GOVERNMENT LAWYERS AND THE CHALLENGE OF POPULISM

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This Article considers the challenges of serving as a government lawyer within a populist regime. Populism raises a direct challenge to a conception of legal ethics that emphasizes commitment to the values and practices referred to as the rule of law. The negative example of populism also highlights the value of the rule of law, however, and illustrates how constraint on the arbitrary exercise of power, and the commitment to treating all members of the political community with respect and dignity, can serve as a foundation for the ethical role of lawyers in a liberal democratic society.

INTRODUCTION: LAWYERS AND THE IDEAL OF LEGALITY

The professional role of lawyers is grounded, normatively, in political values. At least that is the claim of the so-called second wave of legal ethics theorists, who challenge the thesis that legal ethics should be built up out of a kind of Kantian universal morality.[1] The defining characteristic of second-wave scholarship is its starting point, asking the following question: What is the purpose of the legal profession in a liberal democracy?[2] The answer could draw from one or more of a cluster of related but distinct concepts from normative political theory—liberalism, democracy, the public interest, and the rule of law all potentially playing some role in defining

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1 *See* David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 GEO. J. LEGAL ETHICS 337 (2017).

2 *See id.* at 352–54.

the obligations of lawyers.[3] Lawyers obviously have an important role as representatives of clients, and fiduciary loyalty is central to the law and ethics of lawyering.[4] Lawyers are not merely agents for clients, however, in the sense of being mouthpieces or instruments of their clients' will; rather, they have a complex duty of loyalty that is qualified by obligations conventionally shorthanded using the phrase "officers of the court."

As I see it, fiduciary loyalty for lawyers entails reconciling individual and social interests with reference to the positive law of a political community.[5] Other theorists disagree, among them William Simon, who contended that a lawyer should act in ways that "seem likely to promote justice,"[6] Anthony Kronman, who sees the lawyer's role as mediating between public and private interests,[7] and Russell Pearce, who argued for the revitalization of a republican approach to legal ethics which grounds the obligations of lawyers in the public good.[8] Whatever one thinks of the normative foundations of the role of lawyers, the methodological commitment of this Article is to analyzing contested issues in political theory through the lens of professional role morality.[9] We may better understand the challenge populisms poses for liberal democratic values by considering what should be the obligations of lawyers in a liberal democratic society.

Alexis de Tocqueville's treatment of lawyers in *Democracy in America* is a touchstone for much theorizing in American legal ethics.[10] His point was not that many of the American founders and important figures in the early history of the Republic, including Jefferson, Adams, Hamilton, Jay, and Marshall, were trained as lawyers. Nor is it that people believe that lawyers are acting in the public interest. Rather, Tocqueville argues that that the social prestige of the legal profession and the influence of lawyers in the government are essential protections against tyranny of

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3 *See*, *e.g.*, Stephen Mayson, *Legal Services Regulation: The Meaning of 'The Public Interest*, Second Supplementary Report of the Independent Review of Legal Services Regulation (Sept. 2024).

4 *See* W. Bradley Wendel, *Should Lawyers Be Loyal To Clients, the Law, or Both?*, 65 AM. J. JURIS. 19 (2020).

5 *Id.*

6 WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 138 (1998).

7 ANTHONY T. KRONMAN, THE LOST LAWYER 14 (1993).

8 Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 250–51 (1992). For a concise but profound overview of the republican tradition in thinking about legal professionalism, see Robert W. Gordon, *The Independence of Lawyer*s, 68 B.U. L. REV. 1, 14–17 (1988).

9 *Cf.* Richard H. Fallon Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221 (2023).

10 *See, e.g.*, Phil C. Neal, *De Tocqueville and the Role of the Lawyer in Society*, 50 MARQ. L. REV. 607 (1967); 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 (2001). Pearce, *supra* note 8, at 253–54.

the majority.[11] Lawyers acquire, through their education and professional socialization, habits of mind including a preference for formalities and "an instinctive love for a regular concatenation of ideas" that is "strongly opposed . . . to the ill-considered passions of democracy."[12] Lawyers develop a "great distaste for the behavior of the multitude,"[13] characterized by passion instead of reason. Lawyers in an Anglo-American common law system also adopt a kind of tacit Burkean attitude toward the significance of precedent, valuing "laws not because they are good but because they are old."[14] As a result of these habits and dispositions of individual lawyers, the legal profession in America exerts an inherently (small-c) conservative force, resisting or at least slowing down the enthusiasm of the majority for whatever project captures its fancy.[15] Otherwise the instability produced by majoritarian rule inevitably leads to either revolution or the fracturing of the society.[16] The legal profession was therefore capable of acting as a guardian of counter-majoritarian values.[17]

One version of the recent political history of the United States, according to the Hungarian-American historian John Lukacs, is the devolution of liberal democracy toward populism.[18] Like democracy, populism is a term susceptible to a wide range of interpretations and, in contemporary forms, is adjacent to the problem of autocracy.[19] For the purposes of analyzing the impact of populism on the American legal profession, however, we can focus on the characteristics of populism that seem to exert the most severe pressure upon the duties of lawyers insofar as they are owed not only to clients but to the political community at large. These characteristics include: a political leader who appeals directly to support from his followers, often relying on a singular style of charisma that is not reducible to ideology or policy views; pervasive divisiveness and good "us" vs. evil "them" categorizations, and in particular the valorization of "the people" over corrupt or impure elites or the "establishment"; and

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[11] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 263 (George Lawrence, trans., J.P. Mayer ed.,

[12] *Id.* at 264.

[13] *Id.*

[14] *Id.* at 268.

[15] *Id.* at 249 ("As the majority is the only power whom it is important to please, all its projects are taken up with great ardor; but as soon as its attention is turned elsewhere, all these efforts cease . . . ."), 268 ("When the American people let themselves get intoxicated by their passions or carried away by their ideas, the lawyers apply an almost invisible brake which slows them down and halts them.").

[16] *Id.* at 251.

[17] Pearce, *supra* note 8, at 255–56.

[18] JOHN LUKACS, DEMOCRACY AND POPULISM: FEAR AND HATRED 174–75 (2005).

[19] *See*, *e.g.*, STEVEN LEVITSKY & DANIEL ZIBLATT, TYRANNY OF THE MINORITY: WHY AMERICAN DEMOCRACY REACHED THE BREAKING POINT (2023); CAS MUDDE & CRISTÓBAL ROVIRA KALTWASSER, POPULISM: A VERY SHORT INTRODUCTION (2017); Steven Levitsky & Lucan A. Way, *The Path to American Authoritarianism: What Comes After Democratic Breakdown*, FOREIGN AFFS. (Mar./Apr. 2025).

understanding of social pluralism as a source of weakness rather than strength, along with profound mistrust of compromise, consensus, and the attempt to recognize the interests and values of as many different groups as possible.[20] The concept of the general will of the people as a whole, recognizable in political philosophy from Rousseau through Carl Schmitt, is also a characteristic of populism.[21]

Populism is, by its nature, hostile to the rule of law.[22] A populist leader who claims a mandate based on the will of the pure, the good, the uncorrupted people of a nation will not accept limitations on his power arising from the values of the elites or the establishment. As the British legal scholar Nicola Lacey rightly notes, a populist leader is likely to reject the institutional structures of constitutionalism to the extent these checks on power assume a pluralist view of politics.[23] The last thing a populist leader wants is lawyers who care about counter-majoritarian values. The leader claims to know what is in the interests of the people, understood as his supporters, and will perceive any restrictions on power to act for the people as illegitimate.

Populist hostility to the rule of law extends to judges who thwart the will of the people based on legal rights or constitutional principles that, in the eyes of the leader, represent establishment or elite interests. An example of this attitude is a statement by Vice President J.D. Vance, who said that judges "aren't allowed to control the executive's legitimate power."[24] His statement has a hedge built in, via the word "legitimate," because of course if the executive has the legal authority to take some action, judges should not interfere with that authority. But the comment was widely interpreted as a threat that the administration would defy any judicial order it perceived as standing in the way of its political agenda.[25]

This Article explores the impact of populist government on the ethical obligations of government lawyers, in conversation with a long line of legal scholarship. Recently, Richard Abel and Scott Cummings deserve considerable credit for putting the issue of the responsibility of lawyers for promoting democratic backsliding on the agenda for theoretical legal ethics.[26] Autocrats can dress up attacks on the rule of

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20 MUDDE & KALTWASSER, *supra* note 19, at 9–18.

21 *Id.* at 16–18.

22 *Id.* at 91.

23 Nicola Lacey, *Populism and the Rule of Law*, *in* THE CAMBRIDGE COMPANION TO THE RULE OF LAW 458, 465 (Jens Meierhenrich & Martin Loughlin eds., 2017).

24 *See*, *e.g.*, Robert Tait, *Outrage After JD Vance Claims Judges Are Not Allowed to Check Executive Power*, GUARDIAN (Feb. 10, 2025).

25 *See*, *e.g.*, Jaclyn Diaz, *What Happens if Trump Starts Ignoring Court Rulings? We Break it Down*, NAT'L PUB. RADIO (Feb. 12, 2025).

26 *See* RICHARD L. ABEL, HOW AUTOCRATS ABUSE POWER: RESISTANCE TO TRUMP AND TRUMPISM (2024); Scott C. Cummings, *Lawyers in Backsliding Democracy*, 112 CAL. L. REV. 513 (2024).

law in the language of law and legal procedures, and for this, they need lawyers.[27] Abel's and Cumming's concern is more with autocracy, rather than populism (although the two phenomena can travel together in certain political systems), but in either case the role of the legal profession is an important, and under-studied feature of the weakening of democracy and the rule of law. In general jurisprudence, Gerald Postema's recent book on the rule of law, *Law's Rule*, considers threats to the rule of law from erosion or subversion of legal institutions and norms.[28] One of the forces he considers is the replacement of norms of independence and impartiality with the preference for a thin conception of loyalty, emphasizing only its personal dimension, and a desire for unconstrained power.[29] Cummings and Postema both consider the use of legal institutions and procedures themselves as a vehicle for subverting the rule of law.[30] Postema labels as "stealth authoritarianism" the attempt to "degrade the power of significant sources of opposing power, in government and in civil society, by legal or quasi-legal means, turning the law and its guardians against the rule of law and the people that cling to it for protection."[31]

Erosion of respect for the rule of law is not solely the result of subversion by stealth authoritarians or, more recently, frontal assaults on rule of law norms such as the independence of prosecutors from government interference.[32] Skepticism about the value of the rule of law has long been a feature of critical perspectives on the law, from the left as well as the right. Judith Shklar's well-known critique of the ideology of legalism is one example.[33] Shklar was a "Cold War liberal" who was concerned above all with the replacement of freedom by tyranny.[34] She cautioned, however, against conflating the rule of law with an attitude that "holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules."[35] Legalism is an ethos of the law, held by those professionals, including lawyers, judges, and legal scholars, who derive "their identity, their social place, and their sense of purpose" from participating in a process that is committed, above all, to

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27 Cummings, *supra* note 26, at 526. *See also* Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 548 (2018) (Autocratic legalism is the phenomenon "[w]hen electoral mandates plus constitutional and legal change are used in the service of an illiberal agenda.").

28 GERALD J. POSTEMA, LAW'S RULE: THE NATURE, VALUE, AND VIABILITY OF THE RULE OF LAW, at xi (2022).

29 *Id.* at 152.

30 Cummings, *supra* note 26, at 526; POSTEMA, *supra* note 28, at 154.

31 POSTEMA, *supra* note 28, at 154.

32 William K. Rashbaum, Benjamin Weiser, Jonah E. Bromwich & Maggie Haberman, *Order to Drop Adams Case Prompts Resignations in New York and Washington*, N.Y. TIMES (Feb. 13, 2025).

33 JUDITH SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS (1964).

34 SAMUEL MOYN, LIBERALISM AGAINST ITSELF: COLD WAR INTELLECTUALS AND THE MAKING OF OUR TIMES 14 (2023).

35 SHKLAR, *supra* note 33, at 1.

understanding human relations in terms of fixed categories and established rules.[36] The result is a profound detachment from the social ends served by the law and also a preference for order over liberty.[37] Although Shklar does not go quite this far, Samuel Moyn sees legalism as a mindset to be resisted, or at least exposed as the fiction it is:

> Legalism . . . not only does work but must work as a noble lie: philosophers, and perhaps associated guardians, know it is false but allow its many votaries to proceed as if it were true because only the myth makes their conduct possible.[38]

The claim I am defending is not that legalism (the pejorative term) or the rule of law is value-neutral or apolitical. I am in agreement with two scholars who observe that, for Shklar, legalism was not a lie at all, whether noble or otherwise.[39] One can make a self-consciously political or moral choice to adopt the *mentalité* of legalism. At the same time, however, this is not necessarily a partisan, or sectarian, or ideological position in the Red State vs. Blue State sense. Rather, it is a presupposition of a constitutional democracy, in which comparing partisan or ideological claims can be promoted by elected officials, voted on by citizens, and disputes about them adjudicated by courts. The rule of law is a foundation or framework, not the platform of either the Republican or Democratic Party. In that sense it is apolitical, but that should not be understood as the claim that it can be derived like a theorem of geometry from uncontested first principles. The rule of law is something that must be argued for on the basis of moral considerations pertaining to the way a society of sociable but disputatious creatures should be organized.

The question is why one should be committed to the values and practices of the rule of law. The rise of populism sharpens the question: What is good about thwarting the will of the people based on arcane rules and procedures having no obvious connection to the general will, as embodied in the persona of the charismatic leader? Answering this question requires consideration of two somewhat distinct issues in the theory of legal ethics. First, what is so good about the rule of law, as distinct from other values, such as democracy, justice, or the public interest, that may serve as the foundation for the obligations of lawyers? Second, is it possible to square

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[36] *Id.* at 10, 12.

[37] *Id.* at 14–16. Paraphrasing Tocqueville, Shklar acerbically postulates that "if [lawyers] fear tyranny it is because it tends to be arbitrary, not because it is repressive." *Id.* at 15.

[38] Samuel Moyn, *Judith Shklar Versus the International Criminal Court*, 4 HUMANITY 473, 494 (2013).

[39] Seyla Benhabib & Paul Linden-Retek, *Judith Shklar's Critique of Legalism*, *in*, THE CAMBRIDGE COMPANION TO THE RULE OF LAW 295, 307 (Jens Meierhenrich & Martin Loughlin eds., 2017).

the duty of loyalty owed by lawyers to their clients with the obligations that follow from the value of legality?[40]

I. THE RULE OF LAW, EXPLICITLY MORALIZED

One influential way of thinking about the rule of law, associated with Joseph Raz among others, is that the law is simply a tool like any other, capable of being used for good or bad purposes, and therefore morally neutral on its own.[41] As Raz observes, a society may be committed to the formal features of legality emphasized by Lon Fuller,[42] including regular and transparent procedures, directives stated generally, clearly, and prospectively, and the consistent application of norms, yet at the same time pursue a goal like racial segregation that perpetuates a great moral wrong.[43] Fuller claims it is less likely that a system that respects a thin, formal conception of the rule of law will pursue evil ends,[44] but this is an empirical conjecture, not a conceptual necessity. Along these lines, Andrei Marmor writes that one of the most common mistakes made when thinking about the rule of law is to confuse it with the ideal of *good* law.[45] Further, the type of goodness we ascribe to law is sometimes left ambiguous. If law's goodness is understood in purely functional terms, like that of a good knife that fulfills its function by being sharp, then we miss the connection between other goods that are valued independently of the function of law in guiding human conduct.[46]

It can be easier to see this point if it is turned around. A legal system that is functionally good, in the sense of being capable of guiding human conduct effectively, can nevertheless coexist with moral wrongs that the law should aim to prevent. Tom Bingham, the former Lord Chief Justice of England and Wales, famously argued against Raz and other proponents of a thin conception of the rule of law, contending that

> [a] state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed.[47]

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40 ANDREW BOON, LAWYERS AND THE RULE OF LAW (2022).

41 Joseph Raz, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW 210 (1979).

42 LON L. FULLER, THE MORALITY OF LAW (rev'd ed. 1969).

43 Raz, *supra* note 41, at 211.

44 Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 636 (1959).

45 Andrei Marmor, *The Rule of Law and Its Limits*, 23 L. & PHIL. 1 (2004).

46 *Id.* at 8.

47 TOM BINGHAM, THE RULE OF LAW 67 (2010).

As intuitively and morally appealing as Bingham's thick conception of the rule of law may be, it risks begging an important normative question. His contention that the rule of law is not respected in a savagely repressive legal system appeals to more than a thin or functional good of guiding human conduct. He is piggybacking the value of the rule of law off the value of respect for human rights. It is nevertheless important to remember his critique, that the "formal discipline of legality" does not necessarily incorporate any substantive conception of justice or rights.[48]

A frankly moralized conception of the rule of law would understand the relevant good not merely functionally, but also with concern for substantive moral and political values. The relevant values could be human rights, as Lord Bingham contended, or they could be other values such as freedom or dignity. As Jeremy Waldron cautions, the move to a conception of the rule of law grounded on substantive values should set off analytic alarm bells, for it invites "a sort of competition in which everyone clamors to have their favorite political ideal incorporated as a substantive dimension of the Rule of Law."[49] It is also important not to make the category mistake of equating law as such with a *good* law. What I mean by a "frankly" moralized conception of the rule of law is that it is necessary to be explicit about the political ideals it instantiates, and why. One must take sides in a contested debate, not pretend that one's favored political value can be unpacked out of the concept of the rule of law.[50] Nevertheless, the field is not open to just any political value to serve as the organizing principle for understanding the value of the rule of law. It must have some connection to the distinctive mode of governance that we identify with legal systems and procedures. Justice, for example, is an ideal that is related to the distribution of resources and advantages among members of a society, or a property of relationships between individuals; it has less to do with a way of governing the members of a political community. The ideal of

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48 JEREMY WALDRON, THOUGHTFULNESS AND THE RULE OF LAW 247 (2023).

49 Jeremy Waldron, *The Rule of Law*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2016). Bingham appears to concede the point. After the famous passage quoted in the text, he writes that "there is no universal consensus on the rights and freedoms which are fundamental, even among civilized nations." BINGHAM, *supra* note 47, at 68. Despite the lack of a universal consensus, however, he believes that it is "possible to identify the rights and freedoms which, in the UK and developed Western or Westernized countries elsewhere, are seen as fundamental." Among other critiques of this position, I would observe that there may be consensus at a high level of generality about the importance of a right, such as free expression, freedom of the press, or privacy, but a great deal of controversy will arise in the application of that right to concrete facts. As one example, consider the balance struck among the competing values of press freedom and individual dignitary interests; the US and UK vary tremendously in the priority they give to the legal rights supporting these values.

50 Jeremy Waldron, *The Rule of Law as an Essentially Contested Concept*, *in*, THE CAMBRIDGE COMPANION TO THE RULE OF LAW 121 (Jens Meierhenrich & Martin Loughlin eds., 2017).

the rule of law should have something to do with ways of exercising and constraining state power.

One of the virtues of Postema's recent book, *Law's Rule*, is the connection it draws out, between the way in which the law and a legal system are intended to function and substantive political values. The primary evil that law is meant to protect against is arbitrariness.[51] Legal institutions, procedures, and norms promote the rule of law when they safeguard against the arbitrary exercise of power. Arbitrariness is not the same thing as injustice. It refers to a defect in a process of relying on reasons to reach a conclusion in a process of practical reasoning. An arbitrary act is one that expresses pure will, without considering rules or reasons; in Postema's excellent phrase, arbitrariness is a manifestation of "feral will."[52] Arbitrary power does not need to take account of anyone else's perspective or listen to the reasons they give in opposition. Wielders of arbitrary power are exempt from giving reasons.[53] As a result, they have the capacity to dominate others, and domination is the antithesis of freedom.[54]

Refusal to give reasons in justification of an exercise of power is also an indication of the attitude the wielder of power has toward its subjects. On this relational perspective, toward which I have a great deal of sympathy as a matter of moral theory,[55] the wrongfulness of exercising arbitrary power consists in the *subordination* of one party to another, where the victim is vulnerable to the raw will of the dominator in circumstances of dependency.[56] The dominator's superior will commands the victim's subordinated will. It is the opposite of treating another as an equal, as a bearer of dignity, as entitled to respect, and as someone with a rational will worth engaging with.

This way of understanding the moral value of the rule of law is much indebted to Jeremy Waldron's sympathetic reconstruction of Fuller's

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51 POSTEMA, *supra* note 28, at 17–18.

52 *Id.* at 29.

53 *Id.* at 30.

54 *Id.* at 81–82.

55 The conceptual foundation of my recent book, *Canceling Lawyers*, is the relational approach to morality that developed in Anglo-American philosophy following Peter Strawson's influential paper, *Freedom and Resentment*, 48 PROC. BRIT. ACAD. 187 (1962). For contemporary ethical theory that can broadly be characterized as relational in the way Postema appeals to, see R. JAY WALLACE, THE MORAL NEXUS (2019); SUSAN WOLF, THE VARIETY OF VALUES: ESSAYS ON MORALITY, MEANING, AND LOVE (2015); T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME (2008); STEPHEN DARWALL, THE SECOND PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY (2006). For my reliance on this work, see W. BRADLEY WENDEL, CANCELING LAWYERS: CASE STUDIES IN ACCOUNTABILITY, TOLERATION, AND REGRET 40–56 (2024).

56 POSTEMA, *supra* note 28, at 86–87.

Morality of Law.[57] Waldron understands dignity as the status of a person predicated on the assumption of that person's capacity to recognize and act on reasons that apply to her, to give an account of herself, and to insist on being taken seriously and accommodated by others' actions and attitudes. This contrasts with merely directing, managing, or ordering around. "Ruling by law is quite different from herding cows with a cattle prod or directing a flock of sheep with a dog."[58] Respecting the rule of law requires holders of state power to aspire to connect with the rational agency of their subjects, rather than simply issuing orders by fiat or attempting to terrorize people into compliance. Many legal philosophers, starting with Hart, have questioned Fuller's assertion that the law has an "inner morality."[59] As both Waldron and David Luban have argued, however, this is a misunderstanding of Fuller.[60] Fuller's point was that there is moral significance to a mode of governance that emphasizes clear, prospective, public, general, feasible, consistent, non-retroactive directives.[61] Again, philosophers may quibble with Fuller calling this a "morality" of law,[62] but as Waldron and Luban have argued, a way of ordering human conduct that aspires to connect with the capacity of self-governing moral agents to employ practical understanding and control over their own behavior to comply with norms that other, similarly situated agents can understand is one that should be approved of on moral grounds.[63] This is not a traditional, substantive natural law account of the concept of law; rather, it is a normative argument about what would make a system of laws preferable to other ways of regulating the activities of people possessing dignity and agency.

Accordingly, an idealized vision of non-domination (in Postema's terms) or the undertaking to treat the subjects of official power with respect and dignity (following Waldron and Luban), would be realized in a

> community that publicly embraces the dignity and diversity of individuals who find themselves a part of that community and that seeks to structure and sustain a domain of social life in which each relates to each as equals.[64]

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[57] *See* Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1 (2008). For a subsequent restatement of many of the themes in that influential lecture, including the idea of dignity as a status concept, see WALDRON, *supra* note 48, at 76–77.

[58] Waldron, *supra* note 57, at 40.

[59] *See* Frederick Schauer, *Lon Fuller and the Rule of Law*, *in* ROUTLEDGE HANDBOOK OF THE RULE OF LAW (Michael Sevel ed. 2024).

[60] WALDRON, *supra* note 48, at 80; David Luban, *Natural Law as Professional Ethics: A Reading of Fuller*, *in* LEGAL ETHICS AND HUMAN DIGNITY 99 (2007).

[61] FULLER, *supra* note 42, at 46–91.

[62] Schauer, *supra* note 59, at 113–14.

[63] WALDRON, *supra* note 48, at 81.

[64] POSTEMA, *supra* note 28, at 88. Postema borrows this vision from the farmer, essayist, novelist, poet, and activist Wendell Berry. *Id.*

One who is treated with dignity has equal standing with others in the community, and can demand respect in his or her own right.[65] Arbitrariness, therefore, is disrespect in the exercise of power; it consists of treating members of the community as though they need not be taken seriously as equals. There is value in requiring the exercise of official power to follow procedures and respect constraints that are intended to "treat ordinary citizens with respect as active centers of intelligence."[66] Indications of non-arbitrariness in the exercise of power include procedural features such as the reliance on generally applicable reasons in a process of fair-minded deliberation, the opportunity for affected parties to participate in the decisionmaking process, and accountability for the misuse of power (such as inspectors general or other internal watchdog offices). Non-arbitrary decisions may also bear more substantive hallmarks, such as close fit between the content of a directive and the policy objective it is meant to serve. In a thin sense of reasons, whim and caprice count in favor of a decision,[67] but substantive non-arbitrariness requires that reasons explain and justify a decision with reference to something other than its having been chosen by the decisionmaker.

Arbitrariness is one reason that the second Trump Administration's attitude toward the exercise of power is so terrifying. Frequently government officials and lawyers for the government simply refuse to give any reason at all for an action, treating subjects of government authority as a flock of sheep to be directed by a dog. For example, in defense of an executive order threatening to revoke government contracts with any client of the law firm Perkins Coie, a Justice Department lawyer contended that the President has unconstrained authority to identify any individual or organization as threatening to vaguely specified government interests. In response to an incredulous question from a federal district judge, the lawyer stated: "The president of the United States . . . is authorized under the Constitution to find certain individuals and certain companies are not trustworthy with the nations' secrets[.]"[68] As Trump himself admitted, the firm was targeted because it had represented the presidential campaign of Hillary Clinton, not because of any credible national security threat.[69]

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65 *Id.* at 89.

66 WALDRON, *supra* note 48, at 73.

67 As Postema notes, some decisions are unobjectionably arbitrary, such as "one's choice of restaurant for dinner with friends" or "one's choice of hobby, career, employer, or mate . . . ." POSTEMA, *supra* note 28, at 144. The reason "I feel like Thai food tonight" is a sufficient justification for the choice of a Thai restaurant, but it is a thin reason. A substantively non-arbitrary reason would be one that can be shared or endorsed by others subject to the decision.

68 Kyle Cheney & Josh Gerstein, *Judge Blocks Key Provisions of Trump's Bid to Punish Democratic-Linked Law Firm*, POLITICO (Mar. 12, 2025).

69 Michael S. Schmidt, *Trump's Revenge on Law Firms Seen as Undermining Justice System*, N.Y. TIMES (Mar. 12, 2025). In a subsequent Executive Order directed against the New York City law firm Paul Weiss, Trump added to the purported national security risk, which had

From the perspective of the rule of law, the threat in the government's argument was the assertion that the President's say-so was sufficient as a basis for a decision that could put one major law firm out of business and chill other firms from ever representing clients who might anger Trump.[70] There is nothing that can be done—no reason that can be given or argument in opposition that can be made—in the face of this sort of assertion of power. The only available alternative is to obey.[71]

Furthermore, the executive order was arbitrary, and therefore an affront to the rule of law in both procedural and substantive senses. Procedurally, there is abundant evidence that none of the executive orders in the first few months of the second Trump Administration were developed in consultation with the Office of Legal Counsel (OLC), the branch of the Justice Department that advises the President on compliance with law.[72] OLC review would have identified some of the

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also been in the Perkins Coie EO, a statement tantamount to "because I said so." Section 3 of the EO provides that federal agencies will terminate government contracts with any client of Paul Weiss in order to put a stop to taxpayer funding that indirectly supports "activities that are not aligned with American interests." Exec. Order No. 14237, 19 Fed. Reg. 13039 (Mar. 14, 2025) ("Addressing Risks From Paul Weiss").

As for what is contrary to American interests, the EO describes the un-American activities of the firm as anything that takes a policy position that is contrary to this Administration:

> Global law firms have for years played an outsized role in undermining the judicial process and in the destruction of bedrock American principles. Many have engaged in activities that make our communities less safe, increase burdens on local businesses, limit constitutional freedoms, and degrade the quality of American elections. Additionally, they have sometimes done so on behalf of clients, pro bono, or ostensibly "for the public good"—potentially depriving those who cannot otherwise afford the benefit of top legal talent the access to justice deserved by all.

Id. This is not quite the refusal to give any reason at all, but the reason that "the President does not like the position of your client" is a far cry from the type of generally applicable reasons that could be accepted by other, similarly situated parties. It is this latter type of reason that the rule of law requires. Paul Weiss eventually "settled" with the administration, although it strains the concept of a settlement when the party releasing its claim never had a valid claim to begin with. *See* Matthew Goldstein, Jessica Silver-Greenberg & Pen Protess, *Paul Weiss Chair Says Deal With Trump Adheres to Firm's Principles*, N.Y. TIMES (Mar. 21, 2025); Benjamin Weiser, *What to Know About Paul Weiss, the Law Firm Bowing to Trump's Demands*, N.Y. TIMES (Mar. 21, 2025). In response to a threat of a similar order, the law firm Skadden Arps preemptively agreed to do a number of things to support the administration's initiatives. *See* Daniel Barnes, *Major Law Firm Strikes Preemptive Deal with White House*, POLITICO (Mar. 28, 2025). Two other law firms, Jenner & Block and WilmerHale took the path of Perkins Coie and retained counsel to challenge the orders entered against them. *See* Michael S. Schmidt, Matthew Goldstein & Devin Barret, *As Firms Sue to Stop Trump's Executive Orders, a Split Emerges in Big Law*, N.Y. TIMES (Mar. 28, 2025).

70 Stephen L. Carter, *Perkins Coie Scores Partial Win Against Trump But Chilling Effect Remains*, BLOOMBERG LAW (Mar. 13, 2025).

71 For a brief op-ed making this point, by two prominent scholars of populism and authoritarianism, see Ryan D. Enos & Steven Levitsky, *First They Came for Columbia*, HARV. CRIMSON (Mar. 13, 2025).

72 *See* Bob Bauer & Jack Goldsmith, *The Trump Executive Orders as "Radical Constitutionalism*, EXECUTIVE FUNCTIONS (Feb. 3, 2025), https://executivefunctions.substack.com/p/the-trump-executive-orders-as-radical [https://perma.cc/49DX-9SN6].

glaring constitutional deficiencies in the order and, presumably, advised the President to rectify them. There was also substantive arbitrariness. Without necessarily endorsing the full Dworkinian version of this claim,[73] I believe that at root legality entails respect for the principles underlying past decisions and an aspiration to consistency, as an aspect of the respect for the rational agency of the subjects of official directives. There was no evidence mentioned in either the executive order or the accompanying fact sheet,[74] of any potential threat to national security. That ground for the order appears to have been mentioned solely because courts traditionally defer to presidential decisions regarding national security. The EO and fact sheet, however, mostly talk about the firm's diversity, equity, and inclusion (DEI) policies, as well as former firm lawyers' involvement in election law litigation on behalf of Hillary Clinton's presidential campaign. The reasons given had no relationship with the punitive actions against the firm, including threatening firm clients with loss of government contracts if they continued to do business with the firm.

In addition to Postema's concern about arbitrariness, there are other threats to the rule of law that manifest a lack of respect for the agency and dignity of citizens, but in different ways. For example, as Scott Cummings has argued, lawyers can sow mistrust of legal institutions and target them as political opponents like any other, as opposed to neutral, apolitical actors.[75] The aim is to influence civil society as well as official legal actors. A different subversion strategy, often referred to as "lawfare" or the "weaponization" of the legal system, employs facially legitimate procedures like criminal investigations and civil lawsuits to target political adversaries.[76] In another example from the second Trump Administration, the acting U.S. Attorney for the Southern District of New York directed the dismissal of corruption charges, without prejudice to refiling them, against New York City Mayor Eric Adams.[77] The critique of weaponizing the legal system would not be so much that the actions of a government lawyer were without reasons, but that they were motivated by the wrong type of reasons. Seeking the mayor's cooperation in the administration's political objective of increasing the tempo of deportation of undocumented immigrants, the stated reason for using the criminal justice system to keep up pressure on Adams,[78] is not the type of reason that is properly taken

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[73] RONALD DWORKIN, LAW'S EMPIRE (1985).

[74] The fact sheet is available at https://www.whitehouse.gov/fact-sheets/2025/03/fact-sheet-president-donald-j-trump-adresses-risks-from-perkins-coie-llp/ [https://perma.cc/3QEB-W5WR].

[75] Cummings, *supra* note 26, at 555–57.

[76] *Id.* at 564, 620.

[77] *See* the disciplinary complained filed by the Democratic members of the Senate Judiciary Committee, filed on March 4, 2025, available at https://www.judiciary.senate.gov/imo/media/doc/2025-03-04 SJC Bar Complaint re Bove.pdf [https://perma.cc/5BPW-79C5].

[78] In a television interview, Trump's "border czar" Tom Homan colorfully explained the motivation for dismissing the charges against Adams without prejudice: "If he doesn't come

into consideration in connection with the lawful exercise of prosecutorial discretion. In theoretical terms this may better be described as implicating Razian exclusionary reasons rather than non-domination or avoiding arbitrariness.[79]

Nevertheless, avoiding arbitrariness is a promising normative objective that helps connect the concept of the rule of law with ethical lawyering. The claim in a nutshell, to be explored in the next Section, is that legal ethics theory goes wrong when it seeks to orient the ethical obligations of lawyers around the bare *interests* of clients, as opposed to client rights and privileges that are supported by the law of the community. The standard picture of lawyers' duties as zealously advocating for their clients' interests is vulnerable to the pressures of populism and authoritarianism when lawyers understand themselves as having no option but to acquiesce in their client's demands and follow the instructions of their clients, subject only to minimal duties of avoiding counseling or assisting client conduct that amounts to a crime or a civil fraud.[80] I hope the distinction between the interests of a client, including a government agency or the entire executive branch of the federal government will become clear in the next Section. However, as a simple definition, consider the distinction between the following:

> "I have an Article II, where I have the right to do whatever I want as president." Donald Trump, speaking to the Turning Point USA Teen Student Action Summit on July 23, 2019.[81]
>
> The President "shall take Care that the Laws be faithfully executed."[82]

The first statement concerning government power is explicitly authoritarian. If coupled with a conception of legal ethics that requires

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through . . . I'll be back in New York City, and we won't be sitting on the couch. I'll be in his office, up his butt, saying, 'Where the hell is the agreement we came to?'" Emily Ngo, *Trump Border Czar Crows That New York City Mayor Must Do His Bidding*, POLITICO (Feb. 14, 2025).

[79] *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 57–62 (1986).

[80] MODEL RULES OF PRO. CONDUCT r. 1.2(d) (A.B.A. 1983).

[81] Michael Brice-Saddler, *While Bemoaning Muller Probe, Trump Falsely Says the Constitution Gives Him 'The Right to Do Whatever I Want'*, WASH. POST (July 23, 2019). The Justice Department filed a motion to disqualify U.S. District Judge Beryl Howell, who had entered a temporary restraining order barring enforcement of the government's executive order against the law firm Perkins Coie. In the motion, the Justice Department complained about "ongoing improper encroachments of President Trump's Executive Power playing out around the country" As Judge Howell explained in response, what the government calls improper encroachments are in fact the exercise of the authority of federal courts to decide whether the exercise of executive power is lawful. *See* Perkins Coie LLP v. U.S. Department of Justice, Civil Action No. 25-716 (BAH) (Mar. 26, 2025). The government's position in the motion to disqualify is remarkably similar to the statement by Trump that he can do whatever he wants.

[82] U.S. CONST., Art. II § 3.

only that lawyers promote the state interests of their client, or follow their client's instructions, then the ethical obligations of lawyers become subordinate to the will of the leader. We can refer to this as the "client interests" version of the lawyer's fiduciary duty to the client. The second statement, by contrast, builds in recognition of the limitations of official power to that which is legally authorized. The Take Care Clause expressly requires the President to ensure fidelity to law in government action. For the purposes of the ethical obligations of executive branch lawyers, it makes clear that their duties are oriented toward "the Laws" and not simply the interests, instructions, or whims of the President. We can call this the "client's lawful interests" version of the lawyer's fiduciary duty. Apart from the Constitution, however, the claim to be developed further in the next Section is that the client's lawful interests version of the lawyer's fiduciary duty is baked into the concept of what it means to carry out one's fiduciary obligations as a lawyer.

II. THE RULE OF LAW AND THE CRAFT OF ETHICAL LAWYERING[83]

Lawyers, at least in the United States, are fond of invoking the idea of "zealous advocacy." On its face this is kind of strange. Rules of professional conduct do not generally prescribe an emotional state, like representing one's client with zeal. The rule also seems to have no application outside the litigation context. After fighting a Quixotic battle against lawyers' invocation of this ideal for many years, however, I have come to understand that what lawyers mean by zealous advocacy is a unidirectional set of duties. It is an account of fiduciary loyalty as much as it has anything to do with advocacy. Lawyers would like it to be the case that they owe obligations only to their client, uncomplicated by duties owed to courts, justice, the public interest, or to be required to act in any way as an intermediary between their client's interests and the interests of specific third parties or society as a whole. In the field of fiduciary law, the classic English statement of the duty of loyalty emphasizes that a fiduciary has only one object of concern:

> [N]o one, having [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.[84]

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[83] I am indebted to Leora Bilsky's questioning at the conference for clarifying the centrality of the relationship between the rule of law and lawyering craft to the arguments in this Article.

[84] Aberdeen Railway Co. v. Blaikie Bros. (1854) 1 Macq. 461 (H.L.) 471.

Note the reference here to the interests of the client, suggesting it is the client's bar interests, not the client's legal rights and privileges, that sets the parameters of the lawyer's fiduciary duties.

Another English example much beloved by American lawyers is from a nineteenth century barrister defending Queen Caroline against charges of adultery. To protect his client, the barrister, Henry Brougham, threatened to reveal that the king had secretly married a Catholic woman. Questioned about these tactics, the barrister responded:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.[85]

This is also an example of the client-interests version of the lawyer's fiduciary duties, given the exhortation to "save the client . . . at all hazards and costs to other persons." It is possible that Lord Brougham meant to qualify this duty by requiring zealous advocacy only by "means and expedients" consistent with the client's rights, but the more natural reading is that the client's interests alone set the parameters of the lawyer's fiduciary duties.

While the Brougham quote does mention advocacy, what is significant about both of these descriptions of fiduciary loyalty is the unidirectional quality of fiduciary relationships. The first passage conveys the importance of not being encumbered by any conflicting interest that would cause a deviation from pursuing the best interests of the beneficiary. The second similarly captures the idea of single-minded concern, but goes beyond the avoidance of conflicting interests to a kind of resolute indifference to the "alarm, torments, and destruction" that may be the result of pursuing the interests of one's client to the exclusion of all other concerns. Care must be taken, however, not to apply these passages uncritically to the ethical obligations of lawyers. As I have argued, the loyalty owed by lawyers to clients is not a simple matter of pursuing the client's objectives with zeal.[86] Rather, lawyers should use reasonable professional skill and diligence to promote the lawful objectives

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[85] Quoted in, among innumerable sources on the ethics of lawyers, Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 GEO. J. LEGAL ETHICS 1213, 1215 (2006) (quoting 2 THE TRIAL OF QUEEN CAROLINE 3 (1821)); *see also* Eberhard P. Deutsch, *The Trial of Queen Caroline*, ABA J. 57: 1201-08 (Dec. 1971). For a lively and funny recounting of the whole sordid story, see TIM DARE, THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE 6 (2009).

[86] W. Bradley Wendel, *Understanding the Complex Loyalty of Lawyers: Dual-Commission, Governance Mandate, and Intrinsic-Limit Analyses*, *in* OXFORD STUDIES IN PRIVATE LAW THEORY: VOLUME II 159 (2023).

of their clients, and only those objectives that are adequately supported by the client's legal entitlements.[87]

The reason for this is not that there is an independent duty under the rules of professional conduct to prevent a client from committing crimes or frauds. Such a duty does exist,[88] but the more general reason that a lawyer is limited to promoting the client's lawful objective is that the law itself establishes the metes and bounds of the client's authorization to act. This is a conclusion that follows from the principal-agent structure of the lawyer-client relationship and is the case in public as well as private law. In private law contexts, I have argued that lawyers act unethically (although not necessarily in violation of any specific rule of professional conduct) when they draft contract provisions they know are unenforceable. This is not "zealous advocacy" because no advocacy is involved; the lawyer is not taking a position in litigation that a court may agree or disagree with. I have talked a couple of times about an example from clinical teacher and legal ethics scholar Paul Tremblay.[89] He was representing a startup business in a law school entrepreneurship clinic. One of the founders of a business asked him to draft an "independent contractor agreement" for two software engineers. Under applicable law, the relationship between the company and the engineers would necessarily be an employer-employee relationship, not an independent contractor relationship. However, the startup company did not want to pay for unemployment and workers' compensation benefits. The engineers were content with the agreement because the company would compensate them well. Can a lawyer draft what purports to be an independent contractor agreement in these circumstances?

Even on the assumption that doing so would involve no fraud on state unemployment compensation authorities, my view is that the lawyer may not draft the agreement because the client does not have the lawful power to enter into an independent contractor relationship in these circumstances. As an agent for a principal, a lawyer cannot have any greater power than the client has. The lawyer cannot conjure up power to do something that the law does not permit the client to do. Perhaps the point is clearer in the context of some of the executive orders issued by President Trump in the early months of his second presidential term. Many of these orders purport

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87 Restatement (Third) of the Law Governing Lawyers § 16(1) (2000).

88 MODEL RULES OF PRO. CONDUCT r. 1.2(d) (A.B.A. 1983).

89 *See* Paul R. Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 FLA. L. REV. 251 (2018). I became obsessed with the example and first wrote a short response in the law review's online forum and later built out the response into a substantial theoretical piece. *See* W. Bradley Wendel, *Lawyers' Constrained Fiduciary Duties: A Comment on Paul R. Tremblay,* At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct, 70 FLA. L. REV. F. 7 (2018); W. Bradley Wendel, *Should Lawyers Be Loyal To Clients, the Law, or Both?*, 65 AM. J. JURIS. 19 (2020).

to bring about a result that depends on legal authority the president simply does not have. In the case of the law firm executive orders, for example, Article II of the Constitution, the First Amendment, the Due Process Clause, and the right to counsel under the Fifth and Sixth Amendments do not permit the president to cancel government contracts with clients of a law firm that angers the president by representing his political opponents or taking positions that he believes to be contrary to American values. A lawyer called upon to draft such an order should respond that doing so would be beyond what the lawyer may do, because the lawyer's ability to bring about a lawful result is conceptually inextricable from the extent of the client's (here, the President's) lawful power.

The inevitable response to this argument is that it presupposes an implausible degree of determinacy in the law. Legal scholarship beginning with American legal realism in the 1920s and '30s, and extending through Critical Legal Studies in the 1970s and '80s and various critical-studies offshoots (e.g. Critical Race Theory, LatCrit Theory, and so on) has claimed that law and politics are not distinguishable, that there is no Archimedean point outside of politics from which a legal position can be evaluated as objectively valid, and that legal judgment can never be politically neutral.[90] This has long been understood as presenting a challenge for legal ethics.[91] Many of the sweeping Realist and post-Realist arguments assume a strong version of the determinacy thesis, somewhere in the neighborhood of Ronald Dworkin's notorious "one right answer" claim.[92] But defenders of professional craft and the obligation to interpret the law in good faith do not have to assume that there is only one right answer to a question of how the law can be interpreted. A more modest claim about the determinacy and objectivity of law is simply that there are better and worse legal interpretations, having greater or lesser support in law and the interpretive norms within a professional community, and varying confidence that lawyers have in their judgment that the client's proposed course of action is adequately supported by the law.[93] I believe,

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[90] *See, e.g.*, Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339 (1996); Kenneth Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Duncan Kennedy, F*reedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

[91] David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

[92] *See* Ronald M. Dworkin, *No Right Answer?*, *in* LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF HLA HART 58 (P.M.S. Hacker & Joseph Raz eds., 1977); *see also* Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007).

[93] Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1321 (2000) ("Lawyers, legislators, and judges operate on a daily basis on the understanding that there are right and wrong answers in the law, or, at least, answers that do and must govern relevant conduct."); David A. Strauss,

based on the fiduciary structure of the lawyer-client relationship, that when a reasonable lawyer, employing the techniques and craft of legal analysis learned through extensive training and experience, would conclude that the law does not permit the client to do something, the lawyer may not assist the client in that course of action.

In a review of *Lawyers and Fidelity to Law*, William Simon refers to my understanding of the constrained fiduciary duties of lawyers as "authoritarian."[94] He says the arguments in the book "underestimates the extent to which social order depends on informal as well as formal norms and adopts a utopian attitude toward constituted power."[95] Setting aside the polemical tone, Simon's critique is similar to Shklar's analysis of legalism. He dislikes my insistence that lawyers understand their ethical obligations with respect to positive law and the institutionalized resolution of conflicts about justice in a pluralistic society.[96] Simon's objection calls to mind Shklar's mistrust of legality as a totalizing framework for understanding and regulating human relationships. Shklar and Simon both rightly caution about loading up too much moral significance onto the bare fact that some norm has the status of "law." They also worry about the suppression of normative arguments that cannot be framed in terms of rules.[97] From a very different political perspective, Paul Carrington's attack on Critical Legal Studies makes a similar point:

> Law teachers have the power to influence the process by which law students can numb themselves to many of their more desirable human impulses. As technocrats we can lose feelings for the human tragedies in which we participate; we can also permanently anesthetize for indignation at injustice or mendacity.[98]

Carrington's paper was part of the "CLS wars" of the 1980s, and created an uproar with its insistence that a lawyer must accept that law matters, almost as an article of faith, and that law teachers who go too far in the direction of realism, so that their belief about law amounts to nihilism, "ha[ve] an ethical duty to depart the law school."[99]

Common Law Constitutional Interpretation, 63 U. CHI. L. REV. 877, 931 (1996); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

94 William H. Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, 90 TEX. L. REV. 709 (2012) (book review).

95 *Id.* at 710.

96 *Id.* at 712.

97 *Id.* at 712–13.

98 Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 224 (1984).

99 *Id.* at 227. For the response by numerous legal scholars, see the correspondence collected in Peter W. Martin, *"Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL. EDUC. 1 (1985).

Having been in the legal academy during the CLS wars, as Simon was, may be one reason that scholars are wary of invocations of the rule of law as a political ideal. However, it need not be taken on as a matter of faith alone. Reasonable people can certainly disagree over whether the deference I believe lawyers owe to the official resolution of contested normative questions is excessive. However, it is not at all "authoritarian" to insist that the exercise of state power be constrained by rules and procedures governing the operation of official institutions. It is a morally valuable practice to require that exercises of official power be based on reasons and using processes that provide opportunities to submit evidence and arguments to the decisionmaker. A contrast with the norms established by Department of Justice leadership in the second Trump Administration will illustrate that the fidelity-to-law conception of ethical lawyering is, in fact, the antithesis of authoritarianism.

Soon after she was confirmed as Attorney General, Pam Bondi released a memorandum for all Justice Department lawyers.[100] The memo states that the interests of the United States are set by the President, and that "attorneys are expected to zealously advance, protect, and defend their client's interests." This is the Brougham view, the client-interests approach to the fiduciary duty thesis. However, the concluding paragraph of the memo appears to hedge somewhat, albeit in a roundabout way:

> When Department of Justice attorneys, for example, *refuse to advance good-faith arguments* by declining to appear in court or sign briefs, it undermines the constitutional order and deprives the President of the benefit of his lawyers.[101]

The italicized language suggests that Bondi recognizes a limitation, consistent with the "client's lawful interests" version of the fiduciary duty thesis. On this reading of the memo, a lawyer may refuse to advance an argument if there is no good faith basis for it. This is consistent with legal constraints on frivolous advocacy, including the prohibition in the professional conduct rules on "bring[ing] or defend[ing] a proceeding, or assert[ing] or controvert[ing] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous,"[102] and the requirement in the Federal Rules of Civil Procedure that an attorney certify when submitting any filing to a court that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending,

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100 *See* Memo from the Attorney General: General Policy Regarding Zealous Advocacy on Behalf of the United States (Feb. 5, 2025), available at https://www.justice.gov/ag/media/1388521/dl?inline [https://perma.cc/5LRL-EVVU].

101 *Id.* (emphasis added).

102 MODEL RULES OF PRO. CONDUCT r. 3.1 (A.B.A. 1983).

modifying, or reversing existing law or establishing new law."[103] Without the italicized language, however, Bondi's memo suggests that the duties of government lawyers are merely to do whatever is necessary to zealously advance, protect, and defend their client's interests."

Shklar's concern, and Simon's as well, is that a myopic focus on the rule of law can cause one to lose sight of other criteria of good government, such as protecting individual rights or promoting a more egalitarian distribution of resources. Perhaps surprisingly, Paul Carrington would agree with this critique. Replying to Bob Gordon's letter in response to "Of Law and the River," Carrington said something that resonates with Shklar's doubts about legality:

> Moral outrage and a zeal for reform are singularly difficult to generate in professional students. Although constrained by my belief that students are ends not means, I have been taking a stab at evoking moral outrage for 25 years. The bottom line of my course in civil procedure is that the system is broken, that it operates to grind the faces of the weak and poor, and needs radical reform.[104]

Again, heeding Waldron's cautionary note, it is important not to assume that all of the qualities of good government can be deduced from the concept of the rule of law. As applied to the ethical obligations of lawyers, however, the rule of law is not intended to be an all-encompassing evaluative criterion. A theory of legal ethics that foregrounds the rule of law is, by design, a modest one. At least as I see it, the duties of lawyers should not be understood primarily as ensuring that justice is promoted through a legal system. Nor is it to ensure that the rights and duties established by the legal system are in the public interest. The emphasis on the rule of law does, however, serve as a crucial barrier to authoritarianism. On Waldron's reading of Fuller, the rule of law insists that official power be supported by reasons, and specifically by reasons that are publicly available, can be grasped by intelligent people, and at least aim at consistency in principle with the reasons supporting relevantly similar exercises of state power.

The fidelity-to-law version of this position merely adds that the constraint on official authority, which protects against the arbitrary exercise of power, is provided by positive law, not considerations such as the public interest, the common good, or justice. The Take Care Clause of the Constitution directs the President to ensure that *the laws* be faithfully executed. Lawyers advising the President on the legality of a proposed course of conduct should, accordingly, be oriented in their advising toward

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103 FED. R. CIV. P. 11(b)(2).

104 Martin, *supra* note 99, at 11.

the law, not the President's desires or political objectives.[105] Of course the President structures and manages the Executive Branch to achieve his political objectives, subject to political constraints; that is a commonplace of administrative law.[106] Review of presidential actions by the Office of Legal Counsel in the Justice Department can thus be understood merely as a means of enhancing trust in Executive Branch decisionmaking.[107] Exclusively looking at the problem of the lawful exercise of presidential power through an administrative law lens, however, misses something essential about the role of lawyers. Administrative law scholars tend to focus on the President. A legal ethics perspective on the problem of Executive Branch legal interpretation, by contrast, would focus on the role of lawyers as legal advisors. From that perspective, the essential point is that lawyers, even those working in high-level Executive Branch positions, are still no more than agents for their principal, with fiduciary duties running to their client. All lawyers are required to provide independent legal advice.[108] As applied to government lawyers, the Office of Professional Responsibility in the Department of Justice has interpreted the requirement of providing independent advice to require lawyers to counsel clients regarding whether a court would sustain a legal position if challenged, identify strengths and weaknesses in the position and acknowledge possible counterarguments.[109]

As noted previously, the obvious response to the fidelity-to-law perspective is to assert the identity of law and politics. Thomas Merrill's observation is typical: "[I]n a post-Legal Realist Age, . . . most legal commentators take it for granted that law cannot be disentangled from politics and that legal judgment is driven by the political beliefs of the decisionmaker."[110] But the claim of realism may not be borne out in the decisionmaking of government lawyers. Daphna Renan cites a number of former high-level government lawyers who have stated that the perceived need to give reasons for a decision—because the reasoning may subsequently be disclosed or simply because considerations of legal professionalism demand it—may have a significant constraining effect on executive power:

> Professor Abram Chayes, reflecting on the role of lawyers and legal analysis in the Cuban Missile Crisis, emphasized that "the requirement of [legal] justification suffuses

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105 Moss, *supra* note 93, at 1312–13.

106 Daphna Renan, *The Law Presidents Make*, 103 VA. L REV. 805 (2017); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

107 Renan, *supra* note 106, at 809–10.

108 MODEL RULES OF PRO. CONDUCT r. 2.1 (A.B.A. 1983).

109 Milan Markovic, *Advising Clients after Critical Legal Studies and the Torture Memos*, 114 W. VA. L. REV. 109, 130–31 (2011).

110 Thomas W. Merrill, *High Level, 'Tenured' Lawyers*, 61 L. & CONTEMP. PROBS. 83, 88 (1998).

> the basic process of choice. There is continuous feedback between the knowledge that the government will be called upon to justify its actions and the kind of action that can be chosen." Similarly, Professors Curtis Bradley and Trevor Morrison have suggested that "[t]he pervasive existence of public 'law talk' may itself be . . . a mechanism promoting . . . law's constraining effect."[111]

The views summarized here, of Professors Chayes, Bradley, and Morrison, are a practical counterpart to the Fuller-Waldron-Postema-Luban approach to the rule of law which sees reason-giving as fundamental to the protection against the arbitrary exercise of state power. Giving reasons is inherently a check on populist appeals to the bare will of the majority and the leader's belief that public acclaim is his source of authorization to act to vindicate the general will.

Where I disagree with Renan relates to her understanding of government legal professionalism as amounting to a distinctive role for lawyers in the Office of Legal Counsel:

> Implicit in some defenses of a formalist OLC seems to be an idea that OLC's professional role is somehow distinct from these other legal advisors—that lawyers working in the White House Counsel's Office or the Defense Department's General Counsel, for example, will and should press hard for the president's preferred policy views, while OLC lawyers should say "no" when the legal argument goes too far.[112]

Renan's article, in common with much of the scholarship on executive constitutionalism, focuses on specialized advisory offices such as OLC. She is skeptical that there should be different professional standards for occupants of different government lawyering roles, and I agree. I go beyond her skepticism, however, and have written that the law governing lawyers does not differentiate between government and private lawyers acting in a counseling role.[113] Particularly if one emphasizes professionalism and lawyerly craft, as Chayes, Bradley, and Morrison do, the source of the relevant norms is not the Constitution but the fiduciary relationship between lawyers and clients. In both public and private advisory contexts,

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[111] Renan, *supra* note 106, at 890 (citing Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1140 (2013); ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 103 (1987)).

[112] Renan, *supra* note 106, at 892.

[113] W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 Hastings L.J. 275 (2017).

the duty of loyalty to the client is geared toward promoting the lawful objectives of the client, not the client's interests full-stop.

I recognize there is some loss here. Renan states the objection well:

> [T]he primacy of lawyers and legal craft can also subjugate a type of blended judgment – the ability to combine legal and extralegal (moral, policy, and political) considerations in the making of presidential judgment. A strongly articulated process of formal OLC review creates the risks either that legal analysis will be insufficiently attentive to policy and moral concerns, or that the policy preferences of a small set of lawyers will unduly drive presidential decisionmaking.[114]

The "blended judgment" that may be subjugated to legal craft is precisely the quasi-aristocratic role so prized by many scholars, including Kronman and Simon. The loss inherent in a fairly narrow, formalist or technocratic view of the lawyer's role in relationship to the value of the rule of law, is that some practical wisdom, acquired by lawyers after a long course of government service, may be irrelevant to government decisionmaking. Lawyers in a policymaking role in the government may take nonlegal considerations into account when advising government officials.[115] The challenge of populism, however, is that the "extralegal (moral, policy, and political) considerations that go into the making of presidential judgment" simply collapse into the leader's belief about the content of the mandate from the people. If the leader, who claims special understanding into the will of the people, claims to exercise power based on that general will, then nothing constrains state power except the leader's own judgment. This is certainly *a* conceivable form of government, but it is antithetical to the value of the rule of law, which is to limit the exercise of unconstrained, arbitrary will.

Tocqueville's idea that lawyers can serve as a counterweight to majoritarian excesses is worth preserving; however, I would emphasize that lawyers go beyond "an instinctive love for a regular concatenation of ideas" and a mere "distaste for the behavior of the multitude."[116] The role of lawyers is not founded on a style or a preference, but on a specify duty to promote only the lawful objectives of a client. Holding this line is important, in light of the caution in the last sentence of Renan's passage above. The policy preferences of a small group of lawyers should not unduly drive presidential decisionmaking. The president's agenda, with

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114 Renan, *supra* note 106, at 893.

115 Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1194 (2006).

116 TOCQUEVILLE, *supra* note 11, at 264.

a presumed basis in a mandate from a democratic election, may drive decisionmaking in the first instance, but the exercise of presidential power must always be constrained by the necessity of complying with applicable law. Finally, and in response to J.D. Vance's objection to the judiciary limiting the power of the executive, the professional craft and lawyer's role account defended here is not a "departmental" story. I am not making any claim about the power of judges. Rather, the argument depends on the necessity of lawyers ensuring that the exercise of government power is consistent with the law.

CONCLUSION

Returning, in closing, to the Tocquevillian theme from the Introduction, the position defended here is not that lawyers generally, or government lawyers specifically, have a role that involves mediating between the interests of clients and the common good, or taking the public interest into account when representing clients. Rather, the theory of fiduciary loyalty defended here builds in respect for the rule of law as a constraint on the exercise of arbitrary power. The rights and duties that define the limits of a principal's lawful power, and thus constrain what an agent may permissibly do in the course of representation, are determined by a process that relies on reason-giving and responding to reasons. This is the case whether the law develops through common-law adjudication, legislation, or administrative rulemaking. Reasons and reason-giving are central to what constitutes the legal entitlements of individuals and entities.

At least in the form considered here, strong populism and the rule of law are utterly irreconcilable. In a society in which the rule of law is respected, the authorization to exercise power does not emanate from the will of the people, as embodied in the persona of a leader who claims to represent the authentic, true, good people of the nation, as against the impure and the enemies of the state. The frequently quoted line from Shakespeare's *Henry VI*, "the first thing we do, let's kill all the lawyers," is actually making the same point.[117] Lawyers are an obstacle to revolution, as recognized by Dick the Butcher, who played a part in a plot hatched by the Duke of York to sow disorder so that he could become king. As Cummings shows in his scholarship on the role of lawyers in backsliding democracy, however, it is not sufficient that a society simply have (live) lawyers. The lawyers must also be educated, socialized, and regulated so that they promote, rather than subvert, the rule of law.

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[117] DANIEL J. KORNSTEIN, KILL ALL THE LAWYERS? SHAKESPEARE'S LEGAL APPEAL (1994).