, and electronic manipulation of voting tabulation machines)" and asserts that "important state election laws were altered or dispensed with altogether in key swing states," such as Georgia, Pennsylvania, Wisconsin, Michigan, Arizona, and Nevada.[314] The memo fails to mention that, except for one minor instance affecting a small number of ballots in Pennsylvania,[315] courts had rejected those allegations of fraud and manipulation.

The memo then describes a more comprehensive set of hypothetical scenarios in a section titled "War Gaming the Alternatives," including two BIDEN WINS and two TRUMP WINS scenarios, the latter set of scenarios being predicated on Pence asserting his unilateral legal authority under the Twelfth Amendment to determine the validity of the electoral votes.[316] Under the first set of TRUMP WINS scenarios, Pence completes the counting on January 6 or throws the election to the House of Representatives, at the conclusion of which Trump is declared the victor.[317] Under the second set of TRUMP WINS scenarios, Pence unilaterally postpones the final resolution of the election until after January 6 (in derogation of the Electoral Count Act), effectively giving state legislatures extra time to appoint alternative slates of electors.[318] When Congress reconvenes, Pence counts the alternative slates and declares Trump the victor.[319] The memo then urges Pence to exercise his Twelfth Amendment authority to finally and unilaterally determine the validity of electoral ballots and predicts that lawsuits challenging Pence's actions will be dismissed on the basis that these are "nonjusticiable political questions."[320]

311. *Id.*

312. *Id.* at 2 (emphasis added).

313. WOODWARD & COSTA, *supra* note 6, at 224–27.

314. Memorandum by John Eastman 1–2 (Jan. 3, 2021) (on file with author).

315. A Pennsylvania court ruled that an extension of the deadline for curing mail-in ballots lacked statutory authority. That ruling affected far fewer ballots than the margin of Biden's victory in Pennsylvania. *See* Alexandra Jones, *Trump Ekes Out a Small Win Against Extension to Cure Pennsylvania Ballots*, COURTHOUSE NEWS SERV. (Nov. 12, 2020), https://www.courthousenews.com/trump-ekes-out-a-small-win-against-extension-to-cure-pennsylvania-ballots/ [https://perma.cc/F8R8-CKL5].

316. Memorandum by John Eastman 4–5 (Jan. 3, 2021) (on file with author).

317. *Id.*

318. *See id*.

319. *Id.*

320. *Id.* at 5–6.

At one point in the memo, Eastman appears to self-consciously admit to the subversive nature of his strategy: "BOLD, Certainly. But this Election was Stolen by a strategic Democrat plan to systematically flout existing election laws for partisan advantage; we're no longer playing by Queensbury Rules, therefore."[321]

Eastman has since distanced himself from the memos and, contrary to reports,[322] has denied having counseled Pence to block the certification of the election for Biden.[323] But Eastman's other reported conduct on January 6 seems to belie that denial.[324] For example, speaking before the crowd of Trump supporters an hour before the electoral count began, Eastman, standing beside Rudy Giuliani, explained, "[a]ll we are demanding of Vice President Pence is this afternoon at one o'clock he let the legislatures of the state look into this so we get to the bottom of it and the American people know whether we have control of the direction of our government or not!"[325] To punctuate these remarks, Eastman exclaimed, "anybody that is not willing to stand up to do it does not deserve to be in the office. It's that simple."[326] Also, even after Trump supporters stormed the Capitol, Eastman continued to press for Pence to block the certification of the election for Biden,[327] even going so far as to make the argument that the

321. *Id.* at 5.

322. Luke Broadwater, *Lawyer Says He Dealt Directly With Trump over Jan. 6 Plans*, N.Y. TIMES (May 20, 2022), https://www.nytimes.com/2022/05/20/us/politics/john-eastman-trump-jan-6.html?searchResultPosition=5 [https://perma.cc/3PYW-E236] (noting Judge Carter's observation that Eastman presented his plan to Pence, "focusing on either rejecting the electors or delaying the count").

323. John C. Eastman, *Here's the Election Advice–I Actually Gave Mike*, SACRAMENTO BEE, Oct. 8, 2021, at 13A. Eastman maintains that, in response to a direct question from Pence during a meeting in the Oval Office on January 4, Eastman answered "that even if [Pence] had that authority, it would be foolish to exercise it in the absence of certifications of alternate Trump electors from the contested states' legislatures." Eastman's response implicitly acknowledges his position that Pence had the legal authority to disregard duly certified electoral votes; it also implicitly supports the view that state legislatures have the legal authority to certify an alternative slate of electors—a view that has no basis in historical precedent or law. *See also* WOODWARD & COSTA, *supra* note 6 (reporting on Eastman's view that Pence could act to throw the election to Trump).

324. For a discussion of the evidence, see Philip Bump, *What Did John Eastman Really Want to Have Happen?*, WASH. POST (Nov. 1, 2021, 1:48 PM), https://www.washingtonpost.com/politics/2021/11/01/what-did-john-eastman-really-want-have-happen/ [https://perma.cc/R7GZ-DQ34].

325. ABC7, *Faculty Call for Firing of Chapman University Law Professor Who Spoke at Pro-Trump Rally*, YOUTUBE (Jan. 11, 2021), https://www.youtube.com/watch?v=xAvR4RQXp_8 [https://perma.cc/WF5C-DB4U].

326. Greg Jacob, *Pence Aide Greg Jacob's Draft Opinion Article Denouncing Trump's Outside Lawyers*, WASH. POST (Oct. 29, 2021, 11:15 PM), https://www.washingtonpost.com/investigations/pence-jacob-trump-op-ed/2021/10/29/d9f324ac-392b-11ec-91dc-551d44733e2d_story.html [https://perma.cc/ZJ3A-NW9N].

327. In an email that Eastman sent to Pence's chief counsel, Greg Jacob, Eastman reportedly wrote, "The 'siege' is because YOU and your boss [Pence] did not do what was necessary to allow this [claims of voter fraud] to be aired in a public way so that the American people can see for themselves what happened." Josh Dawsey, Jacqueline Alemany, Jon Swaine & Emma Brown, *During Jan. 6 Riot, Trump Attorney Told Pence Team the Vice President's Inaction Caused Attack on Capitol*, WASH. POST (Oct. 29, 2021, 10:26 PM) https://www.washingtonpost.com/investigations/eastman-pence-email-riot-trump/2021/10/29/59373016-38c1-11ec-91dc-551d44733e2d_story.html [https://perma.cc/87T3-YM2L]. Also, former Trump White House attorney Eric Herschmann testified before the House committee that on January 7, 2021, Eastman was still pursuing legal options to appeal the election results in Georgia. Kyle Cheney, *Select Committee Points to Evidence Trump Lawyer's Election-Related Efforts Resumed After Jan. 6*, POLITICO (June 14, 2022, 6:29 PM), https://www.politico.com/news/2022/06/14/select-committee-points-to-evidence-trump-lawyers-election-related-efforts-resumed-after-jan-6-00039649 [https://perma.cc/6ULG-XHPN].

disruption in certifying the electoral votes constituted a minor violation of the Electoral Count Act, which justified Pence delaying the certification for ten days.[328] Finally, news reports focusing on Eastman's conduct before January 6 reveal that Eastman was working behind the scenes in getting state legislators in Pennsylvania to appoint alternate Trump electors, despite Biden winning the state by more than 80,000 votes.[329]

B. Eastman and the Rule of Law

There are several ways of characterizing Eastman's conduct as potentially violating the lawyer's duty to uphold the rule of law. One option would be to make the case that (i) the laws governing the administration of the presidential election—Article II, Section 1, Clause 3 of the U.S. Constitution; the Twelfth Amendment; and the Electoral Count Act—vest Congress, and not the Vice President, with the authority to resolve presidential election disputes; (ii) under the most plausible interpretation of these election laws, the Vice President's role in the administration of the presidential election is largely ceremonial; (iii) lawyers have a prima facie obligation to respect and comply with such laws and, given their nonarbitrary nature, resisting these laws is not justified, (iv) when Eastman advanced a discredited legal theory holding that the Vice President could unilaterally resolve election disputes in his own favor, Eastman was being complicit in undermining these laws in light of their purposes; and, therefore, (v) Eastman's actions amounted to a violation of the lawyer's duty to uphold the rule of law.[330]

Making the foregoing multifarious argument would require a textual, structural and historical analysis of the election laws in order to determine whether Eastman had counseled the violation of these nonarbitrary laws by proposing a frivolous legal theory. Thankfully, we need not perform such an exhaustive analysis, as Matthew Seligman has performed a decisive refutation of Eastman's legal theory, including a careful analysis of historical practice.[331] But the best encapsulation of the improbability of Eastman's theory against the historical and constitutional backdrop comes from the former general counsel to Vice President Pence, Greg Jacob, who testified in a hearing before the House select committee investigating the January 6, 2021 attack on the Capitol. He stated:

> There is just no way that the framers of the U.S. Constitution, who divided power and authority, who separated it out, who had broken away from George III and declared him to be a tyrant, there was no way that they

328. *Id.*

329. Kyle Cheney, *'Provide Some Cover': New Eastman Emails Shed Light on His Push to Overturn Biden's Win*, POLITICO (May 11, 2022, 12:28 AM), https://www.politico.com/news/2022/05/10/eastman-emails-pennsylvania-legislators-biden-00031668 [https://perma.cc/CCN5-MZ5K].

330. *See* U.S. CONST. art. II, § 1, cl. 3; id. amend. XII; 3 U.S.C. §§ 5–7, 15–18.

331. *See* Seligman, *supra* note 303, at 12–31.

would have put in the hands of one person the authority to determine who was going to be president of the United States.[332]

Also, there may be sufficient evidence that Eastman himself acknowledged his own complicity in violating at least the letter of the applicable election laws (or their most probable interpretation). In testimony before the House select committee, Jacob testified that he told Eastman that his scheme would violate the Electoral Count Act[333] and that Eastman conceded to him that his legal theories "would lose 9-0 in the Supreme Court."[334] Also, it is now known that, days after the insurrection, in what could be interpreted as an admission of his own criminal liability, Eastman sent an email to Trump's counsel Rudy Giuliani, asking to be included on a list of potential recipients of a presidential pardon.[335] And when questioned by a panel of the House select committee about his scheme to invalidate the election results, Eastman reportedly invoked the Fifth Amendment against self-incrimination 146 times,[336] suggesting that he appreciated the risk of criminal prosecution. Of course, it is also possible that Eastman believed that he had been engaged in principled disobedience to the law.[337]

There is a simpler and more intuitive way of framing Eastman's conduct that better reflects the gravity of his transgression. Eastman's conduct is disturbing not only or principally because he flouted nonarbitrary election laws by advancing a dubious legal theory about the Vice President's legal authority that would invariably be rejected by the Supreme Court. Rather, Eastman's conduct was troubling because its very purpose was to facilitate Trump's arbitrary exercise of power over citizens.

Without Eastman's constitutional law expertise and support, Trump's desire to remain in office despite having lost the election could only remain a fantasy. Armed with his legal memos, Eastman crafted and offered the sitting president a blueprint on how to steal an election—a blueprint that was draped in interpretations of election law and the U.S. Constitution that were unconvincing, perhaps even farfetched, and concocted to exploit lexical imprecision where a constitutional crisis might genuinely be forced.[338] And in pressuring Pence to throw the election to Trump and in working with state legislators to get alternate

332. *Here's Every Word of the Third Jan. 6 Committee Hearing on Its Investigation*, WBAA (June 16, 2022, 8:25 PM), https://www.wbaa.org/2022-06-16/heres-every-word-of-the-third-jan-6-committee-hearing-on-its-investigation [https://perma.cc/N3JC-QXES].

333. Under the Electoral Count Act of 1887, any objections to the results of a presidential election must be sustained by both the House of Representatives and Senate, which would have been impossible with a Democratic-led House. *See* 3 U.S.C. § 15.

334. Aaron Blake, *4 Takeaways from the Jan. 6 Committee's Hearing on Pence*, WASH. POST (June 16, 2022, 3:57 PM), https://www.washingtonpost.com/politics/2022/06/16/3-takeaways-jan-6-committees-hearing-pence/ [https://perma.cc/9SHD-PZ6X].

335. *See id.*

336. Luke Broadwater & Michael S. Schmidt, *Trump, Told It Was Illegal, Still Pressured Pence to Overturn His Loss*, N.Y. TIMES (June 16, 2022), https://www.nytimes.com/2022/06/16/us/trump-pence-election-jan-6.html [https://perma.cc/GS24-ZNXT].

337. *See* Simon, *supra* note 264, at 235–36.

338. *See* Ross Douthat, *Why Would John Eastman Want to Overturn an Election for Trump?* N.Y. TIMES (May 25, 2002) https://www.nytimes.com/2022/05/25/opinion/john-eastman-claremont-trump.html [https://perma.cc/EYE6-9JBT].

electors appointed in swing states, Eastman acted as Trump's agent to execute their illicit plan. In plain terms, this plan sought to boost the voting power of Trump supporters and to disenfranchise millions of Biden supporters: it was designed to undermine the common interests of citizens in conducting a free and fair election in derogation of the free and equal status of citizens. Moreover, Eastman's efforts were not grounded in reason for the purpose of advancing the common good but, rather, were deployed to kowtow to the whims and passions of a single man, driven by a longing to retain power. By pressuring Pence to do Trump's bidding on January 6, Eastman was facilitating a state of affairs in which Trump could ignore the common good and could answer only to his own *arbitrium*. In short, Eastman was being complicit in Trump's arbitrary exercise of power and denigrated the *telos* of the rule of law.

VI. CONCLUSION

The prevailing view of the lawyer's role understands lawyers to be fiduciaries *only* of their clients. Hence, the lawyer's principal, if not sole, obligation is to pursue her client's objectives, within the bounds of the law, without having to consider the impact on third parties, including those directly affected by the lawyer's representation of the client, or even the system-at-large. Despite the narrow circumscription of the lawyer's obligations, the bar has long acknowledged that lawyers ought to advance the rule of law.[339] But this responsibility, as traditionally characterized, appears to be largely redundant of the lawyer's existing obligations.[340]

This Article has argued that the lawyer's duty to uphold the rule of law need not be superfluous. There is an alternative vision of the lawyer's role, inspired and partly justified by republican precepts. This vision maintains that lawyers owe special public-regarding obligations arising out of their special position and power vis-a-vis the law and the republic. It recognizes that lawyers have a fiduciary or fiduciary-like relationship with the legal system, which generates special responsibilities to safeguard the integrity of the legal framework in a manner that advances the rule of law. This alternative vision also recognizes that the rule of law should not be defined narrowly by those measurable conditions commonly believed necessary to maintain it. Rather, the rule of law should be understood and examined in light of its *telos*—the *restraint of the arbitrary exercise of power*. With this more capacious perspective on the rule of law, we can more clearly think about the ways in which the law restrains or fails to restrain the arbitrary exercise of power; we can more clearly think about the ways in which lawyers can help achieve a society in which law actually rules and rules robustly.

339. *See* discussion *supra* Part I.
340. *See* discussion *supra* Part I.