THE GOOD LAWYERS OF JANUARY 6

W. Bradley Wendel†

Much of the response by the community of legal ethics and professional responsibility scholars to the 2020 presidential election has been focused on the wrongs committed by lawyers like John Eastman, Jeffrey Clark, and Kenneth Chesebro, who created the alternate elector scheme to throw the decision regarding the election to the House of Representatives. Yet there was a group of lawyers, that I will refer to as "the good lawyers of January 6," who forcefully and unequivocally opposed this plan, refused to cooperate in its execution, advised Vice President Mike Pence that it was not legally supportable, and in some cases threatened to resign in protest if President Trump went forward with it. What accounts for the behavior of these lawyers? The hypothesis explored in this article is that a commitment to the rule of law is central to the professional identity of the lawyers who refused to lend their assistance to Trump's "Stop the Steal" efforts. Of course, each of these lawyers may have acted for his own unique reasons, but the normative commitment shared by all of them is fidelity to the rule of law. The actions of the good lawyers of January 6 serve as a kind of ostensive definition of the ideal of the rule of law as a principle of ethical lawyering.

TABLE OF CONTENTS

---

† Edwin H. Woodruff Professor of Law, Cornell Law School. I gratefully acknowledge the research funding provided by the Judge Albert Conway Memorial Fund for Legal Research, established by the William C. and Joyce C. O'Neil Charitable Trust. Thank you to Deborah Perlstein, Jennifer Gerarda Brown, Helen Kruuse, Margaret Raymond, and other participants at panel discussions of related issues at the International Legal Ethics Conference in Amsterdam and the 2024 SEALS conference, for suggestions and criticisms of the claims in this Article.

INTRODUCTION

A great many distressing facts have been learned about the involvement of lawyers in Donald Trump's efforts to first contest the results of the 2020 presidential election, and then to use unlawful means to overturn it. Trump's attempted overthrow of a rightfully democratically elected administration took the form of promoting the "Big Lie" that many states' results were affected by widespread voter fraud and encouraging a wide-ranging "Stop the Steal" campaign of public relations and social media advocacy.[1] For our purposes, relevant to the topic of legal ethics, the most troubling aspect of Trump's conduct was the direction to lawyers inside and outside of the administration to look into means of preventing Congress from certifying Joe Biden as the winner of the election.[2] This Order culminated in the alternate-elector scheme under which former Vice President Mike Pence would unilaterally reject electors submitted by certain states that had voted for Joe Biden, replacing them with pro-Trump alternatives, thereby securing an outright win for Trump or at least throwing the resolution of the election into the House of Representatives.[3]

---

1 For a detailed account of the events of January 6, 2021, and the events leading up to it, including Trump's "Big Lie," the "Stop the Steal" campaign, and the role of legal advisors including John Eastman and Rudy Giuliani, see BENNIE G. THOMPSON ET AL., FINAL REPORT OF THE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, H.R. REP. NO. 117-663 (2022). For analysis by prominent legal ethics scholars of the misconduct of some of these lawyers, see, e.g., Scott L. Cummings, *Lawyers in Backsliding Democracy*, 112 CALIF. L. REV. 513 (2024); George M. Cohen, *The Discipline of Rudy Giuliani and the Real Fraud of the 2020 Election*, 73 CATH. U. L. REV. 325 (2024); Margaret Tarkington, *The Role of Attorney Speech and Advocacy in the Subversion and Protection of Constitutional Governance*, 69 WASH. U. J.L. & POL'Y 287 (2022); Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies They Tell*, 69 WASH. U. J. L. & POL'Y 37 (2022).

2 *See, e.g.*, Eastman v. Thompson, 594 F. Supp. 3d 1156, 1189–90, 1196 (C.D. Cal. 2022) (applying the crime-fraud exception to communications between Eastman and Trump and describing in detail the scheme outlined by Eastman to overthrow the election results). The crime in question, for the purposes of the crime-fraud exception to the attorney-client privilege, is attempting to obstruct an official proceeding, i.e., Congress's counting of the electoral votes, under 18 U.S.C. § 1512(c)(2); *see also* Specification of Charges, *In re* Clark, No. 2021-D193 (D.C. July 19, 2022); Notice of Disciplinary Charges, *In re* Eastman, No. 23-O-30029 (Cal. State Bar Ct. Jan. 26, 2023) [hereinafter Eastman Complaint].

3 Eastman Complaint, *supra* note 2, at 7, 9.

I want to shift the focus for a moment to the actions of a number of other lawyers, most of whom would be described as "movement conservatives,"[4] or members of the Republican establishment. They had similar pedigrees, including membership in the Federalist Society, clerkships for conservative Supreme Court Justices and Court of Appeals judges, and service in previous Republican administrations. They presumably shared many of the policy goals of the Trump Administration. However, when the rubber hit the road, when the details of the "fake electors" plan were presented to them,[5] they refused to further it, counseled Vice President Pence that he did not have the constitutional authority to do what the plan contemplated, and in some cases organized rearguard efforts within the Administration to thwart the scheme.[6] These lawyers include Greg Jacob, counsel to Vice President Pence; White House Counsel Pat Cipollone; White House Senior Advisor Eric Herschmann; retired federal judge J. Michael Luttig; Acting Attorney General Jeffrey Rosen; Deputy Attorney General Richard Donoghue; former Attorney General William Barr; and Secretary of Labor Eugene Scalia.[7] In various ways, all of them took steps to support the rule of law and the peaceful transition of power to Joe Biden. Legal ethics scholars

---

4 *See generally* ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008); STEVEN MICHAEL TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008).

5 Luke Broadwater & Maggie Haberman, *Newly Released Messages Detail Roots of the 'Fake Electors' Scheme*, N.Y. TIMES (Mar. 4, 2024), https://www.nytimes.com/2024/03/04/us/politics/chesebro-troupis-jan-6-messages.html.

6 *See* Michael Kranish, *New Details Emerge of Oval Office Confrontation Three Days Before Jan. 6*, WASH. POST (June 14, 2022), https://www.washingtonpost.com/politics/2022/06/14/inside-explosive-oval-office-confrontation-three-days-before-jan-6 (detailing the incident in which Jeffrey Clark, the head of the Environmental and Natural Resources Division of the Department of Justice, met with Trump in the White House and asked to be named Attorney General; Acting Attorney General Jeffrey Rosen and Deputy Attorney General Richard Donoghue rushed to the meeting and Donoghue informed Trump that there would be mass resignations from senior Department of Justice (DOJ) leadership if he appointed Clark AG). The *Washington Post* article reports an all-time great putdown by Donoghue to Clark: "You're an environmental lawyer. How about you go back to your office, and we'll call you when there's an oil spill." *Id.*

7 Many of the details of these lawyers' efforts behind the scenes prior to and on the day of the January 6 insurrection are from the House of Representatives Special Committee Report. *See* THOMPSON ET AL., *supra* note 1, at 21, 32–36, 49; *see also* Kyle Cheney, *He Devised a Fringe Legal Theory to Try to Keep Trump in Power. Now He's on the Verge of Being Disbarred*, POLITICO (June 11, 2023, 7:00 AM), https://www.politico.com/news/2023/06/11/john-eastman-disbarment-trial-trump-00101407 [https://web.archive.org/web/20240819221557/https://www.politico.com/news/2023/06/11/john-eastman-disbarment-trial-trump-00101407]; Brendan Cole, *Trump WH Lawyer Recalls John Eastman Call: 'You Out of Your F***ing Mind?'*, NEWSWEEK (June 15, 2022, 7:43 AM), https://www.newsweek.com/eastman-herschmann-trump-january-6-committee-mind-1715961 [https://perma.cc/NR9N-8NAT]. Other details are set forth in the decision of the District of Columbia Court of Appeals Board on Professional Responsibility in the disciplinary proceeding against Jeffrey Clark. *See infra* Section I.B.

should be just as interested in what they did right and why, as what John Eastman, Jeffrey Clark, Kenneth Chesebro, Cleta Mitchell, Kenneth Klukowski, Rudy Giuliani, and Sidney Powell did wrong.

If there is a sociological explanation for the behavior of the good lawyers of January 6, this would go a long way toward answering the objection from Trump-aligned/MAGA commentators that the professional disciplinary actions brought against lawyers like Eastman and Clark are examples of targeting disciplinary proceedings against political opponents or unpopular viewpoints, or "character assassination" of lawyers who worked in the Trump administration.[8] It would be significant if lawyers who are politically aligned in many ways with the president believed themselves to be ethically obligated, as professionals, not to engage in certain prohibited conduct. Most of these lawyers have said very little since then about their reasons for acting as they did. Thus, any attempt to explain their decision-making process will inevitably involve some speculation.

As a normative legal ethics theorist, however, what interests me more than explanation is *justification*. Is there a coherent and attractive ideal or set of principles of ethical conduct by lawyers that would align with the refusal of these lawyers to advise or assist in the overthrow of the election? The answer to this question may inform the way we regulate lawyers and seek to educate and inspire law students to promote the highest ideals of the profession. Should lawyers be trained and encouraged to be zealous advocates for their clients' interests, represent clients while exhibiting fidelity to law, or carry out their work for clients with due regard for the public interest, the common good, the rule of law, or something else?

In working toward a mixed sociological and normative account of the rights and wrongs we find in the behavior of lawyers in the Trump administration, I am going to lean a bit on a concept that has recently gained currency in legal education: professional identity formation. The American Bar Association standards for the accreditation of law schools now require law schools to "provide substantial opportunities to students for . . . the development of a professional identity."[9] An explanatory comment elaborates on what is meant by professional identity: "Professional identity focuses on what it means to be a lawyer and the

---

8 *See, e.g.*, Katie Benner & Charlie Savage, *Jeffrey Clark Was Considered Unassuming. Then He Plotted with Trump.*, N.Y. TIMES (Oct. 13, 2022), https://www.nytimes.com/2021/01/24/us/politics/jeffrey-clark-trump-election.html (quoting a former colleague of Jeffrey Clark characterizing the allegations against Clark as character assassination of the most effective lawyers in the Trump administration).

9 AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 303(b)(3) (2024).

special obligations lawyers have to their clients and society. The development of professional identity should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice."[10]

I have always been fairly skeptical about the discourse around professional identity, in part because it seems like an open-ended invitation to pack all sorts of feel-good ideas, like civility, professionalism, and "well-being practices," into an idea that should have sharper conceptual boundaries.[11] More importantly, as a theorist of role morality and normative legal ethics, I care a great deal that law schools' intentional exploration of values and guiding principles be done in a rigorous way, with sufficient attention to the work of scholars like David Wilkins and Gerald Postema, who have written complex, challenging, and subtle articles on the relationship between personal and professional identities.[12] Otherwise, it risks becoming, in the words of a *Doonesbury* cartoon about post-Watergate legal ethics education, "trendy lip service to our better selves."[13] Finally, in light of what is known about the power of groups and organizations to socialize members into wrongdoing, it seems unlikely that anything that happens in law school could inculcate a sufficiently robust professional identity to resist serious pressures within an organization to conform.[14]

One optimistic takeaway from the behavior of the good lawyers of January 6 is that there actually may be something to the idea of professional identity, even if it may not have been formed exclusively through legal education. My hypothesis is that a commitment to the rule of law is central to the professional identity of lawyers like Jacob, Rosen, Donoghue, Cipollone, and Luttig, who refused to lend their assistance to Trump's "Stop the Steal" efforts generally, and in particular to provide a purportedly legal foundation for a hoped-for refusal by Vice President Pence to certify the election results. Of course, each of these lawyers may have acted for his own unique reasons, but the normative commitment shared by all of them is fidelity to the rule of law.

---

10 *Id.* at Interpretation 303-5.

11 *See infra* notes 161–64 and accompanying text.

12 *See* David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502 (1998); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980).

13 THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS 30 (8th ed. 2003).

14 *See, e.g.*, YUVAL FELDMAN, THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR (2018); PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL (2007); John M. Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 BROOK. L. REV. 1177 (2005).

The concept of the rule of law is, notoriously, a contested one in legal philosophy.[15] Debates continue over matters such as formal or substantive definitions of the rule of law, the relationship between democracy and the rule of law, the problem of legal injustice, and whether a state that purports to respect the ideal of the rule of law must also respect certain substantive human rights.[16] However, there may be sufficient agreement—or at least an overlapping consensus—on key features of the rule of law as it bears on the ethical obligations and professional identity of lawyers. The actions of the good lawyers of January 6 serve as a kind of ostensive definition of the ideal of the rule of law as a principle of ethical lawyering. The basis for these lawyers' advice to Vice President Pence was a judgment that the Constitution and federal election law, properly interpreted, simply did not support the position urged by Eastman and Chesebro.

In my own scholarship, I have long advocated for the view that the political-moral ideal of the rule of law entails an obligation on the part of lawyers to manifest fidelity to law when advising clients.[17] One need not agree with that view in all its particulars to appreciate the connection between the social value of a system of government in which the exercise of power is subject to principled limitations and the duties of professionals who interpret and apply the law to the situation of private or public clients. As Gerald Postema argues, the rule of law is a moral ideal that requires institutional realization.[18] Lawyers are necessarily part of that institutional realization. A society that respects the rule of law is one committed to "public processes of official review and accountability, where law-based reasons for official actions can be demanded."[19] That sort of system cannot be self-executing, but relies for its functioning on the commitment of lawyers to the use of principled reason-giving in the representation of clients, whether in litigation or advising contexts. The distinctive ethical identity of lawyers consists of acting in ways that constrain the abuses of power through the interpretation and application

---

15 *See* Jeremy Waldron, *The Rule of Law as an Essentially Contested Concept*, *in* THE CAMBRIDGE COMPANION TO THE RULE OF LAW 121, 126–27 (Jens Meierhenrich & Martin Loughlin eds., 2021).

16 *See, e.g.*, GERALD J. POSTEMA, LAW'S RULE: THE NATURE, VALUE, AND VIABILITY OF THE RULE OF LAW 97–112 (2022) (providing a clear overview of the terms of the debate over democracy, injustice, and the rule of law); TOM BINGHAM, THE RULE OF LAW 66–67 (2010) (arguing for a thicker account including human rights); JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 221 (2d ed. 2009) (defending a thinner version of the concept); Andrei Marmor, *The Rule of Law and Its Limits*, 23 LAW & PHIL. 1 (2004).

17 *See generally* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010).

18 *See* POSTEMA, *supra* note 16, at 113–14.

19 *Id.* at 116.

of law.[20] The quality that unifies the good lawyers of January 6 is their commitment to this ideal, which supported their refusal to assist the unreasoned, unprincipled, and lawless acts of their principal, Donald Trump.

The plan of attack for the remainder of the Article is as follows: Part I considers the abuse of power by lawyers employed by or working for the Trump administration or presidential campaign in connection with the 2020 presidential election. The claim to be developed is that the wrongfulness of the conduct of many of the bad lawyers of January 6 is difficult to fit in a principled way within existing rules of professional conduct. That means either that the professional disciplinary apparatus has to admit that it is powerless to respond to the threat to democracy posed by these lawyers or else bend, stretch, and manipulate the rules so that they cover the conduct of lawyers like Eastman, Chesebro, and Clark. Part II then argues that regulation by means of enforceable rules is not the only—and perhaps not even the best—way of ensuring that future lawyers do not go down the path of the bad lawyers of January 6. If we can better understand what features of their background, professional training, and socialization supported their decision not to assist in the attempted coup, we may have the foundations for a better way of educating lawyers and fostering a professional identity centered on respect for the rule of law. To emphasize, the sociological explanation here is offered as a hypothesis, not the result of a rigorous empirical inquiry. It is offered, however, in support of a normative position that I believe is significant—namely, that the relevant professional identity that can support the role of lawyers in a pluralistic, polarized society is one that centers on the rule of law.

I. THE WRONGS OF JANUARY 6

One way to get at the nature of the wrongdoing we are interested in is to restate it as a kind of pre-theoretical question—or at least one innocent of the Rules of Professional Conduct—as to any particular lawyer, like John Eastman, Jeffrey Clark, or Kenneth Chesebro: "What,

---

20 *See id.* at 128. In this section of the chapter on institutional structures that support the rule of law, Postema draws a distinction between lawyers for private clients and government lawyers that is not one I would draw. The private versus government lawyer distinction is often overdrawn, as I have argued elsewhere. *See* W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275, 294–95 (2017). To cite one area of disagreement with Postema, he says that "the proper model for . . . government lawyer[ing] is not . . . interest-driven *advocacy*, . . . but rather independent, fidelity-driven *advising*." POSTEMA, *supra* note 16, at 128. The important distinction is not private versus government, however, but litigation versus advising, which would apply on the private side as well.

exactly, did that lawyer do wrong?" In doing so, we can exclude some of the easy cases, like Sidney Powell or Lin Wood, where the answer is "filed a bunch of meritless lawsuits," or Rudy Giuliani, where the answer is "lied repeatedly in the course of official proceedings." The existing framework of rules and other positive law constraints, like Rule 11 of the Federal Rules of Civil Procedure and the prohibition in the Rules of Professional Conduct on making false statements to a tribunal, are adequate to deal with those problems; in fact, procedural sanctions and the disciplinary process worked well in those cases.[21] The fascinating cases, but the most difficult to characterize, are the actions of John Eastman and Jeffrey Clark, who provided would-be legal roadmaps to be followed by Trump in his quest to retain power despite the lack of evidence of widespread fraud in the 2020 presidential election.

One of the fascinating ironies of Trump's conduct in office, specifically his efforts to overturn the election results, is that for all his authoritarian tendencies, he never simply asserted or attempted to exercise raw power. Although he may have considered taking actions such as asserting executive power and ordering the military to seize election machines in the disputed states,[22] he never followed through on those threats. It may be that *rhetorically* one of the "persistent message[s]" of Trump is "that he is above the law—indeed, that the very idea of 'law' is irrelevant to someone like him—and that if we follow him, we can be above the law as well."[23] In action, however, Trump seemed to be perennially looking for legal cover. From the perspective of legal ethics, the most interesting wrongdoing of the January 6 lawyers was the effort to provide Trump the legal blessing he was seeking. That was the distinctive contribution of John Eastman, along with a few other lawyers including Kenneth Chesebro and Jeffrey Clark, and distinguished their

---

21 *See, e.g.*, King v. Whitmer, 71 F.4th 511, 517–18, 521–23 (6th Cir. 2023) (affirming sanctions against lawyers who brought outlandish claims that the election was stolen through a conspiracy with origins in Venezuela and connecting with China and Iran to manipulate voting machines); O'Rourke v. Dominion Voting Sys. Inc., 571 F. Supp. 3d 1190, 1193, 1202–03 (D. Colo. 2021), *aff'd*, No. 21-1442, 2022 WL 17588344 (10th Cir. Dec. 13, 2022) (imposing sanctions under Rule 11 and the court's inherent authority for bringing frivolous challenges to state election results); *In re* Giuliani, 146 N.Y.S.3d 266, 268, 280 (N.Y. App. Div. 2021) (concluding that interim suspension of Rudy's Giuliani's law license for, among other things, telling a lot of lies, is warranted).

22 *See* Betsy Woodruff Swan, *Read the Never-Issued Trump Order That Would Have Seized Voting Machines*, POLITICO (Jan. 25, 2022, 11:34 AM), https://www.politico.com/news/2022/01/21/read-the-never-issued-trump-order-that-would-have-seized-voting-machines-527572 [https://web.archive.org/web/20250126162423/https://www.politico.com/news/2022/01/21/read-the-never-issued-trump-order-that-would-have-seized-voting-machines-527572].

23 Garrett Epps, *The Dangerous Journey of John Eastman*, WASH. MONTHLY (Apr. 4, 2023), https://washingtonmonthly.com/2023/04/04/the-dangerous-journey-of-john-eastman [https://perma.cc/M42L-7RSY].

conduct from that of Rudy Giuliani, Sidney Powell, and others who are often lumped together as vaguely described "Trump enabler" lawyers.

The actions of Eastman, Chesebro, and Clark can be understood as a lawyerly version of the strategy notoriously described by Trump ally Steve Bannon as "flood the zone with shit."[24] The idea behind the Bannon strategy is that if there is enough disinformation in the air, people will start to mistrust everything, or at least be too exhausted to wade through the competing claims. Then, if someone in the Trump camp says up is down, the obvious critical rejoinder (no, up is up) will appear to be merely another competing narrative. The parallel to Bannon's strategy of hacking the media was to seek out lawyers inside and outside the administration who would be willing to develop something that looked like a legal framework under which Vice President Pence could refuse to certify the election based on electors submitted in several swing states. Pence could then accept alternate slates of electors, or else declare the election results inconclusive and submit it to the House of Representatives. Any critical response to this position could then be labeled as just another point of view, to be accepted or rejected not on the merits but based on partisan affiliation.

The originators of the alternate-electors plan were law professor John Eastman and lawyer (and former Lawrence Tribe protégé) Kenneth Chesebro.[25] In one communication, Eastman said to Chesebro that the legal arguments that the two had devised in support of the plan were "rock solid."[26] However, Eastman later said that he believed, "not based on the legal merits but [instead] an assessment of the justices' spines," that the Supreme Court might accept his legal theory.[27] Chesebro responded that the "odds of action before Jan. 6 will become more favorable if the justices start to fear that there will be 'wild' chaos on Jan. 6 unless they rule by then, either way."[28] Jeffrey Clark's role was different,

---

24 *See, e.g.*, Sean Illing, *"Flood the Zone with Shit": How Misinformation Overwhelmed Our Democracy*, VOX (Feb. 6, 2020, 9:27 AM), https://www.vox.com/policy-and-politics/2020/1/16/20991816/impeachment-trial-trump-bannon-misinformation [https://perma.cc/EDU8-H42R].

25 *See* Luke Broadwater & Maggie Haberman, *Trump Lawyer Cited 'Heated Fight' Among Justices over Election Suits*, N.Y. TIMES (June 15, 2022), https://www.nytimes.com/2022/06/15/us/trump-emails-eastman-chesebro-jan-6.html; Josh Kovensky, *Exclusive: Trump Lawyer Kenneth Chesebro Talks About His Role in the Runup to Jan. 6*, TALKING POINTS MEMO (June 16, 2022, 11:46 AM), https://talkingpointsmemo.com/feature/exclusive-trump-lawyer-kenneth-chesebro-talks-about-his-role-in-the-runup-to-jan-6 [https://perma.cc/6HSN-HGVY]. Chesebro pleaded guilty in the Georgia state RICO prosecution to charges of conspiracy to file false documents. *See* Holly Bailey & Amy Gardner, *Trump Co-Defendant Kenneth Chesebro Pleads Guilty in Georgia Election Case*, WASH. POST (Oct. 20, 2023), https://www.washingtonpost.com/national-security/2023/10/20/chesebro-guilty-plea-trump-georgia.

26 Broadwater & Haberman, *supra* note 25.

27 *Id.*

28 *Id.*

but in support of the overall scheme. He wrote a draft letter, which he circulated to Justice Department leadership, including Acting Attorney General Jeffrey Rosen, to be sent to Georgia state election officials.[29] The letter stated that the Department of Justice (DOJ) had identified irregularities in the administration of the election and that, based on the belief that Georgia had a separate slate of electors supporting Trump, the DOJ believed that the Governor should convene a special session of the legislature to evaluate the election irregularities and "take whatever action is necessary" to ensure that the proper slate of electors (presumably those supporting Trump) would be transmitted to Congress on January 6.[30] The letter was never sent.

In the cases of the three lawyers involved in this aspect of the election denial scheme—Eastman, Chesebro, and Clark—it is tricky to get the description of their conduct just right, in a way that would be amenable to handling by the professional disciplinary apparatus or some other form of legal regulation. It is one thing to describe it polemically (although I believe correctly) as the equivalent of Steve Bannon's recipe of "flood[ing] the zone with shit."[31] Legal rules and disciplinary processes work at a lower level of generality, however, and as a result, one of two things tends to be the case. First, there may be a rule of professional conduct that functions as a convenient pigeonhole in which the lawyer's conduct can be placed. Rudy Giuliani was a zone-flooder like Eastman, but he happened to make specific factual misrepresentations that fell within Rule 4.1(a). This feels like missing the forest for the trees. We got Giuliani on the lies, but the essence of his conduct is much broader, and much worse. Alternatively, there is a temptation to jam conduct into a pigeonhole in which it does not really fit. I worry that this is what professional grievance authorities have done with Eastman, Chesebro, and Clark, the generators of the legal "shit" with which to "flood the zone."

As Rebecca Roiphe rightly points out in her contribution to this Symposium,[32] the balance of competing regulatory objectives and policies varies depending on the specific context of a lawyer's actions: Was the allegedly wrongful behavior in connection with claims asserted in

---

29 *See* Specification of Charges, *supra* note 2, ¶¶ 12–20 (describing the contents of the "Proof of Concept" letter); Report and Recommendation of Hearing Committee Number Twelve ¶¶ 85–88, *In re* Clark, No. 2021-D193 (D.C. Aug. 1, 2024) [hereinafter Clark Report & Recommendation] (describing the same).

30 *See Read the Unsent Letter by Jeffrey Clark to Georgia Officials*, N.Y. TIMES (June 23, 2022), https://www.nytimes.com/interactive/2022/06/23/us/jeffrey-clark-draft-letter.html [hereinafter *Proof of Concept Letter*]; *see also In re* Clark, 678 F. Supp. 3d 112, 119 (D.D.C. 2023).

31 Illing, *supra* note 24.

32 Rebecca Roiphe, *Why Courts Should Not Discipline Trump's Lawyers*, 46 CARDOZO L. REV. 1817 (2025).

litigation or in-court advocacy? In that case, one would expect that centrally important policies would be candor to the tribunal, not wasting judicial resources and burdening opposing policies with baseless litigation, and protecting the integrity of the proceeding. Courts are permitted, in this setting, to impose restrictions on the speech of lawyers that might not survive First Amendment scrutiny in other contexts.[33] On the other hand, if the alleged wrongdoing pertains to advocacy in the political arena, public speeches, or going on TV and making baseless claims about the election being stolen, the free speech and free press interests safeguarded by the First Amendment can be expected to be much more significant. Alternatively, if the alleged wrongdoing amounts to nothing more than a lawyer spitballing a novel legal theory, as is arguably the case with Clark's unsent letter,[34] then professional discipline might threaten the integrity of the attorney-client relationship. While this may not have the same constitutional significance, the Supreme Court has recognized the importance of "full and frank communication between attorneys and their clients" to the public end of "the observance of law and administration of justice."[35]

Simply repeating the description, at a very high level of generality, that lawyers are officers of the court or have a special role in maintaining democracy and the rule of law, or citing aspirational ideals from the Preamble to the Model Rules of Professional Conduct,[36] does not go very

---

33 *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991); United States v. Trump, 88 F.4th 990, 1007 (D.C. Cir. 2023). These First Amendment cases support this Article's general claim that the application of legal prohibitions and rights, such as the right to free speech, must take into account the circumstances of the conduct. Many mistakes in the application of the First Amendment to lawyer expression occur when principles are stated at too high a level of generality—e.g., inferring from *Gentile*, which involved speech in connection with a pending judicial proceeding, that lawyers have diminished expressive rights. As the Supreme Court has held, however, there is no general "professional speech" exception to the First Amendment. *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 771–72 (2018). As Rebecca Roiphe argues in her contribution to this Symposium, even a case like *Gentile*, which permits restrictions on the speech of lawyers, should not be read too broadly as permitting restrictions on speech in "a professional setting," as opposed to the narrower construction of speech that has a substantial likelihood of prejudicing a pending judicial proceeding. *See* Roiphe, *supra* note 32. All this said, strictly speaking, the First Amendment is relevant only where legal regulation of lawyers is involved. It may be that nonlegal norms that ethically conscientious lawyers seek to respect may reflect a different ranking among values pertaining to political expression and those regarding the rule of law.

34 *See* Specification of Charges, *supra* note 2; Report and Recommendation of Hearing Committee Number Twelve, *supra* note 29, ¶¶ 85–88.

35 Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

36 *See, e.g.*, MODEL RULES OF PRO. CONDUCT pmbl. ¶ 6 (A.B.A. 2023) (urging lawyers to foster public confidence in the law, legal institutions, and the justice system because legal institutions in a constitutional democracy depend on public perception and support to maintain their legitimacy).

far toward resolving any of the interesting questions concerning the January 6 lawyers. Nor does it help to characterize their conduct as "assisting in the effort to overthrow a democratic election" or "promoting Trump's Big Lie." That is true regarding potential professional discipline for rules violations, proposed changes to the Rules of Professional Conduct to mitigate the risk of this kind of conduct in the future, or, per the framing of this Article, how to educate and socialize lawyers to develop a professional identity that would enable them to resist political pressure to go along with Trump's Big Lie. As for professional discipline, there are catch-all provisions in the Rules of Professional Conduct of all U.S. jurisdictions. These are broadly worded, in terms of "conduct involving dishonesty, fraud, deceit or misrepresentation,"[37] or "conduct that is prejudicial to the administration of justice."[38] (California has a statutory prohibition on attorneys committing any act involving moral turpitude.[39] As discussed below, this was one of the grounds for Eastman's disbarment.) These rules require care in application to avoid constitutional problems—under the First Amendment and due process overbreadth and vagueness—as well as interfering with the lawyer-client relationship.

Considering the lawyers who developed the alternate-electors scheme that was to serve as a basis for Vice President Pence to refuse to certify the election, a number of different descriptions might be employed to convey the nature of the wrongdoing involved—for example:

- seeking, or conspiring to, overthrow or undermine American democracy;[40]
- telling various lies in public forums about the prevalence of fraud in the 2020 election;[41]

That statement is surely correct, but many specific steps are required to derive duties for lawyers, either those stated as rules enforceable by the professional disciplinary apparatus of a jurisdiction or nonlegal norms that ethically-conscientious lawyers aim to comply with.

37 *Id.* r. 8.4(c).

38 *Id.* r. 8.4(d). The specification of charges by the D.C. Bar against Jeffrey Clark relies heavily on the D.C. version of both of these rules. *See In re* Clark, 678 F. Supp. 3d 112, 118–19 (D.D.C. 2023).

39 CAL. BUS. & PROF. CODE § 6106 (West 2023).

40 *See* Tarkington, *supra* note 1, at 306–08; Renee Knake Jefferson, *Lawyer Lies and Political Speech*, 131 YALE L.J. FORUM 114, 114–15 (2021). California requires, by statute, that attorneys support the Constitution and laws of the United States and the state. *See* CAL. BUS. & PROF. CODE § 6068(a) (West 2019). This statute was invoked in the disbarment of John Eastman. *See* Decision and Order of Involuntary Inactive Enrollment at 110, *In re* Eastman, No. 23-o-30029 (Cal. State Bar Ct. Mar. 27, 2024) [hereinafter Eastman Order].

41 *See In re* Giuliani, 146 N.Y.S.3d 266, 283–84 (N.Y. App. Div. 2021); Green & Roiphe, *supra* note 1, at 40–42.

- undermining (or failing to support) the rule of law;[42]
- undermining the integrity of the legal profession;[43]
- contributing to "a narrative that threatened to undermine the democratic transfer of power";[44] and
- advising clients based on an inadequately supported legal position that their proposed course of action was lawful.

Note the different levels of generality at which the conduct is described. Criticism of the January 6 lawyers can be stated very broadly, in terms of undermining democracy or the rule of law. Rules of professional conduct are adopted by the judicial branch of every U.S. jurisdiction. As state action, they are subject to constitutional limitations, including prohibition on vagueness and overbreadth.[45] Thus, even if it were the case that the actions of Eastman, Chesebro, Clark, and others contributed to a false narrative—the Big Lie—which had immensely deleterious effects on national politics and public life, it would be hard to conceive of a rule of professional conduct aimed at *that*.

To the extent that rules of professional conduct are vague and malleable, they are susceptible to being invoked or enforced selectively against opposing counsel (in ordinary cases) or political opponents (in

---

42 *See* Scott L. Cummings, *Lawyers in Backsliding Democracy*, 112 CALIF. L. REV. 513 (2024); Eastman Complaint, *supra* note 2, at 7–8.

43 *See* Cynthia Godsoe, Abbe Smith & Ellen Yaroshefsky, *Can You Be a Legal Ethics Scholar and Have Guts?*, 35 GEO. J. LEGAL ETHICS 429 (2022).

44 David McGowan, *Lawyers and the Theory of the "Big Lie"* 3 (Univ. S.D. Sch. L., Research Paper No. 22-019, 2022), https://ssrn.com/abstract=4231550 [https://perma.cc/DK4R-XS98]. The *New York Times* described one lawyer's role as giving cover to the political efforts by Trump and others:

> Through litigation, Mr. Chesebro said, the Trump campaign could allege "various systemic abuses" and, with court proceedings pending, encourage legislatures to appoint "alternative" pro-Trump electors that could be certified instead of the Biden electors chosen by the voters.
>
> "At minimum, with such a cloud of confusion, no votes from WI (and perhaps also MI and PA) should be counted, perhaps enough to throw the election to the House," Mr. Chesebro wrote to Mr. Troupis, referring to the swing states of Wisconsin, Michigan and Pennsylvania.

Broadwater & Haberman, *supra* note 5. Compare the short shrift given to that argument by a federal court of appeals considering sanctions against lawyers who had filed frivolous challenges to the election results. The district court had concluded that the filings were made in bad faith for the purpose of framing a public narrative; the Sixth Circuit responded that "another word for 'framing a public narrative' is speech; and Rule 11 cannot proscribe conduct protected by the First Amendment." King v. Whitmer, 71 F.4th 511, 520 (6th Cir. 2023).

45 *See, e.g.*, Greenberg v. Goodrich, 593 F. Supp. 3d 174, 218–19, 222–23 (E.D. Pa. 2022), *rev'd sub nom.* Greenberg v. Lehocky, 81 F.4th 376, 389–90 (3d Cir. 2023). The Third Circuit's reversal was on standing grounds and the district court's analysis of vagueness and overbreadth is generally sound as applied to state rules of professional conduct for lawyers. *See id.*

cases of public significance).[46] Eastman's defense is, in essence, that he was doing nothing more than providing legal advice to a client, for the client to do with as it will, and now he is being hounded by a professional disciplinary board for taking a politically unpopular stance.[47] Jeffrey Clark has engaged in a similar effort to change the narrative from "enforcing ideologically neutral rules of professional conduct" to "political persecution."[48] Like Eastman, he has attempted to characterize his actions as no different from those of any other lawyer who presents a novel, possibly somewhat aggressive interpretation of law to the client for consideration.

The importance of the vagueness problem can be seen by flipping around the politics: Imagine that a lawyer in the Biden Justice Department writes a memo or a draft letter proposing a novel way to get around the lack of statutory authorization for a broad student loan forgiveness program or a path to citizenship for DACA recipients, to name a couple of issues that are both politically controversial and arguably at the outer boundaries of executive power. Now imagine that the lawyer is admitted to practice in a red state like Texas or Missouri. Pursuant to the McDade-Murtha Amendment, the lawyer's conduct is governed by the rules of professional conduct of the attorney's state of admission.[49] If the state's bar grievance commission was dominated by MAGA Republicans who wanted to score political points against the Biden administration and entertained a disciplinary grievance against these lawyers for engaging in conduct prejudicial to the administration of justice, it is not a stretch to imagine blue-state lawyers and voters objecting to this effort to "weaponize" the disciplinary system or engage

---

46 *See* Bruce A. Green & Rebecca Roiphe, *Impeaching Legal Ethics*, 49 FLA. ST. U. L. REV. 447, 485, 496 (2022).

47 *See, e.g.*, Joyce E. Cutler, *Eastman Blames Trump Haters, Activists for California Bar Trial*, BLOOMBERG L. (Nov. 3, 2023, 9:24 PM), https://news.bloomberglaw.com/litigation/eastman-blames-trump-haters-activists-for-california-bar-trial. The California Bar Court decision specifically addressed this argument. *See* Eastman Order, *supra* note 40, at 123.

48 Clark's leadoff argument in his appellate brief in the D.C. Circuit makes the "weaponization" claim explicit: "Prior to the 2020 election controversies, which have seen the weaponization of attorney discipline proceedings against lawyers who have been painted as allied with President Trump, Mr. Clark enjoyed an excellent reputation with no question ever being raised as to his ethics." Brief of Appellant Jeffrey B. Clark at *1, *In re* Clark, No. 22-mc-96, 2023 WL 8527678 (D.C. Cir. Dec. 6, 2023). The brief was filed in the D.C. Circuit on appeal from *In re* Clark, 678 F. Supp. 3d 112 (D.D.C. 2023). The district court decision denied removal of the disciplinary action to federal court under the federal officer removal statute, 28 U.S.C. § 1442(a)(1)–(2). The district court held that the disciplinary proceeding is neither a civil action nor a criminal prosecution. Rather, pursuant to a congressional delegation of authority, the District of Columbia Court of Appeals is empowered to regulate admission and adopt procedural and substantive rules for the discipline of attorneys licensed in the District. *See Clark*, 678 F. Supp. 3d at 115–16, 123, 125, 132–33.

49 28 U.S.C. § 530B; *see Clark*, 678 F. Supp. 3d at 118.

in "lawfare." The task for professional responsibility scholars, as opposed to political consultants or ad makers, is to determine whether there is factual and legal support for discipline against lawyers like Eastman and Clark that is politically neutral. That is, if a lawyer not connected with the Trump administration or presidential campaign had engaged in relevantly similar conduct, would state bar grievance committees have pursued the charges with equal vigor and would commentators be as united in agreeing that these lawyers should be punished?

To make the "weaponization" critique and the attempt to find an ideologically neutral standpoint for evaluating these proceedings more concrete, we can consider two lawyers, John Eastman and Jeffrey Clark, whose conduct was not a clear rules violation like Rudy Giuliani's lies and Sydney Powell's frivolous lawsuits.[50]

A. *John Eastman*

Responding to the "weaponization" critique requires understanding what advice Eastman actually gave to Trump supporters inside and outside of the administration. The complaint filed by the State Bar of California against John Eastman alleges that Eastman prepared two memos that concluded that the Vice President had unilateral authority to accept or reject state electors in the event that there was some dispute over the validity of their designation.[51] The Twelfth Amendment prescribes that the Vice President "shall . . . open all the certificates and the votes shall then be counted,"[52] strongly implying that his responsibilities are

---

50 Although Kenneth Chesebro is often mentioned as the architect of the plan developed more fully by John Eastman, there is no record comparable to the California Bar Court's decision in the *Eastman* disciplinary action or the D.C. Hearing Panel's decision in the proceeding against Jeffrey Clark. Chesebro pleaded guilty in the Georgia state RICO proceeding to one felony count of conspiracy to file false documents. He stated that he advised Trump on ways of putting together slates of alternate electors in states whose electoral votes had already been certified for Biden. *See* Amy Gardner & Holly Bailey, *Ex-Trump Allies Detail Efforts to Overturn Election in Georgia Plea Videos*, WASH. POST (Nov. 13, 2023), https://www.washingtonpost.com/national-security/2023/11/13/trump-georgia-case-videos-overturn-2020-election.

51 *See* Eastman Complaint, *supra* note 2, ¶ 8 (referencing the two-page memo); *id.* ¶ 12 (referencing the six-page memo); *id.* ¶ 17 (concluding that in both memos the Vice President had unilateral authority to take actions to reverse the election results); *see also* Michael S. 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 (providing a succinct overview of Eastman's advice); Joseph M. Bessette, *A Critique of the Eastman Memos*, CLAREMONT REV. BOOKS (Fall 2021), https://claremontreviewofbooks.com/critique-eastman-memos [https://perma.cc/NG6V-F4BZ] (providing a generally similar account of Eastman's advice in a conservative manner). The Eastman memos are available on various media websites, including CNN.

52 U.S. CONST. amend. XII.

merely ministerial. Eastman, however, contended that there is "very solid legal authority, and historical precedent," for the conclusion that the Vice President, in his capacity as President of the Senate, has the right to resolve disputed electoral votes.[53] Furthermore, he argued that the Electoral Count Act of 1887, which governs the actions of the President of the Senate,[54] is likely unconstitutional because the Act gives precedence to the certification of votes by the executive of a state, not the legislature.[55] Eastman therefore advised Pence that he had several options, including delaying the vote count, allowing state legislatures to certify alternate slates of Trump electors, unilaterally deciding not to count Biden electors where there was a question about the validity of their designation, and referring the decision to the House of Representatives where "IF the Republicans in the State Delegations stand firm, . . . TRUMP WINS."[56]

The California State Bar complaint further alleges that Eastman knew that it was false or misleading to advise Mike Pence that he had this lawful power and that he knew, or at least was grossly negligent in not knowing, that the election had not been tainted by outright fraud, ballot stuffing, or manipulation of voting machines.[57] Eastman's response should not surprise any lawyer (most of whom would have made the same argument if they were defending him): The legal reasoning that formed the basis of his advice to Pence may have been a bit adventurous, forward-leaning, or even "BOLD,"[58] but advising clients is just what lawyers do, and as long as the position has some plausibility, is not legally frivolous, and the lawyer advises the client of the likelihood of success on the merits, then Eastman did nothing different from what thousands of lawyers do every day for their clients.[59] Referring to the specific advice in this case and citing numerous law review articles, Eastman denied that his conclusion about the Vice President's power under the Twelfth

---

53 Memorandum from John Eastman 3 (Jan. 3, 2021), https://www.documentcloud.org/documents/21066947-jan-3-memo-on-jan-6-scenario [https://perma.cc/7FML-C5H3] [hereinafter Six-Page Memo].

54 3 U.S.C. §§ 5–6, 15–18.

55 Six-Page Memo, *supra* note 53, at 3.

56 *Id.* at 4–5 (emphasis omitted).

57 Eastman Complaint, *supra* note 2, ¶¶ 10, 13, 15, 18.

58 *Id.* ¶ 15 (quoting Six-Page Memo, *supra* note 53, at 5).

59 *See* Respondent John Charles Eastman's Answer to Notice of Disciplinary Charges, *In re* Eastman, No. 23-o-30029 (Cal. State Bar Ct. Feb. 15, 2023) [hereinafter Eastman Answer]. The Eastman Answer cites the standard for frivolousness and engages in a lengthy discussion of the legal reasoning contained in the memos and the support for it. *Id.* at 6–9. Eastman's counsel seeks to turn the tables on the allegations of false statements regarding election fraud by claiming that there was evidence of illegality or fraud in the election and, therefore, it is the California State Bar and supporting amici that have engaged in the prohibited conduct of making false statements to a tribunal. *Id.* at 10–11.

Amendment to make unilateral decisions about counting contested electoral votes is false.[60] Eastman therefore contended that:

> The Office of Disciplinary Counsel wields its disciplinary authority here in a politically biased manner, prosecuting a prominent Republican lawyer and supporter of former President Trump with excessive and improper zeal, while turning a blind eye to the blatant falsehoods that were perpetrated by Democrat[ic] members of the California Bar, such as Adam Schiff . . . and Eric Swalwell . . . .[61]

A potentially promising way to respond to this sort of argument is to employ content-neutral criteria for evaluating legal arguments as sufficiently well-grounded to support the conclusion. Eastman could then be criticized, or even subject to professional disciplinary sanctions, for promoting a legal position that is "false" in the sense of being inadequately supported by the legal and factual record. When this kind of critique is applied to judges, it is familiar in the form of Chief Justice Roberts's much-derided metaphor of the judge as a baseball umpire, calling balls and strikes.[62] The idea is that the strike zone is something external to and independent of the preferences or extralegal commitments of the umpire. It provides an objective standard against which the correctness of a judicial decision can be evaluated. In the same way that baseball fans yell at umps for blowing calls, an observer can criticize a judicial decision that deviates from the external standard.

One reason for the mockery directed against this image is that most, if not all, lawyers disagree with Ronald Dworkin's claim that there is only

---

60 *See id.* at 13–14 (first citing John Yoo & Robert Delahunty, *What Happens if No One Wins?*, AM. MIND (Oct. 19, 2020), https://americanmind.org/salvo/what-happens-if-no-one-wins [https://perma.cc/8GGE-N59S]; then citing Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 608 (2004); then citing Vasan Kesavan, *Is the Electoral Count Act Unconstitutional*, 80 N.C. L. REV. 1653 (2002); then citing Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOYOLA CHI. L.J. 309, 322, 325 (2019); and then citing Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475, 480 (2010)).

61 *Id.* at 107. Eastman's counsel apparently overlooked the irony of using the epithetic term "Democrat" instead of "Democratic" to describe Schiff and Swalwell while complaining about partisanship. *See* Hendrik Hertzberg, *The "Ic" Factor*, NEW YORKER (July 30, 2006), https://www.newyorker.com/magazine/2006/08/07/the-ic-factor (observing that the use of the term "Democrat Party" is used as a "slur" or "a handy way to express contempt").

62 The intellectual antecedent of Roberts's metaphor is Herbert Wechsler's neutral principles approach. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). The late legal philosopher, former judge, and former U.S. Solicitor General Charles Fried gave a sympathetic account of what Roberts really intended, which was to emphasize the distinction between the role of player and umpire; Roberts, in Fried's view, did not contemplate an implausibly strong conception of objectivity. *See* Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641 (2012).

one right answer to any question of law.[63] There is a range of reasonable outcomes that could be defended using a variety of reasonable interpretive methodologies. Even within a single methodology—textualism in statutory interpretation, for example—there are often competing "moves in the game" that lead to inconsistent results, as Karl Llewellyn famously observed of canons of statutory interpretation.[64] And that assumes agreement on the methodology. Where there is good faith disagreement among lawyers, judges, and scholars over, for example, textualism versus purposivism in statutory interpretation, we have a "meta-game" that is "a product of legal and political reflection," with competing approaches ably defended by the camps represented by Justice Scalia and Justice Breyer.[65]

Legal scholars have severely criticized Eastman's legal reasoning. Election law scholar Matthew Seligman submitted an expert report in the California Bar proceedings against Eastman in which he testified that the Vice President does not, in fact, have the unilateral authority to resolve disputes about electoral votes, nor to delay the count to give state legislatures an opportunity to appoint alternate electors.[66] Seligman went through historical episodes prior to and following the enactment of the Twelfth Amendment, analyzed the Electoral Count Act, and considered Senate Resolutions passed following the 2020 presidential election to govern the vote count. He concluded that Eastman's arguments in the Six-Page Memo were contrary to the Constitution and federal election law: "[N]o reasonable lawyer exercising diligence appropriate to the circumstances would adopt Dr. Eastman's legal positions on either issue."[67] Unsurprisingly, Eastman introduced the testimony of his own expert, U.C. Berkeley School of Law professor John Yoo, as a rebuttal to Seligman's report.[68] Yoo testified that the Vice President does have

63 RONALD DWORKIN, *The Model of Rules I*, *in* TAKING RIGHTS SERIOUSLY 14 (1977).

64 Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

65 Fried, *supra* note 62, at 643.

66 *See* Expert Report of Matthew A. Seligman at 8, *In re* Eastman, No. 23-o-30029 (Cal. State Bar Ct. Aug. 25, 2023), https://ssrn.com/abstract=4552179 [https://perma.cc/EEC6-7PGT]; Appendix of Historical Materials to Expert Report of Matthew A. Seligman, *In re* Eastman, No. 23-o-30029 (Cal. State Bar Ct. Aug. 25, 2023), https://ssrn.com/abstract=4553130 [https://perma.cc/G2BS-5WE2].

67 Expert Report of Matthew A. Seligman, *supra* note 66, at 91.

68 *See* Cheryl Miller, *In Eastman Trial, Berkeley Law's John Yoo Backs Disputed Electoral Theory*, RECORDER (Sept. 12, 2023, 10:12 PM), https://www.law.com/therecorder/2023/09/12/in-eastman-trial-berkeley-laws-john-yoo-backs-disputed-electoral-theory.

unilateral authority to reject state electors.[69] The Twelfth Amendment is ambiguous on that point and Eastman's view represents the better reading of the constitutional text, Yoo argued.[70] The proverbial battle of the experts was joined with predictable results. As any tort litigator knows, once a trial court has exercised its gatekeeping function and screened expert testimony for reliability and admissibility under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[71] it falls to the trier of fact to determine the credibility and sufficiency of the evidence.[72] By analogy, in a state bar grievance proceeding such as this one, there would be a fact issue regarding whether Seligman or Yoo is right about the Vice President's authority under the Constitution and federal election laws. Content-neutral criteria for evaluating legal arguments are elusive here, as in many close cases with high stakes decided against a background of intense ideological disagreement.

The California State Bar Court's ultimate decision did not rest solely on the content of Eastman's memos.[73] Numerous charges—which the court found to have been substantiated at trial—involved false statements, such as the statement that Dominion's voting machines had fraudulently manipulated the election results[74] or that there was specific evidence of voter fraud in Georgia and Michigan.[75] Although Eastman said he made that statement in subjective good faith, fully believing in its truth, the court found that he was at least grossly negligent in making it, which was sufficient as charged in California as an aspect of moral turpitude.[76] The Bar Court also found that Eastman had made false factual statements in a complaint filed in the U.S. Supreme Court in *Texas v. Pennsylvania*,[77] and false and misleading statements in a complaint filed in federal court in Georgia.[78] But the star of the show was the allegation that Eastman had engaged in an act of moral turpitude by drafting the memos advancing his theory supporting the Vice President's

---

69 *See id.* Along with Robert Delahunty, with whom Yoo worked at the Office of Legal Counsel in the George W. Bush Administration, Yoo wrote a law review article taking the same position. *See* Robert J. Delahunty & John Yoo, *Who Counts?: The Twelfth Amendment, the Vice President, and the Electoral Count*, 73 CASE W. RSRV. L. REV. 27 (2022).

70 *See* Miller, *supra* note 68.

71 509 U.S. 579 (1993).

72 *See, e.g.*, *In re* Roundup Prods. Liab. Litig., 390 F. Supp. 3d 1102, 1111–13 (N.D. Cal. 2018) (providing an excellent overview of the *Daubert* standard and its application to admissibility of expert testimony), *aff'd sub nom.* Hardeman v. Monsanto Co., 997 F.3d 941 (9th Cir. 2021).

73 *See* Eastman Order, *supra* note 40.

74 Eastman Order, *supra* note 40, at 101–02.

75 *Id.* at 105–06.

76 *Id.* at 102–03, 106.

77 *Id.* at 81–87 (citing Complaint, Texas v. Pennsylvania, 141 S. Ct. 1230 (2020)).

78 *Id.* at 90–94 (citing Complaint, Trump v. Kemp, 511 F. Supp. 3d 1325 (N.D. Ga. 2021)).

authority to certify alternate electors,[79] and similarly by trying to pressure Mike Pence's counsel Greg Jacob to sell Pence on Eastman's theory.[80] The Bar Court regarded this conduct as equivalent to a conspiracy to obstruct a lawful government function.[81] In its assessment of aggravating and mitigating factors, the court gave substantial weight to the seriousness of "encouraging Vice President Pence to disregard properly certified electoral votes and delay or adjourn the electoral count."[82]

This is not to say that the more specific charges of making false statements to courts are not serious. The underlying concern is not so much that the public will believe that lawyers will make false statements in judicial proceedings or raise frivolous claims and not be sanctioned for this misconduct. Rather, it is that lawyers will assist in efforts to overthrow the government. If that is the correct description of Eastman's conduct, it is hard to avoid the conclusion that it is conduct involving moral turpitude. But an equally plausible act-description would be providing boundary-pushing advice on an argument that a party might make in a matter having great constitutional significance. Finding the appropriate description for acts taken by individuals acting in a professional role is a tricky problem in theoretical professional ethics.[83] From the point of view of responding to the "weaponization" or "lawfare" critique, however, relying on a broad and vague concept like moral turpitude, used in a rule that is almost never enforced on its own but only as a makeweight along with other, more specific rule violations, is not likely to be particularly persuasive to observers who believe the bar disciplinary apparatus was mobilized due to opposition to Trump. The specific false statements are one thing, but it is hard to shake the concern that the grievance was driven primarily by revulsion at the plan set forth in the memos, and Eastman was disbarred for that.

B. *Jeffrey Clark*

Jeffrey Clark was the Assistant Attorney General in charge of the Environment and Natural Resources Defense Division of the DOJ and was serving as acting head of the Civil Division in the waning months of

---

79 *Id.* at 88–90, 106–08.

80 *Id.* at 103–05.

81 *Id.* at 111–13 (citing 18 U.S.C. § 371).

82 *Id.* at 115.

83 *See* ARTHUR ISAK APPLBAUM, *Are Lawyers Liars?: The Argument of Redescription*, *in* ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE 76 (1999).

the Trump administration.[84] He had no experience in criminal investigations of any kind, let alone those arising out of allegations of election fraud. There is an Election Crimes Branch within the Criminal Division of the DOJ and the Civil Rights Division has authority to enforce voting rights laws.[85] Neither of these divisions were within Clark's area of responsibility.[86] After the election, Attorney General William Barr instructed the FBI and all United States Attorneys "to pursue substantial allegations of voting and vote tabulation irregularities."[87] Richard Donoghue, then serving as Principal Associate Deputy Attorney General, "had the most comprehensive overall view of the investigations of anyone in the Justice Department."[88] He concluded that "[n]one of the [government] investigations" found irregularities "that [could] have had a significant effect on the outcome of the election."[89] Attorney General Barr then reported publicly that the DOJ had investigated allegations and not found any fraud on a scale that would have changed the election outcome.[90]

In a couple of conversations with Donoghue and Acting Attorney General Jeffrey Rosen, Trump mentioned the name of Jeffrey Clark.[91] Clark then sent an email to Rosen and Donoghue attaching a draft letter he proposed that Rosen and Donoghue send to the governor of Georgia and state legislators indicating that the DOJ is investigating election irregularities and that, in light of these significant concerns that may have impacted the outcome of the election in multiple states, the legislature should meet and consider appointing a separate slate of electors supporting Trump.[92] Previous DOJ investigations had not reached this conclusion and there was no evidence that Clark had conducted an investigation that obtained information to support the contention in the draft letter.[93] Donoghue said there was no chance he would sign that letter or anything remotely like it.[94] Clark had apparently met with Trump and suggested, in so many words, that a leadership change in the Department

---

84 *See* Clark Report & Recommendation, *supra* note 29, at 10. Many of these details had previously been reported. *See, e.g.*, Kranish, *supra* note 6.

85 Clark Report & Recommendation, *supra* note 29, at 12.

86 *Id.* at 46.

87 *Id.* at 18–19.

88 *Id.* at 20.

89 *Id.* at 21, 24–25.

90 *Id.* at 27, 30.

91 *Id.* at 31–32, 36–37.

92 *Id.* at 38–41. The Proof of Concept letter is available online from numerous sources, including the *New York Times*. *See, e.g.*, *Proof of Concept Letter*, *supra* note 30.

93 Clark Report & Recommendation, *supra* note 29, at 58–59.

94 *Id.* at 44, 55.

was needed and that he was just the man for the job.[95] At a meeting on January 2, Clark told Rosen and Donoghue that Trump had offered him the position of Acting Attorney General.[96] Deputy White House Counsel Patrick Philbin talked to Clark and warned him that if he went through with the plan to become Acting Attorney General, there would be "a massive wave of resignations at the Justice Department."[97] In fact, all of the Assistant Attorney Generals heading up divisions within the DOJ agreed to resign if Clark was appointed as Acting Attorney General.[98] Philbin also said that if, somehow, Clark's plan succeeded, the result would be riots in every major city in the country, to which Clark replied, "well, Pat, that's what the Insurrection Act is for."[99] After a contentious meeting, Trump decided not to appoint Clark to the Acting Attorney General Position. The letter to the Georgia government officials was never sent.

Clark characterized the letter as "predecisional and deliberative."[100] In nontechnical terms, it was just spitballing or kicking ideas around. Importantly, however, bar counsel in the disciplinary proceeding clarified that it was not seeking discipline based solely on Clark's initial draft of the letter. Counsel's brief noted, rather acidly, that "[i]t is generally not a disciplinary violation to make a stupid suggestion."[101] Clark's conduct went beyond sending up a trial balloon, stupid or not. He persisted in trying to persuade, and even coerce, his supervisors into sending the letter, including by seeking to have himself appointed Acting Attorney General. By January 2, 2021, Clark was telling Rosen and Donoghue that he would take over as head of the Justice Department unless they signed the letter.[102] Thus, the disciplinary action essentially focused on the inappropriate pressure that Clark sought to bring to bear on the DOJ.

When the dust settled, the D.C. Bar Hearing Panel concluded that Clark's misconduct was limited to attempting to send a letter containing misrepresentations in violation of Rules 8.4(a) and 8.4(c) of the D.C.

---

95 *See id.* at 48.

96 *Id.* at 57.

97 *Id.* at 62; *see also id.* at 68–69 (reporting Donoghue's warning to the President that there would be mass resignations at the Department—all the Assistant Attorney Generals and many United States Attorneys—if he appointed Clark Acting Attorney General, and that White House Counsel Pat Cipollone also stated that he would resign).

98 *Id.* at 66–67.

99 *Id.* at 62.

100 *Id.* at 86.

101 *Id.* at 89 (emphasis omitted) (quoting Disciplinary Counsel's Omnibus Response to Respondent's September 1, 2022 Pleadings at 2, *In re* Clark, No. 2021-D193 (D.C. Sept. 6, 2022)).

102 *Id.*

Rules of Professional Conduct.[103] The misstatement in Clark's letter was "that the Justice Department had already 'identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia.'"[104] In fact, the DOJ had not identified any significant concerns.[105] Under D.C. law, dishonesty or misrepresentation may be shown by proof of recklessness with regard to the truth.[106] The fact that the Proof of Concept letter was never sent did not prevent Clark from being disciplined, since D.C. Rule 8.4(a), in common with Model Rule 8.4(a), includes an attempt provision.[107] The Hearing Board's analysis of attempt, which under criminal law includes a requirement of proving some act that goes beyond mere preparation,[108] comes back to Clark's conduct after the original version of the letter was drafted. The spitballing, brainstorming, and floating of trial balloons crossed over into something very different once Clark sought to be appointed as Acting Attorney General so that he could send the letter notwithstanding the objections of Rosen and Donoghue.[109] Moreover, the gist of the letter was not merely "let's investigate and see if there were irregularities in tabulating the results in Georgia," but was much more forceful, amounting to "the Department of Justice has concluded that there is fraud sufficient to warrant the Georgia legislature meeting to consider sending alternate electors."[110] He acted recklessly by ignoring evidence that contradicted his belief that there was evidence of outcome-determinative fraud in Georgia, overstepping his authority within the Department, violating procedures intended to insulate investigations from political pressure, seeking to exclude lawyers like Donoghue from meetings because they disagreed with his proposed course of action, and persisting in this course of action even after being told that all of the

---

103 *Id.* at 117, 146. The Hearing Panel rejected the contention that Clark attempted significantly to interfere with the administration of justice, because the unsent letter was not an attempt to disrupt or unreasonably burden some sort of process. *Id.* at 117, 191–93.

104 *Id.* at 144 (quoting *Proof of Concept Letter*, *supra* note 30, at 2).

105 *Id.* at 161.

106 *Id.* at 154–55. Donoghue testified, and the Hearing Panel credited his testimony, that Clark sincerely believed in the allegations he made. Notwithstanding this subjective good faith, Clark's "belief was not objectively reasonable" and he was "reckless" in his actions predicated on his belief. *Id.* at 183–89.

107 *Id.* at 156.

108 *Id.* at 156–57.

109 *See id.* at 159, 181. The Hearing Panel actually found that Clark's conduct became an attempt to violate the rule prohibiting dishonesty and misrepresentation only after January 3, 2021, when President Trump rejected Clark's offer to take over as Acting Attorney General. *Id.* at 182.

110 *See id.* at 166.

President's seniormost legal advisors would resign if the letter were sent.[111]

As I read the Hearing Panel decision, it was bending over backwards to avoid the "weaponization" or "lawfare" critique. Clark or his counsel probably overstepped by characterizing the proceeding as "a dictatorial crushing of dissent," which led the Hearing Panel to respond that there is nothing oppressive about requiring lawyers who challenge elections not to engage in dishonesty and misrepresentation.[112] Compared with the *Eastman* decision in California, however, the D.C. Hearing Panel decision rested in considerably narrower grounds. The California Bar Court found that Eastman failed to support the Constitution and laws of the United States and participated in a "shared plan to obstruct the lawful function of the government."[113] That finding was in addition to findings of dishonest statements made in court filings.[114] It seems to me that one could characterize Clark's conduct in the same way—as failure to support the Constitution and laws of the United States and participating in a plan to obstruct the lawful process of certifying Georgia electors. The D.C. Hearing Panel's decision is more defensible as an instance of appropriate professional discipline. It may be that the conduct of Eastman and Clark are similar in substance and intended effect. By focusing on a narrower set of acts, described in a way that more closely aligns with the Rules of Professional Conduct, the *Clark* decision may be less susceptible to attack as a partisan act of retribution.

II. THE RULE OF LAW AS AN IDEAL FOR LAWYERS

Taking a page from the distinction between neutrality and perfectionism in liberal political theory,[115] I will argue in this Part that the ideal of the rule of law includes a commitment to a specific conception of the ethical role of lawyers, either within government or representing private parties. Perfectionism in political theory refers to a position that takes a stance with respect to "which virtues, activities, relationships, goals, ideals, attitudes, or values contribute to, or are essential to, a worthwhile, excellent, or otherwise valuable human life."[116] Applied to

111 *Id.* at 185–88. The "extreme nature" of the warnings Clark disregarded were an aggravating factor in determining the applicable sanction. *Id.* at 204.

112 *Id.* at 209.

113 Eastman Order, *supra* note 40, at 124.

114 *See id.* at 29–36, 81–87.

115 *See, e.g.*, JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION (2011); STEVEN LECCE, AGAINST PERFECTIONISM: DEFENDING LIBERAL NEUTRALITY (2008); JOHN RAWLS, POLITICAL LIBERALISM (1993); JOSEPH RAZ, THE MORALITY OF FREEDOM (1988).

116 QUONG, *supra* note 115, at 12–13.

the rule of law and legal ethics, the claim is that certain forms of government are more valuable than others, and specifically more valuable because of their relationship with underlying moral considerations such as human dignity.[117] This Part will first argue for a specific conception of the rule of law as an ethical ideal for lawyers and then show how the good lawyers of January 6 instantiated this ideal, and this professional identity, in their advice to Vice President Pence.

A. *The Rule of Law Ideal*

The rule of law is a distinctive mode of governance. There are all sorts of ways that a ruler might guide the actions of the subjects of his—or its, in the case of a modern institutional state—authority. These ways include force and violence; top-down orders; the exercise of relatively unconstrained discretion;[118] the deployment of specialized expertise in, for example, psychology or management; manipulation by deception and pervasive propaganda; nondeceptive efforts at persuasion; or directives that are mandatory but nevertheless intended to be understood and internalized by subjects. These methods vary in many dimensions, but importantly in the respect they manifest for the subjects of authority. Ordering and threatening someone is obviously different from seeking to guide them in ways that are consistent with their dignity and moral agency. The rule of law also differs from other modes of governance by being an *institutional* process of guiding action, employing procedures for issuing and applying law that emphasize regularity, transparency, and principled reason-giving.[119]

Jeremy Waldron has argued that the moral value of the rule of law that lies in the capacity of the law and legal institutions—including legislatures, courts, and I would add, lawyers—is that "[t]hey operate by using, rather than suppressing and short-circuiting, the responsible agency of ordinary human individuals."[120] Laws appeal to the capacity of human beings for practical reasoning and self-governance. Waldron cites Lon Fuller in support of this view: "To embark on the enterprise of subjecting human conduct to the governance of rules involves . . . a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his

---

117 *See* JEREMY WALDRON, THOUGHTFULNESS AND THE RULE OF LAW (2023); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1 (2008).

118 *See* A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (8th rev. ed. 1982).

119 *See* POSTEMA, *supra* note 16, at 171–83.

120 Waldron, *supra* note 117, at 26.

defaults."[121]From this it follows that law should be capable of guiding action by self-regulating agents; it must be public, in the sense of "not secret," and the sort of thing that can be grasped and complied with by intelligent people, for their own sake or on behalf of some organization or institution with which they are affiliated. A method of directing the actions of the subjects of one's authority that do not satisfy these criteria will lack the moral value of guiding action in a way that is respectful of the dignity of rational agents.

More controversially, but I believe essentially in this context, for something to be law, it must be oriented toward the public good in the following respect: Legal directives "purport to stand in the name of the whole society and to address matters of concern to the society as such."[122] Clients have their own private purposes and there is nothing wrong with that. A liberal society aims to protect the liberty of all citizens to pursue their own projects, to the extent compatible with the equal liberty of others. Obviously, however, any individual's or group's pursuit of its own projects may conflict with that of others. A mechanism that resolved, for the society as a whole, the question of how to harmonize the competing goals and policies of members of that society, would be a very useful thing. It would be even more useful, and in my view would acquire moral significance, if it enabled people to determine the limits of their own liberty and interact with others with whom they came into conflict, in public or social terms that all members of the society could endorse. On the assumption of conflicting values and conceptions of the good in a pluralistic society, the endorsement of these norms would be on the ground that they were enacted and interpreted, as Waldron says, in the name of the whole society.[123] The law achieves a "social settlement" of normative conflict and factual uncertainty. It aims to replace the purely private stances of individuals vis-à-vis others with whom they interact with a generalized, social perspective, roughly along the lines of "the law permits *X*" or "the law does not permit you to *Y*." These are the principles of law that are grasped and self-applied by rational agents who intend that the law serve as a guide to their actions.[124]

---

121 *Id.* at 27–28 (quoting LON L. FULLER, THE MORALITY OF LAW 162 (rev. ed. 1969)). David Luban also emphasizes this aspect of Fuller's jurisprudence and draws out implications from it for legal ethics; his chapter on Fuller is, along with Waldron's *Concept and Rule of Law* lecture, an important inspiration for much of my thinking about lawyers and the rule of law. *See* DAVID LUBAN, *Natural Law as Professional Ethics: A Reading of Fuller*, *in* LEGAL ETHICS AND HUMAN DIGNITY 99–130 (2007).

122 Waldron, *supra* note 117, at 31.

123 *See id.*

124 Sidestepping here the jurisprudential debate around the idea of Holmes's "bad man" theory of law.

After all the criticism and caution in Part II against understanding principles of ethical lawyering at too high a level of generality, it will not do here if I only gesture in the direction of the ideal of the rule of law as used by legal philosophers, however attractive that ideal may be. For this to be more than an academic exercise, there must be some connection between the political-moral ideal of the rule of law and the "everyday practices" of lawyers.[125] The Report of the Legal Services Board ("LSB Report"), the "regulator of regulators" in England and Wales under the Legal Services Act 2007, seeks to do just that.[126] One theme of the Report is that the duties owed by lawyers to clients, often shorthanded in the U.S. by the motto "zealous advocacy," even in non-litigation contests, may be limited in order to promote the rule of law.[127] One of the subjects considered in the Report bears on the evaluation of John Eastman's conduct.[128] That is the problem of facilitating so-called "creative compliance" with ambiguous legal norms.[129] In these situations, a lawyer may provide advice that appears to satisfy the formal requirements of law, but something seems "off" about the advice. It may appear to run contrary to the clear purpose of the law, be against the overwhelming weight of existing interpretation, or otherwise strike most lawyers as a strained or even abusive interpretation. In theoretical terms, it is not an interpretation that is publicly available in the sense that it is not faithful to the terms of the settlement of social controversy that was accomplished by the law.

Two very important caveats are in order here. First, "creative" is a word with positive valence for many lawyers, who see their job in terms of problem-solving and finding ways for clients to pursue their objectives within the framework of law. Transactional planning, tax advising, and litigation strategies may all be appropriately and positively described as creative. This is all to the good. Perhaps the term as used in the LSB Report was not well chosen, but the Report was trying to capture a negatively-valenced sense of creativity that has a connotation of "too clever by half" or "nice try, counsel." Everyone who teaches first-year law students is familiar with the use of increasingly extreme hypotheticals to probe the limits of a principle asserted by a student. We are trying to demonstrate that some legal arguments just do not hold up to scrutiny.

---

125 RICHARD MOORHEAD, STEVEN VAUGHAN & KENTA TSUDA, WHAT DOES IT MEAN FOR LAWYERS TO UPHOLD THE RULE OF LAW?: A REPORT FOR THE LEGAL SERVICES BOARD 2 (2023) [hereinafter LSB REPORT].

126 *Id.* at 11.

127 *Id.* at 3.

128 *Id.* at 5.

129 *Id.* at 40–41.

Along those lines, I find the following passage from an Enron employee, describing the company's accounting practices, endlessly amusing:

> Say you have a dog, but you need to create a duck on the financial statements. Fortunately, there are specific accounting rules for what constitutes a duck: yellow feet, white covering, orange beak. So you take the dog and paint its feet yellow and its fur white and you paste an orange plastic beak on its nose, and then you say to your accountants, "This is a duck! Don't you agree that it's a duck?" And the accountants say, "Yes, according to the rules, this is a duck." Everybody knows that it is a dog, not a duck, but that does not matter, because you've met the rules for calling it a duck.[130]

Although the passage is funny, it is analytically flawed by begging the question of whether a particular transaction is bad-creative (i.e., slapping the plastic beak on a dog), good-creative, or at least normatively-neutral-creative. The duck-dog passage points out the problem, but more must be said by way of a solution.

An example of good, or at least normatively neutral creativity comes from a column by Bloomberg financial writer Matt Levine about a trade between Bed Bath and Beyond (which, famously, became a meme stock) and a hedge fund, Hudson Bay Capital Management.[131] The trade involved a sale of significant blocks of stock to an institutional investor at slightly below market prices. The investor then turned around and sold the stock into the inflated meme-stock market for a profit. The obstacle to this trade is a U.S. Securities and Exchange Commission (SEC) rule on short-swing profits, which provides that anyone who owns more than 10% of the stock of a company may not retain the profits on any sale made within six months of purchasing the stock. In light of this rule, the deal was structured so the investor got preferred stock that it could convert to common stock, but the conversion would happen only if, after the conversion, the investor would own less than 9.99% of the common stock of the company. This is a device called a "Section 16 blocker," named after the section of the SEC rule regulating short-swing profit-taking. The device worked even though, in theory, Section 16 would also reach the preferred stock. Levine, who used to be a derivatives structuring lawyer at Wachtell Lipton Rosen & Katz, after working as an investment banker at Goldman Sachs, wrote about the Section 16 blocker:

> Does it work? Man, I don't know; what I'll tell you is:

---

130 BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON 142–43 (10th anniversary ed. 2013).

131 Matt Levine, *Bed Bath Strikes from the Beyond*, BLOOMBERG (May 9, 2024, 2:59 PM), https://www.bloomberg.com/opinion/articles/2024-05-09/bed-bath-strikes-from-the-beyond.

- This has always seemed kind of like arcane metaphysics to me.
- I used to be an equity derivatives structurer and we all sure believed that Section 16 blockers worked. Certainly a lot of deals work this way.

This example is seemingly remote from the topic of high-level government officials attempting to avoid accountability. However, it is a useful elaboration on the Enron dog-duck example. It shows that many lawyers in transactional practices believe that their job description literally is to come up with a creative way around a legal prohibition, in furtherance of their clients' interests. Sometimes, these solutions involve "arcane metaphysics," to use Levine's language.[132] They work, however, if and to the extent the legal community of well-informed lawyers, judges, and regulators agree that the investor's approach respects the substance of the regulation and is not merely an attempt to evade it. However, this is not a yardstick or test for a good-faith legal interpretation. The hard work of determining on which side of the line an instance of creativity falls must still be done.

If the investment example seems too dissimilar to John Eastman's advice to Mike Pence, perhaps because it involves financial transactions that may inherently involve "arcane metaphysics," consider a different example of creative lawyering. In *Students for Fair Admissions v. President and Fellows of Harvard College*,[133] the Supreme Court held that the use of race-conscious admissions policies by universities—as Chief Justice Roberts put it, "admissions decisions that *turn on* an applicant's race"[134] or "race-based admissions programs in which some students may obtain preferences on the basis of race alone"[135]—violate the Equal Protection Clause of the Fourteenth Amendment (for state universities, such as the University of North Carolina) or Title VI of the Civil Rights Act of 1964 (for private universities, such as Harvard). However, the Court majority said that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[136]

Can you guess what university general counsel's offices did in response to the *SFFA* decision? If you said "immediately ended the use of race as a criterion in admissions decisions," you are not thinking like a

---

132 *Id.*

133 600 U.S. 181 (2023).

134 *Id.* at 208 (emphasis added).

135 *Id.* at 220.

136 *Id.* at 230.

creative lawyer.[137] A creative lawyer, concerned with promoting the interests of the client (i.e., the university, which is seeking a diverse entering class), would fasten onto the qualification in the Court's majority opinion, considering race is permissible as long as it is situated in the context of the effect race had on an applicant's life. This may be revealed in an essay asking applicants to reflect on various challenges and forms of adversity they have encountered in their life, including those based on their identity.[138] University of Chicago Law Professor Sonja Starr offers a counterpoint to the Enron dog-duck passage:

> Some of the questions that mention diversity are actually asking about "viewpoint diversity," for example, and many of the prompts are open-ended enough to avoid charges that they are winkingly asking for an applicant to identify their racial background. But they offer "plenty of opportunity for students to convey race-related information," Starr said.[139]

Why is this not slapping a plastic beak on a dog and calling it a duck? The superficial answer is that the Court itself invited the use of this stratagem with its qualification at the end of the majority opinion. But that ignores the hostility of the majority opinion as a whole to race-conscious admissions decisions,[140] and the predictable response if the Court believes universities are evading the *SFFA* holding by employing a transparent workaround. Again, the distinction between an effort to evade a legal requirement, on the one hand, and making a creative attempt to comply with it in furtherance of the client's objectives, on the other, is not one that can be drawn merely by considering the text of a decision or the form of a legal rule. There is a necessary step of applying interpretive judgment, and this is a matter for the ethics of legal advising.

---

137 *See* Liam Knox, *Re-Evaluating the 'Essay Carveout,'* INSIDE HIGHER ED (May 20, 2024), https://www.insidehighered.com/news/admissions/traditional-age/2024/05/20/examining-admissions-essays-post-affirmative-action [https://perma.cc/N9L2-NWSY] (discussing research by University of Chicago law professor Sonja Starr on the use by admissions offices of what has become known as the "essay carveout").

138 Knox reports that universities vary in their candor about working around the *SFFA* decision:

> Almost immediately after the Supreme Court's June 29 ruling striking down race-conscious admissions, colleges began amending their applications and adding new essay prompts. Some did so as a thinly veiled rejoinder to the decision, like Sarah Lawrence College, which added a question quoting an entire passage from Roberts's majority opinion weeks after it was passed down. But most new prompts simply work in language that implies a concern with one's identity, like "adversity" or "lived experience."

Id.

139 *Id.*

140 *See SFFA*, 600 U.S. at 226–27 (chastising dissenting opinions for downplaying or ignoring precedent that disfavors the remedial use of race-conscious affirmative action as a means of rectifying social discrimination).

Once interpretation enters the picture, David Luban's distinction between Low Realism and High Realism is important in analyzing the ethics of creative lawyering.[141] It is "nearly a cliché among American law professors" to say that we are all legal realists now.[142] Legal realism has had a pernicious impact on legal ethics, at least in its Low Realist form. Low Realism is the caricature version of realism that most first-year law students flirt with at some time. It amounts to something like "the law means anything a court wants it to mean," or "there's no constraint in the law—it's just politics, ideology, what the judge had for breakfast," or "the law is equivalent to whatever you can get away with, so if some funky transactional structure isn't challenged—perhaps because it is obscured through layers of special-purpose entities, trusts, offshore corporations, or other such devices—then it is for that reason and by definition lawful." As I have argued, Low Realism plus the commitment to an ethic of "zealous advocacy" on behalf of clients produces the traditional Standard Conception of legal ethics.[143] The mistake in the traditional, unmodified version of the Standard Conception is to elevate client *interests* to a position of primacy in legal ethics. Instead, the fiduciary service ethic,[144] properly understood, requires lawyers to carry out their clients' lawful instructions. The *Restatement of the Law Governing Lawyers* has it exactly right when it says "a lawyer must . . . proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation."[145]

High Realism acknowledges the truth behind the cliché that we are all realists now. The law is not self-applying or self-interpreting. Judges and lawyers use judgment and discretion when interpreting legal texts. However, that judgment is not unconstrained. Interpretive traditions, professional communities, and craft values play a decisive role in determining whether an interpretation is legitimate, reasonably well-supported, and put forward in objective good faith, or whether it is too aggressive, forward-leaning, implausible, frivolous, or inadequately grounded.[146] This is a view that I have endorsed for quite some time.[147] However, I have come to believe something stronger—call it Wendel's

---

141 *See* David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. BAR FOUND. RSCH. J. 637, 646.

142 Brian H. Bix, *The Many Faces of Modern Legal Realism*, 2022/2 REVISTA ORDINES 18, 30 (2022).

143 WENDEL, *supra* note 17, at 8.

144 Which can be called zealous advocacy—I am tired of fighting the battle against that misleading maxim.

145 RESTATEMENT (THIRD) L. GOVERNING LAWS. § 16(1) (AM. L. INST. 2000).

146 Luban, *supra* note 141, at 646–47.

147 WENDEL, *supra* note 17.

Hypothesis Concerning the Relationship Between Jurisprudence and Legal Ethics: *The law is not sufficient to constrain bad clients from doing bad things, if they are advised by bad lawyers.*

Of course, it is trivially true that bad lawyers may assist clients with crimes and frauds, but that is not what Wendel's Hypothesis is primarily concerned with. There is an enormous range of client conduct that does not amount to a crime or fraud but is nevertheless not legally authorized. Maybe university admissions offices will be challenged in their use of the "essay carveout" and deemed to have violated the Equal Protection Clause of Title VI of the Civil Rights Act. This is almost certainly not a crime or fraud, but it is conduct that is not legally authorized—or, consider John Eastman's advice to Mike Pence. Although people have been prosecuted for crimes related to Trump's "Stop the Steal" effort,[148] it may not have been a crime for Pence to put forward an alternative slate of electors (or maybe it would—I express no judgment about that here). Nevertheless, Eastman's advice would not be objectively well-grounded in the law regulating the Vice President's role in counting electoral votes.

The challenge—what makes this an interesting and difficult jurisprudential and ethical issue—is to define a sufficiently objective standpoint for assessing whether a legal position is adequately supported so that it is possible to distinguish good from bad creativity. The LSB Report explains that creativity in the bad sense involves the deliberate frustration of a legislature's or regulator's proper goals and methods.[149] In some cases, the line between acceptable and unacceptable creativity might track the distinction between substance and form, or purpose and text. The dog-duck story from Enron alludes to the form versus substance distinction. That is not the only way that an interpretation can be creative in the bad sense, however. In the instance of John Eastman's legal advice, my understanding of the battle of the experts over the quality of the advice is that it turned on the weight to be given to the text and enactment history of the Twelfth Amendment and the Electoral Count Act, as well as to several episodes in American history during which there was controversy over the presidential election. The case for finding that Eastman had engaged in lawyerly creativity in the bad sense is that his interpretation was so against the weight of other considerations that would be taken into account by a reasonable competent legal analysis that his interpretation had to be regarded as falling below the professional

---

148 *See, e.g.*, Emily Sawicki, *Judge DQs Ex-Overstock CEO's Atty for Discovery Violations*, LAW360 (Aug. 14, 2024, 4:11 PM), https://www.law360.com/articles/1869615/judge-dqs-ex-overstock-ceo-s-atty-for-discovery-violations (reporting two sets of felony charges against attorney Stefanie Lambert Junttila in Michigan for allegedly tampering with voting machines in an effort to discover evidence of election fraud).

149 LSB REPORT, *supra* note 125, at 41.

standard of care. Whether this is correct or not is ultimately a question committed to the expertise of lawyers and scholars who specialize in constitutional and election law.

There really is not any way around this problem in legal ethics as in torts. There is no formula or algorithm to differentiate good (or at least normatively neutral) from bad creativity. For this reason, there is no way to banish the "lawfare" or "weaponization" critique altogether. If it were possible to make a knock-down showing that Eastman's legal advice was deficient by the standards that all lawyers must accept if they purport to be minimally competent—if assent was, in effect, mandatory to the criticism of Eastman's memos—then a disciplinary proceeding could not be attacked as a partisan witch-hunt. In the absence of such a decisive demonstration, which I do not believe will be forthcoming in many cases, the criticism will persist. That is okay. Most complex technical issues are accompanied by disagreement, sometimes in bad faith, but sometimes reasonable. We will have to muddle through in a similar way in matters that implicate complex technical judgments about the sufficiency of legal and factual grounds to support the legal advice given by some lawyers. In these cases, however, the issue will be how the interpretation fares as an account of the public purposes and methods of the law in question.

The second caveat is that, if one is persuaded by the metaphor of law addressing its subjects from the standpoint of society as a whole, it is important not to lose sight of the positivity of law.[150] The norms a lawyer is interpreting are those that have institutional sources: they are contained within statutes, regulations, and judicial opinions. The criticism of the bad lawyers of January 6 may assume that lawyers—either all lawyers or those working within government—have an obligation to promote the public interest in their representation of clients. One traditional response to this line of criticism, picked up by Roiphe in her contribution to this Symposium, is that lawyers promote the public interest by representing clients competently and diligently within the bounds of the law.[151] The rule-of-law response adds to Roiphe's position that when a lawyer is attempting to ascertain the bounds of the law, that inquiry necessarily takes into account the public purposes of the law and shared interpretive methods that reasonable lawyers employ when dealing with ambiguous laws.[152]

The rule of law does not demand blind obedience to law. The value of legality is consistent with, and even relies upon, practices like dissent, protest, resistance, whistleblowing, and civil disobedience to maintain its

150 *See* Waldron, *supra* note 117, at 28–31.

151 *See* Roiphe, *supra* note 32.

152 *See id.*

necessary connection with morality and the public interest.[153] A lawyer who sincerely believes that complying with the law in a particular instance, such as keeping the draft report about Moonves's misconduct confidential, is so contrary to the public good that it would be intolerable to comply with the law, can resort to open acts of civil disobedience or conscientious objection. But this would no longer be a plausible interpretation of law. As Postema emphasizes, in a society committed to the rule of law, permissible avenues of resistance and dissent will vary according to whether the party challenging the application of law is an official or an ordinary citizen.[154] Legal institutions may be much more lenient regarding ordinary citizen dissent as long as it is sincere and the costs to the community are not excessive.[155] Officials, however, may have stricter responsibilities.[156] If the rule of law as a political-normative ideal is aimed at protecting against the arbitrary exercise of power, officials have less latitude for dissent and resistance.[157]

Lawyers, in my view, should be understood as closer to officials than civilians on this continuum of responsibilities. That is particularly true in advising and compliance-counseling contexts. Bringing a lawsuit is an accepted official channel for expressing dissent, but as a representative of a client in litigation, a lawyer is an agent for a principal who is an ordinary citizen, not an official. By contrast, when a lawyer is advising a client about what the law permits or requires, knowing that the client will act on that advice, the lawyer's role is closer to that of a judge or legislature, stating the content of the law and opining on its application to the client's situation. This is true for lawyers representing private clients as well as lawyers in government service. No distinction in ethical responsibilities follows, for example, from whether John Eastman is representing the Office of the President (i.e. the White House) or Donald Trump as an individual and a presidential candidate, or whether Jeffrey Clark is representing the Civil Division of the Justice Department or the Executive Branch as a whole. Again, following Postema, the rule of law requires an ethos that is pervasive in the entire political community, where all of the members of the community—officials and subjects of the law alike—take responsibility for maintaining a practice of principled reason-giving and accountability.[158] As a matter of legal ethics, this supports the same set of duties on the part of a lawyer. Or, as developed in the next Section, it requires a commitment to the same foundational professional identity,

153 POSTEMA, *supra* note 16, at 176.

154 *See id.* at 177–79.

155 *See id.* at 179.

156 *See id.*

157 *See id.* at 181.

158 *See id.* at 20.

whether a lawyer is representing private clients, government officials, or government agencies.

B. *The Rule of Law and Professional Identity*

As the discussion in Part I of the disciplinary actions against John Eastman and Jeffrey Clark shows, I am skeptical of efforts to craft an enforceable rule of professional conduct requiring lawyers to support the rule of law, on pain of some sort of licensure-related sanction such as disbarment or suspension. If one were to propose a rule of professional conduct requiring lawyers to support, or refrain from undermining, the rule of law, that rule would have serious overbreadth or vagueness problems in application. The LSB Report declined to recommend specific regulatory changes to enforce this obligation.[159] It noted that the character of practitioners, and "professional dispositions to regard something as ethical or unethical," were significant factors in ensuring compliance with professional norms.[160] These dispositions should take the form of a tendency to defer to the finality of enacted positive law as a resolution of contested questions of what is in the public interest; respect for procedures and chains of command, where a decision-maker at the top of the hierarchy has final say on what the law permits or requires; and a commitment to a process of principled reason-giving as foundational to legal interpretation.

The emphasis in the LSB Report on character and dispositions has some resonance with the recent directive from the American Bar Association that accredited law schools must provide students with "substantial opportunities . . . for . . . the development of a professional identity."[161] As interpreted by the committee that promulgated this Standard, professional identity should be centered on "what it means to be a lawyer and the special obligations lawyers have to their clients and society."[162] As one contribution to the recent literature on professional identity defines it: "[P]rofessional identity entails recognition that lawyers and their craft are part of and honor something larger than themselves. Something important to the wellbeing of society. Something that carries ideals and aspirations grander than simply doing a law job well."[163]

---

159 *See* LSB REPORT, *supra* note 125.

160 *Id.* at 8, 49.

161 *See* AM. BAR ASS'N, *supra* note 9, § 303(b)(3).

162 *See id.* at Interpretation 303-5.

163 Margaret Reuter, *Professional Identity in a Time of Uncertainty: Not a Moment Too Soon*, 89 UMKC L. REV. 487, 489 (2021).

Thus, I want to conclude this Article by asking what ideal or identity—what thing of value to society as a whole—is presupposed by the actions of lawyers like Jeffrey Rosen, Richard Donoghue, Patrick Philbin, Patrick Cipollone, Gregg Jacob, and Michael Luttig? Reading the D.C. Bar Hearing Panel's careful review of the evidence presented in the disciplinary proceeding against Jeffrey Clark, the strongest theme that emerges concerning the good lawyers of January 6 is a commitment to the ideal of the rule of law. This includes respecting regular procedures and chain of command; believing that facts and evidence matter; taking contrary evidence and points of view seriously; seeking reasonable interpretations of law on point; keeping straight the distinction between the interests of one's client and what the client is entitled to as a matter of law; and being willing to resign one's position if necessary to prevent an abuse of power. Most importantly, and underlying Wendel's Hypothesis Concerning the Relationship Between Jurisprudence and Legal Ethics, the rule of law depends on the character, ethical commitments, and dispositions of lawyers. In this I am very much in agreement with the LSB Report and Postema's recent book. The rule of law is not a concern only for judges or other legal officials, but is an ideal that depends for its realization on the willingness of lawyers to resist the arbitrary exercise of power, to demand reasoned explanations for the use of power, and to insist on following procedures, requiring evidence, and to be open to contrary points of view.[164]

CONCLUSION

At the risk of ending on a pessimistic note, if it is possible to discern a common feature of the motivation of the good lawyers of January 6, it should also be possible for a client seeking the assistance of bad lawyers to select for lawyers whose professional identities do not include a commitment to the rule of law. There has been a good amount of reporting about the planning by Trump-aligned interest groups to stock the next Trump administration with loyalists and yes-men, including lawyers in the DOJ and White House Counsel's office.[165] For Trump,

---

164 POSTEMA, *supra* note 16, at 17–19.

165 *See, e.g.*, Jonathan Swan, Charlie Savage & Maggie Haberman, *If Trump Wins, His Allies Want Lawyers Who Will Bless a More Radical Agenda*, N.Y. TIMES (Nov. 1, 2023), https://www.nytimes.com/2023/11/01/us/politics/trump-2025-lawyers.html; Jonathan Swan, *A Radical Plan for Trump's Second Term*, AXIOS (July 22, 2022), https://www.axios.com/2022/07/22/trump-2025-radical-plan-second-term [https://perma.cc/528N-CRF8].

independence in a lawyer or judge is a bad thing, a sign of disloyalty, which is the most grievous offense Trump can conceive of.[166]

A Trump-like client could misuse the concept of professional identity to make sure to find a lawyer who is not committed to the rule of law. If, as I concede, it would be difficult to craft and enforce disciplinary rules directly regulating a lawyer's commitment to the rule of law, it is inevitable that there will be good lawyers as well as bad lawyers, as I understand that difference. Perhaps the best we can hope for is that there is some tangible upside to clients retaining good lawyers, such as a stock of credibility that results in greater willingness by judges, regulators, and counterparties in transactions to accept assurances from those lawyers at face value. I also do not suggest for a moment that legal education has the capacity to turn out only good lawyers. Law professors have a limited capacity to teach, model, and inspire values and commitments. To a significant extent, formation of professional identity depends on background social and cultural factors beyond the control of legal educators. The conclusion here is not that a program of professional identity formation centered on the rule of law is a panacea, but that it is a normatively coherent and attractive identity, as well as one that explains the actions of the good lawyers of January 6.

166 *See* Josh Dawsey & Marianne LeVine, *Trump's Anger at Courts, Frayed Alliances Could Upend Approach to Judicial Issues*, WASH. POST (Feb. 17, 2024), https://www.washingtonpost.com/politics/2024/02/17/trump-judicial-issues.